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Reconstituting Constitutional Orders

Brexit

Democratic Authority, Executive Prerogatives, and
the Courts

Disassociation

Exiting by Degree

(De)criminalization

Constitutional Constraints on Policing

Co-Editors
Judith Resnik
Clare Ryan
2017





Gruber Program for Global Justice and Women's Rights

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Disassociation

Harold Hongju Koh, Dieter Grimm, and Frank Iacobucci

Exiting by Degree

Clare Ryan, Miguel Poiares Maduro, and Kim Lane Scheppele

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Kate Stith and Marta Cartabia

Constitutional Constraints on Policing

Tracey Meares, Tom Tyler, and Carlos Rosenkrantz

Reconstituting Constitutional Orders

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Preface

Reconstituting Constitutional Orders, this year's volume for Yale's Global Constitutionalism Seminar, both continues our annual inquiries into the authority exercised by constitutional courts and reflects on the political and legal shifts that have taken place during the last twelve months. The first chapter, focused on *Brexit* and its immediate aftermath, is emblematic of a reconstitution of political-legal orders and provides a backdrop for the discussions to follow. As is familiar, in June of 2016, the United Kingdom held a referendum on the question of whether to remain within the European Union; 51.9 percent of the voters opted for exit. Scotland and Northern Ireland considered their own legal and political responses, as courts in the United Kingdom were asked to rule on the legal import of the popular vote. Throughout the 2017 Seminar, questions akin to the legal issues surrounding Brexit emerge as we consider the role of courts when reappraisals and realignments of entrenched political agreements are underway.

Chapter II, *Democratic Authority, Executive Prerogatives, and the Courts*, considers how, within given polities, courts respond to claims that the outcomes or structures of democratic processes are unlawful. The materials, edited by Cristina Rodríguez and Manuel Cepeda-Espinosa, focus on judicial review of electoral lists, the allocation of voting rights, bans on political parties, and the import of referenda. In addition, given debates about the boundaries of executive authority, this chapter takes up the question of judicial constraints on the executive branch, including decisions about the deployment of troops and on migration.

Chapter III, *Disassociation*, framed by Harold Hongju Koh, Dieter Grimm, and Frank Iacobucci, reflects on disengagement efforts across the globe—of which Brexit is but one example. Courts have been called upon to examine the domestic processes required to authorize withdrawal and to decide what role (if any) international law plays in determining when a country can reject what were binding treaty obligations. At the domestic level, the possibility of secession provides a parallel, and the chapter concludes by asking whether disassociation from an international organization differs from withdrawal within a national constitutional system.

Chapter IV, *Exiting by Degree*, by Clare Ryan, Miguel Poiares Maduro, and Kim Lane Scheppele, centers on disengagement within Europe and deepens the puzzle about what disassociation means. While Brexit provides a vivid example of a reconfiguration (even as its parameters remain unclear), the idea of exiting “by degree” underscores that Member States may remain “in” Europe but resist or renege commitments said to be central to what “Europe” means. The chapter first explores the sources and content of “European values” from the vantage point of the Treaty of Lisbon and decisions by the Court of Justice of the European Union. At issue, for example, is whether European law prevents discrimination against Member State nationals moving across borders or limits incursions on judicial independence. The chapter then turns to Member State courts, as they repeatedly invoke their countries’ “constitutional identity” to justify elevating national law above European court rulings or European Union principles. Hence, as in prior Seminars, the issue is whether and under what conditions such “constitutional

pluralism” is to be valorized or accepted, as rulings by Member States affect what it means to be “Europe.” When do acts of domestic resistance become a form of disassociation from within?

In the last two chapters, we return to a historic function of sovereignty: maintaining peace and security through criminal law and policing. In Chapter V, *(De)criminalization*, the materials compiled by Kate Stith and Marta Cartabia address when courts prohibit—or require—criminalization of certain activities. From sexual identity to procreation and assisted suicide, courts have addressed the impact of criminal laws on individual privacy, liberty, autonomy, and free expression. Across jurisdictions, judges have focused on dignity, equality, and safety; at times to prohibit punishment through criminal law (such as of abortion or same-sex relationships) and at other times to call for criminal remedies (such as in response to violence against women and other vulnerable persons).

We close this volume by looking at courts’ relationship to one of the central facets of criminal law: the police. In Chapter VI, *Constitutional Constraints on Policing*, by Tracey Meares, Tom Tyler, and Carlos Rosenkrantz, we examine how policing has come within the ambit of constitutional courts. Studies of policing document the vast differences in how individuals and communities relate to the police. The materials illustrate the ways that interactions with police can support the legitimacy of the state or prompt alienation from the state. We consider what the constitutional boundaries on policing are in terms of regulating investigations, stops, detention, and the use of force, and how the courts’ rulings reflect democratic commitments to equality and dignity, as well as transnational approaches to police powers. The issue is whether these relatively new constitutional rules function (or not) to ensure that government provision of “peace and security” applies equally to everyone and that those subjected to the state’s police powers are accorded respect.

In short, across the six chapters, the question of state sovereignty in a global world comes to the fore, as does the executive power to express that authority in transnational and domestic contexts and unfettered by courts. Given that, during the last months in many parts of the world, judges and the concept of judicial independence have been attacked, these readings provide one way to reflect on the roles and vitality of constitutional courts in light of recent upheavals.

* * *

We turn now to discuss how the volume itself has been constituted, and as always, it is a cooperative venture. We are indebted to participants for suggesting materials and to the discussion leaders for their review of the edited compilations provided by the editorial group of this Seminar.

Our annual reminders are that the excerpts have been ruthlessly pruned, that paragraphs have been combined for easier reading, and that most footnotes and citations have been omitted; the footnotes that have been retained have their original numbering. For accessibility across jurisdictions, we add excerpts of referenced constitutional texts in footnotes marked by asterisks that, along with square brackets, indicate editorial additions. This book will also be published as the sixth volume in a series of Yale Global Constitutionalism Seminar E-Books, begun in 2012.

Thanks are also due to Yale Law Librarian Michael VanderHeijden, who remains so helpful in identifying sources that would otherwise have been unavailable. Jason Eiseman, Yale Law School's Associate Law Librarian for Technology and Digital Initiatives, continues to provide guidance on how to turn the Seminar's volumes into E-Books, which we have done with help from Assistant Dean Sara Lulo and under the tutelage of our colleague Jack Balkin in connection with the Information Society Project that he chairs, and with the support of The Oscar M. Ruebhausen Fund at Yale Law School.

In addition, a word of welcome is in order to Clare Ryan, the co-editor of this volume. Clare joins Yale's Global Constitutionalism Seminar as a Senior Research Fellow. She graduated from Yale Law School in 2013, and after teaching political science and clerking at a U.S. federal appellate court and at the European Court of Human Rights, Clare has returned to Yale to complete a Ph.D. in Law. We are both indebted to remarkable students at Yale Law School, led by the tireless and thoughtful Eric Chung, class of 2017, who serves as the Executive and Managing Editor of this volume, along with Matt Butler, class of 2018, who has become the Associate Managing Editor. Their commitment, care, and insights made this volume possible. They worked on all facets of the volume, from substantive research to editorial consistency, administrative coordination of other student editors, securing permissions for the reprinting of excerpted materials, and shaping the E-Book format. Our Senior Editors are returning students Erin Biel and Beatrice Walton along with alumni Sergio Giuliano and Andrea Scoseria Katz, and our Executive and Managing Editor Emeritus David Louk. They have provided invaluable service and advice. Our new Editors are José Argueta Funes, Srinath Reddy Kethireddy, and Laura Savarese. The entire group has worked across time zones and continents to bring this volume to completion.

A special note is always appropriate for Renee DeMatteo, Yale Law School's talented Senior Conference and Events Services Manager; participants know her well for her advice, attention, and kindness. Renee ensures that this book comes into being in time for its circulation to the travelers who make their way to New Haven in September. Other Yale staff, including Bonnie Posick and Kelly Mangs-Hernandez, generously gave their time. Once again, Bonnie Posick demonstrated her expertise as a proofreader and editor. We are also supported and guided by Mindy Roseman, Yale Law School's Director of International Programs and Director of the Gruber Program for Global Justice and Women's Rights; her expertise in issues at the heart of this Seminar informs our work.

No account of this Global Seminar would be complete without acknowledging the institutional support that frames it. In its founding years, the resources for Yale Law School's Global Constitutionalism Seminar were provided by Betty and David A. Jones, Sr. '60, and by Mary Gwen Wheeler and David A. Jones, Jr. '88, who generously welcomed the idea of a new project at Yale to build bridges across oceans and legal systems. Since 2011, this Seminar has been part of the Gruber Program for Global Justice and Women's Rights at Yale Law School.

We are the beneficiaries of the vision and commitments of Peter and Patricia Gruber, who have enabled Yale Law School to continue its work in this area and who contribute so

generously to many other arenas at Yale University. Their support has both created and sustained relationships across borders that are all the more important as we watch efforts to erode commitments to stability and justice, within and beyond the nation-state.

One other word of introduction is in order. This year, the Seminar enters into its third decade and Yale Law School welcomes our new Dean, Heather Gerken. As we celebrate the change in leadership and give thanks to former Dean Robert Post, we also reflect on our history. The Seminar was inaugurated in 1996 by Paul Gewirtz and Anthony Kronman, and then chaired by Robert Post from 2003-2008, followed by Bruce Ackerman and Jed Rubenfeld, who co-chaired the project through 2011. Given the myriad challenges that the past year has presented to a global vision of rights and constitutionalism, we begin this third decade with renewed commitments to aspirations to make the world fairer and safer for the diversity of its inhabitants and for future generations.

Judith Resnik
Chair and Co-Editor,
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December 2017

BREXIT

I. BREXIT

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The Brexit Vote

On June 23, 2016, the United Kingdom held a referendum and voted to leave the European Union. The referendum carried 51.9 percent to 48.1 percent. More than 72 percent of eligible voters participated.

As the breakdown below reflects, the subparts of the United Kingdom had substantially different views on whether to leave or remain.

	Leave	Remain
England	53.4%	46.6%
Northern Ireland	44.2	55.8
Scotland	38	62
Wales	52.5	47.5

Several lawsuits were filed challenging the referendum. One, brought by several plaintiffs including Gina Miller, an English citizen, argued that the decision on Brexit required the Parliament to participate. The High Court held that parliamentary approval was required. On January 24, 2017, the Supreme Court of the United

Kingdom affirmed. Before excerpting the Court's decision, we include the December 2016 statement by Scotland's First Minister who explained her government's opposition to exiting. Also excerpted is a 2017 discussion by a group of scholars about the potential impact on and the disagreements within Northern Ireland on Brexit. Brief reflections on the impact of Brexit, including the Irish Government's 2017 White Paper and commentary on the implications of the 2017 United Kingdom Parliamentary elections, follow the opinion.

Scotland's Place in Europe The Scottish Government (December 20, 2016)*

. . . [Nicola Sturgeon, Foreword by the First Minister:] On 23 June, the people of Scotland voted categorically and decisively to remain within the European Union (EU).

Although the concerns of those who voted to leave must be listened to and addressed, there is clearly a strong desire in Scotland to be a full and active member of the European family of nations. The Scottish Government shares that desire. There was also a majority for Remain in Northern Ireland. In England and Wales, there were majorities to Leave.

The stark divergence in the democratic will between the different nations of the United Kingdom (UK) demands a reappraisal of how political power in the UK is exercised. Before she became Prime Minister, Theresa May, set out her view of a UK "in which Scotland, Wales, Northern Ireland and England continue to flourish side by side as equal partners." Accordingly, the way in which the Westminster Government responds to proposals put forward by the devolved administrations will tell us much about whether or not the UK is indeed a partnership of equals. . . .

The Scottish people did not vote for Brexit, and a "hard Brexit" would severely damage Scotland's economic, social and cultural interests. It will hit jobs and living standards—deeply and permanently. That is why we are so determined to avoid it.

There are various ways in which Scotland's place in the European Single Market could be maintained. One option—in my view, the best option—is to become a full member of the EU as an independent country. Indeed, independence would resolve the fundamental cause of the position Scotland currently finds itself in: Westminster Governments that Scotland doesn't vote for, imposing policies that a majority in Scotland does not support.

* Excerpted from *Scotland's Place in Europe*, THE SCOTTISH GOVERNMENT (December 20, 2016), available at <https://beta.gov.scot/publications/scotlands-place-europe/>.

The Scottish Government was elected in May on a manifesto which said in relation to independence: “The Scottish Parliament should have the right to hold another referendum [. . .] if there is a significant and material change in the circumstances that prevailed in 2014, such as Scotland being taken out of the EU against our will.” . . .

Firstly, we argue that the UK as a whole should remain within the European Single Market—through the European Economic Area—and within the EU Customs Union.

Secondly, we consider how Scotland could remain a member of the European Single Market and retain some key benefits of EU membership even if the rest of the UK decides to leave. . . .

We consider that UK-wide free movement and free trade could and would continue if Scotland becomes independent, just as the UK Government believes that free trade and movement between the UK and the Republic of Ireland will continue after Brexit. Our proposal seeks to secure the benefits of the European Single Market for Scotland in addition to—not instead of—free trade across the UK.

Finally, we argue that in light of the removal of the rights and protections provided by EU law—and whatever the outcome of the Brexit negotiations—Scotland’s interests within the UK demand that the powers of the Scottish Parliament be fundamentally revisited. This paper looks at three broad categories of powers that should now be considered:

1. Those powers that will be “repatriated” to the UK from Brussels and that currently sit within the Scottish Parliament’s competence, for example fishing and farming. These must remain the responsibility of the Scottish Parliament.
2. Those powers to be “repatriated” that are not currently within the Scottish Parliament’s competence and where devolution would allow the Scottish Parliament to protect key rights, for example employment law.
3. Powers, beyond those to be “repatriated,” to protect Scotland’s interests, including those to support the differentiated solutions for Scotland proposed in this paper: for example, powers over immigration, powers to conclude international agreements in areas of Scottish Parliament responsibility, and a range of powers that would be required for the Scottish Government to meet the regulatory and administrative requirements of continued European Single Market membership. . . .

117. What we propose . . . is an integrated solution for Scotland which ensures continued membership of the European Single Market, and collaboration with EU partners on key aspects of policy and participation in EU programmes such as Horizon 2020. This has been described by some as the “Norway option,” but properly encompasses all of the EFTA countries which are also party to the EEA Agreement, including Iceland and Liechtenstein. Beyond the common aspects of these relationships (which relate to the implementation of the European Single Market), Scotland would also seek the opportunity to collaborate in a wider range of policy areas such as energy and justice, which would add to our ability to work with European partners beyond a relationship based solely on free trade. Other differentiated options would also be open to Scotland . . . whereby Scotland could seek to remain part of particular EU policies and initiatives

120. While the so called “Norway option” is perhaps the most obvious example of how this kind of relationship could be achieved—by Scotland becoming a full or associate member of EFTA and thereafter becoming party to the EFTA EEA Agreement—there are variants on this model. One such example would be for Scotland, through the UK, to enter a direct association with the EEA. Scotland could also seek associate membership of EFTA and subsequently to become party to the EEA Agreement. The associate member option would share many characteristics with the arrangements agreed for Finland to become an associate member of EFTA in 1961. . . .

123. We also recognise that the success of this proposal will require compromise on all sides. It will require the UK Government initially and, in due course, other European governments, to be flexible and innovative. It will also require compromise on the part of the Scottish Government. Indeed, we recognise the reality that if Scotland is not an independent country and stays within the UK it will almost certainly have to leave the EU. However, by retaining membership of the European Single Market we can both mitigate the worst damage of leaving the EU and ease the transition to a full independent Member State should the people of Scotland decide to choose that future. . . .

179. If Scotland remains in a UK outside the EU, it will be for the Scottish Parliament and Government to put in place the laws and administrative systems to replace EU law in devolved areas. Any proposal to take back powers from Scotland to the UK Parliament and Government on leaving the EU would require the consent of the Scottish Parliament under the Sewel Convention and the Scottish Government would not recommend consent. Where there may be a need to devise a cross-border framework within the UK to replace that provided by EU law, for example in relation to animal health, that should be a matter for negotiation and agreement between the governments concerned, not for imposition from Westminster. . . .

182. The implications of “repatriation” of EU competences also need to be considered for matters not currently devolved to the Scottish Parliament. . . . [K]ey

rights and protections under EU law will be removed. Devolution of additional responsibilities to the Scottish Parliament would enable it to reflect Scottish priorities in safeguarding and enhancing the rights of people in Scotland. Key areas where additional devolution should be considered in this context include: a) employment law, including that on trade union rights; b) equalities; c) health and safety at work; d) consumer protection. . . .

186. Key areas to be considered for further devolution should include: Freedom of movement of people, goods, services and capital. There will need to be arrangements to enable Scottish law and regulatory regimes to be consistent with the requirements of the European Single Market, and to protect Scotland's economic, social protection and solidarity interests. The main areas in which there will need to be additional devolution, or arrangements to secure flexibility in reserved policies, include: a) import and export control; b) immigration; c) competition, product standards and intellectual property; d) company law and insolvency; e) social security, including to enable reciprocal arrangements with other states; f) professional regulation (for example to enable recognition of professional qualifications); g) energy regulation; h) financial services, telecommunications, postal services and reserved aspects of transport. . . .

Northern Ireland and Brexit: The European Economic Area Option

Brian Doherty, John Temple Lang, Christopher McCrudden, Lee McGowan, David Phinnemore, and Dagmar Schiek (April 7, 2017)*

. . . Brexit poses major challenges for Northern Ireland. It threatens to hinder access to the EU market and especially cross-border trade with the rest of Ireland, disrupt significantly integrated cross-border markets and supply- and production-chains, and impede the movement of workers and people more generally across the border. It raises questions about the future of the Common Travel Area and the Belfast/Good Friday Agreement as well as cooperation on policing and criminal justice matters. . . .

In some ways the most obvious way to mitigate some of the key impacts of Brexit on Northern Ireland is for Northern Ireland to join the European Economic Area (EEA). . . .

* Excerpted from Brian Doherty, John Temple Lang, Christopher McCrudden, Lee McGowan, David Phinnemore, and Dagmar Schiek, *Northern Ireland and Brexit: The European Economic Area Option* (European Policy Centre, Discussion Paper, April 7, 2017), available at http://epc.eu/documents/uploads/pub_7576_northernirelandandbrexit.pdf.

The case for some form of dedicated consideration of Northern Ireland, however, follows from practical and political challenges that arise from a unique combination of specific factors that set it apart from the other devolved administrations in the UK, both Scotland and Wales.

First, Northern Ireland is the only part of the UK that shares a land border with another EU member state. The effect is that a denser set of cross-border trade relations and economic interdependencies exists on the island of Ireland than exist between any other part of the UK and EU member states. This is particularly so in the border region. While relations and interdependencies have long existed, they have become more extensive and intense through 43 years of shared UK and Irish membership of the EU. Moreover, in several sectors the level of trade integration means that a fair claim can be made to the existence of an all-island market and in some instances an all-island economy. A UK withdrawal from the EU, its single market and its customs union threatens to disrupt and damage those markets and economies irreparably.

Second, Northern Ireland is geographically detached from the rest of the United Kingdom. This can be an obstacle to full economic relations between Northern Ireland and the rest of the UK. As far as trade is concerned, the detachment can place producers and suppliers in Northern Ireland at a competitive disadvantage in the UK market. It does, however, encourage the development of supply chains across the land border and on an all-island basis. These, in turn, have contributed to the development of highly integrated all-island markets subject, in an EU membership context, to an essentially uniform regulatory framework governing those cross-border markets. . . .

Third, all-island perspectives are not limited to trade, but also encompass other aspects of economic integration, such as free movement of labour and capital. Again, while there is considerable movement of persons between the island of Ireland and Great Britain, there is also considerable movement of persons between the north and the south of Ireland. Further, the all-island interaction is not limited to the economic sphere, but encompasses the societal and civic sphere as well. For example, the higher education sector and the health sector—both partly defined as public sector—are partly integrated across the state border. Police cooperation on the island is another aspect, as well as cooperation of civil society in cultural, leisure and other projects.

Fourth, there is the particular socio-political context. The Northern Ireland facing Brexit is a radically transformed place compared to the Northern Ireland of the ‘Troubles’ with its associated violence and terrorism. Northern Ireland is in the midst of a peace process and was on its way to becoming a post-conflict society. However, memories and legacies of the conflict remain and paramilitary activity has not been eliminated. Moreover, the political institutions of the peace process—an elected Assembly and a powersharing government—remain fragile, their future uncertain, particularly in the light of recent political developments and Assembly elections. Further direct rule from Westminster cannot be ruled out. Exacerbating the situation are tensions over Brexit, a lack of an agreed plan on the issue, and a fear that a UK

withdrawal from the EU that fails to address the legitimate concerns of interests in Northern Ireland could act as a catalyst for a further deterioration of inter-communal relations. . . .

Fifth, the particular nature of Northern Ireland's devolution arrangements sets it apart from Scotland and Wales, in five important respects: a. the arrangements in Northern Ireland are a fundamental part of a larger peace agreement, meant to bring about reconciliation between the two major communities; b. Northern Ireland's devolution arrangements are underpinned by a bilateral treaty, binding in international law, between the UK and the Republic of Ireland; c. the devolution arrangements in Northern Ireland assume that both the UK and the Republic of Ireland will be members of the EU—joint membership in the EU provides an important mechanism by which concerns over nationality and sovereignty are reduced; d. the north-south institutions which form part of that agreement have references to the relevance of the commonality of EU membership embedded in them; e. Northern Ireland's devolution arrangements depend on the consent of both communities if they are to continue, demonstrated most obviously by the requirement that power-sharing between unionism and nationalism is a compulsory part of those arrangements.

Finally, Northern Ireland is likely to be more adversely affected economically as a consequence of Brexit than much of the rest of the UK. Analysis by Oxford Economics, commissioned by the Department of Enterprise, Trade and Investment, of the economic implications of Brexit indicates that Northern Ireland's economy 'is likely to be relatively more vulnerable to the type of structural changes triggered by a UK exit from the EU in comparison to the rest of the UK.' Whereas across nine scenarios the modelling found that on average, by 2030, UK gross value added would be 1.8% lower than the baseline, in Northern Ireland it would on average be 2.8% lower than the baseline. . . .

Northern Ireland's uniqueness is . . . reflected in particular in the draft EU guidelines for negotiating the UK's withdrawal from the EU . . . [which] note the EU's consistent support for 'the goal of peace and reconciliation enshrined in the Good Friday Agreement,' adding that 'continuing to support and protect the achievements, benefits and commitments of the Peace Process will remain of paramount importance [to the EU].' Specific reference is then made to 'the unique circumstances on the island of Ireland' requiring 'flexible and imaginative solutions . . . including with the aim of avoiding a hard border, while respecting the integrity of the Union legal order.' . . .

The only formal statement on Northern Ireland's priorities in the Brexit process is . . . [an August 2016] letter of the First Minister and deputy First Minister to the Prime Minister. Disappointingly, there has been no official follow-up from the Northern Ireland Executive. . . . There are, therefore, no official proposals from the Northern Ireland Executive currently indicating how the clear preference for

maintaining the status quo might be achieved. Three political parties have, however, launched proposals for some form of ‘special status’ to be established

Notably, the UK will not be remaining in either the customs union or the single market. . . . This position—widely viewed as a ‘hard Brexit’—provides little comfort . . . to the 56% of the Northern Ireland electorate who voted for the UK to remain in the EU. . . .

Today the EEA encompasses the EU and Iceland, Liechtenstein and Norway. The UK government has rejected the EEA option for the United Kingdom as a whole. This does not, however, necessarily preclude part of the UK participating in the EEA. . . . The UK government also appears to have rejected party political calls for a ‘special status’ for Northern Ireland, which we understand to mean that the UK government will not accept that Northern Ireland should remain within the EU. The government has not, we understand, rejected Northern Ireland being in the EEA. . . .

Joining the EEA would result in little direct change for companies and individuals in Northern Ireland so far as the everyday running of their businesses would be concerned. The institutional changes involved would also have little practical effect on most people because the EEA would substantially maintain the status quo. Companies in Northern Ireland providing goods and services in the EU would retain full access to existing European markets, and would continue to trade freely with the rest of the UK. . . .

The EEA is not simply the EU under another name, however, and constitutes a lesser degree of economic integration than the EU, in particular because it does not comprise a customs union. That means that if Northern Ireland were a member of the EEA, it could and would need to make whatever arrangements regarding customs issues that were thought appropriate with the rest of the UK, as well as with being in the EU single market.

The EEA would also go some way to safeguarding the status quo as regards maintenance of the spirit, if not the letter, of the Belfast/Good Friday Agreement, in providing membership of both Northern Ireland and the Republic of Ireland in a common European economic entity. . . .

In the EEA, Northern Ireland would remain outside the single currency and would not be subject to any directives or regulations relating to the economic and monetary union and the eurozone. Outside of the . . . [Common Agricultural Policy], yet inside the single market, if Northern Ireland were in the EEA, it would be able to benefit from any post-withdrawal UK agricultural policy and the market access arrangements the UK secures for agriculture in its trade agreement with the EU. The possibility of securing market access arrangements specific to producers in Northern Ireland may arise. The arrangements would be separate from the EEA. . . .

In the EEA, there would continue to be free movement of persons from the EU, including the Republic of Ireland, into Northern Ireland. Accordingly, access to migrant labour would be maintained, as well as the right of tourists from other EU member states to come to Northern Ireland (under the freedom to receive services). As the Citizens' Rights Directive (Directive 2004/38/EC) has been integrated into the EEA Agreement, this Directive would also apply to new members, enabling some free movement of persons for purposes other than economic ones.

The openness of Northern Ireland to free movement of persons from the EU would entail control of movement from the rest of the UK to Northern Ireland. Further, the UK might wish to apply immigration controls to movement from Northern Ireland to the rest of the UK, if it wishes to limit immigration of EU nationals. However, the control of immigration into the UK results from its withdrawal from the EU, and thus exists independently of the proposed participation in the EEA. The EEA option does not solve the question of how the controls are to be operated, but importantly it does not accentuate them. . . .

The human rights protections provided through the Treaty of Lisbon, especially the EU Charter of Fundamental Rights, would no longer apply to Northern Ireland. The existing standards of human rights protection would therefore need to be maintained and, in some areas, enhanced if human rights standards are to be maintained overall. This will be particularly important in areas relating to immigration, refugees, and the free movement of people. . . .

We turn to the January 2017 UK Supreme Court decision. The following questions were before the Court:

1. Whether Act of Parliament is required before giving notification of withdrawal under Article 50(2) of the Treaty on European Union*;
2. Whether the Northern Ireland Act 1998 ("the Northern Ireland Act") requires an Act of Parliament before notification is given

* Article 50 of the Treaty on European Union (TEU) provides: "1. Any member state may decide to withdraw from the Union in accordance with its own constitutional requirements. 2. A member state which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that state, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union . . . 3. The Treaties shall cease to apply to the state in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the member state concerned, unanimously decides to extend this period"

under Article 50(2) and if so, whether the consent of the Northern Ireland Assembly is required before enacting such an Act;

3. Whether the giving of notification under Article 50(2) without the consent of the people of Northern Ireland would in any case impede the Northern Ireland Act, which provides that Northern Ireland shall not cease to be part of the United Kingdom without the consent of a majority of the people of Northern Ireland.

**R (on the application of Miller and Another) v. Secretary of State for
Exiting the European Union**
Supreme Court of the United Kingdom
[2017] UKSC 5 (January 24, 2017)

Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord
Wilson, Lord Sumption, Lord Hodge: . . .

1. On 1 January 1973, the United Kingdom became a member of the European Economic Community (“the EEC”) and certain other associated European organisations. On that date, EEC law took effect as part of the domestic law of the United Kingdom, in accordance with the European Communities Act 1972 which had been passed ten weeks earlier. Over the next 40 years, the EEC expanded from nine to 28 member states, extended its powers or “competences,” merged with the associated organisations, and changed its name to the European Community in 1993 and to the European Union in 2009.

2. In December 2015, the UK Parliament passed the European Union Referendum Act, and the ensuing referendum on 23 June 2016 produced a majority in favour of leaving the European Union. UK government ministers (whom we will call “ministers” or “the UK government”) thereafter announced that they would bring UK membership of the European Union to an end. The question before this Court concerns the steps which are required as a matter of UK domestic law before the process of leaving the European Union can be initiated. The particular issue is whether a formal notice of withdrawal can lawfully be given by ministers without prior legislation passed in both Houses of Parliament and assented to by HM The Queen.

3. It is worth emphasising that nobody has suggested that this is an inappropriate issue for the courts to determine. It is also worth emphasising that this case has nothing to do with issues such as the wisdom of the decision to withdraw from the European Union, the terms of withdrawal, the timetable or arrangements for withdrawal, or the details of any future relationship with the European Union. Those are all political issues which are matters for ministers and Parliament to resolve. They are not issues which are appropriate for resolution by judges, whose duty is to decide

issues of law which are brought before them by individuals and entities exercising their rights of access to the courts in a democratic society.

4. Some of the most important issues of law which judges have to decide concern questions relating to the constitutional arrangements of the United Kingdom. . . . [T]hey concern (i) the extent of ministers' power to effect changes in domestic law through exercise of their prerogative powers at the international level, and (ii) the relationship between the UK government and Parliament on the one hand and the devolved legislatures and administrations of Scotland, Wales and Northern Ireland on the other.

5. The main issue on this appeal concerns the ability of ministers to bring about changes in domestic law by exercising their powers at the international level, and it arises from two features of the United Kingdom's constitutional arrangements. The first is that ministers generally enjoy a power freely to enter into and to terminate treaties without recourse to Parliament. This prerogative power is said by the Secretary of State for Exiting the European Union to include the right to withdraw from the treaties which govern UK membership of the European Union ("the EU Treaties"). The second feature is that ministers are not normally entitled to exercise any power they might otherwise have if it results in a change in UK domestic law, unless statute, i.e. an Act of Parliament, so provides. The argument against the Secretary of State is that this principle prevents ministers withdrawing from the EU Treaties, until effectively authorised to do so by a statute.

6. Most of the devolution issues arise from the contention that the terms on which powers have been statutorily devolved to the administrations of Scotland, Wales and Northern Ireland are such that, unless Parliament provides for such withdrawal by a statute, it would not be possible for formal notice of the United Kingdom's withdrawal from the EU Treaties to be given without first consulting or obtaining the agreement of the devolved legislatures. And, in the case of Northern Ireland, there are certain other arguments of a constitutional nature. . . .

26. . . . [N]otice under article 50(2) (which we shall call "Notice") cannot be given in qualified or conditional terms and . . . , once given, it cannot be withdrawn. . . .

36. The applicants' case . . . is that when Notice is given, the United Kingdom will have embarked on an irreversible course that will lead to much of EU law ceasing to have effect in the United Kingdom, whether or not Parliament repeals the 1972 Act. . . . [G]iving of Notice would pre-empt the decision of Parliament on the Great Repeal Bill. It would be tantamount to altering the law by ministerial action, or executive decision, without prior legislation, and that would not be in accordance with our law. . . .

55. Subject to any restrictions imposed by primary legislation, the general rule is that the power to make or unmake treaties is exercisable without legislative authority and that the exercise of that power is not reviewable by the courts. . . . This principle rests on the so-called dualist theory, which is based on the proposition that international law and domestic law operate in independent spheres. The prerogative power to make treaties depends on two related propositions. The first is that treaties between sovereign states have effect in international law and are not governed by the domestic law of any state. . . . The second proposition is that, although they are binding on the United Kingdom in international law, treaties are not part of UK law and give rise to no legal rights or obligations in domestic law. . . .

57. It can thus fairly be said that the dualist system is a necessary corollary of Parliamentary sovereignty, or, to put the point another way, it exists to protect Parliament not ministers. . . .

58. While ministers have in principle an unfettered power to make treaties which do not change domestic law, it had become fairly standard practice by the late 19th century for treaties to be laid before both Houses of Parliament at least 21 days before they were ratified, to enable Parliamentary objections to be heard. . . .

60. Many statutes give effect to treaties by prescribing the content of domestic law in the areas covered by them. The 1972 Act does this, but it does considerably more as well. It authorises a dynamic process by which, without further primary legislation (and, in some cases, even without any domestic legislation), EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes. This may sound rather dry or technical to many people, but in constitutional terms the effect of the 1972 Act was unprecedented. Indeed, it is fair to say that the legal consequences of the United Kingdom's accession to the EEC were not fully appreciated by many lawyers until the *Factortame* litigation in the 1990s. Of course, consistently with the principle of Parliamentary sovereignty, this unprecedented state of affairs will only last so long as Parliament wishes: the 1972 Act can be repealed like any other statute. For that reason, we would not accept that the so-called fundamental rule of recognition (i.e. the fundamental rule by reference to which all other rules are validated) underlying UK laws has been varied by the 1972 Act or would be varied by its repeal.

61. In one sense, of course, it can be said that the 1972 Act is the source of EU law, in that, without that Act, EU law would have no domestic status. But in . . . a more realistic sense, where EU law applies in the United Kingdom, it is the EU institutions which are the relevant source of that law. The legislative institutions of the EU can create or abrogate rules of law which will then apply domestically, without the specific sanction of any UK institution. It is true that the UK government and UK-elected members of the European Parliament participate in the EU legislative processes and can influence their outcome, but that does not diminish the point. Further, in the many areas of EU competence which are subject to majority decision,

the approval of the United Kingdom is not required for its legislation to take effect domestically. It is also true that EU law enjoys its automatic and overriding effect only by virtue of the 1972 Act, and thus only while it remains in force. That point simply reflects the fact that Parliament was and remains sovereign: so, no new source of law could come into existence without Parliamentary sanction—and without being susceptible to being abrogated by Parliament. However, that in no way undermines our view that it is unrealistic to deny that, so long as that Act remains in force, the EU Treaties, EU legislation and the interpretations placed on these instruments by the Court of Justice are direct sources of UK law.

62. The 1972 Act did two things which are relevant to these appeals. First, it provided that rights, duties and rules derived from EU law should apply in the United Kingdom as part of its domestic law. Secondly, it provided for a new constitutional process for making law in the United Kingdom. These things are closely related, but they are legally and conceptually distinct. The content of the rights, duties and rules introduced into our domestic law as a result of the 1972 Act is exclusively a question of EU law. However, the constitutional processes by which the law of the United Kingdom is made is exclusively a question of domestic law.

63. Under the terms of the 1972 Act, EU law may take effect as part of the law of the United Kingdom in one of three ways. First, the EU Treaties themselves are directly applicable by virtue of section 2(1). Some of the provisions of those Treaties create rights (and duties) which are directly applicable in the sense that they are enforceable in UK courts. Secondly, where the effect of the EU Treaties is that EU legislation is directly applicable in domestic law, section 2(1) provides that it is to have direct effect in the United Kingdom without the need for further domestic legislation. This applies to EU Regulations (which are directly applicable by virtue of article 288 of the TFEU). Thirdly, section 2(2) authorises the implementation of EU law by delegated legislation. This applies mainly to EU Directives, which are not, in general, directly applicable but are required (again by article 288) to be transposed into national law. While this is an international law obligation, failure of the United Kingdom to comply with it is justiciable in domestic courts, and some Directives may be enforced by individuals directly against national governments in domestic courts. Further, any serious breach by the UK Parliament, government or judiciary of any rule of EU law intended to confer individual rights will entitle any individual sustaining damage as a direct result to compensation from the UK government

64. Thus, EU law in EU Treaties and EU legislation will pass into UK law through the medium of section 2(1) or the implementation provisions of section 2(2) of the 1972 Act, so long as the United Kingdom is party to the EU Treaties. Similarly, so long as the United Kingdom is party to the EU Treaties, UK courts are obliged (i) to interpret EU Treaties, Regulations and Directives in accordance with decisions of the Court of Justice, (ii) to refer unclear points of EU law to the Court of Justice, and (iii) to interpret all domestic legislation, if at all possible, so as to comply with EU

law. And, so long as the United Kingdom is party to the EU Treaties, UK citizens are able to recover damages from the UK government in cases where a decision of one of the organs of the state based on a serious error of EU law has caused them loss.

65. In our view, then, although the 1972 Act gives effect to EU law, it is not itself the originating source of that law. . . . So long as the 1972 Act remains in force, its effect is to constitute EU law an independent and overriding source of domestic law. . . .

67. The 1972 Act accordingly has a constitutional character

81. . . . It would be inconsistent with long-standing and fundamental principle for such a far-reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone. All the more so when the source in question was brought into existence by Parliament through primary legislation, which gave that source an overriding supremacy in the hierarchy of domestic law sources. . . .

88. In our judgment, far from indicating that ministers had the power to withdraw from the EU Treaties, the provisions of the 1972 Act, particularly when considered in the light of the unusual nature of those Treaties and the Act's unusual legislative history, support the contrary view. As the Divisional Court said, the long title of the 1972 Act stated that its purpose was to make provision in connection with the "enlargement" of what is now the European Union, which is not easy to reconcile with a prerogative power to achieve the opposite. Similarly, the side-note to section 2, "General implementation of Treaties," points away from a prerogative to terminate any implementation. In addition, there is the fact that the 1972 Act required ministers not to commit the United Kingdom to any new arrangement, whether it increased or decreased the potential volume and extent of EU law, without first being approved by Parliament—by statute in the case of a new EU Treaty and by an approved Order in Council in the case of a treaty ancillary to any existing EU Treaty. It would scarcely be compatible with those provisions if, in reliance on prerogative powers, ministers could unilaterally withdraw from the EU Treaties, thereby reducing the volume and extent of EU law which takes effect domestically to nil without the need for Parliamentary approval. . . .

93. . . . [T]he continued existence of the new source of law created by the 1972 Act, and the continued existence of the rights and other legal incidents which flow therefrom, cannot as a matter of UK law have depended on the fact that to date ministers have refrained from having recourse to the Royal prerogative to eliminate that source and those rights and other incidents. . . .

96. It was further pointed out that unilateral actions by other member states could remove EU law-based rights enjoyed by EU nationals (including UK citizens) living in the United Kingdom—e.g. if another member state withdrew from the

European Union. We agree, but cannot accept that it has any relevance to the present dispute, which concerns the domestic constitutional arrangements which apply if the UK government wishes to withdraw from the EU Treaties. The fact that it is inevitable that to the extent that they depend on a particular foreign government, EU rights can be abrogated by the withdrawal from EU Treaties by that foreign government gives no guidance as to what is required by the United Kingdom's constitutional arrangements before ministers can cause the United Kingdom to withdraw from those Treaties. . . .

101. Accordingly, we consider that, in light of the terms and effect of the 1972 Act, and subject to considering the effect of subsequent legislation and events, the prerogative could not be invoked by ministers to justify giving Notice: ministers require the authority of primary legislation before they can take that course. . . .

104. We start by addressing the fact that the EU Treaties contained no provision entitling a member state to withdraw at the time of the 1972 Act, and that such a provision, article 50, was introduced by the TFEU in 2008. . . . [A]rticle 50 operates only on the international plane, and is not therefore brought into UK law through section 2 of the 1972 Act Accordingly, the Secretary of State can derive no domestic authority from the fact that the EU Treaties now include provision for unilateral withdrawal. In any event, article 50 only entitles a member state to withdraw from the EU Treaties "in accordance with its own constitutional requirements," which returns one to the issue in the current proceedings.

105. It was suggested that, by incorporating the TFEU, including its introduction of article 50, into section 1(2) of the 1972 Act in 2008, it cannot have been the intention of Parliament to "strip" ministers of their ability to exercise their powers under article 50. That is not the issue. Nobody doubts but that, under the TFEU and the TEU, ministers can give Notice under article 50(2); the question we have to decide is whether they can do so under prerogative powers or only with Parliamentary authority. . . .

111. . . . [T]he absence of any Parliamentary controls on article 50(2) in the 2011 Act is entirely consistent with the notion that Parliament assumed that ministers could not withdraw from the EU Treaties without a statute authorising that course—and that if and when Parliament had to consider the issue, it would decide whether and if so on what terms, if any, to give such authorisation.

112. If prerogative powers are curtailed by legislation, they may sometimes be reinstated by the repeal of that legislation, depending on the construction of the statutes in question. But if, as we have concluded, there never had been a prerogative power to withdraw from the EU Treaties without statutory authority, there is nothing to be curtailed or reinstated by later legislation. The prerogative power claimed by the Secretary of State can only be created by a subsequent statute if the express language of that statute unequivocally shows that the power was intended to be created

116. We turn to the 2015 Act and the ensuing referendum. The Attorney General submitted that the traditional view as to the limits of prerogative power should not apply to a ministerial decision authorised by a majority of the members of the electorate who vote in a referendum provided for by Parliament. In effect, he said that, even though it was Parliament which required the referendum, the response to the referendum result should be a matter for ministers, and that it should not be constrained by the legal limitations which would have applied in the absence of the referendum.

117. The referendum is a relatively new feature of UK constitutional practice. There have been three national referendums: on EEC membership in 1975, on the Parliamentary election voting system in 2011 and on EU membership in 2016. There have also been referendums about devolution in Scotland, Wales and Northern Ireland and about independence in Scotland. In 2000, it was considered worth having a legislative framework for the conduct of referendums “held in pursuance of any provision made by or under an Act of Parliament.”

118. The effect of any particular referendum must depend on the terms of the statute which authorises it. Further, legislation authorising a referendum more often than not has provided for the consequences on the result. Thus, the authorising statute may enact a change in the law subject to the proviso that it is not to come into effect unless approved by a majority in the referendum. The Scotland Act 1978 provided for devolution, but stipulated that the minister should bring the Act into force if there was a specified majority in a referendum, and if there was not he was required to lay an order repealing the Act. The Parliamentary Voting System and Constituencies Act 2011 had a provision requiring the alternative vote system to be adopted in Parliamentary elections, but by section 8 stated that the minister should bring this provision into force if it was approved in a referendum, but, if it was not, he should repeal it. Section 1 of the Northern Ireland Act 1998 (“the NI Act”) provided that if a referendum were to result in a majority for the province to become part of a united Ireland, the Secretary of State should lay appropriate proposals before Parliament. . . .

121. Where, as in this case, implementation of a referendum result requires a change in the law of the land, and statute has not provided for that change, the change in the law must be made in the only way in which the UK constitution permits, namely through Parliamentary legislation.

122. What form such legislation should take is entirely a matter for Parliament. . . . [T]he fact that Parliament may decide to content itself with a very brief statute is nothing to the point. There is no equivalence between the constitutional importance of a statute, or any other document, and its length or complexity. A notice under article 50(2) could no doubt be very short indeed, but that would not undermine its momentous significance. The essential point is that, if, as we consider, what would otherwise be a prerogative act would result in a change in domestic law, the act can

only lawfully be carried out with the sanction of primary legislation enacted by the Queen in Parliament. . . .

126. . . . [As for the references from Northern Ireland, there are] five devolution questions :

- (i) Does any provision of the NI Act, read together with the Belfast Agreement and the British-Irish Agreement, have the effect that primary legislation is required before Notice can be given?
- (ii) If the answer is “yes,” is the consent of the Northern Ireland Assembly required before the relevant legislation is enacted?
- (iii) If the answer to question (i) is “no,” does any provision of the NI Act read together with the Belfast Agreement and the British-Irish Agreement operate as a restriction on the exercise of the prerogative power to give Notice?
- (iv) Does section 75 of the NI Act prevent exercise of the power to give Notice in the absence of compliance by the Northern Ireland Office with its obligations under that section?
- (v) Does the giving of Notice without the consent of the people of Northern Ireland impede the operation of section 1 of the NI Act? . . .

128. The NI Act is the product of the Belfast Agreement and the British-Irish Agreement, and is a very important step in the programme designed to achieve reconciliation of the communities of Northern Ireland. It has established institutions and arrangements which are intended to address the unique political history of the province and the island of Ireland. Yet there is also a relevant commonality in the devolution settlements in Northern Ireland, Scotland and Wales (i) in the statutory constraint on the executive and legislative competence of the devolved governments and legislatures that they must not act in breach of EU law (“the EU constraints”); and (ii) in the operation of the Sewel Convention. (The EU constraints are to be found in sections 29(2)(d), 54 and 57(2) of the Scotland Act 1998; sections 108(6)(c) and 80(8) of the Government of Wales Act 2006; and sections 6(2)(d) and 24(1) of the NI Act).

129. . . . When enacting the EU constraints in the NI Act and the other devolution Acts, Parliament proceeded on the assumption that the United Kingdom would be a member of the European Union. That assumption is consistent with the view that Parliament would determine whether the United Kingdom would remain a member of the European Union. But, in imposing the EU constraints and empowering the devolved institutions to observe and implement EU law, the devolution legislation did not go further and require the United Kingdom to remain a member of the

European Union. Within the United Kingdom, relations with the European Union, like other matters of foreign affairs, are reserved or excepted in the cases of Scotland and Northern Ireland, and are not devolved in the case of Wales.

130. Accordingly, the devolved legislatures do not have a parallel legislative competence in relation to withdrawal from the European Union. The EU constraints are a means by which the UK Parliament and government make sure that the devolved democratic institutions do not place the United Kingdom in breach of its EU law obligations. . . .

131. . . . [T]he NI Act conferred rights on the citizens of Northern Ireland, . . . [which in light of] the EU constraints, have endowed the people of Northern Ireland with the right to challenge actions of the Executive or the Assembly on the basis that they are in breach of EU law. A recent example of the exercise of such a right is found in . . . [another case] where the lifetime ban on men who have had sex with other men from giving blood in Northern Ireland was challenged as being contrary to EU law.

132. As already explained, it is normally impermissible for statutory rights to be removed by the exercise of prerogative powers in the international sphere. It would accordingly be incongruous if constraints imposed on the legislative competence of the devolved administrations by specific statutory provisions were to be removed, thereby enlarging that competence, other than by statute. A related incongruity arises by virtue of the fact that observance and implementation of EU obligations are a transferred matter and therefore the responsibility of the devolved administration in Northern Ireland. . . .

134. We also answer the fifth question in the negative. Section 1 of the NI Act is headed “Status of Northern Ireland” and it provides:

- (1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.
- (2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty’s Government in the United Kingdom and the Government of Ireland.

135. In our view, this important provision, which arose out of the Belfast Agreement, gave the people of Northern Ireland the right to determine whether to remain part of the United Kingdom or to become part of a united Ireland. It neither

regulated any other change in the constitutional status of Northern Ireland nor required the consent of a majority of the people of Northern Ireland to the withdrawal of the United Kingdom from the European Union. . . .

136. That leaves the second question, which raises in substance the application of the Sewel Convention. The convention was adopted as a means of establishing cooperative relationships between the UK Parliament and the devolved institutions, where there were overlapping legislative competences. In each of the devolution settlements the UK Parliament has preserved its right to legislate on matters which are within the competence of the devolved legislature. Section 5 of the NI Act empowers the Northern Ireland Assembly to make laws, but subsection (6) states that “[t]his section does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland.” Section 28(7) of the Scotland Act 1998 provides that the section empowering the Scottish Parliament to make laws: “does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.” Substantially identical provision is made for Wales in section 107(5) of the Government of Wales Act 2006.

137. The practical benefits of achieving harmony between legislatures in areas of competing competence, of avoiding duplication of effort, of enabling the UK Parliament to make UK-wide legislation where appropriate, such as establishing a single UK implementing body, and of avoiding any risk of legal challenge to the vires of the devolved legislatures were recognised from an early date in the devolution process. . . . In a debate in the House of Lords on the clause . . . , [Lord Sewel, for whom the Convention is named,] stated . . . that, while the devolution of legislative competence did not affect the ability of the UK Parliament to legislate for Scotland, “we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.” That expectation has been fulfilled.

138. The convention was embodied in a Memorandum of Understanding between the UK government and the devolved governments originally in December 2001. . . . [T]he current Memorandum of Understanding, which was published in October 2013, states:

The UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.

139. . . . That consent is given by a legislative consent motion which the devolved government introduces into the legislature. Para 2 of the Memorandum of

Understanding stated that it was a statement of political intent and that it did not create legal obligations. . . .

144. Attempts to enforce political conventions in the courts have failed. . . .

145. While the UK government and the devolved executives have agreed the mechanisms for implementing the convention in the Memorandum of Understanding, the convention operates as a political restriction on the activity of the UK Parliament. Article 9 of the Bill of Rights, which provides that “Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament,” provides a further reason why the courts cannot adjudicate on the operation of this convention.

146. Judges therefore are neither the parents nor the guardians of political conventions; they are merely observers. As such, they can recognise the operation of a political convention in the context of deciding a legal question, but they cannot give legal rulings on its operation or scope, because those matters are determined within the political world. . . .

147. The evolving nature of devolution has resulted in the Sewel Convention also receiving statutory recognition through section 2 of the Scotland Act 2016, which inserted sub-section (8) into section 28 of the Scotland Act 1998 (which empowers the Scottish Parliament to make laws). Thus subsections (7) and (8) now state:

- (7) This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.
- (8) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.

A substantially identical provision (clause 2) is proposed in the Wales Bill 2016-2017, which is currently before the UK Parliament. . . .

150. The Lord Advocate and the Counsel General for Wales were correct to acknowledge that the Scottish Parliament and the Welsh Assembly did not have a legal veto on the United Kingdom’s withdrawal from the European Union. Nor in our view has the Northern Ireland Assembly. . . . [C]onsent of the Northern Ireland Assembly is not a legal requirement before the relevant Act of the UK Parliament is passed.

151. In reaching this conclusion we do not underestimate the importance of constitutional conventions, some of which play a fundamental role in the operation of our constitution. The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures.

But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law. . . .

Lord Reed (dissenting): . . .

161. Confiding foreign affairs to the Crown, in the exercise of the prerogative, does not, however, secure their effective conduct at the expense of democratic accountability. Ministers of the Crown are politically accountable to Parliament for the manner in which this prerogative power is exercised, and it is therefore open to Parliament to require its exercise to be debated and even to be authorised by a resolution or legislation: as it has done, for example, in relation to the ratification of certain treaties under the European Union Amendment Act 2008, the Constitutional Reform and Governance Act 2010 and the European Union Act 2011. The Crown can, in addition, seek Parliamentary approval before exercising the prerogative power if it so chooses. There is however no legal requirement for the Crown to seek Parliamentary authorisation for the exercise of the power, except to the extent that Parliament has so provided by statute Since there is no statute which requires the decision under article 50(1) to be taken by Parliament, it follows that it can lawfully be taken by the Crown, in the exercise of the prerogative. There is therefore no legal requirement for an Act of Parliament to authorise the giving of notification under article 50(2). So runs the Secretary of State's argument. . . .

177. I entirely accept the importance in our constitutional law of the principle of Parliamentary supremacy over our domestic law That principle does not, however, require that Parliament must enact an Act of Parliament before the UK can leave the EU. That is because the effect which Parliament has given to EU law in our domestic law, under the 1972 Act, is inherently conditional on the application of the EU treaties to the UK, and therefore on the UK's membership of the EU. The Act imposes no requirement, and manifests no intention, in respect of the UK's membership of the EU. It does not, therefore, affect the Crown's exercise of prerogative powers in respect of UK membership. . . . Further, since the effect of EU law in the UK is entirely dependent on the 1972 Act, no alteration in the fundamental rule governing the recognition of sources of law has resulted from membership of the EU, or will result from notification under article 50. It follows that Ministers are entitled to give notification under article 50, in the exercise of prerogative powers, without requiring authorisation by a further Act of Parliament. . . .

182. . . . It follows from the UK's dualist approach to international law that the Treaties could only be given effect in our domestic law by means of an Act of Parliament. This was so notwithstanding the doctrine of EU law, established by the European Court of Justice in *Van Gend en Loos* (Case C-26/62) [1963] ECR 1, 12, that the Treaty of Rome was "more than an agreement which merely creates mutual obligations between the contracting states," and that "independently of the legislation of member states, Community law therefore not only imposes obligations on

individuals but is also intended to confer upon them rights which become part of their legal heritage.” . . .

183. This doctrine is incompatible with the dualist approach of the UK constitution, and ultimately with the fundamental principle of Parliamentary sovereignty. . . .

204. . . . If Parliament chooses to give domestic effect to a treaty containing a power of termination, it does not follow that Parliament must have stripped the Crown of its authority to exercise that power. In the present context, the impact of the exercise of the power on EU rights given effect in domestic law is accommodated by the 1972 Act: the rights simply cease to be rights to which section 2(1) applies. Withdrawal under article 50 alters the application of the 1972 Act, but is not inconsistent with it. The application of the 1972 Act after a withdrawal agreement has entered into force (or the applicable time limit has expired) is the same as it was before the Treaty of Accession entered into force. As in the 1972 Act as originally enacted, Parliament has created a scheme under which domestic law tracks the obligations of the UK at the international level, whatever they may be. . . .

215. . . . [T]he Miller claimant[’s] . . . first argument . . . is that the giving of notification under article 50(2) will result in the alteration of the law and the destruction of statutory rights, and therefore cannot be effected in the exercise of prerogative powers, applying the principles established in . . . [past cases].

216. The argument that the 1972 Act created statutory rights which cannot be taken away without a further Act of Parliament starts from a premise which requires examination. The 1972 Act did not create statutory rights in the same sense as other statutes, but gave legal effect in the UK to a body of law now known as EU law. . . . [S]ection 2(1) recognises that the rights arising under that body of law can be altered from time to time, as a result of changes to the Treaties or to the laws made under the procedures laid down in the Treaties, without the necessity of a further Act of Parliament. Such alterations result not only in the creation of EU rights which are consequently given effect in domestic law by the 1972 Act, but also in the repeal and restriction of EU rights previously created, and given effect under domestic law. The successive regulations imposing fishing quotas are an example. To give another example, if Greece were to decide to leave the EU while the UK remained a member, the Treaties would cease to apply to Greece either when a withdrawal agreement entered into force, or in any event after two years had expired. Greek citizens living in the UK would then cease to enjoy the EU rights which continued to be enjoyed here, for example, by French citizens. As these examples illustrate, rights given direct effect by section 2(1) of the 1972 Act are inherently contingent, and can be altered without any further Act of Parliament. This is a very different situation from any contemplated by the judges in the cases relied on, or by the Scottish and English Parliaments at the time of the Glorious Revolution or the Acts of Union.

217. . . . [T]he majority of the court respond to this point by drawing a distinction between changes which result from the UK's giving notice under article 50, for which a further Act of Parliament is argued to be necessary, and changes which result from any other alteration in the Treaties or in the instruments made under the Treaties, for which no further Act of Parliament is necessarily required. . . . It has to be based on an interpretation of the 1972 Act

219. More fundamentally, however, the argument that withdrawal from the EU would alter domestic law and destroy statutory rights, and therefore cannot be undertaken without a further Act of Parliament, has to be rejected even if one accepts that the 1972 Act creates statutory rights and that withdrawal will alter the law of the land. It has to be rejected because it ignores the conditional basis on which the 1972 Act gives effect to EU law. If Parliament grants rights on the basis, express or implied, that they will expire in certain circumstances, then no further legislation is needed if those circumstances occur. If those circumstances comprise the UK's withdrawal from a treaty, the rights are not revoked by the Crown's exercise of prerogative powers: they are revoked by the operation of the Act of Parliament itself. . . .

242. Given my disagreement with the decision of the majority of the court as to the necessity for an Act of Parliament before article 50 can be invoked, it follows that I would also have dealt with the devolution issues raised in the Northern Irish cases differently. So far as those cases raise issues which are distinct from those arising in the Miller appeal, however, I agree with the way in which the majority have dealt with them. Nothing in the Northern Ireland Act bears on the question whether the giving of notification under article 50 can be effected under the prerogative or requires authorisation by an Act of Parliament. More specifically, neither section 1 nor section 75 of the Northern Ireland Act has any relevance in the present context. Nor does a political convention, such as the Sewel Convention plainly is in its application to Northern Ireland, give rise to a legally enforceable obligation.

Lord Carnwath (dissenting):

243. For the reasons given by Lord Reed, I would have allowed the appeal by the Secretary of State in the main proceedings. In view of the importance of the case, and the fact that we are differing from the Divisional Court and the majority in this court, I shall add some comments of my own from a slightly different legal perspective. I agree with the majority judgment in respect of the Northern Irish cases and the other devolution issues. . . .

274. Shortly after the 1972 Act came into force, Lord Denning famously spoke of the European Treaty as "like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back" That process is now to be reversed. Hydrologists may be able to suggest an appropriate analogy. On any view, the legal and practical challenges will be enormous. The respondents have done a great service in bringing these issues before the court at the beginning of the process. The very full debate in

the courts has been supplemented by a vigorous and illuminating academic debate conducted on the web (particularly through the UK Constitutional Law Blog site). Unsurprisingly, given the unprecedented nature of the undertaking there are no easy answers. In the end, in respectful disagreement with the majority, I have reached the clear conclusion that the Divisional Court took too narrow a view of the constitutional principles at stake. The article 50 process must and will involve a partnership between Parliament and the Executive. But that does not mean that legislation is required simply to initiate it. Legislation will undoubtedly be required to implement withdrawal, but the process, including the form and timing of any legislation, can and should be determined by Parliament not by the courts. That involves no breach of the constitutional principles which have been entrenched in our law since the 17th century, and no threat to the fundamental principle of Parliamentary sovereignty.

Lord Hughes (dissenting):

275. Some observers, who have not been provided with the very detailed arguments which have been debated before us (or the something over 20,000 pages of documents which supported those arguments) might easily think that the principal question in this case is: “Does the 2016 referendum result not conclude the issue, and mean that the country is bound to leave the EU?” In fact, that is not the principal question. No-one suggests that the referendum by itself has the legal effect that a Government notice to leave the EU is made lawful. Specifically, that is not the contention of the Government, speaking through the Secretary of State for exiting the EU. The referendum result undoubtedly has enormous political impact, but it is not suggested by the Government that it has direct legal effect.

276. The principal question in this case is not whether the UK ought or ought not to leave the EU. That is a matter for political judgment, which is where the referendum comes in. Courts do not make political judgments. The question in this case is not *whether*, but *how*, the UK may lawfully set about leaving the EU, if that is the political decision made. It is about the legal mechanics of leaving. . . .

Ireland and the Negotiations on the UK's Withdrawal from the European Union: The Irish Government's Approach
The Irish Government (May 2017)*

Brexit poses unprecedented political, economic and diplomatic challenges for Ireland. . . .

With the formal process for exiting the EU now underway, it is timely for the Government to publish this detailed Position Paper for the forthcoming negotiations. Building on our work done to date, this document comprehensively sets out the positions and priorities that will underpin our engagement in the Brexit process as it unfolds over the next two years. The specifics of key negotiating points will crystallise in the period ahead and the Government will work to ensure that Ireland's interests are protected as we negotiate as part of the EU 27.

Brexit presents challenges to our peace, and challenges to our prosperity. Brexit is a British policy, not an EU policy or an Irish policy. The Government believes it is bad for Britain, for Europe and for Ireland. Given the challenges it presents for this island, it is vital that Ireland prepares thoroughly for its consequences, both at a national level and as part of the EU. . . .

Our headline priorities are clear: minimising the impact on our trade and economy, protecting the peace process and the Good Friday Agreement, maintaining the Common Travel Area with the UK, and securing Ireland's future in a strong European Union. All of these underpin the most fundamental objective of all—ensuring the continued wellbeing of our citizens.

Our work confirms that membership of the European Union has underpinned our national values, helped our economy to prosper, not least by unhindered access to a vast single market, and assisted our transition to a less isolated society that is more equal and open. It also underscores the unequivocal conclusion that Ireland's interests are best served by remaining a fully committed member of the EU, working with our EU partners to deliver more for our citizens. At the same time, we will maintain our close relationship with Britain, which reflects our unique economic, political, cultural and people-to-people links. These two essential objectives need not in any way be mutually exclusive.

In these negotiations, Ireland will be negotiating from a position of strength as part of the EU Team of 27 Member States. In recent months the Irish Government has undertaken an extensive programme of dialogue with our EU partners and with the EU

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institutions. There have been over 400 discussions to date at either political or senior official level, and this interaction will continue as the negotiations begin in Brussels. The EU's chief negotiator, Michel Barnier, the EU institutions and our fellow Member States have shown great understanding and support for the significant challenges we face and for Ireland's unique position and concerns. Ireland's specific priorities are a central element of the EU's overall negotiating objectives and we will be working with our EU partners to ensure that the wellbeing of all Member States and our citizens is protected. . . .

The UK's decision to leave the EU has raised a number of specific and very significant issues which are unique to Ireland, in particular in relation to Northern Ireland, the border and the Common Travel Area (CTA). These issues have been identified as matters to be addressed as part of the Article 50 process and in the withdrawal agreement between the EU and the UK. The outcome of the UK referendum poses particular challenges in Northern Ireland. The Government will ensure that the Good Friday Agreement is fully respected and protected in the withdrawal process and that the gains of the peace process are preserved. The statement approved by the European Council on 29 April includes an explicit acknowledgement of the possibility of a change in the constitutional status of Northern Ireland, as provided for in the Good Friday Agreement and in accordance with the principle of consent, and that the EU Treaties will apply to the unified Ireland.

The Government has made clear its priority that there be no visible, "hard" border on the island of Ireland. This will require a political and not just a technical solution, as well as recognition that the land border on the island represents a unique and unprecedented set of circumstances. The Government will also ensure the protection of the rights of those in Northern Ireland who choose to exercise their right to hold Irish, and thus EU, citizenship, and will advocate for continued EU engagement in Northern Ireland. Both the Irish and British Governments have indicated their intention to maintain the Common Travel Area (CTA) after the UK withdraws from the EU. The CTA pre-dates Ireland and the UK joining the EU and is not dependent on EU membership. The CTA is particularly important in the context of the Northern Ireland Peace Process and relations on the island of Ireland. It facilitates the vast numbers of people who commute across the border and to and from Great Britain for work, business, trade, education, health, family or other reasons. For this reason, the recognition of "existing bilateral arrangements" in the EU Negotiation Guidelines is important, given that it speaks to the fundamental importance of the Common Travel Area in underpinning relationships across these islands. . . .

Another key issue which will need to be resolved during the negotiations is the protection of the rights of EU and UK citizens and those of their families. It is estimated that in the region of 3 million EU citizens are resident in the UK and 1.2 million UK citizens are resident in the EU. These figures exclude Irish citizens in the UK, and UK citizens in Ireland, both of whose status and rights are protected under

the Common Travel Area arrangements as well as under EU law. It is the Government's position that all EU and UK citizens, who are understandably very anxious about the future, should be provided with as much legal certainty and clarity as possible on their rights and entitlements at an early stage in the negotiations, and that both sides should be generous in putting the interests of citizens first. This is of immense importance in human terms but it would also be an important confidence building step in the negotiations. The Government will advocate for a strong and unified EU position on safeguarding the rights of EU citizens and their family members in the UK and vice versa to be provided as soon as possible. Any agreement on this issue should be wide, ambitious and comprehensive, and as such should cover continued access to services. . . .

On June 8, 2017, the United Kingdom held a general election for all 650 seats in the House of Commons. The governing Conservative party, led by Prime Minister Theresa May, lost thirteen seats, which reduced its number from 330 to 317. The result was a "hung Parliament" in that no one political party had enough seats to form a government.

Prime Minister May sought to form a coalition with the Northern Irish Democratic Unionist Party (DUP) in order to add ten seats and secure a majority. The other major Northern Irish party, Sinn Féin, has a policy of refusing to take seats in Westminster because it rejects the United Kingdom's authority over Northern Ireland.

Writing in the days following the election, Christopher McCrudden reflected on how the DUP's priorities might influence Brexit and the UK-Ireland relationship.

Post-Election Reflections

Christopher McCrudden (June 15, 2017)*

We now know the substantial problems the island of Ireland faces with a hard Brexit. In particular, we know that what to do with a land border between the UK and the EU after Brexit, one that is now open, porous and uncontrolled, is a major problem. Reintroducing border controls between Northern Ireland and the Republic of Ireland is likely to destabilize the already fragile peace in Northern Ireland.

There has developed a significant degree of consensus among the parties in Northern Ireland, and with the Irish government in Dublin, about the wish list that should be presented to deal with Northern Ireland in the forthcoming negotiations. In

* Excerpted from Christopher McCrudden, Post-Election Reflections (June 15, 2017) (unpublished manuscript).

Ireland, north and south, there is no appetite for a hard Brexit, for powerful political and economic reasons. Remember that the majority in Northern Ireland voted to remain in the EU.

The broad aim of policy should be to seek to preserve as much of the *status quo* as possible in Northern Ireland, between Northern Ireland and the Republic of Ireland, and between the island of Ireland and Britain.

Prior to the UK general election, this logic was accepted by the EU-27. There was a broad consensus among the EU-27, that there are “unique circumstances” that apply to Northern Ireland. Achieving the inclusion of the “unique circumstances” language was a major achievement of Irish diplomacy. . . .

But the results of the general election have, potentially, changed [the state of negotiations]. Although we simply don’t know for certain how things will develop over the next few days and weeks, it looks likely that the Conservative Party under Theresa May will form a loose coalition with . . . the [DUP], because without such an agreement, she does not have a majority in the House of Commons, and therefore cannot govern. This puts the DUP in the critical role of being the ‘king maker.’ So, what they want is critical.

What *do* the DUP want for Brexit? Essentially, they want *two* things. They want a soft Brexit, with open borders on the island of Ireland, free movement between North and South, and free trade between North and South. To have otherwise will cause severe economic hardship to their own constituents. . . .

But the second element of what they want is actually the critical one. The DUP wants *no*, . . . “special status” for Northern Ireland. This means that they do not want a deal for Northern Ireland that is separate from what the rest of the UK gets, because they think that this would weaken the union between Northern Ireland and the rest of the UK. Reconciling their first demand with the second demand means that the DUP can only be satisfied if the UK *as a whole* seeks to achieve a soft Brexit, essentially equivalent to the position of Norway.

What most media comment has not fully comprehended yet are the implications of the fact that the DUP is not only negotiating with Theresa May. They are also negotiating to form a *devolved* government in Northern Ireland, one which they desperately want. But they cannot, legally, form such a government without the agreement of Sinn Féin, the now-dominant Irish nationalist party in Northern Ireland. So, the DUP are also having to consider what effect the London negotiation will have on negotiating with Sinn Féin, in a context where the possibility of another election will mean that making the necessary political compromises will be difficult for all parties.

Sinn Féin is seeking to stop Brexit, or at least achieve a special status for Northern Ireland in the EU. The DUP must, therefore, manage two possible coalition partners, which point in almost entirely opposite directions, and this poses a major challenge to the DUP and to any future UK government dependent on the DUP. Even assuming that the UK is able to formulate a negotiating position, will it long survive, or will it contribute to a breakdown of the negotiations with the EU-27? . . .

In this context, the Irish government, under its new leadership, will be critical, and the UK desperately needs to keep it onside, since it will significantly influence the EU-27s approach. For that reason alone, ensuring the establishment of a devolved government in Belfast is critical. The Irish government would find it very difficult indeed to stomach a return to direct rule of Northern Ireland from London, a government that contains at least one senior Cabinet member (Michael Gove) who considers that the Belfast-Good Friday Agreement “legitimised terror,” and particularly if that UK government is also now dependent on DUP support for its very existence.

What should the EU-27 do? They should make clear that the EU would accept Northern Ireland in the EEA [European Economic Area]. Apart from that, however, the EU-27 should hang tough and offer no concessions to the UK at the present time. A hard-line approach in Brussels is perhaps the only way now of bringing British public opinion to its senses. Bring them to the cliff edge and perhaps they will see the logic of not jumping off.

What Happens to ‘Acquired Rights’ in the Event of a Brexit? Sionaidh Douglas-Scott (2016)*

. . . [O]ne area of EU rights law where there still exists little information is that of acquired rights. In spite of being central to the Brexit debate, the topic of acquired rights is beset by confusion and misinformation. This is regrettable because any future lack of protection of rights currently guaranteed under EU law is one of the most serious risks of a UK withdrawal from the EU. . . .

It is clear that EU law and the EU treaties are distinct from many other international treaties in the extent to which they give individuals rights, ‘which become part of their legal heritage.’ Since the UK joined the (then) EEC in 1973, EU law has furnished British citizens with an immense array of rights and freedoms. But a crucial question of the Brexit debate is what happens to these rights if the UK

* Excerpted from Sionaidh Douglas-Scott, *What Happens to ‘Acquired Rights’ in the Event of a Brexit?*, UK CONSTITUTIONAL LAW ASSOCIATION BLOG (May 16, 2016), available at <https://ukconstitutional.org/>.

withdraws from the EU? Post-withdrawal, EU law would cease to apply in the UK, meaning not only would the EU treaties cease to apply, but any national law implementing EU law would have to be repealed, amended, or possibly retained. So the legal source of many, or even most, of these rights would be removed.

These rights presently take a number of forms. British citizens have used their free movement rights under EU law to move to other EU countries and to live, work and retire there. Other EU citizens have likewise moved to the UK. These citizens need to know how, and if, their rights are protected to understand fully the implications of a Brexit. However, the rights at issue are not only migratory in nature. British business enjoys all sorts of rights of freedom to trade within the EU, without tariff or non-tariff barriers, as indeed do other EU traders with Britain. Investors and companies have long-term supply and procurement contracts, on the basis that the UK is a part of the EU. The EU Charter of Fundamental Rights is legally enforceable, carrying the same weight as the EU treaties. So it is a fundamental to know what would happen to all of these measures in the event of a Brexit.

Protection of rights in such situations concerns an area known as that of ‘acquired rights’ in legal terms. Acquired rights (sometimes also described as vested or executed) are those rights not automatically revoked if a treaty or law no longer applies. If acquired rights are recognised, then once a person/organisation has exercised them, they cannot be removed—even in the event of a change in the ultimate power over a country (e.g. a grant of independence, secession, or exit from the EU).

The crucial question therefore is whether rights already exercised under EU law (such as the rights of other EU citizens currently living and working in the UK, or of British nationals currently living and working elsewhere in the EU, without the need for a residence permit, work permit or visa) would be legally recognised as ‘acquired,’ and still enforceable after a Brexit? Put differently, might the ECJ’s famous holding in *van Gend*, that EU law confers rights on Member State nationals that become part of their ‘legal heritage,’ actually imply that this legal heritage can outlast the legal provisions that created it? On this issue we find much confusion.

An obvious place to turn on this issue is EU law. Do EU treaties require that rights acquired under EU law be continued, should a state leave the EU? Art 50(3) TEU, which concerns withdrawal from the EU, provides: ‘*the Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.*’

But Article 50 makes no specific mention of acquired rights. Nor does any other provision in the EU Treaties set out any explicit rules on protection of acquired rights. There is no legal obligation under the EU treaties for them to be taken into account. This contrasts with some international treaties, such as the ECHR, or the

Energy Charter Treaty, which provide specific protection for individuals' acquired rights on termination of the treaty.

Of course, EU Law is not just a matter of treaty law, but also of general principles recognised as binding in EU law. While there is no general principle of EU law specifically protecting acquired rights, a principle of relevance is that of legal certainty, recognised as a general principle of law by the ECJ. Legal certainty has specific applications, such as non-retroactivity and legitimate expectations, which may be of some relevance. Yet it is unlikely that, in the event of Brexit, EU general principles of law could protect acquired rights within either UK courts, or those in another member state. On withdrawal, EU general principles would no longer be a justiciable source of law in the UK. And if an expat, for example, were to seek to assert their relevance in another EU state, the argument could be made that EU law did not apply to their situation as, being no longer EU citizens, they lacked a connecting factor with EU law.

It is clearly advisable for the UK to negotiate protection of acquired rights as part of a Withdrawal Agreement with the EU. However, it is possible that there might be no Agreement, or alternatively that even an extensive agreement might fail to protect acquired rights adequately. If this happens, is international law capable of protecting acquired rights? Some commentators . . . cite Article 70 of the Vienna Convention on the Law of Treaties as relevant. However, I would be cautious in claiming international law as a clear source of protection for acquired rights.

Article 70.1(b) Vienna Convention provides that termination of an international treaty 'does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.' . . . [T]he reference to 'the parties' in Article 70 is a reference to *the parties to the treaty*—i.e. *States*. Article 70 does not directly address individual rights. The International Law Commission, in its commentary on the scope of the identically worded predecessor to Article 70.1(b) (Article 66 draft Vienna Convention) specifically rejected an interpretation that it gave rise to acquired rights . . . [I]t would seem that the faith placed in the capacity of Article 70 Vienna Convention to protect acquired rights may well be misplaced. . . .

There is some authority suggesting that, under customary international law, some treaty obligations continue to exist, protecting acquired rights notwithstanding the termination of a treaty. . . . However, to the extent that acquired rights are recognised by customary international law, their scope is very narrow. . . . [I]nternational law does not treat all rights as worthy of respect as acquired rights, indeed it does not protect most rights as acquired rights. . . .

At present, we cannot know what might be negotiated in a Withdrawal Agreement, nor what the UK Government's withdrawal strategy might be, nor indeed if the EU would be a hard bargainer, leading to negative economic effects for the UK.

What should be clear is that, absent a Withdrawal Agreement which gives give clear protection of acquired rights, existing national, EU and international law does not offer a great deal of protection. So the content of the Withdrawal Agreement would be crucial. And in order to protect British citizens' acquired rights in such an Agreement, reciprocity would be necessary (i.e. the UK would have to offer similar protections to those from other EU states). Otherwise UK citizens may sacrifice their current rights under EU law in the cause of British isolation.

DEMOCRATIC AUTHORITY, EXECUTIVE PREROGATIVES, AND THE COURTS

DISCUSSION LEADERS

CRISTINA RODRÍGUEZ AND MANUEL CEPEDA-ESPINOSA

II. DEMOCRATIC AUTHORITY, EXECUTIVE PREROGATIVES, AND THE COURTS

DISCUSSION LEADERS:

CRISTINA RODRÍGUEZ AND MANUEL CEPEDA-ESPINOSA

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This chapter addresses the availability and scope of judicial review in cases that are “political” in nature. We begin by considering the authority of courts to review aspects of democratic practices: the political parties, electoral lists, voting, and referenda. The materials then consider judicial constraints on the authority of the executive branch of government. A third segment reflects on the interactions between judicial review and sovereignty. In each of these arenas, governments argue that their exercises of authority are non-reviewable. What are the sources of authority and the limits on judicial involvement in these contexts? Do responses vary based on particular constitutions? Are there shared approaches?

CONSTITUTING THE DEMOCRACY

The judiciary has been asked to respond to arguments that political parties cannot be banned, that laws organizing electoral lists violate constitutional rights, and that elections themselves violate constitutional rights. Further, efforts at direct democracy—such as lawmaking through referenda and plebiscites—have been challenged as unconstitutional. We provide examples of these conflicts below.

Banning Parties

National Democratic Party Ban Case

Federal Constitutional Court of Germany (Second Senate)

2 BvB 1/13 (January 17, 2017)*

[The Second Senate of the Federal Constitutional Court with the participation of Justices Voßkuhle (President), Huber, Hermanns, Müller, Kessler-Wulf, König, and Maidowski.]

The National Democratic Party of Germany (NPD) advocates a concept aimed at abolishing the existing free democratic basic order. The NPD intends to replace the existing constitutional system with an authoritarian national state that adheres to the idea of an ethnically defined “people’s community” (*Volksgemeinschaft*). Its political concept disrespects human dignity and is incompatible with the principle of democracy. Furthermore, the NPD acts in a systematic manner and with sufficient intensity towards achieving its aims that are directed against the free democratic basic order. . . .

2. The applicant requests, pursuant to Art. 21 sec. 2 GG in conjunction with §§ 43 et seq. of the Act on the Federal Constitutional Court, the declaration that the NPD is unconstitutional because it seeks, by reason of its aims or the behaviour of its adherents, to undermine the free democratic basic order. This request must be measured against the following standards:

a) The notion of the free democratic basic order within the meaning of Art. 21 sec. 2 GG encompasses the central basic principles that are absolutely indispensable for the free constitutional state. Human dignity (Art. 1 sec. 1 GG) is the very basis of the free democratic basic order. The guarantee of human dignity encompasses in particular the safeguarding of personal individuality, identity and integrity, as well as the fundamental equality before the law. Concepts aimed at racist discrimination are incompatible with this finding. Apart from this, under the principle of democracy, also the possibility of equal participation of all citizens in the process of developing an informed political opinion, and the exercise of all state authority being attributable to, i.e. derived from, the people (Art. 20 secs. 1 and 2 GG), are constitutive elements of the free democratic basic order. As far as the rule of law is concerned, this applies with regard to public authority being bound by the law, the independent courts’ review in that respect, and to the state’s monopoly on the use of force.

* Excerpted is the Court’s English press release; the judgment was published in German. See Press Release: No Prohibition of the National Democratic Party of Germany as there are no Indications that it will Succeed in Achieving its Anti-Constitutional Aims (January 17, 2017), *available at* <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-004.html>.

b) The concept of “abolishing” (*beseitigen*) within the meaning of Art. 21 sec. 2 GG describes the abolishment of at least one of the constituent elements of the free democratic basic order or the replacement of this order with another constitutional order or another system of government. The criterion “undermining” (*beeinträchtigen*) can be assumed to be met once a party, according to its political concept, noticeably threatens one of the constituent elements of the free democratic basic order.

c) Whether a political party seeks to undermine or abolish the free democratic basic order must result from the aims or the behaviour of its adherents. . . .

d) The prohibition of a political party requires that the party seeks (*darauf ausgehen*) to undermine or abolish the free democratic basic order. It is not a means for prohibiting views or an ideology. Instead, the party must go beyond its commitment to its anti-constitutional aims in that it exceeds the threshold of actually combating the free democratic basic order. This criterion is met if the party actively and systematically advocates its aims and acts towards undermining or abolishing the free democratic basic order. It does not require, however, that the party’s acts result in a specific danger to the legal interests protected by Art. 21 sec. 2 sentence 1 GG. However, there must be specific and weighty indications that at least make it appear possible that the party’s activities will be successful (potentiality). If, on the contrary, the acts of a party do not even suggest that it might possibly succeed in achieving its anti-constitutional aims, it is not necessary to protect the Constitution preventively by prohibiting the party. . . .

e) Art. 21 sec. 2 GG leaves no room for assuming that there are other (unwritten) criteria. Neither is the principle of proportionality applied in proceedings regarding the prohibition of political parties, nor does a party’s similarity in nature to National Socialism provide a substitute for the criteria set out in Art. 21 sec. 2 GG. Nonetheless, similarity in nature to National Socialism can in fact serve as an indication of a party’s pursuit of anti-constitutional aims.

3. Measured against these standards, the application to prohibit the NPD is unfounded.

a) The political concept of the NPD is aimed at abolishing the free democratic basic order.

aa) The concept of “people” (*Volk*) advocated by the NPD violates human dignity. It negates a person’s entitlement to respect which follows from human dignity and leads to the denial of the fundamental equality before the law to the detriment of those persons who do not belong to the NPD’s ethnical definition of the *Volksgemeinschaft*. The NPD’s political concept is aimed at segregating and disparaging social groups (foreigners, migrants, religious and other minorities) and at largely depriving them of most of their rights.

bb) Moreover, the NPD also disrespects the free democratic basic order with a view to the principle of democracy. A national state characterised by the “unity of people and state” as defined by the NPD, as a matter of principle leaves no room for a participation of non-ethnic Germans in the process of developing an informed political opinion. This concept contradicts the right to equal participation of all citizens in the development of political opinions that is rooted in the human-rights core reflected in the principle of democracy. Furthermore, the NPD also advocates abolishing the existing system of parliamentary representation and replacing it with a national state that adheres to the concept of the *Volksgemeinschaft*. . . .

b) However, a fact that precludes a prohibition of the NPD is that the element of “seeking” (*darauf ausgehen*) within the meaning of Art. 21 sec. 2 sentence 1 GG is not met. While the NPD indeed professes its commitment to aims that are directed against the free democratic basic order and although it systematically acts towards achieving them, which is why its acts constitute a qualified preparation of abolishing the free democratic basic order that it strives for, there are no specific and weighty indications that suggest that the NPD will succeed in achieving its anti-constitutional aims. Neither is there a prospect of successfully achieving these aims in the context of participating in the development of political opinions (aa), nor is it sufficiently discernible that there is an attempt—attributable to the NPD—to achieve these aims by undermining the freedom of participating in the development of political opinions (bb).

aa) It appears to be entirely impossible that the NPD will succeed in achieving its aims by parliamentary or extra-parliamentary democratic means.

(1) As far as the parliamentary sphere is concerned, the NPD neither has a prospect of obtaining [its] own majorities in elections nor the option of creating its own scope for action by taking part in coalitions. . . .

(2) In the foreseeable future, the NPD does not have any possibility of successfully pursuing its anti-constitutional aims with democratic means outside its parliamentary action by participating in the process of policy formulation either. . . .

bb) Furthermore, there are no specific and weighty indications suggesting that the NPD exceeds the boundaries of admissible political struggle of opinions in a manner that would satisfy the criterion of “seeking.” It is incapable of realising its aspirational urge to dominate delimited social spaces to a relevant degree. . . . Finally, there are no sufficient indications at present and with regard to the near future to suggest that the party creates an atmosphere of fear that noticeably undermines the free process of the development of political opinions. The fact that the NPD, by intimidating or criminal behaviour of members or adherents is able to occasionally raise understandable concerns for the freedom of the political process or even fear of violent attacks is undeniable, but it does not reach the threshold determined by Art. 21 sec. 2 GG. Intimidation and threats, as well as the building up of potentials for

violence, must be countered with the means of preventive police law and of repressive criminal law in order to effectively protect the freedom of the political process as well as individuals affected by the behaviour of the NPD.

Refah Partisi (The Welfare Party) and Others v. Turkey
European Court of Human Rights (Grand Chamber)
ECHR 2003-II 267 (2003)

. . . The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges: Mr L. Wildhaber, *President*, Mr C.L. Rozakis, Mr J.-P. Costa, Mr G. Ress, Mr Gaukur Jörundsson, Mr L. Caflisch, Mr R. Türmen, Mr C. Bîrsan, Mr P. Lorenzen, Mr V. Butkevych, Mrs N. Vajić, Mr M. Pellonpää, Mrs M. Tsatsa-Nikolovska, Mr A.B. Baka, Mr R. Maruste, Mr A. Kovler, Mrs A. Mularoni, and also of Mr P.J. Mahoney, *Registrar*

1. The case originated in four applications against the Republic of Turkey lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish political party, Refah Partisi (the Welfare Party—“Refah”) and three Turkish nationals

2. The applicants alleged . . . that the dissolution of Refah by the Turkish Constitutional Court and the suspension of certain political rights of the other applicants, who were leaders of Refah at the material time, had breached Articles 9, 10, 11, 14, 17 and 18 of the Convention and Articles 1 and 3 of Protocol No. 1. . . .

5. On 31 July 2001 the [Third Section of the Court] gave judgment, holding by four votes to three that there had been no violation of Article 11 of the Convention and unanimously that it was not necessary to examine separately the complaints under Articles 9, 10, 14, 17 and 18 of the Convention and Articles 1 and 3 of Protocol No. 1. . . .

10. The first applicant, Refah Partisi (the Welfare Party—“Refah”), was a political party founded on 19 July 1983. . . .

11. . . . The results of the 1995 general election made Refah the largest political party in Turkey with a total of 158 seats in the Grand National Assembly (which had 450 members at the material time). On 28 June 1996 Refah came to power by forming a coalition government with the centre-right True Path Party (Doğru Yol Partisi), led by Mrs Tansu Ciller. According to an opinion poll carried out in January 1997, if a general election had been held at that time, Refah would have obtained 38% of the votes. The same poll predicted that Refah might obtain 67% of the votes in the general election to be held roughly four years later. . . .

12. On 21 May 1997 Principal State Counsel at the Court of Cassation applied to the Turkish Constitutional Court to have Refah dissolved on the grounds that it was a “centre” (*mihrak*) of activities contrary to the principles of secularism. In support of his application, he referred to [a number of] . . . acts and remarks by certain leaders and members of Refah. [These included advocating for wearing of Islamic headscarves in State schools and buildings occupied by public administrative authorities where the Constitutional Court had already ruled that this infringed the principle of secularism enshrined in the Constitution, and more generally calling for the secular political system to be replaced by a theocratic system.] . . .

23. On 16 January 1998 the Constitutional Court dissolved Refah on the ground that it had become a “centre of activities contrary to the principle of secularism.” It based its decision on sections 101(b) and 103(1) of Law no. 2820 on the regulation of political parties. It also noted the transfer of Refah’s assets to the Treasury as an automatic consequence of dissolution, in accordance with section 107 of Law no. 2820. . . .

49. The applicants alleged that the dissolution of Refah Partisi (the Welfare Party) and the temporary prohibition barring its leaders—including Mr Necmettin Erbakan, Mr Şevket Kazan and Mr Ahmet Tekdal—from holding similar office in any other political party had infringed their right to freedom of association, guaranteed by Article 11 of the Convention*

89. . . . [T]here can be no democracy without pluralism. It is for that reason that freedom of expression as enshrined in Article 10 is applicable, subject to paragraph 2, not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Inasmuch as their activities form part of a collective exercise of the freedom of expression, political parties are also entitled to seek the protection of Article 10 of the Convention. . . .

90. . . . [A]s protected by Article 9, freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious

* Article 11 of the European Convention on Human Rights provides:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. . . .

asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion.

91. Moreover, in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected. The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs and that it requires the State to ensure mutual tolerance between opposing groups. . . .

98. . . . [A] political party may promote a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds.

99. The possibility cannot be excluded that a political party, in pleading the rights enshrined in Article 11 and also in Articles 9 and 10 of the Convention, might attempt to derive therefrom the right to conduct what amounts in practice to activities intended to destroy the rights or freedoms set forth in the Convention and thus bring about the destruction of democracy. In view of the very clear link between the Convention and democracy, no one must be authorised to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society. Pluralism and democracy are based on a compromise that requires various concessions by individuals or groups of individuals, who must sometimes agree to limit some of the freedoms they enjoy in order to guarantee greater stability of the country as a whole. In that context, the Court considers that it is not at all improbable that totalitarian movements, organised in the form of political parties, might do away with democracy, after prospering under the democratic regime, there being examples of this in modern European history.

100. . . . [T]he exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining whether a necessity within the meaning of Article 11 § 2 exists, the Contracting States have only a limited margin of appreciation. Although it is not for the Court to take the place of

the national authorities, which are better placed than an international court to decide, for example, the appropriate timing for interference, it must exercise rigorous supervision embracing both the law and the decisions applying it, including those given by independent courts. Drastic measures, such as the dissolution of an entire political party and a disability barring its leaders from carrying on any similar activity for a specified period, may be taken only in the most serious cases. Provided that it satisfies the conditions set out in paragraph 98 above, a political party animated by the moral values imposed by a religion cannot be regarded as intrinsically inimical to the fundamental principles of democracy, as set forth in the Convention. . . .

102. . . . [A] State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy, even though the danger of that policy for democracy is sufficiently established and imminent. . . . [W]here the presence of such a danger has been established by the national courts, after detailed scrutiny subjected to rigorous European supervision, a State may [as the Chamber held] “reasonably forestall the execution of such a policy, which is incompatible with the Convention’s provisions, before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country’s democratic regime.” . . .

104. . . . [T]he Court’s overall examination of the question whether the dissolution of a political party on account of a risk of democratic principles being undermined met a “pressing social need” must concentrate on the following points: (i) whether there was plausible evidence that the risk to democracy, supposing it had been proved to exist, was sufficiently imminent; (ii) whether the acts and speeches of the leaders and members of the political party concerned were imputable to the party as a whole; and (iii) whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a “democratic society.”

105. . . . [T]he Court must . . . take account of the historical context in which the dissolution of the party concerned took place and the general interest in preserving the principle of secularism in that context in the country concerned to ensure the proper functioning of “democratic society.” . . .

135. . . . [F]ollowing a rigorous review to verify that there were convincing and compelling reasons justifying Refah’s dissolution and the temporary forfeiture of certain political rights imposed on the other applicants, the Court considers that those interferences met a “pressing social need” and were “proportionate to the aims pursued.” It follows that Refah’s dissolution may be regarded as “necessary in a democratic society” within the meaning of Article 11 § 2.

136. Accordingly, there has been no violation of Article 11 of the Convention. . . .

137. . . . [The Court also held no] violation of Articles 9, 10, 14, 17 and 18 of the Convention. . . .

[Judge Ress filed a concurring opinion, joined by Judge Rozakis, to clarify that the protection of the Convention is not limited to situations where the political party has acted in every respect in conformity with the law, but also applies to situations in-between. Therefore, “paragraph 98 of the judgment should . . . not be understood to exclude for more or less minor illegalities the application of the principle of proportionality in relation to sanctions such as dissolution of a party.” Judge Kovler filed a concurring opinion critiquing the Court’s use of terms “borrowed from politico-ideological discourse, such as ‘Islamic fundamentalism,’ ‘totalitarian movements,’ ‘threat to the democratic regime,’ whose connotations, in the context of the present case, might be too forceful.” He stated that the Court had missed an opportunity to “analyse in more detail the concept of a plurality of legal systems, which is linked to that of legal pluralism and is well-established in ancient and modern legal theory and practice.”]

Electoral Lists

Judgment No. 1 Constitutional Court of Italy (2014)

[The Constitutional Court, composed of President: Gaetano Silvestri; Judges: Luigi Mazella, Sabino Cassese, Giuseppe Tesauro, Paolo Maria Napolitano, Giuseppe Frigo, Alessandro Criscuolo, Paolo Grossi, Giorgio Lattanzi, Aldo Carosi, Marta Cartabia, Sergio Mattarella, Mario Rosario Morelli, Giancarlo Coraggio, Giuliano Amato.]

[Author: Giuseppe Tesauro] . . .

1. The Court of Cassation questions the constitutionality of certain provisions of Presidential Decree no. 361 of 30 March 1957 (Approval of the consolidated text of laws laying down rules governing elections to the Chamber of Deputies) . . . concerning the allocation of a majority bonus on a national level in the Chamber and on regional level in the Senate and the provisions that, in regulating the arrangements governing the casting of list votes, do not enable voters to state any preference.

1.1 . . . [T]he Court of Cassation challenges first and foremost Article 83 of Presidential Decree no. 361 of 1957 insofar as it provides that the National Electoral Office shall ascertain “whether the coalition of lists or individual list that has obtained

the largest number of valid votes cast has won at least 340 seats” and shall rule that, if this is not the case, “it shall be allocated the number of seats necessary in order to reach that level.” These provisions are claimed to violate Article 3 of the Constitution in addition to Articles 1(2) and 67 of the Constitution on the grounds that, by failing to subject the allocation of the majority bonus to the achievement of a minimum threshold of votes, thereby transforming a relative majority of votes (which may potentially even be very modest) into an absolute majority of seats, they unreasonably cause an objective and serious impairment of democratic representation.

In addition, the mechanism for allocating the bonus which has been introduced is claimed to be unreasonable since, in the first place, it contrasts with the need to ensure governability, as it incentivises the conclusion of agreements between lists for the sole purpose of securing the bonus, without averting the risk that the beneficiary coalition may collapse or that one or more parties comprising it may leave, even immediately after the elections. Secondly, it is claimed to upset institutional equilibria, taking account of the fact that the majority that receives the bonus would be able to elect guardian bodies that remain in office for longer than the duration of the legislature. The arrangements for allocating the majority bonus laid down under the aforementioned provisions are also claimed to violate the principle of equality in voting, that is the equal status of voters at the time each vote is cast, in breach of Article 48(2) of the Constitution. The resulting distortion of the principle does not in fact constitute a merely factual inconvenience, but is claimed to be the result of an irrational mechanism planned through legislation in order to achieve that result. . . .

2. . . . [T]he question relates to a fundamental right protected under the Constitution—the right to vote—an essential corollary of which is its association with an interest of society as a whole

[L]aws such as those relating to elections to the Chamber of Deputies and the Senate, which set out the rules governing the composition of constitutional bodies that are essential for the proper operation of a representative democratic system, and which therefore cannot be immune from such review, must not be subtracted from constitutional review. Any other conclusion would end up creating a free-for-all within the system of constitutional justice, precisely in an area which is closely related to the democratic framework as it involves the fundamental right to vote; for this reason, it would end up causing intolerable harm to the overall constitutional order. . . .

3.1 . . . In areas characterised by broad legislative discretion, such as that under examination, . . . this Court must satisfy itself that the balance between constitutionally significant interests has not been struck in such a manner as to cause one of these interests to be sacrificed or impaired to an excessive degree, such as to render it incompatible with the requirements of the Constitution. Such assessments must involve “a consideration of the proportionality of the means chosen by the legislator when exercising its absolute discretion vis-a-vis the objective requirements to be met

or the goals it intends to pursue, taking account of the specific circumstances and restrictions that obtain.” The proportionality test used by this Court and by many other European constitutional courts, which is often paired with a reasonableness test and is an essential instrument of the Court of Justice of the European Union within the judicial review of the legality of acts of the Union and of the Member States, requires an assessment as to whether the provision under review, along with the arrangements stipulated for its application, is necessary and capable of achieving legitimately pursued objectives by requiring that the measure chosen out of those most appropriate is the least restrictive of the rights in play and imposes burdens that are not disproportionate having regard to the pursuit of those objectives.

These conditions have not been met in this case. The contested provisions are intended to facilitate the formation of an adequate parliamentary majority, with the purpose of guaranteeing stable government for the country and streamlining the decision making process, which is undoubtedly an objective that is consistent with the Constitution. This objective is pursued through the allocation of a bonus, which will be activated whenever voting according to the proportional system has not secured any list or coalition of lists a number of votes that is capable of translating into a majority, which is greater even than an absolute majority of seats (340 out of 630). Thus, in the event of such an outcome, the bonus mechanism would guarantee additional seats (up to the threshold of 340 seats) to the list or coalition of lists that has obtained even one vote more than the others, even where the number of votes is not high in absolute terms, given the lack of any provision for a minimum threshold in terms of votes and/or seats.

However, the contested provisions are not limited to introducing a corrective mechanism (in addition to that already provided by the minimum threshold clauses pursuant to Article 83(1) no. 3 and no. 6, which are not contested here) to the system for transforming votes into seats “in a proportional manner,” as required under Article 1(2) of Presidential Decree no. 361 of 1957, with the legitimate objective of favouring the formation of stable parliamentary majorities and thus stable governments, but rather run entirely contrary to the rationale underlying the electoral system chosen by the legislator in 2005 of ensuring a representative parliamentary assembly. In this way, these provisions result in an excessive imbalance between the composition of the politically representative body, which lies at the heart of the system of representative democracy, and the parliamentary form of government stipulated by the Constitution on the one hand, and the wishes of the people expressed through votes, as the principal instrument for expressing popular sovereignty under Article 1(2) of the Constitution on the other hand. . . .

Whilst the contested provisions pursue an objective of constitutional significance, namely that of ensuring stable government for the country and efficient decision making processes within Parliament, they enact legislation which does not comply with the requirement of the least possible sacrifice of other interests and

values protected under constitutional law, thereby violating Articles 1(2), 3, 48(2) and 67 of the Constitution. Ultimately, that legislation is not proportionate having regard to the objective pursued, given that it excessively limits the representative function of the Chamber of Deputies, as well as the equal status of each individual right to vote, in such a manner as profoundly to alter the composition of the democratic representative bodies on which the entire architecture of the prevailing constitutional order is based. Therefore, Article 83(1) no. 5, and (2) of Presidential Decree no. 361 of 1957 must be declared unconstitutional. . . .

Act Amending the Electoral Code and the Code of Municipalities
Conseil Constitutionnel (France)
82-146 DC (1982)*

[At the recommendation of nearly eighty French MPs, the Conseil Constitutionnel took up the constitutionality of a law that amended the Electoral Code for local elections to require that the lists of candidates drawn up by the parties contain a maximum of seventy-five percent of persons of the same sex. In other words, women would be guaranteed a minimum of twenty-five percent of the places on the list of candidates.] . . .

6. By Article 3 of the Constitution:

National sovereignty shall belong to the people, who shall exercise it through their representatives and by means of referendum. No section of the people nor any individual may arrogate to itself, or to himself, the exercise thereof. Suffrage may be direct or indirect as provided by the Constitution. It shall always be universal, equal, and secret. All French citizens of either sex who have reached their majority and are in possession of their civil and political rights may vote as provided by statute[.]

[And by Article 6 of the Declaration of Human and Civic Rights:

All citizens, being equal [in the eyes of the law], shall be equally eligible to all high offices, public positions and employments, according to their ability, and without other distinction than that of their virtues and talents[.]

* Excerpted from a translation provided by the Conseil Constitutionnel, Decision 82-146 DC of 18 November 1982: Act amending the Electoral Code and the Code of Municipalities and governing the election of municipal councilors and the conditions for entry of French nationals residing outside France in electoral registers, *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a82146dc.pdf.

7. . . . [T]hese constitutional principles preclude any division of persons entitled to vote or stand for election into separate categories . . . ;

8. . . . [T]he rule . . . must be declared unconstitutional.

* * *

As Julie Suk recounts,^{*} after the 1982 decision: . . .

Feminists appropriated the language of universalism and indivisibility to be compatible with—if not require—gender parity achieved through quotas. “No real democracy is possible . . . if the question of equality between men and women is not posed as a political prerequisite, emanating from the constitutive principles of the regime, exactly like universal suffrage and separation of powers,” declared a report to the Council of Europe in 1989. . . .

Parity was not a division of the electorate, but a way of repairing longstanding divisions.

In France, this reconceptualization of gender quotas catalyzed important legal changes. In 1999, . . . Article 3, the very same article that declared the universality and secrecy of suffrage, was amended to add the following sentence: “The law shall promote equal access by men and women to electoral power and elected positions.” This amendment removed the constitutional barrier to legislation adopting an electoral gender quota. In 2000, a new parity statute required party candidate lists to alternate male and female candidates for positions on various regional and municipal councils. This alternation rule guaranteed the outcome that women would constitute half (or almost half, in the case of odd numbers) of all these positions. However, for the national parliamentary elections, which do not follow a proportional representation/party list system, the 2000 law simply required political parties to run an equal number of male and female candidates under threat of losing public funding proportionate to the party’s gender gap.

An additional constitutional transformation was achieved in 2008. In 2006, the French legislature had attempted to adopt a statute requiring gender parity on corporate boards of directors. The

^{*} Julie C. Suk, *Quotas and Consequences: A Transnational Re-evaluation*, in PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 228 (Deborah Hellman and Sophia Moreau editors, Oxford University Press 2013).

[Conseil Constitutionnel] struck it down, holding that the 1999 amendment had only applied to elected office. In response, the Constitution was amended once again, strengthening the link between gender quotas and the indivisibility of the republic. In 2008, the language authorizing gender quotas was moved to Article 1 of the French Constitution, which articulates the fundamental principles of the republic. It now reads:

France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organized on a decentralized basis.

Statutes shall promote equal access by women and men to elective offices and posts as well as to positions of professional and social responsibility.

This amendment enabled the 2011 statute imposing gender parity quotas on corporate boards of directors, as well as other recent legislation adopting gender balance rules in other leadership contexts. The constitutional amendments of 1999 and 2008 reflect a shift in the collective understanding of gender balance. While achieving gender representation through quotas was regarded as divisive thirty years ago, it is now understood as constitutionally authorized and encouraged in order to create a more universal and legitimate democratic republic.

Electoral Gender Quotas Case
Constitutional Court of Spain
STC Decision No. 12/2008 (2008)*

The Plenum of the *Tribunal Constitucional* (“Constitutional Court”), made up of Ms María Emilia Casas Baamonde, Presiding Judge, Mr Guillermo Jiménez Sánchez, Mr Vicente Conde Martín de Hijas, Mr Javier Delgado Barrio, Mr Roberto García-Calvo y Montiel, Ms Elisa Pérez Vera [Judge Rapporteur authoring the

* Excerpted from a translation provided by the Constitutional Court of Spain, Constitutional Court Judgment No. 12/2008, of January 29 (Unofficial translation), *available at* <https://www.tribunalconstitucional.es/ResolucionesTraducidas/12-2008,%20of%20January%2029.pdf>. The dissenting opinion was translated by Bilyana Petkova (Yale Law School, M.S.L. Class of 2014) and Andrea Scoseria Katz (Yale Law School, J.D. Class of 2016).

opinion], Mr Eugeni Gay Montalvo, Mr Jorge Rodríguez-Zapata Pérez, Mr Ramón Rodríguez Arribas, Mr Pascual Sala Sánchez, Mr Manuel Aragón Reyes and Mr Pablo Pérez Tremps, Judges

On behalf of the King, the following decision:

[Article 44 bis of the Organic Law 5/1985 of the General Election Law (hereafter the Organic Law on Equality, or, in Spanish: LOREG), as amended by a second additional provision of Organic Law 3/2007 (in Spanish: LOIMH), of March 22nd, on achieving effective equality between men and women requires that election lists must have “a balanced composition between women and men, so that in the list of candidates as a whole each sex represents a minimum of forty percent.” Enforcing this provision, an Elections Board rejected the all-female list for a local election of the center-right party, the People’s Party (PP’s). The rejected PP’s candidates filed a case before the First Administrative Court of Santa Cruz of Tenerife; before the Spanish Constitutional Court, more than fifty Members of Parliament from the PP’s Parliamentary Group also contested the law.] . . .

[N]ew article 44 bis LOREG [provides]:

The lists of candidates presented for elections for the lower house of parliament (Congreso), for municipal elections and elections for members of island councils (consejos insulares) and for inter-island councils (cabildos insulares) of the Canary Islands under the terms set out in this Act, members of the European Parliament and members of the legislative assemblies of the devolved regions (comunidades autónomas) must have a balanced composition between women and men, so that in the list of candidates as a whole each sex represents a minimum of forty percent. When the number of positions to cover is less than five, the proportion between women and men shall be as numerically balanced as possible. . . .

2. The challenged additional provision is inserted in a statute the title of which—“Organic Law for the effective equality between women and men”—states its purpose, which is none other than achieving effective, substantial equality between the sexes. . . .

3. . . . That legislative reform, incorporated by the second additional provision of LOIMH, [Organic Law 3/2007 of March 22nd] seeking the effective equal participation of men and women in the membership of the representative institutions of a democratic society, does not establish an inverse or compensatory discrimination measure (favouring one sex over another), but rather a formula for balance between sexes, which is not even strictly equal as it does not impose total equality between men and women, but rather stipulates that neither can make up the election lists of candidates in a proportion below 40 percent (or above 60 percent). It operates in two directions, insofar as that proportion is ensured equally for both sexes. . . .

The starting point for our analysis lies in the fact that the requirement for electoral balance between sexes is exclusively aimed at those who can present lists of candidates, in other words, in accordance with article 44.1 of the LOREG, exclusively the parties, federations and coalitions of parties and to groups of electors. It is not therefore strictly speaking a condition for eligibility/cause for ineligibility, as it does not immediately affect individual rights to stand for election. It is a condition relating to political parties and groups of electors, in other words, legal entities which are not holders of rights to vote and stand for election, the infringement of which is claimed.

5. . . . [As the law] does not deal with any aspect of the ordinary internal life of the political parties, . . . there [is no] infringement of the dimension relating to the freedom of internal organisation and functioning.

6. . . . [N]or does the challenged provision infringe the political parties' ideological freedom or their freedom of expression. First, it does not do so with regard to feminist ideology. A rule such as article 44 bis LOREG does not make feminist parties or ideologies unnecessary, but, from this precept, it is article 9.2 of the Spanish Constitution which, once specifying its effective mandate in terms of positive law, makes constitutionally lawful the impossibility of presenting lists of candidates which wish to make feminist statements by presenting lists made up entirely of women. In the new regulatory context it is not now necessary to compensate the greater masculine presence with exclusively female lists of candidates, for the simple reason that that historical imbalance becomes impossible. It is true that a radical feminist ideology which seeks female predominance cannot be constitutionally prohibited, but nor can it hope to elude the constitutional mandate of formal equality (article 14 of the Spanish Constitution) or the rules pronounced by the legislator in order to make effective substantive equality as established in 9.2 of the Spanish Constitution. . . .

7. . . . The aim is in short that the equality that effectively exists insofar as the division of the society in accordance to gender is not distorted in the bodies of political representation with the overwhelming majority of one of them. Political representation which is organised from the supposition of the necessary division of society into two sexes is perfectly constitutional, as it is considered that that balance is a determining factor in order to define the content of the regulations and acts which must emanate from those bodies. Not their ideological or political content, but rather the pre-content or substratum upon which any political decision must be based: the absolute equality between men and women. Requiring those who wish to perform a representative function and to rule over their fellow citizens who stands for election in a group which is balanced in terms of gender is to guarantee that whatever their political programme they will share with all of the representatives a representation which includes both sexes cannot be waived when governing a society which is, necessarily, thus composed. . . .

10. Finally, as regards the complaint which must be considered as referring to section 1 of article 23 of the Spanish Constitution about the fragmentation of the

electoral body, it is not held that the debated measures violate the unity of the category of citizen or involve a certain risk of dissolving the general interest into a set of partial interests or by categories. As we have already indicated, the principle of balanced composition of the electoral lists of candidates is based on a natural and universal criterion, namely sex. Now then, here we must add that the provisions of the second additional provision of the LOIMH do not involve creating special links between electors and those eligible, nor the compartmentalisation of the electoral body according to gender. The candidates defend diverse political opinions before the electorate as a whole and, if they receive its support, will also represent it as a whole and not only the voters of their same sex.

The appellants' argument that the requirement of equality prejudices the unity of the sovereign people insofar as it introduces in the category of citizen—"one and indivisible" for the appellant members of parliament—the dividing line of sex, cannot be upheld. It is sufficient to say that the electoral body is not confused with the holder of the sovereignty, in other words the Spanish people,^{*} although its will is expressed through it. This electoral body is subject to the Constitution and the rest of the legal order (article 9.1 of the Spanish Constitution), insofar as the sovereign people is the ideal unit to attribute the constituent power and, as such, foundation of the Constitution and of the law. The grounds determining the condition of elector do not therefore affect this ideal unit, but rather to the group of those who, as citizens, are subject to Spanish law and they only have the rights guaranteed to them in the Constitution, with the content which, ensuring an indispensable constitutional minimum, is determined by the constituted legislator. . . .

Magistrate Don Jorge Rodríguez-Zapata Pérez, dissenting

5. I believe that legislative imposition of parity or electoral quotas violates the freedom of thought and self-organization of political parties (Art. 6 and 22 SC). A

^{*} The Constitution of Spain provides:

Article 1.2: "National sovereignty is vested in the Spanish people, from whom emanate the powers of the State."

Article 9.1: "It is incumbent upon the public authorities to promote conditions which ensure that the freedom and equality of individuals and of the groups to which they belong may be real and effective, to remove the obstacles which prevent or hinder their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life."

Article 22: "(1) The right of association is recognised. (2) Associations which pursue ends or use means classified as criminal offences are illegal. (3) Associations set up on the basis of this article must be recorded in a register for the sole purpose of public knowledge. (4) Associations may only be dissolved or have their activities suspended by virtue of a justified court order. (5) Secret and paramilitary associations are prohibited."

mature democracy must have confidence that its political parties “express political pluralism, contribute to the formation and manifestation of the popular will and are an essential tool for political participation” and that “their creation and exercise of activity is free when in compliance with the Constitution and the law.” (Art. 6 SC).

It seems obvious that the women or men who make up electoral lists do not aspire to represent, respectively, women or men. It is indefensible that women vote for women only and men for men, or that each sex only represents itself. The decision of the voter is the result of a complex sets of motives that only a concrete sociological analysis could, more or less precisely, determine in each case, but it seems clear that citizens’ votes depend on the program defended by political parties, coalitions and groups of voters, regardless of whether their lists are composed of men or women.

Finally, I think we should reflect on the reasons why in France, Germany, Italy, Portugal or Belgium, the introduction of quotas or parity requirements in political activity was preceded by reforms to their constitutions. I do not think that these revisions merely express these countries’ respect for their own constitutional norms, but something deeper, namely the need for structural elements of democracy to be the result of consensus and not imposition by a temporary parliamentary majority upon the rest of the political forces.

Voting, Popular Will, and Judicial Review

Judiciaries have been called to adjudicate claims about the constitutionality of electoral procedure. In the United States, these challenges have centered around the drawing of electoral districts. The 1962 decision of *Baker v. Carr*, excerpted below, addresses the decisions of the Tennessee General Assembly, charged by the Tennessee Constitution with redrawing districts every ten years and doing so by using federal census population data. However, Tennessee had not done so for decades, and a Tennessee voter argued that Tennessee’s failure to redistrict since 1901 was a violation of the Equal Protection Clause of the Fourteenth Amendment.* *Baker* is an iconic U.S. Supreme Court decision.

* Section 1 of the Fourteenth Amendment of the United States Constitution provides: “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

More than fifty years after *Baker*, in 2017, the U.S. Supreme Court considered a challenge to North Carolina's General Assembly's redistricting; the argument was that the decisions drawing the state's 1st and 12th congressional districts were racially motivated, thereby violating federal statutes and the Fourteenth Amendment. That same year, the Kenyan Supreme Court invalidated the presidential election held on August 8th, 2017 due to various procedural irregularities.

Baker v. Carr
Supreme Court of the United States
369 U.S. 186 (1962)

Mr. Justice Brennan delivered the opinion of the Court. . . .

The complaint, alleging that by means of a 1901 statute of Tennessee apportioning the members of the General Assembly among the State's 95 counties, "these plaintiffs and others similarly situated, are denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes," was dismissed by a three-judge court The court held that it lacked jurisdiction of the subject matter and also that no claim was stated upon which relief could be granted. . . .

In holding that the subject matter of this suit was not justiciable, the [lower court] stated: "From a review of these decisions there can be no doubt that the federal rule . . . is that the federal courts . . . will not intervene in cases of this type to compel legislative reapportionment." We understand the [lower court] to have read the cited cases as compelling the conclusion that since the appellants sought to have a legislative apportionment held unconstitutional, their suit presented a "political question" and was therefore nonjusticiable. We hold that this challenge to an apportionment presents no nonjusticiable "political question." . . .

Of course the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection "is little more than a play upon words." Rather, it is argued that apportionment cases, whatever the actual wording of the complaint, can involve no federal constitutional right except one resting on the guaranty of a republican form of government, and that complaints based on that clause have been held to present political questions which are nonjusticiable. . . .

We have said that "[i]n determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to

obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. . . .

But it is argued that this case shares the characteristics of decisions that constitute a category not yet considered, cases concerning the Constitution's guaranty, in Art. IV, § 4,^{*} of a republican form of government. A conclusion as to whether the case at bar does present a political question cannot be confidently reached until we have considered those cases with special care. . . . [The] Guaranty Clause claims involve those elements which define a "political question," and for that reason and no other, they are nonjusticiable. . . .

[T]he Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government. The Court has since refused to resort to the Guaranty Clause—which alone had been invoked for the purpose—as the source of a constitutional standard for invalidating state action. . . .

Just as the Court has consistently held that a challenge to state action based on the Guaranty Clause presents no justiciable question so has it held, and for the same reasons, that challenges to congressional action on the ground of inconsistency with that clause present no justiciable question. . . .

[As for] whether our precedents as to what constitutes a nonjusticiable "political question" bring the case before us under the umbrella of that doctrine[,] . . . [a] natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present. We find none: The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.

^{*} Article IV, Section 4 of the United States Constitution provides: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

This case does, in one sense, involve the allocation of political power within a State, and the appellants might conceivably have added a claim under the Guaranty Clause. Of course, as we have seen, any reliance on that clause would be futile. But because any reliance on the Guaranty Clause could not have succeeded it does not follow that appellants may not be heard on the equal protection claim which in fact they tender. True, it must be clear that the Fourteenth Amendment claim is not so enmeshed with those political question elements which render Guaranty Clause claims nonjusticiable as actually to present a political question itself. But we have found that not to be the case here. . . .

We conclude then that the nonjusticiability of claims resting on the Guaranty Clause which arises from their embodiment of questions that were thought “political,” can have no bearing upon the justiciability of the equal protection claim presented in this case. Finally, we emphasize that it is the involvement in Guaranty Clause claims of the elements thought to define “political questions,” and no other feature, which could render them nonjusticiable. Specifically, we have said that such claims are not held nonjusticiable because they touch matters of state governmental organization. . . .

We conclude that the complaint’s allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment. . . .

[Justice Whittaker did not participate in the decision of this case. Justice Douglas, Justice Clark, and Justice Stewart each filed concurring opinions and agreed that the case was justiciable. Justice Frankfurter, joined by Justice Harlan, dissented on the grounds that the case raised a “political question.” Justice Harlan, joined by Justice Frankfurter, also dissented on the grounds that the existing apportionment of legislative districts was not so unreasonable as to violate the Equal Protection Clause.]

Cooper v. Harris
Supreme Court of the United States
137 S. Ct. 1455 (May 22, 2017)

Justice Kagan delivered the opinion of the Court.

The Constitution entrusts States with the job of designing congressional districts. But it also imposes an important constraint: A State may not use race as the predominant factor in drawing district lines unless it has a compelling reason. . . .

The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans. It prevents a State, in the absence of “sufficient justification,” from “separating its citizens into different voting districts on

the basis of race.” When a voter sues state officials for drawing such race-based lines, our decisions call for a two-step analysis.

First, the plaintiff must prove that “race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.” That entails demonstrating that the legislature “subordinated” other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to “racial considerations.” The plaintiff may make the required showing through “direct evidence” of legislative intent, “circumstantial evidence of a district’s shape and demographics,” or a mix of both. . . .

Second, . . . [t]he burden . . . shifts to the State to prove that its race-based sorting of voters serves a “compelling interest” and is “narrowly tailored” to that end. This Court has long assumed that one compelling interest is complying with operative provisions of the Voting Rights Act of 1965 (VRA or Act). . . .

Two provisions of the VRA—§ 2 and § 5—are involved in this case. Section 2 prohibits any “standard, practice, or procedure” that “results in a denial or abridgement of the right . . . to vote on account of race.” We have construed that ban to extend to “vote dilution”—brought about, most relevantly here, by the “dispersal of [a group’s members] into districts in which they constitute an ineffective minority of voters.” Section 5, at the time of the districting in dispute, worked through a different mechanism. Before this Court invalidated its coverage formula, that section required certain jurisdictions (including various North Carolina counties) to pre-clear voting changes with the Department of Justice, so as to forestall “retrogression” in the ability of racial minorities to elect their preferred candidates.

When a State invokes the VRA to justify race-based districting, it must show (to meet the “narrow tailoring” requirement) that it had . . . “good reasons” to think that it would transgress the Act if it did *not* draw race-based district lines. That . . . standard gives States “breathing room” to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed. . . .

A district court’s assessment of a districting plan, in accordance with the two-step inquiry just described, warrants significant deference on appeal to this Court. We of course retain full power to correct a court’s errors of law, at either stage of the analysis. But the court’s findings of fact—most notably, as to whether racial considerations predominated in drawing district lines—are subject to review only for clear error. Under that standard, we may not reverse just because we “would have decided the [matter] differently.” A finding that is “plausible” in light of the full record—even if another is equally or more so—must govern. . . .

This case concerns North Carolina’s most recent redrawing of two congressional districts, both of which have long included substantial populations of black voters. In its current incarnation, District 1 is anchored in the northeastern part

of the State, with appendages stretching both south and west (the latter into Durham). District 12 begins in the south-central part of the State (where it takes in a large part of Charlotte) and then travels northeast, zig-zagging much of the way to the State's northern border. . . .

The more substantial question is whether District 1 can survive the strict scrutiny applied to racial gerrymanders. . . . The General Assembly (so says the State) had “good reasons to believe it needed to draw [District 1] as a majority-minority district to avoid Section 2 liability” for vote dilution. We now turn to that defense.

This Court identified, in *Thornburg v. Gingles* [(1986)], three threshold conditions for proving vote dilution under . . . the VRA. First, a “minority group” must be “sufficiently large and geographically compact to constitute a majority” in some reasonably configured legislative district. Second, the minority group must be “politically cohesive.” And third, a district's white majority must “vote[] sufficiently as a bloc” to usually “defeat the minority's preferred candidate.” Those three showings, we have explained, are needed to establish that “the minority [group] has the potential to elect a representative of its own choice” in a possible district, but that racially polarized voting prevents it from doing so in the district as actually drawn because it is “submerg[ed] in a larger white voting population.” If a State has good reason to think that all the “*Gingles* preconditions” are met, then so too it has good reason to believe that [the VRA] . . . requires drawing a majority-minority district. But if not, then not.

Here, electoral history provided no evidence that . . . could demonstrate the third *Gingles* prerequisite—effective white bloc-voting. For most of the twenty years prior to the new plan's adoption, African-Americans had made up less than a majority of District 1's voters[.] . . . In the *closest* election during that period, African-Americans' candidate of choice received 59% of the total vote; in other years, the share of the vote garnered by those candidates rose to as much as 70%. Those victories (indeed, landslides) occurred because the district's white population did *not* “vote[] sufficiently as a bloc” to thwart black voters' preference; rather, a meaningful number of white voters joined a politically cohesive black community to elect that group's favored candidate. In the lingo of voting law, District 1 functioned, election year in and election year out, as a “crossover” district, in which members of the majority help a “large enough” minority to elect its candidate of choice. When voters act in that way, “[i]t is difficult to see how the majority-bloc-voting requirement could be met”—and hence how [VRA] . . . liability could be established. So experience gave the State no reason to think that the VRA required it to ramp up District 1's [black voting-age population]

To have a strong basis in evidence to conclude that [the VRA] . . . demands such race-based steps, the State must carefully evaluate whether a plaintiff could establish the *Gingles* preconditions—including effective white bloc-voting—in a new

district created without those measures. We see nothing in the legislative record that fits that description. . . .

And that absence is no accident: . . . [North Carolina] proceeded under a wholly different theory—arising not from *Gingles* but from *Bartlett v. Strickland* [(2009)]—of what . . . [the VRA] demanded in drawing District 1. *Strickland* involved a geographic area in which . . . a substantial bloc of black voters, if receiving help from some white ones, could elect the candidates of their choice. A plurality of this Court . . . held that . . . [w]hen a minority group is not sufficiently large to make up a majority in a reasonably shaped district, [the VRA] . . . does not apply. . . . [The General Assembly] apparently reasoned that if, as *Strickland* held, [the VRA] . . . does not *require* crossover districts (for groups insufficiently large under *Gingles*), then [it] . . . also cannot be *satisfied by* crossover districts (for groups in fact meeting *Gingles*’ size condition). In effect, they concluded, whenever a legislature *can* draw a majority-minority district, it *must* do so—even if a crossover district would also allow the minority group to elect its favored candidates. . . .

But this Court has made clear that unless *each* of the three *Gingles* prerequisites is established, “there neither has been a wrong nor can be a remedy.” And *Strickland* . . . underscored the necessity of demonstrating effective white bloc-voting to prevail in a . . . vote-dilution suit. The plurality explained that “[i]n areas with substantial crossover voting,” . . . [VRA] plaintiffs would not “be able to establish the third *Gingles* precondition” and so “majority-minority districts would not be required.” Thus, North Carolina’s belief that it was compelled to redraw District 1 (a successful crossover district) as a majority-minority district rested not on a “strong basis in evidence,” but instead on a pure error of law. . . .

North Carolina declined to mount any defense (similar to the one we have just considered for District 1) that § 5’s requirements in fact justified race-based changes to District 12—perhaps because § 5 could not reasonably be understood to have done so. Instead, the State altogether denied that racial considerations accounted for (or, indeed, played the slightest role in) District 12’s redesign. According to the State’s version of events, . . . [the chairs of the two committees jointly responsible for drawing new district lines] moved voters in and out of the district as part of a “strictly” political gerrymander, without regard to race. The mapmakers drew their lines, in other words, to “pack” District 12 with Democrats, not African-Americans.

Getting to the bottom of a dispute like this one poses special challenges for a trial court. In the more usual case alleging a racial gerrymander—where no one has raised a partisanship defense—the court can make real headway by exploring the challenged district’s conformity to traditional districting principles, such as compactness and respect for county lines. . . . But such evidence loses much of its value when the State asserts partisanship as a defense, because a bizarre shape—as of the new District 12—can arise from a “political motivation” as well as a racial one.

And crucially, political and racial reasons are capable of yielding similar oddities in a district's boundaries. That is because, of course, "racial identification is highly correlated with political affiliation." As a result of those redistricting realities, a trial court has a formidable task: It must make "a sensitive inquiry" into all "circumstantial and direct evidence of intent" to assess whether the plaintiffs have managed to disentangle race from politics and prove that the former drove a district's lines.

Our job is different—and generally easier. As described earlier, we review a district court's finding as to racial predominance only for clear error, except when the court made a legal mistake. Under that standard of review, we affirm the court's finding so long as it is "plausible"; we reverse only when "left with the definite and firm conviction that a mistake has been committed." . . .

In light of those principles, we uphold the District Court's finding of racial predominance respecting District 12. The evidence offered at trial, including live witness testimony subject to credibility determinations, adequately supports the conclusion that race, not politics, accounted for the district's reconfiguration. And no error of law infected that judgment: Contrary to North Carolina's view, the District Court had no call to dismiss this challenge just because the plaintiffs did not proffer an alternative design for District 12 as circumstantial evidence of the legislature's intent. . . .

[Justice Thomas filed a concurring opinion to add that North Carolina's "concession that it created District 1 as a majority-black district is by itself sufficient to trigger strict scrutiny" and that the state "cannot satisfy strict scrutiny based on its efforts to comply with [Section 2] of the VRA."]

Justice Alito, with whom the Chief Justice and Justice Kennedy join, concurring in the judgment in part and dissenting in part. . . .

Partisan gerrymandering is always unsavory, but that is not the issue here. The issue is whether District 12 was drawn predominantly because of race. The record shows that it was not. . . .

District 12's borders and racial composition are readily explained by political considerations and the effects of the legislature's political strategy on the demographics of District 12. Second, the majority largely ignores this explanation, as did the court below, and instead adopts the most damning interpretation of all available evidence.

Both of these analytical maneuvers violate our clearly established precedent. Our cases say that we must "exercise extraordinary caution" "where the State has articulated a legitimate political explanation for its districting decision"; the majority ignores that political explanation. Our cases say that "the good faith of a state

legislature must be presumed”; the majority presumes the opposite. And . . . [the Court previously] held that plaintiffs in a case like this are obligated to produce a map showing that the legislature could have achieved its political objectives without the racial effect seen in the challenged plan; here, the majority junks that rule and says that the plaintiffs’ failure to produce such a map simply “does not matter.” . . . The judgment below regarding District 12 should be reversed . . .

[Justice Gorsuch took no part in the consideration or decision of the case.]

The 2017 Kenyan Presidential Elections

On August 8th, 2017, Kenya held general elections for the president, members of Parliament, and county leaders. The presidential race pitted the incumbent President Uhuru Kenyatta against opposition leader Raila Odinga, a longtime rival. In Kenya’s 2013 presidential election, Kenyatta had defeated Odinga by a narrow margin, which Odinga unsuccessfully contested at the Supreme Court on grounds of election fraud. Fierce disputes over the outcome of the 2013 election resulted in months of widespread violence, more than 1,000 dead, and 500,000 displaced amidst fighting between opposing parties and ethnic groups.

For the 2017 elections, governing rules required presidential candidates to clear two voting thresholds in order to win the election. First, candidates had to obtain fifty percent of all the votes cast. Second, candidates had to obtain at least twenty-five percent of all votes cast in at least half of Kenya’s forty-seven counties. To ensure accurate vote counting, Kenyan law required that representatives from both parties approve forms reporting the results at each of the country’s 40,882 polling stations and the 290 other constituencies. These forms were then scanned and electronically transmitted to the National Tallying Center in Nairobi.

Although the casting of votes on August 8th, 2017 went relatively smoothly, the electronic system malfunctioned. The results, but not the forms approved by the two parties at the polling stations, were transmitted to the National Tallying Center. Days after the election, the electoral commission announced that 10,000 forms were still unaccounted for in the tally. A subsequent report verified by the registrar of the Supreme Court found that a third of the forms which were received lacked the security features used to prove their authenticity. Despite these irregularities, Kenya’s electoral commission announced on August 11th, 2017 that Kenyatta had been elected to a second term.

On August 18th, 2017, Odinga petitioned the Supreme Court to nullify the election because of the faulty transmission of results. Odinga won in the Supreme Court. In an oral opinion issued on September 1st, four justices held the election was void. Two justices dissented. The Court issued a full written opinion on September 20th, 2017, which is excerpted below.

**Odinga and Another v. Independent Electoral and
Boundaries Commission and 2 Others**

Supreme Court of Kenya

Presidential Petition No. 1 (September 20, 2017)

[Chief Justice D.K. Maraga, Deputy Chief Justice P.M. Mwilu, Justice S.C. Wanjala, and Justice I. Lenaola.] . . .

[2] On the 8th August, 2017, Kenya held her second general elections under the Constitution 2010 and Kenyans from all walks of life trooped to 40,883 polling stations across the country to exercise their rights to free, fair and regular elections under Article 38(2) of the Constitution. . . .

[4] The number of registered voters in the country was 19,646,673 and on 11th August 2017, the [Chair of the Independent Elections and Boundaries Commission (IEBC)] . . . declared . . . Uhuru Muigai Kenyatta . . . the winner of the election with 8,203,290 votes and . . . Raila Amollo Odinga . . . the runner[] up with 6,762,224 votes.

[5] On 18th August, 2017, Raila Amolo Odinga and Stephen Kalonzo Musyoka, who were the presidential and deputy presidential candidates respectively, . . . filed this petition challenging the declared result of that Presidential election (the election).

[6] The petitioners . . . aver that the . . . IEBC . . . conducted the election so badly that it failed to comply with the governing principles established under . . . the Constitution of Kenya and the Elections Act (No. 24 of 2011). . . .

[125] The main issues for determination . . . are as follows:

- (i) Whether the 2017 Presidential Election was conducted in accordance with the principles laid down in the Constitution and the law relating to elections.
- (ii) Whether there were irregularities and illegalities committed in the conduct of the 2017 Presidential Election.

(iii) If there were irregularities and illegalities, what was their impact, if any, on the integrity of the election?

(iv) What consequential orders, declarations and reliefs should this Court grant, if any? . . .

[171] . . . Section 83 of the Elections Act is the fulcrum of this petition. . . . [T]he petition states that “where an election is not conducted in accordance with the Constitution and the written law, then that election must be invalidated notwithstanding the fact that the result may not be affected.” . . . Section 83 provides that:

“No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.” . . .

[194] . . . In interpreting the Section . . . this Court must first pay due regard to the meaning and import of the constitutional principles it envisages. . . .

[196] Whereas the petitioners listed a host of Articles of the Constitution which they alleged to have been violated, we would like to zero in on Article 10 which obliges all State organs, State Officers, public officers and all persons to observe national values (inter alia, good governance, integrity, transparency and accountability) whenever they apply and/or interpret the Constitution or other law or implement public policy decisions; Article 38 which sets out the political rights including the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors; Article 81 which sets out the principles to be observed in the conduct of free and fair elections; Article 86 which sets out the manner of conducting referenda and elections; Article 88 which establishes the IEBC and enumerates its functions the paramount one being conducting and supervising referenda and elections; and Article 138 which sets out the procedure for conducting presidential elections. These Articles have to be read together to effectuate the purpose of electoral processes in our country.

[197] Particularly, under Article 38, besides the right to be registered as a voter and to vote in any referenda or election as well as the right to contest in any public elective position, every citizen of this country is entitled to the right to free, fair, and regular elections based on universal suffrage. Article 81(e) requires, in mandatory terms, that our electoral system “shall comply,” inter alia “with . . . the principles . . . of free and fair elections, which are—

(i) by secret ballot;

- (ii) free from violence, intimidation, improper influence or corruption;
- (iii) conducted by an independent body;
- (iv) transparent; and,
- (v) administered in an impartial, neutral, efficient, accurate and accountable manner.[’’]

[198] In addition to these principles, Article 86 of the Constitution demands that “[a]t every election, the Independent Electoral and Boundaries Commission shall ensure that—

- (a) whatever voting method . . . is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
- (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;
- (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer, and
- (d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place including the safe keeping of election materials. . . .

[203] Guided by these principles, and given the use of the word “or” in Section 83 of the Elections Act as well as some of our previous decisions, we cannot see how we can conjunctively apply the two limbs of that section and demand that to succeed, a petitioner must not only prove that the conduct of the election violated the principles in our Constitution as well as other written law on elections but that he must also prove that the irregularities or illegalities complained of affected the result of the election as counsel for the respondents assert. . . .

[209] . . . [W]e would . . . not [conclude] . . . that even trivial breaches of the law should void an election. That is not realistic. It is a global truism that no conduct of any election can be perfect. We will also go a step further and add that even though the word “substantially” is not in our section, we would infer it in the words “if it appears” in that section. That expression in our view requires that, before vitiating it, the court should, looking at the conduct of the whole election, be satisfied that it substantially breached the principles in the Constitution, the Elections Act and other electoral law. . . .

[212] . . . An election such as the one at hand, has to be one that is both quantitatively and qualitatively in accordance with the Constitution. It is one where the

winner of the presidential contest obtains “more than half of all the votes cast in the election; and at least twenty-five per cent of the votes cast in each of more than half of the counties” as stipulated in Article 138(4) of the Constitution. In addition, the election which gives rise to this result must be held in accordance with the principles of a free and fair elections, which are by secret ballot; free from intimidation; improper influence, or corruption; and administered by an independent body in an impartial, neutral, efficient, accurate and accountable manner as stipulated in Article 81. Besides the principles in the Constitution which we have enumerated that govern elections, Section 83 of the Elections Act requires that elections be “conducted in accordance with the principles laid down in that written law.” The most important written law on elections is of course the Elections Act itself. That is not all. Under Article 86 of the Constitution, IEBC is obliged to ensure, inter alia, that:

“Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent; the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.” . . .

[214] [T]he petitioners allege that in the conduct of the presidential election, IEBC became “a law and institution unto itself” and so flagrantly flouted the Constitution and the written election law . . . that in the end it completely subverted the will of the electorate. In particular, the petitioners urge that the 1st respondent violated the constitutional principles . . . by failing to ensure that the conduct of the elections was simple, accurate, transparent, verifiable, secure and accountable.

[215] In support of their case, the petitioners filed several affidavits setting out what, in their view, were egregious irregularities and illegalities, which, taken together, establish an impregnable case on both limbs of the section to wit: non-compliance with constitutional principles and the written law on election, as well as commission of irregularities which affected the results of the elections. . . .

[216] The petitioners’ major complaint in this matter relates to the transmission of the election results. . . . [A]gents at the National Tallying Centre at Bomas of Kenya[] deposed that hardly 10 minutes after polling closed at 5.00 pm on 8th August, 2017, the presidential results started streaming in and were beamed on TV screens at the Centre without any indication of where they were coming from. . . . By the time the results were declared on 11th August 2017, results from over 10,000 polling stations had not been received. In the circumstances, [one election official] wondered how the final results declared could be relied upon to validate the election.

[217] The petitioners' further case is that the results that were streaming in from 8th August, 2017 to 11th August, 2017 showed a consistent difference of 11% between the results of Uhuru Kenyatta and Raila Odinga. According to the petitioners, such a pattern indicated that the results were not being streamed in randomly from the different polling stations but that they were being held somewhere and adjusted using an error adjustment formula to bring in a pre-determined outcome of results.

[218] In a nutshell, the petitioners' claim in this regard is that, on the consideration of the evidence contained in all the affidavits sworn in support of the petition and the submissions made by their counsel, IEBC's conduct of the presidential election was fundamentally flawed and/or incompatible with the electoral values and principles of the Constitution including transparency, accountability, accuracy, security, verifiability, and efficiency. They further argue that . . . IEBC failed to transmit or to promptly and simultaneously electronically transmit presidential election results from polling stations to the Constituency Tallying Centres (CTC) and National Tallying Center (NTC). According to them, this failure was deliberate, systemic and systematic. . . .

[224] [W]e are of the view that . . . elections are not only about numbers as many . . . would like the country to believe. . . . Elections are not events but process. . . .

[226] Here in Kenya, the issue of elections as a process was discussed in the case of *Karanja Kabage v. Joseph Kiuna Kariambegu Nganga & 2 Others* [(2013)] where the High Court observed that:

“an election is an elaborate process that begins with registration of voters, nomination of candidates to the actual electoral offices, voting or counting and tallying of votes and finally declaration of the winner by Gazettement. In determining the question of the validity of the election of a candidate, the court is bound to examine the entire process up to the declaration of results The concept of free and fair elections is expressed not only on the voting day but throughout the election process. . . . Any non-compliance with the law regulating these processes would affect the validity of the election of the Member of Parliament.” . . .

[After a survey of the claims made by petitioners, and respondents' defenses, the Court held petitioners had proven the Chair of the IEBC had declared the winner of the election without having received all the relevant paperwork, basing his call only on a small subset of the results, consisting of Forms 34B, some of which were of “dubious authenticity.” The Court also held that in failing to electronically transmit the prescribed forms to the National Tallying Center, the IEBC had violated Article 39(1C) of the Electoral Act, which provides:

“For purposes of a presidential election, the Commission shall—

- (a) electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre to the national tallying centre;
- (b) tally and verify the results received at the national tallying centre; and
- (c) publish the polling results forms on an online public portal maintained by the Commission.”

These actions violated Articles 81 and 86 of the Constitution in addition to Article 138(3)(c) of the Constitution, which provides that “in a presidential election . . . after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.”

The Court next considered whether there were any illegalities or irregularities in the conduct of the elections. The Court held that petitioners had not satisfied the burden of proof for their claims about illegalities, particularly relating to the claim that Kenyatta and his cabinet had abused their state positions by engaging in electioneering efforts. The Court then concluded that there were several irregularities in the conduct of the elections, not only in the transmission of the ballot box tallies to the NTC, but also in the absence of security features to protect the integrity and verifiability of official forms. The Court placed particular emphasis on the fact that out of a total of 290 Forms 34B, 56 of them lacked any security features. The Court then considered the impact of these irregularities on the integrity of the election.]

[371] . . . Elections are the surest way through which the people express their sovereignty. Our Constitution is founded upon the immutable principle of the sovereign will of the people. The fact that, it is the people, and they alone, in whom all power resides; be it moral, political, or legal. And so they exercise such power, either directly, or through the representatives whom they democratically elect in free, fair, transparent, and credible elections. Therefore, whether it be about numbers, whether it be about laws, whether it be about processes, an election must at the end of the day, be a true reflection of the will of the people, as decreed by the Constitution, through its hallowed principles of transparency, credibility, verifiability, accountability, accuracy and efficiency. . . .

[378] . . . It is true that where the quantitative difference in numbers is negligible, the Court, as we were urged, should not disturb an election. But what if the numbers are themselves a product, not of the expression of the free and sovereign will of the people, but of the many unanswered questions with which we are faced? . . . It is to the Kenyan voter, that man or woman who wakes up at 3 a.m on voting day,

carrying with him or her the promise of the Constitution, to brave the vicissitudes of nature in order to cast his/her vote, that we must now leave Judgment.

[379] . . . We have shown in this judgment that our electoral law was amended to ensure that in substance and form, the electoral process and results are simple, yet accurate and verifiable. The presidential election of 8th August, 2017, did not meet that simple test and we are unable to validate it, the results notwithstanding. . . .

* * *

After declaring the election invalid, the Court ordered that a new election be held within sixty days of its September 1, 2017 oral decision. Two justices, J.B. Ojwang and Njoki S. Ndung'u, filed dissents. Both argued that the actual ballots cast were valid and therefore that the election was valid. Turning to the majority's test of accuracy and verifiability, Justice Ojwang noted that the

physical form of the ballot is directly visible, and is readily subjected to the test . . . of simplicity, accuracy, verifiability, security, accountability and transparency. The physical evidence, quite clearly, is the natural starting point in ascertaining who has won an election: and hence the majority Judgment would have been expected to begin from a foundation of numerical assessment, before invoking any other parameters. For such other elements are essentially subjective, and are inherently destined to compromise the sovereign will of the voters which the Constitution expressly safeguards.

Justice Njoki S. Ndung'u wrote that the decision of the voters at the polling station, which was the primary locale of the election, had not been challenged. Therefore, a process used to transmit these results should not upset the will of the electorate.

In early October 2017, Odinga announced that he would not run in the second election and encouraged his supporters not to vote. He argued that the election ordered by the Kenya Supreme Court would present even greater legal and political problems than the previous election. Both Kenyatta and Odinga's names remained on the ballot. On October 26, 2017, Kenya held its second election, and the IEBC again declared Kenyatta the winner.*

* Hamza Mohamed, *Raila Odinga: Kenya election rerun 'must not stand,'* AL JAZEERA (October 31, 2017), available at <http://www.aljazeera.com/news/2017/10/raila-odinga-kenya-election-rerun-stand-171031145447971.html>.

Theorizing Judicial Review: John Hart Ely on the Constitutional Role of Courts

In *Democracy and Distrust: A Theory of Judicial Review* (1980), John Hart Ely articulated a theory of judicial review in the American context. He began with a description of the American Framers' vision of representative democracy, in which the interests of "the people" and of the ruling elite converged. In this model, those who participated in representative government were also citizens of the polity that they governed and returned to their private lives as citizens when their terms of public service ended. Those in government were subject to, and not above, the laws they passed. Under this vision, elections were the primary mechanism for ensuring that the ruled could control the rulers.

Within the first century of American history, however, it became clear that elections were insufficient to protect minorities' rights. Thus, Ely concluded, "if . . . the republican ideal of government in the interest of the whole people was to be maintained, in an age when faith in the republican tenet that the people and their interests were essentially homogeneous was all but dead, a frontal assault on the problem of majority tyranny was needed." The answer to the "majority tyranny" problem was a judicially-enforceable right of equality in representation.

Ely viewed substantive values as fluid and left almost exclusively to the political branches. By contrast, the U.S. Constitution was mostly concerned with "procedural fairness" in individual disputes and with process "writ large." Ely defined process "writ large" as "the processes by which issues of public policy are fairly determined." Because of their desire to retain power, elected officials were the "last persons we should trust" to ensure that the electoral process is fair.

Ely thought that judges were uniquely well situated to decide procedural disputes. Because of their remove from electoral politics, the judiciary had the perspective to determine objectively when laws are impermissibly "clogging the channels of change" or excluding minority groups from the representative process out of "simple hostility or a prejudiced refusal to recognize commonalities of interest." The focus for courts, under his view, should be ensuring that minorities were not excluded from participation in the political process. Once democratic process was ensured, however, choices between substantive values should be left to the political branches.

We turn from review of electoral process to judicial review of popular referenda and if, when, and why courts may intervene. In some countries such as Colombia and Italy, judicial review is required by law before a popular vote is held,

but in other jurisdictions, courts may be asked to consider these issues only after a popular vote has been held. In some jurisdictions, judicial review is limited to procedural grounds, while courts in other countries address the merits of the referenda.

The excerpts below provide a few examples of various forms of referenda. We begin with the 1962 decision by the Conseil Constitutionnel in France and then turn to debates in the United States and the recent popular vote on the Colombian government's peace-making with the Revolutionary Armed Forces of Colombia (FARC). The commentary enlarges the frame by also returning us to Europe after the Brexit referendum.

Referendum Case
Conseil Constitutionnel (France)
62-20 DC (1962)*

[John Bell describes the circumstances prompting the litigation in the *Referendum Case* (Conseil Constitutionnel, France 1962).**

After the assassination attempt at Petit-Clamart on 22 August 1962, General de Gaulle announced at the Council of Ministers on 12 September that he was going to seek to change the Constitution's method of appointing a President of the Republic and to introduce popular, rather than indirect, election. The procedure he adopted was that for amending the Constitution provided for in article 89, which involves a bill being passed by both chambers. The Pompidou Government was already facing problems in Parliament, so that such a bill was unlikely to pass. Drawing on his success in the referendum of April 1962 that put an end to the Algerian crisis, the President relied on article 11, which enables the President to put a bill 'concerning the organization of public authorities' to a referendum, 'on the recommendation of the Government.' The President of the Senate and the opposition criticized the Government for this 'outrageous breach of the Constitution,' and it was defeated in a confidence motion on 5 October 1962. Parliamentary elections were called [T]he President decided by a decree . . . to submit the proposed law in relation to the election of the President to a referendum on 28 October.

* Translation excerpted from COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 137, 137-38 (Norman Dorsen, Michel Rosenfeld, András Sajó, Susanne Baer editors, West 2d edition 2010).

** JOHN BELL, FRENCH CONSTITUTIONAL LAW 133-34 (Oxford University Press 1992).

De Gaulle was successful in the referendum, but the President of the Senate . . . referred the . . . [matter] to the Conseil constitutionnel as unconstitutional.

The decision is excerpted below.]

1. Considering that the competence of the Conseil constitutionnel is strictly limited by the Constitution, as well as by the provisions of the organic law of 7 November 1958 on the Conseil constitutionnel . . . that the Conseil constitutionnel cannot be called upon to rule on matters other than the limited number for which those texts provide;

2. Considering that, even if article 61 of the Constitution gives the Conseil constitutionnel the task of assessing the compatibility with the Constitution of organic laws and ordinary laws, which, respectively, must be submitted to it for scrutiny, without stating whether this competence extends to all texts of legislative character, be they adopted by the people after a referendum or passed by Parliament, or whether, on the contrary, it is limited only to the latter category, it follows from the spirit of the Constitution, which made the Conseil constitutionnel a body regulating the activity of public authorities, that the laws to which the Constitution intended to refer in article 61 are only those *loi* passed by Parliament, and not those which, adopted by the people after a referendum, constitute a direct expression of national sovereignty

5. Considering that it follows from what has been said that none of the provisions of the Constitution, nor of the above-mentioned organic law applying it, gives the Conseil constitutionnel the competence to rule on the request submitted by the President of the Senate, that it consider whether the bill adopted by the French people by way of referendum on 28 October 1962 is compatible with the Constitution . . . [the referral is rejected].

On November 4, 2008, California voters approved California's Proposition 8, which would have amended the state's constitution to read: "Only marriage between a man and a woman is valid or recognized in California." As excerpted below, the Supreme Court of California considered whether the amendment was constitutional.

Strauss v. Horton
Supreme Court of California
46 Cal. 4th 436 (2009)

[Before Ronald M. George, Chief Justice; Marvin R. Baxter, Ming W. Chin, Carol A. Corrigan, Joyce L. Kennard, Carlos R. Moreno, and Kathryn Mickle Werdegarr, Associate Justices.]

[Chief Justice] George

For the third time in recent years, this court is called upon to address a question under California law relating to marriage and same-sex couples. . . .

Unlike the issues that were before us in [*Lockyer v. City and County of San Francisco* (2004) and the *Marriage Cases* (2008)] . . . , the issues facing us here do not concern a public official’s authority . . . to refuse . . . to enforce a statute on the basis of the official’s personal view that the statute is unconstitutional, or the validity . . . of a *statutory* provision limiting marriage to a union between a man and a woman *under state constitutional provisions that do not expressly permit or prescribe such a limitation*. Instead, the principal issue before us concerns the scope of *the right of the people, under the provisions of the California Constitution, to change or alter the state Constitution itself* through the initiative process so as to incorporate such a limitation as an explicit section of the state Constitution. . . .

[A]lthough Proposition 8 eliminates the ability of same-sex couples to enter into an official relationship designated “marriage,” in all other respects those couples continue to possess, under the state constitutional privacy and due process clauses, “the core set of basic *substantive* legal rights and attributes traditionally associated with marriage,” including, “most fundamentally, the opportunity of an individual to establish—with the person with whom the individual has chosen to share his or her life—an *officially recognized and protected family* possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage.” Like opposite-sex couples, same-sex couples enjoy this protection not as a matter of legislative grace, but of constitutional right. . . .

[P]etitioners assert this measure is invalid because it violates the separation of powers doctrine embodied in the California Constitution. The gist of petitioners’ argument is that this doctrine is violated when the initiative process is used to “readjudicate” controversies that have been litigated and settled by the courts. Because, in petitioners’ view, Proposition 8 purports to readjudicate the controversy that was litigated and resolved in the *Marriage Cases*, they maintain that this initiative measure violates the state constitutional separation of powers doctrine. . . .

Article III, section 3, of the California Constitution . . . provides: “The powers of State government are legislative, executive, and judicial. Persons charged with the

exercise of one power may not exercise either of the others except as permitted by this Constitution.” As we [have] observed . . . : “Although . . . [this] language . . . may suggest a sharp demarcation between the operations of the three branches of government, . . . the separation of powers doctrine “does not mean that the three departments of our government are not in many respects mutually dependent,” or that the actions of one branch may not significantly affect those of another branch. . . . Such interrelationship . . . lies at the heart of the constitutional theory of ‘checks and balances’ that the separation of powers doctrine is intended to serve.”

In this case, petitioners’ argument is premised upon the assumption that Proposition 8 constitutes a “readjudication” of the issue resolved in the *Marriage Cases*. . . . Proposition 8 does not address or affect *that* issue, but instead *amends* the California Constitution to add *a new provision* that was not a part of the Constitution when the decision in the *Marriage Cases* was handed down. The new constitutional provision . . . establishes a new substantive state constitutional rule that became effective once Proposition 8 was approved by the voters. Thus, it is not accurate to suggest that Proposition 8 readjudicates the legal issue . . . resolved in the *Marriage Cases*.

To the extent petitioners’ argument rests upon the theory that once a court has construed a provision of the state Constitution in a particular manner, the people may not employ the initiative power to change the provisions of the state Constitution for the future, their contention similarly lacks merit. Our past cases make clear that “[t]he people may adopt constitutional amendments which define the scope of existing state constitutional protections,” and that when they do so the new “specific command supersedes any previous inconsistent interpretations of our state charter’s . . . guarantees.” . . .

In utilizing the initiative process in this fashion, the people do not usurp a power that the Constitution allocates exclusively to some other entity or branch of government, but rather employ a power explicitly entrusted to them by the Constitution. Once the people have adopted a constitutional amendment, of course, it is the duty of the courts to apply the state Constitution as amended by the new provision, but that circumstance does not in any sense signify that the adoption of such an amendment improperly impinges upon the judiciary’s authority or responsibility, in violation of the separation of powers doctrine. Instead, the court’s obligation to follow the mandate of the amended Constitution simply flows from the judiciary’s foundational responsibility to act in accordance with the commands of the current governing law. . . .

The Attorney General . . . advances a novel, alternative theory under which he claims Proposition 8 should be held invalid. . . . “Proposition 8 should be invalidated even if it is deemed to amend the Constitution because it abrogates fundamental rights protected by article I [of the California Constitution] without a compelling interest.”

The Attorney General’s argument is fundamentally flawed on a number of levels. First, as we have explained above and as the Attorney General’s brief itself recognizes in its discussion of the amendment/revision issue, Proposition 8 does not “abrogate” or eliminate a same-sex couple’s “inalienable” constitutional rights as guaranteed by article I, section 1 of the California Constitution. . . .

Second, contrary to the implication of the Attorney General’s assertion, the circumstance that the rights listed in article I, section 1—and in other sections of the Constitution—are identified as “inalienable” does not signify that such rights are totally exempt from any limitation or restriction. . . .

Third, the “inalienable” nature of a constitutional right never has been understood to preclude the adoption of *a constitutional amendment* that limits or restricts the scope or application of such a right. . . . [T]he right of the people “to alter or reform” the provisions of the Constitution itself has been understood to constitute one of the fundamental rights to which article I, section 1 refers . . . [and] there is no basis for suggesting that the inalienable rights set forth in article I, section 1 . . . are of a higher order than—and thus exempt from—the people’s right to “alter or reform” the Constitution

In urging this court to confer upon the “inalienable rights” terminology of article I, section 1 a much more sweeping and far reaching meaning than it traditionally has borne, the Attorney General cites selected excerpts from a number of mid-19th-century opinions that gave voice to the natural-rights jurisprudence that was common in that era. . . . [T]he expansive natural-rights jurisprudence of that time long has been discredited and, moreover, even the cited jurists never suggested that courts possess the authority to invalidate *an explicit constitutional amendment*, adopted through a constitutionally prescribed procedure, on the ground that the amendment is inconsistent with the scope of a right previously embodied in the Constitution. . . .

[The concurring opinions of Justices Kennard and Werdegard are omitted.]

Concurring and Dissenting Opinion by Justice Moreno

I conclude that requiring discrimination against a minority group on the basis of a suspect classification strikes at the core of the promise of equality that underlies our California Constitution and thus “represents such a drastic and far-reaching change in the nature and operation of our governmental structure that it must be considered a ‘revision’ of the state Constitution rather than a mere ‘amendment’ thereof.”* The rule

* Under the California Constitution, a “constitutional revision”—unlike a “constitutional amendment”—cannot be adopted through the initiative process. In a portion not included in this excerpt, the majority opinion concluded that Proposition 8 constitutes a constitutional amendment rather than a revision.

the majority crafts today . . . places at risk the state constitutional rights of all disfavored minorities. It weakens the status of our state Constitution as a bulwark of fundamental rights for minorities protected from the will of the majority. I therefore dissent.

Ensuring equal protection prevents “governmental decisionmakers from treating differently persons who are in all relevant respects alike.” . . . As such, it is a shield against arbitrary government power, because equal protection “requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.” Thus, it is not so much a discrete constitutional right as it is a basic constitutional principle that guides all legislation and compels the will of the majority to be tempered by justice. . . .

The equal protection clause is therefore, by its nature, inherently countermajoritarian. As a logical matter, it cannot depend on the will of the majority for its enforcement, for it is the will of the majority against which the equal protection clause is designed to protect. Rather, the enforcement of the equal protection clause is especially dependent on “the power of the courts to test legislative and executive acts by the light of constitutional mandate and in particular to preserve constitutional rights, whether of individual or minority, from obliteration by the majority.” . . .

* * *

After the Supreme Court of California held that Proposition 8 was constitutional, two same-sex couples filed a lawsuit in federal district court arguing that Proposition 8 violated the Fourteenth Amendment of the U.S. Constitution by denying them due process and equal protection of the law. After a trial, a lower court judge agreed and enjoined enforcement. The Attorney General of California declined to defend the law. The California courts concluded that other individuals could do so, but the U.S. Supreme Court held that those individuals did not have standing in federal courts to pursue the case. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). In 2015, the U.S. Supreme Court held that, as a matter of federal constitutional law, states could not prohibit same-sex marriage. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

The Core of the Case Against Judicial Review

Jeremy Waldron (2006)^{*}

Should judges have the authority to strike down legislation when they are convinced that it violates individual rights? In many countries they do. The best known example is the United States. In November 2003, the Supreme Judicial Court of Massachusetts ruled that the state's marriage licensing laws violated state constitutional rights to due process and equal protection by implicitly limiting marriage to a union between a man and a woman. The decision heartened many people who felt that their rights had been unrecognized and that, as gay men and women, they had been treated as second-class citizens under the existing marriage law. Even if the decision is eventually overturned by an amendment to the state constitution, the plaintiffs and their supporters can feel that at least the issue of rights is now being confronted directly. A good decision and a process in which claims of rights are steadily and seriously considered—for many people these are reasons for cherishing the institution of judicial review. They acknowledge that judicial review sometimes leads to bad decisions—such as the striking down of 170 labor statutes by state and federal courts in the *Lochner* era—and they acknowledge that the practice suffers from some sort of democratic deficit. But, they say, these costs are often exaggerated or mischaracterized. The democratic process is hardly perfect and, in any case, the democratic objection is itself problematic when what is at stake is the tyranny of the majority. We can, they argue, put up with an occasional bad outcome as the price of a practice that has given us decisions like *Lawrence*, *Roe*, and *Brown*, which upheld our society's commitment to individual rights in the face of prejudiced majorities. That is almost the last good thing I shall say about judicial review. (I wanted to acknowledge up front the value of many of the decisions it has given us and the complexity of the procedural issues.) . . .

[J]udicial review of legislation is inappropriate as a mode of final decisionmaking in a free and democratic society. Arguments to this effect have been heard before, and often. They arise naturally in regard to a practice of this kind. In liberal political theory, legislative supremacy is often associated with popular self-government, and democratic ideals are bound to stand in an uneasy relation to any practice that says elected legislatures are to operate only on the sufferance of unelected judges. Alexander Bickel summed up the issue in the well-known phrase, “the counter-majoritarian difficulty.” We can try to mitigate this difficulty, Bickel said, by showing that existing legislative procedures do not perfectly represent the popular or the majority will. But, he continued,

^{*} Excerpted from Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE LAW JOURNAL 1346 (2006).

nothing in the further complexities and perplexities of the system, which modern political science has explored with admirable and ingenious industry, and some of which it has tended to multiply with a fertility that passes the mere zeal of the discoverer—nothing in these complexities can alter the essential reality that judicial review is a deviant institution in the American democracy.

In countries that do not allow legislation to be invalidated in this way, the people themselves can decide finally, by ordinary legislative procedures, whether they want to permit abortion, affirmative action, school vouchers, or gay marriage. They can decide among themselves whether to have laws punishing the public expression of racial hatred or restricting candidates' spending in elections. If they disagree about any of these matters, they can elect representatives to deliberate and settle the issue by voting in the legislature. That is what happened, for example, in Britain in the 1960s, when Parliament debated the liberalization of abortion law, the legalization of homosexual conduct among consenting adults, and the abolition of capital punishment. . . .

[J]udicial review is vulnerable to attack on two fronts. It does not, as is often claimed, provide a way for a society to focus clearly on the real issues at stake when citizens disagree about rights; on the contrary, it distracts them with side-issues about precedent, texts, and interpretation. And it is politically illegitimate, so far as democratic values are concerned: By privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights. . . . This is an Essay about judicial review of legislation, not judicial review of executive action or administrative decisionmaking. . . . My target is strong judicial review. . . .

We are imagining a society with a Bill of Rights, and if there is to be judicial review of legislation, it will presumably center on the Bill of Rights. The Bill of Rights, we have assumed, has been adopted in the society pursuant to members' shared commitment to the idea of individual and minority rights notwithstanding the fact that they disagree about what these rights are and what they entail. Now, when rights-disagreements erupt in regard to legislation, there is a question about the role that the established Bill of Rights should play in the decision-process in which the issue is posed. From an outcome-related point of view, is it a good idea or a bad idea that rights-disagreements be fought out in relation to the terms of a Bill of Rights?

One reason for thinking it is a good idea is that the written formulations of the Bill of Rights can help disputants focus on the abstract rights-issues at stake. But there are powerful reasons on the other side. The forms of words used in the Bill of Rights will not have been chosen with rights-disagreements in mind. Or, if they were, they will have been chosen in order to finesse the disagreements about rights that existed at the time the Bill of Rights was set up. Their platitudes may be exactly the wrong

formulations to focus clear-headed, responsible, and good faith explorations of rights-disagreements.

The written formulations of a Bill of Rights also tend to encourage a certain rigid textual formalism. A legal right that finds protection in a Bill of Rights finds it under the auspices of some canonical form of words in which the provisions of the Bill are enunciated. One lesson of American constitutional experience is that the words of each provision tend to take on a life of their own, becoming the obsessive catchphrase for expressing everything one might want to say about the right in question. . . .

At the very least, courts will tend to be distracted in their arguments about rights by side arguments about how a text like the Bill of Rights is best approached by judges. American experience bears this out: The proportion of argument about theories of interpretation to direct argument about the moral issues is skewed in most judicial opinions in a way that no one who thinks the issues themselves are important can possibly regard as satisfactory. This is partly because the legitimacy of judicial review is itself so problematic. Because judges (like the rest of us) are concerned about the legitimacy of a process that permits them to decide these issues, they cling to their authorizing texts and debate their interpretation rather than venturing out to discuss moral reasons directly.

One final point. The text of a Bill of Rights may distort judicial reasoning not only by what it includes but also by what it omits. Suppose the members of a given society disagree about whether the Bill of Rights should have included positive (socioeconomic) as well as negative (liberty) rights. Those who think positive rights should have been included may think the present Bill of Rights distorts moral reasoning by excluding them. A response may be that, at worst, this omission just leads to a possible failure to review legislation in cases in which review would be appropriate, but it is not an argument against judicial review as such. But that's too simple. A failure to include positive rights may alter (or distort) judges' understanding of the rights that are included. Judges may give more weight to property rights or to freedom of contract, say, than they would if property and freedom of contract were posited alongside explicit welfare rights. And giving them greater weight may lead judges to strike down statutes that ought not to be struck down—statutes that are trying to make up the deficiency and implement by legislation those rights that failed to register in the formulations of the Bill of Rights.

The Colombian Plebiscite on the Revolutionary Armed Forces of Colombia (FARC) Peace Accord

In August 2016, the President of Colombia, Juan Manuel Santos, announced a plebiscite for voters to ratify a peace accord that had been negotiated to terminate the armed conflict between the Colombian government and the Revolutionary Armed Forces of Colombia (FARC). In an earlier enactment in 2015, the Colombian Congress had amended a 1994 statute that regulated referenda, plebiscites, popular consultations, initiatives, recall, and other institutions of direct democracy so as to authorize the plebiscite on the peace agreement and create special rules for it. Under the new statute, the President was required to inform Congress of his intention to hold a plebiscite and the date of the vote; within one month of the submission of the report by the President, the Senate or the House of Representatives had the power to block the calling of the plebiscite by means of a simple majority. Under Colombian constitutional law, every statute that regulates direct-democracy institutions must be reviewed by the Constitutional Court before its entry into force; the Court's decision on the amended statute permitting the plebiscite and its effect is excerpted below.

Constitutional Review of the Peace Accord Plebiscite Constitutional Court of Colombia Judgment C-379/16 (2016)*

María Victoria Calle Correa, President; Luis Guillermo Guerrero Pérez; Alejandro Linares Cantillo; Gabriel Eduardo Mendoza Martelo; Jorge Iván Palacio Palacio; Jorge Ignacio Pretelt Chaljub; Gloria Stella Ortiz Delgado; Alberto Rojas Ríos; Luis Ernesto Vargas Silva; Martha Victoria Sáchica Méndez, Secretary

1. Participatory democracy is a value, a “structural and integral” principle of the Colombian State, as well as a right. . . .

3.1. . . . [I]n a participatory democracy . . . the citizen retains at every moment his political rights to control his representative, because [an] election does not suppose the transfer of popular sovereignty, but rather bestows legitimacy upon the elected representative to act as a delegate of the People. . . .

3.2. . . . [I]n a participatory democracy, citizens . . . have the fundamental right . . . to participate *actively* in the making of collective decisions about matters of national interest through the mechanisms of citizen participation. . . .

* Translation by José Argueta Funes (Yale Law School, J.D. Class of 2019).

4. . . . [T]he principle of participatory democracy is characterized [within constitutional doctrine] as essential, transversal, universal, and expansive.

4.1. It is considered essential because it is “*a necessary condition for the validity of the Constitutional State,*” for the sovereign People as a constituting power is what legitimates constituted powers. . . .

4.2. . . . The principle *is transversal* insofar as it is “*incorporated as a constitutional imperative which covers different normative aspects of the Constitution itself.*” As the Constitutional Court recognized in Judgment C-089 of 1994, these aspects include: electoral organization; the exercise of administrative functions; participation in matters related to public services; the administration of justice; the territorial regimen; economic, budgetary, and planning matters; . . . participation in the making of decisions related to the environment, among others. . . .

4.3. . . . This Court defined . . . [the universal and expansive] characteristics in Judgment C-089 of 1994:

“[i]t said to *be universal* insofar as it involves a variety of scenarios, processes, and places, both public and private, and also because the notion of politics that underpins it is nourished by everything that vitally interests the person, the community, and the State, and could therefore affect the distribution, control, and assignment of social power. The *democratic principle is expansive* because its dynamic, far from ignoring social conflict, channels it through respect and constant vindication of a minimum of social and political democracy, which in accordance with its ideology must be expanded progressively, conquering new ambits and permanently deepening its validity. . . .

4.4. In that same judgment, the Constitutional Court expressed that the democratic principle constitutes “*a priceless guideline to resolve doubts or fill gaps that may arise upon examination or application of a precept. In effect, in light of the Constitution, the interpretation that will always outweigh others will be the one that coincides most closely with the democratic principle, either by demanding a minimum of democracy or by extending democracy’s empire into a new realm.*” . . .

5.1. . . . [I]t is important to note that citizen participation as a right-duty must exist in accordance with the mechanisms established under the legal and constitutional parameters applicable in each particular case. As such, the constituting power must express its sovereignty through established means of intervention in collective decision-making. In a constitutional and democratic State, the People “*accepts that every power must have its limits and, therefore, as a sovereign people, it agrees to constitute and limit itself in accordance with that democratic model and institutes channels through which it can express itself with all of its diversity.*” . . .

6. . . . [The] Constitution of 1991 . . . enunciated the following mechanisms of citizen participation . . . : the plebiscite, the referendum, the popular consultation, public assemblies, the popular legislative initiatives, and the recall of mayors and governors. It is important to clarify that *“existing forms of participation do not extinguish the possibilities in this subject. In effect, given the expansive character of democracy and the mandate to optimize the principle of participation, it is possible to identify and develop other instruments that concretize the constitutional commitment to promote, as far as possible, the involvement of citizens in the making of decisions that affect them.”* . . .

7. . . . This Court has held that *“the plebiscite and the public consultation count with a common constitutional foundation in Article 104 of the Constitution* and therefore the plebiscite can be considered as a form of popular consultation.”* . . .

8. . . . Laws 134 of 1994** and 1757 of 2015*** allow the identification of the essential elements of the plebiscite as a mechanism of citizen participation, differentiating it from other mechanisms. However, these laws are not, strictly speaking, a parameter for the constitutionality of new mechanism of participation that could be created. . . . [T]he law under scrutiny here is a special plebiscite, which means that it has particular characteristics with relation to the plebiscite described in the laws above. . . . [I]n order to assess the constitutionality of the law under consideration, we must identify the general characteristics of the plebiscite in order to determine whether the law is in accordance with the essential traits of this mechanism for citizen participation.

9. Given that the plebiscite has minimal constitutional regulation, the lawmaker has an ample margin of configuration to define it. This was the

* Article 104 of the Constitution of Colombia provides: “The President of the Republic, with the signature of all ministers and with prior approval of the Senate of the Republic, may consult the people about decisions of national importance. The people’s decision shall be binding. The consultation takes place concurrently with an election.”

** Law 134 of 1994, “Dictating Norms for Mechanisms of Citizens Participation,” defines referendum as “convocation of the people so that they may approve or reject a juridical norm or derogate an existing norm.” Article 3. The law defines plebiscite as “the pronouncement of the people, through a call by the President of the Republic, on whether to support or reject a specific decision by the Executive.” Article 7. The Constitutional Court of Colombia, in Judgment C-180 of 1994, reviewed this act ex officio, and provided that “juridical norm” in Article 3 means a legislative act, a law, an ordinance, an agreement, or a local resolution. In addition, it specified that the President may only call for a plebiscite subject to the requirements included in Article 104 of the Constitution.

*** Law 1757 of 2015, “Dictating Provisions in Relation to the Promotion and Protection of the Right to Participatory Democracy,” introduced several requirements on the use of mechanisms for democratic participation. In particular, the statute required participation from at least fifty percent of the electorate in order to render binding the result of a plebiscite. The Constitutional Court reviewed this act ex officio in Judgment C-150 of 2015.

Constitutional Court's conclusion in Judgment C-150 of 2015, which held the degree of liberty of configuration as inversely proportional to the "constitutional institutionalization" of the participatory mechanism. . . .

By consequence, "*the lawmaker is empowered to select, among all normative options available in the constitutional text, those which, while neither disproportional nor unreasonable, best develop the law in question.*"

9.1. . . . [W]e identify the following definitional elements of a plebiscite: [(i) Only the President of the Republic may convene a plebiscite, and he may do so (ii) only in order to consult citizens about a political decision of the President's Government within the orbit of the President's competences. The plebiscite (iii) bestows popular legitimacy upon the Government's initiative and (iv) is binding upon the Executive without impinging upon the other branches of the public power.] . . .

10. The plebiscite may be convened *only* by the President of the Republic in those cases where he considers it necessary; that is to say, it is the *exclusive* competence of that public authority to convene the People through this mechanism of citizen participation. . . .

10.1. . . . [T]he political decision subjected to a popular vote must be within the orbit of [the President's] competences. . . . Therefore, the President may not consult the public about a matter over which he lacks constitutional power to act by using a plebiscite. . . . [T]his fear is founded in historical experiences, in which the President used the plebiscite to legitimate dictatorships and other autocratic regimes. . . .

[T]he Constitutional Court noted in Judgment C-180 of 1994: "*The personal use given to this mechanism in the nineteenth century under the Napoleonic—1802—and Bonapartist—1852 and 1870—regimes, examples that have served as inspiration for several later dictatorships, presents the 'plebiscite' as a direct vote by the citizens through a 'yes' or 'no' in order to express their support or rejection of a specific ruler. It was understood, then, as a 'ratification' mechanism used by 'dictators and usurpers of power,' in search of legitimacy*" With these historical experiences in the background, Law 134 of 1994 expressed the need to establish "*a series of strict written controls to guarantee that the plebiscite is used as a mechanism for democratic participation free of the vices historically associated to the instrument used in authoritarian regimes. This is the only goal of the controls envisioned in this law, and they shall not impede the President's ability to use the plebiscite as a democratic tool that will allow him to invoke a popular pronouncement.*"

For this reason, the matters over which the President is not allowed to consult the People through a plebiscite have been delineated, and include: matters related to the state of exception and the exercise of powers corresponding to that state, the length of the constitutional period of the presidential mandate, the possibility of introducing modifications to the Constitution, budgets or matters related to fiscal or tax laws.

Additionally, he cannot consult about international treaties, for the Constitutional Court declared unconstitutional “*the possibility that, by means of a plebiscite, the people may pass judgments on matters that fall within the purview of article 150, numeral 16 of the Constitution.*”^{*} . . .

11.1. The matter put forth for the People’s consideration must be a political decision of the President, founded in his constitutional competences; that is to say, the matter may not require authorization of any other national authority to carry out said act. A political decision is a determination with which the Head of State guides a given matter; its political nature is manifested in the fact that it has not yet been developed through a juridical norm [(any act adopted by an organ of the state, following established procedures in exercise of its competences)]. Consequently, “*the President may not convene a plebiscite to conduct a referendum on a juridical norm,*” because he would be reaching beyond a plebiscite’s limits and therefore go against its nature. Furthermore, there are other mechanisms of citizen participation through which it is possible to achieve that goal. . . .

11.2. . . . [T]his Court finds it pertinent to highlight that the *President of the Republic is also forbidden to submit to the will of the People a fundamental right through a plebiscite*, given the countermajoritarian nature of these rights. . . .

12. The end goal of a plebiscite is to inform the President of the Republic about the opinion of the citizens with respect to a policy advanced by his Government. . . . [T]he purpose of a plebiscite is to produce a political mandate from the sovereign People expressed directly about a policy within the President’s competence, in order to define the collective fate of the State. . . .

13. The decision made by citizens in a plebiscite . . . (i) bestows popular legitimacy to the President’s initiative, and (ii) has a binding character as a political mandate from the sovereign People. The binding quality of such a mandate . . . urges the President of the Republic to carry out the corresponding actions from the orbit of his competences in order to make the mandate effective. . . .

13.2. We reiterate that in no way does the result of a plebiscite result in the automatic inclusion of a legal or constitutional norm within our legal order, given that what is put up for the People’s consideration is not a norm but a political decision of the President of the Republic. . . .

13.4. The plebiscite materializes participatory democracy, insofar as this mechanism achieves the expression of citizen will which, as source of sovereign

^{*} Article 150 Numeral 16 of the Constitution of Colombia provides: “It falls upon Congress to make laws. Through these laws, it exerts the following functions: . . . Approve or reject any treaties the Government might enter into with other States or international law entities. . . .”

power, radiates into the spheres of State decision-making, demanding that representatives act in accordance with the expressed political mandate and render it effective. To hold the contrary would imply that the people's mandate . . . lacks any content and counts only with a symbolic character. In this sense, ignoring the binding character of the political mandate would lead us to suppress the axiological foundations upon which the constitutional and democratic Colombian State is built. . . .

13.5. Still, it is important to highlight that the effects of the plebiscite are confined to the figure of the President, without extending onto the other public powers. This delimitation corresponds to the necessity of guaranteeing the efficacy of the principle of separation of powers. . . .

In other words, this circumscription avoids a situation where the Government is invested with a power to ignore the competences of the other powers through a primal validation of its decisions by the citizens. . . .

The goal is to recognize, on the one hand, the validity of the democratic legitimacy awarded by the plebiscite, while avoiding, on the other, the use of the People's sovereignty to reject the constitutional powers and competences of the other State branches. This would occur, for example, if the ruler, under cover of a popular decision obtained through a plebiscite, sought to [remove from the purview of Congress or the courts matters delegated to those bodies by the Constitution]. . . .

[T]his is subject to the later Government's exercise of its constitutional competence to implement the political decision This achieves the double purpose alluded to before: recognizing the validity of direct democratic legitimization, but also maintaining the equilibrium and checks and balances among the powers, which are derived from the precise definition of their competences from the Constitution. . . .

14.2. For this reason, in cases where the political mandate of the People requires normative development, the corresponding authorities will have to intervene and bestow efficacy upon the popular pronouncement through the implementation of provisions in line with the requirements on normative production outlined in the Constitution. In any case, such normative development must come after the expression of the will of the sovereign People and must aim to bestow legal efficacy to the expressed political mandate. Of course, the fulfillment of the political mandate by corresponding authorities may never lead to the immediate reform of the Constitution

One could argue . . . that the political mandate constitutes and expression of the constituting power itself which *in any case* must be fulfilled. For this reason, if the People approve a decision of the President which implies a constitutional reform, it is not necessary to follow the proceedings [for constitutional reform] contained in . . . the Constitution. This interpretation of the plebiscite is . . . unconstitutional, for in a

constitutional democracy “*every power must have limits, and, as such, as sovereign, the people agree to constitute and limit itself in accordance with the democratic model an institute channels through which it may express itself with all its diversity.*” . . .

14.3. Consequently, laws issued as implementation of the mandate must adjust to the content of the Constitution, under penalty of being declared unconstitutional. . . .

20.1. . . . [B]ased on the previous characterization of the plebiscite, it is possible to establish the differences between [a plebiscite and a referendum]

The referendum is a mechanism through which the constitutive power expresses itself with respect to the approval or derogation of a juridical norm. This means that the People, exercising their popular sovereignty, approve or reject a normative act previously emanating from a constituted power, in this case the Congress of the Republic. Once approved, this act directly enters the juridical order. . . . The Constitution of 1991 establishes the referendum as the mechanism available to citizens to participate in (i) the derogation of a law [after a tenth of the electorate calls for a referendum on derogation], (ii) the approval of an act turning a region into a territorial entity, (iii) reform of the Constitution, (iv) approval or rejection of reforms to fundamental rights and guarantees approved by Congress [after five percent of the electorate calls for such a referendum], and (v) approval or rejection of constitutional reform passed by Congress [when requested by the Government or the citizens].

From the above we can conclude that there are four principal differences between the plebiscite and the referendum. First, the referendum is the mechanism of citizen participation through which the Constitution can be reformed. Second, only the President of the Republic has the ability to call a plebiscite. Third, a referendum cannot lend support to the policies of a specific Government, for that is the function of the plebiscite Fourth, while the subject of a plebiscite is a political decision of the President of the Republic, the item submitted for the People’s consideration in a referendum is a [juridical norm]. . . .

In other words, the plebiscite implies . . . a more direct form of participation by the constitutive power than in the case of a referendum, although limited in the former case to a strictly political, non-normative, connotation. . . .

[The separate opinions of Justice Mendoza Martelo and Justice Calle Correa, each concurring; Justice Guerrero Pérez, Justice Linares Cantillo, and Justice Pretelt Chaljub, each concurring and partially dissenting; and Justice Ortíz Delgado, Judge Rojas Ríos, and Justice Vargas Silva, each partially dissenting; are omitted.]

* * *

The Constitution of Colombia does not require peace agreements to be subject to the approval of the people. As the excerpt reflects, the Court declared unconstitutional the part of the statute that would have made the plebiscite binding on the legislative and judicial branches. The Court held that the result of the plebiscite was binding only on the President. The Court also addressed two related issues: (i) whether the approval of the peace agreement by the people would transform the agreement from a political accord to a juridical norm; and (ii) whether, should the approved peace agreement become a juridical norm, it would be automatically incorporated into the legal system.

The Court answered both questions in the negative. It reasoned that, under Colombian law, a plebiscite is just a vote on a political decision within the competence of the President, and therefore the eventual approval of the peace agreement would not modify the legal system of the country. Rather, the Court held that a decision of the people was only a mandate to the President to implement the peace agreement, if approved, or to change it, if rejected.

On October 2, 2016, the plebiscite failed, with 50.2 percent voting against the peace agreement and 49.8 percent voting in favor. The President then renegotiated the peace agreement with the FARC to reflect some of the demands of the leaders of the “No” vote and agreed on a new text for the peace agreement, which was signed on November 24, 2016, in Bogotá.

The leaders of the “No” vote claimed that the second agreement should be subject to a second plebiscite. The President refused to call for another vote and sent the peace agreement for ratification to the Congress. The new agreement was ratified by the Senate and the House of Representatives of Colombia on November 29 and 30, 2016. On December 1, 2016, the FARC initiated the demobilization and disarmament process, which is subject to oversight and verification by the United Nations Security Council.

In Judgment C-160 of 2017, the Court considered, *inter alia*, whether the President must submit the second peace agreement to a new plebiscite. The Court answered in the negative. The Court reasoned that the process (which had begun with the first plebiscite); the negotiations with the leaders of the “No” vote concerning five hundred points; and the subsequent good faith modification of the peace agreement followed by congressional hearings with civil society actors (which ended with resolutions of both plenary chambers of Congress as representatives of the people) provided sufficient avenues for popular participation. During 2017, the Court has continued to review the constitutionality of congressional and presidential provisions related to the implementation of the peace accord.

Judicial Review of Direct Democracy

Julian N. Eule (1990)^{*}

A nation that traces power to the people's will does not easily digest the practice of unelected and unaccountable judges' denying the populace what most of them appear to want. It is no wonder that a substantial portion of constitutional scholarship deals with the apparent tension between judicial review and majoritarian democracy. Judicial review in its conventional guise, however, does not entail a direct conflict between the judiciary and the people. It is instead the will of a legislature that is being thwarted in the name of the Constitution. In fact, this very lack of identity between the people and their representatives forms the foundation for Alexander Hamilton's defense of judicial review in *The Federalist* No. 78: "[W]here the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former." While we ordinarily engage in the fiction that legislative enactments represent majority will, we discard this fiction when courts find that the people's agents have acted beyond the power delegated to them by the constitutive document.

Although most laws originate in a representative body, the constitutions of approximately half the states authorize lawmaking by the electorate itself. Should the conflict between the lawmaker and judge be played out differently when the people express their preferences directly rather than through an agent? Among the tens of thousands of pages written on the role of courts in a democratic society, this question has received almost no attention. Judicial opinions resolving constitutional challenges to laws enacted by plebiscite seldom explicitly address the matter of the appropriate standard of review. The unspoken assumption, however, seems to be that the analysis need not vary as a result of the law's popular origin. The nearly three dozen Supreme Court cases reviewing ballot propositions contain scarcely a word on the subject. The rare recognition that the law under attack originated with the electorate is most often followed by a boilerplate statement like Chief Justice Burger's in *Citizens Against Rent Control / Coalition for Fair Housing v. City of Berkeley* [(1981)]: "It is irrelevant that the voters rather than a legislative body enacted [this law] because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation."

Intuitively, Chief Justice Burger's position seems wrong. If the people are the sovereign from which all power originates, then why should their expression of will not carry more weight than the legislature's crude effort to approximate it? If the root difficulty of judicial review is its counter-majoritarian nature, why does the argument for judicial intervention not abate as it becomes clearer what the majority prefers? This

^{*} Excerpted from Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE LAW JOURNAL 1503 (1990).

claim struck a responsive chord with Hugo Black. During the oral argument in *Reitman v. Mulkey*, then Solicitor General Thurgood Marshall called attention to the fact that California's authorization of discrimination in the private housing market had been enacted by voter initiative. "Wouldn't you have exactly the same argument," he was asked, if the provision "had been enacted by the California legislature?" "It's the same argument," Marshall replied, "I just have more force with this." "No," interjected Justice Black, "It seems to me you would have less. Because here, it's moving in the direction of letting the people of the State—the voters of the State—establish their policy, which is as near to a democracy as you can get."

It is more than abstract theories of sovereignty and democracy, however, that give judicial review of voter lawmaking a different cast. A judicial decision striking down a voter effort also risks engendering a perception by the public itself that its will has been subverted. Neglecting voter expressions thus carries with it a measure of political discomfort unlike that associated with invalidating legislation. . . .

[A]rguments for judicial restraint indeed play out differently when courts review the constitutionality of direct expressions of the electorate. My ultimate conclusion, however, is that judicial review of direct democracy frequently calls for *less* rather than more restraint. Admittedly, this proposition may seem even more counterintuitive than Chief Justice Burger's suggestion that the people's voice deserves no more sensitive a judicial ear than is accorded their representatives.' Direct democracy has a strong emotional pull cutting clear across the political spectrum. The Port Huron Statement, founding document of the Students for a Democratic Society, called for a shift from representative to "participatory democracy." Ralph Nader endorsed a constitutional amendment for a national initiative. Conservative politicians and think tanks trumpet the virtues of popular decision-making. Public opinion polls show widespread support for expanding the use of plebiscites. Small wonder that Professor Derrick Bell has warned that those who criticize direct democracy risk being labeled "reactionary, if not un-American," and that public figures in states that provide for direct legislation uniformly refrain from urging elimination—or even substantial modification—of these provisions. . . .

I [comment] not [on] whether we should continue to permit citizen lawmaking, but how courts should go about deciding challenges to the constitutionality of the voters' enactments. Despite the instinctive appeal of Hugo Black's view that the level of appropriate scrutiny ought to decline as democracy becomes more direct, I believe that a deeper consideration will reveal that he is 180 degrees off the mark. . . .

**The Quintessentially Democratic Act?
Democracy, Political Community and Citizenship in
and After the UK's EU Referendum of June 2016
Jo Shaw (2017)***

. . . On the one hand, the [Brexit] referendum seems like the purest expression of a democratic will on the part of the voting population of a European state, which has a long history of democratic culture and has been a Member State of the EU and its predecessor European Communities for more than 40 years, whilst retaining a stubborn Eurosceptic streak within its political culture. On the other hand, any referendum result—however close or decisive—will have been influenced by the design of political community (i.e. the question of who could vote and the manner in which the referendum question and outcome are structured) and by the extent to which issues of (political) membership and belonging (often taking the form of discussions of immigration) have been framed into the referendum process. . . .

Post-EU referendum political discourse in the UK at the political party level has been dominated by the trope of ‘the people have spoken,’ so Brexit must be delivered (or at least not opposed, e.g. in Parliament). . . . [A] challenge to this monocular vision of popular will emerges from an analysis of the various and potentially discordant democratic interests at play in a complex polity such as the UK, which comprises multiple interrelated *demoi* at the subnational, national and the supranational levels, with each level involving elements of both representative and direct democracy. Characterising the UK as a complex democracy comprising plural and often competing political interests (some of which are defined territorially) reflects substantial constitutional change in the UK over the last fifty years. . . . A singular vision of democracy also misses the point that *demoi* can be horizontally as well as vertically intertwined. In the EU context, decisions taken in one Member State clearly can have spillover effects for citizens and residents of other Member States; decisions taken in one part of the UK will have impacts elsewhere.

There are thus several possible democratic deficiencies within the UK referendum process There is one crucial statement contained in the 2017 UK White Paper: it argues that one of the UK's strengths is ‘our identity as one nation.’ This seems to suggest that both the territorially differentiated outcome of the referendum and the continuing spillover of this decision for the EU27 Member States

* Excerpted from Jo Shaw, *The Quintessentially Democratic Act? Democracy, Political Community and Citizenship in and After the UK'S EU Referendum of June 2016*, JOURNAL OF EUROPEAN INTEGRATION 1-16 (2017).

(and their citizens) come to naught when faced by this singular identity. The simplicity of this declaration sweeps away more than 40 years of constitutional history and crucial legal and institutional changes that have occurred at several levels and across a number of dimensions, in particular in relation to the conceptions of democracy and citizenship, and behaves as if the attachments (both legal and identitarian) that these changes have brought about can be reversed by means of some simple steps. It seems to suggest that the UK's territorial constitution is paper only. . . . [T]his point is true neither as a matter [of] (democratic) theory nor as a matter of (legal and institutional) practice. . . .

[P]luralist thinking about 'demoi-cracy' offers a powerful vehicle for setting out the conditions of legitimacy in complex and composite polities. It offers a useful basis for understanding how democratic legitimacy operates in polities comprising more than a single *demos* both in descriptive terms and as an ideal-type setting a normative standard of non-domination amongst the respective *demos*. Normatively, when the EU is understood as a demoi-cracy, this means that democratically legitimate outcomes ought to emerge from the interplay of states, states peoples and citizens of the EU, not just from any single authority or constituent power. Democracy, in such a complex polity, with multiple *demos* and democratic interests, is inherently 'multilevel' and multi-perspectival. There is no one single process that needs to be completed, in order to allow a legitimate decision to be 'declared' as an outcome. On the contrary, before political and legal decisions can be regarded as fully legitimate there will be multiple counterbalancing and often competing interests and arguments that need to be taken into account. . . .

[R]econceiving the complex set-ups of both the EU and the UK in demoi-cratic terms highlights the challenges of reconciling the interests of different communities defined by citizenship and territorial differentiation. There are difficult questions to be asked about both the pre- and the post-referendum processes when we consider the differential impacts of Brexit upon various groups of citizens and non-citizens, within, without and across the UK and its various constitutionally defined territories. That is not to say that holding a referendum under the terms of UK law was somehow illegitimate or undemocratic. On the contrary, exit rights can be defended on grounds of legitimacy. But the questions asked in this article do shine a different light upon the referendum debate and legal framing. The standard taxonomies of EU law do not provide clear answers. But nor does the UK's current constitutional framework, given the incoherence of a system based partly on notions of devolution and territorial autonomy and partly on notions of (central) parliamentary sovereignty. It was the absence of any simple answers that motivated the critical enquiry into the normative potential of demoi-cracy, in an endeavour to see how best to ensure the autonomy and equality of these interrelated publics.

There is no constitutional principle of UK law that prohibits the UK from removing the status, and protection, of EU citizenship from both UK citizens

(wherever) and those who are currently resident in the UK as EU citizens but who become third country nationals in the UK on Brexit day. EU citizenship is not an Arendtian ‘right to have rights’ that somehow transcends the limitations of a treaty concluded between sovereign state actors. But one way forward is to argue that democracy triggers a number of duties incumbent on political actors, as they take the referendum vote forward, in order to guard against the illegitimate domination of one demos by others. These are different—and additional [to]—the duties of Member States to each other

[T]here is the duty to pay particular attention to the interests of those co-participants in the UK body-politic (EU citizens resident under EU law; UK citizens resident elsewhere under EU law; young citizens) whose voices were not heard in the referendum vote, and whose voices are also attenuated in the associated debates. One might have argued that only the ‘softest’ of Brexits, conserving as much as possible of the UK’s previous relationships with the EU and its Member States, could be an effective rejoinder to this particular challenge, but it has been clear at least since the date of Prime Minister May’s Lancaster House speech that this particular boat had sailed, with the UK Government determined to seek a rather sharper exit from the EU, with red lines being drawn, *inter alia*, around the issue of free movement of persons and the role of the European Court of Justice. . . .

CHALLENGES TO EXECUTIVE BRANCH AUTHORITY

When faced with a challenge to the legality of their actions, executive officials often seek immunity from judicial review or argue that deep deference from the courts is due. Are the concepts of judicial review of or insulation of the electoral process similar to deference for politically-authorized executive actions? And if deference is due, should it be broader for executive officials acting in sensitive or highly political contexts? Here, the examples come from courts in Germany and the United States asked to consider executive branch decisions to engage in military operations and to control immigration and from a case in North Carolina about judicial review of a legislature’s efforts to strip powers from the newly elected governor belonging to an opposing political party.

Deployment of German Soldiers Case

Federal Constitutional Court of Germany (Second Senate)

2 BvE 1/03 (2008)

[The Second Senate of the Federal Constitutional Court, with the participation of Justices Hassemer (Vice-President), Broß, Osterloh, Di Fabio, Mellinghoff, Lübbecke-Wolff, Gerhardt.]

1. The *Organstreit* proceedings (proceedings on a dispute between supreme federal bodies) relate to whether the deployment of German soldiers in NATO [Airborne Warning and Control System (AWACS)] aircraft to monitor airspace above the sovereign territory of Turkey required the approval of the German *Bundestag*. [The Federal Government had refused to apply for parliamentary approval before deploying soldiers of the Bundeswehr (German Federal Armed Forces) to as part of the NATO AWACS crew.] . . .

19. . . . [T]he Federal Constitutional Court . . . held [in 1994] that beyond the minimum conditions for and limits of the requirement of parliamentary approval, which could be inferred from this decision, the constitution did not contain detailed provisions on the procedure and the intensity of the involvement of the German *Bundestag*, and therefore it was a matter for the legislature to give more concrete shape to the form and the extent of parliamentary cooperation in deployments of the German army abroad [O]n 24 March 2005 the Act on Parliamentary Involvement in the Decision on the Deployment of Armed Forces Abroad entered into force; this Act contains more detailed provisions on the form and extent of parliamentary involvement. Pursuant to § 1.2 of the Act on the Involvement of Parliament, the deployment of armed German forces outside the area of application of the Basic Law (*Grundgesetz*—*GG*) requires the approval of the German *Bundestag*. The concept of deployment is defined by § 2 of the Act on the Involvement of Parliament as follows:

20. (1) A deployment of armed forces exists if soldiers of the Bundeswehr are involved in armed operations or an involvement in an armed operation is to be expected.

21. (2) Preparatory measures and planning are not a deployment in the meaning of this Act. They do not require the approval of the *Bundestag*. The same applies to humanitarian relief services and the rendering of assistance by the forces where arms are carried solely for the purpose of self-defence, if it is not to be expected that the soldiers will be involved in armed operations.

22. In addition, § 4.1 of the Act on the Involvement of Parliament provides that, in the case of “deployments of minor intensity and implications,” parliamentary approval may be granted in simplified proceedings. Under § 4.2 of the Act on the Involvement of Parliament, such deployments are those in which the number of

soldiers deployed is small, the deployment is, by reason of the other attendant circumstances, discernibly of lesser importance, and the deployment does not constitute participation in a war. . . .

23. In its application in the main action, the applicant petitions the court to find that the respondent has violated the rights of the German *Bundestag* by failing to obtain its approval for the deployment of German soldiers in measures of aerial surveillance for the protection of Turkey pursuant to the NATO decision of 19 February 2003. . . .

56. The application is well-founded. The respondent should have obtained the approval of the German *Bundestag* for the participation of German soldiers in measures of aerial surveillance of Turkey from 26 February to 17 April 2003 as part of the NATO Operation Display Deterrence, by reason of the requirement of parliamentary approval for the deployment of armed forces under the provisions of the Basic Law which concern defence. . . .

57. The Basic Law has entrusted the decision as to war or peace to the German *Bundestag* as the body representing the people. This is provided expressly for the determination of a state of defence and a state of tension (Article 115a.1, Article 80a.1 of the Basic Law) and in addition it applies in general to the deployment of armed forces, including deployments in systems of mutual collective security under the terms of Article 24.2 of the Basic Law.* From the totality of the provisions of the Basic Law

* The Basic Law of Germany provides:

Article 24 [Transfer of sovereign powers—System of collective security]: “. . . (2) With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world. . . .”

Article 59 [Representation of the Federation for the purposes of international law]: “(1) The Federal President shall represent the Federation for the purposes of international law. He shall conclude treaties with foreign states on behalf of the Federation. He shall accredit and receive envoys. (2) Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply *mutatis mutandis*.”

Article 80a [State of tension]: “(1) If this Basic Law or a federal law regarding defence, including protection of the civilian population, provides that legal provisions may be applied only in accordance with this Article, their application, except when a state of defence has been declared, shall be permissible only after the *Bundestag* has determined that a state of tension exists or has specifically approved such application. . . .”

Article 115a [Declaration of state of defence]: “(1) Any determination that the federal territory is under attack by armed force or imminently threatened with such an attack (state of defence)

which concern defence and against the background of German constitutional tradition since 1918, the Federal Constitutional Court has derived from the Basic Law a general principle that every deployment of armed forces requires the mandatory approval of the German *Bundestag*, which as a general rule should be given in advance. The provisions of the Basic Law that relate to the forces are designed not to leave the Bundeswehr as a potential source of power to the executive alone, but to integrate it as a “parliamentary army” into the constitutional system of a democratic state under the rule of law.

58. The requirement of parliamentary approval under the provisions of the Basic Law which concern defence creates an effective right of participation for the German *Bundestag* in matters of sovereign decisions relating to foreign affairs. Without parliamentary approval, a deployment of armed forces is as a general rule not permissible under the Basic Law; only in exceptional cases is the Federal Government entitled—in the case of imminent danger—to provisionally resolve the deployment of armed forces in order that the defence and alliance capacities of the Federal Republic of Germany are not called into question by the requirement of parliamentary approval. In such an exceptional case, however, the Federal Government must without delay refer the deployment resolved in this way to parliament and at the request of the *Bundestag* recall the forces. On the other hand, nor may the German *Bundestag* order a deployment of forces without the Federal Government, because the requirement of parliamentary approval is a reservation of consent which confers no power to initiate deployments. . . .

61. “Deployment of armed forces” is a constitutional concept the concretisation of which does not depend directly on the international-law basis of the specific deployment, and which can also not be bindingly concretised by a statute that is subordinate to the constitution, although the statutory formulation of the concept may in the individual case give indications as to its scope as laid down in the constitution itself. . . .

63. . . . [T]he substantive basis of the legitimation contained in Article 24.2 of the Basic Law [to allow individual deployment of forces as a consequence of joining integrated international forces] does not answer the question as to who on the domestic level is constitutionally to decide on such deployments. In the Basic Law, only Article 59.2 sentence 1 contains an express provision on the question hereby raised as to the competent body in the area of foreign affairs

69. German participation in the overall strategic direction of NATO and in decision-making as to specific deployments of the alliance is quite predominantly in

shall be made by the Bundestag with the consent of the Bundesrat. Such determination shall be made on application of the Federal Government and shall require a two-thirds majority of the votes cast, which shall include at least a majority of the Members of the Bundestag. . . .”

the hands of the Federal Government: this does not fundamentally conflict with the allocations of competencies by the Basic Law, which in the area of foreign affairs leave particular areas of freedom for the government, if only because this satisfies the principle that the allocation of functions should be appropriate to the bodies concerned. But the freedom of the Federal Government to structure its alliance policy does not include the decision as to who, on the domestic level, is to determine whether soldiers of the Bundeswehr will take part in a specific deployment that is decided in the alliance. By reason of the political dynamics of an alliance system, it is all the more important that the increased responsibility for the deployment of armed forces should lie in the hand of the body that represents the people.

70. . . . [T]he requirement of parliamentary approval under the provisions of the Basic Law which concern defence is in this connection an essential corrective to the limits of parliament's assumption of responsibility in the field of foreign security policy. When military force is exercised, the executive's broad sphere of influence in foreign affairs ends. When armed forces are deployed, the German *Bundestag* does not have the mere role of a body that only indirectly steers and monitors the situation, but instead is called upon to make fundamental, essential decisions; it bears the responsibility for armed foreign deployments of the Bundeswehr. To this extent, the Bundeswehr is a "parliamentary army," despite its command structure, which returns the military and operative leadership to the hands of the executive. The German *Bundestag* can preserve its legally relevant influence on the deployment of the forces only if it has an effective right of participation in the decision on the deployment of armed forces before the military operation commences and then becomes essentially a question of military expediency.

71. The use of armed force means not only a considerable risk for the life and health of German soldiers, but it also contains a potential for political escalation or possibly involvement: every deployment is capable of developing from a limited individual action into a larger and longer-lasting military conflict, up to an extensive war. The transition from diplomacy to force is accompanied by a corresponding change in the proportions of the internal division of powers. The requirement of parliamentary approval creates in this way a collaboration of parliament and government to decide on the deployment of armed forces; this does not fundamentally call into question the executive's own area of action and responsibility for foreign affairs allocated to it under constitutional law. For when it comes to deciding on the concrete particulars and the extent of individual deployments, the Federal Government retains sole competence, as it does for the coordination of the integration of forces in and with the institutions of international organisations. In this respect, the requirement of parliamentary approval under the provisions of the Basic Law which concern defence ensures that bodies have the appropriate competencies, particularly with regard to the participation of the opposition in free parliamentary debate, and in this way also makes it more easily possible for public opinion to decide on the political scope of the deployment in question. The appropriate division of state power in the

field of foreign affairs, with regard to systems of mutual collective security, is thus structured in such a way that parliament, through its participation in the decision, assumes fundamental responsibility for the treaty basis of the system on the one hand, and for the decision on the concrete deployment of armed forces on the other hand, whereas in other respects the specific structure of alliance policy, as responsibility for the concept, and concrete planning of deployments are both the responsibility of the Federal Government.

72. This division of responsibility between parliament and government has repercussions on the question as to how borderline cases of a potential deployment of armed forces are to be judged. This question cannot be answered in the light of areas of freedom for the executive to structure its policy or by arguing on the basis of mechanisms of the alliance, such as “alliance routine,” which was referred to by the respondent. In view of the function and importance of the requirement of parliamentary approval under the provisions of the Basic Law which concern defence, its scope may not be defined restrictively. Instead, the requirement of parliamentary approval, contrary to the opinion of the respondent as stated in the present proceedings, must in case of doubt be interpreted by the Federal Constitutional Court in favour of parliament. In particular, when the requirement of parliamentary approval applies, it may not be made substantially dependent on the political and military evaluations and prognoses of the Federal Government, invoking areas of freedom for the executive to structure its policy; the executive may be granted a prerogative of assessment only in urgent cases and thus only temporarily.

73. If and to the extent that competence of the German *Bundestag* in the form of a right of participation in decisions under the provisions of the Basic Law which concern defence can be derived from the Basic Law, there is necessarily no freedom for the Federal Government to decide on its own authority. Where there is an a priori doctrine of the separation of powers, it is impossible to derive from this autonomous areas of competence of the powers named in Article 20.2 sentence 2 of the Basic Law, i.e. areas of competence which are ultimately removed from review by a constitutional court. Consequently, merely invoking the topos of an executive with its own authority is unsuited to argue in favour of a restrictive interpretation of the requirement of parliamentary approval, and still less for rejecting the requirement of parliamentary approval on principle. The requirement of parliamentary approval is part of the structural principle of the separation of powers, not a mechanism to break down the barriers between them.

74. If German soldiers are involved in armed operations, this is a deployment of armed forces which under the Basic Law is permissible only on the basis of the essential approval of the German *Bundestag*. . . .

76. It is not relevant for the requirement of parliamentary approval under the provisions of the Basic Law which concern defence whether armed conflicts in the sense of combat have already taken place, but whether, in view of the specific context

of the deployment and the individual legal and factual circumstances, the involvement of German soldiers in armed conflicts is concretely to be expected and German soldiers are therefore already involved in armed operations. . . .

83. By this standard, the involvement of German soldiers in the aerial surveillance of Turkey by NATO from 26 February to 17 April 2003 was a deployment of armed forces which under the requirement of parliamentary approval under the provisions of the Basic Law which concern defence required the approval of the German *Bundestag*. Although no combat operations took place, German forces, in participating in this deployment, were involved in armed operations.

84. By carrying out aerial surveillance of Turkey in NATO AWACS aircraft, German soldiers took part in a military deployment in which there was tangible actual evidence of imminent involvement in armed operations. . . .

In the 1970s, the U.S. Supreme Court faced the question of the reviewability of military decisions related to the Vietnam War. One issue was the bombing of Cambodia in June 1973. Elizabeth Holtzman, a member of the U.S. House of Representatives from New York, brought a lawsuit against U.S. Secretary of Defense James Schlesinger in an effort to stop the bombings; she argued that they were not authorized by Congress and were therefore in violation of Article I, Section 8, Clause 11 of the U.S. Constitution, which provides that “[The Congress shall have Power . . .] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”

The District Court for the Eastern District of New York agreed; it granted summary judgment and issued an order enjoining the bombing campaign. The injunction was stayed by the Second Circuit, pending a decision on the merits. Holtzman then applied to Justice Thurgood Marshall, the Supreme Court justice assigned to the Second Circuit, for a stay. He refused, explaining that it “would be inappropriate for [him], acting as a single Circuit Justice, to vacate the order of the Court of Appeals.” He added that

the proper response to an arguably illegal action is not lawlessness by judges charged with interpreting and enforcing the laws. Down that road lies tyranny and repression. We have a government of limited powers, and those limits pertain to the Justices of this Court as well as to Congress and the Executive. Our Constitution assures that the law will ultimately prevail, but it also requires that the law be applied in accordance with lawful procedures.

Congresswoman Holtzman then applied to another justice, William O. Douglas, who ordered that the stay be lifted and the injunction be put into effect. He explained that

an application for stay denied by one Justice may be made to another. We do not, however, encourage the practice; and when the Term starts, . . . the practice is to refer the second application to the entire Court. . . . My Brother Marshall accurately points out that if the foreign policy goals of this Government are to be weighed the Judiciary is probably the least qualified branch to weigh them. . . . But this case in its stark realities involves the grim consequences of a capital case. . . . The merits of the present controversy are . . . to say the least, substantial, since denial of the application before me would catapult our airmen as well as Cambodian peasants into the death zone. I do what I think any judge would do in a capital case—vacate the stay entered by the Court of Appeals.

Thereafter, the government sought review by the full Court, and Justice Marshall wrote for seven justices, again leaving the stay in place; Justice Douglas dissented. *Schlesinger v. Holtzman*, 414 U.S. 1321 (1973). The Second Circuit subsequently held the case non-justiciable; its decision is excerpted below.

Holtzman v. Schlesinger

United States Court of Appeals for the Second Circuit
484 F.2d 1307 (2d Cir. 1973)

[Before William Hughes Mulligan, James L. Oakes and William H. Timbers, Circuit Judges.] . . .

Mulligan, Circuit Judge: . . .

At the outset, as the parties agreed below and on the argument on appeal, we should emphasize that we are not deciding the wisdom, the propriety or the morality of the war in Indo-China and particularly the on-going bombing in Cambodia. This is the responsibility of the Executive and the Legislative branches of the government. The role of the Judiciary is to determine the legality of the challenged action and the threshold question is whether under the “political question” doctrine we should decline even to do that. Ever since *Marbury v. Madison* (1803) the federal courts have declined to judge some actions of the Executive and some interaction between the Executive and Legislative branches where it is deemed inappropriate that the judiciary intrude. It is not possible or even necessary to define the metes and bounds of that doctrine here. The most authoritative discussion of the subject is found in . . . *Baker v. Carr* (1962) which elaborated criteria that have since guided this court in determining

whether a question involving the separation of powers is justiciable or is a political question beyond our purview. . . .

[T]he continuing bombing of Cambodia, after the removal of American forces and prisoners of war from Vietnam, represents “a basic change in the situation: which must be considered in determining the duration of prior Congressional authorization.” . . . [S]uch action [is] a tactical decision not traditionally confided to the Commander-in-Chief. These are precisely the questions of fact involving military and diplomatic expertise not vested in the judiciary, which make the issue political and thus beyond the competence of that court or this court to determine. We are not privy to the information supplied to the Executive by his professional military and diplomatic advisers and even if we were, we are hardly competent to evaluate it. If we were incompetent to judge the significance of the mining and bombing of North Vietnam’s harbors and territories, we fail to see our competence to determine that the bombing of Cambodia is a “basic change” in the situation and that it is not a “tactical decision” within the competence of the President. It is true that we have repatriated American troops and have returned American ground forces in Vietnam but we have also negotiated a cease fire and have entered into the Paris Accords which mandated a cease fire in Cambodia and Laos. The President has announced that the bombing of Cambodia will terminate on August 15, 1973 and Secretary of State Rogers has submitted an affidavit to this court providing the justification for our military presence and action until that time. The situation fluctuates daily and we cannot ascertain at any fixed time either the military or diplomatic status. We are in no position to determine whether the Cambodian insurgents are patriots or whether in fact they are inspired and manned by North Vietnam Communists. While we as men may well agonize and bewail the horror of this or any war, the sharing of Presidential and Congressional responsibility particularly at this juncture is a bluntly political and not a judicial question. . . .

[T]he return and repatriation of American troops only represents the beginning and not the end of the inquiry as to whether such a basic change has occurred that the Executive at this stage is suddenly bereft of power and authority. That inquiry involves diplomatic and military intelligence which is totally absent in the record before us, and its digestion in any event is beyond judicial management. The strictures of the political question doctrine cannot be avoided by resort to the law of agency as the court did below, finding the Congress the principal and the President an agent or servant. Judicial *ipse dixit* cannot provide any proper basis particularly for the injunctive relief granted here which is unprecedented in American Jurisprudence. . . .

Oakes, Circuit Judge (dissenting): . . .

There is here “a manageable standard” . . . since there has been such a “radical change in the character of war operations.” The Defense Department is continuing to bomb in Cambodia despite the cease-fire in Vietnam and despite the return of our prisoners of war from North Vietnam. The justiciable question then is whether there is

any Constitutional authorization for the employment of United States armed forces over Cambodia, now that the war in Vietnam has come to an end. There is no question under the law of this Circuit . . . that the Executive lacks unilateral power to commit American forces to combat absent a “belligerent attack” or “a grave emergency.”

Has Congress ratified or authorized the bombing in Cambodia by appropriations acts or otherwise? Congress can confer power on the Executive by way of an appropriations act. And this Circuit has expressly held that congressional authorization for the war in Vietnam may be found in appropriations acts. . . .

It can be argued that Congress could, if it had so desired, cut off the funds for bombing Cambodia immediately by overriding the Presidential veto. This was indeed championed by those voting against the ultimate compromise Resolution. But it does not follow that those who voted in favor of the Resolution were thereby putting the Congressional stamp of approval on the bombing continuation. While the Resolution constituted a recognition that Executive *power* was being exercised, it did not constitute a concession that such exercise was rightful, lawful or constitutional.

It may be that those voting for the Resolution thought that in some way previous appropriations acts or the omission expressly to prohibit a continuation of bombing after the cease-fire and return of our prisoners of war amounted to an authorization, which could only be limited by affirmative congressional action. But as I have previously suggested I cannot find any express congressional authorization for such a continuation of the Cambodian bombing, nor do I think that authorization can be implied from prior appropriations acts. This being true, affirmative action on the part of Congress was not necessary as a matter of constitutional law. An agreement by the Executive to some cut-off date was essential, however, because the *legality* of bombing continuation might not be tested or testable for months to come, by the very nature of the judicial process. Therefore, Congress as I see it, took the only practical way out. It acknowledged the reality of the Executive’s exercise of power even while it disputed the Executive’s authority for that exercise. It agreed to a final cut-off date as the best practical result but never conceded the legality or constitutionality of interim exercise.

Thus the Resolution of July 1, 1973 cannot be the basis for legalization of otherwise unlawful Executive action. We are talking here about the separate branches of government, and in doing so we must distinguish between the exercise of power on the one hand and authorization for such exercise on the other. That the Executive Branch had the power to bomb in Cambodia, there can be no doubt; it did so, and indeed is continuing to do so. Whether it had the constitutional authority for its action is another question.

If we return to fundamentals, as I think we must in the case of any conflict of view between the other two Branches of Government, it will be recalled that the Founding Fathers deliberately eschewed the example of the British Monarchy in

which was lodged the authority to declare war and to raise and regulate fleets and armies. *See* The Federalist No. 69 ([Alexander] Hamilton). Rather, these powers were deliberately given to the Legislative Branch of the new American Republic in Article I, section 8 of the Constitution. I fail to see, and the Government in its able presentation has failed to point out, where the Congress ever authorized the continuation of bombing in Cambodia after the cease-fire in Vietnam, the withdrawal of our forces there, and the return of our prisoners of war to our shores. . . .

In the excerpt below, Texas challenged the authority of President Obama to defer the deportation of large numbers of undocumented immigrants. The President defended his decision as within the scope of his executive and prosecutorial discretion. Texas prevailed in the lower courts, and the U.S. Supreme Court, then sitting as an eight-justice bench, affirmed by an equally divided court. *Texas v. United States*, 136 S. Ct. 2271 (2016).

Texas v. United States
United States Court of Appeals for the Fifth Circuit
809 F.3d 134 (5th Cir. 2015)

[Before Carolyn D. King, Jerry E. Smith, and Jennifer W. Elrod, Circuit Judges.]

Jerry E. Smith, Circuit Judge:

The United States appeals a preliminary injunction, pending trial, forbidding implementation of the Deferred Action for Parents of Americans and Lawful Permanent Residents program (“DAPA”). Twenty-six states (the “states”) challenged DAPA under the Administrative Procedure Act (“APA”) and the Take Care Clause of the Constitution; in an impressive and thorough Memorandum Opinion and Order issued February 16, 2015, the district court enjoined the program on the ground that the states are likely to succeed on their claim that DAPA is subject to the APA’s procedural requirements.

The government appealed and moved to stay the injunction pending resolution of the merits. After extensive briefing and more than two hours of oral argument, a motions panel denied the stay after determining that the appeal was unlikely to succeed on its merits. Reviewing the district court’s order for abuse of discretion, we affirm the preliminary injunction because the states have standing; they have established a substantial likelihood of success on the merits of their procedural and substantive APA claims; and they have satisfied the other elements required for an injunction. . . .

In June 2012, the Department of Homeland Security (“DHS”) implemented the Deferred Action for Childhood Arrivals program (“DACA”). In the DACA Memo to agency heads, the DHS Secretary “set[] forth how, in the exercise of . . . prosecutorial discretion, [DHS] should enforce the Nation’s immigration laws against certain young people” and listed five “criteria [that] should be satisfied before an individual is considered for an exercise of prosecutorial discretion.” The Secretary further instructed that “[n]o individual should receive deferred action . . . unless [the individual] first pass[es] a background check and requests for relief . . . are to be decided on a case by case basis.” Although stating that “[f]or individuals who are granted deferred action . . . [U.S. Citizenship and Immigration Services (‘USCIS’)] shall accept applications to determine whether these individuals qualify for work authorization,” the DACA Memo purported to “confer[] no substantive right, immigration status or pathway to citizenship.” At least 1.2 million persons qualify for DACA, and approximately 636,000 applications were approved through 2014.

In November 2014, by what is termed the “DAPA Memo,” DHS expanded DACA by making millions more persons eligible for the program and extending “[t]he period for which DACA and the accompanying employment authorization is granted . . . to three-year increments, rather than the current two-year increments.” The Secretary also “direct[ed] USCIS to establish a process, similar to DACA,” known as DAPA, which applies to “individuals who . . . have, [as of November 20, 2014], a son or daughter who is a U.S. citizen or lawful permanent resident” and meet five additional criteria. The Secretary stated that, although “[d]eferred action does not confer any form of legal status in this country, much less citizenship[,] it [does] mean[] that, for a specified period of time, an individual is permitted to be *lawfully present* in the United States.” Of the approximately 11.3 million illegal aliens in the United States, 4.3 million would be eligible for lawful presence pursuant to DAPA. . . .

The states sued to prevent DAPA’s implementation on three grounds. First, they asserted that DAPA violated the procedural requirements of the APA as a substantive rule that did not undergo the requisite notice-and-comment rulemaking. Second, the states claimed that DHS lacked the authority to implement the program even if it followed the correct rulemaking process, such that DAPA was substantively unlawful under the APA. Third, the states urged that DAPA was an abrogation of the President’s constitutional duty to “take Care that the Laws be faithfully executed.” . . .

The government maintains that judicial review is precluded even if the states are proper plaintiffs. “Any person ‘adversely affected or aggrieved’ by agency action . . . is entitled to ‘judicial review thereof,’ as long as the action is a ‘final agency action for which there is no other adequate remedy in a court.’” . . . “But [under U.S. Supreme Court precedent,] before any review at all may be had, a party must first clear the hurdle of 5 U.S.C. § 701(a). That section provides that the chapter on judicial review ‘applies, according to the provisions thereof, except to the extent that—(1)

statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.”

“[T]here is a ‘well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action,’ and we will accordingly find an intent to preclude such review only if presented with ‘clear and convincing evidence.’” The “‘strong presumption’ favoring judicial review of administrative action . . . is rebuttable: It fails when a statute’s language or structure demonstrates that Congress wanted an agency to police its own conduct.”

Establishing unreviewability is a “heavy burden,” and “where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling.” “Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.”

The United States relies on 8 U.S.C. § 1252(g) for the proposition that the [Immigration and Naturalization Act (INA)] expressly prohibits judicial review. But . . . the Court rejected “the unexamined assumption that § 1252(g) covers the universe of deportation claims—that it is a sort of ‘zipper’ clause that says ‘no judicial review in deportation cases unless this section provides judicial review.’” The Court emphasized that § 1252(g) is not “a general jurisdictional limitation,” but rather “applies only to three discrete actions that the Attorney General may take: her ‘decision or action’ to ‘commence proceedings, *adjudicate* cases, or *execute* removal orders.’”

None of those actions is at issue here—the states’ claims do not arise from the Secretary’s “decision or action . . . to commence proceedings, adjudicate cases, or execute removal orders against any alien”; instead, they stem from his decision to grant lawful presence to millions of illegal aliens on a class-wide basis. Further, the states are not bringing a “cause or claim by or on behalf of any alien”—they assert their own right to the APA’s procedural protections. Congress has expressly limited or precluded judicial review of many immigration decisions, including some that are made in the Secretary’s “sole and unreviewable discretion,” but DAPA is not one of them. . . .

The Secretary has broad discretion to “decide whether it makes sense to pursue removal at all” and urges that deferred action—a grant of “lawful presence” and subsequent eligibility for otherwise unavailable benefits—is a presumptively unreviewable exercise of prosecutorial discretion. “The general exception to reviewability provided by § 701(a)(2) for action ‘committed to agency discretion’ remains a narrow one, but within that exception are included agency refusals to institute investigative or enforcement proceedings, unless Congress has indicated otherwise.” Where, however, “an agency *does* act to enforce, that action itself

provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers.” . . .

Deferred action . . . is much more than nonenforcement: It would affirmatively confer “lawful presence” and associated benefits on a class of unlawfully present aliens. Though revocable, that change in designation would trigger (as we have already explained) eligibility for federal benefits—for example, under title II and XVIII of the Social Security Act—and state benefits—for example, driver’s licenses and unemployment insurance—that would not otherwise be available to illegal aliens. . . .

Revocability, however, is not the touchstone for whether agency action is reviewable. Likewise, to be reviewable agency action, DAPA need not directly confer public benefits—removing a categorical bar on receipt of those benefits and thereby making a class of persons newly eligible for them “provides a focus for judicial review.”

Moreover, if deferred action meant only nonprosecution, it would not necessarily result in lawful presence. “[A]lthough prosecutorial discretion is broad, it is not ‘unfettered.’” Declining to prosecute does not transform presence deemed unlawful by Congress into lawful presence and confer eligibility for otherwise unavailable benefits based on that change. Regardless of whether the Secretary has the authority to offer lawful presence and employment authorization in exchange for participation in DAPA, his doing so is not shielded from judicial review as an act of prosecutorial discretion. . . .

Under DAPA, “[d]eferred action . . . means that, for a specified period of time, an individual is permitted to be *lawfully present* in the United States,” a change in designation that confers eligibility for substantial federal and state benefits on a class of otherwise ineligible aliens. Thus, DAPA “provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers.” . . .

“The mere fact that a statute grants broad discretion to an agency does not render the agency’s decisions completely unreviewable under the ‘committed to agency discretion by law’ exception unless the statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised.” . . .

[T]he government’s limitless reading of [the INA]—allowing for the issuance of employment authorizations to any class of illegal aliens whom DHS declines to remove—is beyond the scope of what the INA can reasonably be interpreted to authorize, as we will explain. And even assuming, *arguendo*, that the government does

have that power, Texas is also injured by the grant of lawful presence itself, which makes DAPA recipients newly eligible for state-subsidized driver's licenses. As an affirmative agency action with meaningful standards against which to judge it, DAPA is not an unreviewable "agency action . . . committed to agency discretion by law." . . .

The government urges that this case is not justiciable even though "a federal court's 'obligation' to hear and decide cases within its jurisdiction is 'virtually unflagging.'" We decline to depart from that well-established principle. And in invoking our jurisdiction, the states do not demand that the federal government "control immigration and . . . pay for the consequences of federal immigration policy" or "prevent illegal immigration."

Neither the preliminary injunction nor compliance with the APA requires the Secretary to enforce the immigration laws or change his priorities for removal, which have expressly not been challenged. Nor have the states "merely invited us to substitute our judgment for that of Congress in deciding which aliens shall be eligible to participate in [a benefits program]." DAPA was enjoined because the states seek an opportunity to be heard through notice and comment, not to have the judiciary formulate or rewrite immigration policy. "Consultation between federal and state officials is an important feature of the immigration system," and the notice-and-comment process, which "is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making," facilitates that communication.

At its core, this case is about the Secretary's decision to change the immigration classification of millions of illegal aliens on a class-wide basis. The states properly maintain that DAPA's grant of lawful presence and accompanying eligibility for benefits is a substantive rule that must go through notice and comment, before it imposes substantial costs on them, and that DAPA is substantively contrary to law. The federal courts are fully capable of adjudicating those disputes. . . .

[The court affirmed the order granting the preliminary injunction against DAPA on the grounds that Texas had established a substantial likelihood of success on its claim that DAPA must be submitted for notice and comment, that DAPA was an unreasonable interpretation that is manifestly contrary to the INA, and that Texas had shown a substantial threat of irreparable injury if the injunction were not issued.]

The government claims that the nationwide scope of the injunction is an abuse of discretion and requests that it be confined to Texas or the plaintiff states. But the Constitution requires "an *uniform* Rule of Naturalization"; Congress has instructed that "the immigration laws of the United States should be enforced vigorously and *uniformly*"; and the Supreme Court has described immigration policy as "a comprehensive and *unified* system." Partial implementation of DAPA would "detract[] from the 'integrated scheme of regulation' created by Congress," and there is a substantial likelihood that a geographically-limited injunction would be ineffective

because DAPA beneficiaries would be free to move among states. . . . The district court did not err and most assuredly did not abuse its discretion. The order granting the preliminary injunction is affirmed.

[Judge King dissented on the grounds that this case should be dismissed because prosecutorial discretion is unreviewable, and even if the case were reviewable, the discretion to adopt the DAPA Memo did not need to go through notice and comment, nor did it violate the INA.] . . .

Cooper v. Berger

Superior Court of North Carolina, Wake County
2017 WL 1433245 (N.C. Super. March 17, 2017)

Jesse B. Caldwell, Judge. Honorable L. Todd Burke, Judge. Honorable Jeffrey B. Foster, Judge. . . .

Session Law 2016-125 was signed into law by Governor Pat McCrory on December 16, 2016. Session Law 2016-126 was signed into law by Governor McCrory on December 19, 2016.

[Plaintiff was the Governor-Elect at the time of filing a complaint and is the current Governor of North Carolina.] . . . [The governor] challenges the constitutionality of Part I of Session Law 2016-125 [the Board of Elections Amendments], which reorganizes two statutorily-created bodies, the State Board of Elections (the “Board of Elections”) and the State Ethics Commission (the “Ethics Commission”), into one independent, regulatory and quasi-judicial body, the Bipartisan State Board of Elections and Ethics Enforcement (the “Bipartisan Board”). . . .

While legislative enactments do enjoy a presumption of constitutionality, “it is the duty of the courts to determine the meaning of the requirements of our Constitution. When a government action is challenged as unconstitutional, the courts have a duty to determine whether that action exceeds constitutional limits.”

This Court must apply “every reasonable presumption that the legislature as the lawmaking agent of the people has not violated the people’s Constitution[.]” “[T]he burden of proof is on the challenger, and the statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground.” . . .

9. This Court concludes that . . . the State Board of Elections and the New State Board are “housed in the executive branch of government. . . .”

10. . . . The State Board of Elections—and the New State Board under the Board of Elections Amendments—is *primarily* administrative or executive in character. . . .

12. The fact that the Board of Elections Amendments describe the New State Board as “an independent regulatory and quasi-judicial agency” does not change the actual nature of the State Board. . . .

14. The “powers and duties” detailed under N.C. Gen. Stat. § 143B-10 include eight express references to required approval by, or reporting to, the Governor.

15. . . . [B]ecause the New State Board is primarily executive in nature, the Governor “must have enough control over [the appointees] to perform his constitutional duty,” to faithfully execute the laws.

16. Because the powers of the State Board are contained within the executive branch, a constitutional violation of the Separation of Powers clause occurs if the Board of Elections Amendments “prevent” the Governor “from performing [his] constitutional duties.” . . .

18. The Court concludes that under the Board of Elections Amendments, the Governor will have inadequate control over the New State Board.

19. Under the Board of Elections Amendments, all appointees to the New State Board will be appointed by the General Assembly and will serve until June 30, 2017. Only the General Assembly—and not the Governor—will be permitted to remove such members, and only for “misfeasance, malfeasance, or nonfeasance.”

20. Even with the July 1, 2017 appointments, the Court concludes that the Governor is prevented from controlling the New State Board, as required by the separation of powers clause, Art. I, § 6, the executive powers clause, Art. III, § 3, and faithful execution clause, Art. III, § 5(4) of North Carolina Constitution.

21. Specifically, the Governor only appoints four of eight members of the New State Board, while six of eight members are required to take any action. The Governor does not have the power to remove all eight members (or even six), but instead may only remove the four members that he appoints. Any three members of the New State Board may block any board action or investigation—meaning only three of the four legislative members can vote to prevent the board from acting. . . .

23. Because they reserve too much control in the legislature—and thus block the Governor from ensuring faithful execution of the laws—the Court concludes that the Board of Elections Amendments are unconstitutional. . . .

* * *

On April 25, 2017, the North Carolina General Assembly repealed the Board of Elections Amendments enjoined in the decision above and, over Governor Cooper’s veto, enacted a new law that created a Bipartisan State Board of Elections and Ethics Enforcement. The new law differed in that it permitted all eight members of the Board to be “appointed by the Governor,” although it also specified that “the Governor shall appoint four members each from a list of six nominees submitted by the State party chairs of the two political parties with the highest number of registered affiliates, as reflected by the latest registration statistics published by the State Board.” In addition, the law required that four members “shall be of the political party with the highest number of registered affiliates” and four members “shall be of the political party with the second highest number of registered affiliates.” On April 27, 2017, Governor Cooper filed a lawsuit challenging the new law’s constitutionality and seeking injunctive relief. On June 1, 2017, the same three-judge panel that found the previous Board of Elections Amendments unconstitutional dismissed the new lawsuit pursuant to N.C. Gen. Stat. § 1-A-1, Rule 12(b)(1), which permits a court to dismiss a claim for lack of jurisdiction. The court’s brief order did not explain how the two cases differed. Governor Cooper moved for a stay pending appeal, but the court denied the motion in a June 15, 2017 order.

REFLECTIONS ON JUDICIAL REVIEW AND CONCEPTS OF SOVEREIGNTY

We conclude with three reflections on judicial review and popular sovereignty. Alec Stone Sweet’s 2000 book addresses judicial review in Europe. Tom Ginsburg’s 2003 essay recounts how national and international courts expanded review of the constitutionality of parliamentary statutes, thereby limiting parliamentary sovereignty. Robert Post and Reva Siegel’s 2007 article focuses on the role of social movements in framing the function of courts.

Governing with Judges: Constitutional Politics in Europe

Alec Stone Sweet (2000)*

. . . One important measure of the social legitimacy of constitutional review is the extent to which review has provoked normative discourse. In Europe, constitutional courts have drawn an ever-widening range of actors, public and private, into participating in, and perpetuating, that discourse. Although I have argued that each set of actors participates in constitutional politics with different purposes in mind, the core activities of each tends to push for more, not less, constitutional review, and for more, not less, rule-governed discourse. The result is that constitutional review process function as permanently constituted forums for the construction of the constitutional law. . . .

This process of constructing the law, represented [in a figure] as the line moving from left to right, involves three sets of actors: litigants, judges, and legal scholars. As we move from left to right, the nature of the normative discourse changes. Litigation activity, the far left-hand pole, requires that self-interests—private or partisan—be expressed as legal interests; the discourse is overtly instrumental. Doctrinal activity, the far right-hand pole, produces a relatively ‘pure’ normative discourse, as divorced as possible from socio-political interests. Judges co-ordinate abstract rule structures and concrete disputes and, in doing so, build the constitutional law. Litigants keep the law open, and legal scholars work to close it. The court is advantaged by both activities. To use an analogy, litigation pours in, turning the mill; constitutional judges operate the mill, separating the wheat from the chaff; and legal scholars produce neat loaves that are easily stacked. . . .

I consider each of these stages to be equally, and profoundly, political processes. Governance is, in my view, how rules are adapted to the experiences and exigencies of those who live under them. If political scientists have reason to care about how rules are produced and stabilized within social systems like political systems, [then] they have reason to take seriously the sources and consequences of normative deliberations. . . .

Separation of powers ideologies, of course, are less suited to the accurate description of how the world of government actually works than they are to putting in order that (potentially chaotic) world. Moreover, they ground arguments designed to secure the legitimacy of public authority, including the judicial. Nevertheless, I have argued in this chapter that traditional, Continental separation of powers notions provide an inherently weak basis for discussions about the political legitimacy of constitutional review. I conclude by sketching three different ways to conceptualize

* Excerpted from ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* (Oxford University Press 2000).

the legitimacy of the constitutional judge, each of which admits (at least partly) the policy-making consequences of constitutional review.

The first is drawn from the logic of delegation and hierarchy of laws notions. [Hans] Kelsen argued that the exercise of constitutional review could effectively operate not to obstruct but to legitimize the work of the legislature, but only if constitutional judges were not given jurisdiction over rights provisions. There existed no logical means, he demonstrated, for judges to defend rights without at the same time supplanting the legislator. Kelsen's prognosis was correct: if Europeans wish to have judicially enforceable rights then they must accept that constitutional judges will fully participate in the legislative function. It follows that the legitimacy of constitutional rule-making is ultimately tied to the legitimacy of rights provisions. The calculus: is the polity better off without constitutional rights?; and should legislators alone decide how constitutional rights are to be enjoyed and protected in law? The answer to both questions, in most of Europe today, is a clear and resolute *No*.

Second, if we accept that constitutional judges behave as adjunct legislators, that this is a core component of their job description, provided for by the constitution, then legitimacy issues are recast in important ways. Most debates about the legitimacy of constitutional review are debates about whether or not constitutional courts behave as 'judicial bodies' are expected to behave, that is, as adjudicators (applying pre-existing law to resolve disputes) not law-makers; and these expectations are derived from outmoded separation of powers schemes. But constitutional courts were neither meant, nor originally intended, to be 'judicial bodies' traditionally conceived (which is not to say that the ordinary courts make less law than do constitutional courts). The founders recognized the mixed politico-legal nature of these new jurisdictions, just as they recognized the mixed nature of constitutional law. Constitutional courts were instead expected to participate in the legislative function. . . .

The Decline and Fall of Parliamentary Sovereignty

Tom Ginsburg (2003)*

. . . The ideal of limited government, or constitutionalism, is in conflict with the idea of parliamentary sovereignty. This tension is particularly apparent where constitutionalism is safeguarded through judicial review. One governmental body, unelected by the people, tells an elected body that its will is incompatible with fundamental aspirations of the people. This is at the root of the "countermajoritarian difficulty," which has been the central concern of normative scholarship on judicial review for the past three decades.

* Excerpted from Tom Ginsburg, *Introduction: The Decline and Fall of Parliamentary Sovereignty*, in *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* (Cambridge University Press 2003).

Although the postwar constitutional drafting choices in Europe dealt parliamentary sovereignty a blow, the idea retained force in terms of political practice. More often than not, the idea was used by undemocratic regimes. Marxist theory was naturally compatible with parliamentary sovereignty and incompatible with notions of constitutional, limited government. Similarly, new nations in Africa and Asia reacting to colonialism often dressed their regimes in the clothes of popular sovereignty, though oligarchy or autocracy were more often the result.

Today, in the wake of a global “wave” of democratization, parliamentary sovereignty is a waning idea, battered by the legacy of its affiliation with illiberalism. Judicial review has expanded beyond its homeland in the United States and has made strong inroads in those systems where it was previously alleged to be anathema. From France to South Africa to Israel, parliamentary sovereignty has faded away. We are in the midst of a “global expansion of judicial power,” and the most visible and important power of judges is that of judicial review.

Even in Britain, the homeland of parliamentary sovereignty and the birthplace of constitutional government, there have been significant incursions into parliamentary rule. There have been two chief mechanisms, one international and the other domestic. The first mechanism is the integration of Britain into the Council of Europe and the European Union (EU), which has meant that supranational law courts are now regularly reviewing British legislation for compatibility with international obligations. . . . More recently the incorporation of the European Convention of Human Rights into United Kingdom domestic law by the Human Rights Act 1998 has led to greater involvement of courts in considering the “constitutionality” of parliamentary statutes (and administrative actions) under the guise of examining compatibility with Convention requirements. . . .

Roe Rage: Democratic Constitutionalism and Backlash

Robert Post and Reva Siegel (2007)*

. . . We propose a model that we call “democratic constitutionalism” to analyze the understandings and practices by which constitutional rights have historically been established in the context of cultural controversy. Democratic constitutionalism views interpretive disagreement as a normal condition for the development of constitutional law.

The premise of democratic constitutionalism is that the authority of the Constitution depends on its democratic legitimacy, upon the Constitution’s ability to inspire Americans to recognize it as *their* Constitution. This belief is sustained by

* Excerpted from Robert Post and Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW 373 (2007).

traditions of popular engagement that authorize citizens to make claims about the Constitution's meaning and to oppose their government—through constitutional lawmaking, electoral politics, and the institutions of civil society—when they believe that it is not respecting the Constitution. Government officials, in turn, both resist and respond to these citizen claims. These complex patterns of exchange have historically shaped the meaning of our Constitution.

Courts play a special role in this process. Courts exercise a distinctive form of authority to declare and enforce rights, which they enjoy by virtue of the Constitution and the norms of professional legal reason that they employ. Citizens look to courts to protect important social values and to constrain government whenever it exceeds constitutional limitations. Yet judicial authority to enforce the Constitution, like the authority of all government officials, ultimately depends on the confidence of citizens. If courts interpret the Constitution in terms that diverge from the deeply held convictions of the . . . people, [the people] will find ways to communicate their objections and resist judicial judgments. . . .

Democratic constitutionalism analyzes the practices employed by citizens and government officials to reconcile these potentially conflicting commitments. Such practices are everywhere around us. Through multiple channels, some explicit and others implicit, Americans have historically mobilized for and against legal efforts to enforce the Constitution. Courts exercising professional legal reasoning resist and at times respond to popular claims on the Constitution. . . .

Because traditional scholarship has tended to confuse the Constitution with judicial decisionmaking, it has imagined resistance to courts as a threat to the Constitution itself. This is a mistake. To criticize a judicial decision as betraying the Constitution is to speak from a normative identification *with* the Constitution. Citizens who invoke the Constitution to criticize courts associate the Constitution with understandings they find normatively compelling and believe to be binding on others. When citizens speak about their most passionately held commitments in the language of a shared constitutional tradition, they invigorate that tradition. In this way, even resistance to judicial interpretation can enhance the Constitution's democratic legitimacy. . . .

Democratic constitutionalism thus offers a fresh perspective on the potentially constructive effects of backlash. This is not the common view in the legal academy, where law-abidingness and deference to professionals are generally prized. Backlash challenges the presumption that citizens should acquiesce in judicial decisions that speak in the disinterested voice of law. Backlash twice challenges the authority of this voice. In the name of a democratically responsive Constitution, backlash questions the autonomous authority of constitutional law. And in the name of political self-ownership, backlash defies the presumption that lay citizens should without protest defer to the constitutional judgments of legal professionals.

These two challenges go to the core of judicial review. Judges regularly assert the authority of their constitutional judgments by invoking the distinction between law and politics. They rely on professional legal reason to separate law from politics. If judges appear to yield to political pressure, the public may lose confidence in the authority of courts to declare constitutional law. . . . Backlash expresses the desire of a free people to influence the content of their Constitution, yet backlash also threatens the independence of law. Backlash is where the integrity of the rule of law clashes with the need of our constitutional order for democratic legitimacy. . . .

[T]he model of democratic constitutionalism . . . [provides] a lens through which to understand the structural implications of this conflict. We theorize the unique traditions of argument by which citizens make claims about the Constitution's meaning and the specialized repertoire of techniques by which officials respond to these claims. Democratic constitutionalism describes how our constitutional order actually negotiates the tension between the rule of law and self-governance. It shows how constitutional meaning bends to the insistence of popular beliefs and yet simultaneously retains integrity as law. . . .

DISASSOCIATION

DISCUSSION LEADERS

HAROLD HONGJU KOH, DIETER GRIMM, AND FRANK IACOBUCCI

III. DISASSOCIATION

DISCUSSION LEADERS:

HAROLD HONGJU KOH, DIETER GRIMM, AND FRANK IACOBUCCI

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We suddenly find ourselves living in a world of global disassociation. After nearly a century of multilateral organization-building, we face a spate of dissociative activity. This trend raises questions at both a domestic and an international level. In this chapter, we first look at a domestic level and ask when, if ever, an executive branch has authority to withdraw unilaterally from a treaty or international institution. Then, we look at an international level: under what circumstances may a nation withdraw its consent to be bound by the terms of a treaty? The third segment looks at secession: what are the differences between disassociation from an international organization and secession from within a constitutional system? In all of these segments, the questions involve the political authority needed for withdrawal, whether by executive action, legislation, or popular referenda. Another important question is whether all of the entities once connected have independent authority in the decision to disentangle.

Secession and Nullification as a Global Trend

Ran Hirschl (2016)*

Much has been written about the global convergence on constitutional supremacy, perhaps even the emergence of a global constitutional order, and the corresponding rise of an Esperanto-like universal constitutional discourse, primarily visible in the context of rights. The ever-accelerating advance of these trends may be linked to broader trends of universalism, globalization, post-nationalism and the corresponding erosion of the local and the particular. Yet, a closer look suggests that while these convergence trends are undoubtedly extensive and readily visible, expressions of constitutional resistance or defiance in the form of secessionism and nullification may in fact be regaining ground worldwide.

From the so-called “Brexit” referendum in Britain to all-out secessionist movements in Scotland, Catalonia, or Kurdistan, separatist sentiments are enjoying something of a heyday, rather than a decline, worldwide. And from Russia to Canada to the European Union (EU), the notion of an issue-based withdrawal from the overarching federal pact—what is often referred to in American constitutional thought as nullification—is commonly invoked. In fact, core elements of the “Quebec vs. Canada” constitutional saga, the struggle over the place of Chechnya in the Russian Federation, or the landmark German Federal Constitutional Court rulings on the constitutional status of Germany in relation to the Treaty of Maastricht or the Lisbon Treaty address the question of sub-national (or sub-supranational) constitutional sovereignty and the right to override centralizing legislative and regulatory authority.

* Excerpted from Ran Hirschl, *Secession and Nullification as a Global Trend*, 2 CONSTITUTIONAL STUDIES 23 (2016).

Whereas at first glance the reemergence of such sentiments appears counter-intuitive in an age of apparent globalization, it may actually reflect a predictable reaction to, perhaps even a backlash against, powerful global convergence vectors. When understood against the backdrop of formidable centripetal forces of political, cultural, and economic globalization, the rise of a new trans-national constitutional order and judicial class and the corresponding decrease in the autonomy of “Westphalian” constitutionalism, as well as an ever-increasing deficit of democratic legitimacy, counter pressures for preserving a given sub-national unit’s, region’s, or community’s unique constitutional legacy, cultural-linguistic heritage, and political voice seem destined to intensify, not to decline. Secession and nullification may thus be viewed as a reaction against the centralization of authority and the decline of the local in an increasingly—constitutionally and otherwise—universalized reality. . . .

Contrary to what many globalists and post-nationalists predicted or wished, not only have separatist impulses and aspirations failed to vanish, but have instead gained renewed momentum worldwide. Within barely a few weeks during the autumn of 2014, nearly half of Scottish voters expressed their desire for independence in a widely publicized referendum while Ukraine’s leadership acknowledged the de-facto separation of the Donbas region. The Minsk Accord (2015) facilitated the granting of a special autonomous status to that region. Meanwhile, protestors in Hong Kong took to the streets demanding more political autonomy for the territory, just as opposition groups in Malaysia’s Sabah and Sarawak region (formerly East Malaysia) resurrected partition claims. A Walloon-led coalition government was finally formed in Belgium after the country had functioned five months (and for the second time in several years) without an elected government, during which time the Flemish nationalist N-VA party headed the Flanders regional government.

After government officials in Madrid turned to the Spanish Constitutional Court to successfully prevent a plebiscite on separation in Catalonia from taking place, in an explicit act of defiance—some might call it “nullification”—the government of Catalonia proceeded with a non-binding referendum. In September 2015, the separatist “Together for Yes” (JxSi) coalition won the Catalan regional elections, garnering approximately 40% of the popular vote. In short, secessionist movements are many, and spread in literally four corners of the world; the quest for subnational political autonomy is very much alive. In fact, it is hard to identify more than a handful of countries that have not witnessed secessionist upheaval of one sort or another during their history as independent polities. . . .

Nullification—the idea that sub-national units can, and perhaps even ought to, refuse to enforce federal laws that they deem unconstitutional—is a somewhat different impulse within the broad class of separatist political voices. It lies in the fuzzy conceptual area between calls for all-out secession on the one hand and common displeasure expressed by sub-national units against unwelcome federal policies, laws and regulations on the other. It is a recalcitrant gesture against central political

authority by people who nevertheless do not want to slam the door shut on a political union or entity. Nullification, at least in its “classical” meaning, is the argument that a sub-national unit can declare legislation or a judicial decision from the central authority “null and void” because, according to the unit, such a decision violates the constitution regardless of whether or not the legitimate federal legislature and apex court of that polity consider it valid. It reflects a strong belief in subsidiarity (or its relatives: “states’ rights” or “the states preceded the Union,” “compound theory” and “dual federalism”) as a core principle of political confederations and the source of constitutional sovereignty and authority more broadly. Nullification also bodes well with sentiments of “distinct society,” authentic “local traditions” or “community values” that are dear to the unit’s heart, and an overarching disdain for the supposedly elitist, inattentive, and detached central government. Nullification arguments are not invoked with respect to every disagreement between a sub-unit and a central authority; they are reserved for situations where a given sub-unit objects to a supposedly intrusive, centrally-imposed regulatory measure that is perceived to illegitimately infringe on an inviolable constitutional principle or belief indispensable to the sub-unit’s fundamental identity. . . .

Oftentimes, nullification-like sentiments arise in certain sub-national units as a reaction to controversial high court rulings that are perceived by the sub-national unit as unacceptable. In its historic ruling *Mabo v. Queensland II* (1992), the High Court of Australia abandoned the legal concept of terra nullius (“vacant land”) that had served for centuries as the basis for the institutional denial of Aboriginal title. The Court established native title as a basis for proprietary rights in land, and held that Aboriginal title was not extinguished by the change in sovereignty. In *Wik Peoples v. Queensland* (1996), the High Court went on to hold that leases of pastoral land by the government to private third parties did not necessarily extinguish native title. Such extinguishment would depend on the specific terms of the pastoral lease and the legislation under which it was granted. The potentially far-reaching redistributive implications of *Mabo II* and *Wik* prompted an immediate popular backlash; the powerful agricultural and mining sectors, backed by the governments of Queensland, Western Australia, and the Northern Territory, demanded an across-the-board statutory extinguishment of native title. One Nation—a populist, far right, anti-immigration and anti-Aboriginal people political party led by the colorful Pauline Hanson—was formed in Queensland in 1997, and gained instant support nationwide. The conservative government under John Howard willingly bowed to the counter-court political backlash by introducing amendments to the Native Title Act that, for all intents and purposes, overrode *Wik*. . . .

Separation and nullification debates within federal or “pluri-national” states have interesting equivalents at the supra-national level of governance. In fact, precisely because the units in supra-national political associations preceded the association, and because such associations allow for multiple and parallel projects of national identity promotion, they are more likely than other political formations to

experience secessionist or nullificationist pressures. The heated debate among EU law experts concerning the implications of the putative secessions of Catalonia and Scotland—potential sub-national unit exit from member states—confirms the prevalence of constitutional discourse of sub-unit emancipation within supra-national entities.

Since the 1950s, Europe has been witnessing what is arguably the largest experiment with multi-level governance in modern history. . . . As many observers have noted, trans-national constitutionalism has been a key concept in the quest for a unified Europe. In its case-law starting with the landmark *Van Gend and Loos* ruling (1963), the European Court of Justice (ECJ, the highest court of the EU) introduced the principle of the direct effect of Community law on the Member States, which now enables European citizens to rely directly on rules of European Union law in their national courts. In its 1964 ruling in the *Costa* case, the ECJ went on to establish the primacy of Community law over domestic law. In 1991, the ECJ established the liability of a Member State to individuals for damage caused to them by a breach of Community law by that State. Since 1991, European citizens have been able to bring an action for damages against a Member State that infringes a Community rule. The unification-through-constitutionalization project gained further momentum with the signings of the Maastricht Treaty (1992) and the Lisbon Treaty (2009) that effectively establish a trans-national quasi-constitutional regime in the EU. Meanwhile, the European Court of Human Rights (ECtHR, the apex forum for deciding [European Convention on Human Rights (ECHR)]-based claims made by residents of the Council of Europe countries) has become one of the busiest apex courts on the planet. This enormous unification-through-constitutionalization project now directly affects the lives of over 800 million people and indirectly impacts the lives of hundreds of millions more. In light of this, it is hardly surprising that strong resentment has fomented throughout Europe; a quick survey would yield a list of several hundred active separatist movements in Europe, stretching from Moravia and the Republic of Crimea to Schleswig-Holstein and the Faroe Islands. . . .

[N]ational high court rulings in Europe seem to reject the notion of unconditional subjection of Member State law to European trans-national law. Instead, a notion of duality of constitutional authority (national and supra-national) first introduced by the German Federal Constitutional Court (FCC) in its landmark *Maastricht Case* ruling (1993) has become the mainstream vision of national/supranational constitutional relations in the EU. In its judgment, the FCC advanced a statist conception of the EU in which each member state is an autonomous unit that retains its self-determination and sovereignty, including the ability to revoke its consent to participate in international organizations. The FCC is clear that “[i]n contrast to the federal parliament, the ‘European Community legislator’ does not possess any direct democratic legitimation.” Adamant that member state sovereignty be maintained, the FCC warns that “[i]f sovereign rights are granted to supra-national organizations, then the representative body elected by the people, i.e., the German

Federal Parliament . . . necessarily lose[s] some of their influence upon the processes of decision-making and the formation of political will.” En route, the FCC confirmed the principle of subsidiarity as a core element of EU law; the EU may only act or legislate where action of individual member states is insufficient.

The ruling’s “bottom-line” is that the FCC affirmed the legitimacy and constitutionality (with respect to German law) of the Maastricht Treaty, yet reserved to itself the right to “examine whether legal acts of the European institutions and organs are within or exceed the sovereign powers transferred to them.” In other words, the FCC, not the European Court of Justice, will decide where the limits to European power lie, at least with respect to Germany. Furthermore, the Court stated that legal acts of the Union determined by the German Court to lie outside the competences delineated in the Treaty, will not be legally binding in Germany. In so deciding, the FCC maintained the authority to examine the applicability of EU law in Germany, thus posing a permanent Member State-based challenge to the overarching competence of EU laws and institutions. Implicit in the FCC’s ruling, though not fully endorsed, is the notion that member states are to be pardoned for not enforcing what they regard an imposed supplementary condition in a sphere not explicitly transferred from the sub-units to the central EU authority. . . .

In its subsequent decision in the Lisbon Treaty Case (2009), arguably one of the most significant political rulings in its history, the FCC held that Germany must maintain its constitutional sovereignty within the emerging European constitution. The case involved a claim by German nationals that an unconditional ratification of the Lisbon Treaty would jeopardize and unreasonably limit German constitutional autonomy and self-determination. The Court agreed that European constitutional integration is not an automatic and inescapable process; under certain circumstances, the Court may review the implications of such integration on German constitutional sovereignty, and, when needed, opt out on an issue-by-issue basis. The judges wrote that “if obvious transgressions of boundaries take place when the European Union claims competences,” then they will call for a review to “preserve the inviolable core content of the [German] Basic Law’s constitutional identity.” Moreover, EU institutions must respect the non-transferable identity of member states’ constitutions and the principles they enshrine, as well as a minimum core of sovereignty vested in national political institutions. Specifically, the FCC identified five areas of competence where full subjection of national power to EU authorities could seriously erode German sovereignty: armed forces’ monopoly of the use of force; criminal law; fundamental fiscal policy decisions, and state budgetary autonomy more generally; substantive understanding of what constitutes a just social order; and most importantly, the preservation of national identity, especially through state control over the education system. When it comes to these areas, held the FCC, legitimate and accountable national political institutions must retain the ability to effectively determine policy and maintain state autonomy. At the more abstract level, the Court held that “a will aiming at founding a [federal] state in Europe could not be

ascertained,” and that, as [Donald Kommers and Russell Miller] point out, “the civil society, or demos, essential to democracy . . . still is centered on the nation-state, framed by a common language, culture, and history.”

To be sure, the FCC’s judgment may easily be interpreted as suggesting both solid German constitutional sovereignty vis-à-vis the emerging European constitutional order, as well as provisional subjection of the former to the latter. Either way, for the purposes of our comparative discussion, it is evident that that the FCC did not endorse the Euro-centric view of unconditional subjection of any given Member State’s constitutional order and identity to the emerging trans-national European constitution. We may call it nullification, or perhaps German-style nullification, *in potentia*.

The multi-layered, fragmented structure of the emerging pan-European constitutional framework and the corresponding eminence of the pan-European rights regime have given rise to . . . the theoretical posture known as *constitutional pluralism*. Building on the German Federal Constitutional Court’s *Maastricht Case* articulation of dual (EU and German) constitutional authority, proponents of this view describe a reality of, and provide normative justification for, a post-national, multifocal constitutional order (at least with respect to the distribution of constitutional authority in Europe) in which there is no single legal center or hierarchy, and “where there is a plurality of institutional normative orders, each with its functioning constitution.” . . .

[T]he evolving pan-European constitutional order is a living laboratory for studying nullification-like ideas (and creative legal and institutional responses to them) from a comparative perspective. The political project of a unified Europe and the corresponding eminence of the pan-European rights regime have generated renewed interest in comparative constitutional inquiry among European jurists. Landmark constitutional court decisions such as the FCC’s *Maastricht* or *Lisbon* rulings, and concepts such as “constitutional pluralism” or the “margin of appreciation,” quickly evolved to help reconcile the centripetal forces of constitutional convergence with the unabating centrifugal forces of constitutional divergence, and to help make sense of the multiplicity of constitutional authority and traditions in Europe. . . . Secession and nullification impulses have not vanished in the age of constitutional globalization. In fact, evidence may suggest that powerful centripetal forces of political, economic, and cultural convergence have triggered more, not less, separatist talk (and, oftentimes, actual walk) in national and supra-national sub-units worldwide. . . .

And to be sure, there are differences between a scenario whereby anti-centrist sentiment is advanced in a longstanding nation-state (e.g., France) that has just recently signed up for a larger, supra-national entity (the EU), in an occupied or annexed territory (e.g., Western Sahara), or in a region that has never previously had

full sovereignty or a distinct identity. And there are other pertinent differences of scale and scope: in the United States, secession and nullification claims are raised by fringe movements or appear occasionally in law review articles. In other instances (e.g., Québec, Scotland, Catalonia), full-blown secessionist claims were put forth by mainstream, widely popular political actors within the sub-national unit, and have attracted attention worldwide. But these differences notwithstanding, the general trend towards political convergence, globalism and supra-nationalism have spawned an array of localist counter-movements that profess to represent a given polity's, region's or community's "genuine" identity.

Finally, we may speculate that, as internationalization and global convergence processes march on, it may be the case that debates over nullification-like constitutional devices become even more prevalent, as well thought-out, "selective" invalidation and repudiation mechanisms offer a more realistic means to enhancing unit autonomy in a globalized world than the bolder, yet ultimately impracticable, notion of full-blooded secession. . . .

As Hirschl reminds us, treaty association is not unconditional; it often comes with caveats in the name of domestic law. A famous example in Europe is the Federal Constitutional Court of Germany's *Judgment on the Lisbon Treaty* that Hirschl discussed and that is excerpted in *Constitutional Pluralism and Constitutional Conflicts* in the Global Constitutionalism 2012 volume. Below we reproduce the paragraphs insisting on the inviolable core content of the "non-transferable identity of member states' constitutions and the principles they enshrine."

Judgment on the Lisbon Treaty

Federal Constitutional Court of Germany (Second Senate)

2 BvE/08 (2009)

. . . [T]he Second Senate of the Federal Constitutional Court, with the participation of Judges Voßkuhle (Vice-President), Broß, Osterloh, Di Fabio, Mellinghoff, Lübke-Wolff, Gerhardt, and Landau delivered the following

213. Self-determination of the people according to the majority principle, achieved through elections and other votes, is constitutive of the state order as constituted by the Basic Law. It acts in the sphere of public, free opinion-forming and in the organised competition between political forces of accountable government and parliamentary opposition. The exercise of public authority is subject to the majority principle of regularly forming accountable government and an unhindered opposition, which has an opportunity to come into power. In particular, in electing the

representative assembly of the people, or in the election of highest-ranking offices at government level, a generalised will of the majority with regard to persons or subjects must have an opportunity to express itself and decisions on political direction resulting from the elections must be possible. . . .

219. The elaboration of the principle of democracy by the Basic Law allows for the objective of integrating Germany into an international and European peace order. The new shape of political rule thereby made possible is not schematically subject to the requirements of a constitutional state applicable at national level and may therefore not be measured automatically against the concrete manifestations of the principle of democracy in a Contracting State or Member State. The empowerment to embark on European integration permits a different shaping of political opinion-forming than the one determined by the Basic Law for the German constitutional order. This applies as far as the limit of the inviolable constitutional identity (Article 79.3 of the Basic Law). The principle of democratic self-determination and of participation in public authority with due account being taken of equality remains unaffected also by the Basic Law's mandate of peace and integration and the constitutional principle of the openness towards international law. . . .

238. Under the constitution, . . . faith in the constructive force of the mechanism of integration cannot be unlimited. If in the process of European integration primary law is amended, or expansively interpreted by institutions, a constitutionally important tension will arise with the principle of conferral and with the individual Member State's constitutional responsibility for integration. If legislative or administrative competences are only transferred in an unspecified manner or with a view to further dynamic development, or if the institutions are permitted to re-define expansively, fill lacunae or factually extend competences, they risk transgressing the predetermined integration programme and acting beyond the powers granted to them. They are moving on a road at the end of which there is the power of disposition of their foundations laid down in the treaties, i.e. the competence of freely disposing of their competences. There is a risk of transgression of the constitutive principle of conferral and of the conceptual responsibility for integration incumbent upon Member States if institutions of the European Union can decide without restriction, without any outside control, however restrained and exceptional, how treaty law is to be interpreted. . . .

How, then, does international association affect constitutionalization and democracy? What are its costs? Consider Dieter Grimm's 2015 article.

**The Democratic Costs of Constitutionalisation:
The European Case
Dieter Grimm (2015)***

. . . Democracy and constitutionalism are usually not seen as mutually contradictory. Both emerged simultaneously. Their prototypes came into being as democratic constitutions based on the principle of popular sovereignty. Non-democratic constitutions were regarded as a deficient form of constitutionalism. Whenever people fought battles for constitutions, the constitutions they had in mind were democratic. Where nations turned from authoritarian or dictatorial regimes to democracy, they started by drafting constitutions. How could then be that constitutionalisation puts democracy at risk? Before turning to the European case, a look at the beginning of constitutionalism may be helpful.

Modern constitutions were the product of successful revolutions against traditional rule: colonial in North America, absolutist in France. These revolutions differed from the many revolts and upheavals of the past in that they did not content themselves with replacing one ruler by another. Rather, they aimed at a different system of rule, which they designed and made normatively binding before calling individual persons to power. The lack of legitimate public power that the revolution left behind together with the principles for the future regime pointed toward constitutionalism.

These principles were not invented by the revolutionaries. They had been developed in natural law theory long before. But in spite of its name, natural law was not law. It was a philosophical system that did not gain legal recognition before the revolutions. Only after the American colonists and the French middle classes had failed to reach their reform goals—self-rule in North America, removal of feudalism and liberalisation of the economy in France—within the framework of the existing legal order did they resort to natural law to justify the break with the old system and to design a new one. . . .

The constitution furnishes the basic structure and the lasting principles for politics. Politics concretises them and fills the space they leave according to changing preferences and circumstances. Constitutions thus provide a durable structure for change. They combine principles that enjoy a broad consensus with flexibility to meet

* Excerpted from Dieter Grimm, *The Democratic Costs of Constitutionalisation: The European Case*, 21 EUROPEAN LAW JOURNAL 460 (2015).

new challenges or changing majorities and thereby enable a peaceful transition of power. . . .

[T]he text of the constitution is one thing, its interpretation and application to individual cases is quite another. Even if the text avoids the risks of radicalism, courts may interpret it in a way that increasingly narrows the space for political decisions. To the same extent, the power of courts will increase. Constitutionalisation of ordinary law by way of interpretation may have the same cementing effect. The more ordinary law is regarded as constitutionally mandated, the less politics can change it if this is required by the circumstances or by a shift of political preferences.

This danger exists especially where courts have the last word on the meaning of constitutional provisions. As history teaches us, constitutions are of little value without judicial enforcement. To be sure, courts should have the power to adapt constitutional law to new challenges. But there is a borderline between interpreting the law and making law under the guise of interpretation, although it may be difficult to define. When courts overstep this line, the only remedy is for politics to re-programme the judiciary by amending the constitution, which is easy in some countries, but extremely difficult in others. The more difficult constitutional amendments are, the less space there is for democratic re-direction of courts. . . .

It is generally accepted that the European Union suffers from a democratic deficit that affects its legitimacy. But it is rarely noticed that this deficit has a source in the state of European constitutionalism. How can this be true, even though the EU does not have a constitution? After all, the legal foundation of the EU are treaties under international law, originally concluded by six Member States in Rome in 1957, several times amended, and now in force in the form of the Lisbon Treaty . . . ratified by 28 Member States.

Nevertheless, the European treaties fulfil many of the functions proper of a constitution. The treaties specify the purposes of the EU, establish its organs, determine their powers and procedures, frame the relationship with the Member States and contain a charter of fundamental rights just as constitutions do. EU Treaties differ from a constitution because they do not have its source in an autonomous act of a European constituent power. EU Treaties have been established by the Member States and depend on their agreement. Only the Member States have the power to amend the EU Treaties. They are the ‘Masters of the Treaties.’

Although suggested from time to time, the transformation of the treaties into a constitution in the full sense of the concept has not been undertaken up to now. Even the so-called Constitutional Treaty of 2003, the most far-reaching endeavour to form a closer union, did not attempt to change the nature of the Union’s legal foundation. Had it been adopted by all Member States, it would still have remained a treaty under international law, because the constituent power was not handed over to the EU itself.

Rather, the Member States reserved this power for themselves so that no transition from hetero-determination to auto-determination would have taken place.

Applied to the EU, the word ‘constitutionalisation’ must therefore have a meaning different from the usual one. It neither denominates a process of making a constitution nor permeates ordinary law by constitutional law through interpretation. In Europe, the expression is used rather to characterise the result of two early judgments of the European Court of Justice (ECJ) that endowed the treaties with effects typical of constitutional law. . . .

In 1963, the ECJ initially confronted the relationship between European and national law. The traditional answer to that question was clear: because European law is international law, it binds the Member States, but produces legal effects for the individual citizens only after having been incorporated into or concretised by national law. This was the position of several Member States when they argued the case in court, and it was equally the position of the Court’s Advocate General. In contrast, the ECJ declared European law to be directly applicable in the Member States to the effect that individuals could derive rights from it and claim them before the national courts without waiting for further concretisation by the national legislature.

However, the initial decision did not determine what was to happen when European and national law conflicted. The answer to this question followed a year later in a second decisive ruling. The Court declared that the treaties and, in fact, European law in general enjoyed primacy over national law, even over national constitutions. National law that contradicted European law was to be set aside. No national court or other agency was permitted to apply it. In case of doubt, national courts had to refer the question of compatibility to the ECJ, whose decision was binding on them.

The ECJ had opened the door to these rulings by a methodological turn. In its view, European law was neither a part of international law nor dependent on a national order to apply it, but was an autonomous legal order that had emancipated itself from the national sources. This meant that it was not necessary to interpret European law in the cautious manner of international law, emphasising the will of the contracting parties and limiting the adverse impacts on national sovereignty. Instead, the ECJ began to interpret the European treaties in a constitutional mode, namely as more or less detached from the Member States’ will and oriented instead by an objectivised purpose. . . .

As an immediate consequence of the two revolutionary judgments, the direct participation of Member States was no longer needed in order to establish the single market. Direct effect and supremacy of European law allowed the Commission (as the organ charged with enforcing the treaties vis-à-vis the Member States) and the ECJ (the organ charged with determining the meaning of the treaties in concrete cases) to take the task of implementing economic integration into their own hands. If they

declared that a given national law impeded the common market, that national law was set aside without the Member States having a realistic chance to insist on the application of that national norm. . . .

Different from national constitutions, the treaties are not confined to those provisions that reflect the functions of a constitution. They are full of provisions that would be ordinary law in the Member States. This is why they are so voluminous. As long as the treaties were treated as international law, this was not a problem. As soon as they were constitutionalised, their volume became problematic: in the EU the crucial difference between the rules for political decisions and the decisions themselves is to a large extent levelled. The EU is over-constitutionalised. This has two important consequences.

First, the over-constitutionalisation severely limits the Member States' role as 'Masters of the Treaties.' It exists with regard to formal amendments, but it is undermined at the level of treaty application. The principle of conferral that limits the power of the EU to those competences that have been explicitly transferred by the Member States is undermined. The *Kompetenz-Kompetenz*, which guarantees that only the Member States have the power to determine the allocation of competences, is also undermined. There is a power shift from the Member States toward the EU that blurs the borderline between treaty amendment and treaty interpretation and particularly bothers the German Constitutional Court.

Second, combined with the lack of differentiation between the constitutional law level and the ordinary law level, the constitutionalisation of the treaties immunises the Commission and particularly the ECJ against any attempt by the democratically responsible institutions of the EU to react to the Court's jurisprudence by changing the law. Likewise, they immunise the executive and judicial institutions of the EU against public pressure. As far as the treaty extends, elections do not matter. Because of the self-empowering effects of constitutionalisation created by the ECJ, it is freer than any national court.

To be sure, the Member States are not without any means to defend themselves against the creeping power shift toward the EU. They can bring an action for annulment of decisions by the Commission if, in their view, they transgress the competences of the EU. And they can amend the treaties. But the practical use of these instruments is limited. Given the pro-integration attitude of an ECJ that does not understand itself as an umpire between the EU and the Member States, there is little chance of success of an annulment action. Amendments to the treaties are practically unavailable because of the extremely high hurdles they face to pass. It seems almost impossible to mobilise this instrument in order to remedy a seemingly minor goal such as the correction of a line of jurisprudence.

Thus, the EU confirms the assertion that more constitutional law means less democracy. The confusion of elements of constitutional law with elements of ordinary

law in the treaties favours the unelected and non-accountable institutions of the EU over the democratically legitimised and accountable organs. Decisions of great political impact are taken in a non-political mode. The result is a state of integration that the citizens were never asked to agree to, but cannot change either, even if they do not support it. . . .

Over-constitutionalisation is not the only cause of the legitimacy problem the EU faces. But it is the most neglected one. The blindness toward the de-legitimising effects of over-constitutionalisation impedes the search for remedies. The reason for the democratic deficit is mostly sought in the lack of sufficient powers of the European Parliament. It does not possess all the competences that national parliaments used to have. Therefore, many believe that the democratic deficit would be repaired if only the European Parliament was endowed with the competences that parliaments in a parliamentary democracy enjoy. . . .

Yet . . . the external legitimation that emanates from the Member States is still much stronger than the internal legitimation coming from the European Parliament. A parliamentarisation of the EU would minimise the external legitimation without being able to increase the internal legitimation, given the weakness of the societal substructure of European democracy. . . .

[T]he parliamentarisation of the EU would leave the effects of the over-constitutionalisation completely unaffected. In the area that is determined by constitutional law, elections do not matter and parliaments have no say. This source of the democratic deficit can only be repaired by a politicisation of decision-making processes in the EU. Decision-making power must be shifted from the executive and adjudicative branches to the political organs, the Council and the European Parliament. The only way to achieve this goal is to scale back the treaties to their truly constitutional elements and downgrade all other treaty provisions of a non-constitutional nature to the status of secondary law.

This should not be misunderstood as a reversal of the constitutionalisation of the treaties. Rather, it draws out the consequences of constitutionalisation. This would also reduce the power of the ECJ, yet only the power that flows from its current immunity against re-direction by the democratically legitimated and controlled organs of the EU. The freer a court, the more necessary it seems for politics to have the possibility of re-directing it through legislation. Legally speaking, this is easy. Not a single provision in the treaties has to be sacrificed. Politically, it is difficult, as long as the democratic costs of over-constitutionalisation escape public attention.

AUTHORITY TO WITHDRAW UNDER DOMESTIC LAW

The British Referendum of June 23, 2016, voting in favor of the United Kingdom leaving the European Union (commonly known as “Brexit”) has focused attention on the question of who decides under domestic law whether a nation may withdraw from a longstanding treaty arrangement. The 2017 decision by the Supreme Court of the United Kingdom, *R (Miller) v. Secretary of State for Exiting the European Union*, excerpted in this volume, presents a number of questions about the internal allocation of authority within a state to withdraw from the European Union. In 2015, the High Court of South Africa considered the decision by that country’s government to leave the International Criminal Court (ICC). Like the UK Supreme Court, the South African court held that parliamentary approval was required.

**Democratic Alliance v. Minister of International
Relations and Cooperation**
High Court of South Africa (Gauteng Division, Pretoria)
Case No. 83145/2016 (February 22, 2017)

Mojapelo[, Deputy Judge President;] Makgoka and Mothle[, Judges] (sitting as a Full Bench and court of first instance): . . .

[1] This case turns on the separation of powers between the national executive and parliament in international relations and treaty-making. It calls for a proper interpretation of s 231 of the Constitution of the Republic of South Africa, 1996 (the Constitution).^{*} The primary question is whether the national executive’s power to

^{*} Section 231 of the Constitution of South Africa provides:

1. The negotiating and signing of all international agreements is the responsibility of the national executive.
2. An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
3. An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
4. Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
5. The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

conclude international treaties, also includes the power to give notice of withdrawal from international treaties without parliamentary approval. Related to that is an ancillary question whether it is constitutionally permissible for the national executive to deliver a notice of withdrawal from an international treaty without first repealing the domestic law giving effect to such treaty. At the heart of the dispute is the withdrawal of South Africa from the Rome Statute of the International Criminal Court (the ICC).

[2] The litigation history over the ICC has its genesis in the refusal by the South African government to arrest and surrender to the ICC, Omar Hassan Ahmad al-Bashir (President al-Bashir) the President of Sudan, when he visited the country in June 2015 for an African Union (AU) summit. . . .

[4] On 19 October 2016, the national executive took a decision to withdraw from the Rome Statute. Pursuant thereto and on the same day, the Minister of International Relations signed a notice of withdrawal to give effect to that decision and deposited it with the Secretary-General of the United Nations. This triggered the process for South Africa's withdrawal. . . . In terms of article 127(1) of the Rome Statute, the withdrawal of a party state from the Rome Statute takes effect 12 months after the depositing of a notice to that effect. Thus, South Africa would cease to be state party to the statute in October 2017. . . .

[6] . . . [T]he applicant [Democratic Alliance (DA), the largest minority party in parliament] . . . seeks orders declaring unconstitutional and invalid: the notice of withdrawal and the underlying cabinet decision to withdraw from the Rome Statute and to deliver the notice to the Secretary-General of the United Nations, initiating the withdrawal. Consequentially, the applicant seeks an order that the first, second and third respondents be directed to revoke the notice of withdrawal and to take reasonable steps to terminate the process of withdrawal under article 127(1) of the Rome Statute. . . .

[9] The Rome Statute was adopted and signed on 17 July 1998 by a majority of states attending the Rome Conference, including South Africa. This paved the way for the establishment of the ICC. South Africa ratified the Rome Statute on 27 November 2000. It was the obligation of states parties, which signed and ratified the Rome Statute, to domesticate the provisions of the statute into their national law to ensure that domestic law was compatible with the statute. South Africa accordingly passed the Implementation Act on 16 August 2002. . . .

[32] The question here is whether the national executive is entitled to decide on the withdrawal and execute its decision without the involvement of the legislature and thereafter seek legislative approval Secondly, whether it may execute its decision without the repeal of the Implementation Act. In answering the above questions the point of departure must inevitably be s 231 of the Constitution and the proper construction to be placed on it. The section governs the manner in which

international agreements are concluded, made binding on South Africa, and domesticated into our national law. . . .

[43] We have no difficulty in accepting, as a general proposition, that under our constitutional scheme, it is the responsibility of the national executive to develop and implement policy. It is also the responsibility of the executive to initiate legislation in order to implement policy. . . .

[44] It is now axiomatic that the exercise of all public power, including the conducting of international relations, must accord with the Constitution. As stated already, South Africa has, in terms of s 231 of the Constitution, both ratified the Rome Statute and domesticated it through the Implementation Act. While the notice of withdrawal was signed and delivered in the conduct of international relations and treaty-making as an executive act, it still remained an exercise in public power, which must comply with the principle of legality and is subject to constitutional control.

[45] Equally, it is the responsibility of parliament to make laws. When making laws parliament will exercise its judgment as to the appropriate policy to address the situation. The formulation of policy to withdraw from the Rome Statute therefore no doubt falls exclusively within the national executive's province. In the present case, the declaratory statement which accompanied the notice of withdrawal, reflects the national executive's policy position. . . .

[47] . . . A notice of withdrawal, on a proper construction of s 231, is the equivalent of ratification, which requires prior parliamentary approval in terms of s 231(2). . . . [T]he act of signing a treaty and the act of delivering a notice of withdrawal are different in their effect. The former has no direct legal consequences, while by contrast, the delivery of a notice of withdrawal has concrete legal effects in international law, as it terminates treaty obligations, albeit on a deferred basis in the present case. Also, . . . the explicit provisions of article 127(1) of the Rome Statute . . . provide that a state may withdraw by written notification addressed to the Secretary-General of the United Nations. The notice of withdrawal deposited by the Minister of International Relations is the written notification envisaged in the article. Although the withdrawal does not take effect until a year, that notice constitutes, at international level, a binding, unconditional and final decision of withdrawal from the Rome Statute. . . .

[52] . . . [A] resolution by parliament in terms of s 231(2) to approve an international agreement is a positive statement . . . to the signatories of that agreement that parliament, subject to the provisions of the Constitution, will act in accordance with the ratified agreement. Therefore, the approval of an international agreement in terms of s 231(2) creates a social contract between the people of South Africa, through their elected representatives in the legislature, and the national executive. That social contract gives rise to the rights and obligations expressed in such international agreement. The anomaly that the national executive can, without first seeking the

approval of the people of South Africa, terminate those rights and obligations, is self-evident and manifest.

[53] What is more, it is trite that where a constitutional or statutory provision confers a power to do something, that provision necessarily confers the power to undo it as well. In the context of this case, the power to bind the country to the Rome Statute is expressly conferred on parliament. It must therefore, perforce, be parliament which has the power to decide whether an international agreement ceases to bind the country. The conclusion is therefore that, on a textual construction of s 231(2), South Africa can withdraw from the Rome Statute only on approval of parliament and after the repeal of the Implementation Act. This interpretation of the section is the most constitutionally compliant, giving effect to the doctrine of separation of powers so clearly delineated in s 231. The fact that s 231 does not expressly say that only parliament has the power to decide the withdrawal from the Rome Statute, is no bar to this interpretation. . . .

[55] With regard to the conclusion of international agreements, it is not for parliament to engage in negotiating such agreements. It is for this reason that the Constitution gave that power to the national executive. It is thus provided for in the scheme of section 231 (1), for the executive to do what is in effect exploratory work: negotiate and conclude an agreement but not bind the country. As stated already, the executive does not have the power to bind South Africa to such agreement. The binding power comes only once parliament has approved the agreement on behalf of the people of South Africa as their elected representative. It appears that it is a deliberate constitutional scheme that the executive must ordinarily go to parliament (the representative of the people) to get authority to do that which the executive does not already have authority to do.

[56] It would have been unwise if the Constitution had given power to the executive to terminate international agreements, and thus terminate existing rights and obligations, without first obtaining the authority of parliament. That would have conferred legislative powers on the executive: a clear breach of the separation of powers and the rule of law. On this basis, too, the national executive thus does not have and was never intended to have the power to terminate existing international agreements without prior approval of parliament. . . .

[57] In sum, since on the structure of s 231, the national executive requires prior parliamentary approval to bind South Africa to an international agreement, there is no cogent reason why the withdrawal from such agreement should be different. The national executive did not have the power to deliver the notice of withdrawal without obtaining prior parliamentary approval. The inescapable conclusion must therefore be that the notice of withdrawal requires the imprimatur of parliament before it is delivered to the United Nations. Thus, the national executive's decision to deliver the notice of withdrawal without obtaining prior parliamentary approval violated s 231(2)

of the Constitution, and breached the separation of powers doctrine enshrined in that section. . . .

[64] The above conclusion leads to the question of procedural rationality of the notice of withdrawal. The requirement for rationality is that government action must be rationally connected to a legitimate government purpose. The principle of legality requires that both the process by which the decision is made and the decision itself must be rational. . . .

[65] The primary reason advanced by the national executive for delivering the notice of withdrawal is that the Rome Statute impedes its role in diplomatic and peace-keeping efforts on the continent, as it is required to arrest, on its soil, sitting heads of state against whom the ICC has issued warrants of arrest. By withdrawing from the Rome Statute, so was the argument, government would be free to pursue its peacemaker role on the continent without the obligation to arrest the indicted heads of state. It would be free to give immunity to such leaders. But this ignores the effect of the Implementation Act. It is domestic legislation which creates peremptory obligations which bind the State on their own terms, independent of its international obligations. In other words, South Africa's international law obligations are thus not dependent on the Rome Statute and *vice versa*. . . .

[67] . . . [T]he national executive is ordering the legislature to finalise its process of considering the repeal bill before the effective date of 18 October 2017. This in itself is impermissible, as it has the potential to undermine the process of parliament. Section 57(1)(a) of the Constitution provides that the National Assembly may determine and control its internal arrangements, proceedings and procedures. Section 70(1)(a) gives similar powers to the National Council of Provinces. Parliament is therefore the master of its own processes, and the national executive is not entitled to dictate time frames to it within which to consider any bill before it. . . . [P]arliament has a very special role to play in our constitutional democracy—it is the principal legislative organ of the state. With due regard to that role, it must be free to carry out its functions without interference. Parliament should therefore not be dictated to by the national executive to rush through the repeal bill in order to meet the national executive-created deadlines. . . .

[70] . . . The United Nations, the ICC and member states to the Rome Statute, as well as the broader international community, deserve a united, final and determinative voice from South Africa on this aspect. That can only be achieved through our country's normal legislative processes. The question should be: what is so pressing for the national executive about the withdrawal from the Rome Statute which cannot wait for our legislative processes (and possibly judicial pronouncements) to take their course? Government respondents have not provided any explanation for this seemingly urgent need to withdraw from the Rome Statute. All these, in our view, point to one conclusion: the prematurity and procedural irrationality of the lodging of

the notice of withdrawal by the national executive without first consulting parliament. This unexplained haste, in our view, itself constitutes procedural irrationality.

[71] We find, on a construction of s 231 of the Constitution, that prior parliamentary approval and the repeal of the Implementation Act are required before the notice of withdrawal from the Rome Statute is delivered by the national executive to the United Nations. Also, that the delivery of the notice of withdrawal was procedurally irrational. These are process-based grounds, as they relate to the procedure by which the notice of withdrawal was prepared and handled. The rest of the grounds . . . concern the substantive merits of the withdrawal. In other words, whether it is at all constitutionally permissible for South Africa to withdraw from the Rome Statute. . . .

[81] Given that this court has refrained from expressing a view on the substantive policy decision by the national executive to withdraw from the Rome Statute, it follows that it would be inappropriate to declare that decision unconstitutional as a stand-alone decision. There is nothing patently unconstitutional, at least at this stage, about the national executive's policy decision to withdraw from the Rome Statute, because it is within its powers and competence to make such a decision. What is unconstitutional and invalid, is the implementation of that decision (the delivery of the notice of withdrawal) without prior parliamentary approval. As a result, a declaration of invalidity of the notice of withdrawal, coupled with an order for the withdrawal of such notice, should suffice as an effective, just and equitable remedy. . . .

* * *

As illustrated in the excerpt above, the High Court of South Africa made a direct comparison between signing a treaty and attempts to withdraw from a treaty. The court concluded that a notification of withdrawal was not analogous to signing because while a signature "has no direct legal consequences, . . . the delivery of a notice of withdrawal has concrete legal effects in international law, as it terminates treaty obligations, albeit [usually] on a deferred basis." The court also held that a notification of intent to withdraw from the International Criminal Court was "unconstitutional and invalid" and ordered the Government of South Africa to revoke the notification. On March 7, 2017, the United Nations Secretary General accepted South Africa's "withdrawal of notification of withdrawal."

In the United Kingdom and South Africa, the courts found justiciable questions on the legality to withdraw. In the United States, courts have generally not found themselves to have a role in treaty termination. In the late 1970s, Senator Barry Goldwater and other members of the U.S. Congress challenged President Jimmy

Carter's termination without U.S. Senate approval of the 1954 Mutual Defense Treaty Between the United States of America and the Republic of China. A federal district court held that the President's notice of termination had to receive the approval of two-thirds of the U.S. Senate or a majority of both houses of Congress for it to be effective under the Constitution. The appellate court reversed, holding that the President did not exceed his authority in terminating the treaty. The U.S. Supreme Court vacated the appellate decision and remanded the case to the district court with directions to dismiss the complaint. We provide some of the debates within the Court about the appropriate federal response.

Goldwater v. Carter
Supreme Court of the United States
444 U.S. 996 (1979)

Order: The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to dismiss the complaint. Mr. Justice Marshall concurs in the result. Mr. Justice Powell concurs in the judgment and has filed a statement. Mr. Justice Rehnquist concurs in the judgment and has filed a statement in which Mr. Chief Justice Burger, Mr. Justice Stewart, and Mr. Justice Stevens join. Mr. Justice White and Mr. Justice Blackmun join in the grant of the petition for a writ of certiorari but would set the case for argument and give it plenary consideration. Mr. Justice Blackmun has filed a statement in which Mr. Justice White joins. Mr. Justice Brennan would grant the petition for certiorari and affirm the judgment of the Court of Appeals and has filed a statement.

Mr. Justice Powell, concurring.

Although I agree with the result reached by the Court, I would dismiss the complaint as not ripe for judicial review. . . .

Prudential considerations persuade me that a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority. Differences between the President and the Congress are commonplace under our system. The differences should, and almost invariably do, turn on political rather than legal considerations. The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse. Otherwise, we would encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict.

In this case, a few Members of Congress claim that the President's action in terminating the treaty with Taiwan has deprived them of their constitutional role with respect to a change in the supreme law of the land. Congress has taken no official action. In the present posture of this case, we do not know whether there ever will be an actual confrontation between the Legislative and Executive Branches. Although the Senate has considered a resolution declaring that Senate approval is necessary for the termination of any mutual defense treaty, no final vote has been taken on the resolution. Moreover, it is unclear whether the resolution would have retroactive effect. It cannot be said that either the Senate or the House has rejected the President's claim. If the Congress chooses not to confront the President, it is not our task to do so. I therefore concur in the dismissal of this case. . . .

[Justice Rehnquist] suggests, however, that the issue presented by this case is a nonjusticiable political question which can never be considered by this Court. I cannot agree. . . .

In my view, the suggestion that this case presents a political question is incompatible with this Court's willingness on previous occasions to decide whether one branch of our Government has impinged upon the power of another. Under the criteria enunciated in *Baker v. Carr* [(1962)], we have the responsibility to decide whether both the Executive and Legislative Branches have constitutional roles to play in termination of a treaty. If the Congress, by appropriate formal action, had challenged the President's authority to terminate the treaty with Taiwan, the resulting uncertainty could have serious consequences for our country. In that situation, it would be the duty of this Court to resolve the issue.

Mr. Justice Rehnquist, with whom The Chief Justice, Mr. Justice Stewart, and Mr. Justice Stevens join, concurring in the judgment. . . .

[T]he controversy in the instant case is a nonjusticiable political dispute that should be left for resolution by the Executive and Legislative Branches of the Government. Here, while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty. . . . In light of the absence of any constitutional provision governing the termination of a treaty, and the fact that different termination procedures may be appropriate for different treaties, the instant case in my view also "must surely be controlled by political standards."

I think that the justification for concluding that the question here is political in nature [is] . . . compelling . . . because it involves foreign relations—specifically a treaty commitment to use military force in the defense of a foreign government if attacked. . . .

Here . . . we are asked to settle a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests,

resources not available to private litigants outside the judicial forum. Moreover, . . . the effect of this action, as far as we can tell, is “entirely external to the United States, and [falls] within the category of foreign affairs.” Finally, . . . the Constitution spoke only to the procedure for ratification of an amendment, not to its rejection. . . .

Mr. Justice Blackmun, with whom Mr. Justice White joins, dissenting in part.

In my view, the time factor and its importance are illusory; if the President does not have the power to terminate the treaty (a substantial issue that we should address only after briefing and oral argument), the notice of intention to terminate surely has no legal effect. It is also indefensible, without further study, to pass on the issue of justiciability or on the issues of standing or ripeness. . . . I would set the case for oral argument and give it the plenary consideration it so obviously deserves.

Mr. Justice Brennan, dissenting.

I . . . would affirm the judgment of the Court of Appeals insofar as it rests upon the President’s well-established authority to recognize, and withdraw recognition from, foreign governments.

In stating that this case presents a nonjusticiable “political question.” Mr. Justice Rehnquist, in my view, profoundly misapprehends the political-question principle as it applies to matters of foreign relations. Properly understood, the political-question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been “constitutional[ly] commit[ted].” But the doctrine does not pertain when a court is faced with the antecedent question whether a particular branch has been constitutionally designated as the repository of political decision making power. The issue of decision making authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts.

The constitutional question raised here is prudently answered in narrow terms. Abrogation of the defense treaty with Taiwan was a necessary incident to Executive recognition of the Peking Government, because the defense treaty was predicated upon the now-abandoned view that the Taiwan Government was the only legitimate political authority in China. Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes. . . .

Litigating the President's Power to Terminate Treaties

Louis Henkin (1979)*

. . . Whatever the fate of *Goldwater* on the preliminary obstacles to litigation, the interesting constitutional question, of course, is the substantive one: who has power to terminate a treaty on behalf of the United States? The issue has never been adjudicated. It does not appear even to have been a point of major political controversy at any time in American history. Most scholars who have addressed the question have concluded that the President has authority to terminate a treaty on behalf of the United States whether in accordance with its terms or when the United States is entitled to do so for one of a variety of reasons, say, breach by the other side or “change of circumstances.” I share that view.

In *Goldwater* [the district court] declared that “[b]ased on the Court’s consideration of these historical precedents, the Court believes the power to terminate treaties is a power shared by the political branches of this government, namely the President and the Congress.” The State Department counted and weighed the precedents differently. But looking to the precedents alone is misleading, especially since many of them are old, antedating the development of clear lines of constitutional authority in foreign affairs.

The case for the President, I believe, is not rooted in the number of precedents (although there are a number of recent ones to support him) but in the nature of his office as it has become. Termination of a treaty is an international act, and the President, and only the President, acts for the United States in foreign affairs. The constitutional basis of that authority may be the “Executive Power” clause of Article II, as suggested by Alexander Hamilton, or the President’s role as “sole organ,” as suggested by John Marshall; or his authority may result from the sum of other powers. When the Supreme Court addressed the question in [*United States v. Curtiss-Wright Export Corp.* (1936)] it recognized the “very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.” A power so characterized, I believe, implies the authority to make the kind of decision that has to be made for the United States when a treaty no longer serves our interests, when it is out of date, when the other side breached it.

The case for Congress is harder to make. Since 1798, when Congress purported to declare a treaty with France terminated for breach by the other side, no Congress has asserted any such authority, although on a few occasions it directed the President to terminate treaties (and the President sometimes complied, sometimes did

* Excerpted from Louis Henkin, *Editorial Comments: Litigating the President’s Power to Terminate Treaties*, 73 AMERICAN JOURNAL OF INTERNATIONAL LAW 647 (1979).

not). Authority to terminate a treaty does not seem to be within any power “herein granted” to Congress by the Constitution (Article I, section 1). Termination of a treaty is not a legislative act that might be within a legislative component of powers of the United States rooted in sovereignty or nationhood. A voice for Congress in terminating a treaty would depend on a claim for Congress of “extra-legislative” authority. Even now, moreover, Congress does not claim such power, only a “shared power,” a veto on the President. But the Constitution provides no such shared powers between the President and Congress (as distinguished from the President and the Senate). . . .

One of the arguments made against presidential power is that treaties are the supreme law of the land and it takes a legislative act to repeal a law. This argument, I submit, plays with words. The provision in Article VI that treaties are “the supreme law of the land” is addressed to the courts, and principally for the purpose of declaring treaties supreme in relation to state law and policy. That phrase has also been held to imply that the courts can apply a self-executing treaty without awaiting implementing legislation. But many a treaty is not domestic law at all, in that it has no domestic legal implications. In any event, termination of a treaty by the President is not “repeal” of a “law”; it is an international act terminating an international legal obligation of the United States. For some treaties terminating the international legal obligation may also terminate whatever status the treaty has as domestic law, but that is an incidental consequence of termination, and follows whatever it is that causes the international legal obligation to lapse. It would be just as accurate—and ludicrous—to say that a foreign state “repeals U.S. law” when it declares war against the United States, which abrogates (or suspends) treaties between them, and thus “repeals” their domestic character as law.

Those who challenge the President’s power to terminate the Taiwan treaty are trying to keep alive a “no longer” treaty with a “no longer” government for special reasons, perhaps in the hope of enhancing the likelihood that the United States would defend Taiwan if it were attacked, and of persuading the Chinese Communists of that likelihood so that they might be deterred. As a general proposition, there may be serious, if hypothetical, reason for concern that a President might unilaterally pull us out of, say, [North Atlantic Treaty Organization (NATO)] or [Strategic Arms Limitations Talks/Treaty (SALT)]. Congress might well resist that, arguing that the President should not be able to exercise any of his powers, in any way, so as seriously to implicate our defense posture or otherwise bring us close to war, since that would undercut the constitutional power of Congress to decide for war or peace. (That, I note, is an argument for Congress, not for the Senate acting alone.) There, as perhaps also elsewhere, it is plausible to urge that the President should not act to terminate an important treaty without at least meaningful consultation with Congress, congressional committees, congressional leaders. It is not an argument for distorting constitutional doctrine to require a vote of Congress as to whether some provision in some treaty should be kept in the face of breach, or changed circumstances, or desuetude.

A different constitutional issue is whether the Senate can require, as a condition of its consent to a particular treaty, a presidential undertaking to terminate that treaty only in accordance with prescribed procedures. Perhaps there is no meaningful limit on the price the Senate can exact as the condition for consenting to a treaty. Surely, it ought not to impose a condition that has no relation to the treaty before it, or that requires the President to accept the Senate's view on some general constitutional principle, even one relating to the treaty power. But a condition applicable to the treaty before it and having a plausible relation to it might pass. . . .

Treaty Termination and Historical Gloss

Curtis A. Bradley (2014)*

. . . Treaty termination is an especially rich example of how governmental practices can inform and even define the Constitution's separation of powers. The authority to terminate treaties is not addressed specifically in the constitutional text and instead has been worked out over time through political-branch practice. This practice, moreover, has developed largely without judicial review. Despite these features, Congress and the President—and the lawyers who advise them—have generally treated this issue as a matter of constitutional law, not merely political happenstance. Legal scholars, too, have long discussed and debated the issue in legal terms. At the same time, there has been a recognition that the constitutional law in this area is not entirely distinct from politics, and that it both is informed by and shapes political contestation. . . .

[T]he center of gravity of the debate over treaty termination has shifted substantially over time, from whether the full Congress or merely the Senate needs to approve a termination to whether Congress or the Senate can even limit the President's unilateral authority to terminate. . . . [A]s a matter of practice, presidents today exercise a unilateral power of treaty termination. . . .

[There is a] general desirability, for legitimacy and other reasons, of having an account of constitutional law that bears a reasonable resemblance to actual constitutional practice, both now and in the foreseeable future. In addition, if in fact government actors look to past practice to inform their own understanding of—and to shape their claims about—the law, legal philosophers working in the tradition of H.L.A. Hart would treat that second-order practice as itself a fundamental feature of the legal order. These considerations have particular salience for the issue of treaty termination. Unilateral presidential termination of treaties is an established and longstanding practice, and it seems unlikely that Congress will do anything in the coming years to destabilize that practice. Moreover, the courts have shown little

* Excerpted from Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEXAS LAW REVIEW 773 (2014).

inclination to resolve the issue, and the longer they wait the more entrenched the practice becomes. As a result, an account of modern U.S. constitutional law that denied a presidential authority to terminate treaties (at least as a general matter) would face serious descriptive limitations.

The absence of judicial review may itself be related to the longstanding nature of the practice. In abstaining on this issue, courts may reasonably perceive that the durability of a practice over numerous presidential administrations is evidence that the practice is functionally desirable, or at least not too functionally problematic. It is easy to imagine that there are advantages to the United States of being able to make credible threats of exit from treaty regimes as part of negotiations to reform international institutions or induce better compliance by its treaty partners—advantages that could be facilitated by allowing for unilateral presidential action. Moreover, it is possible that ease of exit as a matter of U.S. constitutional procedure makes it easier to persuade the Senate to agree to such treaties in the first place. While such ease of exit could also in theory be destabilizing to foreign relations, it is not obvious from the historical record that there is any presidential tendency to devalue international commitments more than Congress. . . .

To say that the President has a unilateral authority to terminate treaties is not to say that this is an exclusive presidential power. If it is merely a concurrent power shared with either the full Congress or the Senate, then either Congress or the Senate could potentially place limitations on it. . . . Under th[is] account, a unilateral presidential termination authority does not exist today because of an assessment of founding intent or understanding. Nor does it follow clearly from constitutional text or structure, or from judicial decisions, although those aspects of constitutional interpretation are of course relevant. Rather, the President's constitutional authority for this issue exists in part because some aspects of U.S. constitutional law are made by the participants in the system over time. Treaty termination is, in another words, an instance of what some scholars have termed “constitutional construction”—the fleshing out of constitutional meaning in ways that go beyond merely interpreting constitutional text. . . .

The accretion dynamic described here . . . implicates tradeoffs associated more generally with the idea of “common law constitutionalism,” an approach usually associated with judicial decision making but which in theory might also apply to constitutional reasoning by nonjudicial actors. On the one hand, having the law develop through the accretion of precedents can lead to path dependency and, relatedly, a lack concentrated deliberation. On the other hand, it can also help ensure that the law is shaped to address specific, real-world contexts rather than abstract speculations about the future. This benefit might have particular salience for foreign relations law issues, such as treaty termination, in light of the ever-changing nature of the international environment and the United States' role within it. The wide variety of situations that might trigger a decision to suspend or terminate treaty obligations, or to

threaten to do so, also supports an inductive, evolutionary approach to the issue rather than one based on a general theory or abstract reasoning. . . .

[A] focus on the role of historical practice in discerning the separation of powers almost inevitably mixes together internal and external perspectives on the law. As noted, invocations of such practice have long been part of the internal legal argumentation in debates over treaty termination. At the same time, there are a variety of reasons to think that such practice also has an external effect on the development of the law relating to this issue, whether such law is interpreted by the courts or by nonjudicial actors. There is tension between these two accounts since the more that the account is external, the more that the law will seem epiphenomenal. It is at least plausible to think, however, that the internal and external accounts are interrelated, such that historical practice not only affects legal understandings but is also itself affected by such understandings. . . .

In addition to showing how practices can inform constitutional interpretation, the issue of treaty termination enriches our understanding of constitutional change. The twentieth-century shift towards a unilateral presidential power of termination was not the result of one particular controversy or period of deliberation, and it was not primarily driven by judicial decisions. Instead, the shift involved a gradual accretion of actions and claims by the Executive Branch combined with long periods of inaction by Congress. This account sheds light on some of the interpretive and normative challenges associated with a practice-based approach to the separation of powers.

Does the domestic mode of entering an international legal arrangement determine how it may be exited?

**Triptych's End: A Better Framework To Evaluate 21st Century
International Lawmaking**
Harold Hongju Koh (2017)*

How does the United States enter and exit its international obligations? By the last days of the Obama Administration, it had become painfully clear that the always

* Excerpted from Harold Hongju Koh, *Triptych's End: A Better Framework To Evaluate 21st Century International Lawmaking*, 126 YALE LAW JOURNAL FORUM 337 (2017).

imaginary “triptych” of Article II* treaties, congressional-executive agreements, and sole executive agreements, which has guided foreign relations scholars since the [1970s,] is dying or dead. . . .

[E]arly exit is easier said than done. . . . [The Paris Climate Change Agreement and the Iran Nuclear Deal, for instance,] are stickier than might be assumed, because each has substantially reshaped expectations and default patterns of behavior in its issue area. Whether or not the United States honors its commitments will depend not just on which elected officials lead the country at any particular time, but on whether and how a diverse group of stakeholders in an ongoing transnational legal process use tools available to them to hold America to its commitments. Whether the President is internationalist or isolationist, entering or exiting international obligations, . . . going forward, the fast-changing model of twenty-first century international lawmaking demands fewer formalistic tests and more pragmatic standards that will enable a more realistic sharing of constitutional powers. . . .

We have come a long way since anyone imagined Article II treaties to be the primary, much less the exclusive, means for the United States to enter international law obligations. It was long ago settled that congressional-executive agreements should be treated as instruments legally interchangeable with Article II treaties for conducting and completing diplomatic deals. . . . Indeed, the United States has used congressional-executive agreements as the technique of choice to conclude a whole range of international economic arrangements: not just NAFTA, but also the Agreement Establishing the World Trade Organization (WTO) and the 1945 Bretton Woods Agreement, which “did nothing less than create the foundations of a new world economic order.”

Nor, given the huge political difficulty of securing congressional majorities even for previously uncontroversial trade agreements, are formal congressional-executive agreements the sine qua non of international lawmaking. Under the political deadlock between the President and Congress during the Obama Administration, the number of Senators needed to block consideration of such an agreement has declined over time from fifty-one (a majority of the Senators), to forty-one (the number needed to sustain a filibuster), to ten (the number usually needed to prevent a congressional-executive agreement from being voted out of the relevant committee), to one (a single Senator or Senate staffer preventing an otherwise uncontroversial congressional-executive agreement from receiving unanimous consent).

True “sole executive agreements” or agreements based solely on the President’s plenary constitutional authorities—the third category of the triptych—

* Article II, Section 2, Clause 2 of the United States Constitution provides: “[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur”

remain extremely rare. Legal scholars traditionally cite a few iconic sole agreements, like Franklin Roosevelt's 1941 Destroyer-for-Bases deal or the early twentieth-century Soviet deals in *United States v. Belmont* [(1937)] and *United States v. Pink* [(1942)]. But in practice, few modern-day presidents ever claim to be making a controversial agreement based solely on their own plenary constitutional authority, particularly when Congress has already legislated elsewhere regarding the same subject. Instead, the agreement-making President almost always—and often with good reason—claims to be making the agreement supported by express or implied congressional approval or receptivity, evidenced by other related congressional actions in the subject-matter field.

Yet despite these trends, many foreign relations scholars and pundits still fetishize the triptych. They argue that a particular international lawmaking arrangement they don't like must be unconstitutional because they cannot easily place the agreement in one triptych box or another. . . . In my view, such hyperbole substitutes unnuanced pigeonholing for more nuanced understandings of the many complex real-world ways by which the Executive now seeks to make—and Congress now signals its acceptance of—international commitments with foreign partners. . . .

What all this suggests is that foreign relations scholars should now dispense with the transsubstantive triptych, which is no longer a meaningful—and at times is a positively misleading—way of describing the multifarious ways in which the United States currently engages in international lawmaking. . . .

Instead, we should shift to a more realistic, issue-specific, and agreement-specific conceptual framework that better reflects how the current process of congressional approval for, and acceptance of, Executive Branch international lawmaking actually works. In my view, that framework should account for three factors: (1) whether the agreement entails new, legally binding obligations; (2) the degree of congressional approval for the executive lawmaking; and (3) the constitutional allocation of institutional authority over the subject matter area at issue. . . .

During the 2016 presidential campaign, President-Elect Donald Trump promised to “cancel” the Paris Agreement and “rip up” the Iran Nuclear Deal. But reality is not as simple as rhetoric. In support of this threat, thirteen Senators wrote to Secretary of State John Kerry citing the triptych, claiming that the Paris Agreement could be easily dissolved, because the United States signed it as a “sole executive agreement[] [which is] one of the lowest forms of commitment the United States can make and still be considered a party to an [international] agreement.” The forty-seven Senate Republicans who wrote to the leaders of Iran attacking the [Joint Comprehensive Plan of Action] before it was completed similarly engaged in a hornbook recitation of the triptych.

But in both cases, the Senators' reasoning simply confirms the practical obsolescence of formalistic triptych reasoning. To the extent that these two deals constitute nonbinding political agreements made by the Executive alone, of course, both could be terminated by a new President as a matter of domestic law. But both letters misunderstand the modern process of international lawmaking by ignoring the interactive way in which such agreements are actually implemented and confusing the domestic and international dimensions of the United States law of international agreements. . . .

[D]eals are sticky, regimes are path-dependent, and in complex political equations, the locus of domestic legal authority often plays a subsidiary role. Twenty-first century international legal engagement has increasingly expanded beyond the traditional tools of treaties and executive agreements to nonlegal understandings, layered cooperation, and diplomatic law talk—fluid conversations about evolving norms that memorialize existing understandings on paper without creating binding legal agreements. . . .

As this international lawmaking process becomes more fluid, our constitutional analysis should not become more rigid. Given that international law and institutions evolve organically, we need to develop constitutional understandings that do not operate mechanically. As we move from diplomatic dialogue to political commitments to soft regimes to shared norms to legal rules to international institutions, we should not impose a formal triptych on novel ways of negotiating international arrangements, because such rules make such arrangements nearly impossible to achieve.

Even in a Trump presidency, it is a mistake to conclude that the goal of constitutional interpretation should be to raise the costs of presidential action in foreign affairs, without regard to issue area. After all, if our constitutional readings make it harder for the President to make international deals than to go to war, that legal rigidity will inevitably shift presidential incentives to rely upon—and overextend—lethal tools of American hard power instead of deploying our diplomatic, smart power resources. In the twenty-first century, we should instead pursue more nuanced conceptual understandings of the Constitution that promote what Justice Jackson once wisely called “a workable government.” As Justice Stephen Breyer has recently argued [in *Making Our Democracy Work: A Judge's View* (2011)], the role of constitutional interpretation must be “maintaining a workable constitutional system of government”: not simply declaring a set of formal rules, but pragmatically evaluating an existing architecture of cooperation that allows each branch of government to “build the necessary productive working relationships with other institutions”

Most fundamentally, these case studies remind us that today, America's observance of law—both international and constitutional—is preserved not just by the federal political branches and those officials who lead them at any particular time, but by an ongoing transnational legal process whose diverse stakeholders are not

controlled by elected officials. As the Paris and Iran examples illustrate, these stakeholders are full-fledged, energetic actors within the transnational legal process. As the Trump Administration unfolds, these stakeholders will surely strive to use all available tools—the courts, subnational entities, media, civil society, transnational alliances and institutions, and bureaucratic stickiness—to hold America’s leaders accountable for their commitments. . . .

INTERNATIONAL LEGAL CONSTRAINTS ON TREATY WITHDRAWAL

The many forms of international lawmaking raise questions within domestic constitutional law as well as give rise to debates about whether international legal constraints impose limits on a country’s ability to withdraw from treaties or from institutions, including transnational courts.

Vienna Convention on the Law of Treaties (entered into force January 27, 1980)

. . . Article 11. Means of expressing consent to be bound by a treaty

The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

Article 12. Consent to be bound by a treaty expressed by signature

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when: (a) The treaty provides that signature shall have that effect; (b) It is otherwise established that the negotiating States were agreed that signature should have that effect; or (c) The intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. For the purposes of paragraph 1: (a) The initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed; (b) The signature *ad referendum* of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty. . . .

Article 18. Obligation not to defeat the object and purpose of a treaty prior to its entry into force

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) It has signed the treaty or has exchanged instruments

constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed. . . .

Article 46. Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

Article 47. Specific restrictions on authority to express the consent of a State

If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent. . . .

Article 54. Termination of or withdrawal from a treaty under its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take place: (a) In conformity with the provisions of the treaty; or (b) At any time by consent of all the parties after consultation with the other contracting States. . . .

Article 56. Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation, or withdrawal

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) A right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1. . . .

Article 68. Revocation of notifications . . .

A notification or instrument provided for in article 65 or 67 may be revoked at any time before it takes effect. . . .

A case concerning the dismissal by the Peruvian Congress of three justices on the Peruvian Constitutional Court was submitted to the Inter-American Court of Human Rights on July 2, 1999. On July 8, 1999, Peru's Congress approved the withdrawal of Peru's acceptance of the compulsory jurisdiction of the Inter-American Court. Peru's Minister of Foreign Relations then presented the General Secretariat of the Organization for American States with a declaration stating that it was withdrawing its acceptance of jurisdiction, effective immediately. The Inter-American Commission on Human Rights concluded that Peru could not effectively withdraw from the jurisdiction of the Inter-American Court of Human Rights with respect to a contentious case once proceedings had been initiated. The Inter-American Court ultimately agreed and held that it still had jurisdiction over the case.

**Observations on Human Rights Concerning the Return of the
Application in the Constitutional Court v. Peru (11.760), and the
Jurisdiction of the Inter-American Court of Human Rights
Inter-American Commission on Human Rights (1999)**

. . . According to the terms of its putative "withdrawal," which do not conform to the terms of Article 62*, the State seeks to rest jurisdiction from the Honorable Court in matters, such as the case of the Constitutional Court, with respect to which the latter was already duly seized, depending on whether the State had decided to file an answer to the application. In other words, Peru seeks to retroactively condition the Court's exercise of its validly conferred jurisdiction on its own subsequent conduct. . . .

It is a long settled question that such subsequent acts, including the expiration or attempted withdrawal of a declaration of acceptance of contentious jurisdiction

* Article 62 of the American Convention on Human Rights provides:

1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.
2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court.
3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

under an optional clause during proceedings already initiated, will have no effect on the exercise of that jurisdiction.

For example, in the *Nottebohm Case* [(1955)] before the ICJ, Guatemala had argued that the expiration of its declaration (by reason of the period for which it had been subscribed) one month after an application was filed by Liechtenstein divested the Court of any jurisdiction it may have had at the time of filing. In other words, Guatemala contended that the Court must not only have jurisdiction when first seized of the dispute, but throughout the proceedings. That contention was unanimously rejected

The existence or scope of such jurisdiction cannot, as Peru contends, then be made to depend on the subsequent conduct of a party. This would make the operation and efficacy of the contentious case system under the American Convention contingent upon the vicissitudes of the State's conduct, frustrating the system's very object and purpose, as well as the due expectations of the other Parties and actors affected by that system. . . .

Additionally, the effects of the putative "withdrawal" must not be interpreted so as flout general principles of law such as non-retroactivity and good faith informing any mechanism for the administration of justice. The Commission considers that the interpretation asserted by the State would result in the suppression of the right to access the mechanism for judicial enforcement provided by the Convention in violation of the aforementioned rules and principles and should therefore be rejected.

Accordingly, the present section of these observations sets forth the Commission's view that, under any theory of law which might be asserted as a basis for the putative "withdrawal" of jurisdictional acceptance by Peru—whether invoking general principles of law, drawing an analogy to Article 78 of the Convention,^{*} or construing provisions of treaty law—a reasonable period of one year of advance notice would be required before the "withdrawal" would become effective. Further, as will be explained, the Commission considers that the effect on the temporal scope of the

^{*} Article 78 of the American Convention on Human Rights provides:

1. The States Parties may denounce this Convention at the expiration of a five-year period from the date of its entry into force and by means of notice given one year in advance. Notice of the denunciation shall be addressed to the Secretary General of the Organization, who shall inform the other States Parties.
2. Such a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation.

jurisdiction of the Honorable Court would be the same under any of these approaches. . . .

In addition, the Commission submits that, even assuming its legal validity, a putative “withdrawal” of this or any other kind could never affect claims of violation already introduced into the Convention enforcement process against States Parties that had accepted the compulsory jurisdiction of the Honorable Court. The position of the State regarding the far reaching effects of its putative “withdrawal” not only violates basic principles of nonretroactivity and good faith, but also disregards the principles that inform the structure, functioning and effectiveness of the adjudication system created by the American Convention. . . .

“Trust and confidence are inherent in international cooperation . . . just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.”²⁹ When the parties concerned take cognizance of unilateral declarations they must be able to place confidence in them and are thus entitled to require that the obligation undertaken be respected. The Commission submits that, even if tested under the more general framework of the rules applicable to international disputes between States, the “withdrawal” of such a declaration would not affect the integrated jurisdiction of the Commission and the Court in the way asserted by the State.

International practice indicates that there is no rule supporting a right of immediate termination of declarations with indefinite duration. Therefore the Commission considers that, even assuming the validity of the “withdrawal,” the principles governing the effects of acceptance of jurisdiction suggest that such a declaration could not be deemed to become effective until a reasonable time has lapsed. Under this reasoning, the State would remain bound to abide by the contentious jurisdiction and judgments of the Court during that reasonable period. . . .

The objective of a notification period such as that under consideration is to place those parties whose interests may be affected on reasonable notice. . . . Assuming the validity of such a withdrawal, the State concerned would necessarily continue to be bound, without interruption, by all obligations under the Convention apart from those with respect to the compulsory jurisdiction of the Court. Accordingly, petitions complaining of alleged violations would continue to be filed with the Commission under the terms and subject to the requirements of the Convention. . . .

²⁹ [International Court of Justice], *Nuclear Tests Cases*, I.C.J. Reports 1974, para. 49.

In 2010, Ingabire Victoire Umuhoza, leader of the Rwandian opposition party *Forces Democratiques Unifiées*, (FDU-Inkingi), sought to return home after seventeen years abroad in order to stand for election later that year. In February 2010, she was charged with “spreading the ideology of genocide, aiding and abetting terrorism, sectarianism and divisionism, undermining the internal security of a state, spreading rumours which may incite the population against political authorities, establishment of an armed branch of a rebel movement and attempted recourse to terrorism,” and sentenced to fifteen years of imprisonment by the Supreme Court of Rwanda. Umuhoza brought her case to the African Court on Human and Peoples’ Rights in 2014. Rwanda responded by providing a notification of withdrawal under Article 34(6) of the Protocol to the African Charter on Human and Peoples’ Rights. The Court held that it had jurisdiction to hear the case under Article 3(1) and Article 34(6) of the Protocol* and proceeded to consider three questions: “First, whether [Rwanda’s] withdrawal is valid. Secondly, if it is valid, what are the applicable conditions for such a withdrawal? Thirdly, what are the legal effects of the withdrawal?”

Umuhoza v. Rwanda
African Court on Human and Peoples’ Rights
Application 003/2014 (2016)

The Court composed of: Augustine S. L. Ramadhani; President, Elsie N. Thompson, Vice-President; Gerard Niyungeko, Fatsah Ouguergouz, Duncan Tambala, Sylvain Ore, El Hadji Guisse, Ben Kioko, Rania Ben Achour, Solomy B. Bossa, Angelo V. Matusse—Judges; and Robert Eno—Registrar. . . .

36. . . . [T]he Respondent [Rwanda] avers that by virtue of the principle of parallelism of forms, it is only the [African Union Commission (AUC)] that is empowered to decide on the withdrawal and its effects. The Respondent argues that the Court and Parties to the Application have nothing to do with the decision regarding the withdrawal of its declaration once it was deposited with the AUC. The Respondent further indicates that in its letter dated 3 March 2016, it was only requesting to be heard by the Court on its request to suspend hearings and not on the question of the withdrawal.

* The Protocol to the African Charter on Human and Peoples’ Rights provides:

Article 3(1): “The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.”

Article 34(6): “At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration.”

37. The Respondent prays the Court to take judicial notice that debate regarding the withdrawal for review, was a matter within the purview of the African Union.

38. . . . [T]he Applicant [Umuhoza] argues that in the absence of provisions for withdrawal of the declaration pursuant to Article 34(6) of the Protocol, Article 56 of the Vienna Convention on the Law of Treaties (hereinafter referred to as “the Vienna Convention”) should be applied in the interpretation of the Protocol. The Applicant further argues that prohibiting States from withdrawing from a treaty or declaration that they made voluntarily may be too radical a position and would interfere with State sovereignty. The Applicant argues however, that this should not be viewed as allowing States to withdraw at any moment or in any manner. The Applicant urges the Court to be guided by the principle of *pacta sunt servanda*, which requires parties to a treaty to perform their duties in good faith.

39. The Applicant argues further that the principle of good faith requires a reasonable time for withdrawal to serve as a cooling off period.

40. To this end, the Applicant cites the case of Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) *Jurisdiction and Admissibility, Judgment of 26 November 1984*, in which the International Court of Justice held that:

But the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity.

41. The Applicant argues further that “the goal of demanding advance notice of withdrawal is to discourage opportunistic defections that may cause treaty-based cooperation to unravel.” The Applicant cites the examples of the European Convention on Human Rights and the American Convention on Human Rights which provide for notice periods of six months and one year, respectively. The Applicant requests the Court to consider these comparative treaties and apply their principles by analogy.

42. The Applicant takes the view that the Respondent’s withdrawal has no effect on pending cases based on the principle of non-retroactivity. The Applicant argues further that allowing the Respondent to withdraw from proceedings before the Court at this stage would offend the principle of legality. In support of this argument, the Applicant cites Article 70(1)(b) of the Vienna Convention which provides that the termination of a treaty, unless otherwise agreed, does not affect any preexisting obligation or legal situation. The Applicant states that complaints submitted after the

withdrawal would still be admissible to the extent that they address State action during the period when the State was still bound by the convention. . . .

43. The Coalition [*amicus* Coalition for an Effective African Court] focused on two issues, namely: whether the Respondent was entitled to withdraw its declaration and the legal effects on pending proceedings of such withdrawal. The Coalition is of the view that in the absence of express provisions for withdrawal of declarations in the Protocol, the provisions of Article 56 of the Vienna Convention may apply. The Coalition asserts that the rules that govern treaties also apply to the acceptance of the jurisdiction of courts, and as such, the Court should interpret the Respondent's withdrawal in light of the provisions of the Vienna Convention. . . .

47. . . . [T]he Coalition takes the view that the Respondent's request to suspend pending cases before the Court breaches the provisions of international law on treaties, the Charter and Protocol. The Coalition notes that the role of the Court is to preserve, complement and reinforce progress made in the protection of human rights by the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission") and other institutions and developments in African and international legal instruments. This specifically includes ensuring compliance with the criteria on the equality of parties to a trial, regardless of whether or not a Party is a sovereign State. The Coalition also states that the Court should aim at ensuring observance of the right of any victim to seek effective legal remedy in conformity with Article 7 of the Charter and the "*Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* 3" adopted by the Commission. . . .

53. It is not in dispute that the Protocol does not contain provisions for denunciation of the Protocol or withdrawal of the declaration under Article 34(6). Similarly, the Charter does not contain any provisions for denunciation. The Applicant, in her submission argues that in the absence of express provisions in the Protocol for withdrawal, the Vienna Convention applies. . . .

54. . . . [T]he declaration itself is a unilateral act that is not subject to the law of treaties. The Court therefore holds that the Vienna Convention does not apply to the declaration under Article 34(6) of the Protocol.

55. . . . [T]he Court is guided by relevant rules governing declarations of recognition of jurisdiction as well as the international law principle of state sovereignty.

56. . . . [T]he Court notes that related declarations are generally optional in nature. This is illustrated by the provisions relating to the recognition of jurisdiction of the International Court of Justice, the European Court of Human Rights and the Inter-American Court of Human Rights.

57. The Court is of the view that the declaration provided under Article 34(6) is of a similar nature to those mentioned above. This is because although the declaration emanates from the Protocol, its making is optional in its nature. As such, and being unilateral, the declaration is separable from the Protocol and is therefore subject to withdrawal independently of the Protocol.

58. The Court is also of the view that the optional nature of the declaration and its unilateral character stem from the international law principle of state sovereignty. As far as unilateral acts are concerned, state sovereignty commands that states are free to commit themselves and that they retain discretion to withdraw their commitments.

59. As a consequence, the Court holds that the Respondent is entitled to withdraw its declaration pursuant to Article 34(6) and that such withdrawal is valid under the Protocol. . . .

60. In respect to conditions of withdrawal, the Court notes that even if withdrawal of the declaration under Article 34(6) is unilateral, the discretionary character of the withdrawal is not absolute. This is so particularly regarding acts that create rights to the benefit of third parties, the enjoyment of which require legal certainty.

61. In such circumstances and when they are allowed to withdraw, states should be required to give prior notice. The requirement of notice is necessary in the instant case especially as the declaration pursuant to Article 34(6) once made constitutes not only an international commitment on the part of State, but more importantly, creates subjective rights to the benefit of individuals and groups. . . .

66. . . . [A] notice period of one year shall apply to the withdrawal of the Respondent's declaration. . . .

67. The Court considers that the legal effects of the withdrawal are two-fold. On the one hand, and considering that a notice period of one year applies, the act of withdrawal will have effect only after the expiry of that period. As a consequence, the Court holds that the withdrawal of the Respondent's declaration under Article 34(6) of the Protocol shall take effect after a period of one year, that is, from 1 March 2017.

68. On the other hand, the Parties have raised the issue of the possible effect of withdrawal on pending cases. In the view of the Court, an act of the Respondent cannot divest the Court of jurisdiction it had to hear the matter. This position is supported by the legal principle of non-retroactivity which stipulates that new rules apply only to future situations. The Court therefore holds that the Respondent's notification of intention of withdrawal has no legal effect on cases pending before the Court. . . .

What is the relationship between domestic lawfulness and international lawfulness? Should the international lawfulness of a treaty withdrawal ever depend on compliance with domestic constitutional law governing treaty withdrawal? Formally, under Article 46 of the Vienna Convention on the Law of Treaties, a “[s]tate may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.” Furthermore, a violation is only “manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.” While this Article does not directly speak to the issue of treaty withdrawal, it suggests that an act of termination made in violation of domestic law might still have international legal effect, unless it is abundantly obvious that the act of termination violated domestic constitutional law.

Considerable uncertainty remains over how to interpret Article 50 of the Treaty on European Union’s reference to termination “in accordance with” a state’s “own constitutional requirements.”* What issues regarding the United Kingdom’s triggering of Article 50, for instance, might be litigated at the Court of Justice of the European Union?

Is termination the inevitable outcome of all attempts to withdraw from a treaty? A number of historical examples suggest that states have at times used notices of intent to withdraw as a way to encourage other treaty partners to renegotiate existing treaty terms. For example, in November 1965, the United States informed Poland of its intent to withdraw from the 1929 Warsaw Convention on Air Transport,

* Article 50 of the Treaty on European Union provides:

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. . . .
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. . . .
5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

citing concerns about low limits on liability for death and personal injury provided under the Convention. However, by May 1966 the two governments and relevant air carriers had struck a deal, and the United States withdrew its notification.

These issues are coming to the fore in connection with the Trump Administration's recent notice of withdrawal from the Paris Agreement on climate change. In particular, can other treaty partners ignore a party's efforts to disengage? In the famous 1966 "Indonesian Intermezzo," the United Nations (UN) General Assembly passed a resolution welcoming the "return" of Indonesia to the United Nations, recharacterizing what might otherwise have seemed an unequivocal attempt by Indonesia to withdraw from the United Nations as a sort of temporary cessation of participation. In a letter to the UN Secretary-General, the Foreign Minister of Indonesia had announced Indonesia's decision by 1965 that it was left with "no alternative . . . but withdrawal from the United Nations." However, in a letter accepted by the UN General Assembly in 1966, Indonesia explained that it had since "decided to resume full co-operation with the United Nations and to resume participation in its activities." Another potential parallel is the United States' attempt to revoke its signature of the Rome Statute to the International Criminal Court, as discussed in the excerpts below.

Unsigning

Edward T. Swaine (2003)*

What accounts for the tumult over the Bush Administration's decision to "unsign" the treaty establishing the International Criminal Court (ICC)? On its face, the decision was not only rational, but to everyone's benefit. When signing the Rome Statute, President Clinton restated American objections to the ICC's jurisdiction, claimed that his intention in signing was to maintain an avenue for changing the court, and signaled that he would not submit the treaty to the Senate unless significant revisions were made—and would recommend that his successor likewise refrain. Whatever promise for eventual ratification this tack once held disappeared when the Bush Administration made known that it sided with the Senate in categorically opposing U.S. participation. . . .

The widespread disapproval of the U.S. decision is probably easiest to understand in substantive terms. Those having faith in the ICC would have preferred full-fledged U.S. participation, and disliked unsigning because it signaled a decisive setback for that possibility—and the end to any obligation the United States assumed as a signatory. But this substantive explanation is also incomplete. The United States's longstanding objections to certain basic aspects of the court's operation, and its failure

* Excerpted from Edward T. Swaine, *Unsigning*, 55 STANFORD LAW REVIEW 2061 (2003).

(despite concerted effort) to persuade other negotiating states of those objections' merits, make it implausible that remaining a signatory would have led it to participate harmoniously in the new regime—let alone to engage in what Harold Koh has labeled “an international Marbury versus Madison moment.” If so, ICC-based objections to unsigned were either highly optimistic or preoccupied with the gesture's symbolism.

International lawyers also regarded the mere act of unsigned as significant in itself. Some seemed to think it impossible, and the European Union's official reaction hedged as to its effect. It was, in any event, apparently unprecedented, and a precedent some considered troubling. U.S. officials and their political supporters urged the unsigned of a number of important treaties that the United States has signed but not yet ratified—such as the Kyoto Protocol, the Biodiversity Treaty, the Comprehensive Test Ban Treaty, the Convention on the Rights of the Child, and the ILO Convention on Race Discrimination in Employment. Other states, such as Israel, are considering the possibility with respect to the Rome Statute. Given the number of unratified signatures to multilateral treaties, not to mention the number of multilateral treaties still open to signature, the scope of the obligation imposed on signatories—and the limits, if any, to unsigned—are questions of considerable moment to treaty law. The former head of the U.S. delegation to the ICC negotiations cautioned that “there is a whole list of treaties that we've ratified that other states have signed but not yet ratified. . . . If we ‘unsigned’ the ICC, we give a signal that a new practice is acceptable, and we lay the groundwork for undermining a whole range of treaties,” including for other states desirably constrained by international law. . . .

The history of the law of treaties, greatly simplified, supports a shift in gravity from signature to ratification. Signature was generally regarded as sufficient between monarchs or, for that matter, between their duly authorized representatives. Even in the early twentieth century, dictators sometimes personally negotiated, signed, and through those acts made binding treaties along much the same lines. But separate ratification procedures also have an ancient pedigree in international relations, have come to be required by numerous national constitutions, and are now the default procedure for international agreements.

The relationship among negotiating authority, signature, and ratification raises a host of technical issues, but at least one of potential consequence: If ratification is required before a state can become a party, what significance remains for prior acts, particularly signature? To be sure, signature has some recognizable, if often overlooked, consequences. Collectively, signature tends to fix the treaty's substantive terms—at least in the absence of reservations. It also establishes the terms by which a treaty is to come into force, such as by setting a time limit for ratification or stipulating the minimum number of signatories.

Commentators puzzled, however, over the significance of individual signatures for state consent, a problem made more acute by widespread and prolonged delays in

ratification. Some conceded that the signature lacked any legal effect, but most shrunk from such a nihilistic view. At the opposite end of the spectrum, some claimed that signature created an obligation to ratify. But this would basically divest ratification of significance, and in the process slight the functional arguments for it. Because adding discrete stages to the consent process may improve the likelihood of cooperation, rendering ratification redundant may harm the objectives of treatymaking. Moreover, to the extent that domestic ratification processes broaden participation—as in the United States, where ratification increases public scrutiny, requires legislative participation, and presents the executive branch with a second opportunity to evaluate the treaty—requiring ratification on the international plane may improve the credibility of treaty commitments. . . .

A third, intermediate possibility was that ratification, though necessary to make an obligation binding, had an effect retroactive to the time of signature. Whatever the potential merits of that rule, it too was regarded as inconsistent with the migration from ratification of the signature to ratification as a separable mechanism for indicating consent. By the time of the Harvard Research project in 1935, retroactive ratification was considered “obsolete,” a judgment reiterated in the International Law Commission’s proceedings.

A fourth possibility, that endorsed by the Harvard project, the International Law Commission, and ultimately by those negotiating the Vienna Convention, was to redeem the signature by imposing a distinct duty on signatories. A handful of cases decided following World War I indicated that signatories—including, at least arguably, mere signatories—assumed some kind of duty not to disrupt the treaty’s operation. . . . The essential ambition, from a doctrinal point of view, has been to establish some legal significance for the signature within the process of consent. . . .

If these scenarios seem overly exotic and anecdotal, more systematic, *ex ante* effects can be identified. Where parties are free to exit a relationship at any point and for any reason, they will under-invest in reliance—that is, fail to depend upon the relationship’s perpetuation in ways that might be efficient. In the treaty context, such under-investment can take several forms. States may decide not to negotiate at all if they believe that signatures are unreliable, and may even invest their resources in activities inconsistent with what would otherwise be the treaty regime—such as in pursuing treaty relations with other partners, or acting unilaterally. If they elect nonetheless to negotiate, they may be inclined to agree to less exacting terms than would be ideal, if and to the extent that those terms would impose fewer costs if one side reneged on its signature. Finally, states may simply wait to ratify, perhaps mutually deterring one another’s ratification. . . .

Unsigning, in short, should be acknowledged as a legitimate and understandable course of action under the Vienna Convention, albeit one that may impair the successful pursuit of multilateral treaties. If little is asked of mere

signatories, the risk that unsigned will become endemic is low. But with the continued popularity of multilateral conventions, and the proliferation of parties actively engaged in making and enforcing international law, it is becoming steadily less likely that states will be able to maintain any kind of collective repose. Under these circumstances, unsigned may well become more common, and in the process threaten the possibilities for international cooperation. . . .

On American Exceptionalism

Harold Hongju Koh (2003)*

. . . In a penetrating essay, Michael Ignatieff has catalogued various kinds of American exceptionalism, in the process separating out at least three different faces of American engagement with the world: first, what he calls America's human-rights narcissism, particularly in its embrace of the First Amendment and its nonembrace of certain rights—such as economic, social, and cultural rights—that are widely accepted throughout the rest of the world. The second face is America's judicial exceptionalism, espoused by some Supreme Court Justices, and typified by Justice Scalia's statement in *Stanford v. Kentucky* [(1989)] that the practices of foreign countries are irrelevant to U.S. constitutional interpretation, because, in construing open-ended provisions of the Bill of Rights, "it is American conceptions of decency that are dispositive." The third face . . . [is reflected in] ways in which the United States actually exempts itself from certain international law rules and agreements, even ones that it may have played a critical role in framing, through such techniques as noncompliance; nonratification; ratification with reservations, understandings, and declarations; the non-self-executing treaty doctrine; or the latest U.S. gambit, unsigned the Rome Statute of the International Criminal Court (ICC). . . .

I believe that lumping all of America's exclusionary treaty practices—e.g., nonratification, ratification with reservations, and the non-self-executing treaty doctrine—under the general heading of "American exemptionalism" misses an important point: that not all the ways in which the United States exempts itself from global treaty obligations are equally problematic. For example, although the United States has a notoriously embarrassing record for the late ratification, nonratification, or "Swiss cheese ratification" of various human rights treaties, as my colleague Oona Hathaway has empirically demonstrated, the relevant question is not nonratification but noncompliance with the underlying norms, a problem from which the rest of the world tends to suffer more than the United States. Many countries adopt a strategy of ratification without compliance; in contrast, the United States has adopted the perverse practice of human rights compliance without ratification. So, for example, during the

* Excerpted from Harold Hongju Koh, *On American Exceptionalism*, 55 STANFORD LAW REVIEW 1479 (2003).

thirty-seven years after the United States signed, but before it ratified, the Genocide Convention, no one plausibly claimed that U.S. officials were committing genocide. This was simply another glaring example of American compliance without ratification. . . .

[T]he . . . most problematic face of American exceptionalism . . . [is] when the United States actually uses its exceptional power and wealth to promote a double standard. The most problematic case is not distinctive American rights culture, a taste for different labels, or a flying buttress mentality, but rather, when the United States proposes that a different rule should apply to itself than applies to the rest of the world. Recent well-known examples include such diverse issues as the International Criminal Court, the Kyoto Protocol on Climate Change, executing juvenile offenders or persons with mental disabilities, declining to implement orders of the International Court of Justice with regard to the death penalty, or claiming a Second Amendment exclusion from a proposed global ban on the illicit transfer of small arms and light weapons. In the post-9/11 environment, further examples have proliferated: America's attitudes toward the global justice system, holding Taliban detainees on Guantanamo without Geneva Convention hearings, and asserting a right to use force in preemptive self-defense

Under international law, it is unclear what the precise legal force of "unsigning" a previously signed treaty should be. At present, the U.S. letter of unsigning is simply lodged with the U.N. depositary of treaties, along with a notation of President Clinton's prior signature. Nor is the matter automatically controlled by the administration's stated desire to reject the ICC. In 1994, for example, the United States attempted to modify its acceptance of the compulsory jurisdiction of the International Court of Justice to avoid a suit by Nicaragua, but the court itself eventually rejected that attempt as legally ineffective and proceeded to judgment against the United States.

As a policy matter, it is by no means clear that governments should be allowed to enter and exit their human rights obligations with equal ease. If that were so, other countries could invoke the U.S. "unsigning" precedent to justify backing out of other international commitments of importance to the United States. In each case, the goal should not be to give these nations an easy way out of their commitments, but to enmesh them within the global treaty system to encourage them to internalize those norms over time. Nor can the United States so forthrightly protest North Korea's acknowledged violation of the 1994 Agreed Framework, when the United States itself is unsigning solemn commitments it previously made.

Rather than taking America's unsignature at face value, a transnational legal process approach would recognize that the unsigning actually marks the beginning, not the end, of the United States's relationship with an ongoing International Criminal Court. Henceforth, every act of American cooperation with the court will constitute a

de facto repudiation of the categorical, but theoretical, act of unsignature. Thus, in a well-chosen case, a state party to the court could request that the United States provide evidence to support an ICC prosecution—as was done, for example, when the United States made classified evidence available to the International Criminal Tribunal for the former Yugoslavia (ICTY) to support the indictment of Slobodan Milosevic. Alternatively, another State could seek to extradite to the ICC a suspect located on U.S. soil. If the United States were to cooperate—as it well might in a case that served U.S. interests—the incident could reduce American exceptionalism, undermine the force of the May 2002 unsigning, and help shift the United States toward a new, more pragmatic long-term policy of cooperating with the court on a case-by-case basis. . . .

* * *

Among African states, South Africa is not alone in wavering with regard to its membership in the International Criminal Court. In February 2017, Gambia also revoked its notification of intent to withdraw from the Rome Statute. Gambian President Yahya Jammeh had provided notice of Gambia’s intent to withdraw in October 2016 and accused the ICC of bias towards Africans. However, after President Adama Barrow—who vowed to restore human rights—defeated Jammeh in a December 2016 election, Barrow formally un-notified Gambia’s intent to withdraw in February 2017, as he had promised in his campaign.

These examples bring to the fore a key question of treaty withdrawal: How easy or difficult should the withdrawal process be? Should it be possible to withdraw from treaties and international institutions as easily as it is to overturn domestic legislation? Edward Swaine’s article on “unsigning” treaties cautions that nations may be reluctant to commit to cooperative arrangements that are too easily undone by one party. On the other hand, too onerous procedural barriers to withdrawal, or doctrines too favorable to continued cooperation and the bargaining power of remaining treaty parties, might make nations reluctant to sign on in the first place. Further, a regime that makes it difficult to withdraw, but tolerates “slackers” who stay within the system, may end up condoning two kinds of membership: full active membership and membership in name only.

Yet another issue is whether it matters that an international regime resembles a constitutional order. Is “lip service membership” antithetical to the notion of a constitutional order? How should law value a Member State’s claim of a “right to disengage?” And how does membership in name only differ from “tiers of membership”—after all, even before Brexit, the United Kingdom was not fully subject either to the currency (Eurozone) or immigration (Schengen Zone) rules that govern the European Union. These issues are at the core of the chapter *Exiting by Degree*.

THE LAW OF SECESSION

Secession, or the withdrawal of a subunit from the larger governmental entity, has conceptual parallels to disassociation at the transnational level. This segment looks at secession movements in Canada, Italy, and Spain as examples for discussing the judicial review of and the constraints on seceding. Whereas the primary governing law in disassociation is a treaty or treaties, the primary governing law in secession is a constitution. How much difference should that make?

In 1998, the Supreme Court of Canada considered in *Reference re Secession Quebec* who could effectuate the secession of the province of Quebec from Canada and what procedures and processes would be required for the secession to be legal. The decision represents how courts consider these issues under both domestic and international law. The Constitutional Court of Italy and the Constitutional Court of Spain considered similar questions concerning the constitutionality of Veneto and Catalonia, respectively, holding their own referenda to declare their political autonomy. Veneto had enacted two laws: the first law proposed a referendum on five questions concerning more autonomy for the region, and the second law proposed complete independence from Italy. Catalonia had similarly enacted one resolution approving a referendum for complete independence from Spain.

Reference re Secession of Quebec

Supreme Court of Canada

2 S.C.R. 217 (1998)

. . . Present: Lamer[, Chief Justice,] and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie, [Justices]. . .

The following is the judgment delivered by the Court—

1. This Reference requires us to consider momentous questions that go to the heart of our system of constitutional government. . . .

2. The questions posed by the Governor in Council by way of Order in Council P.C. 1996-1497, dated September 30, 1996, read as follows:

[Question 1:] Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?

[Question 2:] Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that

would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

[Question 3:] In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada? . . .

27. As to the “proper role” of the Court, it is important to underline . . . that the questions posed in this Reference do not ask the Court to usurp any democratic decision that the people of Quebec may be called upon to make. The questions posed by the Governor in Council, as we interpret them, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken. The attempted analogy to the U.S. “political questions” doctrine therefore has no application. The legal framework having been clarified, it will be for the population of Quebec, acting through the political process, to decide whether or not to pursue secession. As will be seen, the legal framework involves the rights and obligations of Canadians who live outside the province of Quebec, as well as those who live within Quebec. . . .

31. . . . The Reference questions raise issues of fundamental public importance. It cannot be said that the questions are too imprecise or ambiguous to permit a proper legal answer. Nor can it be said that the Court has been provided with insufficient information regarding the present context in which the questions arise. Thus, the Court is duty bound in the circumstances to provide its answers. . . .

32. . . . In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question . . . [of whether under the Constitution of Canada, the National Assembly, legislature or government of Quebec can effect the secession of Quebec from Canada unilaterally] (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities. . . .

33. In our constitutional tradition, legality and legitimacy are linked. The precise nature of this link will be discussed below. However, at this stage, we wish to emphasize only that our constitutional history demonstrates that our governing institutions have adapted and changed to reflect changing social and political values. This has generally been accomplished by methods that have ensured continuity, stability and legal order.

34. Because this Reference deals with questions fundamental to the nature of Canada, it should not be surprising that it is necessary to review the context in which the Canadian union has evolved. . . .

48. . . . [T]he evolution of our constitutional arrangements has been characterized by adherence to the rule of law, respect for democratic institutions, the accommodation of minorities, insistence that governments adhere to constitutional conduct and a desire for continuity and stability. . . .

49. . . . Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. The following discussion addresses the four foundational constitutional principles that are most germane for resolution of this Reference: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights. These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.

50. Our Constitution has an internal architecture, or what the majority of this Court . . . called a “basic constitutional structure.” The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole. . . .

83. Secession is the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane. In a federal state, secession typically takes the form of a territorial unit seeking to withdraw from the federation. Secession is a legal act as much as a political one. . . . [W]e are asked to rule on the legality of unilateral secession “[u]nder the Constitution of Canada.” This is an appropriate question, as the legality of unilateral secession must be evaluated, at least in the first instance, from the perspective of the domestic legal order of the state from which the unit seeks to withdraw. As we shall see below, it is also argued that international law is a relevant standard by which the legality of a purported act of secession may be measured.

84. The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation. The amendments necessary to achieve a secession could be radical and extensive. Some commentators have suggested that secession could be a change of such a magnitude that it could not be considered to be merely an amendment to the Constitution. We are not persuaded by this contention. It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, although the Constitution neither expressly authorizes nor prohibits secession, an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements. The fact that those changes would be profound, or that they would purport to have a

significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada. . . .

103. To the extent that a breach of the constitutional duty to negotiate . . . undermines the legitimacy of a party's actions, it may have important ramifications at the international level. Thus, a failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's claim to legitimacy which is generally a precondition for recognition by the international community. Conversely, violations of those principles by the federal or other provincial governments responding to the request for secession may undermine their legitimacy. Thus, a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process. Both the legality of the acts of the parties to the negotiation process under Canadian law, and the perceived legitimacy of such action, would be important considerations in the recognition process. In this way, the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the international plane.

104. Accordingly, the secession of Quebec from Canada cannot be accomplished by the National Assembly, the legislature or government of Quebec unilaterally, that is to say, without principled negotiations, and be considered a lawful act. Any attempt to effect the secession of a province from Canada must be undertaken pursuant to the Constitution of Canada, or else violate the Canadian legal order. However, the continued existence and operation of the Canadian constitutional order cannot remain unaffected by the unambiguous expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The primary means by which that expression is given effect is the constitutional duty to negotiate in accordance with the constitutional principles that we have described herein. In the event secession negotiations are initiated, our Constitution, no less than our history, would call on the participants to work to reconcile the rights, obligations and legitimate aspirations of all Canadians within a framework that emphasizes constitutional responsibilities as much as it does constitutional rights.

105. It will be noted that Question 1 does not ask how secession could be achieved in a constitutional manner, but addresses one form of secession only, namely unilateral secession. Although the applicability of various procedures to achieve lawful secession was raised in argument, each option would require us to assume the existence of facts that at this stage are unknown. In accordance with the usual rule of prudence in constitutional cases, we refrain from pronouncing on the applicability of any particular constitutional procedure to effect secession unless and until sufficiently clear facts exist to squarely raise an issue for judicial determination. . . .

110. The argument before the Court on Question 2 has focused largely on determining whether, under international law, a positive legal right to unilateral secession exists in the factual circumstances assumed for the purpose of our response to Question 1. . . .

111. It is clear that international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their “parent” state. This is acknowledged by the experts who provided their opinions on behalf of both the *amicus curiae* and the Attorney General of Canada. Given the lack of specific authorization for unilateral secession, proponents of the existence of such a right at international law are therefore left to attempt to found their argument (i) on the proposition that unilateral secession is not specifically prohibited and that what is not specifically prohibited is inferentially permitted; or (ii) on the implied duty of states to recognize the legitimacy of secession brought about by the exercise of the well-established international law right of “a people” to self-determination. . . .

112. International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination, e.g., the right of secession that arises in the exceptional situation of an oppressed or colonial people

138. . . . [T]he international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions. Accordingly, neither the population of the province of Quebec, even if characterized in terms of “people” or “peoples,” nor its representative institutions, the National Assembly, the legislature or government of Quebec, possess a right, under international law, to secede unilaterally from Canada. . . .

147. In view of our answers to Questions 1 and 2, there is no conflict between domestic and international law to be addressed in the context of this Reference. . . .

149. The Reference requires us to consider whether Quebec has a right to *unilateral* secession. Those who support the existence of such a right found their case primarily on the principle of democracy. Democracy, however, means more than simple majority rule. As reflected in our constitutional jurisprudence, democracy exists in the larger context of other constitutional values such as those already mentioned. In the 131 years since Confederation, the people of the provinces and territories have created close ties of interdependence (economically, socially,

politically and culturally) based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly secession of a province “under the Constitution” could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.

150. The Constitution is not a straitjacket. Even a brief review of our constitutional history demonstrates periods of momentous and dramatic change. Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. While it is true that some attempts at constitutional amendment in recent years have faltered, a clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.

151. Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations. Nor, however, can the reverse proposition be accepted. The continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government, Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities. No one suggests that it would be an easy set of negotiations. . . .

Judgment No. 118
Constitutional Court of Italy (2015)

[The Constitutional Court, composed of President: Alessandro Criscuolo; Judges: Giuseppe Frigo, Paolo Grossi, Giorgio Lattanzi, Aldo Carosi, Marta Cartabia, Mario Rosario Morelli, Giancarlo Coraggio, Giuliano Amato, Silvana Sciarra, Daria de Pretis, Nicolò Zanon delivered the following judgment.]

[Author: Marta Cartabia] . . .

1. By two applications served on 23-28 August 2014 and filed on 2 September 2014, the President of the Council of Ministers, represented by the State Counsel, raised questions concerning the constitutionality, respectively, of Veneto Regional Law no. 15 of 19 June 2014 (Consultative referendum concerning autonomy for Veneto), . . . and Veneto Regional Law no. 16 of 19 June 2014 (Calling of the consultative referendum on independence for Veneto)

7.2. The consultative referendum provided for under Article 1 [of Veneto Regional Law no. 15] does not concern solely fundamental choices on [a] constitutional level, which are as such precluded from the scope of regional referendums according to the case law of the Constitutional Court . . . , but seeks to subvert the institutions in a manner that is inherently incompatible with the founding principles of the unity and indivisibility of the Republic laid down in Article 5 of the Constitution.

The unity of the Republic is an aspect of constitutional law that is so essential as to be protected even against the power of constitutional amendment. There is no doubt—as this Court has also recognized—that the republican order is also based on principles including social and institutional pluralism and territorial autonomy, in addition to an openness to supranational integration and international law; however, these principles must be developed within the framework of the Republic alone: “The Republic, which is one and indivisible, shall recognise and promote local government” (Article 5 of the Constitution).

According to the settled case law of this Court, pluralism and autonomy do not permit the regions to classify themselves as sovereign bodies and do not permit their governmental organs to be treated as equivalent to the representative bodies of a nation. *A fortiori*, the same principles cannot be taken to extremes so as to result in the fragmentation of the legal order and cannot be invoked as justification for initiatives involving the consultation of the electorate—albeit only for consultative purposes—concerning prospective secession with a view to the creation of a new sovereign body. Such a referendum initiative, as also that under examination, at odds with the unity of the Republic could never involve the legitimate exercise of power by the regional institutions and would thus lie *extra ordinem*. . . .

8.4. As regards the questions provided for under Article 2(1) no. 2), 3) and 4) of Veneto Regional Law no. 15 of 2014, the challenges alleging the violation of Articles 26 and 27 of the Statute of Veneto Region, and thus of Article 123 of the Constitution, are well founded. Questions no. 3) and no. 2) delineate respectively a financial structure within which at least eighty percent of the taxes collected within the regional territory, or which are paid by the “citizens of Veneto,” are to be withheld by the Region, whilst at least eighty percent of the part collected by the “central government” should be used within the regional territory “to procure goods and services.” The referendum and the resulting initiatives taken by the representative bodies of the Region provided for under the contested law thus relate to the destination of the revenues resulting from existing taxation and propose that a significant percentage be removed from general public finances for allocation for the exclusive benefit of Veneto Region and its inhabitants. In doing so the two questions patently encroach upon taxation and thus violate Articles 26(4)(a) and 27(3) of the Statute, which do not permit consultative referendums in relation to tax legislation.

The violation of the constitutional principles concerning the coordination of the public finances and of the limit relating to budgetary laws, interpreted in accordance with the settled case law of this Court concerning referendums pursuant to Article 75 of the Constitution*, which can be used as a basis for interpreting also the analogous provision within the Statute, is no less far-reaching.

The questions under examination propose lasting and deep-seated changes to the equilibria of the public finances, thereby impinging upon the bonds of solidarity between the regional population and the rest of the Republic. Thus, the two questions are directly focused not on individual budgetary initiatives or specific measures provided for thereunder but on certain structural elements of the national system of financial planning, which are indispensable in order to guarantee cohesion and solidarity within the Republic along with its legal and economic unity. In doing so the questions breach principles of certain constitutional significance and strike at the heart of an area of law in which the Regional Statute itself, in line with the Constitution, does not accept referendums, not even consultative referendums. . . .

* Article 75 of the Constitution of Italy provides:

A popular referendum shall be held to abrogate, totally or partially, a law or a measure having the force of law, when requested by five hundred thousand voters or five Regional Councils. Referenda are not admissible in the case of tax, budget, amnesty and pardon laws, or laws authorising the ratification of international treaties. All citizens eligible to vote for the Chamber of Deputies have the right to participate in referenda. The proposal subjected to a referendum is approved if the majority of those with voting rights have participated in the vote and a majority of votes validly cast has been reached. The procedures for conducting a referendum shall be established by law.

8.6. Article 2(1) no. 5) of Veneto Regional Law no. 15 of 2014 concerns a referendum which will place the following question before the electorate: “Do you want Veneto Region to become a region governed by special statute?”

The purpose of this plebiscite is to include Veneto Region in the class of regions governed by special statute, which are specified in a closed list in Article 116 of the Constitution. Accordingly, this question also impinges upon fundamental choices on constitutional level which cannot be addressed in regional referendums, according to the case law of this Court, and contrasts irremediably with the Regional Statute, Articles 26(4)(b) and 27(3) of which provide that the terms of regional referendums must respect “constitutional obligations.” The clear wording of the question does not leave scope for interpretations such as that proposed by counsel for the Region, according to whom the referendum seeks to obtain a different classification of the applicant region, albeit still as a region governed by ordinary statute: on the contrary, the question is clearly intended to include Veneto Region alongside the five regions governed by special statute already provided for under Article 116 of the Constitution. Article 2(1) no. 5) of Veneto Regional Law no. 15 of 2014 must therefore be ruled unconstitutional. . . .

* * *

Following the Constitutional Court’s decision, calls for a referendum on more autonomy continued in Veneto and another Italian region, Lombardy. Both regions scheduled consultative referendums for October 22, 2017 on the question of whether voters “wanted their region to be granted further and special forms and conditions of autonomy.” Unlike the “independence referendum” that was held unconstitutional in the decision excerpted above, the Constitutional Court held that this popular consultation was compatible with the Constitution under Article 116, Paragraph 3, which provides for “additional special forms and conditions of autonomy” to be granted to some regions in limited areas concerning education, protection of the environment, cultural heritage, and the organization of lower courts.

Judgment No. 259 Constitutional Court of Spain (2015)

The Constitutional Court, in full bench, composed of the Honour Judges Mr. Francisco Pérez de los Cobos Orihuel (President), Ms. Adela Asua Batarrita, Ms. Encarnación Roca Trías, Mr. Andrés Ollero Tassara, Mr. Fernando Valdés Dal-Ré, Mr. Juan José González Rivas, Mr. Santiago Martínez-Vares García, Mr. Juan Antonio Xiol Ríos, Mr. Pedro José González-Trevijano Sánchez, Mr. Ricardo Enríquez Sancho, and Mr. Antonio Narváez Rodríguez, has pronounced . . . [t]he

judgment . . . drawn up by Judge Mr. Andrés Ollero Tassara, who expresses the opinion of the Court. . . .

2. . . . For a resolution adopted by an Autonomous Community to be challengeable through the aforementioned constitutionality proceedings, we established, in said judgment, that: it must be legal in nature; it must constitute an expression of the institutional intent of the Autonomous Community in question—that is, it must be issued by a body capable of expressing the Autonomous Community’s intent and not be presented as a procedural measure within a larger process; and, finally, it must have, even if only circumstantially, the capacity to produce legal effects.

Resolution 1/XI was issued by the Parliament, the Autonomous Community body which represents the people of Catalonia, in the discharge of its statutory duty, i.e. to control and further political and governmental action, through the parliamentary process established in the corresponding regulations. The Resolution therefore constitutes an act performed by the Parliament that, despite being clothed as a political act, also has an undeniable legal nature. . . .

Furthermore, the Resolution is capable of producing its own legal, not only political, effects, since, even if it could be understood as lacking of binding force over its intended targets (citizens, the Catalan Parliament and Government, and the other institutions of the Autonomous Community), “having a legal nature” . . . “does not stop having binding force.” Firstly, since the challenged Resolution “solemnly declares the beginning of the process to create an independent Catalan State in the form of a republic”, and “proclaims the opening of a . . . constituent process to lay the foundations for the future Catalan constitution,” within an announced framework of “uncoupling” from the Spanish state, it is capable of producing legal effects, as these statements could be understood as the acknowledgement that the bodies and entities which the Resolution entrusts with carrying out these processes—the Parliament and the Government of the Autonomous Community in particular—have “powers inherent to sovereignty that go above and beyond the powers derived from the autonomy afforded by the Constitution to the different nationalities that make up the Spanish nation.” . . .

Secondly, the declaratory nature of the Resolution, in that it proclaims the immediate opening of a constituent process aimed at the creation of an independent Catalan state in the form of a republic, “does not permit us to construe its effects in the parliamentary sphere as being limited to strictly political matters, as it demands that certain actions be taken, the performance of which may be subject to the parliamentary control process in place for resolutions adopted by the Parliament”

[T]he people of Catalonia do not constitute a “legal entity entitled to compete with the holder of the national sovereignty which was exercised to establish the

Constitution that, in turn, gave rise to the existence of the Statute that constitutes the basic institutional legislation governing the Autonomous Community.” In other words, “the citizens of Catalonia cannot be confused with the sovereign people, conceived as “the ideal unit to which allocate constituent power, and, as such, the source of the Constitution and the legal system”

4. From a reading of Resolution 1/XI, it is unequivocally inferred that said Resolution is considered the founding act of a “process to create an independent Catalan State in the form of a republic” . . . and, to this end, it makes use of language that seeks to be substantially “constitutional” (the future “constitution” . . . , or “sovereignty” and “constituent power” . . .). These terms, however, appear in the Spanish Constitution and in this Court’s case law. . . .

The sovereignty of the nation, vested in the Spanish people, necessarily entails the unity of the nation, proclaimed . . . by Article 2 CE [Constitution of Spain], pursuant to which the Constitution itself “is based on the indissoluble unity of the Spanish Nation, the common and indivisible country of all Spaniards; it recognizes and guarantees the right to autonomy of the nationalities and regions of which it is composed, and solidarity amongst them all.” This unity of the sovereign entity is the basis of a Constitution through which the nation itself is, in turn, constituted as a social, democratic and rule-of-law-based State. Therefore the State is also common to everyone throughout the national territory, notwithstanding that it is also a complex, compound unit thanks to the territorial autonomy conferred by the Constitution on the different nationalities and regions that, in the form of Autonomous Communities governed by their respective Statutes, make up Spain. . . .

Article 1.2 CE is thus the basis of our entire legal system, so, as it was said in the cited doctrine “if in the present constitutional system sovereignty is vested in the Spanish people and the Spanish people alone, exclusively and indivisibly, no public authority can attribute sovereignty to any other entity or body of the State, or to any fraction of the Spanish people. Any act by a public authority that attributes legal entitlement to sovereignty to the people of an Autonomous Community must always constitute a concurrent repudiation of national sovereignty, which, pursuant to the Constitution, rests solely with the Spanish people as a whole. Entitlement to sovereignty cannot, therefore, be attributed to any fraction or part of the Spanish people.” . . .

Resolution 1/XI seeks, in short, justification through the democratic legitimacy of the Parliament of Catalonia, a principle whose formulation and consequences are in absolute discord with the Constitution of 1978 and the Statute of Autonomy of Catalonia. This not only disrupts the notion of the State based on the rule of law and on the utmost deference to legislation and the law, but also the democratic legitimacy of the Parliament of Catalonia, recognized and protected by the Constitution. . . .

As a source of legitimacy, the Spanish Constitution set the will of the constituent power. The sovereign people, conceived as the ideal entity for attributing constituent power, confirmed, by referendum, the text that had been previously agreed on by their political representatives. The Constitution's unconditional supremacy also safeguards the principle of democracy, "so guaranteeing the entirety of the Constitution must, in turn, be seen as preserving due respect for the will of the people, as expressed through the constituent power, which is the source of all legal and political legitimacy." It is, therefore, this Court's mission to safeguard the Constitution's unconditional supremacy, which is nothing more than another way of acquiescing to the will of the people expressed as a constituent power. . . .

[T]he Constitution is based on respect for the values of human dignity, freedom, equality, justice, political pluralism, democracy, the rule of law, and fundamental rights. The principle of democracy, as a constitutional principle, must, therefore, be interpreted within the scope of the entire constitutional system and its processes (electoral rules, rules of procedure, fundamental rights, the protection of minorities and constitutional reform, to cite some of the most important). . . .

Precisely because the rule-of-law-based State is based on the principle of democracy, and as a result of safeguarding democracy itself via the rule of law, the Constitution is not an intangible or unchangeable legal text. In providing for constitutional reform, as will be expanded on further below, it recognizes and channels aspirations—fully legitimate within the constitutional framework—that seek the revision and amendment of the Constitution as established in Articles 167 and 168 CE. . . . [T]he legal system, with the Constitution at its pinnacle, cannot, under any circumstances, be considered a limit to democracy, but rather as the very thing that guarantees it. . . .

6. . . . The challenged Resolution displays an ignorance of and violates the constitutional provisions which vest national sovereignty in the Spanish people and which, accordingly, proclaim the unity of the Spanish nation, the holder of this sovereignty. This violation of the Constitution is not, as is usually the case with contraventions of our fundamental statute, the result of a misunderstanding of what the Constitution enforces or allows in a given circumstance, but rather the result of an outright rejection of the binding power of the Constitution itself, which has been expressly set at odds with a power claiming to hold sovereignty and to constitute the expression of a constituent dimension from which a blatant repudiation of the current constitutional system has taken place. This is an affirmation by an authority with pretensions of founding a new political order, and for that very reason, of being released from all legal ties.

7. . . . The Constitution is entirely open to formal revision, which can be requested or proposed by, among other authorities of the State, the assemblies of the Autonomous Communities

An Autonomous Community's Parliament cannot set itself up as a source of legal and political legitimacy, unlawfully taking matters into its own hands in order to violate the constitutional system on which its own authority is based. In doing so, the Parliament of Catalonia would be undermining its own constitutional and statutory foundations by unilaterally withdrawing from any requirement to obey the Constitution and the rest of the legal system, and would be breaching the foundations of the rule-of-law State and the precept that everyone is subject to the Constitution. . . .

[U]nilaterally attempting to alter the content of the Constitution, deliberately ignoring the procedures expressly set forth for this purpose therein, means abandoning the only path that leads to this outcome—the path of the law. . . .

* * *

Since the Court's judgment, Catalonia has moved forward with a confidence vote and another proposed referendum on independence to be held in 2017. On December 14, 2016, the Court ordered the suspension of the proposed referendum. But Carles Puigdemont, the president of Catalonia's regional government, announced on June 9, 2017 that it would proceed with a referendum on independence on October 1, 2017 regardless of whether the referendum is recognized by Spain.

What Factors Favor a Claim To Disassociate?

As exemplified in *Reference re Secession of Quebec*, secession raises difficult questions of legality both under domestic and international law, and the obstacles to secession are generally quite significant. But when does oppressive action by a union trigger a member state's right of exit by impeding the right to self-determination of its citizens?

Under domestic law, many courts have held that secession is significantly constrained by their country's respective constitutions. For instance, in 1869, the U.S. Supreme Court held in *Texas v. White* that the U.S. Constitution provides for an indestructible union composed of indestructible states and that Texas could not reconsider or revoke the indissoluble relationship constructed by the U.S. Constitution without a revolution or by the consent of the states. Subsequently, in *Williams v. Bruffy* (1877), the U.S. Supreme Court discussed another legal issue of effectiveness of secession by reasoning that the validity of acts of a separatist state depends entirely upon its ultimate success. If the state fails to establish itself permanently, all such acts perish with it. If the state succeeds, and it is recognized, its acts from the commencement of its existence are upheld as those of an independent nation. In considering the secession of Chechnya, the Russian Constitutional Court similarly

concluded in 1995 that the Russian Constitution did not grant a right to secession and that a subject of the Russian Federation could change its status only by mutual agreement.

Relatedly, constitutional courts have held that certain processes of referenda are insufficient for the purpose of secession. As excerpted above, the Constitutional Court of Italy invalidated regional legislation calling for referenda on the independence and autonomy of the region as unconstitutional. The Court held that the legislation was unconstitutional because the referenda concerned “fundamental choices on constitutional level, which are as such precluded from the scope of regional referendums according to the case law of the Constitutional Court.” The Constitutional Court of Spain similarly held that secession through referenda was unconstitutional and must proceed through a constitutional amendment.

Under international law, a major question is when oppressive actions that impede the right to self-determination trigger a right of exit. In a 2004 advisory opinion, for instance, the International Court of Justice (ICJ) found that Israel’s wall construction impeded the right to self-determination of the Palestinian people. In 2010, the ICJ found that the unilateral declaration of independence by Kosovo did not violate international law. The Court made no statements, however, concerning Kosovo’s statehood and recognition by third states, and it did not examine whether Kosovo had a “right” to secession or mention effectiveness. And in 2003, the European Court of Human Rights in *Cyprus v. Turkey* supported the ICJ’s position that international law recognizes, in the interest of certain populations, the legitimacy of certain legal arrangements. Without accepting the legitimacy of the Turkish Republic of Northern Cyprus, the ECtHR, citing the ICJ, nevertheless required the non-recognized “state” to provide basic civil services and ensure human rights protections, while it remained in control of the territory.

More recently, in 2009, the African Commission on Human and Peoples’ Rights held that there is no right to secession for the people of Southern Cameroon in the absence of proof of massive violations of human rights under the African Charter on Human and Peoples’ Rights. The Commission reasoned that federalism, local government, unitarism, confederacy, and self-government can be exercised subject only to conformity with state sovereignty and the territorial integrity of a state party. Such forms of governance cannot be imposed on a state party by the African Commission. The decision follows an earlier opinion by the Court holding that unless there was evidence of human rights violations by the state of Zaire to the point that the territorial integrity of Zaire could be called into question, or that the people of Katanga were denied political participation, Katanganese self-determination could only take forms compatible with the principles of sovereignty and territorial integrity.

In short, the obstacles to secession under domestic law are immense, and the rights to secession under international law are limited. Given the nature of

constitutions and their roles in structuring governments and democracies, it is understandable that the constraints would be greater for secession than for disassociation from international organizations. But as evidenced by the European Union, today's international organizations extend far beyond a single treaty that establishes some mutual partnerships or limited relationships.

In the end, how much should the law of international disassociation look like the domestic law of secession? When states become so enmeshed in and intertwined with international organizations, and the law of those international organizations becomes deeply internalized through domestic law, barriers to disassociate will rise and increasingly start to look like the constitutional barriers to secede. Is this a trend that constitutional courts should support or encourage?

EXITING BY DEGREE

DISCUSSION LEADERS

CLARE RYAN, MIGUEL POIARES MADURO,
AND KIM LANE SCHEPPELE

IV. EXITING BY DEGREE

DISCUSSION LEADERS:

CLARE RYAN, MIGUEL POIARES MADURO, AND KIM LANE SCHEPPELE

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EUROPE'S VALUES AND THE RULE OF LAW

This chapter addresses the conflicts in Europe over the form, shape, nature, and very existence of the European project. Brexit is a vivid example of a reconfiguration. In this chapter, our focus is on the conflicts over commitments to “European values,” as they are reflected in the Consolidated Treaty on the European Union (2012) (TEU), which states in Article 2:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

The European Union (EU) has developed an extensive catalogue of fundamental rights and rule of law principles. Before the Lisbon Treaty, the European Court of Justice (ECJ) [now the Court of Justice of the European Union (CJEU)] was the primary vehicle for articulating fundamental rights principles. Over time, through an iterative process, these judicial developments then were codified into treaties and expanded in the legally binding Charter of Fundamental Rights. In addition to the Charter of Rights and Article 2, Article 6 of the TEU explains: “the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.” Under Article 49 of the TEU, compliance with these principles is a necessary condition to become a Member State of the European Union.

One set of questions about compliance arises with entry into the European Union. Another set of challenges arise once a state is part of the Union. What happens if a state backslides? What tools does the EU have to protect the rule of law within its Member States and across the Union? These questions have come to the fore in the last few years, as challenges to the independence of the judiciary and civil society have arisen in several Member States. Starting in 2014, the EU developed new mechanisms to monitor and constrain countries that seem to be rejecting Europe’s core values. The European Union has labeled these efforts “rule of law” initiatives.

A ringing endorsement of these EU values, excerpted below, comes from Frans Timmerman, First Vice-President of the European Commission. We then turn to two opinions issued in 1992 and 2007 by Advocates General of the ECJ. At issue in the first case was whether Germany could force a Greek national to use the German spelling of his name. The second case addressed whether foreign telecommunications could compel the Italian government to allocate radio frequencies. In both cases, the Advocates General argued that when members of EU countries travel across borders within the Union—exercising their EU right to freedom of movement—they carry

with them the fundamental rights protected under the European Charter on Fundamental Rights and the European Convention on Human Rights.

We then turn to the rise of national authoritarianism and its dissonance with European self-understanding and law. R. Daniel Kelemen's article on sub-unit authoritarianism provides a context for events in Hungary and Poland, where the governments have recently threatened judicial independence and civil society. As is familiar, courts in Member State have in various contexts insisted on maintaining adherence to their own constitutional identity. We provide excerpts from German, Hungarian, Danish, and Italian constitutional judgments expressing views on their authority to resolve disputes about judicial independence, migration, monetary policy, and criminal law. In each case, state courts claim "constitutional identity" and assert the supremacy of national law in direct conflict with European court rulings or EU principles.

These cases raise a series of questions about the relationship between the EU and its Member States. To what extent does contestation over Europe's authority constitute a challenge to rule of law? To what extent does it constitute exit from the core values of the Union? In an age where complete exit seems all too possible, is it better to tolerate more forms of "constitutional pluralism" where Member States can pick and choose the elements of Europe that they like and reject those that are at odds with domestic interests? Or is exit to be preferred over the gradual dilution of European values?

We conclude with the European Union's contemporary response to the threats of exit from within. The EU's ultimate sanctioning power rests in Article 7 TEU, excerpted below. Because Article 7 is often viewed as a "nuclear option," the European institutions have experimented with less drastic methods. We provide excerpts of the European Commission's Rule of Law Framework and the European Council's Rule of Law Dialogue, which represent efforts since 2014 to monitor and sanction serious breaches of European values. These processes envision a back-and-forth between Brussels and national governments. The European Commission has applied its Rule of Law Framework to Poland, which led to a sequence of escalating exchanges between Brussels and Warsaw over the Polish government's attempts to weaken its Constitutional Court. The European Parliament has also recently adopted a Resolution on Hungary threatening to invoke Article 7. In light of the executive and diplomatic nature of the current mechanisms, we ask: What role do courts—both national and supranational—play in keeping Europe together? Would and could fundamental rights protection by courts help preserve the project of European integration?

Carlos de Amberes Foundation Commemorative Lecture
Frans Timmermans (March 30, 2017)*

. . . I cannot speak today, of course, without starting to talk about what happened yesterday. The divorce papers [triggering Brexit] as you have all seen are now in the mail: signed, sealed, delivered (I'm no longer yours, to try and quote Stevie Wonder). . . . [N]othing in Europe is irreversible. When we were in the Convention, we drafted Article 50 because we wanted to take away all these feelings that the EU is a prison. It is not. You become a member because you want to and if you do not want to be a member anymore you can leave. That is why we drafted Article 50.

But there was no one, no one in the convention, not even anyone in the British delegation, who thought we would actually ever use Article 50. Frankly, at the time Brexit or the exit of any other member state was unimaginable, literally unimaginable. And the lesson to learn here in my view is: nothing is unimaginable in this Europe of ours. The disintegration of Europe? Not unimaginable. . . .

I say this because I want to mobilise the vast, vast majority of European citizens who today are silent but who profoundly feel attached to this project that is worth to defend, to foster, to strengthen. This is a project that will take us into the new millennium, this is the project that will help us conquer all the challenges of the fourth industrial revolution. This is the project that can permanently bring peace to societies that thrive on diversity. Diversity is the norm of the world to come. Those who propose to undo diversity are people who propose to unscramble scrambled eggs. You create an incredible mess in your kitchen if you try to do that, but the eggs will stay scrambled. They only become inedible and that is not a proposition I would follow. . . .

If you stand in front of a Hieronymus Bosch painting, he reflects human suffering in a way that is understandable by everyone, whether you're from the Netherlands or from Spain. This is what binds us in this European Union. . . . It's the same digestive vision on the horrors of war, in a different way but the emotion it appeals to is exactly the same. The horrors of war, we are in this because we do not want the horrors of war anymore in Europe. Every thirty years through our European history some European would fight with some other European. We put an end to that, let us not forget it.

Our joint history is a European history: our present cooperation replaces our past conflicts. And that is a feat of enormous proportions. . . . That to me is the essence of the European project. And this is, ladies and gentlemen, the biggest and most

* Excerpted from Frans Timmermans, Vice President of the European Commission, *Carlos de Amberes Foundation Commemorative Lecture*, EUROPEAN COMMISSION (March 30, 2017), available at https://ec.europa.eu/commission/commissioners/2014-2019/timmermans/announcements/carlos-de-ambres-foundation-commemorative-lecture_en.

successful peace project in the history of mankind. In the past, the ties between our countries were the accidental result of dynastic policies, imposed by an absolute monarchy, through force of arms. Today we work together through a conscious and voluntary choice. . . .

Europe is an act of political will. A deliberate decision. A conscious choice. And that we must continue to make this choice, every single day. Because this union, our values, our way of life, they are not self-executing. Self-evident but not self-executing. . . .

We chose, especially in this country, to renounce the dictatorships that so blighted our common history, and to embrace democracy. Most fundamentally, we chose to uphold a set of shared values, the bedrock of our society. We made a conscious choice when we signed the EU treaties to uphold these values . . . : “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.” Article 2, essential in what we do in Europe.

But we cannot take these values for granted. And we must remind ourselves, how extra-ordinary these values are. Our Union is very young, and the values that our parents and grandparents fought for have triumphed only for a brief period. Seen against the backdrop of our shared histories, there is nothing ordinary about our democracies, or our Union. In fact, it is close to a miracle. . . .

We are still faced by many choices. The first choice is that we must decide whether to stand together or see our Union falter. Because there is no middle way, one cannot truly choose to be part of the European Union and treat it like a supermarket at the same time.

The financial crisis of 2009 may have subsided, but the pain is still felt in the homes of too many Europeans. The migration crisis is testing European solidarity and responsibility. The geopolitical crisis is testing European unity. And our identity crisis is testing our values of an open society, and our resolve, and makes us wonder: who are we? And what do we belong to? Who do we belong to? . . .

The European Union, Europe is not “Brussels,” nor is it just about the Commission, or about the Parliament or about the Council. We are just tools, instruments. What we need to do, as instruments of the will of the European people, is to find solutions to the challenges that face us. Migration affects us. The economy affects us. Climate change affects us. Global security affects us all. Terrorism affects us all. Again, I do not need to explain this. Sadly, people in the rest of Europe, Paris, Brussels, Berlin, London, have learnt that we can all be targets. . . .

Solidarity [is] the second choice we have to make. . . . The common currency is not a goal, the common market is not a goal, it is an instrument to create wealth so that there is more solidarity, there is more growth, that people can live better lives and

take care of each other. Too many people in our society feel left behind. The promises of unfettered open markets that would spur economies and raise all boats, big and small, turned out to be true, but only half true. Not all the boats were raised. Trickle-down economics did not work as people had hoped. . . .

[M]ake no mistake: as far as values are concerned, Europe is a lot more than a market. It is a Union of values which is the cement that holds it all together. To choose Europe is a moral choice, not an economic choice. But it is also a utilitarian choice, not just a moral choice. Member States old and new, businesses big and small, citizens rich and poor; they need to have the confidence and trust that they will get an equal treatment, wherever they are in Europe. Without the rule of law, the biggest Internal Market in the history could not function. So for the Internal Market to flourish, the open society must flourish. Erode fundamental values, and you kill the goose that lays the golden eggs.

And this brings me to a third choice, perhaps the most fundamental one: we must stand for our achievements, and stand for our values. Our values may be inalienable, but they're not unassailable. The forces of xenophobia, intolerance, illiberalism are on the march. The old generations who witnessed and suffered nationalism in its most extreme form are dying out, new generations are being lured into perilous concepts that failed miserably in the past, but that memory is lost. European graveyards full of the victims of this murderous ideology are their silent proof.

And you know, contrary to what people sometimes believe, poverty is not the main driver. Where do you see these extremist parties flourish—in Denmark, in Sweden, in Germany, in the Netherlands, in Belgium. Where did the crisis hit hardest? Most of all in Greece. Is there a far-right party in Greece—yes, but it's marginal. Is there an extremist party in Portugal—No. Is there one in Ireland—No. Is there one in Spain—No. . . .

And so this leads me to believe that people are not dissatisfied about where they are today or what they have today—but really worried about what will happen tomorrow and what they might lose. . . . In the past people saw our society as an escalator going up. They could only improve their housing. They could only improve their education. They could only improve their situation. This was the *raison d'être* of social democracy, the movement I belong to: lifting people up. . . . Now people fear that the social escalator is going down. They fear that globalisation is an uncontrollable force. They fear they will lose their jobs—if not to immigrants, then to robots in China, or algorithms in cyberspace.

And so nostalgia is gaining ground. It's tempting, and I myself sometimes ruminate about the past. But nostalgia is also dangerous. . . . It blinds us to the facts, and holds us back. Populist, Europhobe nationalists. . . . By the way these extreme populists, they disagree on everything with the exception of one thing: they all hate

Europe. That must be for a good cause. Europe has been doing something well then. . . .

What I strongly reject is *exclusive* nationalism that claims the nation for itself and rejects others. Nationalism that wants to bring our Union down. I think François Mitterrand said: “A patriot loves his country, a nationalist hates other countries.” . . . Nationalism makes us do things we regret. . . . The populist nationalists offer you a deal. They say: we will protect you, but for you to feel safe, we must exclude others. Some call this “illiberalism.” And not just Muslims, migrants and minorities. Anyone who disagrees with the populists is the enemy. After the British referendum and the US elections, you could hear: “I am the people” or “We are the nation.” As though the others, the forty-eight percent, no longer existed. . . . So if you are not part of that group, you are the enemy. . . . Populists won’t protect you. They will only give you chaos, collapse and conflict. Only an open society can truly protect people from the challenges of modernity. . . .

The greatest danger is that we take for granted what we have achieved, that we consider it “normal.” Look at the timeline of history, Europe is anything but normal, in fact, it is close to a miracle. But it is not . . . self-executing. It is the work of men and women and it will continue to be. . . .

The British people decided to leave. The government now announced it in a letter. We have to work at an amicable divorce as much as we can. But all over Europe I can hear people think: “Guys, let’s not try this at home.” And what is even better, is that people coming from their homes into the street, saying that they are pro-Europe. They say there is no European public sphere. But when people in Poland and Spain and Italy follow closely the outcome of elections in the Netherlands, France and Germany, when we see a shared understanding that our destinies are bound together—what else is that but a European public sphere? A sphere that does not replace national political communities, but one that connects us all. . . .

Today I am more optimistic than two years ago about our common future. Today, with all the challenges we have, I see countries coming together again and looking for common ground. This is new, this is beautiful. And we should not underestimate the power that can generate. . . . And let me say one thing, a final word, playing around with something Václav Havel said years ago: “North, South, East, West, these should only be geographical denominations. There is no moral difference between North and South or East and West. There is no political difference between North and South, East and West. There is no difference in the dreams of our people between North and South, East and West. We only live in different corners of Europe, but we share the same dream.”

Let nobody drive us apart. Let us not fall into the trap of continuing to use stereotypes, let us just see our destiny as Europeans as it is. We either stand united and face the challenges the world throws at us, or we are divided and we become the

object of decisions taken elsewhere. That last proposition is not a proposition I like. We are masters of our common destiny, we are captains of our soul, let us make it happen. . . .

The 1992 case, excerpted below, asked whether Germany could tell a Greek national to spell his name using Roman characters in official documents. The Advocate General argued that compelling an EU citizen to do so discriminated against people with Greek names and, therefore, was a violation of the right to freedom of movement. The 2007 case concerned foreign telecommunications companies whose attempts to broadcast in Italy were consistently thwarted by the Italian government's refusal to assign radio frequencies. Again, the Advocate General proposed that EU rights protected the telecommunications companies from discrimination based on the right to freedom of movement. These approaches, although not directly adopted by the ECJ, helped provide a foundation for European efforts to combat rule of law erosion through an emphasis on fundamental rights protection across the Union.

When reading these cases, consider: What is the appropriate role for Europe's highest court? To what extent can and should the EU monitor "purely" domestic conflicts over rights because the citizen of another Member State is involved? Conversely, can the EU protect freedom of movement if Member States are free to violate EU citizens' rights through domestic law without consequences?

Konstantinidis v. Stadt Altensteig-Standesamt
Opinion of Advocate General Francis Jacobs
European Court of Justice
Case C-168/91 (1992)

. . . 1. The [German District Court of Tübingen] has asked the Court to give a preliminary ruling on the interpretation of Articles . . . 7, 48, 52, 59 and 60 of the [Treaty establishing the European Economic Community (EEC Treaty)]^{*} with regard

^{*} The Treaty establishing the European Economic Community (Treaty of Rome) provides:

Article 7: "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. . . ."

Article 48: "Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest" and "[s]uch freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. . . ."

to certain provisions of German law which require Greek names to be transliterated into Roman characters according to a system that is phonetically inaccurate.

2. The applicant in the main proceedings is a Greek national who works in Altensteig (Germany) According to his Greek birth certificate, his first name is Hréstos and his surname is Konstantinidés. He wishes those names to be transcribed in Roman characters as “Christos Konstantinidis” on the ground that such a spelling indicates as accurately as possible to German speakers the correct pronunciation of his name in Greek. . . .

3. . . . He married a German national at the Altensteig registry office. His name was entered in the marriage register as “Christos Konstadinidis.” . . . [H]e applied to the [German registry office] for the entry of his surname to be rectified from “Konstadinidis” to “Konstantinidis.” . . .

5. The [German court] considers that, if Mr Konstantinidis is compelled to have his name spelt in accordance with the ISO standard in the marriage register, his rights under Community law may be infringed. . . .

7. In principle it is not for the Court of Justice to say that one system for transliterating Greek names into Roman characters is better than another. . . . [However, if] the version of the ISO system that has been placed before the Court were used generally, there is no doubt that it would seriously distort the spelling of many Greek names. . . .

10. [The question is] . . . whether a national of a Member State who has established himself as a self-employed person in another Member State, in which a different alphabet is used, is entitled by virtue of Articles 7 and 52 of the Treaty, to oppose the transliteration of his names, for the purpose of entries in registers of civil status, in a manner that grossly misrepresents the pronunciation of those names. . . .

Article 52: “. . . [R]estrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages” and the “[f]reedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms . . . under the conditions laid down for its own nationals by the law of the country where such establishment is effected”

Article 59: “. . . [R]estrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended. . . .”

Article 60: “Services shall be considered to be ‘services’ within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. . . .”

12. Mr Konstantinidis . . . [gave] the Court a rare opportunity to hear a litigant in person when he represented himself at the hearing. His essential argument . . . is that “Hréstos Konstantinidés” is an insulting, unpronounceable parody of his name, which is offensive to his religious sentiments. He also points out that, having been known to his clients as ‘Christos Konstantinidis’ for eight years, he must now suffer either the inconvenience of telling them that he has a new name or the confusion of using different names for different purposes. . . .

20. In my view, the practice of the German authorities is capable of resulting in covert discrimination against Greek nationals. . . .

21. . . . The fact that the rules governing the writing of names in public registers are in principle a matter for national law rather than Community law does not of course mean that any discrimination in those rules is removed from the ambit of the Treaty. . . .

42. The . . . question is . . . whether a person who exercises his right of free movement under Articles 48, 52 or 59 of the Treaty is entitled, as a matter of Community law, to object to treatment which constitutes a breach of his fundamental rights. . . .

46. In my opinion, a Community national who goes to another Member State as a worker or self-employed person under Articles 48, 52 or 59 of the Treaty is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host State; he is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. . . .

48. . . . It is perhaps not unreasonable that, as regards technical obstacles to freedom of establishment, a person who moves to another Member State should in general have to comply with the local legislation But when a breach of fundamental rights is in issue, I do not see how the non-discriminatory nature of the measure can take it outside the scope of Article 52. Indeed, the proposition that a Member State may violate the fundamental rights of nationals of other Member States, provided that it treats its own nationals in the same way, is untenable. . . .

* * *

Advocate General Jacobs’ opinion in *Konstantidinis* was unconventional. Rather than keeping within the framework of the common market’s four fundamental freedoms, which were traditionally cast in economic terms, he concluded that an individual did not need to demonstrate financial loss caused by the transliteration of his name. Looking to the European Convention on Human Rights and Member States’ national constitutions, Jacobs concluded that there was “the existence of a principle

according to which the State must respect not only the physical well-being of the individual but also his dignity, moral integrity and sense of personal identity.” These rights, according to Advocate General Jacobs, were violated when a state required an individual to alter his name without sufficient justification. Even a non-discriminatory measure could therefore be contrary to then-Article 52, if it infringed upon fundamental rights.

When the ECJ issued its opinion, it did not adopt the Advocate General’s approach. Instead, the Court focused on whether “the national rules relating to the transcription in Roman characters of the name of a Greek national . . . are capable of placing him at a disadvantage in law or in fact, in comparison with the way in which a national of that Member State would be treated in the same circumstances.” The Court found that there is “nothing in the Treaty to preclude the transcription” and it was therefore “for the Member State in question to adopt legislative or administrative measures” for such transcription. Thus, the Court framed the problem as an economic injury and stated that the German measure on transliteration would only be incompatible under Article 52 “if that spelling is such as to modify its pronunciation and if the resulting distortion exposes him to the risk that potential clients may confuse him with other persons.” *Konstantinidis v. Stadt Altensteig-Standesamt*, Judgment, Case No. C-168/91 paragraphs 13-16 (European Court of Justice, March 30, 1993).

In the 2007 case, excerpted below, Advocate General Poiares Maduro sought to harmonize former Advocate General Jacobs’ opinion with the Court’s jurisprudence. Noting that the Treaty of Amsterdam, which entered into force in 1999, had solidified a “respect for fundamental rights [as] a formal legal requirement for membership of the European Union,” Maduro revived the position that EU citizens carried fundamental rights with them across borders.

Centro Europa 7
Opinion of Advocate General Poiares Maduro
European Court of Justice
Case No. C-380/05 (2007)

. . . 1. . . . The Consiglio di Stato (Council of State) (Italy) asks the Court a wide range of questions regarding fair competition, freedom to provide services, freedom of expression, as well as the principle of pluralism of the media. The main proceedings concern a television company that, several years after having obtained national broadcasting rights in a public tender procedure, has not yet been assigned the radio frequencies necessary to exercise those rights. Meanwhile, national legislation has allowed incumbent operators to continue their broadcasting activities and to use radio frequencies, thus effectively prolonging a situation which is at odds with the outcome of the public tender procedure. . . .

15. Respect for freedom of expression constitutes a principle on which the European Union is founded. However, . . . [a]s the Court has held on numerous occasions, it only has power to examine the compatibility with fundamental rights of national rules which fall within the scope of Community law. . . .

16. In . . . *Konstantinidis*, Advocate General Jacobs expressed the view that any national of one Member State who pursues an economic activity in another Member State may, as a matter of Community law, invoke the protection of his fundamental rights

17. The Court, however, . . . did not endorse the view that any violation, by the host State, of a fundamental right of a national from another Member State may hamper the exercise of the right to free movement. Though I do not wish to propose that the Court reverse its long-established viewpoint in this matter, I believe that the time is ripe to introduce a refinement into this line of case-law. . .

20. . . . [A] distinction must be drawn between, on the one hand, jurisdiction to review any national measure in the light of fundamental rights and, on the other hand, jurisdiction to examine whether Member States provide the necessary level of protection in relation to fundamental rights in order to be able adequately to fulfil their other obligations as members of the Union. The first type of review does not yet exist and is not within the Union's current competences. However, the second type of review flows logically from the nature of the process of European integration. . . .

21. . . . I do not discount, offhand, the idea that a serious and persistent breach of fundamental rights might occur in a Member State, making it impossible for that State to comply with many of its EU obligations

22. . . . However, so long as the protection of fundamental rights in a Member State is not gravely inadequate in that sense, I believe the Court should review national measures for their conformity with fundamental rights only when these measures come within the scope of application of the Court's jurisdiction as defined in its case-law to date.

23. As to the present case, I propose that the Court remain faithful to its conventional approach. . . .

31. Member States are not obliged under the Treaty to privatise particular sectors of the market. In principle, the Treaty allows them to maintain State monopolies or public ownership of certain companies. Nevertheless, it does not entitle them selectively to curtail the access of market operators to certain economic sectors once those sectors have been privatised. . . .

34. . . . [I]t is possible for a licensing system which limits the total number of operators in the national territory to be justified in the light of considerations of public interest. . . . However, that would require not only a legitimate reason for limiting the number of operators, but also a selection process which excludes arbitrary discrimination by providing sufficient guarantees that the right to operate is awarded on the basis of objective criteria. Therefore, when a Member State grants such a right, it must do so pursuant to transparent and non-discriminatory procedures. The purpose of this requirement is to ensure that operators throughout the Community have equal opportunities to gain access to any part of the internal market. . . .

40. It follows that national courts, which have a duty to ensure the effective application of Community law, must closely scrutinise the reasons given by a Member State for seeking to delay the allocation of frequencies to an operator who has obtained national broadcasting rights through a public tendering procedure, and, if necessary, order appropriate remedies to ensure that those rights do not remain illusory.

41. The rules and conditions for obtaining legal redress before national courts are, in principle, a matter of domestic law. However, . . . where domestic rules do not make an effective remedy available, Community law requires national courts to grant such a remedy none the less, in order to avoid a situation in which “the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened.” . . .

* * *

The Court’s judgment in *Centro Europa 7* referenced Advocate General Maduro’s opinion and agreed that in order for the licensing system to be justified under European Community law the system must be conducted on the basis of “objective, transparent, non-discriminatory and proportionate criteria.” However, because the Court determined that Italy’s actions were discriminatory under EU law, the Court concluded that it did not need to reach the question of whether the telecommunications companies would also be protected under the right to freedom of movement.

CONTESTING EUROPE’S AUTHORITY

We begin this section with an excerpt from R. Daniel Kelemen, which illustrates how the European Union might foster and/or protect national authoritarian tendencies in countries like Hungary. We then turn to the limits on the EU’s power to intervene in domestic rule of law challenges. In 2012, the Hungarian government

purged national judges unfriendly to its regime. The European Court treated the case as one of age discrimination. As a consequence, the awarded remedy was back pay for the effected judges, rather than a ruling on the underlying threat to judicial independence.

The next set of excerpted cases reveal how resistance to European values and supremacy is often framed in terms of national sovereignty. The German case examined the scope of EU authority over the financial crisis. The German Constitutional Court relied on its own constitutional jurisprudence to identify core competences that cannot be delegated to the EU, but the Court ultimately found a path to reconcile its constitutional identity with EU law. The Hungarian case, regarding asylum seekers, ended with the Hungarian Court's rejection of EU authority. Hungary bolstered its "constitutional identity" argument with quotations from the constitutional doctrine of many other Member States. Like Hungary, Denmark rejected the supremacy of the EU by contrasting EU "principles" with formal law, even after a clear CJEU ruling to the contrary. By contrast, Italy avoided (or delayed) conflict by asking the CJEU to clarify whether it *really* meant to create a collision between EU law and Italian constitutional protections for criminal defendants.

**Europe's Other Democratic Deficit:
National Authoritarianism in Europe's Democratic Union**
R. Daniel Kelemen (2017)*

. . . From its inception, the EU was conceived as a union of democracies, and it eventually made it explicit that states wishing to join the union would have to possess "stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities." European leaders understood that national democracies would vary in profound ways, and they did not presume to impose a uniform model of democracy. Yet, member states did commit themselves in the EU treaties . . . to uphold a set of core values, including democracy, pluralism and the rule of law, and they established a mechanism (TEU, Article 7) to sanction states that breached these democratic values in serious and persistent ways. Recent episodes of "democratic backsliding" in Hungary, Poland, Romania, Bulgaria, Slovenia and other EU member states have led many observers to conclude that these core democratic values were under threat. . . .

[T]he same factors that explain the survival of authoritarian enclaves in the comparative politics literature also shed light on the EU's reaction to democratic backsliding in EU member states—and why this reaction has differed in various cases.

* Excerpted from R. Daniel Kelemen, *Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union*, 52 GOVERNMENT AND OPPOSITION 211 (2017).

Considerations relating to partisan politics provide the most powerful explanation of why the EU has tolerated democratic backsliding in Hungary since 2010, while also explaining the EU's somewhat more robust reaction to threats to democracy in Poland since 2015. The comparative literature also highlights the impact of a second, related factor—rentierism [a state that derives significant revenues from renting its resources to external entities]—in explaining why financial support from the EU can help sustain regimes even as they erode democracy and the rule of law—in effect subsidizing authoritarianism. One central claim advanced in this article is that there may be a linkage between recent increases in democracy at the EU level and the erosion of democracy in some member states: as EU-level politics become more democratic and partisan, with EU-level political parties in the European Parliament (hereafter Europarties) gaining greater power, incentives intensify for the leaders of Europarties to protect national autocrats who deliver votes to their coalition at the EU level. At the same time, EU-level party politics is not developed to a point where Europarties can intervene directly to support the democratic opposition to a local autocrat.

[T]he EU is trapped in what I term an 'authoritarian equilibrium,' with just enough partisan politics at the EU level to coddle local autocrats, but not enough to topple them. Thus, ironically, encouraging more partisan politics at the EU level in an effort to address the EU's supposed democratic deficit may inadvertently help perpetuate autocracy at the national level. . . .

[D]emocratic leaders at the federal or union level may overlook concerns about the authoritarian nature of rule in member states so long as the local authoritarian delivers needed votes to their coalition in the federal legislature. For this reason, perversely, increasing democratization at the federal level may help to entrench authoritarian rule at the state level. . . .

[L]ocal authoritarians may use federal transfers to support clientelist systems that perpetuate their rule. Given the typical dynamics of fiscal transfers in federal systems, states with less developed economies will tend to be major recipients of federal transfers. Where authoritarian enclaves are located in such less developed states, these local authoritarian regimes will be able to rely substantially on federal funds, rather than on their own tax base, to finance their regime. . . . Even the best-intentioned federal fiscal transfer programmes may inadvertently sustain subnational autocracy, and federal democratic leaders may find themselves in the perverse position of funding subnational regimes that openly defy democratic norms. . . .

Just as federal partisan politics may help protect local authoritarians under some conditions, under other conditions it can help bring them down. . . . When federal parties who oppose the local authoritarian party intervene to support beleaguered local opposition parties, they may bring resources the opposition needs to break the local authoritarian's grip on power. . . .

In the EU, as in other multilevel polities, party politics is crucial for the survival of state-level authoritarian regimes, and party politics may—under certain conditions—help to dislodge them. In short, one would expect that where an authoritarian leader in an EU member state delivers votes to an EU-level political coalition—such as a party group in the European Parliament—its EU-level co-partisans will have incentives to tolerate its democratic backsliding and shield it from EU sanctions. To be sure, if a local authoritarian went too far—for instance by jailing opposition leaders or engaging in blatant human rights abuses—it could become an electoral liability for its co-partisans in Strasbourg and national capitals and lose their protection. . . .

This perspective also points to a potential irony in EU politics: efforts to make EU-level politics more democratic may discourage the EU from intervening if a member state becomes less democratic. Increasing the legislative power of the European Parliament and giving it more control over the selection of the Commission president gives Europarties a greater incentive to tolerate democratic backsliding by governments that deliver votes to their coalitions in the European Parliament. . . . By dint of their control of the state and their ability to channel EU funding to favoured interests, [authoritarian governments] already control substantial material resources. It is enough for their federal co-partisans to defend their rule publicly and to shield them from intervention by federal institutions. By contrast, local oppositions—deprived of needed resources by the hegemonic party—need sympathetic federal parties to intervene in local politics by providing material support. However, in the contemporary EU context, such intervention would be viewed as illegitimate external meddling in a national democracy. . . .

[T]he specific tactics a national government uses in attacking the rule of law and democracy may influence the likelihood of EU intervention. The EU may be more willing to intervene in cases such as Poland and Romania, where a member government blatantly violates its own constitutional order, than in a case like Hungary, where government secures a parliamentary majority large enough to legally amend the constitution and thus to consolidate autocratic rule through methods that—at least formally—respect the rule of law. . . .

European Commission v. Hungary
Court of Justice of the European Union (First Chamber)
Case C-286/12 (2012)

The Court (First Chamber) composed of A. Tizzano (Rapporteur), President of the Chamber, A. Borg Barthet, M. Ilešić, E. Levits and J.-J. Kasel, Judges, Advocate General: J. Kokott . . .

1. . . . [T]he European Commission seeks a declaration from the Court that, by adopting a national scheme requiring the compulsory retirement of judges, prosecutors and notaries on reaching the age of 62—which gives rise to a difference in treatment on grounds of age which is not justified by legitimate objectives and which, in any event, is not appropriate or necessary as regards the objectives pursued—Hungary has failed to fulfil its obligations under Articles 2 and 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

23. . . . Hungary claims that the present case [is partially moot because the Hungarian legislature] repealed, with retroactive effect, Articles 90(ha) and 230 of the Law of 2011 on judges.* Consequently, according to Hungary, there is no longer any need to adjudicate on the corresponding part of the action. . . .

24. According to the Commission, the Hungarian legislation at issue infringes Article 2 of Directive 2000/78 in that it gives rise to age-based discrimination between, on the one hand, judges, prosecutors and notaries who have reached the age-limit for retirement fixed by that legislation and, on the other hand, those persons who may continue to work. The lowering of the age-limit for compulsory retirement applicable to judges, prosecutors and notaries from 70 to 62 gives rise to a difference in treatment based on age between persons within a given profession. While recognising that Hungary is free to set the age of retirement for those persons, the Commission argues that the new scheme profoundly affects the duration of the working relationship between the parties as well as, more generally, the exercise by the persons concerned of their professional activity, by preventing their future participation in working life. . . .

* In its judgment of July 16, 2012, the Constitutional Court of Hungary declared unconstitutional the provisions on the compulsory retirement age of judges, Sections 90(ha) and 230 of the Law of 2011 on Judges. However, in paragraph 46 of the European Court of Justice’s judgment, the Court noted that the repeal “has had no effect as regards the transitional provisions which set out rules analogous to those contained in [the repealed provisions]” and “since the repeal of those provisions did not directly affect the validity of those individual measures by which the employment relationships of the persons concerned were brought to an end, those persons are not automatically reinstated.”

51. The disputed national measures, pursuant to which the fact that a worker has reached the retirement age laid down by that legislation leads to automatic termination of his employment contract, must be regarded as directly imposing less favourable treatment of workers who have reached that age as compared with all other persons in the labour force. Such legislation therefore establishes a difference in treatment directly based on age

55. . . . [Under the Directive] a difference in treatment based on age does not constitute discrimination if, within the context of national law, it is objectively and reasonably justified by a legitimate aim and where the means of achieving that aim are appropriate and necessary

61. . . . [I]n so far as such an aim ensures observance of the principle of equal treatment for all persons in a specific sector and relates to an essential element of their employment relationship, such as the time of retirement, that aim can constitute a legitimate employment policy objective.

62. As regards the aim of establishing a more balanced age structure facilitating access for young lawyers to the professions of judge, prosecutor and notary, suffice it to state that the Court has already had the opportunity to find that the aim of establishing an age structure that balances young and older civil servants in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees' fitness to work beyond a certain age, while at the same time seeking to provide a high-quality justice service, can constitute a legitimate aim of employment and labour market policy

64. . . . [T]hose provisions are, in principle, an appropriate means of achieving the aim of standardisation pursued by Hungary, in that they are designed precisely, if not to eliminate, at least to reduce significantly the diversity of the age-limits for compulsory retirement for all the professions attached to the public justice service. . . .

68. However, the provisions at issue abruptly and significantly lowered the age-limit for compulsory retirement, without introducing transitional measures of such a kind as to protect the legitimate expectations of the persons concerned. . . .

71. . . . Hungary has failed to provide any evidence to enable it to be established that more lenient provisions would not have made it possible to achieve the objective at issue. . . .

75. . . . [I]t must be concluded that the provisions at issue are not necessary to achieve the objective of standardisation invoked by Hungary. . . .

78. While, in 2012, the turnover of personnel in the professions concerned will be subject to a very significant acceleration due to the fact that eight age groups will

be replaced by one single age group, namely that of 2012, that turnover rate will be subject to an equally radical slowing-down in 2013 when only one age group will have to be replaced. . . .

79. . . . [T]he provisions at issue are not appropriate to achieve the objective of establishing a more balanced “age structure.”

80. . . . [T]he contested national provisions give rise to a difference in treatment which does not comply with the principle of proportionality and that, therefore, the Commission’s action must be upheld. . . .

Operating in the context of the post-2008 economic crisis, the Governing Board of the European Central Bank (ECB) decided in 2012 to undertake a new monetary initiative, known as Outright Monetary Transactions (OMT). Through the program, the ECB can purchase government bonds from European nations recovering from the debt crisis to help stabilize their national economies.* However, not all Member States agreed with the nature of the program, or that such a program fell within the ECB’s mandate. Germany’s representative on the Governing Board, German Central Bank President Jens Weidmann, was the sole member to vote against the initiative. He, along with Germany’s economic minister, expressed strong opposition to the plan, suggesting that it would reduce Member States’ willingness to implement important economic reforms. Members of the German Bundestag, including German politician Peter Gauweiler and the German political party Die Linke, challenged the OMT program in the Federal Constitutional Court of Germany. They claimed that the German Central Bank’s required involvement in implementing the OMT and that the Federal Government’s and Bundestag’s failure to respond to the creation of the OMT program would erode the federal budget and violate the right guaranteed in the German Basic Law to democratic input into matters of important public policy embedded in the right to vote. For the first time in its history, the Constitutional Court requested a preliminary ruling from the CJEU on the OMT’s compatibility with EU law. The preliminary reference order made clear however, the limits that the German Court would set on enforcement of any CJEU judgment that would violate an unamendable clause of the Basic Law.

Below are excerpts from the exchange between the Federal Constitutional Court of Germany and the CJEU over the OMT. We begin with Constitutional Court’s preliminary reference to the CJEU and trace the back-and-forth through the CJEU’s response and the Constitutional Court’s final resolution in 2016. The opinion by

* The Treaty on the Functioning of the European Union prohibits the ECB from acquiring government bonds directly under Article 123, as this would result in the ECB becoming, in essence, a direct lender. Instead, the OMT enables the ECB to buy government bonds in the secondary market, meaning the ECB purchases bonds from another party that has purchased the bonds directly from the Member State.

Advocate General Cruz Villalón emphasized the awkward situation that the Constitutional Court's reference created. In essence, the high court told the CJEU that it would not comply with a ruling that violated German "constitutional identity." A final excerpt from Lorenzo Pace discusses what took place in Germany after the CJEU decided the preliminary reference and held that the OMT was permitted under EU law.

Gauweiler and Others v. Deutscher Bundestag
Federal Constitutional Court of Germany (Second Senate)
Preliminary Reference Order C-62/14 (2014)

[The Second Senate of the Federal Constitutional Court, with the participation of Justices Voßkuhle (President), Lübbe-Wolff, Gerhardt, Landau, Huber, Hermanns, Müller, and Kessler-Wulf.] . . .

II. . . . [T]he following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

a) Is the Decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical Features of Outright Monetary Transactions incompatible with Article 119 and Article 127 sections 1 and 2 of the Treaty on the Functioning of the European Union, and with Articles 17 to 24 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank, because it exceeds the European Central Bank's monetary policy mandate, which is regulated in the above-mentioned provisions, and infringes the powers of the Member States? . . .

b) Is the Decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical Features of Outright Monetary Transactions incompatible with the prohibition of monetary financing enshrined in Article 123 of the Treaty on the Functioning of the European Union? . . .

The relevant Articles of the Basic Law for the Federal Republic of Germany [include] . . .

Art. 20: (1) The Federal Republic of Germany is a democratic and social federal state; (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies; (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice. . . .

Art. 23: (1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal

principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. [. . .] The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to sections (2) and (3) of Article 79. . . .

Art. 38: (1) Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. . . .

Art. 79: . . . (2) Any such law [amending the Basic Law] shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat; (3) Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

Art. 88: The Federation shall establish a note-issuing and currency bank as the Federal Bank. Within the framework of the European Union, its responsibilities and powers may be transferred to the European Central Bank, which is independent and committed to the overriding goal of assuring price stability. . . .

a) In its established case-law, the Federal Constitutional Court interprets these provisions so that they impose limits on the Federal Republic of Germany's participation in European integration; the Federal Constitutional Court can review whether these limits are respected, also upon complaints lodged by individual citizens. . . .

Th[e] substantive content of what is guaranteed by the right to vote is violated only, but always so, if this right is in danger of being rendered ineffective in an area that is essential for the political self-determination of the people, i.e. if the democratic self-government of the people—through the German *Bundestag*—is permanently restricted in such a way that central political decisions can no longer be made independently. . . .

b) The actions of the institutions and agencies of the European Union are democratically legitimated—as far as Germany is concerned—in the legislative Acts of Assent to the Treaty establishing the European Union and the Treaty on the Functioning of the European Union, which were enacted on the basis of Art. 23 sec. 1 [of the Basic Law for the Federal Republic of German (GG)], and in the programme of integration set out therein. An essential element of this programme of integration is the principle of conferral.

Against this background, actions of institutions and agencies of the European Union have a binding effect in the Federal Republic of Germany only within certain limits:

[In a judgment upholding the compatibility of the Maastricht Treaty with the German Basic Law]: “Since the Germans entitled to vote exercise their right to participate in the democratic legitimation of the institutions and organs entrusted with sovereign authority mostly via the election of the German *Bundestag*, the *Bundestag* must also decide on the German membership in the European Union, its continued existence, and its development. (. . .) What is decisive is that the membership of the Federal Republic of Germany and the ensuing rights and obligations—especially the legally binding direct acts of the European Communities within the national legal sphere—have been defined in the Treaty so as to be predictable for the legislature, and have been enacted by it with sufficient certainty in the act of assent. . . .

The requirements for an *ultra vires* review have been further outlined in the *Honeywell* decision:

Ultra vires review may only be exercised in a manner which is friendly towards European law The Union understands itself as a legal community; it is in particular bound by the principle of conferral and by fundamental rights, and it respects the constitutional identity of Member States According to the legal system of the Federal Republic of Germany, the primacy of application of Union law is to be recognised and it is to be guaranteed that the powers of control which are constitutionally reserved for the Federal Constitutional Court are only exercised in a manner that is cautious and friendly towards European law. This means for the *ultra vires* review at hand that the Federal Constitutional Court must in principle comply with the rulings of the Court of Justice as a binding interpretation of Union law. . . . *Ultra vires* review by the Federal Constitutional Court can moreover only be considered if it is manifest that acts of European institutions and agencies have taken place outside the transferred powers

bb) If an act of an institution or other agency of the European Union has consequences which affect the constitutional identity protected by Art. 79 sec. 3 GG, it is, from the outset, inapplicable in Germany. Such an act cannot be based on primary law because even the legislature that decides on integration with the majority required by Art. 23 sec. 1 sentence 3 GG in conjunction with Art. 79 sec. 2 GG may not

transfer sovereign powers to the European Union whose exercise would affect the constitutional identity protected by Art. 79 sec. 3 GG. If conferrals which originally have been in accordance with the Constitution were expanded in such a way, this would amount to *ultra vires* acts. Whether the principles which are declared inviolable by Art. 79 sec. 3 GG are affected by an act of the European Union is subject to review by the Federal Constitutional Court via a review of identity. In such a case the Federal Constitutional Court will take the interpretation which the Court of Justice gives in a preliminary ruling pursuant to Art. 267 sec. 2 and 3 [Treaty on the Functioning of the European Union (TFEU)] as a basis. In their cooperative relationship, it is for the Court of Justice to interpret the act. On the other hand, it is for the Federal Constitutional Court to determine the inviolable core content of the constitutional identity, and to review whether the act (in the interpretation determined by the Court of Justice) interferes with this core.

Identity review can, in particular, affect the safeguarding of the overall budgetary responsibility of the German *Bundestag*: . . .

Since Art. 79 sec. 3 GG also sets an “ultimate limit” to the applicability of Union law within the German jurisdiction under the Basic Law, the principles which are stipulated therein may not be balanced against other legal interests. Thus, the identity review performed by the Federal Constitutional Court is fundamentally different from the review under Art 4 sec. 2 sentence 1 TEU by the Court of Justice of the European Union. Art. 4 sec. 2 sentence 1 TEU obliges the institutions of the European Union to respect national identities. This is based on a concept of national identity which does not correspond to the concept of constitutional identity within the meaning of Art. 79 sec. 3 GG, but reaches far beyond . . . On this basis, the Court of Justice of the European Union treats the protection of national identity, which is required according to Art. 4 sec. 2 sentence 1 TEU, as a “legitimate aim” which must be taken into account when legitimate interests are balanced against the rights conferred by Union law However, as an interest which may be balanced against others, the respect of national identity which is required according to Art. 4 sec. 2 sentence 1 TEU does not meet the requirements of the protection of the core content of the Basic Law according to Art. 79 sec. 3 GG, which may not be balanced against other legal interests. The protection of the latter is a task of the Federal Constitutional Court alone.

cc) The above-mentioned principles concerning the protection of the constitutional identity and of the limits of the transfer of sovereign powers to the European Union can also be found, with modifications depending on the existence or non-existence of unamendable elements in the respective national constitutions, in the constitutional law of many other Member States of the European Union. . . .

d) Finally, with regard to the constitutional foundations of Germany’s membership in the monetary union and to the transfer of powers to the European Central Bank, the Federal Constitutional Court held as follows:

The *Bundestag*'s, and thus the voters', possibilities to influence the exercise of sovereign powers by European institutions have . . . been taken away almost completely insofar as the European Central Bank has been provided with independence vis-à-vis the European Community and the Member States (Art. 107 EC). . . . Placing most of the tasks of monetary policy on an autonomous basis with an independent central bank disconnects the exercise of governmental authority from direct governmental or supranational parliamentary responsibility, in order to free the monetary system from the access of interest groups and holders of political office who are concerned about their re-election

This limitation of democratic legitimation, which is derived from the voters in the Member States, affects the principle of democracy, but is compatible with Art. 79 sec. 3 GG The intention of the legislature amending the Constitution was thus clearly to create a constitutional basis for the monetary union envisaged in the Union Treaty, but to restrict the granting of the ensuing above-mentioned independent powers and institutions to that case. . . . [A]n independent central bank is more likely to safeguard the monetary value, and thus the general economic basis for governmental budgetary policies as well as for private plans and transactions in exercise of the economic freedoms, than state bodies whose options and means for action depend on money supply and monetary value and which need to rely on short-term approval by political forces. . . . [P]lacing the monetary policy on an autonomous basis under the sovereign jurisdiction of an independent European Central Bank, which cannot be transferred to other political areas, satisfies the constitutional requirements according to which the principle of democracy may be modified. . . .

The first question referred for a preliminary ruling is relevant to the Federal Constitutional Court's decision. It is relevant even though the OMT Decision does not yet have legal effects on others The applications would be successful if the OMT Decision, transgressing the European Central Bank's mandate, encroached upon the powers of the Member States for economic policy and/or violated the prohibition of monetary financing of the budget. According to German constitutional law, the OMT Decision would then have to be qualified as a manifest and structurally significant *ultra vires* act In this case, the German constitutional organs would, because of their inactivity, not have met their responsibility with respect to integration (*Integrationsverantwortung*), and they would thus have violated the complainants' constitutional rights as well as the legal positions of the German *Bundestag* invoked by the applicant in the *Organstreit* proceedings

b) It would have to be considered a manifest and structurally significant transgression of its mandate if the European Central Bank acted beyond its monetary policy mandate . . . , or if the prohibition of monetary financing of the budget was violated by the OMT programme

aa) If the European Central Bank exceeded its monetary policy mandate with the OMT Decision, it would thus interfere with the responsibility of the Member States for economic policy. . . .

The violation would be manifest because the Treaty on the Functioning of the European Union stipulates an explicit prohibition of monetary financing of the budget and the Treaty thus unequivocally excludes such powers of the European Central Bank. . . .

An *ultra vires* act as understood above creates an obligation of German authorities to refrain from implementing it and a duty to challenge it (a and b). These duties can be enforced before the Constitutional Court at least insofar as they refer to constitutional organs

b) Moreover, the German *Bundestag* and the Federal Government may not simply let a manifest or structurally significant usurpation of sovereign powers by European Union organs take place. . . .

c) A violation of these duties, which follow from the responsibility with respect to integration of the German *Bundestag* and Federal Government, also violates individual rights of the voters that can be asserted with a constitutional complaint

[The Court reviewed its earlier jurisprudence on EU treaties in which it established that the right to vote under the German Basic Law cannot be deprived of its content by having the government confer powers on the European Union that should be the subject of democratic decision-making under the Basic Law.]

The democratic decision-making process, which these regulations guarantee in addition to the necessary specificity of the transfer of sovereign powers, is undermined when there is a unilateral usurpation of powers by institutions and other agencies of the European Union. A citizen can therefore demand that the *Bundestag* and the Federal Government actively deal with the question of how the distribution of powers entailed in the treaties can be restored, and that they decide which options they want to use to pursue this goal. . . .

[The Federal Constitutional Court interpreted Union law and concluded that the European Central Bank had acted outside its mandate when it developed the OMT program.]

Pursuant to § 33 sec. BVerfGG, the procedures shall be suspended pending the decision of the Court of Justice of the European Union. After completion of the

proceedings for a preliminary ruling, the Federal Constitutional Court will resume the proceedings *ex officio*. . . .

[The dissenting opinions of Justice Lübbe-Wolff and of Justice Gerhardt, arguing that the motions should have been rejected as inadmissible, are omitted.]

Gauweiler and Others v. Deutscher Bundestag
Opinion of Advocate General Cruz Villalón
Court of Justice of the European Union
Case No. C-62/14 (2015)

. . . 4. For the first time in its history the Bundesverfassungsgericht (Germany’s Federal Constitutional Court; “the BVerfG”) has made a reference to the Court of Justice under Article 267 TFEU and has done so in order to raise the question of the legality of the OMT programme. As will be seen below, the questions raised by the BVerfG give rise to difficulties of interpretation of utmost importance, which the Court of Justice will have to resolve.

5. A first point that should be made about this case is that the BVerfG has made its request for a preliminary ruling in the context of what it classifies as an *ultra vires* review of European Union (EU) acts which have consequences for the “constitutional identity” of the Federal Republic of Germany. The BVerfG’s starting point is an initial finding that the act of the ECB at issue is unlawful under national constitutional law, as well as under EU law, but, before proceeding any further with its assessment, it has decided to bring the matter before the Court of Justice so that the latter may give a ruling on that act from the perspective of EU law. . . .

8. This situation has led the BVerfG to share with the Court of Justice its doubts as to whether the OMT programme is compatible with the Treaties. First, it asks whether that programme is an economic policy measure—and therefore beyond the scope of the ECB’s mandate—rather than a monetary policy measure. Second, it questions whether the measure in issue observes the prohibition on monetary financing laid down in Article 123(1) TFEU. . . .

30. A singular feature of the order for reference in these proceedings is that it devotes an extensive introductory section to national legislative provisions and national case-law which are considered to be relevant. That singularity naturally does not lie in the fact that national legislation is cited—in this case a small number of constitutional provisions (Articles 20, 23, 38, 79 and 88 of the Basic Law of the Federal Republic of Germany; “the BL”)—but rather in the very full presentation of the BVerfG’s case-law concerning the constitutional basis and limits of the Federal Republic of Germany’s integration in the European Union. In a section of the order for

reference dealing with the “case-law of the BVerfG,” the latter interprets the scope of its own previous case-law

31. It might be thought that, as in so many other cases, this introductory section of the order for reference serves no purpose other than to help the Court of Justice to place the questions raised in their proper context. The section in question certainly does that, although it cannot be said that it confines itself to summarising the national case-law concerned. It also contains appraisals that cannot be regarded as being of minor importance. . . .

33. . . . [W]hen the Court of Justice answers a question raised in respect of a given EU act, as would be the case here, that answer is not necessarily a determining factor in deciding the case in the main proceedings. Rather, if the criterion constituted by EU law has been satisfied, *another* criterion for assessing validity, which is a matter for the BVerfG, could possibly be applied to the same contested act: that of the national constitution itself.

34. More specifically, a constitutional criterion of that kind, which is subsequently used by the BVerfG in its assessment, is said to consist in both the unalterable core content of the national constitution (“constitutional identity,” as enshrined in Article 79(3) BL), and the principle of conferral of powers (with the logical consequences for “ultra vires” EU acts that follow from that principle implicit in Article 23(1) BL). It seems that these two constitutional criteria, far from being mutually exclusive, are each able to provide support for the other, as appears to be the case here. Such criteria for reviewing validity (the so-called “identity review” and the “ultra vires review”), by definition, may be applied only by the BVerfG itself. . . .

36. In short, a national court should not be able to request a preliminary ruling from the Court of Justice if its request already includes, intrinsically or conceptually, the possibility that it will in fact depart from the answer received. The national court should not be able to proceed in that way because Article 267 TFEU cannot be regarded as providing for such a possibility. . . .

38. . . . [I]t is the case that a number of national constitutional and supreme courts, in quite different ways but with an essentially precautionary aim, have found it appropriate to discuss or allude to the possibility, normally conceived of as a last resort, of—stated in the most general possible terms—a breakdown in the European ‘constitutional compact’ underlying the integration process, specifically because of the conduct of one of the EU institutions. . . .

[In the system of EU law, national and EU courts must work together]

48. This “cooperative relationship” is far from being precisely defined but it is clear that it purports to be something more than the imprecise “dialogue” between courts. It is said to derive ultimately from the notion that the obligation of the BVerfG to safeguard the basic order under the national constitution must always be guided by

an open and receptive attitude to EU law (“europarechtsfreundlich”), a notion which it might also have been possible to derive from the principle of sincere cooperation (Article 4(3) TEU).

49. Therein lies all the ambiguity with which the Court of Justice is faced in this reference for a preliminary ruling: there is a national constitutional court which, on the one hand, ultimately accepts its position as a court of last instance for the purposes of Article 267 TFEU, and does so as the expression of a special “cooperative relationship” and a general principle of openness to the so-called “integration programme” but which, on the other hand, wishes, as it makes clear, to bring a matter before the Court of Justice without relinquishing its own ultimate responsibility to state what the law is with regard to the constitutional conditions and limits of European integration so far as its own State is concerned. That ambivalence runs all through the request for a preliminary ruling, so that it is extremely difficult to disregard it entirely when analysing the case. . . .

55. According to the order for reference, however, it is not only the principle of conferral (*ultra vires*) which is in issue in the main proceedings but also the “constitutional identity” of the Federal Republic of Germany; that is so because of the consequences which the contested act is said to entail for the national constitutional body which is first and foremost responsible for expressing the will of the citizens. “*Ultra vires* review” and “identity review,” to use the terms employed by the BVerfG itself, are said to converge in the main proceedings.

56. . . . [A]s regards specifically the “identity review,” the BVerfG expressly proposes that “in the cooperative relationship which exists, it is for the Court of Justice to interpret the measure. On the other hand, it is for the BVerfG to determine the inviolable core of constitutional identity and to review whether the measure (as interpreted by the Court of Justice) encroaches on that core.” . . .

59. . . . [I]t seems to me an all but impossible task to preserve *this* Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as “constitutional identity.” That is particularly the case if that “constitutional identity” is stated to be different from the “national identity” referred to in Article 4(2) TEU.

60. Such a “reservation of identity,” independently formed and interpreted by the competent—often judicial—bodies of the Member States (of which, it need hardly be recalled, there are currently 28) would very probably leave the EU legal order in a subordinate position, at least in qualitative terms. Without going into details, and without seeking to pass judgment, I think that the characteristics of the case before us may provide a good illustration of the scenario I have just outlined.

61. Second, I think it useful to recall that the Court of Justice has long worked with the category of “constitutional traditions common” to the Member States when seeking guidelines on which to construct the system of values on which the Union is based. Specifically, the Court of Justice has given preference to those constitutional traditions when establishing a particular culture of rights, namely that of the Union. The Union has thus acquired the character, not just of a community governed by the rule of law, but also of a “community imbued with a constitutional culture.” That common constitutional culture can be seen as part of the common identity of the Union, with the important consequence, to my mind, that the constitutional identity of each Member State, which of course is specific to the extent necessary, cannot be regarded, to state matters cautiously, as light years away from that common constitutional culture. Rather, a clearly understood, open, attitude to EU law should in the medium and long term give rise, as a principle, to basic convergence between the constitutional identity of the Union and that of each of the Member States. . . .

64. Furthermore, it is clear that the principle of sincere cooperation also applies to courts and tribunals, including the two courts concerned in these important proceedings. That mutual loyalty is all the more important in those cases in which the supreme court of a Member State, responsibly exercising its constitutional jurisdiction, and without going into other considerations, raises, in a spirit of sincere cooperation, its concern about a given decision of an EU body. The principle of sincere cooperation is of course binding on the national court, as it is part of its own responsibility to give that principle form and effect. . . .

**The OMT Case, the “Intergovernmental Drift” of the Eurozone
Crisis and the (Inevitable) Rectification of the *BVerfG*
Jurisprudence in Light of the ECJ’s *Gauweiler* Judgment
Lorenzo F. Pace (2017)***

. . . [In June 2015,] [t]he Court of Justice responded to the preliminary reference of the *BVerfG* with the *Gauweiler* judgment. This judgment was rightly called a “model of restraint.” The Court in its judgment did not in fact seek confrontation with the *BVerfG* Rather, it sought to show the legality of the OMT “on the force of its substantive arguments.” The only point disputed by the Court related to the supposed lack of binding nature of the judgment of the Court

With reference to the OMT, the Court recognized the legality of the program by clarifying that the requirements as defined there constituted a solid system of

* Excerpted from Lorenzo F. Pace, *The OMT Case, the “Intergovernmental Drift” of the Eurozone Crisis and the (Inevitable) Rectification of the BVerfG Jurisprudence in Light of the ECJ’s Gauweiler Judgment*, 1 DIRITTO DELL’UNIONE EUROPEA 153 (2017).

checks and balances in order to ensure that the bond-buying program was in breach of neither the mandate of the ECB nor of art. 123 TFEU.

However, the Court did not follow the *BVerfG*'s "request" to impose new restrictions on the activation and exercise of the OMT program. To the contrary, the Court affirmed the legality of the program as drafted by the ECB in 2012 without any reservation. Moreover, the Court in para. 88 of the judgment clearly rejected the *BVerfG*'s "request" that the size of the OMT program should be limited *ex ante*

[T]he German Constitutional Court has recognized in its [June 2016] judgment the legality of the OMT program.

Regarding the first part of the *ultra vires* review, the *BVerfG* concluded (contrary to what it stated in the preliminary reference . . .) that the OMT program does not breach the ECB mandate. The program is in fact "to the largest extent monetary in kind." In order to reach this conclusion, the Court had to elaborate a difficult analysis aimed at showing that the Court of Justice had in fact accepted the views of the *BVerfG* as expressed in the preliminary reference. The difficulty stems from the fact that the Court of Justice, as mentioned above, considered the OMT decision as adopted in 2012 to be lawful, without taking the *BVerfG*'s requests into consideration. . . .

Continuing with its *ultra vires* review, the *BVerfG* also found that the OMT is not in breach of art. 123 TFEU. That is again the opposite of what the *BVerfG* concluded in its preliminary reference. As the *BVerfG* states: "If interpreted in accordance with the Court of Justice's judgment, the policy decision on the technical framework conditions of the OMT programme as well as its possible implementation [. . .] do not manifestly violate the prohibition of monetary financing of the budget." The German Court is here faced with an even harder problem, which is to bring its own demands in the preliminary reference into line with the *Gauweiler* judgment. This is a harder task because the Court of Justice clearly refused in the *Gauweiler* judgment to amend the requirements of the OMT decision, as "requested" by the *BVerfG*, particularly *vis-à-vis* the "request" to impose *ex ante* limits to the size of the OMT program.

In spite of this, surprisingly the German Court in its judgment included among the conditions of the OMT program (conditions allegedly listed by the Court of Justice in the *Gauweiler* judgment) the one regarding the *ex ante* size limitation of the OMT program

The *BVerfG* concluded by outlining an obligation on the Federal Government and the Bundestag in the context of [integration]. According to the *BVerfG*, not only is it necessary to control that the conditions defined in the *BVerfG* judgment are met, but these bodies should also check the existence of a specific danger for the federal budget that may arise

[T]he grounds of the judgment of the *BVerfG* in the operative part are all aimed at demonstrating what clearly is not the case: namely, that the ECJ had fulfilled the requests in the *BVerfG*'s preliminary reference, thus modifying the features of the OMT program. In this sense, the way in which the *BVerfG* justifies its conclusion has the goal not only of avoiding "the humiliation of recognizing the position taken in its referral as erroneous" but also of dissimulating its (failed) attempt to modify the content of the OMT program through the interpretation requested in the preliminary reference to the Court of Justice. . . .

In 2016, Hungary filed a case at the European Court of Justice seeking to annul European Council Decision 2015/1523, which allocated responsibility for asylum seekers across EU member states. Hungary argued that because the procedure used to adopt the EC Decision was flawed, it should be void. As of June 2017, the case is pending before the CJEU.

Hungary's dispute arose out of the migration crisis in Europe. In the summer of 2015, more than one million irregular migrants entered the EU, many claiming asylum as they left warzones in Syria, Iraq, and Afghanistan, as well as areas in Africa menaced by various al Qaeda affiliates, such as Boko Haram and al Shabaab. The refugees came disproportionately into the EU through Greece (via the Western Balkans route) or Italy (via the Central Mediterranean route). Given that the European Court of Human Rights had declared Greece to be in violation of the Article 3 Convention rights of asylum seekers, Hungary then became the front-line state on the Western Balkan route that, under the Dublin Regulation, was legally obligated to process their asylum claims.*

The asylum system, as it was then structured under EU law, imposed burdens on some of Europe's poorest and/or most resistant states, which received a disproportionate share of the asylum applications. The Council of Ministers enacted Council Decision 2015/1523, which created a program to relocate 120,000 of the migrants from Greece and Italy to the other Member States according to a formula that took into account the population of the country and the Member States' abilities to care for the migrants. Hungary was offered an opportunity to participate in the scheme as a donor country (a donor of refugees, that is), by relocating some of the refugees whose asylum claims it was processing to other Member States. Hungary refused. By that time, most of the asylum seekers who had registered asylum claims in Hungary had in fact moved to other Member States of the EU. The Council then assigned Hungary the responsibility for processing the asylum claims of 1,294 new asylum seekers under the relocation system.

* Article 3 of the European Convention on Human Rights provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Hungarian government under Viktor Orbán had been reelected in 2014 with precisely two-thirds of the seats in the Parliament, but the government had since lost two by-elections. In 2016, Orbán sought to generate public support for the government's zero tolerance policy towards migrants. The government scheduled a referendum for October 2, 2016, which asked: "Do you want the European Union to be able to mandate the obligatory resettlement of non-Hungarian citizens into Hungary even without the approval of the National Assembly?" Only 44% of voters cast valid ballots, but of those, 98% voted "no." Hungarian law holds that a referendum is only valid if 50% of the public votes.

In December 2016, the government proposed to amend the Hungarian Basic Law (constitution) to include a provision that would have barred the resettlement of migrants to Hungary under the Council Decision. The constitutional amendment failed by two votes.

One week later, the Hungarian Constitutional Court issued a decision in a case brought by the Commissioner for Fundamental Rights in Hungary (the ombudsman) asking for an opinion on the question of whether the Hungarian Constitution's European Union clause permitted refugees to be resettled in Hungary under Council Decision 2015/1523. The ombudsman reasoned that the Hungarian Constitution prohibited mass expulsions to Hungary just as it prohibited mass expulsions from Hungary. In addition, argued the ombudsman, under the Hungarian Constitution's clause on the European Union, Hungary could only participate in Union projects that complied with Hungary's vision of human rights. In June of 2017, the European Commission brought legal infringements proceedings against Hungary, Poland and the Czech Republic for failing to comply with EU regulations concerning refugees.

The following excerpt is the Hungarian Constitutional Court's response to the ombudsman's request, in which the Court held that Hungary need not comply with the Council Decision.

Interpretation of Article E(2) of the Fundamental Law

Constitutional Court of Hungary

Decision 22/2016 (XII. 5.) AB (2016)

Upon the motion of the commissioner for fundamental rights on the interpretation of the Fundamental Law, the plenary session of the Constitutional Court . . . has adopted the following decision . . .

32. The Constitutional Court is aware of the fact that from the point of view of the Court of Justice of the European Union the EU law is defined as an independent and autonomous legal order. However, the European Union is a legal community with the power—in the scope and the framework specified in the Founding Treaties and by the Member States—of independent legislation and of concluding international treaties

in its own name, and the core basis of this community are the international treaties concluded by the Member States. As the contracting parties are the Member States, it is their national enforcement acts that ultimately determine the extent of primacy to be enjoyed by EU law against the relevant Member State's own law in the Member State concerned. There is no difference in this respect whether the norm defining the way of the EU law's enforcement can be found in the relevant Member State's constitution or constitutional law [citing and quoting from numerous examples from other European countries' constitutions and jurisprudence]. . . .

43. In accordance with the requirement of constitutional dialogue between the Member States, in one of its decisions the Supreme Court of the United Kingdom made a reference to a decision of the German Federal Constitutional Court: "There is in addition much to be said for the view, advanced by the German Federal Constitutional Court . . . that as part of a co-operative relationship, a decision of the Court of Justice should not be read by a national court in a way that places in question the identity of the national constitutional order"As part of a cooperative relationship between the Federal Constitutional Court and the European Court of Justice [. . .], this decision must not be read . . . as if it endangered the protection and enforcement of the fundamental rights in the Member States [. . .] in a way that questioned the identity of the Basic Law's constitutional order." . . .

45. Within the framework of the European constitutional dialogue, the Court of Justice of the European Union also pays respect to the competences of Member States and takes account of their constitutional demands

46. On the basis of the review of case law of the Member States' . . . the Constitutional Court established that within its own scope of competences, on the basis of a relevant petition, in exceptional cases and as a resort of *ultima ratio*, i.e. along with paying respect to the constitutional dialogue between the Member States, it can examine whether exercising competences on the basis of Article E(2) of the Fundamental Law results in the violation of human dignity, the essential content of any other fundamental right or the sovereignty (including the extent of the competences transferred by the State) and the constitutional self-identity of Hungary.

47. With regard to the reservation of fundamental rights, the Constitutional Court established that any exercise of public authority in the territory of Hungary (including the joint exercising of competences with other Member States) is linked to fundamental rights. This was also the case at the moment of Hungary's accession to the European Union, and the level of the fundamental rights' constitutional protection was not affected by the accession to the European Union.

48. The Constitutional Court underlines that according to Article I (1) of the Fundamental Law, it is the primary obligation of the State to protect the inviolable and inalienable fundamental rights of MAN. As the protection of fundamental rights is a primary obligation of the State, it shall precede the enforcement of everything else. . . .

49. As demonstrated in the opinion of the German Constitutional Court, detailed in the so called *Solange-decisions*, due to the institutional reforms, the Charter of Fundamental Rights and the Court of Justice of the European Union, the European Union, in most cases, can grant the same level of protection for fundamental rights as the level secured by the national constitutions, but at least a protection of adequate level

53. . . . Article E(2) of the Fundamental Law allows Hungary, as a Member State of the European Union, to exercise some of its competences through the institutions of the European Union. This joint exercising of competences, nevertheless, is not unlimited, as Article E(2) of the Fundamental Law not only grants the validity of EU law in respect of Hungary, but at the same time it imposes limitations on the transferred and jointly exercised competences.

54. . . . [T]he Constitutional Court establishes two main limitations upon the joint exercising of competences. On the one hand the joint exercising of a competence shall not violate Hungary's sovereignty (sovereignty control), and on the other hand it shall not lead to the violation of constitutional identity (identity control).

55. Respecting and safeguarding the sovereignty of Hungary and its constitutional identity is a must for everybody (including the National Assembly contributing to the European Union's decision-making mechanism and the Government directly participating in that mechanism), and, according to Article 24 (1) of the Fundamental Law, the principal organ for the protection is the Constitutional Court.

56. The Constitutional Court emphasizes that the direct subject of sovereignty- and identity control is not the legal act of the Union or its interpretation, therefore the Court shall not comment on the validity, invalidity or the primacy of application of such Union acts. . . .

59. According to Article B) of the Fundamental Law, in Hungary, the source of public power shall be the people, and power shall be exercised by the people through elected representatives or, in exceptional cases, directly. The exercised state authority is not an unlimited power; the Parliament may only act in the framework of the Fundamental Law and the provisions of the Fundamental Law set limits upon its powers As long as Article B) of the Fundamental Law contain[s] the principle of independent and sovereign statehood and indicates the people as the source of public power, these provisions shall not be emptied out by the Union-clause in Article E).

60. Since by joining the European Union, Hungary has not surrendered its sovereignty, it rather allowed for the joint exercising of certain competences, the maintenance of Hungary's sovereignty should be presumed when judging upon the joint exercising of further competences additional to the rights and obligations provided in the Founding Treaties of the European Union (the principle of maintained

sovereignty). Sovereignty has been laid down in the Fundamental Law as the ultimate source of competences and not as a competence. Therefore the joint exercising of competences shall not result in depriving the people of the possibility of possessing the ultimate chance to control the exercising of public power (realised either in joint or in individual—Member State—form). . . .

61. With regard to identity control, the Constitutional Court notes the following.

62. According to Article 4 (2) TEU, “the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.”

63. The protection of constitutional identity should be granted in the framework of an informal cooperation with EUC based on the principles of equality and collegiality, with mutual respect to each other, similarly to the present practice followed by several other Member States’ constitutional courts and supreme judicial bodies performing similar functions.

64. The Constitutional Court of Hungary interprets the concept of constitutional identity as Hungary’s self-identity and it unfolds the content of this concept from case to case, on the basis of the whole Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of our historical constitution—as required by Article R(3) of the Fundamental Law.

65. The constitutional self-identity of Hungary is not a list of static and closed values, nevertheless many of its important components—identical with the constitutional values generally accepted today—can be highlighted as examples: freedoms, the division of powers, republic as the form of government, respect of autonomies under public law, the freedom of religion, exercising lawful authority, parliamentarism, the equality of rights, acknowledging judicial power, the protection of the nationalities living with us. These are, among others, the achievements of our historical constitution, the Fundamental Law and thus the whole Hungarian legal system are based upon.

66. The protection of constitutional self-identity may be raised in the cases having an influence on the living conditions of the individuals, in particular their privacy protected by fundamental rights, on their personal and social security, and on their decision-making responsibility, and when Hungary’s linguistic, historical and cultural traditions are affected.

67. The Constitutional Court establishes that the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law—it is merely acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty—Hungary can only be deprived of its

constitutional identity through the final termination of its sovereignty, its independent statehood. Therefore the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State. Accordingly, sovereignty and constitutional identity have several common points, thus their control should be performed with due regard to each other in specific cases.

68. The petitioner's question related to the transferring of third country nationals in the context of the European Union can be answered by the Constitutional Court in the framework of this procedure aimed at the interpretation of the Fundamental Law as follows.

69. If human dignity, another fundamental right, the sovereignty of Hungary (including the extent of the transferred competences) or its self-identity based on its historical constitution can be presumed to be violated due to the exercising of competences based on Article E(2) of the Fundamental Law, the Constitutional Court may examine, on the basis of a relevant petition, in the course of exercising its competences, the existence of the alleged violation. . . .

The Danish case, excerpted below, arose out of an employment dispute over pensions. In 2016, the CJEU determined that Danish pension law constituted age discrimination. In response, the Supreme Court of Denmark held that domestic law superseded the "general principle of non-discrimination" under EU law.

Ajos A/S v. Estate of A
Supreme Court of Denmark
Case No. 15/2014 (2016)

. . . The bench consisted of nine judges: Poul Søgaaard, Jytte Scharling, Thomas Rørdam, Jon Stokholm, Poul Dahl Jensen, Jens Peter Christensen, Hanne Schmidt, Lars Hjortnæs and Kurt Rasmussen. . . .

By order of 22 September 2014 . . . the [Supreme Court] requested the EU Court of Justice to answer [certain questions concerning Paragraph 2a(3) of the Law on salaried employees]: . . .

6.2. By judgment delivered on 12 October 2010, *Ingeniørforeningen i Danmark v Region Syddanmark* . . . , the EU Court of Justice held that, by not permitting payment of the severance allowance to workers who are eligible for an old-age pension from their employer, Paragraph 2a(3) of the Law on salaried employees is contrary to the Employment Directive [Council Directive 2000/78/EC of 27

November 2000 establishing a general framework for equal treatment in employment and occupation] and the prohibition contained therein prohibiting discrimination on grounds of age where the dismissed workers intend to continue with their career. . . .

6.5. In Danish case-law Paragraph 2a(3) of the Law on salaried employees has been consistently interpreted . . . as meaning that an employee is not entitled to a severance allowance if the employee is entitled to an old-age pension financed by his or her employer under a scheme which the employee in question joined before attaining the age of 50, irrespective of whether the employee opts temporarily not to receive a pension in order to pursue a professional career. Against that background it would be *contra legem* to interpret Paragraph 2a(3) in such a manner as to bring the provision into line with the Employment Directive as interpreted by the EU Court of Justice in its judgment *Ingeniørforeningen i Danmark v Region Syddanmark*

6.6. The main issue in this case then becomes whether an EU law principle prohibiting discrimination on grounds of age can be used as a basis for requiring the private-sector employer Ajos A/S to pay a severance allowance, even though it is not obliged to do so under Paragraph 2a(3) of the Law on salaried employees. The case thus raises issues of whether an unwritten EU law principle can preclude an individual or private-sector business from relying on a national legislative provision. . . .

The Court of Justice of the European Union (Grand Chamber) delivered judgment on 19 April 2016, *Dansk Industri*, . . . stating inter alia: . . .

25. . . . [B]y generally excluding a whole category of workers from entitlement to the severance allowance, Paragraph 2a(3) of the Law on salaried employees affects the conditions regarding the dismissal of those workers for the purposes of Article 3(1)(c) of Directive 2000/78 It follows that the national legislation at issue in the main proceedings falls within the scope of EU law and, accordingly, within the scope of the general principle prohibiting discrimination on grounds of age. . . .

29. . . . [A]ccording to settled case-law, where national courts are called on to give judgment in proceedings between individuals in which it is apparent that the national legislation at issue is contrary to EU law, it is for those courts to provide the legal protection which individuals derive from the provisions of EU law and to ensure that those provisions are fully effective. . . .

33. It should be noted in that connection that the requirement to interpret national law in conformity with EU law entails the obligation for national courts to change its established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive

35. . . . [E]ven if a national court seised of a dispute that calls into question the general principle prohibiting discrimination on grounds of age, as given concrete expression in Directive 2000/78, does in fact find it impossible to arrive at an interpretation of national law that is consistent with the directive, it is nonetheless under an obligation to provide, within the limits of its jurisdiction, the legal protection which individuals derive from EU law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle

38. . . . [A] national court cannot rely on [the principle of legitimate expectation] in order to continue to apply a rule of national law that is at odds with the general principle prohibiting discrimination on grounds of age, as laid down by Directive 2000/78. . . .

It is apparent from the EU Court of Justice's judgment . . . in *Dansk Industri*, . . . that the EU Court of Justice has consistently held that, in relation to disputes between individuals, a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual but that the Member States' obligation arising from a directive . . . [is] binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts Furthermore, . . . national courts . . . are required to consider the whole body of rules of law and to apply methods of interpretation that are recognised by those rules in order to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU Moreover, the obligation to interpret national law in conformity with EU law is limited by general principles of law and cannot serve as the basis for an interpretation of national law *contra legem*

[T]he Supreme Court takes the view that the state of the law is clear and that it is not possible, in applying the rules of interpretation recognised under Danish law, to arrive at an interpretation of Paragraph 2a(3) of the Law on salaried employees as then in force in a manner that is consistent with the Employment Directive as interpreted by the EU Court of Justice in its judgment in *Ingeniørforeningen i Danmark v Region Syddanmark*

There is thus a *contra legem* situation, which means that it is not possible to interpret Paragraph 2a(3) of the Law on salaried employees as then in force in accordance with the Employment Directive. . . .

The EU Court of Justice has jurisdiction to rule on questions concerning the interpretation of EU law: see Article 267 TFEU. It is therefore for the EU Court of Justice to rule on whether a rule of EU law has direct effect and takes precedence over a conflicting national provision, including in disputes between individuals.

The question whether a rule of EU law can be given direct effect in Danish law, as required under EU law, turns first and foremost on the Law on accession by which Denmark acceded to the European Union.

Under Paragraph 2 of that law, powers which under the constitution are conferred on the authorities of the Kingdom are exercised by the European Union's institutions in so far as laid down in the treaties, etc., referred to in Paragraph 4. Under Paragraph 3, those provisions referred to in Paragraph 4 are put into force in Denmark in so far as they are directly applicable in Denmark under EU law. . . .

A situation such as this, in which a principle at treaty level under EU law is to have direct effect (thereby creating obligations) and be allowed to take precedence over conflicting Danish law in a dispute between individuals, without the principle having any basis in a specific treaty provision, is not foreseen in the Law on accession. . . .

It is furthermore well known and also foreseen in the Law on accession that the EU Court of Justice can develop and establish general principles that are to be found in the European Convention on Human Rights and similar treaties and in the constitutional traditions common to the Member States. Such general principles are not, however, directly applicable in Denmark by virtue of the Law on accession, and thus cannot be relied on in disputes between individuals. . . .

[U]nder the Law on accession, principles developed or established on the basis of Article 6(3) TEU have not been made directly applicable in Denmark. The same holds true for the provisions of the Charter, including Article 21 thereof on non-discrimination which, under the Law on accession, has not been made directly applicable in Denmark. . . .

In summary, we accordingly find that the Law on accession does not provide the legal basis to allow the unwritten principle prohibiting discrimination on grounds of age to take precedence over Paragraph 2a(3) of the Law on salaried employees in so far as the provision is contrary to the prohibition.

The Supreme Court would be acting outside the scope of its powers as a judicial authority if it were to disapply [Paragraph 2a(3) of the Law on salaried employees] in this situation. . . .

Judge Jytte Scharling states [dissenting]:

In its judgment . . . in *Mangold*, the EU Court of Justice held that Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation . . . the source of the actual principle underlying the prohibition of those forms of discrimination being found . . . in various international instruments and in the constitutional traditions common to the Member States The EU Court of Justice further held that the principle of non-discrimination on

grounds of age must be regarded as a general principle of Community law It follows from that judgment that the principle prohibiting discrimination has direct effect, including in a dispute between individuals.

By that judgment, the EU Court of Justice has thus, as part of its law-making activity, established that the general EU law principle prohibiting discrimination on grounds of age applies at Treaty level and is directly applicable. . . .

The [EU] Court has also, in the time leading up to the most recent amendments to the Law on accession, further developed that style of interpretation, holding, for example, that treaty provisions as well can have direct effect on individuals by imposing duties on them

In the light of the foregoing, I find that there is not such an extraordinary situation that it can be held with the requisite certainty that the application of a general principle of EU law prohibiting discrimination on grounds of age in the employment sphere falls outside the jurisdiction conferred on the EU Court of Justice by the Law on accession. . . .

I find that the principle prohibiting discrimination on grounds of age must be considered to follow from those treaties referred to in Paragraph 4 of the Law on accession, as those treaties have been interpreted by the EU Court of Justice. . . .

I further note that the judgment in *Mangold* was delivered in 2005, before the latest amendment to the Law on accession in connection with Denmark's ratification of the Lisbon Treaty . . . was adopted. It was thus known at the time of that amendment that the principle prohibiting discrimination on grounds of age under EU law was directly applicable, and no reservation was made . . . to the effect that that principle should not have direct effect in Denmark.

The Constitutional Court of Italy's preliminary reference Order No. 24/2017 in the *Tarrico* case, excerpted below, addressed whether individuals who committed value-added tax (VAT) fraud, which is subject to a short statute of limitations in Italy, could be prosecuted under EU law. The Tribunale di Cuneo (District Court of Cuneo, Italy) submitted a reference for preliminary ruling to the CJEU, asking whether the statute of limitations provided in the Italian Criminal Code was in accordance with EU law, or whether the statute of limitations effectively granted impunity, creating a new VAT exemption not provided for by EU law. Article 325 TFEU* obligates EU

* Article 325(1) of the Treaty on the Functioning of the European Union provides: "The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and

Member States to combat “fraud and any other illegal activities affecting the financial interests of the Union.” The CJEU, applying the language of Article 325 TFEU, held that Italian domestic courts would need to disregard the relevant provisions of the Italian Criminal Code—the last paragraph of Article 160 and Article 161(2)—if the resulting national rule would prevent “the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or provide[] for longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union, which it is for the national court to verify.” *Taricco*, Judgment, Court of Justice of the European Union (Grand Chamber), Case No. C-105/14, paragraph 58 (September 8, 2015).

Following the CJEU’s judgment, two Italian courts, hearing VAT fraud cases that otherwise would have been time-barred under the Italian Criminal Code, asked the Constitutional Court of Italy to clarify whether they should apply EU law, which would likely be incompatible with the fundamental principles of Italian constitutional order. The Constitutional Court referred the matter back to the CJEU.

Order No. 24

Constitutional Court of Italy (January 26, 2017)

[The Constitutional Court, composed of President: Paolo Grossi; Judges: Giorgio Lattanzi, Aldo Carosi, Marta Cartabia, Mario Rosario Morelli, Giancarlo Coraggio, Giuliano Amato, Silvana Sciarra, Daria de Pretis, Nicolò Zanon, Franco Modugno, Augusto Antonio Barbera, Giulio Prosperetti.]

[Author: Giorgio Lattanzi] . . .

2. The recognition of the primacy of EU law is an established fact within the case law of this Court pursuant to Article 11 of the Constitution; moreover, . . . compliance with the supreme principles of the Italian constitutional order and inalienable human rights is a prerequisite for the applicability of EU law in Italy. In the highly unlikely event that specific legislation were not so compliant, it would be necessary to rule unconstitutional the national law authorising the ratification and implementation of the Treaties Furthermore, there is no doubt that the principle of legality in criminal matters is an expression of a supreme principle of the legal order This principle is laid down by Article 25(2) of the Constitution, according to which “No person may be punished except by virtue of a law that was in force at the time the offence was committed.” Were the application of Article 325 TFEU to

be such as to afford effective protection in the Member States, and in all the Union’s institutions, bodies, offices and agencies.”

Article 325(2) of the Treaty on the Functioning of the European Union provides: “Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.”

entail the incorporation into the legal order of a rule at odds with the principle of legality in criminal matters, as is hypothesised by the referring courts, this Court would be under a duty to prevent it.

3. It is therefore necessary to establish as a preliminary matter whether Article 325 TFEU should actually be applied in the manner indicated by the referring courts or whether it is also open to any other interpretation, even if in part different, that is capable of precluding any conflict with the principle of legality in criminal matters laid down by Article 25(2) of the Italian Constitution, along with the similar principles contained in the Charter of Fundamental Rights of the European Union

Given a persisting interpretative doubt concerning EU law, which it is necessary to resolve in order to decide on the question of constitutionality, it is thus appropriate to seek further clarification from the Court of Justice concerning the meaning to be attributed to Article 325 TFEU on the basis of the judgment given in the *Taricco* case. . . .

4. . . . [I]n the European legal context, there is no requirement whatsoever for uniformity across European legal systems regarding this aspect, which does not directly affect either the competences of the Union or the provisions of EU law. Each Member State is therefore free to conceptualise the limitation of criminal offences in either substantive or procedural terms, in accordance with its own constitutional tradition.

This conclusion was not placed in doubt by the judgment given in the *Taricco* case, which limited itself to excluding limitation from the scope of Article 49 of the Nice Charter, but did not assert that the Member States must disregard any of their own constitutional rules and traditions that prove to be more beneficial for the accused compared to Article 49 of the Nice Charter and Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*

* Article 49 of the Nice Charter provides: “(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable. (2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations. (3) The severity of penalties must not be disproportionate to the criminal offence.”

Article 7 of the European Convention on Human Rights provides: “(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. (2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

Moreover, this would not be permitted within the Italian legal system where these assert a supreme principle of the constitutional order, as is the case for the principle of legality in criminal matters

5. . . . It is first and foremost necessary to establish whether the individual could reasonably foresee, on the basis of the legislative framework applicable at the time the offence was committed, that EU law, and in particular Article 325 TFEU, would have required the courts to disregard Articles 160, last paragraph, and 161(2) of the Criminal Code in the event that the conditions laid down by the Court of Justice in the *Taricco* case obtained. This is an indispensable principle of constitutional principles in the area of criminal law. . . . A similar concern is moreover shared by the Strasbourg Court under Article 7 ECHR with regard to the need, which has been repeatedly asserted, that it must have been possible for the perpetrator to have known of the offence and the penalty at the time it was committed

6. . . . [I]t is necessary to ask whether the Court of Justice took the view that the national courts should apply the rule even where it conflicts with a supreme principle of the Italian legal system. This Court thinks that it did not, but considers that it is in any case appropriate to bring the doubt to the attention of the Court of Justice. . . .

The primacy of EU law . . . reflects the conviction that the objective of unity . . . justifies the renunciation of areas of sovereignty, even if defined through constitutional law. At the same time, the legitimation for (Article 11 of the Italian Constitution) and the very force of unity within a legal order characterised by pluralism (Article 2 TEU) result from its capacity to embrace the minimum level of diversity that is necessary in order to preserve the national identity inherent within the fundamental structure of the Member State (Article 4(2) TEU). Otherwise, the European Treaties would seek, in a contradictory fashion, to undermine the very constitutional foundation out of which they were born by the wishes of the Member States. . . .

It is . . . reasonable to expect that . . . the European court will establish the meaning of EU law, whilst leaving to the national authorities the ultimate assessment concerning compliance with the supreme principles of the national order. . . . The Constitution of the Republic of Italy vests this task exclusively in this Court

7. . . . The judgment in the *Taricco* case held that Article 325 TFEU has direct effect and entails an obligation to set aside national legislation on the limitation of offences which, in the situations and under the circumstances identified, compromises the efficacy of the penalty. . . . The European judgment does not consider the compatibility of the rule with the supreme principles of the Italian constitutional order, but appears to have expressly delegated this task to the competent national bodies. In fact, paragraph 53 of the judgment asserts that “if the national court decides to disapply the national provisions at issue, it must also ensure that the fundamental

rights of the persons concerned are respected.” Paragraph 55 goes on to add that the disapplication is to be ordered “subject to verification by the national court” of respect for the rights of the accused.

The conviction of this Court, confirmation of which is sought from the Court of Justice, is that the intention in making these assertions was to state that the rule inferred from Article 325 TFEU is only applicable if it is compatible with the constitutional identity of the Member State, and that it falls to the competent authorities of that State to carry out such an assessment. . . .

8. . . . [T]he primacy of EU law is not called into question in the case before this Court because, as has already been noted, it does not question the rule laid down by the judgment in the *Taricco* case inferred from Article 325 TFEU, but only the existence of a constitutional bar on its direct application by the courts. This bar does not result from the juxtaposition of a national provision and the rules of EU law but only from the fact, which is extraneous to EU law, that the limitation of offences in Italy is an institute of substantive criminal law, and is thus subject to the principle of legality in criminal matters.

It is thus proportionate for the Union to respect the heightened level of protection afforded by the Italian Constitution to accused persons, given that this does not entail any sacrifice to the primacy of EU law. . . .

10. . . . [W]ere the Court of Justice to agree with this Court as to the meaning of Article 325 TFEU and of the judgment given in the *Taricco* case, the questions of constitutionality raised by the referring court would be rendered moot. . . .

* * *

The Federal Constitutional Court of Germany’s claim to “constitutional identity” in *Gauweiler* has not generally been read as a direct threat to the European project. Why not? For one, Germany ultimately determined that its constitutional values were consistent with its European obligations. By contrast, the Hungarian and Danish constitutional courts held that, in the event of an irreconcilable conflict between national and Union law, domestic law prevailed. How are these different examples of resistance assessed: Which constitute healthy examples of “constitutional pluralism” and which pose risks to European values and the rule of law? Does it matter which country is making the “constitutional identity” claim? The subject matter of the dispute?

EU EFFORTS TO REASSERT ITS RULE OF LAW VISION

As populist and nationalist parties gain traction in a number of European countries, the European Union has proposed several responses aimed at ensuring Member State adherence to basic rule of law principles. This section examines evolving strategies for identifying, monitoring, and preventing erosion of the rule of law. To understand the puzzle about what it means to be part of Europe, we look to both the institutions and the practices that are targets of European rule of law enforcement and the sources of the challenges to the rule of law.

There are three primary “rule of law” mechanisms. The first is Article 7 of the Treaty on the European Union, which allows European institutions to identify “a clear risk of serious breach” of the values articulated in Article 2. Second, the European Commission has set out a Rule of Law Framework that provides a formal process for dialogue between Brussels and Member States that are at risk of systemic rule of law violations. Finally, the European Council has devised a Rule of Law Dialogue that is less formal than the Commission’s mechanism and that emphasizes collective dialogue between Member States.

Treaty on European Union (Lisbon Treaty) Article 7 (entered into force, December 1, 2009)

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the

Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State. . . .

**Overseeing the Rule of Law in the European Union:
Legal Mandate and Means**
Christophe Hillion (January 2016)*

. . . There is a deepening concern about some EU Member States' disregard for the rule of law, and understandably so. Such disregard not only hampers the trust between the Member States and in turn the Union's functioning, it directly strikes at the very heart of European integration. Various schemes have been put forth in an attempt to address the issue. After a call for a "new and more effective mechanism to safeguard fundamental values in Member States," the European Commission has established a "EU framework to strengthen the rule of law," which it has activated for the first time in relation to Poland. For their part, the Council and Member States have initiated an annual "dialogue to promote and safeguard the rule of law," the first of which took place under the Luxembourg Presidency of the Council. This paper discusses the underlying question of what the Union is legally entrusted to do on this rather slippery terrain. What legal mandate does it have to ensure respect for the rule of law? And importantly, what are the means to fulfil such a mandate? . . .

Two rationales stand out to explain why the Treaties make EU membership rights contingent upon states' observance of the common values. First, a Member State contravening such values would endanger the legitimacy of EU decision-making as a whole, and possibly impede the lawfulness of subsequent EU decisions. Second, rule of law deficiencies potentially disrupt the very functioning of the Union legal order, based as it is on mutually legal interdependence and mutual trust among its members. . . .

The rule of law must not only be respected for a state to become and remain a member of the EU, it must also be actively promoted. Article 3(1) TEU foresees that the Union is to "*promote* . . . its values and the well-being of its peoples." Article 13(1) TEU reiterates this broadly defined EU value-promotion *mandate*, by stating that the EU institutional framework "*shall aim to promote* [the Union's] values"

* Excerpted from Christophe Hillion, *Overseeing the Rule of Law in the European Union: Legal Mandate and Means*, SWEDISH INSTITUTE FOR EUROPEAN POLICY STUDIES (January 2016), available at http://www.sieps.se/sites/default/files/2016_1_epa_eng.pdf.

(emphasis added). As in Article 3(1) TEU, value-promotion spearheads the list of institutions' duties, preceding that of advancing the Union's objectives, serving its interests, those of its citizens and those of its Member States.

In other words, ensuring respect for the rule of law in the EU legal order is not exclusively a judicial task. . . .

EU primary law provides a solid constitutional basis for an active EU *engagement* to ensure compliance with the values of Article 2 TEU in general, and the rule of law in particular. Member States are bound to respect EU values, not only to keep their membership rights intact, but also because as Member States, they must assist the Union and its institutions effectively to fulfil their all-encompassing aims of value-promotion, as enshrined notably in Article 3(1) TEU. . . .

Two complementary means may be used legally to compel Member States to respect the rule of law as value of the Union: first the specific sanction mechanism of Article 7 TEU, and second, the general enforcement procedure of Articles 258-260 TFEU. [See Article 7, excerpted above] . . .

[C]ontrary to the EU Charter of Fundamental Rights (EUCFR), the mechanism is not circumscribed to situations where Member States "implement EU law." The fact that *all* actions or inactions of Member States can be considered for the purpose of the sanction mechanism may indeed explain its stringent procedural requirements and thresholds for sanctioning breaches. . . .

In effect, EU values in general, and the rule of law in particular, have been incrementally articulated, notably in the context of the EU enlargement policy. This has been deemed necessary to ensure that the substantive conditions of Article 49(1) TEU are fulfilled. In particular, EU institutions and Member States have to ascertain that the candidate state respect and promote the values of Article 2 TEU, for its membership application to be admissible. Indeed, the content of Article 2 TEU has been further developed in the context of the constantly evolving "pre-accession strategy," whereby the Commission reports to the Council and European Council on the candidates' progress in fulfilling the accession criteria.

Articulated notably by reference to constitutional and international sources, EU membership conditions have been formally *endorsed* by the Member States. . . .

Given that the General Principles and the Charter cover aspects of the rule of law, could they inform the interpretation of the values of Article 2 TEU, despite their circumscribed application? Or should the values be interpreted differently, by reference to other sources, considering the distinct function of Article 2 TEU? In other words, should the Court introduce a differentiation between the values applicable to Member States in general, and founding principles applicable to Member States when implementing EU law? . . .

[The 2015] discussion about the possible reintroduction of the death penalty in Hungary illustrates well the difficulty resulting from the present system of differentiated application of the Charter and of the General Principles, on the one hand, and of Article 2 TEU, on the other. Applied strictly, the current regime entails that one could have invoked the prohibition of the death penalty deriving from Article 2(2) EUCFR against Hungary only when “acting in the scope of Union law.” . . . [S]uch a reading would deprive the EUCFR provision of actual meaning, in turn suggesting that the provisions of the Charter could be used as inspiration for interpreting Article 2 TEU and as a yardstick for the purpose of its enforcement. Indeed, the Preamble of the Charter points towards such a connection, when declaring that “The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on *common values*” (emphasis added); in so far as the purpose of the Charter is arguably to articulate such values. . . .

[T]he substantial differences between the two mechanisms reflect the distinct yet arguably *complementary* function they fulfil in the system of the Treaties. First, they are deemed to respond to different types of Member States’ deviances from Article 2 TEU. While the infringement procedure purports to tackle *any* failure, the sanction mechanism of Article 7 TEU is crafted specifically to address a “serious and persistent” breach of Article 2 TEU, whose effect is more corrosive on the EU legal order as a whole. In the case of the infringement procedure, the failure is more limited and circumstantial, whereas in the context of Article 7 TEU, the breach has become systematic, denoting that the State’s contentious behaviour has an intentional systemic character.

Second, and as a result, the Union’s responses vary under each mechanism. In the context of the infringement procedure, a state’s failure to fulfil an obligation may lead to a judicial sanction, and eventually to the payment of a lump sum and/or a penalty payment, if the state concerned fails to comply with the Court’s judgment. The purpose is to respond to a contentious *action* (or inaction). By contrast, the “persistent and serious” breach under Article 7 TEU, if established by the European Council, leads to the suspension of some of the prevaricating state’s membership rights, including its participatory rights. Thus, the target is the state’s overall *behaviour*, by way of *quarantine*, to protect the functioning of the Union.

The notion of complementarity of the procedures of Article 258 TFEU and of Article 7 TEU, respectively, appears to be endorsed by the Council and the Member States. Their joint Conclusions not only suggested that the rule of law could be safeguarded through both procedures; they also indicated that the infringement procedure is not excluded from the “field of the rule of law,” where it coexists with the Article 7 procedure. . . .

While the EU may sanction Member States’ breaches of the rule of law, it is also entrusted to *prevent* them. This is the specific purpose of Article 7(1) TEU. As

illustrated by several recent initiatives, EU institutions appear to be more active on this preventive front, as compared to sanctions, albeit mainly *outside* the particular framework of Article 7(1) TEU (4.2). This phenomenon is partly explained by the disagreement among institutions as to the role the Union should play on this terrain. . . .

[T]he preventive mechanism of Article 7 TEU has thus far remained a dead letter. Instead, faced with a deteriorating compliance with the rule of law in the Union, alternative preventive mechanisms have been envisaged. . . .

Thus, the Commission's "EU Framework to strengthen the Rule of Law" displays a slight change of approach in the prevention of breaches of EU values. Not only does it refrain from reviving the idea of regular monitoring based on Article 7(1) TEU, but the framework is also set to operate *outside* of the mechanisms of Article 7 TEU. . . . [T]he Commission has set up a pre-preventive procedure, seemingly located between the classic infringement procedure and the mechanisms of Article 7 TEU.

On the Council's side, it was decided to "establish . . . a dialogue among all Member States within the Council to promote and safeguard the rule of law in the framework of the Treaties." While acknowledging the Council's role in "promoting a culture of respect for the rule of law within the European Union," the hybrid "Conclusions of the Council and the Member States meeting in the Council" foresee that the dialogue takes place annually in the General Affairs configuration of the Council

[T]he two approaches differ significantly. One explanation could be the institutions' distinctive powers in general, and in the context of Article 7 TEU in particular. Yet, the differences also appear to express an underlying divergence of views as to the role the EU should play in safeguarding the rule of law. Thus, the *object* of the two undertakings is not the same. The Commission has established a "framework" to "strengthen" the rule of law and to "resolve future threats to the rule of law in Member States before conditions for activating the mechanism [of Article 7] would be met." By contrast, the Council and the Member States have set up a "dialogue" to "promote a culture of respect for the rule of law" (emphases added).

Moreover, the approaches differ in *nature*. While the Commission proposes a structured exchange between itself and a potentially prevaricating Member State in an EU-driven process, the Council & Member States envisage a dialogue "among" peers, pointing towards a more restricted EU involvement. . . .

**Communication from the Commission to the European Parliament
and the Council: A New EU Framework to Strengthen
the Rule of Law**

European Commission (March 19, 2014)*

The rule of law is the backbone of any modern constitutional democracy. It is one of the founding principles stemming from the common constitutional traditions of all the Member States of the EU and, as such, one of the main values upon which the Union is based. . . . This is . . . why, under Article 49 TEU, respect for the rule of law is a precondition for EU membership. Along with democracy and human rights, the rule of law is also one of the three pillars of the Council of Europe and is endorsed in the Preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). . . .

The Commission is the guardian of the Treaties and has the responsibility of ensuring the respect of the values on which the EU is founded and of protecting the general interest of the Union. . . . In September 2012, in his annual State of the Union speech to the European Parliament, President Barroso said: “We need a better developed set of instruments, not just the alternative between the ‘soft power’ of political persuasion and the ‘nuclear option’ of Article 7 TEU.[”] . . .

The precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each Member State’s constitutional system. Nevertheless, case law of the Court of Justice of the European Union . . . and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the Venice Commission, provide a non-exhaustive list of these principles and hence define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU.

Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law. . . .

[E]xperience has shown that a systemic threat to the rule of law in Member States cannot, in all circumstances, be effectively addressed by the instruments currently existing at the level of the Union.

Action taken by the Commission to launch infringement procedures, based on Article 258 TFEU, has proven to be an important instrument in addressing certain rule

* Excerpted from *Communication from the Commission to the European Parliament and the Council: A New EU Framework to strengthen the Rule of Law*, EUROPEAN COMMISSION (March 19, 2014), available at http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf.

of law concerns. But infringement procedures can be launched by the Commission only where these concerns constitute, at the same time, a breach of a specific provision of EU law.

There are situations of concern which fall outside the scope of EU law and therefore cannot be considered as a breach of obligations under the Treaties but still pose a systemic threat to the rule of law. For these situations, the preventive and sanctioning mechanisms provided for in Article 7 TEU may apply. The Commission is among the actors which are empowered by the Treaty to issue a reasoned proposal in order to activate those mechanisms. Article 7 TEU aims at ensuring that all Member States respect the common values of the EU, including the rule of law. Its scope is not confined to areas covered by EU law, but empowers the EU to intervene with the purpose of protecting the rule of law also in areas where Member States act autonomously. As explained in the Commission's Communication on Article 7 TEU, this is justified by the fact that "if a Member State breaches the fundamental values in a manner sufficiently serious to be caught by Article 7, this is likely to undermine the very foundation of the EU and the trust between its members, whatever the field in which the breach occurs."

Nevertheless, the preventive mechanism of Article 7(1) TEU can be activated only in case of a "clear risk of a serious breach" and the sanctioning mechanism of Article 7(2) TEU only in case of a "serious and persistent breach by a Member State" of the values set out in Article 2 TEU. The thresholds for activating both mechanisms of Article 7 TEU are very high and underline the nature of these mechanisms as a last resort. . . .

There are therefore situations where threats relating to the rule of law cannot be effectively addressed by existing instruments. . . .

The Framework will be activated in situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law.

The new EU Rule of Law Framework is not designed to be triggered by individual breaches of fundamental rights or by a miscarriage of justice. These cases can and should be dealt with by the national judicial systems, and in the context of the control mechanisms established under the European Convention on Human Rights to which all EU Member States are parties. . . .

Where there are clear indications of a systemic threat to the rule of law in a Member State, the Commission will initiate a structured exchange with that Member State. The process is based on the following principles: focusing on finding a solution through a dialogue with the Member State concerned; ensuring an objective and

thorough assessment of the situation at stake; respecting the principle of equal treatment of Member States; indicating swift and concrete actions which could be taken to address the systemic threat and to avoid the use of Article 7 TEU mechanisms.

The process is composed, as a rule, of three stages: a Commission assessment, a Commission recommendation and a follow-up to the recommendation. . . .

If, as a result of this preliminary assessment, the Commission is of the opinion that there is indeed a situation of systemic threat to the rule of law, it will initiate a dialogue with the Member State concerned, by sending a “rule of law opinion” and substantiating its concerns, giving the Member State concerned the possibility to respond. . . .

In a second stage, . . . the Commission will issue a “rule of law recommendation” addressed to the Member State concerned, if it finds that there is objective evidence of a systemic threat and that the authorities of that Member State are not taking appropriate action to redress it.

In its recommendation the Commission will clearly indicate the reasons for its concerns and recommend that the Member State solves the problems identified within a fixed time limit and informs the Commission of the steps taken to that effect. . . .

Commission Recommendation Regarding the Rule of Law in Poland European Commission (July 27, 2016)*

. . . (3) The Rule of Law Framework provides guidance for a dialogue between the Commission and the Member State concerned to prevent the escalation of systemic threats to the rule of law.

(4) The purpose of this dialogue is to enable the Commission to find a solution with the Member State concerned in order to prevent the emergence of a systemic threat to the rule of law that could develop into a “clear risk of a serious breach” which would potentially trigger the use of the ‘Article 7 TEU Procedure.’ . . .

(5) . . . [Core] principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law. In addition to upholding those principles and values, State institutions also have the duty of loyal cooperation.

* Excerpted from *Commission Recommendation of 27.7.2016 regarding the rule of law in Poland* EUROPEAN COMMISSION (July 27, 2016), available at http://ec.europa.eu/justice/effective-justice/files/recommendation-rule-of-law-poland-20160727_en.pdf.

(6) The Framework is to be activated in situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law. The purpose is to address threats to the rule of law which are of a systemic nature. The political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists, must be threatened. The Framework is to be activated in situations when national “rule of law safeguards” do not seem capable of effectively addressing those threats.

(7) The Rule of Law Framework has three stages. [See Commission 2014 above] . . .

(8) In November 2015, the Commission became aware of an ongoing dispute in Poland concerning in particular the composition of the Constitutional Tribunal, as well as the shortening of the mandates of its current President and Vice-President. The Constitutional Tribunal rendered two judgments on this matter, on 3 and 9 December 2015.

(9) On 22 December 2015, the [lower house of Parliament, known as the *Sejm*] adopted a law amending the law on the Constitutional Tribunal, which concerns the functioning of the Tribunal as well as the independence of its judges.

(10) In a letter . . . to the Polish Government, the Commission asked to be informed about the constitutional situation in Poland The Commission also recommended to the Polish authorities to work closely with the Council of Europe’s Venice Commission.

(11) On 23 December 2015, the Polish Government asked for an opinion of the Venice Commission on the law adopted on 22 December 2015. However, the Polish Parliament did not await this opinion before taking further steps, and the Law was published in the Official Journal and entered into force on 28 December 2015.

(12) . . . On 31 December 2015, the Polish Senate adopted the “small media law” concerning the management and supervisory boards of the Polish public television broadcaster and public radio broadcaster. [T]he Commission received a response from the Polish Government . . . denying any adverse impact on media pluralism. On 11 January, the Commission received a response from the Polish Government on the Constitutional Tribunal reform. These responses did not remove existing concerns.

(13) On 13 January 2016, . . . the Commission wrote to the Polish Government informing the Government that it was examining the situation under the Rule of Law

Framework and wished to enter into a dialogue with the institutions of the Republic of Poland

(16) On 1 February 2016, the Commission wrote to the Polish Government noting that the judgements of the Constitutional Tribunal on the appointment of judges had still not been implemented. The letter also underlined the need to further examine the amendment to the Act on the Constitutional Tribunal, in particular the “combined effect” of the various changes made

(17) . . . [The Polish government’s reply] clarified that the Tribunal’s judgment of 9 December 2015 states that the interim provisions of the amending law that provided for ending the mandate of the President had been pronounced unconstitutional and lost their legal effect. As a result, the current President of the Tribunal would continue to exercise his mandate pursuant to the old legislative provisions until his mandate expired on 19 December 2016. . . . [T]he mandate of the next President would be 3 years long. . . .

(18) . . . [The Commission replied] [r]egarding the amendment to the Act on the Constitutional Tribunal . . . that according to a preliminary assessment, certain amendments, both individually and taken together, made more difficult the conditions under which the Constitutional Tribunal could review the constitutionality of newly passed laws and requested more detailed explanations on this. . . .

(19) On 9 March 2016, the Constitutional Tribunal ruled that the law adopted on 22 December 2015 was unconstitutional. That judgment has so far not been published by the Government in the Official Journal, with the consequence that it does not have legal effect.

(20) On 11 March 2016, the Venice Commission adopted its opinion “on amendments to the Act of 25 June 2015 on the Constitutional Tribunal.” As regards the appointment of judges, the opinion called on the Polish Parliament to find a solution on the basis of the rule of law, respecting the judgments of the Tribunal. . . . [And] that a high attendance quorum, the requirement of two thirds majority for adopting judgements and a strict rule making it impossible to deal with urgent cases, especially in their combined effect, would have made the Tribunal ineffective. Finally, it considered that a refusal to publish the judgement of 9 March 2016 would further deepen the constitutional crisis in Poland. . . .

(23) Following the judgment of 9 March 2016, the Constitutional Tribunal resumed the adjudication of cases. The Polish Government did not participate in these proceedings and the judgements rendered by the Constitutional Tribunal since 9 March 2016 have so far not been published by the Government in the Official Journal.

(24) On 13 April 2016, the European Parliament adopted a Resolution on the situation in Poland, inter alia urging the Polish Government to respect, publish and

fully implement without further delay the Constitutional Tribunal's judgment[s] . . . and calling on the Polish Government to fully implement the recommendations of the Venice Commission. . . .

(26) . . . [T]he General Assembly of the Supreme Court of Poland adopted a resolution attesting that the rulings of the Constitutional Tribunal are valid, even if the Polish Government refuses to publish them in the Official Journal. . . .

(29) . . . [D]espite the detailed and constructive nature of the exchanges between the Commission and the Polish Government, they were not able to resolve the concerns of the Commission. . . . [T]he Commission deemed it necessary to formalise its assessment of the current situation in that Opinion. The Opinion set out the concerns of the Commission and served to focus the ongoing dialogue with the Polish authorities towards finding a solution. . . .

(31) On 22 July 2016, the *Sejm* adopted a new law on the Constitutional Tribunal . . .

2. . . . [The Commission identified the following issues]:

(1) the appointment of judges of the Constitutional Tribunal and the lack of implementation of the judgments of the Constitutional Tribunal of 3 and 9 December 2015 relating to these matters;

(2) the lack of publication in the Official Journal and of implementation of the judgment[s] . . . rendered by the Constitutional Tribunal . . . ;

(3) the effective functioning of the Constitutional Tribunal and the effectiveness of Constitutional review of new legislation, in particular in view of the law on the Constitutional Tribunal adopted by the *Sejm* on 22 July 2016. . . .

3. Ahead of the general elections for the *Sejm* of 25 October 2015, . . . the outgoing legislature nominated five persons to be 'appointed' as judges of the Constitutional Tribunal by the President of the Republic. Three judges would take seats vacated during the mandate of the outgoing legislature while two would take seats vacated during that of the incoming legislature which commenced on 12 November 2015.

4. . . . On 25 November 2015, the *Sejm* passed a motion annulling the five [judicial] nominations by the previous legislature and on 2 December nominated five new judges. . . .

6. . . . [T]he Constitutional Tribunal ruled . . . that the previous legislature of the *Sejm* had been entitled to nominate three judges replacing the judges whose terms

expired on 6 November 2015. At the same time, the Tribunal clarified that the *Sejm* had not been entitled to elect the two judges replacing those whose term expired in December. The judgment also specifically referred to the obligation for the President of the Republic to immediately take the oath from a judge elected by the *Sejm*.

7. . . . [T]he Constitutional Tribunal . . . invalidated the legal basis for the nominations by the new legislature of the *Sejm* of the three judges for the vacancies opened up on 6 November 2015 for which the previous legislature had already lawfully nominated judges.

8. Despite these judgments, the three judges nominated by the previous legislature have not taken up their function of judge in the Constitutional Tribunal and their oath has not yet been taken by the President of the Republic. Conversely, the oath of the three judges nominated by the new legislature without a valid legal basis has been taken by the President of the Republic.

9. The two judges elected by the new legislature replacing the two judges outgoing in December 2015 have in the meantime taken up their function of judge in the Constitutional Tribunal. . . .

12. The . . . binding and final judgments of the Constitutional Tribunal of 3 and 9 December 2015 have still not been implemented as far as the appointment of judges is concerned. These judgments require that . . . the three judges that have been nominated by the previous legislature of the *Sejm* can take up their function of judge in the Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis do not take up this function. . . .

13. In one of its letters the Polish Government has referred to the existence of a constitutional custom in Poland regarding the nomination of judges which would justify the position taken by the new legislature of the *Sejm*. . . . [H]owever . . . it is for the Constitutional Tribunal to interpret and apply the national constitutional law and custom, and . . . the Constitutional Tribunal did not refer to such a custom in its judgments. The judgment . . . cannot be overturned by invoking a supposed constitutional custom which the Tribunal has not recognized. . . .

16. . . . [The new law requires] the President of the Constitutional Tribunal to assign cases to all judges who have taken the oath before the President of the Republic but have not yet taken up their duties as judges. This provision seems targeted at the situation of the three judges which were unlawfully nominated by the new legislature of the *Sejm* in December 2015. It would enable these judges to take up their function while using the vacancies for which the previous legislature of the *Sejm* had already lawfully nominated three judges. . . .

18. . . . [F]ollowing an accelerated procedure, the *Sejm* amended the Law on the Constitutional Tribunal. . . . [T]he Constitutional Tribunal declared

unconstitutional the law . . . in its entirety as well as specific provisions thereof. So far the Polish authorities have failed to publish the judgment in the Official Journal. The Polish Government contests the legality of the judgment, as the Constitutional Tribunal did not apply the procedure foreseen by the law . . .

19. The Commission considers that the judgment of 9 March 2016 is binding and must be respected. The Constitutional Tribunal was correct not to apply the procedure foreseen by the law adopted on 22 December 2015. In that respect the Commission agrees with the Venice Commission, which states on this point that “a simple legislative act, which threatens to disable constitutional control, must itself be evaluated for constitutionality before it can be applied by the Court. [. . .] The very idea of the supremacy of the Constitution implies that such a law, which allegedly endangers constitutional justice, must be controlled—and if need be, annulled—by the Constitutional Tribunal before it enters into force.” . . .

20. . . . [C]ompliance with final judgments is an essential requirement inherent in the rule of law. In particular, where the publication of a judgment is a prerequisite for its taking effect and where such publication is incumbent on a State authority other than the court which has rendered the judgment, an ex post control by that State authority regarding the legality of the judgment is incompatible with the rule of law. The refusal to publish the judgment denies the automatic legal and operational effect of a binding and final judgment, and breaches the principles of legality and separation of powers. . . .

26. On 22 December 2015, following an accelerated procedure, the *Sejm* amended the Law on the Constitutional Tribunal. The amendments . . . increased the attendance quorum of judges for hearing cases, raised the majorities needed in the Constitutional Tribunal to hand down judgments by the full bench, required the handling of cases in chronological order and provided a minimum delay for hearings. Certain amendments increased the involvement of other institutions of the State in disciplinary proceedings concerning judges of the Tribunal. . . .

28. . . . [T]he Commission took the view that the effect of the amendments . . . in particular their combined effect, undermined the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution. . . .

32. In addition to the increased attendance quorum, a two-third majority for adopting decisions (for “abstract” constitutional review of newly adopted laws) significantly aggravated the constraints on the decision-making process of the Constitutional Tribunal. . . .

34. The “sequence rule” according to which the Constitutional Tribunal had to hear cases in the sequence in which they were registered negatively affected its capacity to render rapidly decisions on the constitutionality of new laws, in particular in view of the number of pending cases. The impossibility to take into account the

nature of a case (notably when involving fundamental rights issues), its importance and the context in which it is presented, could have prevented the Constitutional Tribunal from meeting the requirements for a reasonable length of proceedings as enshrined in Article 6 of the European Convention on Human Rights and Article 47 of the EU Charter of Fundamental Rights. . . .

38. . . . [C]ertain amendments increased the involvement of other institutions of the State in disciplinary proceedings concerning judges of the Tribunal. In particular, the President of the Republic or the Minister of Justice were given the power to initiate disciplinary proceedings against a Constitutional Tribunal judge and, in particularly serious cases, the *Sejm* was given the power to take the final decision on the dismissal of a judge following a request to that effect by the Constitutional Tribunal.

39. The . . . fact that a political body decides on (and hence may refuse to impose) a disciplinary sanction as proposed by the Constitutional Tribunal may pose a problem regarding the independence of the judiciary, as the Parliament (as a political body) could be expected to decide on the basis of political considerations. Similarly it was not clear why political institutions such as the President of the Republic and the Minister of Justice should have the power to initiate disciplinary proceedings. . . .

41. The Commission considers that even if certain improvements can be noted as compared to the amending Act . . . [o]verall, the effects of certain provisions of the law adopted on 22 July 2016, taken separately or in combination, raise concern regarding the effectiveness of constitutional review and the rule of law. . . .

54. In practice, the combination of Articles 61(6) and 30(5) [requiring participation of the Public Prosecutor-General] would appear to give a possibility to the Public Prosecutor-General, who is also the Minister of Justice, to delay or even to prevent the examination of certain cases, including cases handled by the full bench, by deciding not to participate at the hearing. This would allow for an undue interference with the functioning of the Tribunal and would violate the independence of the judiciary and the principle of the separation of powers. . . .

56. For cases examined by a full bench . . . the law adopted . . . allows at least four judges of the Tribunal to raise an objection to a draft determination. This could lead to the postponement of deliberations on a case for at least three months and in some instances for six months following the moment the Tribunal reaches the stage of deliberation. The Law does not provide for an exception to deal with urgent cases more rapidly. . . .

65. A number of particularly sensitive new legislative acts have been adopted by the *Sejm*, often through accelerated legislative procedures, such as, . . . a media law, a new Civil Service Act, a law amending the law on the Police and certain other

laws and laws on the Public Prosecution Office, and a new law on the Ombudsman

66. The Commission considers that as long as the Constitutional Tribunal is prevented from fully ensuring an effective constitutional review, there will be no effective scrutiny of compliance with the Constitution, including fundamental rights, of legislative acts such as those referred to above. . . .

72. . . . [T]he Commission is of the opinion that there is a situation of a systemic threat to the rule of law in Poland. The fact that the Constitutional Tribunal is prevented from fully ensuring an effective constitutional review adversely affects its integrity, stability and proper functioning, which is one of the essential safeguards of the rule of law in Poland. Where a constitutional justice system has been established, its effectiveness is a key component of the rule of law.

73. Respect for the rule of law is not only a prerequisite for the protection of all fundamental values listed in Article 2 of the Treaty on European Union. It is also a prerequisite for upholding all rights and obligations deriving from the Treaties and from international law, and for establishing mutual trust of citizens, businesses and national authorities in the legal systems of all other Member States. . . .

74. The Commission recommends that the Polish authorities take appropriate action to address this systemic threat to the rule of law as a matter of urgency. In particular the Commission recommends that the Polish authorities:

- (a) implement fully the judgments of the Constitutional Tribunal . . . which requires that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge in the Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis do not take up the post of judge without being validly elected;
- (b) publish and implement fully the judgements of the Constitutional Tribunal . . . and ensure that the publication of future judgements is automatic and does not depend on any decision of the executive or legislative powers;
- (c) ensure that any reform of the Law on the Constitutional Tribunal respects the judgments of the Constitutional Tribunal, . . . ;
- (d) ensure that the Constitutional Tribunal can review the compatibility of the new law adopted on 22 July 2016 on the Constitutional Tribunal before its entry into force and publish and implement fully the judgment of the Tribunal in that respect;

- (e) refrain from actions and public statements which could undermine the legitimacy and efficiency of the Constitutional Tribunal. . . .

77. On the basis of this recommendation, the Commission stands ready to pursue a constructive dialogue with the Polish Government. . . .

**Presidency non-paper for the Council (General Affairs):
Rule of Law Dialogue**

Council of the European Union (May 13, 2016)*

The conclusions of the Council and the Member States of December 2014 on ensuring respect for the rule of law establish an annual rule of law dialogue and foresee possible thematic debates in the Council (General Affairs) in order to promote and safeguard rule of law in the framework of the Treaties as one of the key values on which the Union is based. The first dialogue took place during the Luxembourg Presidency in the Council (General Affairs) on 17 November 2015. . . .

The EU is currently facing multiple interrelated challenges in the context of the refugee and migration situation. One of these challenges for the EU is to safeguard its fundamental values, including the rule of law, fundamental rights, non-discrimination, tolerance and solidarity. . . .

Member States have a[n] obligation to adhere to EU fundamental values and rights when receiving and integrating refugees and migrants. Vice versa, refugees and migrants also have an obligation to fully respect these EU values and rights. In the end, Member States must ensure these values and rights for everyone.

The societal effects of the current (and also previous) migration flows are to a large extent dependent on the way refugees and migrants are integrated into European societies. Integration should take place in a framework that respects and protects fundamental rights and rule of law. It is therefore important, building on the Council discussion following the Paris declaration on promoting citizenship and the common values of freedom, tolerance and non-discrimination through education . . . , to continue the debate on the challenges for Member States in this regard. This is especially relevant in light of the forthcoming EU Action Plan on Integration by the Commission. . . .

A seminar on EU fundamental values, immigration and integration was held on 2 February 2016 in Strasbourg Italian Secretary of State for European Affairs Sandro Gozi stated clearly that “solidarity is not an option, [. . .] solidarity is an

* Excerpted from *Presidency non-paper for the Council (General Affairs) on 24 May 2016—Rule of Law Dialogue*, COUNCIL OF THE EUROPEAN UNION (May 13, 2016), available at <http://data.consilium.europa.eu/doc/document/ST-8774-2016-INIT/en/pdf>.

essential value and a legally binding principle.” He added that solidarity and close collaboration provide the only basis for practical solutions like hotspots and relocation. . . . Nils Muižnieks, Council of Europe Commissioner for Human Rights, expressed his concern about recent developments and the “toxic atmosphere” in Europe. . . .

With an influx of about one million migrants in 2015, the challenge the EU is facing can hardly be overestimated. There was a general consensus that a common European response is needed, while taking national capacities into account. Many participants bemoaned the lack of solidarity. . . . At the moment, different national governments are adopting different policy options in various areas, which may complicate follow-up on decisions taken at EU level. Some national policy choices were criticised for not being in line with EU fundamental values and the principle of solidarity, such as extended waiting times for family reunification, reception conditions for unaccompanied minors, and push-backs at the borders. . . . [T]he Fundamental Rights and Rights of the Child unit of the Commission’s DG Justice . . . has adopted more than 50 infringement decisions against several member states for national decisions that may not be in line with European rules. . . . Another suggested approach was checking national institutions’ migration policy for compliance with European human rights standards. These ideas triggered a horizontal discussion on the desirability, feasibility and practical details of arrangements to ensure national compliance with European standards. . . .

[The Secretary-General of the Council of Europe] stressed that the rule of law must not be confused with rule by law, nor with “rule by my law.” Many speakers affirmed that the EU’s fundamental values and the rule of law are not only Treaty principles but also an essential part of European identity. Therefore any departure from our values must be addressed as a matter of priority. . . .

Many contributions discussed communication and a common narrative and vocabulary as important tools in promoting and upholding EU fundamental values in the migration crisis. It was noted that public attitudes towards migrants are often based on emotions rather than facts. In some member states, migration is discussed purely in terms of security. Mr Gozi referred to a negative narrative of fear: fear for our safety, of economic insecurity or even of a cultural threat. He asserted that fear makes political leaders and European societies at large insensitive to the fundamental rights of others. This could explain why fundamental rights and values are not central to migration politics today. . . .

Several speakers highlighted the need to develop a common European narrative on values. The events in Cologne* and other European cities and the image of a divided, panicky EU have unquestionably influenced the public debate on

* See Alison Smale, *As Germany Welcomes Migrants, Sexual Attacks in Cologne Point to New Reality*, NEW YORK TIMES (January 14, 2016), available at <https://www.nytimes.com/2016/01/15/world/europe/as-germany-welcomes-migrantssexual-attacks-in-cologne-point-to-a-new-reality.html>.

migration. Now that in the general public debate these fears are widely expressed, there is only a thin line left between a general discussion on migration and hate speech. . . .

“Rule of law” initiatives since 2014 have been driven by the European Council and the European Commission engaging directly with domestic governments. Nevertheless, these institutions derive the content of European values directly from judgments of European courts (both the CJEU and the European Court of Human Rights). To what extent do courts have a role to play in monitoring and remedying rule of law challenges? How would such a case be brought? How might legal action serve to bolster or undermine Europe’s efforts to monitor systemic rule of law erosion? In short, when illiberal, nationalist pockets within Europe resist a pan-European solution to a shared crisis, what can and should be done?

(DE)CRIMINALIZATION

DISCUSSION LEADERS

KATE STITH AND MARTA CARTABIA

V. (DE)CRIMINALIZATION

DISCUSSION LEADERS:
KATE STITH AND MARTA CARTABIA

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When can courts override the judgment of legislatures and prohibit the criminalization of certain activities? Examples in this chapter include policing of sexuality, reproduction and assisted suicide. Can courts require criminalization or other forms of state sanctions? Illustrative is the law on violence against women and other vulnerable persons.

The constitutional premises that have motivated courts to limit legislative regulation of crimes rest on understandings of individual privacy, liberty, autonomy, free expression, dignity, equality, and concerns for safety risks and societal needs. Likewise, when courts call for governments to provide remedies including criminalization, those decisions rest on these commitments.

SEXUALITY

Courts around the world have considered the question of whether the criminalization of sexual acts violates their constitutions. This set of cases highlights recurring debates around legal regulation of acts cast as against community or religious mores.

Dudgeon v. The United Kingdom European Court of Human Rights (Plenary) [1981] ECHR 5

. . . The European Court of Human Rights, taking its decision in plenary session in application of Rule 48 of the Rules of Court and composed of the following judges: Mr. R. Ryssdal, *President*, Mr. M. Zekia, Mr. J. Cremona, Mr. Thór Vilhjálmsson, Mr. W. Ganshof van der Meersch, Mrs. D. Bindschedler-Robert, Mr. D. Evrigenis, Mr. G. Lagergren, Mr. L. Liesch, Mr. F. Gölcüklü, Mr. F. Matscher, Mr. J. Pinheiro Farinha, Mr. E. Garcia de Enterria, Mr. L.-E. Pettiti, Mr. B. Walsh, Sir

Vincent Evans, Mr. R. Macdonald, Mr. C. Russo, Mr. R. Bernhardt, and also Mr. M.-A. Eissen, *Registrar*, and Mr. H. Petzold, *Deputy Registrar*

13. Mr. Jeffrey Dudgeon is a homosexual . . . and his complaints are directed primarily against the existence in Northern Ireland of laws which have the effect of making certain homosexual acts between consenting adult males criminal offences. . . .

14. The relevant provisions currently in force in Northern Ireland are contained in the Offences against the Person Act 1861 (“the 1861 Act”), the Criminal Law Amendment Act 1885 (“the 1855 Act”) and the common law.

Under sections 61 and 62 of the 1861 Act, committing and attempting to commit buggery are made [punishable] offences Buggery consists of sexual intercourse per anum by a man with a man or a woman, or per anum or per vaginam by a man or a woman with an animal.

By section 11 of the 1885 Act, it is an offence . . . for any male person . . . to commit an act of “gross indecency” with another male. . . . [A]ccording to the evidence submitted to the Wolfenden Committee [*see infra*], [gross indecency] . . . usually takes the form of mutual masturbation, inter-crural contact or oral-genital contact. . . . Consent is no defence to any of these offences and no distinction regarding age is made in the text of the Acts. . . .

15. Acts of homosexuality between females are not, and have never been, criminal offences, although the offence of indecent assault may be committed by one woman on another under the age of 17. . . .

16. The 1861 and 1885 Acts were passed by the United Kingdom Parliament . . . [and] applied to England and Wales, [and] to all Ireland, then unpartitioned and an integral part of the United Kingdom

17. In England and Wales the current law on male homosexual acts is contained in the Sexual Offences Act 1956 (“the 1956 Act”) as amended by the Sexual Offences Act 1967 (“the 1967 Act”). . . .

The 1967 Act . . . was passed to give effect to the recommendations concerning homosexuality made in 1957 in the report of the Departmental Committee on Homosexual Offences and Prostitution established under the chairmanship of Sir John Wolfenden (the “Wolfenden Committee” and “Wolfenden report”). . . .

The Wolfenden Committee concluded that homosexual behaviour between consenting adults in private was part of the “realm of private morality and immorality which is, in brief and crude terms, not the law’s business” and should no longer be criminal.

The 1967 Act qualified sections 12 and 13 of the 1956 Act by providing that, subject to certain exceptions concerning mental patients, members of the armed forces and merchant seamen, buggery and acts of gross indecency in private between consenting males aged 21 years or over should not be criminal offences. . . .

19. Under an Act of the United Kingdom Parliament, the Government of Ireland Act of 1920, a separate Parliament for Northern Ireland was established with the power to legislate on all matters devolved by the Act, including criminal and social law.

20. In March 1972, the Northern Ireland Parliament was prorogued and Northern Ireland was made subject to “direct rule” from Westminster. . . .

21. No measures comparable to the 1967 Act were ever introduced into the Northern Ireland Parliament either by the Government of Northern Ireland or by any Private Member. . . .

33. On 21 January 1976, the police went to Mr. Dudgeon’s address to execute a warrant under the Misuse of Drugs Act 1971. During the search of the house . . . [p]ersonal papers, including correspondence and diaries, belonging to the applicant in which were described homosexual activities were also found and seized. As a result, he was asked to go to a police station where for about four and a half hours he was questioned, on the basis of these papers, about his sexual life. The police investigation file was . . . considered with a view to instituting proceedings for the offence of gross indecency between males. The Director [of Prosecutions], in consultation with the Attorney General, decided that it would not be in the public interest for proceedings to be brought. Mr. Dudgeon was so informed in February 1977 and his papers, with annotations marked over them, were returned to him. . . .

37. The applicant complained that under the law in force in Northern Ireland he is liable to criminal prosecution on account of his homosexual conduct . . . that, in breach of Article 8 of the Convention, he has thereby suffered, and continues to suffer, an unjustified interference with his right to respect for his private life.

38. Article 8 provides as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the

protection of health or morals, or for the protection of the rights and freedoms of others.

60. . . . As compared with the era when [the] legislation [in question] was enacted, there is now a better understanding . . . of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices . . . as in themselves a matter to which the sanctions of the criminal law should be applied In Northern Ireland itself, the authorities have refrained in recent years from enforcing the law in respect of private homosexual acts between consenting males over the age of 21 years capable of valid consent. No evidence has been adduced to show that this has been injurious to moral standards in Northern Ireland or that there has been any public demand for stricter enforcement of the law.

It cannot be maintained in these circumstances that there is a “pressing social need” to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public. On the issue of proportionality, the Court considers that such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.

61. Accordingly, the reasons given by the Government . . . are not sufficient to justify the maintenance in force of the impugned legislation in so far as it has the general effect of criminalising private homosexual relations between adult males capable of valid consent. In particular, the moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant’s private life to such an extent. “Decriminalisation” does not imply approval, and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with all its unjustifiable features. . . .

63. Mr. Dudgeon has suffered and continues to suffer an unjustified interference with his right to respect for his private life. There is accordingly a breach of Article 8.

64. Article 14 reads as follows:

The enjoyment of the rights and freedoms set forth in this 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. . . .

69. According to the applicant, the essential aspect of his complaint under Article 14 is that in Northern Ireland male homosexual acts, in contrast to heterosexual and female homosexual acts, are the object of criminal sanctions even when committed in private between consenting adults. . . .

[O]nce it has been held that the restriction on the applicant's right to respect for his private sexual life give rise to a breach of Article 8 by reason of its breadth and absolute character, there is no useful legal purpose to be served in determining whether he has in addition suffered discrimination as compared with other persons This being so, it cannot be said that a clear inequality of treatment remains a foundational aspect of the case.

70. The Court accordingly does not deem it necessary to examine the case under Article 14 as well. . . .

**National Coalition for Gay and Lesbian Equality and Another
v. Minister of Justice and Others**
Constitutional Court of South Africa
Case No. CCT 11/1998 (1998)

[President Chaskalson, Deputy President Lanfa, Justice Goldstone, Justice Kriegler, Justice Mokgoro, Justice O'Regan, and Justice Yacoob all concur in the judgment of Justice Ackerman.] . . .

[14] . . . The offence of sodomy . . . was defined as "unlawful and intentional sexual intercourse per anum between human males," consent not depriving the act of unlawfulness, "and thus both parties commit the crime." [Neither anal nor oral sex, in private, between a male and a female or two females was unlawful.] . . .

[21] The concept of "sexual orientation" as used in section 9(3) of the 1996 Constitution* must be given a generous interpretation of which it is linguistically and

* Section 9(3) of the 1996 Constitution of South Africa provides: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

textually fully capable of bearing. It applies equally to the orientation of persons who are bi-sexual, or transsexual and it also applies to the orientation of persons who might on a single occasion only be erotically attracted to a member of their own sex. . . .

[23] The discriminatory prohibitions on sex between men reinforces already existing societal prejudices and severely increases the negative effects of such prejudices on their lives. . . .

[25] The impact of discrimination on gays and lesbians is rendered more serious and their vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favourable legislation for themselves. They are accordingly almost exclusively reliant on the Bill of Rights for their protection. . . .

[27] . . . The inevitable conclusion is that the discrimination in question is unfair and therefore in breach of section 9 of the 1996 Constitution.

[28] [In addition to its inconsistency with the right to equality,] the common-law crime of sodomy also constitutes an infringement of the right to dignity which is enshrined in section 10 of our Constitution.* As we have emphasised on several occasions, the right to dignity is a cornerstone of our Constitution. . . . Dignity is a difficult concept to capture in precise terms. At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. The common-law prohibition on sodomy criminalises all sexual intercourse per anum between men: regardless of the relationship of the couple who engage therein, of the age of such couple, of the place where it occurs, or indeed of any other circumstances whatsoever. In so doing, it punishes a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. . . . But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.

* Section 10 of the 1996 Constitution of South Africa provides: "Everyone has inherent dignity and the right to have their dignity respected and protected."

Section 14 of the 1996 Constitution of South Africa provides: "Everyone has the right to privacy, which includes the right not to have—(a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed."

[29] Counsel for the applicant argued, in the alternative, that the provisions were in breach of section 14 of the Constitution, the right to privacy

[30] . . . I would emphasize that in this judgment I find the offence of sodomy to be unconstitutional because it breaches the rights of equality, dignity and privacy. The present case illustrates how, in particular circumstances, the rights of equality and dignity are closely related, as are the rights of dignity and privacy. . . .

[32] . . . The fact that a law prohibiting forms of sexual conduct is discriminatory, does not, however, prevent it at the same time being an improper invasion of the intimate sphere of human life to which protection is given by the Constitution in section 14. We should not deny the importance of a right to privacy in our new constitutional order, even while we acknowledge the importance of equality. In fact, emphasising the breach of both these rights in the present case highlights just how egregious the invasion of the constitutional rights of gay persons has been. . . .

[33] . . . [S]ection 36(1) of the 1996 Constitution* . . . involves a process [of] . . . weighing up of competing values, and ultimately an assessment based on proportionality . . . which calls for the balancing of different interests.

[35] . . . On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose.

[36] The criminalisation of sodomy in private between consenting males . . . hits at one of the ways in which gays give expression to their sexual orientation. It is at the same time a severe limitation of the gay man's rights to privacy, dignity and freedom. The harm caused by the provision can, and often does, affect his ability to achieve self-identification and self-fulfilment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays.

* Section 36(1) of the 1996 Constitution of South Africa provides the general limitations clause and proportionality analysis for deciding when the protections within the Bill of Rights can be cabined: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—a. the nature of the right; b. the importance of the purpose of the limitation; c. the nature and extent of the limitation; d. the relation between the limitation and its purpose; and e. less restrictive means to achieve the purpose."

[37] Against this must be considered whether the limitation has any purpose and, if so, its importance. No valid purpose has been suggested. The enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate purpose. . . .

[39] There is nothing in the jurisprudence of other open and democratic societies based on human dignity, equality and freedom which would lead me to a different conclusion. In fact, on balance, they support such a conclusion. In many of these countries there has been a definite trend towards decriminalisation. . . .

[74] For the sake of convenience, the provisions of section 20A of the Sexual Offences Act are again quoted:

- (1) A male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or to give sexual gratification, shall be guilty of an offence.
- (2) For the purposes of subsection (1) ‘a party’ means any occasion where more than two persons are present. . . .” . . .

[76] There being no similar provision in relation to acts by women with women, or acts by men with women or by women with men, the discrimination is based on sexual orientation and therefore presumed to be unfair. . . . The section amounts to unfair discrimination and, for fundamentally the same reasons that were expressed above in relation to sodomy, the section cannot be justified under section 36(1) of the 1996 Constitution. There is nothing before us to show that the provision was motivated by anything other than rank prejudice and had as its purpose the stamping out of these forms of gay erotic self-expression. . . .

[Justice Sachs wrote a separate concurrence, emphasizing three issues: “the relationship between equality and privacy, . . . the connection between equality and dignity, and . . . the question of the meaning of the right to be different in the open and democratic society contemplated by the Constitution.”]

Jordan and Others v. State
Constitutional Court of South Africa
Case No. CCT 31/01 (2002)

[In August 2001, a massage parlor owner, Ellen Jordan, and two of her employees, appealed their criminal convictions for “intercourse for reward” (the prostitution prohibition) and keeping or managing a brothel (the brothel provision) to

the Pretoria High Court. They argued that those provisions were unconstitutional. The High Court dismissed the appeal of the brothel provisions, but found the prostitution provisions unconstitutional. Thereafter, the Constitutional Court unanimously upheld the brothel provisions, but divided six to five on the constitutional validity of the prostitution provision. Justice Ngcobo wrote for the majority, which found that the prohibition on prostitution was constitutional. Justices O'Regan and Sachs wrote a joint partial dissent, concluding that that both provisions violated the Constitution.]

[Justice Ngcobo:] . . .

[1] I have had the benefit of reading the joint judgment of O'Regan and Sachs JJ. I agree with the conclusion that the constitutional challenges based on human dignity, freedom of person, privacy and economic activity must fail. But the reasons that persuade me to conclude that the challenge based on the right to economic activity and the right to privacy must fail differ in both their scope and emphasis from those advanced in the joint judgment. . . . However, I do not agree with the conclusion that section 20(1)(aA) of the [Sexual Offences] Act [criminalizing having sex for reward] discriminates unfairly against women and that it is thus inconsistent with the interim Constitution, as found by my colleagues. . . .

[16] If the public sees the recipient of reward as being “more to blame” than the “client,” and a conviction carries a greater stigma on the “prostitute” for that reason, that is a social attitude and not the result of the law. The stigma that attaches to prostitutes attaches to them not by virtue of their gender, but by virtue of the conduct they engage in. That stigma attaches to female and male prostitutes alike. . . .

[18] In my view, a gender neutral provision which differentiates between the dealer and the customer, a distinction that is commonly made by statutes, and which is justifiable having regard to the qualitative difference between the conduct of the dealer and that of the customer, and which operates in the legal framework that punishes both the customer and the dealer and makes them liable to the same punishment, cannot be said to be discriminating on the basis of gender, simply because the majority of those who violate such a statute happen to be women. . . .

[19] In contending that section 20(1)(aA) discriminates unfairly against women, reliance was also placed upon the practice of the police and the prosecutors. It was contended that in practice only prostitutes are prosecuted and that customers are not. . . . What happens in practice may therefore point to a flaw in the application of the law but it does not establish a constitutional defect in it.

[27] . . . I have grave doubts as to whether the prohibition contained in section 20(1)(aA) implicates the right to privacy. This case is different from *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [(1998)]. There the offence that was the subject of the constitutional challenge infringed the right of gay people not to be discriminated against unfairly, and also their

right to dignity. It intruded into “the sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community” and in doing so affected the sexuality of gay people “at the core of the area of private intimacy.” None of those considerations are present here.

[28] This case is concerned with the commercial exploitation of sex, which as I have found, involves neither an infringement of dignity nor unfair discrimination. . . . What compounds the difficulty is that the prostitute invites the public generally to come and engage in unlawful conduct in private. . . .

[29] But even if the right to privacy is implicated, it lies at the periphery and not at its inner core. . . . The prohibition is directed solely at the sale of sexual activity. . . . What is limited is the commercial interests of the prostitute. But that limitation is not absolute. They may pursue their commercial interests but not in a manner that involves the sale of sex. Having regard to the legitimate state interest in proscribing prostitution and brothel keeping, viewed against the scope of the limitation on the right of the prostitute and brothel keeper to earn a living, I conclude that if there be a limitation of the right to privacy, the limitation is justified. . . .

[Justice O’Regan and Justice Sachs:]

[72] We do not agree with Ngcobo J that the stigma attaching to prostitutes arises not from the law but only from social attitudes. It is our view that by criminalising primarily the prostitute, the law reinforces and perpetuates sexual stereotypes which degrade the prostitute but does not equally stigmatise the client, if it does so at all. The law is thus partly constitutive of invidious social standards which are in conflict with our Constitution. . . . Where, although neutral on its face, its substantive effect is to undermine the values of the Constitution, it will be susceptible to constitutional challenge. . . .

[76] In our view . . . the rights of the sex worker appear to have been limited by section 20(1)(aA) . . . in respect of her right of personal privacy. The concept of privacy has been much debated in recent times. In *Bernstein [and others v. Bester and Others NNO]* (1996), Ackermann J held that the right to privacy in the interim Constitution must be understood as recognising a continuum of privacy rights which may be regarded as starting with a wholly inviolable inner self, moving to a relatively impervious sanctum of the home and personal life, and ending in a public realm where privacy would only remotely be implicated, if at all. . . .

[82] In arguing that prostitution involves private consensual sexual activity and should be located at the most protected end of the continuum, counsel for the appellants relied heavily on this Court’s decision in the *Gay and Lesbian Coalition (Sodomy)* case. . . . In the first place, what was at stake in that matter was not just a privacy interest, but an equality one. . . .

[83] Prostitution is quite different; the equality interest works the other way inasmuch as it is the very institution of commercial sex that serves to reinforce patterns of inequality. Moreover, central to the character of prostitution is that it is indiscriminate and loveless. It is accordingly not the form of intimate sexual expression that is penalised, nor the fact that the parties possess a certain identity. It is that the sex is both indiscriminate and for reward. The privacy element falls far short of “deep attachment and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctly personal aspects of one’s life.” . . . Although the commercial value of her trade does not eliminate her claims to privacy, it does reduce them in great degree. . . .

[90] . . . Open and democratic societies vary enormously in the manner in which they characterise and respond to prostitution. Thus practice in such countries ranges from allowing prostitution but not brothel-keeping; to allowing both; suppressing both; to setting aside zones for prostitution; and to licensing brothels and collecting taxes from them. The issue is generally treated as one of governmental policy expressed through legislation rather than one of constitutional law to be determined by the courts. We are unaware of any successful constitutional challenge in domestic courts to laws prohibiting commercial sex. . . . The issue is an inherently tangled one where autonomy, gender, commerce, social culture and law enforcement capacity intersect. A multitude of differing responses and accommodations exist, and public opinion is fragmented and the women’s movement divided. . . .

[91] We conclude, therefore, that although nearly all open and democratic societies condemn commercialised sex, they differ vastly in the way in which they regulate it. These are matters appropriately left to deliberation by the democratically elected bodies of each country. . . .

[93] What emerges from the above analysis is that because of the commercial character of the activity involved, the right to privacy of the prostitutes is attenuated. What is also clear is that there is a strong public interest in the regulation of prostitution in a manner which will foster the achievement of equality between men and women. Open and democratic societies generally denounce prostitution. Some criminalise it, others make it difficult by criminalizing activities associated with it, while others permit it with reluctance and subject it to fairly stringent conditions. We were not told of any society in which prostitution is regarded as a normal business activity just like any other, or a legitimate form of self-expression just like any other. Neither has any example been brought to our attention of international law or domestic constitutional law which has been used in any country successfully to challenge laws penalising prostitution on the grounds that such laws violated rights of autonomy or rights to pursue a livelihood. . . .

Griswold v. Connecticut
Supreme Court of the United States
381 U.S. 479 (1965)

Mr. Justice Douglas delivered the opinion of the Court. . . .

The statutes whose constitutionality is involved in this appeal are §§ 53–32 and 54–196 of the General Statutes of Connecticut. The former provides: “Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.”

Section 54–196 provides: “Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.” The appellants [who prescribed contraception for a married woman] were found guilty as accessories and fined \$100 each, against the claim that the accessory statute as so applied violated the Fourteenth Amendment.* . . .

Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York* [(1905)] should be our guide. But we decline that invitation, as we did in *West Coast Hotel v. Parrish* [(1937)] We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician’s role in one aspect of that relation.

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents’ choice—whether public or private or parochial—is also not mentioned. . . . Yet the First Amendment has been construed to include certain of those rights. . . .

[Our prior] cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one The Third Amendment in its prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner is another facet of that privacy. The Fourth

* The Fifth Amendment of the United States Constitution provides: “. . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law”

The Fourteenth Amendment of the United States Constitution provides: “. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .”

Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” The Fourth and Fifth Amendments were described in *Boyd v. United States* [(1886)], as protection against all governmental invasions “of the sanctity of a man’s home and the privacies of life.” We recently referred in *Mapp v. Ohio* [(1961)], to the Fourth Amendment as creating a “right to privacy, no less important than any other right carefully and particularly reserved to the people.” . . .

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a “governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.” *NAACP v. Alabama* [(1958)]. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. . . .

[Justice Goldberg, with whom Chief Justice Warren and Justice Brennan joined, filed a concurring opinion that the Connecticut birth-control law unconstitutionally infringed upon the right of marital privacy. They relied on the language and history of the Ninth Amendment and argued that the concept of liberty protected by the Fifth and Fourteenth Amendments was not restricted to the specific terms of the Bill of Rights. Justice Harlan and Justice White filed separate concurring opinions stating that the statute violated the Due Process Clause of the Fourteenth Amendment. Justice Black and Justice Stewart filed dissents arguing that the Constitution provides no right of privacy.]

Loving v. Virginia
Supreme Court of the United States
388 U.S. 1 (1967)

Mr. Chief Justice Warren delivered the opinion of the Court.

This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. For reasons which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the Fourteenth Amendment. . . .

[T]he Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.

There can be no question but that Virginia's miscegenation statutes^{*} rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashia v. United States* (1943). At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," *Korematsu v. United States* (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they "cannot conceive of a valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense." *McLaughlin v. Florida* [(1964)].

^{*} Section 20—58 of the Virginia Code provided: "Leaving State to evade law.—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in s 20—59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage."

Section 20—59 of the Virginia Code, which defines the penalty for miscegenation, provided: "Punishment for marriage.—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years."

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause. . . .

Mr. Justice Stewart, concurring.

I have previously expressed the belief that “it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor.” *McLaughlin*. Because I adhere to that belief, I concur in the judgment of the Court.

Bowers v. Hardwick
Supreme Court of the United States
478 U.S. 186 (1986)

Justice White delivered the opinion of the Court.

[R]espondent Hardwick . . . was charged with violating the Georgia statute criminalizing sodomy by committing that act with another adult male in the bedroom of respondent’s home. . . .

The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time. The case also calls for some judgment about the limits of the Court’s role in carrying out its constitutional mandate.

We first register our disagreement . . . with respondent that the Court’s prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy [The reach of this line of cases . . . were described as dealing with childrearing and education, family relationships, procreation, marriage, contraception, and abortion.]

[W]e think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been

demonstrated Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. . . .

Precedent aside, however, respondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do. . . .

Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. . . . [The Court has] said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties [includes] . . . those liberties that are "deeply rooted in this Nation's history and tradition."

It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. . . . Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Respondent, however, asserts that the result should be different where the homosexual conduct occurs in the privacy of the home. He relies on *Stanley v. Georgia* [1969], where the Court held that the First Amendment prevents conviction for possessing and reading obscene material in the privacy of one's home

Stanley . . . was firmly grounded in the First Amendment. The right pressed upon us here has no similar support in the text of the Constitution Its limits are

also difficult to discern. Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home. . . . And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. . . .

The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated . . . , the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.

Justice Blackmun, with whom Justice Brennan, Justice Marshall, and Justice Stevens join, dissenting. . . .

The behavior for which Hardwick faces prosecution occurred in his own home, a place to which the Fourth Amendment attaches special significance. The Court's treatment of this aspect of the case is symptomatic of its overall refusal to consider the broad principles that have informed our treatment of privacy in specific cases. Just as the right to privacy is more than the mere aggregation of a number of entitlements to engage in specific behavior, so too, protecting the physical integrity of the home is more than merely a means of protecting specific activities that often take place there. . . . "[T]he essence of a Fourth Amendment violation is 'not the breaking of [a person's] doors, and the rummaging of his drawers,' but rather is 'the invasion of his infeasible right of personal security, personal liberty and private property.'" . . .

[Justice Stevens filed a dissenting opinion, joined by Justices Brennan and Marshall, emphasizing the selective enforcement of Georgia's law against homosexuals.]

Lawrence v. Texas
Supreme Court of the United States
539 U.S. 558 (2003)

Justice Kennedy delivered the opinion of the Court.

[The three questions before the Court were whether the Texas 'Homosexual Conduct' law—which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples—violates the Fourteenth Amendment's guarantee of equal protection of the laws and the Fourteenth Amendment's protection

of vital interests in liberty and privacy protected under the Due Process Clause, and, if so, whether *Bowers v. Hardwick* should be overruled.]

We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holding in *Bowers*. . . .

The Court began its substantive discussion in *Bowers* as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." . . . To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. . . .

Having misapprehended the claim of liberty there presented to it . . . the *Bowers* Court said: "Proscriptions against that conduct have ancient roots." . . .

[T]here is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. . . . [E]arly American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally. This . . . show[s] that . . . [homosexual nonprocreative sexual activity] was not thought of as a separate category from like conduct between heterosexual persons. . . . It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so. . . .

It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. . . . These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." . . . *Planned Parenthood of Southeastern Pa. v. Casey* [(1992)].

Two principal cases decided after *Bowers* cast its holding into even more doubt. In *Casey* [(1992)], the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause . . . [and] again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:

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

Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. . . .

The second post-*Bowers* case . . . is *Romer v. Evans* [1996]. There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. . . . We concluded that the provision was “born of animosity toward the class of persons affected” and further that it had no rational relation to a legitimate governmental purpose. . . .

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. . . . When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. . . .

The stigma this criminal statute imposes, moreover, is not trivial. . . . The petitioners will bear on their record the history of their criminal convictions. . . .

To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere [citing *Dudgeon*, among others]. . . . *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled. . . .

[Justice O'Connor concurred in the judgment, finding that the Texas statute violated the Equal Protection Clause of the Fourteenth Amendment because it criminalized only homosexual sodomy but not heterosexual sodomy. As she explained, that issue had not been raised before the *Bowers* Court, whose majority opinion Justice O'Connor joined.]

Justice Scalia, with whom The Chief Justice and Justice Thomas join, dissenting.

The Court today does not . . . describe homosexual sodomy as a “fundamental right” or a “fundamental liberty interest” Instead, having failed to establish that

the right to homosexual sodomy is “deeply rooted in this Nation’s history and tradition,” the Court concludes that the application of Texas’s statute to petitioners’ conduct fails the rational-basis test, and overrules *Bowers*’ holding to the contrary. . . .

[T]he contention that there is no rational basis for the law here under attack . . . is so out of accord with our jurisprudence—indeed, with the jurisprudence of *any* society we know—that it requires little discussion.

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are “immoral and unacceptable”—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this *was* a legitimate state interest. The Court today reaches the opposite conclusion. The Texas statute, it says, “furthers *no legitimate state interest* which can justify its intrusion into the personal and private life of the individual.” The Court embraces instead Justice Stevens’ declaration in his *Bowers* dissent, that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.” This effectively decrees the end of all morals legislation. . . .

[Justice Thomas dissented separately. He stated that, although he believed that “[p]unishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources,” his duty was to interpret the Constitution and was “not empowered to help petitioners and others similarly situated.”]

Koushal and Another v. NAZ Foundation and Others
Supreme Court of India, Civil Appellate Jurisdiction
Civil Appeal No. 10972 (2013)

[Justice G.S. Singhvi, joined by Justice Sudhansu Jyoti Mukhopadhaya.] . . .

2. These appeals are directed against [an] order . . . by which the Division Bench of the High Deli Court allowed the writ petition filed by NAZ Foundation—respondent No. 1 herein . . . challenging the constitutional validity of Section 377 of the Indian Penal Code, 1860 (IPC) *

* Section 377 of the Indian Penal Code provides: “Unnatural offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable for a fine.”

9. The Division Bench of the High Court extensively considered the contentions of the parties and declared that Section 377, insofar as it criminalises consensual sexual acts of adults in private[,] is violative of Articles 21 [“No person shall be deprived of his life or personal liberty except according to a procedure established by law.”], 14 [“ . . . The State shall not deny to any person equality before the law or the equal protection of the laws . . . ”] and 15 [“ . . . The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them . . . ”] of the Constitution. While dealing with the question relating to violation of Article 21, the High Court outlined the enlarged scope of the right to life and liberty which also includes right to protection of one’s dignity, autonomy and privacy . . . and held:

The sphere of privacy allows persons to develop human relations without interference from the outside community or from the State. . . . In the Indian Constitution, the right to live with dignity and the right of privacy both are recognised as dimensions of Article 21. . . . As it stands, Section 377 IPC denies a gay person a right to full personhood which is implicit in notion of life under Article 21 of the Constitution.

The criminalisation of homosexuality condemns in perpetuity a sizable section of society and forces them to live their lives in the shadow of harassment, exploitation, humiliation, cruel and degrading treatment at the hands of the law enforcement machinery. . . . Section 377 IPC grossly violates their right to privacy and liberty embodied in Article 21 insofar as it criminalises consensual sexual acts between adults in private.

10. The High Court discussed the question whether morality can be a ground for imposing restriction of fundamental rights . . . and observed: . . .

[P]ublic disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of “morality” that can pass the test of compelling state interest, it must be “constitutional” morality and not public morality. . . .

42. Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the later category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification. . . .

45. . . . The requirement of substantive due process has been read into the Indian Constitution through a combined reading of Articles 14, 21 and 19 and it has

been held as a test which is required to be satisfied while judging the constitutionality of a provision which purports to restrict or limit the right to life and liberty, including the rights of privacy, dignity and autonomy, as envisaged under Article 21. In order to fulfill this test, the law must not only be competently legislated but it must also be just, fair and reasonable. Arising from this are the notions of legitimate state interest and the principle of proportionality. . . .

47. In *Gobind v. State of MP* [(1975)] the Court observed: . . .

23. . . . [T]oo broad a definition of privacy raises serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution. Of course, privacy primarily concerns the individuals. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values.

24. Any right to privacy must encompass and protect the personal intimacies of the home, the family marriage, motherhood, procreation and child rearing. . . .

27. There are two possible theories for protecting privacy of home. The first is that activities in the home harm others only to the extent that they cause offence resulting from the mere thought that individuals might [b]e engaging in such activities and that such 'harm' is not Constitutionally protective by the state. The second is that individuals need a place of sanctuary where they can be free from societal control. . . .

28. . . . [E]ven assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute. . . .

50. The right to live with dignity has been recognized as part of Article 21 . . . in *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors.* (1981) wherein the Court observed:

8. . . . We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and commingling with fellow human beings. . . . Every act which offends against or

impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights. . . .

51. Respondent No. 1 attacked Section 377 IPC on the ground that the same has been used to perpetrate harassment, blackmail and torture on certain persons, especially those belonging to LGBT [lesbian, gay, bisexual, and transgender] community. In our opinion, this treatment is neither mandated nor condoned by it and the mere fact that the section is misused by police authorities and others is not a reflection of the vires of the section. It might be a relevant factor for the Legislature to consider while judging the desirability of amending Section 377 IPC. . . .

52. In its anxiety to protect the so-called rights of LGBT persons and to declare that Section 377 IPC violates the right to privacy, autonomy and dignity, the High Court has extensively relied upon the judgments of other jurisdictions. Though these judgments shed considerable light on various aspects of this right and are informative in relation to the plight of sexual minorities, we feel that they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature. This view was expressed as early as in 1973 in *Jagmohan Singh v. State of U.P.* . . . [concerning] the legality of the death sentence One of the arguments raised by the counsel for the appellant was that capital punishment has been abolished in U.S. on the ground of violation of the 8th Amendment. While considering that argument, this Court observed: . . .

14. . . . Having regard . . . to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment. Arguments which would be valid in respect of one area of the world may not hold good in respect of another area, in this context. . . .

54. In view of the above discussion, we hold that Section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High court is legally unsustainable. . . .

56. . . . Notwithstanding this verdict, the competent legislature shall be free to consider the desirability and propriety of deleting Section 377 IPC from the statute book or amend the same as per the suggestion made by the Attorney General.

* * *

Several legislative efforts to decriminalize homosexual conduct have stalled in the Indian Parliament. In 2014, the Supreme Court of India handed down *National Legal Services Authority v. Union of India*, which recognized that legal protections for gender identity and sexual orientation must include protections for transgender individuals, whom the Court classified as falling into a “third gender.” In 2016, the Supreme Court agreed to consider overturning the *Koushal* decision in light of these legal developments. As of this writing, the decision has not been rendered.

CONTROLLING ABORTIONS AND END-OF-LIFE DECISIONS

Third-party harms are invoked in the cases related to sexuality, as arguments are made that not criminalizing certain acts affect others, who might otherwise be deterred from engaging in such activity, as well as harming the social order more generally. In this segment, we take up examples where the underlying individual decisions may require assistance from professionals. Our examples of abortion and physician-assisted suicide continue courts’ discussions of autonomy and equality as the decisions consider the regulation of activities in which individuals seek assistance from others, who are often health care professionals.

The Constitutionalization of Abortion

Reva B. Siegel (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. . . .

* Excerpted from Reva B. Siegel, *The Constitutionalization of Abortion*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* (Michel Rosenfeld and András Sajó editors, Oxford University Press 2012).

Some jurisdictions now require constitutional protections for women's dignity and welfare in government regulation of abortion of a kind unheard of before the modern women's movement. Many jurisdictions require constitutional protection for unborn life, providing for these purposes detailed judgments about what legislatures may or must do in regulating women's conduct. Perhaps the most remarkable aspect of this story is how understanding of this recently articulated duty to protect unborn life has evolved: over time and across jurisdictions, the constitutional duty to protect unborn life has been articulated in terms that increasingly acknowledge, accommodate, and even respect women citizens as autonomous agents—even in matters concerning motherhood. A growing number of jurisdictions now invoke the constitutional duty to protect unborn life as reason for giving women the final word in decisions concerning abortion. . . .

Today, we can see constitutionalization of abortion taking several forms. Some 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. . . .

Respecting Women's Dignity: Periodic Legislation

This approach, originating in the United States, 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, often for an initial period of the pregnancy, thereafter allowing restrictions on abortion except on limited indications (e.g. for life or health).

This approach begins in court decisions but now also finds expression in constitutionalized preambles. In South Africa, for example, the preamble to a statute allowing abortion on request in the first 12 weeks of pregnancy announces that it vindicates 'the values of human dignity, the achievement of equality, security of the person, non-racialism and non-sexism, and the advancement of human rights and freedoms which underlie a democratic South Africa.' The High Court upheld the legislation's constitutionality in a 2004 decision: 'the Constitution not only permits the Choice on Termination of Pregnancy Act to make a pregnant woman's informed consent the cornerstone of its regulation of the termination of her pregnancy, but indeed requires the Choice Act to do so.'

Legislation recently enacted in Mexico City providing for abortion on request during the first 12 weeks of pregnancy appeals to a constitutional provision that guarantees Mexican citizens the freedom to decide the number and spacing of children; the preamble to the Mexico City statute provides: ‘Sexual and reproductive health care is a priority. Services provided in this matter *constitute a means for the exercise of the right of all persons to decide freely, responsibly and in an informed manner on the number and spacing of children.*’ The Supreme Court of Mexico recently confirmed the constitutionality of the legislation. The state was constitutionally permitted to decriminalize abortion.

Protecting Life/Protecting Women: Indications Legislation

Other 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. . . . [C]onstitutional judgments about women are inevitably nested within the constitutional duty to protect life, and emerge in any effort to specify the terms on which abortion is to be banned (and thus also permitted). 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.

Constitutionalization in this form is paternalist, in its conception of women as well as the unborn, reasoning about women as dependants who may deserve protection, and protecting them against injuries to their physical and emotional welfare, rather than to their autonomy. (Jurisdictions that protect unborn life by banning abortion except on third party indication typically excuse women from the duty to bear a child to protect women’s physical survival and to protect women’s physical and emotional welfare; only recently have some considered protecting women’s dignity.) Courts’ reasoning in this tradition typically permit, but do not require, abortion legislation to protect the welfare and autonomy of women citizens who are pregnant; courts may, however, hold that a constitution requires the state to allow abortion to save a woman’s life. . . .

Ireland seems to construe a woman’s ‘equal right to life’ as including protection for a woman’s physical survival but not her dignity. When an adolescent woman who was pregnant by rape was enjoined from traveling abroad for an abortion, the Irish Supreme Court overturned the injunction, reasoning that the young woman’s risk of suicide satisfied the standard of a ‘real and substantial risk’ to the pregnant woman’s life. In other words, in order to fit the case within the right to life that Ireland guarantees equally to women and the unborn, the Court had to efface the young women’s agency—her refusal to have sex with her rapist and the consequent risk she might harm herself if compelled to bear her rapist’s child; instead the Court

approached the young woman's case as if it concerned a physiological risk from pregnancy. . . .

In 1985 the Spanish Constitutional Court declared that its Constitution protected the life of the unborn, in the tradition of the first West German judgment, yet declared that it was constitutional for the legislature to allow abortion on several indications, including rape. In discussing the justification for the indication for rape, the Spanish Court emphasized that in such a case 'gestation was caused by an act . . . harming to a maximum degree her [a woman's] personal dignity and the free development of her personality,' emphasizing that 'the woman's dignity requires that she cannot be considered as a mere instrument.' . . .

[In a] more recent decision of the Colombian Supreme Court interpreting a constitution understood to protect unborn life . . . [, the] Court held that a statute banning abortion was constitutionally *required* to contain exceptions for certain indications in light of 'the constitutional importance of the bearer of the rights . . . the pregnant woman.' '[W]hen the legislature enacts criminal laws, it cannot ignore that a woman is a human being entitled to dignity and that she must be treated as such, as opposed to being treated as a reproductive instrument for the human race.' '[A] criminal law that prohibits abortion in all circumstances *extinguishes the woman's fundamental rights*, and thereby *violates her dignity* by reducing her to a mere receptacle for the fetus, *without rights or interests of constitutional relevance worthy of protection*.' . . .

The Court explained that failure to allow for abortion in cases of rape would be in 'complete disregard for human dignity and the right to the free development of the pregnant woman *whose pregnancy is not the result of a free and conscious decision*, but the result of arbitrary, criminal acts against her in violation of her autonomy.' 'A woman's right to dignity prohibits her treatment as a mere instrument for reproduction, and her consent is therefore essential to the fundamental, life-changing decision to give birth to another person.' By this same reasoning, however, the legislature *was* allowed to criminalize abortion in cases of consensual sex, [so] long as the legislature provided exceptions for women's life, health, and cases of fetal anomaly. This approach presumes that, for women, consent to sex *is* consent to procreation. . . .

Protecting Life/Respecting Women: Result-Open Counseling

Yet other jurisdictions begin from a constitutional duty to protect 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.

Constitutional review of counseling regimes originates in the German cases. In 1975, the German Court endorsed abortion-dissuasive counseling as a mode of protecting life in cases where the legislature deemed abortion non-exactable; in 1993, the German Court expanded that approach, reasoning that a legislature might find counseling coupled with depenalization of abortion generally more effective than the threat of criminal punishment in meeting its duty to protect life, observing that depenalization was *also* consistent with women's autonomy.

The Hungarian Court has amplified the woman-respecting aspects of this approach. In 1998, the Hungarian Court held that it was unconstitutional for the state to make verification of a 'situation of serious crisis' indication depend *solely* on woman's signature: 'Such provisions themselves cannot secure for the foetus the level of minimum protection required by the [Constitution] . . . and in fact, they do not secure any protection, as the regulation is concerned with the mother's right to self-determination, only.' . . . The Court then discussed abortion-dissuasive counseling as a method of protecting unborn life that was *also* respectful of women's rights. 'In principle, such a consulting service would not . . . violate her freedom of conscience.' While 'The state may not compel anyone to accept a situation which sows discord within, or is irreconcilable with the fundamental convictions which mould that person's identity' obligatory participation in counseling violates neither principle 'having particular regard to the fact that she [the pregnant woman] is only obligated to participate without any [further] obligation . . . [A]s far as *its outcome is concerned, the consultation*—while clearly focusing on the protection of the fetus—*must be open*.'

Portugal has taken further steps in this direction. . . . [The Court upheld] legislation that allowed abortion during the first ten weeks of pregnancy after a waiting period and result-open counseling [T]he Portuguese decision invoked women's dignity as a justification for result-open counseling. The Portuguese case thus features emergent elements of women's rights, both as to justification and as to legislative form. But the constitutional framework yet remains at some distance from the women's dignity-periodic access cases of jurisdictions such as the United States and South Africa. The Portuguese Court ruled that a result-open counseling framework in the early period of pregnancy is constitutionally *permitted*, not required, as it would be in a traditional woman's rights framework.

The abortion legislation Spain enacted in 2010 presses result-open counseling in ways that even more robustly associate it with protecting women's rights. . . . The preamble asserts that 'protecting prenatal life is more effective through active policies to support pregnant women and maternity,' and therefore that 'protection of the legal

right at the very beginning of pregnancy is articulated through the will of the woman, and not against it,' and directing public officials to 'establish the conditions for adopting a free and responsible decision.'

In the decades since the German Court's 1993 decision, this hybrid framework has spread, legitimating result-open counseling early in pregnancy as a method of protecting unborn life, while increasingly acknowledging, accommodating, and sometimes even explicitly respecting women's autonomy in making decisions about motherhood. Whether or not the fetal-protective justification for results-open counseling is accompanied by a women's dignity-respecting justification, women are accorded the final word in decisions about whether they become mothers. . . .

After 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. . . .

In 1975, the Federal Constitutional Court of Germany held that protection of unborn life under the German Basic Law required abortion to be criminalized (in the absence of several limited medical indications). After the reunification of East and West Germany in 1993, the Court addressed a new bill that aimed to decriminalize abortion.

Second Abortion Case

Federal Constitutional Court of Germany (Second Senate)

2 BvF 2/90 [1993]

. . . [T]he Second Senate of the Federal Constitutional Court, with the participation of the justices Deputy Chief Justice Mahrenholz, Böckenförde, Klein, and Justices Grasshof, Kruis, Kirchhof, Winter, Sommer

36. . . . The crucial point of the penal law portion of this bill, . . . is a fundamental transformation of § 218 of the Penal Code as well as a revised counseling regulation. According to this, pregnancy terminations performed by a physician within twelve weeks after conception and with the consent of the pregnant woman shall no longer be included in the statutory definition of crime found in § 218 of the Penal Code, as long as the woman has received counseling at a licensed counseling center at least three days prior to the procedure. The previous statutory definitions of the

criminological indication and the general emergency indication are to be abolished, leaving only medical and embryopathic indications as grounds of justification for pregnancy termination.

37. The legislative history of the statute emphasizes that, in light of the significance of the gestating life as a legal value and the constitutional guarantee of it, penal protection is indispensable. Experiences with the indications solution introduced in 1976, however, had shown that it was impossible to standardize sufficiently concrete, medically and judicially verifiable criteria for ascertaining the presence of an emergency which would justify pregnancy termination. In the end, observed the lawmakers, only the pregnant woman herself could assess the conflict situation in which she finds herself. Thus it was necessary to find a solution that would take both the high value of unborn life and the self-determination of the woman into account. The Federal Constitutional Court did not declare all indications solutions to be constitutionally invalid in its Judgment of February 25, 1975. The degree to which the Penal Code must be used to protect unborn life depends on whether other provisions exist through which effective protection of gestating life really is guaranteed. The precondition for constitutionally valid embodiment of the amendments of the Penal Code provided for in the draft bill was, on the one hand, that the state provide sufficient sociopolitical means to protect unborn life in this way. The suggested sociopolitical measures served to meet this requirement. On the other hand, steps must be taken to ensure that the woman does not make her responsible decision of conscience regarding a pregnancy termination in isolation from the fundamental decision for the protection of the gestating life that is prescribed by the Basic Law. This would be ensured procedurally through the compulsory counseling, by means of which the woman would be offered advice and assistance in her conflict as well as sufficient information about governmental assistance as the basis for thorough reflection on her situation. In doing this, it was thought that preparedness to decide in favor of gestating life is greatest when the woman does not have the feeling that she must subjugate herself to the verdict of others, but rather is able, after receiving qualified counseling and carefully considering the situation, to decide for herself whether to continue the pregnancy. The woman's freedom of choice does not leave the gestating life entirely without protection. In this way, there is a chance that the woman—without being patronized in the counseling session—would accept the assistance offered to her in her conflict situation and decide in favor of the child. Because the responsible contact between the pregnant woman and the counselor that is necessary for a counseling session of this kind cannot be forced, no onus to present her case and no obligation to justify her actions would be imposed on the woman. At her request, however, she would receive individual suggested solutions for surmounting her conflict situation. Counseling should establish a trusting relationship between the counselor and the pregnant woman, so that the pregnant woman would be open to considering other solutions to the conflict besides pregnancy termination. . . .

149. . . . The standards of conduct for the protection of unborn life are set by the state when it enacts legislation containing regulations and prohibitions as well as

duties to act or desist from acting. This also applies to the protection of the unborn vis-à-vis its mother, notwithstanding the bond which exists between the two and which leads to a relationship of “joined twosomeness” between mother and child. Protection of this kind for the unborn vis-à-vis its mother is only possible if the legislature fundamentally forbids her to terminate her pregnancy thereby imposing on her a fundamental duty to carry the child to term. The fundamental prohibition on termination of pregnancy and the fundamental duty to carry a child to term are two inseparably bound elements of the constitutionally required protection. . . .

170. Nevertheless, the state can—and where necessary must—involve third parties to achieve effective protection. Parents who raise children are performing tasks whose fulfillment lies in the interests of the community as a whole as well as in the interests of the specific individuals concerned. For this reason, the state is bound to promote a child-friendly society which in turn also has repercussions for unborn life. The legislature must bear this in mind when making rules, not just in the area of labor law, but also in other private law areas. Thus there are provisions prohibiting the termination of a lease because of the birth of a child as well as provisions regarding consumer loans, their wording and government contract assistance which make it possible or easier for parents to meet their financial obligations following the birth of a child. . . .

173. . . . Finally, the mandate to protect also obliges the state to maintain and raise in the public’s general awareness the unborn life’s legal right to protection. Thus the state organs at both the federal and state levels must show that they uphold the protection of life. This relates in particular to school curricula. Public institutions whose job it is to provide health information, family counseling or sex education must strengthen the will to protect unborn life. This is especially true for the sex education provided for in Article 1 § 1 of the Pregnancy and Family Assistance Act. Public and private broadcasters are obliged to respect human dignity when taking advantage of their freedom to broadcast Therefore, their programs also play a part in protecting unborn life.

174. . . . [I]n order to fulfill its duty to protect unborn life, the state must adopt sufficient legal and practical measures, while at the same time considering the conflicting legal values so as to ensure that appropriate, and as such effective, protection is achieved. For this to be done, it is necessary to create a clear protection concept which combines preventative and repressive elements. It is up to the legislature to develop and transform into law such a protection concept. In doing so, it is not free under the existing constitution to treat termination of pregnancy—other than in exceptionable situations which are constitutionally unobjectionable—as not illegal i.e. allowed. Nevertheless, according to standards still to be more precisely defined, the legislature can decide how it will put into effect the fundamental prohibition on termination of pregnancy in other areas of the law. All in all, the protection concept must be defined in such a way as to make it suitable for providing

the required protection without its becoming or appearing like limited permission for pregnancy terminations. . . .

178. According to the above arguments, constitutional law does not, as a matter of principle, bar the legislature from adopting a concept of protection for the protection of unborn life which emphasizes counseling of the pregnant woman during the early phase of pregnancy so as to encourage her to carry her child to term. At the same time, in view of the openness necessary for counseling to be effective, the law dispenses with a threat of criminal punishment based on indications and the ascertainment of grounds supporting indications by third parties. . . .

183. . . . Thus constitutional law does not object to the legislature's choice of a protection concept which is based on the assumption—at least in the early phase of pregnancy—that effective protection of unborn human life is only possible *with* the support of the mother. Only she and those initiated by her know at this stage of the pregnancy about the new life which still belongs to her alone and which is fully dependent on her. The secrecy pertaining to the unborn, its helplessness and dependence and its unique link to its mother would appear to justify the view that the state's chances of protecting it are better if it works together with the mother.

184. Support for the above view is also given by the fact that a woman, who discovers an unwanted pregnancy, will often find her very existence threatened. She might have to make drastic changes to the plans she has for her life. She can also expect, in addition to the inevitable inconveniences associated with pregnancy, to be subject to incalculable and long-lasting duties to act and care for a child, and there may be additional risks to her life. In addition, a woman in the early phase of a pregnancy has often not yet adjusted mentally to the idea of motherhood and does not yet feel an attachment to the life growing inside of her in the way she does later on. A threat of criminal punishment is of little effect at this point so that it is obvious that the law must use preventative means to help her to overcome her conflict and to meet her responsibility to the unborn. The special situation of the woman and the unborn in the early phase of pregnancy can therefore be a reason for replacing penal sanctions with special protective measures. However, as already stated, it may not lead to a woman's fundamental rights being given precedence over those of the unborn. If a human being's dignity lies in its very existence, and if this applies to unborn life, then we must refrain from making distinctions in the duty to protect based on age or stage of development of the unborn life or based on the willingness of the woman to allow the life to continue to live within her.

185. . . . The state acts in conformity with the respect owed to a woman and future mother if, instead of threatening her with punishment, it seeks to persuade her from rejecting the task of motherhood either by providing her with individual counseling or by appealing to her sense of responsibility to the unborn life or by providing her with economic and social support as well as any information she might need. The legislature may assume that the likelihood of her rejection of motherhood

will be increased if a third party has to examine and evaluate the reasons which make her regard carrying the child to term as non-exactable. . . .

Judgment C-355/06
Constitutional Court of Colombia (2006)*

[Writing for the majority of the Court: Honorable Justice Jaime Araújo Renteria and Honorable Justice Clara Inés Vargas Hernández:] . . .

As with “life,” the concept of “dignity” has various functions in Colombian constitutional law, as has been recognized by constitutional case law. Thus, this Court has stated that the normative concept of “human dignity” has three different roles: (i) it is a foundational principle of the legal system and as such, it has an axiological dimension as a constitutional value; (ii) it is a constitutional principle; and (iii) it is an autonomous fundamental right.

From these various perspectives, human dignity plays a role in shaping the legal system. In relation to the evaluative or axiological perspective, this Court has consistently held that human dignity is the foundational principle of the legal system and constitutes an essential premise for the establishment and effectiveness of the entire system of rights and guarantees of the Constitution.⁶⁰ We have also ruled that human dignity is the axiological basis of the Charter, from which the fundamental rights of natural persons are derived; the ethical foundation and pillar of the legal system. From these features, this Constitutional Court has concluded that “human dignity characterizes in a definite way the Colombian State as a set of legal institutions.”

However, the scope of human dignity is not merely reduced to the axiological level. In this respect the case law “on the basis of the normative constitutional commands about the respect for human dignity has identified the existence of two juridical norms that have the logical and normative structure of principles: (a) the principle of human dignity and (b) the right to human dignity. Despite having the same

* Excerpted is an unofficial translation by Sergio Giuliano (Yale Law School, LL.M Class of 2016), drawn in part from a translation published by Women’s Link Worldwide, *available at* <http://www.womenslinkworldwide.org/files/6d52ebe0680c34fd48738ee76e4080af.pdf>.

⁶⁰ “Human dignity is indeed . . . the founding principle of the State (art.1 of the Constitution). More than a right itself, dignity is the essential premise of the dedication and effectiveness of the entire system of rights and guarantees enshrined in the Constitution. Dignity, as the founding principle of the State, has an absolute value that cannot be limited or relativized under any circumstances.” Opinion T-401, 1992.

structure (that is, the structure of principles), they are autonomous normative entities with distinctive features that differ from one another, especially regarding their functions within the legal system.” . . .

[T]he rules which flow from the normative concept of human dignity—both the constitutional principle and the fundamental right to dignity—coincide in protecting the same type of conduct. In fact, this Court has held that in those cases where dignity is used as a criterion in a judicial decision, it must be understood that dignity protects the following: (i) the autonomy, or the possibility of designing one’s life plan and living in accordance with it (to live life as one wishes); (ii) certain material conditions of existence (to live well); and (iii) intangible goods such as physical integrity and moral integrity (to live free of humiliation).

Because of its particular relevance for the study of the concrete case, we must dwell on two of the above-mentioned contents of human dignity: as personal autonomy, and as inviolability of non-property goods. In this regard, this Court has stated that . . .

the legal notion of human dignity (in the sphere of individual autonomy) includes the choice of a particular life plan in the context of the social conditions in which the individual develops. This freedom means that each person should have the maximum freedom with the minimum of restrictions possible, so that both state authorities and other individuals shall not prohibit or discourage in any way the possibility for everyone of a true self-determination, under the social conditions necessary to enable their full development.

Also, the legal notion of human dignity (in the sphere of material conditions of existence) includes the possibility of genuine and effective enjoyment of certain goods and services that enable every human being to function in society according to their special conditions and characteristics, under the logic of inclusion and the real possibility of developing an active role in society. Thus it is not just a concept of dignity mediated by a certain well-being determined abstractly, but a concept of dignity that also includes the recognition of the specific and concrete social dimension of the individual, and thus promotes the conditions that facilitate their real incorporation to society.

The third area is also colored by this new interpretation; it is the way it integrates into the legal notion of human dignity (regarding the intangibility of immaterial individual goods, concretely physical and moral integrity) the possibility for every person to remain socially active. Therefore, any behavior that aimed at social

exclusion through an attack or a disregard of the physical and spiritual dimension of individuals is constitutionally forbidden, because it is covered by the normative predicates of human dignity; likewise, both governmental authorities and private individuals are required to perform what is necessary to preserve the inviolability of these goods and especially to promote socially inclusive policies stemming from the obligation to correct the effects of settled situations in which a harm to such objectives is involved.

Human dignity warrants a sphere of autonomy and moral integrity that must be respected by public authorities and by private citizens. The sphere of protection for women's human dignity includes decisions related to their choice of life plan, among them decisions regarding reproductive autonomy. This protection also includes a guarantee of their moral integrity, which manifests itself in prohibitions against assigning women stigmatizing gender roles or imposing deliberate moral suffering.

According to constitutional case law, the concept of dignity, understood as protecting individual autonomy and the right to choose one's life plan, places a limit on the legislature's discretion over criminal matters.

Similarly, human dignity was one of the arguments employed to declare the qualified enforceability of Article 326, Decree No. 100 of 1980, a provision that criminalized euthanasia. Speaking about human dignity as a limit on the power of the legislator to define the content of criminal law, this Constitutional Court sustained:

The duty of the State of protecting life must therefore be compatible with respect to human dignity and the free development of personality. This is why the Court considers that in the case of terminal illnesses accompanied by intense suffering, this State duty yields in the face of informed consent of the patient that desires to die in a dignified way. In effect, in this case, the State duty is debilitated considerably when by word of informed doctors, it can be held that, beyond all reasonable doubt, death is inevitable within a relatively short time. However, the decision of how to confront death acquires a decisive importance for the terminally ill, who knows that they cannot be cured, and who therefore is not opting between death and many years of life, but rather between death in conditions that they choose, or death a little later under painful circumstances that they judge as lacking dignity. The fundamental right to life in a dignified form implies therefore the right to die with dignity, since condemning a person to prolong life for a brief period, when they do not desire it and suffer profound afflictions, is the equivalent not only of cruel and inhumane treatment, prohibited by the Constitution (Art. 12), but also to an annulment of their

dignity and of their autonomy as a moral subject. The person would be reduced to an instrument for the preservation of life as an abstract value.

For all the reasons expounded, the Court concludes that the State cannot oppose the decision of an individual who does not desire to continue living and solicits help in dying, when that individual suffers a terminal illness that produces intolerable pain, incompatible with their idea of dignity. Therefore, if a terminally ill individual who is found in the objective conditions established by Article 326 of the Penal Code considers that their life must end, because they regard it incompatible with their dignity, they can act accordingly, in the exercise of their liberty, without the State opposing [them], nor impeding [them], through prohibition or sanction, the help of a third party. This is not a matter of reducing the importance of the duty of the State of protecting life, but rather, as already noted, a matter of recognizing that this obligation does not translate into the preservation of life only as a biological fact.

Human dignity thus places a limit on the legislature's discretion with regard to criminal matters, even in circumstances where the legislature aims to protect other relevant constitutional values such as life. Therefore, when the legislature enacts criminal laws, it cannot ignore that a woman is a human being entitled to dignity and that she must be treated as such, as opposed to being treated as a reproductive instrument for the human race or, in certain cases against her will, as an effective tool for procreation. . . .

[The Court] . . . declare[s] the constitutionality of Article 122 of Law 599 of 2000, understanding that the crime of abortion will not be committed when, with the consent of the woman, the interruption of the pregnancy is produced in the following cases: (i) When the continuation of the pregnancy means a danger to the life or health of the woman, which has to be certified by a doctor; and, (ii) When the fetus has a grave malformation that would make their life inviable; and (iii) When the pregnancy is the result of rape, non-consensual artificial insemination, non-consensual in vitro fertilization, or incest; all of which should be duly reported to the police. . . .

[The separate opinions of Justices Escobar Gil, Monroy Cabra, and Tafur Gálvis, each dissenting, and of Justices Araújo Rentería, and Cepeda-Espinosa, each concurring; are omitted.]

Gonzales v. Carhart
Supreme Court of the United States
550 U.S. 124 (2007)

Justice Kennedy delivered the opinion of the Court. . . .

[The] surgical procedure referred to as “dilation and evacuation” or “D & E” is the usual abortion method in [the second] trimester. . . . [In D & E, the] doctor, often guided by ultrasound, inserts grasping forceps through the woman’s cervix and into the uterus to grab the fetus, . . . [evacuating] the fetus piece by piece until it has been completely removed. A doctor may make 10 to 15 passes with forceps to evacuate the fetus in its entirety The abortion procedure that was the impetus for the numerous bans on “partial-birth abortion,” . . . is a variation of this standard D & E. . . . In an intact D & E procedure the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart. . . .

The [challenged] Act punishes “knowingly perform[ing]” a “partial-birth abortion.” . . . [T]o fall within the Act, a doctor must perform an “overt act, other than completion of delivery, that kills the partially delivered living fetus.” . . . [T]he overt act must occur after the delivery to an anatomical landmark. This is because the Act proscribes killing “the partially delivered” fetus, which, when read in context, refers to a fetus that has been delivered to an anatomical landmark. . . .

The Act provides doctors “of ordinary intelligence a reasonable opportunity to know what is prohibited[,]” . . . it sets forth “relatively clear guidelines as to prohibited conduct” and provides “objective criteria” to evaluate whether a doctor has performed a prohibited procedure. . . . [T]he Act defines the line between potentially criminal conduct on the one hand and lawful abortion on the other. . . .

This conclusion is buttressed by the intent that must be proved to impose liability. . . . The Act requires the doctor deliberately to have delivered the fetus to an anatomical landmark. Because a doctor performing a D&E will not face criminal liability if he or she delivers a fetus beyond the prohibited point by mistake, the Act cannot be described as “a trap for those who act in good faith.” . . .

Under . . . [our law the] question is whether the Act, measured by its test in this facial attack, imposes a substantial obstacle to late-term, but previability, abortions. The Act does not on its face impose a substantial obstacle. . . . The Act proscribes a method of abortion in which a fetus is killed just inches before completion of the birth process. . . . The Act expresses respect for the dignity of human life. . . . The government may use its voice and its regulatory authority to show its profound respect for the life within the woman. . . . [T]he State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child

The Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives. . . . Congress determined that the abortion method it proscribed had a "disturbing similarity to the killing of a newborn infant," and thus it was concerned with "draw[ing] a bright line that clearly distinguished abortion from infanticide." . . .

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. . . . Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow. . . . The State has an interest in ensuring so grave a choice is well informed. . . .

[The] prohibition in the Act would be unconstitutional . . . if it "subject[ed] [women] to significant health risks." . . . The evidence presented in the trial courts and before Congress demonstrates both sides have medical support for their proposition. . . . The question becomes whether the Act can stand when this medical uncertainty persists. . . . The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty. . . . The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives.

Justice Ginsburg, with whom Justices Stevens, Souter, and Breyer join, dissenting. . . .

Today's decision is alarming. . . . For the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman's health. . . . [A]t stake in cases challenging abortion restrictions is a woman's "control over her [own] destiny." . . . Women, it is now acknowledged, have the talent, capacity, and right "to participate equally in the economic and social life of the Nation." Their ability to realize their full potential . . . is intimately connected to "their ability to control their reproductive lives." Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature. . . .

Ultimately, the Court admits that "moral concerns" are at work, concerns that could yield prohibitions on any abortions. . . . Revealing in this regard, the Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from "[s]evere depression and loss of esteem." Because of women's fragile emotional state and because of the "bond of love the mother has for her child," the Court worries,

doctors may withhold information about the nature of the intact D & E procedure. The solution the Court approves, then, is not to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks. Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety. This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited. . . . In sum, the notion that the Partial-Birth Abortion Ban Act furthers any legitimate governmental interest is, quite simply, irrational.

Writ of Habeas Corpus 124.306

Supreme Federal Court of Brazil (First Chamber) (2016)¹

[Justice Luís Roberto Barroso, joined by Justices Rosa Weber and Edson Fachin, wrote for the court:] . . .

1. This writ of *habeas corpus*, with request for an injunctive release, challenges the ruling of the Sixth Chamber of the Superior Court of Justice, which dismissed the *habeas corpus* writ According to the proceedings, the defendants (who operated an abortion clinic) were arrested *in flagrante delicto*, on 14 March 2013, for four conducts consisting in the alleged commission of the crimes defined by articles 126 (abortion)³ and 288 (conspiracy to commit crimes)⁴ of the Penal Code, for bringing about “abortion with the consent of the pregnant/indicted woman.” . . .

11. . . . In order to be compatible with the Constitution, the criminalization of a particular conduct demands that the protection of a relevant legal good is at stake, that the criminalized conduct does not constitute a legitimate exercise of a fundamental right, and that the criminalized conduct and the state reaction to it be proportionate.

12. Under consideration in this case is the criminal definition of voluntary abortion, provided by articles 124 to 126 of the Criminal Code,⁸ which punish both

¹ The English version of this opinion was edited by Sara Huddleston and revised by Professor Paulo Barrozo, Associate Professor at Boston College Law School.

³ Art. 126—Inducing abortion with the consent of the pregnant woman: Penalty—confinement, from one to four years.

⁴ Art. 288. The association of three (3) or more persons, for the specific purpose of committing crimes: Penalty—confinement, from 1 (one) to 3 (three) years. (As amended by Law n. 12,850, of 2013).

⁸ Abortion performed by the pregnant woman or with her consent—Art. 124—Inducing abortion onto itself or allowing others to cause it: Penalty—detention, from one to three years. . . .

abortion performed by the pregnant woman and by third parties with the consent of the pregnant woman. The protected legal good—potential life of the unborn—is obviously relevant. However, the criminalization of abortion during the first trimester of pregnancy violates several fundamental rights of women, while failing the requirements of the proportionality principle, as demonstrated below. . . .

24. First of all, criminalization violates the woman's *autonomy*, which corresponds to the essential core of individual freedom, protected by the principle of human dignity (Federal Constitution of 1988, article 1, III).^{*} The autonomy expresses the self-determination of persons, that is, the right to make their own basic existential choices and moral decisions regarding the course of their lives. Every individual—man or woman—is assured a legitimate sphere of privacy within which they live their values, interests and desires. In this space, the State and society have no right to intervene. . . .

26. Secondly, criminalization affects the physical and psychological integrity of the woman. The right to physical integrity (Federal Constitution of 1988, article 5, *caput* and III)^{**} protects individuals from undue interference and injury to their bodies and minds, and also relates to the rights to health and safety. . . .

27. Criminalization also violates a woman's *sexual and reproductive rights*, which include the right of every woman not only to decide *whether and when* she will have children, without discrimination, coercion, or violence, but also to obtain the highest possible level of sexual and reproductive health. . . .

30. Furthermore, criminal law repression produces a breach of *gender equality*. Equality prohibits the hierarchization of individuals and the adoption of baseless forms of differentiation; it demands neutralization of historic, economic, and social injustices; and imposes respect for differences. The historical subordination of women to their male counterparts institutionalized socioeconomic inequality between genders and fostered exclusionary, stereotypical, and discriminatory conceptions of female identity and its social role. . . .

31. Finally, the criminalization of abortion also produces *social discrimination*, as it disproportionately jeopardizes poor women, who neither have access to private doctors and clinics, nor are able to use the public health system to carry out the

^{*} Article 1 of the Constitution of Brazil provides: "The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on: I—sovereignty; II—citizenship; III—the dignity of the human person; IV—the social values of labour and of the free enterprise; V—political pluralism. . . ."

^{**} Article 5 of the Constitution of Brazil provides: "All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: . . . III—no one shall be submitted to torture or to inhuman or degrading treatment . . ."

abortive procedure. Through criminalization, the State robs a woman of the possibility of submitting herself to a safe medical procedure. Not infrequently, poor women must resort to either clandestine clinics without any medical infrastructure, or to precarious and primitive amateur procedures, which create high risks of injury, mutilation and death. . . .

35. . . . [T]he criminalization of abortion would only rest justified if: (i) it is suited to the protection of the life of the fetus (*suitability*); (ii) there is no other measure that is equally effective in protecting this legal good but less restrictive to women's rights (*necessity*); and (iii) the criminalization in question is justified by a cost-benefit analysis (*proportionality in the narrow sense*). . . .

38. In reality, . . . the criminalization of abortion is ineffective to protect the right to life of the fetus. From the penal point of view, it constitutes just a "symbolic" disapproval of the conduct. Yet, from the medical point of view, as already stated, it produces a perverse effect on poor women, who are deprived of medical assistance. To be clear: the moral disapproval of abortion by religious groups or by whomever so believes is perfectly legitimate. Everyone has the right to express and defend dogmas, values, and beliefs. What escapes public reason is the possibility that one of the sides, in a morally contentious issue, criminalizes the opposing position.

39. In morally divisive issues, the proper role of the State is not to take a side and impose a vision, but to allow women to make their choice with autonomy. . . . In short, as the State has the obligation to protect both sides, it cannot favor one over the other.

40. . . . [T]he criminalization of abortion is incapable of preventing the termination of pregnancy and, as such, is hardly suitable means to protect the life of the [embryo or] fetus. It must be recognized, as it was by the German Federal Constitutional Court, that, considering the "*secrecy pertaining to the unborn, its helplessness and dependence and its unique link to its mother, the state's chances of protecting it are better if it works together with the mother,*" and thus not treating the woman who wants to abort as a criminal. . . .

41. With regard to necessity, it is imperative to verify if there is an alternative to criminalization that would be equally protective of the right to life of the [embryo or] fetus, but would yield fewer restrictions on women's rights. . . .

42. Even if a modicum of effectiveness could be attributed to the use of criminal law as a means to avoid the termination of pregnancy, it must be recognized that there are other measures that are effective in protecting the fetus' rights and, concurrently, are less intrusive of and harmful to women's rights. An alternative policy to criminalization that has been successfully implemented in several of the world's developed countries is the decriminalization of abortion in its initial stage (as

a general rule, during the first trimester), as long as procedural requirements are followed in order to allow the pregnant woman to make a reflective decision. . . .

45. On one hand, it has been thoroughly demonstrated that the criminalization of abortion substantially restricts the fundamental rights of women. In fact, the criminalization not only bestows a deficient level of protection on women's sexual and reproductive rights, their health, autonomy, physical and psychic integrity, but also leads to repercussions in terms of gender equality, and disproportionately impacts poor women. Moreover, criminalizing women who want to abort generates social costs and concrete costs for the health system resulting from women who have no choice but to undergo unsafe procedures with high rates of morbidity and mortality.

46. . . . [I]t was also verified that the criminalization of abortion promotes little (if any) in the way of protection of the rights of the fetus, given that it has proved ineffective at reducing the rates of abortion. It must be recognized, however, that the particular weight of the right to life of the unborn fetus changes with the stage of its development during the pregnancy. The degree of constitutional protection of the fetus, therefore, progressively increases and is accorded more weight as the pregnancy advances and the fetus acquires extrauterine viability. In balancing the costs and benefits of criminalization, it becomes evident the constitutional illegitimacy of the criminalization of voluntary termination of pregnancy, given its substantial violations of the fundamental rights of women and its high social costs (e.g. issues of public health and deaths), that greatly overshadows its benefits.

47. As the U.S. Supreme Court stated in its *Roe v. Wade* [(1973)] case, the State interest in the protection of the unborn life does not outweigh the fundamental right of the woman to perform an abortion. By the same token, the decision of the Supreme Court of Canada declared that the article of the Canadian Criminal Code that criminalized abortion violated proportionality and was therefore unconstitutional. . . . It should be noted, finally, that virtually no developed and democratic country in the world considers the termination of pregnancy during its initial stage to be a crime, including the United States, Germany, the United Kingdom, Canada, France, Italy, Spain, Portugal, Holland, and Australia.

48. . . . Given all this, it is necessary to conduct a constitutional interpretation of articles 124 and 126 of the Criminal Code, to exclude from its reach the voluntary termination of pregnancy performed during the first trimester.

49. . . . [B]ecause of the non-incidence of the criminal offence imputed to the defendants and co-defendants concerning the voluntary termination of pregnancy during the first trimester, there is reasonable doubt of the very existence of the crime. Therefore, the indispensable legal requirement for ordering a pretrial detention, stated in the final part of the *caput* of article 312 of the Criminal Procedure Code, was not fulfilled. . . .

[Justice Marco Aurélio, the original justice-rapporteur, joined by Justice Luiz Fux, concurred with the release of the claimants from pre-trial detention on the grounds that the requirements for detention were not met, but dissented from the majority's conclusion that the criminalization of abortion in the first trimester was unconstitutional. The issue, according to the dissent, was for Congress to decide.]

Washington v. Glucksberg
Supreme Court of the United States
521 U.S. 702 (1997)

Chief Justice Rehnquist delivered the opinion of the Court.

The question presented in this case is whether Washington's prohibition against "causing" or "aiding" a suicide offends the Fourteenth Amendment to the United States Constitution. We hold that it does not. . . .

The plaintiffs asserted "the existence of a liberty interest protected by the Fourteenth Amendment which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide." . . . [T]he District Court agreed, and concluded that Washington's assisted-suicide ban is unconstitutional because it "places an undue burden on the exercise of [that] constitutionally protected liberty interest." . . .

We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices. In almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide. The States' assisted-suicide bans are not innovations. Rather, they are longstanding expressions of the States' commitment to the protection and preservation of all human life. Indeed, opposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages. . . .

Attitudes toward suicide itself have changed [over the years] . . . , but our laws have consistently condemned, and continue to prohibit, assisting suicide. Despite changes in medical technology and notwithstanding an increased emphasis on the importance of end-of-life decisionmaking, we have not retreated from this prohibition. Against this backdrop of history, tradition, and practice, we now turn to respondents' constitutional claim.

The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. . . . We have . . . assumed, and strongly suggested, that the Due

Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. But we “ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.” By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore “exercise the utmost care whenever we are asked to break new ground in this field,” lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court. . . .

[We] now inquire whether this asserted right has any place in our Nation’s traditions. Here, . . . we are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.

Respondents contend, however, that the liberty interest they assert *is* consistent with this Court’s substantive-due-process line of cases, if not with this Nation’s history and practice. . . . Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation’s history and constitutional traditions. The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection. . . . That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected. . . .

The Constitution also requires . . . that Washington’s assisted-suicide ban be rationally related to legitimate government interests. This requirement is unquestionably met here. . . . First, Washington has an “unqualified interest in the preservation of human life.” The State’s prohibition on assisted suicide, like all homicide laws, both reflects and advances its commitment to this interest. . . . Those who attempt suicide—terminally ill or not—often suffer from depression or other mental disorders. Research indicates, however, that many people who request physician-assisted suicide withdraw that request if their depression and pain are treated. . . . The State also has an interest in protecting the integrity and ethics of the medical profession. . . . And physician-assisted suicide could, it is argued, undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line between healing and harming.

Next, the State has an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes. . . . The State’s interest here goes beyond protecting the vulnerable from coercion; it extends to

protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and “societal indifference.” The State’s assisted-suicide ban reflects and reinforces its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy, and that a seriously disabled person’s suicidal impulses should be interpreted and treated the same way as anyone else’s.

Finally, the State may fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia. . . . [W]hat is couched as a limited right to “physician-assisted suicide” is likely, in effect, a much broader license, which could prove extremely difficult to police and contain. Washington’s ban on assisting suicide prevents such erosion. . . .

Justice O’Connor, concurring.* . . .

The Court frames the issue in [this case] as whether the Due Process Clause of the Constitution protects a “right to commit suicide which itself includes a right to assistance in doing so,” and concludes that our Nation’s history, legal traditions, and practices do not support the existence of such a right. I join the Court’s opinions because I agree that there is no generalized right to “commit suicide.” But respondents urge us to address the narrower question whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death. I see no need to reach that question in the context of the facial challenges to the New York and Washington laws at issue here. The parties and *amici* agree that in these States a patient who is suffering from a terminal illness and who is experiencing great pain has no legal barriers to obtaining medication, from qualified physicians, to alleviate that suffering, even to the point of causing unconsciousness and hastening death. In this light, even assuming that we would recognize such an interest, I agree that the State’s interests in protecting those who are not truly competent or facing imminent death, or those whose decisions to hasten death would not truly be voluntary, are sufficiently weighty to justify a prohibition against physician-assisted suicide.

Every one of us at some point may be affected by our own or a family member’s terminal illness. There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State’s interests in protecting those who might seek to end life mistakenly or under pressure. . . . [T]here is no need to address the question whether suffering patients have a constitutionally cognizable interest in obtaining relief from the suffering that they may experience in the last days of their lives. There is no dispute that dying patients in Washington and

* Justice Ginsburg concurs in the Court’s judgments substantially for the reasons stated in this opinion. Justice Breyer joins this opinion except insofar as it joins the opinions of the Court.

New York can obtain palliative care, even when doing so would hasten their deaths. The difficulty in defining terminal illness and the risk that a dying patient's request for assistance in ending his or her life might not be truly voluntary justifies the prohibitions on assisted suicide we uphold here. . . .

Justice Breyer, concurring in the judgment

[I] agree with the Court that the critical question in both of the cases before us is whether "the 'liberty' specially protected by the Due Process Clause includes a right" of the sort that the respondents assert. I do not agree, however, with the Court's formulation of that claimed "liberty" interest. The Court describes it as a "right to commit suicide with another's assistance." But I would not reject the respondents' claim without considering a different formulation, for which our legal tradition may provide greater support. That formulation would use words roughly like a "right to die with dignity." But irrespective of the exact words used, at its core would lie personal control over the manner of death, professional medical assistance, and the avoidance of unnecessary and severe physical suffering—combined. . . .

The respondents here . . . argue that one can find a "right to die with dignity" by examining the protection the law has provided for related, but not identical, interests relating to personal dignity, medical treatment, and freedom from state-inflicted pain.

I do not believe, however, that this Court need or now should decide whether or not such a right is "fundamental." That is because, in my view, the avoidance of severe physical pain (connected with death) would have to comprise an essential part of any successful claim and because, as Justice O'Connor points out, the laws before us do not *force* a dying person to undergo that kind of pain. Rather, the laws of New York and of Washington do not prohibit doctors from providing patients with drugs sufficient to control pain despite the risk that those drugs themselves will kill. And under these circumstances the laws of New York and Washington would overcome any remaining significant interests and would be justified, regardless. . . . Were the legal circumstances different—for example, were state law to prevent the provision of palliative care, including the administration of drugs as needed to avoid pain at the end of life—then the law's impact upon serious and otherwise unavoidable physical pain (accompanying death) would be more directly at issue. And as Justice O'Connor suggests, the Court might have to revisit its conclusions in these cases. . . .

[The opinions of Justices Stevens, Souter, and Ginsburg, concurring in the judgment, are omitted.]

Judgment C-239/97
Constitutional Court of Colombia (1997)*

[Writing for the Court: Honorable Justice Carlos Gaviria Diaz:] . . .

[T]he questions that the Court must resolve [are] the following: 1) Does the Constitution recognize the sanction contemplated in Article 326 of the Penal Code for mercy killing? and, 2) What is the legal relevance of the passive subject's consent to the [act]? . . .

[W]e accept [that] motive can be part of the description of the penal norm, which does not mean, in principle, a constitutional violation . . . [T]he next step will consist in examining whether the reduction of the statutory period of detention, in relation with the figure of simple or aggravated homicide, and in consideration of the intention of the act, achieves a proportional and reasonable result, or, to the contrary, denies fundamental rights and guarantees.

Mercy is a state of mind of profound commotion and agitation, similar to the state of grief authorized by Article 60 of the Penal Code as a generic cause for attenuating punishment; except that in contrast to the latter, it moves one to act in favor of another and not out of self-concern.

Whoever kills another because of mercy, with the purpose of putting an end to intense suffering, acts with a clear sense of altruism, and it is this motivation that has led the legislator to create an autonomous norm, which imposes a penalty that is considerably less than the previous penalty for the crime of simple or aggravated homicide. Such a decision does not deny the fundamental right to life consecrated in Article 11 of the Constitution, since the conduct . . . continues being illegal or juridically unjust; but in consideration of the intention of the subject the sanction is lessened . . . [This shows] the respect for the principle of culpability, derived from the adoption of an offense-based penal law, such as that authorized by the Constitution in Article 29. . . .

Therefore, . . . the charge of unconstitutionality that the petitioner proposes (that Article 326 of the Penal Code denies the right to life for one who is found in a precarious health condition, because the lightness of the sanction constitutes authorization to murder), implies a belief that the [individual deserves] a penalty based solely on the materiality of the act, without consideration of [their intention]. The petitioner forgets that in the Social State Ruled by Law penalties must maintain a reasonable proportionality with the degree of culpability of the act, and not only with the material and objective gravity of the injury to the legally protected right. . . .

* Excerpted is an unofficial translation by Sergio Giuliano (Yale Law School, LL.M Class of 2016), drawn in part from a translation made accessible by Patients Rights Council, *available at* http://www.patientsrightscouncil.org/site/wp-content/uploads/2015/05/Colombia_Court_Decision_05_20_1997.pdf.

Consent is, in relation to certain crimes, a cause for the non-criminality of the act In relation to euthanasia, no penal disposition makes allusion to the consent of the passive subject in the act. Does this omission mean that said consent is irrelevant?

The Penal Code of 1936 contemplated a penal rule called *consented homicide* (Art. 368) with a penalty of three to ten years in prison, which indicated that although the legislature considered life a legally protected right, in spite of the decision of the right holder, and therefore it criminalized homicide with consent, the intent of the passive subject worked as a basis for attenuating the punishment. Together with this rule, the rule of mercy homicide was established, termed thusly because the perpetrator committed the deed motivated by the desire to accelerate an imminent death or to put an end to grave bodily suffering reputed to be incurable. The judge was enabled to attenuate the perpetrator's penalty envisioned for homicide, and even grant a judicial pardon, which in practice occurred when, aside from a motive of mercy, there was also the consent of the passive subject. It bears noting, also, that attempted suicide is neither considered a crime in this statute nor in the Penal Code that governs today, a seeming admission, even beneath the supremacy of a Constitution notoriously less explicit than the current one in the recognition of personal autonomy, that the decision of the individual regarding the end of their existence did not merit penal reproach. . . .

Although there is consensus that life is the necessary presupposition of all other rights, and thus inalienable . . . its protection in the field of western jurisprudence [on this topic], is seen from two perspectives: 1) The one that regards life as something sacred and 2) the one that regards life as a valuable good but not a sacred one, since religious beliefs or metaphysical convictions that enshrine life as sacred are but one among many options. In the first, independent of the conditions in which the individual is found, death ought to come through natural causes. In the second, to the contrary, it is permitted that, in extreme circumstances, the individual can decide whether to continue living or not, when the circumstances that accompany their life make being alive neither desirable nor dignifying

In Colombia, in light of the Constitution of 1991, it is essential to resolve this question from a secular and pluralistic perspective that respects the moral autonomy of the individual and the freedoms and rights that inspire our higher law. . . .

Article 1 of the Constitution, for example, provides that the Colombian State is founded in the respect for the dignity of the human being; this means that, as a supreme value, dignity irradiates the collection of recognized fundamental rights, those which find maximum expression in the free development of the human being. . . .

On the other hand, the same Article 1 of the Constitution, in accordance with Article 95, consecrates *solidarity* as one of the basic postulates of the Colombian State, a principle that involves the positive duty of all citizens to aide anyone found in

a situation of necessity with humanitarian methods. And it is not difficult to discover the motives of altruism and *solidarity* of one whose work is motivated by the desire to suppress another's suffering, conquering . . . their own inhibition and aversion to perform an act directed toward destroying an existence whose protection is the justification of the whole legal system. . . .

In these terms, the Constitution is inspired in the consideration of the person as a moral subject, capable of assuming in a responsible and autonomous manner those decisions regarding affairs that pertain to him in the first place, . . . [and] if the manner in which individuals see death reflects their own convictions, they cannot be, under the inadmissible argument that the majority renders it a religious or moral imperative, forced to continue living when, due to extreme circumstances . . . they find it neither desirable nor compatible with their own dignity. . . .

In synthesis, from a pluralistic perspective, the absolute duty to live cannot be affirmed, since [under this] Constitution . . . relations between law and morality are not placed at the level of duties but rather rights. In other words, whoever believes a conduct to be mandatory, in relation to their own religious or moral beliefs, cannot seek to coercively force others to do the same; they are only permitted to live their own moral life without interference. . . .

The duty of the State of protecting life must therefore be compatible with respect to human dignity and the free development of personality. This is why the Court considers that in the case of terminal illnesses accompanied by intense suffering, this State duty yields in the face of informed consent of the patient that desires to die in a dignified way. In effect, in this case, the State duty is debilitated considerably when by word of informed doctors, it can be held that, beyond all reasonable doubt, death is inevitable within a relatively short time. However, the decision of how to confront death acquires a decisive importance for the terminally ill, who knows that they cannot be cured, and who therefore is not opting between death and many years of life, but rather between death in conditions that they choose, or death a little later under painful circumstances that they judge as lacking dignity. The fundamental right to life in a dignified form implies therefore the right to die with dignity, since condemning a person to prolong life for a brief period, when they do not desire it and suffer profound afflictions, is the equivalent not only of cruel and inhumane treatment, prohibited by the Constitution (Art. 12), but also to an annulment of their dignity and of their autonomy as a moral subject. The person would be reduced to an instrument for the preservation of life as an abstract value.

For all the reasons expounded, the Court concludes that the State cannot oppose the decision of an individual who does not desire to continue living and solicits help in dying, when that individual suffers a terminal illness that produces intolerable pain, incompatible with their idea of dignity. Therefore, if a terminally ill individual who is found in the objective condition established by Article 326 of the Penal Code

considers that their life must end, because they regard it incompatible with their dignity, they can act accordingly, in the exercise of their liberty, without the State opposing [them] nor impeding [them], through prohibition or sanction, the help of a third party. This is not a matter of reducing the importance of the duty of the State of protecting life, but rather . . . a matter of recognizing that this obligation does not translate into the preservation of life only as a biological fact.

The duty not to kill finds exceptions in the law, through the consecration of principles such as legitimate defense, and the state of necessity, in virtue of which killing is not illegal, whenever those determined objective assumptions from the respective dispositions are given.

In the case of mercy killing, consented to by the passive subject, the relative character of this legal prohibition is translated into the respect for the will of [said] subject . . . who does not desire to extend a painful life. The behavior of the active participant is not illegal because it is an act of solidarity that is not performed out of a personal desire to end a life, but rather in response to the request of the one who, because of intense suffering produced by a terminal illness, asks for help in dying. . . .

[T]he consent of the passive subject must be free, manifested unequivocally by a person with the capacity to understand the situation in which they are found. . . . [C]onsent implies that the person possesses serious and trustworthy information regarding their sickness, the therapeutic options and their diagnosis, and possesses the intellectual capacity necessary to make the decision. For this reason, the Court concludes that the active subject must be a doctor, given that this is the only professional capable of providing that information to the patient as well as providing the conditions necessary for dying with dignity. Therefore, in cases of terminal illnesses, doctors that carry out the deed described in the penal norm with the consent of the passive subject cannot be sanctioned and . . . judges must exonerate [them]. . . .

Since the State is not indifferent to human life, but rather . . . has the duty of protecting it, it is necessary that very strict legal regulations be established regarding the manner of attaining consent and aid in dying, in order to avoid the murder, in the name of mercy killing, of persons who want to continue living, or that do not suffer intense pain produced by a terminal illness. Those regulations must be directed toward assuring that consent is genuine and not the effect of a temporary depression. . . . [The State would also be able to consider] the possibility that all cases should proceed with a judicial authorization, with the purpose of assuring the authenticity of the consent and guaranteeing that all participants are exclusively concerned with the dignity of the sick person. . . .

Since these regulations can only be established by the legislature, the Court decrees that while this issue is being regulated, in principle, all euthanasia must be accompanied by a penal investigation

On the other hand, in the interest of legal certainty, the Court will ask Congress, as quickly as possible, to formulate regulations regarding this issue in conformity with the constitutional principles and basic considerations of humanity. . . .

[First, the Court] . . . declare[s] the constitutionality of Article 326 of the Penal Code, clarifying that in the case of terminally ill individuals who freely consent to the act, the doctor will not be guilty, since the conduct is justified.

[Second, the Court] . . . exhort[s] Congress to, in the briefest possible time, and according to constitutional principles and basic considerations of humanity, regulate the matter of euthanasia. . . .

Justice Cifuentes Muñoz, concurring. . . .

2. The opinion [of the Court] supposes the existence of a constitutional mandate that prohibits the legislature from punishing the doctor who administers death to a terminal patient, in virtue of the conscious and informed request of the latter. In my opinion, no such constitutional mandate exists. . . . [This] ignores the value that the Constitution places on human life, endows the right of free development of the personality with an undue heteronymous normative capacity, perverts the concept of solidarity contained in the Constitution, and impresses on dignity an objective content that is difficult to defend from a pluralistic perspective. . . .

3. The decision justifies the homicidal act that the doctor commits on the terminal patient who has expressed their free consent to this effect and who finds themselves in the conditions of article 326 of the Penal Code. In this case, in the majority's opinion, the free will of the passive subject, held up in article 16 of the Constitution, has the legal power to control their own life in the sense of . . . putting it directly to an end or authorizing a third party—the doctor—to do it. The action of the third party would not be illegal because it would concur with the free will of the passive subject and fulfill the positive duty of solidarity of every citizen to help whomever they find in a state of need. . . .

In this case, the right to life or to the free development of the personality do not incorporate the ability to demand and obtain from the State precise and suitable collaboration with the object of bringing to a happy end the purpose of death. . . .

9. . . . [A]ctive indirect euthanasia (palliative medicine), in my opinion, is the only recourse that . . . has a solid constitutional foundation. The consecration of active direct euthanasia amounts to a newly articulated norm that should not be legitimized outside of the democratic process, especially if the Constitution does neither mandate it nor sanctions its inexistence. . . .

The Constitution does not decide the issue of the criminal liability of a doctor that [commits euthanasia]. This is an issue that must be decided through the political

process within political institutions The choice made by the legislature to penalize active direct euthanasia with a benign penalty cannot be deemed as an illegitimate action that departs from constitutional [principles]. . . .

In Article 16 of the Constitution, the principle of liberty is consecrated and the autonomous subject is modeled. However, to derive from that article a rule that would inhibit the legislature from punishing active direct euthanasia, simply because a person has given their consent, is to transform the free development of the personality into a principle supplanting the entire legal order. . . . Only thus is it clear that the entire legal order succumbs before the will of the “moral subject.”

[Justices Arango Mejía and Gaviria Díaz joined in a brief concurrence in which they noted that the Court’s interpretation of Article 326 should have been extended to Article 327 (“Assisted Suicide”) and that the holding should not be limited just to the “terminally” ill, but to others whose condition might deserve a dignified death.]

[Justices Hernández Galindo, Naranjo Mesa, and Herrera Vergara wrote separate decisions, in which each dissented in part. They all agreed with the majority on the constitutionality of Art. 326 of the Penal Code, but they held that under no circumstance could the consent of the terminally ill exculpate the doctor that performed the mercy killing. Among their reasons, they argued that the majority’s decision to include the discussion of the passive actor’s consent constituted judicial overreach and that a terminally ill individual cannot provide genuine consent to their death.]

* * *

The Constitutional Court’s order required the formulation of regulations for euthanasia for terminally ill patients. Those measures were promulgated by the Ministry of Health and Social Protection in April of 2015. See Colombia Ministry of Health and Social Protection Resolution n° 1216 of 2015 [Colombia Ministerio de Salud y Protección Social, Resolución n° 1216, del 2015].

Lambert and Others v. France
European Court of Human Rights (Grand Chamber)
[2015] ECHR 545

. . . The European Court of Human Rights, sitting as a Grand Chamber composed of: Dean Spielmann, *President*, Guido Raimondi, Mark Villiger, Isabelle

Berro, Khanlar Hajiyeu, Ján Šikuta, George Nicolaou, Nona Tsotsoria, Vincent A. De Gaetano, Angelika Nußberger, Linos-Alexandre Sicilianos, Erik Møse, André Potocki, Helena Jäderblom, Aleš Pejchal, Valeriu Griţco, Egidijus Kūris, *judges*, and Erik Fribergh, *Registrar*

11. Vincent Lambert sustained serious head injuries in a road-traffic accident on 29 September 2008, which left him tetraplegic and . . . in a chronic vegetative state. . . .

14. As Vincent Lambert's carers had observed increasing signs in 2012 of what they believed to be resistance on his part to daily care, the medical team initiated in early 2013 the collective procedure provided for by the Act of 22 April 2005 on patients' rights and end-of-life issues [amending the Public Health Code]. Rachel Lambert, the patient's wife, was involved in the procedure.

15. The procedure resulted in a decision by Dr Kariger, the doctor in charge of Vincent Lambert and head of the department in which he is hospitalised, to withdraw the patient's nutrition and reduce his hydration. . . .

16. On 9 May 2013 . . . [the parents, a half-brother, and a sister of Vincent Lambert] applied to the urgent-applications judge of the Châlons-en-Champagne Administrative Court . . . seeking an injunction ordering the hospital . . . to resume feeding and hydrating Vincent Lambert normally and to provide him with whatever care his condition required. . . .

23. On 13 January 2014 the applicants made a further urgent application to the Châlons-en-Champagne Administrative Court . . . seeking an injunction prohibiting the hospital and the doctor concerned from withdrawing Vincent Lambert's nutrition . . . [The injunction was granted.]

29. . . . [O]n 31 January 2014 [Vincent Lambert's wife, nephew,] and Reims University Hospital appealed against that judgment to the urgent-applications judge of the *Conseil d'État*. . . .

50. . . . [The *Conseil d'État* held, as regarded the decision taken by Dr Kariger to withdraw life-sustaining treatment, that said decision had not been tainted by a lack of impartiality or by procedural irregularity; that the experts' report had confirmed Dr Kariger's conclusions as to the irreversible nature of Mr Lambert's condition; that Dr Kariger had acted correctly in taking into account statements expressed orally by Mr Lambert on several occasions to his wife before his accident not to be kept alive artificially; and finally, that Dr Kariger had complied with the requirement of the Code to obtain the views of the patient's family before taking his decision, and to take these different opinions into account.] . . .

117. . . . Article 2 [of the European Convention on Human Rights],* which ranks as one of the most fundamental provisions in the Convention and enshrines one of the basic values of the democratic societies making up the Council of Europe, enjoins the State not only to refrain from the “intentional” taking of life (negative obligations), but also to take appropriate steps to safeguard the lives of those within its jurisdiction (positive obligations). . . .

147. The Court notes that no consensus exists among the Council of Europe member States in favour of permitting the withdrawal of artificial life-sustaining treatment, although the majority of States appear to allow it. . . . [T]here is nevertheless consensus as to the paramount importance of the patient’s wishes in the decision-making process, however those wishes are expressed.

148. Accordingly, the Court considers that in this sphere concerning the end of life, as in that concerning the beginning of life, States must be afforded a margin of appreciation, not just as to whether or not to permit the withdrawal of artificial life-sustaining treatment and the detailed arrangements governing such withdrawal, but also as regards the means of striking a balance between the protection of patients’ right to life and the protection of their right to respect for their private life and their personal autonomy. However, this margin of appreciation is not unlimited and the Court reserves the power to review whether or not the State has complied with its obligations under Article 2. . . .

160. . . . [T]he provisions of the Act of 22 April 2005, as interpreted by the *Conseil d’État*, constitute a legal framework which is sufficiently clear, for the purposes of Article 2 of the Convention, to regulate with precision the decisions taken by doctors in situations such as that in the present case. The Court therefore concludes that the State put in place a regulatory framework apt to ensure the protection of patients’ lives. . . .

167. The *Conseil d’État* found that the doctor had complied with the requirement to consult the family and that it had been lawful for him to take his decision in the absence of unanimity among the family members. . . .

171. [Regarding the remedies that were available to the applicants in the present case, the] Court notes that . . . the role of the urgent-applications judge entails the power not only to suspend implementation of the doctor’s decision but also to conduct a full review of its lawfulness (and not just apply the test of manifest unlawfulness)

* Article 2 of the European Convention on Human Rights provides: “Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

178. . . . [I]t is the patient who is the principal party in the decision-making process and whose consent must remain at its centre; this is true even where the patient is unable to express his or her wishes. The Council of Europe's "Guide on the decision-making process regarding medical treatment in end-of-life situations" recommends that the patient should be involved in the decision-making process by means of any previously expressed wishes, which may have been confided orally to a family member or close friend. . . .

181. The Court is keenly aware of the importance of the issues raised by the present case, which concerns extremely complex medical, legal and ethical matters. . . .

On the basis of that approach, the Court has found both the legislative framework laid down by domestic law, as interpreted by the *Conseil d'État*, and the decision-making process, which was conducted in meticulous fashion in the present case, to be compatible with the requirements of Article 2. As to the judicial remedies that were available to the applicants, the Court has reached the conclusion that the present case was the subject of an in-depth examination in the course of which all points of view could be expressed and all aspects were carefully considered, in the light of both a detailed expert medical report and general observations from the highest-ranking medical and ethical bodies.

Consequently, the Court concludes that the domestic authorities complied with their positive obligations flowing from Article 2 of the Convention, in view of the margin of appreciation left to them in the present case. . . .

[The joint partly dissenting opinion of Judges Hajiyeu, Šikuta, Tsotsoria, De Gaetano, and Gričco, is omitted.]

CRIMINALIZING AGGRESSION AGAINST VULNERABLE PERSONS

X and Y v. The Netherlands European Court of Human Rights (Chamber) [1985] ECHR 4

. . . The European Court of Human Rights, sitting . . . as a Chamber composed of the following judges: Mr. R. Ryssdal, *President*, Mr. G. Wiarda, Mr. B. Walsh, Sir Vincent Evans, Mr. C. Russo, Mr. R. Bernhardt, Mr. J. Gersing, and also of Mr. M.-A. Eissen, *Registrar*, and Mr. H. Petzold, *Deputy Registrar*

[Mr. X's 16-year-old mentally handicapped daughter, Miss Y, was forced by Mr. B to have sexual intercourse with him. Mr. X, after explaining Miss Y's condition to the police, filed a criminal complaint on his daughter's behalf. The public prosecutor provisionally decided not to charge Mr. B, and Mr. X appealed this decision to the Arnhem Court of Appeal. The Court of Appeal dismissed the appeal, holding that Mr. X could not act on Miss Y's behalf for the purpose of filing a complaint being that she was over the age of sixteen, and that the Court could not fill this gap in the law.]

21. According to the applicants [Mr. X and his daughter], the impossibility of having criminal proceedings instituted against Mr. B violated Article 8 of the Convention

23. The Court recalls that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. . . .

27. The Court finds that the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated.

Moreover, as was pointed out by the [European Commission of Human Rights], this is in fact an area in which the Netherlands has generally opted for a system of protection based on the criminal law. The only gap, so far as the Commission and the Court have been made aware, is as regards persons in the situation of Miss Y; in such cases, this system meets a procedural obstacle which the Netherlands legislature had apparently not foreseen. . . .

29. . . . [T]he Criminal Code . . . requires a complaint by the actual victim before criminal proceedings can be instituted against someone who has [deliberatively caused a minor to engage in indecent acts either through offers of gifts or an abuse of a position of authority]

30. . . . [T]he Criminal Code [did not] provide[] Miss Y with practical and effective protection. It must therefore be concluded, taking account of the nature of the wrongdoing in question, that she was the victim of a violation of Article 8 of the Convention. . . .

Valiulienė v. Lithuania
European Court of Human Rights (Second Section)
[2013] ECHR 240

. . . The European Court of Human Rights (Second Section), sitting as a Chamber composed of: Guido Raimondi, *President*, Danutė Jočienė, Dragoljub Popović, András Sajó, Işıl Karakaş, Paulo Pinto de Albuquerque, Helen Keller, *judges*, and Stanley Naismith, *Section Registrar*

42. Relying on Articles 6 and 13 of the Convention [on Human Rights],* the applicant [Ms Loreta Valiulienė] complained that the domestic authorities had failed to investigate the repeated acts of domestic violence against her and to hold the perpetrator [J.H.L., her live-in partner,] accountable. She also complained that the criminal proceedings against him had been excessively lengthy.

43. The Court, which is master of the characterisation to be given in law to the facts of the case, finds that the above complaints fall to be examined solely under Articles 3 and 8 of the [European Convention on Human Rights]**

70. . . . [T]he Court considers that the ill-treatment of the applicant, which on five occasions caused her physical injuries, combined with her feelings of fear and helplessness, was sufficiently serious to reach the level of severity under of Article 3 of the Convention and thus raise the Government's positive obligation under this provision. . . .

73. Once the Court has found that the level of severity of violence inflicted by private individuals attracts protection under Article 3 of the Convention, its case-law is consistent and clear to the effect that this Article requires the implementation of adequate criminal-law mechanisms. However, the scope of the State's positive obligations might differ between cases where treatment contrary to Article 3 of the Convention has been inflicted through the involvement of State agents and cases where violence is inflicted by private individuals. The Court observes in the first place that no direct responsibility can be borne by Lithuania under the Convention in respect of the acts of the private individuals in question.

74. The Court notes, however, that even in the absence of any direct responsibility for the acts of a private individual under Article 3 of the Convention, State responsibility may nevertheless be engaged through the obligation imposed [on

* Articles 6 and 13 of the European Convention on Human Rights provide for the right to a fair trial and to effective remedy, respectively.

** Article 3 of the European Convention on Human Rights provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

states] by Article 1 of the Convention . . . to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention

75. Furthermore, Article 3 requires States to put in place effective criminal-law provisions to deter the commission of offences against personal integrity, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions, and this requirement also extends to ill-treatment administered by private individuals. . . . In order that a State may be held responsible it must, in the view of the Court, be shown that the domestic legal system, and in particular the criminal law applicable in the circumstances of the case, failed to provide practical and effective protection of the rights guaranteed by Article 3. . . .

78. . . . The Court is . . . satisfied that at the time relevant to the instant case Lithuanian law provided a sufficient regulatory framework to pursue the crimes attributed by the applicant to J.H.L.

79. The Court will now examine whether or not the impugned regulations and practices, and in particular the domestic authorities' compliance with the relevant procedural rules, as well as the manner in which the criminal-law mechanisms were implemented in the instant case, were defective to the point of constituting a violation of the respondent State's positive obligations under Article 3 of the Convention. . . .

82. . . . [O]nce the case had been transferred for public prosecution, the investigation was suspended two times for lack of evidence. Each time the applicant had shown great interest in her case and had made serious attempts to have J.H.L. prosecuted. Upon her persistent appeals, the prosecutors quashed the investigator's decisions as not being thorough enough. . . . The Court thus finds that this was a serious flaw on the part of the State. . . .

84. . . . Even though the applicant without any delay addressed the same Panevėžys City District Court with an application for private prosecution, that court dismissed her application on the very ground she feared, namely that the prosecution had become time-barred. Finally, the decision to terminate the criminal proceedings due to the statutory limitation was upheld by the Panevėžys Regional Court, thus leaving the applicant in a state of legal limbo. Accordingly, all the attempts by the applicant to have her attacker prosecuted were futile.

85. Turning to the question of the State's responsibility under Article 3 of the Convention, the Court firstly reiterates that, within the limits of the Convention, the choice of the means to secure compliance with Article 3 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the domestic authorities' margin of appreciation, provided that criminal-law mechanisms are available to the victim. Thus, and inasmuch as it concerns the circumstances of the instant case, it is not for the Court to speculate whether the applicant's criminal complaint should have been pursued by the public prosecutor, or by a way of private

prosecution Be that as it may, the fact remains that the circumstances of the case were never established by a competent court of law. In this connection the Court notes that one of the purposes of imposing criminal sanctions is to restrain and deter the offender from causing further harm. However, these aims can hardly be achieved without having the facts of the case established by a competent criminal court. The Court thus cannot accept that the purpose of effective protection against acts of ill-treatment is achieved where the criminal proceedings are discontinued owing to the fact that the prosecution has become time-barred and where this has occurred, as is shown above, as a result of the flaws in the actions of the relevant State authorities.

86. In the Court's view, the practices at issue in the present case, together with the manner in which the criminal-law mechanisms were implemented, did not provide adequate protection to the applicant against acts of violence. Therefore the Court finds that there has been a violation of Article 3 of the Convention. . . .

Concurring Opinion of Judge Pinto de Albuquerque . . .

[T]he Court is again confronted with the excruciating question of domestic violence. The legal relevance of lesser forms of violence such as verbal abuse and minor bodily injuries, the failure to acknowledge the public interest of prosecuting this form of ill-treatment and the final dismissal of the criminal case owing to the statute of limitations give to this case all the ingredients of a leading case, raising fundamental legal issues which have not been dealt with properly by the majority. . . .

Against the backdrop of . . . developments in international law, which are supported by the findings of modern psychology, it can be concluded that *domestic violence has emerged as an autonomous human rights violation consisting in the commission of physical, sexual or psychological harm, or the threat or attempt thereof, in private or public life, by an intimate partner, an ex-partner, a member of the household, or an ex-member of the household*. Yet a human rights litigation approach to domestic violence faces three strong conceptual obstacles, all of them very well entrenched in the history of democratic societies: respect for privacy, tolerance *vis-a-vis* different cultures and the upholding of the rights of defendants. . . . These obstacles can only be overcome by breaking the classical public-private divide and acknowledging the State's positive obligation to act against domestic violence. *States have the obligation not only to bring to justice the alleged offenders and empower the victims of domestic violence with an active role in the criminal proceedings, but also to prevent private actors from committing or reiterating the offence and provide elementary social support measures to victims, such as post-traumatic care and shelter. Such an international positive obligation must be acknowledged, in view of the broad and long-lasting consensus mentioned above, as a principle of customary international law, binding on all States. This is a fortiori true in the case of violence against women. Domestic violence is basically violence against women.* . . .

One of the most problematic aspects of the State's positive obligation is the definition of the exact ambit of its duty to prevent and protect. The Court has developed a test [from the European Court of Human Rights' judgment in *Osman v. United Kingdom* (1998)] . . . Put simply, *the State answers for the wrongful conduct of non-State actors when their conduct was foreseeable and avoidable by the exercise of State powers*. The heart of the dispute in the current case lies in the adequateness of this standard to the particular situation of domestic violence. . . . *If a State knows or ought to know that a segment of its population, such as women, is subject to repeated violence and fails to prevent harm from befalling the members of that group of people when they face a present (but not yet imminent) risk, the State can be found responsible by omission for the resulting human rights violations*. . . .

The second major problem raised by the current case is the failure, under the successive applicable prosecution regimes of the old and the new (2003) Code of Criminal Procedure, to acknowledge the "public interest" of prosecuting this form of ill-treatment, with the final dismissal of the case due to the statute of limitations. . . . *[T]he requirement of a victim to act as a private prosecutor, which reflects the misconception of violence between members of a family/intimate relationship as "private business," is not compatible with the above-mentioned international obligation to protect*. . . .

[Judge Jočienė filed a dissenting opinion arguing that the attacks against the applicant did not fall within the scope of Article 3, and that the Court should instead have accepted the Lithuanian government's declaration acknowledging a violation of Article 8.]

Bălșan v. Romania

European Court of Human Rights (Fourth Section)

[2017] ECHR 468 (May 23, 2017)

. . . The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of: Ganna Yudkivska, *President*, Vincent A. De Gaetano, Paulo Pinto de Albuquerque, Faris Vehabović, Egidijus Kūris, Iulia Motoc, Carlo Ranzoni, *judges*, and Marialena Tsirli, *Section Registrar*

3. The applicant alleged that she had been subjected to violence by her husband [N.C.] and that the State authorities had done little to stop or prevent it from happening again. . . .

[The Court detailed a series of physical assaults by N.C. against applicant, as well as applicant's repeated pleas and complaints to the police. In one instance, applicant's daughters told the police that their father had not hit her and that their mother had a tendency to drink too much. N.C. made similar statements. In response

to her first complaint, the prosecutor's office held that she had provoked the incident while inebriated and referred to N.C. and her daughters' statements. Later on, as part of the investigation into a later complaint, one of the daughters retracted her testimony and stated that N.C. had hit her and her mother, and that she had testified otherwise under threats from N.C. After the applicant lodged a complaint with the Petrosani District Court, the court acquitted N.C. of the crime of bodily harm and ordered administrative fines totaling less than 200 euros.]

47. . . . [T]he applicant complained that the domestic authorities had failed to protect her from repeated acts of domestic violence and to hold the perpetrator accountable. . . .

72. Having regard to the particular circumstances of this case and the nature and substance of the applicant's complaints, the Court considered it appropriate to communicate of its own motion a complaint under Article 14 of the Convention read in conjunction with Article 3. . . .

74. . . . [T]he applicant submitted that she had been discriminated against on the basis of her gender and that the respondent State's domestic law failed to provide proper protection for the real victims of domestic violence. . . .

78. The Court has already held that failure by a State to protect women against domestic violence breaches their right to equal protection under the law and that this failure does not need to be intentional. . . .

81. The . . . domestic authorities have deprived the national legal framework of its purpose by their finding that the applicant provoked the domestic violence against her, that the violence did not present a danger to society and therefore was not severe enough to require criminal sanctions, and by denying the applicant's request for a court-appointed lawyer. In doing so, the domestic authorities have also acted in a way that was inconsistent with international standards on violence against women and domestic violence in particular.

82. The authorities' passivity in the present case is also apparent from their failure to consider any protective measures for the applicant, despite her repeated requests to the police, the prosecutor, and the courts. Bearing in mind the particular vulnerability of victims of domestic violence, the Court considers that the authorities should have looked into the applicant's situation more thoroughly. . . .

85. . . . [T]he combination of the above factors demonstrates that the authorities did not fully appreciate the seriousness and extent of the problem of domestic violence in Romania and that their actions reflected a discriminatory attitude towards the applicant as a woman.

86. In the light of the foregoing, the Court considers that there is *prima facie* evidence that domestic violence mainly affected women and that the general and discriminatory passivity of the authorities created a climate that was conducive to domestic violence. . . .

87. Bearing its above findings in mind, the Court considers that the violence suffered by the applicant can be regarded as gender-based violence, which is a form of discrimination against women. Despite the adoption by the Government of a law and a national strategy on preventing and combating domestic violence, which the Court appreciates, the overall unresponsiveness of the judicial system and the impunity enjoyed by aggressors, as found in the instant case, indicated that there was an insufficient commitment to take appropriate action to address domestic violence.

89. In view of the above, the Court concludes that there has been a violation of Article 14 of the Convention, read in conjunction with Article 3 in the instant case. . . .

Criminal Liability of Sibling Incest
Federal Constitutional Court of Germany (Second Senate)
2 BvR 392/07 (2008)*

[The Second Senate of the Federal Constitutional Court, with the participation of Justices Hassemer (Vice-President), Broß, Osterloh, Di Fabio, Mellinghoff, Lübbecke-Wolff, Gerhardt, and Landau.]

The provision in § 173.2 sentence 2 of the German Criminal Code** (. . . hereinafter: StGB), which threatens sexual intercourse between natural siblings with imprisonment of not more than two years or a fine, is compatible with the Basic Law. . . . The legislature did not overstep its discretion in decision-making when it deemed protection of the family order from the damaging effects of incest, protection of the “inferior/weaker” partner in an incestuous relationship, as well as the avoidance of serious genetic diseases in children of incestuous relationships, sufficient to punish incest, which is taboo in society, through criminal law. . . .

* Excerpted is the Court’s English Press Release; the judgment was published in German. See Press Release No. 29/2008: Criminal liability of sibling incest is constitutional (March 13, 2008), *available at* <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2008/bvg08-029.html>.

** Section 173.2 (2) of the German Criminal Code provides: “Whosoever performs an act of sexual intercourse with a consanguine relative in an ascending line shall be liable to imprisonment not exceeding two years or a fine; this shall also apply if the relationship as a relative has ceased to exist. Consanguine siblings who perform an act of sexual intercourse with each other shall incur the same penalty.”

1. With . . . the StGB, the legislature restricts the right to sexual self-determination of natural siblings by making the completion of sexual intercourse between them a punishable offence. . . . However, this is not an encroachment upon the core area of private life which is impermissible to the legislature from the outset. . . .

2. The legislature pursues objectives . . . that are not constitutionally objectionable and, in any event, in their totality legitimise the limitation on the right to sexual self-determination.

a) The essential ground considered by the legislature as the reason for punishment in § 173 StGB is the protection of marriage and the family. Empirical studies show that the legislature is not acting outside of its latitude for assessment when it assumes that incestuous relationships between siblings can lead to serious consequences damaging the family and society. Incestuous relationships result in overlapping familial relationships and social roles and, thus, can lead to interference in the system that provides structure in a family. This does not correspond with the image of family that is the basis of Article 6.1 [of the Basic Law].* It seems conclusive and is not far-fetched that the children of an incestuous relationship have significant difficulties in finding their place in the family structure and in building a trusting relationship to their closest caregivers. The function of the family, which is of primary importance for the human community and which is at the basis of Article 6.1, would be decisively damaged if the required structures were shaken by incestuous relationships. . . .

c) The legislature additionally based its decision on eugenic grounds and assumed that the risk of significant damage to children who are the product of an incestuous relationship cannot be excluded due to the increased possibility of an accumulation of recessive hereditary dispositions. In both medical and anthropological literature, which are supported by empirical studies, reference is made to the particular risk of the occurrence of genetic defects.

d) The challenged criminal provision is justified by the sum of the comprehensible penal objectives against the background of a societal conviction effective to date based upon cultural history regarding the fact that incest should carry criminal penalties, which is also evident in international comparison. As an instrument for protecting sexual self-determination, the public health, and especially the family, the criminal provision fulfils an appellative, law-stabilising function and, thus, a general preventive function, which illustrates the values set by the legislature and, therefore, contributes to their maintenance. . . .

* Article 6.1 of the Basic Law of Germany provides: "Marriage and the family shall enjoy the special protection of the state."

The dissenting opinion of Judge Hassemer is . . . based on the following considerations:

§ 173.2 sentence 2 StGB is incompatible with the principle of proportionality. The provision is not aimed at establishing a rule that would be internally consistent and compatible with the elements of the crime. From the outset consideration of eugenic aspects is not an objective of a criminal-law provision that is supportable under constitutional law. Likewise, neither the wording of the provision nor the statutory system indicate that the protective purpose of the provision or even just one such protective purpose could be protection of the right to sexual self-determination. Lastly, the prohibition on sibling incest also is not constitutionally in regard to protection of marriage and the family. Only sexual intercourse between natural siblings is a punishable offence, not, however, all other sexual acts. Sexual relationships between same-sex siblings and between non-blood-related siblings are not encompassed. If the criminal provision were actually aimed at protecting the family from sexual acts, it would also extend to these acts that are likewise damaging to the family. The evidence seems to indicate that the provision in its existing version is solely aimed at attitudes to morality and not at a specific legally protected right. Building up or maintaining societal consensus regarding values, however, cannot be the direct objective of a criminal provision. . . .

Stübing v. Germany
European Court of Human Rights (Fifth Section)
[2012] ECHR 656

. . . The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of: Karel Jungwiert, *President*, Boštjan M. Zupančič, Mark Villiger, Ann Power-Forde, Ganna Yudkivska, Angelika Nußberger, André Potocki, *judges*, and Claudia Westerdiek, *Section Registrar*

3. The applicant alleged that his criminal conviction had violated his right to respect for his private and family life. . . .

6. At the age of three, the applicant was placed in a children's home and later in the care of foster parents. . . .

7. In 1984, the applicant's biological sister, S. K., was born. The applicant was unaware of his sister's existence until he re-established contact with his family of origin in 2000. Following their mother's death in December 2000, the relationship between the siblings intensified. As from January 2001, the applicant and his sister had consensual sexual intercourse. They lived together for several years.

8. In 2001, 2003, 2004 and 2005 four children were born to the couple. Following the birth of the fourth child, the applicant underwent a vasectomy. The three older children were placed in the care of foster families. The youngest daughter

lives with her mother. [Applicant was repeatedly convicted of incest, and repeatedly committed the offence again.] . . .

14. On 22 February 2007 the applicant lodged a constitutional complaint, arguing, in particular, that Section 173 § 2 (2) of the Criminal Code had violated his right to sexual self-determination, had discriminated against him and was disproportionate. In addition, it interfered with the relationship between parents and their children born out of incestuous relationships.

15. On 26 February 2008 the Federal Constitutional Court, by seven votes to one, rejected the complaint as being unfounded. . . .

16. The legislator had pursued objectives that were not constitutionally objectionable and that, in any event, in their totality legitimised the limitation on the right to sexual self-determination. The primary ground for punishment was the protection of marriage and the family. . . . Incestuous relationships resulted in overlapping familial relationships and social roles and, thus, could damage the structural system of family life. The overlapping of roles did not correspond with the image of a family as defined by the Basic Law. . . .

18. The legislature had additionally based its decision on eugenic grounds and had assumed that the risk of significant damage to children who were the product of an incestuous relationship could not be excluded. In both medical and anthropological literature, which was supported by empirical studies, reference had been made to the particular risk of the occurrence of genetic defects.

19. The impugned criminal provision was justified by the sum of the above-mentioned objectives against the background of a common conviction that incest should be subject to criminal liability. This conviction was also evident on the international level. As an instrument for protecting self-determination, public health, and especially the family, the criminal provision fulfilled a signalling, norm-reinforcing and, thus, a general preventive function, which illustrated the values set by the legislature and, therefore, contributed to their maintenance. . . .

31. The applicant complained that his criminal conviction had violated his right to respect for his private and family life as provided in Article 8 of the Convention

55. The Court does not exclude that the applicant's criminal conviction had an impact on his family life and, possibly, attracted protection under Article 8 of the Convention, as he was forbidden to have sexual intercourse with the mother of his four children. In any event, it is common ground between the parties that the applicant's criminal conviction interfered with his right to respect for his private life, which includes his sexual life. The Court considers that there is no reason to hold otherwise

and endorses this assessment. The applicant's criminal conviction thus interfered with the applicant's right to respect, at least, for his private life. . . .

59. . . . 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. Accordingly, the Court has found that there must exist particularly serious reasons before interference on the part of public authorities concerning a most intimate aspect of private life, such as the manifestation of a person's sexuality, can be legitimate for the purposes of paragraph 2 of Article 8.

60. 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. By reason of their direct and continuous contact with the vital forces of their countries, the State authorities are, in principle, in a better position than the international court to give an opinion, not only on the "exact content of the requirements of morals" in their country, but also on the necessity of a restriction intended to meet them. . . .

63. The Court observes that the Federal Constitutional Court . . . concluded that the imposition of criminal liability was justified by a combination of objectives, including the protection of the family, self-determination and public health, set against the background of a common conviction that incest should be subject to criminal liability. The Federal Constitutional Court considered that sexual relationships between siblings could seriously damage family structures and, as a consequence, society as a whole. . . .

64. The Court notes that . . . the applicant's sister first entered into a sexual relationship with the applicant following their mother's death. At that time, the sister was sixteen years of age; the applicant was her senior by seven years. According to an expert opinion prepared before the District Court, the sister suffered from a serious personality disorder which, together with an unsatisfying family situation and mild learning difficulties, led to her being considerably dependent on the applicant. . . .

65. The Court considers that the above-mentioned aims, which had been expressly endorsed by the democratic legislator when reviewing the relevant legislation in the 1970s, appear not to be unreasonable. Furthermore, they are relevant in the instant case. Under these circumstances, the Court accepts that the applicant's criminal conviction corresponded to a pressing social need.

66. . . . [T]he Court concludes that the domestic courts stayed within their margin of appreciation when convicting the applicant of incest.

67. There has accordingly been no violation of Article 8 of the Convention. . . .

In February 2017, President of Russia Vladimir Putin signed into law a bill to amend Article 116 of the Criminal Code to reclassify first instances of violence against “close persons” as a civil, rather than a criminal offense. *See* “On Amending Article 116 of the Criminal Code of the Russian Federation” [О внесении изменений в статью 116 Уголовного кодекса Российской Федерации]. The law framed itself as “eliminating the ambiguous interpretation of the provisions of the Criminal Code of the Russian Federation that arose in connection with the adoption of the Federal Law of July 3, 2016,” which had aimed at decreasing instances of domestic violence “by establish[ing] liability for beatings against close people, and the article was supplemented with a note containing the definition of ‘close persons.’”

This bill provides for the introduction of changes to Article 116 of the Criminal Code of the Russian Federation by excluding “beatings against close persons” from among crimes. Thus, beatings against members of the family, other close relatives will be attributed to administrative violations. It is important to emphasize that the Criminal Code of the Russian Federation by the same Federal Law No 323-f3 was supplemented with a new article criminalizing the beating of a person subjected to administrative punishment. Thus, a person re-engaged for beatings will be prosecuted under criminal law.*

Domestic Abuse: Why Russia Believes the First Time Is Not a Crime Sarah Rainsford (January 31, 2017)**

. . . More than 600 Russian women are killed in their homes every month, according to estimates drawn from wider police statistics. Now some fear the situation could get worse.

Russia’s lower house of parliament, the Duma, has approved an amendment that removes domestic abuse from the criminal code. . . . If President Vladimir Putin signs off the change in the law as expected, it will mean that first-time offenders who beat a family member, but not badly enough to put them in hospital, will not face a prison sentence. The maximum penalty will be a fine or up to a fortnight in police custody.

* Translation checked by Claire Kim (Yale Law School, J.D. Class of 2017).

** Excerpted from Sarah Rainsford, *Domestic Abuse: Why Russia Believes the First Time Is Not a Crime*, BBC NEWS (January 31, 2017), available at <http://www.bbc.com/news/world-europe-38794677>.

The amendment sailed through parliament amid talk of protecting the family from interference. “For us, it is extremely important to protect the family as an institution,” Olga Batalina, one of the authors of the amendment explained beneath the vast chandeliers on the sweeping staircase into parliament.

Her proposal undoes a change made only last July when beating relatives was first defined as a criminal offence. . . . Deputies condemned it as “anti-family,” arguing that a stranger could slap a child and get a fine, while a parent who did the same risked a prison sentence.

Reversing that decision is part of a broader backlash in Russia against what are seen as alien, Western values. “We are talking about conflict in families. You should not point at this problem from the liberal point of view,” argues ultra-conservative deputy Vitaly Milonov. “That’s like having three in a bed. You are sleeping with your wife—and a human rights organisation.” . . .

A proposal for a specific law addressing domestic violence was sent to parliament well over a year ago. It includes restraining orders, prevention and special training for police. But the draft has made no progress; instead, deputies have lessened the penalties for abusers.

“It’s like they’ve been given freedom to beat: as if it’s not serious, just a slap or a shove. But it can lead to very serious consequences,” warns Irina Matvienko. She’s in charge of a hotline at the Anna crisis centre, which received some 5,000 calls last year from women seeking help. “Domestic violence is not about a normal family fight. We are talking about systematic behaviour. So allowing impunity is especially dangerous, because the woman is one-on-one with her abuser,” she argues. . . .

Due Diligence and Gender Violence: Parsing its Powers and its Perils*

Julie Goldscheid and Debra J. Liebowitz (2015)

. . . Human rights advocates increasingly invoke the due diligence standard as a tool in efforts to address gender violence via the international human rights system. That standard extends human rights protections to violations committed by non-State actors by holding States “responsible for private acts if they fail to act with due diligence”¹ to prevent gender violence, to prosecute and punish perpetrators, and to

* Excerpted from Julie Goldscheid and Debra J. Liebowitz, *Due Diligence and Gender Violence: Parsing its Powers and its Perils*, 48 CORNELL INTERNATIONAL LAW JOURNAL 301 (2015).

¹ Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, art. 4(c), U.N. Doc. A/RES/48/104 (December 20, 1993) See also Comm. on the Elimination of Discrimination against Women, 11th Sess., *General Recommendation No. 19: Violence against Women*, ¶ 9, U.N. Doc. A/47/38 (January 29, 1992)

protect and provide redress for its victims. International human rights bodies and some States' national courts now recognize the due diligence principle in their decisions and policy discourse. . . .

The notion of State responsibility is important, and is appealing in many ways, particularly when considering the near-universal history of non-responsiveness to, State approval of, and all-too-frequent participation in gender violence. But as this principle is newly applied to cases of gender violence, lessons from advocacy should be taken into account. The due diligence obligation's focus on State responsibility should be viewed with a cautious eye in light of the potential and proved hazards of State involvement. . . .

Many scholars argue that the anti-violence movement's partnership with the State has resulted in a de-politicization, professionalization, and standardization of the anti-domestic violence movement, with a problematic emphasis on criminal justice responses. Others caution that mainstream approaches to gender violence serve to reinforce women's traditional roles, rather than targeting root causes and gender-based inequalities.

In particular, the due diligence standard's explicit focus on prosecution and punishment amplifies concerns about inviting an enhanced State role in criminal justice interventions. For many, the State, particularly as embodied by the criminal justice system, is a perpetrator of violence rather than a protector against violence. State criminalization and incarceration policies exacerbate and perpetuate interconnected forms of gender violence, particularly for racial, ethnic, religious, and sexual minorities, and for others from marginalized communities, such as indigenous, immigrant, and disabled survivors. Criminal justice interventions have acute ramifications for women accused or convicted of defending themselves against a violent partner. In other cases, a dysfunctional criminal justice system itself perpetrates many rights violations. . . .

State efforts to encourage law enforcement responsiveness have led to mandatory interventions, such as mandatory arrests and no-drop prosecutions. Though some advocates support those reforms, the resulting dual arrests and arrests of women who use violence in self-defense raise a number of concerns. Multiple collateral consequences can follow a victim's arrest. For example, arrest records can jeopardize women's parental rights, through child-welfare interventions or the use of an arrest record in custody hearings. Battered immigrant women may be reluctant to call the police for fear of harmful immigration-related ramifications. Women who are part of racial or ethnic minority communities face police biases that influence which women are seen as "true" victims and which are not. LGBT survivors may resist criminal justice interventions because of fears that law enforcement either will not respond, will arrest and criminalize both parties, or will respond with homophobic comments that further subject them to abuse. Furthermore, in at least seventy-six countries, laws

criminalize some form(s) of private, consensual, same-sex behavior. For LGBT communities in these countries, using the criminal justice system to address gender violence is largely inconceivable.

Unchecked, the due diligence principle's call for State responsiveness poses the risk of exacerbating these concerns. On its face, the due diligence principle's enumeration of States' obligations to "prosecute" and "punish" are invitations to expand criminal justice interventions. Indeed, criminal justice-related reforms may be among the most common measures taken to meet international obligations under CEDAW [Convention on the Elimination of all Forms of Discrimination against Women]. Advocates may seek criminal justice responses, particularly in contexts where formal mechanisms do not punish, or where they condone, gender violence. In some places, however, inter-personal violence may not be seen as a local issue that can be addressed by law enforcement interventions. In the case of Armenia, for example, locals interpreted the focus on criminal justice responses and accompanying State services (like shelters and hotlines, for example), as a "Western" import, making it difficult to develop national support for addressing domestic violence. While the decision whether to advocate for particular reforms can only be made in local contexts, the limits of criminal justice strategies should be part of the calculus. . . .

The broad framing of the due diligence obligation is infused with a consistent call for use of the criminal justice system to address gender violence. This focus on criminal justice engagement is, in part, a response to historic and current State indifference to or complicity in gender violence. While most would agree that some criminal justice engagement to address gender violence is appropriate, the flip-side of the broad sweep of the obligation is that the guiding documents are not careful about the limits of State action. As such they open the door to controversial forms of criminal justice intervention without problematizing those remedies. Illustrative of this endorsement of mandatory criminal justice policies is a 2010 United Nations General Assembly resolution, which requires: . . .

taking effective measures to *prevent the victim's consent* from becoming an impediment to bringing perpetrators of violence against women and girls to justice, while ensuring that appropriate safeguards to protect the victim and adequate and comprehensive measures for the rehabilitation and reintegration of victims of violence into society are in place. . . .

These endorsements of mandatory criminal justice interventions in cases of gender violence do not acknowledge the contentious debate about whether removing discretion from women survivors of gender violence is a good way to deal with the inadequate treatment of interpersonal violence by law enforcement agencies. This framing of the issue is particularly noteworthy given extensive feminist scholarship situating consent as central to sexual agency, bodily integrity, and human rights. While

some feminist scholars and activists clearly support these types of mandatory interventions, there can be no question that they are extremely controversial. . . .

[A] few beginning suggestions [might be made as to a framework that allows advocates and policymakers to adequately consider the risks of state intervention]. . . . First, advocates should critically consider how, why, and in what context State responsiveness should be sought before endorsing particular reforms. Calls for a robust role for the State may make most sense in contexts in which the State has not acted at all. . . .

Second, interpretations of due diligence principles should take into account existing critiques of the role of the State. For example, policy-based and judicial interpretations can employ balancing tests that explicitly consider whether a particular decision triggers problems attendant either to over-responsiveness or to under-responsiveness. Interpretations should consider the impact of any intervention on those at the margins, and should take into account the experiences and recommendations of both advocates and survivors.

Third, analyses of State responses . . . should recognize that States may meet their obligations by exercising discretion not to respond or by delegating response to others. This may entail delegating the response to a community-based NGO. In this context, it is more helpful to think of the State's obligation as State accountability, rather than State responsiveness. . . .

Finally, it may be that the type of State response sought makes a difference. For example, the exercise of State power to punish or to coerce then triggers different concerns than the exercise of State power to distribute resources, or to ensure the comprehensive and accessible delivery of social and legal services. As Beth Richie has said, we might urge State intervention that is "caring, but not controlling." . . .

The cases and guiding international documents highlight the fact that it is much easier to identify failures of State responsibility than it is to be prescriptive in the first order about what the State ought to do. The interpretations favoring State intervention make sense in light of the long history of State refusal and failure to respond to or to sanction intimate partner and sexual violence. Yet, we need to be careful that in the push for State accountability, we do not romanticize the role of the State or the ability of the criminal justice system to address effectively the problem of gender violence. . . .

Should Domestic Violence Be Decriminalized?

Leigh Goodmark (2017)*

. . . One could make a credible, even a strong, theory-based case for the decriminalization of domestic violence. There is limited to no evidence that criminalization deters domestic violence and reason to believe that criminalization helps to create conditions that stimulate domestic violence. The costs of criminalization, particularly when prosecution leads to incarceration, are quite high. Criminalization undermines the economic and social structures of marginalized neighborhoods, depressing ex-offenders' employment opportunities and destroying relationships within communities. The traumatic effects of the inhumane conditions and exposure to violence within prisons set into motion a destructive cycle of violence when those who abuse are released into the community and resume their intimate relationships. The costs of incarceration particularly, and criminalization generally, far outweigh the limited benefits criminalization provides. And the focus on criminalization is preventing the development of alternatives that could provide justice for people subjected to abuse without the harms associated with the carceral system.

But complete decriminalization of domestic violence is unlikely, and probably unwise. Assault is one of the early common law crimes, and assault statutes cover a range of behaviors from minor incidents to serious injuries. It is unrealistic to believe that there would be widespread support for repealing these laws; the ratchet of criminalization tends only to move in one direction. Politicians and many anti-violence advocates are committed to the criminalization of domestic violence and unlikely to turn away from it completely. Arrest and prosecution play an important role in securing safety and justice for some people subjected to abuse. Whatever one thinks of the choice to criminalize as a means of making the private public, or expressing society's interest in stemming intimate partner violence, the message sent by repealing such statutes at this point would be problematic. While the prosecution of each and every individual act of intimate partner violence, however small, may not appreciably benefit society, the need still exists to ensure that serious, repeat offenders (who are not deterred by current sanctions) are prevented from continuing to do harm to their partners. Even those who are most concerned about the detrimental aspects of criminalization have experience with offenders who they believe should be isolated from the greater society.

Instead of decriminalizing domestic violence, then, we could rethink two aspects of the current criminal legal regime. First, the criminal legal system should respond to serious intimate partner violence without doing harm to those it was intended to benefit. Second, the punishment meted out for intimate partner violence should address the harm done without creating the potential for increased violence.

* Excerpted from Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 HARVARD JOURNAL OF LAW AND GENDER 53 (2017).

Rather than viewing punishment for domestic violence as a binary—a perpetrator is either found guilty and incarcerated or not—we should conceptualize criminalization and punishment as a spectrum, with a range of possible responses. . . .

Mandatory policies have been controversial among anti-violence advocates since the first mandatory arrest policy was adopted in 1977. From their inception, some anti-violence advocates, particularly women of color, questioned both the effectiveness of mandatory interventions and the disproportionate impact these policies would have on communities of color. . . . The desire to avoid mandatory reporting statutes may prevent some from seeking assistance. Although the two are often conflated, criminalizing domestic violence does not require the implementation of mandatory policies. Repealing mandatory policies could prevent a substantial amount of harm to people subjected to abuse. . . .

Using “less costly, less coercive, more respectful” options before resorting to incarceration serves several goals. Restorative approaches engage offenders in thinking about the impact of their actions on their victims, helping to engender empathy; punishment-focused interventions make it difficult for perpetrators to think about anything but avoiding that punishment. Starting with restorative approaches also underscores the importance of treating citizens with dignity and respect. As Braithwaite writes, “[I]f we want a world with less violence and less dominating abuse of others, we need to take seriously rituals that encourage approval of caring behavior so that citizens will acquire pride in being caring and non dominating.” . . .

When incarceration is used, it should be used with a clear understanding of its limitations. Incarceration has only a limited impact on decreasing the rate of serious crime. Keeping those who commit intimate partner violence in prison for long periods of time is unlikely to deter further violence. Studies have found that longer sentences do not have a greater deterrent effect on perpetrators. Moreover, incarceration is unlikely to change the behavior of those who commit intimate partner violence. “Even the staunchest advocates of incarceration do not argue that prisons are successful [correctional] institutions, only that they punish well.”

CONSTITUTIONAL CONSTRAINTS ON POLICING

DISCUSSION LEADERS

TRACEY MEARES, TOM TYLER, AND CARLOS ROSENKRANTZ

VI. CONSTITUTIONAL CONSTRAINTS ON POLICING

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Policing is one of the historic functions of the state and one of its most visible manifestations. Individuals have diverse relationships with law enforcement, as some communities and individuals have intense and regular contact and others are less involved with police. After considering the role played by police in legitimating state authority, we turn to the law of policing to review cases regulating investigations, stops, detention, and the use of force.

As the materials reflect, courts have inserted a layer of constitutional constraints on many police practices. As you read, consider the sources of constraints on policing and the consequences and utilities of legal oversight. How do the interaction between courts and police align with democratic constitutional orders' attempts to provide "peace and security"?

Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization [Part I]

Tom R. Tyler, Jeffrey Fagan, and Amanda Geller (2014)*

. . . What is legitimacy? In the Weberian view, legitimacy is based on beliefs that legal authorities have the right to dictate appropriate behavior. As a consequence, members of the public internalize an obligation and responsibility to follow the law and obey the decisions of legal authorities. Although definitions of legitimacy vary widely, a key feature of many is that it confers the right to command and to dictate behavior, and that it promotes the corresponding duty to obey. . . . [Max] Weber, like [Niccolo] Machiavelli . . . , argued that successful authorities and institutions use more than brute force to execute their directives. They also strive to win the consent of the governed so that their commands will be voluntarily obeyed.

Others suggest that legitimacy of legal authorities is earned, if not negotiated, through actions that demonstrate its moral grounding. In this view, legitimacy is imparted to legal institutions (or other institutions with power over subordinates) when there is moral alignment between those with power and their subordinates. Legitimacy in this framework is the right to rule, and this right is earned in part by what [David] Beetham calls “the degree of congruence, or lack of it, between a given system of power and the beliefs, values and expectations that provide its justification.” Legitimacy is not a given power, but accumulates through dense social interactions with authorities, where accounts and evaluations of experiences with the police are shared through efficient information markets and social networks. There also is an implicit emotional component to this view, suggesting that legitimacy is the product of salient gratifying interactions and, alternately, that it can be corroded through negative interactions. Neutrality in interactions produces little more than more neutrality, and suggests a situational and transient tie between the powerful and subordinates.

[Research on procedural justice has demonstrated strong support for a model of legitimacy that centers on the relationship between authorities and the public. This framework has shown that fairness in how authorities act is central to whether people see them as legitimate, more so than whether people receive favorable or fair outcomes from authorities. People confer legitimacy to authorities when they believe those authorities show them respect, demonstrate that they are trustworthy and act with neutrality: when they demonstrate procedural justice. Fairness is so critical because it is indicative of the relationship between authorities and the public. The form of legitimacy that authorities gain by demonstrating procedural justice goes beyond mere acceptance of their status and position; the public places trust and confidence in authorities and views authorities as acting in line with their own values. When people view authorities as procedurally just, the legitimacy that results leads not

* Excerpted from Tom R. Tyler, Jeffrey Fagan, and Amanda Geller, *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization*, 11 JOURNAL OF EMPIRICAL LEGAL STUDIES 751 (2014).

only to more compliance with their directives, but active cooperation to help authorities, engagement in the community, and even greater trust within communities.*]

[Herbert] Kelman and [V. Lee] Hamilton argue that legitimacy “authorizes” a legal actor to determine appropriate behavior within a specific situation; the citizen then feels obligated to follow the directives or rules that authority establishes. . . . [T]he authorization of actions by authorities “seem[s] to carry automatic justification for them. Behaviorally, authorization obviates the necessity of making judgments or choices. Not only do normal moral principles become inoperative, but—particularly when the actions are explicitly ordered—a different type of morality, linked to the duty to obey superior orders, tends to take over.” . . .

**Policing as a Public Good:
Reconstituting the Connections Between Policing and the State**
Ian Loader and Neil Walker (2001)**

. . . At a foundational level, the modern state draws on the police’s latent coercive power to secure and guarantee the daily routines of general order which are prerequisite to the pursuit of more specific goods (trade, communication, etc.)—policing, in short, secures the order that makes the governance of territory possible. More specifically, . . . the police have been required at the level of policy generation and implementation to . . . ‘stand in’ for, other agencies in the supply of state-guaranteed goods and services. Taken together, this adds up to a theory of the police as a significant constitutive element in the production and reproduction of political order and community. . . .

Take first community policing, a policy which has acquired almost global prominence—and much warm official rhetoric—in recent decades. While one finds varying strategies and techniques parading under this banner, they share in common the attempt to embed policing more deeply into the governance of local social relations. Minimally, this takes the form of policies aimed at reinstating the police constable as a dedicated, exemplary, networking presence within particular localities. More boldly, one recalls John Alderson’s ambitious attempts to construct the police as local civic leaders, spearheading and coordinating efforts to ‘activate the good’ within communities. And we have of late witnessed the coming to prominence of ‘problem-

* See generally Tom R. Tyler and Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 20 *PSYCHOLOGY, PUBLIC POLICY, AND LAW* 78 (2014); TOM R. TYLER AND YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* (Russel Sage Foundation, 2002).

** Excerpted from Ian Loader and Neil Walker, *Policing as a Public Good: Reconstituting the Connection Between Policing and the State*, 5 *THEORETICAL CRIMINOLOGY* 9 (2001).

oriented policing’ with its conception of the police, not as a force reacting willy-nilly to outbreaks of crime and disorder, but as an institution proactively engaged with other agencies in attempting to forge holistic solutions and deep-seated problems of which crime and disorder are merely the symptoms. . . .

[Richard] Ericson and [Kevin] Haggerty contend that the ‘modern’ police project of tackling crime and securing territorial order is being transformed by a pervasive concern with information management organized around risk. The police, they argue, have been reconfigured as ‘knowledge workers,’ generating, brokering and disseminating—socially authoritative—information to other governmental agencies (licensing authorities, insurance companies, credit organizations, media and the like) in order to assist them in constituting individuals and populations ‘in their respective risk categories.’ Here community policing becomes ‘communications policing’ as the police come (again) to be deeply and widely embedded in processes of government; this time at the hub of a loosely coupled informational network whose express purpose is to classify and administer the population efficiently with a view to suppressing risk. . . .

[A] conception of policing closely tied to broader programmes of government can make sense of late modern police practice—something that a Weberian preoccupation with legitimate force can only partially explain. . . . [A]n understanding of policing as civic governance appears to chime closely with . . . some important contemporary transformations in the nature of power and rule; one that conceives of the police, not as an ever-present threat to individual liberties (about which liberals routinely fret), but as an active agent in the construction of a liberal political order. . . .

[Yet another] basis for grounding the connection between policing and the state can be located within economics, and represents an attempt to reconstruct in formal theoretical terms what is more usually presented as a historically informed thesis about police and state formation. Here the focus is on an economic conception of ‘public goods,’ by which is meant goods that are most efficiently provided in a compulsorily collective manner, a prime candidate for which is the state. . . .

[Another] possible means of connecting policing and state is symbolic rather than instrumental (though it is not without its social effects) and concerns the cultural linkage between police, security, state and nation. . . . [J]ust as another feature of the development of the political form of the modern state since the 18th century has been its provision, in many instances, of a framework to nurture and sustain the cultural identity of the nation, the development of policing has also become interwoven with *this* wider project; the police institution and officer often providing an important aspect of the iconography of the *nation* state. Policing, in short, has come to be viewed as both a constituent and expression of collective national identity. . . .

[P]olicing is—in a thick, sociological sense—a public good, and [it is upon this basis that we can reformulate and ground] a positive connection between policing and

the state. This entails us, first, explaining why we must conceive of the good policing offers to guarantee—namely, security—in essentially social terms; and second, developing a revised conception of policing as a public good that is capable of grounding the presumption that state institutions should continue to occupy a privileged place in the delivery and governance of security. In so doing, we aim to provide an account of the police-state nexus that is both sociologically viable under contemporary conditions and more normatively adequate to the task of producing democratic, equitable and effective policing than any of . . . [a number of other contemporary approaches] considered alone or in limited combination.

What then does it mean, in sociological rather than economic terms, to call something—such as policing and security—a public good? . . . Unlike . . . two aspects [which are] central to a thin, economic conception of public goods (jointness of production and non-excludability), the ‘thicker’ meaning of that term denotes, in the words of Jeremy Waldron, ‘something which is said to be valuable for human society without its value being adequately characterizable in terms of its worth to any or all of the members of society considered one by one.’ In other words, the value of public goods in the social or communal sense (unlike technical public goods such as clean air and street-lighting) is not reducible to their aggregate value to each member of society considered discretely; rather, ‘no account of their *worth* to anyone can be given except by concentrating on what they are worth to everyone together.’ . . .

Other goods mentioned by Waldron as public goods in the deeper sense that they are communally constituted and experienced include fraternity and solidarity. But what of policing and security? Is this a public good in this thicker, communal sense? Our answer is unequivocally in the affirmative. To the extent that public safety is inexorably connected with the quality of our association with others, this must surely be the case. In so far as it depends upon the texture of social relations and the density of social bonds this must be so. And in as much as it remains tied up with the nature and legitimacy of public power and authority this must clearly hold. Our sense of safety and security is, in short, like conviviality, *irreducibly social*, deeply implicated in our relationship with others. Indeed, it might even be suggested (just as it is within economic discourse on public goods) that policing and security offer the primary and fundamental example of a public good in this thicker sense—one which is prerequisite to the generation of other such goods.

By presenting security as an irreducibly social accomplishment, and insecurity as an irreducibly social failure—a ‘collective bad’—we hope to address those objections which view any conception of policing that prioritizes community over individual, public over private, as inherently suspect, intrinsically threatening to individual liberty and intolerant of social diversity. Such objections, which lie behind some of the concerns noted above about recognizing and promoting a strong connection between police, state and national culture, fail to distinguish between the moment in normative political theory where choices and trade-offs have to be made

between community-centred and individual-centred values, and a prior sociological claim about the basic social character of security. The prior claim is compelling—something crucial about security fails to be understood if it is not acknowledged, yet does not necessarily yield an illiberal and anti-pluralist conception of political community and its associated policing institutions. . . .

We might usefully distil these imperatives and values under . . . [four headings]:

Legitimate force: The capacity to concentrate and circumscribe non-negotiable coercion serves as both the bedrock of effective policing and as something that lends coherence to much of what policing has come in liberal democratic societies to be about. Its connection to the state is thus central to the possibility of directing such violence to the common good, ensuring that it does not undermine democratic autonomy, and rendering its exercise subject to public deliberation and account. To the extent that this linkage is severed, we are left with ‘illegitimate power.’

Coordinated governance: In the face of a proliferation of plural, fragmented policing bodies, the state (alone) possesses the knowledge and expertise required both to ‘steer’ the delivery of services among diverse policing forms, to coordinate the relationship of policing agencies to other governmental authorities, and to ensure that the increasingly complex institutional pattern of policing does not present a closed and self-corroborating bureaucratic system, opaque and unresponsive to its wider public environment. It exhibits, in particular, the capacity to bring reflexive coherence and forms of democratic accountability to the inter-organizational networks and multi-level political configurations within which the police are now situated, and represents as such a prerequisite of equitable and effective policing.

Collective provision: Economists are right to emphasize the problems of delivering goods which require joint production and whose benefits are non-excludable. While the state cannot resolve the problems of collective action (for example, consumer ‘free-riding,’ the production of ‘club goods’) it is better equipped than most for the task. State action is thus needed if policing is to be delivered efficiently, equitably or (even) at all.

Communities of attachment: State policing forms but one of the means by which territorial and interest communities can be transformed into communities where reciprocity and mutuality have some resonance, one means by which minimal ethical bonds of community can be fostered and sustained. . . . Police institutions benefit in terms of the legitimacy and effectiveness from the capacity of the state to nurture inclusionary communities of attachment, and in turn, as they are themselves important symbolic tokens of sovereign state authority—indeed, of any general form or level of political authority—such police institutions may undergird and reinforce the authority of the political community which they purport to represent.

The complex of ‘virtues’—coercive, logistical, economic and, above all, cultural—that go to make up this revised conception of policing as a ‘thick’ public good offer we think a basis for reconstituting the connection between policing and state that is both sociologically plausible and normatively adequate. . . .

INVESTIGATION

Surveillance: Covert and Overt

R. v. TELUS Communications Company

Supreme Court of Canada

2013 SCC 16

Present: McLachlin, Chief Justice, and LeBel, Fish, Abella, Cromwell, Moldaver and Karakatsanis, Justices. . . .

Abella J.—

[1] For many Canadians, text messaging has become an increasingly popular form of communication. Despite technological differences, text messaging bears several hallmarks of traditional voice communication: it is intended to be conversational, transmission is generally instantaneous, and there is an expectation of privacy in the communication. The issue in this appeal is the proper procedure under the *Criminal Code*, R.S.C. 1985, c. C-46, for authorizing the prospective daily production of these messages from a computer database maintained by a telecommunications service provider.

[2] The service provider in this case is TELUS Communications Company. It urges this Court to find that the prospective, daily acquisition of text messages from their computer database constitutes an interception of private communications and therefore requires authorization under Part VI of the *Code*, a comprehensive scheme for “wiretap authorizations” for the interception of private communications. The Crown, on the other hand, contends that the retrieval of messages from a computer maintained by a service provider does not fall within the scope of Part VI because the production of messages in computer storage does not amount to an “interception,” and that the police are therefore permitted to use the general warrant power

[3] . . . The question in this appeal is whether the technical differences inherent in Telus’ transmission of text messages should deprive Telus subscribers of the protection of the *Code* that every other Canadian is entitled to. . . .

[16] Section 487.01 . . . was meant to make search warrants available for techniques or procedures not specified in the *Code*. It authorizes a judge to issue a general warrant permitting a peace officer to “use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure”

[18] Viewed contextually, . . . s. 487.01(1)(c) stipulates that the general warrant power is residual and resort to it is *precluded* where judicial approval for the proposed technique, procedure or device or the “doing of the thing” is available under the *Code* or another federal statute. . . .

[20] This means that the Crown is only entitled to a general warrant where it can show that no other provision would provide for a warrant, authorization or order permitting the technique, including, . . . provisions that authorize techniques which are substantively equivalent to the technique proposed by the police in a given case. . . .

[23] Section 184(1) makes it an indictable offence to “wilfully intercept[t] a private communication” by use of a device. Part VI provides a comprehensive scheme for the authorization of these interceptions. . . .

[24] Because the purpose of Part VI is to restrict the ability of the police to obtain and disclose private communications, it is drafted broadly to ensure the necessary protection. . . .

[26] [The statutory definition of private communication] focuses on the individual’s reasonable expectation of privacy in the communication. . . .

[32] As all parties acknowledged, it is clear that text messages qualify as telecommunications under the definition in the *Interpretation Act*. They also acknowledged that these messages, like voice communications, are made under circumstances that attract a reasonable expectation of privacy and therefore constitute “private communication” within the meaning of s. 183. . . .

[33] The issue then is how to define “intercept” in Part VI. The interpretation should be informed not only by the purposes of Part VI, but also by the rights enshrined in s. 8 of the *Charter* [“Everyone has the right to be secure against unreasonable search or seizure”], which in turn must remain aligned with technological developments. . . .

[36] The interpretation of “intercept a private communication” must, therefore, focus on the acquisition of informational content and the individual’s expectation of privacy at the time the communication was made. In my view, to the extent that there may be any temporal element inherent in the technical meaning of intercept, it should not trump Parliament’s intention . . . to protect an individual’s right to privacy in his or her communications. . . .

[38] Focusing on the fact that the *Code* draws a distinction between the interception of private communications and the disclosure of those communications, fails to provide the intended protection under Part VI. On the contrary, it allows technological differences in Telus' transmission process to defeat Parliament's intended protection of private communications from state interference. . . .

[41] The communication process used by a third-party service provider should not defeat Parliament's intended protection for private communications. . . .

[45] The general warrant in this case purported to authorize an investigative technique contemplated by a wiretap authorization under Part VI, namely, it allowed the police to obtain *prospective* production of *future* private communications from a computer maintained by a service provider as part of its communications process. Because Part VI applied, a general warrant under s. 487.01 was unavailable.

[46] Accordingly, I would allow the appeal and quash the general warrant and related assistance order.

[Justices Moldavar and Karakatsanis concurred, but favored a narrower decision invalidating the warrant but not resolving whether the investigative technique was, within the meaning of s. 183 of the *Code*, an intercept. Chief Justice McLachlin and Justice Cromwell dissented, arguing that the investigative technique authorized by the general warrant was not an interception of private communications. They emphasized the distinction between the interception of private communications and the disclosure, use, or retention of such communications, and concluded that the police sought disclosure of information that Telus had lawfully intercepted.]

**Investigative Powers of the Federal Criminal Police Office for
Fighting International Terrorism Case**
Federal Constitutional Court of Germany (First Senate)
1 BvR 966/09 (2016)

[The First Senate of the Federal Constitutional Court, with the participation of Justices Kirchhof (Vice-President), Gaier, Eichberger, Schluckebier, Masing, Paulus, Baer, Britz.]

[The complaints challenged the federal legislature's authorization of the Federal Criminal Police Office (BKAG) to carry out covert surveillance measures—including surveillance of private homes, remote searches of information technology

systems, and telecommunications surveillance and data collection—for the purpose of protecting against international terrorism threats.] . . .

The challenged surveillance and investigative powers authorise interferences with fundamental rights, which, depending on which fundamental right is affected and on the varying weight of the interference, must individually be measured against the principle of proportionality and the principle of legal clarity and specificity. The powers have in common that the potential interferences they authorise are for the most part very serious, yet since their objective is to protect against the threat of international terrorism, they have a legitimate aim and are, to that end, suitable and necessary.

The challenged powers authorise the Federal Criminal Police Office to covertly collect personal data in the context of the protection against threats and the prevention of criminal offences. This allows for—depending on the power in question—interferences with the fundamental rights of Art. 13 sec. 1 [inviolability of the home], Art. 10 sec. 1 [privacy of telecommunications] and Art. 2 sec. 1 [personal freedoms] in conjunction with Art. 1 sec. 1 GG [human dignity], the latter both in its manifestation as the right to the guarantee of the confidentiality and integrity of information technology systems as well as the right to informational self-determination. . . .

Covert surveillance measures, to the extent that they seriously interfere with privacy, as most of the measures at issue here do, are only compatible with the Constitution if they pursue the aim of protecting or legally reinforcing sufficiently weighty legal interests when these are in danger or are violated, as evidenced by strong factual indications in the specific case. . . .

[T]he collection of data by means of covert surveillance measures having a high interference intensity is generally only proportionate if there is a sufficiently specific foreseeable danger to these legal interests in an individual case and the person targeted by these measures appears, to a reasonable person examining the objective circumstances, to be involved therein. . . .

Tiered requirements arise with regard to the extent to which surveillance measures can be carried out in a target person's sphere where the measures also affect persons not responsible for particular actions or circumstances or who are not suspects and therefore bear no special responsibility. . . .

The ordering of other covert surveillance measures directly targeting third parties is not impermissible *per se*. . . . The extension of such an authorisation to third parties is subject to strict proportionality requirements and requires a specific individual proximity of the person concerned to the threat or criminal offence being investigated. . . .

Overarching procedural requirements also derive from the principle of proportionality. The investigative and surveillance measures in question here, which predominantly involve serious interferences, and regarding which it can be presumed that they will also record highly private information, and that are carried out covertly without the knowledge of the affected persons, as a rule require prior review by an independent body, in the form, for example, of a judicial order. . . .

The principle of proportionality also sets requirements for transparency, the judicial protection of individuals, and supervisory control. . . .

The provision of deletion requirements also belongs to the overarching proportionality requirements. The purpose of these is to ensure that the use of personal data remains limited to the purposes that justified the data processing, and that the use is no longer possible once these have been achieved or settled. The deletion of the data must be documented in order to ensure transparency and oversight.

In various respects, the challenged police surveillance measures do not satisfy the constitutional requirements set out above with regard to their respective conditions for interference. . . .

§ 20g sec. 1 BKAG permits surveillance outside of private homes using the particular means of data collection defined in greater detail in § 20g sec. 2 BKAG. It thus authorises the Federal Criminal Police Office to interfere with the right to informational self-determination (Art. 2 sec. 1 in conjunction with Art. 1 sec. 1 GG). . . .

The provision permits surveillance outside of private homes using the means listed in section 2. Among these, in particular, are surveillance for extended periods, the covert creation of visual records, the covert monitoring of non-public speech, the application of tracking devices, or the use of police informants and undercover investigators. . . .

§ 20h BKAG permits audio and visual surveillance in private homes. It thus constitutes an interference with Art. 13 sec. 1 GG.

With the power to conduct surveillance within private homes, the provision authorises interferences with fundamental rights that are particularly serious. It permits the state to penetrate into spaces that are a person's private refuge and that are closely linked to human dignity. This does not, as implied by Art. 13 secs. 3 and 4 GG, rule out surveillance measures. The protection against threats from international terrorism may justify such measures. These are, however, subject to particularly strict requirements, which § 20h BKAG does not fulfil in every respect.

§ 20h secs. 1 and 2 BKAG is not constitutionally objectionable insofar as it—comprehensively, with regard to all persons potentially addressed—governs the general conditions for the surveillance of private homes. . . .

There is no constitutional objection to be raised with regard to the surveillance of private homes in terms of its procedural design. In particular, it is to be ordered by a judge. . . .

Specific constitutional requirements also arise at the level of data analysis and data use. It must be provided that the results of the surveillance will be screened by an independent body. . . .

In the case that, despite all safeguards, information relevant to the core area is collected, both a prohibition of its use, as well as a deletion requirement, including the documentation of the deletion, must be put in place.

On this basis, § 20h sec. 5 BKAG satisfies the constitutional requirements at the data collection level, but not at the level of its use. . . .

§ 20k sec. 1 BKAG authorises access to information technology systems and permits covert remote searches of information technology systems, by means of which data saved or stored on the affected person’s private computer or other computers linked thereto (for example in “the cloud”) can be collected and the person’s online behaviour can be tracked. The provision thus permits interference with the fundamental right to the guarantee of the confidentiality and integrity of information technology systems (Art. 2 sec. 1 in conjunction with Art. 1 sec. 1 GG). . . .

[T]he measures in question lack constitutionally sufficient safeguards at the level of a subsequent protection of the core area. § 20k sec. 7, sentences 3 and 4 BKAG do not provide for sufficiently independent review.

[The Court also held that § 20l, governing surveillance of ongoing telecommunications, and § 20m, governing the collection of telecommunications traffic data, were overbroad, without adequate protection for persons subject to professional confidentiality, and lacking specifications for regular mandatory reviews, documentation requirements, and reporting duties to Parliament and the public. The Court also criticized the exception from the obligation to delete collected data for certain law enforcement purposes, under §20v. The Court then considered provisions permitting the transfer of data to third-party authorities and authorities in third countries. The Court declared certain sections of §20h and §20v unconstitutional and void, and incapable of legislative remedy. The Court declared other challenged provisions incompatible with the Constitution in their drafting, but not void, meaning that these provisions, subject to certain restrictions, would stay in effect through June 2018. The dissenting judges, Justice Eichberger and Justice Schluckebier, argued that the provisions found unconstitutional could instead have been interpreted as in conformity with the German Basic Law.]

Florida v. Jardines
Supreme Court of the United States
133 S. Ct. 1409 (2013)

Justice Scalia delivered the opinion of the Court.

We consider whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a "search" within the meaning of the Fourth Amendment. . . .

The Fourth Amendment provides in relevant part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Amendment establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." . . . That principle renders this case a straightforward one. The officers were gathering information in an area belonging to Jardines and immediately surrounding his house—in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner.

The Fourth Amendment "indicates with some precision the places and things encompassed by its protections": persons, houses, papers, and effects. The Fourth Amendment does not, therefore, prevent all investigations conducted on private property; for example, an officer may . . . gather information in what we have called "open fields"—even if those fields are privately owned—because such fields are not enumerated in the Amendment's text.

But when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.

We therefore regard the area "immediately surrounding and associated with the home"—what our cases call the curtilage—as "part of the home itself for Fourth Amendment purposes." That principle has ancient and durable roots. Just as the distinction between the home and the open fields is "as old as the common law," so too is the identity of home and what Blackstone called the "curtilage or homestall," for the "house protects and privileges all its branches and appurtenants." 4 W. Blackstone, *Commentaries on the Laws of England* 223, 225 (1769). This area around the home is

“intimately linked to the home, both physically and psychologically,” and is where “privacy expectations are most heightened.”

While the boundaries of the curtilage are generally “clearly marked,” the “conception defining the curtilage” is at any rate familiar enough that it is “easily understood from our daily experience.” Here there is no doubt that the officers entered it: The front porch is the classic exemplar of an area adjacent to the home and “to which the activity of home life extends.” . . .

[A] police officer not armed with a warrant may approach a home and knock, precisely because that is “no more than any private citizen might do.”

But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*. . . . To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police. . . . Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search. . . .

The government’s use of trained police dogs to investigate the home and its immediate surroundings is a “search” within the meaning of the Fourth Amendment. The judgment of the Supreme Court of Florida is therefore affirmed.

Justice Kagan, with whom Justice Ginsburg and Justice Sotomayor join, concurring.

For me, a simple analogy clinches this case—and does so on privacy as well as property grounds. A stranger comes to the front door of your home carrying super-high-powered binoculars. He doesn’t knock or say hello. Instead, he stands on the porch and uses the binoculars to peer through your windows, into your home’s furthest corners. It doesn’t take long (the binoculars are really very fine): In just a couple of minutes, his uncommon behavior allows him to learn details of your life you disclose to no one. Has your “visitor” trespassed on your property, exceeding the license you have granted to members of the public to, say, drop off the mail or distribute campaign flyers? Yes, he has. And has he also invaded your “reasonable expectation of privacy,” by nosing into intimacies you sensibly thought protected from disclosure? Yes, of course, he has done that too. . . .

Like the binoculars, a drug-detection dog is a specialized device for discovering objects not in plain view (or plain smell). And as in the hypothetical above, that device was aimed here at a home—the most private and inviolate (or so we expect) of all the places and things the Fourth Amendment protects. Was this activity a trespass? Yes, as the Court holds today. Was it also an invasion of privacy? Yes, that as well. . . .

[T]he dissent's argument that the device is just a dog cannot change the equation. . . . [T]he "sense-enhancing" tool at issue may be "crude" or "sophisticated," may be old or new (drug-detection dogs actually go back not "12,000 years" or "centuries," but only a few decades), may be either smaller or bigger than a breadbox; still, "at least where (as here)" the device is not "in general public use," training it on a home violates our "minimal expectation of privacy"—an expectation "that *exists*, and that is acknowledged to be *reasonable*." That does not mean the device is off-limits, as the dissent implies; it just means police officers cannot use it to examine a home without a warrant or exigent circumstance. . . .

Justice Alito, with whom The Chief Justice, Justice Kennedy, and Justice Breyer joined, dissenting: . . .

[I]n the entire body of common-law decisions, the Court has not found a single case holding that a visitor to the front door of a home commits a trespass if the visitor is accompanied by a dog on a leash. On the contrary, the common law allowed even unleashed dogs to wander on private property without committing a trespass. . . .

[T]he real law of trespass provides no support for the Court's holding today. While the Court claims that its reasoning has "ancient and durable roots," its trespass rule is really a newly struck counterfeit. . . .

Public Exposure

Paul v. Davis Supreme Court of the United States 424 U.S. 693 (1976)

Mr. Justice Rehnquist delivered the opinion of the Court. . . .

In late 1972 [the Petitioners] agreed to combine their efforts for the purpose of alerting local area merchants to possible shoplifters who might be operating during the Christmas season. In early December petitioners distributed to approximately 800 merchants in the Louisville metropolitan area a "flyer," which began as follows:

TO: BUSINESS MEN IN THE METROPOLITAN AREA

The Chiefs of The Jefferson County and City of Louisville Police Departments, in an effort to keep their officers advised on shoplifting activity, have approved the attached alphabetically arranged flyer of subjects known to be active in this criminal field.

This flyer is being distributed to you, the business man, so that you may inform your security personnel to watch for these subjects. These persons have been arrested during 1971 and 1972 or have been active in various criminal fields in high density shopping areas.

Only the photograph and name of the subject is shown on this flyer, if additional information is desired, please forward a request in writing

The flyer consisted of five pages of “mug shot” photos, arranged alphabetically. . . .

At the time the flyer was circulated respondent was employed as a photographer by the *Louisville Courier-Journal* and *Times*. The flyer, and respondent’s inclusion therein, soon came to the attention of respondent’s supervisor, the executive director of photography for the two newspapers. This individual called respondent in to hear his version of the events leading to his appearing in the flyer. Following this discussion, the supervisor informed respondent that although he would not be fired, he “had best not find himself in a similar situation” in the future.

Respondent thereupon brought this §1983 action [permitting lawsuits in federal court against individuals “acting under color” of state law for violations of the U.S. Constitution and federal law] in the District Court for the Western District of Kentucky, seeking redress for the alleged violation of rights guaranteed to him by the Constitution of the United States. . . .

Respondent’s due process claim is grounded upon his assertion that the flyer, and in particular the phrase “Active Shoplifters” appearing at the head of the page upon which his name and photograph appear, impermissibly deprived him of some “liberty” protected by the Fourteenth Amendment. His complaint asserted that the “active shoplifter” designation would inhibit him from entering business establishments for fear of being suspected of shoplifting and possibly apprehended, and would seriously impair his future employment opportunities. Accepting that such consequences may flow from the flyer in question, respondent’s complaint would appear to state a classical claim for defamation actionable in the courts of virtually every State. Imputing criminal behavior to an individual is generally considered defamatory per se, and actionable without proof of special damages.

Respondent brought his action, however, not in the state courts of Kentucky, but in a United States District Court for that State. He asserted not a claim for defamation under the laws of Kentucky, but a claim that he had been deprived of rights secured to him by the Fourteenth Amendment of the United States Constitution [“. . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ”]. Concededly if the same allegations had been made about

respondent by a private individual, he would have nothing more than a claim for defamation under state law. But, he contends, since petitioners are respectively an official of city and of county government, his action is thereby transmuted into one for deprivation by the State of rights secured under the Fourteenth Amendment. . . .

If respondent's view is to prevail, a person arrested by law enforcement officers who announce that they believe such person to be responsible for a particular crime in order to calm the fears of an aroused populace, presumably obtains a claim against such officers under §1983. And since it is surely far more clear from the language of the Fourteenth Amendment that "life" is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under 1983.

It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent. . . .

[One] premise upon which the result reached by the Court of Appeals could be rested that the infliction by state officials of a "stigma" to one's reputation is somehow different in kind from infliction by a state official of harm to other interests protected by state law is equally untenable. The words "liberty" and "property" as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interests that may be protected by state law. While we have in a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the Due Process Clause. . . .

Respondent's complaint also alleged a violation of a "right to privacy guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments." . . .

While there is no "right of privacy" found in any specific guarantee of the Constitution, the Court has recognized that "zones of privacy" may be created by more specific constitutional guarantees and thereby impose limits upon government power. Respondent's case, however, comes within none of these areas. He does not seek to suppress evidence seized in the course of an unreasonable search. And our other "right of privacy" cases, while defying categorical description, deal generally with

substantive aspects of the Fourteenth Amendment . . . very different from that for which respondent claims constitutional protection—matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. . . .

Respondent's claim . . . is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be "private," but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner. . . .

[Mr. Justice Stevens took no part in the consideration or decision of this case.]

Mr. Justice Brennan, with whom Mr. Justice Marshall concurs and Mr. Justice White concurs in part, dissenting. . . .

The Court today holds that police officials, acting in their official capacities as law enforcers, may on their own initiative and without trial constitutionally condemn innocent individuals as criminals and thereby brand them with one of the most stigmatizing and debilitating labels in our society. If there are no constitutional restraints on such oppressive behavior, the safeguards constitutionally accorded an accused in a criminal trial are rendered a sham, and no individual can feel secure that he will not be arbitrarily singled out for similar *Ex parte* punishment by those primarily charged with fair enforcement of the law. The Court accomplishes this result by excluding a person's interest in his good name and reputation from all constitutional protection, regardless of the character of or necessity for the government's actions. The result, which is demonstrably inconsistent with our prior case law and unduly restrictive in its construction of our precious Bill of Rights, is one in which I cannot concur. . . .

**In the matter of an application by JR 38
for Judicial Review (Northern Ireland)**
Supreme Court of the United Kingdom
[2015] UKSC 42

[Before Lord Kerr, Lord Clarke, Lord Wilson, Lord Toulson, and Lord Hodge.]

Lord Kerr: (with whom Lord Wilson agrees) . . .

2. The young man who is the appellant in this case is now 18 years old. . . . [In] 2010 two newspapers, the *Derry Journal* and the *Derry News* . . . published an image of him. He was at that time barely 14 years old. These photographs had been published

by the newspapers at the request of the police. The publication of the appellant's photographs and those of others who had been involved in public disorder in Londonderry was part of a police campaign known as "Operation Exposure" which was designed to counteract sectarian rioting at what are called "interface areas" in parts of Derry. Interface areas are situated at the boundaries of parts of the city which are predominantly inhabited by one or other of the two main communities.

3. The appellant argues that publication of photographs of him constituted a violation of his article 8 rights [to respect for a private life under the European Convention on Human Rights]. The Divisional Court in Northern Ireland (Morgan LCJ, Higgins and Coghlin LLJ) dismissed his application for judicial review on 21 March 2013. . . .

56. The test for whether article 8 is engaged is, essentially, a contextual one, involving not merely an examination of what it was reasonable for the person who asserts the right to expect, but also a myriad of other possible factors such as the age of the person involved; whether he or she has consented to publication; whether the publication is likely to criminalise or stigmatise the individual concerned; the context in which the activity portrayed in the publication took place; the use to which the published material is to be put; and any other circumstance peculiar to the particular conditions in which publication is proposed. To elevate reasonable expectation of privacy to a position of unique and inviolable influence is to exclude all such factors from consideration and I cannot accept that this is a proper approach. . . .

66. Whether, therefore, one approaches the question of whether article 8 was engaged on the basis that reasonable expectation of privacy is but one factor in the equation or that that concept should be adjusted to take into account what the effect would be on the child, irrespective of his personal expectation, I am satisfied that there was an interference with his Convention right and that the essential issue in this case is whether that interference was justified.

67. Justification of interference with a qualified Convention right such as article 8 rests on three central propositions. The interference must be in accordance with law; it must pursue a legitimate aim; and it must be "necessary in a democratic society." Proportionality is a particular aspect of the last of these requirements.

[Lord Kerr found that the Operation Exposure campaign satisfied the test for proportionality: its legislative objective was sufficiently important to justify limiting a fundamental right; the measures used had a rational connection to the objective; they were no more than necessary to accomplish the objective; and they struck a fair balance between the rights of the individual and the interests of the community.]

Lord Toulson: (with whom Lord Hodge agrees)

82. I agree that this appeal should be dismissed but, unlike Lord Kerr, I do not consider that the conduct of the police amounted, *prima facie*, to an interference with the appellant's right to respect for his private life, so as to fall within the scope of article 8 of the European Convention on Human Rights and Fundamental Freedoms. . . .

Lord Clarke: (with whom Lord Hodge agrees)

104. . . . I agree with Lord Kerr and Lord Toulson that this appeal must be dismissed on the basis that, if the facts fall within article 8.1 of the ECHR so that (as it is often put) article 8.1 is engaged, the conduct complained of was justified so that there was no breach of article 8 because of the provisions of article 8.2. . . .

112. I agree with Lord Toulson that on the facts here the criminal nature of what the appellant was doing was not an aspect of his private life that he was entitled to keep private. He could not have had an objectively reasonable expectation that such photographs, taken for the limited purpose of identifying who he was, would not be published. I would not however hold that the mere fact that a person is photographed in the course of a criminal activity deprives him or her from the right to prevent the police from publishing the photographs. . . .

113. I respectfully differ from Lord Kerr in so far as he distinguishes the position of a child. . . .

Sampling, Retaining, and Using Body Bits as Evidence

R. v. Stillman

Supreme Court of Canada

[1997] 1 S.C.R. 607

Present: Lamer, Chief Justice, and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major, Justices. . . .

[The appellant, then 17, was arrested in 1991 for the murder of a teenage girl, whose autopsy revealed semen and a human bite mark on her abdomen. When the appellant arrived home the night of the crime, he was shaken, wet, with a cut on his face and mud on his clothes. His explanation—that he had been in a fight with some “Indians”—varied over time. At the police station, the appellant's lawyers informed the police that the appellant was not consenting to provide any statements or bodily samples. After the lawyers left, the police took, under threat of force, scalp and pubic

hair samples, and also took plasticine teeth impressions. The police interviewed the appellant for an hour, and then permitted him to call his lawyer. The appellant used a tissue to blow his nose and threw it away in the wastebasket. A police officer took the tissue containing the appellant's mucous and used it for DNA testing. The appellant was released and then arrested months later, after which new teeth impressions were taken, without his consent, as well as hair, a saliva sample, and buccal swabs. The trial judge found that the hair samples, buccal swabs, and teeth impressions were obtained in violation of s. 8 of *Canadian Charter of Rights and Freedoms* but held that the evidence was nevertheless admissible. The judge found that the tissue was not obtained in violation of s. 8. The appellant was convicted of first degree murder.]

Cory J.—On this appeal there are two major issues which must be considered. First, what should be the scope and the appropriate limits of the common law power to search which is incidental to an arrest? Second, in what circumstances should evidence obtained as a result of a breach of a *Charter* right be ruled inadmissible on the grounds that its admission would render the trial unfair? . . .

[25] There are three requirements which must be met if a search is to be found reasonable: (a) it must be authorized by law; (b) the law itself must be reasonable; and (c) the manner in which the search was carried out must be reasonable

[26] At the time that this seizure occurred in 1991, the *Criminal Code* only provided a procedure for obtaining a warrant to search a “building, receptacle or place.” It did not authorize the search of a person, nor the seizure of parts of the body. . . . The respondent can justify these searches only by demonstrating that they were authorized by a common law power or that the appellant had no reasonable expectation of privacy in the things seized. To this end, the respondent asserts that the hair samples and teeth impressions were seized pursuant to the common law power of search incident to a lawful arrest.

[42] . . . It has often been clearly and forcefully expressed that state interference with a person's bodily integrity is a breach of a person's privacy and an affront to human dignity. The invasive nature of body searches demands higher standards of justification. . . .

[48] The power to search and seize incidental to arrest was a pragmatic extension to the power of arrest. Obviously the police must be able to protect themselves from attack by the accused who has weapons concealed on his person or close at hand. . . .

[49] The common law power cannot be so broad as to empower police officers to seize bodily samples. They are usually in no danger of disappearing. . . .

[50] It is clear that the appellant's right to be free from unreasonable search and seizure was very seriously violated. Since the search and seizure of the bodily

samples was not authorized by either statutory or common law it could not have been reasonable. . . .

[51] The taking of the dental impressions, hair samples and buccal swabs from the accused also contravened the appellant's s. 7 *Charter* right to security of the person. The taking of the bodily samples was highly intrusive. It violated the sanctity of the body which is essential to the maintenance of human dignity. . . .

[62] . . . [W]here an accused who is not in custody discards a kleenex or cigarette butt, the police may ordinarily collect and test these items without any concern about consent. A different situation is presented when an accused in custody discards items containing bodily fluids. . . .

[63] . . . [I]n this case, the accused had announced through his lawyers that he would not consent to the taking of any samples of his bodily fluids. The police were aware of his decision. Despite this they took possession of the tissue discarded by the appellant while he was in custody. In these circumstances the seizure was unreasonable and violated the appellant's s. 8 *Charter* rights. . . .

[70] In considering how the admission of the evidence would affect the fairness of the trial, the trial judge erred in concluding that the hair samples and dental impressions existed independently of any *Charter* breach and were thus admissible. Certainly the appellant's hair samples, dental patterns and saliva existed as "real" evidence. However, the trial judge failed to appreciate the significance of the inescapable conclusion that, in violation of his *Charter* rights, the appellant was conscripted or forced by the police to provide evidence from his body thus incriminating himself. I have used the term "conscripted" to describe the situation where the police have compelled the accused to participate in providing self-incriminating evidence in the form of a confession or providing bodily samples. It is a term that has been used in other decisions of the Court, . . . to describe self-incriminating evidence obtained as a result of a *Charter* breach. In the circumstances, it was unnecessary and inappropriate to consider the seriousness of the breach. . . .

[73] . . . It is *because* the accused is *compelled* as a result of a *Charter* breach to participate in the creation or discovery of self-incriminating evidence in the form of confessions, statements or the provision of bodily samples, that the admission of that evidence would generally tend to render the trial unfair. That general rule, like all rules, may be subject to rare exceptions.

[74] . . . Evidence to be considered under "fairness" will generally fall into one of two categories: non-conscriptive or conscriptive. The admission of evidence which falls into the "non-conscriptive" category will . . . rarely operate to render the trial unfair. If the evidence has been classified as non-conscriptive the court should move

on to consider . . . the seriousness of the *Charter* violation and the effect of exclusion on the repute of the administration of justice. . . .

[77] The crucial element which distinguishes non-conscriptive evidence from conscriptive evidence is not whether the evidence may be characterized as “real” or not. Rather, it is whether the accused was compelled to make a statement or provide a bodily substance in violation of the *Charter*. . . .

[91] In the case at bar to proceed in the face of a specific refusal to compel the accused to submit to the lengthy and intrusive dental process, to force the accused to provide the pubic hairs and to forcibly take the scalp hairs and buccal swabs was, to say the least, unacceptable behaviour that contravened both s. 7 and s. 8 of the *Charter*. It was a significant invasion of bodily integrity. It was an example of the use of mental and physical action by agents of the state to overcome the refusal to consent to the procedures. It serves as a powerful reminder of the powers of the police and how frighteningly broad they would be in a police state. If there is not respect for the dignity of the individual and the integrity of the body then it is but a very short step to justifying the exercise of any physical force by police if it is undertaken with the aim of solving crimes. . . . There must always be a reasonable control over police actions if a civilized and democratic society is to be maintained. . . .

[Justices McLachlin, Gonthier, and L’Heureux-Dubé filed separate dissents. Justice McLachlin argued that s. 7 of the *Charter* extends only to testimonial and derivative evidence, and thus the taking of bodily samples implicated only s. 8 of the *Charter*, not s. 7. Further, Justice McLachlin argued that the lower courts properly weighed the factors governing the exclusion of evidence under s. 24(2).]

R. v. Rodgers
Supreme Court of Canada
2006 SCC 15

Present: McLachlin, Chief Justice, and Bastarache, Binnie, Deschamps, Fish, Abella and Charron, Justices. . . .

[The appellant R was convicted of sexual assault, which he had committed while on probation for another sexual offense. That conviction came before the enactment of the 1998 *DNA Identification Act*. Therefore, he had not been ordered to provide a DNA sample when he was sentenced. Before R’s release, the Crown applied *ex parte* under s. 487.0551(c) of the *Criminal Code* for authorization to take his DNA samples for inclusion in the national DNA data bank. R applied for a declaration that s. 487.055 infringed ss. 7, 8, 11(h) and (i) of the *Canadian Charter of Rights and Freedoms*, and, in the alternative, that the authorizing judge had relinquished

jurisdiction by proceeding *ex parte*. The Superior Court dismissed R's application, and the Court of Appeal upheld s. 487.055 but interpreted it to require a hearing with both parties present. The Crown appealed the quashing of the authorization, and R cross-appealed to renew.]

Charron J.—. . .

[1] This appeal concerns the constitutionality of the DNA data bank provision contained in [the Criminal Code] . . . which permits a provincial court judge, on *ex parte* application, to authorize the collection of DNA samples from three classes of previously convicted and sentenced offenders: (a) persons already declared to be “dangerous offenders”; (b) persons convicted of “more than one murder committed at different times”; and (c) persons convicted of “more than one sexual offence” and who, on the date of the application, are still serving a sentence of imprisonment of at least two years for one or more of those offences. . . .

[25] There is no question that the taking of bodily samples for DNA analysis without the person's consent constitutes a seizure within the meaning of s. 8 of the Charter. An individual's right to be secure against search and seizure, however, is not absolute. Section 8 only protects against “unreasonable” searches or seizures. To state it in the positive, s. 8 protects reasonable expectations of privacy. This Court has held that for a search to be reasonable: (a) it must be authorized by law; (b) the law itself must be reasonable; and (c) the manner in which the search was carried out must be reasonable. We are only concerned here with the second requirement, the reasonableness of the authorizing provision itself. . . .

[27] . . . [A]ny assessment of reasonableness requires a balancing of the relevant competing interests. In the seminal case of *Hunter v. Southam Inc.*, [1984] Dickson J. described the s. 8 test as follows:

[A]n assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement. . . .

[38] In my view, in considering the purpose of the DNA data bank provisions, the appropriate analogy is to fingerprinting and other identification measures taken for law enforcement purposes. The purpose of the legislative scheme is expressly set out in s. 3 of the *DNA Identification Act*—“to help law enforcement agencies identify persons alleged to have committed designated offences, including those committed before the coming into force of this Act.” . . . It is beyond dispute that DNA sampling is a far more powerful identification tool than fingerprinting. Therein lies the heightened societal interest in adding this modern technology to the arsenal of identification tools. . . .

[42] . . . Mr. Rodgers unquestionably has a residual privacy interest in the information contained in his DNA samples. However, in restricting the use of DNA sampling for data bank purposes to an *identification tool only*, Parliament has adequately answered any heightened concern about the potentially powerful impact that DNA sampling has on the informational privacy interests of the individual. The relevant question then becomes whether Mr. Rodgers has any reasonable expectation of privacy in respect of his *identity*.

[43] The class of persons against whom a DNA data bank authorization may be granted is confined to offenders who have been convicted of designated offences. . . . Mr. Rodgers' identity as a multiple sex offender has become a matter of state interest and he has lost any reasonable expectation of privacy in the *identifying information* derived from DNA sampling in the same way as he has lost any expectation of privacy in his fingerprints, photograph or any other identifying measure taken under the authority of the *Identification of Criminals Act*.

[44] . . . I conclude that there is no constitutional requirement to link the convicted offender, on reasonable and probable grounds, to any particular investigation. The data bank provisions strike an appropriate balance between the public interest in the effective identification of persons convicted of serious offences and the rights of individuals to physical integrity and the right to control the release of information about themselves. . . .

[54] . . . In light of the interests at stake and the panoply of procedural safeguards that are in place, I conclude that a presumptively *ex parte* hearing is a constitutionally valid legislative option.

[55] For these reasons, I conclude that the DNA data bank legislative scheme meets the constitutional requirements of s. 8 of the *Charter*. . . .

[The dissenting opinion of Justice Fish, joined by Justices Binnie and Deschamps, is omitted.]

S. and Marper v. the United Kingdom
European Court of Human Rights (Grand Chamber)
ECHR 2008-V 167

. . . The European Court of Human Rights, sitting as a Grand Chamber composed of: Jean-Paul Costa, *President*, Christos Rozakis, Nicolas Bratza, Peer Lorenzen, Françoise Tulkens, Josep Casadevall, Giovanni Bonello, Corneliu Bîrsan,

Nina Vajić, Anatoly Kovler, Stanislav Pavlovski, Egbert Myjer, Danutė Jočienė, Ján Šikuta, Mark Villiger, Päivi Hirvelä, Ledi Bianku, *judges*, and Michael O’Boyle, *Deputy Registrar*

3. The applicants complained under Articles 8 and 14 that the authorities had continued to retain their fingerprints and cellular samples and DNA profiles after the criminal proceedings against them had ended with an acquittal or had been discontinued. . . .

26. The Police and Criminal Evidence Act 1984 (the PACE) contains powers for the taking of fingerprints and samples. . . .

27. As to the retention of such fingerprints and samples (and the records thereof), section 64 (1A) of the PACE was substituted by Section 82 of the Criminal Justice and Police Act 2001. It provides as follows:

Where—(a) fingerprints or samples are taken from a person in connection with the investigation of an offence, and (b) subsection (3) below does not require them to be destroyed, the fingerprints or samples may be retained after they have fulfilled the purposes for which they were taken but shall not be used by any person except for purposes related to the prevention or detection of crime, the investigation of an offence, or the conduct of a prosecution. . . .

(3) If—(a) fingerprints or samples are taken from a person in connection with the investigation of an offence; and (b) that person is not suspected of having committed the offence, they must except as provided in the following provisions of this Section be destroyed as soon as they have fulfilled the purpose for which they were taken.

(3AA) Samples and fingerprints are not required to be destroyed under subsection (3) above if (a) they were taken for the purposes of the investigation of an offence of which a person has been convicted; and (b) a sample or, as the case may be, fingerprint was also taken from the convicted person for the purposes of that investigation.

28. Section 64 in its earlier form had included a requirement that if the person from whom the fingerprints or samples were taken in connection with the investigation was acquitted of that offence, the fingerprints and samples, subject to certain exceptions, were to be destroyed “as soon as practicable after the conclusion of the proceedings.”

29. The subsequent use of materials retained under section 64 (1A) is not regulated by statute, other than the limitation on use contained in that provision. In

Attorney General's Reference, the House of Lords had to consider whether it was permissible to use in evidence a sample which should have been destroyed under the then text of section 64 the PACE. The House considered that the prohibition on the use of an unlawfully retained sample “for the purposes of any investigation” did not amount to a mandatory exclusion of evidence obtained as a result of a failure to comply with the prohibition, but left the question of admissibility to the discretion of the trial judge.

30. The Data Protection Act was adopted on 16 July 1998 to give effect to the Directive 95/46/EC of the European Parliament and of the Council dated 24 October 1995. Under the Data Protection Act “personal data” means data which relate to a living individual who can be identified—(a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual (section 1). “Sensitive personal data” means personal data consisting, inter alia, of information as to the racial or ethnic origin of the data subject, the commission or alleged commission by him of any offence, or any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings. . . .

60. The applicants submitted that the retention of their fingerprints, cellular samples and DNA profiles interfered with their right to respect for private life as they were crucially linked to their individual identity and concerned a type of personal information that they were entitled to keep within their control. They recalled that the initial taking of such bio-information had consistently been held to engage Article 8 and submitted that their retention was more controversial given the wealth of private information that became permanently available to others and thus came out of the control of the person concerned. They stressed in particular the social stigma and psychological implications provoked by such retention in the case of children, which made the interference with the right to private life all the more pressing in respect of the first applicant. . . .

62. They further emphasised that retention of cellular samples involved an even greater degree of interference with Article 8 rights as they contained full genetic information about a person including genetic information about his or her relatives. It was of no significance whether information was actually extracted from the samples or caused a detriment in a particular case as an individual was entitled to a guarantee that such information which fundamentally belonged to him would remain private and not be communicated or accessible without his permission. . . .

68. The Court notes at the outset that all three categories of the personal information retained by the authorities in the present cases, namely fingerprints, DNA profiles and cellular samples, constitute personal data within the meaning of the Data

Protection Convention as they relate to identified or identifiable individuals. The Government accepted that all three categories are “personal data” within the meaning of the Data Protection Act 1998 in the hands of those who are able to identify the individual.

69. . . . As regards the nature and scope of the information contained in each of these three categories of data, the Court has distinguished in the past between the retention of fingerprints and the retention of cellular samples and DNA profiles in view of the stronger potential for future use of the personal information contained in the latter. . . .

71. The Court maintains its view that an individual’s concern about the possible future use of private information retained by the authorities is legitimate and relevant to a determination of the issue of whether there has been an interference. Indeed, bearing in mind the rapid pace of developments in the field of genetics and information technology, the Court cannot discount the possibility that in the future the private-life interests bound up with genetic information may be adversely affected in novel ways or in a manner which cannot be anticipated with precision today. . . .

75. . . . [T]he profiles contain substantial amounts of unique personal data. While the information contained in the profiles may be considered objective and irrefutable in the sense submitted by the Government, their processing through automated means allows the authorities to go well beyond neutral identification. . . . DNA profiles could be, and indeed had in some cases been, used for familial searching with a view to identifying a possible genetic relationship between individuals. They also accepted the highly sensitive nature of such searching and the need for very strict controls in this respect. In the Court’s view, the DNA profiles’ capacity to provide a means of identifying genetic relationships between individuals is in itself sufficient to conclude that their retention interferes with the right to the private life of the individuals concerned. . . .

76. The Court further notes that it is not disputed by the Government that the processing of DNA profiles allows the authorities to assess the likely ethnic origin of the donor and that such techniques are in fact used in police investigations. The possibility the DNA profiles create for inferences to be drawn as to ethnic origin makes their retention all the more sensitive and susceptible of affecting the right to private life. This conclusion is consistent with the principle laid down in the Data Protection Convention and reflected in the Data Protection Act that both list personal data revealing ethnic origin among the special categories of sensitive data attracting a heightened level of protection.

77. In view of the foregoing, the Court concludes that the retention of both cellular samples and DNA profiles discloses an interference with the applicants’ right to respect for their private lives, within the meaning of Article 8 § 1 of the Convention. . . .

88. The applicants contended that the indefinite retention of fingerprints, cellular samples and DNA profiles of unconvicted persons could not be regarded as “necessary in a democratic society” for the purpose of preventing crime. . . .

119. In this respect, the Court is struck by the blanket and indiscriminate nature of the power of retention in England and Wales. The material may be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender; fingerprints and samples may be taken—and retained—from a person of any age, arrested in connection with a recordable offence, which includes minor or non-imprisonable offences. The retention is not time-limited; the material is retained indefinitely whatever the nature or seriousness of the offence of which the person was suspected. Moreover, there exist only limited possibilities for an acquitted individual to have the data removed from the nationwide database or the materials destroyed; in particular, there is no provision for independent review of the justification for the retention according to defined criteria, including such factors as the seriousness of the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances.

120. . . . [T]he level of interference with the applicants’ right to private life may be different for each of the three different categories of personal data retained. The retention of cellular samples is particularly intrusive given the wealth of genetic and health information contained therein. However, such an indiscriminate and open-ended retention regime as the one in issue calls for careful scrutiny regardless of these differences. . . .

122. Of particular concern in the present context is the risk of stigmatisation, stemming from the fact that persons in the position of the applicants, who have not been convicted of any offence and are entitled to the presumption of innocence, are treated in the same way as convicted persons. In this respect, the Court must bear in mind that the right of every person under the Convention to be presumed innocent includes the general rule that no suspicion regarding an accused’s innocence may be voiced after his acquittal. It is true that the retention of the applicants’ private data cannot be equated with the voicing of suspicions. Nonetheless, their perception that they are not being treated as innocent is heightened by the fact that their data are retained indefinitely in the same way as the data of convicted persons, while the data of those who have never been suspected of an offence are required to be destroyed. . . .

124. The Court further considers that the retention of the unconvicted persons’ data may be especially harmful in the case of minors such as the first applicant, given their special situation and the importance of their development and integration in society. . . .

125. In conclusion, the Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present

applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society. . . .

STOPS AND ARRESTS

R. v. Clayton Supreme Court of Canada 2007 SCC 32

Present: McLachlin, Chief Justice, and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein, Justices. . . .

Abella J.—. . .

[18] The Crown conceded that the initial stopping of Clayton and Farmer resulted in their detention within the meaning of s. 9 of the *Charter*. The Crown also acknowledged that the subsequent police examination of the interior of the car and its occupants constituted a search for the purposes of s. 8. Those provisions of the *Charter* state:

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

[19] If the police conduct in detaining and searching Clayton and Farmer amounted to a lawful exercise of their common law powers, there was no violation of their Charter rights. If, on the other hand, the conduct fell outside the scope of these powers, it represented an infringement of the right under the Charter not to be arbitrarily detained or subjected to an unreasonable search or seizure. . . .

[20] . . . Thus, a detention which is found to be lawful at common law is, necessarily, not arbitrary under s. 9 of the *Charter*. A search done incidentally to that lawful detention will, similarly, not be found to infringe s. 8 if the search is carried out in a reasonable manner and there are reasonable grounds to believe that police or public safety issues exist.

[21] The statement that a detention which is lawful is not arbitrary should not be understood as exempting the authorizing law, whether it is common law or statutory, from *Charter* scrutiny. Previous decisions of this Court are clear that where a detention by police is authorized by law, the law authorizing detention is also subject to *Charter* scrutiny

[22] The key question in this appeal, therefore, is whether the police were acting within the scope of their common law police powers when they detained Clayton and Farmer. These common law powers were described by Doherty J.A. in his reasons . . . with great clarity, requiring no further refinement here: . . .

In the judgment of this court it would be difficult, and in the present case it is unnecessary, to reduce within specific limits the general terms in which the duties of police constables have been expressed. In most cases it is probably more convenient to consider what the police constable was actually doing and in particular whether such conduct was *prima facie* an unlawful interference with a person's liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognised at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.

The powers of police constables at common law, often described as the ancillary police power, . . . have been accepted by the Supreme Court of Canada as part of the Canadian common law in several decisions rendered both before and after the proclamation of the *Charter*. . . .

[26] In determining the boundaries of police powers, caution is required to ensure the proper balance between preventing excessive intrusions on an individual's liberty and privacy, and enabling the police to do what is reasonably necessary to perform their duties in protecting the public. . . .

[30] The justification for a police officer's decision to detain . . . will depend on the "totality of the circumstances" underlying the officer's suspicion that the detention of a particular individual is "reasonably necessary." . . .

[Justice Binnie, joined by Justices LeBel and Fish, delivered a separate opinion concurring in the judgment and concluding that the "reasonably necessary" test as articulated by Justice Abella and derived from common law powers of the police was not a *Charter* test and thus not an adequate substitute for proper *Charter* scrutiny.]

The Law and Social Science of Stop and Frisk

Tracey L. Meares (2014)^{*}

In 1968, almost 50 years ago, the Supreme Court validated, in a case called *Terry v. Ohio* (1968), the common police practice of patting down a stopped suspect's outer clothing, so long as the police officer possesses a reasonable and articulable suspicion both that criminal activity is afoot and that the person with whom the officer was dealing is armed and dangerous. In coming to this conclusion, the Court disagreed both with the petitioner, John Terry, who argued that even a limited pat down during a so-called field interrogation should be treated in the same way as any search—therefore requiring justification by probable cause—and with the respondent, the State of Ohio, which argued that a limited pat down was not a search at all and thus presented no Fourth Amendment issue (e.g., *California v. Greenwood* [(1988)]).

[Stephen] Saltzburg has called the balance the Court struck in *Terry* “practically perfect”—a standard neither so strict that necessary police work becomes unlawful nor so weak that individual autonomy and privacy are unprotected. Stops, as seizures of short duration, are less intrusive than arrests, and pat downs are less intrusive than full searches. If the *Terry* Court had required police officers to show probable cause to justify a stop and frisk, as the petitioner requested, police would have no reason to prefer a frisk to a full-blown search. By demanding less of officers to justify engaging in these activities as contrasted with full arrests or searches, the Court effectively incited police officers to choose these less-intrusive actions.

Such an outcome might appear, at least at first glance, to be the clear liberty-enhancing outcome. Yet, although the doctrine appears to express a preference for less-intrusive police activities, it is also true that encouraging a less stringent standard for stops and frisks might well lead to a greater number of intrusions than would otherwise occur if police were indifferent as between arrests and stops. And, it seems inevitable that lowering the quantum of evidence required for legal police action will increase the number of people innocent of any crime who are forced to interact with authorities. Reflecting on the *Terry* Court's decision, one must wonder whether the 4.4 million stops . . . [people in] New York City have experienced between January 2004 and June 2012 would have occurred had *Terry* come out in the petitioner's favor. Clearly, *Terry* and its progeny endorse a view that a greater number of broad prophylactic law enforcement encounters may well be preferable to fewer deeper reactive ones.

The prophylactic nature of the stop and frisk sets the stage for this review article. When *Terry* was decided, it is unlikely that the Court could have predicted today's widespread use of the tactic as a crime control device. During the 1960s, the conventional wisdom among scholars and law enforcement practitioners alike was that

^{*} Excerpted from Tracey L. Meares, *The Law and Social Science of Stop and Frisk*, 10 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 335 (2014).

policing could not really make a dent in crime rates because the seeds of crime were rooted in poverty and deprivation—factors over which law enforcement agencies have little control. The primary job of police, then, was to be first responders for justice reasons as opposed to crime control. Today, however, that assumption has been upended. Now the question is not whether police make a difference in crime but instead how much.

Between 1991 and 2000, violent crime rates dropped about a third across the country. Even more dramatic, New York City's crime counts plummeted 80% during the same period. Because New York's highly publicized change in policing strategy coincided with the declines, scholars and others have focused attention on the extent to which policing has played a significant role in producing the decline. Analyses increasingly suggest that policing activity can take some of the credit. Under the leadership of William Bratton in the late 1990s, the New York City Police Department (NYPD) reinvented itself, establishing the department as a leader in innovative policing strategies such as COMPSTAT and order maintenance policing. Although Bratton conceived of and brought the order maintenance approach to the NYPD, Commissioner Raymond Kelly deepened and expanded it, relying on stop, question, and frisk (SQF) as its engine. Hundreds of thousands of New Yorkers, the majority of whom are people of color, have been subjected to SQF on the streets of the City. Whereas the NYPD and the City's former mayor, along with their supporters, have claimed that the practice is responsible for making the city safe, detractors claim that the strategy has resulted in massive numbers of civil rights violations. . . .

The facts of *Terry v. Ohio* are well known to most lawyers, but it is useful to summarize them here. Officer McFadden, a 39-year veteran of the Cincinnati police force, observed John Terry and two companions walking back and forth on the sidewalk outside a jewelry store. McFadden suspected that the men were “casing the joint” in preparation for a robbery, so he also suspected that they were armed. He approached the men, identified himself, and asked them what they were doing. Receiving a mumbled response, McFadden grabbed Terry, spun him around, and then patted down his outer clothing. McFadden found a pistol inside Terry's coat pocket. It is important to note that Officer McFadden was engaged in an investigatory tactic in the context of what he suspected to be a crime in progress. I shall return to this point later in this review.

Terry was decided at a pivotal time in history. Crime had spiked to levels the country had not seen since crime was regularly recorded by the government. Moreover, African Americans' roughly decade-long struggle for civil rights was changing in character—transforming from nonviolent protest and acts of civil disobedience to riots in central cities caused by, some hypothesized, conditions in slum living. The conditions against which residents raged were not confined to poor housing, schools, and jobs, however. The Kerner Commission, charged with investigating urban riots, fingered as a prime cause of every riot during the period

tensions between police and residents of so-called racial ghettos in city after city. The Commission noted specifically that public confrontations between law enforcement personnel and residents of segregated urban neighborhoods sparked many riots. A separate presidential commission convened to study crime during the same period also reached a similar conclusion.

Writing to the *Terry* Court via an amicus curiae brief, the NAACP Legal Defense Fund (the Defense Fund) drew on the National Crime Commission's work and relied on its findings as it exhorted the Court to limit the practice of stop and frisk:

We are gravely concerned by the dangers of legitimating stop and frisk, and thus encouraging, and increasing the frequency of occasions for, police-citizen aggressions. Speaking bluntly, we believe that what the ghetto does *not* need is more stop and frisk.

The Defense Fund reasoned that holding police to the high probable cause standard could actually curb the practice. Given the Court's active role in developing a more muscular constitutional law of criminal procedure during the decade preceding *Terry*, the Defense Fund's approach made sense. . . .

Although the Defense Fund did not argue this point explicitly in its brief, it seems likely that the Court's determination to regulate state practices through the creation of a constitutional code of criminal procedure was an effort to combat the poisonous influence of institutionalized racism on state criminal justice system operation. Nearly every important constitutional criminal procedure decision between 1960 and the early 1970s arose from this context.

Perhaps acknowledging the Defense Fund's warning, the *Terry* Court noted poor police-community relations as a factor to consider in its decision, stating in a footnote that members of minority groups complained of "wholesale harassment by certain elements of the police community" and that a component of this harassment was due to "misuse of field interrogations [in which] police adopt 'aggressive patrol,' routinely stop[ping] and question[ing] persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident." However, despite recognizing this pressing problem, the *Terry* Court rejected the Defense Fund's argument and upheld the stop and frisk practice on the basis of reasonable suspicion rather than probable cause. The Court's solution provided some oversight of the police practice because stop and frisk was deemed to be subject to Fourth Amendment regulation. However, by justifying the practice on the basis of reasonable suspicion as opposed to probable cause, the Court gave police more free reign than the petitioner desired. In threading the needle, the Court worried explicitly about the toll that unchecked crime could take if the police were not allowed more discretion to stop and frisk on less than probable cause. . . .

The New York City strategic initiative, entitled Getting Guns Off the Streets, directed police to follow up assiduously on every gun-related offense and every lead related to gun sources. This same strategic initiative directed officers, as an order maintenance approach to get guns off the streets, to employ SQF. Between 2003 and 2009 in New York City, the number of SQF police encounters with citizens tripled from 160,851 to 575,996. . . . The concentrated impact of the NYPD's SQF tactic upon people of color generally and young African American males in particular became highly controversial and resulted in the filing of two civil rights class action lawsuits, *Daniels v. City of New York* (2003) in 1999 and *Floyd v. City of New York* (2013) in 2008, both brought by the Center for Constitutional Rights. Thus, just 40 years after *Terry v. Ohio* (1968) was decided, the issues that the NAACP Defense Fund laid squarely on the table became the subject of a national discussion regarding the legitimacy and efficacy of stop and frisk as a crime control mechanism, as New York City stopped millions in the name of bringing crime down in the city.

It turns out that the intellectual architects of the aggressive approach were not blind to these consequences. Even while he extolled the potential benefits of the Kansas City Gun Experiment, [Lawrence] Sherman also worried that intensified police patrol would irritate police-community relations generally, stating, "Most worrisome is the possibility that field interrogations could provoke more crime by making young men subjected to traffic stops more defiant toward conventional society and thus commit more crimes." Sherman's own important theoretical work on the potential for overly harsh criminal sanctions to increase crime among certain groups provided a strong basis for his concern. [James Q.] Wilson, too, acknowledged the potential for his proffered strategy to antagonize because "[y]oung and black and Hispanic men will probably be stopped more often than older white Anglo males or women of any race." But, he ultimately concluded that the potential for violent crime reduction was worth placing a bet on more aggressive police practice. His wager was called on August 12, 2013, when federal district court judge Shira Scheindlin issued a ruling in *Floyd v. City of New York* (2013), finding that the NYPD had engaged in a pattern and practice of unconstitutional stops and frisks.

The *Floyd* litigation demonstrates in bold relief that the issues the *Terry* Court struggled with over 40 years ago have not changed, although they are presented at a vastly different scale. Recall that Officer McFadden's stop and frisk of Terry occurred in an investigative context. That is, Officer McFadden happened to observe Terry and his companions in what could be described as a one-off situation that appeared suspicious to the officer. By contrast, the *Floyd* litigation presents a situation in which thousands of NYPD officers have stopped hundreds of thousands of New Yorkers as part of a planned and concerted effort to drive crime down rather than intervening in crimes in progress.

The *Floyd* plaintiffs alleged that the NYPD stopped hundreds of thousands of predominantly African American and Latino New York City residents without

justification under the Fourth Amendment and in a racially discriminatory manner in violation of the Fourteenth Amendment's Equal Protection Clause. Defendants responded that the stops were consistent with the law and that the large number of stops and frisks in the City—especially in higher crime areas—was necessary to keep crime down. Fourth Amendment case law post *Terry* developed in such a way that a suspect's presence in a high crime area had become a legitimate factor, although not the sole factor, on which a law enforcement agent could rely in coming to a conclusion about whether she believes there is reasonable suspicion to stop that suspect.

Judge Scheindlin's Fourth and Fourteenth Amendment liability findings are importantly intertwined because racial disproportion in stops and frisks alone does not provide a foundation for a Fourteenth Amendment violation. A Fourteenth Amendment violation requires discriminatory purpose on the part of the state, not just disparate impact resulting from state action. Indeed, given *Terry*'s teaching that police must point to indications amounting to reasonable suspicion that crime is afoot or has occurred before stopping someone, one should expect that more stops and frisks would occur in high crime areas when they are being carried out in a manner that comports with the Fourth Amendment. The demographics of New York City are such that the higher crime areas of the City contain a higher proportion of African American and Latino residents than the areas with lower crime rates; thus, one might expect, all other things being equal, that police would stop a number of people of color disproportionate to their representation in the city's population if they chose, as Fourth Amendment doctrine seems to direct, to focus on places where violent crime is most likely to occur. That is, legal policing of the streets of New York most likely would burden African Americans more than other groups.

An expert report [Jeffrey] Fagan produced as part of the *Floyd* litigation disturbs one's ability to easily conclude that the NYPD's actions were obviously legal, however. In the report, Fagan analyzed thousands of NYPD UF-250s, administrative forms members of the NYPD must complete every time they stop someone. When filling out UF-250s, NYPD officers are required to tick reasons for stopping a suspect, such as "casing a location," "suspicious bulge," "fits relevant description," or "furtive movement." More than half of the approximately 4 million forms Fagan analyzed indicated "furtive movement" as a justification for a stop, and in a substantial subset of these, only "furtive movement" was checked off. It is hard to imagine a scenario in which a person engaging in a "furtive movement" without any other indication of criminal activity could possibly, even if the suspect is moving in this way in a so-called high crime area, support *Terry v. Ohio*'s (1968) clear requirement: "specific, reasonable inferences" that criminal activity is afoot as opposed to "inchoate, unparticularized suspicion or hunch."

If indications of criminality do not adequately explain NYPD police activity, what does? Fagan provides an answer in his expert report: the racial composition of a neighborhood plus patrol strength allocation by place. Looking again to the UF-250 forms, Fagan compared the number of stops in an enforcement area and the race of the

people stopped with the number of stops one would expect to occur in a given area based on crime rates, reasoning, as the City asserted, that there should be more stops in areas that exhibit higher rates of crime. However, rather than supporting the City's argument, the statistical analysis is an indictment. Fagan's regressions test for whether crime rates explain the NYPD's stop practices, controlling for population size and race of the relevant area's population net of other factors such as poverty, education level, and the like. His findings consistently reveal that racial composition of an area predicts stop patterns over and above the contribution made by crime. In fact, the level of violent crime in an area, somewhat surprisingly, does not make any additional contribution to explain the level of stops in high crime areas. Moreover, Fagan finds patrol strength to be a strong predictor of the number of stops in any given area, after controlling for both crime and race. To summarize, although the NYPD claimed to engage in a strategy to deter gun crimes by deploying officers to places exhibiting the highest crime rates, statistical analysis indicates that the Department blanketed certain neighborhoods with patrols and directed those officers to "stop the right people," justifying this policy choice by self-referential statistics indicating that large percentages of New Yorkers arrested for gun crimes were black or Hispanic. The policy amounted to stopping large numbers of people of color "in general" for the purpose of preventing crime, in express contravention of *Terry*'s specific teachings that each and every individual stop must be based on specific, articulable facts indicative of criminal activity. The Fagan analysis strongly supports a finding that many of the New York stops violated the Fourth Amendment.

The Fourteenth Amendment to the U.S. Constitution is implicated when a plaintiff can show either that a facially neutral state practice is being applied in an intentionally discriminatory manner or that a law or policy expressly classifies persons on the basis of race and that the classification does not survive strict scrutiny (*Washington v. Davis* 1976). Discriminatory intent is notoriously difficult to ascertain, so racially differential impact for unjustified reasons helps to support a plaintiff's equal protection case. In *Floyd v. City of New York*, the court concluded that the NYPD's decision to "stop the right people" denied minorities in New York City equal protection of the law, writing, "A police department may not target a racially defined group for stops in general—that is, for stops based on suspicions of general criminal wrongdoing—simply because members of that group appear frequently in the police department's suspect data." Here, the Fourth Amendment figures prominently, though implicitly, for to the extent that the NYPD was making clearly correct judgments under *Terry*, it would be much more difficult for the judge to conclude that stops were made based on suspicions of general criminal wrongdoing. . . .

Legality is, of course, another way of thinking about the acceptability—the rightfulness—of this approach. Legality has long been used to assess quality police conduct. But, the review above of the history and jurisprudence of stop and frisk demonstrates well that a foundation for assessment built on law is full of fissures. The legality of police action, according to rules developed by experts in the field, typically

is assessed at a point in time before an action occurs, but the public, as a group of nonlegally trained ordinary observers, attends to the comportment and demeanor of the legal authorities during an interaction, rather than to the reasons for that engagement in the first place. This means that using lawfulness of police action as the primary yardstick for evaluating good policing will inevitably fail to capture what the public really cares about. The legitimacy of policing in general as well as of police stops and frisks, therefore, is critical.

Effectiveness as a yardstick can also be problematic. Although it is true that security is a key interest of members of the public, no one believes that there shouldn't be any limits to what the police can do in the name of achieving low crime rates. This is especially true when the rules organizing proper police behavior create a dynamic by which those who are forced to encounter police officers are necessarily viewed as people who have done something wrong. The best and most law-abiding police officer, when deciding to stop someone, must necessarily regard the person to be stopped as suspicious. And that person once stopped in public is also branded as a potential criminal even if it turns out, as will be the case most of the time, no crime is actually afoot. . . . One critical mission of good street policing, then, is accommodating the public's desire to be secure in their neighborhoods while ensuring that people are free from humiliation or indignity, can avoid the stigma that comes from being publicly identified as a criminal suspect either as an individual or as part of group, and are not subject to police harassment or discrimination. . . .

[A growing body of research demonstrates that public judgments about the acceptability of police action are shaped by people's evaluations of the fairness of how police make decisions and treat them, rather than whether the outcome they receive is favorable or fair. Fairness is critical because it is indicative of the relationship between authorities and the public; when people feel that police act fairly, that they use procedural justice, they feel respected as part of a larger social group, and they feel pride as a member of that group.] Even more than this, policing is constitutive of the communities in which we live. It is not enough for policing to simply solve collective action problems associated with the project of crime reduction. Policing also can and should play a role in the production of positive feelings of self-identity that help to "construct and sustain our 'we-feeling'—our very felt sense of common publicness." . . . [The consequences of procedural justice go beyond willingness to obey the law; procedural justice makes people have greater trust and confidence in police and feel that police enforce laws that align with their own values, leading them to more actively cooperate to help police. Procedurally unjust policing undermines popular legitimacy and thus even compliance with the law. Thus, if stops and frisks are to be effective at stopping crime, they must be employed without undermining legitimacy; that means that they would need to be employed in such a way that civilians being stopped need to feel that officers are treating them with respect and neutrality, and that the policy itself is fair.]

Floyd v. City of New York

United States District Court for the Southern District of New York
959 F. Supp. 2d 540 (S.D.N.Y. 2013)

Shira A. Scheindlin, District Judge: . . .

This case is about the tension between liberty and public safety in the use of a proactive policing tool called “stop and frisk.” The New York City Police Department (“NYPD”) made 4.4 million stops between January 2004 and June 2012. Over 80% of these 4.4 million stops were of blacks or Hispanics. In each of these stops a person’s life was interrupted. The person was detained and questioned, often on a public street. More than half of the time the police subjected the person to a frisk.

Plaintiffs—blacks and Hispanics who were stopped—argue that the NYPD’s use of stop and frisk violated their constitutional rights in two ways: (1) they were stopped without a legal basis in violation of the Fourth Amendment, and (2) they were targeted for stops because of their race in violation of the Fourteenth Amendment. Plaintiffs do not seek to end the use of stop and frisk. Rather, they argue that it must be reformed to comply with constitutional limits. Two such limits are paramount here: *first*, that all stops be based on “reasonable suspicion” as defined by the Supreme Court of the United States; and *second*, that stops be conducted in a racially neutral manner.

I emphasize at the outset, as I have throughout the litigation, that this case is not about the effectiveness of stop and frisk in deterring or combating crime. This Court’s mandate is solely to judge the *constitutionality* of police behavior, *not* its effectiveness as a law enforcement tool. . . .

This case is also not primarily about the nineteen individual stops that were the subject of testimony at trial. Rather, this case is about whether the City has a *policy* or *custom* of violating the Constitution by making unlawful stops and conducting unlawful frisks.⁵

The Supreme Court has recognized that “the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security.” In light of the very active and public debate on the issues addressed in this Opinion—and the passionate positions taken by both sides—it is important to recognize the human toll of unconstitutional stops. While it is true that any one stop is a limited intrusion in duration and deprivation of liberty, each stop is also a demeaning and humiliating experience. No one should live in fear of being stopped whenever he leaves his home to go about the activities of daily life. Those who are routinely subjected to stops are

⁵ See *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978) (establishing the standards under 42 U.S.C. § 1983 for municipal liability for constitutional torts by employees).

overwhelmingly people of color, and they are justifiably troubled to be singled out when many of them have done nothing to attract the unwanted attention. Some plaintiffs testified that stops make them feel unwelcome in some parts of the City, and distrustful of the police. This alienation cannot be good for the police, the community, or its leaders. Fostering trust and confidence between the police and the community would be an improvement for everyone.

Plaintiffs assert that the City, and its agent the NYPD, violated both the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. In order to hold a municipality liable for the violation of a constitutional right, plaintiffs “must prove that ‘action pursuant to official municipal policy’ caused the alleged constitutional injury.” “Official municipal policy includes the decisions of a government’s lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law.” . . .

With respect to both the Fourth and Fourteenth Amendment claims, one way to prove that the City has a custom of conducting unconstitutional stops and frisks is to show that it acted with deliberate indifference to constitutional deprivations caused by its employees—here, the NYPD. The evidence at trial revealed significant evidence that the NYPD acted with deliberate indifference.

As early as 1999, a report from New York’s Attorney General placed the City on notice that stops and frisks were being conducted in a racially skewed manner. Nothing was done in response. In the years following this report, pressure was placed on supervisors to increase the number of stops. Evidence at trial revealed that officers have been pressured to make a certain number of stops and risk negative consequences if they fail to achieve the goal. Without a system to ensure that stops are justified, such pressure is a predictable formula for producing unconstitutional stops. . . .

In addition, the evidence at trial revealed that the NYPD has an unwritten policy of targeting “the right people” for stops. In practice, the policy encourages the targeting of young black and Hispanic men based on their prevalence in local crime complaints. This is a form of racial profiling. While a person’s race may be important if it fits the description of a particular crime suspect, it is impermissible to subject all members of a racially defined group to heightened police enforcement because some members of that group are criminals. The Equal Protection Clause does not permit race-based suspicion.

Much evidence was introduced regarding inadequate monitoring and supervision of unconstitutional stops. Supervisors routinely review the *productivity* of officers, but do not review the facts of a stop to determine whether it was legally warranted. Nor do supervisors ensure that an officer has made a proper record of a stop so that it can be reviewed for constitutionality. Deficiencies were also shown in the training of officers with respect to stop and frisk and in the disciplining of officers when they were found to have made a bad stop or frisk. . . .

In conclusion, I find that the City is liable for violating plaintiffs’ Fourth and Fourteenth Amendment rights. The City acted with deliberate indifference toward the NYPD’s practice of making unconstitutional stops and conducting unconstitutional frisks. Even if the City had not been deliberately indifferent, the NYPD’s unconstitutional practices were sufficiently widespread as to have the force of law. In addition, the City adopted a policy of indirect racial profiling by targeting racially defined groups for stops based on local crime suspect data. This has resulted in the disproportionate and discriminatory stopping of blacks and Hispanics in violation of the Equal Protection Clause. Both statistical and anecdotal evidence showed that minorities are indeed treated differently than whites. For example, once a stop is made, blacks and Hispanics are more likely to be subjected to the use of force than whites, despite the fact that whites are more likely to be found with weapons or contraband. I also conclude that the City’s highest officials have turned a blind eye to the evidence that officers are conducting stops in a racially discriminatory manner. In their zeal to defend a policy that they believe to be effective, they have willfully ignored overwhelming proof that the policy of targeting “the right people” is racially discriminatory and therefore violates the United States Constitution. One NYPD official has even suggested that it is permissible to stop racially defined groups just to instill fear in them that they are subject to being stopped at any time for any reason—in the hope that this fear will deter them from carrying guns in the streets. The goal of deterring crime is laudable, but this method of doing so is unconstitutional. . . .

To address the violations that I have found, I shall order various remedies including, but not limited to, an immediate change to certain policies and activities of the NYPD, a trial program requiring the use of body-worn cameras in one precinct per borough, a community-based joint remedial process to be conducted by a court-appointed facilitator, and the appointment of an independent monitor to ensure that the NYPD’s conduct of stops and frisks is carried out in accordance with the Constitution and the principles enunciated in this Opinion, and to monitor the NYPD’s compliance with the ordered remedies. . . .

* * *

Thereafter, the City moved to stay the ordered remedies pending an appeal on the merits. The political backdrop was that a mayoral election was soon to occur, and the City’s opposition to the district court order might be affected by the outcome. Prior to hearing the appeal and without notice or an opportunity to provide a record, a panel of the Second Circuit *sua sponte* ordered reassignment of the case to a different judge based on the panel’s reading of “certain statements made by [the trial judge] during proceedings in the district court and in media interviews.” After the trial judge sought reconsideration, the panel modified its comments. See *Ligon v. City of New York*, 736 F.3d 118, 121 (2d Cir. 2013), modified by *Ligon v. City of New York*, 743 F.2d 362 (2d Cir. 2014). Shortly thereafter, the City’s mayoral election resulted in a change in City leadership, and the City then voluntarily dismissed the appeal. The remedies then

proceeded, with a different federal trial level judge presiding. Excerpted below is the 2017 report by the court-appointed monitor.

Fifth Report of the Independent Monitor: Analysis of New York Police Department Stops Reported, 2013-2015

Peter L. Zimroth, Independent Monitor (May 30, 2017)*

. . . In 2013, following a lengthy trial before a federal district court judge, the New York City Police Department (the NYPD or Department) was found to have violated the Fourteenth Amendment by targeting Blacks and Hispanics for stops based on a lower degree of suspicion than Whites. That finding was based, in part, on a statistical analysis of NYPD stop, question and frisk data from 2004 to 2012. The court ordered remedial actions and appointed a monitor to insure their implementation.

This is the monitor's first report examining trends in the NYPD's stop, question and frisk data. It focuses on the years 2013, 2014, and 2015. . . .

During the period 2012 to 2015, reported police stops declined citywide by more than 95 percent. This steep decline began in 2012 and accelerated over the course of 2013 and continued to decline during 2014-2015 at a slower rate. The number of reported stops of Blacks and Hispanics was 159,379 in 2013, 36,808 in 2014, and 18,449 in 2015. Even though the absolute number dropped, stops of Blacks and Hispanics remained roughly the same percentage of stops overall. This is not a statement about racial disparities in stops because it does not account for the many factors other than race that could affect the level of police interaction with communities and therefore the rate of stops, such as crime rates in particular locations, calls for service, and levels of civilian activity on the street. . . . Nonetheless, it must be acknowledged that the steep decline in stops during this period did disproportionately affect Blacks and Hispanics because they were the subject of the vast majority of stops when the numbers were substantially higher.

Although the number of stops has declined, the crimes suspected by officers when making stops have stayed relatively constant in percentage terms. Stops for suspected property crimes and weapons possession remain the largest categories of stops. During the 2013 to 2015 period, of those who were stopped, Blacks and Hispanics were more likely than Whites to be stopped on suspicion of weapons possession, trespass offenses and violent crimes such as robbery and assault. Among those who were stopped, Whites were more likely than Hispanics or Blacks to be stopped for suspected property and quality of life offenses. Also, the share of stops of 16- to 19-year-olds was higher for Blacks and Hispanics than for Whites.

* Excerpted from Peter L. Zimroth, Independent Monitor, Fifth Report of the Independent Monitor: Analysis of New York Police Department Stops Reported, 2013-2015. The report was filed with the United States District Court for the Southern District of New York on May 30, 2017.

This period saw a change in the “outcomes” of stops—the percentage of stops that resulted in frisks, searches, seizures, arrests, and uses of force increased from 2013 to 2015. Of the outcomes tracked, only the percentage of summonses issued decreased.

To explore whether NYPD officers were making stops based on race, the report discusses two different kinds of analysis. The first approach uses a “multivariate regression model” similar to that used in trial testimony by the plaintiffs’ expert, Dr. Jeffrey Fagan of Columbia Law School. The idea is to estimate whether the percentage of the residential population living in a census tract that is Black or Hispanic explains the rate of stops, taking into account the level of crime, precinct location, socioeconomic measures, and monthly trends in the number of stops.

The second approach does not use a regression model to estimate the rate of stops based on the percentage of the residential population living in a census tract that is Black or Hispanic. Instead, it compares the stop rates per reported crime on census blocks for different racial groups on that block. For each census block in the City, the analysis compares the number of crimes that occurred on a particular block in a month to the number of stops of Whites, Blacks and Hispanics on that block during that month. The results are then graphed. From this graph, it is possible to draw conclusions about citywide disparities in stops (but not disparities within individual blocks or census tracts).

If these two different methodologies for analyzing racial disparities resulted in similar findings, that would reinforce any conclusions about the relationship between race and stops. However, for the period of data analyzed in this report, they do not. The regression analysis indicates that racial demographics of census tracts remained an explanatory factor of stop rates during 2013-2015. Census tracts with populations over 70 percent Black or Hispanic appear to drive the association between a higher stop rate and the percentage of Black or Hispanic population. The second analysis, which compares the average rate of stops per crime for Blacks, Whites, and Hispanics on each block in New York City, indicates statistically significant racial disparities in 2013 that diminish over time. The report contains a full discussion of these two types of analyses and some strengths and weaknesses of each.

A stop might result in different “outcomes” that can shed light on the decision to make a stop in the first place. Possible “outcomes” are a frisk, search, summons, arrest, use of force, or no further action. Moreover, a frisk or search might or might not result in the recovery of a weapon or other contraband (a “hit”). Examining racial disparities in these outcomes and in hit rates is another way of measuring the impact of race on stops. If, for example, the hit rate for weapons is lower for Blacks and Hispanics than for Whites, one could postulate that there was a lower threshold of suspicion for stopping Blacks and Hispanics on suspicion of weapons offenses. To reach this conclusion, though, one would have to control for (attempt to eliminate)

reasons for the differences in outcomes other than race. Those differences might include the time of day of the stops, the neighborhoods in which the stops occurred, and other factors. . . .

Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization [Part II]

Tom R. Tyler, Jeffrey Fagan, and Amanda Geller (2014)*

Legal scholars recognize the centrality of the issue of legal culture (i.e., the “network of values and attitudes relating to law”) to the functioning of legal authorities. In particular, they have been concerned about how Americans acquire views about the legitimacy of law and legal authority. People do so through a process that includes childhood socialization and later personal and peer experiences with legal authorities. In particular, the period of adolescence and young adulthood is often viewed as key since young men have their most frequent experiences with legal authorities, as do their peers, during this period. The most frequent legal authority young people encounter is a police officer. The goal of this study is to explore the impact on legitimacy of a particularly salient type of young adult experience with the police—the car or street stop—during a particularly central developmental period—young adulthood.

Being questioned by the police is a common occurrence in New York City for hundreds of thousands of residents and visitors, but particularly for young men of color. Over the past 20 years, the New York Police Department has engaged in a series of controversial policies and practices in its dealings with the public. These have included zero-tolerance arrests for minor infractions and violations, saturation of nonwhite neighborhoods with aggressive stop and frisk tactics, frequent car stops, and surveillance of suspect groups such as Muslims in their places of worship and other gathering spots. Many stops and frisks result from enforcement of trespass and other quality-of-life laws in both public and private housing. In many instances, citizens are either stopped or arrested on suspicion of criminal trespass while attempting to enter their own home or to visit family members in those buildings.

Trespass enforcement is only one dimension of a larger policy of proactive policing in New York and many other cities. Proactive policing emphasizes the engagement of police with potential criminal offenders or situations based on any of several indicia that crime may be imminent or in process. In New York, those policies have produced more than 4.4 million involuntary contacts between the police and

* Excerpted from Tom R. Tyler, Jeffrey Fagan, and Amanda Geller, *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization*, 11 JOURNAL OF EMPIRICAL LEGAL STUDIES 751 (2014).

members of the public between 2004 and 2012 (NYPD various years). Of these contacts, about one in nine resulted in an arrest or a citation, and about one in five appear to fall short of constitutional grounds of legal sufficiency. Almost none turn up guns (0.11 percent of all stops) or other contraband (1.5 percent). The high rate of error in these stops, both constitutionally and in effectiveness, is a potential sore spot that could poison citizen support for and cooperation with the police.

Each of these police-citizen contacts is potentially a “teachable moment” about policing for both citizens and police. Yet both legal and policy debates about proactive policing sidestep these lessons and focus instead on two broader frameworks: legality and effectiveness. Legality draws on the constitutional framework set forth in *Terry v. Ohio* (1968): that “crime is afoot.” That standard refers to crimes that either have just taken place, are imminent, or are ongoing. *Terry* defines the conditions when police may approach and temporarily detain a citizen based on the officer’s reasonable suspicion that “crime is afoot.” The legality standard asks whether the police have acted on the permissible grounds of stopping people when there is reasonable suspicion.

Effectiveness is a policy concern, defined in terms of impact of these policies and practices in identifying those whose behavior may signal that they are intending to commit serious crime, or that they may have just completed a crime. The standard inquiry in this type of evaluation is whether stops turn up active offenders or those being sought by the police or the seizure of contraband.

But neither the constitutional nor policy standards address appropriate police conduct when dealing with persons who have fallen under the police gaze of suspicion. Neither of these standards or benchmarks addresses how police should go about conducting a field interrogation or search of a suspect; they only address the conditions that can initiate the contact and the factors that can justify increasing intrusiveness during the course of the interrogation. There is some “teaching” value in how these formal legal standards shape police behavior and some instructional value for citizens in learning the boundaries of their privacy protections under the Fourth Amendment, but these lessons suggest a narrow concept of legal socialization. At best, these become abstract civics lessons detached from the salience of the moment and the emotional freight that these interactions carry. Our rationale for this article is, quite simply, that we object to the dryness of this version of the civics lesson about police power. . . .

Discussions of street stops typically focus on two issues: the legality of police actions and the effectiveness of street stops in shaping the rate of violent or other crime. The purpose of this study is to raise and examine a third potentially important criterion for evaluating police interactions with young men on the street. Those interactions can potentially shape the views of these young men about the legitimacy

of the police and, through those evaluations, influence a variety of behaviors important to the legal system.

By focusing on legality and performance, legal authorities define the law in a top-down hierarchical framework in which elite decisions define policies and practices and the goal is to secure public compliance via the threat of punishment and/or the promise of performance in service delivery of safety. This command and control model contrasts starkly with the concerns of earlier eras in which legal culture, and in particular the popular legitimacy of the police and courts, was central to discussions about the law and the policies and practices of the police and courts. Questions of legality engage lawyers and effectiveness police professionals, leaving the public out of discussions about how law is practiced in their own communities. . . .

The results of this study and many others suggest that legitimacy matters, and that legitimacy deficits are real in their consequences for public safety. They show that higher legitimacy is related to lower levels of criminal behavior and also demonstrate that cooperation with the police is greater when legitimacy is high. Hence, models of policing that are insensitive to issues of popular legitimacy are [not only] unsuccessful in their own terms (i.e., in terms of crime reduction) [but can actually enhance the problem by undermining legitimacy, and ignoring the importance of legitimacy for compliance and cooperation]. They are further unsuccessful in terms of the emerging goals of motivating public cooperation with the police and engagement in communities. These findings suggest that while studies indicate that risk perceptions, performance evaluations, and legitimacy all motivate compliance, the goals of cooperation and engagement are more strongly linked to legitimacy. . . .

A second factor was performance. It is clear that police performance was important. For example, perceptions of general police competence in fighting crime shaped perceived legitimacy, as did judgments of the appropriateness of police conduct. In the case of personal experience, people were more accepting of street stops when they saw an appropriate legal reason for their stop. With general judgments about police behavior in the neighborhood, people cared whether the police generally used appropriate legal criterion when making stop decisions. In both cases, therefore, people cared about the appropriateness of police conduct.

People also put heavy weight on the fairness of police behavior, including the fairness of the outcome of encounters with the police and the fairness of the way the police exercise their authority. The justice of police actions (i.e., perceived procedural justice) was especially important. It was typically the most important observed element that respondents reacted to when they had a personal experience with the police. In particular, people focused on the quality of their interpersonal treatment. Justice judgments were central to reactions both to personal experiences and to general judgments about the behavior of the police. This suggests that it was not street stops per se, or even the intrusions that they make into people's lives, but whether people

evaluate police actions as involving fair interpersonal treatment and appropriate justification. . . .

People became upset and formed more negative views if they felt that the police were treating them without “dignity and respect,” not “respecting their rights,” and not “trying to do what was right.” This is true irrespective of the number of prior stops. To illustrate this we can look at the correlation between legitimacy and whether a person was treated fairly among those people who have been stopped over 10 times. . . . [Based on our study, we found that w]hether the police are seen as acting fairly shapes the reactions to a pivotal experience both for those with little and for those with substantial prior experience with the police. However, we also showed that assessments of procedural justice during stops decline with increasing exposure and experience. Accordingly, procedural justice matters greatly, but is fragile and declines with high stop exposure. To the extent that legitimacy is an important outcome of police contact, legitimacy is quite sensitive to the manner in which these contacts unfold and the overall exposure of citizens to involuntary police stops and street detentions. . . .

Utah v. Strieff
Supreme Court of the United States
136 S. Ct. 2056 (2016)

[A Utah detective, Douglas Fackrell, received an anonymous tip about drug sales at a residence and watched the premises for several days. After seeing one visitor, Edward Joseph Strieff, Jr., leave the residence, Fackrell stopped Strieff for questioning. During the stop, Fackrell discovered that Strieff had an outstanding warrant for a traffic violation, arrested him, and found methamphetamine and drug paraphernalia by searching him. The Utah Supreme Court held that the outstanding warrant did not dissipate the taint of the illegal stop. Justice Thomas Lee noted that “attenuation should be limited to cases involving intervening acts of a defendant’s free will . . . [in order to] avoid[] the analytical dilemmas . . . as to whether an outstanding warrant is of ‘compelling’ or ‘minimal’ importance, as to the significance of the ‘temporal proximity’ factor, and as to the application of the ‘purpose and flagrancy’ factors” *State v. Strieff*, 356 P.3d 532, 547 (2016).]

Justice Thomas delivered the opinion of the Court.

To enforce the Fourth Amendment’s prohibition against “unreasonable searches and seizures,” this Court has at times required courts to exclude evidence obtained by unconstitutional police conduct. But the Court has also held that, even when there is a Fourth Amendment violation, this exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits. In some cases, for

example, the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression. The question in this case is whether this attenuation doctrine applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest. We hold that the evidence the officer seized as part of the search incident to arrest is admissible because the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest. . . .

Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." . . .

It remains for us to address whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence on Strieff's person. . . . First, we look to the "temporal proximity" between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. Second, we consider "the presence of intervening circumstances." Third, and "particularly" significant, we examine "the purpose and flagrancy of the official misconduct." In evaluating these factors, we assume without deciding (because the State conceded the point) that Officer Fackrell lacked reasonable suspicion to initially stop Strieff. And, because we ultimately conclude that the warrant breaks the causal chain, we also have no need to decide whether the warrant's existence alone would make the initial stop constitutional even if Officer Fackrell was unaware of its existence. . . .

[W]e hold that the evidence discovered on Strieff's person was admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant. Although the illegal stop was close in time to Strieff's arrest, that consideration is outweighed by two factors supporting the State. The outstanding arrest warrant for Strieff's arrest is a critical intervening circumstance that is wholly independent of the illegal stop. The discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling Officer Fackrell to arrest Strieff. And, it is especially significant that there is no evidence that Officer Fackrell's illegal stop reflected flagrantly unlawful police misconduct. . . .

We hold that the evidence Officer Fackrell seized as part of his search incident to arrest is admissible because his discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to arrest. The judgment of the Utah Supreme Court, accordingly, is reversed.

Justice Sotomayor, with whom Justice Ginsburg joins [in part,] . . . dissenting.

The Court today holds that the discovery of a warrant for an unpaid parking ticket will forgive a police officer's violation of your Fourth Amendment rights. Do not be soothed by the opinion's technical language: This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant. Because the Fourth Amendment should prohibit, not permit, such misconduct, I dissent. . . .

To the Court, the fact that a warrant gives an officer cause to arrest a person severs the connection between illegal policing and the resulting discovery of evidence. This is a remarkable proposition: The mere existence of a warrant not only gives an officer legal cause to arrest and search a person, it also forgives an officer who, with no knowledge of the warrant at all, unlawfully stops that person on a whim or hunch. . . .

Most striking about the Court's opinion is its insistence that the event here was "isolated," with "no indication that this unlawful stop was part of any systemic or recurrent police misconduct." Respectfully, nothing about this case is isolated.

Outstanding warrants are surprisingly common. When a person with a traffic ticket misses a fine payment or court appearance, a court will issue a warrant. . . . The Department of Justice recently reported that in the town of Ferguson, Missouri, with a population of 21,000, 16,000 people had outstanding warrants against them. . . . Justice Department investigations across the country have illustrated how these astounding numbers of warrants can be used by police to stop people without cause. . . .

I do not doubt that most officers act in "good faith" and do not set out to break the law. That does not mean these stops are "isolated instance[s] of negligence," however. Many are the product of institutionalized training procedures. The New York City Police Department long trained officers to, in the words of a District Judge, "stop and question first, develop reasonable suspicion later." The Utah Supreme Court described as "'routine procedure' or 'common practice'" the decision of Salt Lake City police officers to run warrant checks on pedestrians they detained without reasonable suspicion. . . .

Writing only for myself, and drawing on my professional experiences, I would add that unlawful "stops" have severe consequences much greater than the inconvenience suggested by the name. This Court has given officers an array of instruments to probe and examine you. When we condone officers' use of these devices without adequate cause, we give them reason to target pedestrians in an

arbitrary manner. We also risk treating members of our communities as second-class citizens. . . .

This case involves a suspicionless stop, one in which the officer initiated this chain of events without justification. As the Justice Department notes, many innocent people are subjected to the humiliations of these unconstitutional searches. The white defendant in this case shows that anyone's dignity can be violated in this manner. But it is no secret that people of color are disproportionate victims of this type of scrutiny. For generations, black and brown parents have given their children "the talk"—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.

By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.

We must not pretend that the countless people who are routinely targeted by police are "isolated." They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but. . . .

Justice Kagan, with whom Justice Ginsburg joins, dissenting. . . .

This Court has established a simple framework for determining whether to exclude evidence obtained through a Fourth Amendment violation: Suppression is necessary when, but only when, its societal benefits outweigh its costs. . . . The exclusionary rule serves a crucial function—to deter unconstitutional police conduct. By barring the use of illegally obtained evidence, courts reduce the temptation for police officers to skirt the Fourth Amendment's requirements. . . .

This case thus requires the Court to determine whether excluding the fruits of Officer Douglas Fackrell's unjustified stop of Edward Strieff would significantly deter police from committing similar constitutional violations in the future. . . . Nothing in Fackrell's discovery of an outstanding warrant so attenuated the connection between his wrongful behavior and his detection of drugs as to diminish the exclusionary rule's deterrent benefits. . . .

The majority's misapplication of [the] . . . three-part inquiry creates unfortunate incentives for the police—indeed, practically invites them to do what Fackrell did here. Consider an officer who, like Fackrell, wishes to stop someone for investigative reasons, but does not have what a court would view as reasonable suspicion. If the

officer believes that any evidence he discovers will be inadmissible, he is likely to think the unlawful stop not worth making—precisely the deterrence the exclusionary rule is meant to achieve. But when he is told of today’s decision? Now the officer knows that the stop may well yield admissible evidence: So long as the target is one of the many millions of people in this country with an outstanding arrest warrant, anything the officer finds in a search is fair game for use in a criminal prosecution. The officer’s incentive to violate the Constitution thus increases: From here on, he sees potential advantage in stopping individuals without reasonable suspicion—exactly the temptation the exclusionary rule is supposed to remove. Because the majority thus places Fourth Amendment protections at risk, I respectfully dissent.

Police Reform and the Dismantling of Legal Estrangement Monica C. Bell (2017)*

In the concluding paragraphs of her fiery dissent in *Utah v. Strieff*, Justice Sotomayor invoked W.E.B. Du Bois, James Baldwin, Michelle Alexander, Ta-Nehisi Coates, and Marie Gottschalk in concluding that the Court’s decision, which further weakened the power of the exclusionary rule to deter unconstitutional police conduct, sent a message—particularly to people of color—“that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.” Justice Sotomayor laments “treating members of our communities as second-class citizens.” Yet despite the boldness of her statements, in some ways Justice Sotomayor might not have gone quite far enough in articulating the troubling implications of our Fourth Amendment jurisprudence.

Justice Sotomayor’s analysis understates the problem on two fronts. First, in addition to the jurisprudential message that poor people of color are “subject[s] of a carceral state” or “second-class citizens,” research in sociology, criminology, political science, and other fields suggests that these groups often see themselves as essentially stateless—unprotected by the law and its enforcers and marginal to the project of making American society. Even as criminal procedure jurisprudence sets the parameters of what police may do under the law, it simultaneously leaves large swaths of American society to see themselves as anomic, subject only to the brute force of the state while excluded from its protection. The message conveyed in policing jurisprudence is not only one of oppression, but also one of profound estrangement.

A second understatement relates to the understanding of whose safety is at risk when the Fourth Amendment insufficiently checks the power of the police. Justice

* Excerpted from Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE LAW JOURNAL 2054 (2017).

Sotomayor uses the second-person pronoun “you” to convey to a public audience both the universality and the personal proximity of the risk of police control. Yet this literary technique, though effective, obscures the reality that the sense of alienation in a carceral regime emanates not only from what police might do to “you,” but from what they might do to your friends, your intimate partners, your parents, your children; to people of your race or social class; and to people who live in the neighborhood or the city where you live. In other words, estrangement from the American citizenry is not merely an individual feeling to which people of color tend to succumb more readily than white Americans do; rather, estrangement is a collective institutional venture.

The Black Lives Matter era has catalyzed meaningful discussion about the tense relationship between the police and many racially and economically isolated communities, and about how policing can be reformed to avoid deaths like those of Rekia Boyd, Michael Brown, Eric Garner, Alton Sterling, Philando Castile, and more. However, contemporary discourse has often neglected or obscured deeper discussion about the relationship between African Americans—especially poor African Americans—and the police. What is the nature of these relationships? How can scholars and policymakers more roundly understand their contours and potential strategies for change?

Many scholars and policymakers have settled on a “legitimacy deficit” as the core diagnosis of the frayed relationship between police forces and the communities they serve. The problem, this argument goes, is that people of color and residents of high-poverty communities do not trust the police or believe that they treat them fairly, and that therefore these individuals are less likely to obey officers’ commands or assist with investigations. This argument took its most prominent position in the May 2015 Final Report of the White House Task Force on 21st Century Policing. The Report sets forth the goal of building trust and legitimacy as both the first pillar of its proposed approach to police reform and as “the foundational principle underlying [the Task Force’s] inquiry into the nature of relations between law enforcement and the communities they serve.” “Trust” is a broad term, but the Report and much of the policymaking energy surrounding shifts in police governance adopt an understanding of trust that treats it as virtually synonymous with legitimacy.

Ample empirical evidence supports the idea that African Americans, and residents of predominantly African American neighborhoods, are more likely than whites to view the police as illegitimate and untrustworthy, along several axes. Empirical evidence suggests that feelings of distrust manifest themselves in a reduced likelihood among African Americans to accept law enforcement officers’ directives and cooperate with their crime-fighting efforts. According to much of this line of scholarship, the primary tool to achieve greater obedience to the law and law enforcement, regardless of race, is procedural justice: police officers treating people with dignity and respect, behaving in a neutral, nonbiased way, exhibiting an intention to help, and giving people voice to express themselves and their needs in interactions.

Yet many reformers would likely disagree that obedience to law enforcement is the central concern in America's current conversation on police reform. Indeed, in many of the cases that have most catalyzed the Black Lives Matter movement, the victims of police violence were not disobeying the law, were complying with officers' demands, or were suspected of violating petty laws that are likely unworthy of strong enforcement efforts or penalties. A large body of scholarship on criminal justice attempts to denaturalize the assumed link between obeying the law and criminal justice contact. Scholars have shown that recent trends in criminal justice such as pervasive stop-and-frisk, increased misdemeanor prosecution, and mass incarceration are not primarily consequences of increases in criminal offending. Instead, these scholars suggest that the American criminal justice system has dual purposes, only one of which is crime response and reduction. Its other, more insidious function is the management and control of disfavored groups such as African Americans, Latin Americans, the poor, certain immigrant groups, and groups who exist at the intersection of those identities. From a social control perspective, increasing compliance and cooperation with law enforcement may well be valuable aims, but they should not be at the root of police reform efforts. Deploying legitimacy theory and procedural justice as a diagnosis and solution to the current policing crisis might even imply, at some level, that the problem of policing is better understood as a result of African American criminality than as a badge and incident of race- and class-based subjugation. . . .

Choosing a theory of the policing crisis and its solutions is critical for advancing meaningful, effective reform. . . . I introduce the concept of legal estrangement to capture both legal cynicism—the subjective “cultural orientation” among groups “in which the law and the agents of its enforcement, such as the police and courts, are viewed as illegitimate, unresponsive, and ill equipped to ensure public safety”—and the objective structural conditions (including officer behaviors and the substantive criminal law) that give birth to this subjective orientation.

The concept of legal estrangement has the power to reorient police reform efforts because it clarifies the real problem of policing: at both an interactional and structural level, current regimes can operate to effectively banish whole communities from the body politic. The legal estrangement perspective treats social inclusion as the ultimate end of law enforcement. This view extends and reformulates the legitimacy perspective, which tends to present inclusion primarily as a pathway toward deference to legal authorities. The legal estrangement approach encourages a fuller, theoretically informed set of interventions into police governance. . . .

Case No. 1239

**Court of Cassation of France (First Civil Chamber) (2016)
(application filed with the European Court of Human Rights)***

The Facts: Thirteen individuals claim that they have been subjected to identity checks based solely on their physical appearance. They claim that they are targeted because, based on their skin color, physical traits, and clothing, they are or appear to be individuals of African or North African origin. They seek compensation for their non-pecuniary damage from the State.

On March 24, 2015, the Paris Court of Appeal issued thirteen judgments. In five cases, the State was ordered to pay damages to the person checked; in the other eight, the court did not hold the State liable. Appeals were lodged in all thirteen judgments, either by . . . the State or by the persons stopped. The Court of Cassation therefore pronounces itself, for the first time, on these questions.

The Law:

—Identity checks may be carried out in the event of visible crime, risk to public order, or on the requisition of the public prosecutor (Article 78-2 of the Code of Criminal Procedure).

—Identity checks shall not be officially recorded unless they lead to the initiation of judicial or administrative proceedings by the public authorities.

—Under civil law, a person who considers that he or she has been discriminated against may apply to a court before which he or she must prove such discrimination.

—In labor law, a person who considers that he or she is a victim of discrimination does not have to prove it, but only to present a *prima facie* case. It is up to the defendant to demonstrate the absence of discrimination.

The decision of the Court of Cassation:

An identity check based on physical characteristics associated with a real or perceived origin, without any prior objective justification, is discriminatory: it is a serious error, which engages the responsibility of the State.

* Excerpted is a translation of the Court's Press Release on the Judgment by Clare Ryan (Yale Ph.D. Candidate in Law, Class of 2019). See Communiqué: Arrêts relatifs aux contrôles d'identité discriminatoires (November 9, 2016), *available at* https://www.courdecassation.fr/communiqués_4309/contr_identite_discriminatoires_09.11.16_35479.html. An application has been filed with the European Court of Human Rights.

The Court specifies how discrimination must be proved. The burden of proof shifts in three stages:

1. The person who has been the subject of an identity check and who applies to the court must provide the judge with *prima facie* evidence of discrimination;
2. It is then up to the State to demonstrate either the absence of discrimination or a difference in treatment justified by objective factors;
3. Finally, the judge decides.

The Court of Cassation finds that the Court of Appeal correctly applied this method:

—The State has been found liable where it has not shown that the difference in treatment was justified by objective factors;

—The State was not held liable when the difference in treatment was justified by objective factors: the person inspected matched the description of a wanted suspect;

—The State was not found liable when the person stopped for an identification check did not introduce evidence that reflected a difference in treatment and presented a *prima facie* case for the existence of discrimination: presenting statistics attesting to the frequency of ID checks carried out among the population of “visible minorities” was not sufficient evidence on its own; Moreover, the evidence submitted did not reveal any difference in treatment.

Eleven of the appeals filed against the judgments of the Court of Appeal are therefore dismissed. In two cases, however, the judgment is quashed. In one case, the reason is a failure to comply with a rule of civil procedure independent of the question of identity checks. In the other case, the reason is because the Court of Appeal did not inquire whether the difference in treatment was justified by objective factors presented by the State.

* * *

In May of 2017, six of the individuals in this case (No. 1239) applied to the European Court of Human Rights to challenge the French police’s ID check policy and provisions of the French Criminal Procedure Code. Filed as *Seydi and Others v. France*, their application claims that the vague and general nature of the French criminal law and police policy, and the absence of any record of checks, permitted discriminatory stops in violation of Article 14 of the Convention, which provides: “The enjoyment of the rights and freedoms set forth in this European Convention on Human Rights 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.” As of this writing, the case is pending.

DETENTION AND INTERROGATION

Miranda v. Arizona

Supreme Court of the United States
384 U.S. 436 (1966)

Chief Justice Warren delivered the opinion of the Court.

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself. . . .

An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today. The difficulty in depicting what transpires at such interrogations stems from the fact that, in this country, they have largely taken place incommunicado. From extensive factual studies undertaken in the early 1930’s, including the famous Wickersham Report to Congress by a Presidential Commission, it is clear that police violence and the “third degree” flourished at that time. In a series of cases decided by this Court long after these studies, the police resorted to physical brutality—beating, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions. . . . The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. Only recently in Kings County, New York, the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party.

The examples given above are undoubtedly the exception now, but they are sufficiently widespread to be the object of concern. Unless a proper limitation upon custodial interrogation is achieved—such as these decisions will advance—there can be no assurance that practices of this nature will be eradicated in the foreseeable future. . . .

The Fifth Amendment privilege is so fundamental to our system of constitutional rule, and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases

whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clear-cut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest. . . .

[The opinion by Justice Clark dissenting in part, and the dissenting opinion of Justice White, joined by Justices Harlan and Stewart, are omitted.]

Gideon at Guantánamo: Democratic and Despotic Detention Hope Metcalf and Judith Resnik (2013)*

[In 1963, the U.S. Supreme Court decided *Gideon v. Wainwright* and unanimously held that states were required under the Sixth Amendment** to provide lawyers to criminal defendants accused of felonies, who could not afford to pay for representation.] . . . *Gideon*, along with another icon of that era, *Miranda v. Arizona*, recognized the dignity of individuals in their encounters with the state, and required that a person cannot be left alone to be subjected to the totalizing power of the state. Both *Gideon* and *Miranda* deployed and subsidized lawyers to serve as witnesses to government interrogation and as advocates, buffering against abuses and bringing claims to public light through court filings. What we term “democratic detention” was

* Excerpted from Hope Metcalf and Judith Resnik, *Gideon at Guantánamo: Democratic and Despotic Detention*, 122 YALE LAW JOURNAL 2504 (2013).

** The Sixth Amendment of the United States Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”

the call for disciplined and accountable government action that stood in opposition to the unfettered intrusions that “despotic” regimes visited on people under their control. Lawyers were a method to police the state by opening up closed encounters, and judges identified themselves as overseers to limit government misconduct. . . .

Gideon is sometimes set into a silo of Sixth Amendment cases rather than read in conjunction with case law reinterpreting the Fourth, Fifth, and Fourteenth Amendments in efforts to redress the specific challenges facing defendants of color, the risks posed by state coercion, and the interrelationships of race and poverty. A brief excursion into pre-*Gideon* case law illuminates that ideas about American commitments to liberty, equality, and dignity were the conceptual wellsprings that produced *Gideon* and other rules equipping individuals with resources when encountering the state.

A right to a lawyer was the basis of the 1932 ruling in *Powell v. Alabama*, reversing the conviction of nine young black men found guilty of the rape of two white women. The trial and conviction of this group (the “Scottsboro Boys”) brought national and international approbation . . . to the United States. . . . The United States Supreme Court responded, holding in *Powell* that the failure to provide the defendants facing capital charges with lawyers violated the Due Process Clause. The quiet reference to race in the opinion (“the attitude . . . of great hostility”) was coupled with a comment that this right to counsel fell within the set of “certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.”

The idea that a “free government” had to treat criminal defendants differently than would countries less committed to liberty became a refrain in decisions during the World War II and the Cold War eras. In 1943, for example, the U.S. Supreme Court insisted that individuals detained by the police had a constitutional right to be brought before a neutral third party. Justice Frankfurter’s majority opinion in *McNabb v. United States* stressed the need for a prompt appearance because a “democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process.” In 1944, in *Ashcraft v. Tennessee*, Justice Black reiterated that concern, as he distinguished the United States from “certain foreign nations” that would “wring from [detainees] confessions by physical or mental torture.” The theme of a democratic—as opposed to a “despotic”—criminal justice system was replayed in the 1951 decision of *United States v. Carignan*, upholding the reversal of a conviction because the defendant was not permitted to testify before a jury about the “involuntary character” of his confession. . . .

The effort to mark as American special attitudes toward detention framed the briefing on behalf of Ernesto Miranda, who argued that the police had violated his Fifth Amendment right against self-incrimination. Miranda’s lawyer, John Frank, detailed how Miranda, a mentally ill twenty-three-year-old with little education, was placed in a room with two police officers and then signed a confession. After quoting

Justice Douglas's *Carignan* concurrence, Frank added: "We are not talking with some learned historicity about the lettre de cachet of pre-Revolutionary France or the secret prisons of a distant Russia. We are talking about conditions in the United States, in the Twentieth Century, and now." . . .

Ambrose v. Harris
Supreme Court of the United Kingdom
[2011] UKSC 43

[Before Lord Hope, Deputy President; Lord Brown; Lord Kerr; Lord Dyson; and Lord Matthew Clarke.] . . .

Lord Hope:

1. On 26 October 2010 this court issued its judgment in *Cadder*. It held that the Crown's reliance on admissions made by an accused without legal advice when detained under section 14 of the Criminal Procedure (Scotland) Act 1995 gave rise to a breach of his right to a fair trial, having regard to the decision of the European Court of Human Rights (ECtHR) in *Salduz v Turkey* (2008). This was because the leading and relying on the evidence of the appellant's interview by the police was a violation of his rights under article 6.3(c) read in conjunction with article 6.1 of the European Convention on Human Rights*

* Article 6 of the European Convention on Human Rights provides:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. . . .
3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

4. The appellant . . . , John Paul Ambrose, was prosecuted on summary complaint at Oban Sheriff Court on a charge of . . . being in charge of a motor vehicle whilst having consumed a level of alcohol in excess of the prescribed limit. . . .

6. . . . [T]he Appeal Court referred the following question to this court:

Whether the act of the Lord Advocate in leading and relying on evidence obtained in response to police questioning of the appellant conducted under common law caution at the roadside and without the appellant having had access to legal advice was incompatible with the appellants rights under article 6(1) and 6(3)(c) of the European Convention on Human Rights, having regard in particular to the decision of the Supreme Court of the United Kingdom in *Cadder v H.M. Advocate* [(2010)]. . . .

15. [A] decision by this court that there is a rule that a person who is suspected of an offence but is not yet in custody has a right of access to a lawyer before being questioned by the police unless there are compelling reasons to restrict that right would have far-reaching consequences. There is no such rule in domestic law. If that is what Strasbourg requires, then it would be difficult for us to avoid holding that to deny such a person access to a lawyer would be a breach of his rights under articles 6(1) and 6(3)(c) of the Convention. But the consequences of such a ruling would be profound, as the answers to police questioning in such circumstances would always have to be held—in the absence of compelling reasons for restricting access to a lawyer—to be inadmissible. . . .

25. . . . The domestic law test for the admissibility of the answers that were given to the questions put by the police is whether or not there was unfairness on the part of the police. The fact that the person did not have access to legal advice when being questioned is a circumstance to which the court may have regard in applying the test of fairness, but it is no more than that. There is no rule in domestic law that says that police questioning of a person without access to legal advice who is suspected of an offence but is not in custody must always be regarded as unfair. The question is whether a rule to that effect is to be found, with a sufficient degree of clarity, in the jurisprudence of the Strasbourg court. . . .

47. The question whether the right of access to a lawyer applies at a stage before the person is taken into custody is now before the Strasbourg court in an application by Ismail Abdurahman. . . .

50. The Lord Advocate placed considerable weight in support of his argument on the judgment of the Supreme Court of the United States in *Miranda v Arizona* (1966). In that case the Supreme Court held that the prosecution may not use statements, whether incriminatory or exculpatory, stemming from custodial interrogation of a defendant unless it demonstrated the use of procedural safeguards

which were sufficient to secure the privilege against self-incrimination. These safeguards require that, unless other fully effective means are devised to inform the accused person of the right to silence and to assure continuous opportunity to exercise it, he must be warned that he has a right to remain silent, that any statement that he does make may be used as evidence against him, that he has the right to consult with an attorney and that, if he cannot afford one, a lawyer will be appointed to represent him. “Custodial interrogation” for the purposes of this rule means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. . . .

53. It is not unreasonable to think that *Miranda* and subsequent cases that the ruling in that case have given rise to in the United States will influence the thinking of the Strasbourg court as it develops the principles described in *Salduz*. . . .

67. The question in Ambrose’s case is whether the act of the Lord Advocate in leading and relying on evidence obtained in response to police questioning of the appellant conducted under common law caution at the roadside and without the appellant having had access to legal advice was incompatible with the appellant’s rights under article 6(1) and 6(3)(c). I would answer this question in the negative. . . . I would hold that Ambrose was charged for the purposes of article 6 when he was cautioned and that the police officer had reason to think that the second and third questions were likely to elicit an incriminating response from him. . . .

68. But I would hold it would be to go further than Strasbourg has gone to hold that the appellant is entitled to a finding that this evidence is inadmissible because, as a rule, access to a lawyer should have been provided to him when he was being subjected to this form of questioning at the roadside. This leaves open the question whether taking all the circumstances into account it was fair to admit the whole or any part of this evidence. There may, perhaps, still be room for argument on this point. So I would leave the decision as to how that question should be answered to the Appeal Court. . . .

[The concurrence of Lord Brown is omitted.]

Lord Dyson:

88. . . . In *Salduz v Turkey* (2008), the ECtHR decided that article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms requires that, as a rule, access to a lawyer should be provided to a suspect when he is interrogated by the police while he is in detention; and that there will usually be a violation of article 6 if incriminating statements made by a suspect during a police interrogation in such circumstances are relied on to secure a conviction. . . . The central question that arises in the present proceedings is whether the *Salduz* principle

also applies to interrogations of a suspect that are conducted before he is placed in detention. . . .

97. The essential question is at what stage of the proceedings access to a lawyer should be provided in order to ensure that the right to a fair trial is sufficiently “practical and effective” for the purposes of article 6(1). What fairness requires is, to some extent, a matter of judgment. . . . I do not doubt that being interrogated by the police anywhere can be an intimidating experience and that a person may make incriminating statements to the police wherever the interrogation takes place. This can occur in a situation of what the majority of the Canadian Supreme Court described as “psychological detention” in *R v Grant* [(2009)].

98. On the other hand, the arresting of a suspect and placing him in custody is a highly significant step in a criminal investigation. The suspect cannot now simply walk away from the interrogator. For most suspects, being questioned after arrest and detention is more intimidating than being questioned in their home or at the roadside. The weight of the power of the police is more keenly felt inside than outside the police station. As was said in *Miranda v Arizona* (1966), there is a “compelling atmosphere inherent in the process of in-custody interrogation.” No doubt, it is also present to the mind of the suspect that the possibility of “abusive coercion” is greater inside than outside the police station. . . . [I] do not see how it can be said to be arbitrary or illogical to recognise that there is a material difference between the two situations. . . . [O]ne should be careful about making assumptions about the *Miranda* experience or believing that it can be readily transplanted into European jurisprudence. . . .

105. . . . [T]he domestic court should remind itself that there exists a supranational court whose purpose is to give authoritative and Europe-wide rulings on the Convention. . . . [W]e should hold that the *Salduz* principle is confined to statements made by suspects who are detained or otherwise deprived of their freedom in any significant way.

Lord Matthew Clarke: . . .

115. . . . I am in agreement with Lord Hope that the Strasbourg jurisprudence, to date, does not support the defence contention in these references that the ECtHR has gone as far as to say that the right emerges as soon as a suspect is to be questioned by the police in whatever circumstances.

116. As to whether this court should go further than the European court seems to have gone so far, certain important considerations lead me to the conclusion that it should not. The first is the difficulty that can arise in relation to defining precisely at what point in time someone becomes a suspect, as opposed to being a witness or a detained person. The second is that the broader version of the right, contended for by the defence in these cases, could have serious implications for the proper investigation of crime by the authorities. If the police are to be required to ensure that a person who

they wish to question about the commission of a crime (in a situation where the circumstances point to the person being a possible suspect) should have access to a lawyer, if he so wishes, then such a requirement could hamper proper and effective investigations in situations which are often dynamic, fast moving and confused. The unfortunately regular street brawls in city and town centres, or disturbances in crowded places like night clubs, which, on occasions, result in homicide, are simply examples of situations which highlight the problems that might be involved. . . .

Lord Kerr: . . .

130. . . . If the much vaunted dialogue between national courts and Strasbourg is to mean anything, we should surely not feel inhibited from saying what we believe Strasbourg ought to find in relation to those arguments. Better that than shelter behind the fact that Strasbourg has so far not spoken and use it as a pretext for refusing to give effect to a right that is otherwise undeniable. I consider that not only is it open to this court to address and deal with those arguments on their merits, it is our duty to do so.

131. The true nature of the right under article 6.1, taken in conjunction with article 6(3)(c), can only be ascertained by reference to its underlying purpose. What is its purpose? The accused argue that its purpose is that when a person becomes a suspect, because of the significant change in his status that this entails; because of the potential that then arises for him to incriminate himself or to deal with questions in a way that would create disadvantage for him on a subsequent trial; and because of the importance of these considerations in terms of his liability to conviction, the essential protection that professional advice can provide must be available to him.

132. The right, it is argued, should not be viewed solely as a measure for the protection of the individual's interests. It is in the interests of society as a whole that those whose guilt or innocence may be determined by reference to admissions that they have made in moments of vulnerability are sufficiently protected so as to allow confidence to be reposed in the reliability of those confessions. . . . [T]hese arguments should prevail. If it has taught us nothing else, recent experience of miscarriage of justice cases has surely alerted us to the potentially decisive importance of evidence about suspects' reactions to police questioning, whether it is in what they have said or in what they have failed to say, and to the real risk that convictions based on admissions made without the benefit of legal advice may prove, in the final result, to be wholly unsafe. The role that a lawyer plays when the suspect is participating in what may be a pivotal moment in the process that ultimately determines his or her guilt is critical.

133. Thus understood, the animation of the right under article 6(1) cannot be determined in terms of geography. It does not matter, surely, whether someone is over the threshold of a police station door or just outside it when the critical questions are asked and answered. And it likewise does not matter whether, at the precise moment

that a question is posed, the suspect can be said to be technically in the custody of the police or not. If that were so, the answer to a question which proved to be the sole basis for his conviction would be efficacious to secure that result if posed an instant after he was taken into custody but not so an instant before. That seems to me to be a situation too ludicrous to contemplate, much less countenance.

134. Two supremely relevant, so far as these appeals are concerned, themes run through the jurisprudence of Strasbourg in this area. The first is that, in assessing whether a trial is fair, regard must be had to the entirety of the proceedings including the questioning of the suspect before trial. The second theme is that, although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial.

135. Taken, as they must be, in combination, these features of a fair trial lead inexorably to the conclusion that where an aspect of the proceedings which may be crucial to their outcome is taking place, effective defence by a lawyer is indispensable. When one recognises, as Strasbourg jurisprudence has recognised for quite some time, that the entirety of the trial includes that which has gone before the actual proceedings in court, if what has gone before is going to have a determinative influence on the result of the proceedings, it becomes easy to understand why a lawyer is required at the earlier stage.

136. There is no warrant for the belief that vulnerability descends at the moment that one is taken into custody and that it is absent until that vital moment. The selection of that moment as the first occasion on which legal representation becomes necessary is not only arbitrary, it is illogical. The need to have a lawyer is not to be determined on a geographical or temporal basis but according to the significance of what is taking place when the later to be relied on admissions are made. . . .

167. Quite apart from these considerations, however, I believe that one must be careful about making assumptions about the *Miranda* experience or believing that it can be readily transplanted into European jurisprudence in any wholesale way. The implications of that decision must be considered in the context of police practice in the United States of America. Nothing that has been put before this court establishes that it is common practice in America to ask incriminating questions of persons suspected of a crime other than in custody. Indeed, it is my understanding that as soon as a person is identified as a suspect, police are trained that they should not ask that person any questions until he or she has been given the *Miranda* warnings. . . .

Mourning *Miranda*
Charles D. Weisselberg (2008)*

Miranda's familiar regime of warnings and waivers was intended to afford custodial suspects an informed and unfettered choice between speech and silence and, at the same time, prevent involuntary statements. But there never was evidence to show that a system of warnings and waivers could actually protect Fifth Amendment rights as the justices expected. In the more than four decades since *Miranda* was decided, the Supreme Court has effectively encouraged police practices that have gutted *Miranda*'s safeguards, to the extent those safeguards ever truly existed. The best evidence now shows that, as a protective device, *Miranda* is largely dead. It is time to "pronounce the body," as they say on television, and move on. . . .

I have obtained police training materials that are not generally available to the public; the discussion of these resources is perhaps this article's most important contribution. Because most police officers are not lawyers and do not read judicial decisions, training is the link between the Supreme Court's pronouncements and the way in which interrogations are conducted every day in police stations. . . . [T]hese training materials demonstrate how the warning and waiver regime coheres with a sophisticated psychological approach to police interrogation, rather than operating apart from it as the *Miranda* Court intended. The training materials also show how law enforcement agencies operate in the shadow of judicial decisions that have weakened *Miranda*'s protections. . . .

To understand how the application of *Miranda* has evolved in practice, we must examine two critical premises underlying the holdings, as well as the Court's assumptions about how a system of warnings and waivers could actually protect Fifth Amendment rights. Briefly stated, the Court adopted two premises; one about the problem, and another about an appropriate solution.

The Court's first premise was that the process of custodial interrogation contains inherent pressures that compel suspects to speak. The Court inferred this premise from the interrogation practices it believed predominated in 1966. Based on this premise, the justices reached the legal conclusion that custodial interrogation unacceptably endangers suspects' Fifth Amendment privilege. The safeguards that the Court created to address this concern—*Miranda*'s famous system of warnings and waivers—were based on a second premise, namely that such a system of warnings and waivers could in fact counteract the pressures inherent in a custodial interrogation. This second premise in turn relied upon four critical though untested assumptions about the way police would implement a system of warnings and waivers and how suspects would respond to it. . . .

* Excerpted from Charles D. Weisselberg, *Mourning Miranda*, 96 CALIFORNIA LAW REVIEW 1519 (2008).

I have long been an advocate of the *Miranda* decision and its theoretically bright-line rules. This research has changed my beliefs. After a more comprehensive review of police training materials, social science literature, and *post-Miranda* decisions, I have concluded that little is left of *Miranda*'s vaunted safeguards and what is left is not worth retaining. But why not try to fix *Miranda*'s protections? After all, courts have put a stop to the "question-first" technique and questioning "outside *Miranda*." The bottom line is that I do not see a reasonable possibility of a meaningful repair, at least in the courts. . . .

[T]here was only modest evidence supporting the Court's description of police practice and its legal conclusion about the "compelling pressures" inherent in a custodial interrogation, [but] there was no empirical basis for the justices' faith that a program of warnings and waivers could counter those pressures and serve as a "fully effective means" of protecting suspects' Fifth Amendment privilege. . . . The Court could cite to no manuals or studies on this point, for there were none. The parties generally hypothesized about the impact of counsel's presence during an interrogation or asserted in a conclusory way that a statement would be deemed voluntary under the totality of circumstances if a suspect had been made aware of the right not to speak. . . .

The *Miranda* Court assumed that warnings would be given and waivers obtained prior to the start of questioning or the application of the tactics described in the *Miranda* opinion. . . .

We might contextualize the issue by acknowledging the disconnect between law enforcement's theory of interrogation and the Supreme Court's present-day definition of interrogation. For officers, interrogation is part of a seamless sequence of events, and there are strategic considerations that govern every step in that sequence, beginning with initial contacts with suspects. Police are taught that their very first interactions with suspects can develop or destroy rapport. What officers glean from their conversations with suspects, even about mundane topics, may later help to facilitate a successful interrogation. . . .

We do not today have a clean separation between administration of *Miranda* warnings and the use of interrogation tactics, at least not in the way the *Miranda* Court envisioned. Observational studies and my review of training materials provide significant evidence that the warnings and waiver regime has moved at least partway into the interrogation process, contrary to the "time out" from the pressures of interrogation the Court imagined. Officers may use pre-*Miranda* conversation to build rapport, which is important to obtaining a *Miranda* waiver and—eventually—a statement. Officers may also downplay the significance of the warning or portray it as a bureaucratic step to be satisfied before a conversation may occur. There is also evidence that police often describe some of the evidence against suspects before seeking waivers. A few cases have approved extreme versions of this tactic. . . .

The *Miranda* Court established two principles in tension with each other. On the one hand, the justices suggested language for standardized warnings, making the critical assumption that suspects who read or who are read form warnings would be able to understand and act on them. On the other hand, the Court determined that the prosecution must prove that waivers are knowing, intelligent, and voluntary, which theoretically leaves room for individualized determinations of suspects' abilities to understand their rights and to waive them. . . .

[I conclude that we cannot continue to pledge our faith in the Supreme Court's most basic assumption about the efficacy of *Miranda* warnings. The best evidence is now that a significant percentage of suspects simply cannot comprehend the warnings or the rights they are intended to convey.] It will not be easy for judges, officers, and lawyers to let go of *Miranda*. For over four decades, this icon has occupied the center of interrogation law and practice. Yet *Miranda*'s protections are more mythic than real. At some point myth must yield to reality. *Miranda* launched a forty-year experiment in reforming police practices. I think the Court was right to try; sometimes there can be no progress without experimentation. Now, four decades later, we know that a set of bright-line rules is not a panacea for the issues endemic in police interrogation. I mourn the passing of *Miranda*. I deeply regret that the justices' ambitions and expectations were not met. However, I think that the best way to mourn the loss is to learn from the experiment called *Miranda*, acknowledge its failures, and move forward.

**Use and Abuse of Pre-Trial Detention in Council of Europe States:
A Path to Reform
Sarah Nagy (2016)***

Of all incarcerated persons in the world, as many as one out of three has not been convicted of a crime. Some of these detainees, held during criminal investigations for reasons of personal safety or a risk of flight, will be given a just and timely trial; but many others will remain in custody for weeks or months, separated from their families, their livelihoods, and any form of legal help, despite the fact that they are legally still presumed innocent. While prisoners' rights have become a matter of close international attention, the problem of pre-trial detention is often overlooked, even where international standards exist to govern the use of pre-trial detention by domestic criminal courts. Numerous international organizations agree that pre-trial detention should be a measure of last resort in criminal proceedings, but abuse is still widespread: In some jurisdictions, whether as a result of judicial inefficiency,

* Excerpted from Sarah Nagy, *Use and Abuse of Pre-Trial Detention in Council of Europe States: A Path to Reform*, 13 LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW 159 (2016).

corruption, or lack of oversight, “pre-trial detainees outnumber convicted prisoners.” . . .

Pre-trial detention (called detention or custody on remand in some jurisdictions) is “any period of detention of a suspected offender ordered by a judicial authority and prior to conviction.” Officially, pre-trial detention is a measure of last resort, to be used in circumstances involving crimes punishable by incarceration where the accused poses a risk of flight or of committing a serious offense upon release, and where no alternative measures would properly address that risk. Alternative, non-custodial measures to prevent flight or further offense might include requiring the accused to appear periodically before a judicial authority during the criminal investigation process; placing limits on engagement in particular activities or restricting the accused’s movement to certain areas before trial; requiring supervision by an agency appointed by a judicial authority; or requiring the surrender of some form of identification or a financial guarantee of conduct prior to trial. The international approach to pre-trial detention may be summarized by the principle that “[c]ourts should only detain an individual during the adjudication process if, having considered the widest possible range of alternatives, they conclude that detention remains necessary to address the risk identified.”

Among the 47 member states of the Council of Europe, the rights of prisoners and detainees are enumerated in the European Convention on Human Rights of 1953 (hereafter “the Convention”). Article 5 of the Convention establishes the fundamental right of the individual to liberty, with the corresponding right not to be subject to any arbitrary deprivation of that liberty. It states in full that “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in [certain cases] and in accordance with a procedure prescribed by law.” Article 5(1) lists six categories enumerating the circumstances under which public authorities may lawfully deprive an individual of his or her liberty (of which pre-trial detention is the third); it is an exhaustive list, containing the *only* permissible circumstances under which a contracting state may allow such a deprivation. Articles 5(2)-(5) enumerate the accused person’s affirmative right to prompt notification of arrest; to stand trial within a reasonable period of time; to have the lawfulness of any pre-trial detention measure speedily examined and decided; and to have an enforceable right to compensation should the accused be the victim of detention in contravention of the terms of the Article.

The Convention, unlike other instruments of international law of its time, contains the “institutional machinery for supervision and enforcement” of its terms in the form of the European Court of Human Rights (hereafter “the Court”). The Court possesses the authority to investigate and adjudicate violations of the Convention in contracting states, and while it has no authority to strike down national laws, it may issue binding decisions ordering corrective action by states found to be in violation. Such corrective action might include the release of a detained person, or a change in the conditions of their detention. Under Article 5(1)(c) of the Convention, pre-trial

detention is a permissible form of deprivation of liberty, provided that it constitutes “the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence of fleeing after having done so.” Lawful pre-trial detention, therefore, must be ordered by a judge or other judicial officer and must involve a “genuine inquiry into the basic facts of a case in order to verify whether a complaint was well-founded.” The detainee must be charged with a specific and concrete criminal offense—a person may not be held on account of a perceived propensity to commit a crime.

In determining whether specific cases constitute unlawful deprivations of liberty, “the Court does not consider itself bound by the legal conclusions of domestic authorities,” but undertakes an autonomous assessment with emphasis on the context in which detention has been imposed by a domestic judicial authority. The Court considers a series of objective and subjective factors to determine whether detention violates the individual’s right to liberty, including (but not limited to) the length of detention; the purpose of detention; the effect of detention on the detainee; and the manner in which the measure in question is implemented. Importantly, the Court has chosen not to establish a minimum length of detention required to constitute a deprivation of liberty under Article 5, holding for example in *Iskandarov v. Russia* [(2010)] that where involuntary detention is imposed by state agents, shortness of duration is not decisive in determining whether a detainee’s rights have been violated. Periods as short as four days have been found to violate the provisions of Article 5, while periods of three years have also been found lawful based on the surrounding circumstances. Likewise, no other single factor is determinative in finding an Article 5 violation; every case is decided within its own context, based on the totality of the circumstances. With this approach, the Court seeks to balance the freedom of individual states to form their own penal codes (for declaring a strict maximum period of legal detention might invalidate national legislation, which is beyond the power of the Court to do) with the right of individuals not to be detained in a manner that violates their fundamental rights.

In practice, the heavily contextual nature of the Court’s analysis of pre-trial detention cases allows for a wide variety of circumstances in which detention might be found permissible. So long as it does not deem an order of detention “arbitrary,” the Court may find detention lawful when permitting release would present some danger to the accused, to a potential witness in the future trial, or to society generally (especially where the investigated offense is of particular severity); when allowing the accused total freedom might lead to a breach of confidentiality; or when the accused might pose a risk of flight out of the jurisdiction in which trial is pending. Council of Europe member states are free to set their own limits on permissible length of pre-trial detention, and may permit maximum limits of just a few weeks or of several years. Detention periods as short as five days have been found unlawful, while periods as long as two years have been found to be appropriate to the circumstances. Overall,

however, some variation in terms between domestic legal systems notwithstanding, the European legal framework for pre-trial detention established in the Convention is in keeping with the standards espoused by most of the international community, which hold that “pretrial detention can only be justified when used to prevent the accused from absconding, committing a serious offense, or interfering with the administration of justice.” Consistent enforcement within national jurisdictions presents the greater difficulty. . . .

ODonnell v. Harris County

United States District Court for the Southern District of Texas
Civil Action No. H-16-1414 (April 28, 2017)

[Lee H. Rosenthal, Chief United States District Judge:]

“Twenty years ago, not quite one-third of [Texas’s] jail population was awaiting trial. Now the number is three-fourths. Liberty is precious to Americans, and any deprivation must be scrutinized. To protect public safety and ensure that those accused of a crime will appear at trial, persons charged with breaking the law may be detained before their guilt or innocence can be adjudicated, but that detention must not extend beyond its justifications. Many who are arrested cannot afford a bail bond and remain in jail awaiting a hearing. Though presumed innocent, they lose their jobs and families, and are more likely to re-offend. And if all this weren’t bad enough, taxpayers must shoulder the cost—a staggering \$1 billion per year.” The Honorable Nathan L. Hecht, Chief Justice of the Texas Supreme Court, *Remarks Delivered to the 85th Texas Legislature*, Feb. 1, 2017.

This case requires the court to decide the constitutionality of a bail system that detains 40 percent of all those arrested only on misdemeanor charges, many of whom are indigent and cannot pay the amount needed for release on secured money bail. These indigent arrestees are otherwise eligible for pretrial release, yet they are detained for days or weeks until their cases are resolved, creating the problems that Chief Justice Hecht identified. The question addressed in this Memorandum and Opinion is narrow: whether the plaintiffs have met their burden of showing a likelihood of success on the merits of their claims and the other factors necessary for a preliminary injunction against Harris County’s policies and practices of imposing secured money bail on indigent misdemeanor defendants. Maranda Lynn ODonnell, Robert Ryan Ford, and Loetha McGruder sued while detained in the Harris County Jail on misdemeanor charges. They allege that they were detained because they were too poor to pay the amount needed for release on the secured money bail imposed by the County’s policies and practices. They ask this court to certify a Rule 23(b)(2) class and preliminarily enjoin Harris County, the Harris County Sheriff, and—to the extent they are State enforcement officers or County policymakers—the Harris County

Criminal Court at Law Judges, from maintaining a “wealth-based post-arrest detention scheme.”

This case is difficult and complex. The Harris County Jail is the third largest jail in the United States. Although misdemeanor arrestees awaiting trial make up about 5.5 percent of the Harris County Jail population on any given day, about 50,000 people are arrested in Harris County on Class A and Class B misdemeanor charges each year. The arrests are made by a number of law-enforcement agencies, including the Houston Police Department and the police forces of smaller municipalities, the Texas Department of Public Safety, and the Harris County Sheriff’s Office. Harris County’s bail system is regulated by State law, local municipal codes, informal rules, unwritten customary practices, and the actions of judges in particular cases. The legal issues implicate intertwined Supreme Court and Fifth Circuit precedents on the level of judicial scrutiny in equal protection and due process cases and on the tailoring of sufficient means to legitimate ends.

Bail has a longstanding presence in the Anglo-American common law tradition. Despite this pedigree, the modern bail-bond industry and the mass incarceration on which it thrives present important questions that must be examined against current law and recent developments. Extrajudicial reforms have caused a sea change in American bail practices within the last few years. Harris County is also in the midst of commendable and important efforts to reform its bail system for misdemeanor arrests. The reform effort follows similar work in other cities and counties around the country. This work is informed by recent empirical data about the effects of secured money bail on a misdemeanor defendant’s likely appearance at hearings and other law-abiding conduct before trial, as well as the harmful effects on the defendant’s life.

The plaintiffs contend that certainly before, and even with, the implemented reforms, Harris County’s bail system for misdemeanor arrests will continue to violate the Constitution. This case is one of many similar cases recently filed around the country challenging long-established bail practices. Most have settled because the parties have agreed to significant reform. This case is one of the first, although not the only one, that requires a court to examine in detail the constitutionality of a specific bail system for misdemeanor arrestees. This case is also one of the most thoroughly and skillfully presented by able counsel on all sides, giving the court the best information available to decide these difficult issues. . . .

[A]t the heart of this case are two straightforward questions: Can a jurisdiction impose secured money bail on misdemeanor arrestees who cannot pay it, who would otherwise be released, effectively ordering their pretrial detention? If so, what do due process and equal protection require for that to be lawful? Based on the extensive record and briefing, the fact and expert witness testimony, the arguments of able counsel, and the applicable legal standards, the answers are that, under federal and

state law, secured money bail may serve to detain indigent misdemeanor arrestees only in the narrowest of cases, and only when, in those cases, due process safeguards the rights of the indigent accused.

[When the Supreme Court ruled in *San Antonio School District v. Rodriguez* (1973) that wealth-based classifications ordinarily require rational basis review, the Court specifically excepted the wealth-based detentions The Court recognized that . . . “[t]he individuals, or groups of individuals, who constituted the class discriminated against . . . shared two distinguishing characteristics: because of their impecuniness they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.” . . . [H]ere, the plaintiffs’ claim is not that some are able to afford better conditions of pretrial release than others. The claim is that misdemeanor defendants who can pay secured money bail are able to purchase pretrial liberty, while those who are indigent and cannot pay are absolutely denied pretrial liberty and detained by their indigence. Under [Supreme Court precedent] an absolute deprivation of liberty based on wealth creates a suspect classification deserving of heightened scrutiny.]

Because Harris County does not currently supply [due process] those safeguards or protect those rights, the court will grant the plaintiffs’ motion for preliminary injunctive relief. . . .

[T]he relief ordered is consistent with Texas state and Harris County law as written, is required by the Equal Protection and Due Process Clauses, and is justified by the plaintiffs’ evidence. The relief is narrow so as not to interfere with the improvements the County is working to implement by July 1, 2017. . . .

REMEDIES FOR POLICE VIOLENCE

Armani da Silva v. the United Kingdom European Court of Human Rights (Grand Chamber) [2016] ECHR 314

. . . The European Court of Human Rights, sitting as a Grand Chamber composed of: Guido Raimondi, *President*, Dean Spielmann, Işıl Karakaş, Josep Casadevall, Luis López Guerra, Mark Villiger, Pāivi Hirvelä, George Nicolaou, Ledi Bianku, Nebojša Vučinić, Vincent A. De Gaetano, Linos-Alexandre Sicilianos, Paul Mahoney, Krzysztof Wojtyczek, Dmitry Dedov, Branko Lubarda, Yonko Grozev, *judges*, and Lawrence Early, *Jurisconsult*

13. On 7 July 2005 four suicide bombers detonated explosions on the London transport network. Three of the suicide bombers were on underground trains and one was on a bus. Fifty-six people, including the four suicide bombers, were killed in the attack and many more were injured. . . .

15. On 21 July 2005, precisely two weeks after the first bombings, four explosive devices were discovered in rucksacks left on three underground trains and on one bus. As it was feared that the failed bombers would regroup the following morning and attempt to detonate further explosions, the [Metropolitan Police Service (MPS)] immediately launched an operation to find them

[On 22 July 2005 surveillance operations began at the Scotia Road address with the aim of arresting any suspects present at the apartment. The plan was to survey and apprehend anyone leaving.]

25. At 6.50 a.m. Commander McDowall held a briefing during which the firearms strategy was outlined. . . .

26. . . . The [review board] later found that this briefing “stoked . . . fears that they would meet suicide bombers and that they may have to shoot such people.” . . .

29. Jean Charles de Menezes was a Brazilian national who lived at 17 Scotia Road. At 9.33 a.m. he left his apartment building through the common doorway in order to go to work. An officer in the surveillance van saw Mr de Menezes, described him and suggested “it would be worth someone else having a look.” . . . [H]e was followed by the surveillance officers. . . .

36. The CCTV at the station shows Mr de Menezes entering the [London tube] station at 10.03 a.m. wearing a thin denim jacket, a T-shirt and denim jeans, walking calmly and not carrying anything. He went down an escalator and onto a platform. There is no CCTV recording of the lower end of the escalator or of the platform: the relevant tapes, when seized by the MPS, were blank. . . .

37. . . . Eyewitness accounts as to what exactly happened next are conflicting and some of the witnesses gave accounts which it is now known could not have been accurate. However, it would appear . . . that: Mr de Menezes went into the third coach of a stationary train and sat down; one of the surveillance officers shouted to the SFOs that Mr de Menezes was there; Mr de Menezes stood up, arms down; he was pushed back onto his seat and pinned down by two police officers; according to one witness his hand may have moved towards the left hand side of his trouser waistband; and two SFOs (Charlie 2 and Charlie 12) shot Mr de Menezes several times and killed him.

38. Within days of the shooting, . . . it had become apparent that Mr de Menezes had not been involved in the attempted terror attacks on 21 July

49. During the course of the investigation [into the operation and shooting] nearly 890 witness statements were taken from police, forensic experts and civilian witnesses and more than 800 exhibits were collected. . . .

52. The report . . . accepted that the death of Mr de Menezes was not the result of any deliberate act designed to endanger the life of any innocent third party, it nevertheless concluded that: “. . . There can be no doubt that on the morning of 22 July 2005 a combination of circumstances between 0500 and 1006 led to the killing of an entirely innocent man.” . . .

74. . . . [Although the report revealed a number of failings in the way the operation had been carried out] the [Independent Police Complaints Commission (IPCC)] decided that no disciplinary action should be pursued against any of the eleven frontline and surveillance officers involved in the operation since there was no realistic prospect of any disciplinary charges being upheld. . . .

76. On receiving the IPCC . . . Report, the [Crown Prosecution Service (CPS)] considered whether to bring prosecutions against any individual officers for murder, involuntary manslaughter by way of gross negligence . . . , misconduct in public office, forgery or attempting to pervert the course of justice. . . . In deciding whether or not to prosecute, it first had to apply a threshold evidential test, namely, whether or not there was a realistic prospect of conviction, before asking whether or not prosecution would be in the public interest. [The CPS decided not to bring any prosecutions.] . . .

142. A civil action in damages was brought by the family of Mr de Menezes (including the applicant) against the Commissioner of Police of the Metropolis. This was settled by way of mediation during the week of 16 November 2009. The settlement was on a confidential basis. . . .

149. In assessing the reasonableness of the force used, prosecutors will ask first, whether the use of force was necessary in the circumstances; and secondly, whether the force used was reasonable in the circumstances. The domestic courts have indicated that both questions are to be answered on the basis of the facts as the accused honestly believed them to be. To that extent it is a subjective test. There is, however, also an objective element to the test. The jury must then go on to ask themselves whether, on the basis of the facts as the accused believed them to be, a reasonable person would regard the force used as reasonable or excessive. . . .

176. There is no uniform approach among Contracting States as to the threshold evidential test necessary to prosecute a case, although in at least twenty-four States a written threshold does exist. . . .

190. The applicant does not complain that her cousin was killed by State agents in circumstances which breached Article 2* in its substantive aspect; consequently, she does not aver that his shooting was unlawful or that the conduct and planning of [the] Operation . . . was in breach of Article 2. Rather, her complaints fall solely under the procedural limb of Article 2 of the Convention and relate solely to the fact that no individual police officer was prosecuted following the fatal shooting of Jean Charles de Menezes.

191. More specifically, she argues that:

- a) the investigation into her cousin's death fell short of the standard required by Article 2 of the Convention because the authorities were precluded from considering the reasonableness of Charlie 2 and Charlie 12's belief that the use of force was necessary; and
- b) the prosecutorial system in England and Wales prevented those responsible for the shooting from being held accountable and, as a consequence, the procedural requirement under Article 2 of the Convention has not been satisfied. . . .

201. . . . [T]he applicant submitted that the need to secure public confidence by ensuring accountability was particularly fundamental where a fatal shooting by a police officer was concerned and that confidence would be undermined by a perceived failure to prosecute public officials who were alleged to have violated Article 2 of the Convention. Consequently, it would be permissible to have a lower threshold for prosecutions for serious breaches of Convention rights by State agents than for other offences. . . .

207. The Government argued that the formulation of the law of self-defence in England and Wales struck an appropriate balance between permitting the use of force to prevent lethal attacks on the public and ensuring that any individuals who may be exposed to a real and immediate risk to life by any operational measures were protected. In doing so, it recognised that it was not for the courts, with the benefit of detached reflection, to substitute their own opinion for that of a police officer required to act in the heat of the moment. . . .

209. Finally, the Government argued that the applicant's proposed change to the law could have far-reaching and counter-productive effects. In particular, if

* Article 2 of the European Convention on Human Rights provides: "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

officers were liable to prosecution even when their use of force was legitimate based on their honest beliefs at the time, there could be a chilling effect on the willingness of officers to carry out essential duties where they might be required to act in the heat of the moment to avert a danger to life. Consequently, it could have a profoundly detrimental effect on their ability to act in defence of their own lives and the lives of others. . . .

230. A general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention," requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State. The State must therefore ensure, by all means at its disposal, an adequate response—judicial or otherwise—so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed

232. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence. What is at stake here is nothing less than public confidence in the State's monopoly on the use of force. . . .

234. In particular, the investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements. Failing to follow an obvious line of inquiry undermines to a decisive extent the investigation's ability to establish the circumstances of the case and the identity of those responsible

235. In addition, the investigation must be accessible to the victim's family to the extent necessary to safeguard their legitimate interests. There must also be a sufficient element of public scrutiny of the investigation, the degree of which may vary from case to case

238. It cannot be inferred from the foregoing that Article 2 may entail the right to have third parties prosecuted or sentenced for a criminal offence or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence. Indeed, the Court will grant substantial deference to the national courts in the choice of appropriate sanctions for homicide by State agents. Nevertheless, it must still exercise a certain power of review and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed.

239. Where the official investigation leads to the institution of proceedings in the national courts, the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect the right to life through the law. In this regard, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished

245. . . . [I]n those Article 2 cases in which the Court specifically addressed the question of whether a belief was perceived, for good reasons, to be valid at the time, it did not adopt the standpoint of a detached observer; instead, it attempted to put itself into the position of the person who used lethal force, both in determining whether that person had the requisite belief and in assessing the necessity of the degree of force used

252. . . . [I]t cannot be said that the definition of self-defence in England and Wales falls short of the standard required by Article 2 of the Convention. . . .

257. Although the authorities should not, under any circumstances, be prepared to allow life-endangering offences to go unpunished, the Court has repeatedly stated that the investigative obligation under Article 2 of the Convention is one of means and not result. . . . [T]he investigation be “capable of leading to a determination of whether the force used was or was not justified in the circumstances . . . and of identifying and—if appropriate—punishing those responsible”

265. . . . [I]n deciding whether proceedings for an offence should be instituted, prosecutors in England and Wales have to apply a two-stage test: first, they must ask whether there is enough evidence to provide a “realistic prospect of conviction” against each defendant on each charge (the threshold evidential test); and secondly, they must decide if a prosecution is needed in the public interest. In deciding whether there is a realistic prospect of conviction, they should not apply an arithmetical “51% rule”; rather, they should ask whether a conviction is “more likely than not.” . . .

270. . . . [T]he threshold evidential test has to be viewed in the context of the criminal justice system taken as a whole. While the threshold adopted in England and Wales may be higher than that adopted in certain other countries, this reflects the jury system that operates there. Once a prosecution has been brought, the judge must leave the case to the jury as long as there is “some evidence” on which a jury properly directed could convict, even if that evidence is “of a tenuous nature”

272. The applicant has suggested that the threshold should be lower in cases involving the use of lethal force by State agents. However, there is nothing in the Court’s case-law to support this proposition. . . .

273. . . . It is true that public confidence in both the law enforcement agencies and the prosecution service could be undermined if State agents were not seen to be held accountable for the unjustifiable use of lethal force. However, such confidence

would also be undermined if States were required to incur the financial and emotional costs of trial in the absence of any realistic prospect of conviction. . . .

276. In light of the above, the Court does not consider that the threshold evidential test applied in England and Wales constituted an “institutional deficiency” or failing in the prosecutorial system which precluded those responsible for the death of Mr de Menezes being held accountable. . . .

283. The facts of the present case are undoubtedly tragic and the frustration of Mr de Menezes’ family at the absence of any individual prosecutions is understandable. However, it cannot be said that “any question of the authorities’ responsibility for the death . . . was left in abeyance”

284. . . . [S]ometimes lives are lost as a result of failures in the overall system rather than individual error entailing criminal or disciplinary liability. . . .

286. Consequently, having regard to the proceedings as a whole, it cannot be said that the domestic authorities have failed to discharge the procedural obligation under Article 2 of the Convention to conduct an effective investigation into the shooting of Mr de Menezes which was capable of leading to the establishment of the facts, a determination of whether the force used was or was not justified in the circumstances and of identifying and—if appropriate—punishing those responsible. . . .

Joint dissenting opinion of Judges Karakaş, Wojtyczek and Dedov: . . .

3. In assessing compliance by the respondent State with its obligations, it is important to bear in mind the international standards on the use of force by the police. “Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty” (Article 3, Code of Conduct for Law Enforcement Officials, adopted by United Nations General Assembly Resolution 34/169 of 17 December 1979). “In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender” (Official commentary on Article 3 of the Code of Conduct). “Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life” (Principle 9, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990).

For those reasons, if the police plan an operation which may require the use of firearms, they have the duty to act with the utmost care and in particular to meticulously check all the relevant information on which the operational plan is based. While planning their operations, the police also have the obligation to carefully assess the available alternatives and to choose the means which entail the least risk for human life and health. . . .

5. . . . Article 2 of the Convention requires that the substantive criminal law should ensure protection against excessive use of force by the police. This requirement of criminalisation does not mean that any use of force which is not absolutely necessary has to entail criminal liability. . . . [I]n our view, Article 2 of the Convention requires the State to criminalise putative self-defence in so far as the factual error was not justified in the circumstances and the perpetrator may therefore legitimately be reproached for it. If acts of killing in putative self-defence based on an unjustified error are not properly criminalised and punished under domestic law, there is a serious danger that the police may use excessive force with lethal effect. . . .

Furthermore, effective protection of the right to life under Article 2 of the Convention requires also that the substantive criminal law should ensure protection against gross negligence in the preparation and carrying out of police operations in which force is used. . . .

7. . . . The tragic events of the case took place within the context of a pre-planned police operation. It was the duty of the police to devise a realistic plan of action which made it possible to arrest the suspect without using lethal force. It appears that Mr de Menezes could and should have been arrested by the police just after leaving his home. It was the fact that the police officers waited until he entered the underground which caused the situation entailing a putative threat to the lives of a large number of people. In other words, the putative danger arose because of the delay in the reaction by the police. . . .

[The dissenting opinion of Judge López Guerra is omitted.]

City of Los Angeles v. Lyons
Supreme Court of the United States
461 U.S. 95 (1983)

Justice White delivered the opinion of the Court. . . .

This case began on February 7, 1977, when respondent, Adolph Lyons, filed a complaint for damages, injunction, and declaratory relief in the United States District

Court for the Central District of California. The defendants were the City of Los Angeles and four of its police officers. The complaint alleged that on October 6, 1976, at 2 a.m., Lyons was stopped by the defendant officers for a traffic or vehicle code violation and that although Lyons offered no resistance or threat whatsoever, the officers, without provocation or justification, seized Lyons and applied a “chokehold”—either the “bar arm control” hold or the “carotid-artery control” hold or both—rendering him unconscious and causing damage to his larynx. . . . Count V, with which we are principally concerned here, sought a preliminary and permanent injunction against the City barring the use of the control holds. That count alleged that the city’s police officers, “pursuant to the authorization, instruction and encouragement of defendant City of Los Angeles, regularly and routinely apply these choke holds in innumerable situations where they are not threatened by the use of any deadly force whatsoever,” that numerous persons have been injured as the result of the application of the chokeholds, that Lyons and others similarly situated are threatened with irreparable injury in the form of bodily injury and loss of life, and that Lyons “justifiably fears that any contact he has with Los Angeles police officers may result in his being choked and strangled to death without provocation, justification or other legal excuse.” Lyons alleged the threatened impairment of rights protected by the First, Fourth, Eighth and Fourteenth Amendments. Injunctive relief was sought against the use of the control holds “except in situations where the proposed victim of said control reasonably appears to be threatening the immediate use of deadly force.” . . .

Since our grant of certiorari, circumstances pertinent to the case have changed. Originally, Lyons’ complaint alleged that at least two deaths had occurred as a result of the application of chokeholds by the police. His first amended complaint alleged that 10 chokehold-related deaths had occurred. By May, 1982, there had been five more such deaths. On May 6, 1982, the Chief of Police in Los Angeles prohibited the use of the bar-arm chokehold in any circumstances. A few days later, on May 12, 1982, the Board of Police Commissioners imposed a six-month moratorium on the use of the carotid-artery chokehold except under circumstances where deadly force is authorized. . . .

It goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy. Plaintiffs must demonstrate a “personal stake in the outcome” in order to “assure that concrete adverseness which sharpens the presentation of issues” necessary for the proper resolution of constitutional questions. Abstract injury is not enough. The plaintiff must show that he “has sustained or is immediately in danger of sustaining some direct injury” as the result of the challenged official conduct and the injury or threat of injury must be both “real and immediate,” not “conjectural” or “hypothetical.” . . .

[In] *Rizzo v. Goode* (1976), a case in which plaintiffs alleged widespread illegal and unconstitutional police conduct aimed at minority citizens and against City

residents in general . . . [t]he Court reiterated . . . that past wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy. The claim of injury rested upon “what one or a small, unnamed minority of policemen might do to them in the future because of that unknown policeman’s perception” of departmental procedures. . . . The Court also held that plaintiffs’ showing at trial of a relatively few instances of violations by individual police officers, without any showing of a deliberate policy on behalf of the named defendants, did not provide a basis for equitable relief. . . .

Lyons has failed to demonstrate a case or controversy with the City that would justify the equitable relief sought. Lyons’ standing to seek the injunction requested depended on whether he was likely to suffer future injury from the use of the chokeholds by police officers. . . . That Lyons may have been illegally choked by the police on October 6, 1976, while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part. The additional allegation in the complaint that the police in Los Angeles routinely apply chokeholds in situations where they are not threatened by the use of deadly force falls far short of the allegations that would be necessary to establish a case or controversy between these parties.

In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either, (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning or, (2) that the City ordered or authorized police officers to act in such manner. . . .

Absent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional. This is not to suggest that such undifferentiated claims should not be taken seriously by local authorities. Indeed, the interest of an alert and interested citizen is an essential element of an effective and fair government, whether on the local, state or national level. A federal court, however, is not the proper forum to press such claims unless the requirements for entry and the prerequisites for injunctive relief are satisfied. . . .

[W]ithholding injunctive relief does not mean that the “federal law will exercise no deterrent effect in these circumstances.” If Lyons has suffered an injury barred by the Federal Constitution, he has a remedy for damages under § 1983.

Furthermore, those who deliberately deprive a citizen of his constitutional rights risk conviction under the federal criminal laws. . . .

Justice Marshall, with whom Justice Brennan, Justice Blackmun and Justice Stevens join, dissenting.

The District Court found that the City of Los Angeles authorizes its police officers to apply life-threatening chokeholds to citizens who pose no threat of violence, and that respondent, Adolph Lyons, was subjected to such a chokehold. The Court today holds that a federal court is without power to enjoin the enforcement of the City's policy, no matter how flagrantly unconstitutional it may be. Since no one can show that he will be choked in the future, no one—not even a person who, like Lyons, has almost been choked to death—has standing to challenge the continuation of the policy. The City is free to continue the policy indefinitely as long as it is willing to pay damages for the injuries and deaths that result. I dissent from this unprecedented and unwarranted approach to standing.

There is plainly a “case or controversy” concerning the constitutionality of the City's chokehold policy. The constitutionality of that policy is directly implicated by Lyons' claim for damages against the City. The complaint clearly alleges that the officer who choked Lyons was carrying out an official policy, and a municipality is liable under 42 U.S.C. § 1983 for the conduct of its employees only if they acted pursuant to such a policy. Lyons therefore has standing to challenge the City's chokehold policy and to obtain whatever relief a court may ultimately deem appropriate. . . .

The Court's decision removes an entire class of constitutional violations from the equitable powers of a federal court. It immunizes from prospective equitable relief any policy that authorizes persistent deprivations of constitutional rights as long as no individual can establish with substantial certainty that he will be injured, or injured again, in the future. . . . We now learn that wrath and outrage cannot be translated into an order to cease the unconstitutional practice, but only an award of damages to those who are victimized by the practice and live to sue and to the survivors of those who are not so fortunate. Under the view expressed by the majority today, if the police adopt a policy of “shoot to kill,” or a policy of shooting one out of ten suspects, the federal courts will be powerless to enjoin its continuation. The federal judicial power is now limited to levying a toll for such a systematic constitutional violation.

Whose Eyes Are You Going To Believe?

Scott v. Harris and the Perils of Cognitive Illiberalism

Dan M. Kahan, David A. Hoffman, and Donald Braman (2009)*

. . . We consider first the story of *Scott v. Harris*. It begins with a relatively familiar challenge—“catch me if you can”—on the roads of Georgia and ends with a very unusual one—“see for yourself”—in the pages of a Supreme Court opinion.

Just before 11:00 p.m. on March 29, 2001, on a two-lane highway in the Atlanta suburbs, the police detected Victor Harris speeding. But when the officers attempted to make a traffic stop, Harris hit the gas pedal, fleeing at high speed. Soon a car driven by Officer Timothy Scott joined the chase. Knowing little of the inciting situation, Scott had decided on his own initiative to help apprehend Harris. Following a slow-speed interlude that included a side swiping in an empty shopping mall parking lot, the chase returned to the road, reaching speeds in excess of eighty-five miles per hour. The pursuit ended some six minutes and nine miles after it began, when Scott decided to strike Harris’s rear bumper with his car, causing Harris, as intended, to spin out of control and crash. Scott recognized that this maneuver involved a significant risk of serious injury or death to Harris, who in fact suffered a broken neck that left him a quadriplegic.

Harris filed a lawsuit . . . alleging that the use of admittedly deadly force to terminate the chase constituted an unreasonable seizure under the Fourth Amendment. After the district court denied Scott’s claim of qualified immunity, Scott took an interlocutory appeal to the Eleventh Circuit Court of Appeals, which affirmed. In addition to upholding the district court’s ruling on immunity, the court of appeals agreed that Scott was not entitled to summary judgment on the merits of Harris’s Fourth Amendment claim:

None of the antecedent conditions for the use of deadly force existed in this case. Harris’ infraction was speeding (73 mph in a 55 mph zone). There were no warrants out for his arrest for anything, much less for the requisite “crime involving the infliction or threatened infliction of serious physical harm.” Indeed, neither Scott nor [a second officer] had any idea why Harris was being pursued. The use of deadly force is not “reasonable” in a high-speed chase based only on a speeding violation and traffic infractions where there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and Harris

* Excerpted from Dan M. Kahan, David A. Hoffman, and Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARVARD LAW REVIEW 837 (2009).

remained in control of his vehicle, and there is no question that there were alternatives for a later arrest.

The court also specifically rejected Scott's argument that "Harris' driving must, as a matter of law, be considered sufficiently reckless to give Scott probable cause to believe that he posed a substantial threat of imminent physical harm to motorists and pedestrians":

This is a disputed issue to be resolved by a jury. As noted by the district court judge, taking the facts from the non-movant's viewpoint, Harris remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. . . . [B]y the time . . . Scott rammed Harris, the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections.

The Supreme Court granted certiorari. Framed by the questions presented for review and by the briefs, the case appeared to hinge on two issues. One was whether Scott was entitled to immunity from suit on the ground that any violation of Harris's Fourth Amendment rights was not based on law "clearly established" at the time of the chase. The other was the relevance of *Tennessee v. Garner* [(1985)], which held that police could not use deadly force in the form of shooting a fleeing suspect "unless . . . the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." The Eleventh Circuit had relied heavily upon *Garner*; Scott argued for a less restrictive standard in the context of a high-speed police chase.

But it was the chase videotape, an exhibit in support of the defendants' motion for summary judgment, that proved decisive. For the Court, the facts revealed in the video made it so indisputably clear that Scott was entitled to summary judgment that it found no need to resolve the immunity issue. Justice Scalia wrote:

[W]e see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.

Referring to the conventional rule that disputed facts should be construed in favor of the nonmoving party in evaluating a motion for summary judgment, Justice Scalia concluded that “[t]he Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.”

The Court also found that the tape so manifestly demonstrated the “reasonableness” of the use of deadly force that there was no need to puzzle over how to adapt *Garner* to a car chase. The Court evaluated the reasonableness of Scott’s actions by looking at several factors, starting first with the risks posed to the police, the public, and Harris by the chase:

Although there is no obvious way to quantify the risks on either side, it is clear from the videotape that respondent posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase. It is equally clear that Scott’s actions posed a high likelihood of serious injury or death to respondent—though not the near certainty of death posed by, say, shooting a fleeing felon in the back of the head

The Court then attempted to balance these factors by framing the issue as one of comparative fault:

So how does a court go about weighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing a single person? We think it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability. It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted. Multiple police cars, with blue lights flashing and sirens blaring, had been chasing respondent for nearly 10 miles, but he ignored their warning to stop. By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent.

The Court apparently viewed the conclusion of this “relative culpability” analysis as likewise so far beyond dispute that no contrary jury determination would be sustainable: “We have little difficulty in concluding it was reasonable for Scott to take the action that he did.”

As noted, Justice Stevens, alone, dissented. Justice Stevens reported his own impression that “the tape actually confirms, rather than contradicts, the lower courts’ appraisal of the factual questions at issue.” In what must have struck the majority as a

strangely flattering rebuke, Justice Stevens, at eighty-seven the Court's oldest Justice, attributed his colleagues' contrary perceptions to their comparative youth: "Had they learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways—when split-second judgments about the risk of passing a slow-poke in the face of oncoming traffic were routine—they might well have reacted to the videotape more dispassionately."

Just as strangely, if not as flatteringly, the Court majority did not counter Justice Stevens's dissent with argument. As noted, the Court replied curtly, "[w]e are happy to allow the videotape to speak for itself." Answering Chico Marx's question, Justice Breyer, in a concurring opinion, seconded the Court's "see for yourself" rejoinder:

Because watching the video footage of the car chase made a difference to my own view of the case, I suggest that the interested reader take advantage of the link in the Court's opinion and watch it. Having done so, I do not believe a reasonable jury could, in this instance, find that Officer Timothy Scott (who joined the chase late in the day and did not know the specific reason why the respondent was being pursued) acted in violation of the Constitution.

Indeed, Justice Breyer and Justice Ginsburg, who also wrote separately, were arguably even more emphatic about the impact of the video. Whereas the majority opinion appeared to endorse a general rule that all uses of deadly force to end dangerous high-speed chases should be treated as constitutional, these Justices stressed the need to review such pursuits case by case. "[T]he video," Justice Breyer wrote, "makes clear the highly fact-dependent nature of this constitutional determination." . . .

For Justices Breyer and Ginsburg, then, the video mandated summary judgment not merely because it foreclosed reasonable disagreement about whether a dangerous chase had occurred, but also because, for them at least, it foreclosed reasonable disagreement on whether chasing Harris at all promoted public safety, whether Harris or the police were more culpable for the danger of the chase to the public, and ultimately whether the use of deadly force was justified in light of the risk that Harris posed.

For those familiar with the Court's commitments both to reasoned justification and to safeguarding its exclusive power to interpret the Constitution, the invitation to members of the public at large to judge the correctness of the decision for themselves by simply applying their senses was a conclusion to the case every bit as spectacular as the metal-contorting crash that ended Harris's flight from the police. There is, however, an obvious problem with the Court's invitation. In reporting that he, at least, saw something different, Justice Stevens was plainly advancing the claim that the tape doesn't speak for itself—that different people, with different experiences, can see

different things in it. No individual who watches the tape and comes away agreeing with the Court will be in a position to rebut Justice Stevens's claim, because however clearly that person perceives things, the fact remains that she is able to see only what she sees and not what anyone else does. The testing method the Court proposes, in sum, is hopelessly solipsistic. . . .

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