

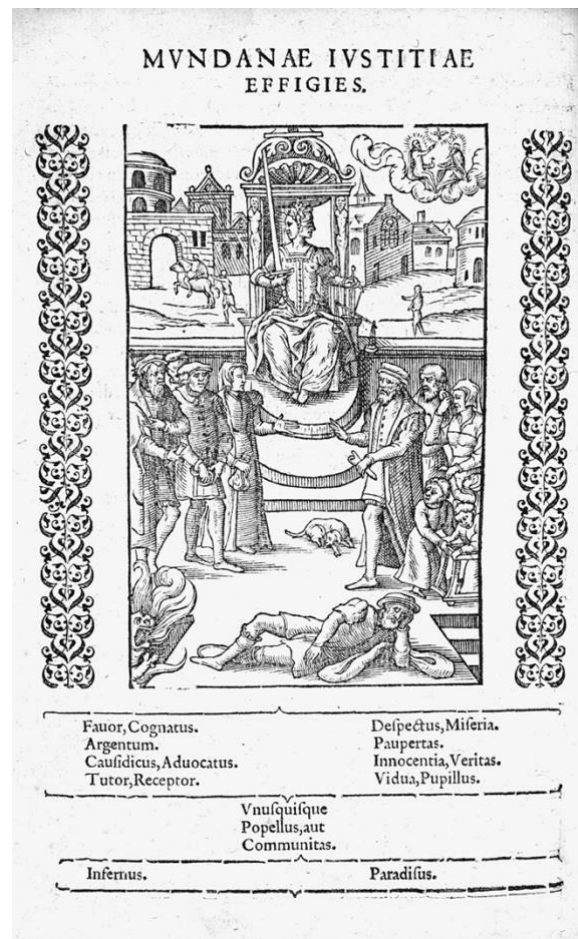


YALE LAW SCHOOL

Global Constitutionalism 2021

A Part of the Gruber Program for Global Justice and Women's Rights

Urgency and Legitimacy



In Medias Res: COVID-19 and the Law

**Two Decades After 9/11: The Judicial Response to Terrorism
from Within and Without**

Encountering Protest

Extremes, Democracy, and the Rule of Law

Editor Judith Resnik



Gruber Program for Global Justice and Women's Rights

The Gruber Program for Global Justice and Women's Rights has supported the Yale Global Constitutionalism Seminar since The Gruber Foundation was established at Yale University in 2011. The Seminar originated at Yale Law School in 1996 and is now an integral part of the Gruber Program.

The Gruber Program supports programs in international justice and human rights. Core components include the Global Constitutionalism Seminar, the Gruber Distinguished Lectures in Global Justice and Women's Rights, the Gruber Fellowships in Global Justice and Women's Rights, and Gruber Project in Global Justice and Women's Rights.

The commitment of philanthropists Peter and Patricia Gruber to bringing about a fundamentally just world is furthered by the Gruber Program for Global Justice and Women's Rights at Yale Law School, which draws upon the missions of the former Gruber Justice and Women's Rights Prizes.

www.gruber.yale.edu

Editor

Judith Resnik

Arthur Liman Professor of Law

Executive and Managing Editor

Sofea Dil

Class of 2021

Associate Managing Editor

Akanksha Shah

Class of 2022

Senior Editors

Alexandria Miskho

Class of 2022

Mark Stevens

Class of 2021

Rachael Stryer

Class of 2022

Editors

Braden Currey

Class of 2023

Eshan Dabak

Class of 2023

Alexis Kallen

Class of 2023

Natalie Nogueira

Class of 2023

Angela Remus

Class of 2022

Christopher Umanzor

Class of 2023

Editor Emeritus

Lawrence Liu

Class of 2022

Senior Coordinator of the Seminar

Renee DeMatteo

Yale Law School, 2021

CHAPTERS

In Medias Res: COVID-19 in the Law

Abbe Gluck, Daphne Barak-Erez, and Marta Cartabia

Two Decades After 9/11: The Judicial Response to Terrorism from Within and Without

Linda Greenhouse, Ivana Jelić, and
Rosalie Silberman Abella

Encountering Protest

Muneer Ahmad and Susanne Baer

Extremes, Democracy, and the Rule of Law

Daniel Markovits, Timothy Snyder, and
Manuel José Cepeda Espinosa

Urgency and Legitimacy

Table of Contents

Judith Resnik, <i>Preface</i>	i
-------------------------------------	---

I. IN MEDIAS RES: COVID-19 IN THE LAW

DISCUSSION LEADERS:

ABBE GLUCK, DAPHNE BARAK-EREZ, AND MARTA CARTABIA

Personal Liberties, Inequalities, and Economic Viability

Tracking Individuals to Collect Data

Ben Meir v. Prime Minister (Supreme Court of Israel, April 2020)	I-5
Law Extending the Public Health State of Emergency and Rounding Out Its Provisions (Constitutional Council of France, May 2020)	I-9
Association for Civil Rights in Israel v. The Knesset (Supreme Court of Israel, March 2021)	I-11
PL. ÚS 13/2020 (Constitutional Court of the Slovak Republic, May 2020)	I-13

Enforcing Emergency Laws, Restricting Movement, and Disparate Impacts

Ruling No. 5-20-EE/20 (Constitutional Court of Ecuador, August 2020)	I-15
Constitutional Review of Decision No. 01/15 of the Government of the Republic of Kosovo, of 23 March 2020 (Constitutional Court of the Republic of Kosovo, March 2020)	I-19
Law Society of Kenya v. Mutiyambi (High Court of Kenya, April 2020)	I-22
Amnesty International, <i>COVID-19 Crackdowns: Police Abuse and the Global Pandemic</i> (December 2020)	I-25

Mandates for Governments to Act

ADPF 672 MC (Federal Supreme Court of Brazil, May 2020)	I-27
MS 37760 MC / DF (Federal Supreme Court of Brazil, April 2021)	I-29
David E. Pozen and Kim Lane Scheppele, <i>Executive Underreach, in Pandemics and Otherwise</i> (2020)	I-32

Order No. 37 of 2021 (Merits) (Constitutional Court of Italy, February 2021)	I-34
Maney v. Brown (U.S. District Court for the District of Oregon, February 2021)	I-36
Valentine v. Collier (Supreme Court of the United States, November 2020)	I-39

Economic Impacts of Lockdowns

De Beer v. Minister of Cooperative Governance and Traditional Affairs (High Court of South Africa, June 2020)	I-42
County of Los Angeles v. California Restaurant Association (Court of Appeal of the State of California, March 2021)	I-45

Regulating Group-Based Activities: Autonomy, Religion, Vaccinations, and Public Health Mandates

Collective Isolation

ADPF 709 MC-REF (Federal Supreme Court of Brazil, August 2020)	I-49
---	------

Limiting Access to In-Person Education and Religious Observances

Case of Vavříčka and Others v. The Czech Republic (European Court of Human Rights, Grand Chamber, April 2021)	I-51
Judgment of the First Senate of 15 July 2020 (Federal Constitutional Court of Germany, First Senate, July 2020)	I-56
DeSantis v. Florida Education Association (First District Court of Appeal of the State of Florida, October 2020)	I-59
Hussain v. Secretary of State for Health and Social Care (High Court of Justice of the United Kingdom, 2020)	I-62
Jacobson v. Massachusetts (Supreme Court of the United States, 1905)	I-65
Roman Catholic Diocese of Brooklyn v. Cuomo (Supreme Court of the United States, November 2020)	I-68
South Bay United Pentecostal Church v. Newsom (Supreme Court of the United States, February 2021)	I-71
Samuel Alito, <i>Address to the Federalist Society's 2020 National Lawyers Convention</i> (November 2020)	I-74

The Next Frontier: The Workplace

U.S. Equal Employment Opportunity Commission, <i>What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws</i> (May 2021)	I-76
---	------

II. TWO DECADES AFTER 9/11: THE JUDICIAL RESPONSE TO TERRORISM FROM WITHIN AND WITHOUT

DISCUSSION LEADERS:

LINDA GREENHOUSE, IVANA JELIĆ, AND ROSALIE SILBERMAN ABELLA

The Weight of Terrorism in Judicial Decisionmaking

Secretary of State for the Home Department v. Rehman (House of Lords of the United Kingdom, 2001)	II-4
Ibrahim and Others v. The United Kingdom (European Court of Human Rights, Grand Chamber, 2016)	II-7
Trump v. Hawaii (Supreme Court of the United States, 2018)	II-12

Judicial Review and National Security

Judgment No. 106 of 2009 (Constitutional Court of Italy, 2009)	II-15
Nasr and Ghali v. Italy (European Court of Human Rights, Fourth Section, 2016)	II-20
Brief of Amicus Curiae Fred Korematsu, Rasul v. Bush (Supreme Court of the United States, 2004)	II-23
Rasul v. Bush (Supreme Court of the United States, 2004)	II-25
District Bar Association, Rawalpindi v. Federation of Pakistan (Supreme Court of Pakistan, 2015)	II-27

Exceptional Action and Individual Rights

Rights of the General Public

Judgment of the First Senate of 15 February 2006 (Federal Constitutional Court of Germany, 2006)	II-31
Szabó and Vissy v. Hungary (European Court of Human Rights, Fourth Section, 2016)	II-34
Gillan and Quinton v. The United Kingdom (European Court of Human Rights, Fourth Section, 2010)	II-38

Rights of Those Suspected of Terrorism

Ghoumid and Others v. France (European Court of Human Rights, Fifth Section, 2020)	II-42
Öcalan v. Turkey (No. 2) (European Court of Human Rights, Second Section, 2014)	II-45
Application Under S 83.28 (Supreme Court of Canada, 2004)	II-47
A and Others v. Secretary of State for the Home Department (House of Lords of the United Kingdom, 2004)	II-51
A and Others v. Secretary of State for the Home Department (II) (House of Lords of the United Kingdom, 2005)	II-55

Boumediene v. Bush (Supreme Court of the United States, 2008)	II-58
Kim Lane Scheppelle, <i>The New Judicial Deference</i> (2012)	II-62
Canada v. Khadr (Supreme Court of Canada, 2008)	II-65

Reflections

Aharon Barak, <i>A Judge on Judging</i> (2002)	II-67
--	-------

III. ENCOUNTERING PROTEST

DISCUSSION LEADERS:

MUNEER AHMAD AND SUSANNE BAER

Martin Luther King, Jr., <i>Letter from Birmingham Jail</i> (1963)	III-4
Walker v. City of Birmingham (Supreme Court of the United States, 1967)	III-7
Shuttlesworth v. City of Birmingham (Supreme Court of the United States, 1969)	III-10

Constraining, Enabling, and Policing Protest

Rakesh Vaishnav & Others v. Union of India & Others (Supreme Court of India, 2021)	III-12
Dhiab v. Obama (U.S. District Court for the District of Columbia, 2014)	III-15
Muneer Ahmad, <i>Resisting Guantánamo: Rights at the Brink of Dehumanization</i> (2009)	III-18
Order of 6 July 2020 (Council of State of France, 2020)	III-21
National Responsibility—Israel My Home v. Israeli Government (Supreme Court of Israel, 2021)	III-23
Snyder v. Phelps (Supreme Court of the United States, 2011)	III-24
Raul Bassi v. Commissioner of Police (NSW) (New South Wales Court of Appeal, Australia, 2020)	III-28
Don't Shoot Portland v. City of Portland (U.S. District Court for the District of Oregon, 2020)	III-31
Kwok Wing Hang and 23 Others v. Chief Executive in Council (Hong Kong Court of Final Appeal, 2020)	III-34
Coastal GasLink Pipeline Ltd. v. Huson (Supreme Court of British Columbia, Canada, 2020)	III-37
Constitutional Petition no. 56 of 2013 (Constitutional Court of Uganda at Kampala, 2020)	III-40

Protest On, About, and From the Bench

Susanne Baer, <i>Democracy in Peril</i> (2019)	III-43
Monica Bell, <i>Police Reform and the Dismantling of Legal Estrangement</i> (2017)	III-46

Jamison v. McClendon (U.S. District Court for the Southern District of Mississippi, 2020)	III-49
Somerset v. Stewart (King’s Bench, 1772)	III-52
In re Booth (Supreme Court of Wisconsin, United States, 1854)	III-54
Robert M. Cover, <i>Justice Accused</i> (1975)	III-56

IV. EXTREMES, DEMOCRACY, AND THE RULE OF LAW

DISCUSSION LEADERS:

DANIEL MARKOVITS, TIMOTHY SNYDER, AND MANUEL JOSÉ CEPEDA ESPINOSA

Entitlements to Participate

Robert Alan Dahl, <i>Polyarchy: Participation and Opposition</i> (1971).....	IV-5
Jan-Werner Müller, <i>Protecting Popular Self-Government from the People?</i> (2016)	IV-6

Gatekeeping: Access to the Popular Vote

Verdict Banning the Communist Party of Germany (Federal Constitutional Court of Germany, First Senate, 1956).....	IV-12
Judgment of the Second Senate of 17 January 2017 (Federal Constitutional Court of Germany, Second Senate, 2017)	IV-13
The Kach Party v. The Chairman of the Central Election Committee for the 12 th Knesset (Supreme Court of Israel, 1988).....	IV-18
Judgment C-089 of 1994 (Constitutional Court of Colombia, 1994)	IV-23
Final Agreement for Ending the Conflict and Building a Stable and Lasting Peace (Colombia, 2016).....	IV-25

Policing Speech in Electoral Politics

Bolsonaro v. Party Coalition “O povo feliz de novo” (Superior Electoral Court of Brazil, 2018)	IV-29
Facebook v. CasaPound (Court of Rome, Italy, 2020).....	IV-31
Case Decision 2021-001-FB-FBR (Facebook Oversight Board, 2021)	IV-34

The Role of Resources: To Participate, to Overwhelm, to Insulate

G.A. Cohen & Michael Otsuka, <i>On the Currency of Egalitarian Justice</i> (2011)	IV-37
Jeffrey A. Winters, <i>Oligarchy</i> (2011).....	IV-38
Daniel Markovits, <i>The Meritocracy Trap</i> (2019).....	IV-40

Financing Campaigns

James Lindley Wilson, <i>Democratic Equality</i> (2019)	IV-43
McCloy v. New South Wales (High Court of Australia, 2015)	IV-45
McCutcheon v. Federal Election Commission (Supreme Court of the United States, 2014)	IV-49
Michael J. Graetz and Ian Shapiro, <i>Death by a Thousand Cuts</i> (2011)	IV-52

Escaping Regulation

Sharon J. Riley and Sarah Cox, <i>Industry Responsible for 80 Per Cent of Senate Lobbying Linked to Bill C-69</i> (2019)	IV-55
Elizabeth Warren, <i>Corporate Capture of the Rulemaking Process</i> (2016)	IV-57
Veena B. Dubal, Ruth Berins Collier, and Christopher L. Carter, <i>Disrupting Regulation, Regulating Disruption</i> (2018).....	IV-59
Shelly Steward et al., <i>Uber's Call for Change in Europe Shirks Responsibility While Highlighting Real Challenges</i> (2021).....	IV-62

Avoiding Taxes

Annette Alstadsæter, Niels Johannesen, and Gabriel Zucman, <i>Tax Evasion and Inequality</i> (2019)	IV-65
U.S. Department of the Treasury, <i>Investing in the IRS and Improving Tax Compliance</i> (2021)	IV-67
Imran Ahmed Khan Niazi v. Mian Muhammad Nawaz Sharif (Supreme Court of Pakistan, 2017)	IV-69
Rebecca Prebble and John Prebble, <i>Does the Use of General Anti- Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law?</i> (2010)	IV-73
Canada Trustco Mortgage Co. v. Canada (Federal Court of Appeal of Canada, 2005)	IV-75

Reinforcing Extremes

Richard Rorty, <i>Achieving Our Country</i> (1998)	IV-77
Daniel Markovits, <i>The Meritocracy Trap</i> (2019).....	IV-80

* * *

Opinions Excerpted.....	A-1
Commentary and Additional Materials Excerpted.....	A-4
About the Chapter Authors and Editor.....	B-1
About the Student Editors.....	B-7

Table of Contents

About the Editor Emeritus.....	B-10
Permissions to Republish Materials.....	C-1

Preface

The title of this year's volume, *Urgency and Legitimacy*, reflects the world we inhabit, in which jurists have been faced repeatedly with arguments that emergencies require rethinking constitutional norms and practices. We compiled this volume as the COVID-19 pandemic, protests, uprisings, and violent assaults were underway. As the materials also reflect, this era is one of many for which the word "urgency" is sadly apt, and in which questions of justice and legitimacy haunt courts.

We begin (as George Eliot explained, all narratives do) *in medias res*, as we continue the discussion of *COVID-19 in the Law*. Last year, we focused on the effect of the pandemic on the functioning of courts. We turn now, in a session led by Abbe Gluck, Daphne Barak-Erez, and Marta Cartabia, to consider a few of the many legal issues raised by the hundreds of lawsuits challenging aspects of responses by governments to COVID-19. As the disease spread, people objected to a variety of state actions as well as to a lack of action. Litigants, challenging executive branch decisions, have asserted harms to individual liberty, privacy, and autonomy as well as to collective interests in education, religious observance, and economic vitality. Courts have probed defences by governments that exceptional needs license their actions; doing so required judges to assess the quality and nature of scientific information as it changed over time and the inequalities that lace society and resulted in differential impacts of decisions made by governments.

Just as COVID-19 has framed the last two years, the terrorist attacks of September 11, 2001 captured the world's attention twenty years earlier. The chapter *Two Decades After 9/11: The Judicial Response to Terrorism from Within and Without* explores how those events affected debates among judges, courts, and theorists about the role of courts in regulating efforts to deal with national security. Edited by Linda Greenhouse, Ivana Jelić, and Rosalie Silberman Abella, the materials examine the responses of jurists, sometimes deferring to the judgments of the political branches and sometimes applying their own judgment on what rule-of-law principles and individual rights require. Courts have weighed government arguments that threats to democratic institutions and national security justify the intrusions on liberty. Judges also have heard government arguments that courts lack the authority or the competency to assess threats, as well as that judicial evidentiary and decision-making procedures themselves increase the risk of harm.

The third chapter, *Encountering Protest*, maps the relationship of courts to another vector of our current experiences—the turn to the streets and to the internet to galvanize individuals and communities to call for, and at times to insist on, change. Some of the action in the streets is celebratory and at other times it is angry and violent. The discussion, with Muneer Ahmad and Susanne Baer at the helm, explores protest movements, past and present, to assess the roles that courts have played in constraining,

enabling, and policing protest. At times, jurists have recognized the legitimacy of protests and have insisted on protection. On other occasions, courts have joined in suppressing or rendering protests invisible. Moreover, in some eras, judges *are* the protestors—calling for re-evaluation of what law ought to condone or condemn.

The fourth chapter, *Extremes, Democracy, and the Rule of Law*, edited by Daniel Markovits, Timothy Snyder, and Manuel José Cepeda Espinosa, continues the discussion of contemporary conflicts through focusing on clashes over political and economic power, as individuals and groups aim to control the state or to escape the reach of government regulation. Some democratic orders have constitutional mandates that authorize oversight and exclusion of certain kinds of political actors, while other governments argue that doing so undermines democratic tenets. Extreme wealth has often eluded control even as such resources are regularly deployed to overwhelm, dilute, or replace democratic politics. Once again, judges interrogate their own roles when they consider whether and how to buffer democracies.

* * *

The rich, nuanced, and textured materials in this volume have been brought together through the efforts of the Seminar's participants and faculty, joined by talented student research assistants. Every year, we depend on collaboration across continents. During 2020 and again this year, contributors devoted time while juggling the difficulties of daily life, where in many jurisdictions, people were discouraged from going in person to courthouses, schools, and many other venues. Grateful for the technology and electricity we have, we managed many hours across time zones to come together virtually to discuss the selection of readings and the focal points of chapters.

Editorial caveats need to be reiterated. As in prior volumes, we have compressed a great deal by pruning ruthlessly. Paragraphs have been combined, and most footnotes and citations have been omitted; the footnotes that are retained keep their original numbering. For accessibility across jurisdictions, we add excerpts of referenced legal texts in footnotes marked by asterisks that, along with square brackets, we use to indicate editorial insertions.

As has been our practice since 2012, this book will be published as an e-book, the tenth in the series to be distributed electronically and free of charge. Thanks are due to Jason Eiseman, who has been the Interim Director of and is the Associate Law Librarian for Administration at the Lillian Goldman Law Library; he has helped each year to oversee the conversion of the materials to an online resource. Thanks are also due to Michael VanderHeijden, the Yale Library's Head of Reference and Lecturer in Legal Research, and to Julian Aiken, Assistant Director for Access and Faculty Services, for help in ferreting out sources that would otherwise have been unavailable. A decade ago, as we began to adopt the e-book format, we had assistance from Yale Law School professor Jack Balkin, in connection with the Information Society Project

that he chairs, and we are grateful for the support that has been provided by the Oscar M. Ruebhausen Fund at Yale Law School.

We are also indebted to remarkable students at Yale Law School, led by Sofea Dil, who serves as this volume's Executive and Managing Editor. Sofea is joined by Akanksha Shah, the Associate Managing Editor, and by returning Senior Editors Alexandria Miskho, Mark Stevens, and Rachael Stryer, and by a new group of editors that includes Braden Currey, Eshan Dabak, Alexis Kallen, Natalie Nogueira, Angela Remus, and Christopher Umanzor. Editor Emeritus Lawrence Liu, who spent this school year completing coursework for his Ph.D. in Jurisprudence and Social Policy at the University of California, Berkeley, continued to be an invaluable resource. These students, whose biographical sketches appear later in the volume, are not only intellectually astute, but they are also generous and generative colleagues. Working with them has been a pleasure.

Renee DeMatteo, who is Yale Law School's Senior Conference and Events Services Manager, kept us all going. In the wake of the Global Constitutionalism Seminar going virtual, Renee managed new and challenging logistics, as she made the far-flung group feel at home. Renee ensures that a draft of this book comes into being in time for circulation electronically and as a bound volume. Assistance also came from Barbara Corcoran, the Conference and Events Administrator, who provided logistical support and helped secure permissions to reprint excerpted articles, and from Bonnie Posick, who lent a hand to do proofreading.

Virtual coordination sounds easier than it is. We have been able to manage the new logistics because of Susan Monsen, Yale Law School's Chief Information Officer, and Daniel Griffin, Associate Director of Yale Law School's Media Services Department, and their staff. In addition, Mindy Jane Roseman, Yale Law School's Director of International Law Programs and Director of the Gruber Program for Global Justice and Women's Rights, continues to facilitate the Seminar's activities and to give wise guidance.

The commitment of the deans of the Yale Law School has been unfailing. Thanks are due to Anthony Kronman, who was the dean when Paul Gewirtz founded the Seminar in the 1990s, to Harold Hongju Koh, Robert Post, and to our current dean, Heather Gerken. In its beginnings, 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 helped to build bridges across oceans and legal systems.

Since 2011, this Seminar has found a home as part of the Gruber Program for Global Justice and Women's Rights at Yale Law School. Yale's Global Constitutional Seminar is thus sustained by the generosity of Peter and Patricia Gruber through the Gruber Foundation; decades ago, they had the vision to develop projects that aim to enhance fairness and justice. Their commitment to this and to many other activities at

Yale University and elsewhere enables our relationships across borders. The community that has been built was able to sustain three days of online sessions last fall, and that spirit will tide us over until we are confident that long distance travel is possible across the many countries from which participants come. This fall, we again welcome new participants to join in ongoing conversations about the difficult legal questions that all jurisdictions face.

During the last few years, as aggressive attempts continue to be made to undercut democratic processes and independent judging, the importance of the Seminar has become all the more vivid. In this time of urgency—awash with anger, violence, racial inequality, economic vulnerability, discrimination, and disease—we hope to contribute to the legitimacy and vitality of institutions that aspire to produce a more just political and economic order than the one in which we live.

Judith Resnik
Chair, Editor, Global Constitutionalism Seminar
Arthur Liman Professor of Law
Yale Law School
July 2021

IN MEDIAS RES: COVID-19 IN THE LAW

DISCUSSION LEADERS

ABBE GLUCK,^{*} DAPHNE BARAK-EREZ, AND MARTA CARTABIA

^{*} Professor Gluck did not participate in the preparation of the materials.

I. IN MEDIAS RES: COVID-19 IN THE LAW

DISCUSSION LEADERS:

ABBE GLUCK, DAPHNE BARAK-EREZ, AND MARTA CARTABIA

Personal Liberties, Inequalities, and Economic Viability

Tracking Individuals to Collect Data

Ben Meir v. Prime Minister (Supreme Court of Israel, April 2020)	I-5
Law Extending the Public Health State of Emergency and Rounding Out Its Provisions (Constitutional Council of France, May 2020)	I-9
Association for Civil Rights in Israel v. The Knesset (Supreme Court of Israel, March 2021)	I-11
PL. ÚS 13/2020 (Constitutional Court of the Slovak Republic, May 2020)	I-13

Enforcing Emergency Laws, Restricting Movement, and Disparate Impacts

Ruling No. 5-20-EE/20 (Constitutional Court of Ecuador, August 2020)	I-15
Constitutional Review of Decision No. 01/15 of the Government of the Republic of Kosovo, of 23 March 2020 (Constitutional Court of the Republic of Kosovo, March 2020)	I-19
Law Society of Kenya v. Mutyambai (High Court of Kenya, April 2020)	I-22
Amnesty International, <i>COVID-19 Crackdowns: Police Abuse and the Global Pandemic</i> (December 2020)	I-25

Mandates for Governments to Act

ADPF 672 MC (Federal Supreme Court of Brazil, May 2020)	I-27
MS 37760 MC / DF (Federal Supreme Court of Brazil, April 2021)	I-29
David E. Pozen and Kim Lane Scheppele, <i>Executive Underreach, in Pandemics and Otherwise</i> (2020)	I-32
Order No. 37 of 2021 (Merits) (Constitutional Court of Italy, February 2021)	I-34
Maney v. Brown (U.S. District Court for the District of Oregon, February 2021)	I-36
Valentine v. Collier (Supreme Court of the United States, November 2020)	I-39

Economic Impacts of Lockdowns

De Beer v. Minister of Cooperative Governance and Traditional Affairs (High Court of South Africa, June 2020).....	I-42
County of Los Angeles v. California Restaurant Association (Court of Appeal of the State of California, March 2021)	I-45

Regulating Group-Based Activities: Autonomy, Religion, Vaccinations, and Public Health Mandates

Collective Isolation

ADPF 709 MC-REF (Federal Supreme Court of Brazil, August 2020)	I-49
--	------

Limiting Access to In-Person Education and Religious Observances

Case of Vavříčka and Others v. The Czech Republic (European Court of Human Rights, Grand Chamber, April 2021)	I-51
Judgment of the First Senate of 15 July 2020 (Federal Constitutional Court of Germany, First Senate, July 2020)	I-56
DeSantis v. Florida Education Association (First District Court of Appeal of the State of Florida, October 2020)	I-59
Hussain v. Secretary of State for Health and Social Care (High Court of Justice of the United Kingdom, May 2020)	I-62
Jacobson v. Massachusetts (Supreme Court of the United States, 1905)	I-65
Roman Catholic Diocese of Brooklyn v. Cuomo (Supreme Court of the United States, November 2020)	I-68
South Bay United Pentecostal Church v. Newsom (Supreme Court of the United States, February 2021).....	I-71
Samuel Alito, <i>Address to the Federalist Society's 2020 National Lawyers Convention</i> (November 2020)	I-74

The Next Frontier: The Workplace

U.S. Equal Employment Opportunity Commission, <i>What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws</i> (May 2021)	I-76
---	------

COVID-19 is one of many sites of conflicts among branches and layers of governments as well as among individual and collective rights and obligations. At once familiar and unique, the law of COVID-19 is a stark reminder of the fragility and complexities of democratic governance. This chapter provides but a glimpse of the legal questions as we explore the concept of “emergency”—its sustainability over months and years, which decision makers have the power to make those demarcations, and

whether this situation is unique or analogous to other times of emergency—be they wars, climate catastrophes, or political upheavals.

A few of the facts of COVID-19 are in order. As of June of 2021, COVID-19 had sickened more than 175 million people and killed more than three million people. To contain the spread of infection, some governments sought to track interactions, to restrict movement, and to limit meetings of groups—be they for work, socializing, or religion. The upending of the economy put many people out of work. The impacts of the virus were not felt equally, whether around the globe or within countries. COVID-19 tracked the inequalities that have inspired protest and political change throughout the world and underscored the harms of preexisting inequalities predicated on racial, gender, and wealth hierarchies. Once vaccines became available, inequalities were again at the fore, as access varied dramatically and depended on a mix of government planning, resources, and will.

Public and private responses to COVID-19 have affected all facets of daily life and raised a host of moral, political, and legal questions. Hundreds of lawsuits challenging aspects of governments' initiatives have been filed. That volume of case law has inspired major cross-jurisdiction empirical projects to map and categorize those materials. Many groups are generating data documenting national policy responses and legal challenges. For example, University College London, King's College London, and the Max Planck Institute of Comparative Public Law and International Law have collaborated on a project, *Lex-Atlas: COVID-19 (LAC19)*, which will provide a comprehensive database and analyses of legal responses to COVID-19 around the world. That project spans 60 countries and plans to categorize law-making activity by the kind of emergency powers used while also seeking to integrate socio-economic, political, and health data into the analyses.* Another mapping project, from the law firm Hunton Andrews Kurth, identified more than 10,800 lawsuits related to COVID-19 that were filed between January 2020 and May 2021 in the United States alone.** Despite the high volume of litigation, judges have seen but a slice of COVID-19 issues. Critical questions related to governments' responses to COVID-19 are not, as of this writing, before courts.

Many issues overlap, and hence do not permit easy sequencing. We have clustered cases based on government action and inaction in seeking to stem the spread of disease, and how those efforts intersect with claims of personal liberty, privacy, and autonomy, as well as with collective interests in education, religious observance, and economic vitality. Throughout the chapter, the case law addresses issues of inequality, disparate impacts, abuses of power, and the nature and duration of emergency authority.

* University College London, King's College London, Max Planck Institute, *Lex-Atlas COVID-19* (2021), <https://lexatlas-c19.org>.

** *COVID-19 Complaint Tracker*, HUNTON ANDREWS KURTH (2021), <https://www.huntonak.com/en/covid-19-tracker.html>.

Repeatedly, judges reflect on their roles, sometimes to admonish the executive, to safeguard constitutional liberties, to interpret epidemiological data for the public health, to prompt more legislative action, or to defer. The fast pace of the disease, science, human needs, and political conflict has freighted all the decisions related to the COVID-19 pandemic. As the pandemic and its consequences continue to unfold, we expect that these issues will remain on the forefront for many years to come.

PERSONAL LIBERTIES, INEQUALITIES, AND ECONOMIC VIABILITY

In the first months of the pandemic, many executive branch actors responded to COVID-19 with emergency orders. Objectors, whether living in a unitary or federated system, went to court to challenge many of the orders issued. Some of the case law turned on the authority of the entity promulgating the orders, while others honed in on the impact of those decisions on individual autonomy, liberty, and privacy. Courts looked for guideposts, and the case law is dotted with familiar legal approaches, such as the precautionary principle, proportionality, and deference to the political branches.

Tracking Individuals to Collect Data

A first set of cases considers how courts assess executive responses to public health needs and the effects on individual rights. We begin when the pandemic did, as many governments sought to collect personal data so as to try to contain the spread of the virus.

Ben Meir v. Prime Minister Supreme Court of Israel HCJ 2109/20 (April 2020)

Before: The Honorable President E. Hayut, The Honorable Deputy President H. Melcer, The Honorable Justice N. Sohlberg

Hon. President E. Hayut:

The joined petitions before us challenge the Government's decision of March 31, 2020 to authorize the Israel Security Agency (hereinafter: ISA), by virtue of sec. 7(b)(6)* of the Israel Security Agency Law, 5762-2002 . . . to collect, process and use

* Section 7 of the Israel Security Agency Law provides:

(a) The Service is responsible for protecting state security, the democratic regime and its institutions against terrorist threats, terrorism, subversion, espionage, and revealing state secrets,

“technological information” regarding persons who have tested positive for the novel coronavirus . . . , as well as persons who came into close contact with them (hereinafter: the Enabling Decision). . . .

6. . . . [O]n March 31, 2020, [the Service Committee] . . . approved Government Decision No. 4950—i.e., the Enabling Decision— . . . grant[ing] the ISA the authority “to receive, collect, and process technological information for the purpose of aiding the Ministry of Health in carrying out an examination in regard to the 14 day period prior to the diagnosis of the patient, for the purpose of identifying location data and routes of movement of the patient and identifying persons who came in close contact with that person, in order to locate those who might have become infected by that person.” At present, the Enabling Decision will remain in force until April 30, 2020 A provision was added that establishes that while the Enabling Decision is in force, the Minister of Health will periodically examine the need for the continued assistance of the ISA

7. The mechanism established in the Enabling Decision for permitting assistance from the ISA and for employing its technological means for tracking contacts is as follows: after diagnosing a patient with a positive laboratory test for the virus, the Ministry of Health requests that the ISA track the patient’s movement over the course of the 14 days prior to the diagnosis, and identify the people who were in the patient’s proximity for more than a quarter of an hour during that period. To that end, the Ministry of Health gives the ISA the patient’s name, identification number, cellphone number, and the date of the diagnosis. At that point, the patient is sent a text message informing him that his particulars have been given to the ISA. After processing the necessary information, the ISA informs the Health Ministry of the route of the patient’s movement over the 14 days prior to the diagnosis, and details of the relevant contacts [A] text message is sent to each of the people whose particulars were transferred to the Ministry of Health as persons who had come into close contact with the diagnosed patient, and they are asked to begin self-isolation at home for 14 days

9. . . . Advocate Shachar Ben Meir . . . , The Association for Civil Rights in Israel . . . , The Adalah – Legal Center for Arab Minority Rights in Israel and the Joint List Knesset faction . . . , and . . . [t]he Union of Journalists in Israel [Petitioners] . . . argue that authorizing the ISA to address a civilian public-health issue is contrary to the ISA Law, and that the Government’s Enabling Decision in this regard was *ultra vires*. According to the Petitioners, the ISA, as the preventive security agency of the State of Israel, is only authorized to conduct security-related tasks, and therefore

and the Service will also act to protect and advance other essential national security interests of the State, as the Government shall decide, and subject to any law.

(b) For the purpose of subsection (a), the Service shall perform the following tasks: . . .

(6) Activity in another area decided upon by the Government, with the consent of the Knesset Secret Services Committee, intended to protect and advance essential national security interests of the State

sec. 7(b)(6) of the ISA Law – which allows the Government . . . to authorize the ISA to carry out tasks in another area for the purpose of protecting and advancing “other essential national security interests” – should be narrowly construed. . . . Alternatively, the Petitioners argue that even if sec. 7(b)(6) of the ISA Law be given a broader interpretation . . . that authority should be exercised only in extreme cases, which the current matter is not. . . .

12. . . . The Government Respondents . . . note that, at the outset, the Ministry of Health conducted individual epidemiological investigations in which each confirmed patient was interviewed But as the number of confirmed cases in Israel rose, individual interviews became impractical, and the professionals in the Ministry of Health concluded that the use of technological means was required in order to identify the movement of those positively diagnosed as quickly as possible [T]he Ministry first considered employing technologies offered by private companies, but those alternatives were found to be inadequate

23. . . . [Section] 7(b)(6) of the ISA Law should be construed as a provision that permits the Government to delegate authority to the ISA even in areas that do not concern security in the narrow sense, but the test that should be adopted for the term “national security” in this regard is that of *a severe, imminent danger to the citizens and residents of the State or its regime.*” . . .

26. . . . [T]he outbreak of the coronavirus crisis meets the conditions of the test for a severe, immediate threat to national security These unique circumstances . . . required mobilizing the ISA in order to provide a quick, effective response to the significant challenge of preventing the spread of the coronavirus, and permitted authorizing it for that purpose by virtue of sec. 7(b)(6) of the ISA Law.

27. We should emphasize that not every threat to public health can be deemed a severe, imminent danger to the citizens of the state. However, the country’s situation following the outbreak of the coronavirus . . . justifies the finding that the current crisis . . . permits the rare, exceptional expansion of the ISA’s authority by virtue of sec. 7(b)(6) of the Law. . . .

28. The next issue . . . concerns the question [of] whether the path chosen for the purpose of activating the ISA, and employing it for confronting the coronavirus is the appropriate path, or whether that authorization should be given by means of primary legislation. . . .

29. . . . [A]s it presently stands, the decision will remain in force until April 30, 2020. Can . . . the force of the Enabling Decision . . . be extended again, rather than address the role of the ISA in the coronavirus crisis in primary legislation? . . . [T]he answer is no.

30. When we are concerned with an arrangement of a temporary character, that was defined as limited in time when it was established, the need to reexamine the

process for enshrining that arrangement, and the question of the sufficiency of the authorization upon which it was based, arise every time an extension of its force is sought. In the present matter, the weight that attaches to the urgency of the executive's need to arrange the matter in a Government decision attenuates over time. This is particularly the case inasmuch as several weeks have passed since Decision No. 4950 was made, during which the Knesset could have conducted a substantial debate, and could have properly enshrined the authorization of the ISA in primary legislation. This fact tips the scales toward the conclusion that the authorization by virtue of sec. 7(b)(6) of the ISA Law . . . cannot provide a sufficient basis for so significant an expansion of the ISA's activity over time without the legislature addressing the issue in the framework of primary legislation

31. . . . In a representative democracy, in which the people are the sovereign, "decisions fundamental to citizens' lives must be adopted by the legislative body which the people elected to make these decisions." . . .

33. Under the unique, exceptional circumstances that developed . . . the decision to act under sec. 7(b)(6) of the ISA Law was lawful. However, . . . if the ISA's continued involvement is required in order to stop the epidemic even after the force of the Enabling Decision lapses on April 3[0], 2020, then the Government must take steps to establish the basis for such involvement in primary legislation Such legislation . . . should be enacted as a temporary order.

34. . . . [I]f the legislative process will move forward, it will be possible to extend the force of the Enabling Decision for a short additional period, not exceeding a few weeks, for the purpose of completing that process. . . .

Hon. Deputy President H. Melcer:

1. I concur in the comprehensive opinion of my colleague President E. Hayut. However, in view of the importance of the matters under discussion, I will . . . add several insights and emphases. . . .

6. . . . In the current emergency situation due to the Corona epidemic . . . , it would seem that here and throughout the world, all agree that the authorities may act in accordance with the *Precautionary Principle*, and they are, indeed, doing so. This principle takes the view that in order to contend with a problem created by a gap between existing knowledge at a given time and the tremendous potential and uncertain harm that may be caused by some activity if no adequate precautions are adopted, the authorities (the legislature or the executive) should be permitted to adopt measures intended to prevent the catastrophe. This is the case when there is a perceived significant threat of wide-spread, irreversible harm, even if it is only of low probability, and when there is no proven scientific certainty that the harm will be realized.

Nevertheless, even the said principle requires setting limits In order to pass the proportionality test *stricto sensu* that caution requires . . . not to continue with the

Enabling Decision (other than for a short period after April 30, 2020, as recommended by my colleague the President in para. 34 of her opinion), and to replace it (if at all) by a temporary order in primary legislation. . . .

Law Extending the Public Health State of Emergency and Rounding Out Its Provisions

Constitutional Council of France
Decision no. 2020-800 DC (May 2020)*

THE CONSTITUTIONAL COUNCIL DECIDED THAT:

1. The President of the Republic, the President of the Senate, the applicant Members of Parliament and applicant Senators refer the law extending the public health state of emergency and rounding out its provisions. . . .

59. Article 11 [of the law extending the public health state of emergency] organises the conditions under which the medical information of persons who have contracted Covid-19 and of those who have been in contact with them may be shared with certain professionals that are in charge of researching transmission chains. . . .

[The legislation at issue authorizes the creation of two new health databases, where all COVID-19 test results are recorded to facilitate contact tracing. This information includes patients' identity, contact information, the identity and contact information of the people they are close to, their frequent contacts, their workplace, whether they display symptoms, and if they are homeless or otherwise in a vulnerable situation.]

60. According to the applicant Members of Parliament, some of the provisions of this article would violate the right to personal privacy [T]hey criticise the scope and the sensitive nature of the data collected, the absence of a system to make the data anonymous, the overly significant number of persons who would have access to this information, and the referral to a decree to set the rules of authorisation for access to the data or the interconnection of files. They esteem that the guarantees that frame the system are insufficient, specifically that they do not provide for the consent on the part of the persons whose information is gathered and shared, or the normal exercise of rights to access, view and correct said information. They also are critical of these provisions for not having provided for a mechanism allowing for ending, in a proactive manner, the use of the information. The applicant Senators also denounce the violation of the right to personal privacy that would come from the broad scope of information collected that is allowed by Article 11. . . .

* Unofficial translation provided by the Constitutional Council of France. Additional translation by Braden Currey (Yale Law School, J.D. Class of 2023).

61. Based on the right to personal privacy, the collection, recording, retention, consultation and disclosure of personal information must be justified by the general interest, and carried out in a manner that is appropriate and proportional to this objective. . . .

62. Article 11 provides that . . . the personal information relating to the health of persons having contracted Covid-19 and the persons in contact with them may be processed and shared, without the consent of the persons concerned, within the context of an ad hoc information system, as well as in the case of an adaptation of the information systems relating to already existing healthcare data. The collection, processing and sharing of information concern not only the personal medical information of the persons concerned, but also certain elements of identification and the contacts that they have made with other persons. This being the case, the disputed provisions infringe on the right to personal privacy.

63. However . . . by adopting the disputed provisions, the legislator has undertaken to reinforce the means of combating the Covid-19 epidemic, by identifying the transmission chains. As such, the legislator has pursued the objective of constitutional value of the protection of health.

64. . . . [T]he collection, processing, and sharing of . . . personal information can only be implemented when strictly necessary to accomplish one of the four following objectives: 1) the identification of persons that have contracted Covid-19 . . . 2) the identification of persons who have been in contact with these infected persons . . . 3) orienting these infected persons and those they have been in contact with to preventive medical isolation measures . . . 4) national and local epidemiological monitoring, as well as research on the virus and the means to combat its spread. . . .

66. . . . [A]s part of the first three objectives . . . the personal information concerned is information that allows for the identification of the persons concerned and that specify the contacts that an infected person has had, at the time when that person could have been infected, and during the period where that person was likely to contaminate other persons. The legislator thus restricted the scope of the personal information subject to the disputed system to only the information that is strictly necessary for carrying out [these objectives].

67. Concerning the last objective, relating to epidemiological monitoring and research to fight against the virus, it provides for the deletion of the first and last names of the persons concerned, as well as their registration number on the national register of identification of natural persons, and their address. Without infringing on the right to personal privacy, this requirement of deletion must also extend to the phone numbers and electronic messaging addresses of the persons concerned. . . .

[The Council described the range of government entities who have access to information collected and stored pursuant to this legislation.]

70. However, the entities that provide social support to the persons concerned are also included in this scope for the sharing of information. Yet, as it is social support, which is not directly related to combating the growth of the epidemic, nothing justifies that the disclosure of personal information processed in the information system not be subject to the request for consent from the persons concerned. Consequently, the second sentence of paragraph III of Article 11,* which violates the right to personal privacy, is unconstitutional. . . .

72. Furthermore . . . the agents of these entities are not authorized to disclose the identification information of an infected person, without that person's express consent, to persons that have been in contact with the infected person. Moreover, and more generally, these agents are subject to the obligations of professional secrecy. As such, with the system implemented, they have access to information that they are not able to disclose to third parties. Disclosure of such information would be an offence under [the French] . . . Criminal Code. . . .

78. . . . [S]ubject to [these] reservations . . . [the remainder of the law at issue does] not violate the right to personal privacy. These provisions, which are also not judged as not acting fully within the competence of jurisdiction, nor as unintelligible, nor as violating other constitutional requirements, subject to the same reservations, conform to the Constitution. . . .

Association for Civil Rights in Israel v. The Knesset
Supreme Court of Israel
HCJ 6732/20 (March 2021)**

The Supreme Court held that the government is precluded from continuing to authorize the GSS (General Security Services) to conduct sweeping electronic tracing of civilians who were in close proximity to identified Covid-19 patients. The Court ruled that the government must limit its reliance on GSS assistance only to cases of identified patients who did not cooperate with epidemiological investigations led by investigators or had reported no human contacts at all.

In a petition submitted by four NGOs, the Court was asked to invalidate the provision known as the “law authorizing the GSS to assist the national effort to reduce the spread of the Novel Coronavirus and to promote the use of civil technology to trace people in close contact with approved patients (Temporary Provision), 2020”

* Article 11, paragraph III of Law no. 2020-546 of 11 May 2020 provides in part:

. . . Organizations that provide social support to those involved in the fight against the spread of the epidemic can receive data strictly necessary for the performance of their mission

** This piece is an informal abstract prepared by the Global Constitutionalism Student Editors.

(hereinafter: the GSS Authorization Law, or the Law)—or alternatively to invalidate the government’s decision to authorize the GSS to act in accordance with this law.

The Court held that the provisions of sections 3 and 5 to the Law, enabling the government to authorize the GSS to assist in tracing contacts with identified Covid-19 patients for a period of 21 days (each time), were significant infringements on the constitutional right to privacy. However, the majority (President Hayut, Deputy President Melcer, and Justices Hendel, Amit, Solberg, and Barak-Erez) held that considering the exceptional circumstances of the time, as well as the clear “checks and balances” in several provisions designed to mitigate this infringement and given the limited period set for this law, the Court ought to refrain from intervening in the validity of the statutory scheme itself.

The Court focused on the use of administrative discretion granted by the law to authorize the GSS. The Court emphasized that since the GSS Authorization Law had first been passed, significant developments and changes had occurred in dealing with the Coronavirus. For example, the epidemiological apparatus run by people (rather than technology alone) had tripled, and a national Covid-19 vaccination project was established and actively promoted. The Court commented that such developments ought to have affected the decision of the government to authorize the GSS, but in fact the government chose to continue relying in a sweeping manner on the GSS; it had not changed anything about the scope of the authorization.

Therefore, a majority formed by President Hayut, Vice President Melcer, and Justices Amit and Barak-Erez ordered the government to stop its expansive use of the GSS and to set clear criteria to guide the scope of the use of the GSS and ensure that its use will be a residual rather than a primary measure. The Court granted the government two weeks to define such criteria and stated that the use of the GSS should be limited to cases in which the identified patient was not cooperating with the epidemiological investigation, either on purpose or due to memory problems or that the person did not report contacts with other individuals.

Three Justices had different views on some aspects of the decision. Justice Solberg stated that the court should refrain from giving an operative remedy. Justice Hendel did not join the remedy as long as it concerned the government’s duty to set criteria, but concurred with the order to limit the use of the GSS to those cases specified by the majority. Justice Baron, in a separate decision, stated that taking into consideration the time since the enactment of the GSS Authorization Law, judicial review should also address the law itself. However, she stated that the constitutional remedy ought to be limited to expressing reservation concerning the possibility of its reenactment. In all other respects, Justice Baron joined the majority.

* * *

Constitutional courts were not only focused on how long personal data would be collected to enable contact tracing, but also on how such data would be kept and used. In some jurisdictions, the issue was whether governments could task private telecommunications companies with collecting personal data for contact tracing. For example, in Brazil, the Federal Supreme Court declared unconstitutional a law enabling telecommunications companies to share consumer data with the government during the pandemic. The Court found that, by failing to provide sufficient safeguards on the use of such data, the measure did not meet constitutional requirements for the protection of Brazilians' fundamental rights.* The decision of the Constitutional Court of Slovakia, excerpted below, responded to similar questions, as the Slovakian government sought to access data collected by telecommunications companies for contact tracing.

PL. ÚS 13/2020
Constitutional Court of the Slovak Republic
(May 2020)**

... The contested provisions [of the Electronic Communications Law] were adopted by the National Council of the Slovak Republic for the purpose of combating the COVID-19 pandemic. In practice these provisions create a system of comprehensive data collection by telecommunications operators which are to be subsequently made available to the Public Health Authority of the Slovak Republic on the basis of a request in specific cases.

Given the exceptional nature of the situation, at this stage of the proceedings the Constitutional Court limited its examination to finding out whether the legislation is sufficiently specific and whether it provides sufficient guarantees against the misuse of the data obtained by the state authorities. The more narrowly the legislator restricts the rights of the individual, the more precise it must be in formulating its intentions, and at the same time the legal regulation must also provide stronger protection of the individual against the undesirable consequences of interfering with his/her rights. If these constitutional requirements are sufficiently guaranteed, any risk of irreparable interference with the fundamental rights of the persons concerned is also significantly lower. . . .

The Constitutional Court is aware that the ongoing pandemic requires the deployment of swift and innovative solutions to protect the life and health of citizens. At the same time, however, it must ensure that the speed of implementation of changes during this period does not lead to unintended erosion of the rule of law. Modern society is characterized by the ability to collect and process information about the individual in an automated way, hence the Constitution of the Slovak Republic protects the individual

* S.T.F., ADI 6387 MC-REF / DF, Relator: Min. Rosa Weber, 07.06.2020, (Braz.).

** Excerpted from English Press Release N. 22/2020 (May 13, 2020) provided by the Constitutional Court of the Slovak Republic.

from the collection and misuse of personal data, in order to ensure truly free development of his/her personality.

. . . [T]he processing of identification and location data obtained from telecommunications operators constitutes a particularly serious interference with the Law on privacy and personal data protection of the individual. The Constitutional Court therefore requires that the strictest criteria be met in the event of such serious interference.

. . . [T]he Constitutional Court found that part of the suspended legislation was not sufficiently specific, as it allowed the state power to process personal data without clearly defining the purpose of such processing and the methods of handling personal data.

In the next part of the suspended legislation, its purpose may admittedly have been evident, but the necessary guarantees against possible misuse of the processed personal data were lacking. The legislation did not take into account the possibility of obtaining the necessary data from less sensitive sources, or the possibility of achieving the objective pursued in other ways which are less restrictive of fundamental rights. In addition, the legislation lacked provisions on high-quality independent supervision to control the processing of personal data by the state; further provisions ensuring an exceptionally high standard and protection in the actual processing of personal data; definite time-specified deletion of personal data once the purpose of their processing has been achieved and, finally, provisions on informing the individual whose personal data could be processed.

The Constitutional Court therefore decided to suspend the effect of those provisions of the Electronic Communications Law which were too vague or did not yet provide sufficient guarantees against the possible misuse of personal data by state authorities.

In its ruling, the Constitutional Court extensively formulated its preliminary legal views in order to be as helpful as possible at this stage of the proceedings in finding a legal framework for technical solutions that will be useful in combating pandemics while respecting fundamental human rights and freedoms. . . .

Enforcing Emergency Laws, Restricting Movement, and Disparate Impacts

Through curfews, full-scale lockdowns, and travel restrictions, many governments aimed to limit the spread of COVID-19. Restrictions on people's mobility therefore became the subject of litigation.

Ruling No. 5-20-EE/20
Constitutional Court of Ecuador
August 24, 2020*

[The Constitutional Court, composed of Constitutional Justices Karla Andrade Quevedo, Ramiro Ávila Santamaría, Carmen Corral Ponce, Agustín Grijalva Jiménez, Enrique Herrería Bonnet, Alí Lozada Prado, Teresa Nuques Martínez, Daniela Salazar Marín and Hernán Salgado Pesantes, delivered the following opinion:]

1. On June 16, 2020, the President of Ecuador remitted to the Constitutional Court Executive Decree No. 1074 . . . declaring a state of exception . . . due to a public calamity . . . given the presence of COVID-19 in the country. On June 29, 2020, the Constitutional Court issued . . . Ruling No. 3-20-EE/20 [by majority vote], declaring the Executive Decree constitutional provided certain parameters are observed

2. On August 14, 2020, the President . . . issued Executive Decree No. 1126, [seeking to renew the state of exception in light of the continuing pandemic]

3. On August 15, 2020, Executive Decree No. 1126 was remitted to the Constitutional Court. . . .

7. It is necessary to emphasize that states of exception represent the response that the constitutional framework provides to confront those situations . . . of such magnitude that the response of the ordinary regime is insufficient to resolve.

8. The importance of constitutional oversight over states of exception manifests the need to verify that this mechanism is deployed in compliance with constitutional principles of need, proportionality, legality, temporality, territoriality, and reasonableness, the same principles which provide that states of exception are extraordinary and ought to be exercised . . . only when there exists reasonable evidence that the mechanisms constituent of the ordinary regime are insufficient to tackle those adverse circumstances stipulated in the Constitution.

9. . . . This in no way suggests that the State can maintain itself a state of exception permanently in the face of structural events sustained indefinitely over time, as that would distort the essence and purpose of states of exception, which would [in turn] seriously jeopardize . . . the Constitutional State.

12. Now . . . it is the obligation of this Tribunal to ascertain whether the decree in question abides by both the formal and substantive requirements of the Constitution.

[The Court reviews the formal conditions mandated by the Constitution and finds that Executive Decree No. 1126 sufficiently complies.]

* Translation by Christopher Umanzor (Yale Law School, J.D. Class of 2023).

21. The substantive review which the Constitutional Court must undertake . . . requires the verification of parameters stipulated by the Constitution as well as those found in Articles 121* and 123** of the Organic Law of Jurisdictional Guarantees and Constitutional Control. . . .

22. . . . [I]n the Executive Decree under scrutiny here, the operative fact is the [foreseeable] permanence of COVID-19 in the country. As evidence . . . the Decree mentions the resolution adopted by the Committee of National Emergency Operations (COE National) upon which the President recommended the extension of the state of exception considering that extraordinary measures remain [necessary to mitigate the propagation of COVID-19]. . . .

* Article 121 of the Organic Law of Jurisdictional Guarantees and Constitutional Control provides:

The Constitutional Court will carry out a substantive review of the declaration of the state of emergency, for which it will verify at least the following:

1. That the facts alleged in the motivation have had actual occurrence;
2. That the constitutive facts of the declaration constitute an aggression, an international or internal armed conflict, serious internal shock, public calamity or natural disaster;
3. That the constitutive facts of the declaration cannot be overcome through the ordinary constitutional regime; and,
4. That the declaration is decreed within the temporal and spatial limits established in the Constitution of the Republic.

** Article 123 of the Organic Law of Jurisdictional Guarantees and Constitutional Control provides:

For the purposes of substantive review, the Constitutional Court shall verify that the measures laid down in the state of emergency are in accordance with the following formal requirements:

1. That they are strictly necessary to deal with the facts that gave rise to the declaration, and that ordinary measures are insufficient for the achievement of this objective;
2. That they are proportional to the facts that resulted in the declaration;
3. That there is a direct and immediate causal link between the facts that gave rise to the declaration and the measures taken;
4. That they are suitable to deal with the facts that gave place to the declaratory;
5. That there is no other measure that generates a minor impact in terms of rights and guarantees;
6. That they do not affect the essential core of constitutional rights, and they respect the set of intangible rights; and,
7. That they do not interrupt or alter the normal operation of the State.

26. . . . The Constitutional Court observes that . . . the allegations in the [Executive Decree] are true . . . [and] constitute a public calamity

27. With respect to spatial and temporal limits, the renewal of the state of exception complies with the Constitution in that . . . Executive Decree 1126 applies the state of exception to the entire national territory . . . [and] does so for 30 days

28. With respect to temporality, it is also important to note that the Constitutional Court [previously upheld the state of exception] . . . on the condition that the ordinary means [of the State] be deployed to confront the public calamity.

29. Today, in order to promote the resolution of COVID-19 through the ordinary means of the State, it is necessary to issue several clarifications. . . . [T]he COVID-19 pandemic is an extraordinary event of global proportions which, due to its rapid spread, the difficulty of identifying positive cases, its range of symptoms, and its mortality rate among particular groups, has disturbed the normal functioning of several States, many of which have responded with . . . the implementation of mechanisms from within their ordinary means; meanwhile, other States have adopted, since the beginning of the pandemic, exceptional tools following declarations of states of exceptions

32. . . . [T]his [Court] must insist that the state of exception marks precisely that, an exception, within the Constitutional State, [and] in no way can it . . . [be exercised] as if it were an ordinary regime that could be employed to overcome an event which has transformed itself, at least to date, into an indefinite one, as that would directly violate those principles established in Article 164* of the Constitution that render it an extraordinary tool.

33. . . . [T]he current conditions . . . which have motivated the President to seek renewal [of the Executive Decree] . . . cannot currently be resolved through ordinary means. This . . . is not solely attributable to the harmful and unpredictable consequences of the COVID-19 pandemic, but also to the . . . State, its functions . . . and, in general, the institutions responsible for implementing the ordinary tools and mechanisms necessary for confronting the situation

34. This . . . Court . . . has previously exhorted the State to . . . “take the measures necessary to organize and confront the pandemic with . . . ordinary means.” [In a later decision] . . . [the Court] briefly recounted the measures adopted by the State following the declaration of a health emergency to confront . . . the pandemic, warning that:

* Article 164 of the Constitution of the Republic of Ecuador provides:

The State of Exception shall observe the principles of needs, proportionality, legality, temporariness, territoriality and reasonableness. The decree establishing the State of Exception shall indicate its cause and motivation, territorial scope of application, period of duration, measures that must be applied, the rights that can be suspended or restricted and the notifications that correspond, in accordance with the Constitution and international treaties.

“ . . . the delay in taking the measures necessary to fight the pandemic and its economic consequences reflect that the functions of the State are not taking with adequate seriousness their obligation to coordinate actions . . . to facilitate the enjoyment and exercise of constitutional rights currently under threat”

35. There, [this Court] established with absolute clarity that the State and all its institutions need to implement the mechanisms necessary to confront the health crisis . . . adjusting the legal order . . . to the emerging exigencies [of the] pandemic . . . ; preserving and guaranteeing the rights recognized by the ordinary regime . . . specifically the rights to health, a life with dignity, and integrity of the population. Moreover, this Court, with the goal of orienting the . . . State . . . , delineated some of that which could be implemented in the ordinary regime

36. Although this decision was not unanimous, even the concurring and dissenting votes agreed in this need to supplant the current regime of exception with the implementation of . . . public policy responsive to the exigencies facing the . . . nation, without indefinitely extending a state of exception

39. Consequently, the Plenary of the Constitutional Court concludes that, even if at the moment . . . there is still the need to rely upon the extraordinary measures of Executive Decree No. 1126 . . . the state of exception cannot be extended beyond 30 days given that the Constitution . . . does not permit the state of exception the possibility of extending indefinitely in order to overcome problems which have become indefinite . . . and which ought to be confronted by . . . the ordinary regime of the State, unless new circumstances justify a new state of exception with facts distinct from those which provided for the current one. . . .

42. Given that the State . . . has now had adequate time to implement ordinary means to confront the pandemic, this [Court], guarantor of the Constitution and the protection of rights, warns that the actions [necessary to overcome the pandemic] ought to materialize in this renewal period of the state of exception, which will also act as the transition between the current regime of exception . . . and the definitive implementation of the ordinary means responsible for confronting the health crisis. . . .

45. Given the reasons stated above [and] that a state of exception is still necessary for the transition to an ordinary regime, [this Court] upholds the constitutionality . . . of the renewal of the [current] state of exception . . . for the 30 days sought by the President, a period in which all the institutions and functions of the State . . . have the constitutional obligation to institute and promote . . . the . . . suitable means for the ordinary regime to assume management of the pandemic

* * *

In the excerpts below, we look at how the Constitutional Court of the Republic of Kosovo rejected limitations on movement, including a night curfew, as

unconstitutionally broad. In Kenya, the High Court upheld a night curfew, but rejected the police's excessive enforcement practices.

**Constitutional Review of Decision No. 01/15 of the Government of the
Republic of Kosovo, of 23 March 2020**

Constitutional Court of the Republic of Kosovo

Case No. KO54/20 (March 2020)

[Court was composed of Arta Rama-Hajrizi, President; Bajram Ljatifi, Deputy President; Bekim Sejdiu, Judge; Selvete Gërxhaliu-Krasniqi, Judge; Gresa Caka-Nimani, Judge; Safet Hoxha, Judge; Radomir Laban, Judge; Remzije Istrefi-Peci, Judge; and Nexhmi Rexhepi, Judge.]

. . . 2. The Applicant, [the President of Kosovo,] challenges the constitutionality of Decision No. 01/15 of the Government of the Republic of Kosovo . . . of 23 March 2020. [The President alleged that the Government unconstitutionally limited human rights and the freedoms of citizens in the Challenged Decision.] . . .

23. In accordance with the Challenged Decision, following the approval of the request of the Ministry of Health, the Government approved the undertaking of the following measures on prevention and control of COVID-19 pandemic transmission: [First,] the movement of citizens and private vehicles is prohibited starting from 24 March 2020 between 10:00 - 16:00 and 20:00 - 06:00, except for the one carried out for medical needs, production, supply and sale of essential goods (food and medicines for people and livestock/poultry), and for services and activities related to pandemic management (essential government and municipal management and personnel of the following sectors: health, security and public administration). . . .

61. . . . [A]ccording to the Government, “the suspension of the Decision . . . would prevent . . . [the] reduction of the intensity of pandemic.” The fact that Kosovo is already entering the critical period of the epidemic only received further confirmation from the fact that, on 23 March, cases of infection in Kosovo have almost doubled. . . . The risks that would be caused by the delay or suspension of these measures, even for a few days, can have serious consequences for the citizens and residents of Kosovo.” . . . [S]uch a fact has been proven by the case of Italy, where even a brief hesitation and delay in imposing strict limitations, has caused thousands of deaths to date. . . .

88. . . . [T]he Government emphasized the constitutional criteria for the constitutional review of limitations of Freedom of Movement and Freedom of Gathering. The question to be asked, according to the Government, is “whether the limitations presented by the Government Decision, on Freedom of Gathering and

Freedom of Movement, meet the conditions set out in Article 55* of the Constitution.” If so, then it would provide a “justification for limitin[g] the rights in question.” . . .

93. As regards the Freedom of Movement, the Government also states that Article 41 of the Law for Prevention and Fighting against Infectious Diseases “gives health authorities broad discretion to stop circulation in the infected regions or endangered regions” in the part where it is stated that: “In order to prohibit the entrance and spreading of . . . other infectious diseases in the whole country, Ministry of Health with sub legal act will be determined the special emergency measures for protection from these diseases as following: b) Prohibition of circulation in the infected regions or directly endangered.”

94. The above provision, the Government states, “gives broad discretion to categorically prohibit the circulation in infected or directly endangered regions” and that with “79 detected cases of infection spread in different regions of the country, it is undeniable that the risk of infection by COVID-19 already includes the entire territory of the Republic of Kosovo, especially considering the latest studies in the field of medicine, which prove that a significant number of people infected with the COVID-19 virus to date, have been infected by people who have not yet shown symptoms.” . . .

222. . . . [T]he Court recalls its initial conclusion that in the circumstances of the present case there has been an “interference” or “limitation” in at least three rights or freedoms, namely, “freedom of movement” under Article 35** [of the Constitution]

* Article 55 of the Constitution of the Republic of Kosovo provides:

1. Fundamental rights and freedoms guaranteed by this Constitution may only be limited by law.
2. Fundamental rights and freedoms guaranteed by this Constitution may be limited to the extent necessary for the fulfillment of the purpose of the limitation in an open and democratic society.
3. Fundamental rights and freedoms guaranteed by this Constitution may not be limited for purposes other than those for which they were provided.
4. In cases of limitations of human rights or the interpretation of those limitations; all public authorities, and in particular courts, shall pay special attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose to be achieved and the review of the possibility of achieving the purpose with a lesser limitation.
5. The limitation of fundamental rights and freedoms guaranteed by this Constitution shall in no way deny the essence of the guaranteed right.

** Article 35 of the Constitution of the Republic of Kosovo provides:

1. Citizens of the Republic of Kosovo and foreigners who are legal residents of Kosovo have the right to move freely throughout the Republic of Kosovo and choose their location of residence.

239. Paragraph 2 [of Article 41 of the Law on Prevention and Fighting against Infectious Diseases] states that in order to prevent “the entrance and spreading” of infectious diseases “in the whole country,” the Ministry of Health is authorized to determine “by sub legal acts” “the special emergency measures for protection from these diseases,” . . . [including] a) Prohibition of travel in the country where the epidemic is spread of one of the above mentioned diseases; [and] b) Prohibition of circulation in the infected regions or directly endangered

242. . . . [T]he Court notes that the challenged Decision does not prohibit travel “in the place” [emphasis on word “in”] where the epidemic is spread, as provided by item a) of Article 41, but the travel ban at certain hours has been made in “the whole country,” namely throughout the state of the Republic of Kosovo and for all citizens and persons living or located in the territory of the Republic of Kosovo. . . .

243. . . . [A]t this point, the Court cannot agree with the Government’s claim that the sentence “the travel ban in the place where the epidemic has spread” means the whole territory of the Republic of Kosovo. . . .

251. The same reasoning applies to item b) of Article 41 of the Law in question because by the challenged Decision the prohibition of circulation was not made only “in the infected regions or directly endangered,” but, the prohibition of travel at certain hours has been imposed at the level of the entire state of the Republic of Kosovo and for all citizens and persons living or located in the territory of the Republic of Kosovo. The Court notes that the purpose of the abovementioned item b) is to prohibit circulation in the “infected regions” and in the “directly endangered” regions, and referring specifically to the regional context, has excluded the possibility of prohibition of movement throughout the territory of the Republic of Kosovo and to all its citizens.

252. Respectively, the purpose of item b) cannot be understood that it authorizes the Ministry of Health, namely the Government, to prohibit the movement in the whole Republic of Kosovo. Therefore, at this point, the Court cannot agree with the allegation of the Government that “prohibition of circulation in infected or directly endangered regions” means the entire territory of the Republic of Kosovo. If the Assembly had chosen to give such authorization in law to the Ministry of Health, namely the Government - it could have done so.

253. Therefore, the Court considers that the Government has acted beyond the authorization given in item b) of Article 41 of the Law on Prevention and Fighting

2. Each person has the right to leave the country. Limitations on this right may be regulated by law if they are necessary for legal proceedings, enforcement of a court decision or the performance of a national defense obligation.

3. Citizens of the Republic of Kosovo shall not be deprived the right of entry into Kosovo.

against Infectious Diseases, prohibiting the movement to all citizens of the Republic of Kosovo in the whole of its territory. . . .

[The Court declared that the Decision was not in compliance with Articles 35 and 55 of the Constitution.]

Law Society of Kenya v. Mutyambai
High Court of Kenya
No. 120 of 2020 (April 2020)

[W. Korir, Judge of the High Court:]

. . . 3. The Kenyan Government has put in place various measures in an attempt to halt or slow the relentless march of . . . [COVID-19]. One of [the] steps taken is the imposition of a night curfew published as Legal Notice No. 36

4. The petitioner, the Law Society of Kenya, is a statutory body established . . . to protect and assist the public in Kenya in all matters touching, ancillary, or incidental to law; and to assist the Government and the courts in all matters affecting legislation and the administration and practice of law in Kenya. . . .

5. Hilary Mutyambi, Inspector General National Police Service is the 1st Respondent [Several other government officials are listed as other Respondents]. . . .

14. The Petitioner . . . faults the Curfew Order on three grounds: firstly, that there is no indication of the rationale for the curfew on its face hence failing the test under Article 24* of the Constitution that limitation of rights should be “reasonable and justifiable in an open and democratic society based on human dignity, equality and

* Article 24 of the Constitution of Kenya provides in part:

A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only 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 or fundamental freedom;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

freedom”; secondly, that it does not demonstrate what legitimate public health or other interest it seeks to achieve and the link between it and the legitimate aim; and thirdly, that it is blanket in scope and indefinite in length and is not the least restrictive measure. It is thus the Petitioner’s case that the Curfew Order fails the three-part test under Article 24 of the Constitution which requires any limitation of rights to be by law, in pursuit of a legitimate aim and proportionate. . . .

18. It is the petitioner’s case that the Curfew Order has been abused. . . . [I]t is averred that police officers had . . . violently assaulted vulnerable persons like pregnant women; bludgeoned providers of exempted services . . . ; and recklessly congregated large crowds. . . .

23. The Petitioner avers that the Curfew Order also violates the rights of arrested persons under Article 49* of the Constitution as well as the right to fair hearing and fair trial under Article 50** of the Constitution as it excludes legal representation from the list of exempted services even though persons arrested during the curfew require legal representation. It is petitioner’s position that persons arrested or detained during the Curfew Order have no access to legal representation. . . .

73. It is the Petitioner’s case that in the Kosovo case, the government’s decision to curtail movement of citizens and private vehicles, prohibit gatherings and enforce social distancing was successfully challenged for violating various constitutional provisions. The pronouncements in this case are referred to extensively in order to demonstrate that the Curfew Order is unconstitutional for failing to meet the threshold set by Article 24 of the Constitution. . . .

100. . . . I flag out the following issues for determination: (a) whether the Curfew Order is constitutional and legal; (b) whether the National Police Service violated the Constitution in the enforcement of the Curfew Order

124. . . . The Curfew Order is of itself a legal instrument which must independently pass the test in Article 24 of the Constitution. . . .

* Article 49 of the Constitution of Kenya provides in part:

. . . [A]n arrested person has the right . . .

(c) to communicate with an advocate, and other persons whose assistance is necessary. . . .

** Article 50 of the Constitution of Kenya provides in part:

Every accused person has the right to a fair trial, which includes the right . . .

(h) to have an advocate assigned to the accused person by the State and at State expense.

125. The judges in the Kosovo case explain how the test to a constitutional provision similar to Article 24 of the Kenyan constitution should be conducted. . . . [I]mmediately after determining whether we are dealing with a “limitation” of a freedom or right . . . the following four (4) non-cumulative questions should be given . . . : (3) Question 3 of the test: Was the limitation of a certain right or freedom proportional, namely was the limitation made only to the extent necessary[?] . . .

[The court explains that the major issue with the constitutionality of the Curfew Order is whether it passes the proportionality test.]

129. The challenge with the application of the proportionality test . . . is that the objective the Curfew Order intends to achieve is unmeasurable. The court has been told that its main objective is to reduce transmission of coronavirus. No evidence was adduced by either side to show how the curfew will achieve this objective and whether the reduced transmissions, if any, outweighs the hardship visited on the populace by the curfew. It is appreciated that because of the novelty of the virus, statistics are not yet available. [Respondents] did not explain the rationale for imposing the curfew from 7:00pm to 5:00am. On the other hand, the Petitioner failed to convince the court that it should interfere with the discretion of [Respondents] in fixing the hours of the curfew.

130. In a crisis like the one facing the country, it can be presumed that [Respondents] issued the Curfew Order in line with the ‘precautionary principle’

131. . . . At the core of this precautionary principle are many of the attributes of public health practice including a focus on primary prevention and a recognition that unforeseen and unwanted consequences of human activities are not unusual. . . . Additionally, where in matters of public health, it proves impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness, or imprecision of the results of studies conducted . . . but the likelihood of real harm to public health persists should the risk materialize, the precautionary principle justifies the adoption of restrictive measures, provided they are non-discriminatory and objective. . . .

132. The government cannot be faulted for enforcing precautionary and restrictive measures in order to slow the spread of this novel disease in line with the precautionary principle. The use of a curfew order to restrict the contact between persons as advised by the Ministry of Health is a legitimate action. . . .

134. I think the main problem with the Curfew Order is the manner in which it has been implemented. . . . The problems that arise from the implementation must be addressed separately.

136. . . . These [incidents of police violence in the record] are sufficient, on a balance of probabilities, to prove the Petitioner’s case that the police killed and brutalised the people of Kenya in the process of enforcing the Curfew Order. . . .

137. . . . The National Police Service must be held accountable for violating the rights to life and dignity among other rights. . . .

149. . . . [T]he work of advocates is not limited to court work. They also attend to persons arrested by the police. There is therefore merit in the contention by Petitioner that its members should have been exempted from the operations of the Curfew Order so that they can assist in the protection of rights guaranteed by Article 49 of the Constitution whenever called upon to do so. The Petitioner's concern becomes more important when the manner in which the curfew has been enforced is taken into account. . . .

151. . . . [A] strong case has been established for the policing of the security personnel [by the Independent Police Oversight Authority ("IPOA")]

[The court holds that the National Police Service's use of force in enforcing the curfew is unreasonable and issues an order of mandamus to amend the curfew order to exempt IPOA personnel and lawyers, in addition to other categories of people.]

* * *

After this decision, Kenya's government extended the curfew order. As of June 2021, it was still in effect, beginning at 10 p.m. each night. Additional travel restrictions prohibiting movement into or out of five of Kenya's counties experiencing a "third wave" of COVID-19 cases were put into place in March 2021, but were subsequently lifted in May 2021. In January 2021, the IPOA charged fifteen officers involved in one of the incidents of police violence that were at issue in *Law Society of Kenya*. The officers allegedly entered a private home that they claimed was a bar operating in violation of the curfew order, sprayed tear gas, smashed windows, and beat a family and their neighbors with whips and clubs. In February 2021, those charges were dropped.

* * *

Impacts of disease and enforcement are not experienced equally. Intersectional forms of discrimination result in disparate impacts felt severely by vulnerable populations. Highlighted by both the case above and the article below, the COVID-19 pandemic has also provided an avenue for abuses of power, especially in the areas of policing and enforcement.

COVID-19 Crackdowns: Police Abuse and the Global Pandemic Amnesty International (December 2020)*

. . . [I]n at least 60 countries in which Amnesty International has documented cases, authorities have adopted punitive and coercive measures that have not only

* Excerpted from AMNESTY INTERNATIONAL, COVID-19 CRACKDOWNS: POLICE ABUSE AND THE GLOBAL PANDEMIC (2020).

resulted in violations of a range of human rights but also divided societies and failed to tackle the [COVID-19 pandemic]. . . .

. . . Police in several European countries have demonstrated racial bias and discrimination in their enforcement of COVID-19 lockdowns, highlighting the ongoing issue of institutional racism within police forces. In some instances police used unlawful force on people who were not resisting or posing a serious threat, often in the context of identity checks, which are known to disproportionately target racialized groups. Stop and search of Black people in London significantly increased after the introduction of COVID-19 measures. In Seine-Saint-Denis, a working class neighbourhood in the Paris region with a high percentage of Black residents and residents of North African descent, the number of police checks was more than double the national average and the number of fines three times higher than in the rest of France. In several cases, police used racial insults while enforcing lockdown measures.

In some European countries, authorities have imposed targeted mandatory quarantines on entire areas, including where Roma live in informal settlements, villages and specific areas of towns, as well as where refugees, asylum-seekers and migrants live in camps, without evidence that they posed a threat to public health or security. Informal settlements and migrant camps have been heavily policed and law enforcement officials have used unlawful force against their residents in several cases.

. . . [P]olice have violated the rights of people on the move in their enforcement of COVID-19 measures. Refugees, asylum-seekers and migrant workers have been subjected to discrimination based on their status and/or race, illegal expulsions from the country they resided in, and forced evictions from settlements they were living in. In Venezuela, authorities quarantined tens of thousands of returning migrants and refugees in inadequate centres, often under military control. High-level government officials described refugees returning from Colombia as “biological weapons” sent to infect people living in Venezuela. Returnees have also been called “traitors” by senior officials. This narrative, taken in conjunction with returnees’ automatic placement in state-run mandatory quarantines, raises concerns that their deprivation of liberty was discriminatory and arbitrary.

Existing threats against trans women in El Salvador increased in the context of COVID-19, including increased police violence, as many of them rely on sex work as their main source of income and have been unable to work during lockdown. In Uganda, police arrested 23 young people at a shelter for LGBTI people on the pretext that they were guilty of “a negligent act likely to spread infection of disease,” as well as “disobedience of lawful orders.”

. . . During the COVID-19 pandemic, sex workers have reported experiencing evictions, police raids and a lack of housing – which in turn puts them at further risk of violence and penalties for violating lockdown restrictions. Police in Kenya and Sri Lanka were reported to be carrying out increased numbers of raids on sex workers

community homes, as well as LGBTI and gender non-conforming community homes, including with the use of tear gas and excessive force. According to research conducted by Creating Resources for Empowerment in Action (CREA), those affected believed that the police was taking advantage of the lockdown to target them, knowing that it would be more difficult to access support from lawyers, for example. . . .

Homeless people and people at risk of homelessness, often living in informal settlements, have also been disproportionately affected by COVID-19 restrictions and the police's enforcement of those measures. In Italy, France, Spain and the United Kingdom, dozens of homeless people have been fined for not being able to comply with self-isolation measures and movement restrictions.

Mandates for Governments to Act

One set of questions—addressed in the cases above—concerns public actors imposing too many restrictions. Another set is public or private actors doing too little. For example, some governments urged constituents to adjust their behavior to protect themselves from COVID-19 rather than undertaking structural responses. Emphasis on personal responsibility for social distancing, for example, did not account for individuals' residence in multigenerational or overcrowded households, reliance on public transit to commute to work, or lack of control over working conditions.* The cases excerpted below exemplify efforts to ask courts to require more from other branches of government.

ADPF 672 MC **Federal Supreme Court of Brazil** **May 8, 2020****

[Chief Justice Luiz Fux, Deputy Chief Justice Rosa Weber, Justice Marco Aurélio, Justice Ricardo Lewandowski, Justice Cármen Lúcia, Justice Dias Toffoli, Justice Roberto Barroso, Justice Edson Rachin, Justice Alexandre de Moraes:]

The Federal Council of the Brazilian Bar Association filed a Claim of Non-Compliance with a Fundamental Precept (ADPF, as in the Portuguese acronym) concerning the actions and omissions the federal government had been taking to manage

* Aziza Ahmed & Jason Jackson, *Race, Risk, and Personal Responsibility in the Response to COVID-19*, 121 COLUMBIA LAW REVIEW FORUM 47, 52 (Apr. 1, 2021).

** Excerpted from *Case Law Compilation COVID-19*, BRAZILIAN FEDERAL SUPREME COURT (Oct. 2020).

the emergency public health and economy policies due to the outbreak of COVID-19 pandemic. . . .

In its petition, the claimant points out that the National Congress has . . . acknowledged the state of public calamity resulting from the pandemic. The Congress allowed budget spending notwithstanding the limits Therefore, although the Union has these instruments to react to the crisis, most of the federal government's decisions do not address the health emergency. According to the petitioner, the actions taken so far have affected the country's governance and endangered Brazilians' life.

The petitioner emphasizes that several states and municipalities have implemented measures to contain social agglomeration and reduce the number of people infected. The claimant states that cooperative federalism model adopted by the 1988 Federal Constitution is the ground of the constitutional, administrative and political agreement entered into the states and the municipal governments. According to . . . the Constitution, the Union, the states and the municipalities have the power to legislate concurrently on public health matters. Amid public calamity, the actions of states and municipalities become even more crucial because local and regional authorities are the ones able to make a diagnosis around the evolution of indicators and service capacity for health care, including intensive care unit and ventilator equipment availability in each region.

The petitioner adds that the president of the Republic acts in such a way as to escalate conflicts with governors and mayors who, in turn, rely on federal support to implement the necessary health policies. In fact, states and municipalities rely on federal resources remittance and other measures taken by the federal government to grant economic relief, as it has a greater financial and technical capacity to coordinate efforts to overcome the crisis.

According to the petitioner, the Ministry of Economy has minimized the economic effects of the crisis and took a long time to adopt measures which, when taken, were proved to be insufficient. . . . [T]he following fundamental precepts had been violated: the right to health, the right to life and the federative principle, as the president of the Republic acts to undermine and discredit measures adopted by other federative entities based on their respective constitutional powers which are independent and harmonious with each other.

Upon these matters, the petitioner requests a provisional measure to enjoin the president of the Republic from performing acts contrary to social isolation policies adopted by the states and the municipalities, and to order the immediate implementation of economic measures to support the most affected sectors by the crisis.

Justice-Rapporteur Alexandre de Moraes found that notorious divergences of opinions among authorities of different levels have caused insecurity and justified fear throughout society. . . . The Rapporteur also recognized, within their territories, the

supplementary competence of municipalities to adopt and maintain the restrictive measures allowed in quarantine, regardless of an overcoming federal act on the contrary. According to the Rapporteur, this decision does not eliminate the power of the Union to establish restrictive measures throughout the country if it deems to be necessary. . . .

. . . [The] severe outbreak of coronavirus pandemic (COVID-19) requires Brazilian authorities, at all levels of government, to implement public health concrete protections and to adopt all possible and technically sustainable measures to support the activities of the Unified Health System.

The . . . Judiciary is not supposed to replace the President's judgment of convenience and opportunity when exercising his constitutional powers. However, the Judiciary has a constitutional duty to verify the facts and the decision's logical coherence taken on each case. Thus, if there is no consistency, the measures are flaw[ed] due to violation of the constitutional order and the principle of prohibition on the arbitrariness of public authorities.

After these considerations and, in respect of federalism and its constitutional rules of distribution of competences, . . . governors and mayors must be respected in their decisions regarding the imposition of social distancing, quarantine, suspension of teaching and cultural activities, and trade restrictions.

. . . [T]he Federal Constitution provides for concurrent power among the Union, the states and the Federal District to legislate on health protection and on defense. Concerning the municipalities, the Constitution also allows supplementing federal and state legislation if there is local interest. . . .

. . . [T]he Union must not cancel decisions that the states, the Federal District or the municipal governments have adopted or will adopt within their territories . . . aiming to fight the pandemic.

MS 37760 MC / DF
Federal Supreme Court of Brazil
April 8, 2021*

. . . [This case concerns a] writ of mandamus filed by senators of the Republic with the objective of determining the installation of a Parliamentary Inquiry Commission (CPI) to "investigate the actions and omissions of the Federal Government in confronting the Covid-19 pandemic in Brazil and, especially, in the worsening of the health crisis in Amazonas with the absence of oxygen for inpatients." . . .

* Translation by Natalie Nogueira (Yale University, J.D. Class of 2023).

MINISTER ROBERTO BARROSO:

. . . [I]t is alleged that the initiation of a parliamentary inquiry, once its constitutional requirements are fulfilled, is a fundamental right of the parliamentary minority. . . .

The constitutional provision that provides for the creation of parliamentary commissions of inquiry establishes the following:

Art. 58. The National Congress and its Houses will have permanent and temporary commissions, constituted in the form and with the attributions foreseen in the respective regiment or in the act result in its creation.

Paragraph 3. The parliamentary commissions of inquiry, which will have powers of investigation of the judicial authorities, in addition to others provided for in the regulations of the respective Houses, will be created by the Chamber of Deputies and the Federal Senate, jointly or separately, upon request of one third of its members, for the determination of fact and for a certain period, with its conclusions, if applicable, forwarded to the Public Prosecutor's Office, so that it promotes the civil or criminal liability of the offenders.

The plaintiffs allege that, on 01.15.2021, a request for the installation of CPI was presented, authenticated by the Federal Senate system. . . . [A]lmost two months after the submission of the request, and about forty days since the election and inauguration of the current President of the Senate, there was no adoption of any measure to install the CPI. . . .

They argue that the omissive conduct of the President of the Senate is contrary to the provision of art. 58, § 3 of the Constitution and violates the liquid and certain right of the plaintiffs. . . .

. . . [I] note the appropriateness of the writ of mandamus. . . .

. . . [R]egarding the actions or omissions that prevent the installation and operation of parliamentary commissions of inquiry, the STF's jurisprudence admits the issuance of a writ of mandamus to guarantee the subjective public right guaranteed to minority groups by art. 58, § 3, of the Constitution. . . .

. . . [The] installation of a CPI is not subject to a discretionary judgment of the president or the plenary of the legislative house. The governing body or parliamentary majority cannot oppose such a request for reasons of political expediency and opportunity. Having met the constitutional requirements [provided for in art. 58, § 3], the creation of the Parliamentary Committee of Inquiry is required. . . .

It should be noted that this counter-majority role of the Federal Supreme Court must be exercised sparingly. In fact, in situations where fundamental rights and the assumptions of democracy are not at stake, the Court must be respectful of the performance of the Legislative and Executive Powers. However, in this writ of mandamus, what is being discussed is the right of parliamentary minorities to inspect actions or omissions by the Federal Government in the face of the greatest pandemic of the last hundred years, which has already killed more than three-hundred-thousand people in Brazil alone. . . . [T]he circumstances involve not only the preservation of democracy itself—which has political pluralism as one of its greatest expressions, manifested by the peaceful coexistence between political majorities and minority groups—but also the protection of human rights fundamental to the life and health of Brazilians. . . .

In addition to the legal plausibility of the plaintiffs’ claim, the danger of delay is demonstrated due to the urgency in investigating facts that may have aggravated the effects resulting from the Covid-19 pandemic. . . .

In view of the foregoing, I grant the preliminary injunction to order the President of the Federal Senate to adopt the necessary measures for the creation and installation of a parliamentary inquiry commission. . . .

* * *

A few days before the decision, the Brazilian Supreme Court had nullified a provisional order that struck down state and local orders suspending religious ceremonies. The injunction excerpted above granted the minority coalition in the Senate the power to investigate the federal government’s response, or lack thereof, to COVID-19. President Bolsonaro publicly attacked Minister Barroso and demanded he open impeachment proceedings against his colleagues on the Federal Supreme Court. In May 2021, as the investigatory commission met for the first time, Senator Humberto Costa, an opposition member of the commission who is also a former health minister, told reporters that he believes there is enough evidence to conclude that Bolsonaro committed “crimes against humanity” for deliberately acting to spread the virus.

David E. Pozen and Kim Lane Scheppele offer a framework for understanding executive “underreach” and how a failure to act can infringe on rights to health and safety; they argue that executive overreach and underreach are complementary modes of reactionary governance.

Executive Underreach, in Pandemics and Otherwise

David E. Pozen and Kim Lane Scheppele (2020)*

... We can define executive underreach, preliminarily, *as a national executive branch's willful failure to address a significant public problem that the executive is legally and functionally equipped (though not necessarily legally required) to address.* ...

... [F]ailure is best understood, for present purposes, relative to the expectations for executive action enshrined in a state's own laws and in applicable international law norms. That is, underreach occurs when domestic and international legal sources are widely seen to authorize, if not also encourage or oblige, an executive to tackle a particular sort of problem with particular sorts of tools and yet the executive declines to do so. ...

... [W]e propose to limit the concept of executive underreach to situations where an executive sees a significant threat coming, has access to information about what might mitigate or avert the threat along with the power to set a potentially effective plan in motion, and refuses to pursue such a plan.

... [B]y juxtaposing the approach taken thus far by Hungarian Prime Minister Viktor Orbán with the approach taken by U.S. President Donald Trump and Brazilian President Jair Bolsonaro, we can begin to illustrate what overreach and underreach look like in a pandemic—and some of the surprising affinities between the two. ...

... Orbán ... put before parliament a new law granting him the power to issue decrees that “suspend the application of certain Acts, derogate from the provisions of Acts[,] and take other extraordinary measures” for the duration of the current state of danger, the end of which would be determined by Orbán himself. ...

Prime Minister Orbán wasted no time issuing emergency decrees under the “Enabling Act” ... [M]any had little to do with the pandemic. ... Orbán declared in late May that he would end the state of danger in mid-June. At that time, however, parliament passed another bill effectively giving Orbán back under a different legal rubric most of the powers he had ostensibly just relinquished. The new law authorizes Orbán not only to issue decrees on a nearly unlimited range of subjects but also to direct the military to use force against civilians inside Hungary “up to but not including death.” To date, Hungary offers the most blatant and alarming example of executive overreach in the COVID-19 crisis. ...

President Trump's anemic response to COVID-19 has been well documented in the U.S. press. Throughout the winter of 2020, Trump minimized the danger posed by

* Excerpted from David E. Pozen & Kim Lane Scheppele, *Executive Underreach, in Pandemics and Otherwise*, 114 AMERICAN JOURNAL OF INTERNATIONAL LAW 608 (2020).

the virus, declined to order the Centers for Disease Control and Prevention to prioritize it, ignored a National Security Council playbook on fighting infectious diseases, and failed to ensure adequate production and distribution of test kits, ventilators, or protective medical gear. A law called the Defense Production Act of 1950 (DPA) has long empowered U.S. presidents to order private companies to manufacture scarce supplies that are essential to the national defense, yet Trump did not utilize this law until late March The Trump administration likewise refused to dispense medical supplies from the national stockpile until late March, at which point it seems to have favored states with Republican governors. Trump has additionally threatened to pull the United States out of the WHO; peddled dubious and dangerous cures; refused to wear a face mask in public; criticized governors who imposed lockdowns or followed public health advice to reopen gradually; and, by June 2020, started holding largely mask-free indoor rallies to gin up support for his reelection.

President Bolsonaro's response to COVID-19 mirrors President Trump's in numerous respects. Bolsonaro, too, has downplayed the danger posed by the virus, threatened to withdraw from the WHO, touted the efficacy of unproven treatments, made inaccurate claims about death counts, encouraged anti-lockdown protests, defied social distancing guidelines issued by his own health ministry, berated governors for closing down the economy, and pushed for a speedier reopening. . . . Unlike Trump, Bolsonaro has faced meaningful pushback from the national congress and from the courts; one federal judge recently ordered him to wear a face mask in Brasília or else pay a daily fine. Like Trump, Bolsonaro nonetheless continues to deny responsibility and cultivate chaos. . . .

Almost by definition, executive overreach and underreach involve suboptimal responses to public problems. An overreaching executive misallocates resources by overstating a particular risk or overinvesting in a problematic solution, thereby jeopardizing people's "negative" rights and interests in being spared intrusive forms of state interference. An underreaching executive misallocates resources by understating a particular risk or underinvesting in a valuable solution, thereby jeopardizing people's "positive" rights and interests in enjoying safety, security, or other goods. What makes executive overreach a distinctive phenomenon, however, is not so much its direct costs for affected parties—who may also be harmed by countless legislative and judicial decisions—as its . . . negative externalities ranging from the normalization of draconian measures and alarmist rhetorics to the militarization of public policy to the concentration of power in one set of institutions and the erosion of rule-of-law values.

The potential negative externalities of executive underreach are somewhat subtler but no less profound. Because underreach may be a rational political tactic for executives, . . . executive underreach may be self-perpetuating, insofar as it proliferates or deepens the set of public problems that will eventually require an expensive response or conditions voters to expect less from their officials. If not corrected quickly, underreach may also tend to foster cynicism and distrust of government, diminish state capacity, exacerbate inequality, and stimulate dangerous or inefficient forms of self-

help by private actors. More than that, executive underreach may tend to foster executive overreach by creating conditions of precarity or unrest that will then be addressed through more legally questionable means. When the problem at issue has a transnational dimension, as with pandemics and climate change, all of these harms may spill over across jurisdictions as well as administrations. . . .

International law is long on possible theories for challenging underreach in a pandemic but short on effective enforcement mechanisms. . . . Yet if past is prologue, no government body is likely ever to be held legally responsible for actions or omissions that have exacerbated the pandemic. In international law as in domestic law, norms against underreach go underenforced. . . .

Before international law can respond effectively to underreach such as President Trump's and President Bolsonaro's, the balance of critical scrutiny must shift in its direction. By moving beyond the negative-liberty paradigm for assessing government performance in pandemics and other emergencies—and in particular by naming and shaming underreach when it threatens severe harm to health, security, or other basic goods—advocates and academics can help lay a foundation for more successful legal and political challenges. . . .

* * *

Italy faced a question of government underreach in its COVID-19 response, this time implicating federalism as well. When different levels of government adopt divergent responses to COVID-19, constitutional courts have been asked to respond to those conflicts. One example comes from the Constitutional Court of Italy, which was asked to decide if a subregion could adopt its own, more limited, COVID-19 policies.

Order No. 37 of 2021 (Merits)
Constitutional Court of Italy
February 24, 2021*

[On January 14, 2021, the Constitutional Court of Italy suspended Valle d'Aosta-Vallee d'Aoste's Regional Law No. 11, which asserted the regional government's authority to exercise discretion in addressing COVID-19 within the region and to adopt measures less strict than those of the national government. After the initial ruling, taken as a precautionary measure, the Court reviewed the merits of the Italian government's claim against the regional law and again rejected the regional law. That decision is summarized below.]

The Constitutional Court has then declared unconstitutional the same regional law, although enacted by the Aosta Valley, a region with autonomous status within the Italian legal order. The law set forth measures—such as curfews and temporary closures

* Informal abstract provided by Minister Marta Cartabia.

of shops, sport facilities, places of worship—for the containment of the spread of COVID-19, which were different from those enacted at a central level by the government in Rome.

Allowing the appeal brought by the central Italian government against the law, the Court ruled that the adoption of legislative measures designed to combat an ongoing epidemic falls under the exclusive competence of the State.

The court reached this conclusion based on Art. 117(2)(q)* of the Italian Constitution that gave legislative competence to the State in the field of “international prophylaxis,” which encompasses the adoption of measures designed to prevent the spread of diseases at an international level. Since a pandemic is defined as an epidemic with a cross-border dimension, the Court saw no difficulties in declaring—for the first time in its case law—that the regional law at issue did violate the Italian government’s exclusive competence.

In particular, the impugned law allowed the regional authorities to take measures that would have been either stricter or less restrictive in comparison to those adopted by the state at a centralised level. According to the Court, such measures had a potential to undermine the uniformity and effectiveness of the strategy put in place by the central government to combat the pandemic, since every measure taken at a local level can easily have an impact at a larger scale, due to the rapid spread of the infection.

In the Court’s opinion, the need effectively to contain the pandemic required a coordinated and centralised strategy based on, *inter alia*, basic therapeutic approaches, monitoring the virus’ spread, processing relevant data, storage and supply of drugs and vaccines, and vaccination programs, etc.

The national regulations that are necessary to achieve these aims inevitably interfere with fields of legislative competence that would fall, under ordinary circumstances, within the regional competences, such as local commerce, sport and health care. However, the Court held that all these regional prerogatives must yield to the state competence, based on Art. 117(2)(q) of the Italian constitution, in taking the necessary measures to tackle a pandemic, insofar as it was (and is) still ongoing.

* * *

In the spring of 2021, the issue of vaccination programs was at the fore, as was the role of governments in ensuring that vulnerable populations have equitable access to quality healthcare, testing, and vaccines. The data underscored that vaccination

* Article 117(2)(q) of the Constitution of Italy provides in part:

... The State has exclusive legislative powers in the following matters: ...

customs, protection of national borders and international prophylaxis ...

campaigns reflected inequities in national and international health systems. As of April 2021, only 0.1% of the 841 million vaccine doses administered had gone to people in low-income countries.* At the same time, in the United States, of the 43 states that report the ethnic breakdowns of vaccines administered, white populations had rates of vaccination about 12 percentage points higher than Black or Latino populations.**

The question of government obligations was litigated in several contexts, including the impact of COVID on obligations to protect the health and safety of incarcerated persons, where rates of infection in the United States among incarcerated persons are more than five times the national rate.*** Hundreds of lawsuits—sometimes seeking individual release and others calling for structural remedies—were filed. Judges disagreed about what efforts met the U.S. constitutional standard which requires that prison authorities not be deliberately indifferent to the known, serious medical needs of people in detention.

Maney v. Brown
U.S. District Court for the District of Oregon
Case No. 6:20-cv-00570-SB (February 2021)

Beckerman, U.S. Magistrate Judge.

. . . To date, over 366,000 incarcerated individuals have tested positive for COVID-19, and over 2,300 have died. Oregon prisons have not been spared from this reality, as COVID-19's toll continues to mount behind bars.

Defendants [including the Governor of Oregon and state health officials] are aware of the higher risk of COVID-19 exposure and infection to individuals living and working in congregate living facilities, and do not dispute that vaccination is an essential component of protecting against COVID-19 exposure. For these reasons, defendants Governor Brown and Oregon Health Authority (“OHA”) Director Patrick Allen (“Allen”) have prioritized in Phase 1A of Oregon’s COVID-19 Vaccination Plan the vaccination of those living and working in congregate care facilities and those working in correctional settings. Yet, Governor Brown and Allen have excluded from Phase 1A individuals living in correctional settings.

* Andrew Green, *How ‘Vaccine Passports’ Could Exacerbate Global Inequities*, DEVEX (Apr. 19, 2021), <https://www.devex.com/news/how-vaccine-passports-could-exacerbate-global-inequities-99687>.

** Nambi Ndugga, et al. *Latest Data on COVID-19 Vaccinations Race/Ethnicity*, KFF (Apr. 21, 2021), <https://www.kff.org/coronavirus-covid-19/issue-brief/latest-data-on-covid-19-vaccinations-race-ethnicity>.

*** *COVID-19’s Impact on People in Prison*, EQUAL JUSTICE INITIATIVE (Apr. 16, 2021), <https://eji.org/news/covid-19s-impact-on-people-in-prison>.

. . . The question of which groups of Oregonians should receive priority is best left to the policymakers, and is not the question before this Court. The narrow question before the Court is whether prioritizing those living and working in congregate care facilities and those working in correctional settings to receive the vaccine, but denying the same priority for those living in correctional settings, demonstrates deliberate indifference to the health and safety of those relying on the state's care. . . .

. . . [Plaintiffs, adults in custody ("AIC") including Paul Maney, allege] that Defendants (1) violated the Eighth Amendment* by subjecting AICs to cruel and unusual punishment by failing to provide adequate healthcare during the COVID-19 pandemic and by operating ODOC facilities without the capacity to treat, test, or prevent the spread of COVID-19, and (2) committed negligence in failing to carry out proper preventative measures. . . .

. . . To date, neither [Oregon Department of Corrections (ODOC)] nor OHA have finalized plans for vaccinating the general population of AICs. . . .

Plaintiffs assert that Defendants' failure to provide them with the COVID-19 vaccine violates their Eighth Amendment right to reasonable protection from severe illness or death. Plaintiffs ask the Court to require Defendants to "offer vaccinations to adults in custody starting immediately, subject to vaccine availability, and to complete the process as promptly as practicable." . . .

. . . Plaintiffs are requesting a mandatory [preliminary] injunction

. . . "A public official's 'deliberate indifference to a prisoner's serious illness or injury' violates the Eighth Amendment ban against cruel punishment." "Deliberate indifference 'may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care.'" . . .

"Deliberate indifference" is established only when "the official knows of and disregards an excessive risk to inmate health or safety; the official must be both aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." . . .

. . . Plaintiffs argue that by "[t]aking no action to have AICs placed within a timely vaccination window means [Defendants] have been deliberately indifferent." Defendants counter that "[t]here are simply not enough vaccine doses for everyone to

* The Eighth Amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

get one immediately” and that Defendants have responded reasonably to the vaccine shortage. . . .

Courts have also long recognized that prison officials have an Eighth Amendment duty to protect inmates from exposure to communicable diseases. . . . Plaintiffs’ recent evidence demonstrates that individuals in ODOC custody continue to lack the means to protect themselves from exposure to COVID-19 and, in some cases, risk being disciplined in attempting to do so. . . .

. . . [T]he Court need only address the more narrow question of whether prioritizing those living and working in congregate care settings and those working in correctional settings in Phase 1A, Group 2, without also prioritizing AICs in the same group, demonstrates deliberate indifference to the AICs’ health or safety. To that end, Defendants argue that . . . Oregon has reasonably determined that the most effective means for slowing transmission is first to administer the vaccine to ODOC staff and contractors.

The Court is not persuaded. First, Defendants’ argument is belied by their own Vaccination Plan. Defendants Allen and Governor Brown have included in Phase 1A individuals living in (1) “Residential care facilities”; (2) “Adult foster care”; (3) “Group homes for people with intellectual and developmental disabilities”; and (4) “Other similar congregate care sites.” This is evidence that Defendants are aware of the high risk of COVID-19 exposure and infection to individuals both working and living in a congregate setting, and aware of the importance of vaccinating both populations to protect against infection. AICs also live in a congregate care setting, yet they have been excluded from Phase 1A. . . .

Additionally, while Defendants are aware that ODOC staff and contractors are the primary source of transmission of COVID-19 within ODOC facilities they are also aware that only an estimated fifty-five percent of ODOC staff and contractors will elect vaccination. . . . [V]accinating only one out of every two or three correctional staff is inadequate to stop the spread of COVID-19 in the prisons. . . . Defendants are well aware of the risks of serious harm to both correctional staff and AICs and have chosen to protect only the staff. This inaction indicates deliberate indifference to a substantial risk of serious harm.

Further, Defendants’ response to the pandemic to date has been ineffective in reducing COVID-19 spread among AICs. With a current AIC population of 12,073 AICs, the known rate of COVID-19 infection among AICs is 28%. That number is sizeable compared to the rate of infection in Oregon’s general population, which is about 3.3%. . . . Denying the vaccine to AICs in institutions suffering from high infection and death rates indicates deliberate indifference. . . .

. . . [B]ased on the current record, Plaintiffs are likely to establish that Defendants are acting with deliberate indifference by failing to offer the COVID-19

vaccine to AICs at the same time that they offer the vaccine to those working in a correctional setting and to others living or working in congregate care settings, and that that the law and facts clearly favor Plaintiffs' position. . . .

. . . [T]he Court GRANTS Plaintiffs' motion for provisional class certification, GRANTS Plaintiffs' motion for a preliminary injunction, and ORDERS that Defendants shall offer all AICs housed in ODOC facilities, who have not been offered a COVID-19 vaccine, a COVID-19 vaccine as if they had been included in Phase 1A, Group 2, of Oregon's Vaccination Plan.

Valentine v. Collier
Supreme Court of the United States
141 U.S. 57 (November 2020)

Justice Sotomayor, with whom Justice Kagan joins, dissenting from the denial of application to vacate stay.

I write again about the Wallace Pack Unit (Pack Unit), a geriatric prison in southeast Texas that has been ravaged by COVID-19. The Pack Unit is a “tinderbox” for COVID-19, not only because it is a dormitory-style facility, “making social distancing in the living quarters impossible,” but also because the vast majority of its inmates are at least 65 years old, and many suffer from chronic health conditions and disabilities. . . .

In July, the District Court held a weeks-long trial that revealed rampant failures by the prison to protect its inmates from COVID-19. In September, the District Court entered a permanent injunction requiring prison officials to implement basic safety procedures. The Fifth Circuit, however, stayed the injunction pending appeal. Now, two inmates, Laddy Valentine and Richard King, ask this Court to vacate the stay. Because they have met their burden to justify such relief, I would grant the application.

Valentine and King are 69 and 73 years old, respectively. Already in a high-risk category due to their ages, both suffer from multiple health conditions that increase the likelihood of serious illness and death from COVID-19, including diabetes, hypertension, and kidney disease. . . .

Following an 18-day trial, the District Court made detailed findings of fact about the officials' “consistent non-compliance with basic public health protocols” Prison staff, for example, regularly failed to wear masks, as documented in the prison's own educational video about COVID-19. The prison's communal showers were not cleaned between uses by different dorms, and disabled inmates had to sit shoulder to shoulder on benches while waiting for a disability-accessible shower to become available. . . .

. . . [T]he District Court entered a permanent injunction requiring the prison to establish and implement minimum safety protocols. These include “regular cleaning of

common surfaces,” “unrestricted access to hand soap,” “wearing of [personal protective equipment (PPE)] among TDCJ staff,” weekly testing, contact tracing, and quarantining inmates who are awaiting test results. . . .

The Fifth Circuit stayed the injunction pending appeal, concluding that respondents were likely to prevail because the inmates failed, before filing suit, to seek relief through the prison’s internal grievance process In the Fifth Circuit’s view, it was “irrelevant” if that grievance process was “ineffective” or “operated too slowly” in light of the ongoing outbreak. The court also concluded, notwithstanding the District Court’s finding of systematic “shortcomings” at the Pack Unit, that the inmates’ claims would likely fail on the merits because the prison’s “actions were reasonable.” Finally, the Fifth Circuit determined that, absent a stay, the injunction would irreparably harm prison officials by interfering with their ability to manage the Pack Unit, and that the public interest favored a stay. . . .

. . . The Fifth Circuit demonstrably erred with respect to both the threshold issue of exhaustion under the [internal grievance process] and the merits of the inmates’ . . . claims.

. . . [T]his Court held that . . . exhaustion is not required, when “an administrative procedure . . . operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates.” . . .

. . . The prison’s grievance process is lengthy, beginning with mandatory informal dispute resolution and followed by up to 160 days of formal review. Remarkably, when this suit was filed, “COVID-related grievances were not treated differently from other types of grievances,” despite inmates’ attempts to designate them as emergencies. . . .

Given the speed at which the contagion spread, the 160-day grievance process offered no realistic prospect of relief. In just 116 days, nearly 500 inmates contracted COVID-19, leading to 74 hospitalizations and 19 deaths. . . .

The Fifth Circuit erred as a matter of law when it disregarded these findings by the District Court. . . . Contrary to the Fifth Circuit’s analysis, consideration of “the real-world workings of prison grievance systems” is central to assessing whether a process makes administrative remedies available. When this suit was filed, the Pack Unit’s process plainly did not. . . .

The Fifth Circuit’s evaluation of the merits of the inmates’ claims was also demonstrably wrong. To prove an Eighth Amendment claim for unconstitutional prison conditions, an inmate must show that he was exposed to an objective risk of serious harm and that prison officials subjectively acted with deliberate indifference to inmate health or safety. . . .

Here, the dangers of COVID-19 to these especially vulnerable inmates were undisputed and, indeed, “indisputable.” The District Court . . . concluded that the officials’ conduct, communications, and omissions reflected deliberate indifference.

Each of these factual findings must be reviewed deferentially under the clear-error standard. . . . Here, the District Court’s assessment of the evidence was not only permissible, but fully supported. The District Court cited specific evidence that respondents knew not only of the dangers of COVID-19, but also of the dangers specifically created by their inadequate response to the outbreak. . . .

. . . [T]he Fifth Circuit’s analysis makes clear that it substituted its own view of the facts for that of the District Court. For instance, in highlighting the prison’s policy requiring masks and social distancing, the Fifth Circuit chose to ignore the District Court’s express finding that “staff non-compliance with regard to wearing PPE and social distancing were regular, daily features of life in the Pack Unit.” . . .

At bottom, the Fifth Circuit rejected the District Court’s careful analysis of subjective deliberate indifference based on the Fifth Circuit’s view that respondents took reasonable “affirmative steps” to respond to the virus. But merely taking affirmative steps is not sufficient when officials know that those steps are sorely inadequate and leave inmates exposed to substantial risks. . . .

The Fifth Circuit’s decision creates a risk of serious and irreparable harm to the inmates that far outweighs any risk of harm to respondents. . . .

The people incarcerated in the Pack Unit are some of our most vulnerable citizens. They face severe risks of serious illness and death from COVID-19, but are unable to take even the most basic precautions against the virus on their own. . . . Twenty lives have been lost already. I fear the stay will lead to further, needless suffering. . . .

Economic Impacts of Lockdowns

Businesses and individuals have asserted that government regulations unfairly disrupt their streams of income. A series of lawsuits across jurisdictions advanced such interests as outweighing some of the measures imposed from a public health perspective.

**De Beer v. Minister of Cooperative Governance and
Traditional Affairs**

High Court of South Africa
No. 21542/2020 (June 2020)

Davis, Judge:

[1] This is the judgment in an urgent application which came before me last week Thursday, 28 May 2020. In the application, the validity of the declaration of a National State of Disaster by the respondent, being the Minister of Cooperative Governance and Traditional Affairs [COGTA] (“the Minister”), and the regulations promulgated by her pursuant to the declaration are being attacked. The attack is by a Mr De Beer in person [and several other nonprofits]

[2] . . . [T]he constitutionality of the regulations currently imposed on South Africa . . . in terms of . . . the Disaster Management Act, 57 of 2002 (the “DMA”) [or “the regulations”] . . . is central to this application. . . .

3.1 The applicants claim . . . [t]hat the national state of disaster be declared unconstitutional and invalid; [t]hat all the regulations . . . [of] the minister be declared unconstitutional, unlawful and invalid; [t]hat all gatherings be declared lawful alternatively be allowed subject to certain conditions; [t]hat all businesses, services and shops be allowed to operate subject to reasonable precautionary measures of utilizing masks, gloves and hand sanitizers. . . .

4.12 The applicants . . . based their attack on the alleged irrational reaction to the coronavirus itself and the number of deaths caused thereby. . . . The applicants referred to various comparisons to other diseases plaguing the country and the continent, such as TB, influenza and SARS COV-2. . . . Taking into account, however, the extent of the worldwide spread of the virus, the pronouncements by the WHO . . . as well as the absence of prophylaxes, vaccines, cures, or, to this date, effective treatment, I cannot find that the decision [to declare a state of emergency and promulgate regulations to control the spread of COVID-19] was irrational I am also prepared to accept that measures were urgently needed to convert an ailing and deteriorated public health system into a state of readiness, able to cope with a previously unprecedented demand for high-care and intensive care facilities

6.1 . . . [W]here the exercise of a public power infringes on or limits a constitutionally entrenched right, the test is whether such limitation is, in terms of Section 36* of the Constitution, justifiable in an open and democratic society

* Section 36 of the Constitution of South Africa provides in part:

6.2 . . . [In evaluating this case] I also referred to the supremacy of the Constitution and the principle of legality that requires the steps taken to achieve a permissible objective to be both rational and rationally connected to that objective. . . .

6.9 The Director General [of COGTA] correctly contended that the COVID 19 pandemic implicates the constitutionally entrenched rights to life, to access to healthcare and an environment that is not harmful. As a result of this, she submitted that “the South African population has to make a sacrifice between the crippling of the economy and loss of lives.” Her submission further was that the regulations “. . . cannot, therefore, be set aside on the basis that they are causing economic hardship, as saving lives should take precedence over freedom of movement and to earn a living.” . . .

[7] . . . It is now necessary to test the rationality of some of the regulations and their “connectivity” to the stated objectives of preventing the spread of infection:

7.1 . . . Loved ones are by the lockdown regulations prohibited from leaving their home to visit [persons dying of COVID-19] if they are not the care-givers of the patient But once the person has passed away, up to 50 people armed with certified copies of death certificates may . . . attend the funeral of one who is departed and is no longer in need of support. The disparity of the situations [is] not only distressing but irrational.

7.2 There are numerous . . . South African[s] who operate in the informal sector . . . who have lost their livelihood . . . as a result of the regulations. Their contact with other people [is] less on a daily basis than for example the attendance of a single funeral. The blanket ban imposed on them as opposed to the imposition of limitations and precautions appear to be irrational.

7.3 To illustrate this irrationality further in the case of hairdressers: a single mother . . . must now watch her children go hungry while witnessing minicab taxis pass with passengers in closer proximity to each other than they would have been in her salon. She is stripped of her rights of dignity, equality, to earn a living and to provide for the best interests of her children. . . .

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. . . .

7.5 Random other regulations regarding funerals and the passing of persons also lack rationality. If one wants to prevent the spreading of the virus through close proximity, why ban night vigils totally? Why not impose time, distance and closed casket prohibitions? . . . If long-distance travel is allowed, albeit under strict limitations, a vigil by a limited number of grieving family members under similar limitations can hardly pose a larger threat. And should grieving family members breach this prohibition, their grief is even criminalized

7.7 The limitations on exercise are equally perplexing

7.8 Restricting the right of freedom of movement in order to limit contact with others is rational, but to restrict the hours of exercise to arbitrarily determined time periods is completely irrational.

7.9 Similarly, to put it bluntly, it can hardly be argued that it is rational to allow scores of people to run on the promenade but were one to step a foot on the beach, it will lead to rampant infection.

7.10 And what about the poor [grandmother] who had to look after four youngsters in a single room shack during the whole lockdown period? She may still not take them to the park, even if they all wear masks and avoid other people altogether.

7.11 . . . [E]ven if the government's attempts at providing economic relief functioned at its conceivable optimal best, monetary recompense cannot remedy the loss of rights such as dignity [or] freedom of movement

7.12 The practicalities . . . of distributing aid relief in the form of food parcels highlights yet another absurdity: a whole community might have had limited contact with one another . . . but are now forced to congregate in huge numbers, sometimes for days, in order to obtain food [aid]. . . .

7.14 Despite the failures of the rationality test in so many instances, there are regulations which pass muster. The cautionary regulations relating to education, prohibitions against evictions, initiation practices and the closures of night clubs and fitness centres . . . as well as the closure of borders . . . all appear to be rationally connected to the stated objectives. . . .

7.17 The clear inference I draw . . . is that once the Minister had declared a national state of disaster . . . little or in fact no regard was given to the extent of the impact of individual regulations on the constitutional rights of people and whether the extent of the limitation of their rights was justifiable or not. . . .

7.18 This paternalistic approach, rather than a Constitutionally justifiable approach, is illustrated further by the following statement by the [COGTA] Director

General: “The powers exercised under lockdown regulations are for public good. Therefore the standard is not breached.” . . .

9.4 Insofar as the “lockdown regulations” do not satisfy the “rationality test,” their encroachment on and limitation of rights guaranteed in the Bill of Rights . . . are not justifiable [under section 36]

9.5 The deficiencies in the regulations need to be addressed by the Minister by the review and amendment [of the regulations] so as not to infringe on Constitutional rights more than may be rationally justifiable. . . .

11.1 The regulations promulgated by the [COGTA] Minister . . . are declared unconstitutional and invalid.

11.2 The declaration of invalidity is suspended until . . . the Minister [in consultation with the cabinet] . . . review, amend, and re-publish [a subset of the regulations] . . . with due consideration to the limitation each regulation has on the rights guaranteed in the Bill of Rights contained in the Constitution. . . .

County of Los Angeles v. California Restaurant Association
Court of Appeal of the State of California, Second Appellate Division
61 Cal. App. 5th 478 (March 2021)

[Currey, J. with concurrence from Manella, P.J. and Willhite, P.J.:]

At a time when infection rates were surging, and Southern California’s intensive care units were about to be overwhelmed by COVID-19 patients, Los Angeles County’s Department of Public Health issued an emergency order temporarily prohibiting outdoor restaurant dining. Indoor restaurant dining had already been banned. Although the Department and its leadership (collectively, the County) had no study specifically demonstrating that outdoor restaurant dining contributes to the spread of the disease, they had a rational basis to believe it does.

. . . The risk of transmission . . . increases when people from different households gather in close proximity for extended periods without masks or other face coverings. The risk also increases with unmasked talking and laughter. These conditions are often all present when people dine together in restaurants, whether indoors or out. . . .

. . . [T]he trial court enjoined the County’s order temporarily banning outdoor restaurant dining until the County performed a risk-benefit analysis acceptable to the court. We issued a stay and an order to show cause why the lower court’s order should not be set aside. We now hold that courts should be extremely deferential to public health authorities, particularly during a pandemic, and particularly where, as here, the public health authorities have demonstrated a rational basis for their actions. Wisdom

and precedent dictate that elected officials and their expert public health officers, rather than the judiciary, generally should decide how best to respond to health emergencies in cases not involving core constitutional freedoms. Courts should intervene only when the health officials' actions are arbitrary, capricious, or otherwise lack a rational basis, or violate core constitutional rights, which demonstrably is not the case here. . . .

This does not mean we are unsympathetic to the plight of restaurant owners and their employees, or to those in so many other sectors who have had their livelihoods taken away and personal finances decimated by the pandemic. Far from it. Both the disease itself and its economic consequences have harmed people and communities unequally, sometimes devastatingly so. But whether, when, and how a risk-benefit calculus should be performed, and whether existing orders should be altered to mitigate their costs, is a matter for state and local officials to decide. . . .

On November 22, 2020, the County announced that, effective November 25, 2020, it would temporarily prohibit both indoor and outdoor dining at restaurants, breweries, wineries, and bars to combat the alarming surge in COVID-19 hospitalizations and deaths (the "Order"). Under the Order, restaurants were permitted to continue take-out, delivery, and drive-through services.

In response to the Order, the California Restaurant Association, Inc. (CRA) and Mark's Engine Company No. 28 Restaurant LLC (Mark's) (collectively, the "Restaurateurs"), filed separate suits against the County in respondent Los Angeles County Superior Court. CRA alleged the County "shut down outdoor dining without relying on or making available to the public any competent scientific, medical, or public health evidence stating that outdoor dining poses a substantial risk of unacceptably increasing the transmission of COVID-19." . . .

On December 8, 2020, the trial court held a hearing on the OSC. On December 15, 2020, the trial court entered an order enjoining the County from enforcing or enacting any County ban on outdoor dining after December 16, 2020, unless and until its public health officers "conduct . . . an appropriate risk-benefit analysis and articulate it for the public to see."

The County petitioned this court for a writ of mandate directing respondent court to immediately stay the preliminary injunction, and issue a peremptory writ commanding respondent court to set aside the injunction. . . .

Here, the Restaurateurs contend the County exceeded its "emergency powers" . . . by implementing the Order without conducting a risk-benefit analysis. They also contend the Order violates their substantive due process rights under the Fifth*

* The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or

and Fourteenth* Amendments. Although the Restaurateurs did not specifically label their claims as violations of their “substantive” due process rights, the trial court so characterized them because the claims target alleged arbitrary government action. . . .

The Restaurateurs also offered the declaration of Jayanta Bhattacharya, M.D., a Professor of Medicine and infectious disease specialist at Stanford University. In Dr. Bhattacharya’s opinion, restaurants could safely permit outdoor dining by following the Centers for Disease Control guidelines (i.e., social distancing and mask wearing by servers and by patrons when not eating). He explained the County provided “no indication that it has estimated or otherwise taken into account any of the economic, social, and public health costs of restricting outdoor dining.” He also . . . stated, “[a] scientifically justified policy must explicitly account for these costs—including an explicitly articulated economic analysis—in setting, imposing, and removing criteria for business restrictions such as the blanket prohibition on outdoor dining.” . . .

. . . [The trial court concluded that the County’s assessment of the level of risk of COVID-19 transmission inherent in outdoor dining] only weakly supports closure of outdoor restaurant dining because it ignores the outdoor nature of the activity which the CDC says carries only a moderate risk

Thus . . . the trial court took it upon itself to . . . mandate a “risk-benefit analysis” before the County could enforce its order. . . .

Mandating a nebulous risk-benefit requirement is inconsistent with the court’s appropriate role. . . .

Of course, more particularized studies of the spread of COVID-19 while dining at outdoor restaurants would be valuable. But undertaking those studies takes time and resources that may not be available when swift government action must be taken in response to surging infection, hospitalization, and death rates during a once in a century pandemic. . . .

in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* The Fourteenth Amendment to the United States Constitution provides in part:

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. . . .

When the Order went into effect, Los Angeles was experiencing a surge of infections. Against this backdrop, the County was forced to take immediate action. . . . [T]he County recognized the preventative measures required to slow the spread of COVID-19, including temporarily restricting in-person dining, have an emotional and economic impact on businesses, families, and individuals, but ultimately determined the restriction on outdoor dining was necessary

We decline the Restaurateurs’ invitation to second-guess public health officials’ actions in an “‘area . . . fraught with medical and scientific uncertainties.’” Because the Restaurateurs failed to satisfy their burden of demonstrating the Order is arbitrary, capricious, or without rational basis, we conclude they cannot ultimately succeed on the merits of their claims. Thus, they were not entitled to injunctive relief. . . .

Let a peremptory writ of mandate issue directing respondent court to vacate its December 15, 2020 order enjoining the County from enforcing its orders to the extent they prohibit outdoor dining until after conducting an appropriate risk-benefit analysis, and enter a new order denying the Restaurateurs’ request for a preliminary injunction. The County is awarded its costs in this original proceeding.

REGULATING GROUP-BASED ACTIVITIES: AUTONOMY, RELIGION, VACCINATIONS, AND PUBLIC HEALTH MANDATES

Litigation about the impact of COVID-19 on incarcerated people is one example of the distinct challenges that the virus posed for congruent settings. Other instances come from settings in which people choose or need to come together. To slow contamination rates, many governments restricted gatherings in groups.

These policies have met with opposition and prompted a stream of court challenges. Parents concerned about their children’s education, religious adherents aiming to participate in collective practices, and employers eager to require people to come to work have argued to judges that particular restrictions were unlawful.

Collective Isolation

One conflict arose when Indigenous communities in Brazil sought to congregate exclusively among members of their community. Hence, a question emerged about a right to remain isolated in order to better protect themselves from COVID-19.

ADPF 709 MC-REF
Federal Supreme Court of Brazil
August 31, 2020*

MINISTER LUÍS ROBERTO BARROSO[:]

The Coalition of the Indigenous Peoples of Brazil (APIB), the Attorney General's Office (PGR), the Public Defender of the Union (DPU) and the National Council of Justice (CNJ) argue that the criterion guiding the definition of priorities by the Sanitary Barriers Plan should be the level of vulnerability of indigenous communities to contagion by COVID-19 [Based on this criterion, they require that the Plan include the Indigenous Lands of Vale do Javari, Yanomami, Uru Eu Waw Waw and Arariboia as Priority 1, given their extreme vulnerability.]

[The claimants explain] . . . that extreme vulnerability is not just a consequence of the existence of a sanitary barrier in the area . . . but also the interaction of communities with their surroundings, the level of expansion of the pandemic in such surroundings, and the presence of invaders

[The Claimants express concern that] . . . the Plan lacks measurable indicators on . . . personnel structure and material resources . . . there is no Contingency Plan for contact situations involving Isolated and Recent Contact Indigenous Peoples (PIIRC)s . . . [the] quarantine protocols for sanitary barriers for PIIRC)s establishes a quarantine period of 7 days, which is inappropriate and puts them at risk . . . [t]he Sanitary Barriers Plan does not include indigenous participation in the Local Situation Room (SSL), which is essential for the proper confrontation of the pandemic . . . [and] there are locations that are neglected by special indigenous health services

[The federal government of Brazil] . . . presents a new timetable for implementing the Sanitary Barriers Plan The schedule foresees for September the concrete implementation of the health barriers included in Priority 1 However, it predicts that the implementation of the health barriers listed in Priority 2, which includes highly vulnerable communities, such as those located in the Javari Valley and Yanomamis, will not occur until December Regarding the extension of the special indigenous health service to peoples located in non-approved lands, the government reiterates that there was a determination to expand the service for such peoples, but it implies that it does not have full control over the issue

. . . According to jurisprudence consolidated in the Federal Supreme Court, in situations of risk to life, health and the environment, decisions must be guided by the principles of precaution and prevention, so that the most appropriate measures are adopted [T]he criterion of greatest vulnerability is that which meets such guidance.

* Translation by Natalie Nogueira (Yale Law School, J.D. Class of 2023).

. . . [G]iven their known vulnerability and the number of PIIRCs they harbor . . . the Union must include the Javari Valley Indigenous Lands (TIs), Yanomami, Uru Eu Waw Waw and Arariboia as Priority 1, observing the September deadline for the implementation of barriers, as foreseen in the schedule. It should also consider the need for such barriers to ensure the isolation from invaders.

. . . Priority 2, [with implementation in December,] is not suited to the situation in the country. . . . By December 2020, the pandemic will have already produced thousands of indigenous victims. The time to act and contain it is now. To implement December measures would imply abandoning these peoples to their fate

. . . [T]he federal government must implement the safest strategies, according to technical health standards, . . . ensure that there is clarity on the matter . . . [, and] must promote the continuous improvement of the Sanitary Barriers Plan

. . . [W]ith regard to the full compliance with the Plan in relation to the peoples of areas not approved, the federal government should, within a reasonable time . . . identify areas and territories in that situation . . . determine the teams and the necessary inputs for service . . . [and] provide the Court with details of the services provided

There is still, it seems, a situation of considerable precariousness of the Plan aimed at safeguarding the rights of indigenous peoples However, the pandemic is ongoing and it is necessary to take immediate and concrete measures that save lives. That means that there is no time to search for a perfect plan [T]he Union has to manage scarce resources and limited personnel, equipment and materials, which can give rise to a performance that is not the one that is considered ideal . . . [Thus,] plans should be refined in the course of their implementation. It is a collective effort—inevitably imperfect—justified by the situation of great adversity and serious risk to the health of the indigenous people

1. To this end, [and with] regard to the Sanitary Barriers Plan, the federal government should:

- (i) include the Vale do Javari, Yanomami, Uru Eu WawWaw and Arariboia as Priority 1;
- (ii) consider the need to isolate invaders;
- (iii) initiate the functioning of the sanitary barriers that integrate Priority 1 in the course of September 2020;
- (iv) initiate the functioning of the sanitary barriers that are part of Priority 2 in the course of October 2020;

(v) indicate the indigenous lands that are the object of Priority 3 and the deadline for the beginning of the operation of such barriers . . . ;

(vii) make explicit, in the Sanitary Barriers Plan, that representatives of the Council for Indigenous Health participating in the Local Situation Room (SSL) are indigenous;

(viii) explain the time and the safest quarantine strategies to enter indigenous lands and ensure that they reach the knowledge of those who work in such lands; . . .

(xi) promote the continuous improvement of the Plan. . . .

Limiting Access to In-Person Education and Religious Observances

Schools present another problem, and the debates among stakeholders have been intense. Courts have struggled to weigh educational imperatives and government public health mandates.

Although COVID-19 is new, conflicts about public health rules' application to children are not. As excerpted below, a 2021 decision by the European Court of Human Rights evaluated parents' arguments that their children ought to be exempt from vaccines against other diseases, and whether the Czech Republic could exclude unvaccinated children from preschool or issue fines to parents who refuse to vaccinate their children.

Case of Vavříčka and Others v. The Czech Republic

European Court of Human Rights (Grand Chamber)

Application Nos. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15, and 43883/15 (April 2021)

The European Court of Human Rights, sitting as a grand chamber composed of Robert Spano, President, [and] Jon Fridrik Kjølbro, Ksenija Turković, Paul Lemmens, Síofra O'Leary, Yonko Grozev, Aleš Pejchal, Krzysztof Wojtyczek, Armen Harutyunyan, Pere Pastor Vilanova, Marko Bošnjak, Tim Eicke, Jovan Ilievski, Lado Chanturia, Erik Wennerström, Raffaele Sabato, [and] Anja Seibert-Fohr, judges[:] . . .

. . . 11. In the Czech Republic, [the Public Health Protection (PHP) Act] requires all permanent residents . . . to undergo a set of routine vaccinations

15. Section 50 of the PHP Act provides that preschool facilities such as those concerned in the present case may only accept children who have received the required

vaccinations, or who have been certified as having acquired immunity by other means or as being unable to undergo vaccination on health grounds. . . .

17. Under [certain sections of the Minor Offenses Act], a person who violates a prohibition or fails to comply with a duty provided for or imposed in order to prevent infectious diseases commits a minor offence punishable by a fine of up to [an amount] . . . currently equivalent to nearly 400 euros

[The court explains that this case consolidates six applicants.]

172. The applicant Vavříčka complained that it had been arbitrary to impose a fine on him for his failure to have his children vaccinated in accordance with the applicable schedule. The child applicants argued that it had been arbitrary to refuse them admission to nursery school for the same failure on the part of their respective parents.

[The court explains that the applicants base their claim on Article 8* of the European Convention on Human Rights.]

173. . . . [T]he applicants invoked their right to personal autonomy in making decisions concerning their health and, in the case of Mr Vavříčka, the health of his children. The child applicants also relied on their right to personal development in the context of attending nursery school. The applicants further referred to a right of parents to care for their children in accordance with their opinions, convictions and conscience and in keeping with the children's best interests. In that regard, they submitted that the best interests of a child were to be primarily assessed and protected by his or her parents, any State intervention being permitted only as a last resort in the most extreme circumstances. . . .

263. The Court has established in its case-law that compulsory vaccination, as an involuntary medical intervention, represents an interference with the right to respect for private life within the meaning of Article 8 With regard to the present applicants, it is true that . . . none of the contested vaccinations were performed . . . [but] the Court is satisfied that . . . there has been an interference with their right to respect for private life. . . .

265. To determine whether this interference entailed a violation of Article 8 of the Convention, the Court must examine whether it was justified . . . that is, whether the

* Article 8 of the European Convention on Human Rights provides in part:

1. Everyone has the right to respect for his private . . . life

2. There shall be no interference by a public authority with the exercise of this right except as such as 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.

interference was “in accordance with the law,” pursued one or more of the legitimate aims specified therein, and to that end was “necessary in a democratic society.” . . .

[The court concludes that the Czech Republic’s interference with the right to respect for private life is in “accordance with the law.”]

272. . . . [T]he objective of the relevant legislation is to protect against diseases which may pose a serious risk to health. . . . This objective corresponds to the aims of protection of health and the protection of rights of others, recognised by Article 8 [and is therefore a “legitimate aim.”] . . .

277. . . . Firstly, there is a general consensus among the Contracting Parties . . . that vaccination is one of the most successful and cost-effective health interventions and that each State should aim to achieve the highest possible level of vaccination among its population

278. . . . [T]here is no consensus over a single model [to protect the interest at stake]. Rather, there exists, among the Contracting Parties to the Convention, a spectrum of policies on the vaccination of children [ranging from a recommendation to a compulsory legal duty]. . . .

280. . . . [T]he Court has previously held that healthcare policy matters come within the margin of appreciation of the national authorities. . . . [T]he Court takes the view that in the present case, which specifically concerns the compulsory nature of child vaccination, that margin should be a wide one.

281. . . . [I]t must next be considered whether the choice of the Czech legislature to make the vaccination of children compulsory can be said to answer to a pressing social need.

282. . . . [I]t is relevant to reiterate that the Contracting States are under a positive obligation [under the European Convention of Human Rights] . . . to take appropriate measures to protect the life and health of those within their jurisdiction. . . .

284. . . . [I]n the Czech Republic the vaccination duty represents the answer of the domestic authorities to the pressing social need to protect individual and public health against the diseases in question and to guard against any downward trend in the rate of vaccination among children.

285. . . . While a system of compulsory vaccinations is not the only . . . model adopted by European States, the Court reiterates that, in matters of health-care policy, it is the domestic authorities who are best placed to assess priorities, the use of resources and social needs. All of these aspects are relevant in the present context, and they come within the wide margin of appreciation that the Court should accord to the respondent State. . . .

289. The Court therefore accepts that the choice of the Czech legislature to apply a mandatory approach to vaccination is supported by relevant and sufficient reasons. . . .

290. Finally, the Court must assess the proportionality of the interferences complained of in light of the aim pursued. . . .

293. While vaccination is a legal duty in the respondent State, the Court reiterates that compliance with it cannot be directly imposed, in the sense that there is no provision allowing for vaccination to be forcibly administered. . . . [T]he duty is enforced indirectly through the application of sanctions . . . [which] can be regarded as relatively moderate . . . and cannot be considered as unduly harsh or onerous. . . .

303. The Court must furthermore consider the intensity of the impugned interferences

306. The Court accepts that the exclusion of the applicants from preschool meant the loss of an important opportunity for these young children to develop their personalities and begin to acquire important social and learning skills However, that was the direct consequence of the choice made by their respective parents to decline to comply with a legal duty Moreover, the possibility of attendance at preschool of children who cannot be vaccinated for medical reasons depends on a very high rate of vaccination of other children The Court considers that it cannot be regarded as disproportionate for a State to require those for whom vaccination represents a remote risk to health to accept this universally practised protective measure, as a matter of legal duty and in the name of social solidarity, for the sake of the small number of vulnerable children who are unable to benefit from vaccination. In the view of the Court, it was validly and legitimately open to the Czech legislature to make this choice, which is fully consistent with the rationale of protecting the health of the population. . . .

307. The Court would further observe that [child applicants] . . . were not deprived of all possibility of personal, social and intellectual development, even at the cost of additional, and perhaps considerable, effort and expense on the part of their parents. Moreover, the effects on the child applicants were limited in time. Upon reaching the age of mandatory school attendance, their admission to primary school was not affected by their vaccination status. . . .

311. Accordingly, there has been no violation of Article 8 of the Convention. . . .

Dissenting Opinion of Judge Wojtyczek[:]

1. I agree with the general view that the Convention does not exclude the introduction of an obligation to vaccinate in respect of certain diseases coupled with exceptions based on conscientious objection. Objectively, there are strong arguments in favor of such a system and they may justify such an interference, even under the very high standards of scrutiny set out in Article 8. . . .

6. . . . The question . . . is not whether vaccination campaigns serve public health but whether it is acceptable under the Convention to impose sanctions for non-compliance with the legal obligation to undergo vaccination. More specifically, the question is whether the added value brought by the obligation justifies the restriction on freedom of choice. . . . It is necessary to show . . . that the benefits for society as a whole and for its members outweigh the individual and social costs and justify taking the risk of suffering the side-effects of a vaccination. Given the weight of the values at stake, such an assessment requires extremely precise and comprehensive scientific data about the diseases and vaccines under consideration. Without such data the whole exercise becomes irrational. . . .

8. [The majority's approach to the margin of appreciation] is difficult to accept. . . . [T]here is no consensus that the interference under consideration, namely the obligation to vaccinate, is necessary for protecting public health The issue at stake is crucial to the individual's effective enjoyment of the most intimate rights, in a context in which there is no direct conflict between two or more rights and in which the right-holder asserts freedom from interference and does not claim any positive entitlements. Restrictions on the freedom to make choices about one's own body, imposed outside the context of a direct conflict between two or more rights, require strong justifications. In this domain, the margin of appreciation should be narrow and the threshold to justify the interference very high. The approach adopted may give the impression that without a low standard of scrutiny the finding of no violation would not have been possible. . . .

13. The majority addresses . . . the issue of the best interests of the child. . . . In the instant case, the central question around the best interests of the children is not whether the general health policy of the respondent State promotes the best interests of children as a group, but instead how to assess in respect of each and every specific child of the applicant parents, with the child's specific health background, whether the different benefits from vaccination will indeed be greater than the specific risk inherent in it. . . .

14. . . . I also note that no evidence was presented to the Court which would show that those States which have introduced the obligation to vaccinate perform better in terms of public health than the States which have not introduced such an obligation. In this second group, no decline in the rate of vaccination below the recommended targets has been established before the Court. The fact that in many States the objectives of health policy can apparently be achieved without introducing an obligation to vaccinate is a very powerful argument that less restrictive means are indeed available and that the impugned interference is not necessary in a democratic society. . . .

18. . . . [T]here are strong objective arguments in favour of finding a non-violation of the Convention rights. These possible arguments would have prevailed – at least in respect of most of the diseases in question – over possible counterarguments,

even if we apply a very strict standard of scrutiny and give credence to a number of factual allegations made by the applicants. . . .

* * *

Below we turn to a less familiar set of provisions—those concerning the shift to online learning and requiring distance among students when attending in person. Those COVID-19 measures resulted in arguments that such structural reorganization of education was impermissible.

Judgment of the First Senate of 15 July 2020
Federal Constitutional Court of Germany (First Senate)
1 BvR 1630/20 (July 2020)*

[Judges Andreas Paulus, Josef Christ and Ines Härtel unanimously decided the following:]

With their constitutional complaint, the complainants object on the one hand to the minimum distance requirement in schools laid down in Section 16 (1) and (2), sentences 2 and 3, of the Sixth Bavarian Infection Protection Measures Ordinance (6th BayIfSMV) of June 19, 2020 and, on the other hand, against the denial of their requested emergency legal protection by . . . the Bavarian Administrative Court on July 3, 2020. With their application for a temporary injunction, they also request the provisional suspension of Section 16 (1) and (2) . . . of the 6th BayIfSMV.

According to Section 16 (1) and (2) of the 6th BayIfSMV, lessons and other school events in schools within the meaning of the Bavarian Education and Teaching Act are only permitted if appropriate measures are taken to ensure that all parties involved are at a minimum distance of 1.5 m The schools have to work out a protection and hygiene concept on the basis of a hygiene plan made available to them by the State Ministries for Education and Culture and for Health and Care and to present it to the responsible district administrative authority upon request. This protection and hygiene concept must contain measures by which the minimum distance is maintained and the risk of infection is minimized. . . .

Complainants submit that, in order to implement the distance requirement, face-to-face lessons are currently only taking place for the school-aged complainants every other week. The inadequately compensated omission of face-to-face teaching hurts school-aged complainants in their own right to education and free development of personality. [They further claim that] . . . it is not certain that regular school operation is associated with . . . the risk of renewed SARS-CoV-2 infection chains . . . [and

* Translation by Natalie Nogueira (Yale Law School, J.D. Class of 2023).

that] . . . there were no empirically proven suspicions that children and adolescents contribute to the spread of SARS-CoV-2. . . .

The constitutional complaint is not accepted . . . as the complainants . . . have not complied with the principle of exhaustion of legal remedies [as a prerequisite to] constitutional complaint. . . .

. . . [T]he Corona ordinances are . . . characterized precisely by the fact that they are typically designed for a short period of time, with the result that they regularly expire before their legality is finally clarified in court. . . .

Since they—like the minimum distance requirement here—generally do not require any administrative enforcement, a subsequent clarification of their compatibility with fundamental rights . . . is obvious. . . .

. . . It cannot be ruled out that the compatibility of the prohibitions with the federal fundamental rights of the Basic Law will still be checked in a revision procedure . . . [as] it is possible that the higher court will come to a different conclusion [from the lower court], especially since there is still no established higher court or supreme court case law on the legality of the various corona bans. . . .

The constitutional complaint is also not admissible . . . [because it fails to] only [raise] specific constitutional questions that the Federal Constitutional Court could answer without prior professional judicial processing of the factual and legal bases for the decision. . . .

In these cases, a complainant is not expected to initiate a specialized judicial procedure if its implementation does not improve the basis for the decision on the constitutionality of the law reserved for the Federal Constitutional Court. The situation is different, however, if—as here—the subject of the complaint is a sub-statutory norm. In this respect, specialized courts also have the competence to reject norms, so that even if only specific constitutional questions are raised, legal protection can be obtained without referring to the Federal Constitutional Court In addition, the constitutional assessment of the challenged provisions does not depend solely on specific constitutional questions. [The] actual conditions of the coronavirus pandemic as well as specialist—virological, epidemiological, medical and psychological—assessments and risk assessments are of major importance This applies in particular to the question at issue, in which risk of infection exists in schools and originates from children. . . .

. . . [T]he Federal Constitutional Court should have factual material that has already been thoroughly examined as a result of the preliminary examination of the objections by a specialist court and . . . the assessment of the factual and legal situation should be conveyed to it by the more relevant specialist courts. . . .

. . . On the merits, the constitutional complaint . . . is limited to violations of fundamental rights that relate to the main issue. They argue that the Administrative

Court misjudged the importance and scope of the fundamental rights criticized as violated, misjudged the situation regarding the risk of infection for children and wrongly considered the distance requirement in schools to be proportionate. According to their nature, these objections can also be asserted and cured in main administrative court proceedings.

. . . [The] consequences that would occur if the interim order were not issued, but the constitutional complaint would later be successful, must be weighed against the disadvantages that would arise if the interim order were issued, but the constitutional complaint would fail to succeed. . . . The effects on all those affected by the attacked regulation must be taken into account, not just the consequences for the complainant. . . .

The application for an interim injunction must be decided on the basis of a weighing of the consequences, which here is to the detriment of the complainant. . . . If the requested interim injunction is not issued and if the constitutional complaint in the main proceedings were successful, face-to-face instruction would be wrongly restricted. In this respect, the complainants clearly point out the associated considerable burdens on their family and professional life and the disadvantages for personal and social development opportunities that cannot be adequately compensated for. . . . In contrast, the issuance of an interim order would cause the unrestricted, nationwide reintroduction of regular classroom teaching in schools In the contested decision of July 3, 2020, the Bavarian Administrative Court stated that . . . the question of what role children play as carriers of the SARS-CoV-2 virus cannot yet be answered with scientific clarity. It is therefore not possible to conclusively assess the consequences of regular lessons. However, based on understandable assumptions, the Robert Koch Institute recommends that children and young people should also observe distance rules and hygiene requirements.

This expert judicial assessment is to be used as a basis for weighing up the consequences. . . . It can . . . be assumed that . . . a preliminary injunction would omit . . . a suitable protective measure to contain the risk of infection [As a result,] the risk of disease would increase, the number of people with partially serious and fatal illnesses would increase, and the overloading of the health facilities would increase.

. . . [It is these] dangers to life and limb, against which the state must protect in accordance with the fundamental right to life and physical integrity . . . in accordance with Article 2, Paragraph 2* of the Basic Law.

. . . In order to weigh up [conflicting interests], it is important that face-to-face teaching is currently taking place in Bavaria in all school types and grade levels, at least alternately. The negative consequences of the current restrictions on school operations

* Article 2, paragraph 2 of the Basic Law of Germany provides:

Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

are therefore of less importance than the previous complete elimination of face-to-face teaching. In addition, the challenged regulation will expire on July 19, 2020 and . . . at the end of the summer holidays, regular face-to-face teaching is to be reintroduced subject to hygiene requirements. This shows that the regulator knows it is responsible for updating the Bavarian Infection Protection Measures Ordinance in the school system, taking into account new developments in the corona pandemic, and always taking into account the principle of proportionality to check whether a full return to a regular school is possible In addition, the nationwide “learning at home” model; the advisory, support and funding offers; and the emergency care . . . guaranteed regardless of the alternate model of face-to-face teaching . . . at least partially cushion the negative consequences. [Finally], it can currently be assumed that the restrictions will only be accepted until the end of the school year which is imminent.

DeSantis v. Florida Education Association
First District Court of Appeal of the State of Florida
No. 1D20-2470 (October 2020)

Rowe, J.[:]

In March 2020, state and local governments across Florida issued emergency orders that . . . closed public schools. . . .

. . . Florida’s schools did not reopen for the rest of the academic year. With a new school year approaching and with COVID-19 still present in Florida, policymakers had to decide when and under what conditions would it be safe enough to reopen schools for in-person instruction. . . .

Stakeholders disagreed on what public health metrics should be used to determine when to reopen schools and on the appropriate interventions to implement when schools did reopen Underlying these disagreements were very different perceptions about the risks posed by COVID-19, the risks posed by not reopening the schools, and views on which risks were more tolerable. . . .

Also prominent in the debate over school reopening was the potential for a sharp decrease in funding to school districts if . . . students chose not to return to the classroom. . . .

. . . [Florida Department of Education (DOE)] Commissioner Corcoran issued an emergency order that allowed school districts to continue to provide online instruction and offered increased funding to avoid the expected budget shortfalls. But to qualify for increased funding, school districts had to reopen schools for in-person instruction by the end of August.

The Florida Education Association [and other appellees] . . . thought it too risky to reopen schools because the possibility of contracting and transmitting COVID-19

posed too great a threat to students, teachers, their families, and communities. And by conditioning the offer of increased funding for online instruction on school districts committing to reopening schools for in-person instruction, Appellees claimed that the State “forced” school districts to reopen. Appellees sued in circuit court seeking a declaration that the State failed to meet its constitutional obligation to provide for a safe and secure public school system. They also moved to temporarily enjoin the emergency order. The trial court granted the injunction and then substantially revised the emergency order.

The State appeals. We reverse because Appellees did not meet the requirements for the trial court to issue an injunction. And even if they had, the trial court exceeded the constitutional limits of its authority by rewriting the Commissioner’s order. . . .

. . . To obtain an injunction, the moving party must show (1) a substantial likelihood of success on the merits, (2) the likelihood of irreparable harm absent the entry of an injunction, (3) a lack of an adequate remedy at law, and (4) that injunctive relief will serve the public interest. . . . Appellees established none of the elements required to obtain an injunction. . . .

. . . [W]hatever the outcome of Appellees’ lawsuit, the choice of how to deliver education to students remains with Florida’s school boards. . . .

. . . The court cannot decide whether the State has met its obligation to provide for safe and secure schools unless it makes policy determinations reserved for the executive branch and the non-party school districts. Nor can the court determine whether the Governor and the Commissioner, through their delegated emergency authority, met the executive’s statutory obligation to address the natural emergency presented by the pandemic. . . .

. . . To measure whether the public school system is “safe” and “secure,” the trial court would need to identify standards to make that measurement—beginning by evaluating the risks posed by COVID-19. And even if the trial court were qualified to isolate and weigh the safety risks posed by the virus, whether it is safe enough to reopen schools is not a binary question answered with a simple yes or no based on the latest public health metrics on COVID-19. The court would still need to consider many other factors to determine whether the State met its obligation to provide for safe and secure schools. . . . Indeed, the trial court would have to consider the myriad concerns the State had to ponder in deciding whether schools should reopen for in-person instruction—the risks associated with the virus if schools reopen and the risks associated with not reopening schools—before deciding which risks were tolerable. . . .

. . . [T]he State showed that its decision to issue the Emergency Order and provide a plan to reopen schools required it to consider education policy, public health policy, economic policy, and emergency management policy. Such complex decision-making and policy judgments are far beyond the authority of the judiciary. Courts

simply lack the expertise and authority to weigh and balance the many public health, social, and economic factors that inform the policy decision made here: when and how to reopen Florida’s public schools in the wake of a public health emergency. . . .

. . . Answering such profound questions “must necessarily be performed exclusively within the political branches, which by their nature are far more responsive and prompt to address the needs of parents and students than the courts could ever be.” This is particularly true when the political branches “act in areas fraught with medical and scientific uncertainties”; in those circumstances, their latitude “must be especially broad.” . . .

Appellees have invited the judiciary to second-guess the executive’s discretionary actions exercising emergency powers during a public health emergency to address the health, safety, and welfare of students in Florida’s public schools. The courts must decline the invitation. . . .

Article II, section 3 of the Florida Constitution provides that “[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.” . . .

. . . [B]y rewriting the Emergency Order, the trial court directed how DOE and the Commissioner had to exercise their discretion. . . . [T]he trial court had no authority to direct the executive to act in a specific manner when the constitution and statutes provide for discretion. . . .

. . . [C]ontrary to Appellees’ suggestion that the Emergency Order required DOH or local health departments to approve school reopening plans, the plain language of the order shows that reopening plans were only “subject to” advice from those entities. And school districts were not set adrift without guidance from public health authorities about reopening schools. Those authorities gave much guidance on how to safely reopen schools and best practices to follow. . . .

Even so . . . the policy questions about when and how to reopen schools cannot be answered simply by referring to available public health data or guidance from public health officials. Whether or not local public health officials consider it safe or prudent to reopen schools, that policy decision is not theirs to make. That decision rests with the elected school board members in each of Florida’s school districts who are directly accountable to the people. . . .

. . . Appellees failed to establish the other elements necessary for the trial court to issue a temporary injunction, including irreparable injury. Appellees argued that . . . they would suffer irreparable injury because . . . [i]f forced to return to the classroom, . . . students and teachers face irreparable harm “in the form of unquantifiable emotional and physical injuries,” including “severe illness, long-term and unpredictable health complications, and . . . death.” But these arguments fail

because nothing in the Emergency Order requires any teacher or any student to return to the classroom. . . .

. . . Nothing in the Emergency Order disturbs a school district’s discretion to determine when to reopen schools and whether to offer in-person instruction. . . . [S]chool districts retain the discretion to continue to offer students the choice of in-person instruction [and] to require teachers to report for duty under their contracts. . . . And so, whether a school district assigns [teachers] to in-person or online instruction is a matter between those teachers and their employing school districts. . . .

As to school districts, none has been “forced” under the Emergency Order to offer in-person instruction. . . . Nothing in the Emergency Order disturbs a school district’s discretion to determine when to reopen schools and whether to offer in-person instruction. And nothing in the Emergency Order limits a school district’s ability to reopen schools under the funding formulae approved by the Legislature and administered by DOE [which provide 25% less per-student funding for online classes]. . . . If a school district desires increased funding for online instruction, it may petition the Legislature for relief from the funding statutes. . . .

For these reasons, we reverse the order of the trial court and vacate the temporary injunction entered against the State.

* * *

A series of cases come from religious communities objecting to limits on communal worship. We present examples from the United Kingdom and the United States.

Hussain v. Secretary of State for Health and Social Care
High Court of Justice of the United Kingdom
[2020] Case No: CO/1846/2020

[Before] Mr. Justice Swift:

2. . . . The Claimant[, Tabassum Hussain,] is the Chairman of the Executive Committee of the Jamiyat Tablighi-Ul Islam Mosque The challenge is directed to the effect of [the Health Protection (Coronavirus Restrictions) (England) Regulations SI202/350]. . . .

3. Regulation 5(5) requires that any person . . . responsible for a place of worship . . . ensure that “during the emergency period” the place of worship is closed save for permitted uses The “emergency period” is . . . to . . . continue until . . . the relevant restriction or requirement . . . is terminated by direction of the Secretary of State. The purposes for which places of worship may be used are . . . funerals, the

broadcast of acts of worship and the provision of essentially voluntary support services or urgent public support services.

4. Regulation 6 sets out restrictions on movement . . . : no person during the emergency period is to leave or be outside the place where they live “without reasonable excuse.” . . . [M]inisters of religion and worship leaders may go to their place of worship, but there is no corresponding provision permitting others to go to their place of worship.

5. Lastly, regulation 7 prevents gatherings of more than two people in any public place, save for . . . specified purposes. Attendance at an act of worship is not one of the permitted purposes. . . . [A] public place would naturally include a place of worship.

6. . . . [T]he Claimant contends, and it is accepted by the Defendant Secretary of State that the effect of the restrictions . . . is to prevent collective Friday prayer at the Barkerend Road Mosque and, specifically, the prayer known as the Jumu’ah, the Friday afternoon prayer. This . . . is not unique to the Barkerend Road Mosque. The provisions . . . apply to all places of worship of all religious denominations. No person who wishes or, as a matter of their religion is required, to attend a collective act of worship at their mosque, church, synagogue, temple or chapel is permitted to do so. . . .

8. . . . [T]he Claimant seeks interim relief in the form of an order prohibiting enforcement of regulations 5, 6 and 7 of the 2020 Regulations so far as they prohibit attendance at Friday prayers at Barkerend Road Mosque. . . .

9. . . . [T]he Claimant must first show a real prospect that at trial he will succeed in obtaining a permanent injunction, taking account of the fact that any decision to grant such relief would include consideration of the public interest. . . . [T]he relevant public interest is that of the Secretary of State continuing to operate effective measures to safeguard public health in response to the risk presented by the COVID-19 pandemic. . . .

10. The claim is that the Secretary of State’s failure to make provision for the Claimant to open the Barkerend Road Mosque for communal Friday prayer is contrary to his right, under Article 9* of the [European Convention on Human Rights], to be

* Article 9 of the European Convention on Human Rights provides:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

permitted to manifest his religious belief in worship, teaching, practice and observance. . . .

11. . . . There is no dispute that the cumulative effect of the restrictions contained in the 2020 Regulations is an infringement of the Claimant's right to manifest his religious belief by worship, practice or observance. . . . Nevertheless, various points bear upon the extent and nature of the interference caused by the 2020 Regulations

12. . . . [T]he interference relied on in these proceedings concerns only one aspect of religious observance – attendance at communal Friday prayers. . . .

13. . . . [T]he duration of the interference will be finite. . . . The 2020 Regulations . . . will expire in September 2020. . . . [T]he content of the 2020 Regulations must be reviewed every three weeks [E]ven within the period that the Regulations are in force, the reach and scope of the prohibitions . . . remain under review. . . .

18. . . . [W]ere this matter to go to trial, it is very likely that the Secretary of State would succeed on his submission that interference with the Claimant's article [9] rights as a result of the 2020 Regulations is justified. . . .

19. The Covid-19 pandemic presents truly exceptional circumstances. . . . [The] virus is a genuine and present danger to the health and well-being of the general population. . . . [T]he maintenance of public health is a very important objective pursued in the public interest. . . . The Secretary of State describes the "basic principle" underlying the restrictions as being to reduce the degree to which people gather and mix with others not of the same household and, in particular, reducing and preventing such mixing in indoor spaces. . . . [T]his premise is rationally connected to the objective of protecting public health. It rests on scientific advice acted on by the Secretary of State to the effect that the Covid-19 virus is highly contagious and particularly easily spread in gatherings of people indoors, including . . . gatherings in mosques, churches, synagogues, temples and so on for communal prayer. . . .

20. . . . [T]he Claimant points to various other activities which are permitted by the 2020 Regulations These include taking exercise . . . ; visiting parks and open spaces for recreation; [and] visiting houses in connection with the purchase, sale, rental of a residential property

21. . . . [T]he Claimant questions the Secretary of State's priorities. Why are matters such as those mentioned above permitted when attendance at a place of worship in fulfilment of a religious obligation is not? While the Secretary of State's order of priorities is a legitimate matter for public debate . . . he must be allowed a suitable margin of appreciation to decide the order in which steps are to be taken to reduce the reach and impact of the restrictions These are complex political assessments which a court should not lightly second-guess.

22. . . . [T]he question is as to the activities that can be permitted consistent with effective measures to reduce the spread and transmission of the Covid-19 virus; that so far as they interfere with Convention rights, strike a fair balance between that inference and the general interest. That will be a delicate assessment. . . . The Secretary of State is entitled . . . to adopt a precautionary stance.

23. Yet . . . it is possible to recognise a qualitative difference in terms of the risk of transmission . . . between a situation such as a religious service where a number of people meet in an enclosed space for a period of an hour or more, and the transitory briefer contact likely in a setting such as that of shopping in a garden centre.

24. In this case I do not think there is any realistic likelihood that the Claimant's case on Article 9 will succeed at trial. The infringement of his Article 9 rights is not disproportionate. . . .

28. For all these reasons the Claimant's application is refused. . . .

* * *

In the United States, when religious communities objected to limits on congregating, judges debated the import of a 1905 decision, *Jacobson v. Massachusetts*, excerpted below, that continues to be the central decision on government's public health authority. The issue arose in the context of the state power to require vaccinations to protect against smallpox.

Jacobson v. Massachusetts
Supreme Court of the United States
197 U.S. 11 (1905)

MR. JUSTICE HARLAN, . . . delivered the opinion of the court. . . .

[The defendant Henning Jacobson challenged an order of the Board of Health of Cambridge, Massachusetts, mandating vaccination against smallpox during an epidemic. The Board of Health empowered a named physician to enforce vaccination. The order, adopted pursuant to a state statute, imposed fines on those who did not comply. Jacobson was prosecuted for refusing the free, mandated vaccination and found guilty by a jury. Jacobson had requested a jury instruction that the regulation was "in derogation of the rights secured" by the Fourteenth Amendment of the United States Constitution. Jacobson asserted the compulsory vaccination law was "unreasonable, arbitrary, and oppressive" and unconstitutionally invaded his liberty.]

. . . Is the statute, so construed . . . inconsistent with the liberty which the Constitution of the United States secures to every person against deprivation by the State?

The authority of the State to enact this statute is to be referred to what is commonly called the police power—a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and “health laws of every description.” . . . According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. It is equally true that the State may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety. The mode or manner in which those results are to be accomplished is within the discretion of the State, subject . . . only to the condition that no rule . . . shall contravene the Constitution of the United States or infringe any right granted or secured by that instrument. . . .

We come, then, to inquire whether any right given, or secured by the Constitution, is invaded by the statute as interpreted by the state court. The defendant insists that his liberty is invaded when the State subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. . . . Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. . . .

Applying these principles to the present case, . . . the legislature of Massachusetts required the inhabitants of a city or town to be vaccinated only when, in the opinion of the Board of Health, that was necessary for the public health or the public safety. The authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body; and surely it was appropriate for the legislature to refer that question, in the first instance, to a Board of Health, composed of persons residing in the locality affected and appointed, presumably, because of their fitness to determine such questions. To invest such a body with authority over such matters was not an unusual nor an unreasonable or arbitrary requirement. Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members. . . . There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government . . . to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint . . . as the safety of the general public may demand. An American citizen, arriving at an American port on a vessel in which, during the voyage, there had been

cases of yellow fever or Asiatic cholera, although apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will on board of such vessel or in a quarantine station, until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the community at large has disappeared. The liberty secured by the Fourteenth Amendment, this court has said, consists, in part, in the right of a person “to live and work where he will,” and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense. It is not, therefore, true that the power of the public to guard itself against imminent danger depends in every case involving the control of one’s body upon his willingness to submit to reasonable regulations established by the constituted authorities, under the sanction of the State, for the purpose of protecting the public collectively against such danger. . . .

We are not prepared to hold that a minority, residing or remaining in any city or town where smallpox is prevalent, and enjoying the general protection afforded by an organized local government, may . . . defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the State. If such be the privilege of a minority then a like privilege would belong to each individual of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population. We are unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the State. While this court should guard with firmness every right appertaining to life, liberty or property as secured to the individual by the Supreme Law of the Land, it is of the last importance that it should not invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law. The safety and the health of the people of Massachusetts are, in the first instance, for that Commonwealth to guard and protect. They are matters that do not ordinarily concern the National Government. . . . [W]e do not perceive that this legislation has invaded by right secured by the Federal Constitution. . . .

* * *

Other constitutional courts have issued comparable decisions approving of health authorities’ balancing of safety measures and constitutional prerogatives; much of that law predates COVID-19. The Israeli High Court of Justice in *Adalah v. The Ministry of Social Affairs** upheld a National Insurance Law amendment which reduced child allowances for parents whose children had not received vaccines mandated by the

* HCJ 7245/10 *Adalah v. The Ministry of Social Affairs* 66(2) PD 442 (2013) (Israel).

Ministry of Health. The court found the amendment to be proportionate and noted the importance of vaccinations to the children of concern and the community writ large. In the United States, by contrast, claims of religion have held sway since the onset of COVID-19.

Roman Catholic Diocese of Brooklyn v. Cuomo
Supreme Court of the United States
No. 20A87 (November 2020)

ON APPLICATION FOR INJUNCTIVE RELIEF . . .

PER CURIAM.

. . . [The petitioners, Roman Catholic Diocese of Brooklyn and Agudath Israel of America,] seek relief from an Executive Order issued by the Governor of New York that imposes very severe restrictions on attendance at religious services in areas classified as “red” or “orange” zones. In red zones, no more than 10 persons may attend each religious service, and in orange zones, attendance is capped at 25. The [petitioners] . . . contend that these restrictions violate the Free Exercise Clause* of the First Amendment, and they ask us to enjoin enforcement of the restrictions while they pursue appellate review. . . . Both the Diocese and Agudath Israel maintain that the regulations treat houses of worship much more harshly than comparable secular facilities. . . .

. . . The [petitioners] have made a strong showing that the challenged restrictions violate “the minimum requirement of neutrality” to religion. . . .

. . . [T]he regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment. In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as “essential” may admit as many people as they wish. And the list of “essential” businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities. The disparate treatment is even more striking in an orange zone. While attendance at houses of worship is limited to 25 persons, even non-essential businesses may decide for themselves how many persons to admit.

These categorizations lead to troubling results. At the hearing in the District Court, a health department official testified about a large store in Brooklyn that could “literally have hundreds of people shopping there on any given day.” Yet a nearby

* The Free Exercise Clause of the First Amendment of the U.S. Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof

church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service. And the Governor has stated that factories and schools have contributed to the spread of COVID-19, but they are treated less harshly than the Diocese's churches and Agudath Israel's synagogues, which have admirable safety records.

Because the challenged restrictions are not "neutral" and of "general applicability," they must satisfy "strict scrutiny," and this means that they must be "narrowly tailored" to serve a "compelling" state interest. Stemming the spread of COVID-19 is unquestionably a compelling interest, but it is hard to see how the challenged regulations can be regarded as "narrowly tailored." They are . . . far more severe than has been shown to be required to prevent the spread of the virus at the applicants' services. . . .

Not only is there no evidence that the applicants have contributed to the spread of COVID-19 but there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services. . . .

. . . There can be no question that the challenged restrictions, if enforced, will cause irreparable harm. . . . If only 10 people are admitted to each service, the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred. . . .

. . . Finally, it has not been shown that granting the applications will harm the public. As noted, the State has not claimed that attendance at the applicants' services has resulted in the spread of the disease. And the State has not shown that public health would be imperiled if less restrictive measures were imposed.

Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here . . . strike at the very heart of the First Amendment's guarantee of religious liberty. . . .

. . . [W]e hold that enforcement of the Governor's severe restrictions on the applicants' religious services must be enjoined. . . .

JUSTICE BREYER, with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join, dissenting.

. . . This Court, unlike the lower courts, has now decided to issue an injunction that would prohibit the State from enforcing its fixed-capacity restrictions on houses of worship in red and orange zones while the parties await the Second Circuit's decision. I cannot agree with that decision.

. . . The nature of the epidemic, the spikes, the uncertainties, and the need for quick action, taken together, mean that the State has countervailing arguments based upon health, safety, and administrative considerations that must be balanced against the applicants' First Amendment challenges. That fact . . . means that the applicants' claim of a constitutional violation (on which they base their request for injunctive relief) is far from clear. . . .

. . . We have previously recognized that courts must grant elected officials "broad" discretion when they "undertake to act in areas fraught with medical and scientific uncertainties." . . . The elected branches of state and national governments can marshal scientific expertise and craft specific policies in response to "changing facts on the ground." And they can do so more quickly than can courts. That is particularly true of a court, such as this Court, which does not conduct evidentiary hearings. It is true even more so where, as here, the need for action is immediate, the information likely limited, the making of exceptions difficult, and the disease-related circumstances rapidly changing.

. . . I can find no need for an immediate injunction. . . . And I dissent from the Court's decision to the contrary.

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN joins, dissenting.

. . . I fear that granting applications such as the one filed by the . . . Diocese . . . will only exacerbate the Nation's suffering.

South Bay [United Pentecostal Church v. Newsom (May 2020)] . . . provided a clear and workable rule to state officials seeking to control the spread of COVID-19: They may restrict attendance at houses of worship so long as comparable secular institutions face restrictions that are at least equally as strict. New York's safety measures fall comfortably within those bounds. Like [California] in *South Bay* . . . , New York applies "[s]imilar or more severe restrictions . . . to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time." Likewise, New York "treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods." That should be enough to decide this case.

The Diocese attempts to get around *South Bay* . . . by disputing New York's conclusion that attending religious services poses greater risks than, for instance, shopping at big box stores. . . . [T]he District Court rejected that argument as unsupported by the factual record. . . . Justices of this Court play a deadly game in second guessing the expert judgment of health officials about the environments in which a contagious virus . . . spreads most easily.

In truth, this case is easier than *South Bay*. . . . While the state regulations in [that] case generally applied the same rules to houses of worship and secular institutions where people congregate in large groups, New York treats houses of worship far more favorably than their secular comparators. And whereas the restrictions in *South Bay* . . . applied statewide, New York’s fixed-capacity restrictions apply only in specially designated areas experiencing a surge in COVID–19 cases. . . .

. . . It is true that New York’s policy refers to religion on its face. But . . . that is because the policy singles out religious institutions for preferential treatment in comparison to secular gatherings, not because it discriminates against them. . . .

. . . The Constitution does not forbid States from responding to public health crises through regulations that treat religious institutions equally or more favorably than comparable secular institutions, particularly when those regulations save lives. Because New York’s COVID-19 restrictions do just that, I respectfully dissent.

South Bay United Pentecostal Church v. Newsom

Supreme Court of the United States
No. 20A136 (20–746) (February 2021)

ON APPLICATION FOR INJUNCTIVE RELIEF . . .

The application for injunctive relief presented to JUSTICE KAGAN and by her referred to the Court is granted in part. Respondents [including California State Governor Gavin Newsom] are enjoined from enforcing the [COVID-19 Restriction] Blueprint’s Tier 1 prohibition on indoor worship services against the applicants pending disposition of the petition for a writ of certiorari. The application is denied with respect to the percentage capacity limitations, and respondents are not enjoined from imposing a 25% capacity limitation on indoor worship services in Tier 1. The application is denied with respect to the prohibition on singing and chanting during indoor services. . . .

CHIEF JUSTICE ROBERTS, concurring in the partial grant . . . for injunctive relief[:]

. . . [F]ederal courts owe significant deference to politically accountable officials with the “background, competence, and expertise to assess public health.” . . . At the same time, the State’s present determination—that the maximum number of adherents who can safely worship in the most cavernous cathedral is zero—appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake.

I adhere to the view that the “Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States.” But the Constitution also entrusts the protection of the people’s rights to the Judiciary Deference, though broad, has its limits. . . .

Statement of JUSTICE GORSUCH, with whom JUSTICE THOMAS and JUSTICE ALITO join. . . .

. . . California . . . insists that religious worship is so different that it demands especially onerous regulation. The State offers essentially four reasons why: It says that religious exercises involve (1) large numbers of people mixing from different households; (2) in close physical proximity; (3) for extended periods; (4) with singing.

No one before us disputes that factors like these may increase the risk of transmitting COVID-19. And no one need doubt that the State has a compelling interest in reducing that risk. This Court certainly is not downplaying the suffering many have experienced in this pandemic. But California errs to the extent it suggests its four factors are always present in worship, or always absent from the other secular activities its regulations allow. Nor has California sought to explain why it cannot address its legitimate concerns with rules short of a total ban. . . .

. . . Drafting narrowly tailored regulations can be difficult. But if Hollywood may host a studio audience or film a singing competition while not a single soul may enter California's churches, synagogues, and mosques, something has gone seriously awry.

JUSTICE KAGAN, with whom JUSTICE BREYER and JUSTICE SOTOMAYOR join, dissenting.

Justices of this Court are not scientists. Nor do we know much about public health policy. Yet today the Court displaces the judgments of experts about how to respond to a raging pandemic. The Court orders California to weaken its restrictions on public gatherings by making a special exception for worship services. The majority does so even though the State's policies treat worship just as favorably as secular activities (including political assemblies) that, according to medical evidence, pose the same risk of COVID transmission. Under the Court's injunction, the State must instead treat worship services like secular activities that pose a much lesser danger. That mandate defies our caselaw, exceeds our judicial role, and risks worsening the pandemic. . . .

California's scheme homes in on these indoor gatherings because they pose a heightened danger of COVID transmission. . . .

. . . [M]edical experts . . . testified about why California imposed more severe capacity limits on gathering places like churches and theaters than on other indoor sites

Given all that evidence, California's choices make good sense. The State is desperately trying to slow the spread of a deadly disease. It has concluded, based on essentially undisputed epidemiological findings, that congregating together indoors poses a special threat of contagion. So it has devised regulations to curb attendance at those assemblies and—in the worst times—to force them outdoors. . . .

Yet the Court will not let California fight COVID as it thinks appropriate. The Court has decided that the State must exempt worship services from the strictest aspect of its regulation of public gatherings. No one can know, from the Court's 19-line order, exactly why: Is it that the Court does not believe the science, or does it think even the best science must give way? In any event, the result is clear: The State may not treat worship services like activities found to pose a comparable COVID risk, such as political meetings or lectures. Instead, the State must treat this one communal gathering like activities thought to pose a much lesser COVID risk, such as running in and out of a hardware store. In thus ordering the State to change its public health policy, the Court forgets what a neutrality rule demands. The Court insists on treating unlike cases, not like ones, equivalently.

This is no garden-variety legal error: In forcing California to ignore its experts' scientific findings, the Court impairs the State's effort to address a public health emergency. There are good reasons why the Constitution "principally entrusts the safety and the health of the people" to state officials, not federal courts. First among them is that judges "lack . . . the background, competence, and expertise to assess public health." To state the obvious, judges do not know what scientists and public health experts do. I am sure that, in deciding this case, every Justice carefully examined the briefs and read the decisions below. But I cannot imagine that any of us delved into the scientific research on how COVID spreads, or studied the strategies for containing it. So it is alarming that the Court second-guesses the judgments of expert officials, and displaces their conclusions with its own. In the worst public health crisis in a century, this foray into armchair epidemiology cannot end well.

. . . [Furthermore, t]he Court's decision leaves state policymakers adrift, in California and elsewhere. It is difficult enough in a predictable legal environment to craft COVID policies that keep communities safe. That task becomes harder still when officials must guess which restrictions this Court will choose to strike down. The Court injects uncertainty into an area where uncertainty has human costs.

All this from unelected actors, "not accountable to the people." I fervently hope that the Court's intervention will not worsen the Nation's COVID crisis. But if this decision causes suffering, we will not pay. Our marble halls are now closed to the public, and our life tenure forever insulates us from responsibility for our errors. That would seem good reason to avoid disrupting a State's pandemic response. But the Court forges ahead regardless, insisting that science-based policy yield to judicial edict. I respectfully dissent.

**Address to the Federalist Society's 2020 National Lawyers
Convention**

Samuel Alito (November 2020)*

. . . The pandemic has obviously taken a heavy human toll But what has it meant for the rule of law? . . . The pandemic has resulted in previously unimaginable restrictions on individual Liberty. . . . I am not diminishing the severity of the virus' threat to public health, and putting aside what I will say shortly about a few Supreme Court cases, I'm not saying anything about the legality of COVID restrictions nor am I saying anything about whether any of these restrictions represent good public policy.

I'm a judge, not a policymaker. All that I'm saying is this. And I think it is an indisputable statement of fact. We have never before seen restrictions as severe, extensive and prolonged as those experienced for most of 2020.

Think of all the live events that would otherwise be protected by the right to freedom of speech, live speeches, conferences, lectures, meetings. Think of worship services. Churches closed on Easter Sunday, synagogues closed for Passover and Yom Kippur. . . . Who could have imagined that? The COVID crisis has served as a sort of constitutional stress test and in doing so, it has highlighted disturbing trends that were already present before the virus struck.

One of these is the dominance of lawmaking by executive fiat, rather than legislation. . . . Every year administrative agencies, acting under broad delegations of authority, churn out huge volumes of regulations that dwarfed the statutes enacted by the people's elected representatives. And what have we seen in the pandemic? Sweeping restrictions imposed, for the most part, under statutes that confer enormous executive discretion. . . .

So what have the courts done in this crisis? When the constitutionality of COVID restrictions has been challenged in court, the leading authority cited in their defense is a 1905 Supreme Court decision called *Jacobson v. Massachusetts*. The case concerned an outbreak of smallpox in Cambridge, and the court upheld the constitutionality of an ordinance that required vaccinations to prevent the disease from spreading. Now, I'm all in favor of preventing dangerous things from issuing out of Cambridge and infecting the rest of the country and the world. It would be good if what originates in Cambridge stayed in Cambridge, but to return to the serious point, it's important to keep *Jacobson* in perspective. Its primary holding rejected a substantive due process challenge to a local measure that targeted a problem of limited scope. It did not involve sweeping restrictions imposed across the country for an extended period,

* Samuel Alito, U.S. Supreme Court Justice, Address to the Federalist Society's 2020 National Lawyers Convention (Nov. 12, 2020).

and it does not mean that whenever there is an emergency executive officials have unlimited reviewable discretion.

Just as the COVID restrictions have highlighted the movement toward rule by experts, litigation about those restrictions has pointed up emerging trends in the assessment of individual rights. This is especially evident with respect to religious liberty. It pains me to say this, but in certain quarters, religious liberty is fast becoming a disfavored right, and that marks a surprising turn of events. . . .

The Next Frontier: The Workplace

In April 2021, Italy became the first jurisdiction of which we are aware to mandate vaccination for healthcare workers in both the private and public healthcare system. Decree-Law No. 44* provides that all health professionals are to obtain, without charge, the COVID-19 vaccine as an “essential requirement for exercising their professions and performing their activities.” The law provides that waiver is available only in the case of “ascertained danger to health, in relation to specific, documented clinical conditions certified by a General Practitioner.” Those who obtain waivers are to be reassigned to “different tasks, without any salary reduction, in order to avoid the risk of spread of SARS-CoV-2 infection,” and adopt additional workplace safety measures to be defined by the Ministry of Health.

In the United States, many schools have required returning students and sometimes staff and faculty to be vaccinated. Some jurisdictions are also using “vaccine passports” as entrance tickets to a variety of activities, including schooling and workplaces.

Jurisdictions have also begun to develop administrative guidance for private employers on vaccination requirements. In the United States, the Equal Employment Opportunity Commission, the agency administering laws against workplace discrimination, issued guidance, updated in May 2021, about how vaccine-related queries of employees interact with federal anti-discrimination laws in the United States.

* D.L. 1 April 2021, n. 44, G.U. n. 79 (Italy).

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

U.S. Equal Employment Opportunity Commission (May 2021)*

. . . K.1. Under the [Americans with Disabilities Act (ADA)], Title VII [of the Civil Rights Act of 1964], and other federal employment nondiscrimination laws, may an employer require all employees physically entering the workplace to be vaccinated for COVID-19?

The federal [Equal Employment Opportunity (EEO)] laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the reasonable accommodation provisions . . . and other EEO considerations These principles apply if an employee gets the vaccine in the community or from the employer.

In some circumstances, Title VII and the ADA require an employer to provide reasonable accommodations for employees who, because of a disability or a sincerely held religious belief, practice, or observance, do not get vaccinated for COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer's business. . . .

As with any employment policy, employers that have a vaccine requirement may need to respond to allegations that the requirement has a disparate impact on—or disproportionately excludes—employees based on their race, color, religion, sex, or national origin Employers should keep in mind that because some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others, some employees may be more likely to be negatively impacted by a vaccination requirement.

It would also be unlawful to apply a vaccination requirement to employees in a way that treats employees differently based on disability, race, color, religion, sex (including pregnancy, sexual orientation and gender identity), national origin, age, or genetic information, unless there is a legitimate non-discriminatory reason. . . .

K.6. Under the ADA, if an employer requires COVID-19 vaccinations for employees physically entering the workplace, how should an employee who does not get a COVID-19 vaccination because of a disability inform the employer, and what should the employer do?

An employee with a disability who does not get vaccinated for COVID-19 because of a disability must let the employer know that he or she needs an exemption from the requirement or a change at work, known as a reasonable accommodation. To

* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS (May 28, 2021).

request an accommodation, an individual does not need to mention the ADA or use the phrase “reasonable accommodation.” . . .

The ADA requires that employers offer an available accommodation if one exists that does not pose an undue hardship, meaning a significant difficulty or expense. Employers are advised to consider all the options before denying an accommodation request. The proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, who may be ineligible for a vaccination or whose vaccination status may be unknown, can impact the ADA undue hardship consideration. . . .

K.12. Under Title VII, how should an employer respond to an employee who communicates that he or she is unable to be vaccinated for COVID-19 (or provide documentation or other confirmation of vaccination) because of a sincerely held religious belief, practice, or observance?

Once an employer is on notice that an employee’s sincerely held religious belief, practice, or observance prevents the employee from getting a COVID-19 vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship. Employers also may receive religious accommodation requests from individuals who wish to wait until an alternative version or specific brand of COVID-19 vaccine is available to the employee. Such requests should be processed according to the same standards that apply to other accommodation requests.

[Equal Employment Opportunity Commission] guidance explains that the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar. Therefore, the employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief, practice, or observance. However, if an employee requests a religious accommodation, and an employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.

. . . [A]n employer should thoroughly consider all possible reasonable accommodations, including telework and reassignment. . . . In many circumstances, it may be possible to accommodate those seeking reasonable accommodations for their religious beliefs, practices, or observances. . . .

TWO DECADES AFTER 9/11:
THE JUDICIAL RESPONSE TO TERRORISM FROM
WITHIN AND WITHOUT

DISCUSSION LEADERS

LINDA GREENHOUSE, IVANA JELIĆ, AND
ROSALIE SILBERMAN ABELLA

II. TWO DECADES AFTER 9/11: THE JUDICIAL RESPONSE TO TERRORISM FROM WITHIN AND WITHOUT

DISCUSSION LEADERS:

LINDA GREENHOUSE, IVANA JELIĆ, AND ROSALIE SILBERMAN ABELLA

The Weight of Terrorism in Judicial Decisionmaking

Secretary of State for the Home Department v. Rehman (House of Lords of the United Kingdom, 2001)	II-4
Ibrahim and Others v. The United Kingdom (European Court of Human Rights, Grand Chamber, 2016)	II-7
Trump v. Hawaii (Supreme Court of the United States, 2018)	II-12

Judicial Review and National Security

Judgment No. 106 of 2009 (Constitutional Court of Italy, 2009)	II-15
Nasr and Ghali v. Italy (European Court of Human Rights, Fourth Section, 2016)	II-20
Brief of Amicus Curiae Fred Korematsu, Rasul v. Bush (Supreme Court of the United States, 2004)	II-23
Rasul v. Bush (Supreme Court of the United States, 2004)	II-25
District Bar Association, Rawalpindi v. Federation of Pakistan (Supreme Court of Pakistan, 2015)	II-27

Exceptional Action and Individual Rights

Rights of the General Public

Judgment of the First Senate of 15 February 2006 (Federal Constitutional Court of Germany, 2006)	II-31
Szabó and Vissy v. Hungary (European Court of Human Rights, Fourth Section, 2016)	II-34
Gillan and Quinton v. The United Kingdom (European Court of Human Rights, Fourth Section, 2010)	II-38

Rights of Those Suspected of Terrorism

Ghoumid and Others v. France (European Court of Human Rights, Fifth Section, 2020)	II-42
Öcalan v. Turkey (No. 2) (European Court of Human Rights, Second Section, 2014)	II-45
Application Under S 83.28 (Supreme Court of Canada, 2004)	II-47
A and Others v. Secretary of State for the Home Department (House of Lords of the United Kingdom, 2004)	II-51
A and Others v. Secretary of State for the Home Department (II) (House of Lords of the United Kingdom, 2005)	II-55

Boumediene v. Bush (Supreme Court of the United States, 2008)	II-58
Kim Lane Scheppele, <i>The New Judicial Deference</i> (2012)	II-62
Canada v. Khadr (Supreme Court of Canada, 2008)	II-65

Reflections

Aharon Barak, <i>A Judge on Judging</i> (2002)	II-67
--	-------

The 2021 session of Yale’s Global Constitutional Seminar takes place twenty years to the day after the terrorist attacks of September 11, 2001. In the United States and elsewhere, courts have played an important role in shaping the response to terrorist threats—real and imagined—by sometimes deferring to the judgments of the political branches and sometimes applying their own judgment as to what was required by law or rule-of-law principles. This chapter explores the debates among judges, courts, and theorists about the role of courts in the immediate and long-term responses to terrorism in the post-9/11 world.

A first set of questions centers on how much weight judges ascribe to the exceptional nature of terrorism as a threat to democratic institutions, security, and individual rights in deciding how much deference to accord to decisions made by political actors in the name of national security.

Another set of questions deals with the competency of courts to consider and to remedy these challenges, especially as political actors claim that issues of national security fall solely under their authority. While some courts have upheld doctrines created to shield state secrets from use in court, others have exercised jurisdiction over challenges to national security measures that the executive or the legislature explicitly intended to be outside of their reach.

We then turn to the constitutional rights that have at times been sacrificed in the name of “emergency.” In the past 20 years, many courts have considered challenges to exceptional political actions that limited rights in detention and trial rights for those suspected of terrorism. Some governments have also taken exceptional preventative measures that implicate still more sets of constitutional rights, including those of the broader public. In addition to those about criminal proceedings, we explore cases regarding surveillance measures, exceptional military powers, and revocation of citizenship.

Like the other chapters in this volume, these materials explore the ways in which courts have responded to a large wave of exceptional measures in a time of perceived emergency. In particular, the sense of urgency that resonates throughout the chapter devoted to judicial responses to measures taken during the COVID-19 pandemic has echoes in this chapter. The year-and-a-half of public health and, often, political crisis

preceding our convening in the fall of 2021 has in many ways been a reminder of the stakes at play in the judicial questions raised in the context of national security and terrorism that are the subjects of the cases that follow.

THE WEIGHT OF TERRORISM IN JUDICIAL DECISIONMAKING

*“The challenge for democracies in the battle against terrorism is not whether to respond but rather how to do so.”**

The corresponding challenge for courts is often how to weigh the political branches’ responses to terrorism in light of the individual and procedural rights protected by law. What degree of deference have courts accorded political actors who, for “compelling reasons,” have responded to “exceptional circumstances”—phrases that appear throughout these readings? When is judicial skepticism rather than deference to be preferred?

While September 11, 2001 and its immediate aftermath lent urgency to these questions, the questions were not new then, and they remain highly pertinent 20 years later. We begin our exploration with a case from the House of Lords of the United Kingdom issued just one month after the September 11 attacks.

Secretary of State for the Home Department v. Rehman House of Lords of the United Kingdom [2001] UKHL 47

[The House of Lords, composed of Lord Hutton, Lord Clyde, Lord Hoffmann, Lord Steyn, and Lord Slynn, delivered the following judgment:]

LORD SLYNN

1. Mr Rehman, the appellant, is a Pakistani national, born in June 1971 in Pakistan. . . . He applied for indefinite leave to remain in the United Kingdom but that was refused In his letter of refusal the Secretary of State said . . . that his deportation from the United Kingdom would be conducive to the public good “in the interests of national security because of [his] association with Islamic terrorist groups.” . . . [In an open statement, the Secretary of State elaborated:]

“ . . . [W]hile Ur Rehman and his United Kingdom-based followers are unlikely to carry out any acts of violence in this country, his activities [in the United Kingdom] directly support terrorism in the Indian subcontinent and . . . are intended to further the cause of a terrorist

* Excerpted from Application under S 83.28, [2004] 2 S.C.R. 248 (Canada), at p. II-47 of these materials.

organisation abroad. . . . For this reason, the Secretary of State considers . . . that Ur Rehman poses a threat to national security”

2. . . . [On appeal, the Special Immigration Appeals] Commission . . . held:

“That the expression ‘national security’ should be construed narrowly . . . [such] that a person may be said to offend against national security [only] if he engages in, promotes, or encourages violent activity which is targeted at the United Kingdom, its system of government or its people.”. . .

[On this definition, the Secretary of State] has not established that [Rehman] was, is, and is likely to be a threat to national security. . . .

. . . 8. The 1971 [Immigration] Act contemplates first a decision by the Secretary of State to make a deportation order under section 3(5) of that Act . . . in respect of a person who is not a British citizen “(b) if the Secretary of State deems his deportation to be conducive to the public good.” There is no definition or limitation of what can be “conducive to the public good”

14. . . . [Rehman] contends that the interests of national security do not include matters which have no direct bearing on the United Kingdom, its people or its system of government. . . .

16. . . . [I]n contemporary world conditions, action against a foreign state may be capable indirectly of affecting the security of the United Kingdom. The means open to terrorists both in attacking another state and attacking international or global activity by the community of nations, whatever the objectives of the terrorist, may well be capable of reflecting on the safety and well-being of the United Kingdom or its citizens. . . . To require the matters in question to be capable of resulting “directly” in a threat to national security limits too tightly the discretion of the executive in deciding how the interests of the state, including not merely military defence but democracy, [and] the legal and constitutional systems of the state need to be protected. . . .

17. . . . I would accept the Secretary of State’s submission that the reciprocal co-operation between the United Kingdom and other states in combating international terrorism is capable of promoting the United Kingdom’s national security, and that such co-operation itself is capable of fostering such security “by, *inter alia*, the United Kingdom taking action against supporters within the United Kingdom of terrorism directed against other states.” . . . If an act is capable of creating indirectly a real possibility of harm to national security it is in principle wrong to say that the state must wait until action is taken which has a direct effect against the United Kingdom. . . .

19. The United Kingdom is not obliged to harbour a terrorist who is currently taking action against some other state . . . if that other state could realistically be seen

by the Secretary of State as likely to take action against the United Kingdom and its citizens.

20. . . . [T]he interests of national security are not to be confined in the way which the Commission accepted . . . [and] the Commission must give due weight to the assessment and conclusions of the Secretary of State

LORD STEYN

. . . 27. I am in agreement with the reasons given by Lord Slynn of Hadley in his opinion and I would also dismiss the appeal. . . .

28. Section 15(3) of the Immigration Act 1971 contemplated deportation of a person in three situations, viz where: “his deportation is conducive to the public good as being in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature.” The Commission thought that section 15(3) should be interpreted disjunctively. . . . [I disagree. [W]hile it is correct that these situations are alternatives, “there is clearly room for there to be an overlap.” . . . Even democracies are entitled to protect themselves, and the executive is the best judge of the need for international co-operation to combat terrorism and counter-terrorist strategies. This broader context is the backcloth of the Secretary of State’s statutory power of deportation in the interests of national security. . . .

LORD HOFFMANN

53. . . . [I]t seems to me that the Commission is not entitled to differ from the opinion of the Secretary of State on the question of whether, for example, the promotion of terrorism in a foreign country by a United Kingdom resident would be contrary to the interests of national security. . . . [I]t is artificial to try to segregate national security from foreign policy. . . .

62. Postscript. I wrote this [opinion] some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove. . . .

Moving ahead fifteen years, the following case from the European Court of Human Rights illustrates a recurring debate in this field: the use of the threat of terrorism as a justification for derogation from human rights obligations.

Ibrahim and Others v. The United Kingdom

European Court of Human Rights (Grand Chamber)

Application Nos. 50541/08, 50571/08, 50573/08, and 40351/09 (2016)

. . . The European Court of Human Rights, sitting as a Grand Chamber composed of: Guido Raimondi, *President*, András Sajó, Işıl Karakaş, Luis López Guerra, Mirjana Lazarova Trajkovska, Ganna Yudkivska, Khanlar Hajiyev, Nona Tsotsoria, Vincent A. De Gaetano, Julia Laffranque, Paul Lemmens, Paul Mahoney, Johannes Silvis, Dmitry Dedov, Robert Spano, Iulia Motoc, Síoifra O’Leary, *judges*, . . . [d]elivers the following judgment[:]

. . . 15. Two weeks [after the 2005 London bombings that killed 52 people on public transport,] . . . the first three applicants and a fourth man, Mr Hussain Osman, detonated four bombs on three underground trains and a bus in central London. [All four bombs failed to explode.] . . .

17. . . . [T]he four men were arrested [Police superintendents ordered that the first three applicants be held incommunicado while the police conducted “safety interviews” with them under Schedule 8 of the Terrorism Act 2000. A “safety interview” is an interview conducted urgently for the purpose of protecting life and preventing serious damage to property. The police superintendents justified the orders to hold the first three applicants incommunicado, thus preventing their access to legal advice, by writing that delaying the interview would involve an immediate risk of harm to persons or damage to property and that legal advice would lead to the alerting of other people suspected of having committed offences but not yet arrested.] They were tried and convicted for conspiracy to murder.

1. The fourth applicant gave Mr Osman shelter at his home in London [while he] was on the run from the police The police interviewed the fourth applicant [as a witness. An hour into the first interview, the officers considered that he was in danger of incriminating himself and should be informed of his right to legal advice. Senior officers instructed them to continue to interview him as a witness. The next day, they took a witness statement from him and later] arrested him [H]e was tried and convicted of assisting Mr Osman and failing to disclose information after the event. . . .

252. . . . There can be no question of watering down fair trial rights for the sole reason that the individuals in question are suspected of involvement in terrorism. . . . [I]t is of the utmost importance that the Contracting Parties demonstrate their commitment to human rights and the rule of law by ensuring respect for . . . the

minimum guarantees of Article 6* of the Convention. Nevertheless, when determining whether the proceedings as a whole have been fair the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration. Moreover, Article 6 should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities in taking effective measures to counter terrorism . . . in discharge of their duty under . . . the Convention to protect the right to life and the right to bodily security of members of the public. However, public interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights. . . .

257. The test . . . for assessing whether a restriction on access to a lawyer is compatible with the right to a fair trial is composed of two stages. In the first stage the Court must assess whether there were compelling reasons for the restriction. In the second stage, it must evaluate the prejudice caused to the rights of the defence by the restriction in the case in question. In other words, the Court must . . . decide whether the proceedings as a whole were fair. . . .

259. . . . [W]here a respondent Government have convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case, this can amount to compelling reasons to restrict access to legal advice In such circumstances, there is a pressing duty on the authorities to protect the rights of potential or actual victims under . . . the Convention [However,] a non-specific claim of a risk of leaks cannot constitute compelling reasons [to restrict] access to a lawyer. . . .

276. . . . [C]ompelling reasons may exist where an urgent need to avert serious adverse consequences for life, liberty or physical integrity has been convincingly made out. . . . [S]uch a need existed at the time when the safety interviews of the first three applicants were conducted. . . . When the first three applicants and Mr Osman detonated their devices . . . , it was inevitable that the police would conclude that the United Kingdom had become the target of a wave of terrorist attacks. They had every reason to assume that the conspiracy was an attempt to replicate the events of 7 July and that the fact that the bombs had not exploded was merely a fortuitous coincidence. The failure of the bombs to explode meant that the perpetrators of the attack were still at liberty and free to detonate other bombs, possibly successfully. . . . The police were operating under

* Article 6 of the European Convention on Human Rights provides in part:

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. . . .

3. Everyone charged with a criminal offence has the following minimum rights:

. . . (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

enormous pressure and their overriding priority was, quite properly, to obtain as a matter of urgency information on any further planned attacks and the identities of those potentially involved

2. . . . [T]here was a clear framework in place, set out in legislation, regulating the circumstances in which access to legal advice for suspects could be restricted and offering important guidance [T]he authorisation was made in accordance with the legislative framework and . . . the applicants' procedural rights were taken into account. . . .

280. . . . It falls to the Court to examine the entirety of the criminal proceedings in respect of the first three applicants in order to determine whether, despite the delays in providing legal assistance, they were fair, within the meaning of Article 6 § 1. . . . [The Court reviewed the criminal proceedings in detail, but it did not find any aspect of the proceedings to be unfair.]

3. Finally, there can be no doubt that there was a strong public interest in the investigation and punishment of the offences in question. Indiscriminate terrorist attacks are, by their very nature, intended to strike fear into the hearts of innocent civilians, to cause chaos and panic and to disrupt the proper functioning of everyday life. In such circumstances, threats to human life, liberty and dignity arise not only from the actions of the terrorists themselves but may also arise from the reaction of the authorities in the face of such threats. The case-law of the Court in recent years bears testimony to the difficulties of reconciling individual human rights and the public interest in the terrorism context. These very applications, calling into question aspects of the police response to a terrorist attack, attest to the strain that such attacks place on the normal functioning of a democratic society. The public interest in preventing and punishing terrorist attacks of this magnitude, involving a large-scale conspiracy to murder ordinary citizens going about their daily lives, is of the most compelling nature.

4. . . . [T]he proceedings as a whole in respect of each applicant were fair. There has therefore been no violation of Article 6 §§ 1 and 3 (c)

298. . . . [Regarding the fourth applicant, t]he question is whether [the] exceptional circumstances [prevailing in July 2005] were sufficient to constitute compelling reasons . . . for continuing with his interview without cautioning him or informing him of his right to legal advice. . . .

300. . . . [T]he Government have not convincingly demonstrated, on the basis of contemporaneous evidence, the existence of compelling reasons in the fourth applicant's case, taking account of the complete absence of any legal framework enabling the police to act as they did, the lack of an individual and recorded determination, on the basis of the applicable provisions of domestic law, of whether to restrict his access to legal advice and, importantly, the deliberate decision by the police not to inform the fourth applicant of his right to remain silent.

[The Court also found that the criminal proceedings against the fourth applicant were unfair overall.]

311. . . . There has therefore been a violation of Article 6 §§ 1 and 3 (c) in the case of the fourth applicant. [The Court ordered the United Kingdom to pay the fourth applicant EUR 16,000 for costs and expenses, but rejected his claim for damages.]

JOINT PARTLY DISSENTING, PARTLY CONCURRING OPINION OF JUDGES
SAJÓ AND LAFFRANQUE

1. . . . [I]t is crucial that in striking the right balance between security needs and the exercise of fundamental rights and freedoms all democratic societies, and all Contracting States of the Convention, show due regard for the requirements of the rule of law and avoid straying from human-rights and rule-of-law principles. . . .

2. . . . [Here,] the Court itself waters down rights, by failing to adhere to the guarantees of Article 6 as interpreted in its own well-established case-law

19. . . . We agree that the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case is an essential consideration in finding compelling reasons to restrict access to legal advice. . . . In such circumstances one need not wait for a lawyer to be present before an interrogation starts. Is this urgent need a good enough reason not to admit access to an available lawyer? . . .

21. The fact that there is an urgent need to save lives does not explain why and how the advice and presence, in particular, of a lawyer, that is, of a right, would, as a matter of principle, be detrimental to saving lives. . . . Are we assuming that the psychological comfort derived from a lawyer's presence is of such comfort to terrorists that it undermines the prevention of calamities? The specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. They therefore play a key role in ensuring that the courts, whose mission is fundamental in a State based on the rule of law, enjoy public confidence. Or is the Court of the view . . . that the lawyer will help the cause of terrorists by precluding certain police tactics?

22. . . . [T]he question is not whether there were exceptional circumstances and an urgent need, but whether there were compelling reasons not to have access to a lawyer under these circumstances. . . . [Judges Sajó and Laffranque concluded that there was not a compelling reason for the applicants to not have access to a lawyer during the safety interviews.]

31. . . . [Regarding overall fairness,] strong public interest in a conviction cannot overrule the Convention guarantees If punishment is of the "most compelling nature," [then] what is the role of all the safeguards granted by the Convention? If a State is of the view that such a compelling public interest exists, then the Convention provides [that d]erogation is possible, under the supervision of the Court. . . .

JOINT PARTLY DISSENTING OPINION OF JUDGES HAJIYEV, YUDKIVSKA, LEMMENS, MAHONEY, SILVIS AND O'LEARY

1. . . . [W]e are unable to agree with the view of the majority that the fourth applicant's defence rights were violated on the facts of the present case. . . .

2. . . . [P]ublic-interest concerns, including the fight against terrorism, cannot justify measures which extinguish the very essence of a suspect's or an accused person's defence rights. That said, it would be a mistake to present the basic Convention issue at the heart of the four applicants' cases as being solely one of fixing the limits on the inroads that the security interests of the State may make into [the applicants'] individual human rights That . . . ignores the fact that the matters calling for Convention analysis in the present case directly involve the human rights of many other people [T]his Court [is] required to identify the appropriate relationship between the fundamental procedural right to a fair trial of persons charged with involvement in terrorist-type offences and the right to life and bodily security of the persons affected by the alleged criminal conduct. . . .

13. . . . [T]he events unfolding in London and the circumstances in which the police operation was taking place were as exceptional when the questioning of the first three applicants took place as they were when the fourth applicant was being interviewed The fourth applicant was thought by the police to know where one of the suspected bombers . . . might have gone and quite possibly what [his] plans were. The police had a difficult choice to make: whether . . . to continue obtaining from the applicant information capable of saving lives and protecting the public or to comply with the applicable police code by cautioning the applicant, with the attendant risk of stopping the flow of valuable security information. . . .

15. . . . [The] essential question is as follows: were the authorities justified in thinking at the relevant time that cautioning the witness as a suspect would have frustrated fulfilment of the urgent need to avert the serious consequences which would result from a successfully executed terrorist attack? . . .

[The judges concluded that the authorities were justified in this respect and went on to consider several factors that would affect whether the fourth applicant's proceedings could be found to have been fair overall.]

36. . . . [T]he majority do not attach sufficient weight [to the public interest in the investigation and punishment of the particular offences in issue]. The atrocities perpetrated in recent years in different Council of Europe member states amply demonstrate the key part that logistical and other support plays in the commission of modern-day terrorist offences involving, as they do, indiscriminate mass murder. What follows from this is . . . urgent action by the police to limit to the maximum the continuing imminent danger to the public once a terrorist attack has occurred or is under way . . . and, thereafter, the need to prosecute wherever possible, in proceedings where

fair trial rights are respected, those reasonably suspected of being part of a support network of a terrorist group. When it comes to seeking the appropriate relationship between the various human rights at stake . . . , there is a risk of “failing to see the wood for the trees” if the analysis is excessively concentrated on the imperatives of criminal procedure to the detriment of wider considerations of the modern State’s obligation to ensure practical and effective human rights protection to everyone within its jurisdiction. . . . [A] basic tenant of the Court’s case-law . . . is that public-interest concerns, including the fight against terrorism, cannot justify measures which extinguish the very essence of a suspect’s or an accused person’s defence rights. . . . [N]either can the imperatives of criminal procedure extirpate the legitimacy of the public interest at stake, based as it is on the core Convention rights to life and to bodily safety of other individuals. . . .

* * *

We turn to the U.S. Supreme Court’s 2018 decision in *Trump v. Hawaii*. Here, the Court debated the extent to which President Trump’s racist, xenophobic, and Islamophobic statements should factor into its analysis of the national security policy that they addressed. The Court considered not only how much to defer to the executive branch’s assessment of the need for new national security measures, but also whether to examine the motivation behind that assessment.

Trump v. Hawaii
Supreme Court of the United States
138 S. Ct. 2392 (2018)

Chief Justice ROBERTS delivered the opinion of the Court.

. . . On September 24, 2017, . . . President [Trump] issued . . . Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats. The Proclamation . . . sought to improve vetting procedures by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present “public safety threats.” . . . [T]he Proclamation placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate.

The Proclamation described how foreign states were selected for inclusion

[Pursuant to the Proclamation, after the Department of Homeland Security “collected and evaluated data on all foreign governments,” and following diplomatic efforts by the State Department “to encourage all foreign governments to improve their practices,”] the Acting Secretary of Homeland Security concluded that . . . Chad, Iran, . . . Libya, North Korea, Syria, Venezuela, and Yemen . . . remained deficient in terms of their risk profile and willingness to provide requested information [and] . . .

recommended that the President impose entry restrictions on certain nationals [Iraq was exempted, “given the close cooperative relationship between the U.S. and Iraqi Governments and Iraq’s commitment to combating ISIS.” The Acting Secretary] also concluded that . . . Somalia[’s] . . . “identity-management deficiencies” and “significant terrorist presence” . . . [justified] entry limitations for certain nationals of that country. . . .

. . . Congress has . . . delegated to the President authority to suspend or restrict the entry of aliens in certain circumstances. . . . [8 U.S.C.] § 1182(f), enables the President to “suspend the entry of all aliens or any class of aliens” whenever he “finds” that their entry “would be detrimental to the interests of the United States.” . . .

The Proclamation falls well within this comprehensive delegation. The sole prerequisite set forth in § 1182(f) is that the President [“find”] that the entry of the covered aliens “would be detrimental to the interests of the United States.” The President has undoubtedly fulfilled that requirement here. . . .

. . . [P]laintiffs’ request for a searching inquiry into the persuasiveness of the President’s justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere. . . .

We now turn to plaintiffs’ claim that the Proclamation was issued for the unconstitutional purpose of excluding Muslims. . . .

The First Amendment [to the U.S. Constitution] provides, in part, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” . . . [P]laintiffs allege that the primary purpose of the Proclamation was religious animus and that the President’s stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims.

At the heart of plaintiffs’ case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation. . . . [W]hile a candidate on the campaign trail, the President published a “Statement on Preventing Muslim Immigration” that called for a “total and complete shutdown of Muslims entering the United States” Then-candidate Trump also stated that “Islam hates us” and asserted that the United States was “having problems with Muslims coming into the country.” . . .

One week after his inauguration, the President issued [Executive Order No. 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States, which suspended entry of nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen, and which was subsequently enjoined by the courts, leading to the executive order presently under review]. . . .

. . . More recently, . . . the President retweeted links to three anti-Muslim propaganda videos. . . .

... [T]he issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.

... The Proclamation ... is facially neutral toward religion. Plaintiffs therefore ask the Court to probe the sincerity of the stated justifications for the policy by reference to extrinsic statements—many of which were made before the President took the oath of office. ...

... Any rule of constitutional law that would inhibit the flexibility of the President to respond to changing world conditions should be adopted only with the greatest caution, and our inquiry into matters of entry and national security is highly constrained. ...

[We review the Government’s action for a rational basis.] ... It cannot be said that it is impossible to “discern a relationship to legitimate state interests” or that the policy is “inexplicable by anything but animus.” ... [B]ecause there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification. ...

Under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review. ...

Justice SOTOMAYOR, with whom Justice GINSBURG joins, dissenting.

... The Court’s decision today fails to safeguard [the promise of religious liberty]. It leaves undisturbed a policy first advertised openly and unequivocally as a “total and complete shutdown of Muslims entering the United States” because the policy now masquerades behind a facade of national-security concerns. But this repackaging does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President’s words have created. Based on the evidence in the record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus. ... Because that troubling result runs contrary to the Constitution and our precedent, I dissent. ...

During his Presidential campaign, then-candidate Donald Trump pledged that, if elected, he would ban Muslims from entering the United States. ... [Since then,] he has continued to make remarks that a reasonable observer would view as an unrelenting attack on the Muslim religion and its followers. ...

... [T]he Court, without explanation or precedential support, limits its review of the Proclamation to rational-basis scrutiny. That approach is perplexing, given that

in other Establishment Clause cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review. . . .

But even under rational-basis review, the Proclamation must fall. . . . [T]he Proclamation is divorced from any factual context from which we could discern a relationship to legitimate state interests, and its sheer breadth [is] so discontinuous with the reasons offered for it that the policy is inexplicable by anything but animus. . . .

JUDICIAL REVIEW AND NATIONAL SECURITY

In many countries, the political branches have sole authority over national security concerns. As a result, especially in the twenty years since 9/11, many courts have grappled with questions about whether they are competent to consider and order remedies related to open questions on the subject.

We explore rulings in which courts in Europe differ in their analyses and then proceed to the United States to consider the ways in which historical rulings on national security have informed the U.S. Supreme Court's post-9/11 jurisprudence. A decision from Pakistan highlights efforts by political actors to remove national security from courts' jurisdiction and how that court nonetheless explained its authority to review the issue.

Judgment No. 106 of 2009 **Constitutional Court of Italy** **March 11, 2009**

THE CONSTITUTIONAL COURT composed of: President: Francesco AMIRANTE; Judges: Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO, Giuseppe FRIGO, Alessandro CRISCUOLO, Paolo GROSSI, gives the following JUDGMENT[:]. . . .

[Hassan Mustafa Osama Nasr, also known as Abu Omar, was an Egyptian citizen living in Milan. He was abducted from a street in Milan and taken to Egypt, where he was tortured and detained for several years on suspicion of support for a terrorist group. While he was detained, the Public Prosecutor of Milan initiated an investigation into his disappearance, which revealed the CIA's role and the Italian government's complicity. As part of its investigation, the prosecutor searched the offices of the Italian Sismi (Military Information and Intelligence Service) and seized documents and computer data. Sismi later voluntarily gave the public prosecutor many of the same documents but with redactions that it formally classified as state secrets at that time. These appeals arose from preliminary hearings in criminal proceedings

against twenty-six Americans and nine Italians alleged to have played a role in the abduction.]

1. Five jurisdictional dispute[s] . . . have arisen between the President of the Council of Ministers and various judicial authorities (Public Prosecutor's Office at the *Tribunale di Milano*, office of the judge for preliminary investigations, . . . and judge sitting alone of the 4th Criminal Law Division of the same court), seized with the criminal proceedings, . . . relating to the kidnapping of Nasr Osama Mustafa Hassan, *alias* Abu Omar

2.1 . . . [T]he [President of the Council of Ministers] requests this Court to rule that the public prosecutor was not entitled, in the first place, to pursue his investigations using documents classified as official secrets

3. . . . [T]he Public Prosecutor's Office . . . request[ed] this Court to rule that the President of the Council of Ministers was not entitled either "to classify the documents and information concerning . . . " the kidnapping, "since they amount to 'acts which subvert the constitutional order,'" or equally "to classify information and documents generically, without justification and retroactively"

. . . [T]he case before the Court is claimed to concern matters falling under those . . . which "subvert the constitutional order" to which law No. 801* prevents the application of official secret, given that the alleged kidnapping (as, the appeal argues more generally, the practice of so-called extraordinary renditions) is clearly incompatible with the rules which are characteristic of a state governed by a constitution

3. . . . [T]he core issue . . . consists in the need to establish . . . the respective extent of the constitutional powers which may lawfully be exercised . . . by the President of the Council of Ministers and . . . the various judicial authorities . . . in relation to official secrets. . . . [L]aw No. 124 of 3 August 2007** (Information system to ensure the security of the Republic and new provisions governing official secrets) . . . embraces the supreme interest of the security of the state as an international actor, that is the

* Law No. 801 of 24 October 1977 provides in part:

. . . In no circumstance shall State secrecy be applied to instances of subversion of the Constitutional order. . . .

** Section 39 of Law No. 124 of 3 August 2007 provides in part:

. . . 1. The records, documents, information, activities and every other thing the disclosure of which may be used to damage the integrity of the Republic (including in relation to international agreements, the defence of its underlying institutions as established by the Constitution, the State's independence vis à vis other states and its relations with them, as well as its military preparation and defence), shall have State-secret status. . . .

interest of the state-community in its own territorial integrity, independence and—in exceptional cases—its very survival.

This is an interest which “is present in and predominates over every other interest within all state organisations, regardless of the political regime,” and is expressed within the Constitution “through the solemn wording contained in Article 52,* which asserts that it is the sacred duty of the citizen to defend the Homeland.” . . . And it is precisely to this concept that we must refer in order to give substantive content to the concept of official secret, considering it “in relation to other provisions contained in the Constitution which lay down indispensable principles for our state: . . . national independence, the principles of the unity and the indivisibility of the state (Article 5) and the provision which encapsulates the essential characteristics of the state itself through the term “democratic republic” (Article 1)”

Therefore it is with reference not only to Article 52 of the Constitution but rather to the broader legislative framework that one may “speak of the external and internal security of the state, the need for protection against any violent action or any other action incompatible with the democratic spirit which inspires our constitutional ordering of the supreme interests which apply to any collectivity organised as a state”

. . . “[A] problem necessarily arises of the interaction or interference with other constitutional principles,” including those “which underpin the judiciary.” . . . “[T]he invocation of an official secret by the President of the Council of Ministers” cannot have “the effect of preventing the public prosecutor from investigating criminal conduct . . .” , but only that of preventing the courts from obtaining and in consequence using information and evidence classified as an official secret. This is . . . without prejudice to the fact that “the security of the state constitutes the essential, irrepressible interest of the collectivity, which clearly enjoys absolute predominance over any other interest since it impinges upon, as stated above, the very existence of the state, one aspect of which is the judiciary.”

. . . [T]he President of the Council of Ministers is vested with broad powers over such matters, which may be restricted only by the requirement that Parliament be informed of the essential reasons underlying the decisions taken and by the prohibition on classifying matters relating to acts which subvert the constitutional order [T]he identification of facts, records, information, etc. which . . . must . . . remain secret is . . . largely discretionary

. . . [A]ny judicial review not only of the existence of the power to classify material, but also of the manner in which it is exercised, is precluded since “the assessment regarding the measures appropriate and necessary in order to guarantee the security of the state is of a purely political nature, . . . and is certainly not pertinent to

* Article 52 of the Constitution of Italy provides in part:

The defence of the country is a sacred duty for every citizen. . . .

the activities of the courts.” In fact, to draw any other conclusion “would be to overturn some of the essential principles of our legal order”

The procedures according to which power to classify matters as official secrets is exercised are therefore subject to review by Parliament, . . . since it is before the body . . . in which the sovereignty which could be undermined is vested

5. . . . [T]hose [disputes] filed by the President of the Council of Ministers [which argue that the public prosecutor was not legally entitled to obtain the documents containing state secrets in the first place and is not now legally entitled to use them to refer accused persons for trial] deserve to be partially accepted

8.3. . . . [T]he SISMi was entitled . . . to transmit documents redacted as necessary in order to protect classified information. . . . [T]o actually disregard this classification as secret would . . . breach the values and purposes of official secrets

. . . [T]he prerogatives vested in the President of the Council of Ministers in the area of official secrets have been infringed. . . . [I]t was . . . incumbent upon the prosecuting judicial authority to adopt all precautionary measures necessary in order to prevent the non “redacted” copies of those documents from entering into the normal mechanism for disclosures within the trial [T]hese precautions cannot be subject to limitations of any sort

On a general level, this Court above all agrees with the resolutions of the European Parliament regarding the unlawful nature of so-called “extraordinary renditions,” because they contrast with the constitutional traditions and principles of law of the Member States of the European Union and qualify as specific offences. However, the conclusion that the offence of the kidnapping amounts to a fact “which subverts the constitutional order” cannot be inferred even from these resolutions

. . . [T]he goal of subversion of the constitutional order [is] that “of undermining the constitutional order and overturning the pluralist and democratic nature of the state, disrupting its structures, preventing its functioning or leading it astray from the fundamental principles which constitute the essence of the constitutional order”; one single criminal offence, no matter how serious it may be, is not in itself capable of qualifying as an act which subverts the constitutional order unless it is capable of undermining and disrupting the overall structure of democratic institutions. . . .

8.7 . . . [T]his Court . . . order[s the] annulment of [the contested] procedural documents insofar as the parts redacted and blacked out relating to holders, addressees and names of offices classified as secret . . . are concerned. . . .

* * *

On November 4, 2009, the Tribunal of Milan issued a decision on remand concerning the twenty-six Americans and nine Italians who were indicted. The Tribunal

convicted and imposed sentences of five to eight years of imprisonment on the twenty-two American CIA agents and the one American army colonel, all of whom were *in absentia*. (The Italian Ministry of Justice had never requested their extradition from the United States.) The Tribunal also sentenced two Italian SISMi agents to three years of imprisonment. The Milan Tribunal dismissed the criminal proceedings against three Americans who were high-level officers of the CIA; the basis was diplomatic immunity. That Tribunal dismissed the cases against five Italians who worked for SISMi on the grounds that it had not been given access to information that the executive had declared protected as a state secret. The Tribunal stated:

The delimitation of the domain of application of the State secret doctrine established by the Constitutional Court and the silence of the accused that resulted pulled a ‘black curtain’ over all of the activities of the SISMi staff . . . , such that it is absolutely impossible to assess [their] legality. . . . The existence of such a shadowy area and, above all, its extent with regard to the evidence, makes it such that it is impossible to have any knowledge of the essential facts and that it is necessary to render a dismissal[.]*

The public prosecutor appealed the dismissals. In decisions issued in October and December of 2010, the Court of Appeal of Milan affirmed the lower court’s dismissal of the criminal proceedings against the five Italian SISMi agents. The appellate court also decided to exclude the testimony of four of these five agents from all the criminal proceedings because their declarations were unusable.

The prosecutor appealed to the Court of Cassation, the court of final appeal in Italy, for questions deemed not to be of a constitutional nature. In a decision issued on September 19, 2012, the Court of Cassation reversed both actions of the Court of Appeal and concluded that the SISMi agents’ testimony could be included in the proceedings because the testimony related to the five agents’ personal actions outside the scope of their duties as officers of SISMi. The Court of Cassation reasoned that, because the President of the Council of Ministers had declared that the government had not participated in Nasr’s abduction, the officers must have acted outside of their official duties, and thus the evidence against them was not a state secret. The Court of Cassation remanded the case to the Court of Appeal of Milan, which on February 12, 2013, concluded that the five SISMi agents were guilty and sentenced them to six to ten years of imprisonment.

The President of the Council of Ministers filed a new submission before the Constitutional Court of Italy challenging the decisions of both the Court of Cassation and the Court of Appeal of Milan. He argued that the Court of Cassation had misinterpreted the Constitutional Court’s 2009 decision, excerpted above, regarding the

* Excerpted from Trib., 4 novembre 2009, Foro. it. Milano 2009, II, 4 (Italy). Translation by Sofea Dil (Yale Law School, J.D. Class of 2021).

state secret doctrine. He also argued that the testimony that the Court of Cassation reinstated should be excluded.

On January 14, 2014, the Constitutional Court reinstated the dismissals of the cases against the five SISMi agents. On the issue of their testimony, the Constitutional Court concluded that the President of the Council of Ministers was legally authorized to declare that evidence to be a state secret. The Constitutional Court also concluded that the Court of Cassation's finding that the evidence related solely to the accused persons' personal actions was implausible. The Constitutional Court thus refused all proposed limits on the definition of a state secret as it was presented in the litigation.

Nasr and his wife, Nabila Ghali, filed an application at the European Court of Human Rights. They alleged that Italy had failed to protect their rights under the European Convention on Human Rights.

Nasr and Ghali v. Italy
European Court of Human Rights (Fourth Section)
Application No. 44883/09 (2016)*

. . . The European Court of Human Rights (Fourth Section), sitting as a chamber composed of: George Nicolaou, *president*, Guido Raimondi, Päivi Hirvelä, Ledi Bianku, Nona Tsotsoria, Paul Mahoney, [and] Krzysztof Wojtyczek, *judges*, . . . [d]elivers the following judgment[:]

. . . 249. Article 3 of the [European] Convention [on Human Rights] provides as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

. . . 252. [First, t]he two applicants allege a violation of Article 3 under its procedural component. . . .

262. . . . [W]hen an individual maintains in a defensible manner that they have experienced, at the hands of . . . the State, or as a consequence of acts committed by foreign agents operating with the acquiescence of the State, treatment contrary to Article 3, that provision, combined with the general obligation imposed on the State by Article 1 of the Convention to “secure to everyone within their jurisdiction the rights and freedoms defined . . . [in the] Convention,” requires . . . that there be an effective official investigation. This investigation must have the possibility of leading to the identification and, where necessary, the punishment of those responsible and the establishment of the truth. . . .

* Translation by Sofea Dil (Yale Law School, J.D. Class of 2021).

265. . . . [T]he domestic jurisdictions . . . conducted a thorough investigation that permitted them to reconstitute the facts. . . .

266. . . . [T]he present case essentially raises two questions: the invalidation of the conviction of the Italian SISMi agents and the absence of adequate steps for executing the announced convictions of the American agents. . . .

268. . . . [T]he elements of proof excluded in the end by the domestic courts on the grounds that . . . they were entirely covered by the State secret were sufficient to convict the accused. . . . [They] had been largely circulated in the press and on the internet; . . . they were a part of the public domain. The Court therefore has difficulty seeing how the usage of the State secret doctrine once the contentious information had been divulged could serve the goal of preserving the confidentiality of the facts. . . . The decision of the executive power to apply the State secret doctrine to [this] information . . . had the effect of preventing the conviction of the SISMi agents. . . .

270. Regarding the convicted American agents, the Court notes that the Government admitted that it never requested the extradition of the concerned parties. . . .

272. . . . [T]he convictions at issue remained without effect, and this was because of the attitude of the executive who exercised the power to invoke the State secret doctrine

. . . [T]he legitimate principle of the “State secret” has . . . been applied in order to prevent those responsible from responding for their actions. As a consequence, the investigation, however effective and thorough, and the trial, which led to the identification of the culpable parties and to the conviction of several of them, did not result in their natural outcome which . . . was the punishment of those responsible. . . .

274. . . . [T]here was a violation [of] Article 3[’s] . . . procedural component.

275. [Second, Nasr] alleges that he was the victim of treatment contrary to Article 3 . . . in the context of the extraordinary rendition

280. Article 3 . . . provides one of the fundamental values of democratic societies. It does not provide for any exceptions, . . . and . . . it does not allow any derogation, even in case of public danger that threatens the life of a nation. . . . [E]ven in the most difficult circumstances, including the fight against terrorism . . . , the Convention prohibits in absolute terms torture and inhuman or degrading punishment or treatment

283. Combined with Article 3, the obligation that Article 1 imposes on the High Contracting Parties . . . commands them to take proper measures to prevent the people concerned from being subjected to torture or to inhuman or degrading treatment The State’s responsibility can therefore be engaged where the authorities have not taken reasonable measures to prevent the materialization of a risk

284. . . . [S]ome of the Italian authorities knew that the applicant was the victim of an extraordinary rendition operation. It remains to be determined whether the treatment to which the applicant was subjected rises to the level of Article 3 . . . and, if so, to what extent that must be imputed to the national authorities.

285. . . . Article 3 does not exclusively refer to physical pain but equally to mental suffering that results from the creation of a state of anguish and stress by means other than attacks on physical integrity.

There is no doubt that the abduction of the applicant, according to a protocol put in place by the CIA for extraordinary rendition operations, implicated the combined use of techniques that did not fail to provoke within the subject a feeling of emotional and psychological distress. . . .

286. The detention that followed . . . certainly placed the applicant in a situation of total vulnerability. He lived without a doubt in a state of permanent anguish regarding the uncertainty of his future departure.

287. . . . [T]he Court judges [the cumulative effects of the treatment] sufficient to consider that this treatment reached the degree of gravity required by Article 3.

288. . . . [H]aving established that the operation of “extraordinary rendition” in the context of the program for detainees of high importance to the CIA was known to the Italian authorities and that they actively cooperated with the CIA during . . . the abduction of the applicant and his transfer outside of Italy, . . . the Italian authorities knew, or should have known, that that operation exposed the applicant to a known risk of treatment prohibited by Article 3.

. . . [I]n letting the CIA conduct the transfer of the applicant outside of their territory, the Italian authorities exposed him to a serious and foreseeable risk of bad treatment and detention conditions contrary to Article 3

291. . . . [T]here was a violation of the substantive component of Article 3

298. The investigations concerning terrorism-related infractions indubitably cause authorities to confront particular problems. This does not mean that the authorities have carte blanche . . . to stop and detain suspects, shielded from any effective control by domestic tribunals and, finally, by the Convention’s organs of control, each time that they evaluate that there is a terrorist infraction. . . .

[The Court also found violations of Articles 5, 8, and 13 with respect to Nasr, and of Articles 3, 8, and 13 with respect to his wife, Nabila Ghali.]

351. . . . [T]he Court considers that the sum of 30,000 EUR for costs and expenses for the proceedings before the Court is reasonable and grants it jointly to the applicants. . . .

In the United States, a long line of cases defined the law of the post-9/11 era in the halls of the U.S. Supreme Court. These cases revolve around legal issues, some novel and some familiar, presented by the detention center at Guantanamo Bay. In *Rasul v. Bush*, the Supreme Court had to decide whether the political branches could create a detention center outside the reach of the judiciary. In the United States, courts have jurisdiction over writs of habeas corpus—a judicial mechanism used to determine the validity of the state’s detention of a prisoner—as defined in a statute at 28 U.S.C. §§ 2241. In this case, the government argued that the court did not have jurisdiction over the writ of habeas corpus because the plaintiff sought relief from detention in a territory where the United States did not exercise “exclusive jurisdiction.”

The following brief sought to remind the Court that the question of courts’ jurisdiction over questions related to exceptional detention measures put in place during wartime was not as novel as it may have appeared.

Brief of Amicus Curiae Fred Korematsu in Support of Petitioners
Rasul v. Bush
Supreme Court of the United States
January 14, 2004*

More than sixty years ago, . . . Fred Korematsu challenged the constitutionality of President Franklin Roosevelt’s 1942 Executive Order that authorized the internment of all persons of Japanese ancestry on the West Coast of the United States. He was convicted and sent to prison. In *Korematsu v. United States*, this Court upheld his conviction, explaining that because the United States was at war, the government could constitutionally intern Mr. Korematsu, without a hearing, and without any adjudicative determination that he had done anything wrong. . . . Because Mr. Korematsu has a distinctive, indeed unique, perspective on the issues presented by this case, he submits this brief to assist the Court in its deliberations. . . .

Although certain aspects of the “war against terrorism” may be unprecedented, the challenges to constitutional liberties these cases present are similar to those the nation has encountered throughout its history. The extreme nature of the Government’s position here is all too familiar [T]he Government’s position is part of a pattern whereby the executive branch curtails civil liberties much more than necessary during wartime and seeks to insulate the basis for its actions from any judicial scrutiny. Only later are errors acknowledged and apologies made.

It is no doubt essential in some circumstances to modify ordinary safeguards to meet the exigencies of war. But history teaches that we tend to sacrifice civil liberties

* Excerpted from Geoffrey R. Stone, *Rasul v. Bush and Al Odah v. United States*, 29 NEW YORK UNIVERSITY REVIEW OF LAW AND SOCIAL CHANGE 613 (2005).

too quickly based on claims of military necessity and national security, only to discover later that those claims were overstated from the start. . . .

Since September 11th, the United States has taken significant steps to ensure the nation's safety. It is only natural that in times of crisis our government should tighten the measures it ordinarily takes to preserve our security. But we know from long experience that the executive branch often reacts too harshly in circumstances of felt necessity and underestimates the damage to civil liberties. Typically, we come later to regret our excesses, but for many, that recognition comes too late. The challenge is to identify excess when it occurs and to protect constitutional rights before they are compromised unnecessarily. . . .

. . . Courts, which are not immune to the demands of public opinion, have too often deferred to exaggerated claims of military necessity and failed to insist that measures curtailing constitutional rights be carefully justified and narrowly tailored. . . .

. . . In *Korematsu*, the Court offered the following explanation:

[We] are not unmindful of the hardships imposed . . . upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. . . . *Korematsu* was not excluded from the [West Coast] because of hostility to . . . his race, [but] because . . . the military authorities . . . decided that the . . . urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the [area]. . . . We cannot—by availing ourselves of the calm perspective of hindsight—say that these actions were unjustified.

. . . This Court's decision in *Korematsu* has become a constitutional pariah. . . .

As in the past, the issues these cases raise involve a direct conflict between our civil liberties and a threat to our safety and security. That we have made mistakes in the past does not mean we should make another, perhaps more serious mistake now. . . .

This Court has a profound responsibility to help guide our nation in the extraordinary circumstances of wartime. It has been said that in such circumstances the Court may grant too much deference to the other branches of government to avoid inadvertently hindering the war effort. . . . But the lesson of [previous wartime] decisions [of the Court] is not that this Court should abdicate its responsibility. It is, rather, that the Court should bring to its responsibility an even deeper commitment to preserving the liberties for which this nation has fought. The Court's confident exercise of that responsibility is essential to enabling our nation to strike the *right* balance in times of crisis. . . .

Rasul v. Bush
Supreme Court of the United States
542 U.S. 466 (2004)

Justice STEVENS delivered the opinion of the Court[:]

. . . Petitioners in these cases are 2 Australian citizens and 12 Kuwaiti citizens who were captured abroad during hostilities between the United States and the Taliban. Since early 2002, the U.S. military has held them—along with, according to the Government’s estimate, approximately 640 other non-Americans captured abroad—at the naval base at Guantanamo Bay. The United States occupies the base . . . pursuant to a 1903 Lease Agreement executed with . . . Cuba

Congress has granted federal district courts, “within their respective jurisdictions,” the authority to hear applications for habeas corpus by any person who claims to be held “in custody in violation of the Constitution or laws or treaties of the United States” [under 28 U.S.C. §§ 2241(a), (c)(3).] . . .

The question . . . is whether the habeas statute confers a right to judicial review of the legality of executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not “ultimate sovereignty.” . . .

. . . [A] prisoner’s presence within the territorial jurisdiction of the district court is not an invariable prerequisite to the exercise of district court jurisdiction under the federal habeas statute. Rather, because the “writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody,” a district court acts “within [its] respective jurisdiction” within the meaning of § 2241 as long as “the custodian can be reached by service of process.” . . .

[Furthermore, the presumption against extraterritoriality] has no application to the operation of the habeas statute with respect to persons detained within the “territorial jurisdiction” of the United States. By the express terms of its agreements with Cuba, the United States exercises “complete jurisdiction and control” over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses. Respondents themselves concede that the habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base. Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee’s citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts’ authority

. . . [Finally,] nothing . . . in any of our other cases categorically excludes aliens detained in military custody outside the United States from the ““privilege of litigation”” in U.S. courts. The courts of the United States have traditionally been open to nonresident aliens. . . .

. . . [T]he federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. . . .

Justice SCALIA, with whom THE CHIEF JUSTICE and Justice THOMAS join, dissenting[:]

. . . Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction—and thus making it a foolish place to have housed alien wartime detainees. . . .

The consequence of this holding, as applied to aliens outside the country, is breathtaking. It permits an alien captured in a foreign theater of active combat to bring a . . . petition against the Secretary of Defense. . . . The military is currently detaining over 600 prisoners at Guantanamo Bay alone; each detainee undoubtedly has complaints . . . about those terms and circumstances. The Court's unheralded expansion of federal-court jurisdiction is not even mitigated by a comforting assurance that the legion of ensuing claims will be easily resolved on the merits. . . .

. . . The Commander in Chief and his subordinates had every reason to expect that the internment of combatants at Guantanamo Bay would not have the consequence of bringing the cumbersome machinery of our domestic courts into military affairs. Congress is in session. If it wished to change federal judges' habeas jurisdiction from what this Court had previously held that to be, it could have done so. . . .

* * *

In 2015, in part as a response to a deadly terrorist attack at the Army Public School in Peshawar that occurred the year before, the National Assembly and Senate of Pakistan ratified the 21st Amendment to the Constitution of Pakistan. The amendment excluded trials of persons who "belong to any terrorist group or organization misusing the name of religion or a sect" from the protections of Article 175 of the Constitution. In particular, the accused persons at issue could be prosecuted in speedy military trials, as opposed to experiencing the protections of the judicial system. Several organizations brought suit alleging that this amendment, as well as two other recent constitutional amendments, violated other provisions of the Constitution of Pakistan and should be struck down. The Supreme Court of Pakistan considered these questions in the following case.

District Bar Association, Rawalpindi v. Federation of Pakistan

Supreme Court of Pakistan

PLD 2015 Supreme Court 401 (2015)

. . . SH. AZMAT SAEED, J.

These Constitutional Petitions . . . have been variously filed to call into question the vires of [several constitutional amendments]. . . . The elemental questions . . . are whether there are any implied limitations on the power of the Parliament to amend the Constitution, if so, whether such limitations can be invoked by this Court to strike down a Constitutional Amendment. . . .

54. . . . [O]ur Jurisprudence . . . has . . . firmly established . . . that . . . there is an inherent integrity and scheme to the Constitution evidenced by certain fundamental provisions, which are its Salient and Defining Features. . . .

59. . . . [I]t is clear that the harmonious and wholistic interpretation of the Constitution is necessary even for discarding its Salient Features. . . .

61. . . . Democracy, Parliamentary Form of Government and Independence of Judiciary are certainly included in . . . the Salient Features

63. . . . The Parliament too is a creature of the Constitution and has only such powers as may be conferred upon it by the said Instrument. . . .

76. . . . [T]his Court is vested with the jurisdiction to scrutinize the Amendments made by the Parliament in the Constitution in order to determine whether the implied limitations upon such amendatory powers have been transgressed. . . .

121. . . . By way of the 21st Constitutional Amendment, the following proviso was added to Article 175, which now reads as under:

“175. (1) There shall be a Supreme Court of Pakistan, a High Court for each Province and a High Court for the Islamabad Capital Territory and such other courts as may be established by law. . . .

(2) No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law. . . .

Provided that the provisions of this Article shall have no application to the trial of persons . . . who claims, or is known, to belong to any terrorist group or organization using the name of religion or a sect.”

. . . 123. . . . [I]t was the case of the petitioners that an attempt has been made to set up a parallel judiciary, not envisaged by the Constitution, providing for trial of civilians by a Court Martial. . . .

127. However, prior to the enactment and enforcement of the Constitution . . . , 1973, the Pakistan Army Act, 1952, was already in force and operational. . . . Provisions were made for maintaining the discipline in the Army, including by way of . . . Court Martial The factum of the existence of such Forums . . . appears to have been acknowledged and protected by the Constitution

133. . . . Article 70 of the Constitution empowers the Parliament to legislate on all matters enumerated in the Federal Legislative List. Item 1 of the said List reproduced hereinabove clearly includes the Defence of Pakistan and the Armed Forces. The Pakistan Army Act, 1952[,] is obviously covered by the said Item The real matter in issue boils down as to whether the 21st Constitutional Amendment and the Pakistan Army (Amendment) Act, 2015, has a direct nexus with the Armed Forces or the Defence of Pakistan. . . .

135. . . . A perusal of Article 245(1)* reveals that the Armed Forces of Pakistan, to achieve the ends mentioned therein i.e. the Defence of Pakistan shall act on the directions of the Federal Government. Broadly speaking two sets of eventualities have been catered for in the said Article. First, the event of “external aggression” or “threat of war” and the second eventuality to “act in aid of civil power.” . . .

137. In the event of an external aggression or the threat of war, the aforesaid restrictions and limitations per se may not be applicable, in view of . . . Article 245

139. . . . The phrase “threat of war” . . . includes a situation where external aggression is threatened and appears to be imminent but actual hostilities have not commenced.

140. There is yet another eventuality, where the law and order situation degenerates beyond mere civil disorder and rioting to insurrection, mutiny or open armed rebellion against the State whereby territories are lost to the miscreants and the Institutions of the State no longer exist in such areas. In such an eventuality, a duty is cast under Article 148(3)** upon the Federal Government to defend the Federation Appropriate directions, in this behalf, can only be given in terms of Article 245. Mere acting in aid of civil power may not be sufficient, adequate or efficacious The provisions of Article 245 with regard to acting in aid of civil power with its restrictions

* Article 245(1) of the Constitution of Pakistan provides:

The Armed Forces shall, under the directions of the Federal Government, defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so.

** Article 148(3) of the Constitution of Pakistan provides:

It shall be the duty of the Federation to protect every Province against external aggression and internal disturbances and to ensure that the Government of every Province is carried on in accordance with the provisions of the Constitution.

and conditionalities may not be applicable. In the circumstances, unless a situation is held to be covered by the phrase “threat of war” the Federal Government may be helpless to make its Defence Power of the State and unable to fulfill its obligations in terms of Article 148(3). The nature of war changes with armed conflicts within a State; these can lead to a warlike situation necessitating appropriate responses. . . .

141. The Constitution must be interpreted so as to keep up with the changing times A contemporaneous interpretation of “threat of war” would include such a state of affairs and all actions taken by the Armed Forces to counter the threat of such armed rebellion within the country would obviously be for the Defence of the State and the offences committed . . . would have a direct nexus with the Defence of Pakistan. . . .

143. . . . [I]t is required to be determined whether the gravity of the current situation and the intensity of the armed conflict, warrants its description as a “threat of war” permitting trial of civilians by Court Martial. . . . [S]ince 2002 more than sixteen thousand incidents of terrorists attacks have occurred which include attacks on the most sensitive of defence installations At various points of time, control of State on the territories have been periodically lost [M]ore than 56,000 Pakistanis have been killed or wounded, including . . . civilians

144. . . . We appear to be currently confronted with a warlike situation and consequently the Federation is duty bound by the Constitution to Defend Pakistan. . . . [T]he Federation must . . . [categorize] the current situation as a threat of war requiring extraordinary measures in terms of use of the Armed Forces

145. We have examined the provisions of the Pakistan Army (Amendment) Act, 2015, in this behalf. There is a specific reference that the offence must be committed by a person known or claiming to be a member of a terrorist group or organization, using the name of religion or sect, who in furtherance of his terrorist design wages war against Pakistan or commits any other offence mentioned therein. It is the activities of such terrorists that have created the warlike situation Thus, the offences committed by said terrorists appear to have direct nexus with the Defence of Pakistan. Consequently, . . . [s]uch legislative measure appears to be in accordance with the Constitution

173. . . . [I]t may now be appropriate to examine whether such action of amending the Constitution offends against the Salient Features thereof. . . .

174. . . . A temporary measure targeting a very small specified clearly ascertainable class of accused has been brought into the net to be tried under the Pakistan Army Act in accordance with procedure which has been held by this Court to be consistent with recognized principles of Criminal Justice. . . . Neither the selection and the transfer of cases nor the eventual order or sentence are immune from the sanctity of Judicial Review [I]t is difficult to hold that the essential nature of the Salient Features of Fundamental Rights . . . has been . . . substantively altered. . . .

QAZI FAEZ ISA, J.

... 45. The 21st Amendment ... seeks to undo ... the separation of the Judiciary from the Executive, and as it is not conceivable to force a flower back into a bud it is not possible to yoke or agglutinate the Executive with the Judiciary. ...

54. Military personnel, who will preside over the trials, are part of the Executive ... It has been repeatedly held by the superior Courts of Pakistan that the Executive cannot decide cases. ...

57. We next consider ... the ... Attorney-General's submission that laws may be made in derogation of Fundamental Rights ... pursuant to clause (3) of Article 8.* ...

58. ... Paragraph (a) of clause (3) [of Article 8 of the Constitution] is restricted to laws relating to members of the Armed Forces or of the police or of such other forces as are charged with the maintenance of public order, discharge of their duties and maintenance of discipline amongst them; conducting the trial of civilians who have been accused of terrorist acts does not come within its parameters. ...

60. ... If we rush to convict terrorists through unconstitutional means we stoop to their level. The Constitution does not permit the trial of civilians by the military as it would contravene Fundamental Rights, which cannot be excluded by invoking clause (3) of Article 8 ...

61. The 21st Amendment and the amendments made to the Laws of the Armed Forces need to be tested against the constitutional directive that, "All citizens are equal before law and are entitled to equal protection of law" (clause (1) of Article 25). ... [P]ersons ... in similar circumstances must be treated in the same manner ...

62. [If a] classification or categorization ... is not properly classified or the classification is unreasonable then it would infringe the equality requirement prescribed in clause (1) of Article 25 of the Constitution. ...

63. ... The stipulated classification of "terrorist group or organization using the name of religion or a sect," does not disclose who would come within its purview nor does the stated classification meet the test of reasonable classification. The Federal

* Article 8 of the Constitution of Pakistan provides in part:

(1) Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void. ...

(3) The provisions of this Article shall not apply to—

(a) Any law relating to members of the Armed Forces, or of the Police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them ...

Government having absolute and unfettered discretion to pick and choose cases to be tried by the military, further violates the reasonable classification criteria . . . [and] the equality requirement

66. Therefore, . . . the categorisation [of] “any terrorist group or organization using the name of religion or sect” cannot be accepted to be a reasonable classification that could be sustained in the presence of clause (1) of Article 25 of the Constitution. . . . Those who commit terrorist acts or spread terrorism do so in violation of the law. They must therefore be treated similarly [Also,] neither Islam nor any other religion permits murder or acts of terrorism, therefore, the phrase terrorism in the name of religion is an oxymoron, and one that cannot be accepted. . . .

[A majority of the Court agreed with Judge Azmat Saeed that while the Court could review the constitutionality of constitutional amendments, none of the challenged constitutional amendments violated the Constitution.]

EXCEPTIONAL ACTION AND INDIVIDUAL RIGHTS

We turn to focus on particular exceptional measures that political branches have adopted in the name of national security and on the particular rights that plaintiffs have claimed these measures placed in jeopardy, derogated from, or denied. We explore the ways in which courts have described the constitutional and human rights hanging in the balance and governments’ obligations to protect them in times of claimed exception.

Rights of the General Public

This section assembles examples of courts dealing with government actions animated by national security that impinge upon the rights of the general public, and hence persons not accused of being involved in terrorism. Courts address whether national security threats justify both force and surveillance; at issue is whether constitutional rights limit these measures.

Judgment of the First Senate of 15 February 2006 **Federal Constitutional Court of Germany (First Senate)** **1 BvR 357/05 (2006)**

. . . [T]he Federal Constitutional Court—First Senate—with the participation of Justices President Papier, Haas, Hömig, Steiner, Hohmann-Dennhardt, Hoffman-Riem, Bryde, [and] Gaier held[:] . . .

. . . The constitutional complaint challenges the armed forces’ authorisation by the Aviation Security Act to shoot down, by the direct use of armed force, aircraft that are intended to be used as weapons in crimes against human lives.

On 11 September 2001, four passenger planes . . . were hijacked in the United States of America by an international terrorist organisation and caused to crash. . . . On 5 January 2003, an armed man captured a sports plane . . . and threatened to crash the plane into the highrise of the European Central Bank [in Frankfurt]

. . . [Since then,] . . . factual as well as legal measures have been taken whose intended objectives are to increase the security of air traffic The legal basis for these measures is laid down in the Act on the New Regulation of Aviation Security Functions . . . of 11 January 2005. . . . Article 1 of the Act contains the Aviation Security Act as the core of the new regulation. . . .

. . . Where on account of a major aerial incident, facts exist that, in the context of the exercise of police power, give rise to the assumption that an “especially grave accident” . . . is imminent, the armed forces can, pursuant to . . . the Aviation Security Act, be employed to support the police forces . . . to prevent such accident

. . . This, however, only applies where it must be assumed under the circumstances that the aircraft is intended to be used as a weapon against human lives, and where the direct use of armed force is the only means to avert this

Article 2.2 sentence 1* of the Basic Law guarantees the right to life as a liberty right. With this right, the biological and physical existence of every human being is protected against encroachments by the state . . . , independently of the individual’s circumstances of life and of his or her physical state and state of mind. Every human life as such has the same value. . . . [T]he fundamental right to life can . . . be encroached upon on the basis of a formal Act of Parliament. The precondition for this is, however, that the Act in question meets the requirements of the Basic Law in every respect. . . .

The challenged provision of § 14.3** of the Aviation Security Act does not live up to these standards. . . .

[First, t]he Federation lacks the legislative competence to enact the challenged regulation . . . because the provision cannot be reconciled with the framework provided by the Basic Law of constitutional law relating to the armed forces.

The armed forces . . . are established by the Federation for defence purposes pursuant to Article 87a.1 sentence 1 of the Basic Law. Pursuant to Article 87a.2 of the

* Article 2.2 sentence 1 of the Basic Law of Germany provides:

Every person shall have the right to life and physical integrity.

** Section 14.3 of the German Aviation Security Act provides:

The direct use of armed force shall only be permissible in the event that circumstances suggest that the aircraft is intended to be used against human life and this is the only means to defend this human life against the current threat.

Basic Law, they may only be employed for other purposes . . . to the extent explicitly permitted by the Basic Law. This regulation . . . is intended to prevent that for the deployment of the armed forces as a means of the executive power, “unwritten . . . competences” are derived “from the nature of things”

The authorisation of the armed forces under § 14.3 of the Aviation Security Act to use direct armed force against an aircraft is not in harmony with these regulations. . . .

. . . [In addition,] an operation involving the direct use of armed force against an aircraft does not respect the boundaries of Article 35.2 sentence 2* of the Basic Law . . . [because] this provision does not permit an operational mission of the armed forces with specifically military weapons . . . in the case of especially grave accidents. . . . [T]he Federal Government intended to ensure that the armed forces can be employed for police functions alone, and only with the competences provided under police law vis-à-vis the citizens. . . .

. . . [Second,] the Act . . . that restricts the fundamental right [to life guaranteed by Article 2.2 sentence 1 of the Basic Law] must in its turn be regarded in the light of the fundamental right and of the guarantee of human dignity under Article 1.1** of the Basic Law Human life is the vital basis of human dignity as the essential constitutive principle, and as the supreme value, of the constitution. All human beings possess this dignity as persons It cannot be taken away What can be violated, however, is the claim to respect which results from it. This applies irrespective, *inter alia*, of the probable duration of the individual human life.

In view of this relation between the right to life and human dignity, the state is prohibited, on the one hand, from encroaching upon the fundamental right to life by measures of its own, thereby violating the ban on the disregard of human dignity. On the other hand, the state is also obliged to protect every human life. . . .

. . . [T]he obligation to respect and protect human dignity generally precludes making a human being a mere object of the state. What is thus absolutely prohibited is any treatment of a human being by public authority which fundamentally calls into question his or her quality of a subject, his or her status as a legal entity by its lack of the respect of the value which is due to every human being

* Article 35.2 sentence 2 of the Basic Law of Germany provides:

In order to respond to a grave accident or a natural disaster, a *Land* may call for the assistance of police forces of other *Länder* or of personnel and facilities of other administrative authorities, of the Armed Forces or of the Federal Border Police.

** Article 1.1 of the Basic Law of Germany provides:

Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

According to these standards, § 14.3 of the Aviation Security Act is . . . incompatible with Article 2.2 sentence 1 in conjunction with Article 1.1 of the Basic Law to the extent that the shooting down of an aircraft affects people who . . . have not exerted any influence on the occurrence of the non-warlike aerial incident

. . . [T]he state which in such a situation resorts to the measure provided by § 14.3 of the Aviation Security Act treats them as mere objects of its rescue operation for the protection of others. . . . Such a treatment ignores the status of the persons affected as subjects endowed with dignity and inalienable rights. By their killing being used as a means to save others, they are . . . deprived of their rights

Finally, § 14.3 of the Aviation Security Act also cannot be justified by invoking the state's duty to protect those against whose lives the aircraft . . . is abused

. . . What [this argument] . . . leaves out of account is that also the victims of an attack who are held in the aircraft are entitled to their lives being protected by the state. . . . The fact that this procedure is intended to serve to protect and preserve other people's lives does not alter this. . . .

. . . The regulation is . . . unconstitutional and consequently, it is void

* * *

We turn next to the perspective of the European Court of Human Rights. The following two cases illustrate the difficult questions at play when States that are party to the European Convention on Human Rights use counter-terrorism to justify the surveillance and the short-term detention of the members of the general public.

Szabó and Vissy v. Hungary
European Court of Human Rights (Fourth Section)
Application No. 37138/14 (2016)

. . . The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of: Vincent A. De Gaetano, *President*, András Sajó, Boštjan M. Zupančič, Nona Tsotsoria, Paulo Pinto de Albuquerque, Krzysztof Wojtyczek, [and] Iulia Antoanella Motoc, *judges* . . . [d]elivers the following judgment[:]

. . . 7. . . . [Máté Szabó and Beatrix Vissy] were staff members of *Eötvös Károly Közpolitikai Intézet*, a non-governmental, “watchdog” organisation

8. Act no. CXLVII of 2010 defines combating terrorism as one of the tasks of the police. Within the force, a specific Anti-Terrorism Task Force (“*TEK*”) was

established Its competence is defined in section 7/E* of Act no. XXXIV of 1994 on the Police, as amended by Act no. CCVII of 2011 (the “Police Act”).

9. Under this legislation, TEK’s prerogatives in the field of secret intelligence gathering include secret house search and surveillance with recording, opening of letters and parcels, as well as checking and recording the contents of electronic or computerised communications, all this without the consent of the persons concerned. . . .

11. . . . [Secret surveillance for national security] under section 7/E (3) is authorised by the Minister in charge of justice

12. “Section 7/E (3) surveillance” takes place under the rules of the National Security Act under the condition that the necessary intelligence cannot be obtained in any other way. Otherwise, the law does not contain any particular rules on the circumstances in which this measure can be ordered The time-frame of “section 7/E (3) surveillance” is 90 days, which can be prolonged for another 90-day period by the Minister; however, the latter has no right to know about the results of the ongoing surveillance when called on to decide on its prolongation. Once the surveillance is terminated, the law imposes no specific obligation on the authorities to destroy any irrelevant intelligence obtained. . . .

26. The applicants complained under Article 8 of the Convention . . . that the legal framework was prone to abuse, notably for want of judicial control.

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.”

. . . 53. In the mere existence of the legislation itself there is involved, for all those to whom the legislation could be applied, a menace of surveillance [which]

* Section 7/E of the Police Act provides in part:

. . . (3) The anti-terrorist organ may—for the purpose of fulfilling its tasks prescribed in subsection (1) . . . —perform secret intelligence gathering in line with the provisions of sections 53-60 of Act no. CXXV of 1995 on the National Security Services (the “Nbtv.”), in the course of which it may request and handle data according to the provisions of sections 38-52 of Nbtv. The secret intelligence gathering provided in section 56 points a)-e) of Nbtv. is subject to authorisation of the Minister responsible for justice.

constitutes an “interference by a public authority” with the exercise of the applicants’ right to respect for private and family life and for correspondence. . . .

55. . . . [T]he aim of the interference in question is to safeguard national security and/or to prevent disorder or crime in pursuance of Article 8 § 2. . . . [I]t has to be ascertained whether the means . . . remain in all respects within the bounds of what is necessary in a democratic society. . . .

57. When balancing the interest of the respondent State in protecting its national security through secret surveillance measures against the seriousness of the interference with an applicant’s right to respect for his or her private life, the national authorities enjoy a certain margin of appreciation However, this margin is subject to European supervision In view of the risk that a system of secret surveillance set up to protect national security may undermine or even destroy democracy under the cloak of defending it, the Court must be satisfied that there are adequate and effective guarantees against abuse. . . .

58. . . . [T]he lawfulness of the interference [under Article 8] is closely related to the question whether the “necessity” test has been complied with in respect of the “section 7/E (3) surveillance” regime and it is therefore appropriate for the Court to address jointly the “in accordance with the law” and “necessity” requirements.

59. The expression “in accordance with the law” in Article 8 § 2 requires, first, that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be compatible with the rule of law and accessible to the person concerned, who must, moreover, be able to foresee its consequences for him. . . .

60. It is not in dispute that the interference in question had a legal basis. The relevant rules are contained in statute law

61. The applicants, however, contended that this law was not sufficiently detailed and precise to meet the “foreseeability” requirement of Article 8 § 2

63. In the present case, two situations may entail secret surveillance, namely, the prevention, tracking and repelling of terrorist acts in Hungary and the gathering of intelligence necessary for rescuing Hungarian citizens in distress abroad. . . .

64. . . . [T]he requirement of “foreseeability” of the law does not go so far as to compel States to enact legal provisions listing in detail all situations that may prompt a decision to launch secret surveillance operations. The reference to terrorist threats or rescue operations can be seen in principle as giving citizens the requisite indication. . . .

65. However, in matters affecting fundamental rights it would be contrary to the rule of law . . . for a discretion granted to the executive in the sphere of national security to be expressed in terms of unfettered power. Consequently, the law must indicate the

scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference. . . .

67. It is of serious concern, however, that [TEK need only identify a “range of persons” which] might include indeed any person and be interpreted as paving the way for the unlimited surveillance of a large number of citizens. . . . [T]he category is overly broad, because there is no requirement of any kind for the authorities to demonstrate the actual or presumed relation between the persons or range of persons “concerned” and the prevention of any terrorist threat—let alone in a manner enabling an analysis by the authoriser which would go to the question of strict necessity with regard to the aims pursued and the means employed

68. . . . In the face of [the recent] progress [of terrorism,] the Court must scrutinise the question as to whether the development of [mass] surveillance methods . . . has been accompanied by a simultaneous development of legal safeguards securing respect for citizens’ Convention rights. . . . [I]t would defy the purpose of government efforts to keep terrorism at bay . . . if the terrorist threat were paradoxically substituted for by a perceived threat of unfettered executive power intruding into citizens’ private spheres

71. . . . [T]he mere requirement for the authorities to give reasons for the request, arguing for the necessity of secret surveillance, falls short of an assessment of strict necessity. There is no legal safeguard requiring TEK to produce supportive materials or, in particular, a sufficient factual basis for the application of secret intelligence gathering measures which would enable the evaluation of necessity

77. . . . In a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge. . . . [S]upervision by a politically responsible member of the executive . . . does not provide the necessary guarantees. . . .

80. The Court concedes that by the nature of contemporary terrorist threats there can be situations of emergency in which the mandatory application of judicial authorisation is not feasible, would be counterproductive for lack of special knowledge or would simply amount to wasting precious time. This is especially true in the present-day upheaval caused by terrorist attacks experienced throughout the world and in Europe, all too often involving important losses of life, producing numerous casualties and significant material damage, which inevitably disseminate a feeling of insecurity amongst citizens. . . . [T]he Court [observed] in [*Klass and Others v. Germany* (1978)]: “[d]emocratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. The Court has therefore to accept that the existence of some legislation granting powers of secret surveillance . . . is, under

exceptional conditions, necessary in a democratic society in the interests of national security.” . . .

89. [Yet, i]n total sum, . . . [g]iven that the scope of the measures could include virtually anyone, that the ordering is taking place entirely within the realm of the executive and without an assessment of strict necessity, that new technologies enable the Government to intercept masses of data easily concerning even persons outside the original range of operation, and given the absence of any effective remedial measures, . . . there has been a violation of Article 8 of the Convention. . . .

Gillan and Quinton v. The United Kingdom
European Court of Human Rights (Fourth Section)
Application No. 4158/05 (2010)

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of: Lech Garlicki, *President*, Nicolas Bratza, Giovanni Bonello, Ljiljana Mijović, Päivi Hirvelä, Ledi Bianku, Nebojša Vučinić, *judges*, . . . [d]elivers the following judgment[:] . . .

. . . 7. Between 9 and 12 September 2003 there was a Defence Systems and Equipment International Exhibition (“the arms fair”) at the Excel Centre in Docklands, East London, which was the subject of protests and demonstrations.

8. . . . [T]he first applicant was riding a bicycle and carrying a rucksack near the arms fair, on his way to join the demonstration. He was stopped and searched by two police officers who told him he was being searched under section 44* of the Terrorism

* Section 44 of the Terrorism Act 2000 provides:

(1) An authorisation under this subsection authorises any constable in uniform to stop a vehicle in an area or at a place specified in the authorisation and to search—

. . . (d) anything in or on the vehicle or carried by the driver or a passenger.

(2) An authorisation under this subsection authorises any constable in uniform to stop a pedestrian in an area or at a place specified in the authorisation and to search—

(a) the pedestrian;

(b) anything carried by him.

(3) An authorisation under subsection (1) or (2) may be given only if the person giving it considers it expedient for the prevention of acts of terrorism.

(4) An authorisation may be given—

Act 2000 (“the 2000 Act”) for articles which could be used in connection with terrorism. . . . Nothing incriminating was found He was detained for roughly 20 minutes.

9. . . . [T]he second applicant, wearing a photographer’s jacket, carrying a small bag and holding a camera in her hand, was stopped close to the arms fair. . . . [She], a journalist, was in the area to film the protests. She was searched by a police officer . . . notwithstanding that she showed her press cards She was told to stop filming. The police officer told her that she was using her powers under sections 44 and 45* of the 2000 Act. Nothing incriminating was found The record of her search showed she was stopped for five minutes but she thought it was more like thirty minutes. . . .

28. The 2000 Act was intended to overhaul, modernise and strengthen the law relating to terrorism

56. . . . In order to determine whether someone has been “deprived of his liberty” within the meaning of Article 5,** . . . account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is . . . one of degree or intensity, and not one of nature or substance. . .

57. . . . [A]lthough the length of time during which each applicant was stopped and search[ed] did not . . . exceed 30 minutes, during this period the applicants were

(a) where the specified area or place is the whole or part of a police area outside Northern Ireland other than one mentioned in paragraph (b) or (c), by a police officer for the area who is of at least the rank of assistant chief constable;

(b) where the specified area or place is the whole or part of the metropolitan police district, by a police officer for the district who is of at least the rank of commander of the metropolitan police

* Section 45 of the Terrorism Act 2000 provides in part:

(1) The power conferred by an authorisation under section 44(1) or (2)—

(a) may be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism, and

(b) may be exercised whether or not the constable has grounds for suspecting the presence of articles of that kind. . . .

(4) Where a constable proposes to search a person or vehicle by virtue of section 44(1) or (2) he may detain the person or vehicle for such time as is reasonably required to permit the search to be carried out at or near the place where the person or vehicle is stopped. . . .

** Article 5 of the European Convention on Human Rights provides in part:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law

entirely deprived of any freedom of movement. They were obliged to remain where they were and submit to the search and if they had refused they would have been liable to arrest, detention at a police station[,] and criminal charges. This element of coercion is indicative of a deprivation of liberty within the meaning of Article 5 § 1. . . .

58. The Court [also] consider[s] whether the stop and search measures amounted to an interference with the applicants' right to respect for their private life[, in violation of Article 8]

61. . . . [T]he concept of "private life" . . . covers the physical and psychological integrity of a person. . . . The Article also protects a right to identity and personal development, and the right to establish relationships with other human beings and the outside world. . . . There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life."

62. . . . [S]ections 44-47 of the 2000 Act permit a uniformed police officer to stop any person within the geographical area covered by the authorisation and physically search the person and anything carried by him or her. The police officer may request the individual to remove headgear, footwear, outer clothing and gloves. . . . [T]he police officer may place his or her hand inside the searched person's pockets, feel around and inside his or her collars, socks and shoes and search the person's hair. The search takes place in public and failure to submit to it amounts to an offence punishable by imprisonment or a fine or both. . . .

63. . . . [T]he coercive powers conferred by the legislation to require an individual to submit to a detailed search of his person [and affects] amounts to a clear interference with the right to respect for private life. . . . [T]he public nature of the search may . . . compound the seriousness of the interference because of an element of humiliation and embarrassment. . . .

65. . . . [T]hese searches constituted interferences with their right to respect for private life under Article 8. Such an interference is justified . . . only if it is "in accordance with the law," pursues one or more of the legitimate aims referred to in paragraph 2 and is "necessary in a democratic society" in order to achieve the aim or aims. . . .

79. . . . [T]he safeguards provided by domestic law have not been demonstrated to constitute a real curb on the wide powers afforded to the executive so as to offer the individual adequate protection against arbitrary interference.

80. . . . [T]he senior police officer . . . is empowered to authorise any constable in uniform to stop and search a pedestrian in any area specified by him within his jurisdiction if he "considers it expedient for the prevention of acts of terrorism." . . .

81. The authorisation must be limited in time to 28 days, but it is renewable. It cannot extend beyond the boundary of the police force area However, many police

force areas in the United Kingdom cover extensive regions with a concentrated population The failure of the [Act's] temporal and geographical restrictions . . . to act as any real check on the issuing of authorisations . . . are demonstrated by the fact that an authorisation for the Metropolitan Police District has been continuously renewed in a "rolling programme" since the powers were first granted [in 2000]. . . .

83. Of still further concern is the breadth of the discretion conferred on the individual police officer. . . . [The decision to conduct a search] is . . . based exclusively on the "hunch" or "professional intuition" of the officer concerned. Not only is it unnecessary for him to demonstrate the existence of any reasonable suspicion; he is not required even subjectively to suspect anything about the person stopped and searched. The sole proviso is that the search must be for the purpose of looking for articles which could be used in connection with terrorism, a very wide category which could cover many articles commonly carried by people in the streets. . . .

85. . . . [T]here is a clear risk of arbitrariness in the grant of such a broad discretion to the police officer. While the present cases do not concern black applicants or those of Asian origin, the risks of the discriminatory use of the powers against such persons is a very real consideration There is, furthermore, a risk that such a widely framed power could be misused against demonstrators and protestors in breach of [other provisions of the European Convention on Human Rights]. . . .

87. . . . [T]he powers of authorisation and confirmation as well as those of stop and search under sections 44 and 45 of the 2000 Act are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. They are not, therefore, "in accordance with the law" and it follows that there has been a violation of Article 8 of the Convention. . . .

Rights of Those Suspected of Terrorism

After 9/11, many countries implemented waves of exceptional detention and trial-like proceedings that formed punitive systems for persons suspected of terrorism parallel to but separate from the criminal law enforcement system in place. Here again, political actors argued that these provisions were necessary, that courts were not to review them, and that, if judiciaries reviewed them, they should find them to be justified by the threat of terrorism. Yet, rights in detention and the right to a fair trial are traditional areas of judicial expertise. In this section, we consider examples of courts assessing whether individuals suspected of terrorism are protected from the deployment of such exceptional procedures by constitutional and human rights.

We begin with a case from the European Court of Human Rights in which it interpreted the right of suspected terrorists to private life. The exceptional measure it

deals with is one that has stirred extensive debate in recent years, and the applicant's challenge offers a glimpse as to why.

Ghoumid and Others v. France

European Court of Human Rights (Fifth Section)

Application Nos. 52273/16, 52285/16, 52290/16, 52294/16, and 52302/16
(2020)*

. . . The European Court of Human Rights (Fifth Section), sitting as a Grand Chamber composed of: Síoífra O'Leary, *president*, Gabriele Kucsko-Stadlmayer, Ganna Yudkivska, André Potocki, Lətíf Hüseyinov, Lado Chanturia, [and] Anja Seibert-Fohr, *judges*, . . . [d]elivers the following judgment[:]. . .

. . . 9. By a judgment of 11 July 2007, the criminal tribunal of Paris convicted the five applicants[, Bachir Ghoumid, Fouad Charouali, Attila Turk, Redouane Aberbri, and Rachid Ait El Haj], for having, [between] 1995[-]2004, participated in a criminal organization in preparation for an act of terrorism. It stated in that regard that they had provided financial and logistical support to the "Moroccan Islamic Combatant Group" (GICM) [The criminal court sentenced the five applicants each to six to eight years in prison.] . . .

11. In April 2015, the Interior Minister addressed a letter to the applicants by which he informed them that, with regard to the judgment of 11 July 2007, . . . he had decided to engage against them the process for revoking citizenship provided for in articles 25** and 25-1*** of the Civil Code. . . . [H]e invited the applicants to produce their observations within a month. He specified that after this period, the Conseil d'Etat would be consulted for its opinion on the proposal of revocation of citizenship

12. After an affirmative opinion of the Conseil d'Etat of 1 September 2015 . . . , the Prime Minister . . . stripped the five applicants of their French citizenship. . . .

* Translation by Sofea Dil (Yale Law School, J.D. Class of 2021).

** Article 25 of the French Civil Code provides in part:

An individual who has acquired French citizenship may, by decree made after an affirmative opinion of the Council of State, be stripped of their French nationality, except if the revocation has the effect of rendering him stateless:

1° If he is convicted of a crime or infraction constituting an attack on the fundamental interests of the Nation or . . . constituting an act of terrorism

*** Articles 25-1 of the French Civil Code provides in part:

. . . [Revocation] may not be pronounced except with a delay of ten years to be counted from the perpetration of the said acts. . . .

28. The applicants claim that the revocation of citizenship . . . violates their right to respect for their private life. They invoke article 8 of the Convention

43. . . . [E]ven though the right to nationality is not currently guaranteed by the Convention or its protocols, an arbitrary revocation of citizenship can in certain circumstances pose a problem with regard to article 8 of the Convention because of its impact on the private life of the interested party. . . . [N]ationality is an element of a person's identity.

5. . . . [The Court's] review will proceed in two points. First, it will verify whether [the measures taken against the applicants] are tainted by arbitrariness; it will establish in this regard whether they were legal [under French law], whether the applicants benefited from procedural guarantees, notably whether they had access to adequate judicial review, and whether the authorities acted diligently and promptly. Secondly, it will examine the consequences of the revocation of citizenship on the private life of the interested parties.

6. . . . [T]he administrative authorities did not immediately engage an action for revocation of citizenship after the applicants' convictions. . . . [T]hey informed the applicants of their intention to revoke their French citizenship in April 2015, . . . almost eight years after the trial judgment [T]he fact that France waited until 2015 to revoke the applicants' French citizenship is explained by [the fact that the country] was touched by a series of grave attacks that year. . . . [T]he applicants argue that this delay gave a political connotation to the measure taken against them. . . . [I]n the presence of events of this nature, a State can reevaluate with a reinforced firmness the relationship of loyalty and solidarity existing between itself and persons previously convicted of . . . an act of terrorism, and it can as a consequence, under a condition of strict review for proportionality, decide to take measures against them that it had not initially taken. . . . [T]he time passed between the convictions of the applicants . . . and the date on which [the] action [for revocation of citizenship] is put in place . . . does not alone suffice to cause the decision to revoke French citizenship to be tainted by arbitrariness.

46. . . . [T]he measures taken against the applicants were legal [under French law]. . . .

47. . . . [T]he applicants [also] benefited from substantial procedural guarantees. . . .

48. . . . [T]he decisions to revoke the French citizenship of the applicants were [therefore not] tainted by arbitrariness.

49. Regarding the consequences of these decisions on the private life of the applicants, it is true that their ability to remain in France was weakened. . . . [S]trangers on French soil, the applicants could from then on be the object of a deportation order. A measure of this type would be susceptible of having effects on their private life in that it could notably provoke the loss of their jobs, their separation from their families and a

rupture of the social relationships that they have been able to develop in France. However, . . . as long as no deportation order has been issued, the consequence of the revocation of citizenship on the private life of the applicants is limited to the loss of an element of their identity.

50. . . . [T]errorist violence constitutes in itself a grave threat to human rights. . . . [T]he French authorities could have decided, following the attacks that France experienced in 2015, to demonstrate a reinforced firmness with regard to persons convicted of . . . an act of terrorism. . . . [T]hat [conviction] can justify that those persons do not benefit anymore from the specific relationship that constitutes citizenship of a country in which they live. . . . [T]he actions that led to the criminal convictions of the parties reveal allegiances that show the low level of importance that their attachment to France and its values had in the construction of their personal identity. . . . [S]ome of the applicants had just acquired French citizenship when they committed these acts, and . . . the others acquired it while they were committing them. . . . [T]he applicants all have another nationality, to which [the Court] accords a great importance. The decision to revoke their French citizenship therefore did not have the effect of rendering them stateless In addition, . . . the loss of French citizenship does not automatically involve deportation . . . and, if a decision having that consequence was to be made in their cases, they would have at their disposal [methods of] recourse through which they would be able to have their rights be considered.

51. . . . [T]he decision to revoke the applicants' French citizenship did not have disproportionate consequences on their private life.

52. . . . [T]here has not been a violation of article 8 of the Convention. . . .

* * *

In 1999, a Turkish State Security Court sentenced to death Abdullah Öcalan, the leader of the Workers' Party of Kurdistan (PKK). The PKK is a militant political organization designated as a terrorist group by the government of Turkey. When Turkey abolished the death penalty in 2002, the Court commuted Öcalan's sentence to life imprisonment. He filed an application to the European Court of Human Rights, wherein he challenged the circumstances of his arrest and detention and the fairness of his trial before the State Security Court. In *Öcalan v. Turkey I* (2005), the European Court of Human Rights concluded that Turkey had violated Articles 3, 5, and 6 of the Convention with respect to Öcalan's arrest and trial. Turkey refused Öcalan's request for a new trial, and he continued to be held in strict detention conditions, including ten years of solitary confinement and long periods during which he was not allowed to see his lawyers. He challenged his detention conditions again before the European Court of Human Rights, whose judgment is excerpted below.

Öcalan v. Turkey (No. 2)

European Court of Human Rights (Second Section)

Application Nos. 24069/03, 197/04, 6201/06, and 10464/07 (2014)

. . . The European Court of Human Rights (Second Section), sitting as a Chamber composed of: Guido Raimondi, *President*, Işıl Karakaş, Peer Lorenzen, Dragoljub Popović, András Sajó, Paulo Pinto de Albuquerque, Helen Keller, *judges*, . . . [d]elivers the following judgment[:]. . .

. . . 9. [In 1999], the Ankara National Security Court found the applicant guilty of carrying out acts designed to bring about the secession of part of Turkey's territory and of training and leading a gang of armed terrorists . . . and sentenced him to death It found that the applicant was the founder and principal leader of an illegal organisation, namely the PKK (the Workers' Party of Kurdistan—hereafter “the PKK”). . . . [O]n his orders and instructions, the PKK had carried out several armed attacks, bomb attacks, acts of sabotage and armed robberies, and . . . in the course of those acts of violence thousands of civilians, soldiers, police officers, village guards and public servants had been killed. . . .

11. In October 2001 . . . the Constitution was amended so that the death penalty could no longer be ordered or implemented other than in time of war or of imminent threat of war, or for acts of terrorism. . . . [In] 2002, the Turkish Grand National Assembly resolved . . . to abolish the death penalty in peacetime As a result . . . , a prisoner whose death sentence for an act of terrorism has been commuted to life imprisonment must spend the rest of his life in prison. . . .

95. The Court . . . considered the conformity with Article 3* of the applicant's conditions of detention from the outset [in 1999] until 12 May 2005 in its judgment of the same date, when it reached the following conclusion:

“ . . . [T]he general conditions in which he is being detained . . . have not thus far reached the minimum level of severity required to constitute inhuman or degrading treatment within the meaning of Article 3 of the Convention. . . . ”

104. . . . [A] prisoner's segregation from the prison community does not in itself amount to inhuman treatment. . . .

105. However, in order to avoid any risk of arbitrariness, substantive reasons must be given when a protracted period of solitary confinement is further extended. . . .

* 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 statement of reasons will need to be increasingly detailed and compelling as time passes. . . .

146. . . . [T]he applicant's social isolation continued until 17 November 2009 under more or less the same conditions as those observed in its 12 May 2005 judgment. . . .

. . . [During] the period . . . [in] which the applicant was the prison's only inmate, [the Court finds] . . . excessive restrictions on access to news information, the persistent major problems with access by visitors to the prison (for family members and lawyers) and the insufficiency of the means of marine transport in coping with weather conditions, the restriction of staff communication with the applicant to the bare minimum required for their work, the lack of any constructive doctor/patient relationship with the applicant, the deterioration in the applicant's mental state in 2007 resulting from a state of chronic stress and social and affective isolation combined with a feeling of abandonment and disillusionment, and the fact that no alternatives were sought to the applicant's solitary confinement until June 2008 [T]he conditions of detention imposed on the applicant during that period attained the severity threshold to constitute inhuman treatment within the meaning of Article 3 of the Convention.

JOINT PARTLY DISSENTING OPINION OF JUDGES RAIMONDI, KARAKAŞ
AND LORENZEN

. . . [W]e cannot concur with the conclusion that the applicant's conditions of detention up to 17 November 2009 were in breach of Article 3 of the Convention.

In its judgment of 12 May 2005 the Grand Chamber of the Court concluded—unanimously—that the general conditions under which the applicant had been incarcerated had not . . . attained the severity threshold to constitute inhuman or degrading treatment within the meaning of Article 3

. . . [I]n the specific circumstances of the present case, the fact that the detention continued under the same conditions for some four-and-a-half years cannot justify an assessment different from that of the Grand Chamber in the previous case. . . .

* * *

Canada enacted the Anti-terrorism Act in 2001 as part of its legislative response to the events of September 11, 2001. One provision of this Act, codified at section 83.28 of the Criminal Code, established the novel “judicial investigative hearing,” through which any individual could be compelled to answer questions before a judge related to the investigation of a terrorism offense, regardless of whether any criminal case was pending. Canadian criminal law not applicable to terrorism offenses generally did not require individuals to assist in criminal investigations, and generally limited the role of the judiciary to the trial of crimes, not their investigation.

The following case concerns the constitutionality of section 83.28. It arose when the Canadian government called a witness in the ongoing Air India Trial to appear in a judicial investigative hearing. The Air India Trial involved the prosecution of three men accused of the 1985 bombing and attempted bombing of two Air India flights. The mid-air explosion of one of the flights killed 329 people, mostly Canadian citizens. The other bomb detonated prematurely, killing two baggage handlers.

Application Under S 83.28
Supreme Court of Canada
2004 S.C.C. 42

Iacobucci and Arbour JJ.—

This appeal raises . . . fundamental questions about the constitutional validity of provisions of the Anti-terrorism Act . . . (the “Act”), which were adopted as amendments to the *Criminal Code* The Act is a legislative component of Canada’s response to the enormous tragedy of the September 11, 2001 terrorist attacks in the United States. . . .

The challenge for democracies in the battle against terrorism is not whether to respond, but rather how to do so. This is because Canadians value the importance of human life and liberty, and . . . respect for the rule of law. . . .

Although terrorism necessarily changes the context in which the rule of law must operate, it does not call for the abdication of law. Yet, at the same time, . . . the Constitution is not a suicide pact

. . . In a democracy, not every response is available to meet the challenge of terrorism. At first blush, this may appear to be a disadvantage, but in reality, it is not. A response to terrorism within the rule of law preserves and enhances the cherished liberties that are essential to democracy. . . .

Ripudaman Singh Malik[,] . . . Ajaib Singh Bagri[, and Inderjit Singh Reyat] were . . . charged with several offences in relation to the [1985] explosions and intended explosion of Air India [flights in 2000 and 2001. The appellant, a witness in that trial, was called to appear in a judicial investigative hearing under s. 83.28* of the *Criminal*

* Section 83.28 of the Criminal Code of Canada provides in part:

- (1) In this section and section 83.29, “judge” means a provincial court judge or a judge of a superior court of criminal jurisdiction.
- (2) Subject to subsection (3), a peace officer may, for the purposes of an investigation of a terrorism offence, apply *ex parte* to a judge for an order for the gathering of information. . . .

Code, created by the Act, within days of the beginning of the trial. The judicial investigative hearing has no formal or legal relationship to the Air India trial.] . . .

. . . [A] number of terms and conditions [were set] to govern the conduct of the judicial investigative hearing [under the requirements of s. 83.28]: (1) it was to be conducted in camera; (2) the appellant was entitled to counsel; . . . (4) the appellant was required to answer questions and produce items ordered to be produced subject to . . . non-disclosure considerations; (5) the appellant was prohibited from disclosing any information or evidence obtained at the hearing; and (6) notice was not to be given to the accused in the Air India Trial, to the press, or to the public. . . . [A] failure to attend . . . the hearing may [have] result[ed] in the issuance of an arrest warrant.

[Although counsel for Malik and Bagri were not informed of the judicial investigative hearing, a]t some point prior to that date, counsel . . . fortuitously became

(4) A judge to whom an application is made under subsection (2) may make an order for the gathering of information if the judge is satisfied that the consent of the Attorney General was obtained as required by subsection (3) and

(a) that there are reasonable grounds to believe that

(i) a terrorism offence has been committed, and

(ii) information concerning the offence, or information that may reveal the whereabouts of a person suspected by the peace officer of having committed the offence, is likely to be obtained as a result of the order; or

(b) that

(i) there are reasonable grounds to believe that a terrorism offence will be committed,

(ii) there are reasonable grounds to believe that a person has direct and material information that relates to a terrorism offence . . . , and

(iii) reasonable attempts have been made to obtain the information referred to in subparagraph (ii) from the person referred to in that subparagraph.

(5) An order made under subsection (4) may

(a) order the examination, on oath or not, of a person named in the order;

(b) order the person to attend at the place fixed by the judge . . . for the examination and to remain in attendance until excused by the presiding judge;

(c) order the person to bring to the examination any thing in their possession or control, and produce it to the presiding judge; . . . and

(e) include any other terms or conditions that the judge considers desirable

aware of the order and advised [the prosecution] that they wished to make submissions. [Counsel also challenged the constitutional validity of s. 83.28]. . . .

. . . [T]he basic issue . . . [is] the tension between responding to terrorism in the interest of national security and respect for the *Charter*'s rights and freedoms

It was suggested in submissions that the purpose of the Act should be regarded broadly as the protection of "national security." However, . . . courts must not fall prey to the rhetorical urgency of a perceived emergency or an altered security paradigm. While the threat posed by terrorism is certainly more tangible in the aftermath of global events such as those perpetrated in the United States, and since then elsewhere, . . . we must not lose sight of the particular aims of the legislation. . . . We conclude that the purpose of the Act is the prosecution and prevention of terrorism offences. . . .

. . . [T]he judicial investigative proceeding can be viewed as a criminal proceeding The common law evidentiary principles of relevance and fairness clearly apply to the provision, as do [statutory] evidentiary requirements

The appellant submits that s. 83.28 ought not to apply retrospectively to incidents that occurred prior to its enactment. . . . [T]he appellant argues that judicial investigative hearings are not strictly procedural as they essentially create new offences by operation of the triggering "terrorism offence" definition We find that s. 83.28 effects only procedural change. . . .

. . . [W]here the enactment deals with procedure only, . . . the enactment applies to all actions, whether commenced before or after the passing of the Act.

. . . [T]he appellant submits that the legislative intent of Parliament precludes retrospective effect given the preventive focus of the anti-terrorism legislation. . . .

. . . While the prevention of future acts of terrorism was undoubtedly a primary legislative purpose . . . of the provision, . . . it does not follow that Parliament intended for procedural bifurcation respecting past acts of terrorism *vis-à-vis* . . . future acts. . . . As such, s. 83.28 has immediate effect, and applies retrospectively

Statutory compulsion to testify engages liberty interests under s. 7* of the [Canadian Charter of Rights and Freedoms]. . . . Individuals named in an order under s. 83.28(5) may be required . . . [to] be examined under oath, and be required to produce any thing in their possession. . . . [S]uch individuals may be imprisoned for evasion of service, or failure to attend or remain at the examination. . . .

* Section 7 of the Canadian Charter of Rights and Freedoms provides:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

. . . [A]ppellant's s. 7 rights have not been infringed [T]he procedural protections available to the appellant . . . are equal to . . . the protections afforded to witnesses compelled to testify in other proceedings

Binnie J. (dissenting)—

. . . [W]hile I agree that s. 83.28 of the *Code* . . . is constitutionally valid, . . . the Crown's resort to it in the circumstances of this case was an abuse of process. . . .

Every legal system has its not-so-proud moments when in times of national upheaval or wartime emergency, civil rights have been curtailed in ways which were afterwards regretted. . . . This case . . . illustrates the problem. . . .

. . . [The] prohibition[s on disclosure in this case were] designed to keep both the accused Malik and Bagri and their counsel, amongst others, in a state of ignorance of even the existence of the s. 83.28 proceedings. . . . [A]n investigative procedure designed for . . . the pre-charge stage . . . was invoked behind the backs of the accused in part at least to obtain advance discovery of an uncooperative prosecution witness not only after charges were laid but during the Air India trial itself. . . .

. . . The Crown's trial tactic . . . was abusive of the proper role of the judiciary. . . .

LeBel J. (dissenting)—

. . . [T]he purpose of having a judge at [a judicial investigative hearing] . . . is to help the executive branch compel the witness to answer questions. The judiciary's symbolic and legal weight will assist the police in their investigations. The judiciary will then no longer be playing the role of an independent arbiter. . . .

. . . [I]t is [not] possible to uphold the constitutional validity of the legislation in question by isolating individual cases in which judges will act unconstitutionally. . . .

* * *

These two cases from the United Kingdom arose from the State's treatment of the same set of persons accused of terrorism. The House of Lords examined whether the terrorist threat targeted by the law under which the accused were detained and prosecuted justified derogating from the U.K.'s obligations under the European Convention on Human Rights.

A and Others v. Secretary of State for the Home Department
House of Lords of the United Kingdom
[2004] UKHL 56

[The House of Lords, composed of Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Hope of Craighead, Lord Scott of Foscote, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Baroness Hale of Richmond, and Lord Carswell, delivered the following judgment:]

LORD BINGHAM OF CORNHILL

. . . 3. The appellants . . . are [all] foreign . . . nationals. . . . [T]hey all contend that [their] detention [under section 23 of the Anti-terrorism, Crime and Security Act 2001] was inconsistent with obligations binding on the United Kingdom under the European Convention on Human Rights, given domestic effect by the Human Rights Act 1998; that the United Kingdom was not legally entitled to derogate from those obligations; that, if it was, its derogation was nonetheless inconsistent with the European Convention and so ineffectual to justify the detention; and that the statutory provisions under which they have been detained are incompatible with the Convention. . . .

7. Her Majesty's Government reacted to the events of 11 September in two ways directly relevant to these appeals. First, it introduced . . . what became Part 4 of the Anti-terrorism, Crime and Security Act 2001. Secondly, it made the Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001/3644) ("the Derogation Order"). . . .

11. The derogation related to . . . article 5(1)(f)* . . . of the Convention. . . .

12. . . . Part 4 [of the 2001 Act] contains the power to detain indefinitely on reasonable suspicion without charge or trial . . . [and] is the [only] subject of the United Kingdom derogation. . . .

14. Section 23(1) [of the 2001 Act] . . . provides:

" . . . (1) A suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily

* Article 5(1)(f) of the European Convention on Human Rights provides:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: . . .

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

or indefinitely)”

. . . 16. The appellants [contended] . . . that there neither was nor is a “public emergency threatening the life of the nation” within the meaning of article 15(1)* [of the European Convention on Human Rights]. . . .

26. . . . I would resolve this issue against the appellants

28. . . . [I]n *Lawless v Ireland (No 3)* (ECtHR 1961)[, the European Court of Human Rights held that the Troubles were a “public emergency” that merited derogation under Article 15.] . . . If . . . it was open to the Irish Government in *Lawless* to conclude that there was a public emergency threatening the life of the Irish nation, the British Government could scarcely be faulted for reaching that conclusion in the much more dangerous situation which arose after 11 September.

29. [In addition,] . . . I would accept that great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise a pre-eminently political judgment. . . .

30. Article 15 requires that any measures taken by a member state in derogation of its obligations under the Convention should not go beyond what is “strictly required by the exigencies of the situation.” Thus the Convention imposes a test of strict necessity or, in Convention terminology, proportionality. . . .

31. The appellants’ argument under this head can . . . be summarised as involving the following steps: . . .

(4) [Section] . . . 23 did not rationally address the threat to the security of the United Kingdom presented by Al-Qaeda terrorists and their supporters because (a) it did not address the threat presented by UK nationals, (b) it permitted foreign nationals suspected of being Al-Qaeda terrorists or their supporters to pursue their activities abroad . . . , and (c) the sections permitted the certification and detention of persons who were not suspected of presenting any threat to the security of the United Kingdom as Al-Qaeda terrorists or supporters.

(5) If the threat presented to the security of the United Kingdom by UK nationals . . . could be addressed without infringing their right to personal liberty, . . . similar measures could . . . adequately address the threat presented by foreign nationals.

* Article 15(1) of the European Convention on Human Rights provides:

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

(6) Since the right to personal liberty is among the most fundamental of the rights protected by the European Convention, any restriction of it must be closely scrutinised by the national court

33. [Regarding t]he fourth step[,] . . . the threat from UK nationals, if quantitatively smaller, is not said to be qualitatively different from that from foreign nationals. . . . [Section] . . . 23 do[es] permit a person certified and detained to leave the United Kingdom and go to any other country willing to receive him But allowing a suspected international terrorist to . . . depart to another country . . . to pursue his criminal designs . . . is hard to reconcile with a belief in his capacity to inflict serious injury to the people and interests of this country. . . .

37. . . . [T]he Attorney General . . . directed the weight of his submission to challenging the standard of judicial review for which the appellants contended in [the] sixth step. He submitted that as it was for Parliament and the executive to assess the threat facing the nation, so it was for those bodies and not the courts to judge the response necessary to protect the security of the public. . . .

42. . . . I do not accept the full breadth of the Attorney General's submissions. I do not in particular accept the distinction which he drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true . . . that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General . . . is wrong to stigmatise judicial decision-making as in some way undemocratic. . . .

43. The appellants' proportionality challenge to the Order and section 23 is, in my opinion, sound [T]he choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem . . . while imposing the severe penalty of indefinite detention on persons who . . . may harbour no hostile intentions towards the United Kingdom. . . .

45. As part of their proportionality argument, the appellants attacked section 23 as discriminatory. They contended that, being discriminatory, the section could not be "strictly required" within the meaning of article 15 and so was disproportionate. . . .

46. . . . [A]rticle 14 of the European Convention . . . provides:

" . . . 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."

. . . 51. . . . The appellants were treated differently from both suspected international terrorists who were not UK nationals but could be removed and also from suspected international terrorists who were UK-nationals and could not be removed. . . . [T]he difference of treatment was on grounds of nationality or immigration status (one of the proscribed grounds under article 14). . . .

54. . . . [T]he justification of the differential treatment of non-UK nationals . . . contended for by the Attorney General . . . cannot . . . be [justified] in a security context, since the threat presented . . . did not depend on . . . immigration status. . . .

73. I would allow the appeals. There will be a quashing order in respect of the Human Rights Act 1998 (Designated Derogation) Order 2001. There will also be a declaration . . . that section 23 of the Anti-terrorism, Crime and Security Act 2001 is incompatible with articles 5 and 14 of the European Convention The Secretary of State must pay the appellants' costs

LORD HOFFMANN

. . . 95. . . . [T]he question is whether [the threat of serious terrorist outrages] is a threat to the life of the nation. The Attorney General's submissions . . . treated a threat of serious physical damage and loss of life as necessarily involving a threat to the life of the nation. But . . . this shows a misunderstanding of what is meant by "threatening the life of the nation." Of course the government has a duty to protect the lives and property of its citizens. But that is a duty which it owes all the time and which it must discharge without destroying our constitutional freedoms. . . .

96. This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. . . . Terrorist violence . . . does not threaten our institutions of government or our existence as a civil community. . . .

LORD WALKER OF GESTINGTHORPE

. . . 209. I . . . differ from most of your Lordships as to whether the derogating measures are proportionate, rational and non-discriminatory

210. As to discrimination, . . . I consider that there has been insufficient recognition that Part 4 of the 2001 Act is only a small . . . part of Parliament's response to the events of 11 September 2001. . . . Those liable to be detained under Part 4 are only a small subset of non-national terrorist suspects, that is those who cannot be deported because of an apprehension of torture after their return home. All the other provisions of the 2001 Act are aimed at any terrorists or . . . suspected terrorists, regardless of nationality

215. In this case a power of interning British citizens without trial, and with no option of going abroad if they chose to do so, would be far more oppressive, and a graver affront to their human rights, than a power to detain . . . a suspected terrorist who has no right of abode in the United Kingdom, and whom the government could and would deport but for the risk of torture if he were returned to his own country. . . . Part 4 of the 2001 Act is not offensively discriminatory, because there are sound, rational grounds for different treatment. . . .

217. . . . [T]he judgment of Parliament and of the Secretary of State is that these measures were necessary, and the 2001 Act contains several important safeguards against oppression. The exercise of the Secretary of State's powers is subject to judicial review by . . . an independent and impartial court Moreover the legislation is temporary While it is in force there is detailed scrutiny of the operation [by several layers of appointed reviewers]. . . . All these safeguards . . . show . . . that . . . Part 4 . . . should not be used to encroach on human rights any more than is strictly necessary.

218. . . . I would dismiss these appeals. . . .

[Baroness Hale of Richmond, Lord Carswell, Lord Hope of Craighead, Lord Scott of Foscote, Lord Nicholls of Birkenhead, and Lord Rodger of Earlsferry agreed that the appeals should be allowed.]

A and Others v. Secretary of State for the Home Department (II)
House of Lords of the United Kingdom
[2005] UKHL 71

[The House of Lords, composed of Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Hope of Craighead, Lord Rodger of Earlsferry, Lord Carswell, and Lord Brown of Eaton-under-Heywood, delivered the following judgment:]

LORD BINGHAM OF CORNHILL

1. May the Special Immigration Appeals Commission (“SIAC”), . . . when hearing an appeal under section 25 of the Anti-terrorism, Crime and Security Act 2001 . . . , receive evidence which has or may have been procured by torture inflicted, in order to obtain evidence, by officials of a foreign state without the complicity of the British authorities? . . .

3. The 2001 Act was this country's legislative response to the grave and inexcusable crimes committed in New York, Washington DC and Pennsylvania on 11 September 2001, and manifested the government's determination to protect the public against the dangers of international terrorism. . . . [T]he Act accordingly established a new regime, applicable to persons who were not British citizens, whose presence in the United Kingdom the Secretary of State reasonably believed to be a risk to national

security and whom the Secretary of State reasonably suspected of being terrorists as defined in the legislation. . . . [The Act gives the Secretary of State the power to certify and detain such a person whether temporarily or indefinitely.]

5. Section 25 of the Act enables [such] a person . . . to appeal to SIAC against his certification. . . .

33. . . . [T]he international prohibition of the use of torture enjoys the enhanced status of a *jus cogens* or peremptory norm of general international law. . . .

34. . . . There is reason to regard it as a duty of states, save perhaps in limited and exceptional circumstances, . . . to reject the fruits of torture inflicted in breach of international law. . . .

41. It is true . . . that [states] . . . have been strongly urged since 11 September 2001 to cooperate and share information in order to counter the cruel and destructive evil of terrorism. But these calls have been coupled with reminders that human rights, and international and humanitarian law, must not be infringed or compromised. . . .

51. . . . [I]t would of course be within the power of a sovereign Parliament (in breach of international law) to confer power on SIAC to receive third party torture evidence. But the English common law has regarded torture and its fruits with abhorrence for over 500 years, and that abhorrence is now shared by over 140 countries which have acceded to the Torture Convention. . . . The issue is one of constitutional principle, whether evidence obtained by torturing another human being may lawfully be admitted against a party to proceedings in a British court To that question I would give a very clear negative answer. . . .

56. . . . [Accordingly,] [i]f SIAC is unable to conclude that there is not a real risk that the evidence has been obtained by torture, it should refuse to admit the evidence. . . .

63. The Court of Appeal were unable to conclude that there was no plausible suspicion of torture in these cases. I would accordingly allow the appeals

LORD NICHOLLS OF BIRKENHEAD

. . . 67. . . . What should the security services and the police and other executive agencies of this country do if they know or suspect information received by them from overseas is the product of torture? Should they discard this information as ‘tainted,’ and decline to use it lest its use by them be regarded as condoning the horrific means by which the information was obtained?

68. The intuitive response to these questions is that if use of such information might save lives it would be absurd to reject it. If the police were to learn of the whereabouts of a ticking bomb it would be ludicrous for them to disregard this information if it had been procured by torture. . . . Similarly, if tainted information points

a finger of suspicion at a particular individual, . . . the police may properly take into account when considering, for example, whether to make an arrest. . . .

70. . . . It is one thing for tainted information to be used by the executive when making operational decisions or by the police when exercising their investigatory powers, including powers of arrest. These steps do not impinge upon the liberty of individuals or, when they do, they are of an essentially short-term interim character. . . . It is an altogether different matter for the judicial arm of the state to admit such information as evidence when adjudicating definitively upon the guilt or innocence of a person charged with a criminal offence. In the latter case repugnance to torture demands that proof of facts should be found in more acceptable sources than information extracted by torture. . . .

76. . . . SIAC is discharging a judicial function which calls for proof of facts by evidence. . . . [I]nformation obtained by torture is [therefore] not admissible

79. . . . I would allow these appeals. . . .

LORD HOPE OF CRAIGHEAD

. . . 116. . . . It would be wholly unrealistic to expect the detainee to prove anything, as he is denied access to so much of the information that is to be used against him. . . . All he can reasonably be expected to do is to raise the issue by asking that the point be considered by SIAC. . . .

118. . . . Lord Bingham . . . says that SIAC should refuse to admit the evidence if it is unable to conclude that there is not a real risk that the evidence has been obtained by torture. My own position . . . is that SIAC should refuse to admit the evidence if it concludes . . . on a balance of probabilities that it was obtained by torture. . . .

LORD BROWN OF EATON-UNDER-HEYWOOD

160. . . . [T]orture cannot be undone and the greater public good thus lies in making some use at least of the information obtained, whether to avert public danger or to bring the guilty to justice.

161. . . . [I]t is [generally] accepted that the executive may make use of all information it acquires: both coerced statements and whatever fruits they are found to bear. . . . [I]n indeed, . . . the executive [is] entitled to make use of this information; to my mind it is bound to do so. It has a prime responsibility to safeguard the security of the state and would be failing in its duty if it ignores whatever it may learn or fails to follow it up. . . . [By contrast,] . . . the court will [generally] shut its face against the admission in evidence of any coerced statement . . . ; it will, however, admit in evidence the fruit of the poisoned tree. . . .

163. . . . The statements in question are those made by detainees abroad, coerced by the authorities of a foreign state without the complicity of any British official. . . .

165. . . . I would hold that SIAC could never properly uphold a section 23 detention order where the sole or decisive evidence supporting it is a statement established to have been coerced by the use of torture. . . .

[Lord Rodger of Earlsferry, Lord Carswell, and Lord Brown of Eaton-Under-Heywood agreed that the appeals should be allowed.]

* * *

We next return to the Guantanamo Bay line of cases from the Supreme Court of the United States. After the Court held that it had jurisdiction to hear the detainees' challenges in *Rasul v. Bush*, the U.S. Congress passed a law meant to prevent their access to the writ of habeas corpus and therefore to the jurisdiction of U.S. courts. Four years after it decided *Rasul v. Bush*, a constitutional challenge to this new statutory restriction reached the U.S. Supreme Court.

Boumediene v. Bush
Supreme Court of the United States
553 U.S. 723 (2008)

Justice KENNEDY delivered the opinion of the Court [in which Justices STEVENS, SOUTER, GINSBURG, and BREYER, joined:]

Petitioners are aliens designated as enemy combatants and detained at the United States Naval Station at Guantanamo Bay, Cuba. . . .

Petitioners present a question not resolved by our earlier cases relating to the detention of aliens at Guantanamo: whether they have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause, Art. I, § 9, cl. 2.* We hold these petitioners do have the habeas corpus privilege. Congress has enacted a statute, the Detainee Treatment Act of 2005 (DTA), that provides certain procedures for review of the detainees' status. We hold that those procedures are not an adequate and effective substitute for habeas corpus. Therefore § 7** of the Military Commissions Act of 2006 (MCA) operates as an unconstitutional suspension of the writ. . . .

* The Suspension Clause of the United States Constitution, found at Art. I, § 9, cl. 2, provides:

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

** Section 7 of the Military Commissions Act of 2006 provides:

In deciding the constitutional questions . . . we must determine whether petitioners are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status, i.e., petitioners' designation . . . as enemy combatants, or their physical location . . . at Guantanamo Bay. . . .

. . . [A]t least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.

. . . [T]he status of these detainees is a matter of dispute. Petitioners . . . are not American citizens [and] deny they are enemy combatants. They have been afforded some process in [Combatant Status Review Tribunal (CSRT)] proceedings to determine their status; but . . . there has been no trial by military commission for violations of the laws of war. . . .

. . . [T]he procedural protections afforded to the detainees in the CSRT hearings . . . fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review. Although the detainee is assigned a "Personal Representative" to assist him during CSRT proceedings, the Secretary of the Navy's memorandum makes clear that person is not the detainee's lawyer or even his "advocate." The Government's evidence is accorded a presumption of validity. The detainee is allowed to present "reasonably available" evidence, but his ability to rebut the Government's evidence against him is limited by the circumstances of his confinement and his lack of counsel at this stage. And although the detainee can seek review of his status determination in the Court of Appeals, that review process cannot cure all defects in the earlier proceedings.

As to the second factor relevant to this analysis, . . . the sites of their apprehension and detention are technically outside the sovereign territory of the United States. . . . [T]his . . . weighs against finding they have rights under the Suspension Clause. . . . [However,] Guantanamo Bay . . . is no transient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.

(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in [§§ 1005(e)(2) and (e)(3) of the DTA] no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

As to the third factor, we recognize . . . that there are costs to holding the Suspension Clause applicable in a case of military detention abroad. Habeas corpus proceedings may require expenditure of funds by the Government and may divert the attention of military personnel from other pressing tasks. While we are sensitive to these concerns, we do not find them dispositive. . . .

. . . At present, dangerous as [Guantanamo Bay prisoners] may be if released, they are contained in a secure prison facility located on an isolated and heavily fortified military base.

There is no indication, furthermore, that adjudicating a habeas corpus petition would cause friction with the host government. No Cuban court has jurisdiction over American military personnel at Guantanamo or the enemy combatants detained there. . . . [T]he United States is, for all practical purposes, answerable to no other sovereign for its acts on the base. . . .

We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. . . . Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention.

In light of this holding the question becomes whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus. . . .

By foreclosing consideration of evidence not presented or reasonably available to the detainee at the CSRT proceedings, the DTA disadvantages the detainee by limiting the scope of collateral review to a record that may not be accurate or complete. . . . In this context, . . . where the underlying detention proceedings lack the necessary adversarial character, the detainee cannot be held responsible for all deficiencies in the record. . . .

. . . Petitioners have met their burden of establishing that the DTA review process is, on its face, an inadequate substitute for habeas corpus. . . .

. . . We hold that petitioners may invoke the fundamental procedural protections of habeas corpus. The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. . . .

Justice SCALIA, with whom THE CHIEF JUSTICE, Justice THOMAS, and Justice ALITO join, dissenting.

Today, for the first time in our Nation's history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war [with "radical Islamists"]. . . . The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause

thus has no application, and the Court's intervention in this military matter is entirely *ultra vires*. . . .

The game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed. That consequence would be tolerable if necessary to preserve a time-honored legal principle vital to our constitutional Republic. But it is this Court's blatant *abandonment* of such a principle that produces the decision today.

* * *

Following the U.S. Supreme Court's decision in *Boumediene v. Bush*, it fell to lower courts—the District Court and Court of Appeals of the District of Columbia Circuit—to adjudicate Guantanamo detainees' habeas petitions. The Supreme Court has not heard appeals in any of these cases. Professor Stephen I. Vladeck describes the debate surrounding the D.C. courts' decisions in these cases:

In the . . . three years [following *Boumediene*], the focus has been on how the D.C. courts would implement *Boumediene*'s mandate that these cases go forward in the absence of any statutory authority, especially given the Supreme Court's express delegation to the lower courts of the power to fashion procedural, evidentiary, and even substantive rules to govern the detainees' claims. . . . [T]hese cases have also come to inform a heated debate over the relationship between the D.C. Circuit and the Supreme Court's decision in *Boumediene*.

In particular, a number of scholars, civil liberties groups, and detainee lawyers . . . have accused the D.C. Circuit in general—and some of its judges in particular—of actively subverting *Boumediene* by adopting holdings and reaching results that have both the intent and the effect of vitiating the Supreme Court's 2008 decision. These critiques usually play up . . . the deep-seated disagreements between the D.C. Circuit and the D.C. District Court in some of these cases (as manifested, for example, by the D.C. Circuit's refusal thus far to affirm a single district court holding that granted habeas relief on the merits . . .)

. . . In contrast, defenders of the work of the court of appeals have stressed both the extent to which *Boumediene* necessarily left these issues open to judicial resolution and the near-unanimity of the D.C. Circuit in virtually all of the post-*Boumediene* cases—especially in its decisions on the “merits.” . . . [V]ery few of the court's post-*Boumediene* opinions have elicited published dissents, and none have successfully been taken en banc. And with one equivocal exception, the Supreme Court has denied certiorari in every post-*Boumediene* Guantánamo case

it has thus far been asked to hear.*

The New Judicial Deference

Kim Lane Scheppelle (2012)**

. . . Before 9/11, the dominant response of courts around the world during . . . public emergencies was to engage in judicial deference. Deference counseled courts to stay out of matters when governments argued that national security concerns were central. As a result, judges would generally indicate that they had no role to play once . . . an emergency was declared. . . . After 9/11, however, . . . courts jumped right in, dealing governments one loss after another. . . .

But . . . deference is still alive and well. We are simply seeing a new sort of deference born out of the ashes of the familiar variety. . . . [N]ow governments win first by losing these cases on principle and then by getting implicit permission to carry on the losing policy . . . for a while longer, giving governments a victory in practice. Suspected terrorists have received from courts a vindication of the abstract principle that they have rights without also getting an order that the abusive practices that have directly affected them must be stopped immediately. Instead, governments are given time to change their policies while still holding suspected terrorists in legal limbo. . . .

. . . [B]ecause the new policies then have to be tested to see whether they meet the new criteria courts have laid down, the final approval may take years, during which time suspected terrorists may still be generally subjected to the treatment that courts have said was impermissible. . . .

. . . For Yaser Hamdi, [of the domestic detention case *Hamdi v. Rumsfeld* (2006),] the concrete results of his “win” at the Supreme Court . . . were not immediate or particularly good in the end. While the Supreme Court did . . . [hold] that he was due a habeas hearing, the Court—in the very same plurality judgment that found he had such rights—conspicuously refused to say what rights those were. . . . Without requiring that this habeas hearing look like other habeas hearings, the Supreme Court was inviting . . . a long, drawn-out process of litigating the specifics, during which . . . the petitioner would remain in detention. . . .

The *Rasul* decision represented an astonishing legal victory for the detainees. And yet, nothing changed quickly. The decision decided no actual habeas claims; it merely decided that habeas claims *could* be made. . . .

* Excerpted from Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 42 SETON HALL LAW REVIEW 1451, 1456 (2011).

** Excerpted from Kim Lane Scheppelle, *The New Judicial Deference*, 92 BOSTON UNIVERSITY LAW REVIEW 89 (2012).

. . . The petitioners, who were left in detention with all of the other prisoners at Guantánamo, could now begin their long treks through the courts seeking resolution of their individual cases. . . . [I]f the Court was really outraged by the detentions and eager to sort out whether the detainees were in fact held unlawfully, the Court could have done more. . . .

. . . [In *Hamdan v. Rumsfeld* (2006), a case on the constitutionality of the use of military commissions to try suspected terrorists, the Supreme Court concluded that] the President's judgments in the "war on terror" were not due deference. If the Congress and the President had acted together, then that was another matter. But the military commissions were constituted by a presidential order that ran contrary to existing statutes. For [the a]dministration . . . , there was a clear way out of this bind: go to Congress and get authorization for the commissions. . . . [T]he result was the Military Commissions Act of 2006 (MCA 2006).

. . . [T]he resulting military commissions were little different from those that had already been set up by presidential decree. . . . [T]he decision of the Supreme Court . . . only served to delay Hamdan's trial while not substantially improving the procedures

. . . By the time he was finally released . . . , [Hamdan] had been held in detention for seven years, much of it in solitary confinement, including more than two years after he "won" before the Supreme Court. In the end, however, he was convicted of a minor charge that only existed because the Supreme Court made the President go to Congress for authorization to use military commissions. . . .

. . . [T]he Supreme Court in *Boumediene* held itself out as the only institution that could keep the others constitutionally honest in times of crisis. The Court's powers were *not* limited by deference; instead, the Constitution required the Court to keep the other branches within their constitutional limits. . . . [T]his judgment gave no deference to either [the executive or legislative] branch[es]

Finally noticing that . . . remanding to the court of appeals would generate further delays, the Court went ahead and finally outlined what, at minimum, a habeas review had to provide. . . .

. . . But what should such a court say about the Guantánamo detentions after this case? The majority frankly admitted that "our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined." So, while the Court appeared to take seriously the years of delay in granting the petitioners any independent review of the bases for their detention, the Court would still not explain when and by what evidentiary standard detention would be permissible. That required more litigation. And that process would require more time, which would in turn allow the executive to detain the petitioners longer. . . .

... Since the Court decided *Boumediene*, the bold guarantees of due process that the Court announced have been turning into something less robust on the ground, as a result of decisions by the Court of Appeals for the District of Columbia spelling out the details. ...

On the positive side, ... [b]y and large, [these] anti-terrorism cases are not obstacles that will have to be overcome by those who want to protect both separation of powers and individual rights when the “war on terror” is over. ... The fact that those who brought the cases did not benefit immediately from their victories does not affect the validity of the general principles, which are all much better than might have been expected under the old deference model. ...

These holdings also carry the not-so-obvious virtue of encouraging litigation. As long as the courts hold out the promise of vindicating rights, those with rights to be vindicated will keep coming to the courts ... [P]erhaps eventually when the crisis passes, courts will find remedies that match the promise of the holdings. ...

This new judicial deference has its negative ... side as well. Courts have tended to act most aggressively in defense of constitutional values ... when their own jurisdiction has been challenged ... These matters ... infringe directly on what courts take to be their most distinctive responsibilities. ...

Another way to interpret these bold constitutional rulings, then, is that courts have been highly alert to keep *themselves* from being a casualty of the crisis. Are suspected terrorists ... the ones whose rights are really vindicated? Or are the courts more self-regarding as they protect themselves from the collateral damage of anti-terrorism policies? ... Had the courts decided that assisting these petitioners was their central aim, the courts could have done so much more to help them. Judges have been bold in their opinions, but not in their regard for those who sought their assistance. The constitutional claims most likely to be vindicated in these cases, as a result, have been those of the courts themselves. ...

* * *

The United States government’s exceptional detention scheme at Guantanamo Bay was not only subject to challenges in U.S. courts. In the following case, the Supreme Court of Canada considered the Canadian governments’ obligations related to its interactions with Guantanamo and a Canadian detained there. The Canadian, Omar Khadr, was captured in Afghanistan in 2002 after allegedly throwing a grenade at U.S. forces while hiding in a compound held by Al Qaeda. He was 15 years old at the time.

Canada v. Khadr
Supreme Court of Canada
2008 S.C.C. 28

[The Supreme Court of Canada, composed of Chief Justice McLachlin and Justices Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron, and Rothstein, delivered the following judgment:]

[1] . . . This appeal raises the issue of the relationship between Canada's domestic and international human rights commitments. Omar Khadr, [a Canadian citizen,] currently faces prosecution on murder and other charges before a U.S. Military Commission in Guantanamo Bay, Cuba. [He was taken prisoner in Afghanistan in 2002, at the age of 15, for his alleged membership in Al Qaeda and participation in acts of terrorism against U.S. forces. He has been detained at Guantanamo Bay for about six years.] Mr. Khadr asks for an order under s. 7 of the *Canadian Charter of Rights and Freedoms* that the appellants be required to disclose to him all documents relevant to these charges in the possession of the Canadian Crown, including interviews conducted by Canadian officials with him in 2003 at Guantanamo Bay. The Minister of Justice opposes the request, arguing that the Charter does not apply outside Canada and hence did not govern the actions of Canadian officials at Guantanamo Bay. . . .

[7] On several occasions, . . . Canadian officials, including agents of the Canadian Security Intelligence Service (CSIS), attended at Guantanamo Bay and interviewed Mr. Khadr for intelligence and law enforcement purposes. The CSIS agents . . . shared the product of these interviews with U.S. authorities. . . .

[16] Had the interviews and process been in Canada, Mr. Khadr would have been entitled to full disclosure under the principles in [*R v. Stinchcombe* (1991)], which held that persons whose liberty is at risk as a result of being charged with a criminal offence are entitled to disclosure of the information in the hands of the Crown under s. 7 of the *Charter*. . . .

[19] If the Guantanamo Bay process under which Mr. Khadr was being held was in conformity with Canada's international obligations, the *Charter* has no application and Mr. Khadr's application for disclosure cannot succeed. However, if Canada was participating in a process that was violative of Canada's binding obligations under international law, the *Charter* applies to the extent of that participation.

[20] . . . [T]he question becomes whether the process at Guantanamo Bay at the time that CSIS handed the products of its interviews over to U.S. officials was a process that violated Canada's binding obligations under international law.

[21] . . . [T]he United States Supreme Court held that . . . detainees [at Guantanamo Bay] had illegally been denied access to *habeas corpus* and that the procedures under which they were to be prosecuted violated the *Geneva Conventions*.

Those holdings are based on principles consistent with the *Charter* and Canada's international law obligations. . . . [T]his is sufficient to establish violations of these international law obligations

[25] . . . [P]articipation in the Guantanamo Bay process which violates these international instruments would be contrary to Canada's binding international obligations.

[26] We conclude that the principles of international law and comity that might otherwise preclude application of the *Charter* to Canadian officials acting abroad do not apply to the assistance they gave to U.S. authorities at Guantanamo Bay. . . . [The principle of comity ends where clear violations of international law and fundamental human rights begin.]

[27] . . . [A]t the time Canada handed over the fruits of the interviews to U.S. officials, it was bound by the *Charter*, because at that point it became a participant in a process that violated Canada's international obligations. . . .

[30] In the domestic context, the principles of fundamental justice impose a duty on the prosecuting Crown to provide disclosure of relevant information in its possession to the accused whose liberty is in jeopardy

[31] . . . Canadian officials operating abroad are bound . . . in an analogous way. . . . [S]. 7 imposes a duty on Canada to provide disclosure of materials in its possession arising from its participation in the foreign process that is contrary to international law and jeopardizes the liberty of a Canadian citizen.

[32] . . . The scope of the disclosure obligation in this context is defined by the nature of Canada's participation in the foreign process. The crux of that participation was providing information to U.S. authorities in relation to a process which is contrary to Canada's international human rights obligations. Thus, the scope of the disclosure obligation must be related to the information provided to U.S. authorities. . . .

[34] Canada has an obligation under s. 7 to provide disclosure to Mr. Khadr to mitigate the effect of Canada's participation by passing on the product of the interviews to U.S. authorities. . . . If Mr. Khadr is given only partial disclosure of the interviews on the ground that only parts of the interviews were shared with U.S. authorities, it may be impossible for him to evaluate the significance of the parts of the interviews that are disclosed to him. . . . [F]airness requires disclosure of all records in any form of the interviews themselves—whether or not passed on to U.S. authorities—including any transcripts, recordings or summaries in Canada's possession. . . .

[35] . . . The ultimate process against Mr. Khadr may be beyond Canada's jurisdiction and control. However, to the extent that Canada has participated in that process, it has a constitutional duty to disclose information obtained by that participation to a Canadian citizen whose liberty is at stake. . . .

[37] . . . The appellants must disclose (i) all records in any form of the interviews conducted by Canadian officials with Mr. Khadr, and (ii) records of any information given to U.S. authorities as a direct consequence of Canada's having interviewed him. This disclosure is subject to the balancing of national security and other considerations

[41] [A] designated judge will . . . consider whether disclosure of the records described in (i) and (ii) to Mr. Khadr would be injurious to international relations or national defence or national security, and whether the public interest in disclosure outweighs in importance the public interest in non-disclosure. . . .

REFLECTIONS

Judge Aharon Barak, then President of the Supreme Court of Israel, offered his views of the import of Israel's already decades-long counter-terrorism jurisprudence soon after 9/11.

A Judge on Judging Aharon Barak (2002)*

. . . We, the judges in modern democracies, are responsible for protecting democracy both from terrorism and from the means the state wants to use to fight terrorism. . . . It is a myth to think that we can maintain a sharp distinction between the status of human rights during a period of war and . . . during a period of peace. . . . The line between war and peace is thin

Furthermore, a mistake by the judiciary in times of war and terrorism is worse than a mistake of the legislature and the executive The . . . judiciary's mistakes will remain with the democracy when the threat . . . passes, . . . entrenched in the case law of the court as a magnet for the development of new and problematic laws. . . .

Democratic nations should conduct the struggle against terrorism with a proper balance between two conflicting values and principles. . . . [W]e must consider [both] the values and principles relating to the security of the state and its citizens . . . [and those] relating to human dignity and freedom. . . .

This synthesis between national security and individual freedom reflects the rich and fertile character of the principle of rule of law in particular, and of democracy in general. It is within the framework of this approach that the courts in Israel have made their decisions concerning the state's armed conflict against the terrorism that plagues

* Excerpted from Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARVARD LAW REVIEW 19 (2002).

it. Our Supreme Court—which in Israel serves as the court of first instance for complaints against the executive branch—opens its doors to anyone with a complaint about the activities of a public authority. Even if the terrorist activities occur outside Israel or the terrorists are being detained outside Israel, we recognize our authority to hear the issue. We have not used the Act of State doctrine or non-justiciability under these circumstances. We consider these issues on their merits. Nor do we require injury in fact as a standing requirement; we recognize the standing of anyone to challenge the act. . . . These hearings sometimes take place just hours after the alleged incident In one case, the state sought to deport 400 suspected terrorists to Lebanon. Human rights organizations petitioned us. . . . Late that night, I issued an interim order enjoining the deportation. At the time, the deportees were in automobiles en route to Lebanon. The order immediately halted the deportation. Only after a hearing held in our Court throughout the night that included comprehensive argumentation . . . did we invalidate the deportation order. . . .

In all these decisions . . . we have recognized the power of the state to protect its security and the security of its citizens on the one hand; on the other hand, we have emphasized that the rights of every individual must be preserved, including the rights of the individual suspected of being a terrorist. The balancing point between the conflicting values and principles is not constant, but rather differs from case to case and from issue to issue. The damage to national security caused by a given terrorist act and the nation’s response to that act affect the way the freedom and dignity of the individual are protected. . . .

Judicial review of the war against terrorism by its nature raises questions regarding the timing and scope of judicial intervention. There is no theoretical difference between applying judicial review before or after the war on terrorism. In practice, however, . . . Chief Justice Rehnquist . . . correctly noted, . . . “courts are more prone to uphold wartime claims of civil liberties after the war is over.” In light of this recognition, Chief Justice Rehnquist goes on to ask whether it would be better to abstain from judicial adjudication during warfare. The answer . . . is clear: I will adjudicate a question when it is presented to me. I will not defer it until the war on terror is over, because the fate of a human being may hang in the balance. The protection of human rights would be bankrupt if, during armed conflict, courts—consciously or unconsciously—decided to review the executive branch’s behavior only after the period of emergency has ended. Furthermore, the decision should not rest on issuing general declarations about the balance of human rights and the need for security. Rather, the judicial ruling must impart guidance and direction in the specific case before it. . . .

I believe that the court should not adopt a position on the efficient security measures for fighting against terrorism As long as [the other branches of government] are acting within the framework of the “zone of reasonableness,” there is no basis for judicial intervention. Often the executive will argue that “security considerations” led to a government action and request that the court be satisfied with this argument. Such a request should not be granted. “Security considerations” are not

magic words. The court must insist on learning the specific security considerations that prompted the government's actions. The court must also be persuaded that these considerations actually motivated the government's actions and were not merely pretextual. Finally, the court must be convinced that the security measures adopted were the available measures least damaging to human rights. . . .

The security considerations entertained by the branches of the state are subject to "God and the law." In the final analysis, this subservience strengthens democracy. It makes the struggle against terrorism worthwhile. To the extent that the legitimacy of the court means that the acts of the state are lawful, the court fulfills an important role. Public confidence in the branches of the state is vital for democracy. Both when the state wins and when it loses, the rule of law and democracy benefit. The main effect of the judicial decision occurs not in the individual instance that comes before it but by determining the general norms according to which governmental authorities act and establishing the deterrent effect that these norms will have. The test of the rule of law arises not merely in the few cases brought before the court, but also in the many potential cases that are not brought before it, since governmental authorities are aware of the court's rulings and act accordingly. . . .

. . . The court's role is to ensure the constitutionality and legality of the fight against terrorism. It must ensure that the war against terrorism is conducted within the framework of the law. This is the court's contribution to democracy's struggle to survive. . . . Realizing this rule during a fight against terrorism is difficult. We cannot and would not want to escape from this difficulty, as I noted in one case:

. . . Even when the artillery booms and the Muses are silent, law exists and acts and decides what is permitted and what is forbidden, what is legal and what is illegal. And when law exists, courts also exist to adjudicate what is permitted and what is forbidden, what is legal and what is illegal. Some of the public will applaud our decision; others will oppose it. Perhaps neither side will have read our reasoning. We have done our part, however. That is our role and our obligations as judges. . . .

ENCOUNTERING PROTEST

DISCUSSION LEADERS

MUNEER AHMAD AND SUSANNE BAER

III. ENCOUNTERING PROTEST

DISCUSSION LEADERS:

MUNEER AHMAD AND SUSANNE BAER

Martin Luther King, Jr., <i>Letter from Birmingham Jail</i> (1963)	III-4
Walker v. City of Birmingham (Supreme Court of the United States, 1967)	III-7
Shuttlesworth v. City of Birmingham (Supreme Court of the United States, 1969)	III-10

Constraining, Enabling, and Policing Protest

Rakesh Vaishnav & Others v. Union of India & Others (Supreme Court of India, 2021)	III-12
Dhiab v. Obama (U.S. District Court for the District of Columbia, 2014)	III-15
Muneer Ahmad, <i>Resisting Guantánamo: Rights at the Brink of Dehumanization</i> (2009)	III-18
Order of 6 July 2020 (Council of State of France, 2020)	III-21
National Responsibility—Israel My Home v. Israeli Government (Supreme Court of Israel, 2021)	III-23
Snyder v. Phelps (Supreme Court of the United States, 2011)	III-24
Raul Bassi v. Commissioner of Police (NSW) (New South Wales Court of Appeal, Australia, 2020)	III-28
Don't Shoot Portland v. City of Portland (U.S. District Court for the District of Oregon, 2020)	III-31
Kwok Wing Hang and 23 Others v. Chief Executive in Council (Hong Kong Court of Final Appeal, 2020)	III-34
Coastal GasLink Pipeline Ltd. v. Huson (Supreme Court of British Columbia, Canada, 2020)	III-37
Constitutional Petition no. 56 of 2013 (Constitutional Court of Uganda at Kampala, 2020)	III-40

Protest On, About, and From the Bench

Susanne Baer, <i>Democracy in Peril</i> (2019)	III-43
Monica Bell, <i>Police Reform and the Dismantling of Legal Estrangement</i> (2017)	III-46
Jamison v. McClendon (U.S. District Court for the Southern District of Mississippi, 2020)	III-49
Somerset v. Stewart (King's Bench, 1772)	III-52
In re Booth (Supreme Court of Wisconsin, United States, 1854)	III-54
Robert M. Cover, <i>Justice Accused</i> (1975)	III-56

On many occasions, courts have been called upon to protect or to prohibit protest. Although these issues are highly visible today, constitutional courts have faced these questions before. What has changed is the technology that enables live transmission of contentious events and information, which can mobilize people to gather, demonstrate, and counter-demonstrate around the world.

In this chapter, we offer examples of and reflections on courts' roles in protest. Judges have at times recognized and enabled the authority of protestors and on other occasions aimed to suppress or render protests invisible. We explore a range of rule-of-law responses in which courts are part of suppressing, legitimating, regulating, and/or authorizing public expressions aiming to contest public and private actions.

* * *

In the United States, an iconic embodiment of the encounter between courts and political protest came in the context of the nonviolent campaign of Dr. Martin Luther King, Jr.'s Southern Christian Leadership Conference which sought to end segregation and virulent racism in Birmingham, Alabama. Given that Birmingham required a permit to march, Dr. King and his associates, including Reverend Fred Shuttlesworth, applied in April 1963 for a permit to demonstrate on April 12; a city commissioner rejected their application.

In addition, Birmingham officials filed a lawsuit in the Alabama Circuit Court to obtain an injunction against 139 respondents whom they argued had previously violated the ordinance and were likely to do so again. On April 10, 1963, two days before the protestors hoped to march, the City won. A state judge, W.A. Jenkins, Jr., prohibited the demonstration.

It is therefore ordered, adjudged and decreed by the Court . . . that the Register issue a peremptory or temporary writ of injunction that the respondents and the others identified in said Bill of Complaint . . . and all other persons in active concert or participation with the respondents and all persons having notice of said order from continuing any act, [including] . . . engaging in, sponsoring, inciting or encouraging mass street parades or mass processions or like demonstrations without a permit, trespass on private property after being warned to leave the premises by the owner or person in possession of said private property, congregating on the street or public places into mobs, and unlawfully picketing business establishments or public buildings in the City of Birmingham, Jefferson County, State of Alabama or performing acts calculated to cause breaches of the peace in the City of Birmingham, Jefferson County, in the State of Alabama or from conspiring to engage in unlawful street parades, unlawful processions, unlawful demonstrations, unlawful boycotts, unlawful trespasses, and unlawful picketing or other like unlawful conduct or from violating the ordinances

of the City of Birmingham and the Statutes of the State of Alabama or from doing any acts designed to consummate conspiracies to engage in said unlawful acts of parading, demonstrating, boycotting, trespassing and picketing or other unlawful acts, or from engaging in acts and conduct customarily known as ‘kneel-ins’ in churches in violation of the wishes and desires of said churches.*

The leadership of the Birmingham Campaign, including Dr. King and Reverend Shuttlesworth, disobeyed the injunction and led a march through Birmingham. They were arrested and held in a Birmingham jail. There, Dr. King received a copy of what eight white clergymen styled “A Call for Unity”—their statement on April 12, 1963 in which they urged Dr. King and his allies to desist.

[W]e are now confronted by a series of demonstrations by some of our Negro citizens, directed and led in part by outsiders. We recognize the natural impatience of people who feel that their hopes are slow in being realized. But we are convinced that these demonstrations are unwise and untimely. . . .

. . . [A]ctions as incite to hatred and violence, however technically peaceful those actions may be, have not contributed to the resolution of our local problems. We do not believe that these days of new hope are days when extreme measures are justified in Birmingham. . . .

We . . . strongly urge our own Negro community to withdraw support from these demonstrations, and to unite locally in working peacefully for a better Birmingham. When rights are consistently denied, a cause should be pressed in the courts and in negotiations among local leaders, and not in the streets.**

Dr. King penned a response, dated April 16, 1963, which was not published in full until the summer of 1963, when it was reprinted in several publications.

Letter from Birmingham Jail Martin Luther King, Jr. (1963)***

. . . Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects

* Excerpted from Temporary Injunction of April 10, 1963 (Tenth Judicial Circuit of Alabama, 1963).

** Excerpted from *White Clergymen Urge Local Negroes to Withdraw from Demonstrations*, BIRMINGHAM NEWS, April 12, 1963.

*** Excerpted from Martin Luther King, Jr., *Letter from Birmingham Jail*, ATLANTIC MONTHLY, August 1963, at 78.

one directly affects all indirectly. Never again can we afford to live with the narrow, provincial “outside agitator” idea. Anyone who lives inside the United States can never be considered an outsider. . . .

In any nonviolent campaign there are four basic steps: collection of the facts to determine whether injustices are alive, negotiation, self-purification, and direct action. We have gone through all of these steps in Birmingham. There can be no gainsaying of the fact that racial injustice engulfs this community. Birmingham is probably the most thoroughly segregated city in the United States. Its ugly record of police brutality is known in every section of this country. Its unjust treatment of Negroes in the courts is a notorious reality. There have been more unsolved bombings of Negro homes and churches in Birmingham than in any other city in this nation. . . .

You may well ask, “Why direct action, why sit-ins, marches, and so forth? Isn’t negotiation a better path?” You are exactly right in your call for negotiation. Indeed, this is the purpose of direct action. Nonviolent direct action seeks to create such a crisis and establish such creative tension that a community that has consistently refused to negotiate is forced to confront the issue. It seeks so to dramatize the issue that it can no longer be ignored. . . . I have earnestly worked and preached against violent tension, but there is a type of constructive nonviolent tension that is necessary for growth. . . . Too long has our beloved Southland been bogged down in the tragic attempt to live in monologue rather than dialogue.

One of the basic points in your statement is that our acts are untimely. . . . My friends, I must say to you that we have not made a single gain in civil rights without determined legal and nonviolent pressure. . . .

We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed. Frankly, I have never yet engaged in a direct-action movement that was “well timed” according to the timetable of those who have not suffered unduly from the disease of segregation. For years now I have heard the word “wait.” It rings in the ear of every Negro with a piercing familiarity. This “wait” has almost always meant “never.” . . . We must come to see with the distinguished jurist of yesterday that “justice too long delayed is justice denied.” We have waited for more than three hundred and forty years for our God-given and constitutional rights. . . . I guess it is easy for those who have never felt the stinging darts of segregation to say “wait.” . . . There comes a time when the cup of endurance runs over and men are no longer willing to be plunged into an abyss of injustice where they experience the bleakness of corroding despair. . . .

You express a great deal of anxiety over our willingness to break laws. This is certainly a legitimate concern. . . . One may well ask, “How can you advocate breaking some laws and obeying others?” The answer is found in the fact that there are two types of laws: there are just laws, and there are unjust laws. I would agree with St. Augustine that “An unjust law is no law at all.”

. . . Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority. . . . So I can urge men to obey the 1954 decision of the Supreme Court because it is morally right, and I can urge them to disobey segregation ordinances because they are morally wrong. . . .

. . . I must confess that over the last few years I have been gravely disappointed with the white moderate. I have almost reached the regrettable conclusion that the Negro's great stumbling block in the stride toward freedom is not the White Citizens Councillor or the Ku Klux Klanner but the white moderate who is more devoted to order than to justice; . . . who paternalistically feels that he can set the timetable for another man's freedom; who lives by the myth of time; and who constantly advises the Negro to wait until a "more convenient season." . . .

In your statement you asserted that our actions, even though peaceful, must be condemned because they precipitate violence. But can this assertion be logically made? Isn't this like condemning the robbed man because his possession of money precipitated the evil act of robbery? . . . We must come to see, as federal courts have consistently affirmed, that it is immoral to urge an individual to withdraw his efforts to gain his basic constitutional rights because the quest precipitates violence. Society must protect the robbed and punish the robber.

I had also hoped that the white moderate would reject the myth of time. . . . [T]he strangely irrational notion that there is something in the very flow of time that will inevitably cure all ills. Actually, time is neutral. It can be used either destructively or constructively. . . . We must come to see that human progress never rolls in on wheels of inevitability. It comes through the tireless efforts and persistent work of men willing to be coworkers with God, and without this hard work time itself becomes an ally of the forces of social stagnation. . . .

Oppressed people cannot remain oppressed forever. The urge for freedom will eventually come. This is what has happened to the American Negro. Something within has reminded him of his birthright of freedom; something without has reminded him that he can gain it. . . . The Negro has many pent-up resentments and latent frustrations. He has to get them out. . . . If his repressed emotions do not come out in these nonviolent ways, they will come out in ominous expressions of violence. . . . I have tried to say that this normal and healthy discontent can be channeled through the creative outlet of nonviolent direct action. Now this approach is being dismissed as extremist. . . .

. . . Was not Jesus an extremist in love? . . . Was not Abraham Lincoln an extremist? . . . Was not Thomas Jefferson an extremist? . . . So the question is not whether we will be extremist, but what kind of extremists we will be. Will we be extremists for hate, or will we be extremists for love? Will we be extremists for the preservation of injustice, or will we be extremists for the cause of justice? . . .

. . . I am impelled to mention one other point in your statement that troubled me profoundly. You warmly commended the Birmingham police force for keeping “order” and “preventing violence.” . . . I don’t believe you would so quickly commend the policemen if you would observe their ugly and inhuman treatment of Negroes here in the city jail

It is true that they have been rather disciplined in their public handling of the demonstrators. In this sense they have been publicly “nonviolent.” But for what purpose? To preserve the evil system of segregation. . . .

I wish you had commended the Negro demonstrators of Birmingham for their sublime courage, their willingness to suffer, and their amazing discipline in the midst of the most inhuman provocation. One day the South will recognize its real heroes. . . . One day the South will know that when these disinherited children of God sat down at lunch counters they were in reality standing up for the best in the American dream and the most sacred values in our Judeo-Christian heritage. . . .

* * *

On April 20, 1963, Dr. King and his associates were released on bail. Thereafter, an Alabama Circuit Court found the petitioners in contempt of the injunction prohibiting the march and sentenced Dr. King, Reverend Shuttlesworth, and other demonstrators to five days in jail and a fine. The protestors appealed, and in 1967, the U.S. Supreme Court issued a decision.

The debate among the justices—disagreeing about what Dr. King should have done and what the Court ought to do—echoes throughout the rest of this chapter, as jurists continue to probe the meaning of their and others’ constitutional convictions and commitments. In an opinion written by Justice Stewart, the majority affirmed the conviction on the grounds that before violating the injunction, the protestors should have exhausted all available judicial remedies.

Walker v. City of Birmingham
Supreme Court of the United States
388 U.S. 307 (1967)

MR. JUSTICE STEWART delivered the opinion of the Court.

. . . We are asked to say that the Constitution compelled Alabama to allow the petitioners to violate this injunction, to organize and engage in these mass street parades and demonstrations, without any previous effort on their part to have the injunction dissolved or modified, or any attempt to secure a parade permit in accordance with its terms. . . . [W]e cannot accept the petitioners’ contentions in the circumstances of this case. . . .

This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims. But there is no showing that such would have been the fate of a timely motion to modify or dissolve the injunction. There was an interim of two days between the issuance of the injunction and the Good Friday march. The petitioners give absolutely no explanation of why they did not make some application to the state court during that period. . . .

The rule of law that Alabama followed in this case reflects a belief that in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom. . . .

MR. CHIEF JUSTICE WARREN, whom MR. JUSTICE BRENNAN and MR. JUSTICE FORTAS join, dissenting.

. . . These facts lend no support to the court's charges that petitioners were presuming to act as judges in their own case, or that they had a disregard for the judicial process. They did not flee the jurisdiction or refuse to appear in the Alabama courts. Having violated the injunction, they promptly submitted themselves to the courts to test the constitutionality of the injunction and the ordinance it parroted. They were in essentially the same position as persons who challenge the constitutionality of a statute by violating it, and then defend the ensuing criminal prosecution on constitutional grounds. . . .

. . . The only circumstance that the court can find to justify anything other than a *per curiam* reversal is that Commissioner Connor had the foresight to have the unconstitutional ordinance included in an *ex parte* injunction, issued without notice or hearing or any showing that it was impossible to have notice or a hearing, forbidding the world at large (insofar as it knew of the order) to conduct demonstrations in Birmingham without the consent of the city officials. This injunction was such potent magic that it transformed the command of an unconstitutional statute into an impregnable barrier, challengeable only in what likely would have been protracted legal proceedings and entirely superior in the meantime even to the United States Constitution. . . .

. . . The Alabama Circuit Court did not issue this temporary injunction to preserve existing conditions while it proceeded to decide some underlying dispute. There was no underlying dispute before it, and the court in practical effect merely added a judicial signature to a pre-existing criminal ordinance. Just as the court had no need to issue the injunction to preserve its ability to decide some underlying dispute, the city

had no need of an injunction to impose a criminal penalty for demonstrating on the streets without a permit. The ordinance already accomplished that. In point of fact, there is only one apparent reason why the city sought this injunction and why the court issued it: to make it possible to punish petitioners for contempt rather than for violating the ordinance, and thus to immunize the unconstitutional statute and its unconstitutional application from any attack. I regret that this strategy has been so successful. . . .

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE, MR. JUSTICE BRENNAN, and MR. JUSTICE FORTAS concur, dissenting.

. . . Since the Alabama courts have flouted the First Amendment,* I would reverse the judgment. . . .

The record shows that petitioners did not deliberately attempt to circumvent the permit requirement. Rather they diligently attempted to obtain a permit and were rudely rebuffed and then reasonably concluded that any further attempts would be fruitless.

The right to defy an unconstitutional statute is basic in our scheme. Even when an ordinance requires a permit to make a speech, to deliver a sermon, to picket, to parade, or to assemble, it need not be honored when it is invalid on its face. . . .

A court does not have *jurisdiction* to do what a city or other agency of a State lacks *jurisdiction* to do. . . . An ordinance—unconstitutional on its face or patently unconstitutional as applied—is not made sacred by an unconstitutional injunction that enforces it. It can and should be flouted in the manner of the ordinance itself. Courts as well as citizens are not free ‘to ignore all the procedures of the law,’ to use the Court’s language. The ‘constitutional freedom’ of which the Court speaks can be won only if judges honor the Constitution. . . .

* * *

Dr. King, Reverend Shuttlesworth, and other leaders served five days in 1967 in a Birmingham jail as part of their contempt sentence. In addition, Birmingham charged Reverend Shuttlesworth, who had for years been central to efforts to desegregate Birmingham, with violating the city’s General Code that prohibited participation in any parade or procession without first obtaining a permit.

A jury in the Circuit Court found Reverend Shuttlesworth guilty of violating the ordinance, and the judge sentenced him to ninety days’ hard labor and a fine. Reverend Shuttlesworth appealed the conviction on the grounds that the ordinance was

* The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

unconstitutional. The Alabama Court of Appeals agreed and held the ordinance void for vagueness, but the City won in the Supreme Court of Alabama. Reverend Shuttlesworth sought review in the U.S. Supreme Court, where Justice Stewart, again writing for the majority, held the ordinance unconstitutional.

Shuttlesworth v. City of Birmingham
Supreme Court of the United States
394 U.S. 147 (1969)

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

On the afternoon of April 12, Good Friday, 1963, 52 people, all Negroes, were led out of a Birmingham church by three Negro ministers, one of whom was the petitioner, Fred L. Shuttlesworth. They walked in orderly fashion, two abreast for the most part, for four blocks. The purpose of their march was to protest the alleged denial of civil rights to Negroes in the city of Birmingham. The marchers stayed on the sidewalks except at street intersections, and they did not interfere with other pedestrians. No automobiles were obstructed, nor were traffic signals disobeyed. The petitioner was with the group for at least part of this time, walking alongside the others, and once moving from the front to the rear. As the marchers moved along, a crowd of spectators fell in behind them at a distance. The spectators at some points spilled out into the street, but the street was not blocked and vehicles were not obstructed.

At the end of four blocks the marchers were stopped by the Birmingham police, and were arrested for violating § 1159 of the General Code of Birmingham. That ordinance reads as follows:

‘It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefore has been secured from the commission.

‘To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose of which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit. . . .’

The petitioner was convicted for violation of § 1159 and was sentenced to 90 days' imprisonment at hard labor and an additional 48 days at hard labor in default of payment of a \$75 fine and \$24 costs. The Alabama Court of Appeals reversed the judgment of conviction, holding the evidence was insufficient 'to show a procession which would require, under the terms of § 1159, the getting of a permit,' that the ordinance had been applied in a discriminatory fashion, and that it was unconstitutional in imposing an 'invidious prior restraint' without ascertainable standards for the granting of permits. The Supreme Court of Alabama, however, giving the language of § 1159 an extraordinarily narrow construction, reversed the judgment of the Court of Appeals and reinstated the conviction. . . .

There can be no doubt that the Birmingham ordinance, as it was written, conferred upon the City Commission virtually unbridled and absolute power to prohibit any "parade," "procession," or "demonstration" on the city's streets or public ways. For in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of "public welfare, peace, safety, health, decency, good order, morals or convenience." This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional. . . .

. . . The petitioner was clearly given to understand that under no circumstances would he and his group be permitted to demonstrate in Birmingham, not that a demonstration would be approved if a time and place were selected that would minimize traffic problems. There is no indication whatever that the authorities considered themselves obligated—as the Alabama Supreme Court more than four years later said that they were—to issue a permit "if, after an investigation, [they] found that the convenience of the public in the use of the streets or sidewalks would not thereby be unduly disturbed."

. . . Here . . . it is evident that the ordinance was administered so as, in the words of Chief Justice Hughes, "to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought . . . immemorially associated with resort to public places."

CONSTRAINING, ENABLING, AND POLICING PROTEST

Through their bodies, words, and actions, protestors from across the political spectrum aim to bring public attention to a host of injuries and concerns. The materials below illuminate the diverse responses of judges, some of whom have enabled or enhanced protest efforts and others of whom have imposed limits on protestors and on knowledge of their work.

One example of a decision to accommodate protest comes from India. In 2020, the government of India enacted three major farm bills that it promoted as reforms, to which many objected. Among other provisions, the bills sought to open the agricultural industry to private interests and raised the specter of reducing or ending public pricing supports for farmers, who comprised nearly fifty percent of the entire Indian workforce. Key farming groups and unions claimed they were not consulted and took issue with many aspects of the bills. Hundreds of millions of farmers led strikes around the country, including in the capital city. These protests sparked litigation, as some litigants asked courts to stay the implementation of the legislation, and others sought to end the protests. At the time of the opinion below, the protests had been ongoing for nearly five months.

Rakesh Vaishnav & Others v. Union of India & Others

Supreme Court of India

Civil Writ Petition No. 1118/2020 (January 12, 2021)

[The Court, composed of the Honorable Chief Justice S. A. Bobde and the Honorable Justices A. S. Bopanna and V. Ramasubramanian, delivered the following judgment:]

. . . 2. We have before us, three categories of petitions, all revolving around the validity or otherwise of three laws namely: (1) Farmers Produce Trade and Commerce (Promotion and Facilitation) Act, 2020; (2) Essential Commodities (Amendment) Act, 2020; and (3) Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Act, 2020, (hereinafter [collectively] referred to as the farm laws), and the protest by farmers against these laws.

3. One category of petitions challenge the constitutional validity of the farm laws. . . .

4. Another category of petitions are those which support the farm laws on the ground that they are constitutionally valid and also beneficial to the farmers. The third category of petitions are those filed by individuals . . . claiming that the agitation by farmers in the peripheries of Delhi and the consequent blockade of roads/highways leading to Delhi, infringes the fundamental rights of other citizens to move freely throughout the territories of India and their right to carry on trade and business.

5. Though several rounds of negotiations have taken place between the Government of India and the farmers' bodies, no solution seems to be in sight. The situation on ground is: (i) that senior citizens, women and children are at site, exposing themselves to serious health hazards posed by cold and [COVID-19]; (ii) that a few deaths have taken place, though not out of any violence, but either out of illness or by way of suicide.

6. Laudably, the farmers have so far carried on the agitation peacefully and without any untoward incident. But it was pointed out in the course of hearing that a few persons who are not farmers have also joined, with a view to show solidarity with

the farmers. An apprehension was expressed that the possibility of some persons creating trouble cannot be entirely ruled out. . . .

8. . . . [T]he negotiations between the farmers' bodies and the Government have not yielded any result so far. Therefore, we are of the view that the constitution of a Committee of experts in the field of agriculture to negotiate between the farmers' bodies and the Government of India may create a congenial atmosphere and improve the trust and confidence of the farmers. We are also of the view that a stay of implementation of all . . . three farm laws for the present, may assuage the hurt feelings of the farmers and encourage them to come to the negotiating table with confidence and good faith.

9. . . . [T]he learned Attorney General, even while agreeing for the constitution of a Committee, opposed . . . any interim stay of the implementation of the farm laws. . . . He argued that . . . the laws enacted by Parliament cannot be stayed by this Court, especially when there is a presumption in favour of the constitutionality of legislation.

10. Though we appreciate the aforesaid submission . . . this Court cannot be said to be completely powerless to grant stay of any executive action under a statutory enactment. Even very recently this Court passed an interim Order . . . directing that admissions to educational institutions for the Academic Year 2020-21 and appointments to public services and posts under the Government shall be made without reference to the reservation provided under the impugned legislation.

11. As a matter of fact, some of the farmers' bodies who are opposing the [farm laws] and who are represented before us through counsel, have agreed to go before the Committee. . . .

12. Mr. V. Chitambaresh, learned senior counsel . . . submitted that the Union which he represents is not aggrieved by the Farm Laws. Mr. Sridhar Potaraju, learned counsel appearing for the . . . Consortium of Indian Farmers Association (CIFA) submits that his client represents 15 farmers' unions across 15 States and that they will be badly affected if a stay of the . . . Farm Laws is ordered. This is for the reason that the farmers whom he represents, cultivate fruits and vegetables and that about 21 million tonnes of fruits and vegetables will rot, if anything is done at this stage. . . .

14. Having heard different perspectives, we deem it fit to pass the following interim Order, with the hope and expectation that both parties will take this in the right spirit and attempt to arrive at a fair, equitable and just solution to the problems:

(i) The implementation of the three farm laws . . . shall stand stayed until further orders;

(ii) . . . [T]he farmers' land holdings shall be protected, i.e., no farmer shall be dispossessed or deprived of his title as a result of any action taken under the Farm Laws.

(iii) A Committee . . . is constituted for the purpose of listening to the grievances of the farmers relating to the farm laws and the views of the Government and to make recommendations. . . . The representatives of all the farmers' bodies, whether they are holding a protest or not and whether they support or oppose the laws shall participate in the deliberations of the Committee and put forth their [viewpoints]. The Committee shall, upon hearing the Government as well as the representatives of the farmers' bodies, and other stakeholders, submit a Report before this Court containing its recommendations. . . .

15. While we may not stifle a peaceful protest, we think that this extraordinary order of stay of implementation of the farm laws will be perceived as an achievement of the purpose of such protest at least for the present and will encourage the farmers' bodies to convince their members to get back to their livelihood, both in order to protect their own lives and health and in order to protect the lives and properties of others. . . .

* * *

After the Supreme Court of India's order, farmers' representatives objected that many of the officials selected to serve on the Committee were pro-government. These complaints resulted in at least one candidate stepping down the day after his appointment. As of June 2021, farmers were continuing their protests against the government, and contentious political deliberations were ongoing.

* * *

Accommodating public protest is one issue; another is deciding whether the public has a right to know about protests of individuals whom governments hold in detention. An example from the United States involved Wa'el (Jihad) Dhiab, who was captured in 2002 in Pakistan, alleged to have assisted al-Qaeda, and brought to the U.S. Naval Base in Guantánamo Bay, Cuba. In 2009, United States authorities cleared him for release, but by 2014, Dhiab remained at Guantánamo. After he began a hunger strike, he was forcibly extracted from his cell and fed. When seeking to enjoin those actions, Dhiab's counsel learned that the government had recorded these events but classified the tapes as "Secret." Several major media outlets joined Dhiab in seeking access to those tapes. Excerpted below is the district court's decision, which agreed that the tapes ought to be released.

Dhiab v. Obama
U.S. District Court for the District of Columbia
70 F.Supp.3d 486 (2014)*

GLADYS KESSLER, United States District Judge[:]

Wa’el (Jihad) Dhiab, a citizen of Syria, has been held by the United States Government in a detention facility at the United States Naval Base in Guantánamo Bay, Cuba since as early as 2002. In 2009, the Guantánamo Review Task Force cleared Mr. Dhiab for release . . . , [but] he remains imprisoned there. In protest of his . . . detention, Mr. Dhiab has been on a long-term hunger strike.

On April 9, 2013, the Government . . . beg[a]n to feed Mr. Dhiab nasogastrically against his will. . . .

In May of 2014, the Government disclosed that it possessed videotapes of Mr. Dhiab’s forced-feedings and forcible cell extractions. Mr. Dhiab . . . wants these videotapes to be made public. . . .

On July 30, 2013, Mr. Dhiab and several other hunger-striking detainees submitted a motion to enjoin the Government from continuing to [tube feed] them. This Court denied the Motion

. . . [O]n April 18, 2014, Mr. Dhiab again filed a Motion . . . requesting that the Court enjoin the Government from enterally feeding him and from forcibly extracting him from his cell. After Petitioner renewed his Motion, the Government disclosed that it possessed videotapes of Mr. Dhiab’s forced-feedings and FCEs.

On May 13, 2014, Petitioner filed an Emergency Motion for an order compelling the Government . . . to produce those videotapes to Petitioner’s counsel. On May 23, 2014, the Court . . . directed the Government to produce to Petitioner’s counsel “all videotapes made between April 9, 2013 and February 19, 2014, that record both [Mr. Dhiab’s] Forcible Cell Extractions and subsequent enteral feeding.” The Government complied with that Order

. . . Petitioner placed 28 videotapes in the judicial record for this case. The Government produced four additional videotapes to Petitioner

The videotapes have been classified at the “secret” level, based on the Government’s belief that the contents of these twenty-eight videotapes “could reasonably be expected to cause serious damage to national security if disclosed.” . . .

* Reversed by *Dhiab v. Trump*, 852 F.3d 1087 (D.C. Cir., 2017).

On June 20, 2014, Intervenor [Hearst Corporation, Inc., ABC, Inc., Associated Press, Bloomberg L.P., CBS Broadcasting, Inc., The Contently Foundation, Dow Jones & Company, Inc., First Look Media, Inc., Guardian US, The McClatchy Company, National Public Radio, Inc., The New York Times Company, Reuters America LLC, Tribune Publishing Company, LLC, USA TODAY, and The Washington Post] filed their Motion to Unseal Videotape Evidence filed in this proceeding's record. . . .

The First Amendment's express guarantees . . . carry with them an implicit right of public access to particular government information. Our Court of Appeals has held that "[t]he first amendment guarantees the press and the public a general right of access to court proceedings and court documents unless there are *compelling reasons* demonstrating why it cannot be observed."

. . . [I]n order to determine whether a particular proceeding and related judicial records are subject to the public's right of access, courts apply a two-part test, commonly referred to as the test of "experience and logic." The first prong of that test asks whether there is a history of access to the proceeding. The second prong considers whether public access "plays a significant positive role in the functioning of the particular process in question." Failure at either stage of the test is fatal to a First Amendment public access claim.

The public's right of access, once established, is a qualified one. Limits on the public's right to access judicial records are appropriate only upon the demonstration of an "overriding interest based on findings that closure is essential to preserve higher values." . . .

The party seeking closure must show a "substantial probability" of harm to an "overriding interest" which has been identified; even a "reasonable likelihood" of harm does not suffice.

Any limit on public access that a court does impose must be "narrowly tailored to serve that interest." Complete closure of the judicial record is proper only in the absence of any alternatives that would provide adequate protection. . . .

The Court is well aware . . . that in no case involving Guantánamo Bay detainees has any court ordered disclosure of classified information over the Government's opposition. . . .

Respondents . . . contend . . . that when a document has been deemed classified by the Executive Branch, that fact alone should bind the court to conclude that public access would not play a significant positive role.

. . . Courts must consider the history and virtues of access to particular *proceedings*, not the information that may arise during those proceedings. Once the right of access to a proceeding has been established, courts may use narrowly tailored

measures to protect compelling interests, like the safeguarding of sensitive information. . . .

. . . [Another Court of Appeals has stated that] “A blind acceptance by the courts of the government’s insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse.”

The Government identifies five means by which release of the videotapes would give rise to a substantial probability of harm to a compelling interest: (1) the videos could aid the development of countermeasures to FCEs; (2) depictions of camp infrastructure in the videos could allow detainees or others to disrupt the camp; (3) detainees might respond to release of the videos by deliberately trying to behave in such a way that necessitates greater use of the FCEs; (4) the videos could “inflame Muslim sensitivities overseas” or be used as propaganda; (5) release of the videotapes could subject Mr. Dhiab to “public curiosity” and “could affect the practice of other states in this regard, which would in turn dilute protections afforded U.S. service personnel in ongoing overseas contingency operations and future conflicts.” . . .

. . . [I]t is our responsibility, as judges, . . . to ensure that any efforts to limit our First Amendment protections are scrutinized with the greatest of care. . . .

Therefore, when the sealed facts are already public, maintaining documents under seal is only appropriate when, despite what the public already knows, the documents’ release would *still* give rise to a substantial probability of harm. . . .

In reviewing Rear Admiral Butler’s justifications for closure, the Court finds—as it will now detail—that most of them are unacceptably vague, speculative, lack specificity, or are just plain implausible.

. . . [T]he Declaration relied on by the Government refers to the possibility that “detainees and other enemies” may develop countermeasures to the FCE and forced-feeding procedures. Nowhere does the Government specify what these “countermeasures” may be

. . . [T]he Government has already released substantial information relating to the feeding process, including the layout of and equipment in the enteral feeding space. It strains credulity to conclude that release of these videos has a substantial probability of causing the harm the Government predicts. . . .

Given what is already available to the public and known to the detainees, it simply is not plausible to argue that release of the videos will give rise to an *additional* probability of harm by encouraging the development of FCE countermeasures. . . .

[The Government] warn[s] that the public release of FCE and enteral feeding “videos,” . . . would prove useful as propaganda for Al Qaeda and its affiliates and could increase anti-American sentiment

However, . . . [t]he rights afforded by the First Amendment cannot be defeated “simply because [the rights exercised] might offend a hostile mob.” . . .

. . . Given the extensive publicity about [Mr. Dhiab’s] situation, and the fact that on any number of occasions his lawyers have talked to members of the press to describe his plight, the Government’s concern that he would be harmed in any way by release of the videos is not plausible. . . .

For the foregoing reasons, Interveners’ Motion to Intervene and to Unseal Videotape Evidence is hereby granted with specified conditions.

* * *

The Government applied for and obtained a stay of the order unsealing the tapes. In 2017, in *Dhiab v. Trump*, the Court of Appeals for the D.C. Circuit reversed the district court’s decision and held that the government had met its burden to keep the tapes under seal. The court agreed that in general, the public had rights of access to evidentiary proceedings, but that closure was permissible when essential to preserving “higher values” and if narrowly tailored to serve that interest. The appellate court reasoned that, because the civil habeas action involved national security and public access to habeas proceedings had not clearly been part of the common law tradition, the recordings were to remain sealed. In an essay written before this litigation, Muneer Ahmad explored the avenues of protest available to people held in detention and the interaction between rights-based approaches and other forms of contestation.

Resisting Guantánamo: Rights at the Brink of Dehumanization Muneer Ahmad (2009)*

. . . What is the value of resistance, and what is the benefit of conceiving of rights in a resistance frame? To answer this question, I first examine modes of resistance engaged in directly by the prisoners at Guantánamo—in particular, the hunger strike—and then suggest that these forms of resistance and the litigation undertaken by the prisoners’ lawyers are more similar than they might first seem. In so doing, I argue that the rights-based litigation in which the lawyers engaged may be nothing more—but importantly, nothing less—than a mode of resistance to state violence.

The lawyers representing the Guantánamo prisoners have done extraordinary work. Over a period of six years, they have filed hundreds of motions, secured Supreme Court victories in three cases, and forced a public accounting of the government. In

* Excerpted from Muneer Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NORTHWESTERN UNIVERSITY LAW REVIEW 1683, 1753 (2009).

addition, they have engaged in the kind of multidimensional advocacy that is frequently urged among social change theorists Despite these efforts, the vast majority of prisoners have yet to receive a meaningful opportunity to contest the legality of their detention, and the habeas courts have yet to determine what substantive rights the prisoners even possess. Perhaps most damning, the issue before the Supreme Court . . . in 2008 was, functionally, the same as that brought before the Court . . . in 2003: whether the prisoners can be heard in habeas corpus proceedings. Although the prisoners prevailed in both cases, the victory in *Rasul* necessarily has tempered enthusiasm for that in *Boumediene*. It is no wonder, then, that in the eyes of many prisoners, nothing has changed.

This is not to say that legal process does not work, for during this time many prisoners have been released after litigation exposed the injustice of their imprisonment, and a small number have since been released following orders by the habeas courts. Moreover, the litigation appears to have played an important role in shifting the politics around Guantánamo, enabling President Obama's promise to close the facility. And yet, the . . . victories of *Rasul* and *Boumediene* coexist with Guantánamo's ongoing operation, suggesting that the litigation, while effective, might be insufficient.

This unsatisfying record only deepened many of the prisoners' despair. When the lawyers first got to Guantánamo, over two years after it opened, and after two years of isolation, interrogation, and torture, there was a moment of hope for many prisoners. For the first time since their capture, there was someone on their side. . . . I believe that many of the prisoners initially placed their faith in their lawyers and gave the lawyers the benefit of the doubt. But as the mountains of motions piled up without meaningful change in the material conditions of the prisoners' lives, as the clarity of *Rasul*'s promise of a hearing before an impartial judge dissolved into convolution, formalism, and bureaucracy of federal litigation, the detainees' despair began to return. . . .

It is against this backdrop of unsuccessful legal advocacy, unending detention, and the persistence of legal forms such as "enemy combatancy" . . . that some prisoners have charted an alternative path of action and protest. . . .

. . . Hunger strikes have been a persistent feature of Guantánamo since shortly after the interrogation and detention center opened. Some of the hunger strikes have been short-lived, while others have been broken by a government's policy of forced feeding. . . . At the end of 2005, by which time the habeas litigation had seriously stalled, eighty-four prisoners were on hunger strike, leading the government to initiate its forced-feeding policy; by February 2006, only three prisoners remained on hunger strike. . . .

We can understand the radical hunger strike—radical not in its ideology, but in its peaceful invitation to violence—as a rejection of the rights-based strategy. Rather than making recourse to rights to intercede in the conflict between state and individual, the hunger striker seeks to force the confrontation. He understands that while rights may

mediate the conflict to the individual's advantage, the mediation also serves the interests of the state, as it both legitimizes and masks the violence of state action. The hunger striker has made a strategic calculation that the invocation of rights at Guantánamo does more work for the government than it does for the prisoner, for it contributes to the perception that the prisoners are subject to legal process, that Guantánamo is governed by law, while the government's ability to maintain its detention regime is little disturbed. Thus, the hunger striker seeks to expose the inherent violence of the state by forcing upon the government an unmediated confrontation. . . .

My point is not to argue that the prisoners' hunger strikes have been more effective than the lawyers' rights-based litigation, or vice versa, nor do I seek to romanticize hunger strikes or denigrate rights. Rather, I see both strategies pulling in the same direction, and both arising from the same conceptual and material challenge of confronting the violence of state power. Moreover, lawyers can play three critical roles with respect to hunger strikes, even assuming that rights are ultimately insufficient to gain their clients' freedom. First, through the assertion of rights, they can dramatize the injustice of Guantánamo, thereby making hunger strikes appear all the more logical and sympathetic. Second, for the many prisoners who are either unwilling or unable to engage in such self-harming self-help as hunger strikes, lawyers are able to use rights-based strategies to engage in resistance on their behalf. In so doing, lawyers take professional risk on their clients' behalf and may provide sustenance to their clients by demonstrating in direct and appreciable ways their willingness not only to provide legal representation, but to vouch for their client's humanity. Lastly, lawyers are able to help publicize the hunger strikes—to amplify their clients' pangs of hunger This proved to be a highly effective strategy in the case of Sami al-Haj, whose lawyers used court filings to oppose the practice of forced feeding and simultaneously to raise the profile of al-Haj's condition. . . .

. . . That the struggle of Guantánamo is fundamentally one of humanity, the social and political meaning of the biological flesh warehoused there, makes inevitable the direct participation of the prisoners in the conflict. The process of representation at Guantánamo recapitulates the divestiture of agency on which Guantánamo was built, and for many (though not all) of the prisoners, unacceptably so. The hunger strike is a profound and necessary assertion of the self—messy, unabstracted, and inescapably human. Because Guantánamo places the prisoners on the razor's edge of bare life, such direct resistance is not merely an act of defiance or a means of retaliation, but a way of staying human. The crisis the prisoners face—year after year of unending detention—is fundamentally existential, and it therefore follows that the prisoners would want, and need, to assert what agency they can.

Ultimately, the body in extremis must speak. For the lawyers, our challenge is to listen and to amplify, to be in conversation, to speak when our clients cannot, and sometimes to be in silence, so that the clients' assertion of humanity might be heard. The prisoners' resistance thus underscores a far more basic value of the lawyers' rights assertion: it, too, is resistance, and it, too, can help to keep the prisoners human.

* * *

Litigation around protest often centers on what restrictions governments can impose, as courts are asked to assess safety and the rights of assembly. The concerns about the spread of disease during COVID and disagreements about COVID regulations put those issues into stark relief.

Order of 6 July 2020
Council of State of France
Nos. 44125, 441263, 441384 (2020)*

[BEFORE THE COUNCIL OF STATE]:

. . . [Several labor unions and tenants' organizations petition the Council] to suspend the execution [of an emergency order] . . . prescribing general measures necessary to address the COVID-19 epidemic. . . .

4. . . . Article 1 of the decree dated May 31, 2020 prescribes measures and general guidelines needed to deal with the COVID-19 epidemic in the context of the state of health emergency Article 3 of the decree dated May 31, 2020 . . . provides that “any gathering, meeting or activity . . . on the public highway, or in a public place, bringing together more than ten people, is prohibited throughout the territory of the Republic. . . . the gatherings, meetings or activities which are essential to the continuity of the life of the Nation may be maintained by way of derogation by the prefect of the department, or by regulatory measures . . .” and [part 5 of Article 3] provides that no event bringing together more than 5,000 people can take place in the territory of the Republic until August 31, 2020. . . .

5. In an order dated June 13, 2020, the judge of the Council of State . . . suspended the execution of [certain] provisions of the decree of May 31, 2020, . . . insofar as the prohibition they enacted applied to demonstrations on public roads The Prime Minister, the next day, by a decree dated June 14, 2020, amended Article 3 of the decree dated May 31, 2020. He . . . inserted [language] stating that: “. . . processions, parades, and gatherings of people . . . may be authorized by the [police] prefect of the department if the plans for their organization are in compliance with the provisions in Article 1 of this decree [describing social distancing regulations]”

6. The applicants ask the judge for summary proceedings of the Council of State . . . suspending the execution of [certain provisions] of the decree dated May 31, 2020 . . . insofar as they apply to demonstrations on public roads

* Translation by Braden Currey (Yale Law School, J.D. Class of 2023).

10. Freedom of expression and communication are guaranteed by Articles 10* and 11** of the European Convention for the Protection of Human Rights and Fundamental Freedoms, from which derives the right of collective expression of ideas and opinions, which constitutes a fundamental freedom. . . . However, these rights must be reconciled with the constitutional value of the protection of public health and with the maintenance of public order.

11. . . . Measures which limit the exercise of fundamental rights and freedoms must . . . be necessary, appropriate and proportionate to the objective of safeguarding public health

16. . . . As long as the [the police] has not commented on the request for authorization of these events . . . the events are effectively prohibited [I]n the absence of any time limit for the prefect to make a decision, there may not be any administrative remedy available before the date of the planned demonstration. . . .

17. In these circumstances, the pleading alleging that the contested provisions . . . of Article 3 of the decree dated May 31, 2020 do not constitute a necessary measure and are not proportionate to the objective of preserving public health . . . [the pleading] is capable, at this stage in the proceedings, of creating a serious doubt as to [Article 3's] legality. . . .

18. . . . [I]n view of the imminence of several of the planned demonstrations, there is a basis to grant the request for an order . . . to suspend the execution of the [contested provisions of Article 3] insofar as they apply to demonstrations on public roads [subject to pre-approval by police authorities]

19. . . . [Part 5 of Article 3] provides . . . that no event of more than 5,000 people can take place on the territory of the Republic

20. . . . [The High Council for Public Health] has stated that mass gatherings can amplify the transmission of the SARS-CoV-2 virus and indicated that the risk of transmission appears to be proportional to the proximity and frequency of interactions between an infected individual and an uninfected individual. Given the state of the national epidemiological situation . . . the pleading alleging that this restriction . . . is not a necessary, suitable or proportionate infringement on the freedom to demonstrate

* Article 10 of the European Convention on Human Rights provides in part:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. . . .

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

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. . . .

and is not, at this stage of the proceedings, sufficient to create serious doubt about its legality. . . .

National Responsibility—Israel My Home v. Israeli Government

Supreme Court of Israel
HCJ 5469/20 (April 4, 2021)*

The petitions in this matter concerned the emergency legislation enacted for the sake of coping with the threat of Covid-19 . . . as well as with the regulations promulgated based on this law in the context of imposing further limitations on demonstrations.

The petitions focused on the statutory power to declare a “special state of emergency”—a declaration that grants the government power to impose further restrictions on social activities, including participation in demonstrations, public prayers and religious ceremonies. In addition, they challenged regulation 24 which had set limitations on demonstrations taking place during a “special state of emergency” (by prohibiting participation in demonstrations held further than 1 km from one’s place of residence and setting a maximum cap of 20 persons for a gathering).

[The Supreme Court unanimously dismissed the petitions against the law itself. President Hayut, Deputy President Melcer, and Justices Hendel, Vogelmann, Amit, Barak-Erez, Mazuz, and Baron accepted the petition against the distance limitations set by regulation 24, with only Justice Sohlberg dissenting in this matter. The following is excerpted from a summary of the holding.]

The majority opinion held that the distance restriction set by regulation 24(1) is void. It was held that this regulation, which was in force during the declaration of a “special state of emergency” between October 1, 2020 and October 13, 2020, does not meet constitutional standards since it consists severe infringement of the freedom to demonstrate and of free speech. The court held that the ability to choose the location in which the demonstration would take place is a substantial part of its message, especially when it is planned to take place in front of a formal residence of a public representative. Moreover, the court emphasized the special importance of the ability to criticize the government in times of emergency. Accordingly, the court further held that the fines imposed on participants in demonstrations during that period were void, and that payments which were made in accordance with these fines should be refunded.

The majority also held that the limitation imposed by regulation 24(2) (on the number of participants in a demonstration during a “special emergency situation”) should be interpreted (as argued for by the government) as imposing a requirement of maintaining “capsules” of 20 people each, with distance between them, rather than as imposing a cap on the total number of participants in a single demonstration.

* We draw from an English summary of the decision.

Accordingly, it was held that this limitation on the right to demonstrate is directly linked to the dangers posed by the pandemic and that therefore it is proportionate.

The majority also criticized the decision-making process in the government prior to the approval of the regulations—a hasty process made via telephone communication late at night. However, most of the majority justices held that this failure alone does not justify regarding regulation 24 as void. In contrast, Justice Mazuz held that the deficiency of the decision-making process should deem regulation 24 in its entirety as void, whereas Justices Barak-Erez and Melcer held that this deficiency was an additional reason for deeming only regulation 24(1) as void. . . .

In the minority opinion, Justice Sohlberg held that since the limitations no longer apply and were actually in force for only 13 days, the petitions should be dismissed as theoretical.

* * *

Recognizing a right to protest does not—in U.S. constitutional parlance—determine its time, place, or manner. Debates about bounding protest are legion. Here we use an example that puts the question into especially sharp relief because the expressive activity is distasteful, as it aimed to disrupt a family’s burial rituals.

Snyder v. Phelps
Supreme Court of the United States
562 U.S. 443 (2011)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court [in which Justices SCALIA, KENNEDY, THOMAS, GINSBURG, BREYER, SOTOMAYOR, and KAGAN joined:]

. . . Fred Phelps founded the Westboro Baptist Church in Topeka, Kansas, in 1955. The church’s congregation believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in America’s military. The church frequently communicates its views by picketing, often at military funerals. . . .

Marine Lance Corporal Matthew Snyder was killed in Iraq in the line of duty. Lance Corporal Snyder’s father selected the Catholic church in the Snyders’ hometown of Westminster, Maryland, as the site for his son’s funeral. . . .

. . . On the day of the memorial service, the Westboro congregation members picketed on public land adjacent to public streets near . . . Matthew Snyder’s funeral. The Westboro picketers carried signs . . . stat[ing], for instance: “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don’t Pray for the USA,” “Thank God for IEDs,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “God Hates Fags,” “You’re Going to Hell,” and “God Hates You.” . . .

Snyder filed suit against Phelps . . . and the Westboro Baptist Church [“Westboro”] . . . [alleging] defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy [under state tort law, specifically]. . . .

A jury found for Snyder on the intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims, and held Westboro liable for \$2.9 million in compensatory damages and \$8 million in punitive damages. . . .

In the Court of Appeals, Westboro’s primary argument was that the church was entitled to judgment as a matter of law because the First Amendment fully protected Westboro’s speech. The Court of Appeals agreed. . . .

Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case. . . .

Speech deals with matters of public concern when it can “be fairly considered as relating to any matter of political, social, or other concern to the community,” or when it “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.” The arguably “inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.” . . .

The “content” of Westboro’s signs plainly relates to broad issues of interest to society at large, rather than matters of “purely private concern.” . . . While these messages may fall short of refined social or political commentary, the issues they highlight . . . are matters of public import. . . .

Apart from the content of Westboro’s signs, Snyder contends that the “context” of the speech—its connection with his son’s funeral—makes the speech a matter of private rather than public concern. The fact that Westboro spoke in connection with a funeral, however, cannot by itself transform the nature of Westboro’s speech. . . .

Snyder goes on to argue that Westboro’s speech should be afforded less than full First Amendment protection “not only because of the words” but also because the church members exploited the funeral “as a platform to bring their message to a broader audience.” . . .

Westboro’s choice to convey its views in conjunction with Matthew Snyder’s funeral made the expression of those views particularly hurtful to many, especially to Matthew’s father. . . . But Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street. Such space occupies a “special position in terms of First Amendment protection.” . . .

That said, “[e]ven protected speech is not equally permissible in all places and at all times.” Westboro’s choice of where and when to conduct its picketing is not beyond the Government’s regulatory reach—it is “subject to reasonable time, place, or manner restrictions” that are consistent with the standards announced in this Court’s precedents. Maryland now has a law imposing restrictions on funeral picketing, as do 43 other States and the Federal Government. To the extent these laws are content neutral, they raise very different questions from the tort verdict at issue in this case. . . .

We have identified a few limited situations where the location of targeted picketing can be regulated under provisions that the Court has determined to be content neutral. . . . The facts here are obviously quite different, both with respect to the activity being regulated and the means of restricting those activities.

Simply put, the church members had the right to be where they were. . . . The picketing was conducted under police supervision some 1,000 feet from the church, out of the sight of those at the church. The protest was not unruly; there was no shouting, profanity, or violence.

The record confirms that any distress occasioned by Westboro’s picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself. . . .

Given that Westboro’s speech was at a public place on a matter of public concern, that speech is entitled to “special protection” under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt. . . .

The jury here was instructed that it could hold Westboro liable for intentional infliction of emotional distress based on a finding that Westboro’s picketing was “outrageous.” . . . What Westboro said, in the whole context of how and where it chose to say it, is entitled to “special protection” under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous. . . .

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case. . . .

JUSTICE ALITO, dissenting:

Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.

. . . Mr. Snyder wanted what is surely the right of any parent who experiences such an incalculable loss: to bury his son in peace. But respondents, members of the Westboro Baptist Church, deprived him of that elementary right. . . .

. . . The more outrageous the funeral protest, the more publicity the Westboro Baptist Church is able to obtain. Thus, when the church recently announced its intention to picket the funeral of a 9-year-old girl killed in the shooting spree in Tucson . . . their announcement was national news, and the church was able to obtain free air time on the radio in exchange for canceling its protest. . . .

. . . [T]he Court finds that “the overall thrust and dominant theme of [their] demonstration spoke to” broad public issues. . . . I fail to see why actionable speech should be immunized simply because it is interspersed with speech that is protected. The First Amendment allows recovery for defamatory statements that are interspersed with nondefamatory statements on matters of public concern

. . . Exploitation of a funeral for the purpose of attracting public attention “intrud[es] upon [the family’s] . . . grief,” and may permanently stain their memories of the final moments before a loved one is laid to rest. Allowing family members to have a few hours of peace without harassment does not undermine public debate. . . .

In order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims like petitioner. I therefore respectfully dissent.

* * *

The incident that spurred the state tort law litigation in *Snyder v. Phelps* took place in March of 2006. In response to public outcry around such picketing, Congress enacted two statutes (38 U.S.C. § 2413 and 18 U.S.C. § 1388) that created 150-foot buffer zones to delineate a space in which demonstrations related to funerals were not to take place. One statute, 38 U.S.C. § 2413, established these zones at funerals in cemeteries owned by the National Cemetery Administration and at Arlington National Cemetery, and the other, 18 U.S.C. § 1388, created parallel zones for funerals of members or former members of the Armed Forces. To enforce these provisions, Congress authorized the Attorney General to bring prosecutions or to pursue civil remedies against violators; Congress also specified that individuals harmed by the protests could seek damages. Neither these statutes, nor their many state counterparts, were at issue in *Snyder*, yet Chief Justice Roberts implicitly referenced them in the majority opinion.

Westboro’s choice of where and when to conduct its picketing is not beyond the Government’s regulatory reach—it is ‘subject to reasonable time, place, or manner restrictions’ . . . consistent with the standards announced in this Court’s precedents. Maryland now has a law imposing restrictions on funeral picketing, as do 43 other States

and the Federal Government. To the extent these laws are content neutral, they raise very different questions from the tort verdict at issue in this case.

In 2014, three years after the decision in *Snyder*, the Court addressed the constitutionality of a buffer zone created by a Massachusetts statute aiming to protect individuals seeking abortions. The state statute made it a crime to “knowingly stand on a ‘public way or sidewalk’ within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions [were] performed.”* After a trial, the lower federal courts upheld the statute, but in *McCullen v. Coakley*, a majority of the Supreme Court (again in an opinion by Chief Justice Roberts) held that the state statute was not narrowly tailored enough to respond to the significant government interests. As Professor Leslie Kendrick explained, what the decision meant “for the myriad buffer zones that governments use in other contexts, from political conventions to funerals, to the regulation of panhandling—or for content-neutral laws generally—is anyone’s guess.”**

* * *

As protestors across the globe gathered in the summer of 2020 in reaction to the killing of George Floyd by police in Minneapolis in the United States, the question of the right to protest was raised in a variety of jurisdictions. One example comes from New South Wales.

Raul Bassi v. Commissioner of Police (NSW)
New South Wales Court of Appeal, Australia
[2020] NSWCA 109

[Judges BATHURST, BELL, and LEEMING delivered the opinion of the Court:]

. . . 4 The proceedings before the primary judge related to a proposed public assembly set to commence in Sydney . . . on . . . 6 June 2020.

5 The assembly had been organised by the appellant (Mr Bassi) in response to the tragic death of Mr George Floyd . . . on 25 May 2020

7 . . . [T]he appeal was allowed by reason of . . . a notice of intention to hold a public assembly . . . which had been given . . . by Mr Bassi to the Commissioner on 29 May 2020. . . .

* *McCullen v. Coakley*, 573 U.S. 464 (2014).

** Leslie Kendrick, *Nonsense on Sidewalks: Content Discrimination in McCullen v. Coakley*, 2014 SUPREME COURT REVIEW 215, 241 (2015).

16 . . . Mr Bassi completed the prescribed form for the purposes of registering his intention to hold a public assembly. . . .

19 . . . Mr Bassi emailed the Notice of Intention . . . to the Commissioner on 29 May 2020. . . for a public vigil of approximately 50 persons

22 In . . . the week leading up to the proposed assembly, the increased public support for the proposed vigil . . . led Mr Bassi to get in touch with Chief Inspector Dunstan to inform him that a bigger location was required A meeting occurred on . . . 4 June 2020 . . . between Mr Bassi and Chief Inspector Dunstan

23 . . . [I]t appeared to [Mr. Bassi] that agreement had been reached at this meeting that the assembly could be held in the square in front of the Sydney Town Hall . . . , and that there would be a procession thereafter to Belmore Park. . . . Chief Inspector Dunstan agreed . . . that a proposal to that effect was made . . . at their meeting.

24 What occurred thereafter is of particular significance. The Police evidently made it clear to Mr Bassi that the new details in relation to the proposed assembly needed to be formalised. With commendable co-operation, it was agreed that Sergeant Hallett who, it may be inferred, also participated in the meeting, would prepare an amended Form 1 to be sent to Mr Bassi to reflect the new particulars of the proposed assembly. . . .

29 . . . [T]he proceedings before [Judge Fagan,] the primary judge, were commenced not by Mr Bassi but rather by the Commissioner. . . . [O]n the afternoon of Friday 5 June 2020, the Commissioner sought an order . . . “prohibiting the holding of a public assembly in respect of which the defendant [Mr Bassi] served a notice”

31 . . . [On 5 June] the primary judge took the view . . . that there was no notice given on 29 May 2020 for the assembly ultimately proposed, and that the only notice of such a proposed assembly was given . . . on 4 June 2020 following a meeting between Mr Bassi and Chief Inspector Dunstan on that day. . . .

34 . . . [T]he primary judge . . . declined to authorise the assembly. . . .

38 . . . [I]n our opinion, . . . Mr Bassi gave . . . a notice of intention to hold a public assembly more than seven days prior to it taking place, and . . . although the particulars of this assembly changed very significantly, that did not mean that the original Notice of Intention had ceased to have legal efficacy or that the modified notice issued on 4 June 2020 was a new notice which . . . required Mr Bassi to obtain [new] authorization

39 . . . [W]e consider that what occurred was an amendment of particulars of a Notice of Intention as opposed to a new notice of Intention

41 It is not without significance . . . that the Commissioner took the view that the amendments which had been made to the Notice of Intention originally provided by Mr Bassi on 29 May 2020 did not amount to a new notice of intention. . . .

42 . . . [W]e are also of the opinion that the email sent by Sergeant Hallett . . . amounted to a communication of non-opposition by the Commissioner

43 . . . The language employed in the email is consistent only with a position of non-opposition on the part of the Commissioner, at least at the time the email was sent. By requesting Mr Bassi to bring a signed copy of the amended Form 1 on Saturday 6 June 2020 . . . there was an unequivocal indication that the public assembly in the amended form proposed would occur without opposition from the Commissioner.

44 Plainly enough, at some point between the sending of this email on 4 June 2020 on which Mr Bassi was entitled in the circumstances to rely upon and 5 June 2020, the Commissioner's view as to the advisability of the public assembly going ahead changed, and he accordingly and appropriately made an application to this Court. No criticism should be made of that change of stance; we live in challenging and uncertain times where the exigencies of public health are of critical importance and the situation is no doubt extremely fluid. Considerations of public order, or further information becoming known to the Commissioner, may require flexibility of approach. . . .

46 Until and unless the Commissioner succeeded in an application under s 25, there was an authorised public assembly. . . .

* * *

The Court of Appeal approved the rally fifteen minutes before that rally was scheduled to start. Yet by then, more than 20,000 people in Sydney had joined Bassi's Stop All Black Deaths in Custody event, which focused on Aboriginal rights and deaths in custody; similar rallies were held that day in cities across Australia.

* * *

The safety of protesters is—or ought—always to be of concern. The risks of injury can stem from public and from private actors. In Portland, Oregon, the protests related to the Movement for Black Lives continued for many months after those in many other jurisdictions had ended. In the excerpts below, a federal district court judge addressed arguments that local police had mistreated protesters.

Don't Shoot Portland v. City of Portland
U.S. District Court for the District of Oregon
465 F.Supp. 3d 1150 (2020)

HERNÁNDEZ, District Judge:

. . . On May 29, 2020, citizens of Portland, Oregon, joined nationwide protests against the death of George Floyd and other acts of violence perpetrated by police officers against the African American community. . . . Plaintiffs in this case challenge the Portland Police Bureau (“PPB”)’s use of tear gas against protestors participating in these demonstrations.

. . . Defendant highlights the destruction that occurred on the first night of demonstrations, including a fire instigated by protestors inside the Justice Center . . . and [offers evidence] of officers using tear gas in response to individuals shaking fences and throwing projectiles. Plaintiffs . . . offer evidence that . . . officers fired canisters of tear gas at protestors without warning or provocation both in front of the Justice Center and elsewhere Plaintiffs also recount multiple occasions in which crowds were surrounded by tear gas without available avenues of escape. Tear gas was also fired at protesters attempting to comply with officers’ orders to leave the areas at issue.

Defendant’s use of tear gas is governed by two internal policy directives . . . [and] on June 6, 2020, Mayor Ted Wheeler . . . imposed further limitations on the use of tear gas, directing that “gas should not be used unless there is a serious and immediate threat to life safety, and there is no other viable alternative for dispersal.”

The standard for a temporary restraining order (TRO) is . . . “[that a] plaintiff . . . must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of . . . relief, that the balance of equities tips in his favor, and that a [TRO] is in the public interest. . . . [A] stronger showing of one element may offset a weaker showing of another. . . .”

Before turning to the TRO analysis, there are four points worth addressing. First, . . . people have a right to demonstrate and protest the actions of governmental officials . . . without fear for their safety. . . . Second, police in this country have difficult . . . jobs. . . . Third, this case arises in unprecedented times. . . . Finally, . . . the Court recognizes the difficulty in drawing an enforceable line that permits police officers to use appropriate means to respond to violence and destruction of property without crossing the line into chilling free speech and abusing those who wish to exercise it.

The Fourth Amendment* prohibits unreasonable searches and seizures. Excessive force claims are analyzed under the objective reasonableness standard of the

* The Fourth Amendment to the United States Constitution provides:

Fourth Amendment. The reasonableness of an officer's conduct must be assessed "from the perspective of a reasonable officer on the scene"

. . . [T]here is no dispute that *Plaintiffs* engaged only in peaceful and non-destructive protest. . . . Given the effects of tear gas, and the potential deadly harm posed by the spread of COVID-19, Plaintiffs have established a strong likelihood that Defendant engaged in excessive force contrary to the Fourth Amendment.

The First Amendment provides that all citizens have a right to hold and express their personal political beliefs. . . . "Activities such as demonstrations [and] protest marches . . . are . . . protected by the First Amendment." . . . "[T]o demonstrate a First Amendment violation, a plaintiff must provide evidence showing that by his actions [the defendant] deterred or chilled [the plaintiff's] political speech. . . ."

There is a serious question as to whether Plaintiffs will succeed on their First Amendment claim. . . . [T]he parties' sole dispute is whether Plaintiffs can demonstrate that their protected activity was a . . . motivating factor in PPB's conduct. Plaintiffs have submitted evidence demonstrating that officers indiscriminately used force against peaceful protestors. . . . These incidents demonstrate that . . . officers may have been substantially motivated by an intent to interfere with Plaintiffs' constitutionally protected expression.

Plaintiffs must also "demonstrate that irreparable injury is likely in the absence of an injunction." . . .

Plaintiffs have demonstrated a threat of immediate, irreparable harm in the absence of a TRO. . . . PPB has regularly used tear gas to disperse peaceful protestors. It is likely that it will continue to do so. The risk of irreparable harm is further heightened by the context in which these protests are occurring. Despite the global coronavirus pandemic, Plaintiffs and other protestors throughout the country—frequently wearing protective face coverings—have taken to the streets to protest police brutality and systemic injustice after the killing of George Floyd. But the use of tear gas under these circumstances may put protestors' health at risk, contributing to the increased, widespread infection of this lethal virus. Without a court order limiting the circumstances in which PPB may use tear gas, Plaintiffs are likely to suffer irreparable physical and constitutional injuries.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Under the “balance of equities” analysis, a court must “balance the competing claims of injury” and “consider the effect on each party of the granting or withholding of the requested relief.” . . .

. . . [L]imits on the use of tear gas may impede officers’ ability to protect themselves But [this] is outweighed by the irreparable harm that Plaintiffs . . . are likely to endure. The relief . . . limits but does not eliminate the use of tear gas. Accordingly, the balance of equities weighs in Plaintiffs’ favor. . . .

. . . The public has an enormous interest in the rights of peaceful protesters to assemble These rights are critical to our democracy. The community, however, also has an interest in allowing the police to . . . protect lives as well as property.

. . . [T]here is evidence that officers have violated the constitutional rights of peaceful protestors, as well as their own department’s internal directives and guidelines. Limiting the use of tear gas may mean that officers are unable to stop some property damage. But the unconstrained use of tear gas cannot weigh in the public’s interest when this use is likely to exacerbate the transmission of COVID-19. . . . The Court therefore finds that the public interest weighs in favor of granting a TRO in this case.

. . . The Court . . . orders that PPB be restricted from using tear gas . . . except as provided by its own rules. . . . In addition, tear gas use shall be limited to situations in which the lives or safety of the public or the police are at risk. . . .

* * *

The district court’s TRO regarding the usage of tear gas and was issued on June 9, 2020 and, as specified in federal procedural rules, applied for fourteen days unless renewed. On June 18, the plaintiffs filed an amended complaint stating that the defendants began using less lethal weapons in place of tear gas. On June 26, the district judge issued another TRO that restricted the use of a variety of items, including less-lethal launchers (which launch non-lethal projectiles such as rubber bullets), rubber ball distraction devices, aerosol restraints, and long-range acoustical devices.

Soon thereafter, the plaintiffs asked the court to hold the City in contempt for violating the court order for continuing to use enjoined crowd control measures. As protests continued, in mid-July, then-President Trump sent federal law enforcement officers into the city. Protestors alleged that federal law enforcement officers, not wearing uniforms, seized and put them into unmarked cars. Thereafter, the judge denied the City of Portland’s motion to dismiss the case, and on March 16, 2021, the court ordered sanctions, including required training for all officers and removal of a particular officer from any crowd management events.

Government efforts to squelch protest can be found around the world. In February of 2019, the Hong Kong government proposed an amendment, known as the Fugitive Offenders Bill, which would allow suspected criminals in Hong Kong to be

extradited to China for trial. At the time, Hong Kong did not have an extradition agreement with China. Following the proposed bill, massive protests against the amendment broke out in Hong Kong and continued for months. While the protests began in opposition to the bill, by June 2019 the protestors' demands included the resignation of Chief Executive Carrie Lam. In September 2019, the government announced it would withdraw the bill, and protests related to the other issues continued.

In October of 2019, Chief Executive Carrie Lam invoked the British colonial-era Emergency Regulations Ordinance, which allowed her to implement regulations without consulting Hong Kong's Legislative Council. She enacted a regulation prohibiting protestors from wearing masks, which protestors feared would enable police to identify and harass protestors and their families. As of June of 2021, the regulation remained in place.

Kwok Wing Hang and 23 Others v. Chief Executive in Council

Hong Kong Court of Final Appeal

[2020] HKCFA 42

[Chief Justice MA and Justices RIBEIRO, FOK, CHEUNG, and Lord HOFFMANN delivered the opinion of the Court:]

1. . . . [B]etween June and October 2019, Hong Kong, a city long regarded as safe, experienced an exceptional and sustained outbreak of violent public lawlessness. . . . [T]here is no question that by early October 2019 the situation in Hong Kong had become dire. Something had to be done.

2. For reasons we shall examine in detail below, the Chief Executive in Council ("CEIC") determined that what should be done was to introduce a law prohibiting the wearing of face masks and face coverings at certain types of public gatherings. That law . . . is the Prohibition on Face Covering Regulation ("PFCR"). . . .

4. . . . [T]he . . . principal question central to these appeals is whether certain of the provisions of the PFCR are a proportionate restriction of protected rights. . . .

86. . . . [T]o the extent that the PFCR restricts any protected rights, the validity of any such restrictions will depend on the provision in question satisfying the four-step proportionality test

98. The starting point of the proportionality test is the prerequisite of identifying the constitutional right engaged and to determine whether the provision under challenge restricts any such right.

99. In the present case, the PFCR makes the wearing, at particular types of public gatherings, of facial coverings likely to prevent identification an offence punishable by a fine and imprisonment. It is not disputed that the restrictions in the PFCR affect the

enjoyment of (i) the freedom of assembly, procession and demonstration . . . , (ii) the freedom of speech and expression . . . , and (iii) the right to privacy

103. . . . In the light of [the] evidence, the aims of the Government in making the PFCR are undeniably legitimate. . . . The escalating violence and continued lawlessness arising from the ongoing protests made it essential to take some action to prevent, deter, and stop the violence in the first place or at least to assist the police to detect and apprehend those persons breaking the law. . . .

105. As in relation to the first step of the proportionality test, therefore, it is unnecessary to deal at length on the question of whether the measures taken by section 3 of the PFCR are rationally connected to the legitimate aims identified by the Government. That such rational connection is established is plainly made out. . . . [B]y prohibiting the use of facial coverings at public events the Government would self-evidently directly address both unlawful behaviour itself and the emboldening effect the wearing of masks has on both violent and peaceful protesters alike. It would also obviously assist in the identification of those who nevertheless do break the law and facilitate their apprehension and prosecution.

106. [Rather] . . . the focus of the argument on the constitutionality of the PFCR has been on the third and fourth steps of the proportionality test. . . .

107. The freedom of speech and the freedom of peaceful assembly are “precious and lie at the foundation of a democratic society.” But it is important to stress that their cardinal importance hinges on their *peaceful* exercise. . . .

120. It is undoubtedly correct that a peaceful demonstration does not lose its character as such because of an isolated outbreak of violence. The question is, however, inevitably one of degree and will be highly fact sensitive. . . .

123. . . . The legitimate aim of the PFCR is not limited to the suppression of violence after it has broken out but is also preventative and intended to deter violence from developing out of the highly fluid and volatile situations that had been occurring in Hong Kong over a period of many months. . . .

126. . . . As such, it is clearly proportionate for the PFCR to seek to prohibit the wearing of facial coverings—used to hide the identity of law breakers and having an emboldening effect leading to degeneration of peaceful protests into violence—whether at an unauthorised assembly, a public meeting or a public procession. . . .

134. . . . The wearing of a facial covering, whilst it may be a legitimate form of expression or be used for reasons of privacy or a legitimate desire for anonymity, does not lie at the heart of the right to peaceful assembly. It is still possible to demonstrate peacefully without wearing a facial covering. . . .

136. In the context of what we have earlier referred to as the degeneration of law and order, and the ever increasing violence and lawlessness, the ban on facial coverings can be regarded as a relatively minor incursion into the relevant rights on which the applicants rely. . . .

144. . . . [A] fourth step should be adopted in the proportionality analysis. This requires:

“. . . asking whether a reasonable balance has been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual.” . . .

145. . . . [T]he Government did not decide to address the legitimate aim to deter violence and crime and to promote effective law enforcement by casting the net of the prohibition on facial coverings as widely as possible. Instead, the prohibition was tailored to the specific public gatherings listed in section 3 of the PFCR. . . .

146. Relevant to the fourth step in the present case is the fact that the PFCR was made to address an ongoing situation of violence and unlawfulness that had existed over a period of months and had led to the CEIC to conclude that there was an occasion of public danger under the ERO. . . . There is a clear societal benefit in the PFCR when weighed against the limited extent of the encroachment on the protected rights in question. . . . And finally, the interests of Hong Kong as a whole should be taken into account since the rule of law itself was being undermined by the actions of masked lawbreakers who, with their identities concealed, were seemingly free to act with impunity. . . .

[The Hong Kong Court of Final Appeal upheld the ordinance in its entirety, including allowing police officers to forcibly remove masks for identification or protestors, and imprisonment for protestors who refused to comply.]

* * *

Continuing to explore the different contexts and content of protests, we turn to the conflict over the construction of a pipeline in Canada and the arguments about sovereignty that the pipeline engendered. In 1997, the Canadian Supreme Court decided *Delgamuukw v. British Columbia*, which held that Canada could not extinguish the Aboriginal land titles of the Delgamuukw. That ruling established a test for evaluating projects that might disrupt or build upon First Nations’ territories. In 2012, members of the Wet’suwet’en claimed that they had not been adequately consulted by the architects of the Coastal GasLink Pipeline and set up a blockade to prevent the pipeline’s construction. They based their claims on Wet’suwet’en law. Coastal GasLink Pipeline Ltd. sought to enjoin the blockade.

Coastal GasLink Pipeline Ltd. v. Huson
Supreme Court of British Columbia, Canada
2019 BCSC 2264 (2020)

[The Honourable Madam Justice Church delivered the following judgment:]

... [11] ... [Over a period of several years beginning in 2012, Coastal GasLink Pipeline Ltd.] obtained all of the necessary provincial permits and authorizations to commence construction of a natural gas pipeline ... (the “Pipeline Project”) ...

[17] In or about 2012, [defendants] and others set up the Bridge Blockade ... The defendants have said publicly that one of the main purposes of the Bridge Blockade was to prevent industrial projects, including the Pipeline Project, from being constructed in ... traditional territories. ...

[31] ... I granted an interim injunction order [restraining the defendants from blockading] on December 14, 2018 ...

[32] Despite the ... Injunction, the Bridge Blockade ... remained in place ...

[121] The plaintiff [now] seeks [another] interlocutory injunction on largely the same terms ...

[122] The plaintiff submits that the defendants have chosen to engage in illegal activities to voice their opposition ... rather than to challenge the Pipeline Project by legal means. The plaintiff further submits that the defendants continued to engage in illegal activities after the ... Injunction was granted, in clear breach of the court order.

[123] The plaintiff argues that ... the use of self-help remedies is contrary to the rule of law and is an abuse of process. The plaintiffs submit that where the defendant is obstructing lawfully permitted activity, recourse to self-help remedies cannot and should not be condoned by the court.

[124] The defendants remain opposed to the interlocutory injunction ... [and] maintain that the plaintiff is attempting to enter [their] territory in violation of Wet’suwet’en law and authority and they were simply taking steps to prevent such violation of Wet’suwet’en law. The defendants submit that they have at all times acted in accord with Wet’suwet’en law and with proper authority.

[125] The defendants argue ... that Wet’suwet’en authorization is also required in order for the plaintiff to proceed on Wet’suwet’en territories and such authorization has not been obtained. Thus, the defendants maintain that they have a legal right for their actions based on traditional Wet’suwet’en law. ...

[129] Indigenous laws may ... be admissible as fact evidence of the Indigenous legal perspective, where there is admissible evidence of such Indigenous customary

laws. It is for this purpose that evidence of Wet'suwet'en customary laws is relevant in this case. . . .

[133] . . . However, for the reasons that follow, the evidence regarding traditional Wet'suwet'en customary law is of limited assistance with respect to the Indigenous legal perspective in the context of this application.

[134] The evidence . . . indicates significant conflict amongst members of the Wet'suwet'en nation regarding construction of the Pipeline Project, including disagreements amongst the Wet'suwet'en people as to whether traditional hereditary governance protocols have or have not been followed . . . [and] whether hereditary governance is appropriate for decision-making that impacts the entire Wet'suwet'en nation

[137] All of this evidence suggests that the Indigenous legal perspective in this case is complex and diverse and that the Wet'suwet'en people are deeply divided with respect to either opposition to or support for the Pipeline Project.

[138] It is difficult to reach any conclusions about the Indigenous legal perspective, based on the evidence before me [T]hose are issues that must be determined at trial. . . .

[146] At its heart, the defendants' argument is that the Province of British Columbia was not authorized to grant permits and authorizations to the plaintiff to construct the Pipeline Project on Wet'suwet'en traditional territory Thus, rather than seeking accommodation of Wet'suwet'en legal perspectives . . . the defendants are seeking to exclude the application of British Columbia law within Wet'suwet'en territory, which is something that Canadian law will not entertain.

[147] I cannot accept the defendants' submission that their conduct in blockading . . . was simply to prevent the plaintiff from violating Wet'suwet'en law by entering [their] territory without permission. The actions of the defendants at the establishment of the Bridge Blockade and their subsequent public statements and internet postings do not, in my view, support that submission.

[148] The Bridge Blockade was established in or about 2012 with the stated purpose of preventing industrial projects, including the Pipeline Project, from being constructed in . . . "traditional territories." The defendants have publicly questioned the authority of the Province of British Columbia, the Government of Canada and the [Royal Canadian Mounted Police] within . . . traditional territories. . . .

[151] Thus, rather than efforts to prevent violation of Wet'suwet'en law, the defendants' efforts appear to have been directed specifically towards opposition to pipelines in general and the Pipeline Project specifically. Their public statements do not reference traditional Wet'suwet'en governance structures They continue to encourage the establishment of new blockades and participation of individuals from

outside the local community to join the blockades and establish new structures in locations designed to impede the Pipeline Project or its construction.

[152] While the defendants may well sincerely believe in their collective rights to title or ownership of their traditional Wet'suwet'en territories, it is clear that they are entirely aware that the legal rights claimed by them remain outstanding and are at odds with the permits and authorizations granted to the plaintiff to undertake the Pipeline Project. Despite that fact, the defendants chose not to engage in consultation with the plaintiff or to challenge the validity of the permits and authorizations when they were issued. . . .

[154] The defendants' affidavit materials clearly demonstrate that they are entirely familiar with . . . the concept of Aboriginal law and Aboriginal title. They cannot help but be aware of the uncertainties and processes for reconciliation of common law and Aboriginal law perspectives.

[155] There is no evidence before me of any Wet'suwet'en law or legal tradition that would allow blockades of bridges and roads or permit violations of provincial forestry regulations or other legislation. There is also no evidence that blockades of this kind are a recognized mechanism of dealing with breaches of Wet'suwet'en law.

[156] . . . [T]he defendants in this case have resorted to self-help remedies, which are not condoned in Canadian law or Indigenous law. Self-help remedies, such as blockades, undermine the rule of law and the administration of justice.

[157] The Supreme Court of Canada has made it clear that such conduct amounts to a repudiation of the mutual obligation of Aboriginal groups and the Crown to consult in good faith, and therefore should not be condoned. . . .

[158] . . . I agree with the submission that the defendants cannot rely on their assertion that their actions in blockading . . . are in accordance with their Indigenous laws when they have failed to take any steps to challenge by legal means the permits and authorizations granted to the plaintiff.

[159] The defendants have obstructed lawfully permitted activity and their recourse to self-help remedies is contrary to the rule of law. Their actions are an abuse of process and cannot be condoned by the court. . . .

[234] I will therefore grant the interlocutory injunction order sought by the plaintiff

* * *

The Uganda decision excerpted below returns to the issues of the power of government officials to target protestors raising certain issues. Prior to the Constitutional Court's ruling, police had used the statute, which had been enacted in

2013, to prohibit and then to break up a protest after an election in 2016 in Uganda was contested.

Constitutional Petition no. 56 of 2013
Constitutional Court of Uganda at Kampala
Civil Writ Petition No. 1118/2020 (2020)

[The Honorable Justice Barishaki Cheborion delivered the following judgment:]

... In 2013, the Parliament of Uganda passed the Public Order Management Act (POMA). ... The Act places rather burdensome restrictions on an individual's ability to exercise rights to hold public meetings, assemblies and professions. It also grants the Inspector General of Police or any officers he/she designates absolute discretion and broad authority to stop, control and use force to disburse public meetings. In addition, the Inspector General of Police or any of his delegated officers are authorized to impose criminal liability on organizers and participants of public meetings. ...

Counsel for the Petitioners submits that ... the enactment of [S]ection 8 of the [POMA], which is in pari materia with section 32(3) of the Police Act ... that was [previously] ruled unconstitutional ... has the effect of altering ... said decision of the Constitutional Court contrary to Article 92* of the Constitution. ...

In reply, Counsel for the Respondent submits that the purpose of the POMA is ... “to provide regulation of public meetings; to provide for the duties and responsibilities of police, organizers and participants in relation to public meeting; to prescribe measures for safeguarding public order; and for related matters.”

He contends that the purpose of the section is to operationalize Article 29** of the Constitution. He avers that as people express the right to free speech, expression, assembly and demonstration, there is a need by the law enforcers to ensure compliance with the Constitution. That it would not be wise to assume that all persons in the exercise

* Article 92 of the 1995 Constitution of the Republic of Uganda provides:

Parliament shall not pass any law to alter the decision or judgment of any court as between the parties to the decision or judgment.

** Article 29 of the 1995 Constitution of the Republic of Uganda provides:

(1) Every person shall have the right to—

(a) freedom of speech and expression, which shall include freedom of the press and other media; ...

(d) freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition ...

of the right to assemble and peacefully demonstrate shall actually do so strictly in accordance with the law. . . .

On a strict reading of Section 8 of POMA, the following aspects arise; first and foremost, Subsection 1 grants discretionary powers to the Inspector General of Police (the IGP) who in turn can delegate or authorize any other officer to stop or prevent the holding of public meetings.

Subsection 2 further allows an officer authorized by the IGP to issue orders dispersing a public meeting as he/she seems reasonable in the circumstances [whereas] Subsection 3 provides that while doing so he/she shall have regard to the right of those to whom the order has been issued and other persons. Lastly, under Subsection 4, failure to adhere to orders issued therein and above is an offense punishable under section 117 of the Penal Code Act.

There is no doubt . . . that just like the nullified . . . Police Act, Section 8 (1) & (2) of [the] POMA are neither couched in a regulatory manner nor are the powers therein intended to be exercised in the regulatory manner. The provisions of Section 8 on the face of it clearly show that the section is prohibitory in nature. . . .

Without any hesitation therefore, I find the provisions Section 8 of the [POMA] are in pari materia with the nullified Section 32(2) of the Police Act. The . . . Constitutional Court [has previously] labored to explain . . . the reasons why the police cannot be permitted to have powers to stop the holding of a public gathering including a protest or demonstration ostensibly on grounds that such a public meeting with caused a breach of the peace. It is a pity that their explanations . . . were contemptuously ignored by parliament and the executive.

They unanimously emphasized that in the event the police anticipate a breach of the peace at a public gathering, their duty is to provide reinforced deployments and not to prohibit the planned gathering altogether. . . .

Public processions, meetings or gatherings, irrespective of whether they are of a political, religious or social nature are protected by the constitutionally guaranteed freedom of expression, free speech and assembly. Peaceful public protests are equally protected by the [C]onstitution. . . .

There is no doubt that public order is necessary in any society. A law regulating public order may be justifiable. . . .

However, [the] world over, law enforcement organs in democratic states do not suppress public gatherings that are peaceful protests in the name of protecting public order. Neither do they require that the organizers of public meetings or peaceful protests must have prior permission or clearances from the police. Provided a protest or public gathering is peaceful, it does not matter that it may be disruptive or even inconveniencing

Unfortunately, the context in which POMA was passed and is routinely applied portrays a different intention and understanding of the same by law enforcement in my view. Law enforcers, particularly the Police Force, believe that POMA empowers them to ban or violently disburse public meetings of a political nature or even social gatherings organized by certain categories of individuals. . . .

. . . [T]he police have indeed suppressed numerous public gatherings of a political or social nature in the name of maintaining public order. . . .

In my view, the illegal directives that were the subject of that petition obtained . . . legitimacy from the provisions of POMA. It is for that reason that this court must express itself unequivocally that the police have absolutely no legal authority to stop the holding a public gathering on the grounds of alleged possible breach of the peace if such gatherings are allowed to proceed.

. . . I wholly reject the notion that the police have super natural powers to determine that a particular public gathering should not be allowed to happen because it will result into a breach of the peace.

A breach of the peace may result not from participants in a public gathering but rather from unlawful interference with the same by third parties. The attention of the police is supposed to be directed at the actual individuals causing a breach of the peace

The notion that public meetings should be held without inconveniencing anyone, which is clearly evident in the Attorney General's submissions is without merit. . . . There is little doubt that numerous social gatherings, such as sports related gatherings, religious gatherings, wedding motorcades inter alia caused some measure of inconvenience to the rest of the public going about their private lives at the same or routinely, and rightly so, allowed to proceed without disruption

The assumption is that public meetings of a political nature, or social gatherings held by politicians, are more likely to cause a breach of peace because they have not been authorized by police and should not be allowed to happen is not correct. Neither is the assumption that failure to notify police of an intended public meeting of a political nature is good enough excuse The blanket prohibition on holding a public meeting they have no police permission or prior notification is simply unconstitutional and a violation of Article 29 of the Constitution

The refusal to extend the same favor to public gatherings of a political nature is simply a reflection of an unconstitutional animus by law enforcement against political activities. . . .

. . . The notion that all orders issued by the police prohibiting a public meeting, profession or gathering for whatever arbitrary reasons are lawful is equally unconscionable. . . .

Unlawful orders, including those issued by law enforcement agencies such as the police, may be lawfully disregarded. . . .

As I have elaborated, the concept of breach of the peace is subject to an objective test. It is not true that public gatherings or meetings are the cause of breach of the peace. It may, in some cases, be caused by law enforcement unduly interfering with the rights of protesters or demonstrators or individuals gathered in a particular space. . . .

. . . Hopefully, this decision will provide much needed guidance to the law makers [whose] enactment of the imputed provision led to this petition and a pattern of violation of Article 29 of the Constitution by law enforcement organs. . . .

PROTEST ON, ABOUT, AND FROM THE BENCH

In addition to responding to government efforts to regulate protests, courts are at times the focus of protest, in search of information about the impact of the law that they shape, or the object of protest. And, on occasion, judges may use their decisions to protest the legal regime of which they are a part.

Democracy in Peril

Susanne Baer (2019)*

. . . The starting question is thus: are you a friend of a court, an amicus or an amica curiae? If not, I call on you to better become one. This is because . . . [l]aw is needed when democracy is at risk. . . .

In the twenty-first century, there are rather different attitudes towards the law and the courts that apply it shared by people in the academy and among lawyers Today, with democracy under attack and populism ruining the rule of law . . . a productive stance towards courts and judicial review is desperately needed. . . .

Many good conservatives defend the law and the rule of law, and they often do with more commitment than critical scholars. But . . . the seriously conservative defenders of law are not very fond of, specifically, constitutional courts. . . .

For legal conservatives, courts that are truly independent and have the mandate and the courage to not perpetuate the status quo, when in doubt, are a problem. . . . Specifically, . . . [they are a problem] when they stop an elected majority, which is structurally always conservative, or when they stop mainstream resentments. . . .

* Excerpted from Susanne Baer, *Democracy in Peril: A Call for Amici and Amicae Curiae and Critical Lawyering*, 10 TRANSNATIONAL LEGAL THEORY 140 (2019).

Even more so, courts become a problem for status quo conservatives when they do not only stop legislation or administrative acts, but when courts apply the basic rules to call for a change of the societal status quo. This happens, for example, in rulings that take the social dimension of fundamental rights seriously. . . . Then, courts are criticised as going too far, ‘managing’ society instead of only ‘speaking the law.’ . . .

But . . . there is an alternative attitude towards the law and judicial review. . . . Nihilists may be so afraid of . . . ‘the siren call of law’ that they end up rejecting it altogether. Politically, this attitude is found more on ‘the left’ than ‘the right,’ and it boils down to depicting, and confounding, the law as just another means of power of ‘the system.’ But once the law is placed in that corner, labelled and written off as a further instance of authority if not of authoritarianism itself, and certainly as a mechanism of exclusion, . . . nothing of it seems worth putting up a fight for. . . .

. . . If influential voices both on the right and on the left can afford to take a lofty stand on ‘the law,’ then it is indeed anything but obvious that we would be able to return to the law in the hope of finding in it an ally for the fight against . . . populist autocrats. . . .

Because neither *status quo* defence nor nihilist rejection are convincing, one must turn to . . . *critical pragmatism*

. . . The point of a critical pragmatist stance towards the law is a critical yet constructive understanding of it. . . .

To do so, one needs to find one’s own interpretation of Audre Lorde’s ‘the master’s tool that will never dismantle the master’s house.’ . . . [I]n a constructive mode, to reject capitalist, sexist, racist or in other ways unequally normative law is to criticise and call for change. Courts are then arenas to have such discussions, and courts may in fact intervene into what the master desires. Also, law can be mobilised to address the needs of people the master exploits or ignores. . . . [O]ne needs to distinguish: yes, there is law as the master’s tool, as unjust law To dismantle the master’s house, such law will not do. But there is also law conditioned by constitutionalism. Only then, it is a tool to challenge, to limit and to hold a master accountable. Then, law is one way to indeed even effectively address social inequality, safeguard democracy and protect fundamental rights. . . .

. . . [I]t is important to understand the productive force of law, and not to focus on its repressive side only. . . . Despite the widespread scepticism towards constitutional and human rights courts in particular, . . . and in the wake of the imminent destruction of such independent courts in several countries as well as the populist attacks on courts and the rule of law in all others, a focus on courts seems urgently needed. . . .

. . . When courts protect [political rights], they protect democracy. . . . [T]he point of constitutionalism is that, as independent institutions, courts do so—regardless of whether you like it politically, or not. . . .

. . . Since constitutional law is productive for politics, in safe-guarding democracy, and since constitutionalism is a collective enterprise, courts as actors in such a continuous process have a specific role to play. It seems not only unrealistic but also a dangerous idea to call them ‘Hercules,’ or see rights as ‘trumps,’ and generally dismiss judicial review as ‘activism.’ Instead, courts with a constitutional mandate are designed to have a significant voice, in taking binding decisions, to safeguard democracy in respect for fundamental rights. . . . [T]hey are important contributors to a collective enterprise. When they are inactive, they fail in that mission. . . .

. . . Constitutionalism is the answer. And constitutionalism needs competent and independent courts for sure. But this is never enough. Even strong courts need *amici* and *amicae curiae*.

. . . All over, we see attacks on democracy, which are attacks on open societies, on academic freedom, on freedom of speech and the media, on the right to assembly, on self-determination, on equal fundamental rights. . . . They start with constitutional courts, which is no coincidence and not erratic. In fact, TV stations, papers and websites, as well as faculties, institutes, professors and students, as well as courts and judges, are exactly the institutions that are conceptualised and protected as autonomous, as independent, and thus as sites of critique and mobilisers of change. If they work properly, it is exactly the media and the academy and the courts that serve as counter majoritarian forces in what is generally run by majority vote. And if they go down, we all eventually do.

Therefore, there is a need . . . to be friends of courts. It is a bit more difficult because courts, and the judges who do the job, are not the outsider opposition type you may easily identify with. In many contexts, judges are part of a socio-economic and political elite and rather far away from social movements, student protests, and progressive politics beyond borders. However, support of courts is needed nonetheless. . . . [A] critical attitude towards law and constitutional law and courts, do indeed allow for critical lawyering, and actually call on you to eventually defend constitutionalism. . . . It needs to be based on a proper understanding of law as practice and of constitutionalism with the institutional need for courts with a constitutional mandate. Thus, critical lawyering consciously works with the frames, as limits and options of judging. . . . Right now, autocratic regimes are out there on a cruel mission. . . . If you interpret this normality as a constitutional order, you can engage in critical lawyering, as *amici* and *amicae curiae*. We need to affirmatively engage and critically re-envision how justice is done. . . . [I]n light of widespread conservatism as well as nihilism regarding law and courts, be a friend.

Police Reform and the Dismantling of Legal Estrangement

Monica C. Bell (2017)*

. . . 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. . . .

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

. . . This Essay broadens the usual lens by proposing *legal estrangement* as a corrective to the prevailing legitimacy perspective on police reform. . . . The theory of legal estrangement . . . examines the more general disappointment and disillusionment felt by many African Americans and residents of high-poverty urban communities with respect to law enforcement.

. . . [E]xperiences in which individuals feel treated unfairly by the police are one key provocateur of legal estrangement. . . . Survey research indicates that a feeling that the police have behaved disrespectfully feeds into an overall disbelief in the legitimacy of the law and law enforcement. The path to legitimacy, from a procedural justice perspective, requires “treatment with dignity and respect, acknowledgment of one’s rights and concerns, and a general awareness of the importance of recognizing people’s personal status and identity and treating those with respect, even while raising questions about particular conduct.” . . .

The second contributor to legal estrangement . . . is vicarious marginalization: the marginalizing effect of police maltreatment that is targeted toward others. . . .

. . . More work needs to be done to examine the collective memory of police interaction, defined as the cultural conception of what it is like to interact with the police that emanates in part from membership in a group or identity category (here, in various degrees, being African American or residing in a racially and socioeconomically isolated neighborhood). . . . Through a combination of major social upheavals and everyday forms of information gathering, people come to understand themselves and gain perspective on what it means to be a part of a group (be it a religion, a race, or even a business). . . .

* Excerpted from Monica Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE LAW JOURNAL 2054 (2017).

There is no better illustration of how vicarious marginalization might operate, and what its repercussions might be, than current events involving police officer maltreatment of African Americans. . . . [T]he recent stream of videos of violent police interactions has, along with organizing techniques, given birth to the Black Lives Matter movement. . . . Some have claimed that the seemingly ceaseless stream of grisly scenes on television and social media are giving birth to a new form of race-based posttraumatic stress. . . . That message might be that the police as a whole are dangerous, untrustworthy, and opposed to the idea that African Americans and the poor are truly members of the polity. . . .

. . . Shared narratives about how the police treat African Americans and people who live in poor communities propel legal estrangement. To reduce legal estrangement, counternarratives that focus on respect and value for black and poor lives must emerge and take root.

The third part of the theory of legal estrangement is structural exclusion. This component describes the ways in which policies that may appear facially race- and class-neutral distribute policing resources so that African Americans and residents of disadvantaged neighborhoods tend to receive lower-quality policing than whites and residents of other neighborhoods. . . . The apparent neutrality of most modern laws and policies means that even those who are disadvantaged under them might not fully perceive them as discriminatory. . . .

The concept of legal closure . . . reframes the problem that police reform attempts to address as not only a problem of racism or poverty, but a problem of *inequality* in access to the machinery of the law. . . . [It] also emphasizes that police violence is not primarily a problem of wayward officers or misunderstood suspects, but instead a problem embedded in the legal system itself.

. . . Structural exclusion often occurs in ways that community members do not recognize, but police nonresponse is an inequality that community members often notice, and it is usually evidence of local, state, and federal policy decisions. In response to police abandonment, marginalized people seeking protection or redress of grievances have generally turned to “self-help,” either by calling upon family members or friends (and thus increasing violence in the aggregate), or by creating or enlisting the help of informal institutions. . . .

. . . *Fully* dismantling legal estrangement will be impossible without more fundamental shifts in economic distribution and eradication of racial discrimination: the problems of policing that have motivated Black Lives Matter are problems of America’s broken opportunity structure. The root causes of estrangement . . . may seem inappropriate to address through the criminal justice system.

. . . The “root causes” mentality encourages scholars and policymakers to ignore ways that police practices and policy *directly and actively* contribute to legal

estrangement and its concomitant racial and socioeconomic conditions. . . . Because there has been insufficient attention to legal estrangement in the regulation of policing, opportunities to link the structural factors in estrangement with concrete reforms to policing have been underexplored. . . .

One tool that provides the federal government with leverage to force local departments to change or eliminate structurally exclusive policies is section 14141 of the Violent Crime Control and Law Enforcement Act of 1994 Section 14141 authorizes the U.S. Attorney General to sue a local police department for engaging in a pattern or practice of violating constitutional and legal rights. The Department of Justice may use the threat of litigation to reach an agreement with the agency to pursue specific reforms, or take the agency to court and mandate actions through a consent decree. . . .

Understanding today's policing crisis as a problem of legal estrangement clarifies and raises the stakes of our Fourth Amendment jurisprudence. . . .

Judges who rule on the constitutionality of searches should keep in mind the stakes of giving too much leeway to the police, stakes that legal estrangement theory illuminates. . . . Getting Fourth Amendment rulings wrong by giving the police too much power risks both individual and collective membership in the American social order.

Legal estrangement demands a deep, meaningful approach to democratizing police governance. Bringing about cohesion and solidarity between police and African American and poor communities will require a more aggressive infusion of deliberative participation in policing than most proposals demand. . . .

Finally, the legal estrangement perspective raises fundamental questions about the role of police in society. . . .

. . . Shrinking the footprint of armed bureaucrats and creating a more robust system of civil supports might bring more legitimacy to these institutions and increase their capacity to produce social inclusion. . . .

. . . The legal estrangement perspective demands taking account of historically rooted group marginalization and the collective consciousness of discrimination and mistreatment. This historical and collective perspective is central to the project of police reform. Accordingly, the perspective sensitizes police reformers to the idea that, while modifications within the institution of policing are critical and should move beyond individual line officers, their work will not be finished until it spurs change in the full array of institutions that perpetuate poverty, race-correlated disadvantage, and symbolic statelessness.

* * *

Below is the opinion of Judge Carlton Reeves, a United States District Judge in the Southern District of Mississippi. While Judge Reeves applies the doctrine of

qualified immunity, a doctrine which shields police officers who act in “good faith” from liability, his opinion advocates for the Supreme Court of the United States to overturn qualified immunity. In doing so, it interacts with and draws from the Movement for Black Lives, while also charting its own course of action in the courts.

Jamison v. McClendon

U.S. District Court for the Southern District of Mississippi
476 F.Supp. 3d 386 (2020)

Judge REEVES delivered the opinion of the Court:

. . . Clarence Jamison was a Black man driving a Mercedes convertible.

As he made his way home to South Carolina from a vacation in Arizona, Jamison was pulled over and subjected to one hundred and ten minutes of an armed police officer badgering him, pressuring him, lying to him, and then searching his car top-to-bottom for drugs.

Nothing was found. Jamison isn’t a drug courier. He’s a welder. . . .

Thankfully, Jamison left the stop with his life. Too many others have not.

The Constitution says everyone is entitled to equal protection of the law—even at the hands of law enforcement. Over the decades, however, judges have invented a legal doctrine to protect law enforcement officers from having to face any consequences for wrongdoing. The doctrine is called “qualified immunity.” In real life it operates like absolute immunity.

. . . Tragically, thousands have died at the hands of law enforcement over the years, and the death toll continues to rise. Countless more have suffered from other forms of abuse and misconduct by police. Qualified immunity has served as a shield for these officers, protecting them from accountability.

This Court is required to apply the law as stated by the Supreme Court. Under that law, the officer who transformed a short traffic stop into an almost two-hour, life-altering ordeal is entitled to qualified immunity. . . .

But let us not be fooled by legal jargon. Immunity is not exoneration. And the harm in this case to one man sheds light on the harm done to the nation by this manufactured doctrine. . . .

Jamison brings his claims under 42 U.S.C. § 1983, a statute that has its origins in the Civil War and “Reconstruction,” the brief era that followed the bloodshed. . . .

These “emancipationist” efforts existed alongside white supremacist backlash, terror, and violence. . . .

Many of the perpetrators of racial terror were members of law enforcement. It was a twisted law enforcement, though, as it prevented the laws of the era from being enforced. . . .

. . . [Congress] passed The Ku Klux [Klan] Act of 1871, which “targeted the racial violence in the South undertaken by the Klan, and the failure of the states to cope with that violence.” . . .

Some parts of the Act were fairly successful. . . . Frederick Douglass proclaimed that . . . the “slaughter of our people have so far ceased.”

Douglass had spoken too soon. . . . The federal system largely abandoned the emancipationist efforts of the Reconstruction Era. And the violence returned. . . .

Just as the 19th century Supreme Court neutered the Reconstruction-era civil rights laws, the 20th century Court limited the scope and effectiveness of Section 1983

The doctrine of qualified immunity is perhaps the most important limitation.

. . . In *Pierson v. Ray*, “15 white and Negro Episcopal clergymen” . . . were arrested and charged with violation of a Mississippi statute . . . that made it a misdemeanor “to congregate[]” . . . and to “refuse[] to move on when ordered to do so by a police officer.” The clergymen sued under Section 1983. In their defense, the officers argued that “they should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid.”

The Supreme Court agreed. It held that officers should be shielded from liability when acting in good faith—at least in the context of constitutional violations that mirrored the common law tort of false arrest and imprisonment.

. . . The Supreme Court eventually characterized the doctrine as an “attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also the need to protect officials who are required to exercise discretion and the related public interest in encouraging the vigorous exercise of official authority.”

A review of our qualified immunity precedent makes clear that the Court has dispensed with any pretense of balancing competing values. Our courts have shielded a police officer who shot a child while the officer was attempting to shoot the family dog; . . . an officer who seriously burned a woman after detonating a “flashbang” device in the bedroom where she was sleeping; . . . and an officer who shot an unarmed woman eight times after she threw a knife and glass at a police dog that was attacking her brother. . . .

Jamison was a Black man driving through Mississippi, a state known for the violent deaths of Black people and others who fought for their freedom. . . .

By the time Jamison was pulled over, more than 600 people had been killed by police officers in 2013 alone. Jamison was stopped just 16 days after the man who killed Trayvon Martin was acquitted. . . . A movement was in its early stages that would shine a light on killings by police and police brutality writ large

Jamison's traffic stop cannot be separated from this context. Black people in this country are acutely aware of the danger traffic stops pose to Black lives. . . .

It was in this context that Officer McClendon repeatedly lied to Jamison. It was in this moment that Officer McClendon intruded into Jamison's car. It was upon this history that Jamison said he was tired. These circumstances point to Jamison's consent being involuntary

Accordingly, Officer McClendon's search of Jamison's vehicle violated the Fourth Amendment.

The Court must now determine whether Officer McClendon "violated clearly established constitutional rights of which a reasonable person would have known." . . .

"It is the plaintiff's burden to find a case in his favor that does not define the law at a high level of generality." To meet this high burden, the plaintiff must "point to controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity."

It is here that the qualified immunity analysis ends in Officer McClendon's favor. . . .

. . . [A]s people marching in the streets remind us today, some have always stood up to face our nation's failings and remind us that "we cannot be patient." Through their efforts we become ever more perfect. . . .

The question of today is whether the Supreme Court will rise to the occasion and do the same with qualified immunity. . . .

. . . From TikTok to the chambers of the Supreme Court, there is increasing consensus that qualified immunity poses a major problem to our system of justice.

. . . Overturning qualified immunity will undoubtedly impact our society. Yet, the status quo is extraordinary and unsustainable. Just as the Supreme Court swept away the mistaken doctrine of "separate but equal," so too should it eliminate the doctrine of qualified immunity. . . .

Let us waste no time in righting this wrong. . . .

* * *

Another protest against a legal rule comes from *Somerset v. Stewart*, which famously held in 1772 that an enslaved person could not be removed from England to be sold in Jamaica and questioned the legality of the institution of slavery itself on English soil. The phrase the court used—“let justice be done or may the heavens fall”—has sometimes been understood as insisting on the moral imperative to act, whatever the consequences, and at other times has been read as cautioning against doing “justice.” This difficulty is especially salient if the consequences of “justice” undo too much of a social order and could put the court or a polity at risk of losing power.

Somerset v. Stewart
King’s Bench
12 Geo. 3 (1772)

[Lord MANSFIELD delivered the opinion of the Court:]

The question is, if the owner had a right to detain the slave, for the sending of him over to be sold in Jamaica. . . . Compassion will not, on the one hand, nor inconvenience on the other, be to decide; but the law The now question is, whether any dominion, authority or coercion can be exercised in this country, on a slave according to the American laws. . . . If the parties will have judgment, *fiat justitia, ruat coelum* [let justice be done though the heavens fall]

. . . [T]here have been, and still are, slaves to a great number in Africa; and . . . the trade in them is authorized by the laws and opinions of Virginia and Jamaica they are goods and chattels; and, as such, [are] saleable and sold. . . . James Somerset, is a negro of Africa, . . . and was sold to Charles Stewart, Esq. then in Jamaica. . . . Mr. Stewart, having occasion to transact business, came over hither, with an intention to return and brought Somerset, to attend and abide with him, and to carry him back as soon as the business should be transacted. . . . Charles Stewart did commit the slave . . . to be taken [back] with him to Jamaica, and there sold as a slave. . . . The power of a master over his slave has been extremely different, in different countries. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created is erased from memory: it’s so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.

* * *

Several decades later, the United States Supreme Court faced a question of whether the federal Fugitive Slave Act of 1793—which authorized slaveholders to seize formerly enslaved people who had escaped slavery—prevented Pennsylvania from

prosecuting people who took a person out of that state and back into slavery. Pennsylvania indicted Edward Prigg for abducting and selling a formerly enslaved woman and her children. Prigg was convicted, appealed, and after losing in the Pennsylvania Supreme Court, won in the United States Supreme Court.

In 1842, a majority of the nine justices, in a decision by Justice Joseph Story, held the Pennsylvania law unconstitutional.

We hold the [federal Fugitive Slave Act of 1793] to be clearly constitutional, in all its leading provisions, and, indeed, with the exception of that part which confers authority upon state magistrates, to be free from reasonable doubt and difficulty, upon the grounds already stated. As to the authority so conferred upon state magistrates, while a difference of opinion has existed, and may exist still, on the point, in different states, whether state magistrates are bound to act under it, none is entertained by this court, that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation. . . .

. . . [W]e are of opinion, that the act of Pennsylvania upon which this indictment is founded, is unconstitutional and void. It purports to punish as a public offence against that state, the very act of seizing and removing a slave, by his master, which the constitution of the United States was designed to justify and uphold. The special verdict finds this fact, and the state courts have rendered judgment against the plaintiff in error upon that verdict. That judgment must, therefore, be reversed, and the cause remanded to the supreme court of Pennsylvania, with directions to carry into effect the judgment of this court rendered upon the special verdict, in favor of the plaintiff in error.*

Justices Baldwin, Thompson, Wayne, and Daniel and Chief Justice Taney concurred in the judgment but disagreed on the underlying principles. Chief Justice Taney wrote separately to express his view that states were barred from infringing on the rights of slaveholders, and that—contrary to the principles laid out in Justice Story’s opinion—states could enact laws to protect the rights of slaveholders. Justice McLean dissented and argued that the federal Fugitive Slave Act allowed slaveholders to enforce their rights before a court but did not allow for the forcible seizure and transportation across state lines of suspected fugitives.

Several lower court federal judges continued to enforce the Fugitive Slave Act of 1793 and its successor statute of 1850, while some state court judges refused to do so and in some instances held these statutes unenforceable or unconstitutional under the United State Constitution. In Wisconsin in 1854, the abolitionist Sherman Booth, held in detention by federal authorities for aiding and abetting the escape of a formerly

* Excerpted from *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

enslaved person, filed a habeas corpus petition under state law. The Wisconsin Supreme Court granted the writ, and in its opinion, objected to the Fugitive Slave Act and to the Supreme Court decision in *Prigg*.

In re Booth
Supreme Court of Wisconsin, United States
3 Wis. 1 (1854)*

[Justice SMITH delivered the opinion of the Court:]

. . . The offence here charged is peculiarly the creature of the [Fugitive Slave Act of 1850]. It is not resistance to the marshal in the execution of his duty; it is not the breaking open the jail; that is an offense against the state; it is not a rescue as known to the common law, but it is intended to be the aiding of a fugitive slave to escape from the service to which he is held. It is a penal statute, and must be construed strictly. It is in restraint of freedom, and therefore every presumption arising under it must be in favor of liberty. It creates a new offense, and adds new and severe penalties, and therefore all process and prosecution under it must be in substantial conformity with its requirements. . . . No greater strictness is applied to this warrant than the law applies to all process of that class; though a much stricter rule might be justified; for this is a “wicked and a cruel” enactment, and those who feel compelled to execute it, may well require of those who demand official service at their hands, that in taking their “pound of flesh” they shall not “shed one drop of [C]hristian blood.” . . .

The course of the argument has imposed upon me, a necessity to examine further the case of *Prigg vs. Pennsylvania*. It is cited as binding upon our consciences. It is claimed that it is unbecoming in a state court to question its authority, or to subject its reasoning to elementary criticism. I deny its authority. But if I did not, I should yet claim the right to test its doctrines and reasoning by those rules which are common to all human conclusions, and which are the law of the human mind. I do not mean to be understood, that a subordinate tribunal may lawfully resist the mandate of a superior, merely because the reasoning by which the decision of the latter is supported, may not exactly commend itself to the mind of the former. But there are certain rules common to every mind capable of reasoning, which are the law of its action. Common consent, or perhaps a more profound cause, has fixed to certain words a meaning, and to language certain forms, which become the law of the language, and which the decision of no tribunal can alter or subvert. . . .

. . . If the free states are bound by this clause of the [C]onstitution to recognize the full and complete rights in the owner of the fugitive slave, as property, to the “same extent” as they were recognized in the state from which he escaped, then it will soon be claimed that the free states may be made a highway for slaveholders traveling with their slaves; a thoroughfare for internal slave traders, over which to transport their living

* Reversed by *Ableman v. Booth*, 62 U.S. 506 (1858).

chattels from state to state, and state sovereignty itself must succumb to the slaveholders' authority. I do not mean to say that the case of *Prigg vs. Penn.* has that extent; but that such is its tendency. Perhaps it was intended by the court to restrict the application of its doctrines to the case of slaves who had escaped. Its language, however, has a much wider scope. But conceding as I do the full effect of such limitation, and how easy will it be to construe an advantage taken of a voluntary bringing of the slave into a free state, into a technical escape; so to frame affidavits as to support a constructive escape, and thus to hang not only the liberty of the citizen or inhabitant, but also the sovereign authority of the state, upon the mere affidavit of a man who, for hire, would engage in the service of recapturing fugitives, thus invading the territories of freedom in search of recruits to fill the ranks of slavery. . . .

[The States] will never consent that a slave owner, his agent, or an officer of the United States, armed with process to arrest a fugitive from service is clothed with entire immunity from state authority; to commit whatever crime or outrage against the laws of the state, that their own high prerogative writ of habeas corpus shall be annulled, their authority defied, their officers resisted, the process of their own courts contemned, their territory invaded by federal force, the houses of their citizens searched, the sanctuary of their homes invaded, their streets and public places made the scene of tumultuous and armed violence, and state sovereignty succumb, paralyzed and aghast, before the process of an officer unknown to the constitution, and irresponsible to its sanctions. At least, such shall not become the degradation of Wisconsin, without meeting as stern remonstrance and resistance as I may be able to interpose, so long as her people impose upon me the duty of guarding their rights and liberties, and of maintaining the dignity and sovereignty of their state.

* * *

The Supreme Court of Wisconsin held that the Fugitive Slave Act was unconstitutional because it conferred judicial power upon commissioners who committed people into custody under the Act. After the United States Supreme Court put the case on its docket in 1854, the Wisconsin Supreme Court refused to send the record. In December 1858, the United States Supreme Court in *Ableman v. Booth* unanimously reversed and held that federal law was supreme.

Following the Civil War, in 1872, the United States Supreme Court ruled in the case *In re Tarble* (1872), in which a father had argued the United States military had wrongly permitted his underage son, Edward Tarble, to enlist in 1869. The father filed a habeas corpus petition in Wisconsin state court, which released Tarble. In an opinion whose legal bases were not clear, the United States Supreme Court held that state courts lacked the power to determine the legality of federal detention, and the Court cited *Ableman v. Booth*. Many commentators believe both cases to have been wrongly decided.

One powerful account of the protests by state court judges comes from Robert M. Cover's book, *Justice Accused*, which delved into the judicial responses to the institution of slavery in the United States.

Justice Accused

Robert M. Cover (1975)*

. . . [This] is the story of earnest, well-meaning pillars of legal respectability and of their collaboration in a system of oppression—Negro slavery. I have chosen to analyze at length only the dilemma of the antislavery judge—the man who would, in some sense, have agreed with my characterization of slavery as oppression. It was he who confronted Vere's dilemma, the choice between the demands of role and the voice of conscience. And it was he who contributed so much to the force of legitimacy that law may provide, for he plainly acted out of impersonal duty.

In a static and simplistic model of law, the judge caught between law and morality has only four choices. He may apply the law against his conscience. He may apply conscience and be faithless to the law. He may resign. Or he may cheat: He may state that the law is not what he believes it to be and, thus preserve an appearance (to others) of conformity of law and morality. Once we assume a more realistic model of law and of the judicial process, these four positions become only poles setting limits to a complex field of action and motive. For in a dynamic model, law is always becoming. And the judge has a legitimate role in determining what it is that the law will become. The flux in law means also that the law's content is frequently unclear. We must speak of direction and of weight as well as of position. Moreover, this frequent lack of clarity makes possible "ameliorist" solutions. The judge may introduce his own sense of what "ought to be" interstitially, where no "hard" law yet exists. And, he may do so without committing the law to broad doctrinal advances (or retreats). . . .

. . . The persistence of the natural law idiom in slavery situations—kept alive in conflict-of-law, international law, and some state constitutions—fostered the illusion that there was an honest, bootstrap operation by which the law might be made to achieve libertarian ends. That illusion was particularly attractive to certain insurgent forces that developed a technique for constantly confronting the judiciary with extensions and reformulations of their own natural law idiom. Although good judges didn't have any trouble rejecting the natural law course as a basis for action where positive law provided a contrary rule, they did have difficulty justifying their positivism to these insurgents. A later age, having rejected the natural law idiom even as a device for expressing commonly accepted ends of law, would not face the dilemma of how to justify limiting its effect.

* Excerpted from ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975). This book is available for purchase at Yale University Press: <https://yalebooks.yale.edu/book/9780300032529/justice-accused>.

The jurisprudence of mid-nineteenth-century America also fostered a degree of imprecision through the formulation of responsible judging as a “will-less” operation. Having rejected as simplistic and inaccurate the traditional characterization of judging as simply *ius dicere*, mid-nineteenth-century jurists had not yet formulated an acceptable alternative that would both describe and explain the senses in which judges make law while justifying and explaining the difference between judicial and legislative lawmaking. By stating that judges did make law but ought never consult their personal “will” in so doing, the age was groping for a way to justify judicial independence, preserve judicial impartiality, yet acknowledge judicial discretion and innovation. Outright confession that the personal will of the judge could be a legitimate determinant of law was a difficult step to take. It would have played into the hands of those who urged democratic controls over judicial tenure and activity, and it would have placed a burden of responsibility on judges that they were rightfully unwilling to accept, in part because there had not yet been an adequate description of alternative restraining devices. . . .

The jurisprudential tools of an epoch, its “juristic competence,” do not determine or generate specific answers to particular problems, but they do determine the universe of viable responses. Antebellum jurisprudence was positivist and preoccupied with refuting the Jacksonian myth of judicial lawmaking run amuck. As a result, the universe of responses available for the judge in the moral-formal dilemma posed by the Fugitive Slave law tended to include and stress formulations of self-denial and mechanical limits. Thus, the juristic competence of the age dovetailed with the needs of the antislavery judge to externalize responsibility for his decisions. . . .

. . . The “juristic competence” of the age may have created predispositions, but the universe of possible responses generated by it was not circumscribed by any hard and fast failure to understand discretion or to value it. The consistent recourse to the highest justifications for formalism, the most mechanical understanding of precedent, and the steadfast excision of self and appeal to separation of powers suggests that it was the performance of troubled men in troubled times as well as the juristic competence of their age that determined the almost uniform response of the antislavery bench to the call for liberty. . . . If a man makes a good priest, we may be quite sure he will not be a great prophet.

EXTREMES, DEMOCRACY, AND THE RULE OF LAW

DISCUSSION LEADERS

DANIEL MARKOVITS, TIMOTHY SNYDER,
AND MANUEL JOSÉ CEPEDA ESPINOSA

IV. EXTREMES, DEMOCRACY, AND THE RULE OF LAW

DISCUSSION LEADERS:

DANIEL MARKOVITS, TIMOTHY SNYDER, AND MANUEL JOSÉ CEPEDA ESPINOSA

Entitlements to Participate

Robert Alan Dahl, <i>Polyarchy: Participation and Opposition</i> (1971).....	IV-5
Jan-Werner Müller, <i>Protecting Popular Self-Government from the People?</i> (2016)	IV-6

Gatekeeping: Access to the Popular Vote

Verdict Banning the Communist Party of Germany (Federal Constitutional Court of Germany, First Senate, 1956).....	IV-12
Judgment of the Second Senate of 17 January 2017 (Federal Constitutional Court of Germany, Second Senate, 2017)	IV-13
The Kach Party v. The Chairman of the Central Election Committee for the 12 th Knesset (Supreme Court of Israel, 1988).....	IV-18
Judgment C-089 of 1994 (Constitutional Court of Colombia, 1994).....	IV-23
Final Agreement for Ending the Conflict and Building a Stable and Lasting Peace (Colombia, 2016).....	IV-25

Policing Speech in Electoral Politics

Bolsonaro v. Party Coalition “O povo feliz de novo” (Superior Electoral Court of Brazil, 2018)	IV-29
Facebook v. CasaPound (Court of Rome, Italy, 2020).....	IV-31
Case Decision 2021-001-FB-FBR (Facebook Oversight Board, 2021)	IV-34

The Role of Resources: To Participate, to Overwhelm, to Insulate

G.A. Cohen and Michael Otsuka, <i>On the Currency of Egalitarian Justice</i> (2011)	IV-37
Jeffrey A. Winters, <i>Oligarchy</i> (2011).....	IV-38
Daniel Markovits, <i>The Meritocracy Trap</i> (2019).....	IV-40

Financing Campaigns

James Lindley Wilson, <i>Democratic Equality</i> (2019)	IV-43
McCloy v. New South Wales (High Court of Australia, 2015)	IV-45
McCutcheon v. Federal Election Commission (Supreme Court of the United States, 2014)	IV-49
Michael J. Graetz and Ian Shapiro, <i>Death by a Thousand Cuts</i> (2011)	IV-52

Escaping Regulation

- Sharon J. Riley and Sarah Cox, *Industry Responsible for 80 Per Cent of Senate Lobbying Linked to Bill C-69* (2019)IV-55
- Elizabeth Warren, *Corporate Capture of the Rulemaking Process* (2016).....IV-57
- Veena B. Dubal, Ruth Berins Collier, and Christopher L. Carter, *Disrupting Regulation, Regulating Disruption* (2018).....IV-59
- Shelly Steward et al., *Uber’s Call for Change in Europe Shirks Responsibility While Highlighting Real Challenges* (2021).....IV-62

Avoiding Taxes

- Annette Alstadsæter, Niels Johannesen, and Gabriel Zucman, *Tax Evasion and Inequality* (2019)IV-65
- U.S. Department of the Treasury, *Investing in the IRS and Improving Tax Compliance* (2021)IV-67
- Imran Ahmed Khan Niazi v. Mian Muhammad Nawaz Sharif (Supreme Court of Pakistan, 2017)IV-69
- Rebecca Prebble and John Prebble, *Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law?* (2010)IV-73
- Canada Trustco Mortgage Co. v. Canada (Federal Court of Appeal of Canada, 2005)IV-75

Reinforcing Extremes

- Richard Rorty, *Achieving Our Country* (1998)IV-77
- Daniel Markovits, *The Meritocracy Trap* (2019).....IV-80

Democracy comes in many forms, yet all democracies embrace what Robert Dahl called “the continuing responsiveness of the government to the preferences of its citizens, considered as political equals.”* Extremism threatens to undermine democratic responsiveness and equality. This chapter focuses on contemporary efforts to use political and/or economic power to make a claim to *be* the state; to participate in and control it; or to challenge, reject, or escape the reach of an extant government.

Political extremism comes in many varieties, including fascism, populism, and authoritarianism. An intense debate explores the meanings of these terms and whether they are appropriate to describe contemporary movements in particular countries. Each of these forms may seek to gain power through democratic or anti-democratic means; some movements seek to pervade, co-opt, and use the democratic mandate to achieve

* ROBERT DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* 1 (1971). This book is available for purchase at Yale University Press: <https://yalebooks.yale.edu/book/9780300015652/polyarchy>.

non-democratic ends while others ignore or rebuff democracy entirely. Courts in many countries have had to consider whether and when they have a role in policing the boundaries of democracy to buffer against movements labelled extreme.

Politics is one space, and economics another. Great wealth has been used to overwhelm, dilute, and replace the mobilization power of democratic politics with the economic power wielded by the rich few. Those holding this wealth deploy it through a variety of means, from political participation and intense lobbying to the outright and often successful avoidance of political responsibilities, such as escaping taxes and other forms of regulation.

Both political and economic extremes pose a dilemma for democratic government. Following the rules designed for those who wish to participate in good faith risks enabling extremists to commandeer the rule of law. Bending or breaking the law to restrict extremists risks that those embracing democracy and the rule of law will themselves betray some of the tenets they admire. This chapter spotlights the challenges political and economic extremes pose for democratic regimes as we explore the role courts play in both protecting and adapting democracy in challenging times.

ENTITLEMENTS TO PARTICIPATE

The rights to run for office and argue for one's candidates are fundamental principles of liberal democracy. Yet extremists can also deploy these tools to seize power and subvert democracy. Liberal democracies face a paradox: either suppress extremists by restricting speech and democracy or extend principles of free speech and democratic participation to extremists who, if they gain power, will then undermine these values.

The choices that countries make in response to these threats are framed by their own constitutional structures and values. One archetype of constitutional self-consciousness is that of popular sovereignty, which grounds the values of democratic order in the populace's choice to organize as such. A second model grounds democratic values in human rights and rational justice that transcend the popular will. Where a democratic order grounded in this latter group may find that those values require it to immunize itself against extreme actors through restrictions on speech or association, a state believing itself to be grounded in the former may be more willing to tolerate extreme actors.

The following excerpts explore the definitional components of democracy and their limits.

Polyarchy: Participation and Opposition

Robert Alan Dahl (1971)*

... [T]he two processes [of] democratization and the development of public opposition ... are not ... identical. ...

... [A] key characteristic of a democracy is the continuing responsiveness of the government to the preferences of its citizens, considered as political equals. ... [T]he term “democracy” [refers to] a political system one of the characteristics of which is the quality of being completely or almost completely responsive to all its citizens. ... As a hypothetical system, one end of a scale, or a limiting state of affairs, it can ... serve as a basis for estimating the degree to which various systems approach this theoretical limit.

... [F]or a government to continue over a period of time to be responsive to the preferences of its citizens, considered as political equals, all full citizens must have unimpaired opportunities:

1. To formulate their preferences;
2. To signify their preferences to their fellow citizens and the government by individual and collective action;
3. To have their preferences weighed equally in the conduct of the government ... with no discrimination because of the content or source of the preference.

These ... [are] three necessary conditions for a democracy, though they are probably not sufficient. Next, ... for these three opportunities to exist among a large number of people, ... the institutions of the society must provide at least eight guarantees: ...

1. Freedom to form and join organizations
2. Freedom of expression
3. Right to vote
4. Eligibility for public office
5. Right of political leaders to compete for support
- 5a. Right of political leaders to compete for votes
6. Alternative sources of information
7. Free and fair elections
8. Institutions for making government policies depend on votes and other expressions of preference.

... [T]he eight guarantees might be fruitfully interpreted as constituting two somewhat different theoretical dimensions of democratization.

* Excerpted from ROBERT DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* 1 (1971). This book is available for purchase at Yale University Press:
<https://yalebooks.yale.edu/book/9780300015652/polyarchy>.

1. . . . [R]egimes vary enormously in the extent to which the eight institutional conditions are openly available, publicly employed, and fully guaranteed to at least some members of the political system who wish to contest the conduct of the government. . . .

2. . . . [R]egimes also vary in the proportion of the population entitled to participate on a more or less equal plane in controlling and contesting the conduct of the government: to participate, so to speak, in the system of public contestation. . . .

The right to vote in free and fair elections . . . partakes of both dimensions. When a regime grants this right to some of its citizens, it moves toward greater public contestation. But the larger the proportion of citizens who enjoy the right, the more inclusive the regime. . . .

. . . [D]eveloping a system of public contestation is not necessarily equivalent to full democratization.

. . . [D]emocratized regimes . . . are regimes that have been substantially popularized and liberalized, that is, highly inclusive and extensively open to public contestation. . . .

. . . The lower the barriers to public contestation and the greater the proportion of the population included in the political system, the more difficult it is for the government of a country to adopt and enforce policies that require the application of extreme sanctions against more than a small percentage of the population; the less likely, too, that the government will attempt to do so. . . .

**Protecting Popular Self-Government from the People? New
Normative Perspectives on Militant Democracy**
Jan-Werner Müller (2016)*

Should democracies take measures against political actors committed to the abolition of democracy through nonviolent means? The concept of militant democracy answers this question in the affirmative. A militant democracy does not wait until its enemies have gained majorities at the polls; it seeks to nip fundamental opposition to democracy in the bud. . . .

Theorists writing about militant democracy often mention paradoxes. . . . [O]ne can identify at least two radically different paradoxes that might be in play. One is the supposedly fundamental paradox that democracy can abolish itself; it can be undermined and eventually extinguished through democratic means. However, even a

* Excerpted from Jan-Werner Müller, *Protecting Popular Self-Government from the People? New Normative Perspectives on Militant Democracy*, 19 ANNUAL REVIEW OF POLITICAL SCIENCE 249 (2016). Modified with permission from the Annual Review of Political Science, Volume 19 © 2016 by Annual Reviews, <http://www.annualreviews.org>.

cursory reflection would confirm that this paradox, if it is one at all, is not peculiar to democracy. A monarch or a dictator could initiate a transition to democracy, for instance. . . .

. . . [A] precise version of this alleged paradox is that democracy . . . furnishes its enemies with the means to fight it, whereas other regimes can be ruthless with people they perceive as opponents without contradicting the values they espouse in justifying their existence. . . . Yet the fact remains that there are very few historical examples of democracies that were destroyed from within through entirely legal means

. . . [T]wo further arguments might be added. One is that the supposed vulnerability of democracy is also a distinct strength: Democracies allow citizens to voice their discontent; rather than seeing social and even political dissatisfaction as immediately turning into the destruction of democracy, one might see fundamental rights to association, assembly, and free speech as . . . providing a safety valve. Grievances are not pent-up as they might be in an authoritarian system. Furthermore, an authoritarian regime receives scant information from and about society, other than what the secret police might report—unless one thinks that less than free and fair elections can help gather information, including about the strength of potential opposition to the regime. Overall, democracies are more likely to respond to their own failures and hence deprive their enemies of causes to rebel against the regime.

. . . [Skeptics might say] that the very attempt to defend democracy will damage democracy: Governments will fight their enemies until they become like their enemies; they might think that they have held on to democracy, but they actually destroyed it in the process of securing it This seems . . . like a genuine paradox. . . .

Alternatively, skeptics about militant democracy might say countries that can have militant democracy probably do not need it, whereas those that need it cannot have it. . . . [A]ny country where the most powerful actors can agree on what genuine threats to democracy are . . . probably has such a strong democratic consensus that challenges to democracy will fail by themselves. Conversely, in highly polarized and unstable polities, characterized by deep moral disagreement, militant democracy might make some sense, but the very facts of polarization and disagreement probably prevent the creation of a militant democracy. Everyone might be too concerned about the abuse of party bans for partisan purposes, for instance, to agree to have such measures available.

None of what has been said so far demonstrates that democratic self-defense is necessarily either superfluous or bound to lead to democratic self-destruction. In any case . . . [s]erious reflection on militant democracy should focus on at least three questions. First, what might serve as an underlying justification for militant democracy? Second, which measures, such as party bans and individual rights restrictions, might be authorized by a particular justification of militant democracy, and what should be the criteria for deciding to employ them? And third, which actor or institution should authorize and implement such measures? . . .

... [A] justification for militant democracy ... is that any toleration of unreasonable speech and organized activity is bound to have a harmful effect on the rest of society. ... Allowing ... antidemocratic attitudes free rein will result in the denigration of particular citizens ... [and] send a signal that organizing to destroy the existing form of fair social cooperation will be condoned by the legal system. ...

... [O]ne needs to separate three possible scenarios of rights restrictions. One approach holds fast to an American-style doctrine that only imminent lawless action justifies rights restrictions, but it adds that the state can still forcefully counter the messages conveyed by antidemocratic actors. ...

The second approach would outlaw certain kinds of speech—quite possibly including advocacy of destroying democracy from within by nonviolent means—but not strip unreasonable citizens of basic, politically relevant rights. ...

The third, most draconian approach would effectively disenfranchise citizens: They would be declared to have forfeited their political rights as such. ...

... Although many democratic theorists regard disenfranchisement of citizens as anathema, ... some democracies disenfranchise prisoners convicted of particularly heinous crimes ... [I]t is one thing to reduce political options when exercising certain rights; it is another to take away rights altogether. The banning of a particular party deprives voters of one option to express their preferences, but they can still vote for other parties, some of which perhaps still advance their core interests. But if rights central to political participation are taken away completely, by definition the possibilities to advance interests are severely curtailed.

If such civic deprivation is not to be permanent, one also has to ask: How might those stripped of basic rights ever regain them? Would they have to pass a citizenship test, perhaps designed specifically to detect whether traces of unreasonableness remain in their minds? ...

... A desideratum is that, in general ... citizens should not be treated like complete outsiders to the polity or as quasi-children whose judgment must be considered somehow impaired. ... [T]here are strong reasons to think that individuals should never be completely stripped of rights, and that, short of speech that can be sanctioned with the criminal law, they should be free to voice their political views, however normatively problematic they might be.

The case is different for parties and other associations. It is one thing to advocate antidemocratic ideas; it is another to organize actively and gather political strength. [The] basic intuition [is] that collective, institutionalized action is more threatening than individual interventions in public discourse ... [I]n the informal public sphere extremist speech should generally be tolerated. If nothing else, listening to such speech, especially by the state, helps track the concerns of citizens; silencing people would mean that genuine social and political problems go undetected. Parties might pick up and

normatively filter such concerns, that is, translate them into policies that do not fail to treat citizens as free and equal, even if the speech that initially expressed the concerns might have been far from reasonable However, as unreasonable citizens organize, gather political support, win votes, and move closer to the center of actual decision-making power, tolerance should decrease—and, in the end, a party with an antidemocratic agenda might have to be banned altogether. . . .

. . . Allowing more speech is meant to teach the state about what is really brewing in society.

. . . But there appears also to be something deeply patronizing about a position according to which one does not really listen to speech but immediately takes it as a symptom of something else. . . .

An alternative to banning . . . is the deployment of what I call soft militant democracy. . . . Soft measures would leave a party in existence but officially limit its possibilities for political participation, or de facto make its life difficult. . . . Parties might also be allowed to compete in elections but be denied party financing or specific means of campaigning, such as access to broadcasting. . . . The best hope is that, in the face of such (relatively) soft measures, parties will decide to become more moderate in order to stay, or fully participate, in the political game. . . .

There is widespread agreement that, if militant democracy is legitimate at all, it ought to be applied by impartial institutions, primarily courts. . . . The entirely reasonable worry . . . is that, if left entirely to executives or parliaments, militant democracy might turn into a convenient means for parties to outlaw their competitors or to score cheap points with the electorate against unpopular minorities. . . .

Although the insistence on courts as final arbiters of militant democracy is sensible in general, . . . it [may be] in the end . . . party politicians who decide on an application for a party ban—and, as is well known from the debate about emergency measures in the face of terror acts, the judiciary may often defer to the executive or the parliament, especially if a party can plausibly be associated with acts of violence. . . .

. . . [T]he idea of democratic self-defense had become widely accepted by constitutional lawyers. . . . However, even those accepting the basic idea have often felt queasy about rights restrictions of one form or another, and they might even have been haunted by the paradox of a self-defending democracy in the end undermining itself. . . . [N]ormative inquiries on militant democracy have been helpful in developing much more nuanced arguments as to what might be justified in the way of rights restrictions and also as to who should decide on such curtailments of political liberties. . . .

Gatekeeping: Access to the Popular Vote

This subsection considers the banning of political parties and associations that espouse extreme rhetoric and actions. Seeking to limit the power of such parties, a number of countries have prohibited political parties and associations that have been labelled anti-democratic. In March of 2021, for example, the French Interior Minister banned the transnational far-right Generation Identity for inciting discrimination and violence against immigrants.* In November 2020, an Athens court declared the violently nationalist and anti-immigrant Greek political party Golden Dawn a criminal organization. The court convicted twenty-seven members of the party, including its leader and seventeen Members of Parliament, of murders, attacks on migrants, illegal possession of weapons, as well as other crimes.

Observers lauded the Greek case for the court's willingness to take on a neo-fascist political party posing a severe threat to Greek democracy. Golden Dawn rose quickly in the early 2010s and became the third-largest party in the Greek Parliament in 2015. Despite the decimation of the party, the impact of the conviction on the influence of Golden Dawn's ideology in Greek politics remains to be seen:

[T]he party casts a long shadow and continues to shape Greek politics. The more mainstream New Democracy, for example, has opened its doors to a number of far-right politicians, who ran successful campaigns in the recent election. Some of them had previously expressed strong xenophobic and antisemitic views. [An] ultranationalist party . . . , meanwhile, won ten seats in the Greek parliament Golden Dawn's spokesperson Ilias Kasidiaris has formed a new movement . . . even though he, too, is now in jail.

. . . The same voters who embraced violence and legitimize Golden Dawn for its violent practices could support a similar movement. We might expect any such party to be less aggressive and neo-Nazi than Golden Dawn, but its values will be similar.

. . . [W]hen it comes to extremism, it is important to reorganize the years of antifascist activism during Golden Dawn's rise. It was a fight that, at times, seemed like a lost cause. Democracy managed to pass an important test in the prosecution and sentencing of this criminal organization. The court ruling was enough to eradicate Golden Dawn, but fascist remnants are still out there, reorganizing and planning their

* Excerpted from Minister of the Interior of the French Republic, *Decree on the Dissolution of an Association* (Mar. 3, 2021).

next move.*

Below, we excerpt some decisions identifying factors that courts consider when imposing limits on the participation of extreme political parties. Whereas commentators employ terms such as fascist, populist, and authoritarian to describe these parties, judges do not usually use such labels but focus instead on the track record and actions of allegedly extreme groups.

We have chosen two jurisdictions—Germany and Israel—with explicit Basic Law provisions that address exclusions of groups deemed to threaten the democratic order. Article 21(2) of Germany’s Basic Law reads:

Parties that, by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. . . .

In 1984, Israel’s Knesset put into place Section 7A its Basic Laws. The current law, as amended in 2002, provides:

A candidates’ list shall not participate in elections to the Knesset, and a person shall not be a candidate for election to the Knesset, if the objects or actions of the list or the actions of the person, expressly or by implication, include one of the following: (1) negation of the existence of the State of Israel as a Jewish and democratic state; (2) incitement to racism; (3) support of armed struggle, by a hostile state or a terrorist organization, against the State of Israel.

As the German Federal Constitutional Court and Israeli Supreme Court encountered parties threatening the values enshrined in their basic laws, their decisions addressed whether states protect themselves better by permitting or by forbidding political participation by extremist parties and where to draw these lines.

* * *

The German Federal Constitutional Court has several cases on the exclusion of political parties under Article 21(2). A first decision in 1952 defined the term “free democratic basic order” as:

[A]n order which, excluding any form of violence or arbitrary rule, represents a rule of law based on the self-determination of the people according to the will of the respective majority and freedom and

* Excerpted from Georgios Samaras, *The End of Golden Dawn: Has Greece Shown Us How to Deal With Neo-Nazis?*, CONVERSATION (Nov. 26, 2020), <https://theconversation.com/the-end-of-golden-dawn-has-greece-shown-us-how-to-deal-with-neo-nazis-150239>.

equality. The basic principles of this order are . . . respect for the human rights specified in the Basic Law, above all the right of the individual to life and free development, popular sovereignty, the separation of powers, the responsibility of the government, the legality of the administration, the [i]ndependence of the courts, the multi-party principle and equal opportunities for all political parties with the right to constitutional formation and exercise of an opposition.*

A 1956 decision banning Community Party expanded upon these principles.

Verdict Banning the Communist Party of Germany (KPD)
Federal Constitutional Court of Germany (First Senate)
1 BvB 1/51 (1956)**

. . . [In] 1951, the federal government requested a determination by the Federal Constitutional Court that the West German Communist Party was unconstitutional in terms of Article 21(2) of the Basic Law. . . .

. . . [T]he principal argument by counsel for both sides, understandably, centered around the interpretation of article 21(2). The court recognized that article 21(2) attempted a synthesis between the principle of tolerance in the face of all political views and the avowal of fixed, inviolable, basic values of the State order. . . .

. . . [A] political party is not to be adjudged as constitution-adverse if the sole objection is that it does not affirmatively acknowledge first principles of the free democratic basic order. To be constitution-adverse, a party must go beyond that and develop an active, combatant, aggressive attitude against the standing order, and plainly prejudice the functioning of that order. Hence . . . article 21(2) demands that the political party in question positively aim to prejudice or set aside the free democratic basic order. The court, however, expressly denied the KPD's argument that inchoate intentions were not enough for purposes of article 21(2), and that overt acts . . . were necessary before there could be any ruling of constitution-adversity The court affirmed that the political course of a party can be determined through . . . the intention to combat the free democratic basic order, for it is the goal of article 21(2) to prevent the rise of parties with anti-democratic objects in view. . . .

The ultimate goal of the KPD . . . is the establishment of the socialist-communist social order, through the proletarian revolution and the dictatorship of the proletariat. . . . [This is] incompatible with the free democratic basic order, for the two systems, dictatorship of the proletariat and the free democratic basic order, are mutually

* Excerpted from BVerfG, 1 BvB 1/51, October 23, 1952.

** Excerpted from Edward McWinney, *The German Federal Constitutional Court and the Communist Party Decision*, 32 INDIANA LAW JOURNAL 295 (1957).

exclusive. . . . [T]he kernel and essence of the present West German Basic Law (dignity, freedom, and equality of the person) could not survive in a state order in which the principles of the dictatorship of the proletariat alone had value. . . . [T]he manner and way in which the KPD systematically made the proletarian revolution and the dictatorship of the proletariat the long-range object of their party-political schooling, propaganda, and agitation in political struggle within the West German Republic made it clear that the party already aimed at the undermining of the free democratic order established under the Basic Law. . . .

* * *

A 2017 decision revisited the definition of the term “free democratic basic order.”

Judgment of the Second Senate of 17 January 2017
Federal Constitutional Court of Germany (Second Senate)
2 BvB 1/13 (2017)

[T]he Federal Constitutional Court—Second Senate—with the participation of Justices President Voßkuhle, Huber, Hermanns, Müller, Kessal-Wulf, König, Maidowski[:] . . .

. . . The subject of the proceedings is the application by the *Bundesrat* [(the upper House of the Parliament)] to establish the unconstitutionality of the National Democratic Party of Germany (NPD) and to dissolve it pursuant to Art. 21(2) of the Basic Law (GG)

The . . . NPD . . . advocates . . . abolishing the existing free democratic basic order . . . [and replacing it] with an authoritarian national state that adheres to the idea of an ethnically defined “people’s community.” 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. However, (currently) there is a lack of specific and weighty indications suggesting that this endeavour will be successful; for that reason, the . . . Court . . . unanimously rejected as unfounded the *Bundesrat*’s admissible application to establish the unconstitutionality of the NPD and its sub-organisations.

. . . [T]he prohibition of a political party by the Federal Constitutional Court is the sharpest weapon . . . a democratic state under the rule of law has against an organised enemy. The highest degree of legal certainty, transparency, predictability and reliability is therefore required in proceedings to prohibit a political party. . . . It must be guaranteed that the political party is able to present its position freely, without being monitored and in a self-determined way. In addition to the requirements of reliability and transparency, the requirement of strict freedom from interference by the state in the

sense of unmonitored and self-determined formation of will and self-portrayal before the Federal Constitutional Court is indispensable. . . .

. . . [T]he principle of “militant” or “fortified” democracy . . . is intended to guarantee that enemies of the Constitution cannot invoke the freedoms guaranteed by the Basic Law and their protection to endanger, undermine or destroy the constitutional order or the existence of the state. . . .

. . . The fundamental concern of a Constitution not to be undermined by abuse of those very freedoms it guarantees would be missed if it lacked effective instruments to protect the free democratic basic order. Therefore, in deciding whether irremediable procedural obstacles exist in proceedings for the prohibition of a political party . . . both the preventive purpose of proceedings for the prohibition of a political party and the rule of law requirements which such proceedings need to meet must be considered and weighed

. . . [P]olitical parties . . . are elevated by Art. 21 GG to the rank of constitutional institutions and acknowledged as being necessary “factors of constitutional life.” The prerequisite for their carrying-out of the constitutional task assigned to them of participating in the formation of the political will of the people is their freedom of foundation and activities which is guaranteed in Art. 21(1) GG. . . .

For a political party to be prohibited it is sufficient that the political party in question “seeks” to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany. Accordingly, Art. 21(2) GG is not a provision that aims at averting specific threats. Rather, it aims to prevent, by way of preventive protection of the Constitution, specific threats to the free democratic basic order from arising in the first place. . . .

The application for prohibition by the applicant concerns the legally protected good of the “free democratic basic order,” which a political party must “seek” to “undermine or abolish” “by reason of its aims or the behaviour of its adherents.” . . .

The term “free democratic basic order” . . . is limited to those principles which are absolutely indispensable for the free democratic constitutional state. . . .

a) The free democratic basic order is rooted primarily in human dignity (Art. 1(1)* GG). The guarantee of human dignity covers in particular the safeguarding of personal individuality, identity and integrity and elementary equality before the law.

* Article 1 of the Basic Law of Germany provides in part:

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

b) . . . [T]he principle of democracy is a constitutive element of the free democratic basic order. The possibility of equal participation by all citizens in the process of forming the political will as well as accountability to the people for the exercise of state authority (Art. 20(1) and (2)* GG) are indispensable for a democratic system.

c) Finally, the concept of the free democratic basic order is further determined by the principle that organs of the state be bound by the law . . . —a principle which is rooted in the principle of the rule of law, and by independent courts’ oversight in that regard. At the same time, protection of the freedom of individuals requires that the use of physical force is reserved for the organs of the state which are bound by the law and subject to judicial oversight.

. . . [T]he criterion “undermining” can be assumed to be met once a political party . . . noticeably threatens the free democratic basic order. . . . It is sufficient for it to be attacking one of the constituent elements of the free democratic basic order (human dignity, democracy and the rule of law)

. . . [N]ot all behaviour by adherents can be attributed to a political party. . . . The determining factor is . . . whether the political will of the political party in question is recognisably being expressed in the respective adherent’s behaviour. This will normally be taken to be the case if the behaviour reflects a fundamental tendency existing in the political party or if the political party explicitly espouses such behaviour. . . .

Art. 21(2) GG does not place sanctions on ideas or convictions. . . . [B]eyond a mere “professing” of its own anti-constitutional aims, the political party must exceed the threshold of actually “combating” the free democratic basic order or the existence of the state

. . . [T]here can . . . be a presumption that the criterion of “seeking” has been met only if there are specific . . . indications suggesting that it . . . is at least possible that a political party’s actions . . . may succeed . . .

. . . [T]he criterion of “seeking” will be met if a political party tries to achieve its unconstitutional aims through the use of force or by committing crimes. Not only does the use of force imply disregard of the state’s monopoly on the use of force, but it also involves a serious interference with the principle of free and equal participation in

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. . . .

* Article 20 of the Basic Law of Germany provides:

(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.

the formation of the political will. . . . The same applies if a political party acts below the threshold of conduct punishable under criminal law in a manner which restricts the freedom of the process of forming the political will . . . [by] creat[ing] an “atmosphere of fear.” . . .

While the respondent does indeed advocate aims which are directed against the free democratic basic order and although it systematically acts . . . towards achieving those aims . . . , there are no specific and weighty indications suggesting even at least the possibility that these endeavours . . . might be successful

Currently, parliamentary majorities enabling the respondent to impose its political concept are achievable neither through elections nor by means of forming coalitions. . . .

Election results in European Parliament and *Bundestag* elections are stagnating at a very low level. In the last *Bundestag* election in 2013 the respondent . . . gained 1.3% of the valid second votes cast. . . . In the 2014 European Parliament election it gained 1% of the valid votes cast

In the more than five decades of its existence, the respondent has not been able to gain representation in any federal state parliament on a permanent basis. There are no indications that this development will change in the future. In addition, the other political parties represented in the parliaments . . . have hitherto not been prepared to enter into coalitions . . . with the respondent. . . .

There are likewise no specific and weighty indications suggesting that the respondent will succeed in achieving its aim of abolishing the free democratic basic order by democratic means outside the parliamentary level. . . .

. . . While the respondent does indeed try to instrumentalise the refugee and asylum problems for its own purposes, it frequently acts not in its own name but under the umbrella of apparently neutral organisations. . . . [T]he anti-asylum initiatives by the respondent have in individual cases been very successful in mobilising attendees. It is, [however], not discernible that this means that its social acceptance is increasing and that it will be able to assert its anti-constitutional aims through the process of forming the political will by democratic means. . . .

Nor are there sufficient indications that there is a fundamental tendency of the respondent to assert its anti-constitutional aims by violent means or by committing criminal offences. . . .

Mere participation by the respondent in the battle of political opinions must . . . remain outside the scope of consideration. . . .

. . . [T]o the extent that individual situations remain in which a potential threat exists or at least cannot be ruled out which may undermine the freedom of formation of

the political will, this is not sufficient to infer that the respondent has a fundamental tendency to pursue its political aims by creating an atmosphere of fear. . . .

. . . Intimidation and threats, as well as the building-up of potentials for violence, must be countered thoroughly and in due time with the means of preventive police law and repressive criminal law in order to effectively protect the freedom of formation of the political will as well as individuals affected by the respondent's behaviour.

* * *

The NDP lost its single European Parliament seat in 2019 and as of this writing held no seats in the Bundestag, state parliaments, or European Parliament. Meanwhile, Alternative for Germany (AfD), a nationalist and far-right populist party that opposes immigration and European integration, has gained increasing power since 2014. In 2017, AfD became the third-largest party in Germany. While it initially presented itself as a center-right party, AfD factions increasingly collaborated with neo-Nazi movements and other extremist groups.

In March 2021, the Cologne Administration Court enjoined Germany's domestic intelligence agency from placing AfD under surveillance in advance of upcoming legal proceedings challenging the intelligence agency's decision to designate the party a suspected extremist organization. The court stated that "[t]he resulting disadvantage for the applicant" from the designation and monitoring "is more serious than the possible consequences for the protection of the free democratic order."^{*}

* * *

As noted, Israeli law provides for the disqualifications of candidates' lists or individual candidates. In 1965 the Israeli Supreme Court recognized the power of the Central Elections Committee to disqualify a candidates' list after the Committee refused to register the Arab Socialist List, arguing that the party was an illegal association denying the existence of Israel.^{**}

The 1985 Section 7A enactment was put into place after the ultra-right nationalist Rabbi Meir Kahane won a seat in the Knesset in the 1984 elections. That provision recognized and broadened the power to disqualify candidate lists. In 2002, the Knesset amended the law to extend the disqualification power to individual candidates. Central Elections Committee decisions on disqualification of a candidates' list of an individual candidate are subject to judicial review by the Supreme Court.

^{*} Administrative Court of Cologne, [2021] 13 L 105/1.

^{**} Yeredor v. Chairman of the Central Elections Committee for the Sixth Knesset, EA 1/65.

The Israeli Supreme Court's first decision interpreting Section 7A is excerpted below.

**The Kach Party v. The Chairman of the Central Election Committee
for the 12th Knesset**
Supreme Court of Israel
Election Appeal 1/88 (1988)

President M. Shamgar[:]

1. On October 5, 1988, the Central Election Committee for the 12th Knesset . . . determined that the “Kach” party may not run in the Knesset elections because it is in violation of Section 7a of the Basic Law. . . . The Appellants appealed. . . .

5. (a) The Appellants argue that by its very nature and content, Section 7a is . . . radically inconsistent with the principles of democracy. [They claim that] these provisions contradict the foundations of the constitutional and democratic regime of the State of Israel because they harm the general right to be elected, and . . . violate the right to vote. . . .

7. . . . [In EA 3, 2/84 (*Neiman v. Central Election Commission; Avni v. Central Election Commission*)], this Court . . . noted that the right to be elected and the right to vote are among the most important basic rights. The right to stand for election is a fundamental political right, which expresses the idea of equality, freedom of expression and freedom of association. Therefore, the existence of this right and its protection is a sure sign of a democratic society. Moreover . . . the right to vote is incomplete if the right to stand for election is limited, because limiting the right to be elected also reduces voters' rights, and this involves . . . a limit upon the freedom of expression. In EA 3, 2/84, . . . we said:

The fundamental liberties—including freedom of expression, freedom of belief and equality in competing for public office, are all inherent in our governmental system [P]ublic debate . . . [is an] essential tool in the service of every opinion, view and belief in a free society. The act of classifying citizens and distinguishing between them . . . contradicts the truth that underlies the freedoms and . . . manifests the same internal contradiction as does a person who decries democracy while utilizing the rights it confers. . . . Prohibitions and restrictions are extreme devices of the last resort. The premise is that freedom of speech finds prominent expression when accorded also to those whose opinions appear to be mistaken and even dangerous. . . .

[However, b]asic rights and their application cannot be absolute because of the likelihood that in extreme circumstances the use of such rights by one person will

conflict with the constitutional rights of another or may create extreme and immediate danger that must be stopped. . . .

. . . [L]imiting these freedoms . . . requires direct and explicit legislation, clearly delineating the limitations without allowing for unlimited discretion on the part of administrative or other authorities. . . . [N]ot only is a formal statute necessary, but also the establishment . . . of the standards by which these powers can be activated. . . .

8. . . . (e) . . . [T]he limitation of a basic constitutional right . . . inherently carries a standard of interpretation that must be strict and narrow. . . . This interpretive approach . . . is . . . a result of a proper understanding of the purpose of the statute, which does not seek to limit freedoms, but to protect them against actual danger. . . . [Section 7a] should be applied in a way that takes into account the great weight given to our fundamental liberties. . . .

9. . . . (b) . . . [Counsel for appellants] claims that there is an internal contradiction between subsections (1) [denying that the State of Israel is the national homeland of the Jewish people] and (2) [denying the democratic nature of the State], since denying the democratic nature of the State can stem from the desire to maintain the State as the state of the Jewish nation [T]he desire to be loyal to one of the stated goals that the legislature wishes to protect can also be what causes a party to be disqualified. Furthermore, within his critique of Section 7a, he argues that the term “democratic” in subsection (2) and the term “racism” in subsection 3 are not properly defined.

(c) . . . The democratic concept as well as its implementation is reflected by . . . the principle of the rule of law, which includes equality before the law. The characteristics of democracy flow through the State’s political, social and cultural makeup. A great expression of this is the guarantee of basic rights and freedoms. . . .

10. There are no real grounds for the claim that there is a contradiction between the different subsections of Section 7a. The existence of the State of Israel as the State of the Jewish people does not change its democratic nature

. . . Each subsection is self-sufficient and exists alongside the other. . . . [W]e . . . cannot assume that the legislature intended for one of the provisions to diminish the illegal nature of an objective or conduct just because a party wishes to advance one provision that the legislature wishes to protect at the expense of another. . . . [I]ncitement to racism . . . can disqualify a party from participating in an election, even if the incitement is supposedly driven by the will to maintain the State of Israel as the state of the Jewish nation. The desire to maintain the State . . . cannot serve as a license for racism. . . .

12. . . . (c) [Counsel] claims . . . that the term “racism” refers only to differentiations and distinctions based on biological features that distinguish between different races of people.

This claim is unfounded. . . . [T]he Penal Code definition of the term . . . refers to unlawful acts . . . against people of different national origins. Likewise, the International Convention on the Elimination of All Forms of Racism and legislation in other countries . . . [include] persecution based on nationality . . . as a form of racism. . . .

15. In EA 3, 2/84, we listed the issues that this Court . . . must investigate when reviewing a decision made by the Central Election Committee. They are: whether the proceedings were held in a legal manner . . . ; that the hearing followed the procedural guidelines established by the statute applying to the authority or its own regulations; [and] that the decision was rendered by the proper authority, and is consistent with the power of the authority. . . . We must also make sure the decision is supported by the evidence provided. . . .

17. (a) . . . [T]he committee [voted] to disqualify the Appellant because it is in violation of both subsections (2) and (3) of Section 7a. The Appellant claims . . . that its goal . . . to revoke civil and other rights of the Arab population in Israel and to restrict it in order to counteract the demographic balance tilting against the Jewish population . . . is . . . within the confines and on the basis of Jewish law. The Appellant also claims that its actions do not constitute racism, because positive discrimination in favor of the Jewish population does not constitute racism against the Arab population.

(b) The general claim of [counsel] that we cannot take into account the legal actions of the Appellant . . . is unacceptable. . . . Section 7a . . . did not distinguish between . . . legal actions and those which are illegal. The nature and content of an objective or behavior and their results are what make the determination Incitement against a portion of the civilian population and calling for their rights to be denied; suggesting that close relationships between Jews and members of another nation be outlawed; calling for discrimination against members of another nation in matters of criminal punishment; revoking their right to petition the High Court of Justice; separating where they can bathe; revoking their social rights and forbidding them from serving in the army, while hurting and insulting those who already serve—all these actions and anything similar are all clear indicators of anti-democratic or racist acts. The same applies even if these suggestions are stated in a newspaper article which is published with a proper license or if the idea surfaces by way of proposed legislation in the Knesset

20. Our clear conclusion is that the Central Election Committee rightfully disqualified the Appellant's party

* * *

Since the 1985 amendment, the Israeli Central Elections Committee has disqualified a number of parties and candidates. Most of these decisions were not upheld by the Supreme Court. The Court stressed that such decisions should be limited to

extreme cases with significant supporting evidence. Only three decisions disqualifying candidates' lists have been upheld by the Supreme Court, all on grounds of incitement to racism—the Kach party (founded by Kahane) in decisions of 1988 and 1992 and the Kahane Chai party in a decision of 1992.*

Much of the more recent litigation has focused on disqualification of individual candidates. During the elections to the twenty-first and twenty-second Knesset in 2019, the Supreme Court disqualified three right-wing candidates (Michael Ben-Ari, Baruch Mersel and Bentzi Gopstein), also due to incitement to racism. Between 2003 and 2020, the Supreme Court overruled twelve Central Election Committee decisions disqualifying parties or candidates from running for office. Most concerned left-wing parties and politicians.

Commentators have considered whether even-handedness with respect to the ideologies of the disqualified parties is a virtue and if so, why.

[The 2019] cases have laid bare the alleged politicisation of the operation of the [Central Election Commission] and the role that the judicial branch . . . must play as a check and balance to the process. While the supreme court has upheld bans only in the rarest of cases, it has opened itself up to further criticism of having a left-wing, liberal bias by repeatedly permitting Arab parties to run.

The court's role is to safeguard Israel's political system from parties peddling extremism that crosses the grey line into illegality, while balancing the right to freedom of expression that is the lifeblood of any true democracy. . . . The sensitive and politicised nature of the process before a case reaches the court's justices—and, indeed, Israel's electoral history—acts to an extent as a constraint on the court. Out of a desire to avoid bias, parties on the far right may be allowed to run because Arab parties up for disqualification have ultimately been allowed to run.

This year's decision to bar a far-right candidate does challenge this perceived false equivalence. However, it almost automatically opened the supreme court up for condemnation from the right, with [Justice Minister Ayelet] Shaked calling it “gross, misguided interference” in Israel's democratic process. The following day she set out her vision for radical reforms to the supreme court, including proposing that the political echelon appoint judges, should she retain the justice portfolio

* Dana Blander, *Disqualification of Electoral Lists and Candidates by the Central Elections Committee*, ISRAEL DEMOCRACY INSTITUTE (Mar. 3, 2021), <https://en.idi.org.il/articles/33991>. In 1965, prior to the passage of the Basic Law provision, the Arab Socialist List was disqualified from running based on its denial of the existence of Israel.

after the next election.*

Others have criticized what they perceived to be a false symmetry between candidates from the left wing and right wing:

[Heba] Yazbak's prior statements, despite their outrageous character, . . . were few in number and sporadic, they were not systematic and did not constitute a critical mass; and they were made seven years ago and then five years ago. Once she clarified her opposition to all forms of violence and illegal activity . . . the idea of disqualifying her should have been dropped

. . . [D]isqualification isn't a punitive measure, but rather a preventive one. It is therefore unacceptable to resort to unless it's clear that there is something that must be prevented

. . . Regrettably, when they wanted to reach a specific conclusion, the dissenting justices were able to find that Yazbak's few, sporadic statements were actually systematic, recurrent and consistent and constituted a critical mass, when in fact they were no such thing. To support their view, they were reduced to scrambling for "evidence," such [as] her visit to a prisoner jailed for security offenses or the pleasure that she expressed on his release, and then interpreted the actions as support for a terrorist organization's armed smuggle. That is clearly at variance with both court precedent and the letter of the law. . . .

It is impossible . . . to reconcile the lenient stance towards far-right extremist Itamar Ben-Gvir with the harshness toward Yazbak, since the weight of the evidence against him was far greater than the evidence against her Yet the court unanimously decided against disqualifying him, based on his explanations. . . .

Equal treatment of minorities is the foremost test of the Supreme Court's actions. . . . The Central Elections Committee . . . behaves like a kind of popular tribunal that disqualifies any party or candidate whose views it deems immoral or upsetting. . . . Even when the committee's illegal decisions are overturned by the Supreme Court, they cause a great deal of damage. The committee should be replaced by an independent panel

* Excerpted from Alona Ferber & Karen Kaufman, *A Mechanism Against Extremism? Who Gets to Run in Israel's Election?*, TONY BLAIR INSTITUTE FOR GLOBAL CHANGE (Mar. 28, 2019), <https://institute.global/advisory/mechanism-against-extremism-who-gets-run-israels-elections>.

appointed by the president.*

In the March 2021 election, Itamar Ben-Gvir from the right wing Otzma Yehudit party gained a seat in the Knesset as part of a slate of far-right ultranationalist parties.

* * *

Germany and Israel grappled with the parameters of democratic systems that relied, on occasion, on exclusion of political parties and candidates. The Colombian Constitutional Court focused on the expansive reach of pluralism and inclusion. As excerpted below, Colombia's Constitutional Court interpreted the 1991 Constitution and concluded that extreme political parties were entitled to participate in the Constituent Assembly.

The materials in this section also implicate questions of secession and territorial control. Extremist parties can, in addition to attempting to replace the democratically elected government, push for the withdrawal of certain regions to elude the control of these states. In the Colombian case below, dissident groups have attempted to gain territorial control of portions of Colombia through violent means. In other cases, regions with particular political identities have aimed to secede through democratic means. In May 2021, voters in five rural counties in the liberal American state of Oregon approved ballot measures calling on lawmakers to redraw the border to make the counties part of Idaho, a state viewed as more conservative. Vivid examples in Europe include the Scottish and Catalan independence movements and the Brexit vote. While this chapter does not explore these issues and case law, secessionism is a mechanism that extremists can use to exit one government and create an alternative.

Judgment C-089 of 1994
Constitutional Court of Colombia (Full Chamber)
March 3, 1994**

[The Constitutional Court, composed of President Jorge Arango Mejía and Magistrates Antonio Barrera Carbonell, Eduardo Cifuentes Muñoz, Carlos Gaviria Díaz, José Gregorio Hernández Galindo, Hernando Herrera Vergara, Alejandro Martínez Caballero, Fabio Morón Díaz and Vladimiro Naranjo Mesa . . . delivers the following ruling:]

* Excerpted from Mordechai Kremnitzer, *Israel's Top Court Decided Not to Disqualify Arab Lawmaker, but Its Lack of Conviction Is Disturbing*, HAARETZ (Feb. 10, 2020), <https://www.haaretz.com/israel-news/elections/.premium-israeli-court-didn-t-disqualify-arab-mk-but-its-lack-of-conviction-is-disturbing-1.8521477>.

** Translation by Christopher Umanzor (Yale Law School, J.D. Class of 2023).

...2.2.5 Taking into account the specific treatment accorded... by the Constitution in Articles 108* and 40-3,** as well as the clear definition made there in benefit of liberty and the absence of any restriction or limitation, the most appropriate path for discovering the meaning of the constitutional norms consists of interpreting these provisions in light of Article 1*** of the Constitution. This... leads to the acceptance of the ideological freedom of political parties and movements.

With respect to [political] parties' ideologies, the Constituent Assembly... expressly established freedom. This resolution must be justified in the interests of pluralism. . . .

. . . [T]he basis for the democratic system is not in any one set of notions that determines political decisions, but from a method or group of rules of procedure that establish the manner in which decisions are made. Democracy is not concerned with what to decide but with how to decide. Thus, democracy is compatible with the existence of different ideologies both in political decisions and in political activity.

[Accordingly], pluralism is innate to democracy. The fundamental character of this value is explained by the Kantian idea of democracy's "conditions of possibility." Pluralism is an assumption without which fundamental principles, values, and rights cannot exist.

The constitutional democratic system known as the "Rule of Law" protects the attainment of clearly defined axiological objects, such as human dignity, substantive equality, human rights, etc. This set of essential values and rights acquires coherence and legitimacy when they originate and are maintained as a popular choice among other possible arrangements. That is, when the choice of certain axiological objects of democracy is the result of the exercise of popular freedom and not that of one illuminated group. The fact that popular will, by embracing an undemocratic ideology,

* Article 108 of the Political Constitution of Colombia of 1991 provides:

The National Election Commission shall grant legal personality to political parties and movements and relevant groups of citizens.

** Article 40-3 of the Political Constitution of Colombia of 1991 provides:

Any citizen has the right to participate in the establishment, exercise, and control of political power. To make this decree effective the citizen may: Constitute parties, political movements, or groups without any limit whatsoever; freely participate in them and diffuse their ideas and programs.

*** Article 1 of the Political Constitution of Colombia of 1991 provides:

Colombia is a social state under the rule of law, organized in the form of a unitary republic, decentralized, with autonomy of its territorial units, democratic, participatory, and pluralistic, based on the respect of human dignity, the work and solidarity of the individuals who belong to it, and the prevalence of the general interest.

has been able to—and still can—adopt an autocratic or even tyrannical regime, and yet does not elect to do so is a justification for democracy that adds to the axiological justification, thereby forming a solid and coherent basis.

The relationship between the value of pluralism and the values protected by human rights corresponds to that of a form and its contents, the conditions of possibility and their realization. Pluralism establishes the conditions in which constitutional democracy’s axiological objects have a democratic . . . foundation. . . . [Popular and free elections using these better values is formally justified by the possibility of choosing between competing] values and materially justified by the reality of superior ethics.

It is possible to . . . imagine and justify a pluralist system that looks for the protection of human rights as understood in Western constitutional democracy, but it is not possible to justify a system that pretends to ensure the protection of those human rights in non-pluralist conditions. In short: there may be pluralism without the rule of law, but the rule of law cannot be without pluralism.

For . . . pluralism to materialize, those who participate in the contest for political power must respect and protect the “conditions of possibility,” that is, they cannot violate the rules of the system. A political activity that questions, or simply affects, the rules of the system cannot be accepted. Political pluralism . . . consists of a series of rules that respect the decision of the majority . . . and the validity of public liberties that make it possible. . . .

* * *

In 2016, Colombia signed a peace agreement with Fuerzas Armadas Revolucionarias de Colombia—Ejército del Pueblo (FARC) that reaffirmed the values underlying the Constitutional Court’s decision. FARC was a guerrilla group involved in long-term civil conflict in Colombia that began in 1964. The organization was involved in terrorism, kidnapping, and extortion. In the second accord, the Government provided safeguards for political participation of the political party that has replaced FARC and considered a broader framework of accountability and reconciliation to facilitate this transition. It is excerpted below.

Final Agreement for Ending the Conflict and Building a Stable and Lasting Peace
Colombia (2016)*

. . . 2. The Government and [Revolutionary Armed Forces of Colombia—People’s Army (FARC-EP)] consider that:

* Excerpted from Final Agreement for Ending the Conflict and Building a Stable and Lasting Peace (2016), transmitted by Letter dated 29 March 2017 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2017/272 (Apr. 21, 2017).

... [P]eacebuilding and consolidation requires an expansion of democracy to allow new political forces to emerge, to enrich debate and discussion . . . , thereby strengthening pluralism and thus the representation of different visions and interests in society, with due safeguards for participation and political inclusion. . . .

Peacebuilding . . . requires the involvement of everyone without distinction. . . . [I]t is necessary to encourage participation and decision-making by all sectors of Colombian society. . . .

The signing and implementation of the Final Agreement will help to extend and deepen democracy by . . . outlawing . . . violence as a method of political action . . . with full guarantees for those taking part in politics

... [P]luralism . . . facilitat[es] the establishment of new political parties and movements . . . and will involve sufficient guarantees for the exercising of political opposition

Peace consolidation also requires . . . respect for those exercising political opposition. . . .

... Measures are needed to create the conditions and to provide guarantees for the organizations that took up arms to be converted into political movements or parties, and to play an active part in the shaping, exercising and control of political power so that their proposals and projects might constitute a power alternative. . . .

2.1.1 Political activity is not limited . . . to participation in the political and electoral system, and . . . the creation of spaces for democracy and pluralism . . . requires acknowledgement . . . of . . . social and popular organizations and movements that may . . . act in opposition to the policies of the national government and departmental and municipal authorities. . . .

2.1.2 . . . [T]he maximum possible guarantees for political activity have to be established, thereby using democracy as a vehicle for the settlement of disputes and conflicts, contributing decisively to the creation of a climate of coexistence and reconciliation. . . .

2.1.2.1 . . . [T]he national Government will establish a comprehensive security system for political activity, understanding security as a democratic value and adopting a humanistic approach . . . [to] guarantee the rights and freedoms of those who are exercising politics within the concept of democratic rules. . . .

... [A] unit . . . will . . . [b]e accountable to the Office of the President of the Republic and establish mechanisms for ongoing dialogue with political parties and movements, especially those in opposition and the new movement arising from the transition of FARC-EP to legal political activity. . . .

... [It will also involve a] specialized protection programme for members of the new political movement arising from the transition of FARC-EP to legal political activity

2.2.4 . . . [T]he Government will establish a national council for reconciliation and coexistence composed of [various] representatives from the Government [The] representatives [will be] appointed by political parties and movements, including such movement as may arise from the transition of FARC-EP to legal political activity, [and an array of social organizations]

2.3.5 The strengthening of political and social participation goes hand in hand with a necessary change in political culture in Colombia. To expand democracy and make it more robust, thereby consolidating the peace, a participatory political culture must be fostered, founded on respect for democratic values and principles, the acceptance of contradictions and conflicts inherent in a pluralist democracy and acknowledgement and respect for one's political opponent.

A democratic, participatory political culture . . . should . . . rule out violence as a method of political action. . . .

3. . . . [T]he Government of the Republic of Colombia and [FARC-EP] hereby enter into the following agreements:

... [T]he Government reaffirms its commitment . . . to facilitate the formation of new political movements and parties, with due guarantees for participation under secure conditions.

Furthermore, the Government reaffirms its commitment to . . . the promotion of and respect for human rights and the defence of democratic values, in particular the protection of the rights and freedoms of politically active persons, especially those who . . . make the transition into a political movement and must therefore be acknowledged and treated as such.

In addition, the Government and FARC-EP confirm their commitment to foster the emergence of a new culture that outlaws the use of arms in political activity and to work together to achieve a national consensus involving all political, economic and social sectors, make a commitment to political activity where the values of democracy, freedom of ideas and civilized debate are paramount and [where intolerance] and political persecution are outlawed. This commitment forms part of the guarantees concerning non-repetition of acts that contributed to the armed confrontation between Colombians for political reasons.

Lastly, the Government and FARC-EP reaffirm their commitment to uphold the agreement to the Bilateral and Definitive Ceasefire and Cessation of Hostilities and Laying down of arms, to which end a roadmap will be prepared that will contain the

mutual undertakings whereby, within 180 days of the signature of the Final Agreement, the process of the laying down of arms will have been completed.

* * *

Following the final agreement, FARC became a political party and received state funds to operate and sustain its base of militants until they were able to earn a living independently. Thereafter, the Truth Commission and the Special Jurisdiction for Peace worked for three years, as about 13,000 FARC members demobilized and accepted the jurisdiction of the Commission.

In February 2021, the Commission charged some FARC leaders with crimes against humanity and war crimes for the kidnapping, disappearance and execution of civilians and some members of the military. Their formal collective declaration acknowledging truth and responsibility was issued on April 30, 2021. The Commission's charge for extrajudicial executions committed by the Colombian military is expected to issue during the second half of 2021.

While their votes in the 2018 elections were insufficient to obtain seats in the legislature, FARC leaders were assigned, in application of the Agreement, five seats in the Senate and five seats in the House of Representatives. In 2020, a Senator from FARC was elected vice-president of the Senate with the support of the other opposition parties and some independent parties. As of this writing, the country remains polarized on the issue of whether an individual condemned for crimes against humanity should ever be able to run in an election. Although FARC leaders continued to retain little electoral support, a former guerrilla leader from the M-19, a separate guerrilla group that signed a peace agreement in 1990 and participated in the Constitutional Assembly that approved the 1991 Constitution and created the Constitutional Court, was leading in the polls for the May 2022 presidential elections as of April 2021.

Despite these events, after a heated debate concerning an extradition request by the United States on charges of drug trafficking, some leaders (including FARC's chief negotiator) rejected the Final Agreement, fled to Venezuela, and in 2019 created a dissident guerrilla movement of about one thousand men, including a local faction that never entered the peace process and concentrated on narcotics trafficking. This dissident group intensified the fight with local Colombian traffickers linked to Mexican cartels for the control of the export corridors in the Pacific Coast. More than 27,000 people were displaced in the first quarter of 2021 amidst the growing violence and the inability of the Colombian police and army to control this area.

In April 2021, a labor strike linked to the economic and social impact of COVID-19 governmental policies evolved into a national protest. The protests were aggravated by a tax reform proposal that critics said would exacerbate economic inequality and poverty. The protests resulted in the deaths of over twenty people and the injuries of hundreds of others. Although the government withdrew the tax proposal and

the Minister of Finance resigned, the protest continued for a month. In June, without any agreement with the government, the labor union leaders ended the strike but a few youth continued to protest for free university education and access to jobs.

In May 2021, the Constitutional Court endorsed the approval of a constitutional amendment which created sixteen transitory special electoral districts for the House of Representatives. Only candidates who represent victims of the armed conflict can run. The districts will be open for the 2022 and the 2026 Congressional elections.

Policing Speech in Electoral Politics

We turn from regulations on participation in democratic elections to judicial review of limits on extreme electoral speech as well as decisions by electronic platforms, run by private companies, to regulate speech. A first illustration addressed inflammatory political speech by government actors.

Bolsonaro v. Party Coalition “O povo feliz de novo”

Superior Electoral Court of Brazil

No. 0601776-50.2018.6.00.0000 (2018)*

[J. Luis Felipe Salomão]

... In advance of the 2018 General Elections in Brazil, the Workers’ Party ... produced a campaign advertisement which linked the Social Liberal Party ... presidential candidate Jair Bolsonaro to the torture undertaken by the Brazilian state during the military dictatorship of the 1970s. The advertisement was broadcasted on October 16 and 17 during the election period, which was marked by extreme political polarization.

The campaign ad featured statements made by Bolsonaro such as “Let’s shoot the ‘petralhada’ in Acre”—referring to members of the Workers’ Party ... —and “I’m in favor of torture.” It further showed footage of Bolsonaro ... , a former colonel in the Brazilian army and head of the secret police of Sao Paulo during the military dictatorship, who had been convicted of not only knowing of state sponsored torture but also of participating in it. ...

* Excerpted from *Bolsonaro v. Party Coalition “O povo feliz de novo,”* GLOBAL FREEDOM OF EXPRESSION AT COLUMBIA UNIVERSITY (last accessed Mar. 25, 2021), <https://globalfreedomofexpression.columbia.edu/cases/bolsonaro-v-party-coalition-o-povo-feliz-de-novo>.

In response to the ad campaign, Bolsonaro's party . . . filed an Electoral Complaint before the Superior Electoral Court . . . requesting an injunction to ban the broadcasting of the advertisement. . . .

The main issue before the court was whether the advertisement would effectively violate art. 242* of the Electoral Code, which prohibits the intentional manipulation of public opinion to create states of mental or emotional distress The code, however, clarifies that those prohibitions should not prevent "the political criticism that is intrinsic and necessary to the electoral debate which is the essence of the representative democratic process." . . .

Bolsonaro's Party Coalition argued that the advertisement violated art. 242 of Electoral Code on the grounds that i[t] caused fear in the population by suggesting that if Bolsonaro was elected, he would persecute and torture his political opponents.

The Court affirmed that previous . . . rulings established that art. 242 of the Electoral Code cannot hinder political criticism, since democratic processes demand a diversity of opinions. However, due to the extreme political polarization which dominated the electoral period of 2018, it was necessary to take the context of the political environment into consideration. The Court found that under the then political climate the ad could foment social discord and possibly incite violence in the population. Therefore the Court ruled that the content of the campaign ad violated art. 242 of Electoral Code. . . .

The Court granted the injunction requested by Bolsonaro's Coalition, stating that the advertisement was inflammatory and violated the electoral code. Therefore, the broadcasting of the political advertisement was suspended under a penalty of R\$ 50,000.00 (for each new time it is broadcast) in case of a violation.

* * *

Social media companies are key actors in the regulation of political speech, as exemplified in the decision of an Italian court.

* Article 242 of the Brazilian Electoral Code of 1965 provides:

Advertising, regardless of its form or modality, will always mention the name of the public party and will always be made in the national language, and should not use publicity methods that are designed to create, artificially, in the [public] opinion, mental states, emotions or passions.

Facebook v. CasaPound
Court of Rome, Italy (17th Civil Division)
N. 80961/19 (2020)*

[Judges Claudia Pedrelli, Fausto Basile, Vittorio Carlomagno]

. . . On September 9, 2019, . . . Facebook . . . deactivated the account page of the far-right political party and organization CasaPound Italia . . . together with the pages of representatives and supporters of the association Facebook argued that the removal of CasaPound’s pages was legitimate on the grounds that they included content which constituted hate speech and incitement to violence, in violation of Facebook’s Terms of Use. The Court reasoned that Facebook holds a special position and its mission aims to uphold freedom of expression. Further, the Court stated that the deactivation of CasaPound’s page violated its rights as a political party to participate in public debate and “contribute by democratic means to national policy” under art. 49** of the Constitution. The Court . . . ordered Facebook to immediately reactivate the page of CasaPound Italia . . . and the personal profile of . . . [the] administrator of the page, setting a penalty of € 800.00 for each day of violation.

. . . Facebook said it was a private company operating for profit protected by art. 41*** of the Constitution. . . . In the absence of any legal basis . . . it is not possible to attribute public service obligations to private sector players such as the protection of freedom of association and expression. Likewise, Facebook argued that it is not required to ensure special protection to some users such as organizations engaged in political activities by virtue of their role in the political debate. . . . Facebook complained that the Court had not taken into account the general activity of CasaPound aimed at inciting hate and violence and resembling fascist posturing even outside Facebook.

* Excerpted from *Facebook v. CasaPound*, GLOBAL FREEDOM OF EXPRESSION COLUMBIA UNIVERSITY (last accessed Mar. 24, 2021), <https://globalfreedomofexpression.columbia.edu/cases/casapound-v-facebook>.

** Article 19 of the Constitution of Italy provides:

Any citizen has the right to freely establish parties to contribute to determining national policies through democratic processes.

*** Article 41 of the Constitution of Italy provides:

Private economic enterprise is free.

It may not be carried out against the common good or in such a manner that could damage safety, liberty and human dignity.

The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and co-ordinated for social purposes.

CasaPound . . . recalled that freedom of expression protected by art. 21* of the Italian Constitution provides that CasaPound's adherence to fascist ideology would be relevant only if the limits provided by criminal provisions were exceeded. . . .

The main issue for the Court was whether CasaPound had breached Facebook's contractual terms in circumstances where CasaPound supporters had routinely been involved in incidents of violence and racism.

The Court firstly found that the relationship between Facebook and CasaPound was an ordinary contract under civil law The Court said that the relationship was subject to the limits ordinarily recognized for private sector players, namely, the general clauses of public order, morality, good faith and the prohibition of abuse of the law, all of which must be interpreted according to constitutional principles. . . .

The Court [said that while] Facebook can rely on its economic freedom provided by art. 41 of the Italian Constitution, users can express their ideas and opinions according to art. 21 of the Italian Constitution. . . . The Court pointed out that the rights to freedom of expression and association are superior in the constitutional hierarchy and that contractual discipline cannot justify the termination of the contract because of the manifestations of thought or allow the exclusion of association. The limits connected to the respect for the freedom of thought and association are general and do not refer to special categories of users, nor do they imply the need for any additional check by Facebook.

According to the Court, it is not possible to attribute to private actors, such as Facebook, contractual powers substantially affecting the freedom of expression and association, so as to exceed the limits that the legal system has imposed by criminal law. Besides, CasaPound cannot be considered an illicit association in the Italian legal system: the . . . relevant Law . . . prohibits reconstitution of the fascist party but not neo-fascist associations in themselves except to the extent their activities aim to reconstitute the Fascist Party of WWII. Otherwise there would be an undue limitation of the principle of free expression of thought and free association. . . .

* * *

In response to critiques about their outsized roles in determining who can and cannot have access to platforms to share ideas and information, social media companies have sought to establish standards and processes to guide their decision-making. In 2018, Facebook announced the creation of what it termed an "Oversight Board" to hear appeals regarding the types of speech allowed on the site. The board includes prominent human rights activists, politicians, and scholars and operates as a quasi-judicial body.

* Article 21 of the Constitution of Italy provides in part:

Anyone has the right to freely express their thoughts in speech, writing, or any other form of communication. . . .

The Oversight Board decisions are binding only for the post in question itself; Facebook is not obligated to take down similar posts.

In January 2021, this decision-making body gained increased public attention after the decisions by Twitter, Facebook, and other social media companies to suspend the account of then-U.S. President Donald Trump in response to his praise of rioters attacking the U.S. Capitol. The role of the Oversight Board in emulating and replacing the decision-making of democratic governments has gained mixed reactions:

“No board, whether corporate or ‘independent,’ can or should replace a parliament,” said Marietje Schaake, a Dutch politician “Both the storming of the Capitol and social media companies’ panicked reactions have laid bare the depth of unchecked power social media companies hold over the public debate and public safety. The balancing and weighing of rights and interests belongs with democratically legitimate decision makers. There must be accountability beyond self-regulation.”

[Nick] Clegg, a former British political leader who [now works for Facebook], acknowledged the criticism, but said he did not see an alternative right now. . . . [T]he company can’t wait for democracy to catch up and institute laws and norms around Facebook’s behavior. “Those norms don’t exist, and in the meantime we can’t duck making decisions in real time,” he said. . . .

The board’s decision in the Trump case . . . could . . . set the company’s policy in other big democracies with leaders of the same new right-wing populist ilk, like Brazil, India and the Philippines. . . . The right-wing populists aren’t the only ones worried. Leaders from Germany to Mexico have also objected to the notion that an American company could control their speech. . . .

The emergence of this new kind of governance, and this new kind of decision, signals the return of gatekeeping. The moves also underscore who really keeps the gate, and who has lost that power. That space between government and corporate power used to be occupied by a widely trusted mass media.*

In May 2021, the Oversight Board released its decision upholding Facebook’s January decision to block posts by Mr. Trump.

* Excerpted from Ben Smith, *Trump Wants Back on Facebook. This Star-Studded Jury Might Let Him*, N.Y. TIMES (Jan. 24, 2021), <https://www.nytimes.com/2021/01/24/business/media/trump-facebook-oversight-board.html>.

Case Decision 2021-001-FB-FBR
Facebook Oversight Board (2021)*

. . . Elections are a crucial part of democracy. On January 6, 2021, during the counting of the 2020 electoral votes, a mob forcibly entered the Capitol Building in Washington, D.C. This violence threatened the constitutional process. Five people died and many more were injured During these events, then-President Donald Trump posted two pieces of content. . . .

. . . Facebook removed th[ese] post[s] for violating its Community Standard on Dangerous Individuals and Organizations. It also blocked Mr. Trump from posting on Facebook or Instagram for 24 hours.

On January 7, after further reviewing Mr. Trump’s posts, his recent communications off Facebook, and additional information about the severity of the violence at the Capitol, Facebook extended the block “indefinitely and for at least the next two weeks until the peaceful transition of power is complete.” . . .

. . . Facebook . . . referred this case to the Board. Facebook asked whether it correctly decided on January 7 to prohibit Mr. Trump’s access to posting content on Facebook and Instagram for an indefinite amount of time. The company also requested recommendations about suspensions when the user is a political leader. . . .

The Board found that the two posts by Mr. Trump on January 6 severely violated Facebook’s Community Standards and Instagram’s Community Guidelines. “We love you. You’re very special” in the first post and “great patriots” and “remember this day forever” in the second post violated Facebook’s rules prohibiting praise or support of people engaged in violence.

The Board found that, in maintaining an unfounded narrative of electoral fraud and persistent calls to action, Mr. Trump created an environment where a serious risk of violence was possible. At the time of Mr. Trump’s posts, there was a clear, immediate risk of harm and his words of support for those involved in the riots legitimized their violent actions. As president, Mr. Trump had a high level of influence. . . .

Given the seriousness of the violations and the ongoing risk of violence, Facebook was justified in suspending Mr. Trump’s accounts on January 6 and extending that suspension on January 7.

However, it was not appropriate for Facebook to impose an ‘indefinite’ suspension.

* Excerpted from *Case Decision 2021-001-FB-FBR*, OVERSIGHT BOARD (May 5, 2021), <https://oversightboard.com/decision/FB-691QAMHJ>.

It is not permissible for Facebook to keep a user off the platform for an undefined period, with no criteria for when or whether the account will be restored.

In applying this penalty, Facebook did not follow a clear, published procedure. . . .

It is Facebook's role to create necessary and proportionate penalties that respond to severe violations of its content policies. . . .

In applying a vague, standardless penalty and then referring this case to the Board to resolve, Facebook seeks to avoid its responsibilities. The Board declines Facebook's request and insists that Facebook apply and justify a defined penalty. . . .

. . . This penalty must be based on the gravity of the violation and the prospect of future harm. It must also be consistent with Facebook's rules for severe violations, which must, in turn, be clear, necessary and proportionate. . . .

. . . Facebook specifically requested "observations or recommendations from the Board about suspensions when the user is a political leader." . . . [T]he Board made a number of recommendations to guide Facebook's policies in regard to serious risks of harm posed by political leaders and other influential figures. The Board stated that it is not always useful to draw a firm distinction between political leaders and other influential users, recognizing that other users with large audiences can also contribute to serious risks of harm.

. . . [C]ontext matters when assessing the probability and imminence of harm. When posts by influential users pose a high probability of imminent harm, Facebook should act quickly to enforce its rules. . . . The Board stressed that considerations of newsworthiness should not take priority when urgent action is needed to prevent significant harm.

Facebook should publicly explain the rules that it uses when it imposes account-level sanctions against influential users. These rules should ensure that when Facebook imposes a time-limited suspension on the account of an influential user to reduce the risk of significant harm, it will assess whether the risk has receded before the suspension ends. If Facebook identifies that the user poses a serious risk of inciting imminent violence, discrimination or other lawless action at that time, another time-bound suspension should be imposed when such measures are necessary to protect public safety and proportionate to the risk.

The Board noted that heads of state and other high officials of government can have a greater power to cause harm than other people. If a head of state or high government official has repeatedly posted messages that pose a risk of harm under international human rights norms, Facebook should suspend the account for a period sufficient to protect against imminent harm. Suspension periods should be long enough to deter misconduct and may, in appropriate cases, include account or page deletion.

In other recommendations, the Board proposed that Facebook:

- Rapidly escalate content containing political speech from highly influential users to specialized staff who are familiar with the linguistic and political context. These staff should be insulated from political and economic interference, as well as undue influence.
- Dedicate adequate resourcing and expertise to assess risks of harm from influential accounts globally.
- Produce more information to help users understand and evaluate the process and criteria for applying the newsworthiness allowance, including how it applies to influential accounts. The company should also clearly explain the rationale, standards and processes of the cross-check review
- Undertake a comprehensive review of Facebook’s potential contribution to the narrative of electoral fraud and the exacerbated tensions that culminated in the violence in the United States on January 6. . . .
- Develop and publish a policy that governs Facebook’s response to crises or novel situations where its regular processes would not prevent or avoid imminent harm. . . .

* * *

In June 2021, Facebook responded to the Oversight Board by adopting enforcement protocols for public figures during times of civil unrest and ongoing violence. The company, finding that Mr. Trump’s actions constituted a severe violation, suspended Mr. Trump’s accounts for two years from the date of the initial suspension.

THE ROLE OF RESOURCES: TO PARTICIPATE, TO OVERWHELM, TO INSULATE

Extreme ideologies are not alone in their capacity to use democratic norms to subvert democracy. Money is a core component of what today is understood as the democratic process. Money provides the requisite resources to participate in and thus be heard in a democratic state. A lack of financial resources prevents individuals from running for office, influencing elected officials, and accessing channels to express their opinions. In contrast, those with concentrated wealth can use their resources to overwhelm mobilization power by funding favored politicians and policies. Such players dilute the power of individual voices.

Money also provides the resources to elide and escape the state’s reaches by enabling wealthy individuals to cross borders, to create and to take advantage of

loopholes in regulatory regimes. Akin to anti-democratic actors who use the democratic process to consolidate access to democratic institutions, actors with extreme wealth use the principles of legality to make themselves effectively ungovernable.

Each of these tactics—participation, deregulation, and rejection—contributes to the self-perpetuating nature of extreme wealth in liberal democratic societies.

On the Currency of Egalitarian Justice

G.A. Cohen and Michael Otsuka (2011)*

. . . [It is a] conceptual truth that to have money *is* . . . to have liberty. The richer you are, the more courses of action are open to you, which is to say that you are freer than you would otherwise be. Accordingly, whoever receives money as a result of redistribution thereby enjoys an enhancement of her liberty, albeit at the expense of the liberty of the person from whom it is taken, but with the net result for liberty as such entirely moot. Taxation restricts not . . . liberty as such, but private property rights, both in external things and in one's own labour power. Whether or not such rights are deeply founded, it is ideological hocus-pocus to identify them with liberty as such, and it is entirely alien to traditional socialist belief so to construe them. . . .

A standard political debate runs as follows. The Right extols the freedom enjoyed by all in a liberal capitalist society. The Left complains that the freedom in question is meagre for poor people. The Right rejoins that the Left confuses freedom with resources. You are free to do what no one will interfere with your doing, says the Right. If you cannot afford to do it, that does not mean that someone will interfere with your doing it, but just that you lack the means or ability to do it. The problem the poor face is lack of ability, not lack of freedom. The Left may then say that ability should count for as much as freedom does. The Right can then reply, to significant political effect: so *you* may think, but our priority is freedom.

In my view, the depicted right-wing stance depends upon a reified view of money. Money is unlike intelligence or physical strength, poor endowments of which do not, indeed, prejudice freedom, where freedom is understood as absence of interference. The difference between money and those endowments implies, I shall argue, that lack of money *is* (a form of) lack of freedom, in the favoured sense of freedom, where it is taken to be absence of interference.

To see this, begin by imagining a society without money, in which courses of action available to people, courses they are free to follow, without interference, are laid down by the law. The law says what each sort of person, or even each particular person, may and may not do without interference, and each person is endowed with a set of tickets detailing what she is allowed to do. So I may have a ticket saying that I am free

* Excerpted from G.A. COHEN & MICHAEL OTSUKA, *ON THE CURRENCY OF EGALITARIAN JUSTICE, AND OTHER ESSAYS IN POLITICAL PHILOSOPHY* (2011).

to plough this land, another one saying that I am free to go to that opera, or to walk across that field, while you have different tickets, with different freedoms inscribed on them.

Imagine, now, that the structure of the options written on the tickets is more complex. Each ticket lays out a disjunction of conjunctions of courses of action that I may perform. . . . If I try to do something not licensed by my ticket or tickets, armed force intervenes.

By hypothesis, these tickets are what my freedoms (and, consequently, my unfreedoms) are. But a sum of money is nothing but a highly generalized form of such a ticket. A sum of money is a license to perform a disjunction of conjunctions of actions-actions, like, for example, visiting one's sister in Bristol, or taking home, and wearing, the sweater on the counter at Selfridges.

Suppose that someone is too poor to visit her sister in Bristol. She cannot save, from week to week, enough to buy her way there. Then, as far as her freedom is concerned, that is equivalent to 'trip to Bristol' not being written on someone's ticket in the imagined non-monetary economy. The woman I've described has the capacity to go to Bristol. She can board the underground and approach the barrier she must cross to reach the train. But she will be physically prevented from passing through it, or physically ejected from the train, or, in the other example, she will be physically stopped outside Selfridges and the sweater will be removed. The only way you won't be prevented from getting and using things is by offering money for them.

To have money *is* to have freedom, and the assimilation of money to mental and bodily resources is a piece of unthinking fetishism, in the good old Marxist sense that it misrepresents *social relations of constraint* as *things* that people lack. In a word: money is no object.

Oligarchy

Jeffrey A. Winters (2011)*

. . . In a civil oligarchy . . . the coercion that defends oligarchic fortunes is provided exclusively by an armed state, . . . and the coercive state defending property for oligarchs is governed impersonally through bureaucratic institutions. . . . One [implication] is that in civil oligarchies, strong and impersonal systems of law dominate

. . . Oligarchs submit[] to laws in exchange for states guaranteeing property rights . . . [A]lthough oligarchs are relieved of the violence and political burdens of defending property themselves, the emergence of a state apparatus that takes on these roles raises novel threats to oligarchs in the form of taxation and possibly redistribution

* Excerpted from JEFFREY A. WINTERS, OLIGARCHY (2011).

focused on incomes. . . [O]ligarchs . . . devote virtually all of their material power resources to the political challenges of income defense.

. . . [M]ost people submit routinely to the same legal systems that oligarchs distort and intimidate just as routinely. The great bulk of rule-of-law problems originate in the defeat of laws by the powerful. . . . The ultimate test of a legal system is not its routine or systemic performance, but whether it is stronger than the most powerful actors in society—signifying the achievement of “high” rule of law. If the law tames oligarchs and elites, it will consistently tame everyone else. The reverse relationship does not always hold. . . .

. . . Civil oligarchies are indifferent to democracy. They neither require it to function nor are they seriously threatened by its existence. This suggests that there are many possible combinations of property defense regimes, the rule of law, forms of oligarchy, and democracy. . . .

. . . Oligarchy is focused specifically on the political struggles related to wealth defense. . . .

. . . Although mobilizational power can be transformative for a group or society, one of its weaknesses is that both the actors who mobilize and the social forces that become mobilized must invest enormous personal time and effort in building this power resource. Because they are so demanding, mobilizations are difficult to sustain. Oligarchs using material power resources do not face this problem because they can set in motion armies of actors—whether thugs, militias, demonstrators, or income-defense professionals—based on remuneration rather than ideological commitments. It is unnecessary for them to lead or inspire, nor must they convince anyone of the goals to be pursued or interests to be served. Oligarchs issue directives to be followed as commands, and the actors being paid to carry[] . . . out those orders do so even if their own political interests are not served. Moreover, oligarchs as principals can disengage personally from the political influence they seek to exert once agents have been hired to do the actual work. The scale, intensity, and duration of this kind of political activity and influence are limited only by the level of material power resources oligarchs have.

In a civil oligarchy, the burdens of political engagement for income defense are rarely borne by oligarchs themselves, but fall instead to others they set in motion. Collectively these actors constitute a lucrative Income Defense Industry whose participants are motivated by the profit-making opportunities generated by the threats oligarchs face and desire to overcome. . . .

At the heart of this industry are professional organizations such as accounting firms, banks, investment advisors, and law firms. . . .

The most direct and personal form of oligarchic engagement in income defense lies in their dealings with the Income Defense Industry, which supplies the concrete means of tax evasion and avoidance. Oligarchs participate barely at all in fighting the

political battles at the heart of income defense. A minority of oligarchs takes an active role leading highly public battles, but most do not. . . .

The Income Defense Industry lobbies for myriad incremental changes to the body of tax codes and regulations on a case-by-case basis. However, it also has a vested interest in the overall complexities and uncertainties of the tax system. . . . The resulting confusion of the regulations permits those defending oligarchic incomes to transform matters of questionable legality into murky disputes of interpretation. . . .

The Meritocracy Trap Daniel Markovits (2019)*

. . . [M]eritocratic inequality rejuvenates an old motive for the elite to dominate political competition. Large fortunes encourage political meddling. Self-interest recommends that the rich engage politics as a means for defending their wealth. . . . [M]eritocracy also inaugurates a new means for asserting dominance, creating a new supply of elite power. The skills practices, and institutions that enable superordinate workers to dominate economic life, also allow the elite to dominate politics . . . by controlling policy and by resisting the state when they cannot set policy directly. . . . [M]eritocracy undermines democratic politics and constitutes superordinate workers as a new ruling class.

The rich dominate the financing of political campaigns. . . . A mere 158 families provided nearly half of all campaign contributions for the initial phase of the 2016 [American] presidential election, and by October 2015 these families had collectively contributed \$176 million. . . .

Meanwhile, lobbyists hired by elites dominate the policymaking that elected officials do on[c]e in office. . . . Even when it is narrowly defined lobbying dwarfs campaign finance in scale: in a typical year, expenditures on federally registered lobbyists exceed \$3 billion, and large firms spend perhaps ten times as much on lobbyists as on campaign contributions and nearly 90 percent more than they spent as recently as the late 1990s. . . . [E]lite influence over policymaking extends far beyond formally registered lobbying. Corporations, for example, target their philanthropy at causes associated with legislators who sit on committees that regulate them

Law and policy unsurprisingly follow the path set by money, time, and attention. Sometimes, money openly buys policy, with hardly any disguise. . . . In other cases, money's influence is less obvious—but no less real. The financial sector, seeking to relax regulations limiting certain derivatives trading adopted through the Dodd-Frank Wall Street Reform and Consumer Protection Act in the wake of the financial crisis, bypassed the relatively public House and Senate finance committees and lobbied the low-profile agricultural committee. . . . The casino lobby . . . has exempted winnings at

* Excerpted from DANIEL MARKOVITS, *THE MERITOCRACY TRAP* (2019).

blackjack, baccarat, craps, roulette, and Big Six wheel from the income tax withholding regime used to stop foreign visitors to the United States from committing tax fraud.

... Systemic studies reveal that law and policy respond sensitively to elite preferences while remaining almost totally unresponsive to the preferences of everyone else. . . .

... Meritocracy has created a new class of super-skilled bankers, accountants, lawyers, and other professionals who seek favorable personalized treatment from government—concentrating regulatory requirements . . . or tax shelters—on behalf of individual clients. These professional services dwarf campaign contributions, lobbying, and political philanthropy, even combined. . . . The total revenue of the hundred largest law firms in the United States reached \$90 billion in 2017 All these professionals empower the rich to resist regulation and thereby disempower the rest from subjecting wealth to law. They are, moreover, creatures of meritocracy—of the training that meritocratic educations provide and of the enormous labor incomes that meritocratic work affords. In this way, meritocracy directly produces new means for undermining democratic self-government.

... The common view supposes that every property owner enjoys the same rights and protections—that she owns things in the same way—no matter what or how much property she has. According to this view, the state’s relationship to private property is scale-blind, so that large fortunes and small holdings receive the same legal protections But in fact, size matters for property rights A middle-class person must comply with whatever regulations the state imposes on her and forfeit whatever taxes it assesses. . . . But a rich person can use his swollen fortune to hire skilled professionals to resist regulations and taxes

Meritocracy enhances the elite’s power to resist the state. Meritocratic inequality creates incentives for the most skilled workers to grow rich by devoting themselves to defending still richer people’s fortunes against government encroachment. By inventing the superordinate private-sector job, meritocracy endows a class of workers . . . with the means and the motive to block the state’s efforts to seize, or even just to regulate, elite wealth.

... Historically, the private sector did not value managerial and professional skills, and the state . . . faced effectively no private competition for elite labor. . . . The best-educated and most skilled workers therefore naturally gravitated toward government This kept regulators ahead of the people whom they regulated and helped the state effectively to govern even its richest subjects.

Meritocratic inequality, by contrast, sharply increases elite private-sector wages, even as democratic sensibilities keep public-sector wages stagnant or failing. . . . [S]uperordinate workers now earn many times more in the private sector than in government jobs

. . . Government departments have become, in the shadow of these incentives, “barely disguised employment agencies,” connecting public officials to future private officials. . . .

Meritocracy directs this talent overwhelmingly to serve the private side of the interface between government regulation and the rich—to promote elite economic interests against the state. An entire industry now devotes itself to defending the elite’s income and wealth—and to resisting, as a recent Citigroup brochure directed at the bank’s high-net-worth clients said, the “ways of expropriating wealth” favored by “organized societies” confronting “plutonomy.” This income defense industry overwhelms the state A combination of high exemptions and generous opportunities for tax planning means that in 2016 . . . fewer than fifty-three hundred families across the entire country paid any estate tax at all.

The estate tax is extreme but not exceptional. The broader complex of lawyers, accountants, and bankers advising the rich on tax havens is sufficiently large to allow what the industry calls high-net-worth individuals . . . worldwide to move roughly \$18 trillion of assets offshore. Overall, during the same decades in which the top 1 percent’s share of the national income roughly doubled, the tax rates that it faced fell by perhaps a third. . . . Even when the rich are caught red-handed, they rarely get punished. . . .

Financing Campaigns

Examinations of inequality and democracy often address campaign finance. This inquiry considers the participation of extreme wealth as part of the capture of the democratic system. In a democratic system, every individual is an ostensibly equal speaker because each citizen has an equal impact in political life through votes that are counted equally with every other citizen’s votes. Yet, money can be used to effectively purchase certain candidates or political platforms through generous donations, leading certain individuals to exert disproportionate influence. As Frank Michelman discussed, the dilution of the vote through the overwhelming input of resources from certain individuals raises questions “about exactly what a fair majority vote is, or about what the notion of a fair majority vote properly means.”*

This subsection focuses on the debate over the regulation of campaign donations and campaign advertising spending. We conclude by questioning whether attempts to equalize electoral influence are sufficient to counter the unequal impact of wealthy voices.

* Frank I. Michelman, “*Protecting the People from Themselves, or How Direct Can Democracy Be?*,” 45 UCLA LAW REVIEW 1717 (1998).

Democratic Equality

James Lindley Wilson (2019)*

Wealth inequality in many societies is high and growing. Considerable evidence shows that this inequality substantially affects democratic political processes, as wealthy citizens and corporations exert much greater influence on law and policy making than do poor or middle-class citizens. . . .

Disenfranchisement of citizens who fail to meet some high threshold of personal wealth is definitive of oligarchy (the rule of the rich). Indirect institutional means of achieving the same political disregard for the poor are also incompatible with political equality. If poor citizens voted, but electoral systems discounted or diluted their votes, or they were systematically ignored in political deliberations, the regime would be politically unequal. There are a great many ways to be antidemocratic. . . .

The general problem is that great wealth inequalities may leave poorer citizens unable to secure reliable, appropriate consideration. The concern is not that each citizen ha[s] equal opportunities for equal influence, nor equal resources for influence. Instead, the concern is that resource deficiencies make it difficult or impossible for poorer citizens to claim the authority to which they are entitled.

. . . [C]itizens require resources to be protected from others' manipulation—to have, in this sense, “autonomy protection.” . . . Some deliberative practices and structures are not consistent with respect for other citizens as autonomous in the sense that they are entitled to form what are meaningfully their own judgments. This conception of autonomy is political in that it does not require that citizens' internal constitutions be arranged in some way that meets philosophical standards of autonomy or self-rule. Instead, however the judgments are internally generated, a politically autonomous citizen is one whose judgments are hers in the sense that they are not improperly generated or controlled by others. Both absolute poverty and great wealth inequality threaten this autonomy.

. . . Access to information about relevant features of one's situation, and, in the context of elections, information about candidates and their claims, along with the skills necessary to interpret that information, is essential to citizens' judgment formation, another important deliberative interest of equal authorities. Citizens require information about others' views to exercise opportunities for forming coalitions aimed at securing consideration for shared judgments. . . .

Citizens also require resources for engaging in advocacy. They need time to engage in communication. Ensuring that one's views reach other citizens also requires adequate access to media or communication technologies. . . .

* Excerpted from JAMES LINDLEY WILSON, *DEMOCRATIC EQUALITY* (2019).

... Rich citizens may be able to use their wealth to “capture” otherwise fairly elected representatives. Apart from direct bribery, citizens can use wealth to hire lobbyists, advocates, and even media outlets aimed at setting representatives’ deliberative agenda and shaping their information flow These activities constitute capture if they lead the representative to neglect other citizens’ judgments—for instance, by relying too heavily on information provided by the wealthy or their advocates. . . . [T]he use of wealth to advocate for one’s own judgments in a context in which the egalitarian constraints are weak likely promotes deliberative neglect and undermines political equality. . . .

... Realizing everyone’s political liberty requires not just allowing anyone to say anything, but requires efforts to ensure that everyone is granted appropriate consideration. In contexts of deliberative scarcity, this may require regulation (as elections do). Such regulation may limit a certain citizen’s inputs—such as funding of advocacy—but this does not infringe [on] that citizen’s political liberty, because the liberty only involves a claim to appropriate consideration. . . .

Laws restrict citizens’ use of resources for speech all the time. This happens when governments take citizens’ resources, as through taxation. . . . If the specific restriction on use for speech prevented meaningful advocacy—prevented citizens from securing appropriate consideration—then it would be objectionable. . . . But for any given level of resources left to a citizen, it is hard to see why a targeted restriction involves any more infringement of speech rights than any taking of resources. . . .

... [W]e standardly restrict citizens’ use of resources for speech . . . by maintaining a society in which some people have fewer resources available to fund speech than they would like. Just as the rich citizen is unable to use resources for advocacy beyond the \$100,000 threshold, the poor citizen is unable to use more than \$25, say, for such advocacy, given her limited means, urgent interests, and justice-relevant obligations. . . .

... [A]ccording to the anti-reformist, restrictions on the rich involve interfering in the exercise of speech freedoms, whereas failing to grant resources to the poor merely involves failing to promote the exercise of speech freedoms. The anti-reformist insists on prohibitions on interference, and takes no position on promotion. This, again, is a side-constraints interpretation of the freedom. . . .

This argument fails to recognize that the limited resources of the poor are precisely maintained by actual and threatened interference. When the government protects your property by enforcing your rights against trespass and theft and so on, it prevents me from taking your resources in order to fund political advocacy. It threatens interference if I attempt such taking, and typically will interfere with such attempts. . . . [I]f free speech rights are violated any time the state engages in interference to restrict resource use for speech, then protection of property rights and other distributive entitlements constitute violations of free speech. . . .

Many anti-reformists . . . believe that current distributions of wealth are just or nearly enough just that campaign-finance regulations would . . . violate the rights of most people affected. . . . By defining the scope of speech rights in terms of one's resource entitlements, this argument prioritizes property-rights protection and distributive justice over any values having to do with speech or (noneconomic) liberty. This is not a position grounded in any serious valorization of speech or civil liberty. . . .

. . . While we should doubt that free speech values are fully enjoyed by those who have very few resources, there is little in the history of free speech theory or jurisprudence to suggest that its benefits only apply to the extremely wealthy. Restrictions on the unlimited use of resources for speech . . . do not constitute violations of free speech even if they do involve interference in choice. . . .

* * *

The following two cases debated the relationship between political contributions and protections on political speech as they considered both traditional quid pro quo corruption and a more subtle form of clientelist corruption. Both cases called on judges to limit political contributions to candidates running for office. Drawing on different constitutional and statutory protections, their majorities reached opposite conclusions.

McCloy v. New South Wales
High Court of Australia
257 CLR 178 (2015)

FRENCH[, Chief Justice, joined by Justices] KIEFEL, BELL and KEANE[:]

The *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) (“the EFED Act”) imposes restrictions on private funding of political candidates and parties The plaintiffs contend . . . that provisions of the EFED Act,* which impose

* Section 95A of Division 2A of the New South Wales Election Funding, Expenditure and Disclosures Act 1981 provides in part:

(1) General cap[:] The applicable cap on political donations is as follows:

(a) \$5,000 for political donations to or for the benefit of a registered party, . . .

(d) \$2,000 for political donations to or for the benefit of a candidate, . . .

(2) Aggregation of donations during financial year[:] A political donation of or less than an amount specified in subsection (1) . . . exceeds the applicable cap . . . if that and other separate political donations . . . within the same financial year would, if aggregated, exceed the applicable cap

(3) Aggregation of donations to elected members, groups or candidates of the same party[:] A political donation of or less than an amount specified in subsection (1) . . . exceeds the applicable

a cap on political donations . . . , are invalid for impermissibly infringing the freedom of political communication on governmental and political matters

Th[at] freedom under the Australian Constitution is a qualified limitation on legislative power implied in order to ensure that the people of the Commonwealth may “exercise a free and informed choice as electors.” It is not an absolute freedom. It may be subject to legislative restrictions serving a legitimate purpose compatible with the system of representative government for which the Constitution provides, where the extent of the burden can be justified as suitable, necessary and adequate, having regard to the purpose of those restrictions.

. . . [W]hile the impugned provisions effectively burden [that] freedom, they have been enacted for legitimate purposes[and] advance those purposes by rational means

. . . [The] purpose is to secure . . . the . . . integrity of the Parliament and other institutions of government A risk to that integrity may arise from . . . influences over those institutions That risk arises largely from the need, on the part of political parties and candidates, for large donations in order to compete effectively in election campaigns. . . .

[The Act] provides general caps on the . . . political donations which a person can make to or for the benefit of a particular political party, elected member, group, candidate or third-party campaigner. [Each category of recipient has a set cap.] . . . [I]t is unlawful for a person to accept a political donation which exceeds the applicable cap.

. . . Each of the plaintiffs intends . . . to make donations in excess of [the cap]

The plaintiffs . . . submit that the ability to pay money to secure access to a politician is itself an aspect of the [constitutionally protected] freedom

. . . [First, they assert that a] restriction on the funds available to political parties and candidates, . . . which operates by restricting the source of those funds, effectively burdens the freedom because . . . a party or candidate will have to fund any shortfall. . . .

[Secondly, they assert that the Act burdens] the ability of donors to make substantial political donations in order to gain access and make representations to politicians and political parties. They accept . . . that the act of donation is not itself a political communication, but they submit that donors are entitled to “build and assert political power”

cap . . . if that and other separate political donations . . . would, if aggregated, exceed the applicable cap

To the contrary, guaranteeing the ability of a few to make large political donations in order to secure access to those in power would seem to be antithetical to the great underlying principle [that individual rights are secured by ensuring each an equal share in political power].

. . . The plaintiffs' argument appears to mistakenly equate the freedom under our Constitution with an individual right such as is conferred by the First Amendment to the United States Constitution, which operates in the field of political donations [as] . . . expression and . . . association. . . .

. . . The capping provisions . . . are intended to reduce the risk of corruption by preventing payments of large sums of money by way of political donation. . . . [The Act] targets money which may be used for political communication, but this is not inconsistent with a purpose to prevent corruption.

. . . [The Act is] also directed to overcoming perceptions of corruption and undue influence, which may undermine public confidence in government and in the electoral system itself . . . [because of the] purchase of access to politicians through large donations, which is not available to ordinary citizens

. . . In practice . . . the line between [ingratiation or access] and corruption may not be so bright.

. . . [In addition to] "quid pro quo" corruption[, a] more subtle kind of corruption [called "clientelism"] concerns "the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder." . . .

. . . [In United States constitutional law,] an attempt . . . to level the playing field to ensure that all voices may be heard is, *prima facie*, illegitimate.

. . . [In Australian constitutional law, by contrast, l]egislative regulation of the electoral process directed to the protection of the integrity of the process is . . . *prima facie* legitimate. . . .

Equality of opportunity to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by our Constitution. . . . The risk to equal participation posed by the uncontrolled use of wealth may warrant legislative action to ensure, or even enhance, the practical enjoyment of popular sovereignty. . . .

[As an alternative, t]he plaintiffs put forward . . . [stronger donation disclosure] requirements

. . . Whilst provisions requiring disclosure of donations are no doubt important, they could not be said to be as effective as capping donations in achieving the anti-corruption purpose

. . . [T]he provisions do not affect the ability of any person to communicate with another about matters of politics and government nor to seek access to or to influence politicians in ways other than those involving the payment of substantial sums of money. The effect on the freedom is indirect. By reducing the funds available to election campaigns there may be some restriction on communication by political parties and candidates to the public. On the other hand, the public interest in removing the risk and perception of corruption is evident. These are provisions which support and enhance equality of access to government, and the system of representative government which the freedom protects. The restriction on the freedom is more than balanced by the benefits sought to be achieved. . . .

GAGELER[, Justice, concurring in the judgment:]

The freedom [guaranteed in the Australian Constitution] does not go beyond freedom of political communication. [It] exists to protect systemic integrity, not personal liberty[, and] communication, not expression

That limitation in its scope immediately distinguishes the implied freedom of political communication from express guarantees of freedom of speech or expression in many other constitutional systems . . . [such as] the United States

. . . [A]lthough there might be favours without payment and payment without favours, the basic human tendency towards reciprocity means that payments all too readily tend to result in favours. Whether the causal sequence is that of payment for favours or that of favours for payment, the corrupting influence on the system of government is little different.

NETTLE[, Justice, concurring in the judgment:]

. . . Political sovereignty . . . necessitates that those who govern take account of the interests of all those whom they govern and not just the few of them who have the means of buying political influence.

Reducing opportunities for the purchase of political influence tends to reduce undue influence, encourage candidates and parties to seek support from more individuals and broader segments of society, and motivate individuals with common interests to build political power groups. . . .

McCutcheon v. Federal Election Commission
Supreme Court of the United States
572 U.S. 185 (2014)

Chief Justice ROBERTS announced the judgment of the Court and delivered an opinion, in which Justice[s SCALIA, KENNEDY, and ALITO joined:]

There is no right more basic . . . than the right to participate in electing our political leaders. . . .

. . . Congress may regulate campaign contributions to protect against corruption . . . [, but] Congress may not regulate contributions simply to reduce the amount of money in politics

. . . Money in politics may . . . seem repugnant . . . , but so too does much of what the First Amendment* vigorously protects. If [it] protects flag burning, funeral protests, and Nazi parades . . . it surely protects political campaign speech

. . . [G]overnment regulation may not target . . . the political access [that financial] support may afford. . . . [“A]ccess . . . [is] not corruption.” *Citizens United v. Federal Election Commission* (2010). . . .

Any regulation must instead target . . . a direct exchange of an official act for money. “The hallmark of corruption is . . . dollars for political favors.” *Federal Election Commission v. National Conservative Political Action Committee* (1985). . . .

The statute at issue . . . imposes . . . base limits, [which restrict] how much money a donor may contribute to a particular candidate or committee[, and] aggregate limits, [which restrict] how much money a donor may contribute in total to all candidates or committees.

. . . [W]e have previously upheld [base limits] as serving the permissible objective of combatting corruption. . . . [But] aggregate limits do little . . . to address that concern, while seriously restricting participation in the democratic process. The aggregate limits are therefore invalid under the First Amendment. . . .

. . . [They] have the effect of restricting how many candidates or committees the donor may support, to the extent permitted by the base limits.

* The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

... [A]ppellant Shaun McCutcheon contributed ... to 16 different federal candidates, in compliance with the base limits applicable to each. He ... wished to contribute [to] 12 additional candidates but was prevented from doing so by the aggregate limit ... McCutcheon also contributed ... to several noncandidate political committees, in compliance with the base limits ... He ... wished to contribute to various other political committees ... but was prevented from doing so by the aggregate limit on contributions to political committees. ...

Appellant Republican National Committee is a national political party committee ... [that] wishes to receive the contributions that McCutcheon and [others] would like to make—contributions ... permissible under the base limits ... but foreclosed by the aggregate limit[s] ...

... [T]he District Court concluded that the aggregate limits ... prevented evasion of the base limits. [Otherwise, an individual could contribute the maximum base amount to dozens of committees, which may each transfer that money to the same one candidate.] ...

Buckley v. Valeo (1976) ... distinguished expenditure limits from contribution limits based on the degree to which each encroaches upon protected First Amendment interests. Expenditure limits ... “necessarily reduce the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.” ...

By contrast, ... contribution limits impose a lesser restraint on political speech because they “permit the symbolic expression of support ... but do not in any way infringe the contributor’s freedom to discuss candidates and issues.” ...

... When an individual contributes money to a candidate, he exercises [the] rights[of participating in public debate through political expression and political association]: The contribution “serves as a general expression of support for the candidate and his views” and “serves to affiliate a person with a candidate.” ...

Buckley acknowledged that aggregate limits ... [“]impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself[”] ... An aggregate limit on *how many* candidates and committees an individual may support through contributions is not a “modest restraint” at all. The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse. ...

... Congress may permissibly seek [only] to rein in “large contributions [that] are given to secure a political *quid pro quo* from current and potential office holders.” ...

Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption. . . .

The dissent advocates a broader conception of corruption, and would apply the label to any individual contributions above limits deemed necessary to protect "collective speech." . . .

The difficulty is that once the aggregate limits kick in, they ban all contributions of *any* amount. But Congress's selection of . . . base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption. . . .

Justice BREYER, with whom Justice[s GINSBURG, SOTOMAYOR, and KAGAN] join, dissenting[:]

. . . [The plurality] understates the importance of protecting the political integrity of our governmental institutions[, creating] a loophole that will allow a single individual to contribute millions of dollars to a political party or to a candidate's campaign. . . . [T]oday's decision [leaves] . . . campaign finance laws . . . incapable of dealing with the grave problems of democratic legitimacy

The plurality's . . . claim—that large aggregate contributions do not "give rise" to "corruption"—is plausible only because the plurality defines "corruption" too narrowly . . . [as] an act akin to bribery. . . .

. . . [T]he anticorruption interest . . . is [actually] an interest in maintaining the integrity of our public governmental institutions. . . .

. . . [T]he First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which collective speech *matters*.

. . . Insofar as corruption cuts the link between political thought and political action, a free marketplace of political ideas loses its point. . . .

. . . [T]he Court has used the phrase "subversion of the political process" to describe circumstances in which "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves[.]" . . .

. . . Democracy . . . cannot work unless "the people have faith in those who govern."

. . . [W]e . . . should understand campaign finance laws as resting upon a broader . . . rationale than the plurality's limited definition of "corruption" suggests. . . . [T]he . . . conflict between (1) the need to permit contributions that pay for the diffusion of ideas, and (2) the need to limit payments . . . to help maintain the

integrity of the electoral process . . . takes place within . . . the First Amendment's boundaries. . . .

. . . [The Court] said [in precedents] that Congress could reasonably conclude that criminal laws forbidding “the giving and taking of bribes” did *not* adequately “deal with the reality or appearance of corruption[.]” . . . understood not as *quid pro quo* bribery, but as privileged access to and pernicious influence upon elected representatives.

. . . [For example, in *McConnell v. Federal Election Commission* (2003),] enormous soft money contributions . . . enabled wealthy contributors to gain disproportionate “access to federal lawmakers” and the ability to “influenc[e] legislation.” There was an indisputable link between generous political donations and opportunity after opportunity to make one’s case directly to a Member of Congress. . . .

This Court . . . wrote: “. . . [C]andidates and donors alike have in fact exploited the soft-money loophole, the former to increase their prospects of election and the latter to create debt on the part of officeholders”

. . . “Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions[.]” . . .

. . . [I]n the absence of limits on aggregate political contributions, donors can and likely will find ways to channel millions of dollars to parties and to individual candidates, producing precisely the kind of “corruption” or “appearance of corruption” that previously led the Court to hold aggregate limits constitutional. . . .

Death by a Thousand Cuts

Michael J. Graetz and Ian Shapiro (2011)*

. . . For almost a century, the estate tax affected only the richest 1 or 2 percent of citizens, encouraged charity, and placed no burden on the vast majority of Americans. This tax was grounded on a core American value: that all people should have an equal opportunity to pursue their economic dreams. Yet it became so despised and generally unpopular that a wide majority of Congress voted to repeal it. . . .

A law that constituted the blandest kind of common sense for most of the twentieth century was transformed . . . into the supposed enemy of hardworking citizens all over this country. How did so many people who were unaffected by the estate tax . . . and who might ultimately see their own taxes increased to replace the revenues lost if the estate tax disappeared, come to oppose it? . . .

* Excerpted from MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS* (2011).

. . . [T]he flow of cash did not affect the legislative result in the way that people who fret over money's role in politics usually complain of. Campaign contributions, soft money, spending limits for political candidates, and the like have become controversial issues, but they mattered relatively little in the estate tax fight. . . . [N]o one we spoke to in the Bush administration, on the Hill, or among lobbyists, interest groups, or journalists thought that estate tax repeal had been a major issue for contributors. The most frequently repeated view was that campaign contributors are overrated when it comes to getting legislation passed. Washington insiders consider lobbying and interest groups far more important. Even when well-heeled contributors influence politicians' votes, their sway has more to do with milieu than with money. . . .

In some congressional districts, the mere presence of powerful constituents may shape a legislator's vote on a particular issue, rendering campaign contributions redundant. In Hawaii, [Congressman] Neil Abercrombie was acutely aware of the interests of the Campbell estate, and he supported a special provision in the repeal bill to give them more time to pay their estate taxes at a lower rate. Yet since 1993 they have given a mere \$15,650 to his campaigns, a pittance during a decade of semiannual campaigns and a drop in the bucket for the Campbells. . . .

Money mattered more fundamentally in shifting the tectonic plates underlying American tax debates. This reconstruction of the politics of tax policy has been a long-term affair. With the [repeal] legislation, [conservative activists] realized a significant return on their three decades of investments in activist, conservative think tanks. They have spawned teams of smart, energetic researcher-activists for whom the supply-side hostility to all taxes on capital is second nature. . . .

Money and the wealthy families that possess it also made a difference in the repeal effort because of the unusual position in which many family-owned newspapers found themselves Frank Blethen of the *Seattle Times* was certainly the newspaper owner who took the lead advocating repeal. But many smaller family-owned newspapers in local markets had large stakes in the outcome as well. Representatives of the Newspaper Association of America and others repeatedly assured us that the normal firewalls between editorial policy and news reporting remained in place on the estate tax controversy. But, despite their insistence, one would have to be gullible indeed to believe that the owner's interest in the outcome did not attenuate the press's watchdog role. . . .

Money in politics is always a hot topic—but nearly all the discussions focus on campaign contributions. In Washington, massive legislative energy went into opposing or supporting the ban on soft money contributions that was eventually imposed by the McCain-Feingold bill in 2002 and upheld by the Supreme Court in 2003. More dramatic proposals constantly emanate from the chattering classes inside and outside the academy. In his 2003 book *The Two Percent Solution*, Matthew Miller advocates the idea of “patriot dollars” proposed by law professors Bruce Ackerman and Ian Ayres—publicly funded contributions that individuals could give to candidates anonymously,

along the lines of the secret ballot. He also lauds Jonathan Rauch's idea of public financing for candidates who agree not to accept private money, combined with instant disclosure of all private contributions. He contends that such reforms would create "a more democratic market of political ideas."

Maybe so. But our study of estate tax repeal makes us wonder about the impact of campaign finance reform on the laws that actually are enacted in Washington, D.C. Changing the campaign finance system would have had little effect on the story we have related here. Campaign contributions were not utterly irrelevant to the debate over the estate tax, to be sure. . . .

But while the total [contributions by repeal proponents were] substantial, the contributions . . . were distributed among scores of politicians. . . .

This diffusion of fairly small amounts over large numbers of candidates partly explains why . . . lawmakers from both political parties insisted that their position on estate tax repeal did not have much to do with campaign contributions. . . . They all believed that other factors, such as the involvement of the grassroots constituents, mattered more than campaign contributions. Many lobbyists echoed the view that campaign contributions might be important to getting politicians elected, but they are greatly overrated when it comes to getting legislation enacted, or halting it.

. . . Money had its greatest impact on estate tax repeal by facilitating activities that lie at the core of what the First Amendment protects: research and publishing, political organizing, and the propagation and dissemination of opinion. The investments in conservative think tanks spanning more than three decades, the funding for research and polling, the relentless pressure from the mutually reinforcing patchwork of antitax coalitions and interest groups, the money spent . . . [on] lobbying advocacy with wavering politicians, the newspaper editorials and advertising . . . —these ways for money to influence the political process would all still be there even if private campaign contributions were totally disallowed. And the Constitution will allow constraints on none of these activities.

Money also had less tangible indirect effects: the inescapable influence of wealthy constituents on politicians, the wealthy milieu in which so many of America's politicians travel, and the conflicts of financial interest that tempered the enthusiasm of those who might have fought hardest against repeal. It is often said that the antidote to one-sided speech in American politics is more speech to the contrary. But effective political speech often requires money. Because there was so little of it on the other side, the pro-repeal forces found themselves pushing against an open door to a degree that astonished even them. Unless this financial gap closes, and equivalently funded forces begin to emerge and sustain themselves, the power and effectiveness of the antitax movement in the United States is unlikely to wane any time soon. Controlling campaign finance will not stop money from working its way in Washington. Water flows around a rock.

Escaping Regulation

Whereas those with extreme wealth can choose to participate—disproportionately—in the electoral process, they can also influence the content of regulation both in formation and in implementation.

As discussed in the previous excerpt, wealthy individuals can employ lobbying tactics to warp baseline rules. This impact on legislative and administrative policymaking creates laws that permit wealth and industry to avoid the responsibilities of democratic citizenship entirely.

Once regulations are implemented, individuals and corporations can also employ bankers, lawyers, and consultants to structure their affairs to further avoid obligations. The following sources discuss the role of both ex-post and ex-ante lobbying.

Industry Responsible for 80 Per Cent of Senate Lobbying Linked to Bill C-69

Sharon J. Riley and Sarah Cox (2019)*

An investigation by The Narwhal reveals that industry and related groups, primarily from the oil and gas industry, are responsible for more than 80 per cent of Senate lobbying on Bill C-69, Canada's proposed new environmental assessment law.

In contrast, just 13 per cent of Senate and Senate staff lobbying was conducted by environmental groups and four per cent was carried out by one First Nation.

Twenty-nine groups representing industry, business and related associations registered to lobby the government specifically about Bill C-69, which introduces new rules for reviewing major projects like mines and pipelines following the gutting of environmental assessment legislation by the former Stephen Harper government. . . .

The unelected Senate has become a potential show-stopper for Bill C-69, which would make updates to Canada's environmental assessment laws promised by Prime Minister Justin Trudeau during the last election campaign. . . . Normally the Senate would readily approve legislation backed by a majority of [Members of Parliament (MPs)]. But . . . , in a rare move that tests the limits of its power, the Senate passed Bill C-69 with 187 sweeping amendments that experts say would leave Canada with weaker environmental assessment laws than those introduced by the Harper government.

Many of the Senate's amendments mirrored requests, some word for word, from oil companies and related associations

* Excerpted from Sharon J. Riley & Sarah Cox, *Industry Responsible for 80 Per Cent of Senate Lobbying Linked to Bill C-69*, NARWHAL (June 13, 2019), <https://thenarwhal.ca/industry-responsible-for-80-per-cent-of-senate-lobbying-linked-to-bill-c-69>.

Kevin Taft, a former Alberta [Member of the Legislative Assembly (MLA)] and former leader of Alberta's Liberal Party, said he's not at all surprised that the oil industry has "massively outspent and out maneuvered and out lobbied everybody else" on Bill C-69 Taft said he's struck by what he called an "Orwellian twist" and irony that Alberta Premier Jason Kenney faults "foreign-funded" environmental groups for influencing [bill] C-69 . . . when the oil industry has played a far larger role in lobbying. The oil industry, Taft said, is largely foreign-funded even though it's based in Calgary. . . .

Taft pointed out that Imperial Oil is owned by Texas-based Exxon Mobil Corp., while Canadian Natural Resources Limited trades largely on foreign stock exchanges.

China is also heavily invested in Canada's oil industry. Calgary's Nexen Energy is now owned by China National Offshore Oil Corporation's (CNOOC) international division. And Chinese-owned Sinopec Oilsands Partnership—the biggest oil company in the world ranked by revenue—owns nine per cent of Syncrude

Laurie Adkin, a political science professor at the University of Alberta, said to imply that the oil and gas industry is the victim of propaganda and the environmentalists have all the power is "an inversion of what we know factually."

"The reality is that the oil and gas industry has huge resources to lobby and finance public information campaigns, advertising, . . . departments dedicated to engaging in government relations, digital communications, [and] preparation of submissions for inquiries and consultations of various kinds," she told *The Narwhal*. "We know that they spend millions of dollars a year on this." . . .

"It's not a coincidence that five members of Jason Kenney's cabinet, including the energy minister, are from the oil industry," said Taft

Taft said the oil industry has "got a grip around the throat of democracy in Canada" and that he believes that anybody who thinks the Alberta government is looking after the best interests of Albertans is mistaken. . . . "Those should be ringing loud alarm bells for every Canadian," Taft said. "When we have a rich, powerful, foreign-controlled industry drafting our legislation for us we have a real problem with democracy in Canada." . . .

"Organizations and corporations lobby because it's effective," Taft said, adding that lobbying is "only one small component" of the oil industry's broader strategy.

"It's a strategy that, in addition to lobbying, includes advertising, legal threats, massive political donations . . . [and] overt political organization[.]" . . .

David Hughes, an earth scientist who has studied the energy resources of Canada and the U.S. for more than four decades, said *The Narwhal's* analysis clearly show "industry is in the driver's seat."

“The industry’s been incredibly successful in ramping up production, which is why we have a pipeline bottleneck,” Hughes said in an interview. “If the environmental groups are lobbying to reduce production and leave it in the ground, they’re incredibly unsuccessful.”

Oilsands production increased 376 per cent from 2000 to 2018, according to Hughes As overall oil production has climbed, royalties to government have plummeted—by almost 60 per cent, or \$9.5 billion, from 2000 to 2017

Fossil fuel companies and associations are lobbying in an effort to shape legislation and policy “in ways that maximize their profitability” as part of business strategies “There’s an ongoing strategic concern to shape policy, to in a sense bombard policy makers—including senior civil servants and politicians—with a lot of information in an on-going, really permanent campaign in which the voice of industry is dominant.” . . .

Corporate Capture of the Rulemaking Process

Elizabeth Warren (2016)*

Regulatory capture is . . . one way in which powerful corporations rig the system to work for themselves—and the rest of America pays the price. . . . [C]orporate influence works its magic even better in the shadows—and that’s where rulemaking occurs. This essay focuses on one aspect of this pervasive phenomenon: the capture of agencies as they write the rules.

. . . At every stage, the process is loaded with opportunities for powerful industry groups to tilt the scales in their favor.

The tilt starts early. For example, a 2011 study of U.S. Environmental Protection Agency (EPA) records from 1994 to 2009 found that industry groups held a virtual monopoly over informal communications with EPA that occurred before proposed rules on hazardous air pollutants were publicly available. On average, industry groups engaged in 170 times more informal communications with EPA than public interest players—communications that occurred before any proposed rules were even written.

Similarly, with financial regulation, the big banks and their friends have been lobbying the agencies aggressively. Following the worst financial crisis in three generations—one that resulted in taxpayers spending hundreds of billions to bail out the big banks—Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act to ensure that a crisis of that sort never happened again. This law included a provision . . . to stop banks from engaging in certain kinds of risky behavior. But before that rule was even written, groups representing Wall Street interests met with

* Excerpted from Elizabeth Warren, *Corporate Capture of the Rulemaking Process*, REGULATORY REVIEW (June 14, 2016), <https://www.theregreview.org/2016/06/14/warren-corporate-capture-of-the-rulemaking-process>.

federal regulators 419 times, accounting for over 93 percent of meetings between federal regulators and external parties about the Rule. Less than 7 percent of meetings were with individuals and groups representing the public interest.

As rules wind their way through the process, the lobbying intensifies. When proposed rulemaking notices are published and the public has a formal opportunity to weigh in, their views are quickly buried in an avalanche of detailed, well-funded, well-credentialed comments from industry insiders and their highly-paid allies. Those EPA rules on dangerous air pollutants? Industry groups submitted 81 percent of the comments during the notice-and-comment period. Public interest groups submitted 4 percent. . . .

Over the last few decades, additional barriers to rulemaking have popped up. Requirements include conducting cost-benefit analyses and evaluating the impact of the rule on small businesses and the environment. Sometimes these processes result in better rules, but often these are just more obstacles that result in even longer, more complex rules, and even more opportunities for well-heeled industry players to slow things down and build in exceptions to benefit themselves. . . .

These procedures tie agencies in bureaucratic knots and bleed much-needed resources. Often agencies just give up entirely on writing new rules

These delays can put lives at risk. Five years ago, Congress passed [the] FDA Food Safety Modernization Act to revamp food safety laws. Regulations were due in 2012. Many were not published until 2015, and then only after a court ordered FDA to publish the regulations. Meanwhile, every year, 3,000 Americans were dying from foodborne illnesses, and 48 million Americans—one in six—w[ere] getting sick from contaminated food.

Yet, even if an agency manages to jump through all of the procedural hoops and withstands . . . all the pressure, and actually ultimately issues a final rule, companies will sue. And the rules governing judicial review favor those who would stop the agency from acting in the public interest. Under the law, it is easy for business groups to challenge a rule for being too strong or too restrictive. But it is much harder for public interest groups or ordinary citizens to challenge a rule for being too weak or riddled with loopholes. And it is nearly impossible to challenge successfully an agency for not acting at all. . . .

. . . [E]ngaging in informal dialogue, participating in notice-and-comment, and going to court when agencies step out of line are not bad things. But over time, bludgeoning agencies into submission undercuts the public interest. The goal should be to have a system where influence over new rules is measured not by the size of the bankroll, but by the strength of the argument.

Here are a few principles that I believe would balance the scales.

First, increase transparency. The more sunlight that shines on agency processes—and on industry efforts to influence them—the more likely it is that an agency’s final product will reflect the public interest. A good start would be to disclose all meetings between agencies and interested parties, both before and during rulemaking. Another would be to help agencies and courts distinguish between legitimate, high-quality data and research, on the one hand, and bought-and-paid-for studies on the other, by requiring disclosure of financial arrangements and editorial relationships associated with regulatory comments. . . .

Second, level the playing field between public and private interests. . . . States have experimented with systems that build a public advocate into the regulatory process or that compensate public interest advocates who invest resources to produce meaningful feedback on rules. Similarly, judicial review of agencies needs to be reformed to give the public a fighting chance to challenge weak rules, agency inaction, and agency capture. . . .

[Third], limit opportunities for “cultural” capture. Regulators should be beholden to the American people, not to corporate benefactors. Thus, I suggest cracking down on the revolving door, and ending golden parachutes for executives who enter government. . . .

Implementing the right kind of reforms will not be easy. The industries that have captured the agencies that are tasked with regulating them will not willingly give up their power and influence. But this is about building a government that works not just for those at the top, but for all of us.

* * *

We turn from the role of lobbying in shaping legislative and administrative policymaking to mechanisms for wealthy corporations and individuals to order their affairs to avoid existing obligations. As the following sources demonstrate, Uber and other “platform economy” services employ both tactics. The resulting cycle of regulation avoidance and regulation shaping facilitates Uber’s growth and capture of the ride-hailing sector.

Disrupting Regulation, Regulating Disruption

Veena B. Dubal, Ruth Berins Collier, and Christopher L. Carter (2018)*

. . . Uber is one of the most successful high-tech companies and is the dominant player in the ride-hailing sector. . . . It disrupted a century-old taxi industry, resulting in a sharp decline in medallion values, taxi driver income, and taxi ridership in U.S. cities. Uber entered urban markets claiming to be a “technology company” and operated in

* Excerpted from Veena B. Dubal, Ruth Berins Collier & Christopher L. Carter, *Disrupting Regulation, Regulating Disruption: The Politics of Uber in the United States*, 16 PERSPECTIVES ON POLITICS 919 (2018).

disregard of taxi regulations. It thereby disrupted the ride-hailing market and challenged regulations that both controlled entry and fares and imposed consumer protection and safety requirements. . . .

Existing analyses of regulation generally conform to what we may call the industrial capture, public interest regulation, and deregulatory models. The industrial capture model, pioneered by [George] Stigler, puts in opposition the private versus public (or producer versus consumer) interests. It argues that concentrated private actors with high stakes use a variety of strategies to influence policy and to thwart regulation in the public interest. [Gunnar] Trumbull, to the contrary, argues that state regulation can serve the public interest when diffuse interests are represented by advocacy groups or activists, such as consumer rights organizations that form alliances with the state. The third model responds in part to the deregulatory turn since the 1980s. [Daniel P.] Carpenter and [David A.] Moss present a model of “corrosive capture,” in which regulated “firms push the regulatory process in a ‘weaker’ direction” through reduced “formulation, application, or enforcement” of existing regulations.

. . . . The Uber model of disrupted regulation presents a different combination of answers than is suggested by any one of these models. . . . The pattern is similar to what Carpenter and Moss call “weak capture,” in that “firms render regulation less robust than . . . what the public interest would recommend,” but “the public is still served.” However, Uber regulation differs from their model of “corrosive capture” in that the regulated industry (taxis) does not favor deregulation. Instead, the anti-regulation disrupter is a competitor that defines itself as a different industry and not subject to the extant regulatory regime. . . . [T]hough the public interest is served by providing a desired service, social activists and public interest advocacy organizations play almost no part, and the industry-consumer coalition (or the mobilization of consumers by and on behalf of Uber) is activated to *oppose* a pro-consumer regulation that Uber argues would cause it to leave the market.

We analyze Uber as a model of disrupted regulation, which has two phases. In the first, an existing regulatory regime, in this case for taxis, was not deregulated but disregarded by the challenger, Uber, who flouted entry and price controls, often triggering cease and desist orders from city regulators. A subsequent phase involves regulation and has occurred . . . in legislative and sometimes regulatory bodies—and also in judicial venues. It conforms to an elite-dominated model of contending incumbent versus challenger interests, in which the latter has largely prevailed. In this model of challenger capture, Uber has been able to defend its core interests of low prices, high driver supply (with no labor regulation), and consumer trust. While Uber initially rejected all regulation, it has most vigorously opposed those central to its business model of low-cost service with dynamic pricing, frictionless entry of drivers, and no vehicle caps.

Uber regulation follows a pattern of elite-driven politics in which dispersed actors (consumers and drivers) are weak and are represented primarily by surrogates. It is a model of challenger capture, with the following traits:

- Rather than deregulation per se, the high-tech disrupter disregards existing regulations, including barriers to entry and price controls.
- Concentrated interests dominate the subsequent politics of regulation, in which the disrupter has both substantial structural power and novel—as well as conventional—forms of instrumental power and defended its core interests.
- Dispersed consumers depend on shifting alignments with concentrated interests. . . .
- Dispersed drivers are aligned with Uber on issues concerning Uber’s on-going presence in a city, but, given any further lack of alignment with concentrated actors, labor issues have been addressed primarily by surrogate actors in courts.
- A dual regulatory regime has emerged, which preserves extensive regulations for the incumbent taxi industry while creating much weaker regulations for the challenger, Uber. . . .

Legal analysts have suggested that politically weak groups “are almost always compelled to resort to litigation,” and that litigation is “a technique to be employed when goals are clearly unattainable in other political forums.” The Uber case comports with this theory of political disadvantage. As atomized, dispersed actors, drivers are unable to bring effective claims in legislative venues. Even in courts, worker protection issues are rarely brought through the initiative of groups of drivers. Instead, most cases are brought by surrogates, both plaintiffs’ attorneys who bring lawsuits against Uber on behalf of drivers and government agencies that investigate the company for violation of laws that would protect drivers.

As a venue of regulation, judicial processes have a distinct logic. Unlike legislative venues, where lawmakers can break new ground by passing laws, courts and administrative agencies judge compliance with existing statutes, regulations, and previous judicial decisions. . . .

Reflecting the fact that drivers are an unorganized and atomized workforce, most cases are not brought by groups of drivers but by surrogates, who typically conceive of the litigation and then recruit worker plaintiffs (not vice versa). Prominent among these surrogates are plaintiffs’ attorneys, who have brought class actions. Like all surrogates, class-action attorneys act simultaneously “on behalf of” drivers but also in their own interests, resulting in a biasing that has affected what issues have been litigated and how the litigation proceeds. Because private plaintiffs’ attorneys work on contingency, they have an incentive to bring cases that may yield significant damages or large settlement

sums. . . . [A]s a result, income-related claims are most commonly litigated against Uber, and most cases have been settled or dismissed without resolving drivers' employment status. These settlements are enabled by Uber's significant material resources, and they undermine any efforts to regulate Uber through courts. Other surrogate actors representing drivers' interests in courts include government bodies and an NGO. . . .

**Uber's Call for Change in Europe Shirks Responsibility While
Highlighting Real Challenges**
Shelly Steward et al. (2021)*

In recent years, gig economy companies have faced mounting legal challenges around the world. We have witnessed a rising tide of public and worker dissatisfaction with the insecure and precarious conditions offered by many platforms, including Uber, Deliveroo, and others. These platforms typically rely on a business model in which workers are hired as independent contractors without the legal protections afforded to employees, including a minimum wage, participation in social insurance programs, safe working conditions, and collective bargaining rights. Policymakers and courts across Europe have begun to address these conditions, with courts in Spain, Italy, the Netherlands, France, Belgium, and the UK ruling in favour of reclassifying gig workers.

Against this backdrop, Uber published a white paper this week calling for its exemption from labour laws in the EU. Though framed as a call for better working conditions for drivers, the paper actually calls for a law change to legitimize a lower level of protection for platform workers than most European workers benefit from. . . .

The white paper reproduces the strategy taken by Uber in California where, after the state introduced new regulation that would have extended employee benefits to platform workers, they and several other prominent platforms successfully pushed for a watered-down alternative. The platforms spent approximately US\$200 million persuading voters on their ballot measure, Proposition 22, which exempted delivery and transport platform workers from classification laws in exchange for stripped-back versions of workplace benefits that have already been shown to be inadequate. It is no surprise to see the company extending this strategy to Europe shortly in advance of a February 19th ruling in a UK Supreme Court case challenging the classification of drivers and the European Commission's consultation with workers and employer representatives to inform gig economy regulation on February 24th.

. . . Labour law provides these . . . rights; and work arranged via a platform does not require a radical new approach. The benefits proposed in Uber's white paper, like

* Excerpted from Shelly Steward et al., *Uber's Call for Change in Europe Shirks Responsibility While Highlighting Real Challenges*, FAIRWORK (Feb. 2, 2021), <https://fair.work/en/fw/blog/ubers-call-for-change-in-europe-shirks-responsibility-while-highlighting-real-challenges/#continue>.

those provided under Proposition 22, represent weakened versions of those afforded to employees. . . .

Uber's focus on policy change . . . downplays the company's significant influence over conditions in the gig economy. By calling for new regulations, the company is shifting responsibility for workers' conditions to other actors, when it could step up to the plate and provide an exemplar of how a platform can treat its workers. . . .

Uber's white paper is an attempt to narrowly define the parameters within which the debate about platform working conditions can take place. It is corporate lobbying masquerading as progressivism. Exceptions from employment law might be limited to sectors like driving and delivery today, but could soon become the norm for a much wider range of jobs throughout the labour market.

Avoiding Taxes

While some tax avoidance is overtly illegal, other schemes take advantage of tax loopholes created through lobbying. Confronting these efforts could entail forms of discretion for governments that may raise rule of law questions. Thus, generalized anti-abuse provisions and anti-corruption initiatives serve as structural analogues of doctrines of militant democracy in the law of free-speech and political parties.

States face challenges enforcing tax responsibilities against both those flagrantly evading taxes and those taking advantage of tax loopholes. The character and problem of tax evasion is described by Gabriel Zucman:

Tax havens are at the heart of financial, budgetary, and democratic crises. . . . In the course of the last five years alone in Ireland and Cyprus—two offshore centers with hypertrophic financial systems—banks have gone almost bankrupt, plunging thousands of people into poverty. In the United States, Congress has revealed that one of the largest companies on the planet, Apple, avoided tens of billions in taxes by manipulating the location of its profits. In France, the budget minister had to resign because he had cheated on his taxes for twenty years through hidden accounts. In Spain, the former treasurer of the party in power went to jail after having revealed a hidden system of financing through accounts in Switzerland. . . .

Each country has the right to choose its forms of taxation. But when Luxembourg offers tailored tax deals to multi-national companies, when the British Virgin Islands enables money launderers to create anonymous companies for a penny, when Switzerland keeps the wealth of corrupt

elites out of sight in its coffers, they all steal the revenue of foreign nations. And they all win—fees, domestic activity, sometimes great influence on the international state—while the rest of us lose.*

In one high profile case, the European Commission engaged in litigation against Apple and Ireland from 2004 to 2020, alleging that Apple owed over \$16 billion in corporate taxes to Ireland. The Commission accused Ireland of negotiating a special corporate tax rate with Apple, allowing it to avoid American and Irish corporate taxes. This litigation highlighted the tension between post hoc accountability, deterrence of future corporate tax avoidance, and the preservation of rule of law norms:

“Tax dodging has a real human cost. When a company gets away without paying the tax it should, that has a direct impact on the lives of people around the world.” . . . “This is enough to pay for the education for all of the 121 million children that currently are not in school.” . . . Apple’s tax avoidance has a significant impact in various sectors, such as education, infrastructure, and health care, in developing economies throughout the world. . . . Even though Apple has done much good in Ireland, the public still cannot ignore its tax avoidance schemes.

. . . [I]f Ireland and Apple’s appeal succeeds, Apple will remain unpunished and will continue to circumvent taxes through any means possible. This sends a message to other multinational entities . . . that tax avoidance is all right and that having an unfair advantage is simply part of competing. . . .

Nonetheless, it is unethical for the Commission to seek a recovery of the unpaid taxes based on a rule that did not exist at the time [T]he U.S. and the EU should work together to close the loopholes, and Apple should be sanctioned by the U.S. because, ultimately, the U.S. is the country that should have received those taxes.*

In July 2020, the General Court of the European Union ruled that Apple did not owe back taxes, reversing lower court holdings.**

Excerpted below is an article that delineates the size and distribution of tax evaders, the challenges of addressing tax evasion, and the implications for government policy.

* Excerpted from GABRIEL ZUCMAN, *THE HIDDEN WEALTH OF NATIONS* (2015).

* Excerpted from Rita Barrera & Jessica Bustamante, *The Rotten Apple: Tax Avoidance in Ireland*, 32 *INTERNATIONAL TRADE JOURNAL* 150 (2011).

** T-778/16, T-892/16, *Ireland & Others v Commission*, 2020 E.C.R. 338.

Tax Evasion and Inequality

Annette Alstadsæter, Niels Johannesen, and Gabriel Zucman (2019)^{***}

The size and distribution of tax evasion is a source of sustained interest and controversy among the public. Some believe that the bulk of tax evasion is done by the wealthy, a view fueled recently by high-profile leaks from offshore financial institutions such as the “Panama Papers.” Others stress that poorer individuals may be more likely to evade taxes, highlighting fraud by the self-employed or abuse of refundable tax credits.

Who evades taxes, and how much, matters for both economists and policymakers. First, and most importantly, it matters for the study of inequality. . . . Second, tax evasion matters for analyzing the effects of governments intervention in the economy; it redistributes the tax burden and affects the costs of raising taxes, “bread-and-butter concerns of public economics.” Last, knowing how tax evasion is distributed would help tax authorities, which face tight budget constraints, to better target their enforcement effort.

Tax evasion is fundamentally hard to study because there is no single source of information capturing all of it. The key source used so far in rich countries is stratified random audits. These audits are a powerful way to uncover unreported self-employment income, abuses of tax credits, and more broadly all relatively simple forms of tax evasion. . . . But random audits do not allow one to study tax evasion by the very wealthy satisfactorily, both because of insufficient sample sizes, and because they fail to capture sophisticated forms of evasion involving legal and financial intermediaries. . . . This limitation means that random audits need to be supplemented with other data sources to study tax evasion at the top of the distribution. Such data, however, have so far proven elusive.

. . . [W]e analyze new micro-data that make it possible to study tax evasion by very rich individuals. These data come from recent, massive leaks from offshore financial institutions . . . , and tax amnesties conducted in the aftermath of the financial crisis of 2008–2009. . . . [W]e were able to analyze the leaked and amnesty micro-data matched to population-wide administrative income and wealth records in Norway, Sweden, and Denmark.

The leaked and amnesty data we exploit in this paper reveal a number of consistent and striking findings. The probability of hiding assets offshore rises sharply and significantly with wealth, including within the very top groups of the wealth distribution. . . . [T]he wealth in tax havens turns out to be extremely concentrated: the top 0.01 percent of the wealth distribution owns about 50 percent of it. . . . [T]he top 0.01 percent evades about 25 percent of its tax liability by concealing assets and

^{***} Excerpted from Annette Alstadsæter, Niels Johannesen & Gabriel Zucman, *Tax Evasion & Inequality*, 109 AMERICAN ECONOMIC REVIEW 2073 (2019).

investment income abroad. This estimate only takes into account the wealth held offshore that evades taxes; it excludes properly declared offshore assets. . . .

. . . [M]ost individuals in rich countries truly have few possibilities to evade a lot of taxes, for the simple reason that most of their income derives from wages, pensions, and investment income earned in domestic financial institutions: income sources that are automatically reported to the tax authority. By contrast, tax evasion is possible for the very rich because there is an industry that helps them conceal wealth abroad, and most of their income derives from wealth. . . .

. . . [G]overnment policies have a critical role to play to reduce tax evasion. Increasing penalties for tax evaders has not proved to be a very practical way to curb tax cheating so far. There are limits to the penalties that can be applied to persons conducting such crimes; and if the penalties set by law are too high, judges might require a stronger burden of proof from prosecutors, potentially leading to fewer convictions. Large sanctions against the suppliers of tax evasion services instead of tax evaders themselves could help overcome this problem. If policymakers were willing to systematically put out of business the financial institutions found facilitating evasion, then the supply of evasion services would shrink, and tax evasion at the top could be reduced dramatically. In turn, a lower equilibrium level of tax evasion would make it possible, everything else equal, to increase effective tax rates on the rich and hence ultimately may contribute to reducing inequality. While there is a view that taxing the rich is not possible in a globalized world, with proper enforcement, progressive taxation might be more sustainable than previously thought.

This insight also shows that tax enforcement and financial regulation policies are intertwined. It is easier to close small financial institutions than systematically important ones. Since 2009, 80 Swiss banks have admitted helping US persons to evade taxes But the US government has been able to shut down only three relatively small institutions If financial regulation ensures no bank is so big that it cannot be shut down, then tax evasion could be curbed significantly.

Our model can also explain some of the key observed trends in top-end evasion. In our model, the size and distribution of tax evasion are endogenous to the wealth distribution. The higher inequality, the lower the number of people who evade. The intuition for that result is simple: when inequality is high, relatively few individuals own the bulk of wealth; they generate a lot of revenue for the bank and are unlikely to be detected. Moving down the distribution would mean reaching a big mass of the population that would generate only relatively little additional revenue but would increase the risk of detection a lot; it is not worth it.

. . . As the world becomes more unequal, offshore banks might choose to serve fewer but wealthier clients, making tax evasion even more concentrated at the top. . . .

* * *

Governments have to decide how to prioritize investigation and enforcement against tax evaders and tax evasion services. U.S. President Joe Biden's *American Families Plan* proposed several tactics for stemming tax avoidance, outlined in the following excerpt.

Investing in the IRS and Improving Tax Compliance
U.S. Department of the Treasury (2021)*

A well-functioning tax system requires that all taxpayers pay what they owe. An unfortunate characteristic of the current system, however, is an asymmetric adherence to tax law by the nature of income received. While roughly 99% of the taxes due on wages are remitted to the Internal Revenue Service, compliance across other forms of income is substantially less, as the IRS has difficulty verifying whether income from opaque sources is properly reported. Noncompliance is concentrated at the top of the distribution: A recent study found that the top 1 percent failed to report 20 percent of their income and failed to pay nearly \$175 billion in taxes owed annually.

Lower levels of compliance not only impact tax progressivity, but they also lower tax revenue and deteriorate our nation's fiscal position. Left unaddressed, this tax gap . . . will total about \$7 trillion over the course of the next decade. This massive gap in revenue means policymakers must choose between higher taxes elsewhere in the tax system, lower spending on fiscal priorities, or rising budget deficits.

The tax gap has many underlying causes, chief among them being insufficient resources. Budget cuts over the past decade have resulted in an agency that lacks the capacity to address sophisticated tax evasion efforts. Over this period, audit rates for taxpayers making over \$1 million in income have fallen by almost 80 percent.

. . . The IRS requires more resources to conduct investigations into underreported income and to pursue high-income taxpayers who evade their tax liability through complex schemes. It requires 21st century technology to unpack complex tax returns and track income across various opaque sources. And, it requires access to better information so that the agency can target its efforts at the most egregious offenders, while helping compliant taxpayers avoid unnecessary and costly audits. . . .

These considerations provide the basis for a series of proposals in the American Families Plan that overhaul tax administration and provide the IRS the resources and information it needs to address tax evasion. . . . [T]hese reforms will generate an additional \$700 billion in tax revenue over the course of a decade

- **Provide the IRS the resources it needs to stop sophisticated tax evasion.** . . . The IRS has made clear that it needs additional resources to pursue costly tax evasion. These are not easy cases to resolve; the average investigation

* Excerpted from *Investing in the IRS and Improving Tax Compliance*, U.S. DEPARTMENT OF TREASURY (Apr. 28, 2021), <https://home.treasury.gov/news/press-releases/jy0150>.

of a high-wealth individual takes two years to complete and often requires the IRS to commit substantial resources. Moreover, the lack of adequate investment in compliance has significant revenue consequences. Indeed, several hundred taxpayers who committed the most egregious form of evasion—failing to file taxes all together—cost the federal government \$10 billion over a period of just three years. . . . The President’s proposal directs that additional resources go toward enforcement against those with the highest incomes, rather than Americans with actual income of less than \$400,000.

- **Provide the IRS with more complete information.** When the IRS has information from third parties, income is accurately reported, and taxes are fully paid. However, high-income taxpayers disproportionately accrue income in opaque sources—like partnership and proprietorship income—where the IRS struggles to verify tax filings. As a result, up to 55 percent of taxes owed on these less visible income streams is unpaid, with disproportionate levels of non-compliance for those at the top of the income distribution. . . . This reform aims to provide the IRS information on account flows so that it has a lens into investment and business activity—similar to the information provided on income streams such as wage, pension, and unemployment income. . . . Providing the IRS this information will help improve audit selection so it can better target its enforcement activity on the most suspect evaders, avoiding unnecessary (and costly) audits of ordinary taxpayers. . . .
- **Regulate paid tax preparers.** Taxpayers often make use of unregulated tax preparers who lack the ability to provide accurate tax assistance. These preparers submit more tax returns than all other preparers combined, and they make costly mistakes that subject their customers to painful audits, sometimes even intentionally defrauding taxpayers for their own benefit. The President’s plan calls for giving the IRS the legal authority to implement safeguards in the tax preparation industry. It also includes stiffer penalties for unscrupulous preparers who fail to identify themselves on tax returns and defraud taxpayers (so called “ghost preparers”).

* * *

The Alstadsæter, Johannesen, and Zucman study drew on the Panama Papers, a 2016 leak of more than 11.5 million financial and legal records exposing both legal and illicit offshore dealings. The documents implicated over 140 politicians from over 50 countries,* including details of eight offshore companies linked to then-Pakistani Prime Minister Nawaz Sharif and his family. Excerpted below is a decision by the Supreme Court of Pakistan, which considered whether it had the authority to disqualify the Prime Minister from office following the failure of relevant agencies to investigate. The case

* *The Power Players*, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Jan. 31, 2017), <https://www.icij.org/investigations/panama-papers/the-power-players>.

confronted the challenges of holding legally accountable those who have used their power and wealth to dismantle existing systems of equality.

Imran Ahmed Khan Niazi v. Mian Muhammad Nawaz Sharif

Supreme Court of Pakistan

PLD 2017 Supreme Court 695 (2017)

Present: Asif Saeed Khan Khosa, Ejaz Afzal Khan, Gulzar Ahmad, Sh. Azmat Saeed and Ijaz ul Ahsan, JJ

ASIF SAEED KHAN KHOSA, J. [writing for the minority:]

1. . . . [I]t has been alleged . . . [that] Mian Muhammad Nawaz Sharif, the incumbent Prime Minister of Pakistan, and . . . his immediate family has amassed huge wealth and assets which have been acquired through means which were illegal and unfair, practices which were unlawful and corrupt, and exercise of public authority which was misused and abused. . . . [T]he . . . petitioners have . . . prayed . . . that respondent . . . is not honest and ameen within the purview of Article 62(1)(f)* of the Constitution of the Islamic Republic of Pakistan, 1973 and, thus, he is disqualified from being a member of the . . . Parliament

2. In the last two and a half decades there had been a constant murmur . . . about respondent . . . indulging in corruption, corrupt practices and money laundering, etc. with . . . some specified properties in London, United Kingdom . . . identified as having been acquired by respondent . . . through ill-gotten or laundered money. . . . In the backdrop of an unfortunate refusal/failure on the part of all the relevant institutions in the country . . . to inquire into or investigate the matter or to refer the matter to the Election Commission of Pakistan against respondent . . . , . . . it was decided . . . that these petitions involve some serious questions of public importance with reference to enforcement of some Fundamental Rights conferred by . . . the Constitution and, therefore, the same are maintainable before this Court under Article 184(3)** of the Constitution. . . .

* Article 62(1) of the Constitution of Pakistan provides in part:

A person shall not be qualified to be elected or chosen as a member of Majlis-e-Shoora (Parliament) unless . . .

(f) he is sagacious, righteous, non-profligate, honest and ameen, there being no declaration to the contrary by a court of law . . .

** Article 184(3) of the Constitution of Pakistan provides in part:

. . . [T]he Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved, have the power to make an order

68. . . . [I]f this Court stops short of attending to the issue merely because it involves some disputed or intricate questions of fact then the message being sent would be that if a powerful and experienced Prime Minister of the country . . . appoints his loyalists as heads of all the relevant institutions in the country . . . then a brazen blocking of such inquiry or investigation by such loyalists would practically render the Prime Minister . . . immune from touchability or accountability It is in such spirit of democracy, accountability and rule of law that this Court would not give a Prime Minister . . . a field day merely because no other remedy is available or practicable to inquire into the allegations of corruption, etc. leveled against him or where such inquiry involves ascertainment of some facts. . . . I refuse to accept the contention that the petitions in hand involve disputed and intricate questions of fact which we cannot attend to or adjudicate upon

71. It was . . . contended . . . that in exercise of this Court's jurisdiction under Article 184(3) of the Constitution ordinarily no evidence is recorded, no right of cross-examination of witnesses is available and no right of appeal exists against the decision rendered and, therefore, . . . rendering a finding of fact in exercise of such jurisdiction may militate against the Fundamental Right guaranteed by Article 10A* of the Constitution regarding fair trial and due process. . . .

There is hardly any determination of civil rights of the private respondents involved in the present proceedings and no trial of the said respondents on any criminal charge is being conducted in these proceedings and, therefore, the said contention has failed to impress us. . . .

73. . . . [T]he scope and practice regarding exercise of jurisdiction by this Court under Article 184(3) of the Constitution is still evolving [I]t has been left to the Court to decide as to which lawful procedure would suit the requirements of a given case best. It is the nature of the issue and the circumstances of the case which are to determine the procedure to be adopted. . . .

107. Corruption at high places is not a new phenomenon but the methods . . . have seen a dramatic change in recent times. Previously . . . [s]uch proceeds . . . were not difficult to detect and, therefore, the normal onus and standard of proof required in a criminal case . . . were applicable [T]hrough creation of offshore companies [and tax havens] not only tax is being evaded by concealing wealth but even ill-gotten money is parked behind multiple veils of secrecy which are extremely difficult to lift or penetrate. This new development has forced legislatures around the world to modify the laws about onus and standard of proof In Pakistan, . . . the Prevention of Corruption Act, 1947 places a light initial onus of proof on the prosecution to establish that the accused person is in possession of some movable

* Article 10A of the Constitution of Pakistan provides:

For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.

or immovable property and there is reason to believe that such property had been acquired by improper means . . . disproportionate to his known sources of income and then a heavier onus shifts to the accused person to account for possession [of said items]

EJAZ AFZAL KHAN, J. [writing for the majority:]

. . . 18. . . . Any allegation leveled against a holder of public office under these provisions of law requires an investigation and collection of evidence showing that he . . . owns . . . assets, etc. disproportionate to his known means of income. Such investigation is followed by a full-fledged trial . . . for determination of such liability Let respondent . . . go through all the phases of investigation, trial and appeal. We would not leap over such phases in gross violation of . . . the Constitution which is the heart and the soul of the rule of law We for an individual case would not dispense with due process and thereby undo, obliterate and annihilate our jurisprudence which we built up in centuries in our sweat, in our toil, in our blood.

19. . . . [T]he officers at the peak of [the relevant investigative agencies] may not cast their prying eyes on the misdeeds and lay their arresting hands on the shoulders of the elites on account of their being amenable to the influence of the latter or because of their being beholden to the[m] But it does not mean that this Court should exercise a jurisdiction not conferred on it and act in derogation of the provisions of the Constitution and the law regulating trichotomy of power and conferment of jurisdiction on the courts of law. . . . Let us stay and act within the parameters of the Constitution and the law as they stand, till the time they are changed or altered through an amendment therein. . . .

IJAZ UL AHSAN, J. [writing for the majority:]

. . . 83. . . . We are perturbed and disappointed to find that State functionaries/institutions charged with the responsibility to enforce law and safeguard the interests of the State by strict, impartial and unbiased enforcement of the laws are . . . unwilling to do so. We are in no manner of doubt that by conscious planned and premeditated design all important State institutions which could offer any resistance or act as impediments in the way of loot and plunder of State resources . . . by those who wish to impoverish our country . . . have been captured . . . by appointment of their handpicked officers in complete disregard of merit, honesty and integrity to head such institutions. These cronies . . . do not feel any sense of allegiance, loyalty or fidelity to the country or its people. . . . Being the apex Court of the country and custodians of the Constitution which has placed upon us the responsibility and constitutional mandate to enforce fundamental rights of the people, we cannot look away become unconcerned bystanders and close our eyes to this stark, painful and grim reality. . . .

84. . . . This Court is not a slave of the doctrine of stare decisis. We are not shackled by the chains of precedents where the interests of the people of Pakistan so

demand. While remaining within the four corners of the law and limits set for us by the Constitution, in order to do complete justice, there is no bar on the power of this Court to record evidence in appropriate cases and pass such orders as may be necessary. . . .

88. . . . [C]onsidering the high public office that Respondent . . . holds and the requirement of honesty, transparency, clean reputation, unquestionable integrity, financial probity and accountability for a person who holds the highest elected office of the land, it was necessary and incumbent upon Respondent . . . to place all information . . . before this Court . . . Although lofty claims were made by and on behalf of Respondent . . . regarding readiness and willingness to face accountability and clearing his name, the claims remained hollow rhetoric. Regrettably, no effort was made . . . to come clean, to . . . place the true facts and relevant record before us Instead refuge was taken behind vague, ambiguous, fuzzy and hyper technical pleas. . . .

92. . . . It is high time that standards were set and systems were put in place to develop a culture of accountability at all levels in order to cleanse our system and institutions from the evils of corruption, money laundering, loot and plunder of national resources by a few, irrespective of their rank or status in the system.

ORDER OF THE COURT

By a majority of 3 to 2 . . . dissenting . . . , we hold that . . . a thorough investigation in this behalf is required. . . .

[In July 2017, the court announced in a unanimous decision the disqualification of the Prime Minister from holding public office. The court also ordered the National Accountability Bureau to file a reference against the Prime Minister and his family on corruption charges.]

* * *

A subtler form of tax evasion takes advantage of legal loopholes to ensure that extreme wealth will be legally ungovernable. The following sources consider generalized anti-abuse provisions, which seek to distinguish post hoc between legitimate tax planning and illegitimate tax evasion by wealthy individuals and corporations.

Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law?

Rebecca Prebble and John Prebble (2010)*

. . . As a general rule, the law does not require people to arrange their affairs so that they incur the greatest possible tax liability. When faced with two possible legal ways in which to organize their money, taxpayers are legitimately entitled to choose the option that requires them to pay the lesser amount of tax. There comes a point, however, when governments begin to think that taxpayers are going too far in their attempts to decrease their tax liability. At this point, taxpayers cease to engage in legitimate tax mitigation and embark on unacceptable tax avoidance. . . .

Typically, governments combat avoidance by adding specific and often very detailed rules to tax legislation However, specific anti-avoidance rules cannot combat the more creative forms of tax avoidance that employ transactions governments cannot predict. Consequently, many tax systems feature general anti-avoidance rules in addition to specific ones. . . .

The uncertainty surrounding tax avoidance stems from the fine line that separates unacceptable tax avoidance from acceptable tax mitigation. . . .

The rule of law requires that the law be certain so that it can provide guidance. Generally, laws that are as vague as general anti-avoidance rules attract considerable criticism, because they fail to provide people with sufficient information about what is and is not permitted to allow them to plan their lives. . . .

It is tempting to suggest that if legislators cannot frame a tax avoidance rule that conforms to the rule of law, they should not have an anti-avoidance rule at all. . . . However, this suggestion overlooks the fact that tax avoidance is not a problem for governments alone; it is a problem for society generally. . . . [T]he principle of horizontal equity states that people in the same economic position should be taxed at the same rate. Tax avoidance . . . results in some people . . . not paying their fair share as measured by their wealth.

The aims of the tax system are related to the more general point about the purpose of tax systems. Governments do not tax people only to amass wealth. Rather, tax is necessary to keep states functioning. Governments must provide public services such as defense and education. Furthermore, most societies use tax to redistribute wealth to some extent. Tax avoidance reduces the effectiveness of welfare systems [T]he prevalence of general anti-avoidance rules, either statutory or judge-made, indicates that

* Excerpted from Rebecca Prebble & John Prebble, *Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law? A Comparative Study*, 55 SAINT LOUIS LAW JOURNAL 21 (2010).

countries may think the negative results from not having a general anti-avoidance rule outweigh the breaches of the rule of law that general anti-avoidance rules entail.

This balancing exercise reveals much about the nature of the rule of law and its values. Adherence to the rule of law can often interfere with a society's other goals. Some philosophers insist that the rule of law must be preserved without compromise. Other writers . . . stress that the rule of law is only one yardstick against which a legal system may be measured. Just as a society's conformity to the rule of law does not ensure that the society is good, a breach of the rule of law does not make that society bad. [John] Rawls expands on this point, saying that a breach of the rule of law may be "the lesser of two evils." Tax avoidance is a very real evil for society: A breach of the rule of law seems to be a necessary remedy. . . .

. . . [T]he rule of law itself, as a strict formalist doctrine, inevitably allows people to some extent to circumvent the laws that conform to it. As far as criminal law is concerned, this shortcoming of the rule of law is far outweighed by the benefits that the rule of law offers. In contrast, when it comes to tax avoidance, the benefits to society of legal certainty are outweighed by its detriments.

The argument that the detriments of the rule of law in a particular area outweigh its benefits is, nevertheless, unsatisfactory. . . . [O]ne of the reasons why societies value the rule of law is that it applies despite leading to a net societal detriment from time to time. Societies commit to adherence to the rule of law for the very reason that there will be instances when it is tempting to tolerate breaches. . . .

With respect to the public acceptance of general anti-avoidance rules, tax avoiders appear to be, and are seen as, fundamentally different from criminals. Generally speaking, when criminals break the law, they simply break it. . . . In contrast, there is an entire industry devoted to manipulating fiscal laws with a view to obtaining tax advantages without incurring a corresponding economic loss. In the light of this difference, the fact that the informed public appears to accept general anti-avoidance rules despite their shortcomings as far as the rule of law is concerned is not surprising.

With respect to the justification for the breach of the rule of law, unlike criminal behavior, tax avoidance takes advantage of the very nature of law itself. . . . The formality of law in general, and of tax law in particular, is an essential prerequisite for contriving artificial transactions that enable the creators of the transactions or their clients to avoid tax. . . .

The quality of relying on the formality of the law while circumventing the law's policy distinguishes tax avoidance from criminal behavior While it is true that there are difficult cases at the edges of criminal law, most criminal activity is clearly wrong by the lights of most people, whether or not there is law to forbid it. In contrast, tax avoidance exploits the formality of the law and, in doing so, exploits the values of the rule of law itself. It attacks those values while pretending to honor them. Enacting a

general anti-avoidance rule to frustrate that exploitation presents a justifiable counter-measure. . . .

Canada Trustco Mortgage Co. v. Canada
Federal Court of Appeal of Canada
2005 SCC 54

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

1. . . . This appeal . . . raise[s] the issue of the interplay between the general anti-avoidance rule (“GAAR”) and the application of . . . the *Income Tax Act*, R.S.C. 1985* The Act . . . permit[s] legitimate tax minimization Onto this scheme, the GAAR has superimposed a prohibition on abusive tax avoidance. . . . The task in this appeal is to unite these two approaches in a framework that reflects the intention of Parliament in enacting the GAAR and achieves consistent, predictable and fair results.

2. The respondent, Canada Trustco Mortgage Company (“CTMC”), carries on business as a mortgage lender. . . . In 1996 it purchased a number of trailers which it then circuitously leased back to the vendor, in order to offset revenue from its leased assets This arrangement allowed CTMC to defer paying taxes

4. . . . [T]he Minister of National Revenue reassessed CTMC on its 1997 taxation year and denied the . . . claim . . . on the basis that CTMC had not acquired title to the trailers and, in the alternative, that the GAAR applied to deny the deduction. CTMC appealed to the Tax Court of Canada. . . .

* Section 245 of Canada’s Income Tax Act provides in part:

. . . (2) [General anti-avoidance provision:] Where a transaction is an avoidance transaction, the tax consequences to a person shall be determined as is reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result . . . from that transaction

(3) [Avoidance transaction:] An avoidance transaction means any transaction [or series of transactions]

(a) that . . . would result . . . in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes

(4) Subsection (2) applies to a transaction only if it may reasonably be considered that the transaction

(a) would . . . result directly or indirectly in a misuse of [tax] provisions . . .

(b) would result directly or indirectly in an abuse having regard to those provisions

12. . . . The provisions of the *Income Tax Act* must be interpreted in order to achieve consistency, predictability and fairness so that taxpayers may manage their affairs intelligently. As stated at para. 45 of *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622: [A]bsent a specific provision to the contrary, it is not the courts' role to prevent taxpayers from relying on the sophisticated structure of their transactions, arranged in such a way that the particular provisions of the Act are met, on the basis that it would be inequitable to those taxpayers who have not chosen to structure their transactions that way. . . .

15. The *Explanatory Notes to Legislation Relating to Income Tax* . . . state the purpose of the GAAR . . . :

New section 245 of the Act is a general anti-avoidance rule which is intended to prevent abusive tax avoidance transactions or arrangements but . . . is not intended to interfere with legitimate commercial and family transactions. . . . [It] seeks to distinguish between legitimate tax planning and abusive tax avoidance and to establish a reasonable balance between the protection of the tax base and the need for certainty for taxpayers in planning their affairs. . . .

17. The application of the GAAR involves three steps. The first step is to determine there is a "tax benefit" arising from a "transaction" The second step is to determine whether the transaction is an avoidance transaction . . . , in the sense of not being "arranged primarily for *bona fide* purposes other than to obtain the tax benefit." The third step is to determine whether the avoidance transaction is abusive. . . . All three requirements must be fulfilled before the GAAR can be applied to deny a tax benefit. . . .

58. . . . When properly interpreted, the statutory provisions at issue in a given case may dictate that a particular tax benefit may apply only to transactions with a certain economic, commercial, family or other non-tax purpose. The absence of such considerations may then become a relevant factor towards the inference that the transactions abused the provisions at issue, but there is no golden rule in this respect. . . .

60. A transaction may be considered to be "artificial" or to "lack substance" *with respect to specific provisions* of the *Income Tax Act*, if allowing a tax benefit would not be consistent with the object, spirit or purpose of those provisions. We should reject any analysis under s. 245(4) that depends entirely on "substance" viewed in isolation from the proper interpretation of specific provisions of the *Income Tax Act* or the relevant factual context of a case. However, abusive tax avoidance may be found where the relationships and transactions as expressed in the relevant documentation lack a proper basis relative to the object, spirit or purpose of the provisions that are purported to confer the tax benefit, or where they are wholly dissimilar to the relationships or transactions that are contemplated by the provisions. . . .

62. . . . The negative language in which s. 245(4) is cast indicates that the starting point for the analysis is the assumption that a tax benefit that would be conferred by the plain words of the Act is not abusive. . . . [T]he abusive nature of the transaction must be clear. . . .

80. The Tax Court judge's analysis on the issue of abuse under s. 245(4) is largely consistent with the approach to the application of the GAAR we have adopted. . . . [H]e concluded that a tax benefit was consistent with the object, spirit and purpose of the CCA provisions and held that the GAAR could not apply to disallow the tax benefit. These conclusions were based on a correct view of the law and were grounded in the evidence. They should be confirmed.

MISSING THE MULTIPLE THREATS TO DEMOCRACY

The prior sections have engaged with the threats of political and economic extremes on liberal democracy and the rule of law. Whereas courts play a significant role in the first section of this chapter, their voices are largely missing from the second. Yet, these dynamics are not isolated from one another—economic and political extremes reinforce each other, undermining the integrity of and trust in rule of law. A focus on identity politics while neglecting rising inequality and the elite evasion of democratic responsibilities risks feeding distrust and rejection of the state, strengthening anti-democratic movements.

Two decades apart, two authors described the stakes of the relationship of regulation for the continuance of democratic institutions. Both discuss the fear that the focus on political extremes alone elides, obscures, and could ultimately facilitate the rise of economic and political extremes.

Achieving Our Country: Leftist Thought in Twentieth-Century America

Richard Rorty (1998)*

. . . The pre-Sixties Left assumed that as economic inequality and insecurity decreased, prejudice would gradually disappear.

With [the] partial substitution of Freud for Marx as a source of social theory, sadism rather than selfishness has become the principal target of the Left. The heirs of the New Left of the Sixties have created, within the academy, a cultural Left. Many members of this Left specialize in what they call the “politics of difference” or “of

* Excerpted from RICHARD RORTY, *ACHIEVING OUR COUNTRY: LEFTIST THOUGHT IN TWENTIETH-CENTURY AMERICA* (1998).

identity” or “of recognition.” This cultural Left thinks more about stigma than about money

To subvert this way of thinking, the academic Left believes, we must teach Americans to recognize otherness. To this end, leftists have helped to put together such academic disciplines as women’s history, black history, gay studies, Hispanic-American studies, and migrant studies. . . .

This cultural Left has had extraordinary success. In addition to being centers of genuinely original scholarship, the new academic programs have done what they were, semi-consciously, designed to do: they have decreased the amount of sadism in our society. . . . [T]he casual infliction of humiliation is much less socially acceptable than it was during the first two-thirds of the century. . . . The adoption of attitudes which the Right sneers at as “politically correct” has made America a far more civilized society than it was thirty years ago. Except for a few Supreme Court decisions, there has been little change for the better in our country’s laws since the Sixties. But the change in the way we treat one another has been enormous. . . .

Nevertheless, there is a dark side to the success story I have been telling about the post-Sixties cultural Left. During the same period in which socially accepted sadism has steadily diminished, economic inequality and economic insecurity have steadily increased. It is as if the American Left could not handle more than one initiative at a time—as if it either had to ignore stigma in order to concentrate on money, or vice versa.

One symptom of this inability to do two things at once is that it has been left to scurrilous demagogues . . . to take political advantage of the widening gap between rich and poor. While the Left’s back was turned, the bourgeoisification of the white proletariat which began in World War II and continued up through the Vietnam War has been halted, and the process has gone into reverse. America is now proletarianizing its bourgeoisie, and this process is likely to culminate in a bottom-up populist revolt

Since 1973, the assumption that all hardworking American married couples would be able to afford a home, and that the wife could then, if she chose, stay home and raise kids, has begun to seem absurd. The question now is whether the average married couple, both working full time, will ever be able to take home more than \$30,000 a year. . . . But \$30,000 a year will not permit homeownership or buy decent daycare. In a country that believes neither in public transportation nor in national health insurance, this income permits a family of four only a humiliating, hand-to-mouth existence. Such a family, trying to get by on this income, will be constantly tormented by fears of wage rollbacks and downsizing, and of the disastrous consequences of even a brief illness. . . .

It is as if, sometime around 1980, the children of the people who made it through the Great Depression and into the suburbs had decided to pull up the drawbridge behind them. They decided that although social mobility had been appropriate for their parents,

it was not to be allowed to the next generation. These suburbanites seem to see nothing wrong with belonging to a hereditary caste, and have initiated what Robert Reich . . . calls “the secession of the successful.”

If the formation of hereditary castes continues unimpeded, and if the pressures of globalization create such castes not only in the United States but in all the old democracies, we shall end up in an Orwellian world. In such a world, . . . there will be an analogue of the Inner Party—namely, the international, cosmopolitan super-rich. They will make all the important decisions. The analogue of Orwell’s Outer Party will be educated, comfortably well-off, cosmopolitan professionals

. . . The aim will be to keep the minds of the proles elsewhere—to keep the bottom 75 percent of Americans and the bottom 95 percent of the world’s population busy with ethnic and religious hostilities, and with debates about sexual mores. If the proles can be distracted from their own despair by media-created pseudo-events, including the occasional brief and bloody war, the super-rich will have little to fear.

Contemplation of this possible world invites two responses from the Left. The first is to insist that the inequalities between nations need to be mitigated—and, in particular, that the Northern Hemisphere must share its wealth with the Southern. The second is to insist that the primary responsibility of each democratic nation-state is to its own least advantaged citizens. These two responses obviously conflict with each other. In particular, the first response suggests that the old democracies should open their borders, whereas the second suggests that they should close them.

The first response comes naturally to academic leftists, who have always been internationally minded. The second response comes naturally to members of trade unions, and to the marginally employed people who can most easily be recruited into right-wing populist movements. Union members in the United States have watched factory after factory close, only to reopen in Slovenia, Thailand, or Mexico. It is no wonder that they see the result of international free trade as prosperity for managers and stockholders, a better standard of living for workers in developing countries, and a very much worse standard of living for American workers. It would be no wonder if they saw the American leftist intelligentsia as on the side of the managers and stockholders—as sharing the same class interests. For we intellectuals, who are mostly academics, are ourselves quite well insulated, at least in the short run, from the effects of globalization. To make things worse, we often seem more interested in the workers of the developing world than in the fate of our fellow citizens.

Many writers on socioeconomic policy have warned that the old industrialized democracies are heading into a Weimar-like period, one in which populist movements are likely to overturn constitutional governments. Edward Luttwak, for example, has suggested that fascism may be the American future. The point of his book *The Endangered American Dream* is that members of labor unions, and unorganized unskilled workers, will sooner or later realize that their government is not even trying

to prevent wages from sinking or to prevent jobs from being exported. Around the same time, they will realize that suburban white-collar workers—themselves desperately afraid of being downsized—are not going to let themselves be taxed to provide social benefits for anyone else.

At that point, something will crack. The nonsuburban electorate will decide that the system has failed and start looking around for a strongman to vote for—someone willing to assure them that, once he is elected, the smug bureaucrats, tricky lawyers, overpaid bond salesmen, and postmodernist professors will no longer be calling the shots. A scenario like that of Sinclair Lewis' novel *It Can't Happen Here* may then be played out. For once such a strongman takes office, nobody can predict what will happen. . . .

One thing that is very likely to happen is that . . . [a]ll the sadism which the academic Left has tried to make unacceptable to its students will come flooding back. All the resentment which badly educated Americans feel about having their manners dictated to them by college graduates will find an outlet.

But such a renewal of sadism will not alter the effects of selfishness. For after my imagined strongman takes charge, he will quickly make his peace with the international super-rich . . . He will invoke the glorious memory of the Gulf War to provoke military adventures which will generate short-term prosperity. He will be a disaster for the country and the world. People will wonder why there was so little resistance to his evitable rise. . . .

The Meritocracy Trap Daniel Markovits (2019)*

. . . Meritocratic inequality leads to mistrust not just of particular professions or institutions, but also the general idea of the rule of law and the associated idea that both private and public life should be regulated impersonally, by institutions and their officials, rather than by the personal authority of a charismatic leader. Due process and rule of law underwire the scale-blind approach to property that meritocratic income and wealth defense so successfully exploit, including to frustrate democratic efforts to redistribute through generally applicable taxes and regulations. Advanced meritocratic inequality therefore makes the meritocratic elite itself a political special interest and transforms due process and the rule of law into political tools wielded by elites, effectively as instruments of class warfare. . . . Populism is not a spontaneous eruption of malevolent resentment but rather a natural and even apt reaction to extreme meritocratic inequality.

* Excerpted from DANIEL MARKOVITS, *THE MERITOCRACY TRAP* (2019).

Meritocracy is therefore far from innocent in the recent rise of nativism and populism. Instead, nativism and populism represent a backlash against meritocratic inequality brought on by advanced meritocracy. . . .

OPINIONS EXCERPTED

A and Others v. Secretary of State for the Home Department (House of Lords of the United Kingdom, 2004)	II-51
A and Others v. Secretary of State for the Home Department (II) (House of Lords of the United Kingdom, 2005)	II-55
ADPF 672 MC (Federal Supreme Court of Brazil, 2020).....	I-27
ADPF 709 MC-REF (Federal Supreme Court of Brazil, 2020)	I-49
Application Under S 83.28 (Supreme Court of Canada, 2004).....	II-47
Association for Civil Rights in Israel v. The Knesset (Supreme Court of Israel, 2021).....	I-11
Ben Meir v. Prime Minister (Supreme Court of Israel, 2020).....	I-5
Bolsonaro v. Party Coalition “O povo feliz de novo” (Superior Electoral Court of Brazil, 2018)	IV-29
Boumediene v. Bush (Supreme Court of the United States, 2008)	II-58
Canada v. Khadr (Supreme Court of Canada, 2008)	II-65
Canada Trustco Mortgage Co. v. Canada (Federal Court of Appeal of Canada, 2005).....	IV-75
Case Decision 2021-001-FB-FBR (Facebook Oversight Board, 2021)	IV-34
Case of Vavřička and Others v. The Czech Republic (European Court of Human Rights, Grand Chamber, April 2021)	I-51
Coastal GasLink Pipeline Ltd. v. Huson (Supreme Court of Canada, 2020)	III-37
Constitutional Petition no. 56 of 2013 (Constitutional Court of Uganda at Kampala, 2020)	III-40
Constitutional Review of Decision No. 01/15 of the Government of the Republic of Kosovo (Constitutional Court of the Republic of Kosovo, 2020)	I-19
County of Los Angeles v. California Restaurant Association (Court of Appeal of the State of California, 2021)	I-45
De Beer v. Minister of Cooperative Governance (High Court of South Africa, 2020)	I-42
DeSantis v. Florida Education Association (First District Court of Appeal of the State of Florida, February 2020)	I-59
Dhiab v. Obama (U.S. District Court for the District of Columbia, 2014) .	III-14

District Bar Association, Rawalpindi v. Federation of Pakistan (Supreme Court of Pakistan, 2015).....	II-27
Don't Shoot Portland v. City of Portland (U.S. District Court for the District of Oregon, 2020)	III-31
Facebook v. Casapound (Court of Rome, Italy, 2020).....	IV-31
Ghoumid and Others v. France (European Court of Human Rights, Fifth Section, 2020).....	II-42
Gillan and Quinton v. the United Kingdom (European Court of Human Rights, Fourth Section, 2010).....	II-38
Hussain v. Secretary of State for Health and Social Care (High Court of Justice of the United Kingdom, 2020).....	I-62
Ibrahim and Others v. The United Kingdom (European Court of Human Rights, Grand Chamber, 2016).....	II-7
Imran Ahmed Khan Niazi v. Mian Muhammad Nawaz Sharif (Supreme Court of Pakistan, 2017).....	IV-69
In re Booth (Supreme Court of Wisconsin, United States, 1854)	III-54
Jacobson v. Massachusetts (Supreme Court of the United States, 1905)....	I-65
Jamison v. McClendon (U.S. District Court for the Southern District of Mississippi, 2020)	III-49
Judgment C-089 of 1994 (Constitutional Court of Colombia, 1994).....	IV-23
Judgment No. 106 of 2009 (Constitutional Court of Italy, 2009)	II-15
Judgment of the First Senate of 15 February 2006 (Federal Constitutional Court of Germany, 2006)	II-31
Judgment of the First Senate of 15 July 2020 (Federal Constitutional Court of Germany, First Senate, 2020).....	I-56
Judgment of the Second Senate of 17 January 2017 (Federal Constitutional Court of Germany, Second Senate, 2017)	IV-13
Kach v. Central Election Committee (Supreme Court of Israel, 1988)....	IV-18
Kwok Wing Hang and 23 Others v. Chief Executive in Council (Hong Kong Court of Final Appeal, 2020)	III-34
Law Extending the Public Health State of Emergency and Rounding Out Its Provisions (Constitutional Council of France, 2020)	I-9
Law Society of Kenya v. Mutyambi (High Court of Kenya, 2020).....	I-22
Maney v. Brown (U.S. District Court for the District of Oregon, 2021)	I-36
McCutcheon v. Federal Election Commission (Supreme Court of the United States, 2014)	IV-49

McCloy v. New South Wales (High Court of Australia, 2015)	IV-45
MS 37760 MC / DF (Federal Supreme Court of Brazil, 2021)	I-29
Nasr and Ghali v. Italy (European Court of Human Rights, Fourth Section, 2016)	II-20
National Responsibility—Israel My Home v. Israeli Government (Supreme Court of Israel, 2021)	III-23
Öcalan v. Turkey (No. 2) (European Court of Human Rights, Second Section, 2014)	II-45
Order No. 37 of 2021 (Merits) (Constitutional Court of Italy, 2021)	I-34
Order of 6 July 2020 (Council of State of France, 2020)	III-21
PL. ÚS 13/2020 (Constitutional Court of the Slovak Republic, 2020)	I-13
Rakesh Vaishnav & Others v. Union of India & Others (Supreme Court of India, 2021)	III-12
Rasul v. Bush (Supreme Court of the United States, 2004)	II-25
Raul Bassi v. Commissioner of Police (NSW) (New South Wales Court of Appeal, Australia, 2020)	III-28
Roman Catholic Diocese of Brooklyn v. Cuomo (Supreme Court of the United States, 2020)	I-68
Ruling No. 5-20-EE20 (Constitutional Court of Ecuador, 2020)	I-15
Secretary of State for the Home Department v. Rehman (House of Lords of the United Kingdom, 2001)	II-4
Shuttlesworth v. City of Birmingham (Supreme Court of the United States, 1969)	III-10
Snyder v. Phelps (Supreme Court of the United States, 2011)	III-24
Somerset v. Stewart (King’s Bench, 1772)	III-52
South Bay United Pentecostal Church v. Newsom (Supreme Court of the United States, 2021)	I-71
Szabó and Vissy v. Hungary (European Court of Human Rights, Fourth Section, 2016)	II-34
Trump v. Hawaii (Supreme Court of the United States, 2018)	II-12
Valentine v. Collier (Supreme Court of the United States, 2020)	I-39
Verdict Banning the Communist Party of Germany (Federal Constitutional Court of Germany, First Senate, 1956)	IV-12
Walker v. City of Birmingham (Supreme Court of the United States, 1967)	III-7

COMMENTARY AND ADDITIONAL MATERIALS EXCERPTED

Aharon Barak, <i>A Judge on Judging</i> (2002)	II-67
Amnesty International, <i>COVID-19 Crackdowns: Police Abuse and the Global Pandemic</i> (2020)	I-25
Annette Alstadsæter, Niels Johannesen, and Gabriel Zucman, <i>Tax Evasion and Inequality</i> (2019)	IV-65
Brief of Amicus Curiae Fred Korematsu, <i>Rasul v. Bush</i> (Supreme Court of the United States, 2004)	II-23
Daniel Markovits, <i>The Meritocracy Trap</i> (2019).....	IV-40, IV-80
David E. Pozen and Kim Lane Scheppele, <i>Executive Underreach</i> (2020) .	I-32
Elizabeth Warren, <i>Corporate Capture of the Rulemaking Process</i> (2016)..	IV-57
Final Agreement for Ending the Conflict and Building a Stable and Lasting Peace (Colombia, 2016)	IV-25
G.A. Cohen and Michael Otsuka, <i>On the Currency of Egalitarian Justice</i> (2011)	IV-37
James Lindley Wilson, <i>Democratic Equality</i> (2019)	IV-43
Jan-Werner Müller, <i>Protecting Popular Self-Government from the People?</i> (2016)	IV-6
Jeffrey A. Winters, <i>Oligarchy</i> (2011).....	IV-38
Kim Lane Scheppele, <i>The New Judicial Deference</i> (2012)	II-62
Martin Luther King, Jr., <i>Letter from Birmingham Jail</i> (1963)	III-4
Michael J. Graetz and Ian Shapiro, <i>Death by a Thousand Cuts</i> (2006) ...	IV-52
Monica Bell, <i>Police Reform and the Dismantling of Legal Estrangement</i> (2017)	III-46
Muneer Ahmad, <i>Resisting Guantánamo: Rights at the Brink of Dehumanization</i> (2009)	III-18
Rebecca Prebble and John Prebble, <i>Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law?</i> (2010)	IV-73
Richard Rorty, <i>Achieving Our Country</i> (1998)	IV-77
Robert Alan Dahl, <i>Polyarchy: Participation and Opposition</i> (1971)	IV-5
Robert M. Cover, <i>Justice Accused</i> (1975)	III-56

Excerpted Materials

Samuel Alito, <i>Speech to the Federalist Society</i> (November 2020)	I-74
Sharon J. Riley and Sarah Cox, <i>Industry Responsible for 80 Per Cent of Senate Lobbying Linked to Bill C-69</i> (2019)	IV-55
Shelly Steward et al., <i>Uber’s Call for Change in Europe Shirks Responsibility While Highlighting Real Challenges</i> (2021)	IV-62
Susanne Baer, <i>Democracy in Peril</i> (2019)	III-43
U.S. Department of the Treasury, <i>Investing in the IRS and Improving Tax Compliance</i> (2021)	IV-67
U.S. Equal Employment Opportunity Commission, <i>What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws</i> (December 2020)	I-76
Veena B. Dubal, Ruth Berins Collier, and Christopher L. Carter, <i>Disrupting Regulation, Regulating Disruption</i> (2018)	IV-59

About the Chapter Authors and Editor

Professor Muneer Ahmad is Deputy Dean for Experiential Education, Sol Goldman Clinical Professor of Law, and Director of the Jerome N. Frank Legal Services Organization at Yale Law School. He co-teaches in the Worker and Immigrant Rights Advocacy Clinic (WIRAC). In WIRAC, he and his students represent individuals, groups and organizations in both litigation and non-litigation matters related to immigration, immigrants' rights, and labor, and intersections among them. He has represented immigrants in a range of labor, immigration, and trafficking cases, and for three years represented a prisoner at Guantánamo Bay; he has written on these and related topics. In the Transnational Development Clinic, Professor Ahmad and his students work on projects designed to identify productive sites for intervention for U.S.-based lawyers in global poverty work. This included work regarding the rights of street vendors in India, the barriers faced by immigrant communities in sending remittances to their home countries, access to essential medicines, institutional accountability among international financial institutions, and advocacy on behalf of workers displaced by changes in trade policy. His scholarship examines the intersections of immigration, race, and citizenship in both legal theory and legal practice. Previously, he was Professor of Law at American University Washington College of Law. Prior to joining the faculty at American in 2001, he was a Skadden Fellow and staff attorney at the Asian Pacific American Legal Center in Los Angeles. He clerked for the Hon. William K. Sessions III in the U.S. District Court for the District of Vermont.

The Honorable Prof. Dr. Dr. h.c. Susanne Baer is a Justice of the Federal Constitutional Court in Germany, elected by parliament, the Deutscher Bundestag, in 2011 to the First Senate for a 12-year term. She is also the Professor of Public Law and Gender Studies at Humboldt University Berlin and a James W. Cook Global Law Professor at the University of Michigan Law School, and has taught at the Central European University Budapest, in Austria, Switzerland, and Canada. She received an honorary doctorate from the University of Michigan in 2014 and from the University of Hasselt in 2018, and was elected a Corresponding Fellow of the British Academy in 2017. Justice Baer studied law and political science and joined movements against discrimination and domestic violence; between 2003 and 2010 she directed the GenderCompetenceCentre to advise the German federal government on gender mainstreaming and co-drafted German standards for equality in research. At Humboldt University, she served as Vice-President and as Vice Dean and Director of Gender Studies, founded the Law and Society Institute Berlin and the Humboldt Law Clinic in Fundamental and Human Rights. Her publications in English include: *Comparative Constitutionalism: Cases and Materials*, 3rd edition, St. Paul: Thomson/West 2016 (with Norman Dorsen, Michel Rosenfeld, András Sajó, and Susanna Mancini); *Privatizing Religion: Legal Groupism, No-Go-Areas, and the Public-Private-Ideology in Human Rights Politics, Constellations 1* (2013), 68-84; "Equality," in *The Oxford Handbook of Comparative Constitutional Law* (Michel Rosenfeld and András Sajó, eds., 2012); "Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism," *University of Toronto Law Journal* 4 (2009) 417-468; "The Difference a Justice May Make: Remarks at the Symposium for Justice Ruth Bader Ginsburg," *Columbia Journal of Gender & Law* 25 (2013), *Bernstein Lecture 2013-2014: Adjudicating Inequalities*; and *The Future of the University Community*, with Justice Sonia Sotomayor (University of Michigan, USA 2017).

The Honorable Daphne Barak-Erez has been a member of the Israeli Supreme Court since 2012. Previously, she was the Stewart and Judy Colton professor of law and held the Chair of Law and Security at the Faculty of Law of Tel-Aviv University. She is a member of the American Law Institute and a member of the International Academy of Comparative Law. Her main research and teaching areas are administrative and constitutional law. She is a three-time graduate of Tel-Aviv University: LL.B. (*summa cum laude*) 1988; LL.M. (*summa cum laude*) 1991, and J.S.D., 1993 (recipient of the Colton Fellowship). She was a visiting researcher at Harvard Law School, a visiting fellow at the Max-Planck Institute of Public Law, Heidelberg, an Honorary Research Fellow at University College London, a Visiting Researcher at the Swiss Institute of Comparative Law in Lausanne, a Visiting Researcher at the Jawarlal Nehru University in Delhi, and both a Visiting Fellow at the Schell Center and Senior Research Scholar at Yale Law School. She has also taught as a Visiting Professor at other universities including the University of Toronto, Columbia Law School, Stanford Law School, Duke Law School, and the University of Virginia Law School. In the past, she acted as the Director of the Minerva Center for Human Rights, the Chairperson of the Israeli Association of Public Law, the Director of the Cegla Center for Interdisciplinary Research of the Law, a member of the Council of Higher Education in Israel, the President of the Israeli Law and Society Association, as well as the Vice Dean and Dean of the Faculty of Law at Tel-Aviv University. She was awarded several prizes, including the Rector's Prize for Excellence in Teaching (three times), the Zeltner Prize, the Heshin Prize, the Woman of the City Award (by the City of Tel-Aviv), and the Women in Law Award (by the Israeli Bar). She is the author and editor of several books and of many articles published in Israel, England, Australia, Canada, and the United States.

The Honorable Marta Cartabia is a full professor of constitutional law at Bocconi University, Milan, President emeritus of the Italian Constitutional Court, and has been serving as Minister of Justice since February 2021. Her research focuses on national and European constitutional law, constitutional adjudication, and protection of fundamental rights. She has taught at several Italian universities and was a visiting scholar and professor in France, Spain, Germany, and the U.S. She was an *Inaugural Fellow* at the *Straus Institute for Advanced Study in Law and Justice* and the *Clynes Chair in Judicial Ethics* at Notre Dame University, Indiana, USA (2012). She is a member of the *Inaugural Society's Council of ICON•S—The International Society of Public Law*. Since December 2017, she has served as a Substitute member for Italy of the Venice Commission of the Council of Europe. She sits on the scientific and editorial boards of a number of academic legal journals. Among many books, articles, and chapters, in 2020, she co-authored the book *Dialogues on Italian Constitutional Justice: A Comparative Perspective* (Routledge) with V. Barsotti, P. Carozza, and A. Simoncini.

The Honorable Manuel Cepeda Espinosa is President Emeritus of the International Association of Constitutional Law and Director of the Program on Public Policies, Constitutional Law, and Regulations at the Law School of Universidad de los Andes, Bogotá. From July 2015 to August 2016, he was part of the negotiating team on transitional justice during the Colombia peace process. He was President of the Constitutional Court of Colombia from 2005 to 2006 and a Justice from 2001 to 2009. He was Dean of the Law School of Universidad de los Andes (1996-2000);

Ambassador of Colombia to UNESCO (1993-1995) and to the Helvetic Confederation (1995-1996); Presidential Advisor for the Constituent Assembly and Constitutional Drafting for President of the Republic César Gaviria Trujillo (1990-1991); and Presidential Advisor for Legal Affairs for President of the Republic Virgilio Barco Vargas (1987-1990). Justice Cepeda is also the author of several constitutional law books. He graduated *magna cum laude* from Universidad de los Andes in 1986 and received his LL.M. from Harvard Law School in 1987. In 1993, Justice Cepeda received the Order of Boyacá, in the highest degree of the Great Cross, from the President of the Republic of Colombia.

Professor Abbe R. Gluck is the Alfred M. Rankin Professor of Law and the founding Faculty Director of the Solomon Center for Health Law and Policy at Yale Law School. She is also Professor of Internal Medicine (General Medicine) at the Yale School of Medicine and a Professor in the Institution for Social and Policy Studies at Yale. She currently serves as Special Counsel in the Office of White House Counsel, working with the administration's COVID-19 Response team in the White House as well as on other issues, including the Affordable Care Act. She is a member of the Affiliated Faculty of the Yale Program on Addiction Medicine, an Executive Committee member of Yale's ISPS Health program and directs the Yale Law School Medical Legal Partnership Program. She joined Yale Law School in 2012, having previously served on the faculty of Columbia Law School. She is an expert on Congress and the political process, federalism, civil procedure, and health law, and is the chair emerita of Section on Legislation and the Law of the Political Process for the Association of American Law Schools. Prior to joining Columbia, she served in the administration of New Jersey Governor Jon Corzine as the special counsel and senior advisor to the New Jersey Attorney General; and in the administration of New York City Mayor Michael Bloomberg, as chief of staff and counsel to the Deputy Mayor for Health and Human Services, senior counsel in the New York City Office of Legal Counsel, and deputy special counsel to the New York City Charter Revision Commission. Before returning to government work after law school, Professor Gluck was associated with the Paul Weiss firm in New York. She earned her B.A. from Yale University, *summa cum laude*, and her J.D. from Yale Law School. Following law school, she clerked for then-Chief Judge Ralph K. Winter on the U.S. Court of Appeals for the Second Circuit, and for U.S. Supreme Court Justice Ruth Bader Ginsburg. Her latest book, *The Trillion Dollar Revolution: How the Affordable Care Act Transformed Politics, Law, and Health Care in America*, with Zeke Emanuel, was published in March 2020. Gluck's scholarship has been published in the *Yale Law Journal*, the *Harvard Law Review*, the *Stanford Law Review*, the *Columbia Law Review*, the *New England Journal of Medicine*, *Health Affairs*, and many other journals. Professor Gluck currently serves on numerous boards and commissions, including as an appointed member of both the Uniform Law Commission, where she serves as Chair of the Health Law Committee and the New York State Taskforce on Life and the Law, and as an elected member of the American Law Institute (ALI). She was elected to the leadership body of the ALI, the Council, in 2018.

Linda Greenhouse is a senior research scholar in law at Yale Law School, where she has taught since 2009. She is a contributing opinion writer for The New York Times, where she served for 30 years as the newspaper's Supreme Court Correspondent. She received numerous journalism awards for her coverage of the Court, including a Pulitzer Prize in 1998. She is an honorary

member of the American Law Institute, which awarded her its Henry J. Friendly medal in 2002. Her books include *Becoming Justice Blackmun, a biography of the Justice* (2005); *Before Roe v. Wade: Voices That Shaped the Abortion Debate Before the Supreme Court's Ruling* (with Reva B. Siegel, 2010); *The U.S. Supreme Court: A Very Short Introduction* (2012, 2d ed. 2020); *The Burger Court and the Rise of the Judicial Right* (with Michael J. Graetz, 2016); and a memoir, *Just a Journalist* (2017). Her new book, *Justice on the Brink: The Death of Ruth Bader Ginsburg, the Rise of Amy Coney Barrett, and Twelve Months that Transformed the Supreme Court*, will be published this fall by Random House. Since 2018, she has served as president of the American Philosophical Society.

The Honorable Ivana Jelić has been a judge of the European Court of Human Rights since July of 2018. In July of 2015 she became a member of the Legal Sciences Committee of the Montenegrin Academy of Sciences and Arts. Before joining the Court, she was employed as an Associate Professor at the Faculty of Law, University of Montenegro where, for eighteen years, she taught public international law, international human rights law, minority rights and international humanitarian law. She studied law at the University of Montenegro, University of Belgrade, and Boalt Law School of U.C. Berkeley, as a JFDP fellow. She holds LL.M. (2003) and Ph.D. (2007) degrees in law, Belgrade Law School of University of Belgrade, Serbia. She was a Visiting Scholar and Professor at the Faculty of Law, University of Bergen, Norway (2002), U.C. Berkeley (2004-2005), Center for the Study of Human Rights, Columbia University, New York, USA (2005), Université Paris 2—Assas, Centre de la recherche des droits de l'homme et droit humanitaire (2007), London School of Economics and Political Sciences, London, UK (2009-2010), Faculty of Law, University of Johannesburg, South Africa (2013), Faculty of Law, Freie Universität Berlin, Germany (2014), Faculté de Droit et Science Politique, Université Sophia Antipolis, Nice, France (2015). She was Distinguished Visiting Professor - Mercator Fellow at the Faculty of Law, Freie Universität Berlin, Germany (2016-2017). She was a member of the Committee of experts of the Council of Europe for the Improvement of Procedures for the Protection of Human Rights (DH-PR) in Strasbourg (2008-2010) and member of the Steering Committee of Human Rights (CDDH) in Strasbourg (2008-2012). She was a member (2012-2016), Gender Equality Rapporteur (2013-2016) and Second Vice Chair (2014-2016) of the Advisory Committee on the Framework Convention for the Protection of National Minorities (ACFC) of the Council of Europe, in Strasbourg. She served as a member (2015-2018) and Vice President (2017-2018) of the UN Human Rights Committee, Geneva, Switzerland. Judge Jelić publishes extensively on European and international protection of human rights, rule of law, and multiculturalism.

Professor Daniel Markovits is the Guido Calabresi Professor of Law at Yale Law School and Founding Director of the Center for the Study of Private Law. Markovits publishes widely and in a range of disciplines, including in *Science*, *The American Economic Review*, and *The Yale Law Journal*. His current book, *The Meritocracy Trap* (Penguin Press, 2019), develops a sustained attack on American meritocracy. After earning a B.A. in Mathematics, summa cum laude from Yale University, Markovits received a British Marshall Scholarship to study in England, where he was awarded an M.Sc. in Econometrics and Mathematical Economics from the L.S.E.

and a B.Phil. and D.Phil. in Philosophy from the University of Oxford. Markovits then returned to Yale to study law and, after clerking for the Honorable Guido Calabresi, joined the faculty at Yale.

Professor Judith Resnik is the Arthur Liman Professor of Law at Yale Law School, where she teaches about federalism, procedure, courts, equality, and citizenship. Her teaching and scholarship focus on the impact of democratic, egalitarian principles on government services, from courts and prisons to post offices; on the relationships of states to citizens and non-citizens; on the forms and norms of federalism; and on equality and gender. Professor Resnik's books include *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (2011, with Dennis E. Curtis); *Migrations and Mobilities: Citizenship, Borders, and Gender* (2009, with Seyla Benhabib); and the 2014 Daedalus volume, *The Invention of Courts* (co-edited with Linda Greenhouse). Recent chapters in books include "Not Isolating Isolation," in *Solitary Confinement: History, Effects, and Pathways to Reform* (Oxford University Press, 2020); "Courts and Economic and Social Rights/Courts as Economic and Social Rights," in *The Future of Economic and Social Rights* (Cambridge University Press, 2019); and "Judicial Methods of Mediating Conflicts: Recognizing and Accommodating Differences in Pluralist Legal Regimes," in *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press, 2019). Professor Resnik chairs Yale Law School's Global Constitutionalism Seminar and edits its online book series. Professor Resnik is also the founding director of Yale's Arthur Liman Center for Public Interest Law, which convenes colloquia on access to criminal and civil justice systems and awards year-long fellowships to law school graduates and summer fellowships at several U.S. colleges. The 2019 Liman monograph, *Ability to Pay*, and the 2018 Liman monograph, *Who Pays? Fines, Fees, and the Cost of Courts*, are available as e-books along with monographs compiling survey data on the use of solitary confinement in the United States. Professor Resnik has an Andrew Carnegie Fellowship for two years to support her work to write a book, "Impermissible Punishments," about the impact of constitutionalism on punishment. She is a member of the American Philosophical Society, a Fellow of the American Academy of Arts and Sciences, and a Managerial Trustee of the International Association of Women Judges. In 2018, she received an Honorary Doctorate in Laws from the University College London Faculty of Laws.

The Honorable Rosalie Silberman Abella was appointed to the Supreme Court of Canada in 2004 after serving on the Ontario Court of Appeal for 12 years. She practised civil and criminal litigation until she was appointed to the Ontario Family Court in 1976 at the age of 29, the first pregnant person appointed to the judiciary in Canada. She subsequently chaired the Ontario Law Reform Commission and the Ontario Labour Relations Board. Justice Abella was the sole Commissioner and author of the 1984 Royal Commission on Equality in Employment, creating the term and concept of "employment equity." She was the Boulton Visiting Professor at McGill Law School from 1988 to 1992, where she taught jurisprudence, administrative law, and constitutional law. She is a specially elected Fellow of the Royal Society of Canada, the American Academy of Arts and Sciences, the American Philosophical Society, and was awarded the Knight Commander's Cross of the Order of Merit by the President of Germany. She is a graduate of the Royal Conservatory of Music in classical piano and was a judge of the Giller Literary Prize. She has written over 90 articles, and authored or co-edited four books on a variety of legal topics.

Justice Abella chaired the Rhodes Selection Committee for Ontario and holds 39 honorary degrees. She is married to Canadian history professor Irving Abella, with whom she has two sons, both lawyers. She is the first Jewish woman appointed to the Supreme Court of Canada.

Professor Timothy Snyder was educated at Brown and Oxford and held postdocs at Harvard before joining Yale, where he is the Levin Professor of History and Public Affairs. His historical work concerns central and eastern Europe, the Soviet Union, and the Holocaust. He has also written on U.S. history, international relations, health care, digital politics, and political thought. His fifteen books, which include *Bloodlands* and *Black Earth*, have been translated into more than forty languages and have received a similar number of awards. He holds state orders and honorary doctorates, and has appeared in documentaries, on television, and in films. His writing has inspired poster exhibitions, sculpture, a punk rock song, a rap song, films, a play, and an opera. His pamphlet *On Tyranny* is quoted in demonstrations around the world. In 2021, he introduced the terms “big lie” and “memory laws” into the American political and legal discussion. He is finishing a philosophical book about freedom.

About the Student Editors

Braden Currey is a second-year J.D. student at Yale Law School. He graduated from Yale College in 2017 with a B.A. in Global Affairs and a concentration in development economics. He then worked at Dalberg Advisors, a social-sector management consulting firm, where he helped develop strategies for multilateral organizations, foundations, and governments to address development finance and public health issues. At Yale Law School, Braden serves as a Symposium Editor of the *Yale Journal on Regulation*, is a member of the Media Freedom and Information Access Clinic, and is on the board of the National Security Group. Braden spent the summer of 2021 as an extern in the Civil Division of the U.S. Attorney's Office for the Central District of California.

Eshan Dabak is a second-year J.D. student at Yale Law School. He graduated from The University of Texas at Austin in 2018 with majors in Economics, Plan II Honors, and Sanskrit, and a minor in math. He completed an M.A. in Religious Studies at the University of Washington in Seattle. At Yale Law School, he serves as an editor for the *Yale Journal of International Law* and for the *Yale Law and Policy Review* and is on the board of the South Asian Law Students Association. Eshan spent the summer of 2021 at the Education Law Center, in Philadelphia, where he worked to improve the fairness of education funding.

Sofea Dil is a 2021 graduate of Yale Law School and current Yale Robina Fellow at the Legal Office of the World Food Programme in Rome, Italy. She graduated from the University of California, Berkeley in 2018 with a B.A. in Linguistics with Highest Distinction. At the Law School, Sofea served as an Articles and Executive Editor for the *Yale Journal of International Law*, a board member of the International Refugee Assistance Project, and a member of the Allard K. Lowenstein International Human Rights Clinic. Sofea's primary interests are legal responses to humanitarian crises and international refugee law with a focus on Afghanistan. Before graduation, she worked on these issues at the United Nations High Commissioner for Refugees, the General Counsel of the World Food Programme, and the Asian Law Alliance, an immigration legal services organization in her home state of California.

Alexis Kallen is a second-year J.D. student at Yale Law School. She graduated from Stanford University with a B.A. in Political Science with honors in 2018. She earned an M.Phil. in International Development with honors in 2020 from the University of Oxford, where she was a Rhodes Scholar. At Yale Law School, Alexis is a member of the Veterans Legal Services Clinic, and she serves as the president of Think Different: the Yale Law Disability Coalition. She is also a Notes & Comments Editor for the *Yale Journal of Law and Feminism*, and a co-chair of the Title IX working group. Alexis spent the summer of 2021 as an intern with the American Civil Liberty Union's Disability Rights Project.

Alexandria Miskho is a third-year J.D. student at Yale Law School. She studied chemical engineering at the Massachusetts Institute of Technology, graduating in 2017 with a Bachelor of Science and was a member of the Tau Beta Pi Engineering Honors Society. Thereafter, she worked for Oliver Wyman, a global management consulting firm. At the Law School, Alexandria has served as an Executive Editor for the *Yale Journal of International Law* and an Articles Editor for

the *Yale Journal of Health Policy, Law, and Ethics*. She has been a member of the Allard K. Lowenstein International Human Rights Clinic and the Environmental Protection Clinic. She has also been a Teaching Fellow at Yale College, a Teaching Assistant at Yale Law School, a Fellow with the Solomon Center for Health Law and Policy, and served on the boards of the Food Society and the Immigrant Justice Project. Alexandria spent part of the summer of 2021 at the law firm of Cleary Gottlieb Steen & Hamilton LLP and the remainder working with the Office of the Legal Adviser at the U.S. Department of State. During the summer of 2020, she was a research assistant for Patrícia Galvão Teles, Member of the United Nations International Law Commission.

Natalie Nogueira is a second-year J.D. student at Yale Law School. She received her B.A. from Harvard University, where she was a John Harvard Scholar and was awarded the Hoopes Prize. Her senior thesis—*The Pharmaceuticalization of Therapeutic Jurisprudence*—also received the Rivers Prize from the Society for Medical Anthropology. After graduating, Natalie studied for a year at Oxford University, where she received an M.Sc. in Criminology and served as Student President of her graduate cohort. While at Oxford, Natalie also worked as an immigration paralegal in an English prison for foreign-born prisoners facing deportation. At the Law School, Natalie serves on the board of the Latinx Law Students Association and as a student fellow for the Information Society Project. She is fluent in English, Spanish, Portuguese, German, and French and has extensive experience in translation.

Angela Remus is a third-year J.D. student at Yale Law School. In 2016, she graduated *summa cum laude* from the University of Rochester, where she was a Renaissance & Global Scholar; her B.A. was in International Relations and Spanish. In 2018, she graduated with Distinction from the University of Oxford with her M.Sc. in Refugee & Forced Migration Studies. Angela worked for the International Rescue Committee as a legal representative accredited by the U.S. Board of Immigration Appeals, for the National Immigrant Justice Center as a paralegal, and for the United Nations High Commissioner for Refugees in Guatemala. At Yale Law School Angela is the Editor-in-Chief of the *Yale Journal of International Law* and a Project Coordinator for the Immigration Policy Tracking Project. She spent the summer of 2021 working for the U.S. Department of State and for the Mexican American Legal Defense and Education Fund and the summer of 2020 at the U.S. Agency for International Development in the Office of the General Counsel.

Akanksha Shah is a third-year J.D. student at Yale Law School. She graduated Phi Beta Kappa from the University of Chicago with a B.A. in Economics and in Statistics. At the Law School, Akanksha has served as the Treasurer for the Asian Pacific American Law Students Association, an Articles Editor for the *Yale Journal of Law and Feminism*, and has worked in Yale's International Refugee Assistance Project clinic. She was one of the winners of the Potter Stewart Prize for Best Overall Oral and Written Advocacy in Yale's 2020-21 Morris Tyler Moot Court competition. Akanksha spent the summer of 2021 at Kaplan, Hecker & Fink LLP, the fall of 2020 with the American Civil Liberty Union's Voting Rights Project, and the summer of 2020 with the American Civil Liberty Union's Reproductive Freedom Project.

Mark Stevens is a 2021 graduate of Yale Law School. In 2013, he graduated from Princeton University with an A.B. in Public Policy and International Affairs and a certificate in Near Eastern Studies, and in 2017, he received a Master in Public Affairs from the Princeton School of Public and International Affairs. Mark then served as a fellow at the U.S. Department of State, where he focused on Middle East policy, and thereafter worked for a humanitarian information-gathering organization in East Africa and the Middle East. At Yale Law School, Mark was a member of the Peter Gruber Rule of Law Clinic and the Allard K. Lowenstein International Human Rights Clinic. He spent the summer of 2020 working at Arnold & Porter Kaye Scholer LLP and the summer of 2019 doing human rights litigation with the California-based Center for Justice & Accountability.

Rachael Stryer is a third-year J.D. student at Yale Law School. She graduated from Stanford University with a B.A. with Distinction in Political Science in 2017. At Yale Law School, Rachael has served as Forums Editor for the *Yale Journal of International Law*, as a board member of the Yale Civil Rights Project, and as a member of the Allard K. Lowenstein International Human Rights and Connecticut Parentage Act clinics. Rachael spent the summer of 2021 working for the National Domestic Workers Alliance.

Christopher Umanzor is a second-year J.D. student at Yale Law School. He graduated from Princeton University in 2019 with a B.A. in the School of Public and International Affairs. At Yale Law School, Christopher has served as an editor for the *Yale Law & Policy Review*, the *Yale Journal on International Law*, and the *Yale Journal on Regulation*. In addition, he serves as Academics Chair for the Latinx Law Students Association. Christopher spent the summer of 2021 at the Legal Aid Society of the District of Columbia as a legal intern with the Appellate Advocacy Project.

About the Editor Emeritus

Lawrence Liu is a third-year J.D. student at Yale Law School and a Ph.D. candidate in the Jurisprudence and Social Policy Program at the University of California, Berkeley. He graduated Phi Beta Kappa and magna cum laude from Princeton University's School of Public and International Affairs, with certificates in East Asian Studies and Values and Public Life. He also holds an M.A. in Jurisprudence and Social Policy from U.C. Berkeley. Lawrence's research interests are in administrative law, law and globalization, the legal profession, and state-society relations, with a focus on Chinese law and politics, and his articles are in several journals, including the *Yale Journal of International Law*, *Law & Social Inquiry*, *Journal of Empirical Legal Studies*, and *China Quarterly*. At Yale Law School, Lawrence has been a member of the Housing Clinic, and has served as the Empirical Scholarship Editor for the *Yale Law Journal*, Submissions Editor for the *Yale Journal of International Law*, Co-Director of the Paul Tsai China Center Student Board, and Academics Committee Co-Chair of the Asian Pacific American Law Students Association. Lawrence spent the summers of 2021 and 2020 working for Davis Polk & Wardwell, and he spent the summer of 2019 interning at a legal aid organization in Beijing that assists children and migrant worker populations.

PERMISSIONS TO REPUBLISH MATERIALS

Excerpts of commentary are republished with the following authorizations.

Muneer Ahmad, *Resisting Guantanamo: Rights at the Brink of Dehumanization*, 103 NORTHWESTERN UNIVERSITY LAW REVIEW 1683, 1753 (2009). Reprinted with permission of the author and the Northwestern University Law Review.

Samuel Alito, *Address to the Federalist Society's 2020 National Lawyers Convention* (2020) <https://www.youtube.com/watch?v=VMnukCVIZWQ>. Reprinted with permission of the author.

Annette Alstadsæter, Niels Johannesen & Gabriel Zucman, *Tax Evasion & Inequality*, 109 AMERICAN ECONOMIC REVIEW 2073 (2019). Copyright American Economic Association; reproduced with permission of the American Economic Review.

Amnesty International, *COVID-19 Crackdowns: Police Abuse and the Global Pandemic* (2020), <https://www.amnesty.org/download/Documents/ACT3034432020ENGLISH.PDF>. This is an open access article distributed under the terms of the Creative Commons Attribution 4.0 International License.

Susanne Baer, *Democracy in Peril: A Call for Amici and Amicae Curiae and Critical Lawyering*, 10 TRANSNATIONAL LEGAL THEORY 140 (2019). Reprinted with permission of the author and the Transnational Legal Theory Journal.

Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARVARD LAW REVIEW 19 (2002). Reprinted with permission of the author.

Monica Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE LAW JOURNAL 2054 (2017). Reprinted with permission of the author and the Yale Law Journal.

G.A. COHEN & MICHAEL OTSUKA, *Back to Socialist Basics* in ON THE CURRENCY OF EGALITARIAN JUSTICE, AND OTHER ESSAYS IN POLITICAL PHILOSOPHY (2011). Reprinted with permission of the Princeton University Press.

ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975). Reprinted with permission of the Yale University Press.

ROBERT DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* 1 (1971). Reprinted with permission of the Yale University Press.

Veena B. Dubal, Ruth Berins Collier & Christopher L. Carter, *Disrupting Regulation, Regulating Disruption: The Politics of Uber in the United States*, 16 PERSPECTIVES ON POLITICS 919 (2018). Reprinted with permission of the authors and Cambridge University Press.

MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS* (2011). Reprinted with permission of Princeton University Press.

Dr. Martin Luther King Jr., *Letter from Birmingham Jail* (April 16, 1963). Reprinted with permission of the estate of Dr. King.

DANIEL MARKOVITS, *The Coming Class War in THE MERITOCRACY TRAP* (2019). Copyright © 2019 by Daniel Markovits. Used by permission of the author and Penguin Press, an imprint of Penguin Publishing Group, a division of Penguin Random House LLC. All rights reserved.

Edward McWinney, *The German Federal Constitutional Court and the Communist Party Decision*, 32 INDIANA LAW JOURNAL 295 (1957). Reprinted with permission of the Indiana Law Journal.

Jan-Werner Müller, *Protecting Popular Self-Government from the People? New Normative Perspectives on Militant Democracy*, 19 ANNUAL REVIEW OF POLITICAL SCIENCE 249 (2016). Modified with permission from the Annual Review of Political Science and reprinted with permission of the authors.

David E. Pozen and Kim Lane Scheppele, *Executive Underreach*, 114 AMERICAN JOURNAL OF INTERNATIONAL LAW 608 (2020). Reprinted with permission of the author and Cambridge University Press.

Rebecca Prebble & John Prebble, *Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law? A Comparative Study*, 55 SAINT LOUIS LAW JOURNAL 21 (2010). Reprinted with permission of the authors.

Sharon J. Riley & Sarah Cox, *Industry Responsible for 80 Per Cent of Senate Lobbying Linked to Bill C-69*, NARWHAL (June 13, 2019), <https://thenarwhal.ca/industry-responsible-for-80-per-cent-of-senate-lobbying-linked-to-bill-c-69>. Reprinted with permission of Narwhal.

RICHARD RORTY, *A Cultural Left* in ACHIEVING OUR COUNTRY: LEFTIST THOUGHT IN TWENTIETH-CENTURY AMERICA (1998). Reprinted with permission of Harvard University Press.

Kim Lane Scheppele, *The New Judicial Deference*, 92 BOSTON UNIVERSITY LAW REVIEW 89 (2012). Reprinted with permission of the author and the Boston University Law Review.

Shelly Steward et al., *Uber's Call for Change in Europe Shirks Responsibility While Highlighting Real Challenges*, FAIRWORK (Feb. 2, 2021), <https://fair.work/en/fw/blog/ubers-call-for-change-in-europe-shirks-responsibility-while-highlighting-real-challenges/#continue>. Oxford Internet Institute allows work to be copied for non-commercial research and study.

Elizabeth Warren, *Corporate Capture of the Rulemaking Process*, REGULATORY REVIEW (June 14, 2016), <https://www.theregreview.org/2016/06/14/warren-corporate-capture-of-the-rulemaking-process>. Reprinted with permission of the Regulatory Review.

JAMES LINDLEY WILSON, *Oligarchic Threats* in DEMOCRATIC EQUALITY (2019). Reprinted with permission of Princeton University Press.

JEFFREY A. WINTERS, *Civil Oligarchies* in OLIGARCHY (2011). Reprinted with permission of Cambridge University Press.