

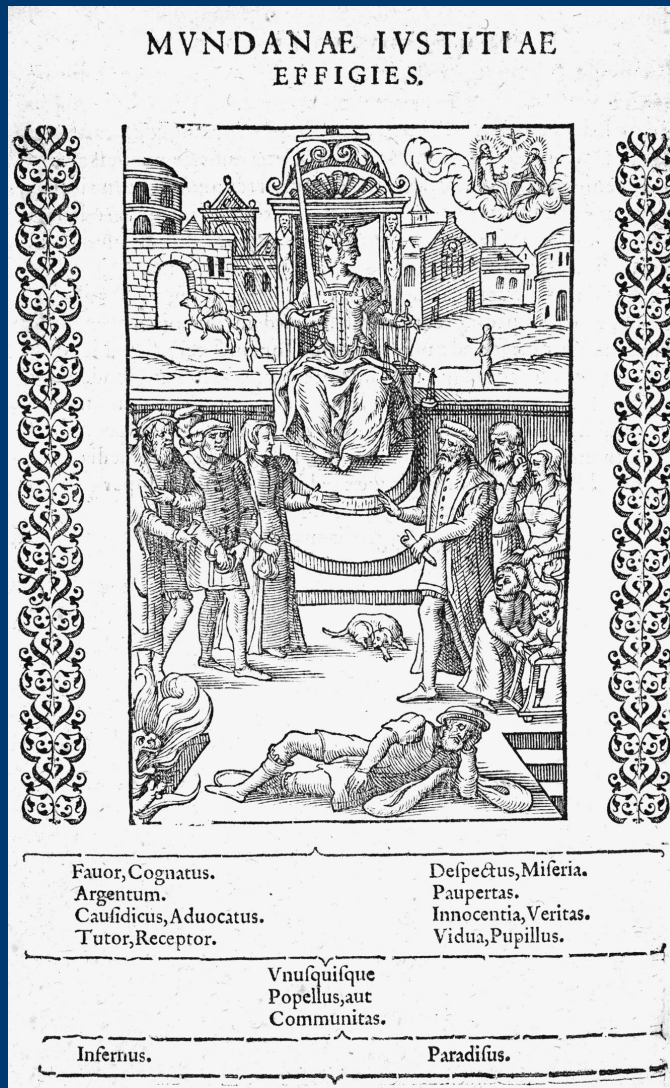


YALE LAW SCHOOL

# Global Constitutionalism 2022

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

## Weighing Judicial Authority



Climate, Changing

Covid-19: Waves, Mandates, and Public Health

Constituting and Reconfiguring Families

Abortion: Rights in Motion

The Independence and Integrity of the Courts

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.

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*Dedication*

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In the year of his retirement from the Supreme Court of the United States, we dedicate this volume to Justice Stephen Breyer to honor his contributions to the Court and to Yale's Global Constitutionalism Seminar.

In his resignation letter, Justice Breyer spoke of the “great honor of participating as a judge in the effort to maintain our Constitution and the rule of law.” Those commitments and Justice Breyer's vision have helped to make the Global Constitutionalism Seminar a remarkable space in which jurists from across the world explore how courts can be generative contributors who are supportive of methods to ensure the vitality of democratic governments and responsive to concerns about equality, liberty, and autonomy.

We are grateful for Justice Breyer's participation throughout the decades of Yale's Global Constitutionalism Seminar, and we look forward to his continued leadership.

## **WEIGHING JUDICIAL AUTHORITY**

### **Climate, Changing**

Dan Esty, Doug Kysar, Susanne Baer, Laurent Fabius, and  
Syed Mansoor Ali Shah

### **COVID-19: Waves, Mandates, and Public Health**

Abbe R. Gluck, Daphne Barak-Erez, and Marta Cartabia

### **Constituting and Reconfiguring Families**

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### **Abortion: Rights in Motion**

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Daniela Salazar Marín

### **The Independence and Integrity of Courts**

Kim Scheppele, Carlos Rosenkrantz, and Philip Sales

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**Yale Law School, 2022**

# Table of Contents

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

## I. CLIMATE, CHANGING

DISCUSSION LEADERS:

DAN ESTY, DOUG KYSAR, SUSANNE BAER,  
LAURENT FABIUS, AND SYED MANSOOR ALI SHAH

### The Role of Courts in Evaluating Government Action

#### Implementing Domestic and International Laws

Notre Affaire à Tous and Others v. France (Administrative Court of Paris, 2021) .....	I-5
Incident under Review R.A.(I) 81/2021 (Eleventh Collegiate Court of the First Circuit in Administrative Matters, Mexico, 2021).....	I-7
Sharma and Others v. Minister for the Environment (Federal Court of Australia, 2021).....	I-9
Minister for the Environment v. Sharma and Others (Full Court of the Federal Court of Australia, 2022).....	I-14
VZW Klimaatzaak v. Kingdom of Belgium & Others (Brussels Court of First Instance, 2021).....	I-17
Thomson v. Minister for Climate Change Issues (High Court of New Zealand, 2017) .....	I-20

#### Implementing the Paris Agreement

Order of the First Senate of 24 March 2021 (Climate Change) (Germany, 2021) .....	I-24
Commune de Grande-Synthe v. France (France, 2021) .....	I-27
Bushfire Survivors for Climate Action Incorporated v. Environmental Protection Authority (Land and Environmental Court of New South Wales, Australia, 2021).....	I-29
Plan B Earth and Others v. Secretary of State for Transport (UK, 2020).....	I-31

#### Justiciability of Climate Litigation

Sacchi et al. v. Argentina et al (Committee on the Rights of the Child, 2021).....	I-34
Carvalho and Others v. European Parliament (European Court of Justice, 2021).....	I-37
Greenpeace v. United Kingdom (Scottish Court of Session, 2021) .	I-40

Juliana v. United States (U.S. Court of Appeals for the Ninth Circuit, 2020).....	I-41
Dan Esty, Should Humanity Have Standing? Securing Environmental Rights in the United States (2022) .....	I-44

### **Towards a Trans-Jurisdictional Law of Climate Change**

Milieudefensie et al. v. Royal Dutch Shell (District Court of the Hague, 2021) .....	I-51
Don C. Smith, Courts Must Provide Climate Change Leadership in the Absence of Law-making Progress (2021) .....	I-53
Justice Syed Mansoor Ali Shah, Foreword to Climate Change Litigation in the Asia Pacific (2020) .....	I-56
Lord Sales, Directors’ Duties and Climate Change: Keeping Pace with Environmental Challenges (2019).....	I-57
Luís Roberto Barroso, Technological Revolution, Democratic Recession, and Climate Change: The Limits of Law in a Changing World (2020).....	I-62

## **II. COVID-19: WAVES, MANDATES AND PUBLIC HEALTH**

DISCUSSION LEADERS:

ABBE R. GLUCK, DAPHNE BARAK-EREZ, AND MARTA CARTABIA

### **The Logic and Trajectory of Public Health**

#### **Emergency Authority over Time**

Brenda Hale and Jonathan Sumption, Constitutional Implications of COVID-19 (2020).....	II-4
--	------

#### **Underreach and Overreach**

David E. Pozen & Kim Lane Scheppele, Executive Underreach, in Pandemics and Otherwise (2020).....	II-8
Writ of Mandamus No. 28312-DF (Superior Court of Justice of Brazil, 2021).....	II-12
Scott Stephenson, The Relationship Between Federalism and Rights During COVID-19 (2021).....	II-13

### **Contesting Government Authority and Debating Public Health Mandates**

#### **Mandating Vaccination**

Vavříčka and Others v. The Czech Republic (ECtHR, 2021).....	II-17
--	-------

## Table of Contents

---

Kassam v. Hazzard (Court of Appeal of New South Wales, Australia, 2021).....	II-21
Kassam v. Hazzard (Supreme Court of New South Wales, Australia, 2021).....	II-24
No. 2022-835 DC (France, 2022).....	II-25
Biden v. Missouri et al. (U.S., 2022).....	II-27
National Federation of Independent Businesses v. Occupational Safety and Health Administration (U.S., 2022) .....	II-31

### **Exempting Religion**

South Bay United Pentecostal Church v. Newson (U.S. 2021).....	II-38
Philip v Scottish Ministers (Scottish Outer House 2021).....	II-41
Gateway Bible Baptist Church v. Manitoba (Court of Queen’s Bench of Manitoba, Canada, 2021).....	II-45

## **The Legacies of COVID-19**

### **The Harms of Confinement**

In Re: Contagion of Covid 19 Virus in Prisons (India, 2021).....	II-50
Feilazoo v. Malta (ECtHR, 2021).....	II-52
Fenech v. Malta (ECtHR, 2022).....	II-54
Jaimie Meyer, Marisol Orihuela & Judith Resnik, Tolerating the Harms of Detention: With and Without COVID-19 (2022).....	II-57

### **Changed Court Practices**

Barry Godfrey, Jane C. Richardson & Sandra Walklate, The Crisis in the Courts: Before and Beyond Covid (2021).....	II-61
Joe McIntyre, Anna Olijnyk & Kieran Pender, Civil Courts and COVID-19: Challenges and Opportunities in Australia (2020)...	II-63
No. 2021-911/919 QPC (France, 2021) .....	II-66

### **Judging Under Uncertainty**

Shaun Fluker & Lorian Hardcastle, Executive Lawmaking and COVID-19 Public Health Orders in Canada (2020) .....	II-67
Lindsay F. Wiley & Stephen I. Vladeck, Coronavirus, Civil Liberties, and the Case Against “Suspending” Judicial Review (2020) .....	II-70
Eric Posner & Kenny Mok, Constitutional Challenges to Public Health Orders in Federal Courts During the COVID-19 Pandemic (2022).....	II-73



### **III. CONSTITUTING AND RECONFIGURING FAMILIES**

DISCUSSION LEADERS:

DOUGLAS NEJAIME, GOODWIN LIU, AND FRANCESCO VIGANÒ

#### **How Many Parents?**

Judgment No. 33 of 2021 (Italy, 2021) .....	III-4
F., F.C., and Others s. adoption (Argentina, 2020) .....	III-8
Courtney G. Joslin & Douglas NeJaime, <i>The Next Normal</i> : States will Recognize Multi-Parent Families (2022) .....	III-10

#### **Technology, Biology, Intentionality, and Legal Status**

##### **(When) Are Genetic Parents Legal Parents?**

Extraordinary Appeal No. 898.060 Santa Catarina (Brazil, 2016).....	III-12
Michael H. v. Gerald D. (U.S., 1989).....	III-14
C.A. v. C.P. (Cal. App., 2018).....	III-15

##### **(When) Are Birthing Parents Legal Parents?**

Valdís Fjölnisdóttir and Others v. Iceland (ECtHR, 2021) .....	III-18
Surrogates' Bill of Rights, N.Y. State Assembly Bill No. A9506B (2020).....	III-20
Unconstitutional Action 16/2016 (Mexico, 2021) .....	III-21

##### **(When) Are Intended Parents Legal Parents?**

V.M.A. v. Stolichna Obsthina, Rayon Pancharevo (CJEU, 2021).....	III-22
Amparo en Revisión 807/2019 (Mexico, 2020).....	III-25

##### **(When) Are Social Parents Legal Parents?**

E.N. v. T.R. (Md. 2020) .....	III-27
Douglas NeJaime, <i>The Constitution of Parenthood</i> (2020).....	III-29

#### **The Claims, Interests, and Rights of Children**

British Columbia Birth Registration No. 2018-XX-XX5815 (Canada, 2021) .....	III-32
Honner v. France (ECtHR, 2021).....	III-34
Judgment No. 32 of 2021 (Italy, 2021) .....	III-37
Sec. 23 of the Connecticut Parentage Act (US, 2022) .....	III-40
Judgment No. 79 of 2022 (Italy, 2022) .....	III-41

## IV. ABORTION: RIGHTS IN MOTION

DISCUSSION LEADERS:

LINDA GREENHOUSE, REVA SIEGEL, AND DANIELA SALAZAR MARÍN

### **Decriminalizing and Expanding Access**

Alba Ruibal, Movement and Counter-Movement: A History of Abortion Law Reform and the Backlash in Colombia 2006-2014 (2014) .....	IV-6
Barbara Sutton and Nayla Luz Vacarezza, Abortion Rights in Images (2020) .....	IV-7
Case No. 34-19-IN/21 and Accumulated (Ecuador, 2021) .....	IV-10
Declaration of Unconstitutionality 148/2017 (Mexico, 2021) .....	IV-16
Douglas NeJaime and Reva B. Siegel, Conscience Wars in the Americas (2020) .....	IV-26
Ruling C-055 of 2022 (Colombia, 2022) .....	IV-29
Case of Manuela et al. v. El Salvador (Inter-American Court of Human Rights, 2021) .....	IV-33
Case on the Crimes of Abortion (South Korea, 2019) .....	IV-34
Dhikta v. Government of Nepal (Nepal, 2009) .....	IV-37
FIDA Kenya v. Attorney General (Kenya, 2019) .....	IV-39

### **Criminalizing and Restricting Access**

Ref. No. K 1/20 (Poland, 2020).....	IV-40
Joy Neumeyer, Poland’s Abortion Ban—And the Women’s Strike—One Year On (2021) .....	IV-41
Judicial Initiative on Act LXXIX of 1992 (Hungary, 2021) .....	IV-43

### **An International Perspective**

UN Human Rights Office of the High Commissioner, Women’s Autonomy, Equality and Reproductive Health in International Human Rights (2017) .....	IV-46
--	-------

### **Addendum: The United States Supreme Court Decision**

Dobbs v. Jackson Women’s Health Organization (United States, 2022).....	IV-50
--	-------

## V. THE INDEPENDENCE AND INTEGRITY OF COURTS

DISCUSSION LEADERS:

KIM LANE SCHEPPELE, PHILIP SALES, AND CARLOS ROSENKRANTZ

### **The Removal and Discipline of Judges**

#### **The Principle of the Irremovability of Judges**

European Commission v. Republic of Poland (CJEU, 2019) ..... V-5

#### **Dissolving a Court or Removing Judges *en Masse***

Emily Channell-Justice, Ukraine’s Constitutional Crisis,  
Explained (2020) ..... V-9

Venice Commission, Urgent Opinion on the Reform of the  
Constitutional Court Issued Pursuant to Article 14a of the  
Venice Commission’s Rules of Procedure (2020) ..... V-11

Venice Commission, Ukraine Draft Law No. 4533 on the  
Constitutional Procedure (2021) ..... V-14

DEJURE Foundation and Others, We Call on the President and  
the Servant of the People Party to End the Pressure on the  
Constitutional Court Against the Newly Appointed Judges  
(2021) ..... V-16

Supreme Court of Justice v. Ecuador (Inter-American Court of  
Human Rights, 2013) ..... V-18

Human Rights Watch, World Report 2021: Ecuador ..... V-22

Daniela Salazar Marin, The Transitory Lottery for Judicial  
Renovation (2022) ..... V-23

Diego Werneck Arguelhes, Public Opinion, Criminal Procedures  
and Legislative Shields: How Supreme Court Judges Have  
Checked President Jair Bolsonaro in Brazil (2022) ..... V-24

#### **Impeachment, Removal, and Discipline of Individual Judges**

Kimberly Wehle, How to Impeach a Supreme Court Justice  
(2022) ..... V-27

Robert L. Brown, From Earl Warren to Wendell Griffen: A Study  
of Judicial Intimidation and Judicial Self-Restraint (2005) ..... V-29

Saikrishna Prakash and Steven D. Smith, Removing Federal  
Judges Without Impeachment (2006) ..... V-32

European Commission v. Republic of Poland (CJEU, 2021). ..... V-34

Case No. 3-19-CN/20 (Ecuador, 2020) ..... V-39

Case No. 37-19-IN (Ecuador, 2021) ..... V-46

Disqualification of Justice, Judge, or Magistrate Judge, 28 U.S.C.  
§ 455 (U.S.) ..... V-54

The Act on the Federal Constitutional Court, Ch. 1, § 19  
(Germany) ..... V-55

*Table of Contents*

---

Complaints Against Judges and Judicial Discipline, 28 U.S.C.  
§ 351–55 (United States)..... V-56  
Judiciary Accountability Act of 2021, H.R. 4827 (U.S.) ..... V-59  
Judicial Ethics and Anti-Corruption Act of 2022, H.R. 7706 (U.S.) ..... V-61  
John Roberts, 2021 Year-End Report on the Federal Judiciary ..... V-65

**Resigning on Principle**

Rafael Solis, Public Letter of Resignation and Denunciation  
(2019) ..... V-67

**Selecting Judges**

**Judges Picking Judges**

European Network of Councils for the Judiciary, ENCJ Votes to  
Expel Polish Council for the Judiciary (2021) ..... V-71

**Appointments by Other Branches**

Xero Flor w Polsce sp. z.o.o. v. Poland, (CJEU, 2021) ..... V-73  
Billy Corriher and Alex Brown, Chris Christie’s War on Judicial  
Independence (2014) ..... V-75

**Appointments in Mixed Systems**

The Judiciary, Basic Law, Chapter Two: Judges (Israel) ..... V-77

**Changing the Judicial Appointments System**

Joshua Jordan, Tackling Corruption while Preserving Judicial  
Independence: Lessons from India’s Supreme Court (2022)..... V-78  
Nancy Gertner and Laurence H. Tribe, The Supreme Court Isn’t  
Well. The Only Hope for a Cure Is More Justices. (2021) ..... V-80

**Time-Limited and Time-Unlimited Appointments**

Venice Commission, Compilation of Venice Commission  
Opinions and Reports Concerning Courts and Judges (2019) ..... V-81  
Starrs v. Procurator Fiscal, Linlithgow (Scotland, 1999)..... V-82  
Judith Resnik, Judicial Selection and Democratic Theory:  
Demand, Supply, and Life Tenure (2005)..... V-90

\* \* \*

Opinions Excerpted..... A-1  
Statutes Excerpted ..... A-4  
Commentary and Additional Materials Excerpted..... A-5  
About the Contributors..... B-1

## Preface

This year's Seminar convenes amidst the ongoing challenges of climate change and COVID as well as the intense debates about democratic practices and restructuring courts, about family arrangements and personal life, and about the responsibilities of constitutional jurists to address these issues. Through a series of chapters previewed below, this volume offers windows into how courts have in recent times responded.

The chapter *Climate, Changing* will be discussed in a roundtable led by Doug Kysar, Susanne Baer, Laurent Fabius, and Syed Mansoor Ali Shah. The readings, edited by Dan Esty and Doug Kysar with contributions from members of the Seminar, map the many times that judges have been asked to hold governments accountable for their action or inaction related to climate change. In some jurisdictions, courts have opened their doors to claims filed against government officials obliged to implement climate policy and against private actors alleged to be responsible for some of the harms. From these rulings, a trans-jurisdictional law about the rights of and remedies for climate change is emerging. Yet, as also discussed, some courts have concluded that the litigants lack standing to bring cases, that no duties exist, or that the judiciary is not an appropriate and effective venue for addressing these harms.

Just as climate change is a site of disagreement about the judicial role, so too is the ongoing struggle over how to address the pandemic. In the chapter *Covid-19: Waves, Mandates and Public Health*, edited by Abbe R. Gluck, Daphne Barak-Erez, and Marta Cartabia, the Seminar returns for a third year to consider the legal implications of COVID-19. The materials explore this emergency's impact on the structure of government and as courts respond to litigants contesting executive action or inaction. We draw examples from conflicts over vaccine mandates, religious liberty, and the constitutional rights to care of people in detention. During the last year, with the ebb and flow of COVID-19 waves and a growing body of scientific evidence, courts have sometimes analysed issues under the rubric of constitutional rights and at other times by turning to administrative law. This chapter continues to probe questions with which we began three years ago. What are the powers of governments to try to protect health risks? Who balances the harms of health and the harms of rules limiting activities such as work, schooling, and prayer? Has COVID-19 affected conceptions of how judges should respond to emergency actions taken under significant uncertainty?

The next topic, *Constituting and Reconfiguring Families*, explores how constitutional law intersects with the structure and formation of families, the regulation of marriage, and decisions to become parents. Litigants have long argued to courts that equality, autonomy, privacy, and liberty require respect for their decisions about these matters. The materials, edited by Douglas NeJaime, Goodwin Liu, and Francesco Viganò, provide vivid examples of how various technologies of reproduction and shifting social norms offer new opportunities to bring families into being and raise new

questions about law’s regulation of families. In recent years, judges have addressed the status, authority, rights, and duties of more than two people to be parents of a child, as well as the rights and interests of children in various family relationships. Also under consideration is the impact of decisions in one jurisdiction on the law of another, as some countries recognize more diverse family configurations than do others. In several cases, judges debate whether to resolve the question or defer to the legislature.

Another facet of family life is the decision about whether, if pregnant, to have a child. In *Abortion: Rights in Motion*, Linda Greenhouse, Reva Siegel, and Daniela Salazar Marín examine how this question has come to the fore as an issue for constitutional law around the world. The chapter (to be accompanied by an addendum relating the decision in the U.S. to overturn a fifty-year-old precedent providing constitutional protection for abortion) selects a few illustrations of approaches of jurisdictions as many—pressed by social movements—have revisited their laws on abortion. Protests have called for decriminalization of abortion in Latin America, a predominantly Catholic region. Although abortion in the region continues to be subject to criminal prohibition, reconsideration is underway in several jurisdictions responding to legislators and litigants asserting constitutional and human rights. In contrast, some countries in Eastern Europe have imposed new restrictions on abortion; those limits have in turn prompted mass protests arguing that self-determination in matters of personal life parallels self-determination in political life. By reading the 2022 U.S. abortion decision along with other rulings excerpted in this chapter, the question of access to abortion within and across jurisdictions’ borders becomes vivid.

A theme across all these chapters is the role of courts. The final chapter, *The Independence and Integrity of Courts*, edited by Kim Lane Scheppele, Carlos Rosenkrantz, and Philip Sales, makes plain that these longstanding issues have new saliency, as arguments arise over whether judges have too much or too little “independence.” As the examples illustrate, judiciaries are creatures of constitutions and statutes that often specify methods of selection, obligations of judges, courts’ authority and procedures, and methods for removal. Judiciaries are hence dependent on the governments that deploy them even as judges sit in judgment of public officials. The materials document the complexity of identifying licit forms of oversight and accountability and necessary levels of insulation. Considering recent developments, one focus is on removal of judges, either individually or *en masse*, sometimes in the name of rejuvenation and other times as discipline for perceived misconduct. Also considered are mechanisms for appointment grounded in accountability and shadowed by concerns about the undue influences of the appointing powers, as well as issues of reappointment and the length of tenure in office.

\* \* \*

In addition to outlining the materials, a brief recap of how this volume came into being is in order. This volume owes a debt, as do all its predecessors, to the Seminar’s participants and faculty, joined by talented student research assistants, who generate a

collaboration across continents. Since 2020, some of this work has taken place at times when people were discouraged from being in close contact. COVID-19 has helped us to use technology 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, indicate editorial insertions.

As has been our practice since 2011, this book will be published as an e-book, and this volume will be the twelfth in the series to be distributed electronically and free of charge. Thanks are due to Jason Eiseman, who is the Associate Director for Administration & Law Library Technology at the Lillian Goldman Law Library; he oversees 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 have otherwise 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.

This volume would not exist but for the work of several students at Yale Law School. The group is led by Akanksha Shah, who serves as this volume's Executive and Managing Editor. She is joined by Alexis Kallen and Braden Currey, the Associate Managing Editors, by returning Senior Editor Chris Umanzor, and by a new group of editors that includes Lucía Baca, Aletta Brady, Ram Dolom, Abyssinia Lissanu, Neha Sharma, and Kate Yoon. These students, whose biographical sketches appear later in the volume, are thoughtful, astute, generous, and generative colleagues. I am lucky to have come to know and to work with them.

Special thanks are due to Renee DeMatteo, Yale Law School's Senior Conference and Events Services Manager and the pivot of this Seminar for many years. Renee helped us to navigate moving the Global Constitutionalism Seminar to a virtual format, and she is central to our returning in person, as she always provides a warm welcome that makes the far-flung group feel at home. Renee ensures that a draft of this book exists in time for circulation electronically and as a bound volume. 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. Our technical connections are enabled by Nick Cifarelli, Assistant Director of Academic Technology and Media Services, who has been a patient, wise, and generous guide.

The commitment of the deans of the Yale Law School has been unfailing. The seminar dates from the 1990s when Anthony Kronman was the dean and Paul Gewirtz founded the Seminar, which has continued under the stewardship of Harold Hongju Koh, Robert Post, and our current dean, Heather Gerken.

Another steward of this Seminar is, as reflected on the dedication page, Stephen Breyer, who resigned this year from the U.S. Supreme Court, to which he was appointed in 1994. One of the Seminar’s “founding fathers,” Justice Breyer and a few other justices and law professors launched this activity to offer participants opportunities for in-depth, private conversations about complex and nuanced questions of constitutional law. Rather than giving lectures, members of the Seminar sit together to puzzle about the problems facing both constitutional jurists and the jurisdictions that empower them. Over the decades, Justice Breyer has been a consistent and brilliant interlocutor, pressing to understand points of view different from his own and seeking to find pragmatic responses to the facts of specific cases in which intense disagreement exists about the course of action.

These exchanges are made possible by special dedicated resources. When we began, support for Yale Law School’s Global Constitutionalism Seminar was provided by Betty and David A. Jones, Sr. ’60, and by Mary Gwen Wheeler and David A. Jones, Jr. ’88. They sought to help us build bridges across oceans and legal systems. Since 2011, this Seminar has found its home as part of the Gruber Program for Global Justice and Women’s Rights at Yale Law School. Yale’s Global Constitutional Seminar has been sustained by the vision and the generosity of Peter and Patricia Gruber through the Gruber Foundation, which has a longstanding goal of enhancing fairness and justice around the world. Yale University is one beneficiary of these commitments. The Grubers’ transnational approach enables our relationships to continue. The community helped us manage three days of online sessions for the past two years and, in 2022, we aim to resume in person and welcome some participants whom we have heretofore met only on screens.

During the last twelve months, we have experienced more instances of stunning and aggressive attempts to undercut democratic processes and the integrity of courts. As the readings in this volume reflect, many people try to enlist judicial authority, some contest and others embrace its legitimacy, and others differ about the weight to accord the judgments made. In this time of urgency—awash with anger, violence, racial inequality, economic vulnerability, discrimination, and disease—we hope that this Seminar contributes to the vitality of institutions that aspire to face these problems and 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 2022



# CLIMATE, CHANGING

DISCUSSION LEADERS

DAN ESTY, DOUG KYSAR,  
SUSANNE BAER, LAURENT FABIUS,  
AND SYED MANSOOR ALI SHAH

## I. CLIMATE, CHANGING

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DAN ESTY, DOUG KYSAR, SUSANNE BAER,  
LAURENT FABIUS, AND SYED MANSOOR ALI SHAH

### **The Role of Courts in Evaluating Government Action**

#### **Implementing Domestic and International Laws**

Notre Affaire à Tous and Others v. France (Administrative Court of Paris, 2021) .....	I-5
Incident under Review R.A.(I) 81/2021 (Eleventh Collegiate Court of the First Circuit in Administrative Matters, Mexico, 2021).....	I-7
Sharma and Others v. Minister for the Environment (Federal Court of Australia, 2021).....	I-9
Minister for the Environment v. Sharma and Others (Full Court of the Federal Court of Australia, 2022).....	I-14
VZW Klimaatzaak v. Kingdom of Belgium and Others (Brussels Court of First Instance, 2021).....	I-17
Thomson v. Minister for Climate Change Issues (New Zealand, 2017).....	I-20

#### **Implementing the Paris Agreement**

Order of the First Senate of 24 March 2021 (Climate Change) (Germany, 2021) .....	I-24
Commune de Grande-Synthe v. France (France, 2021) .....	I-27
Bushfire Survivors for Climate Action Incorporated v. Environmental Protection Authority (Land and Environmental Court of New South Wales, Australia, 2021).....	I-29
Plan B Earth and Others v. Secretary of State for Transport (U.K., 2020).....	I-31

#### **Justiciability of Climate Litigation**

Sacchi v. Argentina (Committee on the Rights of the Child, 2021). I-34	
Carvalho and Others v. European Parliament (European Court of Justice, 2021).....	I-37
Greenpeace v. United Kingdom (Scottish Court of Session, 2021). I-40	
Juliana v. United States (U.S. Court of Appeals for the Ninth Circuit, 2020).....	I-41
Daniel C. Esty, Should Humanity Have Standing? Securing Environmental Rights in the United States (2022) .....	I-44

## **Towards a Transjurisdictional Law of Climate Change**

Milieudefensie et al. v. Royal Dutch Shell (District Court of the Hague, 2021) .....	I-51
Don C. Smith, Courts Must Provide Climate Change Leadership in the Absence of Law-making Progress (2021) .....	I-53
Justice Syed Mansoor Ali Shah, Foreword to Climate Change Litigation in the Asia Pacific (2020) .....	I-56
Lord Sales, Directors’ Duties and Climate Change: Keeping Pace with Environmental Challenges (2019).....	I-57
Luís Roberto Barroso, Technological Revolution, Democratic Recession, and Climate Change: The Limits of Law in a Changing World (2020).....	I-62

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Climate change returns as a core issue in the 2022 Global Constitutionalism Seminar, with a focus on the multifaceted role of courts in responding to requests that they hold governments accountable for their actions (and inaction) related to climate change. During the last few years, in some jurisdictions, courts have provided a forum for climate litigation against private actors and advanced remedies when government officials tasked with implementing climate policy have failed to do so. In other nations, courts have interpreted environmental statutes more narrowly and declined to exert judicial authority to address climate change.\* These courts have rejected cases due to perceived procedural shortcomings or decided that the judiciary is not an appropriate or effective venue for addressing deficiencies in climate change policies. In this chapter, we explore these diverse decisions and the impact of the many rulings that are contributing to an emerging, trans-jurisdictional law of climate change.

## **THE ROLE OF COURTS IN EVALUATING GOVERNMENT ACTION**

As more and more people become concerned with how their governments are handling efforts to mitigate climate change, they have turned to courts as one mechanism by which to enforce both domestic laws and regulations as well as

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\* *See, e.g.*, West Virginia v. Environmental Protection Agency, No. 20-1530, 2022 WL 2347278 (June 30, 2022) (holding that the United States Environmental Protection Agency does not have authority under the Clean Air Act to implement a cap-and-trade system to shift power generation to less carbon-intensive sources).

international agreements aiming to limit climate change. The materials below provide some examples of the response of courts to such requests. As detailed in a subsequent section (“Justiciability of Climate Litigation”), courts also continue to grapple with preliminary and procedural aspects of climate suits. We note, however, that in the years since Yale’s Global Constitutionalism Seminar first began addressing the topic of climate litigation, many cases have proceeded to the merits and explored a number of critical doctrinal and normative questions.

When doing so, courts must address what precisely is the nature of a fundamental right to have one’s government address climate change. Is it, as most advocates contend, a positive right to be protected from climate-related harm? Or is it, as the Federal Constitutional Court of Germany has concluded, a negative right to act as freely as possible in the future?\* Taking a cue from international and regional environmental jurisprudence, the right also could be construed in administrative terms, such as a right to information and government transparency, or as a right to democratic participation in decision-making. Governments might also be held to substantive standards through the process of judicial review, for instance, to ensure that climate policies abide by a principle of environmental sustainability or intergenerational justice. Finally, some courts around the world have begun to extend environmental rights to nonhuman entities themselves, rather than only to humans as beneficiaries of environmental protection. How is climate change litigation impacted by the development of such “rights of nature”?

The case excerpts and other materials in the following two subsections offer a foundation for assessing when and how the judiciary might be positioned to hold governments accountable for delivering on both domestic and international commitments to climate change action and for expanding the view of what will be required to meet the climate change threat.

## **Implementing Domestic and International Laws**

Countries across the world have addressed climate change with a wide range of laws, policies, and international agreements, all based on an equally diverse array of underlying legal theories. This section explores case law on *environmental rights* across the globe as well as whether and how courts have upheld such rights in the climate-change context. This discussion takes place as situations continue to arise that implicate climate issues and international law. One vivid example is the war in Ukraine, which has driven gas prices to a peak and left Western nations condemning Russia’s invasion while still buying Russian gas.

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\* See BVerfG, Order of the First Senate of 24 March 2021, 1 BvR 2656/18 (excerpted *infra*).

We begin this section with a few cases in which courts have enjoined or mandated government action to vindicate environmental rights. We compare those rulings to some opinions in which courts have declined to find such rights or declined to enforce them against governments in ways which would affect policymaking.

**Notre Affaire à Tous and Others v. France**

Administrative Court of Paris

No. 1904967, 1904968, 1904972, 1904976/4-1 (2021)\*

[Before President Duchon-Doris:]

. . . [Notre Affaire à Tous, a French environmental organization, along with Oxfam France, Fondation pour la Nature et L’Homme, and Greenpeace France, sought to] enjoin the Prime Minister . . . [to take] all the necessary measures to repair the ecological damage linked to the surplus of greenhouse gas (GHG) emissions resulting from the State’s failure to comply with its first carbon budget [created to comply with the Paris Agreement] and . . . to take all necessary measures to achieve the government’s emissions-reduction targets. . . .

[Plaintiffs requested a series of concrete measures, particularly in the transportation and agricultural sectors, and that the Prime Minister and the relevant ministers be fined if they did not take these steps within six months.]

The associations maintain that the State has not taken the actions necessary to comply with its own emissions-reduction objectives, set by both the April 21, 2020 decree relating to national carbon budgets and the national low-carbon strategy . . . articulated in the energy code. . . .

The study drawn up at the request of applicant associations . . . concludes without ambiguity that measures adopted or envisioned by the State will not make it possible to achieve the overall objective of reducing GHG emissions by 40% by 2030. . . . The study commissioned by the Government by the Boston Consulting Group comes to the same conclusions. . . .

The Minister for Ecological Transition maintains, in defense, that the State has already taken the measures intended to compensate for the overrun of the first carbon budget. They specify that the trajectory of greenhouse gas emissions has been defined . . . so as to make up for the delay linked to the non-compliance with the first carbon budget and that the current level of GHG emissions is in line with this trajectory.

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\* Translation by Braden Currey (Yale Law School, Class of 2023).

It is not for this court, seized of a dispute seeking compensation for the ecological damage resulting from the overrun of the first carbon budget and the prevention or cessation of the damage observed, to rule on the sufficiency of the set of measures likely to make it possible to achieve the objective of reducing greenhouse gases by 40% by 2030 compared to their 1990 level, but only to verify, as of the date of this judgment, whether this damage continues and whether it has already been the subject of remedial measures.

Under Article 1246 of the Civil Code: “Any person responsible for ecological damage is required to repair it.” Under the terms of article 1249 of the civil code: “. . . In the event of impossibility of law or fact or of insufficiency of the measures of repair, the judge condemns the person in charge to pay damages, allocated to the repair of the environment, to the plaintiff or . . . to the State. . . .” And under the terms of Article 1252 of the Civil Code: “ Apart from compensation for ecological damage, the judge, seized of a request to this effect by a person mentioned in Article 1248, may prescribe reasonable measures to prevent or stop the damage.” . . .

The Minister argues that the injunction issued by the Council of State in its *Commune de Grande-Synthe* decision of July 1, 2021, already makes it possible to repair the ecological damage observed. However, while this injunction aims to ensure compliance with the overall objective of a 40% reduction in GHG emissions by 2030 compared to their 1990 level, it does not relate specifically to compensation for the quantum of damage associated with exceeding the first carbon budget. . . . Under these conditions, the applicant associations are justified in requesting the delivery of an injunction to repair the damage linked to the excess greenhouse gas emissions and prevent the aggravation of the damage likely to result therefrom.

The ecological damage resulting from a surplus of greenhouse gas emissions is continuous and cumulative insofar as the observed non-compliance with the first carbon budget has generated additional greenhouse gas emissions, which will be added to the previous ones and will produce effects throughout the lifetime of these gases in the atmosphere, that is to say approximately 100 years. Consequently, the measures ordered by the judge within the framework of his powers of injunction must intervene within a sufficiently short period of time to allow, when possible, the compensation of the prejudice as well as to prevent or put an end to the damage observed. . . .

. . . [I]t is necessary to order the Prime Minister and the competent ministers to take all the useful sectoral measures likely to repair the damage up to the level of the uncompensated share of gas emissions under the first carbon budget, i.e., 15 Mt CO<sub>2</sub> . . . . As regards the cumulative effect of the damage linked to the persistence of greenhouse gases in the atmosphere and the damage likely to result therefrom, in the absence of elements making it possible to quantify such damage, and whereas the request for the payment of a symbolic euro in compensation for the ecological damage

has already been paid . . . it is necessary . . . to order the enactment of such measures within a sufficiently short period of time to prevent the aggravation of such damage. In the context of the present dispute, the concrete measures likely to enable the damage to be repaired can take various forms and therefore express choices that are at the discretion of the Government.

\* \* \*

We turn to a similar effort in Mexico, where Greenpeace, an NGO, filed suit against the National Institute of Ecology and Climate Change, the Inter-Secretarial Commission on Climate Change, the Secretariat of Environment and Natural Resources, the Council of Climate Change, and the Mexican President. Greenpeace alleged that Mexico’s revised Nationally Determined Contributions (NDC) would adversely affect its members’ right to health and a healthy environment.

**Incident under Review R.A.(I) 81/2021**  
Eleventh Collegiate Court of the First Circuit in  
Administrative Matters, Mexico (2021)\*

[The Eleventh Collegiate Court of the First Circuit in Administrative Matters, comprised of José Luis Cruz Álvarez, Fernando Andrés Ortiz Cruz, and Luis Carlos Vega Margalli, delivered the following judgment:]

. . . [T]he complainant challenged the development and approval of the “Revision of the Nationally Determined Contributions Updated in 2020” . . . .

. . . [T]he precautionary measure requested . . . [seeks] provisionally [to] adjust the unconditional target of a 22% reduction in GHG [greenhouse gas] emissions to the increase [in the baseline]\*\*; avoid the elimination of the GHG emissions peak that was stipulated for 2026; and stop the elimination of [Mexico’s] 50% GHG emissions reduction targets for 2050. . . .

. . . [T]he “Revision of the Nationally Determined Contributions Updated in 2020” constitutes Mexico’s updated “Nationally Determined Contribution” (NDC), in accordance with the General Law on Climate Change (LGCC), as well as Article 4 of the Paris Agreement,\*\*\* through which the Mexican State adopted the commitments

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\* Translation by Lucía Baca (Yale Law School, Class of 2024).

\*\* In its 2015 Nationally Determined Contributions (NDC), Mexico committed to a 22% reduction in greenhouse gas (GHG) emissions by 2030 as compared to 2000 levels. The revised NDC presented in 2020 raised the baseline against which the emission reduction would be measured, which Greenpeace argued would allow the emission of 14 million additional tons of carbon dioxide equivalent.

\*\*\* Article 4 of the Paris Agreement requires each Party to prepare, communicate, and maintain successive NDCs in order to contribute to the long-term temperature goal set out in Article 2, i.e.,

assumed in the year 2015, in the United Nations Framework Convention on Climate Change (UNFCCC), and specifies the way in which it will work collaboratively with the international community to keep the global temperature increase below 2°C and make additional efforts to . . . [limit warming to] 1.5°C . . . .

. . . [T]he complainant is a civil association whose mission includes the protection of the environment and the preservation and restoration of the ecological balance; and, through the lawsuit it seeks to . . . [avoid] damages to the environment in defense of a collective right; therefore, . . . [it has] a legitimate interest in requesting the desistance of the challenged act. . . .

Article 107, section X, of the Magna Carta establishes that when the nature of the act allows the suspension to be granted, the jurisdictional body must carry out a weighted analysis of the appearance of . . . the social interest.

. . . [G]ranted the precautionary measure does not affect the social interest or contravene public order provisions; rather, it privileges the right to a healthy environment and the right to health.

In addition, there is an appearance of good right that justifies granting the precautionary measure, since there is a presumption that the challenged regulation modified, in a non-progressive manner, the “Climate Change Mitigation and Adaptation Commitments for the 2020-2030 Period,” assumed by Mexico in the United Nations Framework Convention on Climate Change. . . .

A stable climate system is linked to a healthy environment and, in addition, to the rights to life, family, water, housing, and food; which is why in the United Nations Framework Convention on Climate Change the contributions to be made by countries were determined such that . . . [the cumulative effort] could reach a safe level of global emissions and protect the related human rights, . . . .

Thus, changes to the environmental planning and policy model contained in the “Climate Change Mitigation and Adaptation Commitments for the 2020-2030 Period” must be progressive. . . .

. . . [T]he challenged regulation modifies the measures, objectives, and action plans originally presented in the “Commitments for Mitigation and Adaptation to Climate Change for the 2020-2030 Period”; therefore, it is preliminarily considered that the execution of the . . . [modifications] could affect the environment, as well as the compliance with the aforementioned international commitments. . . .

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holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.



. . . [By] granting the precautionary measure[, the court] seeks to restore, at least provisionally, the enjoyment of the human right to health, on better terms than those provided for in the “Revision of the Nationally Determined Contributions, Updated in 2020”; especially taking into consideration that it is a right enjoyed by all human beings and that, given its nature, it must be widely protected. . . .

. . . It is appropriate to grant the precautionary measure . . . [as follows]:

Suspend the implementation of the “Revision of the Updated Nationally Determined Contributions in 2020”; and

In its place, continue with the corresponding actions in terms of the provisions of the “Climate Change Mitigation and Adaptation Commitments for the Period 2020-2030,” issued by the Mexican State in 2015. . . .

\* \* \*

The next two decisions stem from the effort by a group of Australian children, who applied for a preliminary injunction to prevent the Minister for the Environment from approving a new coal mine project; their theory was that the Minister owed them a “duty of care.” As you will see, the first decision in *Sharma* imposes a freestanding duty of care on the government with respect to climate harms, which is also the legal basis of the *Urgenda* decision in the Netherlands.\* In the Netherlands, the concept that the government is subject to a basic duty of care has been well established. The *Sharma* holding was the first such decision by an Anglo-American common law jurisdiction, which called on the minister to respond to the newly-articulated duty, rather than issue an injunction. On review, the second decision pulled back from the proposition that a duty of care exists.

**Sharma and Others v. Minister for the Environment**  
Federal Court of Australia  
[2021] FCA 560, 774

[Judgment of Bromberg, J:]

1. The applicants claim that . . . the Commonwealth Minister for the Environment (Minister) owes them and other Australian children a duty of care. They also claim an injunction to restrain an apprehended breach of that duty. . . .

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\* HR 20 December 2019, ECLI:NL:HR:2019:2006 (The State of the Netherlands / Urgenda Foundation) (Neth.).

6. The second respondent is Vickery Coal Pty Ltd, a wholly owned subsidiary of Whitehaven Coal Pty Ltd. Whitehaven holds development consent under the Environmental Planning and Assessment Act 1979 (NSW) (EPA Act) for a coal mine in northern New South Wales, known as the Vickery Coal Project (the Approved Project). . . .

8. The Minister has before her the decision to approve or refuse the Extension Project under s 130(1) and s 133 of the [Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act)]. This proceeding concerns that decision.

9. . . . [T]he applicants claim that the Minister owes each of the Children a duty to exercise her power under s 130 and s 133 of the EPBC Act with reasonable care so as not to cause them harm. That duty of care is said to arise by reason of the existence of a legal relationship between the Minister and the Children recognized by the law of negligence.

10. The applicants apprehend that the Minister will fail to discharge the duty by exercising her discretion in favour of the approval of the Extension Project. The applicants seek declaratory and injunctive relief designed to preclude the Minister from failing to discharge the duty of care they claim she has.

11. The particular harm relevant to the alleged duty of care is mental or physical injury, including ill-health or death, as well as economic and property loss. The applicants assert that the Children are likely to suffer those injuries in the future as a consequence of their likely exposure to climatic hazards induced by increasing global surface temperatures driven by the further emission of CO<sub>2</sub> into the Earth's atmosphere. The feared climatic hazards include more, longer and more intense bushfires, storm surges, coastal flooding, inland flooding, cyclones and other extreme weather events. . . .

15. The Minister does not dispute that climate change presents serious threats and challenges to the environment, the Australian community and the world at large. However, the Minister denies the existence of a duty of care as alleged. The Minister denies that injury to the Children from the approval of the Extension Project is reasonably foreseeable and says that the relevant salient features point overwhelmingly against the recognition of the novel duty of care contended for by the applicants. Additionally, the Minister contends that if a duty of care exists, there is no reasonable apprehension that the duty will be breached and for that and other reasons no proper basis to grant injunctive relief. The Minister contends that the proceeding should be dismissed. . . .

29. . . . The risk of injury alleged by the applicants extends to many forms of what may broadly be described as climatic hazards. Each of these hazards, bushfires

being one example, are alleged to be events which climate change will induce in terms of either frequency, ferocity or geographical spread. The risk of harm in question in this case is therefore harm induced by climate change and, more specifically, harm induced by increases in the Earth's average surface temperature. The applicants alleged that such harm will occur in the future and mainly towards the end of this century when global surface temperatures are forecast to be significantly higher than they are currently. . . .

75 . . . [T]he evidence demonstrates that the risk of harm to the Children from climatic hazards brought about by increased global average surface temperatures, is on a continuum in which both the degree of risk and the magnitude of the potential harm will increase exponentially if the Earth moves beyond a global average surface temperature of 2°C, towards 3°C and then to 4°C above the pre-industrial level. . . .

138. The applicants do not shy from the proposition that their case calls for a development in the law. They accept that legal principles which control the capacity of a court to develop the law are applicable. They contend, however, that the common law is not a set of static rules. . . . I accept . . . that the common law “is a body of principles capable of application to new situations, and in some degree of change by development”. . . .

247. I have concluded that a reasonable person in the Minister's position would foresee that . . . each of the Children is exposed, through the occurrence of heatwaves or bushfires, to the risk of death or personal injury. However . . . the proper inquiry is narrower. What needs to be established is that the injury to the Children is a foreseeable consequence of the Minister's approval of the Extension Project. . . .

256. In my view, the applicability of the ‘precautionary principle’ to the Minister's decision-making attunes both the foresight and response required of a reasonable person in the Minister's position to the risks that the plausible scientific evidence confirms will be faced by the Children. . . . [T]his is a case where the foreseeability of the probability of harm from the defendant's conduct may be small, but where the foreseeable harm, should the risk of harm crystallise, is catastrophic. . . .

271. The risk of harm to the Children is not remote, it is reasonably foreseeable and it is therefore a real risk for reasons already explained. The Minister has direct control over the foreseeable risk because it is her exercise of power upon which the creation of that risk depends. To my mind, there is therefore a direct relation between the exercise of the Minister's power and the risk of harm to the Children resulting from the exercise of that power. The entirety of the risk of harm flowing from that exercise of power is therefore in the Minister's control. . . .

311. It is not necessary for me to determine whether legal obligations are imposed upon the Minister by reason of the *parens patriae* doctrine. It is sufficient to

observe that common law jurisdictions have historically identified and our courts continue to identify that there is a relationship between the government and the children of the nation, founded upon the capacity of the government to protect and upon the special vulnerability of children. . . . [T]he recognition that children have a special vulnerability bolsters ‘vulnerability’ and ‘reliance’ as affirmative indicators of a duty of care. . . .

469. . . . [T]here are three matters which serve to deny a determinative negative role for indeterminacy. First, the posited duty of care is only concerned with personal injury where indeterminacy commonly has no role to play. . . .

470. Second, the Minister is informed (including by this proceeding) or has the capacity to be sufficiently informed, at least in global terms, about the likely number of potential claimants and the likely nature of their claims. . . .

471. There is one further matter . . . . Negligence is about attributing responsibility for careless conduct by reference to the contemporary standards of the reasonable person. Attribution ought to reflect the extent of a defendant’s responsibility for the harm suffered. There can be no doubt that the Minister will not bear sole responsibility for the harms alleged by the Children, should those harms eventuate. . . . But the fact that others would share responsibility greatly diminishes the ubiquitous cry of immense liability which underpinned the Minister’s submission about indeterminacy. . . .

474. It is sometimes said that a duty of care cannot be imposed where it would cut across a “policy decision” or, in other words, that no duty of care should be owed in respect of the exercise of a power by a statutory authority involving public policy . . . .

478. In that respect the Minister said that her statutory duty was political or policy-based because it required choices to be made or value-laden political judgments to be made about matters of importance. . . . [T]he fundamental point made by the Minister was that her statutory task was steeped in policy considerations appropriately dealt with by her without intervention by the common law. In that respect the Minister contended that how to manage the competing demands of society, the economy and the environment over the short, medium and long term, is a multifaceted political challenge. . . . The Minister contended that the imposition of a common law duty of care that, by contrast, would render tortious all activities that involve generating (or allowing someone else to generate) material quantities of greenhouse gases is a blunt and inappropriate response. . . .

483. The question then is what remains to sustain the idea that the imposition of a duty of care in this case would be an inappropriate intervention by the common law . . . .

484. . . . [But] courts are regularly required to deal with legal issues raised in the milieu of political controversy. A political controversy can never provide a principled basis for a Court declining access to justice. . . .

485. . . . “Thus, it is no answer to a claim in tort against the Commonwealth under s 75(iii) of the Constitution that its wrongful acts or omissions were the product of a ‘policy decision’ taken by the Executive Government; still less that the action is ‘non-justiciable’ because a verdict against the Commonwealth will be adverse to that ‘policy decision’” . . . .

490. . . . In totality, in my view, the relations between the Minister and the Children answer the criterion for intervention by the law of negligence. . . .

492. The applicants seek a *quia timet* injunction to restrain the Minister from an apprehended breach of the duty of care they assert she owes to the Children. . . . I accept the Minister’s submission that the restraint that would be imposed by the injunction sought would inevitably require the Minister not to approve the application for the Extension Project. . . . If I granted the injunction, the Minister could approve that application, but only on the condition that coal is not extracted. . . .

502. . . . By pre-empting the Minister’s decision, the injunction which is sought may deny rather than induce the reasonable response which the duty of care requires. A court should always avoid imposing a restraint unless satisfied it is warranted and, where the imposition of a restraint may fetter a statutory discretion, there is even greater reason for not imposing an unnecessary and unjustified restraint. . . .

505. If it were the case that any rights the applicants and the class they represent may have to injunctive relief would be irretrievably lost unless an injunction was now granted, a lower threshold may be appropriate for determining whether a breach of the duty is reasonably apprehended. However, there are a number of reasons for thinking that any rights the applicants may have are not necessarily foreclosed should an injunction be refused. . . .

508. In the circumstances, including that the harm in question is not imminent, I consider it is highly undesirable to pre-empt the Minister’s decision. It would be far more appropriate to assess whether any breach of the duty of care should be restrained once it is known what it is the Minister proposes to do or what she has done in relation to the application to approve or not approve the Extension Project. . . .

512. For those reasons, I refuse the applicants’ application for a *quia timet* injunction.

\* \* \*

After the first *Sharma* decision was issued, the Minister for the Environment approved the expansion of the mine. Under the Federal Court of Australia Act 1976, litigants can appeal the judgment of a single judge of the Federal Court to a Full Court of three or more judges. On March 15, 2022, Chief Judge Allsop, Judge Beach, and Judge Wheelahan, sitting as a Full Court of the Federal Court of Australia, overturned the *Sharma* judgment.

**Minister for the Environment v. Sharma and Others**  
Federal Court of Australia  
[2022] FCAFC 35

[Judgment of a panel consisting of Chief Judge Allsop, Judge Beach, and Judge Wheelahan.]

[Chief Judge Allsop:]

. . . 7. For the reasons that follow the Minister’s appeal against the imposition of a duty of care in the terms articulated and against the conclusion that human safety was an implied mandatory statutory consideration should be upheld. The latter implication cannot be derived from the EPBC Act. . . . The imposition of the duty should be rejected. First, the posited duty throws up for consideration at the point of breach matters that are core policy questions unsuitable in their nature and character for judicial determination. Secondly, the posited duty is inconsistent and incoherent with the EPBC Act. Thirdly, considerations of indeterminacy, lack of special vulnerability and of control, taken together in the context of the EPBC Act and the nature of the governmental policy considerations necessarily arising at the point of assessing breach make the relationship inappropriate for the imposition of the duty. . . .

15. . . . The duty here, however, is framed by reference to contributing to carbon dioxide emissions into the atmosphere by the combustion of the coal mined. That duty throws up for consideration at the point of assessing breach the question of the proper policy response to climate change and considerations unsuitable for resolution by the Judicial branch of government. . . . A duty that calls up such questions should not be imposed: It is one of core, indeed high, policy-making for the Executive and Parliament involving questions of policy (scientific, economic, social, industrial and political) which are unsuitable for the Judicial branch to resolve in private litigation by reference to the law of torts and potential personal responsibility for indeterminate damages, if harm eventuates in decades to come. . . .

[Judge Beach:]

. . . 359. Usually in litigation concerning whether a duty of care is owed, one has the advantage of dealing with the alleged completed tort, having identified the

personal circumstances of an individual claimant, the precise harm suffered by that individual and the applicable factual causation mechanism linking the defendant's alleged negligence with that individual's harm. Actual factual causation can be addressed, and then compared with the appropriate retrospective hypothetical or counterfactual involved with a "but for" analysis . . . . Further, a knowledge of and consideration of such questions feeds back into a more informed analysis concerning the questions of duty and breach. Causation cannot be assessed without identifying the act or omission said to constitute the breach. And breach depends upon identifying the duty of care and its scope. . . .

362. There is another frame of reference question that I should deal with at the outset concerning the salient features approach to determining whether a duty of care is owed. I have no difficulty with it so long as it is appreciated that it is only a conceptual tool. But it should not distract from considering the broader questions, such as whether there is sufficient closeness and directness between the Minister and her exercise of statutory power to approve on the one hand, and any reasonably foreseeable effects on the respondents to this appeal or those that they represent (the claimant class) on the other hand by reason of such exercise. But it may be accepted that the salient features approach has useful and necessary flexibility. Such an approach recognises that the significance of particular features to a case are context dependent. Further, it implicitly accepts that there may be no bright-line between some of the features, such as questions of policy and incoherency with the statutory regime. Other examples are the overlap between the questions of sufficient closeness and directness and control of risk, and between sufficient closeness and directness and indeterminacy.

363. In summary and given the prevailing paradigm of authority binding upon me, I have reached the view that a lack of sufficient closeness and directness and its related partial inverse, namely, indeterminacy, are such as to deny the posited duty of care. . . .

633. . . . I accept that policy questions are involved. But whatever they may be, they can adequately be dealt with at the breach stage. In my view, where the Minister may create a danger by exercising her statutory power in favour of approving a project, policy is no answer to denying the duty unless the Act itself makes such policy questions so fundamental to the exercise of statutory power that such a conclusion is compelling. I am not so compelled to find here. . . .

695. . . . [T]here is no physical, temporal or relational closeness between the Minister and her exercise of power and its consequences on the one hand, and the claimant class on the other hand. Further, the relevant statutory regime and the specific exercise of the statutory power in question has no direct function or purpose concerning human safety or indeed GHG emissions. . . .

696. . . . [T]he central question is whether there is a sufficient closeness and directness. And in my view, the claimant class have not demonstrated the requisite sufficient closeness and directness.

697. First, there is no temporal closeness between the Minister and her exercise of statutory power to approve on the one hand, and the effects on the claimant class on the other hand by reason of such exercise. Indeed, the gap is many decades. . . .

698. Second, there is no geographic closeness. The claimant class consists of members all over Australia. . . .

699. Third, there is no causal closeness and directness between the approval on the one hand, and the effects on the claimant class on the other hand, in the sense that there are many links and other actors in the causal chain. . . .

700. Fourth, there is no otherwise relationship between the Minister and the claimant class, whether to be gleaned from the Act or otherwise.

743. . . [T]he claimant class . . . [also] fail on indeterminacy. . . .

744. Shortly put, in my view the likely number of members of the claimant class with the characteristics that I have identified are not readily ascertainable today. One can identify all those alive today in terms of the relevant universe and in a diffuse sense say that they are at risk from GHG emissions and higher temperatures. But that is not addressing the subset with the relevant characteristics who are simply unascertainable today, even assuming that the claimant class has been properly defined. . . .

746. Further, why confine the duty to the claimant class, as opposed to all living people at the relevant time, including those presently unborn, who will be exposed to the same risks as the claimant class, albeit for different periods of time? And why exclude from the class those that only suffer property damage. Or why exclude consequential economic loss claims? There is no reason in principle to do so. . . .

[Judge Wheelahan:]

. . . 869. . . . For the reasons that I have already given, I would hold that the declaration as to the existence of a duty of care was in error, and I would do so whether or not the claimed risk of injury was reasonably foreseeable. Additionally, . . . I am not persuaded that a decision by the Minister to approve the Extension Project would give rise to a foreseeable risk of injury to the respondents or any of those whom they represent. . . .



**VZW Klimaatzaak v. Kingdom of Belgium**  
Brussels Court of First Instance  
2015/4585/A (2021)\*

[Before Judge Malengreau, Judge Englebert, and Judge Van Den Broeck:]

. . . . The plaintiffs request the Tribunal to:

1) Find . . . that the defendants have not, by 2020 at the latest, reduced the overall volume of annual greenhouse gas emissions from the Belgian territory by 40%, or at least by 25%, compared to the level in 1990; . . .

3) Find . . . that in pursuing their climate policy the defendants violate the fundamental rights of the plaintiffs, and more specifically Articles 2 and 8 of the [European Court of Human Rights] and Articles 6 and 24 of the International Convention on the Rights of the Child;

4) Order . . . the defendants to take the necessary measures to induce Belgium to reduce or cause to be reduced the overall volume of annual greenhouse gas emissions from the Belgian territory so as to achieve: in 2025, a reduction of 48%, or at least 42%, compared to the 1990 level; in 2030, a reduction of 65%, or at least 55%, compared to 1990 levels; in 2050, a net zero emission;

5) Continue . . . the case in order to verify whether the defendants have achieved the objectives imposed for the deadlines of 2025 and 2030; . . .

. . . [N]either party disputes the existence and seriousness of the threat of dangerous global warming. . . .

According to Article 2 and Annex II of Decision 2002/358/EC183, Belgium had to reduce its GHG emissions by 7.5% from the 1990 level by 2012. . . . Belgium had . . . committed itself to reducing its GHG emissions by 20% compared to 1990 by 2020. . . .

In Belgium, climate policy is not assigned as such and exclusively to the federal state or to one of the federated entities of the country. Each entity, federal or federated, is competent to carry out a climate policy within the framework of its own competences . . . . However, the federal structure does not exempt the federal state or the federated entities from their obligations, be they internal, European or international, [such as from the Paris Agreement]. . . .

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\* Unofficial machine translation provided by the Climate Litigation Network.

. . . [C]ooperation between the federal authority and the federated entities is, by the admission of various state bodies, deficient to date, which leads some authors to consider the climate governance framework to be fundamentally inadequate. . . . [E]very year since 2011 the European Union has highlighted Belgium's difficulties in achieving its climate targets and in defining coordinated action between all entities. The systematic and almost repetitive nature of the remarks and warnings issued by the European authorities to Belgium for almost ten years is thus clear.

The combination of . . . the mixed results in terms of figures; the lack of good climate governance; [and] repeated warnings from the European Union; and this in a context where the Belgian public authorities were fully aware of the certain risk of dangerous climate change for the country's population in particular, makes it possible to establish that neither the federal State nor any of the three Regions acted with prudence and diligence within the meaning of Article 1382 of the Civil Code. . . .

. . . [T]hese . . . findings make it possible to consider that the . . . defendants have not, at present, taken all the necessary measures to prevent the effects of climate change on the life and privacy of the plaintiffs, as they are obliged to do under Articles 2 and 8 of the ECHR. Contrary to what the defendants maintain, Belgian federalism is not an obstacle to a finding of concurrent fault by the four entities cited in this case. On the contrary, it is precisely the cooperative federal structure of Belgium that leads to the conclusion that both the federal state and each of the three regions are individually responsible for the lack of climate governance outlined above. . . .

The plaintiffs ask the court to order the defendants to take the necessary measures to bring Belgium to reduce the overall volume of GHG emissions from the Belgian territory: in 2025, by 48%, or at least 42%, of the 1990 level; in 2030, by 65%, or at least 55%, of the 1990 level; by 2050, to achieve zero net emissions.

However, this request for an injunction cannot be granted without infringing the principle of the separation of powers. . . . [I]f the judiciary is competent to establish the fault committed by the public authority, even in the exercise of its discretionary power, it cannot, on this occasion, deprive the latter of its political freedom nor substitute itself for it. The judiciary cannot assess the appropriateness of the action of the public authority when the latter is exercising its competence nor exercise itself the discretionary power which belongs to this public authority.

It is therefore necessary to check whether the injunction requested does not tend to lead the tribunal to substitute itself for the legislative or administrative authority in the exercise of its discretionary competence. . . . [N]either international nor European law directly requires Belgium to reduce its GHG emissions by the various percentages referred to by the plaintiffs in their application.

Thus, the parties to the UNFCCC failed to agree on successor commitments to the Kyoto Protocol for 2012. The Paris Agreement does not provide for quantified and individualized emission reduction targets. . . . International law is therefore limited to setting a common objective, i.e. to keep the increase in average global temperature “well below” 2°C below pre-industrial levels and the commitment to “pursue efforts” to limit it to 1.5°C, while leaving *it* to the States concerned to “determine the means” of contributing to it. . . .

On the European level, the only legally binding commitments for Belgium are found in Regulation (EU) 2018/842, which requires it to reduce its GHG emissions in the non-ETS sectors by 35% compared to 2005 by 2030, and in Directive (EU) 2018/2001, which requires it to provide 13% of its gross final energy consumption to be renewable.

Furthermore, the fact that the European Union has committed itself to GHG emission reduction targets of 55% below 1990 levels by 2030 and carbon neutrality by 2050 on its territory, including that of Belgium, does not allow the country to be legally committed to such targets. Moreover, with regard to the Union itself, its “European Green deal” is a letter of intent rather than a unilateral commitment with binding force.

In Belgium, in their respective declarations, the federal and regional governments acknowledge the relevance of the European GHG emission reduction targets. . . . However, neither the governmental declarations nor the various plans or other strategic documents are in themselves a source of legally binding obligations for the Belgian public authorities.

In fact, the plaintiffs are essentially basing themselves on the report of the Expert Group on Climate and Sustainable Development to determine the GHG emission reduction targets they are asking the Tribunal to impose collectively on the Federal State and the Regions. This report by the Belgian expert group, whose scientific merit is certainly not disputed, argues that the total volume of Belgian GHGs needs to be reduced by about 65% compared to 1990 by 2030 and, to reach carbon neutrality by 2050, for Belgium to effectively contribute to the Paris agreement’s objective of limiting warming to 1.5°C and preventing dangerous climate change. The report also suggests an intermediate range of 42% to 48% reduction for 2025 to ensure the 2030 target is achieved.

However, this scientific report does not constitute a legally binding source of obligation for the public authorities. It is an expert opinion that can assist the public authorities in implementing their climate policy, but it is not binding on the defendants or the court. Therefore . . . the way in which Belgium will participate in the global GHG emissions reduction target is currently a matter for its legislative and executive bodies to decide. . . .

Thus, it is not for the judge to determine the quantified GHG emission reduction targets for all sectors that Belgium should meet in order to do its part in preventing dangerous global warming. . . . [W]hile it is within the remit of the tribunal to note a failure on the part of the federal state and the three regions, this does not organize it, by virtue of the principle of separation of powers, to itself set targets for reducing Belgium's GHG emissions.

The plaintiffs' request for an injunction will therefore be declared unfounded. . . .

**Thomson v. Minister for Climate Change Issues**  
High Court of New Zealand, Wellington Registry  
[2017] NZHC 733

Mallon, J.:

[1] This is a judicial review proceeding concerning the Government's response to climate change. It is brought by the plaintiff who is a law student concerned at that response and the consequences of its alleged inadequacy on future generations. . . .

[6] This judicial review challenges two decisions made by the Minister for Climate Change Issues. Each concerns a target for reducing harmful greenhouse gas emissions. . . .

[7] The [second] decision concerns the setting of a 2030 target pursuant to an international agreement (the Paris Agreement). . . .

[99] . . . The plaintiff contends the defendant failed to take into account . . . relevant considerations in making the NDC decision . . . .

[100] The plaintiff seeks a declaration that the NDC decision was unlawful, and orders quashing the NDC decision and directing that the decision be remade. . . .

[102] An issue arises, however, as to whether the Court can appropriately review the decision. The defendant says it cannot. The defendant's submission about this involves two slightly different points:

- (a) First, the defendant submits the Government's decision setting the 2030 target is not amenable to review because it was set pursuant to an international obligation that has not been incorporated into domestic law and that therefore its compliance with that obligation is a political matter which is not reviewable.
- (b) Secondly, the defendant submits the 2030 target decision involves questions of socio-economic and financial policy, requiring the balancing of

many factors. This means it is not susceptible of determination by any legal yardstick and the assessment of the relevant factors is one that is appropriately made by those elected by the community. . . .

[133] . . . [I]t may be appropriate for domestic courts to play a role in Government decision making about climate change policy. . . . The courts have not considered the entire subject matter is a “no go” area, whether because the state had entered into international obligations, or because the problem is a global one and one country’s efforts alone cannot prevent harm to that country’s people and their environment, or because the Government’s response involves the weighing of social, economic and political factors, or because of the complexity of the science. . . The various domestic courts have held they have a proper role to play in Government decision making on this topic, while emphasizing that there are constitutional limits in how far that role may extend. The IPCC reports provide a factual basis on which decisions can be made. Remedies are fashioned to ensure appropriate action is taken while leaving the policy choices about the content of that action to the appropriate state body.

[134] . . . I proceed to consider the particular grounds advanced in light of these considerations.

[135] In setting the [Intended Nationally Determined Contributions (INDC)] the Minister obtained extensive economic modelling of the costs of reducing emissions . . . . That economic modelling used a “business as usual” scenario. That is, it simulated a future in which no action on climate change is taken against which alternate possible futures are compared. It also assumed the economy would continue to grow at its current rate. . . .

[139] . . . I do not accept the economic modelling on which the Minister’s INDC and [Nationally Determined Contributions (NDC)] decisions were based involved a failure to take into account a mandatory relevant consideration. For one thing, the Minister was alerted to concerns about the modelling from some quarters and therefore presumably took them into account, but this did not cause the Minister to form any different view about how to carry out the modelling. Moreover, neither the Convention nor the Paris Agreement stipulate any specific criteria or process for how a country is to set its INDC and NDC, nor how it is to assess the costs of the measures it intends to take. The Paris Agreement seeks a contribution from a country that represents its “highest possible ambition” and developing countries should continue “taking the lead by undertaking economy-wide absolute emission targets” but it leaves these matters to be nationally determined.

[140] Moreover, the economic modelling was only one input into the NDC decision. The dangerous consequences of climate change are in a sense already part of or inherent in the decision. The reason why New Zealand is a party to the Convention,

the Kyoto Protocol and the Paris Agreement is because it accepts the dangerous consequences of inaction. Its targets are predicated on that fact. New Zealand also accepts that it must play a leadership role, although its own efforts at reducing emissions will make no difference if other countries do not play their part. The business as usual modelling, carried out by the experts that were engaged, simply recognised this reality.

[141] There may have been better ways for the Minister to assess the costs of action and inaction. If there are, the new Minister may pursue those options. However I am not able to say that the INDC and NDC were outside the proper bounds of the Minister's power because of the manner in which the economic modelling was undertaken. . . .

[158] The last pleaded mandatory relevant consideration concerns the scientific consensus that the Parties' combined INDCs fell short of the extent and speed of reductions needed to stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. . . .

[159] The plaintiff contends the Minister failed to consider this between communicating New Zealand's INDC and confirming it as the NDC. In my view this was not a mandatory relevant consideration at this stage of the Paris Agreement process. Under the Paris Agreement each country was to determine their own NDC. The assumption under this Agreement is that a country's INDC would become its NDC on ratifying the agreement unless the country notifies otherwise. The Paris Agreement did not require countries to repeat the substantial process involved in deciding upon an INDC between communicating the INDC and confirming it as the NDC. There was no requirement for countries to adopt a target that if adopted by all would achieve warming well below 2°C, nor to alter its NDC because the combined INDCs were insufficient to meet the target. This stage of the process is about individual decision making (towards the common goal). The Paris process envisages a 2018 facilitative dialogue intended to assess the collective progress towards the long term temperature goal.

[160] The Minister set New Zealand's NDC, considering it to represent New Zealand's fair contribution in light of its national circumstances, recognised it would need to determine ways to "bend the curve" on our greenhouse emissions and to show progression over time. The nature of the decision involved a balancing of competing factors. . . . A differently constituted Government may have balanced the competing factors differently and made different choices about how to lower our emissions. But that does not mean the NDC was outside the proper bounds of the Minister's power . . . .

[179] . . . I am not persuaded the Minister made any reviewable error for which the Court may intervene. . . . New Zealand remains free to review its 2030 target (or any other target) as it considers appropriate. . . .

[180] For these reasons the application for judicial review is dismissed.

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## **Implementing the Paris Agreement**

While a patchwork of domestic and international laws may allow individuals to bring suit against their governments, the Paris Agreement provides a different mechanism by which litigants may try to limit their countries' harmful impact on climate change. Through the Paris Agreement, adopted in 2015, 193 members of the United Nations Framework Convention on Climate Change committed to work together to lower their emissions and increase the ability of lower-resourced member states to adapt to climate change effects. The Agreement's goal is to keep the rise in mean global temperature to well below 2 °C (3.6 °F) above pre-industrial temperature levels but signatories hope to limit the increase to only 1.5 °C (2.7 °F). The Agreement also aims to reach net-zero emissions by the mid-21<sup>st</sup> century.

Notwithstanding its scientific complexity and the intense political negotiation that was its predicate, the Paris Agreement has been positioned by advocates as a potential lever to invoke in courts to force countries into further reducing their emissions. Under the terms of the Paris Agreement, countries are required to formulate their own national-level commitments to climate change mitigation. However, the Paris Agreement contains no internal enforcement mechanisms. Litigants must therefore ask domestic courts to not only ensure, within the constraints of domestic legal systems, that national policies are enacted in accordance with the Paris Agreement, but also ensure that those policies fulfil national commitments made under the agreement.

The excerpts below examine the role of courts in considering these issues. We begin in Germany, where a court held in favor of, mostly, children and young activists of the “Fridays for Future” movement, who sued the German government for insufficient emission reduction targets. As you read, consider the way in which courts identify, characterize, and utilize the scientific facts of climate change, many of which—such as temperature targets and CO<sub>2</sub> budgets—have normative dimensions. Consider also the inherently international nature of climate change and the position national courts take when called upon to make enforceable an international agreement like the Paris Agreement.

**Order of the First Senate of 24 March 2021 (Climate Change)**  
Federal Constitutional Court of Germany  
1 BvR 2656/18 (2021)\*

The complainants primarily claim that the state, in enacting the Climate Change Act, has failed to introduce a legal framework sufficient for swiftly reducing greenhouse gases, especially carbon dioxide (CO<sub>2</sub>). They deem this to be necessary because a temperature increase of more than 1.5°C would place millions of lives in danger and would risk the crossing of tipping points with unforeseeable consequences for the climate system. They claim that the reduction of CO<sub>2</sub> emissions as laid down in the Federal Climate Change Act is not sufficient to stay within the remaining CO<sub>2</sub> budget. The complainants—some of whom live in Bangladesh and Nepal—rely primarily on constitutional duties of protection of the right to health and life arising from Art. 2(2) first sentence GG and property arising from Art. 14(1) GG, as well as on a . . . fundamental right to an ecological minimum standard of living . . . With regard to future burdens . . . after 2030, . . . they rely on fundamental freedoms more generally.

. . . These complaints are partially successful. . . .

I. Where the complainants are natural persons, their constitutional complaints are admissible.

The Federal Government holds the view that the special non-domestic circumstances of the matter exclude the possibility of a fundamental rights violation from the outset. But the complainants who live in Bangladesh and Nepal are particularly vulnerable to changes in climatic conditions. It cannot be ruled out from the outset that the fundamental rights of the Basic Law also oblige the German state to protect them against these.

It is also true that climate change is a genuinely global phenomenon and could obviously not be stopped by the German state on its own. However, this does not render it impossible or superfluous for Germany to make its own contribution towards protecting the climate. . . .

However, the two environmental associations, have no standing as “advocates of nature.” The Basic Law and procedural law make no provision for standing of this kind.

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\* Press release and abridged version of the decision provided by the Federal Constitutional Court of Germany, available at [www.bverfg.de](http://www.bverfg.de).



II. It cannot be ascertained that duties of protection . . . are violated due to the risks posed by climate change. . . . The state's duty of protection . . . also encompasses the duty to protect life and health against the risks posed by climate change, including climate-related extreme weather events such as heat waves, forest fires, hurricanes, heavy rainfall, floods, avalanches and landslides. It can furthermore give rise to an objective duty to protect future generations. Since climate change can moreover result in damage being caused to property such as agricultural land or real estate (e.g. due to rising sea levels or droughts), the fundamental right to property . . . also imposes a duty of protection on the state. But there is leeway afforded to the legislator in fulfilling these duties. [All measures] would have to be considered manifestly unsuitable for affording the protection. . . . An entirely inadequate approach would be to allow climate change to simply run its course, using nothing but so-called adaptation measures. . . . [But this is not] the case here.

III. However, fundamental rights are violated by the fact that the emission amounts allowed until 2030 under [the Act] substantially narrow the remaining options for reducing emissions after 2030, thereby jeopardising practically every type of freedom protected by fundamental rights. As intertemporal guarantees of freedom, fundamental rights afford the complainants protection against comprehensive threats to freedom caused by the greenhouse gas reduction burdens that are mandatory under Art. 20a GG being unilaterally offloaded onto the future. The legislator should have taken precautionary steps to ensure a transition to climate neutrality that respects freedom—steps that have so far been lacking.

1. The challenged provisions have an advance interference-like effect (*eingriffsähnliche Vorwirkung*) on the freedom comprehensively protected by the Basic Law. The possibilities to exercise this freedom in ways that directly or indirectly involve CO<sub>2</sub> emissions come up against constitutional limits because, seen from today's perspective, CO<sub>2</sub> emissions make a largely irreversible contribution towards global warming and, under constitutional law, the legislator may not allow climate change to progress *ad infinitum* without taking action. Provisions that allow for CO<sub>2</sub> emissions in the present time constitute an irreversible legal threat to future freedom . . . ; any exercise of freedom involving CO<sub>2</sub> emissions will therefore be subject to increasingly stringent, and indeed constitutionally required, restrictions. . . . [If] much of the CO<sub>2</sub> budget were already depleted by 2030, there would be a heightened risk of serious losses of freedom because there would then be a shorter timeframe for the technological and social developments required to enable today's still heavily CO<sub>2</sub>-oriented lifestyle to make the transition to climate-neutral behaviour in a way that respects freedom.

In order to be constitutional, the advance interference-like effect of current emission provisions—an effect that arises not only *de facto*, but also *de jure*—must be compatible with the objective obligation to take climate action as enshrined in Art. 20a GG. An interference with fundamental rights can only be justified under constitutional

law if the underlying provisions comply with the core precepts and general constitutional principles of the Basic Law, of which Art. 20a GG is a part. . . .

2. It cannot presently be ascertained that [the Act] violates Art. 20a GG, [which] places the state under an obligation to take climate action and is aimed at achieving climate neutrality. Climate action does not take absolute precedence over other interests. In cases of conflict, it must be balanced with other constitutional interests and principles. However, given that climate change is currently deemed to be almost entirely irreversible, any behaviour that leads to an exceeding of the critical temperature threshold for achieving the constitutional climate goal would only be justifiable under strict conditions—such as for the purpose of protecting fundamental rights. Within the balancing process, the obligation to take climate action is accorded increasing weight as climate change intensifies.

The obligation . . . is not invalidated by the fact that the climate and global warming are worldwide phenomena and that the problems of climate change cannot therefore be resolved by the mitigation efforts of any one state on its own. The climate action mandate . . . possesses a special international dimension. [It] obliges the state to involve the supranational level in seeking to resolve the climate problem. The state cannot evade its responsibility by pointing to greenhouse gas emissions in other states. On the contrary, the particular reliance on the international community here gives rise to the constitutional necessity to actually implement one's own climate action measures at the national level and not to create incentives for other states to undermine the required cooperation.

In declaring . . . that the Act is based on the Paris target, the legislator is exercising its mandate and prerogative to specify the constitution by formulating the climate goal . . . , setting out that the increase in the global average temperature should be limited to well below 2°C and preferably 1.5°C above pre-industrial levels. This must also form part of the basis for constitutional review.

[Yet with] the leeway afforded to the legislator taken into account, it cannot at present be ascertained that [the Act] violates the obligation to take climate action. . . . Due to the uncertainties and assumptions involved in the approach, the calculated size of the budget cannot, at this point, serve as an exact numerical benchmark for constitutional review. Some decision-making leeway is retained by the legislator. However, the legislator is not entirely free when it comes to using this leeway. If there is scientific uncertainty regarding causal relationships of environmental relevance, [the constitution imposes] a special duty of care on the legislator. This entails an obligation to even take account of mere indications pointing to the possibility of serious or irreversible impairments, as long as these indications are sufficiently reliable. [But at] this point, no violation of the aforementioned duty of care can be ascertained.

3. [The Act] does not, however, satisfy the requirement arising from the principle of proportionality that the reduction in CO<sub>2</sub> emissions to the point of climate neutrality that is constitutionally necessary . . . be distributed over time in a forward-looking manner that respects fundamental rights.

a) According to this requirement, one generation must not be allowed to consume large portions of the CO<sub>2</sub> budget while bearing a relatively minor share of the reduction effort if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to comprehensive losses of freedom. . . . [Since] the current provisions on allowable emission amounts have now already established a path to future burdens on freedom, the impacts on future freedom must be proportionate from today's perspective. . . .

The efforts required under constitutional law to reduce greenhouse gas emissions after 2030 will be considerable. . . . [T]he risk of serious burdens is significant and can only be reconciled with the potentially affected fundamental rights if precautionary steps are taken . . . . Here, it is imperative under constitutional law that further reduction measures are defined in good time for the post-2030 period, extending sufficiently far into the future. . . . [Annual] emission amounts and reduction measures must be defined in such detail that sufficiently specific orientation is provided.

b) . . . While it cannot be expected that the decreasing emission amounts already be precisely defined from the present time until the date envisaged for achieving climate neutrality in 2050, it is nonetheless insufficient that the Federal Government is only obliged to draw up a new plan once – in 2025 – by means of an ordinance. . . .

c) . . . The legislator must at the very least determine the size of the annual emission amounts to be set for periods after 2030 itself or impose more detailed requirements for their definition by the executive authority responsible for issuing the ordinance.

**Commune of Grande-Synthe v. France**

French Council of State, Administrative Claims Assembly

No. 427301 (2021)\*

[Before the Sixth and Fifth Chambers:]

The Commune of Grande-Synthe asked the Council of State to annul for abuse of power the implicit decisions of rejection resulting from the silence of President of

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\* Translation provided by Braden Currey (Yale Law School, Class of 2023).

the Republic and the Prime Minister . . . on its request . . . that all effective measures are taken to bend the curve of greenhouse gas emissions produced on national territory so as to respect the commitments made by France at the international and national levels, that immediate measures for adaptation to climate change are implemented, and that legislative and regulatory initiatives are taken in order to . . . prohibit all measures likely to increase greenhouse gas emissions.

[The Commune asks the Council] to enjoin the Prime Minister [and other relevant ministers] to take the aforementioned measures and provisions . . . .

[The Commune stressed the particular vulnerability of Grand-Synthe to the impacts of climate change, since it is a low-lying coastal commune threatened by sea-level rise and flooding.]

. . . [I]t appears from the documents produced . . . that national greenhouse gas emissions amounted to approximately 441 Mt CO<sub>2</sub> in 2019, based on the latest available consolidated data filed by the parties. . . [T]his level of greenhouse gas emissions makes France one of the lowest-emitting industrialized countries [with a per-capita level of greenhouse gas emissions that is about 85% of the EU average]. . . .

It also appears from the submitted documents that the carbon budget . . . is limited to providing for a reduction in greenhouse gas emissions of around 6% over a five-year period (2019-2023 and a reduction of around 12% is planned over the following five-year period (2024-2028), corresponding to the 3<sup>rd</sup> carbon budget . . . In this context, as the applicant and the interveners argue, it is also apparent from the documents in the file . . . that this new path for reducing greenhouse gas emissions requires the adoption of additional short-term measures to meet the 2023 target. As early as its April 2019 opinion on the new [National Low-Carbon Strategy (SNBC), enacted to comply with the Paris Agreement,] projections for 2019-2023, the [Economic, Social and Environmental Council (ESEC) had expressed doubts as to the ability of the policies proposed in the SNBC [and the decarbonization program in the Energy Code] to establish the essential preconditions to meet these emissions-reduction projections. In its annual report published in July 2020, the [High Council for the Climate (HCC)], for its part, noted that the reduction in greenhouse gas emissions continued to be too slow and, in any case, insufficient to reach the ceilings set by current and future carbon budgets. This is also the case in view of the change in EU policy to cap 2030 emissions at 55% compared to their 1990 level, rather than 40%, which was the subject of an agreement between the European Parliament and the Council in April 2021 and which has just been formally adopted by these two institutions. This acknowledgment of the need to step up efforts to achieve the objectives set for 2030 and of the impossibility, given the measures adopted to date, of achieving [these targets] is not seriously contested by the Minister for Ecological Transition . . . . On the basis of the measures already in force, it is clear that the 2030 emissions targets will not be achieved.

Accordingly, the implicit refusal of the executive to take additional measures to curb greenhouse gas emissions produced on national territory to ensure compliance with emissions objectives [set out in national and EU law] should be annulled. Consequently, it is necessary for the Council of State to order that additional measures be enacted before March 31, 2022.

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After the government failed to meet the March 31, 2022 deadline, the municipality of Grande-Synthe and the NGOs announced that they would ask the Council of State to note that the government had not taken the necessary measures and to order a penalty payment. In 2020, the Council of State had ordered such a penalty after deciding that the government had not implemented plans to reduce air pollution in accordance with a prior judgment. On May 4, 2022, the government responded, asserting that the actions it will take under the next five-year term will make it possible to meet its emissions targets. In response, a lawyer for Grande-Synthe noted that the government's five-year plan did not include any decarbonization measures that had not already been considered by the Council. This extended litigation demonstrates the complexity inherent in judicial efforts to enforce national commitments to climate goals.

**Bushfire Survivors for Climate Action, Inc. v. Environmental  
Protection Authority**  
Land and Environment Court of New South Wales, Australia  
[2021] NSWLEC 92

Moore, J.:

[1] A climate action group, Bushfire Survivors for Climate Action (BSCA), seeks an order . . . to compel an environmental regulatory agency, the Environment Protection Authority (EPA), to perform a statutory duty to develop environmental quality objectives, guidelines and policies to ensure the protection of the environment from climate change. The duty on the EPA is imposed by s 9(1)(a) of the *Protection of the Environment Administration Act 1991* (NSW) (POEA Act). . . .

[70] BSCA argues that the environmental quality objectives, guidelines and policies that need to be developed must not only ensure environment protection from climate change generally, but more particularly such instruments must:

- “(a) address the topics of greenhouse gas emissions and climate change;
- (b) address the environmental impacts of greenhouse gas emissions;

- (c) regulate sources of direct and indirect greenhouse gas emissions consistent with limiting global temperature rise to 1.5°C above pre-industrial levels;
- (d) are adapted to reducing direct and indirect sources of greenhouse gas emissions consistent with limiting global temperature rise to 1.5°C above preindustrial levels;
- (e) are calculated to keep greenhouse gas levels at a level which is appropriate having regard to the best available science;
- (f) ensure environment protection;
- (g) are adapted to ensuring environment protection.” . . .

[79] BSCA contends that a target consistent with a global average temperature rise of 1.5°C above pre-industrial levels is appropriate, based on the evidence, for four reasons. First, it is a target, a long-term temperature goal, in the Paris Agreement. Article 2(1)(a) states that the Paris Agreement aims to strengthen the global response to the threat of climate change by “holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.”

[80] Secondly, . . . limiting the increase in global average temperature to 1.5°C will ensure environment protection to a greater degree than would be possible if the increase in global average temperature were to be higher.

[81] Thirdly, limiting the temperature increase to 1.5°C lessens the risk of crossing tipping points. . . . [T]ipping points in the Earth system refer to thresholds that, if crossed, lead to far reaching and in some cases abrupt or irreversible changes in the Earth’s subsystems. The most devastating risk of continued global warming is that some of the Earth’s subsystems, such as Arctic [S]ea ice, ocean circulation, the Amazon rainforests and coral reefs, will become unstable and tip irreversibly into new states that accelerate the effects of climate change. . . .

[83] Fourthly, setting a temperature increase of 1.5°C is still feasible . . . .

[84] BSCA contends that the current emissions reduction trajectories for both Australia and New South Wales are not consistent with limiting global average temperature rise to 1.5°C above pre-industrial levels. . . .

[90] On this evidentiary foundation, BSCA contends that the environmental quality objectives, guidelines and policies to ensure environment protection, which the EPA is required to develop, need to regulate sources of direct and indirect greenhouse gas emissions consistent with limiting global temperature rise to 1.5°C above pre-industrial levels.

[91] BSCA argues that this outcome or objective is supported by the general responsibility of the EPA of “ensuring that the best practicable measures are taken for environment protection in accordance with the environment protection legislation and other legislation.” BSCA submits that the best practicable measures to protect the environment in New South Wales from climate change is to reduce direct and indirect sources of greenhouse gas emissions consistent with limiting global temperature rise to 1.5°C above pre-industrial levels. . . .

[96] I find that the duty under s 9(1)(a) of the POEA Act to develop environmental quality objectives, guidelines and policies to ensure environment protection does not require such instruments to address the topic of climate change at the level of specificity claimed by BSCA . . . .

[97] No doubt, the environmental quality objectives, guidelines and policies to ensure environment protection developed by the EPA could address these matters, and may be the better for doing so, but the EPA is not compelled by the terms of the duty to do so. As the EPA submitted, there are legitimate policy choices to be made in formulating the regulatory approaches and local actions that should be pursued to protect the environment from climate change. The controls on the EPA’s discretion in performing the duty are the negative and positive controls that I have earlier described . . . . On a proper construction of s 9(1)(a), the statutory description of the instruments required to be developed under s 9(1)(a) does not demand that the instruments address the matters with the level of specificity claimed by BSCA . . . .

[While the court found the EPA was not compelled to follow the level of specificity required by the Paris Agreement, the court ordered the EPA to develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change.]

**Plan B Earth and Others v. Secretary of State for Transport**  
Supreme Court of the United Kingdom  
[2020] UKSC 52

[B]efore Lord Reed, President, Lord Hodge, Deputy President, Lady Black, Lord Sales, [and] Lord Leggatt.

Lord Hodge and Lord Sales (with whom Lord Reed, Lady Black and Lord Leggatt agree):

1. This case concerns the framework which will govern an application for the grant of development consent for the construction of a third runway at Heathrow Airport. . . .

7. . . . [O]n 12 December 2015 the text of the Paris Agreement on climate change was agreed and adopted. The Paris Agreement set out certain obligations to reduce emissions of greenhouse gases. . . . On 22 April 2016 the United Kingdom signed the Paris Agreement and on 17 November 2016 the United Kingdom ratified the Agreement.

8. An expansion of airport capacity in the South East would involve a substantial increase in CO<sub>2</sub> emissions from the increased number of flights which would take place as a result. . . .

9. On 25 October 2016, the Secretary of State announced that the NWR Scheme [to expand the airport] was the Government’s preferred option. . . .

10. On 5 June 2018 the Secretary of State laid before Parliament the final version of the Airports NPS (“the ANPS”) . . . .

11. On 25 June 2018 there was a debate on the proposed ANPS in the House of Commons, followed by a vote approving the ANPS . . . .

13. Objectors to the NWR Scheme commenced a number of claims against the Secretary of State to challenge the lawfulness of the designation of the ANPS on a wide variety of grounds. . . .

14. The Divisional Court dismissed all the claims brought by objectors, including those brought by the respondents to this appeal (Friends of the Earth—“FoE” —and Plan B Earth). FoE is a non-governmental organization concerned with climate change. Plan B Earth is a charity concerned with climate change.

15. However, the Court of Appeal allowed appeals by FoE and Plan B Earth and granted declaratory relief stating that the ANPS is of no legal effect and that the Secretary of State had acted unlawfully in failing to take into account the Paris Agreement in making his decision to designate the ANPS. . . .

17. HAL [Heathrow Airport Ltd] appeals to this court with permission granted by the court. . . .

70. At the heart of the challenge to the ANPS is the Paris Agreement . . . .

101. . . . Section 5(7) and (8) of the PA 2008 . . . provide that an NPS must give reasons for the policy set out in the statement and that the reasons must explain how the policy in the NPS “takes account of Government policy relating to the mitigation of, and adaptation to, climate change.”

102. Mr Crosland for Plan B Earth . . . submits that it was unlawful for the Secretary of State when stating the reasons for the policy in the ANPS in June 2018 to



have treated as irrelevant the Government’s commitment to (a) the temperature target in the Paris Agreement and (b) the introduction of a new net-zero carbon target. The Government’s commitment to the Paris Agreement targets constituted “Government policy” within the meaning of section 5(8) of the PA 2008 and so should have been addressed in giving the reasons for the ANPS.

112. . . . [T]he section 5(8) challenge fails . . . . It is conceded that the Paris Agreement itself is not Government policy. . . . It is not in dispute that the internationally agreed temperature targets played a formative role in the development of government policy. But that is not enough for Plan B Earth to succeed in this challenge. . . .

115. Section 10 of the PA 2008 applies to the Secretary of State’s function in promulgating an NPS. In exercising that function the Secretary of State must act with the objective of contributing to the achievement of sustainable development. . . .

129. In our view, . . . , the Secretary of State certainly did ask himself the question whether he should take into account the Paris Agreement beyond the extent to which it was already reflected in the obligations under the CCA 2008 and concluded in the exercise of his discretion that it would not be appropriate to do so. . . .

139. FoE and Plan B Earth complain that the environmental report which the Secretary of State was required under the SEA Directive to prepare and publish was defective, in that it did not make reference to the Paris Agreement. . . .

149. . . . [T]he Court of Appeal cannot be sustained in light of the relevant evidence on the facts. As we have explained, the Secretary of State did not treat the Paris Agreement as legally irrelevant and on that basis refuse to consider whether reference should be made to it. . . .

167. It follows that HAL succeeds . . . . We would allow the appeal.

## **JUSTICIABILITY OF CLIMATE LITIGATION**

While some courts have addressed the merits of whether governments are adequately attempting to address the effects of climate change, others continue to grapple with the justiciability of such a question. In the cases collected below, courts address standing, political question doctrine, exhaustion of remedies, and the feasibility of remedies.

We begin with decisions declining, on procedural grounds, to hear climate litigation cases. A first case, *Sacchi v. Argentina et al.*, was before the Committee on

the Rights of the Child (CRC), a United Nations body which declined jurisdiction over a case because of plaintiff's failure to exhaust domestic remedies. The petitioners in *Saachi*, sixteen children, brought suit against five countries (Argentina, Brazil, France, Germany, and Turkey) under an Optional Protocol to the Convention on the Rights of the Child, which permits individual children to submit communications to the CRC alleging that a state has violated their rights under the Convention. The excerpt below is taken from the CRC's decision in the case against Argentina; the Committee used similar reasoning to dispose of the claims against the other four states.

**Sacchi v. Argentina et al.**

United Nations Committee on the Rights of the Child  
No. CRC/C/88/D/104/2019 (2021)

[Before Suzanne Aho, Aissatou Alassane Sidikou, Hynd Ayobi Idrissi, Rinchen Chopel, Bragi Gudbrandsson, Philip Jaffe, Sopi Kiladze, Gehad Madi, Faith Marshall-Harris, Benyam Dawit Mezmur, Clarence Nelson, Mikkio Otani, Luis Ernesto Pederena Reyna, Zara Ratou, José Ángel Rodríguez Reyes, Ann Marie Skelton, Velina Todorova, and Benoit Van Keirsbilck:]

1.1. . . . At the time of the submission of the complaint the authors were all under the age of 18 years. They claim that by failing to prevent and mitigate the consequences of climate change, [six states have] violated their rights under articles 6 (1-2), 24 and 30, read in conjunction with article 3 of the Convention. The Optional Protocol entered into force for [Argentina, the state party to this decision,] on 14 July 2015. . . .

3.1. The authors claim that by recklessly causing and perpetuating life-threatening climate change, the State party has failed to take necessary preventive and precautionary measures to respect, protect, and fulfil their rights to life, health, and culture. . . . The 1.1°C rise in global average temperature is presently causing devastating heat waves, fostering the spread of infectious diseases, forest fires, extreme weather patterns, floods, and sea level rise. Because children are among the most vulnerable to these life-threatening impacts, physiologically and mentally, they will bear the burden of these harms far more and far longer than adults. . . .

3.3. The authors contend that the climate crisis is a children's rights crisis. The States parties to the Convention are obliged to respect, protect and fulfill children's inalienable right to life, from which all other rights flow. Mitigating climate change is a human-rights imperative. . . . They argue that the State party has failed to uphold its obligations under the Convention to (i) prevent foreseeable domestic and extraterritorial human rights violations resulting from climate change; (ii) cooperate internationally in the face of the global climate emergency; (iii) apply the precautionary principle to protect life in the face of uncertainty; and (iv) ensure intergenerational justice for children and posterity. . . .

3.4. The authors claim that the State party's acts and omissions perpetuating the climate crisis have already exposed them throughout their childhood to the foreseeable, life-threatening risks of human-caused climate change . . . .

3.5. The authors claim that the State party's acts and omissions perpetuating the climate crisis have already caused injuries to their mental and physical health, from asthma to emotional trauma. These injuries violate their right to health under article 24 of the Convention and the injuries will worsen as the world continues to warm. . . .

3.6. The authors claim that the State party's contributions to the climate crisis have already jeopardized millennia-old subsistence practices of the indigenous authors . . . which are not just the main source of their livelihoods, but directly relate to a specific way of being, seeing, and acting in the world, that are essential to their cultural identity.

3.7. By supporting climate policies that delay decarbonization, the State party is shifting the enormous burden and costs of climate change onto children and future generations. In doing so, it has breached its duty to ensure the enjoyment of children's rights for posterity, and failed to act in accordance with the principle of intergenerational equity. . . .

3.8. The authors request that the Committee should find that: 1) climate change is a children's rights crisis; 2) that the State party, along with other states, has caused and is perpetuating the climate crisis by knowingly acting in disregard of the available scientific evidence regarding the measures needed to prevent and mitigate climate change; and 3) that by perpetuating life-threatening climate change, the State party is violating the authors' rights to life, health, and the prioritization of the child's best interests, as well as the cultural rights of the authors from indigenous communities. They further request that the Committee recommends that: 1) the State party reviews, and where necessary, amends its laws and policies to ensure that mitigation and adaptation efforts are being accelerated to the maximum extent of available resources and on the basis of the best available scientific evidence to (i) protect the authors' rights and (ii) make the best interests of the child a primary consideration, particularly in allocating the costs and burdens of climate change mitigation and adaptation . . . .

4.2. The State party argues that the communication is, in relation to Argentina, absolutely generic and legally indeterminate. The communication contains four references related to alleged events that occurred within the jurisdiction of the State party: i) an alleged "wind storm" in Haedo, Province of Buenos Aires, which allegedly devastated the neighbourhood of the author, Chiara Sacchi; ii) the alleged "extreme heat" in this town, that increased the use of air conditioners and therefore the pressure on the electrical system, causing power outages that are common in the author's daily life, affecting her schoolwork and ruining food stored in the refrigerator; iii) alleged

recent storms, in which the author was hit by hail the size of golf balls; and iv) that the author is very scared about the future due to climate change. However, the communication does not provide any evidence to support these considerations, nor does it delimit the legal reproach against the State party. . . .

5.2. The authors note the State party's argument that the communication should be found inadmissible for lack of jurisdiction. They argue that the Committee is competent to examine the communication as the State party has effective control over economic activities in its territory that emit greenhouse gases . . . . As to the specific question of causation, i.e. whether climate change, to which the State party is contributing, has caused an actual or imminent violation of the rights of each author, the authors argue that this is a merits issue. At the admissibility phase, they have presented substantiated allegations of the actual and imminent violations of their rights to life, health, and cultural rights caused by climate change . . . .

10.7. . . . [T]he Committee finds that the appropriate test for jurisdiction in the present case is that adopted by the Inter-American Court of Human Rights . . . . This implies that when transboundary harm occurs, children are under the jurisdiction of the State on whose territory the emissions originated for the purposes of article 5 (1) of the Optional Protocol if there is a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory . . . . The Committee further considers that while the required elements to establish the responsibility of the State are rather a matter of merits, the alleged harm suffered by the victims needs to have been reasonably foreseeable to the State party at the time of its acts or omissions even for the purpose of establishing jurisdiction. . . .

10.12 Having concluded that the State party has effective control over the sources of emissions that contribute to the causing of reasonably foreseeable harm to children outside its territory, the Committee must now determine whether there is a sufficient causal link between the harm alleged by the authors and the State party's actions or omissions for the purposes of establishing jurisdiction. . . . The Committee considers that, as children, the authors are particularly impacted by the effects of climate change, both in terms of the manner in which they experience such effects as well as the potential of climate change to affect them throughout their lifetime, in particular if immediate action is not taken. Due to the particular impact on children, and the recognition by States parties to the Convention that children are entitled to special safeguards, including appropriate legal protection states have heightened obligations to protect children from foreseeable harm. . . .

10.14. . . . [T]he Committee concludes that the authors have sufficiently justified, for the purposes of establishing jurisdiction, that the impairment of their Convention rights as a result of the State party's acts or omissions regarding the carbon emissions originating within its territory was reasonably foreseeable . . . .

10.15. The Committee notes the State party’s argument that the communication should be found inadmissible for failure to exhaust domestic remedies. It notes the State party’s argument that article 41 of the Constitution expressly recognizes the right to a healthy environment, that article 43 recognizes the “*acción de amparo ambiental*” (environmental writ of *amparo*), and that the General Environmental Law contains several provisions that enable actions in environmental matters (“*acción de recomposición del daño ambiental colectivo*”—writ of redress for a collective environmental damage). . . .

10.17. The Committee recalls that authors must make use of all judicial or administrative avenues that may offer them a reasonable prospect of redress. The Committee considers that domestic remedies need not be exhausted if they objectively have no prospect of success . . . . However, the Committee notes that mere doubts or assumptions about the success or effectiveness of remedies do not absolve the authors from exhausting them.

10.18. In the present case the Committee notes that the authors have not attempted to initiate any domestic proceeding in the State party. The Committee notes the authors’ argument that they would face unique obstacles in exhausting domestic remedies as it would be unduly burdensome for them, unreasonably prolonged, and unlikely to bring effective relief. . . . Furthermore, the Committee notes the State party’s argument that legal avenues were available to the authors in the form of an environmental writ of *amparo* under article 43 of the Constitution as well as in the form of writ of a redress for a collective environmental damage under the General Environmental Law. . . . In the absence of any further reasons from the authors as to why they did not attempt to pursue these remedies, other than generally expressing doubts about the prospects of success of any remedy, the Committee considers that the authors have failed to exhaust all domestic remedies that were reasonably effective and available to them to challenge the alleged violation of their rights under the Convention. . . .

10.21. Consequently, the Committee finds the communication inadmissible for failure to exhaust domestic remedies under article 7 (e) of the Optional Protocol.

**Carvalho and Others v. European Parliament**  
European Court of Justice  
Case C-565/19 P (2021)

[Before Larsen, Toader, and Jääskinen, Judges:]

1. By their appeal, Mr Armando Carvalho and 36 other appellants . . . seek the setting aside of the order of the General Court of the European Union . . . by which the General Court dismissed as inadmissible their action seeking, first, the partial annulment of [an EU directive] to enhance cost-effective emission reductions and low-

carbon investments . . . (ii) [an EU regulation] on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement . . . and (iii) [an EU regulation] on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and, second, compensation in the form of an injunction for the damage which the appellants claim to have suffered.

2. The appellants operate in either the agricultural sector, including reindeer husbandry, or the tourism sector. . . .

5. The Paris Agreement focuses on the concept of ‘nationally determined contributions.’ Article 4(2) thereof provides:

‘Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.’

6. The European Union and its Member States have committed jointly to complying, by means of their nationally determined contributions, with a binding target of reducing greenhouse gas emissions within the European Union by at least 40% by 2030 in relation to 1990 levels.

7. The acts at issue were adopted by the European Union in order to comply with the Paris Agreement as regards contributions determined at national level. . . .

26. In support of their appeal, the appellants rely on four grounds of appeal, alleging that the General Court erred (i) in finding that the appellants were not individually concerned; (ii) on account of the failure to adapt the settled case-law on locus standi in order to guarantee the legal protection of fundamental rights . . . and (iv) in rejecting their claim for damages . . . .

40. The General Court held, in essence . . . that the fact that the effects of climate change may be different for one person than they are for another and that they depend on the personal circumstances specific to each person does not mean that the acts at issue distinguish each of the appellants individually. In other words, the fact that the appellants, owing to the alleged circumstances, are affected differently by climate change is not in itself sufficient to establish the standing of those appellants to bring an action for annulment of a measure of general application such as the acts at issue. . . .

44. The first part of the first ground of appeal must therefore be rejected. . . .

46. According to settled case-law, which has not been altered by the Treaty of Lisbon, natural or legal persons satisfy the condition of individual concern only if the contested act affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed . . . .

50. Therefore, the General Court was fully entitled to hold, in paragraph 49 of the order under appeal, that the appellants had not established that the contested provisions of the acts at issue distinguished them individually from all other natural or legal persons concerned by those provisions just as in the case of the addressee. . . .

71. Under [the Treaty on the Functioning of the European Union], any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

72. In that regard, the General Court correctly held, in paragraph 35 of the order under appeal, that the acts at issue do not identify the appellants as being the addressees of those acts and that, consequently, the first scenario in which a natural or legal person has standing to bring proceedings . . . .

80. [T]he second ground of appeal must therefore be rejected. . . .

103. . . . [A]n action for damages must be declared inadmissible where it is actually aimed at securing withdrawal of an individual decision which has become final and it would, if upheld, have the effect of nullifying the legal effects of that decision. That is the case if the applicant seeks, by means of a claim for damages, to obtain the same result as he would have obtained had he been successful in an action for annulment which he failed to commence in due time . . . .

105. . . . The action, taken as a whole, shows that the claim for compensation, which is formulated as an injunction, is intended not to obtain damages for harm attributable to an unlawful act or an omission, but to amend the acts at issue. Thus . . . both by their claim for annulment and by their request for an injunction, the appellants seek to obtain the same result, namely the replacement of the acts at issue with new measures that are more severe than those currently laid down in terms of reducing greenhouse gas emissions. . . .

107. The fourth ground of appeal must therefore be rejected, and the appeal must be dismissed in its entirety. . . .

\* \* \*

As previously noted, some judges have concluded that climate litigation raises political questions not to be decided by courts. Excerpted below are some examples of this analysis.

**Greenpeace v. United Kingdom**  
Scottish Court of Sessions  
[2021] CSIH 53

Opinion of the Court delivered by Lord Carloway, the Lord President [joined by Lord Menzies and Lord Pentland]: . . .

[2] . . . [A challenge is brought on] whether the environmental impact, not of the exploitation process but of the consumption thereafter of the extracted and refined oil, [should have been] a relevant consideration [in the Secretary of State’s decision to grant a consent for BP to build two new production wells]. . . .

[12] Regulation 5A(1)(a) provides that the Secretary of State, when deciding whether to agree to a consent, must “examine . . . any representations . . . made by any other person about the environmental effects of the project” . . . .

[14] In 1981, BP [was] granted a licence to search for, bore for and “get” petroleum in the Vorlich field. . . .

[15] . . . On 3 April [2018], BP applied to the OGA . . . for the necessary consent for two new production wells in the field. . . .

[20] On 19 June 2018, the Secretary of State requested further information from BP, including a habitat assessment and an environmental baseline survey report. These were provided on 6 and 30 July. . . .

[22] On 20 September 2018, the OGA notified BP of the grant of consent for the works. . . .

[24] Offshore construction and installation . . . commenced in January 2019. Drilling operations began in June and were completed in November. This work had cost about £230 million. . . .

[28] In November 2019, the appellants applied for a judicial review of the consent on multiple grounds in the High Court of Justice in London. On 5 February 2020, permission to proceed was refused by Lang J for the ninth ground that the Secretary of State had failed to take a relevant consideration into account; viz. the effect of the consumption of the oil on the UK’s carbon budget and its contribution to climate change. . . .



[29] On 3 April 2020 the parties executed a consent order in these terms. . . .

[30] . . . The appellants lodged this appeal, and a parallel petition for judicial review, challenging both the agreement and the consent. . . .

[63] The relevant considerations which [are] require[d] to be taken into account in an environmental impact assessment . . . are set out in regulation 3A. So far as is relevant to the current appeal, the applicant is required to assess the direct and indirect significant effects of the project on, amongst other elements, the climate and the operational effects of the relevant project. . . .

[64] The question is whether the consumption of oil and gas by the end user, once the oil and gas have been extracted from the wells, transported, refined and sold to consumers, and then used by them are “direct or indirect significant effects of the relevant project”. The answer is that it is not. The exercise which the applicant had to carry out, and the Secretary of State had to assess, was a determination of the significant effects of drilling the two wells and removing the oil and gas. That involved considering the effects of depositing and operating an exploration rig or rigs on site. The ultimate use of a finished product is not a direct or indirect significant effect of the project. It is that effect alone which, in terms of the Regulations, must be assessed. . . .

[67] In *Finch*, Holgate J . . . explain[ed] that the overall responsibility for the transition to a low carbon society, including the net zero target in the Climate Change Act 2008, lay with the UK Government. . . . Once more, the court finds itself in agreement with Holgate J . . . .

[68] It would not be practicable, in an assessment of the environmental effects of a project for the extraction of fossil fuels, for the decision maker to conduct a wide ranging examination into the effects, local or global, of the use of that fuel by the final consumer. . . . The Secretary of State’s submission that these are matters for decision at a relatively high level of Government, rather than either by the court or in relation to one oilfield project, is correct. The issue is essentially a political and not a legal one. . . .

[71] The appeal is refused.

**Juliana v. United States**  
U.S. Court of Appeals for the Ninth Circuit  
947 F.3d 1159 (9th Cir. 2020)

Before Mary H. Murguia and Andrew D. Hurwitz, Circuit Judges, and Josephine L. Staton, District Judge [sitting by designation].

Hurwitz, Circuit Judge:

. . . The plaintiffs are twenty-one young citizens, an environmental organization, and a “representative of future generations.” . . . The operative complaint accuses the government of continuing to “permit, authorize, and subsidize” fossil fuel use despite long being aware of its risks, thereby causing various climate-change related injuries to the plaintiffs. . . . The complaint asserts violations of: (1) the plaintiffs’ substantive rights under the Due Process Clause of the Fifth Amendment; (2) the plaintiffs’ rights under the Fifth Amendment to equal protection of the law; (3) the plaintiffs’ rights under the Ninth Amendment; and (4) the public trust doctrine. The plaintiffs seek declaratory relief and an injunction ordering the government to implement a plan to “phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide].”

The district court denied the government’s motion to dismiss, concluding that the plaintiffs had standing to sue, raised justiciable questions, and stated a claim for infringement of a Fifth Amendment due process right to a “climate system capable of sustaining human life.” . . . The court also concluded that the plaintiffs had stated a viable “danger-creation due process claim” . . . [and] held that the plaintiffs had stated a public trust claim grounded in the Fifth and Ninth Amendments. . . .

The government then moved for summary judgment and judgment on the pleadings. The district court granted summary judgment on the Ninth Amendment claim, dismissed the President as a defendant, and dismissed the equal protection claim in part. But the court otherwise denied the government’s motions, again holding that the plaintiffs had standing to sue and finding that they had presented sufficient evidence to survive summary judgment. . . .

The government . . . has not disputed the factual premises of the plaintiffs’ claims. But it . . . argues that the plaintiffs lack Article III standing to pursue their constitutional claims. To have standing under Article III, a plaintiff must have (1) a concrete and particularized injury that (2) is caused by the challenged conduct and (3) is likely redressable by a favorable judicial decision. . . . The district court correctly found the injury requirement met. . . . The district court also correctly found the Article III causation requirement satisfied for purposes of summary judgment. . . .

The more difficult question is whether the plaintiffs’ claimed injuries are redressable by an Article III court. . . . [Plaintiffs] do not claim that the government has violated a statute or a regulation. They do not assert the denial of a procedural right. Nor do they seek damages under the Federal Tort Claims Act. Rather, their sole claim is that the government has deprived them of a substantive constitutional right to a “climate system capable of sustaining human life,” and they seek remedial declaratory and injunctive relief.

Reasonable jurists can disagree about whether the asserted constitutional right exists. In analyzing redressability, however, we assume its existence. . . . To establish Article III redressability, the plaintiffs must show that the relief they seek is both (1) substantially likely to redress their injuries; and (2) within the district court’s power to award. . . .

The plaintiffs first seek a declaration that the government is violating the Constitution. But that relief alone is not substantially likely to mitigate the plaintiffs’ asserted concrete injuries. . . .

The crux of the plaintiffs’ requested remedy is an injunction requiring the government not only to cease permitting, authorizing, and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions. The plaintiffs thus seek not only to enjoin the Executive from exercising discretionary authority expressly granted by Congress, but also to enjoin Congress from exercising power expressly granted by the Constitution over public lands.

. . . [A]n order simply enjoining those activities will not . . . suffice to stop catastrophic climate change or even ameliorate their injuries. . . . The plaintiffs concede that their requested relief will not alone solve global climate change, but they assert that their “injuries would be to some extent ameliorated.” . . .

We are . . . skeptical that the first redressability prong is satisfied. But even assuming that it is, the plaintiffs do not surmount the remaining hurdle—establishing that the specific relief they seek is within the power of an Article III court. . . . [I]t is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs’ requested remedial plan. . . . [A]ny effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches. . . .

The plaintiffs argue that the district court need not itself make policy decisions, because if their general request for a remedial plan is granted, the political branches can decide what policies will best “phase out fossil fuel emissions and draw down excess atmospheric CO<sub>2</sub>.” . . . But, . . . the plaintiffs’ request for a remedial plan would . . . require the judiciary to pass judgment on the sufficiency of the government’s response to the order, which necessarily would entail a broad range of policymaking. And inevitably, this kind of plan will demand action not only by the Executive, but also by Congress. . . . And, given the complexity and long-lasting nature of global climate change, the court would be required to supervise the government’s compliance with any suggested plan for many decades. . . .

. . . [R]edressability questions implicate the separation of powers . . . . [F]ederal courts “have no commission to allocate political power and influence without standards to guide in the exercise of such authority.” Absent those

standards, federal judicial power could be “unlimited in scope and duration,” and would inject “the unelected and politically unaccountable branch of the Federal Government [into] assuming such an extraordinary and unprecedented role.”

. . . [Plaintiffs] do not suggest how an order from this Court can achieve [atmospheric carbon levels of 350 parts per mission opined by plaintiffs’ experts to stabilize the global climate], other than by ordering the government to develop a plan. . . . We doubt that any such plan can be supervised or enforced by an Article III court. And, in the end, any plan is only as good as the court’s power to enforce it.

. . . We reluctantly conclude . . . that the plaintiffs’ case must be made to the political branches or to the electorate at large. . . . That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes.

For the reasons above, we reverse the certified orders of the district court and remand this case to the district court with instructions to dismiss for lack of Article III standing.

[Judge Staton issued a dissenting opinion.]

## **Should Humanity Have Standing? Securing Environmental Rights in the United States**

Daniel C. Esty (2022)\*

In Professor Christopher Stone’s landmark “Should Trees Have Standing?” article,\*\* he posed the question of whether Nature could, and indeed should, have legally enforceable rights. Today, a handful of countries have granted rights—sometimes in the form of “legal personhood”—to Nature generally or to discrete geographic features, such as mountains or rivers. Many more countries recognize a human right to a healthy environment in one form or another. And a growing number of litigants across the globe—spurred on perhaps by the youth movement for climate change action—have used these rights to force governments or businesses to reduce greenhouse gas emissions. Courts around the world have been increasingly sympathetic to these claims, establishing the judiciary in many nations as an important point of leverage for moving society toward a more sustainable future in general and a more robust response to climate change in particular.

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\* Daniel C. Esty, *Should Humanity Have Standing? Securing Environmental Rights in the United States*, 95 SOUTHERN CALIFORNIA LAW REVIEW (forthcoming 2022).

\*\* Christopher D. Stone, *Should Trees Have Standing?—Toward Natural Rights for Legal Objects*, 45 SOUTHERN CALIFORNIA LAW REVIEW 450 (1972).

In the United States, however, such efforts have met with little success. Recognition of environmental rights remains very limited and largely in the background of the American legal system. . . . Indeed, a number of courts have expressly declined to entertain climate change litigation, rejecting a range of legal theories and assertions of environmental rights advanced by a diverse set of plaintiffs. The judges in these cases consistently suggest that the remedies the plaintiffs seek go beyond what the judiciary can order.

This reality leads to the central puzzle of this article: Why has the conception of environmental rights remained so cramped in the United States in contrast with other nations? . . .

Over the past 50 years, much of the world has come to recognize environmental rights as fundamental to human existence—and therefore to be understood as natural rights that need not be established by law. . . . The importance of environmental conditions to human flourishing is now so widely recognized and highly valued that 150 nations highlight the importance of the environment (framed in a number of different ways) in their constitutions. . . . As David Boyd explains in his seminal study, *The Environmental Rights Revolution*,\* three concurrent waves in the second half of the 20th century contributed to this right’s firm footing in constitutions today: a rise in democratic governance, a global “rights revolution,” and public awareness of severe environmental degradation. Against the backdrop of expanding rights discourse and ecological consciousness, over half of the world’s constitutions were written or re-written, with the majority of framers seizing this opportunity to establish a legal right to a healthy environment. Indeed, over this period environmental rights have been the fastest-growing provision in constitutional revisions. . . . Boyd demonstrates a consistent correlation between a formal right to a healthy environment and strengthened environmental governance and results.

In recent years, the belief that access to a healthy environment is essential to the fulfillment of other human rights has become widely accepted—and increasingly upheld in international legal proceedings . . . .

Nowhere is this trend more visible than at the European Court of Human Rights (ECtHR). Indeed, while European Charter on Human Rights has no explicit reference to the environment, the ECtHR has developed “an elaborate and extensive body of case law that all but in name provides for a right to healthy environment.” . . .

The Court’s decisions suggest that governments retain a degree of flexibility in addressing environmental harms and weighing them against other interests, such as the

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\* DAVID R. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT* (2011).

country’s economic well-being. But the ECtHR has been clear that states have a positive obligation to take preventive measures to address environmental harms. . . .

The increasingly universal recognition of environmental rights suggests that every person should have access to (at least) basic environmental amenities—including clean air to breathe, safe water to drink, freedom from exposure to toxic chemicals, and functioning Earth Systems (including the atmosphere) that provide a “safe operating space for humanity.” So fundamental is this right to human existence that it must be understood to have independent and intrinsic value—and not simply instrumental importance as a pathway to the fulfillment of other fundamental rights such as the right to life or health. Many legal commentators have thus concluded that the right to a healthy environment should be seen as an element of natural law—and therefore part of the universal and foundational moral principles that must be regarded as sacrosanct in all societies at all times. . . .

. . . Courts around the world have advanced environmental rights in recent years and issued decisions that required both governments and corporations to address a diverse set of ecological and public health harms . . . . Taken in their totality, these decisions by trial courts, appeals courts, and supreme courts across all continents make clear that environmental protection is now seen as a fundamental right in most societies. . . .

[Professor Esty continues by canvassing a set of recent efforts by courts to develop a fundamental right to environmental protection, several of which are highlighted below.]

In its 2015 *Leghari* decision, the Lahore High Court [in Pakistan] accepted a farmer’s claim that the government’s failure to carry out its National Climate Change Policy had violated his constitutional right to life—lodging environmental rights under the right to life. The Lahore High Court ordered the creation of a Climate Change Commission charged with developing a framework for reducing GHG emissions in Pakistan. . . . [Professor] Doug Kysar argues the Court’s decision must be read more narrowly and ultimately requiring little “more effective cooperation among various government officials” with the ultimate success of the court-created Commission depending “on the cooperation of existing authorities.” Indeed, as Justice Syed Mansoor Ali Shah explains, the Commission emerged as a “collaborative and participatory tool” in developing national climate policy in Pakistan. The Court monitored the work of the Commission . . . and the government’s response . . . concluding in 2018 that the government had put forward appropriate climate change policies. . . .

In another landmark case, the Hague District Court ordered Royal Dutch Shell to reduce its GHG emissions by 45% by 2030 from the oil company’s 2019 baseline. The 2021 case, brought against Shell by seven Dutch environmental groups and

17,000 individuals, centered on plaintiffs’ claim that the oil company had violated its duty of care under the Dutch Civil Code—which they argued must be interpreted in light of ECHR Articles 2 (right to life) and 8 (right to private and family life). In declaring that Shell must adhere to the “unwritten standard of due care,” the Court concluded that Shell had an obligation to reduce its emissions to “remove serious risks and limit any lasting consequences” of its activities including those of its suppliers and end-users. In highlighting environmental rights . . . and ordering an individual corporation to address its responsibility for GHG emissions outside of statutory obligations, the Hague District Court has expanded the judicial reach in support of a more robust global response to climate change. . . .

. . . [R]ecent cases put France into a global leadership position in terms of judicial recognition of the sustainability imperative—reflecting the idea that the risk of destabilizing critical Earth systems requires a shift in the foundations of the global economy toward deep decarbonization and more sustainable business behavior. The contours of this principle can be seen in the 2019 decision of the Constitutional Council . . . in *Total vs. Prime Minister*, which upheld the National Assembly’s legislation that excluded palm-oil-based biofuels from favorable tax treatment because of worries that palm cultivation in places like Indonesia leads to deforestation and thus increased greenhouse gas emissions. In rejecting the constitutional challenge brought by the French oil company Total, the Council made clear that the Assembly’s priority on climate change action (including indirect emissions caused by land clearing for palm plantations) justified treating palm oil less favorably than other biofuels and was therefore a reasonable exercise of legislative discretion.

Led by Council President Laurent Fabius (who, as Foreign Minister of France, chaired the Council of the Parties (COP21) climate negotiations that produced the 2015 Paris Agreement), the *Total* decision reiterates the Council’s willingness to advance sustainability as a fundamental legal obligation—justifying the conclusion that the National Assembly should be given wide latitude to determine when environment principles will be allowed to over-ride other goals, including ones backed by constitutional claims such as commercial freedom.

The French Council of State (Conseil d’Etat) has similarly put environmental rights at the heart of its recent jurisprudence. In the 2020 *Commune de Grande-Synthe* decision, the judges ordered the French government to protect the coastal community of Grande Synthe from sea level rise and other climate change impacts and signaled a willingness to substantively review the adequacy of the French government’s climate change action plan. Likewise, in the 2021 *Notre Affaire à Tous* case, the Administrative Court of Paris took cognizance of the plaintiffs’ claims that the French government had failed to live up to its climate change commitments and they were entitled to “live in a preserved climate system.” The Court accepted the claim of environmental rights derived from the French Charter for the Environment, the European Convention on Human Rights, French national environmental laws, and

international environmental agreements—and ordered the government to pay (symbolic) damages to the plaintiffs and “take all measures necessary” to reduce GHG emissions to meet the country’s climate goals. In recognizing environmental rights in a variety of circumstances, the French judiciary has thus become a driving force for a sustainable future in general and action on climate change in particular.

. . . Germany’s Constitutional Court sided with a group of youth plaintiffs in the 2021 *Neubauer* case and declared that the government’s inadequate climate change action plan violated nation’s Basic Law (Constitution) protection of “the right to life and physical integrity” (found in Articles 2.2 and 20a). In concluding that the German Basic Law imposed a positive duty on the German government to “protect the climate,” the Court held that the Federal Climate Change Protection Act was, in part, unconstitutional “because it does not sufficiently protect people against future infringements and limitations of freedom rights in the wake of gradually intensifying climate change.” It then ordered the Bundestag (Germany’s federal parliament) to remedy the Act by setting more ambitious GHG reduction targets—including more specific targets for reductions after 2030. . . .

Litigants in the United States seeking to enforce their environmental rights have faced a much more skeptical judiciary. In *Juliana v. United States*, the most high-profile climate case in the federal courts to date, 21 youth plaintiffs organized by Our Children’s Trust (an Oregon-based environmental group) asserted substantive due process claims to a climate system that would sustain life and violations of the federal government’s public trust obligation to protect shared natural resources. The District Court of Oregon initially ruled that the case could go forward based on the theory that “a climate system capable of sustaining human life” was a fundamental right under the Due Process Clause of the Fifth Amendment. But the Ninth Circuit . . . declared that the plaintiffs lacked standing, based on the conclusion that the injury plaintiffs sought to have addressed was not “redressable” by the courts. More specifically, the majority opinion of the Ninth Circuit panel leans on separation of powers arguments and the limits of authority of Article III judges to suggest that, in providing equitable relief, courts are always constrained and can only act where there exist “limited and precise” legal standards to follow.

Three broad conclusions can be drawn from this survey of the judicial response to environmental claims. First, environmental rights are being recognized ever more broadly across the world. Second, the frame and scope of these rights and the underlying legal theories advanced vary across the world—reflecting the individual circumstances, judicial traditions, values, and political dynamics of each society. Finally, the United States stands apart from the rest of the world with regard to the broad trend toward court recognition of environmental rights, clearly suggesting a distinct legal framework and tradition . . . .



The American judiciary’s hesitance to take up climate change cases reflects a . . . distinct legal tradition: a concern that polycentric problems—ones that involve balancing of interests and apportioning of costs—are particularly unsuitable for adjudication by judges. This theory is often associated with Professor Lon Fuller, who analogized polycentric problems to a spider web, where a pull on one strand puts stress across the many other strands and leads to instability. Fuller thus argued that complex policy problems must be left to political processes and not resolved by the judiciary. . . .

Environmental problems generally and climate change in particular present just the sort of polycentric policy challenge that Fuller warned was inappropriate for courts to adjudicate. Not only does climate change policy involve many elements and choices—involving production processes, pollution control possibilities, transportation systems, power generation and energy strategies, clean technology development, and many other aspects of life in modern society—but also multiple trade-offs in which environmental gains for some almost always imply environmental costs for others.

Thus, unlike assertions of civil rights, which will often present bright line choices with clear underlying moral imperatives, environmental rights seem much less clear—and indeed, potentially quite intricate and hard to specify with precision. . . .

. . . [A]ssertions of environmental rights might seem to be relatively unbounded. Do my environmental rights extend to a pristine environment? To a habitable environment? How much money should society (or polluters) be forced to spend to uphold my right? Do I have a right to experience Nature as it is? Does the fact that Nature is not static but rather in a constant state of flux change the scope of the rights? Simply put, if I have a right to a healthy environment, who owes me what duties and to what extent—and at what cost?

While legal cases that require analysis of policy choices, such as climate change litigation, present challenges for the judiciary, a number of scholars, including my Yale colleague Owen Fiss, have pushed back on Lon Fuller’s arguments. Fiss suggests that the judiciary must not shy away from vindicating fundamental rights even in the face of polycentric problems. He argues that “courts should not be viewed in isolation but as a coordinate source of governmental power, as an integral part of the larger political system.” In the American legal system, “the legitimacy of the courts and the power judges exercise in structural reform . . . are founded on the unique competence of the judiciary to . . . give concrete meaning and application to the public values embodied in an authoritative text such as the Constitution.” Cass Sunstein raises a parallel argument, that the task of judges in adjudicating disputes—even those seemingly governed by “some preexisting rule”—is intricate and necessarily requires value judgments. In the context of environmental rights, it is inapposite to suggest that the questions involve too many imprecise calculations or debatable values. If the judiciary is able to weigh the competing concerns of other

rights, both presently enshrined in the Constitution and those recognized in common law, which implicate nearly identical concerns, it is capable of doing so here . . . .

. . . [I]t might be easier within the U.S. constitutional framework to secure negative environmental rights—specifically a right not to be harmed by pollution. Bringing an end to pollution spillovers (or as economists would say, uninternalized environmental externalities) would simply align America’s environmental law and policy framework with long-standing principles of the common law. . . .

Establishing a *right to be free from harmful pollution*—to each of us as individuals and to the resources on which we depend for life—might be seen by American judges as more consistent with the negative rights tradition of the U.S. Constitution. This kind of negative right would be consistent with the widely accepted principle that people have affirmative duties not to harm others—a concept key to modern tort and property law . . . .

. . . [T]he narrow frame of a right to be protected from damaging pollution impacts might also be seen as more judicially manageable. . . .

While a right to be free from harmful pollution would have horizontal effect—establishing duties for private parties as well as the government—it would do so in the most constitutionally protected domain: the right of individuals to the sanctity of their person, their home, and the necessities of life. Framed as a right against harmful pollution intrusions, these negative environmental rights would be seen as offering a bright line that keeps courts clear of the polycentric problem of trying to engage in setting policy goals, allocating costs, or making tradeoffs. . . .

I believe that there is ample basis for concluding that environmental rights should be understood as an element of natural law—meaning, as Professor Shelton proposes, that a narrowly crafted right to a safe and healthy environment should be recognized as an element of human rights and respected in all nations at all times. But to advance this agenda in the United States, the most promising path forward appears to me to be a focus in the federal context on securing negative environmental rights—defined concretely as a right not to be harmed by pollution. In advancing a right centered on enforcing an end to uninternalized environmental externalities, U.S. judges would be able to respond to climate change litigation and other sustainability-related cases in a thoughtful, serious, and tightly focused manner that steers clear of concerns about the separation of powers, the political question doctrine, and appropriate modes of effective judicial relief. Simply put, a narrowly constructed right to be free from harmful emissions would give pollution victims in America standing, which might just be enough to save the planet.

## **TOWARDS A TRANSJURISDICTIONAL LAW OF CLIMATE CHANGE**

In addition to responding to efforts to enforce domestic commitments and international agreements, courts have been asked to hold transnational actors accountable. These efforts have special saliency because some of the largest sources of GHG emissions are not single nation-states, but rather transnational actors. Because these actors generate emissions in a wide variety of jurisdictions, national courts struggle to craft effective legal remedies for climate litigants. We conclude this chapter by exploring whether, in a world in which jurisdictions without major sources of emissions disproportionately bear the effects of climate change, courts can and should work together to develop a trans-jurisdictional law of climate change.

### **Milieudéfensie et al v. Royal Dutch Shell** District Court of the Hague C/09/571932 (2021)

[Before L. Alwin, I.A.M. Kroft, and M.L. Harmsen:]

... 2.1.1. Milieudéfensie was founded on 6 January 1971 . . . , [with the goal of] “ . . . contributing to the solution and prevention of environmental problems . . . , as well as striving for a sustainable society, at the global, national, regional and local level . . . ” . . .

2.2.2. Since the 2005 restructuring of the Shell group, RDS has been the top holding company of the Shell group. . . .

3.1. Milieudéfensie et al. [ask] . . . for the court: . . . to rule: . . . that the aggregate annual volume of CO<sub>2</sub> emissions into the atmosphere due to the business operations and sold energy products of RDS . . . constitutes an unlawful act towards Milieudéfensie et al. and (i) that RDS must reduce this emissions volume . . . , and (ii) that this reduction obligation must be achieved relative to the emissions level of the Shell group in the year 2019 and in accordance with the global temperature target of . . . the Paris Agreement and . . . the related best available (UN) climate science. . . .

3.2. Milieudéfensie et al. . . . claim[ that] . . . RDS has an obligation, ensuing from the unwritten standard of care pursuant to Book 6 Section 162 Dutch Civil Code to contribute to the prevention of dangerous climate change through the corporate policy it determines for the Shell group. For the interpretation of the unwritten standard of care, use can be made of . . . human rights, specifically the right to life and the right to respect for private and family life, as well as soft law endorsed by RDS, such as the UN Guiding Principles on Business and Human Rights, the UN

Global Compact and the OECD Guidelines for Multinational Enterprises. . . . RDS violates this obligation or is at risk of violating this obligation with a hazardous and disastrous corporate policy for the Shell group, which in no way is consistent with the global climate target to prevent a dangerous climate change for the protection of mankind, the human environment and nature. . . .

4.4.5. . . . [T]he Shell group is a major player on the worldwide market of fossil fuels. . . . The total CO<sub>2</sub> emissions of the Shell group exceeds the CO<sub>2</sub> emissions of many states, including the Netherlands. It is not in dispute that these global CO<sub>2</sub> emissions of the Shell group contribute to global warming and climate change in the Netherlands and the Wadden region. . . .

4.4.13. . . . The responsibility of business enterprises to respect human rights, as formulated in the UNGP, is a global standard of expected conduct for all business enterprises wherever they operate. . . . Therefore, it is not enough for companies to monitor developments and follow the measures states take; they have an individual responsibility . . . [to] avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; [and to] seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships . . . .

4.4.20. . . . Regardless of the extent of its control and influence on these emissions, RDS may be expected to identify and assess the adverse effects of its . . . emissions. RDS has done so. It knows that the exploration, production, refinery, marketing, and the purchase and sale of oil and gas by the Shell group as well as the use of products of the Shell group generates significant CO<sub>2</sub> emissions worldwide, which undoubtedly contributes to climate change in the Netherlands and the Wadden region. . . . [F]rom the quotation from the CDP 2019, [it] follows that RDS regularly monitors and assesses the climate-related risks of its business activities and those of its business relations . . . .

4.4.21. Companies subsequently should take ‘appropriate action’ on the basis of their findings and assessments. . . .

4.4.27. . . . The non-binding goals of the Paris Agreement represent a universally endorsed and accepted standard that protects the common interest of preventing dangerous climate change. The court follows this reasoning in its interpretation of the unwritten standard of care. The court assumes that it is generally accepted that global warming must be kept well below 2°C in 2100, and that a temperature rise of under 1.5°C should be strived for. . . . The court includes this broad consensus about what is needed to prevent dangerous climate change – viz. achieving the goals of the Paris Agreement – in its answer to the question whether or not RDS is obliged to reduce the Shell group’s CO<sub>2</sub> emissions via its corporate policy.

4.4.28. The court establishes that tackling dangerous climate change needs immediate attention. . . . The longer it takes to achieve the required emissions reductions, the higher the level of emitted greenhouse gases, and consequently, the sooner the remaining carbon budget runs out. . . . The imperativeness for the Netherlands to reduce CO<sub>2</sub> emissions is even greater, because so far the temperature rise in the Netherlands has developed about twice as fast as the global average . . . .

4.4.34. Milieudefensie et al. would like RDS to do its part and ensure that the CO<sub>2</sub> emissions attributable to the Shell group are reduced. . . .

4.4.49. RDS argues that the reduction obligation will have no effect, or even be counterproductive, because the place of the Shell group will be taken by competitors. . . . Due to the compelling interests which are served with the reduction obligation, this argument cannot justify assuming beforehand there is no need for RDS to not meet this obligation. It is also important here that each reduction of greenhouse gas emissions has a positive effect on countering dangerous climate change. After all, each reduction means that there is more room in the carbon budget. The court acknowledges that RDS cannot solve this global problem on its own. However, this does not absolve RDS of its individual partial responsibility to do its part regarding the emissions of the Shell group, which it can control and influence. . . .

4.4.55. The court concludes that RDS is obliged to reduce the CO<sub>2</sub> emissions of the Shell group's activities by net 45% at end 2030, relative to 2019, through the Shell group's corporate policy. This reduction obligation relates to the Shell group's entire energy portfolio and to the aggregate volume of all emissions. It is up to RDS to design the reduction obligation, taking account of its current obligations. . . .

**Courts Must Provide Climate Change Leadership in the  
Absence of Law-making Progress<sup>\*</sup>**  
Don C. Smith (2019)

While lawmakers round the world have struggled, often unsuccessfully, to enact meaningful climate change legislation, litigation-related activity is increasing, and some courts are moving assertedly ahead to deal directly with the threat. This new trend comes after years of limited success by environmentalists to 'use the courts in their fight to slow the effects of climate change or to hold companies and governments accountable for the crisis.'

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<sup>\*</sup> Don C. Smith, Courts Must Provide Climate Change Leadership in the Absence of Law-making Progress, 39 JOURNAL OF ENERGY & NATURAL RESOURCES LAW 385 (2021).

The trend is underscored by a recent report by the Grantham Research Institute on Climate Change and the Environment finding more than 1,000 climate-related cases have been filed since 2015 in comparison to about 800 cases filed between 1986 and 2014.

The rise in litigation has been attributed to scientists and climate activists who ‘see the response by governments and corporations to the climate threat [as] weak compared to what is needed,’ New York-based Sabin Center for Climate Change Law Fellow Korey Silverman-Roati has said, adding, ‘Litigation is increasingly seen as the only option to fight authorities when they are failing to appropriately address climate change.’ And unlike the past when climate change cases were generally unsuccessful, the trend now appears to be changing. According to the Grantham report, in nearly 370 decided cases, outcomes favoured climate change action in 58 per cent, were unfavourable in 32 per cent, and had no clear impact in ten per cent. . . .

Seeking change through climate litigation may benefit plaintiffs in a number of ways, not least of which is the ‘institutional legitimacy’ attached to court rulings in many legal systems, thus providing ‘a broader systematic effect than their limited enforcement power might otherwise suggest is likely’. On the other hand, seeking court intervention in climate change matters involves significant hurdles including the conservatism of many courts when faced with difficult issues of policy, justice access barriers, and difficulties regarding how to handle scientific evidence.

. . . [S]cepticism [about the role of courts in addressing climate change] has been replaced by significant interest as ongoing court cases and high-profile judgements have seized scholarly and public attention. In addition, the growth in ‘interest in courts as an avenue for pushing positive action on climate change is also a consequence of frustration with the inadequacy of government action’ to address the issue.

. . . [In] *Milieudefensie et al v Royal Dutch Shell PLC*, a Dutch trial court in the Hague found that Shell ‘owed a duty of care to the plaintiffs to reduce [carbon dioxide] emissions from its operations by 45% by 2030 relative to 2019 emission levels.’ The plaintiffs, the Friends of the Earth Dutch branch, had accused Shell of ‘violating human rights by not adhering to the Paris Agreement’s aim of limiting the increase of global temperatures.’ . . .

A court spokeswoman said, ‘The court understands that the consequences could be big for Shell, [b]ut the court believes that the consequences of severe climate change are more important than Shell’s interests.’ The spokeswoman went on to say, ‘Severe climate change has consequences for human rights, including the right to life. And the court thinks that companies, among them Shell, have to respect those human rights.’ During the trial, Shell pointed to steps it had already taken and is taking to reduce carbon emissions, but the court said that the company’s ‘intentions and

ambitions’ amounted largely to ‘rather intangible, undefined and nonbinding plans for the long term.’

The ruling was enormously important in a number of ways, not least of which was because it was ‘the first legal decision in the world [that held] fossil fuel companies accountable for their contribution to climate change,’ according to Columbia University’s Stern Center for Climate Change Law founder and faculty director Michael Gerrard. In addition, the court demanded ‘a change in Shell’s strategy for the future, setting a precedent not just for energy companies but all big greenhouse gas emitters.’ . . .

Several days after the decision was handed down, the Financial Times published an editorial predicting that in the long term, ‘western majors seem set to face unstoppable pressure to shift their business models into new areas such as renewable energy, carbon capture and hydrogen production’. And yet the editorial noted that while climate campaigners had won important victories . . . “it was not in itself a victory for the climate. As long as oil demand holds up, other producers—namely, state-dominated national oil companies [NOCs]—will be happy to step in to meet it. . . . Many NOCs, which together account for more than half of global oil production, privately scoff at what they see as some western majors’ willingness to consign themselves to decline.” . . .

It is evident that ‘the power of the law as a climate action tool is gaining strength with activists filing an ever greater number of lawsuits in an attempt to hold big emitters accountable.’ . . .

Looking ahead, lawsuits filed in Europe will have a greater chance of success . . . . However, the picture in the United States is very different. Despite the fact that President Joe Biden has been referred to as a more ‘climate-friendly president’, New York-based Sabin Center Fellow Korey Silverman-Roati says climate-related litigation is ‘not going anywhere’ in the US. While the US Supreme Court ruled in *Massachusetts v US Environmental Protection Agency* in 2007 that the federal government can regulate carbon dioxide emissions, there has been judicial reluctance— putting it mildly—to ‘impose liability for emissions.’ Moreover, successful lawsuits in the US against private companies seem entirely unlikely because of the US legal system. ‘A climate liability claim against a company or group of companies is always going to fail unless Congress changes the laws around liability. Until then, the courts are going to continue to punt the issue to the legislative branch,’ Bloomberg Intelligence litigation analyst Brandon Barnes says. . . .

And yet despite the attraction of litigation to climate activists seeking a less carbon intensive future, a stark reality is that actions against private companies will not alone bring carbon emissions down. There is the remaining challenge of how to address the workings of nationally owned oil companies. Christopher Frei, former

World Energy Council secretary general, has noted that ‘most NOCs are mandated only to extract oil and gas. They do not have strategies in place to fulfill the Paris Agreement.’ One way to force NOCs to acknowledge their actions regarding climate change would be the establishment of a global price on carbon. But of course, such a decision would have to take account of the struggle oil- and gas-producing countries have experienced for decades in diversifying their economies.

In summary, where lawmakers fail in their obligation to enact legislation that protects their citizens from the very real impacts of climate change, courts must act. The failure to do so will unquestionably lead to a deteriorating climate that benefits no one.

### **Foreword to Climate Change Litigation in the Asia Pacific** Syed Mansoor Ali Shah (2020)\*

The impacts of climate change will intensify over the course of the twenty-first century. There remains a substantial gap between what governments have promised to do and the actions they have undertaken to date. . . . Climate change is a critical existential issue that threatens all life forms on this planet. It is, therefore, larger than human rights and will require all hands on deck across all sectors.

Courts are sworn to impartiality, justice, protection of human rights and upholding the rule of law. . . . In recent cases, courts have played a significant role by holding governments accountable for their inadequate climate action; mitigating carbon emissions; helping evolve adaptation solutions, including compensation; promoting sustainable development goals; influencing climate policy-makers; safeguarding human rights and ensuring sustainable development and climate justice.

. . . Setting the stage for the current state of climate change litigation, some countries in the Asia Pacific have had a strong historical tradition of dealing with public interest environmental litigation based on their democratic and fundamental rights-based constitutional schemes. These courts have a rich jurisprudence of safeguarding nature, ecosystems, biodiversity and the quality of life of their citizens. These judges have intelligently carved international environmental principles of sustainable development, precautionary principles, environmental impact assessments, public trust doctrines and so forth into their constitutional values of political, economic and social justice, along with fundamental constitutional rights like right to life and dignity. Environmental public interest litigation has not been adversarial but

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\* Syed Mansoor Ali Shah, *Foreword* to CLIMATE CHANGE LITIGATION IN THE ASIA PACIFIC (Jolene Lin & Douglas A. Kysar, eds., 2020).



more inquisitorial, informed by a good understanding of environmental science and other life sciences.

In environmental litigation, it is often the case that the polluter largely falls in the local jurisdiction – the courts hold the polluter accountable and impose penalties. . . . However, climate change brings a totally new set of challenges to litigation in the Global South. Countries that contribute insignificantly toward greenhouse gas emissions but suffer at the hands of climate change need to learn to adapt. Adaptation climate change litigation is a new paradigm and very different from mitigation climate change litigation. For instance, countries faced with extreme weather, floods, droughts, erratic monsoon rains, melting of glaciers, siltation of dams, low agricultural productivity, reduction in forest cover, natural migration of adversely affected plant species, damage to coastal areas, natural disasters and reduction of freshwater reserves need to deal with issues regarding water, food and energy security. This climatic imbalance strikes hard at the most vulnerable in the society – that is, children, women and the poor. These countries generally have inadequate infrastructure and weak resilience in the face of natural disasters. For this, pro-adaptation climate change litigation primarily focuses on strengthening institutions, in almost all sectors, to increase their resilience and capacity to adapt to climate change. .

. . . To enhance climate change litigation, judges need to come together and exchange ideas via helpful forums such as the Asian Judges Network and the Roundtable of Judges on Environment/Climate, regularly organized by the Asian Development Bank. Social mobilization, public awareness, understanding of climate science and better judicial coordination can go a long way to promote climate change litigation.

### **Directors' Duties and Climate Change: Keeping Pace with Environmental Challenges**

Speech by Philip Sales before the Anglo-Australian Law Society (2019)

. . . The response of company law to the novel and growing challenges presented by climate change and wider environmental issues is still in its infancy in both England and Australia. . . . There are parallels between the English and Australian legislative scheme . . . despite the absence of an express duty on directors in Australia to consider the environmental impacts of board decisions and company activities, under the Corporations Act 2001, unlike in England under section 172(1)(d) of the Companies Act 2006.

In England, the wider section 172 duty to promote the success of the company for the benefit of its members as a whole, primarily in the financial sense, is expressly supplemented by the further duty to have regard to the wider factors specified in

section 172(1)(a)-(f). By contrast, the Australian Corporations Act 2001 does not contain a similar express provision. However, there is the primary duty under section 180(1) to act with due care and diligence (largely equivalent to the duty found in section 174 of the Companies Act 2006). . . . In short, there is growing recognition of the fact that good environmental practices will often be financially prudent, at least in the long term.

. . . [D]irectors' duties in both England and Australia are owed to the company, not directly to shareholders or other stakeholders. . . . The upshot, as the Hutley 2016 Opinion rightly identifies, is that the directors "must assess risks, including climate change risks" from that particular perspective. A related point is that the approach in both jurisdictions is still driven by risk management, i.e. avoiding negative outcomes for the company. . . . [T]he basic direction of travel in both jurisdictions is clear. With respect to the legislative scheme, environmental considerations may and, increasingly, must be taken into account by directors, particularly where there may be financial impacts on the company. . . . Further, it is clear that the very traditional view of the undemanding nature of directors' duties is now outmoded in both jurisdictions.

. . . The rest of this lecture will explore the following aspects of the climate change and directors' duties debate more fully: (1) recent international and domestic environmental measures; (2) legislative steps in England; (3) legislative changes in Australia; and (4) reform proposals.

It is worth outlining recent activity, both internationally and domestically in the UK and Australia. The obvious game-changer in this area was the 2015 Paris Agreement. [T]he key general points . . . are as follows. First, the 2015 Paris Agreement . . . is unique in deploying nationally determined contributions, rather than imposed targets. Secondly, its focus is on domestic measures to achieve the overall agreed outcomes. Thirdly, there is a significant commitment by developed countries to provide financial support to developing countries (US\$100bn per annum).

. . . In the UK, the Climate Change Act 2008 continues to be the framework legislation. . . . Industry players, spearheaded by regulators, have also taken on a much more active role in tackling climate change and lasting environmental damage from business practices. The Bank of England has been particularly outspoken. . . . [Mark Carney, Governor of the Bank of England] identified three priority areas. First, improved disclosure and reporting of material climate-related financial risks by companies. . . . Secondly, better climate change risk management, in respect of both physical and transition risks. . . . Thirdly, capitalising on the new opportunities associated with the green economy.

. . . Over a decade ago now, the Garnaut Review found that Australia is particularly exposed to the physical risks of climate change. . . . Taking stock of recent developments, the updated 2019 Hutley Opinion considers that these "suggest that we

are now observers of a profound and accelerating shift in the way that Australian regulators, firms and the public perceive climate risk” and that “these matters elevate the standard of care that will be expected of a reasonable director.” I would highlight four of the five changes they identify. First, that “climate risk and disclosure have become a shared focus of Australian financial regulatory bodies.” . . . Secondly, “significant changes in financial reporting frameworks relevant to the disclosure of climate risk.” . . . Thirdly, it appears “investor and community pressures concerning climate risk are becoming more acute.” Notable developments in Australia include several prominent climate-related shareholder resolutions, such as in the QBE Insurance Group, Origin Energy and Whitehaven Coal. . . . Fourthly, the Opinion refers to notable developments in the state of scientific knowledge, which it says affects the gravity and probability of climate risks which directors need to consider.

. . . To comment briefly on the APRA\* survey released in March 2019, this builds on the APRA’s consistent steps in highlighting “the financial nature of climate change risks to its regulated entities” and its position that “these risks are material, foreseeable and actionable now.” To this end, the APRA surveyed 38 large entities . . . [and] found that “a majority of regulated entities were taking steps to increase their understanding of the risk” and “[o]ne third of regulated entities viewed climate risks as material” . . . [and that] “[c]limate risks are being integrated into risk management frameworks, and more sophisticated financial analysis of scenarios is gaining traction across a range of entities.” Notably, many of the respondents accepted that “ultimate responsibility” for climate-related risks lies with company boards.

. . . [T]he trajectory among the Australian regulators, including the APRA, and major industry players reflects the rising recognition of climate change as a significant risk factor for the economy and financial stability. The steps taken in response seem to me to have at least two important implications for directors in both jurisdictions. First, they legitimise the view that serious consideration of environmental impacts to preserve long-term success of companies is warranted more than ever before. . . . Secondly, the urgency of key regulators in addressing environmental issues no doubt underscores the need for boards not only to consider but act on environmental concerns.

. . . [T]he number and extent of . . . [disclosure and reporting obligations under the Companies Act 2006] vis-à-vis environmental matters has increased steadily in England. Section 414C of the Act requires larger companies to report on the implementation of the section 172 duty. . . .

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\* The Australian Prudential Regulation Authority, or APRA, regulates certain types of financial institutions.

As for secondary legislation . . . [t]he thrust of the 2018 regulations is to require directors to explain how they have had regard to various matters in performing their section 172 duty. . . . I venture to suggest that Parliament's express adoption of [this] wider approach, which requires specific regard to be had to environmental factors, casts a shadow on the pre-eminence of financial returns under the [the previous approach to evaluating investment decisions by trustees].

Moving on to consider the position in Australia. . . . I would like to develop three particular aspects. First . . . that section 180 of the Corporations Act 2001 must be seen against the historical background of a shift towards ever stricter directors' duties in Australia. Secondly, . . . that the section 180 framework is capable of accommodating the active consideration of environmental factors by Australian boards, despite not being as express in its requirements as the section 172 duty in England. Thirdly, that recent regulatory and industry changes . . . reflect a greater push for environmental reporting and environmentally-conscious decision-making in Australia.

[Geoffrey Nettle] argues that directors' duties under the Corporations Act 2001 must be looked at as against their historical antecedents under the general law and that "the effect of legislative intervention in directors' duties has been greatly to add to the scope of those duties and to increase the standard of care required of company directors." . . . He also suggests that "in Australia there is no legislative indication that communitarian causes fall within the realm of business judgments entrusted to directors," which he sees as restricting the scope of what Australian directors may do with company resources. It is only with this final comment that I take issue. There would seem to be much force in the contrary view . . . that the general section 180(1) duty requires directors to adapt and respond to changing regulatory attitudes and business practices, such that action on climate change is now ever more a part of the section 180(1) duty.

It is worth setting out more fully the basis for that view. The central claim made is really two-fold. First, directors who are "proactive" in exploring environmental impacts of their decisions may have the protection of the statutory business judgment rule under section 180(2), where "they decide on a properly informed and advised basis not to act." Secondly, "climate change and related economic, environmental and social sustainability risks" are ones which may be taken into account by Australian directors and, in more and more cases, ones that they should actively engage with in order to satisfy their section 180(1) duty.

. . . The starting point is the "core, irreducible requirement" on a director under the section 180(1) duty "to obtain knowledge, sufficiently to place themselves in a position to guide and monitor the management of the company." Accordingly, they should "consider and, if it seems appropriate, take steps to inform themselves about climate-related risks to their business, when and how those risks might materialize,

whether they will impact the business adversely or favorably, whether there is anything to be done to alter the risk, and otherwise to consider how the consequences of the risk can be met,” including by seeking expert or professional advice pursuant to section 189 of the 2001 Act. . . . As stressed earlier in this lecture, the subsequent 2019 Hutley Opinion identifies a number of changes in the regulatory climate and industry practices since October 2016. These changes, it is said, “elevate the standard of care that will be expected of a reasonable director.” . . . In my view, those regulatory shifts read with the stronger investor and community pressures and the evolving state of scientific knowledge about climate risks support the conclusion in the 2019 Hutley Opinion that the strictness of Australian directors’ duties in this regard is increasing.

I tread carefully in suggesting reform proposals, but do consider certain potential changes to existing company law frameworks in both England and Australia follow quite naturally from the above analysis.

First, an obvious reform proposal in Australia, borne out by the comparison to the English position, is to expressly adopt the principle of “enlightened shareholder value,” . . . by making specific provision for consideration of environmental impacts by directors. . . . Secondly, . . . [there is a] need for streamlined disclosure by regulated entities. . . . [F]urther thought should . . . be given to standalone environmental disclosure duties under English and Australian company law alike. Again, this would only require modest amendments. . . . Thirdly, it is worth considering the introduction of a legislative or . . . regulatory best practice requirement to appoint a designated board member for environmental impact issues. This director would be the focal point of a company’s environmental responsibility, which would provide a convenient port of call for accountability as to the company’s environmental disclosures and reporting.

. . . [T]he way forward in this area . . . seems to be ever more tailored and specific duties. While this risks over-proceduralisation, possibly at the expense of substance, it has the clear benefit of imposing concrete obligations at board level. These can be policed effectively, and it is to be hoped that specific duties to consider different environmental impacts would also sharpen the attention of directors.

To conclude, the clear message to be taken away from this lecture is that company law in England and Australia alike is still coming to terms with the new challenges raised by climate change and wider environmental issues. These challenges are, at present, primarily accommodated by the general framework of wide directors’ duties, with certain statutory overlays. . . . There is a clear case for these company laws to be modified, by legislation, to provide a greater impetus to boards and individual directors to accord greater attention and weight to climate issues than traditionally considered appropriate. . . . [T]he old dichotomy between a company’s financial success and its environmental profile is collapsing. . . . Given the gravity of the issue of climate change and the leadership role performed by both the UK and Australia on these issues on the international level, it would only seem advisable for

their company laws to keep pace with the current trends in favour of disclosure, reporting and risk management.

## **Technological Revolution, Democratic Recession, and Climate Change: The Limits of Law in a Changing World**

Luís Roberto Barroso (2020)\*

Climate change has been identified as the most relevant environmental problem of the twenty-first century and one of the issues that defines our time. . . . Two features of the climate debate make it harder to construct proper solutions. The first derives from a mixture of ignorance and skepticism, added to the economic and political costs of the necessary measures. The second is that the effects of carbon emissions today will only be felt by future generations, a circumstance that serves as an incentive to postpone decisions that are, in fact, urgent. The central concept here is still “sustainable development,” which has long been understood as development that “meets the needs of the present without compromising the ability of future generations to meet their own needs.” One of the goals of sustainable development, approved by the UN in 2015, is precisely the “action against global climate change.”

. . . Since 1972, starting with the United Nations Conference on the Human Environment, held in Stockholm, most countries of the world have come together in successive conferences, producing relevant documents and guidelines. . . . All of these meetings, declarations, and treaties had as their main objective to raise the world’s attention to the environmental issue, introduce the concept of sustainable development, and face the problem of global warming, mainly by limiting the emission of gases that aggravate the greenhouse effect, notably carbon dioxide (CO<sub>2</sub>).

. . . Nowadays, the vast majority of scientists agree that the ongoing global warming process is a result of human activities. . . . However, there is no consensus . . . [among global leaders]. In politics, leaders like Donald Trump and Jair Bolsonaro have denied or minimized climate risks. In academia, acknowledged scholars, despite accepting that humans contribute to global warming, reject the urgency of policies that address the problem. Others challenge the findings and predictions of the Intergovernmental Panel or simply deny that global warming is caused by human actions. For people who hold this view, the world climate has always had alternating cycles, so that the current moment of heating is only one of its phases. Adding controversy to the debate, studies have shown that groups opposed to reducing fossil fuel production have used the mass media to instill uncertainty and reduce support for measures against climate change. Notwithstanding opposing positions and reactions,

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\* Luís Roberto Barroso, *Technological Revolution, Democratic Recession, and Climate Change: The Limits of Law in a Changing World*, 18 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 334 (2020).

the prevailing view is that the situation is serious, the risks are real, and steps must be taken urgently.

It is not easy to predict the real impacts of climate change. . . . This scenario of uncertainty is enhanced by what the literature calls “climate lag”: scientists estimate that the impact of emissions will only be fully felt between 25 and 50 years after their occurrence. It is beyond doubt, however, that the planet is warming up and that the consequences of this phenomenon can already be felt in different parts of the world. . . .

. . . [T]he UN climate change regime is based on three pillars: The Framework Convention, the Kyoto Protocol and the Paris Agreement. . . . The harsh reality, however, according to scholars, is that countries have made promises that they will not be able to honor. It must be remembered that, under the Agreement's logic, countries have the flexibility to set their own commitments and there are no coercive enforcement mechanisms. In this context, two are the problems that have been detected: emission reduction targets will not be reached, and, in addition, they have proved to be insufficient. . . .

In the judicial sphere, a significant number of lawsuits has been filed worldwide. . . . [W]e must highlight . . . the important Advisory Opinion 23/17 of the Inter-American Court of Human Rights, establishing the interconnection between the protection of the environment and other human rights, and imposing protection duties on member states. On the other hand, the Court of Justice of the European Union, in a lawsuit filed by ten families from different countries seeking more stringent greenhouse gas emissions reduction targets [*Carvalho v. European Parliament and Council of the European Union*], dismissed the case on procedural grounds. The Court concluded that plaintiffs did not have standing to bring the case because climate change affects every individual in one manner or another and they were not able to demonstrate any circumstances that were peculiar to them.

. . . [S]everal [domestic] lawsuits have challenged governmental responses to climate change. . . . [I]n *Juliana v. United States*, the Oregon District Court, after acknowledging that the right to a climate system capable of sustaining human life was a fundamental right, allowed the case to proceed. In the Netherlands, a legal decision [*Urgenda Foundation v. Netherlands*] ruled that the government should reduce emissions to 25% below the level observed in 1990, considering the proposed 17% cut to be insufficient. . . . Particularly interesting, for representing a major shift in conventional wisdom, are the cases in which elements of nature—i.e., non-human entities, like rivers—have been recognized as subject to rights to protection and have been admitted as plaintiffs in lawsuits . . . .

A general evaluation of the results of the Paris Agreement is expected in 2023. There are few doubts that much broader efforts will be needed to achieve the proposed

goals. Nothing about this subject is simple, starting with the tensions it generates within the very idea of democracy. This is because short-term electoral cycles do not favor decisions whose positive consequences are only felt in the long-term. In addition, most people who will be affected by climate change have no voice or vote, either because they are very young or because they have not even been born. Add to this the fact that intricate technical and scientific issues rarely attract popular mobilization. Finally, because it is a global problem, it does not involve strictly national solutions . . . . For this reason, addressing and solving global warming problems requires awareness and engagement of citizens, businesses and governments, because it implies profound economic and behavioral changes, ranging from the way people move to how they eat. What is at stake here is intergenerational justice, in order not to leave a degraded planet to posterity. . . .



# COVID-19: WAVES, MANDATES AND PUBLIC HEALTH

DISCUSSION LEADERS

ABBE R. GLUCK, DAPHNE BARAK-EREZ, AND MARTA CARTABIA

## II. COVID-19: WAVES, MANDATES AND PUBLIC HEALTH

DISCUSSION LEADERS:

ABBE R. GLUCK, DAPHNE BARAK-EREZ, AND MARTA CARTABIA

### **The Logic and Trajectory of Public Health**

#### **Emergency Authority over Time**

Brenda Hale & Jonathan Sumption, Constitutional Implications of COVID-19 (House of Lords, 2020) ..... II-4

#### **Underreach and Overreach**

David E. Pozen & Kim Lane Scheppele, Executive Underreach, in *Pandemics and Otherwise* (2020)..... II-8

Writ of Mandamus No. 28312-DF (Superior Court of Justice of Brazil, 2021)..... II-12

Scott Stephenson, *The Relationship Between Federalism and Rights During COVID-19* (2021)..... II-13

### **Contesting Government Authority and Debating Public Health Mandates**

#### **Mandating Vaccination**

Vavříčka and Others v. The Czech Republic (ECtHR, 2021)..... II-17

Kassam v. Hazzard (Court of Appeal of New South Wales, Australia, 2021)..... II-21

Kassam v. Hazzard (Supreme Court of New South Wales, Australia, 2021)..... II-24

No. 2022-835 DC (France, 2022)..... II-25

Biden v. Missouri et al. (U.S., 2022)..... II-27

National Federation of Independent Businesses v. Occupational Safety and Health Administration (U.S., 2022) ..... II-31

#### **Exempting Religion**

South Bay United Pentecostal Church v. Newsom (U.S., 2021)..... II-38

Philip & Others v. Scottish Ministers (Scottish Outer House, 2021)..... II-41

Gateway Bible Baptist Church v. Manitoba (Court of Queen’s Bench of Manitoba, Canada, 2021)..... II-45

### **The Legacies of COVID-19**

#### **The Harms of Confinement**

In Re: Contagion of Covid 19 Virus in Prisons (India, 2021) ..... II-50

Feilazoo v. Malta (ECtHR, 2021)..... II-52  
Fenech v. Malta (ECtHR, 2022)..... II-54  
Jaimie Meyer, Marisol Orihuela & Judith Resnik, Tolerating the  
Harms of Detention: With and Without COVID-19 (2022)..... II-57

**Changed Court Practices**

Barry Godfrey, Jane C. Richardson & Sandra Walklate, The Crisis  
in the Courts: Before and Beyond Covid (2021)..... II-61  
Joe McIntyre, Anna Olijnyk & Kieran Pender, Civil Courts and  
COVID-19: Challenges and Opportunities in Australia (2020)... II-63  
No. 2021-911/919 QPC (France, 2021) ..... II-66

**Judging Under Uncertainty**

Shaun Fluker & Lorian Hardcastle, Executive Lawmaking and  
COVID-19 Public Health Orders in Canada (2020) ..... II-67  
Lindsay F. Wiley & Stephen I. Vladeck, Coronavirus, Civil  
Liberties, and the Case Against “Suspending” Judicial Review  
(2020) ..... II-70  
Eric Posner & Kenny Mok, Constitutional Challenges to Public  
Health Orders in Federal Courts During the COVID-19  
Pandemic (2022)..... II-73

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As COVID-19 continues, so do we. Amid a backdrop of the ebb and flow of waves of infection and vigorously contested public health mandates, we pick up our exploration of COVID-19’s impacts on constitutional law and administration. Jurists continue to respond to the interplay of scientific evidence and uncertainty about the future, inequality, rights, economic and social life, religious liberty and personal autonomy, and government regulation or the lack thereof.

We begin by discussing the exceptional nature of this state of extended emergency, its impact on the structure of government, and the opportunities that it has presented for private parties to use courts to contest executive action or to argue that governments have not done enough to respond to the crisis. We draw examples from conflicts over vaccine mandates, religious liberty, and the care required to be afforded to people in detention. We conclude these materials by inquiring about whether the COVID-19 crisis will have a lasting legacy on legal institutions and substantive doctrine.

These materials thus continue to ask the question with which we began three years ago. Has COVID-19 affected conceptions of how judges should respond to emergency actions taken under significant uncertainty?

## **THE LOGIC AND TRAJECTORY OF PUBLIC HEALTH**

As we enter our third year of pandemic response, some argue that traditional justifications for strong judicial deference to executive action during states of exceptional emergency have ended or should end. In this section, we take up two questions centered around claims of governments doing too much or too little. Have legislatures and courts re-evaluated the deference that has been accorded to significant executive action on questions of public health? And has this crisis provided an elaboration of legal principles guiding courts' responses to executive underreach, or the claim that countries have failed to do enough?

### **Emergency Authority Over Time**

As the public health emergency continues, governments have begun to reassess the validity of both the use of emergency powers that were exercised at the beginning of the pandemic and more recent actions. The threat of COVID-19 to public health has become more predictable and foreseeable—at least more so than in March 2020—raising new questions about the scope of legislative and executive authority and when courts ought to put limits on public health interventions.

### **Constitutional Implications of COVID-19**

Brenda Hale and Jonathan Sumption, before the House of Lords Select  
Committee on the Constitution  
Evidence Session No. 16 (December 2020)

[Lady Brenda Hale and Lord Jonathan Sumption as witnesses before a session composed of 13 members:]

Q211 . . . : . . . Today, we are looking at the use and scrutiny of emergency powers during the pandemic. . . .

. . . [H]ow do you think the Government have fared in their use of emergency powers during this pandemic? In particular, can you talk about how Parliament has been able to respond and fulfil its responsibilities in scrutinising the legislation the Government have brought forward?

Baroness Hale of Richmond: . . . The obvious problem with the first regulations is that . . . Parliament had no opportunity to debate them for several weeks.

What has happened since then is a bewildering flurry of new regulations coming in at very short notice. . . . The normal orderly process of scrutinising delegated legislation has not taken place. . . .

Lord Sumption: . . . [T]he regulations were . . . said to be so urgent that Parliament could not be consulted. . . . In spite of the professed urgency, there was a delay of three days . . . .

. . . Since then, there has been a considerable improvement . . . . [T]he second lockdown . . . lasted for less than 30 days and parliamentary approval was sought in advance . . . .

Q211 . . . : Do you think the failing was on the part of Parliament . . . ?

Lord Sumption: . . . Parliament cannot recall itself, so it was, effectively, stymied. . . . [I]t is desirable that Governments should have to explain and produce evidence in support of drastic decisions that they make. . . .

Q212 . . . : [Why did] the Government not . . . use the powers in the Civil Contingencies Act . . . ?

Lord Sumption: . . . [T]he Civil Contingencies Act is specifically designed to deal with cases of national emergency, where it may be thought appropriate to govern by decree . . . . It is precisely because of the drastic nature of those rights that there is an exceptional level of parliamentary scrutiny provided for. . . .

Baroness Hale of Richmond: . . . [T]he Government used the Public Health Act rather than the Civil Contingencies Act . . . [because] they are not allowed to use [the latter] unless the existing legislation cannot be relied upon without risk of serious delay. . . .

Q213 . . . : Do you think there is a new legal basis upon which the necessary powers could or should be placed?

Lord Sumption: Yes, there is. . . . Because the Government may choose to use an Act with the minimum of parliamentary scrutiny, it is highly desirable that the Public Health Act should also be amended. That is first to remove the powers that it confers . . . in relation to healthy people, so that those powers can be exercised only under the Civil Contingencies Act. Secondly, . . . in cases where powers are being exercised in relation to healthy people, [introduce] procedural safeguards comparable to those in the Coronavirus Act. Thirdly, . . . require the production . . . of a proper impact assessment of the kind that some statutes, notably in environmental legislation, require in other contexts. . . .

Q214 . . . : What should Parliament's scrutiny of emergency powers look like at this stage of the pandemic?

Lord Sumption: . . . Some kind of committee investigation . . . would be extremely desirable . . . for the benefit of those voting on these measures in the Chamber.

Baroness Hale of Richmond: . . . [D]uring the first lockdown, the Government could have provided a settled framework that everybody would understand and that could then be applied from time to time, as appropriate, and even from place to place, as appropriate. . . .

Q217 . . . . Lord Sumption: . . . [W]hen the Government give[s] advice, . . . [i]t should be balanced, measured and expressed in unemotional tones . . . [and] it should be absolutely clear what is guidance and what is law. . . .

Q219 . . . : . . . [H]ow can the Government make sure that the new requirements are clearer and more accessible to the public?

Baroness Hale of Richmond: People should be told where they can find out what they need to know, and what they are told when they find it out ought to be clear and accurate. . . .

Lord Sumption: . . . [T]he simplest way of legislating . . . is to have one-size-fits-all rules. . . . The alternative approach . . . involves dealing differently with as many different situations as legislative draftsmen can provide for . . . but at the expense of complexity and comprehension. . . .

Q223 . . . . Baroness Hale of Richmond: . . . [T]he framework and hierarchy of rights contained in the European Convention is a helpful way of looking at the sorts of regulations that involve the invasion of fundamental rights to a very considerable degree. . . . [M]ost of the relevant rights that have been interfered with . . . can be interfered with if it is a proportionate response to meeting a legitimate aim. . . .

Lord Sumption: . . . Are there . . . any circumstances in which I think a lockdown would be acceptable? My answer in one word is yes. I do not believe that liberty is an absolute value, but I believe that it is a very high value. . . . It is often necessary to distinguish between different degrees of vulnerability. That may mean that it is justified in some sectors of the population but not in others.

Q224 . . . . Lord Sumption: . . . [T]he more risk averse you are, the more you find yourself voluntarily conceding powers to the state that involve the use of mass coercion against your fellow citizens. . . . [W]e will always be in the situation where the Government will be able, with substantial public support, to curtail those risks by also curtailing liberty. This is far too open-ended a structure and some curtailment by law of those powers is required.

Q225 . . . : . . . On the one hand, . . . [t]he public . . . [is] quite happy for Governments to act in authoritarian ways where the behaviour of others is concerned. Equally, when it comes to . . . their own particular situation, people reclaim their freedom and, indeed, demand the right to behave in anarchic ways. . . .

Q226 . . . : Baroness Hale, . . . I wonder whether you have any general observations about the role the courts might have in patrolling the particular amount of legislation and regulation that has followed from the pandemic.

Baroness Hale of Richmond: There are two roles. . . . [O]ne role, and it is obviously an important role, [is] for the courts to rule on the validity of delegated legislation.

. . . [A]nother role . . . is to adjudicate upon alleged violations of Convention rights in the case of individuals and what they have suffered. . . . That is what surprises me the most, in that, as far as I know, there do not seem to have been many cases brought by individuals claiming that their Convention rights have been violated. . . .

Lord Sumption: . . . The power of the courts to rule on the validity of an exercise of public powers is absolutely fundamental and should not be limited in any way. The power of the courts to consider the propriety of an exercise of public powers is a much more complicated issue, which is only sometimes constitutionally appropriate.

Secondly, . . . the courts are more sensitive to the political environment than they admit. . . . [T]he danger of . . . the courts deferring to the Executive even on questions of validity is a serious one. . . .

\* \* \*

As the pandemic entered its third year, legislatures grappled with whether to shape new varieties of emergency powers. In Israel, the legislature created a novel concept of the “special health emergency situation” that elides the classical distinction between emergency and non-emergency situations. Under the law, enacted in February 2022, the executive may use special powers solely in the context of COVID-19 and has limited access to the powers that could otherwise be used in a full state of emergency.

The law authorizing the government to act in this context was originally enacted in 2020 (Special Powers for Dealing with the Novel Coronavirus, Temporary Provisions, 2020). The law was amended several times and Amendment No. 11, which came into effect in February 2022, included the distinction between the power to declare “a special health condition due to Coronavirus” and the power to declare “an emergency condition due to the Coronavirus.” The relevant provision is Section 2:

(a)(1) If the government is convinced that there is a real risk for the spreading of coronavirus and that a significant harm be caused to public health, and therefore it is necessary to take action under the powers set out in this law to reduce the spreading of the virus and the harm to public health, it may declare a special health condition due to the coronavirus;

(2) If the Government is convinced that there is a significant upward trend in coronavirus morbidity and a real risk for significant harm to public health or that there is a real risk of wide spreading of coronavirus and for serious harm to public health, requiring action as set out in Section 4(a)(2)(a) to (e) or to frequently take action under the powers set forth in this Law to reduce the spreading of the virus and the harm caused to public health, it may declare a state of emergency due to the coronavirus;

(3) The Government shall not declare as stated in this section until after it has been presented with the position of the Minister of Health and professional opinions on behalf of the Ministry of Health on the matter.

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## **Underreach and Overreach**

Certain countries' responses to the COVID-19 pandemic have highlighted a phenomenon complicating the review of executive action by courts—executive underreach, which occurs when executives fail to use the emergency authority granted to them to respond to the threat the pandemic poses to public health. We begin by outlining the phenomenon through a case study of Hungary's early response to the pandemic and then turn to a recent case in which a court declined to provide a broad structural remedy for the alleged failure of the executive to act in a timely manner. By looking at a case study of Australia's initial response to the pandemic, we also bring into focus the impact of federalism in generating conditions for executive action or inaction.

### **Executive Underreach, in Pandemics and Otherwise**

David E. Pozen and Kim Lane Scheppele\*

Legal scholars are familiar with the problem of executive overreach. Especially in emergencies, presidents and prime ministers may claim special powers that are then used to curb civil liberties, marginalize political opponents, and subvert the rule of law. Concerns about overreach have surfaced once again in the wake of COVID-19, as governments across the globe have taken extreme measures to tackle the virus.

Yet in other countries, including the United States and Brazil, a very different and in some respects opposite problem has arisen, wherein the national executive's efforts to control the pandemic have been disastrously insubstantial and insufficient.

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



Because so many public law doctrines reflect fears of overreach, President Trump’s and President Bolsonaro’s responses to COVID-19 have left the legal community flat-footed. . . .

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*. This definition, unavoidably, contains multiple ambiguities. Perhaps most important, what is the baseline of appropriate action against which “failure” is to be identified? . . .

We submit that failure 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. . . .

. . . In short . . . we 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. . . .

. . . Prime Minister Orbán’s response to the pandemic stands out. . . . Orbán . . . moved to eliminate [constraints on executive authority]. He 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,” as it came to be known. . . . [M]any had little to do with the pandemic. For instance, military commanders were put in charge of every hospital and military teams were inserted into “strategic companies,” from which they exfiltrated data about employees and clients for no apparent public health reason. Other decrees punished political opponents by redirecting tax revenue away from cities where they had gained control. . . . 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 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. Confronted by a journalist in late April about Brazil’s rising death toll, Bolsonaro responded with a particularly pointed version of the underreacher’s credo: “So what? . . . What do you want me to do?” . . .

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 indirect, second- and third-order costs for state and society. As many scholars have discussed in the context of other emergencies, executive overreach can generate 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, as explained above, it cannot be assumed that the problem will be limited to especially feckless leaders or that it will be self-correcting through the electoral mechanism. On the contrary, 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.

Whether and to what degree these harms will in fact materialize depends on many contextual factors. But the harms are sufficiently plausible and worrisome that, as scholars of administrative law have observed, “there is no reason to be systematically more concerned with overreaching than underreaching.” Pushing the observation further, there is no reason to view overreach and underreach as diametrically opposed techniques of public administration. In many scenarios, they may be better conceptualized as overlapping and complementary modes of reactionary governance.

The COVID-19 crisis helps illustrate this point. Both President Trump and President Bolsonaro . . . have contributed to cascading health and economic crises . . . that have especially dire implications for vulnerable social groups . . . .

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. . . .

. . . [I]t seems to us that correcting globally damaging underreach requires a change at the level of international legal culture prior to, and perhaps in lieu of, changes at the level of legal substance. Because the problem of executive overreach is so familiar and salient, legal observers tend to be on the lookout for it as soon as a real or alleged emergency arises. The various international standards that have been proposed for regulating domestic states of emergency reflect this tendency by focusing almost exclusively on what must not be done. As far as we can tell, all of the major civil society efforts to monitor government responses to COVID-19 have similarly highlighted the risk of overreach while ignoring or deemphasizing the risk of underreach. . . .

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. . . .

\* \* \*

Any assessment of the role of courts in spurring government action is tied to the idea of the allocation of power in different jurisdictions. The 2021 decision, excerpted below, from the Superior Court of Justice, Brazil’s highest court for non-constitutional questions of federal law, provides an example of the factors for determining whether a court should seek to alter the government’s decision to delay the start of its vaccination campaign for children.

**Voluntary Discontinuance in Writ of Mandamus Nº 28312**  
Superior Court of Justice, Brazil  
DF (2021/0408539-1) (2022)\*

[Minister Humberto Martins delivered the following judgment:]

This is a writ of mandamus with a request for a preliminary injunction filed by RONAN WIELEWSKI BOTELHO against an act attributed to the MINISTER OF HEALTH.

[The petitioner] claims that he is the father of a . . . child and that he wants her to be vaccinated. . . . [H]e claims that the Federal Government has purposely postponed the initiation of a vaccination campaign for children. . . .

[The court concludes that the plaintiff has not sufficiently alleged that there is a risk of irreparable harm if the preliminary injunction is not immediately granted].

Furthermore, the request for an injunction to immediately vaccinate children before the conclusion of the regular administrative process on the subject would [improperly usurp] the responsibility of the relevant agency.

It is important to assert the expertise of the Executive Branch in constructing public health policy, which has developed a national vaccination plan, as the result of an internal technical-scientific dialogue among several competent administrative bodies . . . for the benefit of the entire community.

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\* Translation by Lucía Baca (Yale Law School, Class of 2024).

It should be emphasized that there can be no undue interference by the Judiciary in the sphere of competence of the Executive Branch . . . without the finding of a flagrant deviation of purpose. Such a deviation could, exceptionally, justify infringing the principle of separation of powers . . . [and] disregarding the presumption of legality of the administrative act . . . .

. . . The Judiciary cannot, therefore, act on the premise that administrative acts are [presumptively illegitimate]. Such a conclusion would configure a subversion of the legal regime of administrative law, the powers granted to the Executive Power and the role of the Judiciary. . . .

[The court then held that the plaintiff had not introduced sufficient evidence of the illegality of administrative inaction to justify a preliminary injunction.]

\* \* \*

In addition to the relationship between the judiciary and the executive, the relationship between the federal government and subunits in federations can, as discussed below, affect responses to claims of executive underreach and overreach.

## **The Relationship Between Federalism and Rights During COVID-19** Scott Stephenson\*

. . . This article argues that the initial response to COVID-19 implicated three aspects of the relationship between federalism and rights . . . . First, federalism affected the protection of rights in a decidedly mixed manner. . . . The federated character of decisions on these rights yielded some largely unambiguous advantages for their protection, such as improved accountability for lockdown orders, but also some largely unambiguous disadvantages, such as considerable gaps in accountability for ensuring that citizens could exercise their right to return to Australia. Second, federalism affected deliberations on rights in a broadly positive manner. . . . Third, the federal-based protection of freedom of movement in the Constitution proved not to be a substitute for a rights-based protection of freedom of movement. In the absence of a bill of rights, there were few options for people to challenge the constitutional validity of COVID-19 response measures before the courts. . . .

It is well understood that federalism might affect the degree of protection rights receive in law. The most obvious instance is where the different governments in a federation either recognise different rights or impose different limitations on rights. These disparities may persist as a result of enduring divergences in value commitments or the circumstances in place in each jurisdiction. . . .

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\* Excerpted from Scott Stephenson, *The Relationship Between Federalism and Rights During COVID-19*, 32 PUBLIC LAW REVIEW 222 (2021).

The response to COVID-19 provides . . . [an] example of the intersection of federalism and the protection of rights. Most notably, different States imposed different restrictions on the right to freedom of movement. Some of these differences were a result of temporary disparities—namely, the level of threat to public health posed by COVID-19 at particular points in time. States instituted lockdown orders in their territory when local outbreaks of COVID-19 occurred. Some of these differences did, however, also appear to be a result of more enduring reasons—namely, public health system capacity and the degree of commitment to open borders. . . .

It is by no means clear whether State-based management of restrictions on freedom of movement improved or undermined protection for that right. On the one hand, it helped ensure that limitations were imposed by decision-makers that had detailed knowledge of local conditions, were closely accountable to affected persons, and were in a better position to explain and therefore justify their decisions to members of the public. . . .

On the other hand, State-based management of restrictions created a number of inconsistencies in response measures that made it more difficult for the public to understand and navigate the restrictions imposed on their freedom of movement. Outbreaks of COVID-19 in one State were met with different responses in each other State, for instance, triggering border closures in some jurisdictions but not others. . . .

The right to return to one’s country of citizenship was another right that was significantly affected by Australia’s federal system. In March 2020, Australia closed its international border to persons who were not citizens or permanent residents (with limited exceptions) and required all arrivals to undertake 14 days of quarantine. . . Many flights into Australia were cancelled, passengers were frequently removed from their flights at the last minute, and the price of flights significantly increased. Tens of thousands of Australian citizens were left stranded overseas, unable to return to the country. This situation was far from a short-term disruption. It continued into 2021 and, in fact, worsened over time. . . .

The federal system for the operation of hotel quarantine produced decidedly mixed results for the protection of the right to return. On the one hand, State-based management of hotel quarantine created redundancy and opportunities for inter-State education. . . .

On the other hand, the State-based system created a considerable accountability gap. . . . This federal division of responsibilities increased the challenge of determining which level of government should be held to account for the tens of thousands of Australians effectively denied the right, unable to return to the country.

The State-based administration of hotel quarantine also created a “levelling down” dynamic. As the fees charged to persons placed in hotel quarantine did not cover the full costs of operating the system, every international arrival a State took increased

the burden on that State's finances. It also increased the risk of a COVID-19 outbreak in the city in which the hotel was located. . . Public attention was drawn to this issue in February 2021 when the [New South Wales] Government attempted to bill the Queensland Government for the costs of quarantining Queensland's residents and Queensland's Deputy Premier tore up the bill on television. . . .

In addition to affecting the degree of protection rights receive in law, federalism can also affect the way in which rights are deliberated. . . Federalism introduces a greater number of participants into the decision-making process. . . While the presence of multiple voices in a debate about rights could improve deliberation, it could just as easily cause confusion or distract from the key issues at stake, thus undermining deliberation.

The response to COVID-19 is an instance where federalism had a considerable effect on deliberations about fundamental rights and freedoms. Education was a particularly prominent example. . . . [F]ederalism arguably served to facilitate deliberation. Through their public disagreements on the matter, two levels of government gave the public a clear understanding of the respective arguments for each position [on school closure versus reopening] and the difficulty of resolving the matter. Neither level of government misled the public about, or distracted from, the issue under consideration.

. . . [I]t is noteworthy that, during the height of the emergency period when decision-making was difficult and the stakes were high, the Commonwealth, States and Territories typically advanced reasonable and reasoned views that helped elucidate, and did not distract from, the crucial questions. As a point of contrast, these cross-jurisdictional debates were often more illuminating of the merits of each position than the parallel debates that occurred within individual jurisdictions. The federal disagreements that occurred in Australia also compared favourably with those that occurred in the United States in the same period, where the efforts of State and federal governments to undermine each other included not only the issuance of misleading statements about each other, but also actions such as the confiscation of critical medical supplies from each other. . . .

. . . One point is that the relationship between federalism and rights extends beyond civil and political rights to also include socio-economic rights. . . . COVID-19 illustrates that federalism's effect on socio-economic rights might be just as significant as, if not more than, its effect on civil and political rights. . . .

. . . [This] COVID-19 case study [also] suggests there are deep continuities between emergency and non-emergency periods. . . . The debates that occurred were not unrecognisable from the debates about rights that occur in Australia in non-emergency periods. COVID-19 thus suggests that the norms and conventions that exist in respect of intergovernmental relations in non-emergency periods will shape how the federal system responds in emergencies. . . .

\* \* \*

In the United States, as scholars like Nicole Huberfeld have detailed, the American national healthcare system is a federalist system built on structural redundancies with overlapping responsibilities between the federal government and the states and some areas of health care that have, historically, been reserved to the states entirely.\* Each level of government has emergency authorities to use, and each used theirs during the pandemic—at times to fill in for the lack of leadership by other levels, including the lack of action by then-President Trump.

Yet despite the security of overlap, Huberfeld worries that our federalist model remains a driver for inequality and ineffective emergency response. The two major federal response bills enacted by Congress in March 2020 largely relied on states to take up funds, implement emergency assistance, and exercise regulatory options to reach those harmed by the pandemic and its attendant recession. This approach, Huberfeld argues, built on states’ preexisting policies—thereby heightening differences between states and intensifying the pandemic’s inequitable impact.

## **CONTESTING GOVERNMENT AUTHORITY AND DEBATING PUBLIC HEALTH MANDATES**

We turn to canvass several of the substantive areas in which public health authority implicates individual rights, and we unpack divergent doctrinal approaches to resolving this friction. Since we examined this issue last year, a new line of cases examines the limit of executive and agency authority concerning mandatory vaccination against COVID-19 and requiring proof of vaccination to participate in in-person public activities. Courts have also worked to define the scope of religious exemptions to public health measures, and jurisdictions have divergent constructions of the right to worship and what constitutes proportionate interference with that right.

### **Mandating Vaccination**

One issue that has generated significant litigation since vaccinations for COVID-19 became widely available is executive authority to mandate vaccination and to condition participation in various activities on vaccination status. Some jurisdictions have an expansive understanding while others, such as the United States, have used principles of public and administrative law to in some contexts constrain the power of

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\* See Nicole Huberfeld, *COVID-19, Federalism, and Public Health Emergencies*, in *COVID-19 AND THE LAW: DISRUPTION, IMPACT, AND LEGACY* (Glenn Cohen, Abbe R. Gluck, Katherine L. Kraschel & Carmen Shachar eds., forthcoming 2022).



the federal government, absent authorization from the legislature, to mandate vaccination and other public health measures.

**Vavříčka and Others v. Czech Republic**  
European Court of Human Rights  
Applications nos. 47621/13 and five others (April 2021)

[The European Court of Human Rights, sitting as a Grand Chamber composed of President Robert Spano 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 violated 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.

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. . . .

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

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 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 the 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

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\* Article 8 of the European Convention of 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.

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. In this respect it 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]t can be said that in 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. . . . [W]hile 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 to be answered 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. . . . In my view, there 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.

**Kassam v. Hazzard**  
Court of Appeals of New South Wales  
[2021] NSWCA 299

Judgment by President Bell [with Judges Meagher and Leeming concurring in the judgement:]

. . . 3. Both the Kassam Plaintiffs and the Henry Plaintiffs contended that the Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021 (NSW) (Order (No 2)) made pursuant to s 7(2) of the *Public Health Act* [(PHA)]\*

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\* Section 7, Part 2 of the PHA, provides, in relevant part:

- (1) This section applies if the Minister considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health.

was invalid. . . . Deployed in support of the attack on Order (No 2) were arguments said to be based upon the principle of legality, with particular focus being placed upon the . . . Plaintiffs' . . . bodily integrity as persons who have chosen not to be vaccinated. The effect but not the form of the Order, it was submitted, was to mandate or coerce vaccination. . . .

45. . . [T]he balance of this judgment focuses on the proper construction of s 7 of the [PHA] and the question of whether it authorised the making of the Impugned Orders. . . .

73. The first argument advanced was that s 7 of the [PHA] only authorised administrative action but that the Impugned Orders were legislative in their effect, and invalid for that reason. . . .

78. . . . The power in s 7 of the [PHA] is very broad and no narrow construction should be afforded to it given its subject matter and the nature of the risk it is designed to address . . . .

96. The Impugned Orders proceed on the basis that there will be citizens who choose not to be vaccinated. Under Order (No 2), if such a worker was an authorised worker, he or she was unable to leave his or her local government area unless vaccinated . . . . So, too, under the Aged Care Order and the Education Order, a relevantly qualified worker was not able to enter particular facilities or schools unless vaccinated to the level specified in each of those Orders. . . .

97. Nothing in any of those Orders *required*, still less coerced, aged care workers or educational professionals, authorised workers or workers in the construction industry, to be vaccinated.

99. The right to bodily integrity was not impaired by any of the Impugned Orders . . . .

104. The primary judge was correct to conclude that there was and is no common law “right to work” in any strict sense which would engage the principle of legality. For this reason, to the extent that people’s ability to work was directly or indirectly affected by the Impugned Orders, they were not invalid by reason of the operation of the principle of legality. . . .

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(2) In those circumstances, the Minister—(a) may take such action, and (b) may by order give such directions, as the Minister considers necessary to deal with the risk and its possible consequences.

(3) . . . [A]n order may . . . contain such directions (a) to reduce or remove any risk to public health in the area, and (b) to segregate or isolate inhabitants of the area, and (c) to prevent, or conditionally permit, access to the area.

112. It would not be . . . [sensible] for [the PHA] to be construed as authorising the restriction of . . . the ability freely to move within New South Wales except to the extent that it impaired a person’s right to work, to privacy and not to be discriminated against. Such a construction would be not only unworkable but corrosive of the obvious purpose of the statute. It would defy clear legislative intent. . . .

144. In some respects, the impugned orders have a hybrid character. . . . They are not “statutory rules” . . . . [T]he order must expire of its own force within 90 days; contrast most statutory rules (such as regulations) which . . . generally expire after five years. On the other hand, . . . the orders are “legislative” in the sense that they prescribe general norms of conduct, with real sanctions if breached which were applicable to thousands, indeed millions, of people. . . .

153. . . . The distinction between “administrative” and “legislative” is in any event problematic. It depends on context. . . .

155. . . . [T]here is no reason in principle why a power may not be conferred which may be exercised in ways which may fairly be described as both legislative and administrative. . . .

158. The power is expressed to turn upon what the Minister considers necessary to deal with the risk to public health and its possible consequences. Both the risk and the possible consequences are apt to be things in the future. Both risk and possible consequences are inherently uncertain and unsusceptible to prediction. That tends to support a broad meaning to be given to the words “action” and “order” in s 7.

159. . . . At the heart of the concept of public health is a danger to members of the public. . . . It is plain from s 7(3) that the power extends to the making of orders which direct the segregation and isolation of inhabitants in an area and the curtailment of access to an area . . . .

162. The essential mode of argument in support the first ground in each appeal was that (a) the impugned orders violated various enumerated “rights,” (b) this was contrary to the “principle of legality” and thus (c) the orders were not authorised. . . .

165. [T]he so-called principle of legality was “but one aspect of a more general rule of construction that clear words were required before legislation would be construed to achieve a particular result (most commonly, derogating from a ‘fundamental’ common law rule).”

166. Secondly, there are rights and there are rights. The “right to bodily integrity” is well-established. It is jealously guarded by the courts. . . . The right to privacy and the protection accorded to it is nascent . . . . The “right to work” is much more elusive. The way in which people have worked has been regulated by statute for many centuries . . . .

175. . . . [T]he orders . . . are authorised by s 7 . . . [because they] were primarily directed to restricting movement and in large measure only incidentally impacting on other rights, were limited in duration, were subject to exceptions, and explicitly contemplated that some persons would not be vaccinated.

**Kassam v. Hazzard**  
Supreme Court of New South Wales  
[2021] NSWSC 1320

[Before Chief Judge at Common Law Beech-Jones:]

. . . 7. Leaving aside the constitutional challenge raised by the Kassam plaintiffs, . . . it is important to note that it is not the Court’s function to determine the merits of the exercise of the power by the Minister to make the impugned orders, much less for the Court to choose between plausible responses to the risks to the public health posed by the Delta variant. It is also not the Court’s function to conclusively determine the effectiveness . . . of COVID-19 vaccines . . . . Instead, the Court’s only function is to determine the legal validity of the impugned orders which includes considering whether it has been shown that no Minister acting reasonably could have considered them necessary to deal with the identified risk to public health and its possible consequences. . . .

9. Although it was contended that the impugned orders interfere with a person’s right to bodily integrity and a host of other freedoms, . . . the proper analysis is that the impugned orders curtail freedom of movement which in turn affects a person’s ability to work (and socialise). So far as the right to bodily integrity is concerned, it is not violated as the impugned orders do not authorise the involuntary vaccination of anyone. So far as the impairment of freedom of movement is concerned, the degree of impairment differs depending on whether a person is vaccinated or unvaccinated. Curtailing the free movement of persons including their movement to and at work are the very type of restrictions that the PHA clearly authorizes. . . .

10. . . . Orders and directions under the PHA that interfere with freedom of movement but differentiate between individuals on arbitrary grounds unrelated to the relevant risk to public health, such as on the basis of race, gender or the mere holding of a political opinion, would be at severe risk of being held to be invalid as unreasonable. However, the differential treatment of people according to their vaccination status is not arbitrary . . . [and] is very much consistent with the objects of the PHA. . . .

59. . . . [P]laintiffs contended that . . . the “practical effect” of . . . the order . . . [was] effectively [to force] persons to undertake vaccination under threat of losing their capacity to work such that they will have not exercised a free choice to consent. . . .



63. . . . People may choose to be vaccinated or undertake some other form of medical procedure in response to various forms of societal pressure including a law or a rule, an employment condition or to avoid familial or social resentment, even scorn. However, if they do so, that does not mean their consent is vitiated or make the doctor who performed the vaccination liable for assault. . . .

271. The effect of the Kassam plaintiffs' written submissions was that Order (No 2) effected a form of civil conscription because it effectively required unvaccinated persons to obtain a COVID-19 vaccine. This wrongly assumed that s 51(xxiiiA) proscribes the compulsory acquisition of medical services which it does not. . . .

276. The Kassam plaintiffs sought to extend the proscription on civil conscription in the provision of medical and dental services to the States by contending that it gives rise to an "an implied constitutional right of individual patients to reject unless consented to vaccination[s]" binding on the states. Nothing in the text or structure of the Constitution supports any such implication. . . .

294. All of the asserted grounds of invalidity raised by both sets of plaintiffs have been rejected. Both proceedings must be dismissed.

**No. 2022-835 DC**  
**French Constitutional Council**  
**(January 2022)\***

[Before Laurent Fabius, President of the Council, and Claire Bazy Malaurie, Alain Juppé, Dominique Lottin, Corinne Luquiens, Jaques Mézard, François Pillet and Michel Pinault, members:]

. . . The requesting deputies and senators refer the law strengthening the tools for managing the public health crisis and modifying the public health code to the Constitutional Council. They dispute the constitutionality of certain provisions of its Article 1 and Article 16. . . .

2. Article 1 of the law [amends a previous public health law] to allow the Prime Minister to condition access to certain places on the presentation of a proof of COVID-19 vaccination status, called a "vaccination pass."

3. . . . [T]he petitioning deputies and senators argue that these provisions infringe the freedom to come and go, the freedom to assemble, and the right to collective expression of ideas and opinions. The applicant deputies also maintain that they infringe the right to respect for private life, the right to lead a normal family life, and the right to employment . . . .

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\* Translation provided by Braden Currey (Yale Law School, Class of 2023).

4. . . . [T]he applicant Members of Parliament argue that these provisions . . . establish an obligation to vaccinate which, in view of the effects and the state of advancement of the vaccines, would be neither necessary nor proportionate. . . . [T]hey maintain . . . that the application of these provisions to minors over sixteen years of age is not justified since the latter only rarely develop serious forms of the disease. They also believe that the exception to this requirement for a "compelling family or health reason," which permits access to interregional public transport without presenting proof of vaccination status, would be too imprecise and restrictive . . . .

7. Under the terms of the eleventh paragraph of the Preamble to the 1946 Constitution, the Nation "guarantees to all . . . the protection of health." This creates a constitutional mandate to protect public health. . . .

8. It is up to the legislature to ensure the reconciliation between this constitutional mandate and respect for other constitutionally guaranteed rights and freedoms. Among these rights and freedoms are the freedom to come and go . . . as well as the right of collective expression of ideas and opinions . . . .

9. The contested provisions provide that the Prime Minister may condition, for person aged sixteen years or older, access to certain places, establishments, services or events, such as restaurants, drinking establishments, and other sites for leisure activities, as well as to seminars and trade shows, interregional public transport for long-distance travel, and certain department stores and shopping centers, on the presentation of proof of vaccination status. . . .

14. It is not for the Constitutional Council, which does not have a general power of assessment and decision of the same nature as that of Parliament, to question the assessment by the legislature of this risk or to seek whether the objective of protecting health could have been achieved by other means, since, given the current state of knowledge of this disease, they are not manifestly inadequate with regard to the objective pursued and the present situation. . . .

16. . . . [The legislature] has bounded the application of these measures by several guarantees. . . . [I]t provided that it would guarantee people's access to essential goods and services as well as to the means of transport to these shops and shopping centers. It also provided that [these restrictions could be imposed only when] the characteristics of these places and the seriousness of the risks of contamination justify it. With regard to long-distance journeys by interregional public transport, the legislature has provided that, in the event of an emergency impeding obtaining the required proof, no health document is required and, by provisions which are not imprecise, that the requirement of presentation of a "vaccination pass" is replaced by that of presentation of a virological screening examination concluding that there is contamination with covid-19 in the event of "compelling family or health reasons." Moreover, as the Constitutional Council has ruled . . . the notion of "leisure activity" excludes in particular a political, trade union or religious activity . . . .

17. In addition, the contested measures may only be taken in the interest of public health and for the sole purpose of combating the Covid-19 epidemic. By law, these restrictions may only be imposed after considering viral circulation and its consequences on the health system, assessed by taking into account health indicators such as the vaccination rate, the positivity rate of screening tests, the incidence rate or the saturation rate of intensive care beds. They must be strictly proportionate to the health risks incurred and appropriate to the circumstances of time and place. They are terminated without delay when they are no longer necessary. . . .

23. It follows from the foregoing that the contested provisions, which are not vitiated by negative incompetence, operate [as] . . . a balanced reconciliation between the aforementioned constitutional requirements.

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In the United States, courts took a different tack. Old precedents and statutory authorities for public health measures were invoked for this new public health emergency. At the same time, many conservative jurists were raising concerns about the administrative state by launching critiques of judicial deference to agencies' interpretation of their statutory authority and of the degree to which the legislature had authorized agency action.

In *Jacobson v. Massachusetts*,\* the U.S. Supreme Court's 1905 flagship ruling on public health measures, the Court upheld the constitutionality of a Massachusetts law authorizing local boards of health to compel vaccinations against smallpox when found to be necessary for public health and safety. In concluding that the police power of a state allows for "reasonable regulations . . . to protect the public health and the public safety," the Supreme Court determined "[t]he possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community." The Court cautioned that "if a statute purporting to have been enacted to protect the public health . . . has no real or substantial relation" to that purpose or is a "plain, palpable invasion of rights secured by the fundamental law, it is the duty of courts to so adjudge."

*Jacobson*'s broad deference to public health authority took center stage in litigation early in the pandemic. Even then, courts struggled to reconcile the century-old precedent's deferential approach to executive action in the name of public health with the individual rights jurisprudence that had developed in the decades thereafter. These tensions could have come to a head in the context of the vaccination requirements imposed by the Biden administration on the national and healthcare workforces. Instead—and perhaps because the Biden administration grounded its authorities in regulatory power rather than constitutional law—the U.S. constitutional debate occurred

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\* *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

through the lens of administrative law and delegation. Two related judicially-created doctrines—termed nondelegation and the newer doctrine of major questions—have come to the fore as tools for conservative jurists to invalidate agency action seen as too broad or too novel.

As Justice Gorsuch explained in his concurrence in *National Federation of Independent Businesses (NFIB) v. Occupational Health and Safety Administration (OSHA)*, “[t]he nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials. . . .” This nondelegation doctrine is premised on constitutional law, while the major questions doctrine is a rule of statutory interpretation inspired by concerns about delegation. As Justice Gorsuch put it in *NFIB*, the major questions doctrine serves a similar function as nondelegation by “guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power” unless Congress has expressly authorized the executive to act on the matter at hand. The following two cases, handed down on the same day—January 13, 2022—are a pair of United States Supreme Court opinions that grapple with the tensions between the sweeping public health authority provided by statute and older precedent and the more aggressive application of judicial doctrines cabining agency power and discretion.

### **Biden v. Missouri**

Supreme Court of the United States

Nos. 21A240 and 21A241 (2022)

On application for stays . . . .

Per Curiam. [Chief Justice Roberts and Justices Sotomayor, Kagan, and Breyer joined in the ruling.]

. . . In November 2021, the Secretary [of Health and Human Services] announced that, in order to receive Medicare and Medicaid funding, participating facilities must ensure that their staff—unless exempt for medical or religious reasons—are vaccinated against COVID–19. . . .

. . . The Secretary issued the rule after finding that vaccination of healthcare workers against COVID–19 was “necessary for the health and safety of individuals to whom care and services are furnished.” . . .

[Two groups of states filed separate actions challenging the rule. Two district courts entered preliminary injunctions against its enforcement. The Fifth Circuit and Eighth Circuit declined to stay the injunctions.]

First, we agree . . . that the Secretary’s rule falls within the authorities that Congress has conferred upon him . . . to impose conditions on the receipt of Medicaid

and Medicare funds that “the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services.” . . .

. . . [E]nsuring that providers take steps to avoid transmitting a dangerous virus to their patients is consistent with the fundamental principle of the medical profession: first, do no harm. . . [H]ealthcare facilities that wish to participate in Medicare and Medicaid have always been obligated to satisfy a host of conditions that address the safe and effective provision of healthcare . . . Such requirements govern in detail, for instance, . . . the programs that hospitals must implement to govern the “surveillance, prevention, and control of . . . infectious diseases.”

Moreover, the Secretary routinely imposes conditions of participation that relate to the qualifications and duties of healthcare workers themselves. . . Of course the vaccine mandate goes further than what the Secretary has done in the past to implement infection control. But he has never had to address an infection problem of this scale and scope before. . .

. . . Vaccination requirements are a common feature of the provision of healthcare in America . . .

All this is perhaps why healthcare workers and public-health organizations overwhelmingly support the Secretary’s rule. Indeed, their support suggests that a vaccination requirement under these circumstances is a straightforward and predictable example of the “health and safety” regulations that Congress has authorized the Secretary to impose.

We also disagree with respondents’ remaining contentions in support of the injunctions. First, the interim rule is not arbitrary and capricious. . . As to the [concerns raised by lower courts about] the nature of the data relied upon [in promulgating this rule], the role of courts in reviewing arbitrary and capricious challenges is to “simply ensur[e] that the agency has acted within a zone of reasonableness.”

Other statutory objections to the rule . . . [take] issue with the Secretary’s finding of good cause to delay notice and comment. But the Secretary’s finding that accelerated promulgation of the rule in advance of the winter flu season would significantly reduce COVID–19 infections, hospitalizations, and deaths . . . constitutes the “something specific” . . . required to forgo notice and comment. And we cannot say that in this instance the two months the agency took to prepare a 73-page rule constitutes “delay” inconsistent with the Secretary’s finding of good cause. . . Lastly, the rule does not run afoul of the directive in § 1395.\* . . That reading of section 1395 would mean that

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\* Section 1395, in relevant parts, provides that federal officials may not “exercise any supervision or control over the . . . manner in which medical services are provided, or over the selection [or] tenure . . . of any officer or employee of” any facility.

nearly every condition of participation the Secretary has long insisted upon is unlawful. . . .

. . . [U]nprecedented circumstances provide no grounds for limiting the exercise of authorities the agency has long been recognized to have. Because [this] principle governs in these cases, the applications for a stay . . . are granted. . . .

Justice Thomas, with whom Justice Alito, Justice Gorsuch, and Justice Barrett join, dissenting:

. . . The Government has not explained why Congress would have used these ancillary provisions to house . . . a “fundamental detail” of the statutory scheme. Had Congress wanted to grant CMS power to impose a vaccine mandate across all facility types, it would have . . . specifically authorize[d] one.

. . . [M]any of [CMS’s] infection-control regulations . . . are far afield from immunization. And insofar as they do touch on immunization, they require only that facilities offer their residents the opportunity to obtain a vaccine, along with “the opportunity to refuse” it. These regulations are not precedents for CMS’s newfound authority *mandating* that all *employees* be vaccinated.

. . . Vaccine mandates also fall squarely within a State’s police power, . . . and, until now, only rarely have been a tool of the Federal Government. If Congress had wanted to grant CMS authority to impose a nationwide vaccine mandate, and consequently alter the state-federal balance, it would have said so clearly. It did not. . . .

Justice Alito, with whom Justice Thomas, Justice Gorsuch, and Justice Barrett, join, dissenting:

. . . I do not think that the Federal Government is likely to be able to show that Congress has authorized the unprecedented step of compelling over 10,000,000 healthcare workers to be vaccinated on pain of being fired. . . . [W]e should demand stronger statutory proof than has been mustered to date.

. . . Under our Constitution, the authority to make laws that impose obligations on the American people is conferred on Congress, whose Members are elected by the people. . . . Today, however, most federal law . . . comes in the form of rules issued by unelected administrators. . . .

In these cases, the relevant agency . . . depart[ed] from ordinary principles of administrative procedure. . . . [T]oday’s ruling . . . may have a lasting effect on Executive Branch behavior.

. . . [CMS] admits it did not comply with the commonsense measure of seeking public input before placing binding rules on millions of people, but it claims that “[t]he

data showing the vital importance of vaccination” indicate that it “cannot delay taking this action.” . . .

Although CMS argues that an emergency justifies swift action, . . . [t]he vaccines that CMS now claims are vital had been widely available 10 months before CMS’s mandate . . . . This is hardly swift.

. . . [I]t is CMS’s affirmative burden to show it has good cause, not respondents’ burden to prove the negative. . . . Because CMS chose to circumvent notice-and-comment . . . regulated parties . . . had no opportunity to present evidence refuting or contradicting CMS’s justifications before the rule bound them. And because CMS acknowledged its own “uncertainty,” . . . it should have been *more* receptive to feedback, not less.

**National Federation of Independent Businesses (NFIB) v.  
Occupational Safety and Health Administration (OSHA)**  
Supreme Court of the United States  
Nos. 21A244 and 21A247 (2022)

On application for stays . . . .

Per Curiam. [Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett joined in the ruling.]

The Secretary of Labor, acting through the Occupational Safety and Health Administration, recently enacted a vaccine mandate for much of the Nation’s work force. The mandate, which employers must enforce, applies to roughly 84 million workers, covering virtually all employers with at least 100 employees. It requires that covered workers receive a COVID–19 vaccine, and it pre-empts contrary state laws. . . .

OSHA has never before imposed such a mandate. Nor has Congress. Indeed, although Congress has enacted significant legislation addressing the COVID–19 pandemic, it has declined to enact any measure similar to what OSHA has promulgated here. Many States, businesses, and nonprofit organizations challenged OSHA’s rule in Courts of Appeals across the country. . . . Applicants now seek emergency relief from this Court, arguing that OSHA’s mandate exceeds its statutory authority and is otherwise unlawful. Agreeing that applicants are likely to prevail, we grant their applications and stay the rule.

Congress enacted the Occupational Safety and Health Act in 1970. The Act created the Occupational Safety and Health Administration (OSHA) . . . . As its name suggests, OSHA is tasked with ensuring occupational safety—that is, “safe and healthful working conditions.” It does so by enforcing occupational safety and health standards promulgated by the Secretary. Such standards must be “reasonably necessary or appropriate to provide safe or healthful employment” . . . .

The Act contains an exception to . . . ordinary notice-and-comment procedures for “emergency temporary standards.” . . . They are permissible, however, only in the narrowest of circumstances: the Secretary must show (1) “that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards,” and (2) that the “emergency standard is necessary to protect employees from such danger.” . . .

[T]he Secretary of Labor issued [an emergency compulsory vaccination standard]. . . . [T]he rule applies to all who work for employers with 100 or more employees. There are narrow exemptions for employees who work remotely “100 percent of the time” or who “work exclusively outdoors,” but those exemptions are largely illusory. . . . The regulation otherwise operates as a blunt instrument. It draws no distinctions based on industry or risk of exposure to COVID–19. . . .

Covered employers must “develop, implement, and enforce a mandatory COVID–19 vaccination policy.” . . . The mandate does contain an “exception” for employers that require unvaccinated workers to “undergo [weekly] COVID–19 testing and wear a face covering at work in lieu of vaccination.” . . . Unvaccinated employees who do not comply with OSHA’s rule must be “removed from the workplace.” And employers who commit violations face hefty fines: up to \$13,653 for a standard violation, and up to \$136,532 for a willful one. . . .

Applicants [the National Federation of Independent Businesses and a coalition of states] . . . are likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate. . . . The Secretary has ordered 84 million Americans to either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense. This is no “everyday exercise of federal power.” It is instead a significant encroachment into the lives—and health—of a vast number of employees. . . .

The question, then, is whether the Act plainly authorizes the Secretary’s mandate. It does not. The Act empowers the Secretary to set workplace safety standards, not broad public health measures . . . no provision of the Act addresses public health . . . which falls outside of OSHA’s sphere of expertise. . . .

The Solicitor General does not dispute that OSHA is limited to regulating “work-related dangers.” She instead argues that the risk of contracting COVID–19 qualifies as such a danger. We cannot agree. Although COVID–19 is a risk that occurs in many workplaces, it is not an occupational hazard in most. . . . [This] kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. . . .

The dissent contends that OSHA’s mandate is comparable to a fire or sanitation regulation imposed by the agency. But a vaccine mandate is strikingly unlike the workplace regulations that OSHA has typically imposed. A vaccination, after all, “cannot be undone at the end of the workday.” . . .



That is not to say OSHA lacks authority to regulate occupation-specific risks related to COVID–19. Where the virus poses a special danger because of the particular features of an employee’s job or workplace, targeted regulations are plainly permissible. . . . But the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting COVID–19 that all face. OSHA’s indiscriminate approach fails to account for this crucial distinction—between occupational risk and risk more generally—and accordingly the mandate takes on the character of a general public health measure, rather than an “occupational safety or health standard.” . . .

It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace. This “lack of historical precedent,” coupled with the breadth of authority that the Secretary now claims, is a “telling indication” that the mandate extends beyond the agency’s legitimate reach. The equities do not justify withholding interim relief. We are told by the States and the employers that OSHA’s mandate will force them to incur billions of dollars in unrecoverable compliance costs and will cause hundreds of thousands of employees to leave their jobs. For its part, the Federal Government says that the mandate will save over 6,500 lives and prevent hundreds of thousands of hospitalizations. It is not our role to weigh such tradeoffs. In our system of government, that is the responsibility of those chosen by the people through democratic processes. Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly. Requiring the vaccination of 84 million Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category. . . .

OSHA’s [standard] . . . is stayed pending disposition of the applicants’ petitions for review . . . .

Justice Gorsuch, with whom Justices Thomas and Alito join, concurring:

The central question we face today is: Who decides? No one doubts that the COVID–19 pandemic has posed challenges for every American. Or that our state, local, and national governments all have roles to play in combating the disease. The only question is whether an administrative agency in Washington, one charged with overseeing workplace safety, may mandate the vaccination or regular testing of 84 million people. . . .

The federal government’s powers, however, are not general but limited and divided. Not only must the federal government properly invoke a constitutionally enumerated source of authority to regulate in this area or any other. It must also act consistently with the Constitution’s separation of powers. And when it comes to that obligation, this Court has established at least one firm rule: “We expect Congress to

speak clearly” if it wishes to assign to an executive agency decisions “of vast economic and political significance.” We sometimes call this the major questions doctrine.

OSHA’s mandate fails that doctrine’s test. The agency claims the power to force 84 million Americans to receive a vaccine or undergo regular testing. By any measure, that is a claim of power to resolve a question of vast national significance. Yet Congress has nowhere clearly assigned so much power to OSHA. . . . Congress has chosen not to afford OSHA—or any federal agency—the authority to issue a vaccine mandate. . . .

. . . According to the agency, [OSHA’s organic statute] supplies it with “almost unlimited discretion” to mandate new nationwide rules in response to the pandemic so long as those rules are “reasonably related” to workplace safety.

The Court rightly applies the major questions doctrine and concludes that this lone statutory subsection does not clearly authorize OSHA’s mandate. . . . As the agency itself explained to a federal court less than two years ago, the statute does “not authorize OSHA to issue sweeping health standards” that affect workers’ lives outside the workplace. Yet that is precisely what the agency seeks to do now . . . .

Why does the major questions doctrine matter? It ensures that the national government’s power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people’s elected representatives. If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress.

In this respect, the major questions doctrine is closely related to what is sometimes called the nondelegation doctrine. Indeed, for decades courts have cited the nondelegation doctrine as a reason to apply the major questions doctrine. Both are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands.

The nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials. . . .

The major questions doctrine serves a similar function by guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power. Sometimes, Congress passes broadly worded statutes seeking to resolve important policy questions in a field while leaving an agency to work out the details of implementation. Later, the agency may seek to exploit some gap, ambiguity, or doubtful expression in Congress’s statutes to assume responsibilities far beyond its initial assignment. . . . In this way, the doctrine is “a vital check on expansive and aggressive assertions of executive authority.”

Either way, the point is the same one Chief Justice Marshall made in 1825: There are some “important subjects, which must be entirely regulated by the legislature itself,” and others “of less interest, in which a general provision may be made, and power given to [others] to fill up the details.” And on no one’s account does this mandate qualify as some “detail.” . . .

Justices Breyer, Sotomayor, and Kagan, dissenting:

Every day, COVID–19 poses grave dangers to the citizens of this country—and particularly, to its workers. The disease has by now killed almost 1 million Americans and hospitalized almost 4 million. It spreads by person-to-person contact in confined indoor spaces, so causes harm in nearly all workplace environments. And in those environments, more than any others, individuals have little control, and therefore little capacity to mitigate risk. COVID–19, in short, is a menace in work settings. The proof is all around us: Since the disease’s onset, most Americans have seen their workplaces transformed. . . .

. . . [OSHA’s Standard] falls within the core of the agency’s mission: to “protect employees” from “grave danger” that comes from “new hazards” or exposure to harmful agents. OSHA estimates—and there is no ground for disputing—that the Standard will save over 6,500 lives and prevent over 250,000 hospitalizations in six months’ time.

Yet today the Court issues a stay that prevents the Standard from taking effect. In our view, the Court’s order seriously misapplies the applicable legal standards. And in so doing, it stymies the Federal Government’s ability to counter the unparalleled threat that COVID-19 poses to our Nation’s workers. Acting outside of its competence and without legal basis, the Court displaces the judgments of the Government officials given the responsibility to respond to workplace health emergencies. . . .

In 1970, Congress enacted the Occupational Safety and Health Act (Act) “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources,” including “by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems.” . . . Still more, the Act requires OSHA to issue “an emergency temporary standard to take immediate effect upon publication in the Federal Register if [the agency] determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.”

Acting under that statutory command, OSHA promulgated the emergency temporary standard at issue here. . . . The Standard . . . encourages vaccination, but permits employers to adopt a masking-or-testing policy instead. . . . Further, the Standard does not apply in a variety of settings. It exempts employees who are at a

reduced risk of infection because they work from home, alone, or outdoors. It makes exceptions based on religious objections or medical necessity. . . .

The legal standard governing a request for relief pending appellate review is settled. To obtain that relief, the applicants must show: (1) that their “claims are likely to prevail,” (2) “that denying them relief would lead to irreparable injury,” and (3) “that granting relief would not harm the public interest.” . . . None of these requirements [are] met here.

The applicants are not “likely to prevail” under any proper view of the law. OSHA’s rule perfectly fits the language of the applicable statutory provision. Once again, that provision commands—not just enables, but commands—OSHA to issue an emergency temporary standard . . . .

The virus that causes COVID–19 is a “new hazard” as well as a “physically harmful” “agent.” The virus also poses a “grave danger” to millions of employees. . . .

Finally, the Standard is “necessary” to address the danger of COVID–19. . . . The agency showed, in meticulous detail, that close contact between infected and uninfected individuals spreads the disease . . . . In short, OSHA showed that no lesser policy would prevent as much death and injury from COVID–19 as the Standard would.

OSHA’s determinations are “conclusive if supported by substantial evidence.” Judicial review under that test is deferential, as it should be. OSHA employs, in both its enforcement and health divisions, numerous scientists, doctors, and other experts in public health, especially as it relates to work environments. . . . Given the extensive evidence in the record supporting OSHA’s determinations about the risk of COVID–19 and the efficacy of masking, testing, and vaccination, a court could not conclude that the Standard fails substantial-evidence review. . . .

[The majority] argues that OSHA cannot keep workplaces safe from COVID–19 because the agency . . . has no power to address the disease outside the work setting. But nothing in the Act’s text supports the majority’s limitation on OSHA’s regulatory authority. Of course, the majority is correct that OSHA is not a roving public health regulator. It has power only to protect employees from workplace hazards. But as just explained, that is exactly what the Standard does. . . . Contra the majority, [the Act] is indifferent to whether a hazard in the workplace is also found elsewhere. . . . The same is true of the provision at issue here demanding the issuance of temporary emergency standards. . . . The statute does not require that employees are exposed to those dangers only while on the workplace clock. And that should settle the matter. When Congress “enact[s] expansive language offering no indication whatever that the statute limits what [an agency] can” do, the Court cannot “impos[e] limits on an agency’s discretion that are not supported by the text.” That is what the majority today does—impose a limit found no place in the governing statute.

Consistent with Congress’s directives, OSHA has long regulated risks that arise both inside and outside of the workplace. . . . Indeed, Congress just last year made this clear. . . . Congress knew—and Congress said—that OSHA’s responsibility to mitigate the harms of COVID–19 in the typical workplace do not diminish just because the disease also endangers people in other settings. . . .

The result of its ruling is squarely at odds with the statutory scheme. As shown earlier, the Act’s explicit terms authorize the Standard. . . . The enacting Congress of course did not tell the agency to issue this Standard in response to this COVID–19 pandemic—because that Congress could not predict the future. But that Congress did indeed want OSHA to have the tools needed to confront emerging dangers (including contagious diseases) in the workplace. . . . The Standard protects untold numbers of employees from a danger especially prevalent in workplace conditions. It lies at the core of OSHA’s authority. It is part of what the agency was built for.

Even if the merits were a close question—which they are not—the Court would badly err by issuing this stay. That is because a court may not issue a stay unless the balance of harms and the public interest support the action. Here, they do not. . . .

Consider first the economic harms asserted in support of a stay. The employers principally argue that the Standard will disrupt their businesses by prompting hundreds of thousands of employees to leave their jobs. But OSHA expressly considered that claim, and found it exaggerated. According to OSHA, employers that have implemented vaccine mandates have found that far fewer employees actually quit their jobs than threaten to do so. . . .

More fundamentally, the public interest here—the interest in protecting workers from disease and death—overwhelms the employers’ alleged costs. . . .

Underlying everything else in this dispute is a single, simple question: Who decides how much protection, and of what kind, American workers need from COVID–19? An agency with expertise in workplace health and safety, acting as Congress and the President authorized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes?

Here, an agency charged by Congress with safeguarding employees from workplace dangers has decided that action is needed. The agency has thoroughly evaluated the risks that the disease poses to workers across all sectors of the economy. It has considered the extent to which various policies will mitigate those risks, and the costs those policies will entail. It has landed on an approach that encourages vaccination, but allows employers to use masking and testing instead. It has meticulously explained why it has reached its conclusions. . . . The Standard also has the virtue of political accountability, for OSHA is responsible to the President, and the President is responsible to—and can be held to account by—the American public.

And then, there is this Court. Its Members are elected by, and accountable to, no one. And we “lack[] the background, competence, and expertise to assess” workplace health and safety issues. When we are wise, we know enough to defer on matters like this one. When we are wise, we know not to displace the judgments of experts, acting within the sphere Congress marked out and under Presidential control, to deal with emergency conditions. Today, we are not wise. In the face of a still-raging pandemic, this Court tells the agency charged with protecting worker safety that it may not do so in all the workplaces needed. As disease and death continue to mount, this Court tells the agency that it cannot respond in the most effective way possible. Without legal basis, the Court usurps a decision that rightfully belongs to others. It undercuts the capacity of the responsible federal officials, acting well within the scope of their authority, to protect American workers from grave danger.

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## **Exempting Religion**

As public health authorities have restricted the ability to congregate, courts have examined the logic and limits of the right to worship—and, in particular, whether the ability to gather in person is a fundamental part of the act of worship of a religion. As public health authorities limited gatherings, some courts have found that interference with religious rights disproportionate, while other courts concluded that temporary restrictions were reasonable in light of the exceptional nature of the pandemic. Below we provide a few examples. In the United States, the 1905 decision of *Jacobson v. Massachusetts* has remained relevant in religious freedom cases, as it provides for broad police powers to protect the public health; the COVID cases made arguments nested in efforts to alter the parameters of religious liberty in this context as well as others. The results have prompted intense debates and significant shifts in governing doctrine on the relationship of governments to religion.

### **South Bay United Pentecostal Church v. Newson**

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

On application for injunctive relief . . . .

Per Curiam. [Chief Justice Roberts and Justices Thomas, Alito, Kavanaugh, Gorsuch and Barrett joined in the ruling:]

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 Newson] 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 of application 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. . . .

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 hones 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 must treat this one communal gathering like activities thought to pose a much lesser COVID risk . . . . 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. . . . 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. . . . [T]he Court forges ahead regardless, insisting that science-based policy yield to judicial edict. I respectfully dissent.

**Philip and Others v. Scottish Ministers**  
Outer House, Court of Session, Scotland  
[2021] CSOH 32

Opinion of Lord Braid:

1. The petitioners, Reverend Dr William Philip and 26 others, are ministers and church leaders of Christian churches of various protestant denominations . . . . They challenge, by judicial review, the lawfulness of the enforced closure, in January 2021, of places of worship in Scotland . . . . The case raises two issues: (1) the extent, if any, to which the respondents have the constitutional power, at common law, to restrict the right to worship in Scotland; and (2) whether the closure is an unjustified infringement of the human rights of the petitioners and others to manifest their religious beliefs, and to assemble with others in order to do so . . . .

2. The legislation under challenge, which effected the closure of places of worship, is [“The Regulations”] . . . . The petitioners seek three orders: declarator that the Regulations are unlawful . . . and declarator that a person living in a Level 4 area may lawfully leave [their home] . . . to attend a place of worship.

5. The essence of the petitioners’ case is that an integral part of Christianity is the physical gathering together of Christians . . . . The essential physical element of these aspects of their faith is absent from virtual, internet events . . . .

12. As introduced (and as currently in force), the Local Levels Regulations set out five protection levels (Level 0 to Level 4) which are designed to apply increasing levels of protection from the virus in local authority areas according to prevalence, the risk to communities and the need to protect the NHS. . . .

13. As introduced, the Local Levels Regulations also required various specified premises within a Level 4 area to close . . . . Those regulations also imposed a prohibition on public gatherings indoors in a Level 4 area, unless (among other exceptions) the gathering was for the purpose of attending a place of worship . . . .

17. Thus, those regulations not only require the closure of all places of worship except for specified purposes (which include marriages and funerals, but do not include, for example, communion or baptisms); they also prohibit any form of communal worship indoors or outdoors. . . .

58. On 18 January 2021, the Cabinet Secretary for Communities and Local Government wrote to Scotland’s faith and belief communities about the restrictions contained in the No 11 Regulations . . . . She committed to ensuring that places of worship would be amongst the first sectors to be seriously considered for any easing of restrictions . . . . On 23 February 2021, the First Minister stated the intention of the Scottish Government to allow the reopening of communal worship in time for Passover and the Easter Weekend . . . . Most recently, on 9 March 2021, the First Minister announced the respondents’ intention to allow places of worship to open, if the data permits, from 26 March 2021 . . . .

61. I accept the evidence of the petitioners and of the additional party that worship in their faiths cannot properly take place on-line, by means of internet platforms . . . .

63. For all these reasons, I am clear that the effect of the closure of places of worship is that the petitioners, and the additional party are effectively prevented from practicing or manifesting their religion, however many broadcasts or internet platforms may exist . . . .

64. The petitioners’ argument in relation to the constitutional issue is that insofar as the Regulations prevent worship, they are beyond the competence of Parliament, and therefore beyond the competence of the Scottish Parliament and of the respondents petitioners, an interference with the practice of the Christian religion in Scotland . . . .

68. [Counsel for petitioners submitted that closure] of places of worship, thereby preventing the church from carrying out corporate worship, communion, baptism and congregational ministry trespassed into the sole province of the church. Those were all spiritual, not civil, matters . . . .

69. Senior counsel for the additional party presented the constitutional argument from a different perspective. From a specifically Catholic perspective to allow for weddings and funerals but to ban the use of churches for baptism was a peculiarly disproportionate restriction because baptism was the necessary “gateway” sacrament to participation and reception of the other sacraments recognized in Catholic teaching. The Regulations, by forcing the additional party to close the churches for which he was responsible, had placed him in an impossible situation . . . .

71. Senior counsel for the respondents submitted that the Regulations did not relate to spiritual matters and so did not constitute an unlawful interference with the independence of the church in Scotland . . . . The state may, and does, regulate a host of civil matters that can affect places of worship, including, for example, health and safety law, compulsory purchase and planning; and occupiers liability. These were civil, not spiritual, matters.

80. I reject the petitioners’ proposition that any interference with their right to worship, no matter how proportionate, is beyond the powers of the respondents. . . .

83. The Human Rights Act 1998 provides in section 6\* that it is unlawful for a public authority to act in a way that is incompatible with a right protected by the European Convention on Human Rights (“the Convention”). . . .

97. As parties agree, the issue for determination is whether the restrictions imposed by the Regulations fall within article 9(2),\*\* namely whether they are prescribed by law, pursue a legitimate aim and are necessary in a democratic society in the interests . . . of public health.

98. To be prescribed by law, the Regulations must both have a basis in domestic law, and be accessible to the persons concerned and be foreseeable as to their effects. On any view, the Regulations pass this test. . . .

99. . . . It is beyond question that the Regulations have a legitimate aim.

100. This leads to the core issue in this case which is whether the Regulations are proportionate. . . . The four stages . . . are: (i) whether the objective being pursued is sufficiently important to justify the limitation of a protected right; (ii) whether the measure is rationally connected to the objective; (iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (iv) whether, balancing the severity of the measure’s effect on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. . . .

101. As regards importance, nothing more need be said in this case, since it is not in dispute that the aim being pursued—reduction in risk for the protection of health and preservation of life—is sufficiently important to justify limitation of the protected right. . . .

103. . . . [I]nsofar as the closure of places of worship combined with the stay at home requirement will inevitably reduce human interaction, which is a known means of transmission, it cannot be said, on an objective approach, that there is no rational

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\* Section 6 of the Human Rights Act 1998 provides, in relevant part:

. . . (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right. . . .

\*\* Article 9 of the European Convention on Human Rights provides, in relevant part:

. . . (2) 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.

connection at all between the Regulations and the aim. . . . That said, there is a whiff of irrationality about the decision not even to allow places of worship to open for private prayer, when one looks at the reasoning behind that option not being recommended. . . .

109. I consider that this question is more finely nuanced than either party would have it. As the authorities make clear, the breadth of the margin of appreciation in each case ultimately must turn on the facts. . . .

112. . . . I now turn to consider the respondents' reasoning for not adopting less restrictive measures. . . .

114. Perhaps a more fundamental problem for the respondents is that as soon as they allow some exceptions to the "stay at home" rule and the corresponding requirements to close premises and restrict activities, it then falls on them to justify why other exceptions are not allowed. . . . [I]t would be easier to justify the closure of places of worship if the risk from the new variant was so great that no activities at all were to be permitted, including meeting under any circumstances, save (say) going to the supermarket once a week. As soon as that approach is departed from, the respondents must be taken to have acknowledged that, whatever the increased risks from the new variant, some indoor assembly can safely be achieved if mitigation procedures are followed. While I accept that it is difficult to draw a meaningful comparison between places of worship and some premises which are exempt from the requirement to close, such as bicycle shops, a more meaningful comparison can perhaps be drawn with the continued use of cinemas as jury centres. Like places of worship, they involve people from different households coming together repeatedly to congregate indoors in a confined area. Indeed on one view, jury centres might be thought to carry more risk because the duration of contact is longer. . . . The answer given by senior counsel for the respondents when pressed about this apparent distinction was to say that choices had to be made, that it was important that the criminal justice system continue to operate, and that the respondents were entitled to leave the decision as to whether to use cinemas . . . [to the State]. I accept all of this, but the point, it seems to me, is that there is at the very least an implicit acceptance by the respondents that meeting indoors can be safe if suitable mitigation measures are adopted. The article 6 right to a fair trial within a reasonable period is important, but so, too, is the article 9 right, and nowhere have the respondents explained why in the one case, closure was considered to be necessary and in the other, not.

115. For all these reasons, and without in any way questioning the science which underlay the respondents' decision-making, I conclude that the respondents have failed to show that no less intrusive means than the Regulations were available to address their aim of reducing risk to a significant extent. . . .

118. It remains necessary to consider the fourth stage of the test, for completeness and in case I am wrong in the conclusion just reached . . . .

120. Considering next the importance of the affected right, it is not clear that the respondents have fully appreciated the importance of article 9 rights. They have admittedly paid lip service to article 9 by referring to it, but there is no evidence that they have accorded it the importance which such a fundamental right deserves. . . .

121. As for severity of effect, it is all too easy to argue, as the respondents in effect do, that “it doesn’t really matter” that places of worship are closed because it’s only for a short period, and those who wish to do so can go on-line. . . . [Virtual worship] can be seen only as an alternative to, not a substitute for, worship. While some people may derive some benefit from being able to observe on-line services, it is undeniable that certain aspects of certain faiths simply cannot take place, at all, under the current legislative regime: in particular, communion; baptism; and confession, to name but three. It is impossible to measure the effect of those restrictions on those who hold religious beliefs. It goes beyond mere loss of companionship and an inability to attend a lunch club. . . .

126. Ultimately the matter is finely balanced, particularly as I recognise that the decision is ultimately a political one and that the respondents do enjoy some margin of appreciation at this stage of the test as at others. Nonetheless, the apparent under-playing of the importance of the article 9 right in comparison with other activities, coupled with the blanket ban on all forms of worship, including private prayer, communion, confession and baptism, lead me to the conclusion that even if some enforced restriction on the right to worship was justified by the situation in December 2020/January 2021, the Regulations in the form they were passed did have a disproportionate effect and thus that they also fail the fourth stage of the assessment.

127. I have concluded that the Regulations do constitute a disproportionate interference with the article 9 right of the petitioners and others. As such, they are beyond the legislative competence of the respondents for the reasons set out above . . . .

129. I have not decided that all churches must immediately open or that it is safe for them to do so, or even that no restrictions at all are justified. All I have decided is that the Regulations which are challenged in this petition went further than they were lawfully able to do . . . .

**Gateway Bible Baptist Church v. Manitoba**  
Court of Queen’s Bench of Manitoba, Canada  
2021 MBQB 219

Joyal, Chief Justice:

[1] This application raises significant constitutional issues in respect of government imposed public health restrictions in the context of the COVID-19 global pandemic.

[2] On March 20, 2020, the Manitoba government (“Manitoba”) declared a province-wide ‘state of emergency.’ . . . It did so in order to protect the health and safety of all Manitobans and reduce the spread of COVID 19. From March 2020 and well into the early summer months of 2021 . . . Manitoba’s Chief Public Health Officer . . . issued successive Public Health Orders (“PHOs”) which significantly affected the constitutional rights and freedoms to assemble and worship. . . .

[6] The applicants challenge by way of application, the constitutionality of specific sections of Manitoba’s Emergency Public Health Orders . . . (the “impugned PHOs”). They also challenge subsequent orders . . . which were in effect at the time of the hearing of the application in May 2021. The applicants contend that the identified and specific sections of the impugned PHOs and the restrictions on public gatherings, gatherings in private residences and the temporary closure of places of worship, all infringe ss. 2(a), 2(b), 2(c), 7 and 15 of the Canadian Charter of Rights and Freedoms (“Charter”).

[9] The applicants in this case include both churches and individual applicants . . . .

[20] . . . . This case is not and should not be a probe or questioning of every aspect of Manitoba’s handling of the pandemic nor a challenge to every public health order or restriction. . . . [T]his Court’s focus must be on the constitutionality of the identified portions of the orders. . . . [T]his Court must take care to not conflate that constitutional assessment with an undue judicial focus on the wisdom of Manitoba’s broader policy choices as it relates to what may have been the inadequacies or adequacies of the particular timing, scope and nature of the public health restrictions. . . .

[The Court sketched the voluminous factual evidence introduced into the lower court proceedings related to the necessity of the challenged PHOs, including competing expert evidence on asymptomatic transmission, the relationship between positive PCR tests and infectivity, and the viability of a herd-immunity-based public health strategy.]

[205] Freedom of religion under the Charter contemplates the right to entertain religious beliefs, to declare those beliefs openly and without fear of hindrance or reprisal and to manifest religious belief by worship and practice or by teaching and dissemination. Section 2(a) [of the Charter]\* is engaged when an impugned law or state conduct interferes with the ability to act in accordance with a sincerely-held religious belief or practice, in a manner that is more than trivial or insubstantial. . . .

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\* Section 2 of the Canadian Charter of Rights and Freedoms reads, in relevant part

Everyone has the following fundamental freedoms:

- (a) Freedom of conscience and religion
- (b) Freedom of thought, belief, opinion and expression . . .
- (c) Freedom of peaceful assembly . . . .

[208] Freedom of expression [under Section 2(b) of the Charter] protects all nonviolent activities that convey or attempt to communicate meaning. A law or government action that has the purpose or effect of interfering with such activity is a *prima facie* interference with freedom of expression. . . .

[213] The jurisprudence [surrounding Section 2(c) of the Charter] confirms that the freedom of assembly and association are by definition, collective and public in nature. . . .

[215] . . . [M]y findings [are] that the impugned PHOs *prima facie* limit aspects of the freedom of religion . . . freedom of expression . . . and freedom of peaceful assembly . . . .

[277] [The impugned PHOs are valid if Manitoba can] demonstrate the following: 1. That the objective of the measure giving rise to the restriction is pressing and substantial [and] 2. That the means employed was proportionate to the objective. . . .

[281] [P]ublic health officials have been required to respond to a novel and complex pandemic. They have been required to make decisions quickly and in real time, in rapidly changing circumstances and in a climate of scientific uncertainty and evolving knowledge. Given that reality, while courts cannot abdicate their responsibility as protectors of the Constitution, neither should they forget that the factual underpinnings for managing a pandemic are essentially scientific and involve medical matters that fall outside the institutional expertise of courts. When determining whether any related restriction on rights is constitutionally defensible, the courts should be wary of second guessing those who are managing a pandemic on the basis of their democratic responsibility or their properly delegated authority, particularly when there may be divergent opinions or schools of scientific thought . . . .

[285] In arguing that there is no rational connection between the PHOs' objectives and PHOs, the applicants submit that Manitoba has not shown a rational connection between the infringement and the benefits sought on the basis of reason or logic . . . . The applicants . . . underscore the negligible risk of asymptomatic transmission, the use of unreliable models, the absence of scientific evidence to justify restrictions on outdoor gatherings, poor evidence to show that places of worship needed to be closed/restricted and what the applicants characterize as the failure on the part of Manitoba, to conduct a cost/benefit analysis. . . .

[289] . . . [T]he applicants also submit that [t]he deleterious effects include . . . the emotional, psychological and practical impact of limiting and prohibiting . . . the sacred religious and spiritual practices of their faith . . . . The negative impact also includes the immense stress, anxiety, despair and depression that comes from unprecedented social isolation. Juxtaposed with these deleterious effects say the applicants, is the reality that "lockdowns don't work" . . . .

[292] . . . I have determined that this is . . . a case where a margin of appreciation can be afforded to those making decisions quickly and in real time for the benefit of the public good and safety. . . . [T]he factual underpinnings for managing a pandemic are rooted in mostly scientific and medical matters. Those are matters that fall outside the expertise of courts. . . .

[The court then held that the objectives of the impugned PHOs were pressing and substantial in nature and that they were rationally connected to their objectives.]

[298] The minimal impairment requirement . . . requires that the impugned PHOs limit rights in a manner that is reasonably tailored to the objective. If there are alternative, less harmful means of achieving the government’s objective “in a real and substantial manner” as compared with the measure or means under challenge, then the law in question will fail the minimal impairment test . . . .

[304] [Manitoba’s objectives and justifications for the impugned PHOs] represent “real time” considerations that implicitly or explicitly required the difficult balancing of a plethora of competing interests as the fast-moving pandemic continued to threaten lives and Manitoba’s healthcare system. Needless to say, the menacing force and unpredictability of that pandemic did not provide public health officials with the “parlour-room luxury” of prolonged speculative debate nor the comfort of trial and error decision making, let alone the possibility of academic research projects that might confirm whether there existed “significantly less intrusive measures” that might be “equally effective.” . . .

[The court explained that the applicants suggest alternative “focused protection” interventions under which young people would be “free to gather and circulate throughout society” and that additional protections could be implemented for the elderly in places of worship.]

[305] . . . As Manitoba consistently has argued, singing and communion are often integral parts of such services and those acts pose a higher risk, which in the dire context in which Manitoba was operating, constituted yet one more risk to the broader threat to public health. . . .

[313] The applicants’ theory respecting focused protection (as a more minimally impairing approach) raises for the Court not only concerns about the practical effects flowing from the resigned acceptance of general community spread in the pursuit of an elusive herd immunity, it also raises significant ethical and moral questions connected to the risks of knowingly exposing any citizen, including some of those most vulnerable persons who are less identifiable because of their integration into the general population. . . .

[316] . . . I find that in examining the exponential growth in COVID-19, the uncontrolled community spread and rise in deaths and serious illness, not to mention



the impending crisis facing the healthcare system, [the Chief Public Health Officer (CPHO)] reasonably concluded that a quick and clear response was required. The difficult balancing that [the CPHO] was required to perform left him to make a decision and tailor measures which I have determined fell within a range of reasonable alternatives. I am far from convinced that in the context in which [the CPHO] was operating, there was any basis to conclude that “a significantly less intrusive” measure or measures would have been “equally effective” in flattening the curve. . . .

[317] The impugned measures in the PHOs “minimally impair” the rights in issue as contemplated by the jurisprudence. . . .

[The Court summarized the parties’ arguments relating to the proportionality requirement.]

[320] I have considered carefully the balance between the identifiable beneficial and deleterious effects of the limitation. I am persuaded that there exists the requisite proportionality as between the beneficial and deleterious effects . . . . The evidence in my view unquestionably demonstrates that the salutary effects of the limitation far outweigh those effects that may be characterized as deleterious. . . .

[324] Having determined as I have that the scientific evidence does support Manitoba’s extraordinary response and the limitations and restrictions on rights they were required to implement, I can similarly say that the benefit from those limitations and restrictions in what was a dire and urgent situation, was neither disproportionately minimal nor insignificant. Notwithstanding what must be readily acknowledged are the hardships and inconvenience that flow from such limitations on rights, it was those very limitations found in the impugned PHOs, that . . . helped realize the pressing and substantial objectives of protecting public health, saving lives and stopping the exponential growth of the virus from overwhelming Manitoba hospitals and its acute healthcare system.

[325] Manitoba argues persuasively that . . . freedom of religion . . . must be exercised with due respect for the rights of others and subject to such limitations as are necessary to protect public safety, order and health, and the fundamental rights and freedoms of others. . . . [T]his approach does not repudiate religious freedom, but instead, it facilitates its exercise so as to take the general wellbeing of others into account. . . .

[335] When examining the benefits of Manitoba’s response in the face of the threat of such a deadly pandemic, it is reasonable and rational to conclude that despite the undeniable hardships caused by the limitations on fundamental freedoms, the salutary benefits far outweigh the deleterious effects. . . . [A]s the Supreme Court of Canada has noted, “it is enough that the justification be convincing, in the sense that it is sufficient to satisfy the reasonable person looking at all the evidence and relevant

considerations, that the state is justified in infringing the right at stake to the degree it has.” . . .

## **THE LEGACIES OF COVID-19**

In this segment, we consider how learning to live with COVID-19, which will continue to disrupt the functioning of society for years to come, has informed our understanding of preexisting inequities and of the practices of courts themselves. What has or has not changed but should? What lessons on wise judging in emergency situations should we take away for the next crisis?

### **The Harms of Confinement**

Above, we excerpted cases in which people protested prohibitions on being in close contact and argued that their religious and political liberties were wrongly infringed. Here we consider protests from individuals in detention centers arguing that continued confinement flew in the face of these many mandates for distancing.

For some critics of imprisonment, COVID looked like an opportunity to expose the risks and harms of enforced density with strangers. In some jurisdictions, efforts to “de-densify” came to the fore. But in the United States, courts have tolerated a great deal of exposure to the disease. One question is whether standards do and should vary depending on the reasons for detention—as some people are awaiting trial or have been convicted of a crime, and others may be migrants or other kinds of civil detainees. Another question is whether COVID-19 has accelerated or hindered the process of implementing adequate safety and health care for people in detention for any reason.

### **In Re: Contagion of Covid 19 Virus in Prisons** Supreme Court of India Suo Moto Writ Petition No. 1 of 2020 (2021)

[Judgement of a Chamber composed of Justices N.V. Ramana, Nageswara Rao, and Surya Kant:]

3. On 23.03.2020, this Court directed the State Governments, Union Territories to constitute High Powered Committees to determine the class of prisoners who can be released on parole or on interim bail for appropriate periods . . . depending upon the nature of offence, the number of years to which he/she has been sentenced, the severity of offences which he/she is charged with and the stage of trial or any other relevant factor which the Committee thinks appropriate. . . . [A] large number of prisoners were released either on interim bail or on parole.

4. Due to the reduction of the number of active cases, the released prisoners were directed to report back to prisons. . . .

5. . . . In the present situation there is a serious concern about the spread of Covid-19 in overcrowded prisons where there is lack of proper sanitation, hygiene and medical facilities.

8. . . . [S]ome of the prisons in India are overburdened and are housing inmates beyond optimal capacity. In this regard, we may notice that the requirement of de-congestion is a matter concerning health and right to life of both the prison inmates and the police personnel working [in prisons]. Reduction of impact of Covid-19 requires this Court to effectively calibrate concerns of criminal justice, health hazards and rights of the accused. . . .

11. . . . [T]he High-Powered Committee, in addition to considering fresh release, should forthwith release all the inmates who had been released earlier pursuant to our order 23.03.2020, by imposing appropriate conditions. Such an exercise is mandated in order to save valuable time.

12. . . . [W]e direct that, those inmates who were granted parole, pursuant to our earlier orders, should be again granted a parole for a period of 90 days in order to tide over the pandemic.

13. . . . [O]ur attention was drawn to [the] example of Delhi, wherein the prison occupancy is updated in websites. Such measures are required to be considered by other States and should be adopted as good practice. . . .

14. . . . Some prisoners might not be willing to be released in view of their social background and the fear of becoming victims of the deadly virus. In such extraordinary cases, the authorities are directed to be considerate to the concerns of the inmates. The authorities are directed to ensure that proper medical facilities are provided to all prisoners who are imprisoned. The spread of Covid-19 virus should be controlled in the prisons by regular testing being done of [not only] the prisoners but also the jail staff and immediate treatment should be made available to the inmates and the staff. . . . Appropriate steps shall be taken for transportation of the released inmates of the prisons, if necessary, in view of the curfews and lockdown in some States.

\* \* \*

In a series of court cases, the European Court of Human Rights explored the positive obligations of governments to protect persons held in detention in Malta against the spread of COVID-19. A report released in early March of 2020 by the European Committee for the Prevention of Torture and Inhuman or Degrading Punishment commented that:

Migrants were generally locked in accommodation units with little, if any, access to time outside, in severely overcrowded spaces, and essentially forgotten for months on end. This neglect came from both the management and staff of the establishments, but also from a government policy that has not focused sufficiently on how to cope with the increasing numbers of migrant arrivals. As a result, [the Maltese government] was detaining migrants en masse, many for unlawful and arbitrarily long periods under public health orders and others for long periods under the reception and removal orders, along with a lack of due process safeguards. . . . Indeed, the CPT considers that certain of the living conditions, regimes, lack of due process safeguards, treatment of vulnerable groups and some specific Covid-19 measures undertaken are so problematic that they may well amount to inhuman and degrading treatment contrary to Article 3 of the European Convention on Human Rights.\*

**Feilazoo v. Malta**  
European Court of Human Rights  
Application no. 6865/19 (2021)

[Before Ksenija Turcović, Linos-Alexandre Sicilianos, Alena Poláčková, Péter Paczolay, Gilberto Felici, Erik Wennerström, and Lorainne Schembri Orland, Judges]:

1. The case concerns the conditions of the applicant’s immigration detention as well as its lawfulness under Articles 3 . . . of the Convention . . . .

5. On 23 February 2010, following a guilty plea in relation to drug related charges, the applicant was convicted by the Criminal Court to twelve years’ imprisonment . . . .

7. [Upon his release from prison,] applicant was informed that he could not return to Spain since the Spanish authorities would not accept him. He was informed that he would . . . have to be sent back to Nigeria but that he would in the meantime be kept at the detention centre [in Malta] . . . .

70. The applicant submitted that the detention centre, where he was held together with other asylum seekers, was not built to serve this purpose as it was a former military barracks made up of warehouses. . . . The applicant relied on a covert video published in the press where fellow detainees had shared their experiences of living in overcrowded conditions with a lack of hygiene, medical attention and nutritious food

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\* EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, REPORT TO THE MALTESE GOVERNMENT ON THE VISIT TO MALTA 7 (March 10, 2021).

and which showed the dire conditions, including dirty floors, worn out and torn clothing and the lack of clean and functional bathrooms.

71. Relying on photographic evidence, he further submitted that he slept on a mattress in overcrowded conditions . . . . The applicant complained about the unhygienic handling of food which moreover had been distributed on a table in close proximity to the sanitary facilities, thus detainees ate whilst smelling human waste; the taste of tap water they had been made to drink; the limited hygiene products (a shower gel once every two months); and the high prices of the “shopping list” where detainees could purchase limited items (which excluded fruit and vegetables) based on any money sent to them by relatives, on an account which had been controlled by the guards. . . .

73. . . . [On] 13 July 2020, upon the applicant’s repeated pleas, he was moved to other living quarters, only to learn that it was being used for new arrivals kept in Covid-19 quarantine. The applicant complained about this hazardous situation and the total disregard to his health, but it was only on 29 August 2020 following repeated requests by his current representative that the applicant had been moved out of those quarters. . . .

80. The Court reiterates that, according to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention.\* The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. Furthermore, in considering whether treatment is “degrading” within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. . . .

83. The Court further reiterates that, quite apart from the necessity of having sufficient personal space, other aspects of physical conditions of detention are relevant for the assessment of compliance with Article 3. Such elements include access to outdoor exercise, natural light or air, availability of ventilation, and compliance with basic sanitary and hygiene requirements. . . .

92. . . . The Court notes that there is no indication that the applicant was in need of such quarantine – particularly after an isolation period – which moreover lasted for nearly seven weeks. Thus, the measure of placing him, for several weeks, with other persons who could have posed a risk to his health in the absence of any relevant consideration to this effect, cannot be considered as a measure complying with basic sanitary requirements.

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\* Article 3 of the European Convention on Human Rights reads:

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

93. . . . [T]here has been a violation of Article 3 in the present case. . . .

139. The Court notes that it only found a violation of Articles 3 of the Convention . . . [t]hus any claims related to other complaints must be dismissed. . . . [I]t awards the applicant EUR 25,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

**Fenech v. Malta**  
European Court of Human Rights  
Application no. 19090/20 (2022)

[Before Péter Paczolay, Krzysztof Wojtyczek, Alena Poláčková, Gilberto Felici, Raffaele Sabato, Lorraine Schembri Orland, and Ioannis Ktistakis, Judges]

1. The case concerns the applicant's conditions of detention in the Corradino Correctional Facility and whether the Maltese authorities took adequate measures to safeguard the applicant, who only has one kidney, against any potential future Covid-19 infection in the prison. . . .

5. The applicant is a businessman and the former head of the Tumas Group. He was arrested on his yacht on 20 November 2019 on suspicion of involvement in the murder of Maltese journalist Daphne Caruana Galizia in October 2017 [and was later remanded to remain in custody]. . . .

13. Since 4 January 2020 onwards, the applicant was moved to a dormitory, the conditions of which he also considered unsanitary and unhealthy. He shared his cell with four or five other detainees. . . . The cell measured 34.8 sq.m. . . . and each detainee had less than 4 sq.m. of free space. The detainees slept on bunk beds and shared a toilet, shower, and handbasin. They had to wash their clothes, dishes and plates in the same handbasin. The applicant was not allowed to use the gym for exercise. Instead, he was able to walk in a yard for thirty minutes per day. The remainder of the day, he was confined to the shared cell.

14. The applicant submitted that he was in daily contact with guards (who were rotated every week) and nurses and a chaplain (who also rotated). On any single day, the applicant was exposed to ten persons who left the prison at least weekly. . . .

98. The applicant complained about the risk to his life due to the Covid-19 pandemic and his vulnerable status, in relation to which the authorities had taken no

steps to safeguard his life and health while in detention, as provided in Articles 2\* and 3\*\* of the Convention . . . .

99. The Government submitted that the applicant had failed to show that the alleged shortcomings had truly placed his life at imminent risk [because at the date of submission, May 2021, there had not been community transmission of COVID-19 within the correctional facility]. . . .

100. The applicant submitted that . . . the prison authorities and the Maltese courts had failed to take into account the applicant's special status as a vulnerable individual who lacked a kidney. By virtue of being both a pre-trial detainee, as well as a detainee with a serious health risk, he had to be specifically safeguarded against any potential future Covid-19 infection in the prison. . . .

104. The Court considers that in his application lodged in May 2020, at the beginning of the pandemic when little was yet known about the virus, the applicant sufficiently explained why he considered that the domestic authorities had not taken sufficient measures to fight the spread of Covid-19 in prison and to protect him personally, as a vulnerable individual lacking a kidney, who could be directly affected by such a virus. . . . [W]ithout diminishing the seriousness of this sometimes deadly virus, the Court cannot consider that individuals are a victim of an alleged violation of Article 2 without substantiating that in their own circumstances the acts or omissions of the State have or could have put their life at real and imminent risk.

106. . . . [A]part from the lack of a kidney, the applicant has no underlying health conditions . . . . [T]he applicant has not relied on any studies or relevant materials capable of giving a clear picture of the chances that a man of his age (early forties), lacking a kidney, would certainly or quite likely die of the disease . . . . Thus, the Court cannot speculate as to whether his condition in such case would be of a life-threatening nature which would therefore attract the applicability of Article 2. . . .

107. The Court does not exclude the applicability of Article 2 in certain Covid-19 related cases. However, in the circumstances of the present case, it considers that the provision is not applicable and that the applicant cannot claim to be a victim of the alleged violation under Article 2. . . .

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\* Article 2 of the European Convention on Human Rights reads, in relevant part:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law

\*\* Article 3 of the European Convention on Human Rights reads:

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

115. [The Applicant argued that, under Article 3,] the authorities should have ensured appropriate measures to prevent the introduction and spread of the disease in the prison, as well as enforced comprehensive, preventative, hygiene measures and strengthened medical support, particularly tailored according to the applicant's medical needs. In particular, the prison authorities had failed to insulate the applicant from exposure to the risk of contracting serious diseases, particularly Covid-19 despite his condition. . . .

117. The Government submitted that, even before there was the first case of Covid-19 in the country, the prison administration had put in place a contingency plan which had been approved by the domestic public health authorities, to safeguard the well-being of the inmates (900) and the prison staff . . . .

121. Furthermore, for several months, CCF was effectively in a lockdown. The prison administration worked on a system of weekly shifts, where the administration slept at the facility for a full week without any person going in or out of the facility. . . .

122. The inmates of CCF were given priority (irrespective of their age) when the Government began to vaccinate the population. In fact, by 21 April 2021, every single inmate at CCF was fully vaccinated, except for those inmates who refused to be vaccinated. Those measures as well as the result achieved through them showed that the authorities took all the precautions necessary to avoid the proliferation of Covid-19 within the facility. . . .

126. The state of health, age and a severe physical disability constitute situations in which capacity for detention is assessed under Article 3 of the Convention. Although this provision cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty . . . .

127. . . . Article 3 imposes on the State a positive obligation to put in place effective methods of prevention and detection of contagious diseases in prisons. . . .

128. On the whole, the Court takes a flexible approach in defining the required standard of health care, deciding it on a case-by-case basis. That standard should be "compatible with the human dignity" of a detainee but should also take into account "the practical demands of imprisonment" . . . .

131. . . . The Court observes that before the first case of Covid-19 was detected in Malta, the prison authorities had already put in place a contingency plan in collaboration with the national health authorities. Regrettably, the Government failed to explain in detail to what extent that contingency plan was put in place once the pandemic hit Malta . . . .



133. . . . [T]he Court takes account of the general measures listed by the Government, such as disinfection (by means of regular cleaning, and relative pumps), and mask wearing as well as the possibility of physical distancing given the size of the applicant's dormitory and the personal space available to him . . . . Moreover, there is no indication that the CCF, which hosts around 900 inmates, was or is generally overcrowded . . . . Thus, the Court considers that, contrary to the applicant's wishes, in respect of the situation at the CCF there would be no pressing necessity to consider a greater use of alternatives to pre-trial detention, particularly for persons like the applicant accused of particularly serious crimes . . . .

136. Importantly the Court notes that vaccination against Covid-19 was available to all inmates in early 2021 and by April 2021 all the inmates who wished so had been vaccinated. . . .

139. While it is true that CCF did not entirely prevent contamination within the prison, there is no indication that the spread of the virus had not been, and continues to be, limited via these measures, nor has the applicant claimed that the contaminations had gone out of hand. . . . [Given the rise of Omicron,] it would be unrealistic to expect that a detainee would never come in contact with a positive person . . . .

140. In light of the above, the Court considers that the authorities have put in place adequate and proportionate measures in order to prevent and limit the spread of the virus. . . .

142. . . . [T]he Court does not find that the authorities failed to secure the applicant's health, nor that he was subjected to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.

143. It follows that there has been no violation of Article 3.

### **Tolerating the Harms of Detention: With and Without COVID-19** Jamie Meyer, Marisol Orihuela, and Judith Resnik (2022)\*

What does COVID-19 teach about the lives of people in detention and the obligations of those running such facilities? How should the experiences of this pandemic inform the body politic about COVID and about incarceration?

In a host of ways, COVID-19 has been radically disruptive. Yet, for people in detention, whether housed in jails before trial, in prisons after conviction, or as immigrants potentially subject to deportation, COVID-19 presents challenges that they

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\* Excerpted from Jamie Meyer, Marisol Orihuela & Judith Resnik, *Tolerating the Harms of Detention: With and Without COVID-19*, in *COVID-19 AND THE LAW: DISRUPTION, IMPACT, AND LEGACY* (Glenn Cohen, Abbe R. Gluck, Katherine L. Kraschel & Carmen Shachar eds., forthcoming 2022), [https://papers.ssrn.com/abstract\\_id=4070640](https://papers.ssrn.com/abstract_id=4070640).

faced before this pandemic. The loss of free movement and autonomy is what detention in the United States currently entails. A risk of contagion accompanies confinement, which too often entails hyper-density as well as profound isolation, if people are held in solitary confinement.

The stunning dysfunction, expense, and racial inequities of the prison system have become a topic of national concern. From a variety of vantage points (whether from conservative groups described as “right on crime” or progressive activists), curbing incarceration has become imperative. When COVID hit, some commentators thought that it would provide a new impetus for radical revisions in support of the prison abolition movement. Yet . . . the heightened risks of COVID atop the other harms incarcerated people face have not, to date, dislodged widespread commitments to incarceration.

. . . COVID-19 underscored the total dependence of detained people on the governments that confine them and made vivid the health care failures endemic before COVID and the degree of connection between prisons and the communities in which they sit. The divisive debates about regulation, government obligations, and the need for joint venturing to reduce the risk of disease have shaped the responses to COVID-19, in and outside of prisons’ gates.

Congregate settings such as jails and prisons enable the rapid spread of infectious diseases that are transmitted person to person, especially those passed by droplets from coughing and sneezing. People are generally required to share bathrooms, showers, eating areas, and other common spaces. Many facilities are old, dilapidated, and have poor ventilation. . . .

In July 2020, the New York Times reported that 80 percent of the largest clusters of cases had occurred in prisons. By November 2020, the health disparities between people residing and working in prisons and the general public widened. Staff in federal and state prisons were 3.2 times more likely to be infected with COVID compared to the U.S. population, and the likelihood for incarcerated people was 1.4 times higher still. . . .

These statistics have public health implications beyond those facilities. . . . [S]taff members come in and out, and detained people rely on area hospitals for acute care. A 2020 modeling study predicted that, were every intensive care unit (ICU) bed made available for sick detainees, COVID outbreaks in nine ICE detention centers would, within three months, overwhelm local intensive care units within a 50-mile radius and the capacity to care for others would be greatly reduced, and other researchers focused on prisons. . . .

Documentation of detention facilities’ health care failures came by way of expert analyses provided to legislatures, government officials, and to courts. One overview of the inadequacies in the Federal Bureau of Prisons (BOP), with some 120 facilities across

the United States, came from testimony by Homer Venters, a physician and epidemiologist . . . Dr. Venters reported that COVID-19 “revealed a disturbing lack of access to care” in general. To seek care in the BOP, people had to submit written requests; with and without the pandemic, requests were ignored, mishandled, or received a delayed response.

The consequence, as Dr. Venters reported, was that “when COVID-19 arrived, incarcerated people relied on broken systems of sick call to seek care.” . . . The result, according to Dr. Venters, was that the “pre-existing weakness in the BOP health services worsened the morbidity and mortality of COVID-19.”

Parallels abounded in the states. In October of 2021, a California state court judge provided more than a hundred pages [documenting] that California’s Department of Corrections had caused “the worst epidemiological disaster in California correctional history;” rather than comply with various of the recommendations to mitigate harms, “instead, it chose to litigate the matter while people died.” . . .

What *does* the U.S. Constitution say about health care in prisons? The Fifth and Fourteenth Amendments protect “life, liberty, and property” from deprivations without “due process,” and the Eighth Amendment prohibits “cruel and unusual punishments” if serving a criminal sentence. . . . Writing for the majority honing in on what the Eighth Amendment required, Justice Thurgood Marshall explained in *Estelle v. Gamble* that the ban on cruel and unusual punishments embodied “broad and idealistic concepts of dignity, civilized standards, humanity, and decency,” which required states not to be deliberately indifferent “to serious medical needs.”

Even as this constitutional pronouncement was a major breakthrough, its test raises many questions. If a prison system does not provide adequate care, why should the *intent*—as contrasted with knowledge—of the administrators matter? And why should the burden rest with the incarcerated person? . . .

Losing *and* winning is one way to understand what happened thereafter. That ruling insulated prison officials, who could rebut claims by arguing they did not have the requisite level of intent to be subjected to injunctive orders to make changes or be held liable for monetary damages. . . .

A distinctive feature of the *Estelle v. Gamble* ruling needs highlighting. In contrast to the constitutions in many other countries, the U.S. Constitution has rarely been read to require affirmative support from the government. Many commentators see the U.S. Constitution as creating “negative liberties” producing freedom from government intervention rather than “positive rights” of provisioning. Moreover, even as other countries have social policies that provide for universal health care as well as education and other benefits, the United States currently does not. Yet the Court’s 1976 requirement that prisons not be deliberately indifferent to serious medical needs does impose an affirmative obligation to provide health care. Prisons are, therefore, one of

the few places in the U.S. where some form of access to health care has a degree of constitutional protection. . . .

Whether abolitionist or not, an array of communities and professionals mobilized to try to mitigate the risk COVID caused in detention. . . . One theory was that, because the disease put a person at risk of illness and death, COVID-19 turned a lawful sentence for a term of years into unlawful detention. The remedy was release . . . . Another theory was that, under *Estelle v. Gamble*, prison systems were deliberately indifferent to known medical needs. Some lower court judges agreed and ordered soap, masks, distancing, reduction of time, release of eligible individuals, and more.

These efforts were complicated by a 1996 statute known as the Prison Litigation Reform Act (PLRA), through which Congress circumscribed judges' authority to respond when prisoners seek relief from conditions of confinement. One line of COVID cases rejected lawsuits because prisoners had not "exhausted" administrative remedies . . . . Other trial-level judges recognized the need for release and did so by shortening sentences or relocating individuals to spend the remaining time in "home confinement." . . . Those decisions generally relied on prison officials' arguments that whatever they did to buffer against COVID-19 was sufficient under the test of "deliberate indifference to known medical needs." Thus, after an initial spurt of lower court judges insisting on methods to lessen the risks to people's lives and health, several courts showed their tolerance for doing just that. . . .

Lawsuits to protect immigration detainees were at times somewhat more successful than those brought on behalf of state and federal prisoners. A number of facility-wide class action lawsuits resulted in the release of significant numbers of ICE detainees, even when lower court decisions were subsequently modified or reversed. These ICE detention suits did not face the legal hurdles imposed by the PLRA, including its exhaustion requirements. Moreover, because people held in ICE detention are "civil" detainees, their right to health care comes from constitutional guarantees of liberty rather than prohibitions on cruel and unusual punishment. . . .

In general, the consensus among public health experts on de-densification was not met by adequate responses from a host of governmental officials, the CDC included. . . . As vaccine availability increased, the issues turned from access to obligations: who would get vaccinated, and can vaccines be mandated in detention? Available data suggested that, as of February 2022, in those jurisdictions providing information, the percentage of incarcerated people with at least one dose of a COVID-19 vaccine ranged from 52 percent to 94 percent. The rates of prison staff who had received at least one dose ranged from 23 percent to 82 percent. . . .

The question of imposing vaccine mandates for detained people is nested in oppressive histories of detention and of medical experimentation. As discussed, given the lack of care in many facilities, prisoners have many reasons to distrust the system that detains them. . . .

... Innovative responses have aimed to address the challenges of ethical and equitable vaccine distribution in prisons. Public health experts focused on identifying “trusted messengers” who could provide information beyond what staff give to detainees. Such innovative information campaigns aimed to provide accurate knowledge and counteract misinformation. . . .

Our account of COVID in U.S. detention in 2020-2021 is embedded in the unhealthy (in all senses of that word) attachment to incarceration, which diminishes the well-being of the people required to live in prison, the staff who work there, and the communities and country of which they are a part. The global and national experience of this public health emergency has again underscored that massive incarceration undermines public and personal health. . . .

What COVID did underscore was the interdependence of communities around the world, including prisons, and the centrality of education in improving public health. . . .

COVID has thus served as a painful reminder that prison is a place where the harms of confinement are known and tolerated. We are “in medias res” – in the middle of understanding the import of the pandemic and in the middle of conflicts about how to generate the political and social will to provide for more safety and to support well-being for all. . . .

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## Changed Court Practices

In the segment above, the question was whether practices of detention ought to be revisited in light of COVID. Here we ask about the practices of courts and how the initial wave of closures and then the move to virtual adjudication have affected the rights of criminal defendants and civil litigants as well as other participants in adjudication, including judges and the public, who in many jurisdictions are entitled to watch court proceedings.

### **The Crisis in the Courts: Before and Beyond Covid** Barry Godfrey, Jane C. Richardson & Sandra Walklate (2021)\*

At the one-year anniversary of the first COVID lockdown, the backlog in the Magistrates’ Courts stood at 476,932 together with a further 56,875 outstanding cases waiting to be dealt with in the Crown Courts. . . . Since domestic abuse cases were prioritized during and after the COVID emergency, victims of many different types of

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\* Excerpted from Barry Godfrey, Jane C. Richardson, & Sandra Walklate, *The Crisis in the Courts: Before and Beyond Covid*, 62 BRITISH JOURNAL OF CRIMINOLOGY 1036 (2021).

crime may have had cases delayed. This backlog is likely to have an enduring impact for many years to come. . . .

This project . . . was funded . . . to investigate how the police responded to the anticipated rise in domestic abuse during the lock-down period, and how the courts would deliver justice to victims once they reopened. We sent questionnaires to all 43 police forces in England and Wales . . . , conducted interviews with senior police officers . . . , interviewed representatives of the Bar Council and the Magistrates Association, Shadow/Ministers with relevant portfolios, and policy officers for the Office of Commissioner of Domestic Abuse . . . , carried out a statistical analysis of receipts (cases sent to the courts), hearings, and disposals in court cases . . . [and] carried out a documentary analysis of updates and communications from government and other agencies. . . .

. . . A main concern that soon arose in March 2020 was the delays to existing cases going through the courts . . . . [O]n 23rd March 2020, all jury trials were suspended. . . . At the end of March 2020, 157 priority court and tribunal buildings were selected to be kept open for urgent and essential face-to-face hearings, and a further 124 were closed to the public but open to staff. . . .

. . . [A]fter just the first week of the lockdown, newspapers reported that the justice system was in ‘meltdown’ as the criminal court case backlog passed 37,000. . . . The backlog in the magistrates’ courts had already increased by 32%, from 12,100 to 16,000 and in the Crown Courts it had increased by over 40% from 17,400 to 24,900. By June 2020 remote hearings were dealing with all urgent applications including those for bailor to extend custody time limits, and also for Domestic Violence Protection Orders. . . .

. . . Some police forces across the country set up working groups to establish local and regional mechanisms for the prioritization of cases (including domestic abuse) . . . . Despite these activities, by June 2020 the media was reporting that there were thousands of out-standing cases. . . . At the end of June the magistrates and crown courts combined had 524,000 outstanding cases waiting to be heard. . . .

. . . On 30 June 2020, a £142 million capital investment was announced, with an additional £80 million to help courts process cases. . . . A total of 300 courts were now in operation and some courts had extended their hours of operation. . . . Three-quarters of Crown Courts resumed trial work, and cases involving high-risk defendants or vulnerable witnesses and victims were added to the Priority 2 category in July. . . .

. . . The criminal courts were beginning to catch up with themselves in terms of receipts (cases entering courts). . . . However, they were not making a dent in the backlog.

By 10 May 2020, a cloud-based video platform was live in 34 magistrates' courts and 12 Crown Court centres, and more than 2,000 hearings had taken place via this system. . . . [M]ore and more cases were dealt with remotely. . . .

. . . Since the courts restarted trials following the end of lockdown restrictions, there have been significant numbers of witnesses, victims, and defendants (and also jurors) who contracted the virus or who were forced to self-isolate for a number of days. The courts were unable to proceed with trials, which were pushed further back as the backlog of cases waiting for first hearings was bolstered by delays in cases that should have been dealt with. . . .

The House of Lords Select Committee on the Constitution were quite explicit in their view of the backlog, describing it as 'unacceptably high before the pandemic,' 'neither acceptable nor inevitable' and caused by long-term underinvestment in the criminal justice system. . . .

For the last ten years, austerity measures introduced across the public sector have bitten hard into the court system and have cast a long shadow. A sustained court closure programme shut approximately a third of all magistrates' courts in England and Wales over a ten-year period and reduced the number of magistrates from 25,710 in 2012 to 14,348 in 2021. . . . According to a spokesperson from the Criminal Bar association, the courts were 'paying the price of years of cuts that began under Chris Grayling' (Minister for Justice 2012–15) long before COVID struck. . . .

. . . The impetus the health emergency has created is the space for more radical reform and may be the opportunity to address some of the existing severe problems inherent in the system, such as the growing backlog of cases . . . [and] dealing with the crisis in the courts.

### **Civil Courts and COVID-19: Challenges and Opportunities in Australia**

Joe McIntyre, Anna Olijnyk, and Kieran Pender (2020)\*

Reforms of courts and judicial processes generally occur at a glacial pace. Not only is law inherently conservative, courts are complex systems. . . .

All of this makes the breakneck transition to 'virtual courts' in response to COVID-19 at once terrifying, thrilling, concerning and exciting. . . . The challenge in such a transition is to find the right balance in protecting both the short- and long-term rights and interests of parties and the public. . . .

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\* Excerpted from Joe McIntyre, Anna Olijnyk & Kieran Pender, *Civil Courts and COVID-19: Challenges and Opportunities in Australia*, 45 *ALTERNATIVE LAW JOURNAL* 195 (2020).

We argue that the transition to online hearings necessitated over the last six months has affected a cultural shift in the profession, such that virtual hearings are likely to continue as a standard feature of legal practice in the post-COVID context. However, the emergency nature of the current responses has meant that many changes were made under intense time pressure, and it is critical that any future model builds upon the lessons of the current measures (both what has worked and what has not) rather than directly replicate them. . . .

In Australia, by mid-March this year [2020] most courts were moving to delay hearings in all but the most urgent cases. . . .

Subsequently, most Australian courts have begun to utilise digital solutions to allow virtual hearings (perhaps best described as emergency remote hearings). . . . While there have been many challenges, the speed with which the judiciary and the profession have managed to adjust to the digital-only landscape is striking. . . .

As dramatic as this shift has been, perhaps equally striking has been the failure to adopt such potentially useful and demonstrably available technologies until emergency circumstances demanded them. The UK apparently only held its first virtual hearing in 2018, while no Australian court had moved beyond the pilot stage. . . .

. . . Jurisdictions across the world (including Canada, Ireland, the Netherlands, China and the United States) are beginning to examine the opportunities presented by these modern [Online Dispute Resolution, ODR] systems . . . . Perhaps the most successful of these public ODR systems is the Civil Resolution Tribunal in British Columbia, Canada. The UK is in the process of investing nearly \$2 billion in digital justice solutions, including a proposed Online Solutions Court. There have been some Australian forays into ODR, for example in the Victorian Civil and Administrative Tribunal.

Part of the challenge, though, in reflecting on such systems is that there is not a common concept of what is being created, or a shared language to describe it. . . . This lack of common language can lead to false comparisons, perhaps causing resistance to the embracing of these solutions. . . .

. . . Open justice is an essential feature of the Australian judicial system, with constitutional underpinnings. It is both an ‘overarching principle’ and the source of practical rules, including that judicial proceedings should be conducted in public. . . .

Initially at least, COVID-19 threatened open justice in Australia. The rapid shift to online courts posed challenges to the ability of the public, and particularly the media, to access judicial hearings. . . . While several Australian courts stated an intention to uphold the principle in their fast-evolving digital practices, their statements were at first sparse on detail. . . .



In the Federal Court, a practice note issued on 31 March 2020 observed that the court was ‘considering streaming and other methods of ensuring the requisite degree of public access to hearings conformable with the open justice and open court principles.’ The Federal Court adopted a practice of including, in its daily cause lists, a direction for any person who wished to observe an online hearing to contact the relevant Judge’s Associate. . . .

. . . How reporting restrictions and protected evidence coexist with online open justice is yet to be seen, and there is a risk that the pandemic may be used to justify more onerous exceptions to open justice (such as suppression orders) than would be tolerated in ordinary times. . . .

. . . The shift online also brings opportunity. . . . If Australia’s judiciary adopted widespread open-access live streaming, its proceedings would suddenly become far more accessible than before—normally the preserve of reporters [and] specialists . . . .

If Australian courts can capitalise on the good and address the bad, the COVID-19-necessitated shift online could be remembered as a defining moment in the protection of open justice. But it is imperative that the Australian judiciary and legal profession continue to have this conversation in the months ahead. . . .

The physical experience of an online hearing will be significantly different from being inside a courtroom. . . . These [in-person] formalities can serve to emphasise the principles of equality before the law and the impartiality of the judge. . . .

It is difficult to replicate this gravitas online, especially when participants appear from their homes. . . .

This is not all bad, of course. To many, the ritualistic aspects of a hearing seem archaic and exclusionary. For some litigants and witnesses, the physical environment of the court is not majestic, it is intimidating. . . .

Like any use of technology, online courts are vulnerable to garden-variety technological failure. But for courts, technological failure is not just a practical headache, it is also an issue of principle, with implications for access to justice and equality before the law. . . .

Finally, and in many ways perhaps most concerningly, the use of digital technology to conduct hearings may impact upon the quality of decision-making of judges, lawyers and parties. . . .

This should not be taken as suggesting that virtual hearings are juridically improper, but rather [that] we cannot simply import the schedules and work-patterns of the physical proceedings directly into the virtual proceeding. The psychological impact

of the technological medium should affect the design of how such proceedings are conducted. . . .

**2021-911/919 QPC**  
Constitutional Council of France  
2021\*

[Before Laurent Fabius, President, and Claire Bazy Malaurie, Alain Juppé, Dominique Lottin, Corinne Luquiens, Jaques Mézard, François Pillet and Michel Pinault, members:]

. . .2. Article 2 of the ordinance of 18 November 2020 . . . provides: “Notwithstanding any provision to the contrary, an audiovisual means of telecommunication may be used before all criminal courts and for presentations before the public prosecutor of the Republic or before the Attorney General, without it being necessary to obtain the agreement of the parties.

The means of telecommunication used must make it possible to certify the identity of persons and guarantee the quality of transmission as well as the confidentiality of exchanges. The magistrate ensures at all times the smooth running of the proceedings and a report of the operations carried out is drawn up.” . . .

3. The applicants . . . claim that these provisions are similar to those which were declared unconstitutional by the decision of the Constitutional Council of 15 January 2021 . . . . According to them, they disregard the rights of the defense . . . . Indeed, they allow a particularly broad use of videoconferencing before the criminal courts and do not provide any details as to the conditions under which the judge may decide to use it. For the same reasons, certain applicants and interveners also maintain that these provisions are contrary to the right to an effective judicial remedy and the right to a fair trial. . . .

6. The contested provisions, applicable until the expiry of a period of one month after the end of the state of health emergency declared by the decree of October 14, 2020 . . . allow the use of [mandatory] videoconferencing before the criminal courts. . . .

7. These provisions aim to promote the continuity of the activity of the criminal courts despite the health emergency measures taken to combat the spread of the COVID-19 epidemic. They thus pursue the objective of upholding the constitutional value of health protection and contribute to the implementation of the constitutional principle of the continuity of the functioning of justice.

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\* Translation provided by Braden Currey (Yale Law School, Class of 2023).

8. However, in the first place, the disputed provisions allow the criminal courts to impose on the litigant the use of a means of audiovisual telecommunication . . . .

9. Secondly, if the use of a means of audiovisual telecommunication is only a faculty for the judge, the disputed provisions do not submit its exercise to any legal condition and do not frame it by any criteria.

10. It follows from all of the foregoing that, given the importance of the guarantee which may attach to the physical presentation of the person concerned before the criminal court . . . these provisions violate the rights of defense and cannot be justified by the particular health context resulting from the COVID-19 epidemic during their period of application. . . . [T]hey must therefore be declared unconstitutional.

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## Judging Under Uncertainty

We close this chapter with an examination of two competing approaches to judicial review of emergency power. Writing in early 2020, one set of scholars sounded the alarm about the long-term implications of a more flexible approach to judicial constructions of the reasonable limitation of rights in emergencies. Another set of scholars, presenting their empirical data on how and on what basis courts in the United States have limited the scope of the public health authority, argued that strong judicial oversight of emergency powers created an opportunity for partisan bias about what rights are privileged by courts.

### Executive Lawmaking and COVID-19 Public Health Orders in Canada

Shaun Fluker and Lorian Hardcastle (2020)\*

. . . [T]he COVID-19 public health orders [in Canada] have been problematic in their failure to adhere to basic principles of democratic lawmaking—namely transparency and accountability—and such concerns are amplified by the fact [that] these orders restricted civil liberties for more than a full year and some of these orders may continue to do so for the foreseeable future. . . .

In most provinces and territories, the declaration of an emergency enables . . . (1) restrictions on property and economic liberties (e.g. the seizure of real property or medical supplies, requiring people to render aid or essential services, or

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\* Excerpted from Shaun Fluker & Lorian Hardcastle, *Executive Lawmaking and COVID-19 Public Health Orders in Canada*, 25 REVIEW OF CONSTITUTIONAL STUDIES 145 (2021).

altering landlord-tenant relationships), and (2) restrictions on civil liberties (e.g. physical distancing, quarantine, limiting gatherings). . . .

The need to act swiftly in order to ensure that hospitals had adequate capacity and to flatten the curve on community transmission in the early days of the COVID-19 pandemic in Canada provided ample justification for the . . . extensive exercise of lawmaking power by the executive . . . .

The concern legal theorists tend to have with emergency lawmaking is the risk that temporary executive rule has the potential to morph into a quasi-dictatorial and essentially lawless state in which officials abuse their discretionary power by enacting partisan rules without due process or rational justification. The COVID-19 public health emergency perhaps demonstrates that the real risk is less alarming but nonetheless still problematic from a rule of law perspective. . . .

. . . [M]eaningful transparency should also reveal how public power is exercised and why a decision was made, both of which help justify the exercise of authority and contribute to the legitimacy of power. . . . [P]olitical accountability requires regular elections, whereby a government places its governance record before the public and seeks a renewed mandate. . . . Legal accountability, by contrast, is ultimately administered by the judicial branch of government. The judicial review of legislative decisions focuses on whether these decisions are sourced in law and accord with legal principles, ensuring that the legislative and executive branches do not overstep or abuse their legal authority.

. . . [A] legislature may require a delegate of the executive to obtain the prior approval of cabinet or a responsible minister before enacting subordinate legislation. However, the strength of this requirement as a means of accountability is questionable given the relationship that often exists between an appointed official and the minister who appointed them and given the fact that cabinet or ministerial approvals may not be published or otherwise transparent. . . .

When it comes to legal accountability, . . . in the absence of explicit statutory direction, choices made by the executive on how or whether to engage in democratic deliberation with the public regarding subordinate legislation are largely immune from legal scrutiny in Canada. . . .

. . . At the time of writing, there are numerous ongoing and decided cases in which applicants assert that restrictions in these orders constitute an unjustifiable breach of Charter rights and freedoms; however, the courts have denied interim injunctive relief in many of the ongoing cases and dismissed other applications outright, with strong reasoning in favour of the restrictions and deference to public health officials. . . .

A COVID-19 public health order that requires all persons to keep two metres from others is clearly a legislative enactment: it is issued under authority granted by

statute; imposes a norm of general application; is written in mandatory language; and contravention leads to sanction. . . .

The absence of an explanation or justification for why there is significant variation in the terms of such a basic rule—a rule that is a central component of the public health strategy across Canada—and the frequency with which these terms have changed explains why some people view the physical distancing rule as arbitrary, and refuse to comply with it. . . .

. . . Although most provinces and territories have relied heavily on catch-all communicable disease powers to make sweeping societal restrictions, . . . [i]n most provinces, these catch-all powers are accompanied by specific enumerated powers suggesting that public health orders will typically bind a particular individual rather than all of society. . . .

COVID-19 public health orders have been enacted and amended with little or no advance notice. . . . At times, it has seemed like media scrums replaced the legislative assembly as a forum for democratic debate, and social media is the official legal reporter. In most jurisdictions, COVID-19 public health orders have never been published in an official government reporter, and governments have instead used dedicated websites to publish the legislation. These websites vary significantly in terms of their user friendliness, and they typically set out other COVID-19 information such as data on reported cases and testing results, protocols, guidance, and educational tools. Accordingly, it can be difficult to distinguish legal rules from guidance or recommendations on these websites. . . .

It is also apparent that Canadian courts will be reluctant to even address these shortcomings, let alone solve them. Accordingly, it will likely be left for the legislatures to ensure appropriate checks are in place. . . .

. . . [I]t is also notable that none of the provinces or territories have public participation requirements in relation to the enactment process for COVID-19 public health orders, which is typical for delegated executive lawmaking but problematic for orders which impose restrictions on civil liberties for long periods of time. . . . While about half of the provinces and territories require the provision of reasons in public health orders, the explanation given in COVID-19 public health orders has typically amounted to little more than bald declarations of a public health emergency. . . .

During the early days of the initial wave of COVID-19, scrutiny was light on the extensive [executive exercise of] legislative authority . . . . It did not seem to matter that these rules were being announced on social media with no advance notice . . . . Principles of democratic governance and the rule of law were seemingly cast aside, casualties in the rush to respond to the COVID-19 public health emergency.

. . . Public officials who continued to issue confusing rules with little advance notice and scant justification faced real scrutiny, resistance to stricter public health measures and, in some cases, blatant defiance of these rules. . . .

. . . [T]hese problems emanate from the inherent nature of delegated executive lawmaking, which is a closed process with few checks and balances to ensure it adheres to the attributes of good lawmaking . . . . [T]here are three basic issues that governments ought to consider. First, they should assess what powers public health officials ought to have and ensure that governing statutes reflect this. . . . [I]t is imperative that this authority be clarified by the legislature. Second, governments should consider how to improve transparency in the exercise of these powers, for example, by specifying exactly how public health orders must be published, confirming whether these orders are exempt from the legislated rules on the enactment of regulations, imposing meaningful justification requirements for these orders, and establishing some form of process for public deliberation such as written notice and comment. Third, governments should explore ways . . . to enhance political and legal accountability, for example, with ministerial or judicial oversight, legislative assembly review, statutory appeal mechanisms, and reporting requirements. . . .

### **Coronavirus, Civil Liberties, and the Courts: The Case Against “Suspending” Judicial Review**

Lindsay F. Wiley & Stephen I. Vladeck (2020)\*

For obvious reasons, local and state orders designed to help “flatten the curve” of novel coronavirus infections (and conserve health care capacity to treat coronavirus disease) have provoked a series of constitutional objections—and a growing number of lawsuits attempting to have those orders modified or overturned. . . . But even in these early days, the emerging body of case law has rather elegantly teed up what we have previously described as “the central (and long-running) normative debate over emergency powers: Should constitutional constraints on government action be suspended in times of emergency (because emergencies are ‘extraconstitutional’), or do constitutional doctrines forged in calmer times adequately accommodate exigent circumstances?”

To take one example from many, consider the Fifth Circuit’s analysis in *In re: Abbott* of a Texas executive order that, as construed by the state’s Attorney General, treated all abortions as elective medical procedures—effectively barring them for a significant period of time. . . . [In reaching its decision,] a far more deferential standard “for adjudging the validity of emergency measures,” purportedly derived from the Supreme Court’s 1905 decision in *Jacobson v. Massachusetts*, was appropriate.

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\* Excerpted from Lindsey F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against “Suspending” Judicial Review*, 133 HARVARD LAW REVIEW FORUM 179 (2020).

According to that standard: “[W]hen faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some ‘real or substantial relation’ to the public health crisis and are not ‘beyond all question, a plain, palpable invasion of rights secured by the fundamental law.’” . . .

In this Essay, we argue that the suspension approach to judicial review is wrong—not just as applied to governmental actions taken in response to novel coronavirus, but in general. As we explain, the current crisis helps to underscore at least three independent objections to the “suspension” model some courts have derived from decisions like *Jacobson* . . . . These critiques likewise apply to instances in which courts purport to adopt the appropriate standard of review but do not actually apply it with appropriate rigor. . . .

. . . [T]he suspension model of judicial review relies heavily on an assumption that crises are fleeting. What is at stake, courts often claim, is but a “temporary loss of constitutional rights,” one that . . . is necessary only for so long as it takes to restore order after a natural disaster. In those contexts, the restriction on civil liberties is meant to be incidental—to allow government to focus its resources elsewhere. The coronavirus pandemic differs in two respects: First, the duration of the crisis—in which days have turned into weeks and weeks into months—already exceeds natural disasters or other episodic emergencies, and its length remains uncertain. Second, and more fundamentally, the incursions into civil liberties are *central* to the crisis response insofar as they are designed to slow the progress of the epidemic. Thus, not only are the stopgaps potentially indefinite, but governments face a catch-22 where the alternative to infringing civil liberties is to allow the crisis to worsen exponentially. . . .

. . . Simply put, in the context of a crisis for which mitigation will prolong, rather than shorten, the emergency, suspending more rigorous judicial scrutiny threatens to allow the exception to swallow the rule. . . .

One of the central defenses of the suspension model is that it is necessary—that standard degrees of judicial scrutiny impose too great a burden on the government during crisis times and thereby run the risk of either invalidating policies that ought to be sustained or, at a minimum, deterring governments from adopting such policies for fear of their invalidation. Here, too, we think that the coronavirus pandemic provides a useful (if still-evolving) counterexample. For even if courts subject curtailments of liberty—from business closures to stay-at-home orders to quarantine orders premised on recent travel from an affected area, without individualized risk assessment—to the normal scrutiny applied to comparable government incursions into civil liberties, most are likely to be upheld. . . .

Of course, some crisis measures will fail proportionality-based standards of review. We believe prohibition of nearly all abortions imposes an undue burden on the right to choose, even in a crisis. We also believe that categorical prohibition of “drive-

in” religious services during which congregants remain in their vehicles at all times—were any jurisdiction to *actually* impose such a prohibition—would impermissibly burden the exercise of religion if sitting in a parked car for other purposes were allowed . . . .

The key for us is that such failures will typically stem from—and trace to—their disproportionality. And it is quite a different argument, in our view, to claim that governments should be allowed to adopt *disproportionate* measures during emergencies than to claim that ordinary judicial review will be fatal to properly calibrated responses. Thus, what the coronavirus pandemic helps to make clear is that even widespread, mass incursions into civil liberties, such as statewide shelter-in-place orders, can generally survive modern constitutional scrutiny under most circumstances. And if they can’t, we think that says far more about the challenged governmental action than it does about the role of the courts. . . .

. . . But perhaps the most important argument against the suspension model is also the strongest affirmative argument for ordinary review during crises: the unique checking role of an independent judiciary and the costs of its absence.

. . . [O]ur claim . . . is a more specific contention about the unique role courts can play *during emergencies* because they are independent of the political branches. Among other things, meaningful judicial review requires the government to dot its proverbial i’s by building a record that can survive proportionality-driven standards of review. To that end, as we have suggested, “a robust judicial role may be indispensable not only in minimizing the loss of our liberties, but also in facilitating the development of a sustainable, long-term response to [the coronavirus pandemic]—and a body of law to guide public health legal preparedness for the next one.” That is to say, robust judicial review not only helps to smoke out pretext for government actions during an emergency, but also has value for the *government*—which can use the case law its policies generate to help define the boundaries of its future approaches. . . .

. . . [C]onsider the decades-long litigation arising out of the detention of noncitizen enemy combatants at Guantánamo Bay, Cuba. Although detainees were originally sent to Guantánamo at least in part to minimize litigation risk, Supreme Court decisions in 2004 and 2008 progressively cemented their entitlement to meaningful judicial review of their detention via habeas corpus—and pursuant to a more rigorous standard of review than the one the government had initially defended.

In the process, roughly sixty detainees had their claims conclusively resolved by the courts, but hundreds more were transferred out of U.S. custody . . . . On the flip side, the decisions *upholding* the long-term noncriminal confinement of many of the detainees not only solidified . . . the legitimacy of much of the Guantánamo detention operation, but also articulated substantive detention standards that Congress subsequently codified. Indeed, one of the common defenses of the fact that forty detainees remain at Guantánamo still today is that most of them have had their day in



court—and have had their amenability to such detention independently reviewed. Thus, “ordinary” judicial review through habeas, which the government had initially and steadfastly opposed, appears to have (1) incentivized the government to abandon the cases it could not defend; (2) allowed some detainees to hold the government accountable by prevailing in their habeas cases; (3) crystallized the government’s authority in the cases it won; and (4) incentivized Congress to legislate—to set clear, forward-looking rules for future cases. . . .

. . . [O]ur point is to show how meaningful judicial review even in extraordinary circumstances is important not only for the protection of civil liberties. It can also promote more transparent governance and clearer communication of the government’s rationale and the details of how its orders operate. For a long-lasting crisis like the coronavirus pandemic, there are a multitude of decisions to be made and continually reassessed. These choices should be guided by the best available scientific evidence, but they cannot be answered by objective scientific principles alone. Democratic deliberation will ultimately have to play a part in determining the balance between suppressing viral transmission and allowing some degree of “nonessential” economic, social, educational, and cultural activity to resume outside the home. Court proceedings requiring elected officials to articulate and justify their plans may be an important step in that process. . . .

### **Constitutional Challenges to Public Health Orders in Federal Courts During the COVID-19 Pandemic** Eric Posner & Kenny Mok (2021)\*

The COVID-19 pandemic put enormous strain on the federal and state governments of the United States. . . . [T]here has so far been little . . . analysis of the errors and successes of government leaders and institutions, and of the possible causes of the bad and the good. Countless agencies and institutions played a role in the crisis response, including federal, state, and local public health organizations; governors and mayors as well as the U.S. president; and federal agencies like the CDC and the FDA. As experts untangle the causal pathways, institutional and legal reform will surely follow, as it did after the last two major crises—the 9/11 attack in 2001 and the financial crisis of 2008.

. . . [W]e focus here on the role of the courts. Like in 2001 and 2008, the courts did not serve as primary “first-responders,” but instead as a backstop, intervening from time to time to prevent other agencies from violating the law and constitutional rights. The conventional wisdom is that during a crisis, the courts are deferential to the government agencies that are charged with responding to the crisis. The classic example

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\* Excerpted from Eric Posner & Kenny Mok, *Constitutional Challenges to Public Health Orders in Federal Courts During the COVID-19 Pandemic*, 102 BOSTON UNIVERSITY LAW REVIEW (forthcoming Oct. 2022), <https://ssrn.com/abstract=3897441>.

is war: while “*inter armis silent leges*” was always an exaggeration, the U.S. courts have allowed the government to engage in actions during war that would be forbidden in times of peace—not exactly suspending the Constitution but interpreting it to require a greater level of deference to the executive in times of national emergency. . . .

This brings us to the COVID-19 crisis response . . . . The government (speaking loosely, as hundreds if not thousands of governments played roles) used both coercion and spending to address the pandemic. . . .

The judicial response was in some ways similar to, and in some ways different from, the 9/11 and 2008 responses. While the courts usually rejected challenges to public health orders, there were some significant exceptions to that pattern. . . . [M]any judges—and particularly judges appointed by Donald Trump—granted relief to religious organizations that challenged public health orders restricting congregation in houses of worship. . . . [W]e focus on all civil liberties challenges other than those based on the religion clauses of the First Amendment. These challenges were based on free speech and association, due process, gun rights, and other rights in the Constitution. We looked at all cases decided at all levels of the federal judiciary between March 1, 2020 and June 29, 2021, for a total of 139 district court cases, twelve court of appeals cases, and two supreme court cases. . . . We also . . . offer an overall assessment of judicial performance during the pandemic. . . .

Of 153 COVID-19 cases, plaintiffs who challenged public health orders prevailed in 21 (13.7%), while the government prevailed in 132 (86.3%). . . . Conventional wisdom suggests that courts would be more likely to defer to government action in the early stages of the pandemic, that is, plaintiffs would succeed less in the initial stages, then succeed more as conditions improve. But . . . the opposite occurred. Plaintiffs were most successful in the first few months, winning 7 out of 23 (30.4%) cases from March 1, 2020, to June 29, 2020, most of which were abortion and gun rights challenges. They were less successful as time went on, winning just 14 out of 131 (10.7%) cases from June 1, 2020, to June 29, 2021. This may have reflected the decreasing severity of public health restrictions as states obtained more information about the virus and adjusted their orders accordingly.

We also use judge-level results because they allow us to combine district and appellate level outcomes. . . . [T]he most frequently adjudicated claims were equal protection (86 votes) and procedural due process (60), which mostly came from business plaintiffs like restaurants and gym owners. Speech (43), takings (35), right to work (36), and right to travel (27) claims were also frequently adjudicated but to a lesser extent. Within each of these six economic claims, plaintiffs were largely unsuccessful, never crossing a 15% winning threshold. By contrast, plaintiffs won 60.7% of abortion claims and 42.9% of gun claims. . . .

. . . Trump-appointed judges ruled in favor of religious organizations substantially more often (82.1%) than other Republican judges (54.8%) and Democrat-

appointed judges (0%), results that give some credence to claims that Trump sought to appease Evangelicals by appointing religious judges or judges sympathetic to religious liberties. . . .

All that said, the overall picture is consistent with conventional wisdom about judicial partisan and ideological differences. Republican and Democratic judges mirrored the attitudes of Republican and Democratic political officials—both their traditional attitudes toward abortion, guns, and property, and their attitudes toward public health orders during the pandemic. Republican politicians were more skeptical of lockdown and stay-at-home orders than Democrats were; and they care more about guns rights and religious rights, and less about abortion rights. So with the judges. . . .

The federal judicial response to pandemic-related public-health orders was partly but not entirely consistent with the tradition of judicial deference to emergency orders in the United States, with the important exception of the religion cases, where the outcomes hostile to government were mostly driven by recent appointments by President Trump. . . .

Let us start with the broad pattern. In the typical case, an executive official—usually a governor, mayor, or public health officer—issues an order prohibiting certain constitutionally protected behavior. The official acts are based on a statute that broadly authorize the official to issue any necessary orders to protect public health and safety. The plaintiffs who challenge the order argue that it prevents them from engaging in political activity, including protests, party organization, and speechifying; from conducting their businesses; from working; from traveling; from obtaining abortions; and from using guns.

The courts that held for the government reached this result through a number of doctrinal pathways. In many cases, the courts used rational basis review because of the limited nature of the constitutional right, and easily found that the public health emergency justified the public health order. In other cases, where intermediate scrutiny or strict scrutiny applied, the courts found that that in light of the gravity of the public emergency, the order was justified, largely crediting the government's claim that there was no less restrictive alternative to the order, given the uncertainty surrounding the behavior of the virus. . . .

From the standpoint of the judicial role during national emergencies, one might begin by noting that the pandemic cases involve a health/liberty tradeoff that parallels the security/liberty tradeoffs in the national security cases. In national security cases, the government claims that an emergency exists based on a new threat from foreign nations or terrorists, arguing that the magnitude and uncertainty of the threat unsettle the balance struck between these concerns in normal times, and justify a tilt toward greater restrictions on civil liberties. In the pandemic cases, one can similarly argue that the magnitude and uncertainty of the risks posed by the COVID-19 virus justifies

restrictions on liberty that would not be accepted during normal times. In both settings, the temporary nature of emergency conditions helps justify the restrictions on liberties.

The difficulty of these judgments can scarcely be exaggerated. When the pandemic began, public health authorities relied on guidelines based on certain practices that had been used for decades, even centuries, to control infectious diseases—lockdowns, quarantines, business shutdowns, masks. Experience had shown these practices were effective, but they were also highly intrusive, economically disruptive, and even deadly for vulnerable populations. At the same time, public health authorities understood from the start that all viruses behave differently, and so what had worked in the past would not necessarily work for COVID-19. Some early guidelines—to shut down outdoor areas like parks, not to wear masks, to avoid touching items touched by others—were eventually withdrawn. Other guidelines were strengthened or altered. Authorities disagreed among each other, as did experts, and different approaches were tried in different places. As far as we know, no government attempted to perform a rigorous cost-benefit analysis of any mitigation measure—no doubt, because of the uncertainty of the virus’s behavior, and perhaps the lack of time. Economists who weighed in produced vastly different estimates. Indeed, the “inputs” for their estimates were predictions about the future course of the virus, which also varied greatly. One unresolvable problem was that the future course of the virus depended in part on the government and social response which in turn depended on the predictions of experts.

What role can courts play in a cloud of so much uncertainty—scientific, economic, and, we might add, political, as public cooperation with government orders (which were often not enforced) was crucial? The fact that few courts tried to seriously evaluate the scientific and economic basis of any particular public health order suggests that the courts themselves believed that their role must be limited. The focus on fairness—whether similarly situated groups were treated alike—preserved a role for courts without embroiling them in technical questions. Or so it may have seemed. We are skeptical. Governments shut down churches rather than casinos, gun ranges rather than liquor stores, restaurants rather than hardware stores, and elective surgical procedures that might be more important than non-elective procedures, because they were juggling an array of political, economic, and scientific considerations in a vacuum of facts. While it was certainly possible that a government official may have indulged a hidden animus against religious people or restaurateurs, or may simply have given insufficient weight to the interests of groups they were unfamiliar with, no evidence was presented that they acted in anything other than good faith. . . .

. . . [T]here were also some important differences between the 9/11 emergency and the pandemic. The burdens of security operations really did fall on an unpopular minority, whether or not that was justified. The vast majority of Americans put up with little more than long security lines in airports. The burdens of the pandemic response fell on everyone. Moreover, government action was far less transparent after 9/11 than during the pandemic, when the public health orders were necessarily directed at the public, and the justifications for them were well known and widely debated. . . . For the

pandemic, unlike 9/11, it is hard to imagine that government intrusions will become permanent . . . . Opinion is divided on whether the government overreacted because of excessive public fear or underreacted because of insufficient public fear: in either event, the traditional argument that governments take advantage of public fear during national emergencies in order to violate civil liberties seems a much more awkward fit for a pandemic than for wartime. All of this suggests that courts should have been more deferential during the pandemic than after 9/11. But they weren't. Why not?

One possibility is that the public health authorities really did overreact—they took excessive actions out of proportion to the threat to public health, and a small number of . . . judges possessed the wisdom and backbone to push back. This argument, coming from the right, mirrors the liberal defense of judges who protect criminal defendants or terrorism suspects from authorities who were too willing to sacrifice the liberties of citizens to combat crime. Bolstering this view, there is even now a great deal of controversy over social distancing policies like masking, the value of mandatory stay-at-home requirements, and the negative health, educational, and economic effects of lockdowns. . . . [An] argument can be made that some of these requirements—shutting down public parks, for example—really were unnecessary, and that the skeptical judges distinguished themselves by demanding stronger justifications than public health officials were often able to provide. And, of course, it is at least possible that, normatively speaking, the magnitude of the public health crisis did not justify restrictions on property or gun or religious rights. But we are unconvinced. Government officials will make errors when confronted by the complexities of a public-health emergency, but nothing we read in the opinions of the judges who ruled against them persuades us that the judges showed superior insight.

Another possibility is that state and local governments lacked the authority of the national government, and for that reason federal courts were less inclined to defer to their judgments. And a third is that the broader impact of restrictions on the population led to polarization, whipped up by politicians, which infected the courts. Needless to say, guns, abortion, and religion are among the most polarizing issues of our time. The special solicitude of Trump appointed judges to the claims of religious organizations also raises questions about the impact of a fragmenting political consensus on judicial practice. It is hard to avoid the conclusion that some judges allowed their passions to overcome the wisdom of deference . . . .

However, we do not believe that the government should always win. . . . [W]e argue that courts should strike down public health orders only where a public health emergency is clearly a pretext for violating constitutional rights or targeting an unpopular group. Given the line-drawing problems, merely unequal treatment should not be sufficient to establish pretext. But a history of targeting an unpopular group may be. . . .

# CONSTITUTING AND RECONFIGURING FAMILIES

## DISCUSSION LEADERS

DOUGLAS NEJAIME, GOODWIN LIU, AND  
FRANCESCO VIGANÒ

### III. CONSTITUTING AND RECONFIGURING FAMILIES

DISCUSSION LEADERS:

DOUGLAS NEJAIME, GOODWIN LIU, AND FRANCESCO VIGANÒ

#### **How Many Parents?**

Judgment No. 33 of 2021 (Italy, 2021) .....	III-4
F., F.C., and Others (Argentina, 2020) .....	III-8
Courtney G. Joslin & Douglas NeJaime, <i>The Next Normal: States will Recognize Multi-Parent Families</i> (2022) .....	III-10

#### **Technology, Biology, Intentionality, and Legal Status**

##### **(When) Are Genetic Parents Legal Parents?**

Extraordinary Appeal No. 898.060 Santa Catarina (Brazil, 2016) .....	III-12
Michael H. v. Gerald D. (U.S., 1989) .....	III-14
C.A. v. C.P. (California Court of Appeal, U.S., 2018) .....	III-15

##### **(When) Are Birthing Parents Legal Parents?**

Valdís Fjölnisdóttir and Others v. Iceland (ECtHR, 2021) .....	III-18
Surrogates' Bill of Rights, N.Y. State Assembly Bill No. A9506B (2020) .....	III-20
Unconstitutional Action 16/2016 (Mexico, 2016) .....	III-21

##### **(When) Are Intended Parents Legal Parents?**

V.M.A. v. Stolichna Obsthina, Rayon Pancharevo (CJEU, 2021) .....	III-22
Amparo en Revisión 807/2019 (Mexico, 2020) .....	III-25

##### **(When) Are Social Parents Legal Parents?**

E.N. v. T.R. (Maryland, U.S., 2021) .....	III-27
Douglas NeJaime, <i>The Constitution of Parenthood</i> (2020) .....	III-29

#### **The Claims, Interests, and Rights of Children**

British Columbia Birth Registration No. 2018-XX-XX5815 (Supreme Court of British Columbia, Canada, 2021) .....	III-32
Honner v. France (ECtHR, 2020) .....	III-34
Judgment No. 32 of 2021 (Italy, 2021) .....	III-37
Sec. 23 of the Connecticut Parentage Act (U.S., 2022) .....	III-40
Judgment No. 79 of 2022 (Italy, 2022) .....	III-41

Courts have long been called upon to protect or prohibit different facets of family life. Courts have had to address the legality of interracial relationships, same-sex couples' families, and, more recently, parents supporting access to gender-affirming care for their transgender children. As emerging technologies and shifting social norms have rapidly changed what family structures look like in communities around the globe, courts have been asked to confront increasingly complex questions about family relations. The materials in this Chapter explore the constitutional status of parent-child relationships as courts consider a range of family configurations as well as the relationship between the impacts of rulings in different jurisdictions.

This Chapter begins with decisions in which courts have recognized—or, in some cases, declined to recognize—the status, authority, rights, and duties of more than two people as parents of a child. Those judgments intersect with changing technologies enabling more people to have different forms of parent-child relationships. In addressing family configurations made possible by assisted reproduction, the materials explore various grounds on which individuals may be treated as legal parents. We conclude by examining how courts respond to claims about the rights and interests of children in various forms of family relationships.

As you will see in reading the materials, courts are often asked to recognize new legal relationships. One set of issues relates to the grounds, internal and transnational, for doing so. Another set of questions revolves around familiar institutional issues about when courts should await or defer to legislation and when judges should act. Yet a third arena to explore is how judges in a jurisdiction that has not decided a specific question of family recognition or has resisted certain family formation efforts within its borders should evaluate whether to, as a matter of comity, defer to the decisions of the jurisdiction in which the family relationships came into being.

In the United States, for example, questions of whether and when laws and judgments of one jurisdiction are entitled to “full faith and credit” in another jurisdiction have arisen with increasing frequency and urgency. The premise is that one state must accord the same weight to a court decision as would the rendering jurisdiction, with debate about what role, if any, a state’s contrary “public policy” should play in limiting a state’s obligation to recognize and enforce a judgment. The U.S. Supreme Court’s precedents distinguish between state court judgments and state statutes, and permit a state to invoke its own public policy as a basis to refuse to apply another state’s statutes. In general, but with some nuances, the Court requires that judicial decisions be recognized and enforced. In 2016, for example, the Court held that Alabama courts were required to give full faith and credit to a same-sex couple’s co-parent adoption completed in another state.\* Yet what it means to give full faith and credit to an adoption completed in another state continues to be debated. For example, one appellate court has held that Louisiana’s refusal to issue a birth certificate listing both members of a

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\* *V.L. v. E.L.*, 136 S. Ct. 1017 (2016).



same-sex couple as parents based on an adoption order from a New York court did not violate its full faith and credit obligation,<sup>\*</sup> while another appellate court held that Oklahoma was required to issue an amended birth certificate listing both members of a same-sex couple after the couple completed a California court-based adoption of a child born in Oklahoma.<sup>\*\*</sup> The recent Supreme Court decisions on state authority over abortion will prompt dozens of such questions as states shape civil and criminal statutes permitting and prohibiting abortion as well.

The United States is but one illustration of vast legal differences across borders. Thus, the question of interstate recognition of parentage judgments and family relations is particularly critical for parents who conceive through assisted reproduction and for LGBTQ parents.

### **How Many Parents?**

Many societies have long operated with family structures that have more than two parental figures. These arrangements include multigenerational families where grandparents and other relatives serve as parental figures for children, blended families where children are parented by stepparents, and polygamous and polyamorous relationships where three or more people co-parent children. More recently, reproductive technologies have played a role in creating families with potentially more than two parents. Courts have grappled with defining the rights among children, parents, and the people connected to the children through genetics or birth.

We begin with a case from Italy that involves three potential parents: a woman who acted as a surrogate, a genetic father, and his same-sex partner of a child born outside of Italy. Because the country has a ban on surrogacy, legal protection of parental relationships for such children born in other jurisdictions through surrogacy was at issue. We then turn to a judgment from Argentina and commentary on the many facets of these issues.

### **Judgment No. 33 of 2021** Constitutional Court of Italy (2021)

[Judge Viganò, writing for the Court, in an opinion signed by President Coraggio and joined by Judges Amato, Sciarra, Pretis, Zanon, Modugno, Barbera, Prosperetti, Amoroso, Antonini, Petitti, Buscema, Navarretta, and San Giorgio:]

1.1.— . . . [T]he case that gave rise to the proceedings concerns a child born in Canada in 2015 to a woman in whom an embryo was implanted, formed from the

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<sup>\*</sup> *Adar v. Smith*, 639 F.3d 146 (5th Cir. 2011).

<sup>\*\*</sup> *Finstuen v. Crutcher*, 496 F.3d 1139, 1154 (10th Cir. 2007).

gametes of an anonymous female donor and a man of Italian nationality (P. F.) married in Canada to another man, also an Italian national (F. B.) . . . .

At the time of the child's birth, the Canadian authorities had drawn up a birth certificate indicating only P. F. as the parent . . . . Upholding the appeal of the two men, the Supreme Court of British Columbia declared in 2017 that both applicants should be considered the parents of the child and ordered the rectification of the birth certificate . . . .

The two men therefore asked the Italian registrar to also rectify the child's birth certificate in Italy on the basis of the decision of the Supreme Court of British Columbia. Upon rejection of this request, they applied to the Venice Court of Appeal for recognition of the Canadian court order in Italy . . . . [Their request was rejected by the Court of Appeal, and they appealed to the Supreme Court.]

1.2.— . . . [I]n the meantime, the Joint Civil Divisions . . . handed down . . . [a] judgment rul[ing] that a foreign decree recognising the parental relationship between a child born as a result of surrogacy and the "intended parent" cannot be recognised in our legal system. According to the Joint Divisions, such recognition would be at odds with the prohibition of surrogate motherhood . . . .

However, the referring Division questions the compatibility of this interpretation of the law with a number of constitutional provisions.

1.3.—First of all, the interpretation adopted by the Joint Civil Divisions allegedly breaches . . . the Italian Constitution in respect of several fundamental rights of the child recognised by international law, namely the rights to private and family life (Article 8 ECHR),\* not to suffer discrimination, to have his or her best interests taken into consideration, to be immediately registered at birth and to have a name, to know his or her parents, [and] to be brought up by them and not be separated from them (Articles 2, 3, 7, 8 and 9 of the Convention on the Rights of the Child respectively) . . . .

1.4.—According to the referring court, the case law established by the ruling of the Joint Divisions also conflicts with . . . the Italian Constitution.

The child's right to integration and stable residence within his or her own nuclear family, understood as a constitutionally protected social unit, and the right to the child's

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\* Article 8 of the ECHR reads, in relevant part:

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 in accordance with the law and is necessary in a democratic society . . . .

identity, are infringed without the justification of protecting the ‘surrogate’ mother, who would in any event derive no advantage from failing to recognise the filial bond between the child and the intended parent.

Furthermore, the child born through surrogacy suffers discrimination with respect to other children due to circumstances for which he or she bears no responsibility.

It would also be unreasonable to allow the biological parent, but not the ‘intended’ parent, to be recognised as such, given that the former—having provided his or her gametes for the formation of the embryo—is even more involved in the procreative process, but this act, which is unlawful in our legal system, gives rise to the supposed contravention of Italian public order in recognising the parental status of the ‘intended’ father.

Lastly, it would be unreasonable to preclude a court from assessing the child’s interest in the recognition of his or her bond with the ‘intended’ parent on a case-by-case basis, thereby automatically sacrificing the protection of the child’s rights in order to condemn the parents’ conduct. . . .

2. – In essence, the questions of constitutionality that this Court is called upon to examine concern the civil status of children born through surrogacy, which is prohibited . . . . More specifically, . . . at issue here is the possibility of . . . not only recognis[ing] the parenthood of the person who has provided his or her own gametes . . . , but also [that of] the person who has shared in the parental project without providing his or her own genetic contribution . . . .

5.3 – . . . [I]n all decisions concerning children . . . primary importance must be given to safeguarding the “best interests” of the child. . . . There is no doubt that the interest of a child who has been cared for from birth by two people (for almost six years, in the case before the Court) who had jointly decided to bring him or her into the world, is to obtain legal recognition of the ties which already exist in respect of both of them, without prejudice to the possible establishment of a legal relationship with the surrogate mother. . . .

. . . [T]hese ties are an essential part of the *identity* of a child who lives and grows up in a given family, or—as far as civil partnerships are concerned—within a given ‘community of affection’ that is also legally recognized . . . . It is unquestionable that the child has an interest in having these ties recognised not only on the social but also on the legal level, with regard to all the fundamental aspects of his or her life—as healthcare, education, and inheritance rights. Even more importantly, he or she has a clear interest to be legally identified as a *member* of that family or household, comprising all the persons who are actually part of it. . . .

. . . [W]e are not discussing here . . . an alleged ‘right to parenthood’ on the part of the child’s carers. What is at issue instead is the child’s interest in those carers being recognised as carriers of the *duties* linked to the exercise of parental responsibility, and which they should not be able to dismiss by a simple act of will . . . .

5.5 – On the other hand, the child’s interest cannot automatically be considered to override any other interest at stake. . . . [T]he interests of the child must be balanced, in the light of the criterion of proportionality, against the legitimate aim pursued by the legal system of discouraging recourse to surrogate motherhood, which is criminally sanctioned in Italy. . . .

5.6 – This balancing between the interests of the child and the legitimate aim of discouraging recourse to a practice which is unlawful and indeed is thought to deserve criminal punishment in Italian law has similarly been undertaken by the ECtHR. From all the judgments handed down by the Strasbourg Court on this subject, it can be seen that . . . each legal system enjoys . . . a certain margin of appreciation on the matter, without prejudice to the abovementioned need to recognise the “parent-child relationship” with both members of the couple who actually take care of him or her.

The ECtHR allows State parties to refrain from giving effect to foreign civil status documents or decrees recognising the father’s or mother’s status as the ‘intended parent’ from the child’s birth, . . . to avoid providing even indirect incentives for a procreative practice that the States may well consider potentially harmful to the rights and dignity of women who agree to carry a pregnancy to term on behalf of a third party.

Nevertheless, the ECtHR considers that each legal order must ensure the real possibility of legal recognition of the ties between the child and the ‘intended parent,’ at the latest when they have become a practical reality . . . .

5.7 – The balance struck by the EtCHR . . . also appears to be in line with the set of principles enshrined in the Italian Constitution.

On the one hand, these principles are not inconsistent with the solution . . . that neither a foreign decree nor, consequently, the original birth certificate indicating the “intended father” as the parent of the child may be transcribed. On the other hand, they require, in such cases, the protection of the child’s interest in the legal recognition of his or her relationship with both partners who not only desired its birth in a foreign country in accordance with its laws, but who then looked after it, effectively exercising parental responsibility.

Such protection must, in this case, be ensured by means of an effective and speedy adoption procedure that recognises the fullness of the parent-child relationship between the adopting person and the adopted child, once it has been ascertained that this is in the child’s best interests. Any solution that fails to offer the child the *possibility*

of such recognition, even *ex post* and after concrete [assessment] by a court, would end up instrumentalising the child for the . . . aim of discouraging recourse to surrogacy . . . .

5.9.—The task of adapting existing law to the need to protect the interests of children born through surrogacy . . . can only lie, in the first instance, with the legislator, which must be granted a wide margin of appreciation for finding a solution capable of taking into account all the rights and principles at stake.

. . . [T]he Court must now stand back and leave it to the discretion of the legislator to provide, without any delay, for appropriate remedies to the current lack of protection for the interests of the child.

\* \* \*

The Constitutional Court of Italy summarized this judgment as posing the question of whether it was constitutional for Italian authorities to disregard a foreign decree recognizing the parental status of two men to a child born abroad to a surrogate mother. The Court described its ruling as concluding that the question was “inadmissible,” and called on the legislature to respond with legislation to ensure “due protection of the child’s best interests, including recognition of the legal relationship with the non-biological parent.”

### **F., F.C., and Others**

Adoption Court of Childhood, Adolescence, Family and Gender  
Violence N° 3 of Córdoba (Argentina)  
RC J 625/20 (2020)\*

[Judge Laila Judith Córdoba delivered the following ruling:]

. . . IV) The prosecutor of the Chamber . . . request[ed] the declaration of unconstitutionality of the last paragraph of article 558 of the Civil and Commercial Code of the Nation [(CCyCom)] . . . . In this case, a request for full adoption was initiated by Mrs. A.F.V. and [Mr.] F.C.F., at which time I noticed that the guardianship for the ultimate purposes of adoption had been granted to Mrs. A.F.V. and Mr. C.A.F. . . . Mr. C.A.F. . . . at first agreed that the child . . . be adopted by his former partner and Mr. F.[C.F.] but later said that he also feels that he is the child’s father, but since he did not want to harm her, he said he agreed.

With the development of the case . . . , the lawyer [for A.F.V. and F.C.F.] filed for multi-parental adoption because . . . [it] would reflect the reality of this family . . . . This family situation was corroborated by the Technical Team’s report . . . [, which showed] that the child . . . identifies Mr. F.[C.F.] and Mr. [C.A.]F. as her fathers . . . . It

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\* Translation by Lucía Baca (Yale Law School, J.D. Class of 2024).

was also very enriching to listen to her siblings, who clearly showed the ways in which the parental roles converge harmoniously with respect to the child in this family reality. While the objective and subjective requirements of the CCyCom are fulfilled, there remains [a] legal obstacle . . . [:] the last paragraph of article 558 . . . , which says that no person can have more than two filial ties, whatever the nature of the filiation. That is why, in view of the fact that they did not ask for the declaration of unconstitutionality of this rule, I, as the Prosecutor of the Chamber, assume this request. . . .

V) . . . [B]ased on the above, the case is apt to be resolved, in order to decide definitively on the legal situation of the child N.M.G.O., who likes to be affectionately called “M.” . . . The new perspective of the protection of children and adolescents . . . [recognizes] children and adolescents . . . as full, active rights-bearing subjects. Thus, the institution of adoption . . . is constructed on the basis of the rights of the child or adolescent . . . . It[s] . . . mandatory starting point and[] . . . cornerstone from a human rights perspective[ is] the “best interests of the child[]” . . . . [T]he decision that I reach does not depend on . . . the strict text of the legal rule, but rather it is the product of . . . [the text’s] conjugation with the principles and values of the legal system as a whole. . . . [I]t is necessary to listen to what is happening in this emerging family reality and let the facts be the basis for my decision. . . .

[M.’s] best interests consist of: a) the right to live in a family and preserve her right to identity; b) the right to grow and develop in a healthy environment, where she is considered as a full subject and bearer of rights; c) the right . . . to be heard and to have her opinion taken into account in accordance with her age and degree of maturity; d) the need to define her legal situation with regard to her family rights in order to achieve the necessary stability and definitive permanence within a family; e) the right . . . to have a legal framework [to address her situation] and thus satisfy her right to effective judicial protection, which must also be guaranteed due to her status as a person of special protection. . . . Therefore, it is necessary to ask whether from the perspective of the best interests of the child it is convenient for . . . [M.] to form the adoptive filial bond in a multi-parental way. . . . [T]he full application of the concept of the best interests of the child requires a rights-based approach . . . [that] ensures the physical, psychological, moral, spiritual, and holistic integrity of the child and . . . promote[s] their human dignity. . . . [T]he best interests of the child is not an abstract concept, but rather it has a first and last name, a nationality, residence, and circumstances; therefore, “the specific mission of the courts in family matters is distorted if they limit themselves to addressing human problems through the application of predefined formulas or models, ignoring the circumstances of the case.” . . . [I]t is possible to infer that “M.” has built her identity alongside [her mother and fathers]. . . .

This family has sheltered “M.” and has given her . . . structure and stability, . . . the opportunity to find her place in the world: a real, palpable, and affection-based family bond has been built day by day. . . . [Her mother and fathers] occupy the role of protective parental figures, which favors the sense of security of . . .

“M.” [M. views] . . . her guardians as her mother and fathers, not only in a verbal sense, but also in how she relates to them in the affective order, in the setting of limits and in the demands . . . that she requests from them. . . . [T]he child’s desire is to be definitively inserted in this family . . . . It is necessary to have a constitutional-conventional vision that respects the rights to freedom, equality, non-discrimination, dignity, autonomy of will, and plurality. [It is necessary t]o look ahead, attending to the particular case and not to stagnant concepts that undermine the life project of the citizens. In this sense, . . . the State cannot . . . impose our own life plans . . . . [I]t is necessary to value . . . the socio-affectivity evidenced in the present case, in which valuable and protectable bonds were created. . . . As such . . . , it is necessary to declare the unconstitutionality and anti-conventionality of the third paragraph of article[] 558 . . . of the CCyCom in this specific case, insofar as it does not recognize the affective bonds emanating from the child towards . . . her two fathers and mother[, and grant the multi-parental adoption of M.]. Parenthood and filiation implicate each other and we should not start from antiquated concepts of relationships since parenthood is a matter of constructs . . . . M. has the right to be treated equally before the law and her reality is recognized in international law and in our Constitution . . . .

**The Next Normal: States will Recognize Multi-Parent Families**  
Courtney G. Joslin & Douglas NeJaime (2022)\*

It soon could be unremarkable for a child to have three or more legal parents. . . . Six states . . . have enacted laws over the past decade expressly allowing a court to recognize more than two parents for a child. Many others, including Massachusetts, are considering similar proposals. . . .

. . . Legal recognition is more than a bureaucratic formality: When parent-child bonds lack legal protection, children suffer. They may be denied crucial benefits—unable to access health insurance through their parent or receive government aid. Worse yet, when a child’s relationship to a parent is not recognized under law, that relationship can be permanently severed—for instance, if there is a custody dispute or if the legal parent dies. If the child enters the child welfare system, they may be removed from a legal parent and placed in foster care, rather than placed with another person whom the child considers a parent. Such separation can have devastating and long-term developmental consequences. . . . [L]oss of a parent can put a child at higher risk for addiction and psychiatric disorders and disrupt healthy development.

Some commentators have expressed fear that recognizing multiparent families will exacerbate instability and conflict in children’s lives, because they will be torn between multiple authority figures and multiple households. . . . Such concerns assume

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\* Courtney G. Joslin & Douglas NeJaime, *The Next Normal: States will Recognize Multi-Parent Families*, WALL ST. JOURNAL (Jan. 28, 2022, 9:12 AM EST), <https://www.washingtonpost.com/outlook/2022/01/28/next-normal-family-law>.

that . . . the risks of legitimizing or normalizing multiparent families are largely unknown and unknowable.

But multiparenthood is hardly new. We are working on the first nationwide empirical study of case law from 1980 to the present on “functional parent doctrines”—laws that allow courts to treat a person as a parent, even if that person is not the child’s biological or adoptive parent. Our preliminary findings show that multiparent families have long existed and . . . take a wide variety of forms. Examples include children who develop parent-child relationships with one or more stepparents, as well as children who have living biological parents but are raised primarily or exclusively by other relatives or friends. Long before statutes expressly permitted it, courts extended parental rights to people besides a child’s biological parents. . . .

To give just one example, these doctrines allowed the West Virginia Supreme Court, in 1990, to continue a child’s placement with his grandmother, with whom he had lived for much of his life, even though he had two parents. In another case, the same court ensured that a child could be cared for by both his legal parent *and* the aunt and uncle he viewed as parents. “It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians,” the court explained, and the couple was “too important” for the child “to be deprived of a continued relationship with them.” To avert this type of trauma, courts often issue orders that “foster the emotional adjustment of the children” and seek to “maintain as much stability as possible in their lives.” Multiparent recognition has made children’s lives steadier and more secure, not less.

The next normal, then, may not be a sweeping legal or societal change, but something simpler: more jurisdictions recognizing and protecting the families that exist today, right now.

## **TECHNOLOGY, BIOLOGY, INTENTIONALITY, AND LEGAL STATUS**

The materials below provide additional examples of judges’ responses when they are asked to recognize parental rights for more than two people. Courts have had to consider how different methods of creating a child change understandings of who is and is not a parent. We begin with a discussion of a child’s right to a relationship with genetic parents and the rights of genetic parents to parental recognition. We then turn to what rights exist between a child and the person who gives birth, as well as children’s relationships with nonbiological parents, including intended parents and social (or functional) parents.



## **(When) Are Genetic Parents Legal Parents?**

### **Extraordinary Appeal No. 898.060 Santa Catarina Supreme Federal Court of Brazil RE 898060 / SC (2016)\***

[The Supreme Federal Court of Brazil, composed of Ministers Cármen Lúcia, Celso de Mello, Marco Aurélio, Gilmar Mendes, Ricardo Lewandowski, Dias Toffoli, Luiz Fux, Rosa Weber, Teori Zavascki, and Edson Fachin, delivered the following judgement:]

[A woman who, at age 18, discovered that the man that raised her was not her biological father, sued to guarantee her legal rights as to her biological father and to determine her ancestry. Brazil recognizes the possibility of dual paternity, but Article 48 of the Child and Adolescent Statute\*\* provides that the origin of paternity is biological. However, the 2002 Civil Code\*\*\* establishes that paternity might be “affective.”]

. . . 2. The family . . . has definitively separated itself from the age-old distinction between legitimate, legitimized, and illegitimate children that informed the system of the Civil Code of 1916, . . . [which,] by adopting a presumption based on the centrality of marriage, disregarded both biological and emotional criteria [in matters of filiation].

3. The family . . . demands the reformulation of the legal treatment of parental bonds in light of the fundamental principle of human dignity and the pursuit of happiness. . . .

5. Overcoming the legal obstacles to the full development of families created by interpersonal affective relationships . . . is a corollary of the fundamental principle of human dignity.

7. The individual can never be reduced to a mere instrument for the fulfillment of the will of those who govern . . . . [T]he right to the pursuit of happiness protects

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\* Translation by Lucía Baca (Yale Law School, J.D. Class of 2024).

\*\* Article 48 of the Child and Adolescent Statute provides in relevant part:

The adopted has the right to know their biological origin as well as to obtain unrestricted access to the process in which the measure was applied and eventual related proceedings, after turning 18 (eighteen) years of age.

\*\*\* Article 1.593 of the Civil Code of 2002 provides that:

Parentage is natural or civil, according to whether it results from consanguinity or another source.

human beings from the State's attempts to force their family realities into models preconceived by the law. . . .

10. The cosmopolitan legal understanding of families requires expanding legal protections to cover all manifestations of parenthood, namely: (i) by the presumption arising from marriage or other legal arrangements, (ii) by biological descent or (iii) by affection. . . .

13. Responsible parenthood, expressly stated in art. 226, § 7, of the Constitution,\* from the perspective of human dignity and the pursuit of happiness, . . . [requires] embracing . . . the filiation bonds created by the affective ties between those involved as well as those originating from biological ancestry, without having to choose between one or the other bond when the best interest of the descendant is the legal recognition of both.

14. Pluriparentage, in Comparative Law, can be exemplified by the concept of "dual paternity," . . . developed by the Supreme Court of the State of Louisiana, USA,\*\* . . . to fulfill, at the same time, the best interests of the child and the right of the genitor to declare paternity.

15. Family arrangements not regulated by the State, due to omission, cannot be left unprotected in situations of multiple parenthood . . . . [The parental bonds of affective and biological origin] deserve concomitant legal protection . . . to provide the most complete and adequate protection to the subjects involved . . . .

16. Extraordinary Appeal dismissed, establishing the following legal thesis for application to similar cases: "Socio-affective paternity, whether declared in the public registry or not, does not prevent the recognition of the concomitant filial tie based on biological origin, with its own legal effects." . . .

\* \* \*

As a ruling of "general repercussion," Extraordinary Appeal 898.600 provides binding guidance on the contours of multi-parentage in Brazil. The decision modifies the concept of family in the country's legal system and, by extending recognition to

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\* Article 226, § 7 of the Constitution of Brazil provides:

Based on the principles of human dignity and responsible parenthood, family planning is a free choice of the couple, it being within the competence of the State to provide educational and scientific resources for the exercise of this right, any coercion by official or private agencies being forbidden.

\*\* The Supreme Court of Louisiana introduced the concept of dual paternity in *Warren v. Richard*, 296 So. 2d 813 (La. 1974), which allowed a child to recover for the wrongful death of her genetic father although, while under Louisiana law, she was the child of another man.

certain family forms not previously recognized in national legislation, the decision is a milestone in Brazilian family and successions law.

**Michael H. v. Gerald D.**  
Supreme Court of the United States  
491 U.S. 110 (1989)

Justice Scalia announced the judgment of the Court, joined by Justices Rehnquist, Stevens, O'Connor, and Kennedy.

[Carole D. and Gerald D. were married in 1976. In 1978, Carole became involved in an extramarital affair with Michael H. In 1980, she conceived a child, Victoria D., who was born in 1981. Gerald was listed on Victoria's birth certificate as his father and claimed that he was her father, but paternity tests showed a 98.07% probability that Michael was Victoria's father. In November 1982, after Carole moved in with a different man and subsequently prevented Michael from visiting Victoria, Michael brought a claim to establish his paternity and right to visitation. Victoria filed a cross-complaint for the right to maintain filial relationships with both Michael and Gerald.]

. . . The California statute that is the subject of this litigation is . . . more than a century old . . . , [and] provided that “[t]he issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate.”\* . . .

We address first the claims of Michael. . . California law, like nature itself, makes no provision for dual fatherhood. Michael was seeking to be declared *the* father of Victoria. . . Michael contends as a matter of substantive due process that, because he has established a parental relationship with Victoria, protection of Gerald's and Carole's marital union is an insufficient state interest to support termination of that relationship. This argument is, of course, predicated on the assertion that Michael has a constitutionally protected liberty interest in his relationship with Victoria.

It is an established part of our constitutional jurisprudence that the term “liberty” in the Due Process Clause extends beyond freedom from physical restraint. . . In an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a “liberty” be “fundamental” (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society. . . .

Thus, the legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has. In fact,

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\* CALIFORNIA EVIDENCE CODE ANNOTATED § 621(a) (West Supp. 1989).

quite to the contrary, our traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts. . . .

We have found nothing in the older sources, nor in the older cases, addressing specifically the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man. Since it is Michael's burden to establish that such a power (at least where the natural father has established a relationship with the child) is so deeply embedded within our traditions as to be a fundamental right, the lack of evidence alone might defeat his case. But the evidence shows that even in modern times—when, as we have noted, the rigid protection of the marital family has in other respects been relaxed—the ability of a person in Michael's position to claim paternity has not been generally acknowledged. . . . Not a single decision is set forth specifically according standing to the natural father . . . .

. . . Victoria's due process challenge is, if anything, weaker than Michael's. Her basic claim is . . . a due process right to maintain filial relationships with both Michael and Gerald. This assertion merits little discussion, for, whatever the merits of the guardian ad litem's belief that such an arrangement can be of great psychological benefit to a child, the claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country. . . .

\* \* \*

In 2014, California enacted a law authorizing courts to recognize more than two parents of a child if not providing recognition would be detrimental to the child. The case excerpted below applied that provision. Since California enacted its multi-parent law, other states, including Connecticut, Maine, Vermont, and Washington, have done the same.

**C.A. v. C.P.**

Court of Appeal of the State of California, Third Appellate District  
29 Cal. App. 5th 27 (Cal. App. 2018)

Duarte, J., with Hull, Acting P.J., and Murray, J., concurring.

This case involves a little girl bonded to and loved by each of her three parents.

The wife in a married couple . . . conceived the child with a coworker . . . . The marriage remains intact and wife and husband parent the child. For the first three years of the child's life, the couple allowed plaintiff to act in an alternate parenting role, and the child bonded with him and his close relatives. Defendants excluded plaintiff from the child's life when he filed the instant petition seeking legal confirmation of his paternal rights. The trial court found that . . . the child was . . . bonded to all three parents

and found this to be a “rare” case where, pursuant to statutory authority, each of three parents should be legally recognized as such, to prevent detriment to their child. . . . We shall affirm. . . .

Defendants primarily contend the trial court should not have found plaintiff was a third parent . . . , and make the subsidiary claims that such a finding interferes with the state’s interest in preserving the institution of marriage and impinges on their parental rights. . . . [W]e disagree.

. . . [T]here is no dispute that husband is presumed to be at least *a* father of the child . . . . The question is whether he can be deemed a third parent . . . .

To advance . . . public policy . . . , section 7612, subdivision (c) now provides . . . .

In an appropriate action, a court may find that more than two persons with a claim to parentage . . . are parents if the court finds that recognizing only two parents would be detrimental to the child. In determining detriment to the child, the court shall consider all relevant factors, including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled the child’s physical needs and the child’s psychological needs for care and affection, and who has assumed that role for a substantial period of time.\* . . .

The trial court discussed all appropriate factors before making the “rare” case finding. The court distinguished this case from others where a married couple *consistently* excluded a biological father, because here defendants allowed plaintiff (and his close relatives) to establish a bond with the child. The court found . . . “ . . . it would be detrimental to [the child] to recognize only two parents . . . [and] not allow [both men] to participate in legal custody decision-making such as health and education. The evidence establishes [she] is a child who would benefit greatly from the continued love, devotion and day to day involvement of three parents.”

The trial court gave “significant weight to the strong, long and enduring bond shared by [the child and plaintiff] from the time leading up to her birth and from her birth and following for more than three years. . . . Both [men] provided persuasive and convincing testimony regarding . . . their affection and love for [her]. . . .”

The trial court did not find defendants’ desire to govern the child’s medical care sufficient to tip the scales in their favor, and found “it would be detrimental to [the child] if the court were to only recognize two parents when considering the evidence presented on her autism diagnosis. The court finds each parent has the ability to contribute to and

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\* CALIFORNIA FAMILY CODE § 7612(c) (West 2014).

support [the child] through her childhood as she engages in the required therapies associated with her diagnosis to assist her in becoming a happy, healthy and self-supporting adult.” The relatively short time during which plaintiff had been excluded . . . did *not* break the bond plaintiff had developed with the child for over three years . . . . Nor would recognizing plaintiff’s role remove the child from a stable home; instead, restoring something akin to the prior schedule “allows for continued consistency and stability” . . . .

[D]efendants contend that if the statutory scheme authorizes the result herein, it violates constitutional norms in two ways. First, they contend it impinges on the state’s right to protect marriage. Second, they contend it impinges on their ability to exercise their parental rights. . . .

First, we observe that defendants provide no authority for the implicit proposition that a *child’s* detriment should be subordinated to a *marriage’s* detriment. . . . Second, . . . [d]efendants paint plaintiff as a would-be homewrecker . . . . But . . . [b]efore the [petition], . . . defendants allowed plaintiff to parent the child and she bonded with him and his relatives. For defendants now to claim plaintiff poses such a severe threat to their marriage that he should be excluded despite the finding that his exclusion would be detrimental to the child rings hollow.

Third, the trial court explicitly found defendants “intend to remain married . . .” and that at trial “he expressed his renewed commitment to [his wife].” Fourth, . . . plaintiff “articulated his goal to respectfully co-exist with” husband, to whom he had apologized for the situation he had unwittingly caused and . . . both men understand and accept the difficulties inherent in the situation . . . and . . . want the best outcome for the child. . . . Thus, defendants’ claim that the judgment under review unconstitutionally threatens their specific marriage lacks any factual basis. . . .

[D]efendants contend that by recognizing plaintiff as a father, husband’s status as a father was diminished. . . . [T]he fact remains that the child’s biological father is an important part of her life. For defendants to allow plaintiff to bond with the child and then cut him off when he tried to formalize the arrangement threatened detriment to the child. In short, we find no infringement of defendants’ constitutional rights to parent the child . . . .



## **(When) Are Birth Parents Legal Parents?**

### **Valdís Fjölvisdóttir and Others v. Iceland** European Court of Human Rights (Third Section) Application No. 71552/17 (2021)

The European Court of Human Rights (Third Section), sitting as a Chamber composed of: Paul Lemmens, President, Georgios A. Serghides, Robert Spano, Georges Ravarani, María Elósegui, Darian Pavli, Anja Seibert-Fohr, judges, and Milan Blaško, Section Registrar, . . . [d]elivers the following judgment . . . :

. . . 5. The first and second applicants were a married [female same-sex] couple who engaged the paid services of a surrogacy agency based in the United States . . . . They . . . travelled to California, where a son, the third applicant, was born to them via a surrogate mother . . . . The child . . . is not biologically related to either . . . applicant . . . . The . . . surrogate mother has waived any claim to legal parenthood . . . .

6. . . . Shortly thereafter, the first and second applicants applied to Registers Iceland for the third applicant's registration in the national register[, which would allow the child to become an Icelandic citizen]. . . .

7. . . . Registers Iceland denied the request . . . . The decision stated that as the child had been born in the United States to a surrogate mother, Icelandic legal provisions on a child's parentage were not applicable, and the child was therefore not automatically entitled to citizenship . . . .

9. . . . [T]he Ministry of the Interior confirmed Registers Iceland's decision to deny the third applicant's registration in the national register. The decision stated that under Icelandic law, the woman who gave birth to a child was always considered its mother . . . .

17. . . . [T]he District Court rejected the [first and second] applicants' claims for the ministry's decision to be annulled and for Registers Iceland to register the first and second applicants as the parents of the third applicant.

18. . . . Noting that surrogacy was unlawful in Iceland, . . . the District Court found that recognising as parents those who were resident in Iceland but went abroad for the purposes of surrogacy would create a legal loophole around the ban on surrogacy. The District Court therefore found that the Icelandic State had a legitimate reason to refuse to recognise parentage established abroad in such circumstances. . . .

23. The Supreme Court, like the District Court, found that the authorities had been entitled to refuse to recognise family ties . . . established in a manner contrary to the fundamental principles of Icelandic family law. . . .

58. The Court must ascertain whether, in the circumstances of the case, the relationship between the first two applicants and the child, the third applicant, came within the sphere of family life within the meaning of Article 8.\* . . .

62. . . . [T]he requirements of “family life” have been fulfilled . . . [in] the present case. . . . [T]he Court has taken account of the long duration of the first two applicants’ uninterrupted relationship with the third applicant, the quality of the ties already formed and the close emotional bonds forged with the third applicant during the first stages of his life . . . .

65. According to the Government’s submissions, the ban on surrogacy served to protect the interests of women who might be pressured into surrogacy, as well as the rights of children to know their natural parents. In the light of this, the Court finds that [while there was a violation of the applicants’ right to respect for family life], the refusal to recognise the first and second applicants as the third applicant’s parents pursued the legitimate aim of protecting the rights and freedoms of others. . . .

68. . . . In determining whether an interference was “necessary in a democratic society” the Court will take into account that a margin of appreciation is left to the national authorities . . . .

75. Considering . . . the absence of an indication of actual, practical hindrances in the enjoyment of family life, and the steps taken by the respondent State to regularise and secure the bond between the applicants, the Court concludes that the non-recognition of a formal parental link . . . struck a fair balance between the applicants’ right to respect for their family life and the general interests which the State sought to protect . . . . The State thus acted within the margin of appreciation . . . . There has accordingly been no violation of Article 8 . . . .

\* \* \*

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

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.



The court found that Icelandic authorities had protected the applicants' family life by placing the child with the intended parents (the married same-sex couple) as foster parents and by holding open the possibility of a joint adoption, as well as by granting citizenship to the child.

As the use of surrogacy as a means by which a couple can conceive a child has increased, some countries have enacted legislation addressing the rights of people who act as surrogates. Excerpted below is legislation in New York, which does not give a person acting as a surrogate the ability to claim parental rights but safeguards rights regarding health and welfare.

**Surrogates' Bill of Rights**  
N.Y. State Assembly Bill No. A9506B  
(2020)

. . . § 581-601. Applicability. . . . Except as otherwise provided by law, any written or verbal agreement purporting to waive or limit any of the rights in this part is void as against public policy. . . .

§ 581-602. Health and welfare decisions. A person acting as surrogate has the right to make all health and welfare decisions regarding themselves and their pregnancy, including but not limited to whether to consent to a cesarean section or multiple embryo transfer, to utilize the services of a health care practitioner of their choosing, whether to terminate or continue the pregnancy, and whether to reduce or retain the number of fetuses or embryos they are carrying. . . .

§ 581-604. Health insurance and medical costs. A person acting as surrogate has the right to have a comprehensive health insurance policy that covers preconception care, prenatal care, major medical treatments, hospitalization and behavioral health care for a term that extends throughout the duration of the expected pregnancy and for twelve months after the birth of the child . . . to be paid for by the intended parent or parents. . . .

§ 581-605. Counseling. A person acting as surrogate has the right to obtain a comprehensive health insurance policy that covers behavioral health care and will cover the cost of psychological counseling to address issues resulting from their participation in a surrogacy and such policy shall be paid for by the intended parent or parents. . . .

**Unconstitutional Action 16/2016**  
Supreme Court of Justice of Mexico  
(2016)\*

[The Plenary Tribunal of the Supreme Court of Justice of Mexico delivered the following judgment:]

Surrogacy refers to the process through which a woman intentionally becomes pregnant without intending to keep the newborn child; it is understood as a practice in which a person of the female sex bears a human being, [pursuant to a] prior agreement . . . , through which she has to cede all rights over the newborn child to the person or persons who will assume the paternity of the child. . . .

In Mexico, the federal legislator has not issued any regulations establishing the rules for accessing surrogacy. Some state legislatures have included regulations on the matter in civil or family codes, in particular, . . . in relation to the filiation of children born through this technique. . . .

The plaintiff asserts the unconstitutionality of the fifth paragraph of article 380 Bis 3 of the Civil Code for the State of Tabasco, for violating the principles of the best interests of the minor, legality, and legal certainty, in the . . . portion that reads:

In the event that the surrogate or her spouse sues for paternity or maternity, she may only receive . . . the custody of the product of the insemination, when the incapacity or death of the contracting mother or father is accredited; given that it enables the surrogate or her spouse to sue for paternity or maternity in the event of the death or incapacity of the contracting father ‘or’ mother.

. . . [U]sing the conjunction ‘or’ instead of . . . ‘and,’ makes it such that, if only one of the contracting spouses becomes incapacitated or dies, the other may be excluded from the exercise of parental rights . . . .

. . . [T]he best interests of the minor . . . require a legal framework that safeguards the right to identity and family relations to those born by way of these assisted reproduction techniques. . . . [W]hen using the assisted reproduction technique known as gestational surrogacy, as a general rule, neither the pregnant woman, nor her spouse or common-law husband, have standing to challenge the maternity or paternity or even the custody of the child resulting from the insemination. . . .

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\* Translation by Lucía Baca (Yale Law School, J.D. Class of 2024).

In the use of an assisted reproduction technique, the right to filiation is determined on the basis of the minors' right to identity, registration, and family relations, which must consider the volitional element called *procreational will* . . . .

. . . [T]he concept of procreational will is one of the determining factors for the construction of the filial bond of minors born via assisted reproduction techniques . . . . In surrogacy, procreational will is the intention to beget a child with one's own genetic material or that of a third party through the implantation of the embryo in the womb of a third person for its gestation and delivery or through in vitro fertilization. The third person lacks this procreational will, such that, even though . . . traditional civil law would attribute maternity to the pregnant woman, the central element that . . . determines filiation in these procedures is missing: procreational will, that is, the intention to acquire rights and obligations and, at the same time, the effect derived from the deployment of such responsibilities. . . .

It is in the best interest of the minor . . . that filiation be attributed to persons who have the will to exercise this role; the genetic link with the surrogate or . . . with the donor(s) is not a reason to . . . automatically [confer] standing to claim rights over the minor. . . .

Thus, . . . the fifth paragraph of article 380 Bis 3 of the Civil Code for the State of Tabasco is unconstitutional because it establishes a rule that places pregnant women and their spouses in a . . . privileged position with respect to other persons who could assume custody of the child . . . —grandparents, uncles, aunts, and other relatives— which makes it impossible for the judge to determine, based on the circumstances of the case and the particularities of the child, the best way to guarantee the child's harmonious and comprehensive development as well as the full exercise of their right to filiation. . . .

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## **(When) Are Intended Parents Legal Parents?**

### **V.M.A. v. Stolichna Obsthina, Rayon Pancharevo** European Court of Justice Case C-490/20 (2021)

THE COURT (Grand Chamber), composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev, K. Jürimäe, C. Lycourgos, E. Regan, N. Jääskinen, I. Ziemele and J. Passer, Presidents of Chambers, M. Ilešič (Rapporteur), J.-C. Bonichot, T. von Danwitz and N. Wahl, Judges, . . . gives the following Judgment:

. . . V.M.A. is a Bulgarian national and K.D.K. is a United Kingdom national. . . . In December 2019, V.M.A. and K.D.K. had a daughter, S.D.K.A., who was born and resides with both parents in Spain. The daughter's birth certificate, issued by the Spanish authorities, refers to V.M.A. as 'Mother A' and to K.D.K. as 'Mother' of the child.

On 29 January 2020, V.M.A. applied to the Sofia municipality [in Bulgaria] for a birth certificate for S.D.K.A. . . . . By letter of 7 February 2020, the Sofia municipality instructed V.M.A. to provide . . . evidence of the parentage of S.D.K.A. with respect to the identity of her biological mother. The municipality stated in that regard that the . . . birth certificate . . . has only one box for the 'mother' and another for the 'father', and that only one name may appear in each box. . . .

By decision of 5 March 2020, the Sofia municipality . . . refused V.M.A.'s application for a birth certificate . . . . The reasons given for that refusal decision were the lack of information concerning the identity of the child's biological mother and the fact that a reference to two female parents on a birth certificate was contrary to the public policy of the Republic of Bulgaria, which does not permit marriage between two persons of the same sex.

V.M.A. brought an action against that refusal decision before the . . . Administrative Court of the City of Sofia, Bulgaria . . . . [T]h[at] referring court asks . . . whether EU law obliges a Member State to issue a birth certificate . . . for a child, a national of that Member State, whose birth in another Member State is attested by a birth certificate that has been drawn up by the authorities of that other Member State in accordance with the national law of that other State, and which designates, as the mothers of that child, a national of the first of those Member States and her wife, without specifying which of the two women gave birth to that child. If the answer is in the affirmative, the referring court asks whether EU law requires such a certificate to state . . . the names of those two women in their capacity as mothers. . . .

Under Article 21(1) TFEU, \* every citizen of the Union is to have the right to move and reside freely within the territory of the Member States . . . . In order to enable their nationals to exercise that right, Article 4(3) of Directive 2004/38\*\* requires

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\* Article 21(1) of the Treaty on the Functioning of the European Union provides:

Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

\*\* Article 4(3) of Directive 2004/38 states:

Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality.

Member States . . . to issue to their own nationals an identity card or passport stating their nationality.

. . . [S]ince S.D.K.A. is a Bulgarian national, the Bulgarian authorities are required to issue to her an identity card or a passport stating her nationality and her surname as it appears on the birth certificate drawn up by the Spanish authorities . . . . [T]he Spanish authorities lawfully established that there was a parent-child relationship, biological or legal, between S.D.K.A. and her two parents, V.M.A. and K.D.K., and attested this in the birth certificate issued in respect of the child of those two parents. V.M.A. and K.D.K. must, therefore, . . . as parents of a Union citizen who is a minor and of whom they are the primary carers, be recognised by all Member States as having the right to accompany that child when her right to move and reside freely within the territory of the Member States is being exercised.

Accordingly, the Bulgarian authorities are required, . . . to recognise that parent-child relationship for the purposes of permitting S.D.K.A. . . . to exercise without impediment, with each of her two parents, her right to move and reside freely within the territory of the Member States . . . .

In addition, in order to enable S.D.K.A. to exercise her right . . . , V.M.A. and K.D.K. must have a document which mentions them as being persons entitled to travel with that child. In the present case, the authorities of the host Member State are best placed to draw up such a document, which may consist in a birth certificate. . . .

. . . The Member States are . . . free to decide whether or not to allow marriage and parenthood for persons of the same sex under their national law. Nevertheless, in exercising that competence, each Member State must comply with EU law, in particular the provisions of the FEU Treaty on the freedom conferred on all Union citizens to move and reside within the territory of the Member States, by recognising, for that purpose, the civil status of persons that has been established in another Member State in accordance with the law of that other Member State . . . .

. . . [T]he obligation for a Member State to issue an identity card or a passport to a child who is a national of that Member State, who was born in another Member State and whose birth certificate issued by the authorities of that other Member State designates as the child's parents two persons of the same sex, and, moreover, to recognise the parent-child relationship between that child and each of those two persons in the context of the child's exercise of her rights . . . does not undermine the national identity or pose a threat to the public policy of that Member State.

Such an obligation does not require the Member State of which the child concerned is a national to provide, in its national law, for the parenthood of persons of the same sex, or to recognise, for purposes other than the exercise of the rights which

that child derives from EU law, the parent-child relationship between that child and the persons mentioned on the birth certificate . . . as being the child's parents. . . .

**Amparo en Revisión 807/2019**  
Supreme Court of Justice of Mexico  
(2020)\*

[The Supreme Court, composed of President Juan Luis González Alcántara Carrancá and Justices Ana Margarita Ríos Farjat, Jorge Mario Pardo Rebolledo, and Alfredo Gutiérrez Ortiz Mena delivered the following opinion:]

. . . [T]his Court has previously indicated that the decision to have biological children with assisted reproduction technology forms part of the rights to personal integrity, personal freedom, and freedom of private and family life; after all, how that decision is made represents part of the autonomy and identity of a person . . . .

With respect to reproductive rights, in particular, in the use of an artificial insemination treatment, the right to identity, contemplated by Article 4 of the Constitution,\*\* is realized under a dual connotation: in the first place, with respect to the legal consequences arising from those who undergo such treatment (the parents); secondly, and mainly, in relation to the impact on the children born under these technologies.

. . . This Court has noted that when presented with an artificial insemination treatment, as technology through which persons, whether individually or as a couple, can exercise their right to form a family, the first thing to verify is in which of these capacities (individual or couple) the treatment was performed; afterward, it will be necessary to determine whether there was consent by the person who did not provide genetic material, as this will make up one of the elements to constitute the filiation of the child born via that assisted reproduction technology.

This is so because when an assisted reproduction technology is consented to within a marriage, one of the fundamental factors for determining the filiation of the children born as a result of those technologies is the will of the parents.

Now, . . . [when] fertilization is carried out with a male gamete from an anonymous donor; . . . the child produced . . . will not biologically have a genetic

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

\*\* Article 4 of the Constitution of Mexico, in relevant part, provides:

Any person has the right to identity and to be registered immediately after their birth. The State shall guarantee the compliance of these rights. The competent authority shall issue, without any cost, the first certified copy of the birth certificate or registration.

material compatible with one of the spouses. This being the scenario, what must be demonstrated is whether the other spouse (male or female) consented for the female spouse to be induced under that treatment, since, if so, they legally will have a filiation with the child born of said assisted reproduction technology and, consequently, there will arise for both parents a parenthood equal to that which is normally acquired by consanguinity.

Thus, when . . . there is consent of the spouses to undergo a heterologous artificial insemination, what is being directed is the consensual will of both spouses, to exercise their right to decide freely, responsibly and informedly over the number and frequency of their children, despite the fact that between the spouse (male or female) who merely gave their consent for the other spouse (necessarily a woman) to undergo the [treatment] mentioned, and the child born, there are no genetic ties; this consent of the non-reproducing spouse is known as *procreational will*, which is nothing more than the desire to assume a child as one's own even if, biologically, they are not. . . .

In this way, [in resolving previous amparos] this Court has considered that in heterologous artificial insemination, the *procreational will* is one of the determining factors for the constitution of the filial bond of the child, and for the spouse who gives it, it is legally binding by all the legal consequences of a genuine paternal-filial relationship, that is, so that the spouse, male or female, may assume the derivative responsibilities of the filiation; [a] freedom that is protected under Article 4 of the Constitution.

[Thus,] it is clear that in heterologous artificial insemination, filiation with the spouse (male or female) is not determined by biological truth, but by the will expressed by both parents . . . .

. . . [I]t is now recognized that homoparental family models constituted by two women exercise so-called comaternity, that is, double maternal filiation . . . . The sexual orientations of the people who make up family unions, . . . whatever their configuration, are subject to protection. . . .

[In this case where a female same-sex couple conceived a child through artificial insemination, and the appellant is the non-biological mother and the complainant is the biological mother, the lower court stated only the complainant had custody over the child. Thus,] the appellant is . . . dissatisfied with the judgment . . . because . . . it should have been taken into account that . . . both [women in the union] decided to be mothers and the third party recognized the child like her daughter . . . .

The foregoing [judgment] is unfounded, because as already analyzed, the State . . . has the duty and obligation to promote, respect, protect and guarantee the human rights of individuals; and among those rights is the human right to equality and non-discrimination; and in addition to this, it has the constitutional obligation to protect

the organization and development of the family, and that obligation is not limited to a particular type of family, but there is a duty to protect the family in all its forms and demonstrations, among them, families made up of same-sex couples.

. . . [I]t is clear that the State is not only obliged to recognize and protect that family as a whole, but that protection must extend to each of its members. . . . [B]eyond the biological link [the daughter] may have with the complainant, [the child] is the daughter of both parties, and insofar as there existed procreational will on behalf of [appellant], there formed a comaternity, where both have the same rights and obligations in relation to the minor.

This situation is strengthened, if it is taken into account that both parties are legally recognized as mothers of the minor, because after the birth of [the child], both [d]ecided to get married . . . and on that same date, both appeared at the Central Office of the Civil Registry of Mexico City to register the minor as a daughter.

Therefore, . . . legal filiation exists between the minor and both mothers . . . .

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## **(When) Are Social Parents Legal Parents?**

**E.N. v. T.R.**

Court of Appeals of Maryland (United States)  
474 Md. 346 (Md. 2021)

Watts, J., writing for the court, joined by McDonald, Hotten, Getty, and Booth, JJ.:

In this case, we must determine the requirements necessary for establishment of *de facto* parenthood in Maryland where a child has two legal parents, specifically, whether both parents must consent to, and foster, a prospective *de facto* parent's formation and establishment of a parent-like relationship with the child. The term "*de facto* parent" . . . is used to describe a party, other than a child's legal parent, *i.e.*, biological or adoptive parent, who claims custody or visitation rights based upon the party's relationship with a non-biological, non-adopted child. . . . [A] person seeking *de facto* parent status must prove . . . that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child . . . , or that a non-consenting legal parent is an unfit parent, or exceptional circumstances exist. . . .



E.N. and D.D. are the biological parents of two minor children . . . . [They separated. D.D.] began a relationship with T.R., and the two moved in together. . . . [T]he children [eventually] moved into D.D. and T.R.’s house . . . .

After D.D. was incarcerated . . . , the children continued to live with T.R. . . . . [Months later], E.N. . . . asked for her children to be returned to her. T.R. refused [and filed this claim for *de facto* parentship]. . . .

. . . [T]o declare the existence of a *de facto* parentship based on the consent of only one parent and ignore whether a second legal parent has consented to and fostered the establishment of a parent-like relationship, or is a fit parent or whether exceptional circumstances exist . . . negates that parent’s constitutional right to the care, custody, and control of the parent’s children. Moreover, [it] . . . runs afoul of . . . basic family law principles. . . .

. . . [T]he [requirement to prove consent of both parents] is not only critical because it makes a legal parent a participant in the creation of the *de facto* parent’s relationship with the child, but also because it “recognizes that when a legal parent invites a third party into a child’s life, and that invitation alters a child’s life by essentially providing him with another parent, the legal parent’s rights to unilaterally sever that relationship are necessarily reduced.” . . .

. . . Creating a *de facto* parentship with the consent of only one parent where there are two fit legal parents and in the absence of exceptional circumstances would result in circumstances that may be unworkable for the legal parents, the *de facto* parent, and the children involved. For instance, “[w]here there are two existing parents, . . . permitting a single parent to consent to and foster a *de facto* parent relationship could result in a second existing parent having no knowledge that . . . a third parent, is created[,]” or, as in this case, a fit legal parent being ordered to co-parent with a person who is a stranger to the parent . . . . Moreover, . . . [it] may result in . . . children being subject to custody and visitation orders between all three or perhaps more fit parents, who have little or no ability to co-parent, and who possibly do not even know each other, a situation that could rarely be seen to be in the best interest of a child. Permitting *de facto* parenthood to be established based on the express or implied consent of both legal parents, where there are two existing legal parents, or a showing of unfitness or exceptional circumstances strikes the appropriate balance between the parent’s fundamental right to raise a child and the best interest of the child. . . .

. . . Accordingly, . . . [t]he case is remanded . . . with instruction to . . . vacate the judgment awarding joint legal custody and sole physical custody to T.R.

Dissenting opinion by Biran, J., which Barbera, C.J., joins:

... There is no sound basis in law or policy to require that both legal parents must consent to and foster a third party's parental-type relationship with their child before a family court may recognize the third party as a *de facto* parent with standing to seek custody and visitation. It should suffice that one of the legal parents has consented to the relationship. . . .

By constraining the family court's ability to assess these cases based on their individual circumstances, the Majority's holding will lead . . . to psychological harm for children as they suffer the sudden loss of a parental-type relationship. Further, it will disincentivize people . . . from filling a void left by a parent who, for whatever reason, is not present for their children for a substantial period of time. . . .

... [T]he best interests of the child take precedence over all other interests, including a legal parent's liberty interest in raising a child. . . . Regrettably, the Majority loses sight of that goal through its overemphasis of the rights of a nonconsenting parent. . . .

### **The Constitution of Parenthood** Douglas NeJaime (2020)\*

... Rather than require nonbiological parents to adopt, family law has developed principles of parental recognition that turn on social criteria. Courts in some states have accommodated nonbiological parents by means of common law and equitable devices that recognize a person as a parent when she has acted as a parent to the child and the child views her as a parent. . . .

But not all states have followed this path. Some continue to hew to a view of parenthood tethered to biological connection. . . . When individuals are told that they are not parents as a family-law matter, they may seek protection under the Constitution. Given that the Constitution has long been read to protect parents' relationships with their children as a matter of substantive due process, these individuals claim that the state's refusal to recognize them as parents violates their constitutional rights.

Yet these claimants often find no relief, as courts conclude that only *biological* parents possess a right to parental recognition protected by the Due Process Clause. . . . [T]he biological basis of constitutional protection for parenthood often rests on a reading of Supreme Court precedents that are now decades old. . . .

... In a landmark 1972 decision, *Stanley v. Illinois*, the Court protected an unmarried father who had been treated by law as a legal stranger to his children. While decisions on unmarried fathers are commonly invoked to support the biological premise of constitutional parenthood, a closer look reveals that the Court viewed fatherhood as

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\* Douglas NeJaime, *The Constitution of Parenthood*, 72 STANFORD LAW REVIEW 261 (2020).

a social practice. The vindication of biological ties in nonmarital families emerged to challenge traditional views that linked parenthood to marriage—men became fathers through marriage to the mother, and unmarried men presumably rejected parental responsibilities. The Court accepted the claims of unmarried fathers who approximated husbands—those who formed a household with the child’s mother and accepted responsibility for the child. When the Court rejected the claims of unmarried fathers, it simultaneously cleared the path for the child’s relationship with a nonbiological father (the man married to the mother) to enjoy legal status. In this sense, the turn to social criteria, to support both unmarried biological fathers and married nonbiological fathers, did not necessarily point in egalitarian directions but instead at least partially propped up the two-parent, marital family—a view the Court made explicit in [*Michael H. v. Gerald. D.*] the last of its decisions on the constitutional rights of unmarried fathers. . . .

Even as the Court’s decisions on unmarried fathers . . . shed light on the relationship between biological ties and constitutional protection, their utility in deciding questions regarding contemporary family arrangements is limited. These cases were decided decades ago and rest in part on views about the family that now appear outmoded. In the ensuing years, legal and cultural understandings of the family have shifted significantly—in directions that are more inclusive and egalitarian and that value nonbiological parent-child relationships. The Court itself contributed to the changing legal landscape—most critically . . . with its decisions on the rights of same-sex couples. In treating same-sex couples and the parent-child relationships they form as equally deserving of respect, the Court embraced nonbiological parenthood. Yet while these cases present a more inclusive approach to parenthood and express significant concern for protecting children’s relationships with their parents, they still connect parenthood to marriage.

. . . Nonetheless, they provide guidance on how to reason about the liberty interest in parental recognition. As *Obergefell* [*v. Hodges*, addressing the right to marriage for same-sex couples,] demonstrates, “new insights” about the family arrangements worthy of respect and the groups subject to exclusion can reshape understandings of the family relationships protected as a matter of due process.

For “new insights” of the kind that shape understandings of the family relationships that the Constitution protects, [we can turn] to family law—the body of law most concerned with questions of parental recognition. Family law supplies guidance on how to reason about parenthood in ways that address contemporary family arrangements in light of constitutional commitments. Through family law’s *functional turn*, courts, legislatures, scholars, and lawyers . . . vindicated established parental bonds in a broad range of families featuring nonbiological parents—what courts and legislatures often call “de facto parents” and what scholars of child development have termed “psychological parents.” The functional approach acknowledges the significance of developed parent-child relationships, prioritizes children’s welfare, and

embraces families that break from the traditional norms of the gendered, heterosexual, marital family. . . .

Family-law authorities are animated by constitutional values and see themselves as acting to vindicate constitutional principles, and yet in doing so may move beyond what constitutional decisionmakers actually have done. . . . Judges, legislators, scholars, and lawyers working in family law have drawn on constitutional understandings in crafting and revising their own account of parenthood. They have furnished interpretations of key constitutional decisions that, rather than bolster a biological approach to parenthood, affirmatively support the recognition of nonbiological parents. The Constitution, on this account, views parenthood as a social practice and protects parent-child relationships that exist in fact. . . .

While this vision of parenthood has arisen as a formal matter in family-law doctrine, it has drawn support from constitutional precedents and principles and furnishes insights that may eventually support new understandings of parenthood in constitutional doctrine. Guided by family-law insights on the meaning of parenthood and its relationship to constitutional commitments, understandings of parenthood as a matter of due process may develop in ways that vindicate actual relationships, whether biological or nonbiological. Ultimately, constitutional decisionmakers, learning from family law, may come to appreciate that parents who have formed relationships with their children, including nonbiological parents, have a liberty interest in parental recognition. . . .

It may seem odd at this moment to argue for an expanded conception of the interest in parental recognition protected as a matter of substantive due process. Current law, best represented by the Court's marriage equality decision in *Obergefell*, views liberty as a capacious and evolving concept—an approach that hearkens back to the origins of the Court's modern due process jurisprudence. Yet, in the coming years, the Court—which has grown more conservative and no longer includes *Obergefell*'s author, Justice Kennedy—may shift away from this approach and instead revert to a narrower view. . . .

Importantly, though, the Supreme Court is not the only constitutional authority, and the federal courts are not the primary actors with respect to parental recognition. The Court has decided a relatively small number of cases on parenthood—and its most significant line of cases is decades old. The Court's decisions—past, present, and future—provide guidance on how to approach questions of parental recognition, but they do not exhaust the range of constitutional understandings. Legislatures, state courts, scholars, and advocates will continue to address parentage and, in doing so, will advance contested views of constitutional principles. Rather than simply treat the constitutional status of parenthood as settled, these actors will grapple with, elaborate, and contribute to constitutional meaning, even when they speak in nonconstitutional registers.

Importantly, questions of parental recognition raise not only federal but also state constitutional issues. . . . State constitutional decisions recognizing the status of nonbiological relationships, like family-law developments protecting such relationships, may shape evolving views of the parental relationships that the federal Constitution protects. . . .

## **THE CLAIMS, INTERESTS, AND RIGHTS OF CHILDREN**

In some jurisdictions, parentage determinations do not turn on the child’s best interest. In others, a determination of best interests is critical to a parentage judgment. The closing materials in this chapter consider children’s rights to parental relationships.

### **British Columbia Birth Registration No. 2018-XX-XX5815** Supreme Court of British Columbia (Canada) 2021 BCSC 767 (2021)

Wilkinson J.—

[1] The petitioners, Olivia, Eliza, and Bill, have been living together in a committed polyamorous relationship since 2017. In the fall of 2018, the petitioners had their first child, Clarke. Eliza and Bill are Clarke’s biological parents and therefore, by reason of provisions in the Family Law Act [FLA], are the only legal parents named on Clarke’s birth registration.\*

[2] The petitioners seek a declaration that Olivia is Clarke’s third legal parent and that his birth registration be amended accordingly. . . .

[19] If a child is conceived through sexual intercourse, the child’s parents are the child’s birth mother and the child’s “presumed” biological father. . . .

[31] . . . The FLA does not contemplate a child having a third parent . . . , unless that child is conceived using assisted reproduction.\*\* . . .

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\* Family Law Act (FLA) 26(1) states:

On the birth of a child not born as a result of assisted reproduction, the child’s parents are the birth mother and the child’s biological father.

\*\* FLA 30 states:

- (1) This section applies if there is a written agreement that
  - (a) is made before a child is conceived through assisted reproduction,
  - (b) is made between

[40] . . . Pursuant to its *parens patriae* jurisdiction, the court has broad discretion to fill [legislative] gaps that have arisen from changing social conditions. This being said, the use of the court’s *parens patriae* jurisdiction is “not meant to be an avenue for statutory amendment or broad interference with existing law, and does not create substantive rights.” . . .

[68] . . . The evidence indicates that the legislature did not foresee the possibility a child might be conceived through sexual intercourse and have more than two parents. Put bluntly, the legislature did not contemplate polyamorous families . . . [or] adequately provide for polyamorous families in the context of parentage. . . .

[79] . . . The fact that Olivia is not Clarke’s legal parent has practical and symbolic implications. . . . A declaration of parentage is a lifelong immutable declaration of status, and the rights and responsibilities that come along with that status. Whether such a declaration is warranted in the circumstances requires considering Clarke’s best interests, although this is not the only consideration.

[80] Recognition of Olivia as one of Clarke’s legal parents would secure Olivia’s legal financial obligations to Clarke which require parents to support and provide for their children. Neither Olivia nor Clarke would be placed in a position of having to differentiate their relationship from Clarke’s relationship with Eliza and Bill. A legal distinction between the relationships may create an inequity between their roles in Clarke’s life which would negatively impact Clarke. Recognition of Olivia as Clarke’s legal parent would also allow Olivia to access additional statutory and other benefits for Clarke which, in turn, would positively impact him. For example, Olivia testified that a declaration of legal parentage would mean that Clarke could be added to her employer’s extended health plan. . . .

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- (i) an intended parent or the intended parents and a potential birth mother who agrees to be a parent together with the intended parent or intended parents, or
  - (ii) the potential birth mother, a person who is married to or in a marriage-like relationship with the potential birth mother, and a donor who agrees to be a parent together with the potential birth mother and a person married to or in a marriage-like relationship with the potential birth mother, and
- (c) provides that
- (i) the potential birth mother will be the birth mother of a child conceived through assisted reproduction, and
  - (ii) on the child’s birth, the parties to the agreement will be the parents of the child.
- (2) On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (1), the child’s parents are the parties to the agreement.

[81] Further, and importantly, the petitioners are in agreement that Olivia should be Clarke’s legal parent. . . . Such a declaration would provide them with security, peace of mind, and validation of the role Olivia plays in Clarke’s life.

[82] . . . [I find] that there is a gap in the FLA with regard to children conceived through sexual intercourse who have more than two parents. To remedy this gap, . . . I exercise my *parens patriae* jurisdiction and declare that Olivia is Clarke’s legal parent, alongside his other two parents, Eliza and Bill. It is in Clarke’s best interests to have all of his parents legally recognized as such. . . .

**Honner v. France**  
European Court of Human Rights (Fifth Section)  
Application No. 19511/16 (2020)\*

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of: Siofra O’Leary, *President*, Stéphanie Mourou-Vikström, Latif Hüseyinov, Jovan Ilievski, Lado Chanturia, Ivana Jelić, Mattias Guyomar, *judges* . . . [d]elivers the following judgment . . . :

The case concerns the refusal to grant visitation . . . rights to the applicant regarding the child that her ex-companion had given birth to through medically assisted procreation when they were a couple . . . . The applicant relies on Article 8 of the Convention.\*\* . . .

The applicant and Ms. C. lived together from 2000 to 2012. . . . The couple took recourse to medically assisted procreation . . . . On 15 October 2007, C. gave birth to G. . . . On February 11, 2008, [the applicant] went on leave to raise the children, while C. pursued her professional progress. . . . On 8 April 2009, the two women concluded a civil solidary pact (PACS), which was broken in May 2012. A few weeks later C. objected to the continuation of relations between G. and the applicant. The latter brought before a judge of family affairs . . . a request for visitation and accommodation rights.

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\* Translation by Kate Yoon (Yale Law School, J.D. Class of 2024).

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

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.

In a judgment of 24 December 2013, the Créteil tribunal de grande instance granted the applicant access and accommodation rights . . . . In a judgment of 5 June 2014, the Paris Court of Appeal reversed the trial judgment and said that there was no need to establish relations between the applicant and the child G. . . . The judgment stated . . . : . . .

Considering that it is indisputable that [the applicant], who lived with Ms. [C.] at the point of her pregnancy, had stopped her professional activity after the latter's maternity leave, notably to raise the child . . . ; that in this context [the applicant] raised the child for more than four years; that she was called "maman Rachel" by the child . . . ;

Considering that the relations between the two woman have become fraught following the . . . decision of the family court judge . . . ; that it follows from the testimonies and messages between the two women taken together that . . . their impossibility of dialogue without aggression, puts the child . . . in a traumatic and guilt-inducing situation . . . ;

Considering that the doctor treating the child . . . testified . . . that "[G.] appears very distressed, tells me that he does not want to go to school and wants to stay with [his biological mother] because he is afraid that [the applicant] will pick him up from school. The child seems to me to be disturbed by the new elements that have arisen in his daily life . . . .";

Considering that the weekend of 31 January 2014, [the applicant] was able to receive the child in her home after a particularly difficult change of hands . . . the child hiding in the arms of his mother, urinating on himself and crying . . . ;

That consequently, it is not in the primary interest of the child to continue these encounters which are too traumatic for him, regardless of the ties of legitimate affection that [the applicant] may harbor towards him . . . .

[The Court of Cassation dismissed the applicant's appeal. The applicant then brought a claim in the European Court of Human Rights.]

The applicant claims that the refusal to grant her visiting rights . . . with regard to the child of her ex-partner . . . violated her right to respect for her family life. She relies on Article 8 of the Convention, according to which:

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 . . . .

The Government stated that it did not dispute that the applicant and the child had created family ties falling within the scope of Article 8 . . . .

[However], the Government pointed out that the best interests of the child may . . . prevail over those of the parents . . . .

According to the Government, . . . the applicant's right to maintain links with the child was recognized, but . . . in the context of balancing this right with the interest of the child, the Court of Appeal took into account that the meetings between the two had had serious consequences on [the child's] well-being . . . and concluded that maintaining the link was contrary to his interests, which [the Court of Appeal] upheld over the applicant's right to respect for her family life. . . .

. . . Party States enjoy a certain margin of appreciation, which is generally wide when the public authorities have to strike a balance between competing private and public interests or between different rights protected by the Convention. . . . [T]hat was the case in the present case since . . . at stake were not only the applicant's right to family life but also the principle of the best interests of the child and the rights of G. under Article 8 of the Convention . . . .

The question which arises in the present case is therefore whether, given the wide margin of appreciation available to it, the respondent State struck a fair balance between these interests, it being understood that the best interests of the child must come first.

. . . [C]arrying out this examination, the Paris Court of Appeal held that the meetings between the applicant and the child were too traumatic for the latter, and that it was therefore not in his interest to pursue them. [The Court of Appeal's] decision is therefore based on the best interests of the child. . . .

. . . The Court, which recalls that it is not its task to substitute itself for the domestic authorities . . . , cannot call into question the conclusion that the Court of Appeal drew from these findings. The Court understands the suffering that the situation in dispute and the response given to it by the Paris Court of Appeal may have caused the applicant. However, it considers that her rights cannot take precedence over the best interests of the child.

Accordingly, having regard also to the wide margin of appreciation available to it, the respondent State did not disregard its positive obligation to guarantee effective respect for the applicant's right to family life.

There has therefore been no violation of Article 8 of the Convention.

**Judgment No. 32 of 2021**  
Constitutional Court of Italy  
(2021)

[Judge Sciarra, writing for the Court, President Coraggio, and Judges Amato, Pretis, Zanon, Modugno, Barbera, Prosperetti, Amoroso, Viganò, Antonini, Petitti, Buscema, Navarretta, and San Giorgio:]

1.- The Ordinary Court of Padua has raised questions as to the constitutionality of Articles 8 and 9 of Law No. 40 of 19 February 2004\* . . . and Article 250 of the Civil Code\*\* in so far as . . . they allegedly do not allow a child born through . . . a heterologous medically assisted procreation (MAP) process, undertaken by a same-sex couple, to be granted the status of child recognised also by the intentional mother who has given her consent to the fertilisation procedure, where the conditions for adoption in special cases are not fulfilled and the courts have established that such recognition would be in the interests of the child.

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\* Article 8 provides:

Those born following the application of medically assisted procreation techniques have the status of legitimate children or recognized children of the couple who have expressed the will to use the same techniques pursuant to article 6.

Article 9 provides:

1. If heterologous medically assisted procreation techniques are used in violation of the prohibition . . . , the spouse or cohabitant whose consent is obtainable from conclusive acts cannot exercise the action of denial of the authorship in the cases provided for by article 235, first paragraph, numbers 1) and 2), of the civil code, nor the appeal referred to in article 263 of the same code.

2. The mother of the child born following the application of medically assisted procreation techniques cannot declare the will not to be named. . . .

3. In the event of the application of heterologous techniques in violation of the prohibition . . . , the gamete donor does not acquire any legal parental relationship with the offspring and cannot assert any rights or be [a] holder of obligations.

\*\* Article 250 provides, in relevant part:

The child born out of wedlock can be recognized . . . by the mother and father, even if already united in marriage with another person at the time of conception. Recognition can take place both jointly and separately. . . .

According to the referring court, those provisions guarantee the recognition of the parent-child relationship . . . only where [the parents] are of different sexes. The provisions, in the referring court's view, would thus leave unprotected the interests of the child . . . . Such a gap in protection would, [according to] the referring court, run counter to the commitment made by the Italian State when ratifying the Convention on the Rights of the Child . . . to consider "the best interests of the child" in all actions concerning children . . . .

2.4.1.1.- Prior to the enactment of Law No. 40 of 2004, . . . this Court highlighted . . . the urgent need to identify suitable means of protecting a child born as a result of assisted fertilization . . . . [T]he development of the legal system, starting from the traditional notion of family, has progressively recognised . . . the legal importance of social parenthood, even where it does not coincide with biological, bearing in mind that "the issue of genetic origin is not an essential prerequisite for the existence of a family." . . .

2.4.1.2.- . . . [T]he principle of safeguarding the best interests of the child is affirmed in international human rights instruments, in particular in the United Nations Declaration on the Rights of the Child of 1959 (Principle 2), which provides that, in the enactment of laws and the adoption of all measures affecting the condition of the child, "the best interests of the child" shall be of "paramount consideration" . . . .

Even in the absence of an express provision referring to children, the ECtHR has traced back to Article 8 ECHR . . . the axiom that the rights to private and family life of the child must be a decisive element of any assessment.

. . . Unless a separation is necessary in the child's best interests, . . . the child must not be separated from his or her parents against their will. Indeed, it is the duty of the States Parties to the New York Convention . . . to ensure (Article 9(3)) the stability of the child's ties and relationships with all persons with whom the child has had a close personal relationship, even in the absence of a biological link unless it is contrary to his or her best interests.\*

The ECtHR has repeatedly referred to Article 8 ECHR as the basis for the guarantee of stable affective ties with a person who, irrespective of the biological link, has in practice performed a parental function by caring for the child for a sufficiently long period of time. . . .

In ruling out the existence of a right to parenthood for same-sex couples, this Court considered the other side of the coin too, directly pertaining to the protection of the best interests of the child born through recourse to MAP carried out by two

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\* Article 9, paragraph 3 of the New York Convention provides that the child who is separated from one or both parents is entitled: "to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."

women. . . . [T]his Court announced the urgent need for “a different protection of the child’s best interests, in the direction of giving more penetrating and extensive legal content to his or her relationship with the ‘intentional mother,’ which would bridge the gap between factual and legal reality,” calling for the legislator to take action. The issues raised by the Court of Padua confirm, even more incisively, the urgency of such action. . . .

From what has been said, it is clear that those born through recourse to heterologous MAP carried out by two women are in a worse condition than all other children, solely because of the sexual orientation of the persons who carried out the procreative plan. They are destined to remain in a relationship with only one parent, precisely because they cannot be recognised as the child of the other person who has pursued the procreative plan, and the protection of their overriding interests is seriously compromised. . . .

2.4.1.4.- This Court believes that it cannot now remedy the lack of protection of the interests of children . . . . A specific intervention by this Court would risk generating disharmony in the system as a whole. . . .

. . . Only an intervention of the legislator, regulating in a comprehensive way the condition of children born to same-sex couples through recourse to MAP, would make it possible to overcome the fragmentary and unsuitable legislative tools currently used to protect the “best interests of the child” . . . .

In declaring the question under examination inadmissible out of deference to the legislator’s assessment of the appropriateness of the means to achieve a constitutionally necessary end, this Court cannot but state that the continuation of legislative inertia would no longer be tolerable, so serious is the gap in the protection of the overriding interest of the child, found in this ruling. . . .

\* \* \*

U.S. authorities are less likely than some other jurisdictions to make parentage determinations that turn explicitly on a best-interests-of-the-child analysis. Rather, a best-interests-of-the-child analysis governs custody disputes once parentage is determined. Nonetheless, as the 2022 Connecticut Parentage Act illustrates, recent statutes addressing the potential for more than two parents expressly include consideration of the child’s best interests.

**Section 23 of the Connecticut Parentage Act**  
United States (2022)

(a) Except as provided in this act, in a proceeding to adjudicate competing claims of parentage of a child by two or more persons, the court shall adjudicate parentage in the best interest of the child, based on:

- (1) The age of the child;
- (2) The length of time during which each person assumed the role of parent of the child;
- (3) The nature of the relationship between the child and each person;
- (4) The harm to the child if the relationship between the child and each person is not recognized;
- (5) The basis for each person's claim to parentage of the child;
- (6) Other equitable factors arising from the disruption of the relationship between the child and each person, or the likelihood of other harm to the child; and
- (7) Any other factor the court deems relevant to the child's best interests.

(b) If a person challenges parentage based on the results of genetic testing, in addition to the factors listed in subsection (a) of this section, the court shall consider:

- (1) The facts surrounding the discovery that the person might not be a genetic parent of the child; and
- (2) The length of time between the time that the person was placed on notice that the person might not be a genetic parent and the commencement of the proceeding.

(c) The court may adjudicate a child to have more than two parents . . . if the court finds that failure to recognize more than two parents would be detrimental to the child. A finding of detriment to the child shall not require a finding of unfitness of any parent or person seeking an adjudication of parentage. In determining detriment to the child, the court shall consider all relevant factors, including the harm if the child is removed from a stable placement with a person who has fulfilled the child's physical needs and psychological needs for care and affection and has assumed the role for a substantial period.

\* \* \*

While the cases and statutes up to this point have focused on the parent-child relationship, the following decision from Italy considers whether a parent-child relationship secured through adoption creates legal ties to extended family members of the adoptive parent, even if the adoptive parent and biological parent are not married to each other.

**Judgment No. 79 of 2022**  
Constitutional Court of Italy  
(2022)\*

[Judge Navarretta, writing for the Court, in an opinion signed by President Amato and joined by Judges Sciarra, Pretis, Zanon, Modugno, Barbera, Prosperetti, Amoroso, Viganò, Antonini, Petitti, Buscema, San Giorgio, and Patroni Griffi:]

. . . 2.– The . . . applicant in the main proceedings had requested . . . to adopt a child, the biological daughter of his civil partner, with whom he had taken part in a surrogacy programme, which led to the birth of the child.

The referring court stated that it was able to grant the application for adoption but not the request for recognition of the child’s civil relationship with the applicant’s relatives. . . .

. . . [T]he referring court . . . observed that the rules concerning adoption in special cases do not allow the establishment of civil relations between the adopted child and the adoptive parent’s relatives . . . . In the referring Court’s view, this is incompatible “with the principle of the equal treatment of all children, regardless of whether they are born in or out of wedlock or adopted . . . , making every kind of filial status of equal value without distinction . . . .” . . .

5.– To examine the questions regarding constitutionality, it is necessary to recall the distinctive features of adoption in special cases as they transpire from blackletter law and its development in the living law.

5.1.– Adoption in special cases was introduced . . . [in] 1983 to address special circumstances involving children, thus permitting adoption under different conditions from those required for so-called full adoption. This kind of adoption combines a variety of special scenarios that arise from two fundamental rationales.

The first is to promote the effectiveness of a relationship that has been established with the child. “Adoption in special cases under Article 44,” this Court observed in . . . 1999, offers the child “the possibility of remaining within the new family

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\* Unofficial translation provided by Judge Francesco Viganò of the Constitutional Court of Italy.

that has taken him or her in, formalising the emotional relationship established with the persons who effectively look after him or her”.

Adoption of a child who has lost both parents by persons bound to him or her either “through kinship up to the sixth degree or a pre-existing stable and lasting relationship, including one that has formed over a prolonged period of foster care” . . . meets this need. The same rationale also applies to the adoption of the child by the “spouse, when the child is the son or daughter of the (even adoptive) parent of the other spouse” . . . , since the child lives within that family unit.

The second reason, which transpires from the law, lies in the fact that for some children access to full adoption is extremely difficult, if not legally impossible. This scenario includes the case of orphans who have lost both parents and “find themselves in one of the situations . . .”–namely a person “with a stable or progressive physical, mental or sensory disability causing difficulties in learning, forming relationships or working, in such a way as to lead to a process of social disadvantage or marginalisation”–or the case of a child who cannot be adopted because of the “ascertained impossibility of pre-adoptive fostering” . . . .

The special circumstances mentioned, and the reasons underlying them, justify access to this form of adoption also–or, in the case of (b), solely–by both single parents and spouses. . . . Regarding adoption in special cases, there is no provision . . . whereby, with full adoption, “the adopted child’s relationship with his or her family of origin shall cease, except with regard to marriage prohibitions.”

5.2.– The legislative fact, which appears to bear the characteristics of a marginal and particular institution, has been subject to a development in the living law, which has begun to give importance to certain specific features of this form of adoption and gradually broaden its range of application. By hermeneutically extending the notion of impossibility . . . –which refers to both legal and factual impediment–the case law has opened up two new lines of interpretation in the wake of the original rationale.

5.2.1.– The first is contained in the effective image of open or ‘mild’ adoption.

This is the case of children who have not been abandoned, but whose biological parents cannot exercise their parental responsibility (so-called semi-permanent abandonment). These children are allowed to access “adoption in special cases,” so to avoid being placed in institutional care or temporary foster care through. In these cases, adoption “in special cases” is available on the assumption that “closed” or “full adoption” is not . . . , as the requirement of abandonment is not met.

Adoption in special cases does not sever ties with the family of origin and makes it possible to avoid otherwise compulsory full adoption. . . .

5.2.2.– The second line introduced by living law . . . concerns children who have emotional links with the partner of the biological parent, who cannot adopt the child because of legal impediments.

On the one hand, this concerns the cohabiting partner of a different sex to the biological parent, who is not covered by letter (b), which refers only to the spouse. On the other, it concerns a same-sex partner in a civil partnership or cohabiting with the biological parent, who has often taken part with him or her in a surrogacy programme, necessarily carried out abroad since [Italian Law] on (Rules on medically assisted procreation) only permits different-sex couples to have access to MAP.

The case law came to admit “adoption in special cases” in such scenarios, on the basis of the convergent interest of the child in maintaining already-established relationships and the general interest of settling situations where it is legally impossible to access full adoption. . . .

7.– . . . [T]he Court must . . . assess whether the denial of a bond of kinship between the adopted child and the adoptive parent’s relatives amounts to discriminatory treatment in violation of Articles 3 and 31 of the Constitution. \* . . .

7.1.1.– . . . A person who has become a son or daughter joins the network of relatives that belongs to the lineage from which each of his or her parents descends, without the parental lines being influenced by the legal relationship between the parents. A child born out of wedlock is a member of two family branches between which no legal connection exists.

In the light of evolving social awareness, the driving force of the principle of equality has therefore impinged on the very concept of the status of son or daughter. This status implies in itself membership of a family community according to a logic

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\* Article 3 of the Italian Constitution provides:

All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country.

Article 31 provides:

The Republic assists the formation of the family and the fulfilment of its duties, with particular consideration for large families, through economic measures and other benefits. The Republic protects mothers, children and the young by adopting necessary provisions.



based on the responsibilities arising from the parent-child relationship and the need to pursue the best interests of the child. . . .

The child has the right “to maintain meaningful relations with relatives,” regardless of the existence of any link between the parents. . . .

7.1.– The current rules on ties of kinship are an expression of the uniqueness of the status of son or daughter. They respond, at the same time, to the need to protect the interests of the child: this is the true guiding principle underlying the reform of the law concerning the parent-child relationship introduced in 2012-2013 . . . .

7.1.1.– “All sons and daughters have the same legal status,” reads the new Article 315 of the Civil Code, and the legal status of son or daughter is the fulcrum from which family ties branch out, united by the same ancestor . . . .

7.1.2.– . . . There is no doubt that the reform of the laws regarding parenthood and their effects on the personal—even before the financial—level focus primarily on the protection of children and the need for them to be able to grow up amid the support of a suitable family environment. . . .

The network of ties of kinship is therefore one of the institutions that the Republic must uphold in order to protect the interests of the child, with a horizontal projection of the aim of the Constitution.

8.– Having clarified . . . the rationale behind the law concerning ties of kinship, . . . the Court needs to assess whether the legal status of a child adopted in special cases can be equated with the status of son or daughter and whether there are reasons to justify the fact that no civil relationship is created “between the adopted child and the relatives of the adoptive parents.”

8.1.– . . . Essentially, the responsibility and duties of parents towards their children number among the various other legal effects of adoption: the adoptive parent gives his or her surname to the adopted child, who not only becomes his or her legitimate heir, but also has a legal claim to a share of the deceased adoptive parent’s assets; if the adopted child cannot or does not wish to inherit from the adoptive parent, his or her descendants become the beneficiaries; adoption automatically revokes the adoptive parent’s will; mutual obligations of maintenance arise between the adopted child and the adoptive parent; the adopted child is included in the “family unit” . . . .

8.2.– . . . [D]espite the uniform status of son/daughter, only children adopted in special cases are denied ties of kinship with the adoptive parent’s family. . . .

The law thus deprives the child of the network of personal and financial safeguards that arise from the legal recognition of ties of kinship, which . . . the legislator

reforming the law on parent-child relationships wished to guarantee to all the children of a family on equal terms, permitting them to grow up in a stable environment enjoying the protection of family ties, starting with the closest, namely with their siblings and grandparents.

At the same time, the challenged rules are prejudicial to the child's identity, which he or she gains through inclusion in the adoptive parent's family environment and thus from belonging to the new network of relations which contribute to building his or her permanent identity.

9.– Not only is the challenged provision incompatible with Articles 3 and 31(2) of the Italian Constitution, but it is also in breach of Article 117(1) of the Italian Constitution\* in respect of Article 8 ECHR, as interpreted by the Strasbourg Court. . . .

Recently, the ECtHR intervened regarding the position of children born through surrogacy . . . and provided a twofold approach to interpretation.

On the one hand, it ruled out the possibility of inferring from Article 8 ECHR that there is a right to the recognition of filial relations established by means of surrogacy in a foreign country; it also acknowledged a wide margin of appreciation afforded to the Member States regarding the possibility of recognising filial relations of this kind.

On the other hand, where there is a need to protect a child's interest in preserving a bond that has been de facto established with the intended parent, the ECtHR stressed that a filial relation must also be recognised in such a case in order to protect the child's own identity.

In the light of such an interest, the ECtHR then stated that while the Member States remain free to establish the institution best suited to ensuring protection for the child, balancing the various requirements involved, a limit to their margin of appreciation lies, however, in the condition "that the procedures established in domestic law guarantee effective and rapid implementation in accordance with the child's best interests."

Since the recognition of the child's family ties with the parent's relatives as a consequence of having acquired the status of son or daughter is . . . particularly meaningful and significant in terms of the concept of "family life" and contributes to building the very identity of the child, it must be considered that the challenged

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\* Article 117(1) provides, in relevant part:

Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations. . . .

provision, being incompatible with Article 8 ECHR, breaches the international obligations set out in Article 117(1) of the Constitution.

A pronouncement of unconstitutionality thus removes an obstacle to the effectiveness of the protection offered by adoption in special cases and permits this institution, the rules of which maintain a balance between the many concerns surrounding this complex issue, to fully protect the child's interests.

10.– In conclusion, Article 55 of Law No. 184 of 1983, in so far as it rules . . . that adoption in special cases can give rise to any civil relationship between the adopted child and the adoptive parent's relatives, breaches Articles 3, 31(2) and 117(1) of the Constitution, the latter in relation to Article 8 ECHR.

This outcome therefore allows the extension of the ties of kinship between the adoptive child and the relatives of the adopting parent who share the same lineage, maintaining . . . the distinction between relatives acquired through adoption and biological relatives. . . .

# ABORTION: RIGHTS IN MOTION

DISCUSSION LEADERS

LINDA GREENHOUSE, REVA SIEGEL,  
AND DANIELA SALAZAR MARÍN

## IV. ABORTION: RIGHTS IN MOTION

DISCUSSION LEADERS:

LINDA GREENHOUSE, REVA SIEGEL, AND DANIELA SALAZAR MARÍN\*

### **Decriminalizing and Expanding Access**

Alba Ruibal, Movement and Counter-Movement: A History of Abortion Law Reform and the Backlash in Colombia 2006-2014 (2014) .....	IV-6
<b>Error! Bookmark not defined.</b>	
Barbara Sutton and Nayla Luz Vacarezza, Abortion Rights in Images (2020) .....	IV-7
Case No. 34-19-IN/21 and Accumulated (Ecuador, 2021) .....	IV-10
Declaration of Unconstitutionality 148/2017 (Mexico, 2021) .....	IV-16
Douglas NeJaime and Reva B. Siegel, Conscience Wars in the Americas (2020) .....	IV-26
Ruling C-055 of 2022 (Colombia, 2022) .....	IV-29
<b>Error! Bookmark not defined.</b>	
Case of Manuela et al. v. El Salvador (Inter-American Court of Human Rights, 2021) .....	IV-33
Case on the Crimes of Abortion (South Korea, 2019) .....	IV-34
Dhikta v. Government of Nepal (Nepal, 2009) .....	IV-37
FIDA Kenya v. Attorney General (Kenya, 2019) .....	IV-39

### **Criminalizing and Restricting Access**

Ref. No. K 1/20 (Poland, 2020).....	IV-40
Joy Neumeyer, Poland’s Abortion Ban—And the Women’s Strike—One Year On (2021) .....	IV-41
Judicial Initiative on Act LXXIX of 1992 (Hungary, 2021) .....	IV-43

### **An International Perspective**

UN Human Rights Office of the High Commissioner, Women’s Autonomy, Equality and Reproductive Health in International Human Rights (2017) .....	IV-46
--	-------

### **Addendum: The United States Supreme Court Decision**

Dobbs v. Jackson Women’s Health Organization (United States, 2022).....	IV-50
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\* We were fortunate to have the translation and research assistance of Lucía Baca and Natasha Reifenberg.

Whether and under what circumstances the law protects a woman's right to terminate a pregnancy are questions that continue to confront legislatures and courts in many countries today. A short chapter of this kind could not possibly map all the different ways that constitutional democracies regulate abortion or show how law on the books diverges from law in action.\* Instead, we have showcased some noteworthy examples of jurisdictions changing or refusing to change law governing abortion, and chosen to sample a few of the frameworks in which constitutional courts review their judgments.

Consider the case of Ireland. Ireland was the first country in the world to enshrine the right to life of the unborn in its Constitution, which instituted one of the most stringent abortion bans in the world. In 2018, Irish voters passed a referendum to amend the Constitution to repeal the abortion ban. The referendum followed years of protests and activism in the majority-Catholic country. 66.4% of voters opted for the repeal of the provision, and 33.6% opposed, paving the way for the legalization of abortion in Ireland. Today, abortion in Ireland is legal for the first twelve weeks of pregnancy, with exceptions available afterward.

Protests and activism seeking the decriminalization of abortion are currently occurring in another predominantly Catholic region. In Latin America, abortion remains generally subject to criminal prohibition, but the impulse to reconsider these long-standing prohibitions is spreading from jurisdiction to jurisdiction and enabling legislators and litigants to make constitutional and human rights claims for legalizing abortion that only a few years ago would not have moved public officials in legislatures and courts. By contrast, some countries in Eastern Europe have imposed new restrictions on abortion so threatening that they have provoked mass movements that are beginning to equate self-determination in matters of personal life with those in political life.

The world is also witnessing searing conflicts over abortion in the United States. As recently as 2016 and 2020, the U.S. Supreme Court reaffirmed the constitutional protections for the abortion right that it first recognized in *Roe v. Wade* in 1973. But with its composition transformed during the presidency of Donald Trump, the Court abruptly changed course in 2022, repudiating *Roe* as “egregiously wrong” and declaring that the U.S. Constitution does not protect a right to abortion. That decision, *Dobbs v. Jackson Women's Health Organization*, left it up to individual states to decide how, if at all, to protect women's reproductive autonomy. A majority of Americans disapprove of the Court's decision to overturn *Roe*, with 62% of Americans saying that abortion should be legal in all or most cases.\*\* Yet because of features of American federalism,

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\* See, for example, *ABORTION LAW IN TRANSNATIONAL PERSPECTIVE: CASES AND CONTROVERSIES* (Rebecca J. Cook, Joanna N. Erdman & Bernard Dickens eds., 2014).

\*\* This has remained steady since before the decision. See *Majority of Public Disapproves of Supreme Court's Decision to Overturn Roe v. Wade*, PEW RSCH. CTR. (July 6, 2022),

abortion quickly became illegal or functionally unavailable in half the states, forcing women, particularly in the South and the country's midwestern heartland, to travel long distances for legal abortion care and leaving doctors reluctant to treat patients with pregnancy-related medical crises according to the standard of care because the doctors or their hospitals feared prosecution if the treatment might be regarded as an unlawful abortion. Do constitutional guarantees of liberty and equality limit the government's ability to criminalize abortion? It had once seemed so in the United States. Five Republican-appointed justices decided otherwise.

But just as the Court in *Roe* did not have the final word on the constitutionality of abortion, neither will the Court in *Dobbs*. State legislatures and state courts in California, Illinois, Michigan, New York, Connecticut, and Vermont are now taking up questions that the United States Supreme Court abandoned as they amend their state constitutions to guarantee persons liberty and equality in reproductive rights and style their states "sanctuaries" for persons seeking abortion care.\*

Reading *Dobbs* with the decisions excerpted in this chapter invites a conversation about abortion across borders and poses, on a transnational stage, the question of what it means to safeguard a constitutional democracy. What conditions of participation, if any, must courts secure? The decisions excerpted in this chapter offer a variety of reasons for limiting a government's power to criminalize abortion. Does the United States Supreme Court address any of them in *Dobbs* when explaining its reasons for overturning *Roe* and (attempting to) deconstitutionalize abortion?

\* \* \*

Early in 2022, the *New York Times* published the obituary of a sixty-six-year-old French woman of whom few Americans had ever heard. But to French feminists, Marie-Clair Chevalier was an inspiring figure. Raped and impregnated by a high school classmate when she was sixteen years old, she had an illegal abortion for which she was prosecuted. Her lawyer, Gisèle Halimi, a prominent feminist, announced during her opening argument that she, too, had once had an illegal abortion. "I say it, gentlemen: I am a lawyer who broke the law," Ms. Halimi declared in open court. Arguing that "sometimes it is necessary to break the law to move forward and bring about a change in society." Ms. Chevalier was acquitted.

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<https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/>.

\* See María Antonia Sánchez-Vallejo, *The Sanctuary States for Abortion in the US: From California to New York*, EL PAIS (June 27, 2022, 9:54 PM), <https://english.elpais.com/usa/2022-06-27/the-sanctuary-states-for-abortion-in-the-us-from-california-to-new-york.html>; Abigail Abrams, *Where Abortion is Literally on the Ballot in 2022*, TIME (Oct. 4, 2022, 2:06 PM), <https://time.com/6219241/abortion-ballot-measures-2022/>.

The year was 1972. Abortion had been illegal in France since the Napoleonic Code of 1810, with women subject to prosecution and imprisonment. Ms. Chevalier's cause was joined by leading French intellectuals, including Simone de Beauvoir. The sensational trial galvanized public opinion and helped paved the way for abortion's decriminalization in France three years later, despite strong opposition from the Catholic Church.\*

We open our chapter with this brief account to underscore the role that social mobilization has played in provoking legal authorities to consider decriminalizing abortion and providing safe access to the procedure. The movement in Ireland to end its long-standing prohibition on abortion by a public referendum was spurred in part by the highly publicized case of Savita Halappanavar, a woman who died of sepsis in 2012 after doctors refused to end the pregnancy that was killing her.

How, and on what basis, do constitutional democracies protect access to abortion today? Although the forms of abortion laws differ across countries, many constitutional democracies offer abortion until the point of viability, either on request or through broad exceptions within criminal bans. Countries in which abortion is largely available until viability include Australia, Belgium, Canada, France, Germany, the Netherlands, New Zealand, and the United Kingdom.\*\* Another measure of abortion access is instructive. According to the United Nations,

In 2013, 82% of Governments in developed regions permitted abortion for economic or social reasons and 71% allowed abortion on request. In contrast, only 20% of Governments in developing regions permitted abortion for economic or social reasons and only 16% allowed it on request.\*\*\*

Not only do many governments in developed regions permit abortion in wide-ranging circumstances; there is a marked trend to consider permitting abortion among countries that currently prohibit it. Over the past five years, there has been a shift toward legalizing and expanding access to abortion, while only a few countries, the United States included, have restricted access. *The New York Times* recently compared the United States to other countries, noting its status as an “outlier”:

Just three countries have tightened abortion laws since 1994 . . . Poland,

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\* Katharine Seelye & Constant Méheut, *Marie-Claire Chevalier, Catalyst for French Abortion Law, Dies at 66*, THE NEW YORK TIMES (Feb. 10, 2022), <https://www.nytimes.com/2022/02/10/world/europe/marie-claire-chevalier-dead.html>.

\*\* Daniela Santamariña, *How Abortion Laws in the U.S. Compare with Those in Other Countries*, THE WASHINGTON POST (Sept. 27, 2021), <https://www.washingtonpost.com/world/interactive/2021/us-abortion-laws-worldwide/>.

\*\*\* Dep't of Econ. & Soc. Affairs, *Abortion Policies and Reproductive Health Around the World*, UNITED NATIONS (Oct. 22, 2014).



El Salvador and Nicaragua. In that period, 59 have expanded them. . . .

In other rich democracies, abortion is covered by public health insurance. . . .

The United States prohibits federal funding of abortions in most cases. Also, abortions tend to be provided only in special clinics . . . . In peer nations, they are more likely to be offered at ordinary hospitals and medical clinics.\*

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## **DECRIMINALIZING AND EXPANDING ACCESS**

One story of decriminalization in the face of staunch religious opposition can be found in Latin America. A largely Catholic region, many countries in Latin America recognize a right to life of the fetus and have criminalized all or most forms of abortion. But over the past twenty years, a movement to decriminalize abortion has gained momentum, including transnational litigation strategies and campaigns designed to push legal systems toward decriminalization. One of the early victories of the campaign came in Colombia:

In 2006 the Colombian Constitutional Court issued the landmark Decision C-355/2006 that liberalized the country's abortion law, which until then criminalized abortion under all circumstances and placed Colombia among the handful of countries with the most restrictive abortion laws in the world. Although the reform was restricted in its scope . . . it was groundbreaking in terms of its argumentation. It was one of the first judicial decisions in the world to uphold abortion rights on equality grounds and the first decision by a constitutional court to review the constitutionality of abortion in line with a human rights framework. Decision C-355 was also the first of a series of legal reforms that would liberalize, to different extents, the abortion laws in four other Latin American jurisdictions in the past decade: Mexico City, Brazil, Argentina and Uruguay. . . .

Two main phases can be identified in the process of implementation of Decision C-355. The first, from 2006 to 2009, was marked by the active

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\* Claire Miller & Margot Sanger-Katz, *On Abortion Law, The U.S. Is Unusual. Without Roe, It Would Be, Too*. THE NEW YORK TIMES (Jan. 22, 2022), <https://www.nytimes.com/2022/01/22/upshot/abortion-us-roe-global.html>.

role of government agencies, in particular the Ministry of Health, in issuing health sector regulations on implementing the decision and the provision of abortion services by the public health system. It was also characterized by the development of litigation by individual women and feminist organizations (in particular Women’s Link and *La Mesa*), who denounced instances of violation of the rights granted by the Court’s ruling and requested compliance on the part of different public and private actors. . . .

The second phase, since 2009, saw a strong backlash led by powerful conservative actors in key positions within the State, who have systematically attempted to obstruct the implementation of Decision C-355.\*

Over the past five years, a renewed movement to challenge laws that criminalize abortion across Latin America has been spurred by “the Green Wave.” The movement takes its name from the ubiquitous green handkerchiefs worn by Argentinian abortion rights activists who amassed in 2018. The handkerchief has intergenerational significance. It connects the Green Wave to the memory—and moral authority—of regional human rights movements of the 1970s, in which women spoke out against state violence.

. . . Campaign members, but also supporters, have worn or displayed this piece of cloth, inscribed with the Campaign’s name, logo, and slogan: “Sex Education for Choice, Contraception to Prevent Abortion, Legal Abortion to Prevent Death.” . . .

The green kerchief immediately situates us in a broader social movement field of human rights activism and in a genealogy of feminist and women’s struggle. In particular, the green kerchief operates as a semimimetic symbol with respect to that identified with a significant organization in Argentina: the Mothers of the Plaza de Mayo. This group of women emerged in the late 1970s during a brutal military dictatorship . . . that perpetrated massive human rights violations, including torture and forced disappearance of people deemed “subversive.” The Mothers confronted the regime, demanding the safe return of their disappeared sons and daughters held in clandestine detention centers (although most did not survive). The Mothers wore on their heads white triangular kerchiefs, evoking diapers, that symbolized the loving bond between mothers and their children.

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\* Alba Ruibal, *Movement and Counter-Movement: A History of Abortion Law Reform and the Backlash in Colombia 2006-2014*, 22 REPRODUCTIVE HEALTH MATTERS 42 (2014).

As one early Campaign member recounted, the Campaign’s kerchief was a kind of “loan” from the Mothers of the Plaza de Mayo. It is no small matter to join symbolically with their struggle, for they represent a moral and political reference for many Argentines, and they are recognized at the international level, too. This connection is also intriguing given the maternal connotations associated with the white kerchief and the prominence of women leaders whose activism emerged from motherhood. . . . The apparent contradiction between claims anchored in motherhood and those stemming from the choice not to be a mother is somewhat muted by the support of the Mothers of the Plaza de Mayo for the Campaign. Likewise, what may seem opposite activist impulses (motherhood and abortion) actually overlap around the defense of “life.” . . . In the case of abortion rights, what is advocated for is the defense of women’s lives, put at risk in another type of clandestine zone generated by the illegal status of abortion. Finally, the fact that many women who undergo abortions are mothers—and have abortions partly or largely due to their need to care for already existing children—also shows that abortion and maternity are not necessarily opposed.\*

In 2018, the center-right President of Argentina, Mauricio Macri, shocked many when he announced his support for debate around an abortion bill that had been submitted by the National Campaign every year since 2007 but never put on the legislative agenda. Public opposition to the legalization of abortion was assumed in a nation where approximately 92% of the population identifies as Catholic. Yet the mass feminist demonstrations in favor of abortion rights made the issue nearly impossible for policymakers to continue ignoring. As one of the most important Argentine newspapers, *La Nación*, reported: “it wasn’t just that the President was motivated by calls from within his party in the legislature . . . [it was that] feminism, through massive mobilizations and growing public adhesion to its demands, had provided a roadmap.”\*\*

Grounding their claims in a framework that focused on disparities in access based on socio-economic class, feminists linked abortion rights to gendered injustice suffered by low-income women at disproportionate rates, including intimate-partner violence and workplace abuse. For poor women in particular, gender-based violence and unsafe abortions are matters of life and death, especially because even women who sought medical care after miscarrying would be turned over to the state authorities.

In December 2020, after years of protests, Argentina legalized abortion in the first fourteen weeks of pregnancy, but the procedure is by no means widely available.

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\* Barbara Sutton & Nayla Luz Vacarezza, *Abortion Rights in Images: Visual Interventions by Activist Organizations in Argentina*, 45 *JOURNAL OF WOMEN IN CULTURE AND SOCIETY* 731 (2020).

\*\* Mariela Daby & Mason W. Moseley, *Feminist Mobilization and the Abortion Debate in Latin America: Lessons from Argentina*, 18 *POLITICS & GENDER* 359 (2021).

In the wake of the law's passage, abortion opponents have encouraged doctors to sign up as conscientiously objecting to performing the procedure and, in many regions, as many as 90% of medical personnel object. Conscientious objection can obstruct access to medical care but will prove less of an obstacle for those who employ medication to end pregnancy during the 14-week period.\*

Years of conflict in Argentina have also galvanized transnational movements across the region seeking to *defend* the criminal bans on abortion law, characterized by constitutional and human rights arguments against the right to abortion. These struggles between abortion rights activists and networks of abortion opponents have played out in many nations including Ecuador, Chile, Mexico, and Colombia.

As some countries have decriminalized abortion regardless of reason up to a certain gestational limit, other countries have tried to strike a balance by decriminalizing abortion for certain exceptions. Although the model of decriminalization based on exceptions has the advantage of being a gradual liberalization process, and therefore more resistant to backlash, it is no less true that this system generates larger implementation challenges.

The decision excerpted below from Ecuador represents an example of very narrow legalization, generating a different view of the right. While Ecuador's legalization of abortion in cases of rape may be viewed as prioritizing the rights of women as victims over women as decision makers, the Constitutional Court of Ecuador was constrained from going further by the protection in Ecuador's Constitution for life from the moment of conception. The constitutional text includes provisions that, on the one hand, enshrine the right to make free decisions about reproductive life (Art. 66.10) and about sexuality (Art. 66.9), a right that includes the obligation of the State to "promote access to the necessary means for these decisions to be made in safe conditions"; and, on the other hand, recognizes that the right to life includes "care and protection from conception" (Art. 45).

The Court was also constrained by the limits of the case. Before this decision, there were three exceptions in which abortion was not punishable in Ecuador, including if the pregnancy was the consequence of the rape of a woman with intellectual disabilities. The case before the Court built on this exception to the abortion prohibition. The Court extended the exception to any woman who is a victim of rape, regardless of intellectual disability, because a rape victim, by definition, does not consent.

Although the Court's decision may be viewed as focusing on the vulnerability of women as victims of violence rather than on the autonomy of women, there are risks

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\* Daniel Politi, *Abortion Is Now Legal in Argentina, but Opponents Are Making It Hard to Get*, THE NEW YORK TIMES (Mar. 7, 2021), <https://www.nytimes.com/2021/03/07/world/americas/argentina-abortion-opposition.html>.

to prioritizing autonomy before protecting equality. Attending only to autonomy may also make invisible the multiple forms of violence suffered by women in our patriarchal societies.

**Case No. 34-19-IN/21 and Accumulated\***  
Constitutional Court of Ecuador  
2021

[Justice Karla Andrade Quevedo announced the opinion of the Court, joined by Justices Ramiro Avila Santamaría (concurring), Agustín Grijalva Jiménez, Alí Lozada Prado, Enrique Herrería Bonnet, Daniela Salazar Marín and Hernán Salgado Pesantes.]

The plenary of the Constitutional Court of Ecuador in exercise of its constitutional and legal powers delivers the following [ruling:]

. . . Violence against women is a manifestation of the historically unequal power relations that have led to the domination of women and their discrimination and have prevented their full advancement . . . .

. . . [T]he rape of girls, women, and adolescents is an act that violates their integrity in all of its dimensions, since it produces grave physical, psychological, sexual, and moral consequences and suffering in the victims . . . .

Consequently, the forced maternity of rape victims is detrimental . . . to (i) physical integrity, since it undermines the free disposition and enjoyment of their bodies . . . can cause permanent and semi-permanent organic alterations . . . [and] affects their right to autonomy and control over their bodies and lives; (ii) psychological integrity, since it produces severe traumas and mental health problems . . . ; (iii) moral integrity, since it leads to social and familial rejection, affects their self-esteem, and engenders feelings of shame and humiliation; and (iv) sexual integrity by limiting their autonomy and control over their sexuality and reproduction. . . .

. . . [T]he imposition of a criminal sanction does not prevent raped women from engaging in the conduct that it is intended to prevent. . . . On the contrary, . . . [it] encourages many women to seek clandestine and high-risk procedures that endanger their health and lives. In addition, it prevents women from going to hospitals or health centers in emergency situations for fear of being reported. . . .

. . . [T]he criminalization of this conduct . . . is not the only way to give effect to the constitutional protection of the life of the unborn. . . .

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\* Translation by Lucía Baca (Yale University, J.D. Class of 2024).

... [T]here are other, less burdensome measures than imprisonment to protect the fetus. . . . [M]easures to prevent voluntary interruption of pregnancy [in cases of rape] should be focused on eradicating violence against women, preventing and punishing crimes of sexual violence, strengthening sexual education and developing comprehensive policies on sexual and reproductive health, [and] eliminating gender stereotypes pertaining to women's inferiority. . . .

... [I]n its eagerness to—supposedly—protect the fetus, the criminalization of abortion in rape cases ends up endangering the life and health of the pregnant mother . . . , which shows that it is not . . . necessary . . . to achieve the intended purpose. . . .

... [T]he little that criminal law achieves to protect the fetus . . . does not justify all that is lost by deploying the punitive power of the State against women victims of rape to the detriment of their personal integrity, sexual and reproductive autonomy, and free development of personality. . . .

... Consequently, it is evident that . . . [the criminalization of abortion] in cases involving the rape of women without a mental disability tilts the scales exclusively towards the fetus, setting aside the protection of the constitutional rights of the victims of rape, despite their equal hierarchy and applicability. . . .

... [G]iven that this judgment exclusively reviews the constitutionality of the punishment of the voluntary termination of pregnancy for women who are victims of rape, it is up to the legislator to develop an appropriate regulatory framework to govern consensual abortion in cases of rape. . . .

... [T]his Constitutional Court instructs the Ombudsman [an independent office in the government focused on human rights]—with the broad and active participation of the citizenry and in coordination with the various state entities—within a maximum period of 2 months from the notification of this judgment, [to] prepare and submit a bill for the voluntary termination of pregnancy involving girls, adolescents, and women victims of rape that . . . establishes . . . an adequate balance between the protection of the fetus and the constitutional rights of women victims of rape. This bill must be . . . discussed . . . by the National Assembly within . . . 6 months . . . [of its] presentation . . . .

Concurring opinion: Constitutional Justice Ramiro Ávila Santamaría

... Decriminalizing abortion does not mean that the Court is promoting abortion or inviting women to have abortions. Decriminalizing abortion means valuing the life and dignity of women and preventing their death. . . .

. . . [The] step taken by the Constitutional Court is a historical and legal victory of the feminist movements of Ecuador and . . . the State must provide all the conditions for women who have abortions to access a dignified and safe healthcare system, without stigmatization. . . .

The power to review the constitutionality of a law, even if approved by an absolute majority of Parliament, is part of the Constitution and its exercise does not signify a break with the legal order, but rather a confirmation of the constitutional democracy that is in force in Ecuador.

Rights are not voted. A parliamentary majority cannot and should not violate rights. Rights represent limits to any kind of power. . . .

Using the penal system to protect [the life of the unborn and of women who have experienced rape] . . . is a fiction and, instead of protecting rights, what it does is multiply the pain and suffering of the people. . . .

Maternal mortality, unwanted abortions, the prevention of pregnancy, [and] forced maternity are social problems that should be addressed with public policies based on rights, not with criminalization or repression. Social injustice is not solved with criminal justice. . . .

. . . [T]here are no absolute rights and, consequently, the weighing of rights in the case is necessary to “balance and find an appropriate equilibrium that allows the coexistence of the different rights recognized by our Constitution.” . . .

Women who have been raped should not bear the burden of criminal prosecution. It is not only unfair, but also disproportionate. . . .

. . . Applying the law to the cases submitted to the Court cannot be considered an “agenda.”

The term “judicial activism,” which has been used pejoratively . . . with the intention of discrediting certain legal positions of some judges . . . denotes . . . a vocation for the application and development of the rights recognized in the Constitution. . . .

If defending a theory of law when interpreting the facts of a case in the light of the Constitution means “legal activism,” then all judges . . . would be [doing] so. . . .

In comparative law, States have gone from the criminalization of all abortion to decriminalization on extreme grounds to the total decriminalization of abortion. Ecuador, with this decision, has decriminalized abortion for rape, which is an extreme ground. . . .

Unobstructed, safe, dignified, and free abortion is a woman's right, according to human rights instruments and organizations. . . . [T]he criminalization of abortion is an obstacle to the exercise of this right. By approving this ruling, the Court has removed one more barrier to accessing this right.

Dissenting opinion: Constitutional Justice Carmen Corral Ponce

. . . [H]uman life begins and must be protected from conception, as enshrined in Article 45, paragraph 1 of the Constitution. . . .\*

The fetus is a defenseless human being who, due to . . . its evolutionary state and by constitutional mandate, must be protected, even in . . . controversial circumstances . . . .

. . . It is very likely that, if an unwanted pregnancy is the result of . . . rape, the victim will only feel disgust and desire to erase the signs and consequences of this atrocious crime from the face of the earth. But, what about the unborn child? Who protects its rights? . . .

. . . [T]his Constitutional Court . . . , under the cover of the crime of rape, opens the door to free and indiscriminate abortion . . . . Allowing a simple sworn statement, a medical examination, or a report to constitute full proof of . . . rape . . . [for the sake of] obtain[ing] an abortion . . . leav[es] the door open for any woman to opt for this extreme measure . . . .

. . . [T]he first paragraph of Article 45 of the Constitutional Charter is clear, express, and exhaustive, . . . the Ecuadorian people . . . ratified the constitutional text in a popular referendum, leaving no doubts as to the protection of life from conception. . . .

. . . [N]o interpretation can . . . annul . . . the defense of life from conception . . . [;] the contrary entails a modification of the text of the Constitution, which corresponds to the constituent power, not to the constituted power such as that exercised by the Constitutional Court. . . .

By virtue of this, . . . a "proportionality test" . . . is not applicable . . . .

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\* Article 45, paragraph 1 of the Constitution of Ecuador provides:

Children and adolescents shall enjoy the rights common to all human beings as well as those specific to their age. The state shall recognize and guarantee life, including care and protection from conception.



. . . [T]his case required the convening of a hearing so that such a sensitive and controversial issue could be publicly debated and confronted, but this possibility was denied by the majority of seven justices on repeated occasions . . . .

The questions that remain unanswered in the majority opinion are: who defends the unborn child?, how can it be explained that the right to live has been ripped from defenseless and innocent beings; and . . . if not the Constitutional Court, who enforces the Constitution?

Dissenting opinion: Constitutional Justice Teresa Nuques Martínez

. . . [D]ecisions regarding the modification of the criminal definition of abortion require not only the legislative configuration whose mandate emanates from the . . . [Constitution], but also the legitimacy that supports such decisions through the exercise of deliberative democracy by way of [constitutional] channels . . . .

. . . [I]nternational human rights law and especially the international instruments incorporated into the Ecuadorian constitutional block . . . recognize the power of each State party to regulate the form of protection and the exercise of the right to life, in accordance with its domestic constitutional and legal norms . . . .

. . . [T]he majority decision, without proper balancing, creates a kind of evidence formula that makes it possible to prove the existence of a crime, producing an important tension with the rules of criminal due process. . . .

. . . [C]onsidering that the majority vote contravenes the principle of the reservation of substantive criminal law, does not exhaust the dialogic paths required by the . . . democratic construction of the Law, and gives rise to an important tension between the right to life and . . . criminal due process, the difficulty of carrying a fetus to term, and to the weighing of the principle of the best interests of children and adolescents, I dissent.

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As a result of the Court's decision, no woman in Ecuador who was raped can be criminally prosecuted for terminating a pregnancy. However, the Constitutional Court of Ecuador recognized that just as criminalization does not operate alone to prohibit access to abortion, decriminalization does not alone guarantee its access. The Court further acknowledged its lack of democratic legitimacy to regulate abortion and ordered that a law should be created to protect this right.

The Court gave the Ombudsman two months to draft legislation aimed at regulating abortion in cases of rape and the National Assembly six months to debate this legislation. Ecuador's new law was approved in February 2022: allowing abortions in

cases of rape up until twelve weeks generally, and until eighteen weeks in exceptional cases involving girls and adolescents or rural and Indigenous women, but the law was vetoed by President Guillermo Lasso, who suggested 61 changes to the bill. The National Assembly did not override his veto, so the modifications introduced by the Executive became law.

Among the changes introduced by the veto, the amended law does not refer to abortion as a right; it only characterizes rape as an exception to the crime of abortion. The veto described the proposed law as “discriminatory” because it differentiated between women based on age and demographic or ethnic background. Thus, the veto set the limit to twelve weeks for all women. The law, as modified by the veto, requires women to show that the pregnancy was caused by rape, setting additional obstacles to access this right. The veto also relied on conscience objections to water down the protection to the right to an abortion.

In theory, the Court’s call for a democratic debate on abortion mandated a discussion in Congress. However, the current law on abortion in Ecuador is the product of an agreement between wealthy Catholic men,<sup>\*</sup> who did not attend to the social and economic inequalities and realities that affect the lives of women who seek an abortion. Because of the conflicts between the current law and the Court’s decision, as of the summer of 2022, a new case is before the Court.<sup>\*\*</sup>

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In Mexico, the second-largest predominantly Roman Catholic country in the world, the Supreme Court of Justice recently interpreted the country’s Constitution to decriminalize abortion in the state of Coahuila de Zaragoza. While formally applicable in only one of Mexico’s 32 states, the decision has nationwide implications.

At the time the decision was issued in September 2021, abortion was illegal under nearly all circumstances in all but four states. Federal law requires medical providers to notify law enforcement if a patient presents signs of having committed a crime—such as signs from having a miscarriage, which are nearly identical to the aftermath of an abortion—and medical personnel have complied.<sup>\*\*\*</sup> According to the Center for Free Information of Sexual Health - Central Region, between 2000 and 2017,

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<sup>\*</sup> See, for example, *Ecuador Abortion: President Correa Threatens to Resign*, BBC NEWS (Oct. 11, 2013), <https://www.bbc.com/news/world-latin-america-24499248>.

<sup>\*\*</sup> Corte Constitucional de Ecuador [Constitutional Court], Causa No. 41-22-IN, Acción Pública de Inconstitucionalidad (admitted June 3, 2022), <http://sgc.corteconstitucional.gob.ec:8494/FichaCausa.aspx?numcausa=41-22-IN>.

<sup>\*\*\*</sup> Natalie Kitroeff & Oscar Lopez, *Abortion Is No Longer a Crime in Mexico. But Will Doctors Object?*, THE NEW YORK TIMES (Sept. 13, 2021), <https://www.nytimes.com/2021/09/13/world/americas/mexico-abortion-objectors.html>.

more than 4,000 women had been accused of the crime of abortion. High-profile cases of women being jailed for miscarriages propelled the Supreme Court case.

**Declaration of Unconstitutionality 148/2017\***  
Supreme Court of Justice of Mexico  
(2021)

[The Plenary Tribunal of the Supreme Court of Justice of Mexico, consisting of Ministers Alfredo Gutiérrez Ortiz Mena, Juan Luis González Alcántara Carrancá (concurring in part and dissenting in part), Yasmín Esquivel Mossa, José Fernando Franco González Salas, Luis María Aguilar Morales, Jorge Mario Pardo Rebolledo, Norma Lucía Piña Hernández (concurring, dissenting, and clarifying), Ana Margarita Ríos Farjat, Javier Laynez Potisek, Alberto Pérez Dayán, and President Arturo Zaldívar Lelo de Larrea (dissenting), delivered the following judgement:]

... 46. ... [This] Court ... [assesses] the case with a gender perspective as a method that seeks to detect and eliminate all the barriers and obstacles that discriminate [against] people based on sex or gender ...

47. ... [T]he decision includes both women and pregnant-capable people, a fundamental concept ... [that seeks the] recognition and visibility of ... people [with] diverse gender identities different than the traditional concept of woman ... [and] the capacity to bear children (for example, transgender men, non-binary people, among others). ...

53. ... [T]he right of women to decide ([which] ... extends, of course, to pregnant-capable people) is the result of a particular combination of different rights and principles ... [:] human dignity, autonomy, free development of the personality, legal equality, the right to health (psychological and physical) and reproductive freedom. ...

85. To make an assessment contrary to what has been stated so far, ... [one that] does not recognize women and pregnant-capable people in light of their own characteristics and their unique dignity and the right to pursue a life plan of their own, would undoubtedly entail a violation of their right to legal equality. For this ... reason, ... the right to equality is ... a fundamental piece ... of the right to decide ...

86. This High Court has been emphatic in the evolution of its jurisprudential line, underscoring that the first paragraph of Article 4\*\* of the Political Constitution of

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\* Translation by Lucía Baca (Yale University, J.D. Class of 2024).

\*\* Article 4 reads, in relevant part:

the United Mexican States, which provides for the equality of men and women before the law and orders the legislator to protect the organization and development of the family, was introduced in the Fundamental Norm as part of a long process to achieve the legal equality of the female gender with the male. The constitutional recognition of equality between men and women before the law was due to the historical discrimination against women, and set as a permanent objective the elimination of this harmful situation; since its express inclusion it has been clear that it is not about giving identical treatment or prohibiting the establishment of differentiations, but rather about achieving real equality between men and women. . . .

90. The right to decide is built on gender equality, which implies the elimination of stereotypes that can be assigned to women (or to pregnant-capable people) in relation to their enjoyment of the right to sexuality. In addition, . . . the freedom to decide on reproductive matters . . . is a matter of dissociating the traditional social construct that has equated the concepts of woman and motherhood, in order to emphasize that the latter “*is not destiny, but rather an action that, to be fully exercised, must be the product of a voluntary decision.*”

91. It is also a matter of eliminating factual or legal assumptions based on a social hierarchy of a supposed biological order, that is, . . . of incorporating a vision of non-subjugation or non-domination, which “ . . . [is not limited to] *formal equality, but rather structural and substantive [equality], which considers it essential to incorporate historical and social data about . . . the subjugation of a group that has been systematically excluded and subjugated.*” . . .

93. The lack of recognition of the elements that define women (and pregnant-capable people), as well as the lack of instruments, such as the right to decide, would entail a correlative injury to gender equality, that is, a [form of] discrimination based on practices or customs anchored in conceptions that assign a social role to women (or pregnant-capable people) that nullifies their dignity and the possibility of choosing an autonomous and individual life plan (including the obligation to be a mother). These types of burdens imposed by the construction of stereotypes result in and translate into mechanisms that perpetuate the exercise of violence against women, girls, adolescents, and pregnant-capable people.

94. Having described the . . . [relationship] with the topic of gender-based violence, . . . [we now] review the international and national legislative context, in order to highlight that its consideration is vital to fully appreciate the topic [at hand] . . . . As can be seen, there is a common thread that harmoniously interweaves the pieces that

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Men and women are equal under the law. The law shall protect the organization and development of the family. Every person has the right to decide, in a free, responsible and informed manner, about the number of children desired and the timing between each of them.

operate as the basis of women’s (and pregnant-capable people’s) freedom to position themselves as the sole owner of their life plan and the decisions related to it.

95. At the international level, the Convention on the Elimination of All Forms of Discrimination against Women (also known as CEDAW) establishes, in its preliminary part, that States Parties condemn all forms of gender-based discrimination, and commit to taking concrete measures to achieve it[s elimination], such as enshrining gender and sex equality in their supreme texts, as well as abolishing all those laws, customs, and practices that result in discriminatory actions against women. Article 2 sets forth the commitment to pursue—by all appropriate means and without delay—a policy aimed at eliminating discrimination against women, in addition to the duty to adopt all appropriate measures, including legislation, to modify or repeal laws, regulations, uses, and practices that constitute discrimination against women (paragraph f of the same provision), and the repeal of all national criminal provisions that constitute discrimination against women (paragraph g).

96. From this body of law, the recommendations and observations issued by the Committee for the Elimination of Discrimination against Women . . . stand out. Reviewing these documents is extremely useful to delve deeper into the scope of the postulates contained in this international regime and note that they tread the same path as the reasoning expressed in this judgment. . . .

98. Regarding the point that different forms of discrimination make up gender-based violence, this was also established in General Recommendation 19, insofar as it is a harmful act that affects or nullifies the enjoyment of women’s human rights. In fact, when interpreting article 2 paragraph f, it was specified that traditional roles and stereotypes perpetuate violence against women, since such practices can justify gender-based violence as a form of protection of women, . . . [to the] detriment of their human rights.

99. Recently, . . . Recommendation 19 was updated through General Recommendation 35\* to include the express message that the prohibition of violence

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\* The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)’s General Recommendation No. 35 provides, in relevant part:

1. General recommendation No. 19 . . . states that discrimination against women . . . includes gender-based violence that is, ‘violence which is directed against a woman because she is a woman or that affects women disproportionately’ . . . [and] is a violation of their human rights. . . .

18. Violations of women’s sexual and reproductive health and rights, such as forced sterilizations, forced abortion, forced pregnancy, criminalisation of abortion, denial or delay of safe abortion and post-abortion care, forced continuation of pregnancy, abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services, are

against women has evolved to become a principle of customary international law, as well as to recognize that violations of women’s sexual and reproductive rights, such as the absolute criminalization of abortion, are forms of gender-based violence that in some circumstances may amount to cruel, inhuman, and degrading treatment (paragraph 18 of this text), and therefore called for the repeal of all provisions that condone violence against women; among them, those that criminalize voluntary abortion.

100. It is also worth invoking . . . General Recommendation 2461, since . . . [it] underscored the commitment of the States to eliminate discrimination against women with regard to their access to health care services throughout their life cycle, particularly in relation to family planning, pregnancy, childbirth, and the postpartum period. In fact, in the line with this decision, it held that . . . States [have the duty] to ensure that all health services are compatible with the human rights of women, including their rights to autonomy, privacy, confidentiality, consent and informed choice. . . .

102. At the regional level, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Belem do Pará Convention) provides that “violence against women” is “any act or conduct, based on gender, which causes death or physical, sexual or psychological harm to women, whether in the public and private sphere,” while article 6\* stipulates the right of women to be free from any type of discrimination. . . .

105. In the national legal framework itself, in line with this Plenary’s reading of the constitutional text, the General Law on Women’s Access to a Life Free from Violence (article 4 of which establishes as guiding principles *the legal equality between women and men; the respect for women’s human dignity; non-discrimination, and women’s freedom*), states that gender-based violence shall be understood as “any act or omission, based on their gender, that causes [women] psychological, physical, patrimonial, economic, sexual harm or suffering or death, both in the private and public spheres.”

106. Consequently, unless the intention is to nullify the legal equality of women (and of pregnant-capable people) by imposing measures that completely eliminate their right to decide, it is essential to recognize their autonomy to have a minimum margin of choice in relation to maintaining the gestating life process or interrupting it.

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forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment.

\* Article 6 of the Belém do Pará Convention provides, in relevant part:

The right of every woman to be free from violence includes, among others . . . [t]he right of women to be free from all forms of discrimination . . . .

107. The mandate of legal equality of men and women [thus] . . . means that, in the face of assumptions that guarantee that women will be subject to an unchosen sphere of life—and that result in them being unable to develop their lives in the same way as men—and another [sphere of life] in which they will have greater opportunities, the latter should be preferred.

108. In accordance with these bases, this High Court notes that there is no doubt that it is a duty of the Mexican State to eliminate the stereotypes that may translate into gender-based violence; international and national normative texts coincide in the importance of including as a pillar and foundation of the right to decide, the prerogative of women to not be victims of gender discrimination, as . . . it imparts a categorical force of origin to the position of women in society. . . .

131. The constitutionalization of the right to decide allows us to maintain that there is no place within the jurisprudential doctrine of this Constitutional Tribunal for a situation in which women and pregnant-capable people cannot consider whether to continue or interrupt their pregnancy for a short period of time at the beginning of gestation, since this . . . assum[es] that their dignity and personal autonomy can be . . . restricted on the basis of . . . a social construct that . . . casts them as vehicles of procreation, which would also . . . [harm] their psycho-emotional integrity by limiting the possibilities for their life plan and project, and . . . [their] wellbeing as a permanent goal of the right to health. . . .

180. The right of the woman or pregnant person to decide can only extend to the procedure of the termination of pregnancy within a brief period close to the start of the gestational process. This is the result of the encounter between the right to choose, which finds its limit in the constitutional protection that the unborn merits. . . .

199. Notwithstanding the foregoing considerations on the impossibility of [a fetus] being a holder of rights or the fact that the right to life does not extend its understanding from the moment of conception, this in no way translates into the embryo or fetus lacking a particular scope of protection; on the contrary, this High Court recognizes an intrinsic quality in the unborn, with a value that is associated with its own characteristics, insofar as it is the expectation of a being—regardless of the stage of development in which it finds itself—whose development is constant as the gestational process progresses. . . .

223. The review of each step of the process of . . . gestation leads to the undeniable truth that it increases the capacity of the organism to feel pain, experience pleasure, react to its environment, and survive outside the womb, as well as its viability to be a person; with each week that passes, fundamental events occur that underscore the importance of the constitutional interest, its singularity, and inherent significance to humanity as a whole; consequently, the State's priority obligation to protect . . . [the unborn] increases synchronously as such events occur, such that its safeguard becomes

a compelling interest that must be translated into the implementation of permanent actions with the objective of providing the broadest protection.

224. The full appreciation of the gestational process enables . . . better integration when it is observed in relation to the constitutional right of women and pregnant-capable people to decide, since it makes it possible to legally establish a space in which both can operate and have their own place. The non-absolute nature of any fundamental right in the face of another and the particularities of life in formation as a good whose value increases progressively, are the features that, ultimately, enable us to reconcile the right to choose with the constitutional protection of the conceived, based on the unique relationship that the woman has with the latter.

225. As can be seen, the definition of the unborn as a constitutional interest in the Mexican legal system has multiple implications that are related to various obligations of public authorities, all of them of enormous scope and significance.

226. The protection of life in gestation cannot be presented as antagonistic to that of women and pregnant persons, who are not only holders of rights and enjoy immunity from State interference in decisions that correspond to their private life, but also it is only by protecting [women and pregnant persons] . . . that the State can protect, in turn, this constitutionally relevant interest.

227. In this line of argument, . . . for the purposes of the protection of the prenatal period, given the implications of the right to decide that were specified lines earlier, the scenario that . . . best safeguards its inherent value, is the joint work of the State with the pregnant woman or pregnant person, through the deployment of a government policy based on the most expansive protection of all the rights and interests involved . . . .

228. The joint work of the State with the woman or pregnant person is the initial manifestation of . . . the legal protection of the unborn [that] must be deployed in the initial stage of the gestational period, enabling the coexistence of the right to decide and the commitment that public policies and officials provide a broad spectrum of protection to pregnant women or persons, allowing them . . . to make an informed choice, which . . . protect[s] . . . the embryo or fetus . . . in a non-invasive way . . . [that respects] reproductive autonomy.

229. It cannot be overstated that these terms are the direct manifestation of the protection of the aforementioned constitutional interest, but the foundation and trigger of the most comprehensive protection lies in . . . educational services, outreach, counseling, and accompaniment related to family planning and . . . in the implementation of actions to overcome the conditions of inequality, marginalization, and precariousness that could jeopardize the effective protection of the rights and interests involved.



230. What was laid out in the preceding paragraph involves a protection that is twofold in scope, insofar as in order to provide effective protection to the unborn, public actions by the Mexican State must be aimed at effectively protecting the rights of women and pregnant-capable people, . . . includ[ing] the essential implications of the right to decide, ensuring prenatal care for all women, adopting effective measures to make motherhood compatible with work and educational interests; reducing maternal mortality, and guaranteeing equal access to educational and employment opportunities.

231. The above considerations support the notion that the right to decide, in relation to the woman or pregnant-capable person who chooses to terminate their pregnancy, only has a place within a brief period of time close to conception, as a mechanism to balance the elements that coexist and . . . protect[] . . . both the conceived and reproductive autonomy, a space where the protection of both is possible.

232. May this determination serve to settle, from a perspective of constitutional justice guided by human rights, how unfeasible it would be to conduct this complex debate from absolute positions located in either of the two extremes, from arguing for an unrestricted protection of “life” to those discourses that are based on unlimited control and freedom of everything that happens in the body of the woman or the pregnant person. The judicial decision taken here, as can be seen, moves away from these false debates and is guided by an exercise of conciliation, integration, and weighing of the principles, rights, and constitutional interests involved.

233. The central theme of the decision of this Constitutional Court recognizes the enormous complexity of the matter under review, and guides its judgment by the pressing interest to provide a framework of constitutional interpretation that reconciles the elements involved in the most optimal way possible through reasoning oriented to offer a response to each of the facets. The right to decide and the constitutional interest constituted by the unborn are two elements that must be analyzed without overlooking any aspect of each . . . .

234. . . . [T]he solution proposed is the one considered to be the most balanced and guided by the principle of human dignity, addressing both the rights of women and pregnant-capable people as well as the inherent value of the unborn. Faced with the consideration that the underlying problem is a borderline case in the field of law, the response provided is not situated in its extreme points but in a narrative of balance that recognizes the natural bond between the pregnant person and the unborn and, which . . . [recognizes that] the ultimate core of the intricate and profound debate regarding the decision to abort will always lie with the intimate individual conviction, and . . . [thus] what is appropriate is to have a legal framework that addresses this reality and provides a far-reaching and comprehensive sphere of protection.

235. Now, in relation to the establishment of the time period in which . . . the interruption of pregnancy can be carried out as part of the exercise of the right to decide,

this Supreme Court of Justice of the Nation considers that it must be reasonable, that is to say that its legislative design must not nullify or render the aforementioned prerogative unenforceable, but must also consider . . . the gradual increase in the value of the gestational process; for its determination, the legislator may turn to the available scientific information as well as to the considerations of health policy that seem applicable . . . [and] are compatible with the reasons stated herein, as well as being guided—as a point of reference—by the parameters established in other places where the right to choose has been implemented in legislation (Mexico City, Oaxaca, and Hidalgo).

236. For reference purposes only, it should be noted that . . . [the Court has already reviewed the constitutional validity of] the regime for the legal termination of pregnancy established in . . . Mexico City . . . and deemed the time period established . . . appropriate and reasonable. [I]t should be noted that the legislator justified that . . . abortion . . . be carried out within a period of twelve weeks, since it is safer and more advisable in medical terms; furthermore, it played a determinative role in the decision of this Supreme Court that the legal interruption of pregnancy was established before the development of the sensory and cognitive faculties of the unborn.

237. In addition to the above, this Full Court, in considering the validity of the implemented regime, found it of special relevance that, in issuing the relevant decree and as part of [its] reasoning . . . , [the legislature] pondered based on scientific information the temporality of gestational development (in line with the reasoning in this judgment), . . . [cognizant] that during the first twelve weeks there is only incipient development, as well as the health security of the interruption of pregnancy, without serious consequences for the health of the woman. . . .

239. Additionally, in the relationship of balance, equilibrium, and harmonious coexistence of the gestational process and the right to decide (which is the line through which this problem has been approached), the period of twelve weeks is deemed to be reasonable for the woman's intimate reflection to take place, for medical and psychological advice to be provided and, where appropriate, the corresponding procedure to be carried out. It is also important to highlight that comparative law itself indicates that different laws have been guided by these parameters, which has resulted in the general legal rule that the legal interruption of pregnancy can only take place within the first twelve weeks of gestation. . . .

240. Once the content and scope of the right to decide, the ownership of which corresponds only to women and pregnant-capable people (where the prerogatives that nurture it, and their essential implications, occupy a particularly important place) and of the constitutionally relevant interest have been established, as well as the interaction of both aspects and the rules of their coexistence, it is appropriate to review . . . the provisions challenged by the Office of the Attorney General of the Republic. . . .

254. Article 196 of the substantive criminal law of the State of Coahuila de Zaragoza provides that “one to three years of imprisonment shall be imposed on the woman who voluntarily performs an abortion or on the person who causes her to have an abortion with her consent.” . . .

266. . . . [T]he criminalization of the voluntary interruption of pregnancy at all times entails the total suppression of the constitutional right to choose of women and pregnant-capable people. . . .

293. . . . [T]he inclusion in the criminal offense of conduct that occurs in the early stages of pregnancy . . . must be expunged from the legal system. . . .

303. Consequently, . . . it is appropriate to declare the unconstitutionality of Article 196 of the Penal Code of the State of Coahuila de Zaragoza . . . .

[Minister Juan Luis González Alcántara Carrancá, concurring in part and dissenting in part:]

. . . 22. . . . [A]lthough I agree with most of the considerations marshaled in support of . . . the ruling, which vindicates women’s and pregnant-capable people’s right to choose . . . , I do not agree with all of their arguments . . . .

24. . . . [I]n particular, I disagree . . . that the right to decide . . . only cover[s] a brief period close to the beginning of the gestational process. . . .

25. Likewise, I disagree with . . . [the majority’s] analysis of the fetus as a constitutional interest, because . . . [it] serves as the basis for this limitation on the right to decide . . . .

[Minister Norma Lucía Piña Hernández, concurring in part and dissenting in part:]

. . . [With respect to Article 196], it is true that the prohibition of abortion . . . [can lead to clandestine abortions that endanger the lives and health of] the most vulnerable women. However, . . . these arguments do not support the holding of unconstitutionality . . . [because] what is being evaluated here is . . . whether [the total prohibition of abortion] proportionally balance[s] the human rights and interests that are in conflict, not the appropriateness of a public policy . . . .

. . . Legislatures can validly consider the social consequences of criminal punishment. . . . However, . . . it is not our role as judges to evaluate laws in terms of their social consequences, but rather in terms of their correctness or proportionality in light of the Constitution itself. . . .

[Presiding Minister Arturo Zaldívar Lelo de Larrea, dissenting:]

... [T]he regulation of abortion in Coahuila is overbroad because it ... [criminalizes] conduct ... protected as the legitimate exercise of a right. [I]t prevents women from terminating their pregnancies in the initial stages of gestation and excessively and arbitrarily limits their ability to terminate a pregnancy that puts their lives, health, and right to a freely chosen motherhood at risk.

From this perspective, ... the entire chapter regulating abortion in the Penal Code of Coahuila is unconstitutional. ...

For a decade, I have defended the right to terminate a pregnancy in this Supreme Court time and again. I have insisted that the crime of abortion punishes poverty and reduces women to a vehicle of reproduction; it condemns them to jail, stigma, and in many cases death. I have pointed out ... [the importance of] overcom[ing] the false debate between those who are pro-life and those who are not. And I have argued that recognizing the right to terminate a pregnancy is a basic and urgent constitutional imperative founded on the dignity and freedom of all women, which our Constitution protects.

Despite my disagreements with the ruling, ... the Constitutional Court has finally said—with one voice—that we are all in favor of life, but of a life with dignity, of a life with equality and freedom for all women and pregnant-capable people. After ten years of insisting on this, I can only celebrate this victory, the merit of thousands of women who for years have demanded respect for their freedoms and a tribute to their tenacious and unstoppable struggle.

\* \* \*

Although the Mexican Court's decision was dramatic, its immediate impact has been limited. While no woman in the country can now be convicted for terminating a pregnancy, the Court's ruling does not automatically eliminate now-unconstitutional criminal codes in other states. Instead, each state's criminal code must be challenged directly in Court or amended by each state legislature.

As of March of 2022, twenty-five out of thirty-two states have yet to amend their statutes penalizing the procedure at every stage of pregnancy. To add to the issue of implementation of the ruling at the state level, many states' constitutions declare life begins at the moment of conception.

Anticipating resistance to its judgment, in September 2021, the Mexico Supreme Court invalidated an article of the General Health Law creating a broad right of conscientious objection for medical personal in public hospitals. The Court explained in a press release that “the law did not establish the necessary guidelines and limits so that conscientious objection can be exercised without endangering the human rights of other people, especially the right to health.” The Court had previously established the

parameters of the constitutionality of conscientious objection, prohibiting the practice from violating human rights, and applying this standard to public as well as private institutions. The president of the Supreme Court, Arturo Zaldívar explicitly invoked institutionalized conscientious objections as a denial of abortion access in an interview with *El País*, stating that new laws regulating contentious objection could not amount to “a blank cheque that denies health services, particularly the right to abortion.”\*

With its decisions limiting criminal bans on abortion and restricting conscientious objection to providing abortion services, the Mexico Supreme Court has announced a new understanding of Mexico’s constitutional and human rights commitments honed in fierce national and transnational debate. As with all such judgments, the decision’s future will be shaped in renewed conflict. Large segments of the country’s medical community have rallied against the Court’s abortion ruling, and studies have found the denial of abortion services based on conscientious objections in Mexico are grounded in fear of legal problems in abortion service provision. Ultimately, women, especially poor women, may find themselves in a grey zone between legal rights and legal access: they may not go to prison for seeking an abortion, but they likely may be unable to obtain the procedure at a hospital either, with their prospects dependent on finding counseling and provisions for medication abortion.

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Constitutional decisions recognizing rights to abortion are commonly accompanied by laws recognizing rights of conscientious objection. The following article explains the spread of conscience claims and the justifications for limits on their recognition and accommodation.

### **Conscience Wars in the Americas**

Douglas NeJaime and Reva B. Siegel (2020)\*\*

... What might explain this forceful turn to conscience by those opposed to reproductive rights and LGBT rights? When opponents of liberalization lose in the conflict over decriminalization and constitutionalization, they increasingly turn to conscience claims to resist newly protected rights. They look for new rules and reasons to attain similar ends—a dynamic we term “preservation through transformation.” Unable to enforce traditional values through laws of general application (such as criminal bans on abortion or civil restrictions on same-sex marriage), opponents seek expansive exemptions from laws departing from traditional morality. Without change

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\* Almudena Barragán, *La Suprema Corte determina que la objeción de conciencia no interfiera con los derechos reproductivos de las mujeres*, *El País* (Sept. 20, 2021, 3:21 EDT), <https://elpais.com/mexico/2021-09-21/la-suprema-corte-determina-que-la-objecion-de-conciencia-no-interfiera-con-los-derechos-reproductivos-de-las-mujeres.html>.

\*\* Douglas NeJaime & Reva B. Siegel, *Conscience Wars in the Americas*, 5 *LATIN AMERICAN LAW REVIEW* 1 (2020).

in numbers or belief, they shift from speaking as a majority to speaking as a minority. . . .

Asserting conscience objections to laws recognizing nontraditional practices offers a way to oppose an emergent legal order and limit the newly recognized rights of those the order protects. Importantly, opponents of liberalization can advance traditional norms by appealing to liberal values. By invoking conscience, religious liberty, pluralism, and nondiscrimination, opponents of reproductive rights and LGBT equality offer more persuasive justifications for their positions and partly disable liberals from objecting. . . .

In the paradigmatic case of conscience exemptions, accommodation serves important goals of pluralism, providing limited exceptions from laws of general application that allow persons of heterogeneous faiths and moral convictions to flourish. But it is not always clear that more recent conscience exemptions from laws protecting reproductive healthcare and LGBT equality serve this same pluralism-promoting end.

We support accommodation in the paradigmatic case in a variety of factual settings, and we are prepared to support accommodation of conscience objections in the more recent cases on the condition that accommodation not (1) obstruct the government's achievement of major social goals or (2) inflict targeted material or dignitary harms on other citizens. Achieving these conditions requires accommodation in a form that permits the government to pursue its constitutional or statutory ends and shields other citizens from the significant impacts of accommodation. In particular, we are concerned about granting accommodations that obstruct or materially burden or impair the exercise of protected rights. Only where government endeavors to shield affected third parties from the impact of exemptions are we persuaded that accommodation would promote pluralism. In cases where that is not possible, the accommodation of conscience objections may not be appropriate. . . .

Many jurisdictions recognize conscientious objection but subject it to principled limits. . . . We observe ways to accommodate objections while ensuring that the government can effectively pursue important ends and that other citizens are not subjected to significant material or dignitary harm. A legal system that provides expansive conscience exemptions without adopting any of the limits we identify will align the public order with the belief system of the objector and against the rights to which the objector objects. . . .

There are an ever-increasing number of faith claims that government may accommodate. But a government that repeatedly accommodates religious objectors without using the mechanisms we have identified to offset the impact on other citizens is plainly doing more than accommodating religion. It is taking a position in the underlying controversy, providing the objector the sanction of law and aligning itself with the religious claimant over and against the parties notionally protected by the law.

In doing so, the state is employing the language of accommodation to create a new public order establishing and sanctioning religion—and depriving citizens of the protection of rights constitutionally recognized or legislatively enacted.

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In addition to Mexico and Ecuador, other Latin American countries have also found the criminalization of abortion to violate constitutional rights. As part of a sustained campaign by feminist activists in Colombia, as noted, the Constitutional Court of Colombia first issued a landmark decision 2006 invoking dignity, equality, and human rights instruments as grounds to legalize certain exceptions to the nation’s criminal ban on abortion. Although some service providers construed these exceptions broadly, most interpreted them in a restrictive manner, which severely curtailed access to abortion in practice.

After decades of continuing conflict and conscience-styled resistance to the judgement’s implementation, in 2022 the Court issued another landmark ruling decriminalizing abortion. The feminists who successfully challenged the country’s abortion ban led an extensive advocacy campaign, which emphasized the ban’s detrimental impacts on women’s dignity and welfare, as well as the limits of criminal law as an instrument for protecting gestational life. The recent decision legalized abortion up to 24 weeks; beyond that point in pregnancy, the exceptions permitted under the 2006 ruling continue to apply.

In the judgment, the Constitutional Court held that the categorical prohibition of abortion violated women’s rights to dignity, health, reproductive rights, equality, and freedom of conscience. It recognized that the criminal ban failed to prevent abortion and relied on punitive means despite the availability of more efficacious and less restrictive tools to vindicate the state interest in protecting gestational life. In paragraph after paragraph the Court pointed out constitutional problems with the ways in which the legislature had relied upon the criminal law to protect life. It then called on the country’s democratic institutions to develop comprehensive policies to protect health and life beyond banning abortion. It also called on democratic institutions to adopt social policies to safeguard the dignity of women and to eliminate obstacles to women’s access to abortion services.

The Court looked beyond its borders and examined alternative regulatory models that protected fetal life without relying on prosecution. Consideration of the regulation of abortion across borders showed the “unnecessary use of criminal law;” that other legal systems approached abortion regulation through health and economic policies without punishment proved women’s health and fetal life could be protected while avoiding the immense dignitary harms imposed by criminal law on women. The Court surveyed four dominant models of abortion regulation in the international sphere: total decriminalization; the “indications” model; the “periodic” model; and the mixed-

system model.\* These models proved suitable measures to protect life in pregnancy without making life more dangerous for women. The Court also appraised the “counseling” model, pioneered by Germany, and adopted by Italy and Spain, in which the state implements mechanisms to ensure women are aware of alternatives to abortion and state financial assistance related to pregnancy as a way of integrating the state’s interest in protecting fetal life with respect for women’s autonomy.

For the Court, the Colombian Legislature’s method of first resort to criminal law, viewed in contrast with the policies that actively provide assistance and protection—e.g., financial subsidies for pregnant women; free provision of medicines, vaccines, and food for pregnant women and minors; allowances for comprehensive health care; free contraception; and heightened labor protections for pregnant women, among others—adopted by other countries, further emphasized the unconstitutionality of the law. This cross-border dialogue covered the law of many jurisdictions. It dramatized that in banning abortion the legislature had unnecessarily exchanged fetal protection for women’s dignity, health, and life.

**Ruling C-055 of 2022\***  
Constitutional Court of Colombia  
(2022)

[The Constitutional Court of Colombia, consisting of Cristina Pardo Schlesinger, *President*, Diana Fajardo Rivera, Jorge Enrique Ibáñez Najar, Antonio José Lizarazo Ocampo, Paola Andrea Meneses Mosquera, Gloria Stella Ortiz Delgado, Julio Andrés Ossa Santamaría (ad hoc), José Fernando Reyes Cuartas, and Alberto Rojas Ríos, delivered the following judgment:]

261. The Court finds that the criminalization of consensual abortion is *prima facie* compatible with the Constitution, as a measure to protect gestational life . . . . However, its criminalization during all stages of pregnancy and in an absolute manner save the three grounds indicated in Ruling C-355 of 2006 . . . —poses a constitutionally relevant tension between the protection of gestational life—an imperative constitutional purpose that Article 122 of the Penal Code\*\* seeks to protect—and the guarantees related to health and reproductive rights, the equality of women in vulnerable situations and in irregular migration situations, the freedom of conscience, and criminal punishment’s

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\* In the “indications” model, abortion is criminalized in the absence of specific indications of permissibility such as a pregnancy resulting from rape or incest; severe fetal anomaly; or risk to the pregnant woman’s life or health. In the “periodic” model, abortion is permissible until a specified point in the pregnancy. The mixed-system model combines these legal regimes.

\* Translation by Lucía Baca (Yale University, J.D. Class of 2024).

\*\* Article 122 of the Penal Code provides in relevant part:

Article 122. Abortion. The woman who causes her own abortion or allows another to cause it will be punished with imprisonment from sixteen (16) to fifty-four (54) months. . . .



constitutional purpose of prevention, as well as with the *ultima ratio* principle of criminal law. . . .

266. As recognized in constitutional and Inter-American jurisprudence, life is a legal interest that must be protected at all stages of development, but not necessarily with the same intensity. Hence, the protection of gestational life as an imperative constitutional purpose, including through criminal law, must also be gradual and incremental . . . .

270. . . . [I]f the legislature decides to resort to criminal law to protect gestational life, its margin of configuration is more limited due to the seriousness of this type of measure and its potential to burden other constitutional guarantees. . . .

288. . . . The criminalization of abortion, in the categorical terms of the law under review, pushes [women, girls, and pregnant-capable people] to seek unsafe and clandestine abortions, which creates a serious public health problem that impacts maternal mortality and morbidity rates . . . .

337. . . . [I]mposing criminal sanctions that deprive women who voluntarily interrupt their pregnancies of their liberty without offering alternative means for exercising their rights, . . . impacts the most vulnerable women in a differential—evidently disproportionate—manner . . . . [C]riminalization exacerbates their situation of vulnerability. . . .

375. . . . [T]he challenged law allows the State to judge and punish a woman who, during pregnancy, decides to act according to her moral judgments or intimate convictions, which generates an evident tension of constitutional relevance with the . . . freedom [of conscience], since it . . . [requires the woman] to become a mother, even against her own will, . . . .

401. Criminal policy encounters formal and material constitutional limits that derive from the prescriptions of the preamble and Articles 1 and 2 of the Charter, which establish human dignity as the foundation of the State and the protection of the rights of individuals as its essential purpose, . . . .

404. The subsidiary, fragmentary, or last resort nature of criminal sanctions requires turning to “other less burdensome controls” before turning to the punitive power of the State; therefore, if there are “other preventive means that are equally suitable and less restrictive of liberty,” criminal intervention must be the last resort. In the present case, although the challenged provision seeks to achieve a compelling constitutional purpose, which is to protect gestational life, it makes a *prima ratio* use of criminal law that evidently enters into tension with the constitutional character of criminal law as an *ultima ratio* mechanism, . . . .

445. . . . [A]n indiscriminate . . . use of criminal law is arbitrary and contrary to the requirements of the social state under the rule of law. . . .

477. The . . . legislative inactivity in seeking substantive solutions to the situation of hundreds of women who face unwanted pregnancies as well as the lack of protection and opportunities for those who wish to assume motherhood, despite the material difficulties of ensuring their maintenance, education, safety, and welfare, make criminal punishment the only visible public policy, thus failing to comply with the State’s constitutional obligation to guarantee assistance and protection to women during pregnancy and after childbirth, as established in Article 42 of the Constitution. . . .

480. . . . [T]he Court’s jurisprudence on the matter, . . . [has] shown that there are multiple obstacles to accessing [abortion] procedures . . . , which have . . . rendered the exceptions aimed at safeguarding the dignity and other rights of women, girls, and pregnant-capable people inoperative. . . .

505. . . . [R]esorting to the criminalization of consensual abortion as a prima ratio mechanism to protect gestational life, without any consideration for the dignity of the woman, reduces her to a mere instrument “of reproduction of the human species,” [which is] incompatible with her dignity and, therefore, in evident tension with the ultima ratio character of criminal law. . . .

534. . . . Article 122 of the Criminal Code establishes a criminal offense that falls on women due to their condition of womanhood, not only because, unlike men, they are the only ones—due to their biological constitution—capable of gestation, but also because the crime punishes a woman who “causes her own abortion” or who, with her consent, “allows another to cause it” . . . .

535. Thus, not only is the criminal offense [of consensual abortion] based on a suspect classification, but its criminalization also seems to be founded on the historical stereotype that reduces women’s bodies to their reproductive function. . . .

536. . . . [T]he way in which the crime is currently defined aggravates the gender difference on which it is based and, therefore, perpetuates the historical discrimination that women have suffered, . . . .

574. . . . [T]he design of public policies and regulation . . . with an intersectional perspective, . . . is suitable for the protection of gestational life and less harmful to the rights of women, girls, and pregnant-capable people. Therefore, rather than resorting exclusively to criminal law as the principal means of social control, States should promote measures related, among others, to sexual and reproductive health and education; the prevention of unwanted pregnancies; family planning and responsible decision-making regarding when to procreate and how many children are desired; safe

motherhood and prenatal care; and the different alternatives for women, girls, and pregnant-capable people who are in conflict with pregnancy. . . .

578. . . . [The] constitutional tension [between the protection of gestational life and the rights and dignity of women, girls, and pregnant-capable people] cannot be resolved by favoring either of these guarantees, since doing so would entail the absolute sacrifice of the other . . . , which undoubtedly reduces the material effectiveness of the Constitution—as a whole—, regardless of the preference. . . .

608. For the Court, the concept that in the current legal context produces a constitutional optimum that resolves the tension at issue is that of autonomy, which corresponds to the moment in which there is a greater probability of extrauterine autonomous life. Furthermore, it is the concept that most comports with the idea of gradual and incremental protection of gestational life . . . .

636. . . . [This] constitutional optimum . . . is obtained by declaring the conditional constitutionality of the challenged law, . . . [such that abortion as defined therein is only punishable] when it is performed after the twenty-fourth (24) week of gestation, [after which the three exceptions established in Ruling C-355 of 2006 continue to apply] . . . .

644. . . . Given the failure of the legislature to regulate the matter, . . . the Court reiterates its call and extends it to the national government so that, . . . [lawmakers] formulate[] and implement[] a comprehensive public policy on [consensual abortion] . . . .

\* \* \*

The conservative backlash was swift and calls to overturn the Court’s decision have intensified in the wake of *Dobbs*. Several organizations have asked the Court to nullify its own 5 to 4 ruling. While there are reasons to believe the judgment stands on solid ground, such as Colombia’s binding human rights obligations, conservative and religious organizations have insisted on gathering signatures calling for a constitutional referendum.

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Since 1998, El Salvador has maintained one of the most draconian abortion bans in Latin America, with scores of women being prosecuted for obstetric emergencies. In 2021, following the death in prison of a thirty-three-year-old woman who was sentenced to thirty years for aggravated homicide after suffering a miscarriage, a suit was brought against El Salvador in the Inter-American Court of Human Rights. The plaintiffs in the case sought acknowledgment of El Salvador’s violation of Manuela’s rights, and compensation for Manuela’s family, including two minor children. The Inter-American

Court of Human Rights ordered El Salvador to reform its harsh policies on reproductive health. The Court considered the effects of criminalization on women, and the regulation of medical personnel under these policies:

192. . . . The right to sexual and reproductive health . . . also refers to access to . . . the means to exercise the right to decide freely and responsibly on the number of children desired and the spacing between births. . . .

221. . . . The information obtained by the physician while treating Manuela was subsequently used in the criminal proceedings against her. Therefore, Manuela had to decide between not receiving medical care or that this care would be used against her in the criminal proceedings.

224. . . . [T]here is an apparent conflict between two rules: the duty to respect professional secrecy and the reporting duty. In cases of obstetric emergencies in which the life of the woman is in danger, the duty to respect the professional secret should be given priority. Therefore, the harm caused by the report made by the treating physician in this case was disproportionate compared to the advantages it obtained. Consequently, the report made by the treating physician constituted a violation of Manuela's rights to privacy and health . . . .\*

Women's rights groups have expressed hope this decision may improve the situation for victims of miscarriage, who, if they seek medical attention, have often been punished in El Salvador with decades in prison.

\* \* \*

Feminist movements seeking decriminalization of abortion have succeeded in changing the law in other regions of the world. Since 1953, South Korea's criminal code penalized both women who obtained or self-induced abortions and medical practitioners who provided abortions. While illegal abortions were often unprosecuted, women's groups in South Korea advocated for decades for legal access to abortion, arguing that the criminalization of abortion created a stigma and made women vulnerable to reprisal. In 2017, groups supporting the right to abortion submitted a petition to the presidential office that garnered over 230,000 signatures. The government announced it would review the abortion law in November 2017.

In early 2018, an obstetrician-gynecologist who had been indicted for committing the crime of carrying out an abortion challenged the conviction at the country's highest court, which agreed to hear her case. In April 2019, the Constitutional

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\* Case of *Manuela et al. v. El Salvador*, Inter-American Court of Human Rights (2021).

Court of Korea held that the challenged laws were in nonconformity with the Constitution, instructing the legislature to amend the relevant provisions before a particular date, after which the laws would be null and void. The decision of nonconformity is a type of decision intended to prevent the creation of a “legal vacuum” where there would be no regulation of an issue. A holding of simple unconstitutionality, in contrast, invalidates challenged laws from the day of the decision.

**Case on the Crimes of Abortion**  
Constitutional Court of Korea  
2017Hun-Ba127 (2019)

Constitutional Nonconformity Opinion of Justice Yoo Namseok, Justice Seo Ki-Seog, Justice Lee Seon-ae, and Justice Lee Youngjin

The first sentence of Article 10 of the Constitution provides that “All citizens shall be assured of human worth and dignity and have the right to pursuit of happiness.” The general right to personality is derived from human dignity protected by this provision. . . . [T]he right of an individual to self-determination is derived from such general right to personality. All citizens are entitled to the right to freely create their own private sphere of life based on their dignified right to personality. . . .

. . . [T]he right to self-determination includes the right of a woman to freely create her own private sphere of life based on her own dignified right to personality, and the right of a pregnant woman to determine whether to continue her pregnancy and give birth is included in such right as well. . . .

. . . [D]uring a sufficient amount of time before the point of viability at around 22 weeks of gestation, during which the right to self-determination regarding whether to continue a pregnancy and give birth can be properly exercised . . . the State’s protection for fetal life may be different with respect to its level or means. . . .

If the State imposes a complete ban on abortions, a fetus retains its right to life, while a pregnant woman is completely deprived of her right to self-determination. Conversely, if the State fully legalizes abortions, the pregnant woman retains her right to self-determination, while the fetus is completely deprived of its right to life. Therefore, it could be inferred that these rights are, in this respect, in an adversarial relationship, which is being formed by the State’s legislation. . . .

. . . This calls on the State to optimize two fundamental rights in accord with the principle of practical concordance, rather than abstractly comparing the two and abandoning one for the sake of the other.

. . . [T]he protection of the life of the fetus . . . gains true significance when it includes the physical and social protection of the pregnant woman. This protection can

be effectively served by proactive and retroactive measures aimed at, e.g., creating a social and institutional environment preventing unwanted pregnancies and reducing abortions. In addition, the life of the fetus can be truly safeguarded if . . . the pregnant woman is able to make a carefully considered decision regarding whether to continue her pregnancy [during the period afforded to women to exercise their right to an abortion] after consultation with professionals providing emotional support and adequate information about abortion; and if the State actively makes the effort to address the socioeconomic conditions that pose obstacles to pregnancy, childbirth, and parenting. . . .

. . . [C]onsidering that criminal sanctions have only a limited deterrent effect . . . and that those who obtain an abortion are . . . rarely prosecuted, . . . the Self-Abortion Provision\* does not effectively protect the life of a fetus in situations in which pregnant women are caught in the dilemma of abortion. . . .

The Self-Abortion Provision compels, under threat of criminal sanctions, a pregnant woman to continue her pregnancy and give birth even if she faces the abortion dilemma arising from various and wide-ranging socioeconomic circumstances, such as where pregnancy and child-rearing are likely to interfere with her education, career, or public activities; where she has inadequate or unstable income; where she lacks resources to care for another child; where she or her spouse cannot stay home to care for the child and both of them have to work, out of necessity; where she has no desire to continue a dating relationship or enter into a marital relationship with the fetus's biological father; where the fetus's biological father or the pregnant woman's male partner does not want her to give birth and insists on an abortion, or overtly refuses to assume the parental responsibilities; where she is pregnant by a man who is married to another woman; where she has discovered her pregnancy at a point when the marriage has in effect been broken irretrievably; where she breaks up with the fetus's biological father; or where she is an unwed minor with an unwanted pregnancy. . . .

The Self-Abortion Provision restricts a pregnant woman's right to self-determination to an extent going beyond the minimum necessary to achieve its legislative purpose. Thus, it satisfies neither the least restrictive means test nor the balance of interests test. Accordingly, it violates the rule against excessive restriction and a pregnant woman's right to self-determination. . . .

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\* Article 296 Section 1 of the Criminal Act provides:

(1) A woman who procures her own miscarriage through the use of drugs or other means shall be punished by imprisonment for not more than one year or by a fine not exceeding two million . . . .

... [T]he Abortion by Doctor Provision, which penalizes a doctor who performs an abortion at the request or with the consent of a pregnant woman to achieve the same goal as hers, violates the Constitution. . . .

If we were to render decisions of simple unconstitutionality on these Provisions, we would be creating an unacceptable legal vacuum in which there is no punishment available for all abortions throughout pregnancy. Moreover, it is within the discretion of the legislature to remove the unconstitutional elements from these Provisions and decide how abortion is to be regulated . . . .

For these reasons, we render, on the Self-Abortion Provision and the Abortion by Doctor Provision, decisions of nonconformity to the Constitution. . . . We also order that these Provisions continue to be applied until the legislature amends them. . . . [I]f no amendment is made by [December 31, 2020], these Provisions will be null and void as of January 1, 2021.

[Justice Lee Seok-tae, Justice Lee Eunae, and Justice Kim Kiyong issued a separate opinion arguing that holding the provisions unconstitutional would not give rise to legal confusion or social costs. Justice Cho Yong-Ho and Justice Lee Jongseok argued that the provisions were constitutional. They observed, “In 1973, the Supreme Court of the United States rendered a decision in *Roe v. Wade* in which it overturned state laws regulating abortion. Has a social consensus on abortion been reached and controversy over it been resolved in the United States since that decision? On the contrary, as we have seen throughout history, the controversy over abortion has continued unabated.”]

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In response to this decision, in October 2020, the South Korean government announced draft legislation to decriminalize abortion, with varying gestational limits depending on the reason for the abortion. However, the law was not voted on before the December 31, 2020 deadline. On January 1, 2021, abortion became legal up to 14 weeks in South Korea on the basis of the Constitutional Court of Korea’s decision.

In some countries, courts have expanded access to abortion by recognizing the intersection of poverty and unsafe abortion and focusing on improving access to safe reproductive healthcare. Nepal offers one example. The 2007 Interim Constitution of Nepal provides in Article 16(2), “Every citizen shall have the right to get basic health service free of cost from the State as provided for in the law.” Article 20(2) provides, “Every woman shall have the right to reproductive health and other reproductive matters.” On this basis, the Supreme Court of Nepal in a two-judge bench held that abortion access was not meaningful unless indigent women could also exercise the right.

**Dhikta v. Nepal\***  
Supreme Court of Nepal, Division Bench  
No. 8464 (2009)

[Justice Kalyan Shrestha, joined by Justice Rajendra Prasad Koirala:]

... Lakshmidevi Dhikta, one of the petitioners, [was] from a very poor family... [and had previously given] birth to five children. When [she] became pregnant again, [she] sought... an abortion and... [received] information that the government hospital legally provide[d] abortion services... [At the hospital, she] was asked to pay a service fee of NPR 1,130.00. Since [she] did not have the said amount, ... [she had] to continue with [the] unwanted pregnancy and give birth to a child. ...

... [Petitioners argue that] though some reforms in... abortion related provisions have been introduced... , [w]omen's rights to live with dignity and right to self-determination have been violated due to the unaffordability and inaccessibility of the right to abortion.

9... [I]t is difficult to say for sure when the [fetus's] life begins... [O]ur Constitution has not dealt with any right of an unborn child including his/her constitutional, religious, property or other rights. ...

13... If a fetus is to be considered a life... , the existence of [the] fetus's life cannot be endangered even when the physical or mental health of a mother is under threat... In reality, such an argument is not practical.

15. It is well understood that a fetus does not have an independent existence and its existence is confined only inside the mother's womb. Therefore, even if a fetus is deemed to have any interest, it cannot exist against the interest of the mother. ...

19. Nepal is known as a country with a high incidence of maternal mortality due to abortion... [F]or women[']s rights, it is important to decriminalize abortion to a certain extent, to protect pregnancy except when they are unwanted and to create [a] safer environment for those seeking abortion services.

21... [A]bortion has been recognized on conditional grounds through the eleventh amendment of the Country Code which was enacted through a political process involving legislators. Thus, ... [the] right to abortion is no longer a legal question... ; rather, the main question is how to undertake effective measures for the proper enjoyment of this right.

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\* Translation provided by the Center for Reproductive Rights.



25. . . . [T]he right to self-determination holds a special importance in relation to the right to . . . reproductive health. This comprises the right to plan one's family, which includes the right to information about and access to family planning methods, and the right to use such contraceptive[s]; as well as . . . the right to independently make decisions relating to reproduction free from any external interference. . . .

33. . . . Although becoming pregnant is a noble human act, [there is] no other situation that can be more burdensome and condemnable [than] when the pregnancy is forced. . . . In order to ensure the birth and development of free human beings, . . . it is important for a mother to be free. It is important to take into consideration, that a mother's servitude cannot be a source of freedom for her children.

40. . . . Reproductive rights cannot be only understood as creating an obligation to reproduce, it includes within their scope the right not to reproduce. Reproductive rights must be envisioned in the same way just as a right to undertake a certain act inherently includes the freedom not to engage in such an act.

55. . . . [T]he purpose of guaranteeing . . . fundamental rights . . . is not merely declaratory . . . . [I]t is necessary on the part of the State to disseminate information about the law, build necessary infrastructures for the implementation of the law, establish necessary institutions, build the capacity of institutions or the human resources working in the institutions, and continue programs to ensure the distribution of services and facilities according to people's needs. . . . The bitter truth is that, no matter how modern, intellectual or scientific the law or decisions are, unless the benefits accruing from them effectively and extensively reach to the grassroots level, they cannot make [a] meaningful contribution to the implementation of the rule of law. . . .

60. In order to make abortion services accessible, it is necessary . . . that the service fees charged by both the government and non-governmental health institutions are reasonable and commensurate with the service seeker's ability to pay. . . .

62. The legitimacy of the abortion service or the relevance of its availability will be meaningful only if it becomes accessible and affordable to those in need of it.

63. The awareness on abortion is only confined to the urban and comparatively educated communities till date. Due to this reason, the flow of unsafe abortion is high in rural areas . . . .

65. . . . If a woman who needs abortion is unable to do so because of procedural complexities and exorbitant service fees or is forced to continue the pregnancy and give birth, then it must be recognized that the benefit created by law has not been enjoyed by its intended beneficiaries.

73. . . . If law creates any benefits or interests, their equal distribution . . . is also necessary. The responsibility of the judiciary cannot be denied in respect of the right to equal protection of the law that also implies equal accessibility and affordability of all to the benefits of the law. . . .

\* \* \*

Unsafe abortion remains a problem around the world. In Kenya, unsafe abortions are one of the leading causes of maternal mortality. In 2010, the Constitution of Kenya was amended by a constitutional referendum to allow abortion when a woman's life was at risk or her health was in danger, but in 2013, the government withdrew guidelines for prevention of maternal mortality and circulated a memo threatening sanctions for healthcare professionals who attended abortion trainings. The High Court of Kenya found that this withdrawal violated the rights of women by preventing them from accessing safe abortions:

328. It is apparent . . . that there is a need to address the challenge posed by unsafe abortion in Kenya. To do otherwise . . . is to leave women and girls . . . without recourse to information on safe services . . . .

397. . . . [T]he general rule is that abortion is illegal. However, abortion is permissible, if in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law. . . .

399. . . . It is not the cause of the danger that determines whether an abortion is necessary but the effect of the danger. . . . It therefore follows that if a pregnancy results from rape or defilement, and in the opinion of a trained health professional, endangers the physical, mental and social well-being of a mother, abortion is permissible . . . .

402. It is also our finding that by withdrawing the 2012 Standards and Guidelines and the Training Curriculum, the DMS in effect disabled the efficacy of Article 26(4)\* of the Constitution and rendered it a dead letter. . . . Since, this is a right that inures to women and girls only, the unjustifiable limitation amounted to the violation of their right to nondiscrimination as well as the right to information, consumer rights,

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\* Article 26(4) of the Constitution of Kenya provides:

Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.

and right to benefit from scientific progress. . . .\*

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## **CRIMINALIZING AND RESTRICTING ACCESS**

Poland has restricted abortion since its transition to democracy in the 1980s, when the Church was important in supporting the broader political Solidarity movement. Recently, more severe restrictions imposed by the Polish Constitutional Tribunal have served as a flashpoint both about the character of government authority and of the Church's hold over it. For the last several decades, Polish law has banned abortion but allowed medical professionals legally to perform an abortion in limited exceptions—specifically, risk to the life of the woman, in cases of rape, or in the case of severe fetal abnormality.

This third exception was struck down in October 2020 by the Constitutional Tribunal after members of the Sejm, the Polish Parliament's lower house, petitioned the Tribunal for review of this exception. The group hailed from three right-wing parliamentary groups, including the ruling Law and Justice Party (PiS). In 2015, after winning a majority in Parliament, PiS refused to allow five newly appointed judges to take their seats in the Tribunal. Instead, PiS appointed five new judges of their own, creating a PiS majority on the Tribunal. The PiS-controlled legislature also passed several laws reorganizing the Tribunal. Because of the method of seating new judges, the European Court of Human Rights unanimously ruled in 2021 that the Tribunal was not “established by law” and thus could not provide a fair trial.

### **Ref. No. K 1/20**

#### **The Constitutional Tribunal of Poland (2020)**

[Judgment of the Constitutional Tribunal composed of Julia Przyłębska, Zbigniew Jędrzejewski, Leon Kieres, Mariusz Muszyński, Krystyna Pawłowicz, Stanisław Piotrowicz, Justyn Piskorski, Piotr Pszczołkowski, Bartłomiej Sochański, Jakub Stelina, Wojciech Sych, Michał Warciński, and Jarosław Wyrembak]

. . . [T]he application [was] lodged . . . with the Constitutional Tribunal for it to examine the conformity of: Article 4a(1)(2) and Article 4a(2), first sentence, of the Act of 7 January 1993 on Family Planning, the Protection of Foetuses, and

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\* FIDA Kenya & 3 Others v. Attorney General & 2 Others, Petition No. 266 of 2015 (High Court of Kenya at Nairobi, 2019).

Grounds for Permitting the Termination of a Pregnancy . . . [to] the Constitution of the Republic of Poland\* . . . .

. . . [T]he challenged provisions legalise eugenic practices with regard to unborn children, thus denying those children respect for human dignity and the protection thereof . . . .

. . . [T]he challenged provisions . . . correlate the protection of the unborn child's right to life with the child's state of health, which constitutes prohibited direct discrimination . . . .

. . . [The challenged provisions] legalise the termination of a pregnancy without indicating sufficiently justified necessity to protect another constitutional value, right, and/or freedom, . . . [and] provide for unspecified criteria for the legalisation [of abortion], thus infringing constitutional guarantees for human life.

. . . [The Court] adjudicates as follows: Article 4(a)(1)(2) of the Act\*\* . . . is inconsistent with . . . the Constitution of the Republic of Poland.

\* \* \*

In the days and weeks following the Tribunal's decision, mass protests erupted in Poland. Demonstrations were held in as many as sixty different smaller towns and cities, including places otherwise considered strongholds for the Law and Justice Party. The protestors, including the All-Poland Women's Strike, staged sit-ins in Catholic churches, disrupted Sunday mass, and demonstrated in front of the Law and Justice party offices as well as those of religious administrators. Many were handed criminal charges in response, and the ban remains in effect today. As observed in *Foreign Policy* in 2021:

. . . [T]he movement's apparent defeat conceals its deep impact. The Catholic consensus that dominated Polish politics since the fall of communism is over, with far-reaching effects: Public acceptance of abortion is up, support for the ruling party has fallen, and progressive activists are building new coalitions. . . .

More young people, especially young women, now identify as leftist.

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\*Applicants alleged that the provisions of the Act were inconsistent with Article 30, Article 38 in conjunction with Article 30 and Article 31(3), and Article 38 in conjunction with Article 32(1) and (2) of the Polish Constitution.

\*\* Article 4(a)(1)(2) provides, in relevant part:

A termination of pregnancy can only be carried out by a doctor when: . . . 2) prenatal examinations or other medical data indicate a high probability of serious and irreversible disability of the foetus or an incurable life-threatening illness.

The court’s decision, which was opposed by 73 percent of the country, has moved the center toward accepting abortion access: Around two-thirds of Poland’s population now supports legal abortion up to 12 weeks, up from 53 percent in 2019. Shifting attitudes among voters led the country’s main opposition party, Civic Platform, to endorse the 12-week policy. . . .

The narrative surrounding abortion has also changed. Although public discourse previously focused on “irresponsible women,” abortion is now more often framed as part of public health. . . .\*

\* \* \*

The United States has also seen a move toward criminalizing and sanctioning abortion, especially in more conservative states. In 2021, Texas enacted a law, soon copied in other conservative states, to ban abortion after six weeks of pregnancy and to provide for enforcement by civil damage suits to be brought by private individuals against any person who performed or “facilitated” a prohibited abortion. The state’s openly stated purpose was to insulate the law from judicial review: since no state official had authority to enforce the law, there would be no state action to provide a basis for a lawsuit to challenge a statute that at the time of enactment was clearly unconstitutional. The state’s ploy succeeded.

The construction of the law aimed to prevent federal courts from reviewing a provision designed to deprive persons of constitutional rights, and the United States Supreme Court refused to intervene to consider the constitutionality of the deprivation. Instead, after briefing on its motions docket, the U.S. Supreme Court declined to enjoin the law, even preliminarily, which meant that it allowed the law to go into effect in the middle of the night in early September and drastically reduce the availability of abortion in the country’s second most-populous state. Women have had to travel from Texas to abortion providers in distant states. Some have crossed the state’s southern border into Mexico, where drugs for medication abortions are available in pharmacies on a walk-in basis. It is an ironic reversal to the old days when abortion was illegal in the United States and women sought abortions in Mexican border towns. One abortion provider on the Texas border observed:

. . . [A]round six of the weekly average of 25 patients who come to the Whole Woman’s clinic will find out they are past the sixth week of pregnancy. If they want an abortion, they face either an 800-mile drive to the nearest out-of-state provider, in New Mexico, or a quick day trip

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\* Joy Neumeyer, *Poland’s Abortion Ban—And the Women’s Strike—One Year On*, FOREIGN POLICY (Nov. 8, 2021), <https://foreignpolicy.com/2021/11/08/poland-abortion-ban-women-strike-catholic-religion-progressive-politics/>.

to Mexico.\*

\* \* \*

Access to safe abortion can be facilitated by expanding exceptions, easing harsh regulations on abortions, and providing guaranteed safe healthcare to all. Abortion can just as easily be constrained via the same avenues—by restricting exceptions, imposing difficult to manage regulations on abortion care, and denying aid for abortion access. One example comes from Hungary, where an increasing trend toward protecting life has led to challenges to the exceptions in abortion laws. While the most recent challenge was unsuccessful, the dissent by Dr. Béla Pokol has laid the groundwork for future challenges.

**Judicial Initiative on Act LXXIX of 1992**  
Constitutional Court of Hungary  
No. III/01838/2020 (2021)

[Before Tamás Sulyok, President, and Ágnes Czine, Egan Dienes-Oehm, Tünde Handó, Attila Horváth, Ildikó Hörchemé Marosi, Imre Juhász, Miklós Juhász, Béla Pokol, László Salamon, Balázs Schanda, Marcel Szabó, Péter Szalay, and Mária Szívós, Judges:]

[President Sulyok:]

... [2]1.1. [T]he plaintiff's parents claimed that their minor child had a congenital malformation and that the defendant health institution could have . . . screened for or diagnosed [the malformation] by the 20th or 24th week of pregnancy at the latest. However, the insufficient professional care provided by the defendant deprived the mother of the right to self-determination granted to her by . . . Section 6 (3) [of Act LXXIX].\*\* According to the plaintiffs, the defendant's omission violated their right to family planning and, above all, their mother's right to self-determination, for which they are entitled to compensation and damages.

[4] [The] Metropolitan Court of First Instance[, by] . . . its partial and interim judgment, . . . found that the defendant medical institution had violated the right of self-

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\* Colleen Deguzman, *Under Texas's Strict Abortion Law, McAllen Clinic Sees Patients Seeking Medication Across the Border*, THE TEXAS TRIBUNE (April 20, 2022), <https://www.texastribune.org/2022/04/20/texas-abortion-law-mexico-drugs-pharmacies/>.

\*\* Section 6 (3), in relevant part, provides:

A pregnancy may be terminated until the 20th week—in the case of a prolonged diagnostic procedure—until the 24th week—if the probability of genetic and teratological harm to the fetus reaches 50%.

determination of the plaintiff's mother and the personal rights of both plaintiffs to family planning and family residence. . . .

[6]1.2. . . . [T]he proceedings to determine the amount of the damages and compensation were stayed by a judge of the court of first instance and appealed to the Constitutional Court. . . . According to the referring judge, . . . [t]he system of definition does not provide adequate protection for fetal life, as the phrase '50% probability of teratological damage' is unclear and cannot be interpreted without concern in relation to the presumed purpose. . . .

[8] [T]herefore it violates Articles II\* [of the Fundamental Law] and 28\*\* of the Basic Law. The provision in question should be reregulated in such a way that the occurrence of "teratological damage" is clear and appears at the statutory level . . . as the interpretation cannot be based solely on medical opinions or the discretion of the courts. . . .

[13]2.2. . . . The designation of the applicable law may therefore be reviewed by the Constitutional Court only if it is clear that the indicated legislation certainly does not apply in the case giving rise to the petition. . . .

[16] In the present case, . . . [t]he violation of the right to self-determination . . . in Section 6 (3) . . . was finally established by the . . . Metropolitan Judgment Board . . . . The decision has substantive legal force. Consequently, the court of first instance can no longer return to the examination of the legal basis of the violation of the right to privacy . . . . Section 6 (3) is no longer applicable in a case pending before a judge, as it is now limited to determining the amount of the plaintiff's claim.

[Judge Pokol, dissenting:]

[18] . . . According to the impugned law, the too wide possibility of abortion makes the taking of a fetal life unconstitutional, and the Constitutional Court may take action against this either by annulling the law or establishing a constitutional omission . . . .

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\* Article II provides:

Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; embryonic and foetal life shall be subject to protection from the moment of conception.

\*\* Article 28 provides:

In applying laws, courts shall primarily interpret the text of any law in accordance with its goals and the Fundamental Law. The interpretation of the Fundamental Law and other laws shall be based on the assumption that they serve a moral and economical purpose corresponding to common sense and the public benefit.

[19] In my opinion, my proposal for a constitutional requirement formulated in the panel debate would have been adequate to remedy the constitutional problem raised by the case, and I maintain this proposal despite the majority decision: “The Constitutional Court states that, if the adverse teratological effect does not constitute a complex developmental disorder and thus does not appear to be a possibility of systemic damage, termination of the pregnancy is not eligible.”

[Judge Schanda, dissenting:]

[22] According to the Basic Law, “[t]he judges . . . shall be subject only to the law”. Therefore, if they have to apply a law that is found to be unconstitutional in adjudicating an individual case pending before them, they must apply to the Constitutional Court. . . . The Constitutional Court could only dispense with the constitutionality of a law . . . if the judge had manifestly unjustifiably determined the law applicable in the course of the proceedings. That is not the case here.

[24] The determination of the amount of compensation is therefore linked to the extent of the parties’ liability. Therefore, in my opinion, the judge turned to the Constitutional Court with a substantive question to be considered.

[Judge Szabó, dissenting:]

[27] In my view, . . . [t]he requirement of a 50% probability of genetic harm to the fetus under Section 6 (3) is only a yes or no certainty in legal terms. The provision was created several decades ago in the light of the much more rudimentary diagnostic tools at the time, and the medical care of premature babies has also developed tremendously over the past period. Nowadays, in most cases, the baby can be viable in the 24th week of pregnancy. Therefore, in the case of a substantive examination, I would have considered it necessary to examine whether the level of certainty, either yes or no, is constitutionally acceptable for fetuses already viable in order to authorize and carry out a medical intervention to eliminate pregnancy.

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## **AN INTERNATIONAL PERSPECTIVE**

Nowhere in international law is there express recognition of a right to abortion. However, international groups, including various UN commissions, have discussed the importance of abortion to the advancement of women’s rights and protection of women’s health. As we have seen, CEDAW and other human rights instruments played a role in the Mexican judgment. While there is far from being a complete international consensus on the issue, the trends toward expanding abortion access and the research



on the positive effect of abortion access on women's rights suggest a gradual movement toward decriminalization, recognition, and expansion of abortion as a human right.

**Women's Autonomy, Equality and Reproductive Health in  
International Human Rights: Between Recognition, Backlash, and  
Regressive Trends**

UN Human Rights Office of the High Commissioner (2017)

Working Group [composed of Frances Raday, Alda Facio, Eleonora Zelinska, Kamala Chandrakirana and Emna Aouij] on the issue of discrimination against women in law and in practice:

The UN Working Group on the issue of discrimination against women in law and in practice has expressed its concern, throughout its first 6 years of mandate, regarding the severe challenges to the universality of women's rights, in the global community. The challenges have resulted from economic crisis and austerity measures on one hand and from cultural and religious conservatism, on the other hand. This retrenchment has been evident in the passage of [Human Rights Commission] resolutions on traditional values and protection of the family, which have excluded mention of women's right to equality in the family and thus threatened to undermine the guarantees of this right rooted in the Universal Declaration of Human Rights and the human rights treaties. And this undermines the whole concept of women's equal personhood as, when women are not viewed as equal to men within the family, their full personhood comes into question. . . . It is in this context of rising fundamentalisms and backlashes against women's human rights that the current discourse on the termination of pregnancy is taking place at the international level. . . .

Women's human rights include the rights to equality, to dignity, autonomy, information and bodily integrity and respect for private life and the highest attainable standard of health, including sexual and reproductive health, without discrimination; as well as the right to freedom from torture and cruel, inhuman and degrading treatment.

The right of a woman or girl to make autonomous decisions about her own body and reproductive functions is at the very core of her fundamental right to equality and privacy, concerning intimate matters of physical and psychological integrity. . . . Countries where women have the right to termination of pregnancy and are provided with access to information and to all methods of contraception, have the lowest rates of termination of pregnancy. . . .

The decision as to whether to continue a pregnancy or terminate it, is fundamentally and primarily the woman's decision, as it may shape her whole future personal life as well as family life and has a crucial impact on women's enjoyment of other human rights. Accordingly . . . the Working Group has called for allowing women

to terminate a pregnancy on request during the first trimester. It is imperative to understand that at this stage, despite the intense efforts made by religious lobbies to portray the zygote as a baby, it still consists of unindividualized cells . . .

Further, the right to equality in the highest available standard of healthcare and the right to non-discrimination in access to health care services, including those related to sexual and reproductive health and family planning, require specific protection. Our expert group has called for recognition of the fact that equality in the supply of health services requires a differential approach to women and men, in accordance with their biological needs. [T]he right to safe termination of pregnancy is an equality right for women. . . . According to a new study, 25 million (or 45%) of all abortions that occurred every year worldwide, between 2010 and 2014, were unsafe. . . . [I]n countries where abortion is completely banned or allowed only to save the women's life or her physical health, only 1 in 4 abortions were safe – whereas in countries where abortion is legal on broader grounds nearly 9 in 10 abortions were safe. A previously published paper showed that these unsafe abortions resulted in 47,000 deaths annually . . . . This results in severe discrimination against economically disadvantaged women.

In the current discourse, the necessity of putting women's human rights at the center of the policy considerations regarding termination of their pregnancy is obfuscated by the rhetoric and political power behind the argument that there is a symmetrical balance between the rights to life of two entities: the woman and the unborn. But there is no such contestation in international human rights law. It was well settled in the 1948 UDHR and upheld in the ICCPR that the human rights accorded under IHRL are accorded to those who have been born. . . .

Between 1950 and 1985, almost all developed countries liberalized their abortion laws for reasons of women's human rights, including equality, health and safety. . . . Those who believe that the foetus is already a human person with rights from the moment of conception are entitled to their belief but a democratic State cannot have laws that are based on belief systems that are not shared by all individuals, cultures and religions. . . . Most notably the Colombian Constitutional Court . . . determined that the legal right to life is limited to born human beings and drew the distinction between value of life, including fetal life, and a legal right to life.

. . . [W]e have . . . called for an end to prosecutions and punishment of women or medical service providers for murder or manslaughter for termination of pregnancy . . . [which] are relevant only to human persons . . . a status acquired at birth. . . .

Human rights mechanisms had started from a hesitant approach to the liberalization of termination of pregnancy, only requesting that states consider changing their laws on termination of pregnancy so as to at least allow abortion in the exceptional cases of risk to the woman's life or health, rape and a severely impaired foetus. They

also tended to focus on the health issue alone. . . . But by 2009, the CEDAW reports make it clear that the fundamental principles of equality and non-discrimination require that precedence be given to protecting the rights of pregnant women over the interest of protecting the life in formation. . . .

Human rights mechanisms call in parallel for decriminalization of abortion, on one hand, and legalization of abortion, variously, in cases in which the life or health, including mental health, of the pregnant woman is threatened, in cases of rape, incest and fatal or severe fetal impairment. Where access to termination of pregnancy is denied in these circumstances, expert international human rights mechanisms and entities have repeatedly concluded that, in some situations, failure to provide women access to legal and safe abortion may amount to cruel, inhuman or degrading treatment or punishment or torture, or a violation of their right to life. . . .

Regulation of the medical procedure for termination of pregnancy after the first trimester may provide a balance between the human rights of the pregnant woman and a societal interest in discouraging termination where the pregnancy is more advanced, which involves a more complex medical procedure for the woman, and a more fully developed foetus. Though there should never be criminalization of termination of pregnancy, termination after the first trimester may be subject to the need to make room for greater societal interest . . . and may hence be regulated in the health system . . . .

Nevertheless, the requirement of grounds must not result in creating a barrier to termination of the pregnancy in situations in which the woman will pursue the course of seeking an unsafe termination rather than continuing the pregnancy. . . . The procedure for fulfilling the requirement must be immediate, in consultation with the medical service providers in order to avoid delays which will in effect prevent the carrying out of a termination procedure before the pregnancy becomes more advanced. Barriers which do not fulfil these conditions in effect force the termination underground, resulting in maternal mortality and morbidity for women who do not have the financial resources to seek illegal medical services by qualified practitioners.

In any case, where objective grounds are required, they should be expansive. . . . Our expert group has suggested that in the vast majority of cases women only seek termination of pregnancy when they are forced to do so by oppressive legal, cultural, social or economic circumstances. . . .

Termination of pregnancy should be by qualified medical service providers in a safe environment. . . . Countries where women gained the right to termination of pregnancy in the 1970s or 1980s and are provided with access to information and to all methods of contraception, have the lowest rates of termination of pregnancy. . . .

The WGDRAW has called on states to ensure that access to health care, including reproductive healthcare, is autonomous, affordable and effective. This necessitates a

series of measures with regard to termination of pregnancy: to invalidate conditioning of women's and girls' access to health care on third-party authorization; provide training to health providers, including on gender equality and non-discrimination, respect for women's rights and dignity; provide non-discriminatory health insurance coverage for women, without surcharges for coverage of their reproductive health; include contraception of choice, termination of pregnancy in universal health care or subsidize provision of these treatments and medicines to ensure that they are affordable; restrict conscientious objection to the direct provider of the medical intervention and allow conscientious objection only where an alternative can be found for the patient to access treatment within the time needed for performance of the procedure; exercise due diligence to ensure that the diverse actors and corporate and individual health providers who provide health services or produce medications do so in a non-discriminatory way and establish guidelines for the equal treatment of women patients under their codes of conduct; provide age-appropriate, comprehensive and inclusive sexuality education based on scientific evidence and human rights, for girls and boys, as part of the mandatory school programmes. . . .

Twenty five per cent of the world's population lives in countries with highly restrictive abortion laws, mostly in Latin America, Africa and Asia. In Europe two countries have highly restrictive abortion laws. The politicized religious conservative movement is active in numerous countries to either stop the clock or set it back and is making a concerted effort in countries in many regions to retain or even introduce prohibitions on termination of pregnancy. . . . It was evident for instance in Chile in the long struggle, recently won, to allow termination of pregnancy where the woman's life is at risk. It was also recently evidenced in the defeat of a bill presented in the Dominican Republic to allow termination of pregnancy where the life of the woman is at risk. Attempts to turn the clock back and introduce restrictive abortion laws have also been taking place for instance in the United States, Poland, the Philippines and Sierra Leone. . . .

The commitment to women's human rights regarding termination of pregnancy, such as evident in the decisions of the US Supreme Court in *Roe v. Wade* and most notably the Colombian Constitutional Court, has not been upheld by all constitutional courts in different regions. Most recently, the UK Supreme Court . . . deferred to the democratic will of the North Ireland legislature in its ban on abortions in cases other than preservation of the pregnant woman's life, thus putting women's human rights to autonomy, health and equality to a popular vote rather than respecting, protecting and fulfilling them as human rights and hence not subject to majority votes or referendums.

. . . [M]uch of the discrimination women face in their right to access to health services and the resulting preventable ill health of women, including maternal mortality and morbidity, can be attributed to the instrumentalization and politicization of women's bodies and health. Insisting on the right to life of zygotes and fetuses and equating this right to the right of a born woman to her life, her health, her autonomy and

her entire personhood by criminalizing termination of pregnancy is one of the most damaging ways of instrumentalizing and politicizing women’s bodies and lives, subjecting them to risks to their lives or health and depriving them of autonomy in decision-making.

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## **ADDENDUM: THE UNITED STATES SUPREME COURT DECISION\***

It is startling to set the U.S. Supreme Court’s decision repudiating the constitutional right to abortion alongside other the constitutional judgments in this chapter. For many courts in the twentieth-first century, the question is whether government has regulated abortion in ways that are consistent with women’s equal citizenship. These courts ask whether government may employ criminal law means first, or even at all, in a constitutional order that is committed to protecting women’s life, liberty, dignity, and equality. As these courts make clear, government has many noncoercive means by which it can protect life, which at a minimum should be employed first, before resort to coercive means that perpetuate historic forms of inequality.\*\*

These concerns and concepts are notably absent from Justice Samuel Alito’s majority opinion, signed in full by four other members of the Court. Overriding strong popular support for preserving abortion rights and for preserving *Roe* (discussed at the outset of this chapter), the Supreme Court pointed to the country’s “history and traditions” as a reason to overrule *Roe v. Wade*—remarkably, much of the same ground on which the Supreme Court had based *Roe* itself. But as Reva Siegel observed in the *Washington Post* the day after the decision, Justice Alito’s “highly selective” account of the nation’s history and traditions was “shaped and whitewashed to justify his desired results.” Nor did the Court ever explain how it was reasonable to derive the meaning of the Constitution’s liberty or equality guarantees from statutes passed at a time when women had no voice or vote in the matter.\*\*\* Rather than an exercise in disinterested

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\* *Dobbs v. Jackson Women’s Health Organization* (2022) was handed down after we finalized the chapter. But given the decision’s far-reaching implications in the United States and its reverberations across borders, we judged it important to include in this addendum to the chapter.

\*\* For an example of this form of equality-inflected reasoning in the United States context, see Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in Dobbs and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUMBIA JOURNAL OF GENDER AND LAW (forthcoming 2023), <https://ssrn.com/abstract=4115569>.

\*\*\* Reva B. Siegel, *The Trump Court Limited Women’s Rights using 19th-century standards*, THE WASHINGTON POST (June 25, 2022, 3:12 PM EDT),

constitutional interpretation, the *Dobbs* decision was the product of a decades-long political project to mobilize conservative voters in support of a party claiming the mantle of “pro-family” and “pro-life” and to populate the Supreme Court with justices who would accomplish the goal of *Roe*’s overturning. As Linda Greenhouse wrote in the *New York Times* on the afternoon of the decision, “They did it because they could. It was as simple as that.”\*

**Dobbs v. Jackson Women’s Health Organization\*\***  
Supreme Court of the United States  
142 S. Ct. 2228 (2022)

Justice ALITO delivered the opinion of the Court.

Abortion presents a profound moral issue on which Americans hold sharply conflicting views. Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life. Others feel just as strongly that any regulation of abortion invades a woman’s right to control her own body and prevents women from achieving full equality. Still others in a third group think that abortion should be allowed under some but not all circumstances, and those within this group hold a variety of views about the particular restrictions that should be imposed.

For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens. Then, in 1973, this Court decided *Roe v. Wade*. Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. It did not claim that American law or the common law had ever recognized such a right, and its survey of history ranged from the constitutionally irrelevant (*e.g.*, its discussion of abortion in antiquity) to the plainly incorrect (*e.g.*, its assertion that abortion was probably never a crime under the common law). After cataloging a wealth of other information having no bearing on the meaning of the Constitution, the opinion concluded with a numbered set of rules much like those that might be found in a statute enacted by a legislature.

Under this scheme, each trimester of pregnancy was regulated differently, but the most critical line was drawn at roughly the end of the second trimester, which, at the time, corresponded to the point at which a fetus was thought to achieve “viability,” *i.e.*, the ability to survive outside the womb. Although the Court acknowledged that States had a legitimate interest in protecting “potential life,” it found that this interest could

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<https://www.washingtonpost.com/outlook/2022/06/25/trump-court-limited-womens-rights-using-19th-century-standards> [<https://perma.cc/8PQP-J84D>].

\* Linda Greenhouse, *Requiem for the Supreme Court*, THE NEW YORK TIMES (June 24, 2022), <https://www.nytimes.com/2022/06/24/opinion/roe-v-wade-dobbs-decision.html> [<https://perma.cc/B4US-KTK9>].

\*\* Edited by Professor Jack M. Balkin.

not justify any restriction on pre-viability abortions. The Court did not explain the basis for this line, and even abortion supporters have found it hard to defend *Roe*'s reasoning. One prominent constitutional scholar wrote that he "would vote for a statute very much like the one the Court end[ed] up drafting" if he were "a legislator," but his assessment of *Roe* was memorable and brutal: *Roe* was "not constitutional law" at all and gave "almost no sense of an obligation to try to be."

At the time of *Roe*, 30 States still prohibited abortion at all stages. In the years prior to that decision, about a third of the States had liberalized their laws, but *Roe* abruptly ended that political process. It imposed the same highly restrictive regime on the entire Nation, and it effectively struck down the abortion laws of every single State. As Justice Byron White aptly put it in his dissent, the decision represented the "exercise of raw judicial power," and it sparked a national controversy that has embittered our political culture for a half century.

Eventually, in *Planned Parenthood of Southeastern Pa. v. Casey* (1992), the Court revisited *Roe*, but the Members of the Court split three ways. Two Justices expressed no desire to change *Roe* in any way. Four others wanted to overrule the decision in its entirety. And the three remaining Justices, who jointly signed the controlling opinion, took a third position. Their opinion did not endorse *Roe*'s reasoning, and it even hinted that one or more of its authors might have "reservations" about whether the Constitution protects a right to abortion. But the opinion concluded that *stare decisis*, which calls for prior decisions to be followed in most instances, required adherence to what it called *Roe*'s "central holding"—that a State may not constitutionally protect fetal life before "viability"—even if that holding was wrong. Anything less, the opinion claimed, would undermine respect for this Court and the rule of law.

Paradoxically, the judgment in *Casey* did a fair amount of overruling. Several important abortion decisions were overruled *in toto*, and *Roe* itself was overruled in part. *Casey* threw out *Roe*'s trimester scheme and substituted a new rule of uncertain origin under which States were forbidden to adopt any regulation that imposed an "undue burden" on a woman's right to have an abortion. The decision provided no clear guidance about the difference between a "due" and an "undue" burden. But the three Justices who authored the controlling opinion "call[ed] the contending sides of a national controversy to end their national division" by treating the Court's decision as the final settlement of the question of the constitutional right to abortion.

As has become increasingly apparent in the intervening years, *Casey* did not achieve that goal. Americans continue to hold passionate and widely divergent views on abortion, and state legislatures have acted accordingly. Some have recently enacted laws allowing abortion, with few restrictions, at all stages of pregnancy. Others have tightly restricted abortion beginning well before viability. And in this case, 26 States

have expressly asked this Court to overrule *Roe* and *Casey* and allow the States to regulate or prohibit pre-viability abortions. . . .

We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.”

The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy. The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment’s protection of “liberty.” *Roe*’s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called “fetal life” and what the law now before us describes as an “unborn human being.”

*Stare decisis*, the doctrine on which *Casey*’s controlling opinion was based, does not compel unending adherence to *Roe*’s abuse of judicial authority. *Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division.

It is time to heed the Constitution and return the issue of abortion to the people’s elected representatives. “The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.” That is what the Constitution and the rule of law demand. . . .

## II

We begin by considering the critical question whether the Constitution, properly understood, confers a right to obtain an abortion. Skipping over that question, the controlling opinion in *Casey* reaffirmed *Roe*’s “central holding” based solely on the doctrine of *stare decisis*, but as we will explain, proper application of *stare decisis* required an assessment of the strength of the grounds on which *Roe* was based.

We therefore turn to the question that the *Casey* plurality did not consider, and we address that question in three steps. First, we explain the standard that our case have



used in determining whether the Fourteenth Amendment’s reference to “liberty” protects a particular right. Second, we examine whether the right at issue in this case is rooted in our Nation’s history and tradition and whether it is an essential component of what we have described as “ordered liberty.” Finally, we consider whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents.

A

Constitutional analysis must begin with “the language of the instrument” . . . . The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text.

*Roe*, however, was remarkably loose in its treatment of the constitutional text. It held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned. And that privacy right, *Roe* observed, had been found to spring from no fewer than five different constitutional provisions—the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. . . .

. . . *Roe* expressed the “feel[ing]” that the Fourteenth Amendment was the provision that did the work, but its message seemed to be that the abortion right could be found somewhere in the Constitution and that specifying its exact location was not of paramount importance. The *Casey* Court did not defend this unfocused analysis and instead grounded its decision solely on the theory that the right to obtain an abortion is part of the “liberty” protected by the Fourteenth Amendment’s Due Process Clause.

. . . [S]ome of respondents’ *amici* have now offered . . . yet another potential home for the abortion right: the Fourteenth Amendment’s Equal Protection Clause. Neither *Roe* nor *Casey* saw fit to invoke this theory, and it is squarely foreclosed by our precedents, which establish that a State’s regulation of abortion is not a sex-based classification and is thus not subject to the “heightened scrutiny” that applies to such classifications. The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a “mere pretext[t] designed to effect an invidious discrimination against members of one sex or the other.” And as the Court has stated, the “goal of preventing abortion” does not constitute “invidiously discriminatory animus” against women. Accordingly, laws regulating or prohibiting abortion are not subject to heightened scrutiny. Rather, they are governed by the same standard of review as other health and safety measures. . . .

With this new theory addressed, we turn to *Casey*’s bold assertion that the abortion right is an aspect of the “liberty” protected by the Due Process Clause of the Fourteenth Amendment.

The underlying theory on which this argument rests—that the Fourteenth Amendment’s Due Process Clause provides substantive, as well as procedural, protection for “liberty”—has long been controversial. But our decisions have held that the Due Process Clause protects two categories of substantive rights.

The first consists of rights guaranteed by the first eight Amendments. . . . [T]his Court has held that the Due Process Clause of the Fourteenth Amendment “incorporates” the great majority of those rights and thus makes them equally applicable to the States. The second category—which is the one in question here—comprises a select list of fundamental rights that are not mentioned anywhere in the Constitution.

In deciding whether a right falls into either of these categories, the Court has long asked whether the right is “deeply rooted in [our] history and tradition” and whether it is essential to our Nation’s “scheme of ordered liberty.” And in conducting this inquiry, we have engaged in a careful analysis of the history of the right at issue. . . .

. . . [I]n *Glucksberg*, which held that the Due Process Clause does not confer a right to assisted suicide, the Court surveyed more than 700 years of “Anglo-American common law tradition,” and made clear that a fundamental right must be “objectively, deeply rooted in this Nation’s history and tradition.” Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the “liberty” protected by the Due Process Clause because the term “liberty” alone provides little guidance. “Liberty” is a capacious term. As Lincoln once said: “We all declare for Liberty; but in using the same word we do not all mean the same thing.” In a well-known essay, Isaiah Berlin reported that “[h]istorians of ideas” had cataloged more than 200 different senses in which the term had been used.

In interpreting what is meant by the Fourteenth Amendment’s reference to “liberty,” we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy. That is why the Court has long been “reluctant” to recognize rights that are not mentioned in the Constitution. . . . As the Court cautioned in *Glucksberg*, “[w]e must . . . exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.”

On occasion, when the Court has ignored the “[a]ppropriate limits” imposed by “respect for the teachings of history,” it has fallen into the freewheeling judicial policymaking that characterized discredited decisions such as *Lochner v. New York* (1905). The Court must not fall prey to such an unprincipled approach. Instead, guided by the history and tradition that map the essential components of our Nation’s concept of ordered liberty, we must ask what the Fourteenth Amendment means by the term

“liberty.” When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion.<sup>22</sup>

B

1

Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed down, no federal or state court had recognized such a right. Nor had any scholarly treatise of which we are aware. And although law review articles are not reticent about advocating new rights, the earliest article proposing a constitutional right to abortion that has come to our attention was published only a few years before *Roe*.

Not only was there no support for such a constitutional right until shortly before *Roe*, but abortion had long been a crime in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow.

*Roe* either ignored or misstated this history, and *Casey* declined to reconsider *Roe*’s faulty historical analysis. It is therefore important to set the record straight.

2

a

We begin with the common law, under which abortion was a crime at least after “quickening”—*i.e.*, the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy. The “eminent common-law authorities (Blackstone, Coke, Hale, and the like),” *all* describe abortion after quickening as criminal. Henry de Bracton’s 13th-century treatise explained that if a person has “struck a pregnant woman, or has given her poison, whereby he has caused abortion, if the foetus be already formed and animated, and particularly if it be animated, he commits homicide.” 2 *De Legibus et Consuetudinibus Angliae* 279 (T. Twiss ed. 1879); see also 1 *Fleta*, c. 23, reprinted in 72 *Selden Soc.* 60–61 (H. Richardson & G.

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<sup>22</sup> That is true regardless of whether we look to the Amendment’s Due Process Clause or its Privileges or Immunities Clause. Some scholars and Justices have maintained that the Privileges or Immunities Clause is the provision of the Fourteenth Amendment that guarantees substantive rights. But even on that view, such a right would need to be rooted in the Nation’s history and tradition.

Sayles eds. 1955) (13th-century treatise). Sir Edward Coke’s 17th-century treatise likewise asserted that abortion of a quick child was “murder” if the “childe be born alive” and a “great misprision” if the “childe dieth in her body.” 3 Institutes of the Laws of England 50–51 (1644). (“Misprision” referred to “some heynous offence under the degree of felony.”) Two treatises by Sir Matthew Hale likewise described abortion of a quick child who died in the womb as a “great crime” and a “great misprision.” Pleas of the Crown 53 (P. Glazebrook ed. 1972); 1 History of the Pleas of the Crown 433 (1736) (Hale). And writing near the time of the adoption of our Constitution, William Blackstone explained that abortion of a “quick” child was “by the ancient law homicide or manslaughter” (citing Bracton), and at least a very “heinous misdemeanor” (citing Coke). 1 Commentaries on the Laws of England 129–130 (7th ed. 1775) (Blackstone). English cases dating all the way back to the 13th century corroborate the treatises’ statements that abortion was a crime. In 1732, for example, Eleanor Beare was convicted of “destroying the Foetus in the Womb” of another woman and “thereby causing her to miscarry.” For that crime and another “misdemeanor,” Beare was sentenced to two days in the pillory and three years’ imprisonment.

Although a pre-quickening abortion was not itself considered homicide, it does not follow that abortion was *permissible* at common law—much less that abortion was a legal *right*. Quite to the contrary, in the 1732 case mentioned above, the judge said of the charge of abortion (with no mention of quickening) that he had “never met with a case so barbarous and unnatural.” Similarly, an indictment from 1602, which did not distinguish between a pre-quickening and post-quickening abortion, described abortion as “pernicious” and “against the peace of our Lady the Queen, her crown and dignity.”

That the common law did not condone even prequickening abortions is confirmed by what one might call a proto-felony-murder rule. Hale and Blackstone explained a way in which a pre-quickening abortion could rise to the level of a homicide. Hale wrote that if a physician gave a woman “with child” a “potion” to cause an abortion, and the woman died, it was “murder” because the potion was given “*unlawfully* to destroy her child within her.” . . .

In sum, although common-law authorities differed on the severity of punishment for abortions committed at different points in pregnancy, none endorsed the practice. Moreover, we are aware of no common-law case or authority, and the parties have not pointed to any, that remotely suggests a positive *right* to procure an abortion at any stage of pregnancy.

b

In this country, the historical record is similar. The “most important early American edition of Blackstone’s Commentaries,” reported Blackstone’s statement that abortion of a quick child was at least “a heinous misdemeanor,” 2 St. George Tucker,

Blackstone's Commentaries 129-130 (1803), and that edition also included Blackstone's discussion of the proto-felony-murder rule. . . .

The few cases available from the early colonial period corroborate that abortion was a crime. . . . And by the 19th century, courts frequently explained that the common law made abortion of a quick child a crime.

c

The original ground for drawing a distinction between pre- and post-quickening abortions is not entirely clear, but some have attributed the rule to the difficulty of proving that a pre-quickening fetus was alive. At that time, there were no scientific methods for detecting pregnancy in its early stages . . . .

The Solicitor General offers a different explanation of the basis for the quickening rule, namely, that before quickening the common law did not regard a fetus "as having a 'separate and independent existence.'" . . . .

At any rate, the original ground for the quickening rule is of little importance for present purposes because the rule was abandoned in the 19th century. During that period, treatise writers and commentators criticized the quickening distinction as "neither in accordance with the result of medical experience, nor with the principles of the common law." In 1803, the British Parliament made abortion a crime at all stages of pregnancy and authorized the imposition of severe punishment. One scholar has suggested that Parliament's decision "may partly have been attributable to the medical man's concern that fetal life should be protected by the law at all stages of gestation."

In this country during the 19th century, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy. By 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening. Of the nine States that had not yet criminalized abortion at all stages, all but one did so by 1910. . . .

This overwhelming consensus endured until the day *Roe* was decided. At that time, also by the *Roe* Court's own count, a substantial majority—30 States—still prohibited abortion at all stages except to save the life of the mother. And though *Roe* discerned a "trend toward liberalization" in about "one-third of the States," those States still criminalized some abortions and regulated them more stringently than *Roe* would allow. In short, the "Court's opinion in *Roe* itself convincingly refutes the notion that the abortion liberty is deeply rooted in the history or tradition of our people."

d

The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation’s history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973. The Court in *Roe* could have said of abortion exactly what *Glucksberg* said of assisted suicide: “Attitudes toward [abortion] have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, [that practice].”

3

Respondents and their *amici* have no persuasive answer to this historical evidence.

Neither respondents nor the Solicitor General disputes the fact that by 1868 the vast majority of States criminalized abortion at all stages of pregnancy. Instead, respondents are forced to argue that it “does [not] matter that some States prohibited abortion at the time *Roe* was decided or when the Fourteenth Amendment was adopted.” But that argument flies in the face of the standard we have applied in determining whether an asserted right that is nowhere mentioned in the Constitution is nevertheless protected by the Fourteenth Amendment.

Not only are respondents and their *amici* unable to show that a constitutional right to abortion was established when the Fourteenth Amendment was adopted, but they have found no support for the existence of an abortion right that predates the latter part of the 20th century—no state constitutional provision, no statute, no judicial decision, no learned treatise. The earliest sources called to our attention are a few district court and state court decisions decided shortly before *Roe* and a small number of law review articles from the same time period.

A few of respondents’ *amici* muster historical arguments, but they are very weak. The Solicitor General repeats *Roe*’s claim that it is “ ‘doubtful’ . . . ‘abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus.’ ” But as we have seen, great common-law authorities like Bracton, Coke, Hale, and Blackstone all wrote that a post-quickening abortion was a crime—and a serious one at that. Moreover, Hale and Blackstone (and many other authorities following them) asserted that even a pre-quickening abortion was “unlawful” and that, as a result, an abortionist was guilty of murder if the woman died from the attempt. . . .

The Solicitor General next suggests that history supports an abortion right because the common law’s failure to criminalize abortion before quickening means that “at the Founding and for decades thereafter, women generally could terminate a pregnancy, at least in its early stages.”<sup>40</sup> But the insistence on quickening was not

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<sup>40</sup> In any event, *Roe*, *Casey*, and other related abortion decisions imposed substantial restrictions on a State’s capacity to regulate abortions performed after quickening. . . .

universal, see *Mills v. Commonwealth* (1850); *State v. Slagle* (1880), and regardless, the fact that many States in the late 18th and early 19th century did not criminalize pre-quickenings abortions does not mean that anyone thought the States lacked the authority to do so. When legislatures began to exercise that authority as the century wore on, no one, as far as we are aware, argued that the laws they enacted violated a fundamental right. That is not surprising since common-law authorities had repeatedly condemned abortion and described it as an “unlawful” act without regard to whether it occurred before or after quickening. . . .

C

1

Instead of seriously pressing the argument that the abortion right itself has deep roots, supporters of *Roe* and *Casey* contend that the abortion right is an integral part of a broader entrenched right. *Roe* termed this a right to privacy, and *Casey* described it as the freedom to make “intimate and personal choices” that are “central to personal dignity and autonomy,” *Casey* elaborated: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”

The Court did not claim that this broadly framed right is absolute, and no such claim would be plausible. . . .

Ordered liberty sets limits and defines the boundary between competing interests. *Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed “potential life.” But the people of the various States may evaluate those interests differently. In some States, voters may believe that the abortion right should be even more extensive than the right that *Roe* and *Casey* recognized. Voters in other States may wish to impose tight restrictions based on their belief that abortion destroys an “unborn human being.” Our Nation’s historical understanding of ordered liberty does not prevent the people’s elected representatives from deciding how abortion should be regulated.

Nor does the right to obtain an abortion have a sound basis in precedent. *Casey* relied on cases involving the right to marry a person of a different race, *Loving v. Virginia* (1967); the right to marry while in prison, *Turner v. Safley* (1987); the right to obtain contraceptives, *Griswold v. Connecticut* (1965), *Eisenstadt v. Baird* (1972), *Carey v. Population Services Int’l* (1977); the right to reside with relatives, *Moore v. East Cleveland* (1977); the right to make decisions about the education of one’s children, *Pierce v. Society of Sisters* (1925), *Meyer v. Nebraska* (1923); the right not to be sterilized without consent, *Skinner v. Oklahoma ex rel. Williamson* (1942); and the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures, *Winston v. Lee* (1985), *Washington*

*v. Harper* (1990), *Rochin v. California* (1952). Respondents and the Solicitor General also rely on post-*Casey* decisions like *Lawrence v. Texas* (2003) (right to engage in private, consensual sexual acts), and *Obergefell v. Hodges* (2015) (right to marry a person of the same sex).

These attempts to justify abortion through appeals to a broader right to autonomy and to define one's "concept of existence" prove too much. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. None of these rights has any claim to being deeply rooted in history.

What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call "potential life" and what the law at issue in this case regards as the life of an "unborn human being." None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite. They do not support the right to obtain an abortion, and by the same token, our conclusion that the Constitution does not confer such a right does not undermine them in any way.

2

In drawing this critical distinction between the abortion right and other rights, it is not necessary to dispute *Casey's* claim (which we accept for the sake of argument) that "the specific practices of States at the time of the adoption of the Fourteenth Amendment" do not "mar[k] the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." Abortion is nothing new. It has been addressed by lawmakers for centuries, and the fundamental moral question that it poses is ageless.

Defenders of *Roe* and *Casey* do not claim that any new scientific learning calls for a different answer to the underlying moral question, but they do contend that changes in society require the recognition of a constitutional right to obtain an abortion. Without the availability of abortion, they maintain, people will be inhibited from exercising their freedom to choose the types of relationships they desire, and women will be unable to compete with men in the workplace and in other endeavors.

Americans who believe that abortion should be restricted press countervailing arguments about modern developments. They note that attitudes about the pregnancy of unmarried women have changed drastically; that federal and state laws ban discrimination on the basis of pregnancy; that leave for pregnancy and childbirth are now guaranteed by law in many cases; that the costs of medical care associated with pregnancy are covered by insurance or government assistance; that States have increasingly adopted "safe haven" laws, which generally allow women to drop off babies anonymously; and that a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home. They also claim that



many people now have a new appreciation of fetal life and that when prospective parents who want to have a child view a sonogram, they typically have no doubt that what they see is their daughter or son.

Both sides make important policy arguments, but supporters of *Roe* and *Casey* must show that this Court has the authority to weigh those arguments and decide how abortion may be regulated in the States. They have failed to make that showing, and we thus return the power to weigh those arguments to the people and their elected representatives.

D

1

The dissent is very candid that it cannot show that a constitutional right to abortion has any foundation, let alone a “deeply rooted” one, “in this Nation’s history and tradition.” The dissent does not identify any pre-*Roe* authority that supports such a right—no state constitutional provision or statute, no federal or state judicial precedent, not even a scholarly treatise. Nor does the dissent dispute the fact that abortion was illegal at common law at least after quickening; that the 19th century saw a trend toward criminalization of pre-quickening abortions; that by 1868, a supermajority of States (at least 26 of 37) had enacted statutes criminalizing abortion at all stages of pregnancy; that by the late 1950s at least 46 States prohibited abortion “however and whenever performed” except if necessary to save “the life of the mother;” and that when *Roe* was decided in 1973 similar statutes were still in effect in 30 States.<sup>47</sup>

The dissent’s failure to engage with this long tradition is devastating to its position. We have held that the “established method of substantive-due-process analysis” requires that an unenumerated right be “deeply rooted in this Nation’s history and tradition” before it can be recognized as a component of the “liberty” protected in the Due Process Clause. But despite the dissent’s professed fidelity to *stare decisis*, it fails to seriously engage with that important precedent—which it cannot possibly satisfy.

The dissent attempts to obscure this failure by misrepresenting our application of *Glucksberg*. The dissent suggests that we have focused only on “the legal status of abortion in the 19th century,” but our review of this Nation’s tradition extends well past that period. As explained, for more than a century after 1868—including “another half-century” after women gained the constitutional right to vote in 1920, it was firmly established that laws prohibiting abortion like the Texas law at issue in *Roe* were permissible exercises of state regulatory authority. And today, another half century later,

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<sup>47</sup> By way of contrast, at the time *Griswold v. Connecticut* (1965), was decided, the Connecticut statute at issue was an extreme outlier.

more than half of the States have asked us to overrule *Roe* and *Casey*. The dissent cannot establish that a right to abortion has ever been part of this Nation's tradition.

2

Because the dissent cannot argue that the abortion right is rooted in this Nation's history and tradition, it contends that the "constitutional tradition" is "not captured whole at a single moment," and that its "meaning gains content from the long sweep of our history and from successive judicial precedents." This vague formulation imposes no clear restraints on what Justice White called the "exercise of raw judicial power," and while the dissent claims that its standard "does not mean anything goes," any real restraints are hard to discern.

. . . First, if the "long sweep of history" imposes any restraint on the recognition of unenumerated rights, then *Roe* was surely wrong, since abortion was never allowed (except to save the life of the mother) in a majority of States for over 100 years before that decision was handed down. Second, it is impossible to defend *Roe* based on prior precedent because all of the precedents *Roe* cited, including *Griswold* and *Eisenstadt*, were critically different for a reason that we have explained: None of those cases involved the destruction of what *Roe* called "potential life."

So without support in history or relevant precedent, *Roe*'s reasoning cannot be defended even under the dissent's proposed test, and the dissent is forced to rely solely on the fact that a constitutional right to abortion was recognized in *Roe* and later decisions that accepted *Roe*'s interpretation. . . . But as the Court has reiterated time and time again, adherence to precedent is not "an inexorable command." There are occasions when past decisions should be overruled, and as we will explain, this is one of them.

3

The most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States' interest in protecting fetal life. This is evident in the analogy that the dissent draws between the abortion right and the rights recognized in *Griswold* (contraception), *Eisenstadt* (same), *Lawrence* (sexual conduct with member of the same sex), and *Obergefell* (same-sex marriage). Perhaps this is designed to stoke unfounded fear that our decision will imperil those other rights, but the dissent's analogy is objectionable for a more important reason: what it reveals about the dissent's views on the protection of what *Roe* called "potential life." The exercise of the rights at issue in *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell* does not destroy a "potential life," but an abortion has that effect. So if the rights at issue in those cases are fundamentally the same as the right recognized in *Roe* and *Casey*, the implication is clear: The Constitution does not permit the States to regard the destruction of a "potential life" as a matter of any significance.

That view is evident throughout the dissent. The dissent has much to say about the effects of pregnancy on women, the burdens of motherhood, and the difficulties faced by poor women. These are important concerns. However, the dissent evinces no similar regard for a State’s interest in protecting prenatal life. The dissent repeatedly praises the “balance,” that the viability line strikes between a woman’s liberty interest and the State’s interest in prenatal life. . . . But . . . the viability line makes no sense. It was not adequately justified in *Roe*, and the dissent does not even try to defend it today. Nor does it identify any other point in a pregnancy after which a State is permitted to prohibit the destruction of a fetus.

Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth. The dissent, by contrast, would impose on the people a particular theory about when the rights of personhood begin. According to the dissent, the Constitution *requires* the States to regard a fetus as lacking even the most basic human right—to live—at least until an arbitrary point in a pregnancy has passed. Nothing in the Constitution or in our Nation’s legal traditions authorizes the Court to adopt that “theory of life.”

### III

We next consider whether the doctrine of *stare decisis* counsels continued acceptance of *Roe* and *Casey*. *Stare decisis* plays an important role in our case law, and we have explained that it serves many valuable ends. It protects the interests of those who have taken action in reliance on a past decision. It “reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation.” It fosters “evenhanded” decisionmaking by requiring that like cases be decided in a like manner. It “contributes to the actual and perceived integrity of the judicial process.” And it restrains judicial hubris and reminds us to respect the judgment of those who have grappled with important questions in the past. . . .

[But s]ome of our most important constitutional decisions have overruled prior precedents. [citing as examples *Brown v. Board of Education* (1954), *West Coast Hotel v. Parrish* (1937), and *West Virginia Bd. of Ed. v. Barnette* (1943).] . . . .

On many other occasions, this Court has overruled important constitutional decisions. . . . Without these decisions, American constitutional law as we know it would be unrecognizable, and this would be a different country.

. . . Our cases have attempted to provide a framework for deciding when a precedent should be overruled, and they have identified factors that should be considered in making such a decision.

In this case, five factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the “workability” of the rules

they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.

A

*The nature of the Court's error.* An erroneous interpretation of the Constitution is always important, but some are more damaging than others.

The infamous decision in *Plessy v. Ferguson* (1896), was one such decision. . . . It was “egregiously wrong” on the day it was decided . . . .

*Roe* was also egregiously wrong and deeply damaging. . . . *Roe's* constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed.

*Roe* was on a collision course with the Constitution from the day it was decided, *Casey* perpetuated its errors . . . . [W]ielding nothing but “raw judicial power,” the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people. *Casey* described itself as calling both sides of the national controversy to resolve their debate, but in doing so, *Casey* necessarily declared a winning side. Those on the losing side—those who sought to advance the State's interest in fetal life—could no longer seek to persuade their elected representatives to adopt policies consistent with their views. The Court short-circuited the democratic process by closing it to the large number of Americans who dissented in any respect from *Roe*. “*Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since.” Together, *Roe* and *Casey* represent an error that cannot be allowed to stand. . . .

B

*The quality of the reasoning.* . . .

*Roe* found that the Constitution implicitly conferred a right to obtain an abortion, but it failed to ground its decision in text, history, or precedent. It relied on an erroneous historical narrative; it devoted great attention to and presumably relied on matters that have no bearing on the meaning of the Constitution; it disregarded the fundamental difference between the precedents on which it relied and the question before the Court; it concocted an elaborate set of rules, with different restrictions for each trimester of pregnancy, but it did not explain how this veritable code could be teased out of anything in the Constitution, the history of abortion laws, prior precedent, or any other cited source; and its most important rule (that States cannot protect fetal life prior to “viability”) was never raised by any party and has never been plausibly explained. *Roe's*

reasoning quickly drew scathing scholarly criticism, even from supporters of broad access to abortion.

The *Casey* plurality, while reaffirming *Roe*'s central holding, pointedly refrained from endorsing most of its reasoning. It revised the textual basis for the abortion right, silently abandoned *Roe*'s erroneous historical narrative, and jettisoned the trimester framework. But it replaced that scheme with an arbitrary "undue burden" test and relied on an exceptional version of *stare decisis* that, as explained below, this Court had never before applied and has never invoked since.

1

a

The weaknesses in *Roe*'s reasoning are well-known. Without any grounding in the constitutional text, history, or precedent, it imposed on the entire country a detailed set of rules much like those that one might expect to find in a statute or regulation. . . .

This elaborate scheme was the Court's own brainchild. Neither party advocated the trimester framework; nor did either party or any amicus argue that "viability" should mark the point at which the scope of the abortion right and a State's regulatory authority should be substantially transformed.

b

Not only did this scheme resemble the work of a legislature, but the Court made little effort to explain how these rules could be deduced from any of the sources on which constitutional decisions are usually based. . . .

*Roe* featured a lengthy survey of history, but much of its discussion was irrelevant, and the Court made no effort to explain why it was included. . . . When it came to the most important historical fact—how the States regulated abortion when the Fourteenth Amendment was adopted—the Court said almost nothing. It allowed that States had tightened their abortion laws "in the middle and late 19th century," but it implied that these laws might have been enacted not to protect fetal life but to further "a Victorian social concern" about "illicit sexual conduct."

*Roe*'s failure even to note the overwhelming consensus of state laws in effect in 1868 is striking, and what it said about the common law was simply wrong. . . .

After surveying history, the opinion spent many paragraphs conducting the sort of fact-finding that might be undertaken by a legislative committee. This included a lengthy account of the "position of the American Medical Association" and "[t]he position of the American Public Health Association," as well as the vote by the American Bar Association's House of Delegates in February 1972 on proposed abortion

legislation. Also noted were a British judicial decision handed down in 1939 and a new British abortion law enacted in 1967. The Court did not explain why these sources shed light on the meaning of the Constitution, and not one of them adopted or advocated anything like the scheme that *Roe* imposed on the country.

Finally, after all this, the Court turned to precedent. Citing a broad array of cases, the Court found support for a constitutional “right of personal privacy,” but it conflated two very different meanings of the term: the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference. Only the cases involving this second sense of the term could have any possible relevance to the abortion issue, and some of the cases in that category involved personal decisions that were obviously very, very far afield. See *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary* (1925) (right to send children to religious school); *Meyer v. Nebraska* (1923) (right to have children receive German language instruction).

What remained was a handful of cases having something to do with marriage, *Loving* (right to marry a person of a different race), or procreation, *Skinner* (right not to be sterilized); *Griswold* (right of married persons to obtain contraceptives); *Eisenstadt* (same, for unmarried persons). But none of these decisions involved what is distinctive about abortion: its effect on what *Roe* termed “potential life.”

When the Court summarized the basis for the scheme it imposed on the country, it asserted that its rules were “consistent with” the following: (1) “the relative weights of the respective interests involved,” (2) “the lessons and examples of medical and legal history,” (3) “the lenity of the common law,” and (4) “the demands of the profound problems of the present day.” Put aside the second and third factors, which were based on the Court’s flawed account of history, and what remains are precisely the sort of considerations that legislative bodies often take into account when they draw lines that accommodate competing interests. The scheme *Roe* produced looked like legislation, and the Court provided the sort of explanation that might be expected from a legislative body.

c

What *Roe* did not provide was any cogent justification for the lines it drew. Why, for example, does a State have no authority to regulate first trimester abortions for the purpose of protecting a woman’s health? The Court’s only explanation was that mortality rates for abortion at that stage were lower than the mortality rates for childbirth. But the Court did not explain why mortality rates were the only factor that a State could legitimately consider. Many health and safety regulations aim to avoid adverse health consequences short of death. And the Court did not explain why it departed from the normal rule that courts defer to the judgments of legislatures “in areas fraught with medical and scientific uncertainties.”

An even more glaring deficiency was *Roe*'s failure to justify the critical distinction it drew between pre- and post-viability abortions. Here is the Court's entire explanation:

With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the womb.

. . . [T]he definition of a "viable" fetus is one that is capable of surviving outside the womb, but why is this the point at which the State's interest becomes compelling? If, as *Roe* held, a State's interest in protecting prenatal life is compelling "after viability," why isn't that interest "equally compelling before viability"? *Roe* did not say, and no explanation is apparent.

This arbitrary line has not found much support among philosophers and ethicists who have attempted to justify a right to abortion. Some have argued that a fetus should not be entitled to legal protection until it acquires the characteristics that they regard as defining what it means to be a "person." Among the characteristics that have been offered as essential attributes of "personhood" are sentience, self-awareness, the ability to reason, or some combination thereof. By this logic, it would be an open question whether even born individuals, including young children or those afflicted with certain developmental or medical conditions, merit protection as "persons." But even if one takes the view that "personhood" begins when a certain attribute or combination of attributes is acquired, it is very hard to see why viability should mark the point where "personhood" begins.

The most obvious problem with any such argument is that viability is heavily dependent on factors that have nothing to do with the characteristics of a fetus. One is the state of neonatal care at a particular point in time. Due to the development of new equipment and improved practices, the viability line has changed over the years. In the 19th century, a fetus may not have been viable until the 32d or 33d week of pregnancy or even later. When *Roe* was decided, viability was gauged at roughly 28 weeks. Today, respondents draw the line at 23 or 24 weeks. So, according to *Roe*'s logic, States now have a compelling interest in protecting a fetus with a gestational age of, say, 26 weeks, but in 1973 States did not have an interest in protecting an identical fetus. How can that be?

Viability also depends on the "quality of the available medical facilities." Thus, a 24-week-old fetus may be viable if a woman gives birth in a city with hospitals that provide advanced care for very premature babies, but if the woman travels to a remote area far from any such hospital, the fetus may no longer be viable. On what ground could the constitutional status of a fetus depend on the pregnant woman's location? And if viability is meant to mark a line having universal moral significance, can it be that a

fetus that is viable in a big city in the United States has a privileged moral status not enjoyed by an identical fetus in a remote area of a poor country?

In addition, as the Court once explained, viability is not really a hard-and-fast line. A physician determining a particular fetus's odds of surviving outside the womb must consider "a number of variables," including "gestational age," "fetal weight," a woman's "general health and nutrition," the "quality of the available medical facilities," and other factors. It is thus "only with difficulty" that a physician can estimate the "probability" of a particular fetus's survival. And even if each fetus's probability of survival could be ascertained with certainty, settling on a "probabilit[y] of survival" that should count as "viability" is another matter. Is a fetus viable with a 10 percent chance of survival? 25 percent? 50 percent? Can such a judgment be made by a State? And can a State specify a gestational age limit that applies in all cases? Or must these difficult questions be left entirely to the individual "attending physician on the particular facts of the case before him"?

The viability line, which *Casey* termed *Roe*'s central rule, makes no sense, and it is telling that other countries almost uniformly eschew such a line. The Court thus asserted raw judicial power to impose, as a matter of constitutional law, a uniform viability rule that allowed the States less freedom to regulate abortion than the majority of western democracies enjoy. . . .

2

When *Casey* revisited *Roe* almost 20 years later, very little of *Roe*'s reasoning was defended or preserved. The Court abandoned any reliance on a privacy right and instead grounded the abortion right entirely on the Fourteenth Amendment's Due Process Clause. . . .

The Court also made no real effort to remedy one of the greatest weaknesses in *Roe*'s analysis: its much-criticized discussion of viability. The Court retained what it called *Roe*'s "central holding"—that a State may not regulate pre-viability abortions for the purpose of protecting fetal life—but it provided no principled defense of the viability line. Instead, it merely rephrased what *Roe* had said, stating that viability marked the point at which "the independent existence of a second life can in reason and fairness be the object of state protection that now overrides the rights of the woman." Why "reason and fairness" demanded that the line be drawn at viability the Court did not explain. And the Justices who authored the controlling opinion conspicuously failed to say that they agreed with the viability rule; instead, they candidly acknowledged "the reservations [some] of us may have in reaffirming [that] holding of *Roe*."

The controlling opinion criticized and rejected *Roe*'s trimester scheme, and substituted a new "undue burden" test, but the basis for this test was obscure. And as we will explain, the test is full of ambiguities and is difficult to apply.



*Casey*, in short, either refused to reaffirm or rejected important aspects of *Roe*'s analysis, failed to remedy glaring deficiencies in *Roe*'s reasoning, endorsed what it termed *Roe*'s central holding while suggesting that a majority might not have thought it was correct, provided no new support for the abortion right other than *Roe*'s status as precedent, and imposed a new and problematic test with no firm grounding in constitutional text, history, or precedent.

As discussed below, *Casey* also deployed a novel version of the doctrine of *stare decisis*. This new doctrine did not account for the profound wrongness of the decision in *Roe*, and placed great weight on an intangible form of reliance with little if any basis in prior case law. *Stare decisis* does not command the preservation of such a decision.

## C

*Workability*. Our precedents counsel that another important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner. *Casey*'s “undue burden” test has scored poorly on the workability scale.

## 1

Problems begin with the very concept of an “undue burden.” As Justice Scalia noted in his *Casey* partial dissent, determining whether a burden is “due” or “undue” is “inherently standardless.”

The *Casey* plurality tried to put meaning into the “undue burden” test by setting out three subsidiary rules, but these rules created their own problems. The first rule is that “a provision of law is invalid, if its purpose or effect is to place a *substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability.” But whether a particular obstacle qualifies as “substantial” is often open to reasonable debate. In the sense relevant here, “substantial” means “of ample or considerable amount, quantity, or size.” Huge burdens are plainly “substantial,” and trivial ones are not, but in between these extremes, there is a wide gray area.

. . . [T]he second rule, which applies at all stages of a pregnancy, muddies things further. It states that measures designed “to ensure that the woman’s choice is informed” are constitutional so long as they do not impose “an undue burden on the right.” To the extent that this rule applies to pre-viability abortions, it overlaps with the first rule and appears to impose a different standard. Consider a law that imposes an insubstantial obstacle but serves little purpose. As applied to a pre-viability abortion, would such a regulation be constitutional on the ground that it does not impose a “*substantial obstacle*”? Or would it be unconstitutional on the ground that it creates an “*undue*

burden” because the burden it imposes, though slight, outweighs its negligible benefits? *Casey* does not say, and this ambiguity would lead to confusion down the line.

The third rule complicates the picture even more. Under that rule, “[u]nnecessary health regulations that have the purpose or effect of presenting a *substantial obstacle* to a woman seeking an abortion impose an *undue burden* on the right.” . . . The term “necessary” has a range of meanings—from “essential” to merely “useful.” *Casey* did not explain the sense in which the term is used in this rule.

. . . [A]ll three rules . . . call on courts to examine a law’s effect on women, but a regulation may have a very different impact on different women for a variety of reasons, including their places of residence, financial resources, family situations, work and personal obligations, knowledge about fetal development and abortion, psychological and emotional disposition and condition, and the firmness of their desire to obtain abortions. In order to determine whether a regulation presents a substantial obstacle to women, a court needs to know which set of women it should have in mind and how many of the women in this set must find that an obstacle is “substantial.”

*Casey* provided no clear answer to these questions. It said that a regulation is unconstitutional if it imposes a substantial obstacle “in a large fraction of cases in which [it] is relevant,” but there is obviously no clear line between a fraction that is “large” and one that is not. Nor is it clear what the Court meant by “cases in which” a regulation is “relevant.” These ambiguities have caused confusion and disagreement.

2

The difficulty of applying *Casey*’s new rules surfaced in that very case. The controlling opinion found that Pennsylvania’s 24-hour waiting period requirement and its informed-consent provision did not impose “undue burden[s],” but Justice Stevens, applying the same test, reached the opposite result. . . .

The ambiguity of the “undue burden” test also produced disagreement in later cases. In *Whole Woman’s Health*, the Court adopted the cost-benefit interpretation of the test, stating that “[t]he rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.” But five years later, a majority of the Justices rejected that interpretation. Four Justices reaffirmed *Whole Woman’s Health*’s instruction to “weigh” a law’s “benefits” against “the burdens it imposes on abortion access.” But THE CHIEF JUSTICE—who cast the deciding vote—argued that “[n]othing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts.” And the four Justices in dissent rejected the plurality’s interpretation of *Casey*. . . .

3

The experience of the Courts of Appeals provides further evidence that *Casey*'s "line between" permissible and unconstitutional restrictions "has proved to be impossible to draw with precision." . . .

The Courts of Appeals have experienced particular difficulty in applying the large-fraction-of-relevant-cases test. They have criticized the assignment while reaching unpredictable results. And they have candidly outlined *Casey*'s many other problems.

*Casey*'s "undue burden" test has proved to be unworkable. . . . Continued adherence to that standard would undermine, not advance, the "evenhanded, predictable, and consistent development of legal principles."

#### D

*Effect on other areas of law.* *Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those decisions.

Members of this Court have repeatedly lamented that "no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion."

The Court's abortion cases have diluted the strict standard for facial constitutional challenges. They have ignored the Court's third-party standing doctrine. They have disregarded standard *res judicata* principles. They have flouted the ordinary rules on the severability of unconstitutional provisions, as well as the rule that statutes should be read where possible to avoid unconstitutionality. And they have distorted First Amendment doctrines.

When vindicating a doctrinal innovation requires courts to engineer exceptions to longstanding background rules, the doctrine "has failed to deliver the 'principled and intelligible' development of the law that *stare decisis* purports to secure."

#### E

*Reliance interests.* We last consider whether overruling *Roe* and *Casey* will upend substantial reliance interests.

#### 1

Traditional reliance interests arise "where advance planning of great precision is most obviously a necessity." In *Casey*, the controlling opinion conceded that those traditional reliance interests were not implicated because getting an abortion is generally "unplanned activity," and "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions." . . . [W]e agree

with the *Casey* plurality that conventional, concrete reliance interests are not present here.

2

Unable to find reliance in the conventional sense, the controlling opinion in *Casey* perceived a more intangible form of reliance. It wrote that “people [had] organized intimate relationships and made choices that define their views of themselves and their places in society . . . in reliance on the availability of abortion in the event that contraception should fail” and that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” But this Court is ill-equipped to assess “generalized assertions about the national psyche.” *Casey*’s notion of reliance thus finds little support in our cases, which instead emphasize very concrete reliance interests, like those that develop in “cases involving property and contract rights.”

When a concrete reliance interest is asserted, courts are equipped to evaluate the claim, but assessing the novel and intangible form of reliance endorsed by the *Casey* plurality is another matter. That form of reliance depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women. The contending sides in this case make impassioned and conflicting arguments about the effects of the abortion right on the lives of women. The contending sides also make conflicting arguments about the status of the fetus. This Court has neither the authority nor the expertise to adjudicate those disputes, and the *Casey* plurality’s speculations and weighing of the relative importance of the fetus and mother represent a departure from the “original constitutional proposition” that “courts do not substitute their social and economic beliefs for the judgment of legislative bodies.”

Women are not without electoral or political power. It is noteworthy that the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so. In the last election in November 2020, women, who make up around 51.5 percent of the population of Mississippi, constituted 55.5 percent of the voters who cast ballots.

3

Unable to show concrete reliance on *Roe* and *Casey* themselves, the Solicitor General suggests that overruling those decisions would “threaten the Court’s precedents holding that the Due Process Clause protects other rights.” (citing *Obergefell*, *Lawrence*, and *Griswold*). . . .As even the *Casey* plurality recognized, “[a]bortion is a unique act” because it terminates “life or potential life.” And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the

constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.

#### IV

Having shown that traditional *stare decisis* factors do not weigh in favor of retaining *Roe* or *Casey*, we must address one final argument that featured prominently in the *Casey* plurality opinion.

The argument was cast in different terms, but stated simply, it was essentially as follows. The American people’s belief in the rule of law would be shaken if they lost respect for this Court as an institution that decides important cases based on principle, not “social and political pressures.” There is a special danger that the public will perceive a decision as having been made for unprincipled reasons when the Court overrules a controversial “watershed” decision, such as *Roe*. A decision overruling *Roe* would be perceived as having been made “under fire” and as a “surrender to political pressure,” and therefore the preservation of public approval of the Court weighs heavily in favor of retaining *Roe*.

. . . The *Casey* plurality was certainly right that it is important for the public to perceive that our decisions are based on principle, and we should make every effort to achieve that objective by issuing opinions that carefully show how a proper understanding of the law leads to the results we reach. But we cannot exceed the scope of our authority under the Constitution, and we cannot allow our decisions to be affected by any extraneous influences such as concern about the public’s reaction to our work. That is true both when we initially decide a constitutional issue and when we consider whether to overrule a prior decision. As Chief Justice Rehnquist explained, “The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution. The doctrine of *stare decisis* is an adjunct of this duty, and should be no more subject to the vagaries of public opinion than is the basic judicial task.” . . .

The *Casey* plurality “call[ed] the contending sides of a national controversy to end their national division,” and claimed the authority to impose a permanent settlement of the issue of a constitutional abortion right simply by saying that the matter was closed. That unprecedented claim exceeded the power vested in us by the Constitution. . . . A precedent of this Court is subject to the usual principles of *stare decisis* under which adherence to precedent is the norm but not an inexorable command. If the rule were otherwise, erroneous decisions like *Plessy* and *Lochner* would still be the law. That is not how *stare decisis* operates.

The *Casey* plurality also misjudged the practical limits of this Court’s influence. *Roe* certainly did not succeed in ending division on the issue of abortion. On the

contrary, *Roe* “inflamed” a national issue that has remained bitterly divisive for the past half century. And for the past 30 years, *Casey* has done the same.

Neither decision has ended debate over the issue of a constitutional right to obtain an abortion. Indeed, in this case, 26 States expressly ask us to overrule *Roe* and *Casey* and to return the issue of abortion to the people and their elected representatives. This Court’s inability to end debate on the issue should not have been surprising. This Court cannot bring about the permanent resolution of a rancorous national controversy simply by dictating a settlement and telling the people to move on. Whatever influence the Court may have on public attitudes must stem from the strength of our opinions, not an attempt to exercise “raw judicial power.”

We do not pretend to know how our political system or society will respond to today’s decision overruling *Roe* and *Casey*. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision. We can only do our job, which is to interpret the law, apply longstanding principles of *stare decisis*, and decide this case accordingly.

We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.

V

A

1

The dissent argues . . . that the Court should never (or perhaps almost never) overrule an egregiously wrong constitutional precedent unless the Court can “poin[t] to major legal or factual changes undermining [the] decision’s original basis.” . . . [T]he dissent claims that *Brown v. Board of Education*, and other landmark cases overruling prior precedents “responded to changed law and to changed facts and attitudes that had taken hold throughout society.” The unmistakable implication of this argument is that only the passage of time and new developments justified those decisions. Recognition that the cases they overruled were egregiously wrong on the day they were handed down was not enough.

The Court has never adopted this strange new version of *stare decisis*—and with good reason. Does the dissent really maintain that overruling *Plessy* was not justified until the country had experienced more than a half-century of state-sanctioned segregation and generations of Black school children had suffered all its effects?

Here is another example. On the dissent's view, it must have been wrong for *Barnette* to overrule *Minersville School Dist. v. Gobitis* (1940), a bare three years after it was handed down. In both cases, children who were Jehovah's Witnesses refused on religious grounds to salute the flag or recite the pledge of allegiance. The *Barnette* Court did not factual developments, so if the Court had followed the dissent's new version of *stare decisis*, it would have been compelled to adhere to *Gobitis* and countenance continued First Amendment violations for some unspecified period.

Precedents should be respected, but sometimes the Court errs, and occasionally the Court issues an important decision that is egregiously wrong. When that happens, *stare decisis* is not a straitjacket. And indeed, the dissent eventually admits that a decision could "be overruled just because it is terribly wrong," though the dissent does not explain when that would be so. . . .

B

1

. . . [The Chief Justice, concurring in the judgment] would "leave for another day whether to reject any right to an abortion at all," and would hold only that if the Constitution protects any such right, the right ends once women have had "a reasonable opportunity" to obtain an abortion. The concurrence does not specify what period of time is sufficient to provide such an opportunity, but it would hold that 15 weeks, the period allowed under Mississippi's law, is enough—at least "absent rare circumstances."

There are serious problems with this approach, and it is revealing that nothing like it was recommended by either party. . . . [B]oth parties and the Solicitor General have urged us either to reaffirm or overrule *Roe* and *Casey*. And when the specific approach advanced by the concurrence was broached at oral argument, both respondents and the Solicitor General emphatically rejected it. . . . The concurrence would do exactly what it criticizes *Roe* for doing: pulling "out of thin air" a test that "[n]o party or amicus asked the Court to adopt."

2

The concurrence's most fundamental defect is its failure to offer any principled basis for its approach. . . . [The viability] rule was a critical component of the holdings in *Roe* and *Casey*, and *stare decisis* is "a doctrine of preservation, not transformation." Therefore, a new rule that discards the viability rule cannot be defended on *stare decisis* grounds. . . .

. . . If [the Chief Justice's proposed] rule is to become the law of the land, it must stand on its own, but the concurrence makes no attempt to show that this rule represents

a correct interpretation of the Constitution. The concurrence does not claim that the right to a reasonable opportunity to obtain an abortion is “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.” Nor does it propound any other theory that could show that the Constitution supports its new rule. And if the Constitution protects a woman’s right to obtain an abortion, the opinion does not explain why that right should end after the point at which all “reasonable” women will have decided whether to seek an abortion. While the concurrence is moved by a desire for judicial minimalism, “we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right.” . . .

3

. . . [I]f we held only that Mississippi’s 15-week rule is constitutional, we would soon be called upon to pass on the constitutionality of a panoply of laws with shorter deadlines or no deadline at all. The “measured course” charted by the concurrence would be fraught with turmoil until the Court answered the question that the concurrence seeks to defer.

. . . [I]f the period required to give women a “reasonable” opportunity to obtain an abortion were pegged, as the concurrence seems to suggest, at the point when a certain percentage of women make that choice, we would have to identify the relevant percentage. It would also be necessary to explain what the concurrence means when it refers to “rare circumstances” that might justify an exception. And if this new right aims to give women a reasonable opportunity to get an abortion, it would be necessary to decide whether factors other than promptness in deciding might have a bearing on whether such an opportunity was available.

In sum, the concurrence’s quest for a middle way would only put off the day when we would be forced to confront the question we now decide. The turmoil wrought by *Roe* and *Casey* would be prolonged. It is far better—for this Court and the country—to face up to the real issue without further delay. . . .

VI

A

Under our precedents, rational-basis review is the appropriate standard for such challenges. . . .

It follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot “substitute their social and economic beliefs for the judgment of legislative bodies.” . . .



A law regulating abortion, like other health and welfare laws, is entitled to “strong presumption of validity.” It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. These legitimate interests include respect for and preservation of prenatal life at all stages of development, the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.

B

These legitimate interests justify Mississippi’s Gestational Age Act. . . . The legislature also found that abortions performed after 15 weeks typically use the dilation and evacuation procedure, and the legislature found the use of this procedure “for nontherapeutic or elective reasons [to be] a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession.” These legitimate interests provide a rational basis for the Gestational Age Act, and it follows that respondents’ constitutional challenge must fail.

VII

We end this opinion where we began. Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.

The judgment of the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, concurring.

I join the opinion of the Court because it correctly holds that there is no constitutional right to abortion. . . . “[T]he idea that the Framers of the Fourteenth Amendment understood the Due Process Clause to protect a right to abortion is farcical.”

I write separately to emphasize a second, more fundamental reason why there is no abortion guarantee lurking in the Due Process Clause. Considerable historical evidence indicates that “due process of law” merely required executive and judicial actors to comply with legislative enactments and the common law when depriving a person of life, liberty, or property. Other sources, by contrast, suggest that “due process of law” prohibited legislatures “from authorizing the deprivation of a person’s life,

liberty, or property without providing him the customary procedures to which freemen were entitled by the old law of England.” Either way, the Due Process Clause at most guarantees process. It does not, as the Court’s substantive due process cases suppose, “forbi[d] the government to infringe certain ‘fundamental’ liberty interests at all, no matter what process is provided.”

As I have previously explained, “substantive due process” is an oxymoron that “lack[s] any basis in the Constitution.” “The notion that a constitutional provision that guarantees only ‘process’ before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words.” The resolution of this case is thus straightforward. Because the Due Process Clause does not secure any substantive rights, it does not secure a right to abortion.

The Court today declines to disturb substantive due process jurisprudence generally or the doctrine’s application in other, specific contexts. . . . I agree that “[n]othing in [the Court’s] opinion should be understood to cast doubt on precedents that do not concern abortion.”

For that reason, in future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is “demonstrably erroneous,” we have a duty to “correct the error” established in those precedents. After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court’s substantive due process cases are “privileges or immunities of citizens of the United States” protected by the Fourteenth Amendment. To answer that question, we would need to decide important antecedent questions, including whether the Privileges or Immunities Clause protects any rights that are not enumerated in the Constitution and, if so, how to identify those rights. That said, even if the Clause does protect unenumerated rights, the Court conclusively demonstrates that abortion is not one of them under any plausible interpretive approach.

Moreover, apart from being a demonstrably incorrect reading of the Due Process Clause, the “legal fiction” of substantive due process is “particularly dangerous.” At least three dangers favor jettisoning the doctrine entirely.

First, “substantive due process exalts judges at the expense of the People from whom they derive their authority.” . . . The Court divines new rights in line with “its own, extraconstitutional value preferences” and nullifies state laws that do not align with the judicially created guarantees. . . .

Second, substantive due process distorts other areas of constitutional law. For example, once this Court identifies a “fundamental” right for one class of individuals, it

invokes the Equal Protection Clause to demand exacting scrutiny of statutes that deny the right to others. Statutory classifications implicating certain “nonfundamental” rights, meanwhile, receive only cursory review. Similarly, this Court deems unconstitutionally “vague” or “overbroad” those laws that impinge on its preferred rights, while letting slide those laws that implicate supposedly lesser values. . . . Therefore, regardless of the doctrinal context, the Court often “demand[s] extra justifications for encroachments” on “preferred rights” while “relax[ing] purportedly higher standards of review for less preferred rights.” Substantive due process is the core inspiration for many of the Court’s constitutionally unmoored policy judgments.

Third, substantive due process is often wielded to “disastrous ends.” For instance, in *Dred Scott v. Sandford* (1857), the Court invoked a species of substantive due process to announce that Congress was powerless to emancipate slaves brought into the federal territories. While *Dred Scott* “was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox,” that overruling was “[p]urchased at the price of immeasurable human suffering.” Now today, the Court rightly overrules *Roe* and *Casey*—two of this Court’s “most notoriously incorrect” substantive due process decisions—after more than 63 million abortions have been performed. The harm caused by this Court’s forays into substantive due process remains immeasurable.

. . . [I]n future cases, we should “follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and adds, beyond that, a right to due process when life, liberty, or property is to be taken away.” Substantive due process conflicts with that textual command and has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity.

Justice KAVANAUGH, concurring.

I write separately to explain my additional views about why *Roe* was wrongly decided, why *Roe* should be overruled at this time, and the future implications of today’s decision.

## I

Abortion is a profoundly difficult and contentious issue because it presents an irreconcilable conflict between the interests of a pregnant woman who seeks an abortion and the interests in protecting fetal life. The interests on both sides of the abortion issue are extraordinarily weighty. . . .

The issue before this Court, however, is not the policy or morality of abortion. The issue before this Court is what the Constitution says about abortion. The Constitution does not take sides on the issue of abortion. The text of the Constitution does not refer to or encompass abortion. To be sure, this Court has held that the

Constitution protects unenumerated rights that are deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty. But a right to abortion is not deeply rooted in American history and tradition, as the Court today thoroughly explains.<sup>1</sup>

On the question of abortion, the Constitution is therefore neither pro-life nor prochoice. The Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process in the States or Congress—like the numerous other difficult questions of American social and economic policy that the Constitution does not address.

Because the Constitution is neutral on the issue of abortion, this Court also must be scrupulously neutral. The nine unelected Members of this Court do not possess the constitutional authority to override the democratic process and to decree either a pro-life or a pro-choice abortion policy for all 330 million people in the United States.

Instead of adhering to the Constitution’s neutrality, the Court in *Roe* took sides on the issue and unilaterally decreed that abortion was legal throughout the United States up to the point of viability (about 24 weeks of pregnancy). The Court’s decision today properly returns the Court to a position of neutrality and restores the people’s authority to address the issue of abortion through the processes of democratic self-government established by the Constitution.

Some *amicus* briefs argue that the Court today should not only overrule *Roe* and return to a position of judicial neutrality on abortion, but should go further and hold that the Constitution outlaws abortion throughout the United States. No Justice of this Court has ever advanced that position. I respect those who advocate for that position, just as I respect those who argue that this Court should hold that the Constitution legalizes pre-viability abortion throughout the United States. But both positions are wrong as a constitutional matter, in my view. The Constitution neither outlaws abortion nor legalizes abortion.

To be clear, then, the Court’s decision today *does not outlaw* abortion throughout the United States. On the contrary, the Court’s decision properly leaves the question of abortion for the people and their elected representatives in the democratic process. . . .

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<sup>1</sup> The Court’s opinion today also recounts the pre-constitutional common-law history in England. That English history supplies background information on the issue of abortion. As I see it, the dispositive point in analyzing American history and tradition for purposes of the Fourteenth Amendment inquiry is that abortion was largely prohibited in most American States as of 1868 when the Fourteenth Amendment was ratified, and that abortion remained largely prohibited in most American States until *Roe* was decided in 1973.

. . . After today’s decision, all of the States may evaluate the competing interests and decide how to address this consequential issue.<sup>2</sup>

In arguing for a *constitutional* right to abortion that would override the people’s choices in the democratic process, the plaintiff Jackson Women’s Health Organization and its *amici* emphasize that the Constitution does not freeze the American people’s rights as of 1791 or 1868. I fully agree. To begin, I agree that constitutional rights apply to situations that were unforeseen in 1791 or 1868—such as applying the First Amendment to the Internet or the Fourth Amendment to cars. . . .

The Constitution does not grant the nine unelected Members of this Court the unilateral authority to rewrite the Constitution to create new rights and liberties based on our own moral or policy views. . . .

This Court therefore does not possess the authority either to declare a constitutional right to abortion *or* to declare a constitutional prohibition of abortion.

. . . In my respectful view, the Court in *Roe* therefore erred by taking sides on the issue of abortion.

## II

The more difficult question in this case is *stare decisis*—that is, whether to overrule the *Roe* decision. . . .

. . . When precisely should the Court overrule an erroneous constitutional precedent? The history of *stare decisis* in this Court establishes that a constitutional precedent may be overruled only when (i) the prior decision is not just wrong, but is egregiously wrong, (ii) the prior decision has caused significant negative jurisprudential or real-world consequences, and (iii) overruling the prior decision would not unduly upset legitimate reliance interests.

Applying those factors, I agree with the Court today that *Roe* should be overruled. The Court in *Roe* erroneously assigned itself the authority to decide a critically important moral and policy issue that the Constitution does not grant this Court the authority to decide. As Justice Byron White succinctly explained, *Roe* was “an improvident and extravagant exercise of the power of judicial review” because “nothing in the language or history of the Constitution” supports a constitutional right to abortion.

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<sup>2</sup> In his dissent in *Roe*, Justice Rehnquist indicated that an exception to a State’s restriction on abortion would be constitutionally required when an abortion is necessary to save the life of the mother. Abortion statutes traditionally and currently provide for an exception when an abortion is necessary to protect the life of the mother. Some statutes also provide other exceptions.

Of course, the fact that a precedent is wrong, even egregiously wrong, does not alone mean that the precedent should be overruled. But as the Court today explains, *Roe* has caused significant negative jurisprudential and real-world consequences. By taking sides on a difficult and contentious issue on which the Constitution is neutral, *Roe* overreached and exceeded this Court’s constitutional authority; gravely distorted the Nation’s understanding of this Court’s proper constitutional role; and caused significant harm to what *Roe* itself recognized as the State’s “important and legitimate interest” in protecting fetal life. All of that explains why tens of millions of Americans—and the 26 States that explicitly ask the Court to overrule *Roe*—do not accept *Roe* even 49 years later. Under the Court’s longstanding *stare decisis* principles, *Roe* should be overruled.<sup>3</sup>

But the *stare decisis* analysis here is somewhat more complicated because of *Casey*. . . .

I have deep and unyielding respect for the Justices who wrote the *Casey* plurality opinion. And I respect the *Casey* plurality’s good-faith effort to locate some middle ground or compromise that could resolve this controversy for America.

But as has become increasingly evident over time, *Casey*’s well-intentioned effort did not resolve the abortion debate. The national division has not ended. In recent years, a significant number of States have enacted abortion restrictions that directly conflict with *Roe*. Those laws cannot be dismissed as political stunts or as outlier laws. Those numerous state laws collectively represent the sincere and deeply held views of tens of millions of Americans who continue to fervently believe that allowing abortions up to 24 weeks is far too radical and far too extreme, and does not sufficiently account for what *Roe* itself recognized as the State’s “important and legitimate interest” in protecting fetal life. In this case, moreover, a majority of the States—26 in all—ask the Court to overrule *Roe* and return the abortion issue to the States.

In short, *Casey*’s *stare decisis* analysis rested in part on a predictive judgment about the future development of state laws and of the people’s views on the abortion issue. But that predictive judgment has not borne out. As the Court today explains, the

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<sup>3</sup> I also agree with the Court’s conclusion today with respect to reliance. Broad notions of societal reliance have been invoked in support of *Roe*, but the Court has not analyzed reliance in that way in the past. For example, American businesses and workers relied on *Lochner v. New York* (1905), and *Adkins v. Children’s Hospital of D.C.* (1923), to construct a laissez-faire economy that was free of substantial regulation. In *West Coast Hotel Co. v. Parrish* (1937), the Court nonetheless overruled *Adkins* and in effect *Lochner*. An entire region of the country relied on *Plessy v. Ferguson* (1896), to enforce a system of racial segregation. In *Brown v. Board of Education* (1954), the Court overruled *Plessy*. Much of American society was built around the traditional view of marriage that was upheld in *Baker v. Nelson* (1972), and that was reflected in laws ranging from tax laws to estate laws to family laws. In *Obergefell v. Hodges* (2015), the Court nonetheless overruled *Baker*.

experience over the last 30 years conflicts with *Casey*'s predictive judgment and therefore undermines *Casey*'s precedential force.<sup>5</sup>

In any event, although *Casey* is relevant to the *stare decisis* analysis, the question of whether to overrule *Roe* cannot be dictated by *Casey* alone. To illustrate that *stare decisis* point, consider an example. Suppose that in 1924 this Court had expressly reaffirmed *Plessy v. Ferguson* and upheld the States' authority to segregate people on the basis of race. Would the Court in *Brown* some 30 years later in 1954 have reaffirmed *Plessy* and upheld racially segregated schools simply because of that intervening 1924 precedent? Surely the answer is no. . . .

### III

. . . [T]he parties' arguments have raised other related questions, and I address some of them here.

*First* is the question of how this decision will affect other precedents involving issues such as contraception and marriage . . . . I emphasize what the Court today states: Overruling *Roe* does not mean the overruling of [*Griswold*, *Eisenstadt*, and *Loving*], and does not threaten or cast doubt on those precedents.

*Second*, as I see it, some of the other abortion-related legal questions raised by today's decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel. May a State retroactively impose liability or punishment for an abortion that occurred before today's decision takes effect? In my view, the answer is no based on the Due Process Clause or the Ex Post Facto Clause. . . .

To be sure, many Americans will disagree with the Court's decision today. That would be true no matter how the Court decided this case. Both sides on the abortion issue believe sincerely and passionately in the rightness of their cause. Especially in those difficult and fraught circumstances, the Court must scrupulously adhere to the Constitution's neutral position on the issue of abortion.

. . . [T]he Constitution is neither pro-life nor pro-choice. The Constitution is neutral, and this Court likewise must be scrupulously neutral. The Court today properly

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<sup>5</sup> To be clear, public opposition to a prior decision is not a basis for overruling (or reaffirming) that decision. Rather, the question of whether to overrule a precedent must be analyzed under this Court's traditional *stare decisis* factors. The only point here is that *Casey* adopted a special *stare decisis* principle with respect to *Roe* based on the idea of resolving the national controversy and ending the national division over abortion. The continued and significant opposition to *Roe*, as reflected in the laws and positions of numerous States, is relevant to assessing *Casey* on its own terms.

heeds the constitutional principle of judicial neutrality and returns the issue of abortion to the people and their elected representatives in the democratic process.

Chief Justice ROBERTS, concurring in the judgment.

. . . I would take a more measured course. I agree with the Court that the viability line established by *Roe* and *Casey* should be discarded under a straightforward *stare decisis* analysis. That line never made any sense. Our abortion precedents describe the right at issue as a woman’s right to choose to terminate her pregnancy. That right should therefore extend far enough to ensure a reasonable opportunity to choose, but need not extend any further—certainly not all the way to viability. Mississippi’s law allows a woman three months to obtain an abortion, well beyond the point at which it is considered “late” to discover a pregnancy. I see no sound basis for questioning the adequacy of that opportunity.

But that is all I would say, out of adherence to a simple yet fundamental principle of judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more. Perhaps we are not always perfect in following that command, and certainly there are cases that warrant an exception. But this is not one of them. Surely we should adhere closely to principles of judicial restraint here, where the broader path the Court chooses entails repudiating a constitutional right we have not only previously recognized, but also expressly reaffirmed applying the doctrine of *stare decisis*. . . .

I

. . . [T]his Court seriously erred in *Roe* in adopting viability as the earliest point at which a State may legislate to advance its substantial interests in the area of abortion. *Roe* set forth a rigid three-part framework anchored to viability, which more closely resembled a regulatory code than a body of constitutional law. That framework, moreover, came out of thin air. . . .

It is thus hardly surprising that neither *Roe* nor *Casey* made a persuasive or even colorable argument for why the time for terminating a pregnancy must extend to viability. The Court’s jurisprudence on this issue is a textbook illustration of the perils of deciding a question neither presented nor briefed. As has been often noted, *Roe*’s defense of the line boiled down to the circular assertion that the State’s interest is compelling only when an unborn child can live outside the womb, because that is when the unborn child can live outside the womb.

Twenty years later, the best defense of the viability line the *Casey* plurality could conjure up was workability. Although the plurality attempted to add more content by opining that “it might be said that a woman who fails to act before viability has consented to the State’s intervention on behalf of the developing child,” that mere



suggestion provides no basis for choosing viability as the critical tipping point. A similar implied consent argument could be made with respect to a law banning abortions after fifteen weeks, well beyond the point at which nearly all women are aware that they are pregnant. The dissent, which would retain the viability line, offers no justification for it either.

This Court’s jurisprudence since *Casey*, moreover, has “eroded” the “underpinnings” of the viability line, such as they were. The viability line is a relic of a time when we recognized only two state interests warranting regulation of abortion: maternal health and protection of “potential life.” That changed with *Gonzales v. Carhart* (2007). There, we recognized a broader array of interests, such as drawing “a bright line that clearly distinguishes abortion and infanticide,” maintaining societal ethics, and preserving the integrity of the medical profession. The viability line has nothing to do with advancing such permissible goals.

Consider, for example, statutes passed in a number of jurisdictions that forbid abortions after twenty weeks of pregnancy, premised on the theory that a fetus can feel pain at that stage of development. Assuming that prevention of fetal pain is a legitimate state interest after *Gonzales*, there seems to be no reason why viability would be relevant to the permissibility of such laws. The same is true of laws designed to “protect[ ] the integrity and ethics of the medical profession” and restrict procedures likely to “coarsen society” to the “dignity of human life.” Mississippi’s law, for instance, was premised in part on the legislature’s finding that the “dilation and evacuation” procedure is a “barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession.” That procedure accounts for most abortions performed after the first trimester—two weeks before the period at issue in this case—and “involve[s] the use of surgical instruments to crush and tear the unborn child apart.” Again, it would make little sense to focus on viability when evaluating a law based on these permissible goals.

In short, the viability rule was created outside the ordinary course of litigation, is and always has been completely unreasoned, and fails to take account of state interests since recognized as legitimate. It is indeed “telling that other countries almost uniformly eschew” a viability line. Only a handful of countries, among them China and North Korea, permit elective abortions after twenty weeks; the rest have coalesced around a 12-week line. See *The World’s Abortion Laws*, Center for Reproductive Rights (Feb. 23, 2021) (online source archived at [www.supremecourt.gov](http://www.supremecourt.gov)) (Canada, China, Iceland, Guinea-Bissau, the Netherlands, North Korea, Singapore, and Vietnam permit elective abortions after twenty weeks). The Court rightly rejects the arbitrary viability rule today.

## II

None of this, however, requires that we also take the dramatic step of altogether eliminating the abortion right first recognized in *Roe*. Mississippi itself previously argued as much to this Court in this litigation.

... [I]t went out of its way to make clear that it was *not* asking the Court to repudiate entirely the right to choose whether to terminate a pregnancy: “To be clear, the questions presented in this petition do not require the Court to overturn *Roe* or *Casey*.” ...

After we granted certiorari, however, Mississippi changed course. . . .

The Court now rewards that gambit, noting three times that the parties presented “no half-measures” and argued that “we must either reaffirm or overrule *Roe* and *Casey*.” Given those two options, the majority picks the latter.

... Our established practice is instead not to “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”

Following that “fundamental principle of judicial restraint,” we should begin with the narrowest basis for disposition, proceeding to consider a broader one only if necessary to resolve the case at hand. . . .

Here, there is a clear path to deciding this case correctly without overruling *Roe* all the way down to the studs: recognize that the viability line must be discarded, as the majority rightly does, and leave for another day whether to reject any right to an abortion at all.

Of course, such an approach would not be available if the rationale of *Roe* and *Casey* was inextricably entangled with and dependent upon the viability standard. It is not. Our precedents in this area ground the abortion right in a woman’s “right to choose.” If that is the basis for *Roe*, *Roe*’s viability line should be scrutinized from the same perspective. And there is nothing inherent in the right to choose that requires it to extend to viability or any other point, so long as a real choice is provided.

To be sure, in reaffirming the right to an abortion, *Casey* termed the viability rule *Roe*’s “central holding.” Other cases of ours have repeated that language. But simply declaring it does not make it so. The question in *Roe* was whether there was any right to abortion in the Constitution. How far the right extended was a concern that was separate and subsidiary, and—not surprisingly—entirely unbriefed.

... The viability line is a separate rule fleshing out the metes and bounds of *Roe*’s core holding. Applying principles of *stare decisis*, I would excise that additional rule—and only that rule—from our jurisprudence. . . .

Overruling the subsidiary rule is sufficient to resolve this case in Mississippi’s favor. The law at issue allows abortions up through fifteen weeks, providing an adequate opportunity to exercise the right *Roe* protects. By the time a pregnant woman has reached that point, her pregnancy is well into the second trimester. Pregnancy tests are

now inexpensive and accurate, and a woman ordinarily discovers she is pregnant by six weeks of gestation. Almost all know by the end of the first trimester. Safe and effective abortifacients, moreover, are now readily available, particularly during those early stages. Given all this, it is no surprise that the vast majority of abortions happen in the first trimester. Presumably most of the remainder would also take place earlier if later abortions were not a legal option. Ample evidence thus suggests that a 15-week ban provides sufficient time, absent rare circumstances, for a woman “to decide for herself” whether to terminate her pregnancy. . . .

### III

The Court’s decision to overrule *Roe* and *Casey* is a serious jolt to the legal system—regardless of how you view those cases. A narrower decision rejecting the misguided viability line would be markedly less unsettling, and nothing more is needed to decide this case.

Our cases say that the effect of overruling a precedent on reliance interests is a factor to consider in deciding whether to take such a step, and respondents argue that generations of women have relied on the right to an abortion in organizing their relationships and planning their futures. The Court questions whether these concerns are pertinent under our precedents, but the issue would not even arise with a decision rejecting only the viability line: It cannot reasonably be argued that women have shaped their lives in part on the assumption that they would be able to abort up to viability, as opposed to fifteen weeks.

In support of its holding, the Court cites three seminal constitutional decisions that involved overruling prior precedents: *Brown v. Board of Education* (1954), *West Virginia Bd. of Ed. v. Barnette* (1943), and *West Coast Hotel Co. v. Parrish* (1937). The opinion in *Brown* was unanimous and eleven pages long; this one is neither. *Barnette* was decided only three years after the decision it overruled, three Justices having had second thoughts. And *West Coast Hotel* was issued against a backdrop of unprecedented economic despair that focused attention on the fundamental flaws of existing precedent. It also was part of a sea change in this Court’s interpretation of the Constitution, “signal[ing] the demise of an entire line of important precedents,”—a feature the Court expressly disclaims in today’s decision. None of these leading cases, in short, provides a template for what the Court does today.

The Court says we should consider whether to overrule *Roe* and *Casey* now, because if we delay we would be forced to consider the issue again in short order. There would be “turmoil” until we did so, according to the Court, because of existing state laws with “shorter deadlines or no deadline at all.” But under the narrower approach proposed here, state laws outlawing abortion altogether would still violate binding precedent. And to the extent States have laws that set the cutoff date earlier than fifteen weeks, any litigation over that timeframe would proceed free of the distorting effect that

the viability rule has had on our constitutional debate. The same could be true, for that matter, with respect to legislative consideration in the States. We would then be free to exercise our discretion in deciding whether and when to take up the issue, from a more informed perspective. . . .

Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN, dissenting.

For half a century, *Roe v. Wade* (1973), and *Planned Parenthood of Southeastern Pa. v. Casey* (1992), have protected the liberty and equality of women. *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman’s right to decide for herself whether to bear a child. *Roe* held, and *Casey* reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a woman’s body or the course of a woman’s life: It could not determine what the woman’s future would be. Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.

*Roe* and *Casey* well understood the difficulty and divisiveness of the abortion issue. . . . So the Court struck a balance, as it often does when values and goals compete. It held that the State could prohibit abortions after fetal viability, so long as the ban contained exceptions to safeguard a woman’s life or health. It held that even before viability, the State could regulate the abortion procedure in multiple and meaningful ways. But until the viability line was crossed, the Court held, a State could not impose a “substantial obstacle” on a woman’s “right to elect the procedure” as she (not the government) thought proper, in light of all the circumstances and complexities of her own life.

Today, the Court discards that balance. It says that from the very moment of fertilization, a woman has no rights to speak of. A State can force her to bring a pregnancy to term, even at the steepest personal and familial costs. An abortion restriction, the majority holds, is permissible whenever rational, the lowest level of scrutiny known to the law. And because, as the Court has often stated, protecting fetal life is rational, States will feel free to enact all manner of restrictions. The Mississippi law at issue here bars abortions after the 15th week of pregnancy. Under the majority’s ruling, though, another State’s law could do so after ten weeks, or five or three or one—or, again, from the moment of fertilization. States have already passed such laws, in anticipation of today’s ruling. More will follow. Some States have enacted laws extending to all forms of abortion procedure, including taking medication in one’s own home. They have passed laws without any exceptions for when the woman is the victim of rape or incest. Under those laws, a woman will have to bear her rapist’s child or a young girl her father’s—no matter if doing so will destroy her life. So too, after today’s ruling, some States may compel women to carry to term a fetus with severe physical anomalies—for example, one afflicted with Tay-Sachs disease, sure to die within a few years of birth. States may even argue that a prohibition on abortion need make no

provision for protecting a woman from risk of death or physical harm. Across a vast array of circumstances, a State will be able to impose its moral choice on a woman and coerce her to give birth to a child.

Enforcement of all these draconian restrictions will also be left largely to the States' devices. A State can of course impose criminal penalties on abortion providers, including lengthy prison sentences. But some States will not stop there. Perhaps, in the wake of today's decision, a state law will criminalize the woman's conduct too, incarcerating or fining her for daring to seek or obtain an abortion. And as Texas has recently shown, a State can turn neighbor against neighbor, enlisting fellow citizens in the effort to root out anyone who tries to get an abortion, or to assist another in doing so.

The majority tries to hide the geographically expansive effects of its holding. Today's decision, the majority says, permits "each State" to address abortion as it pleases. That is cold comfort, of course, for the poor woman who cannot get the money to fly to a distant State for a procedure. Above all others, women lacking financial resources will suffer from today's decision. In any event, interstate restrictions will also soon be in the offing. After this decision, some States may block women from traveling out of State to obtain abortions, or even from receiving abortion medications from out of State. Some may criminalize efforts, including the provision of information or funding, to help women gain access to other States' abortion services. Most threatening of all, no language in today's decision stops the Federal Government from prohibiting abortions nationwide, once again from the moment of conception and without exceptions for rape or incest. If that happens, "the views of [an individual State's] citizens" will not matter. The challenge for a woman will be to finance a trip not to "New York [or] California" but to Toronto.

Whatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens. Yesterday, the Constitution guaranteed that a woman confronted with an unplanned pregnancy could (within reasonable limits) make her own decision about whether to bear a child, with all the life-transforming consequences that act involves. And in thus safeguarding each woman's reproductive freedom, the Constitution also protected "[t]he ability of women to participate equally in [this Nation's] economic and social life." But no longer. As of today, this Court holds, a State can always force a woman to give birth, prohibiting even the earliest abortions. A State can thus transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare. Some women, especially women of means, will find ways around the State's assertion of power. Others—those without money or childcare or the ability to take time off from work—will not be so fortunate. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost. At the least, they will incur the cost of

losing control of their lives. The Constitution will, today's majority holds, provide no shield, despite its guarantees of liberty and equality for all.

And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. See *Griswold*; *Eisenstadt*. In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. See *Lawrence*; *Obergefell*. They are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions. The majority (or to be more accurate, most of it) is eager to tell us today that nothing it does “cast[s] doubt on precedents that do not concern abortion.” But how could that be? The lone rationale for what the majority does today is that the right to elect an abortion is not “deeply rooted in history”: Not until *Roe*, the majority argues, did people think abortion fell within the Constitution's guarantee of liberty. The same could be said, though, of most of the rights the majority claims it is not tampering with. The majority could write just as long an opinion showing, for example, that until the mid-20th century, “there was no support in American law for a constitutional right to obtain [contraceptives].” So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.

One piece of evidence on that score seems especially salient: The majority's cavalier approach to overturning this Court's precedents. *Stare decisis* is the Latin phrase for a foundation stone of the rule of law: that things decided should stay decided unless there is a very good reason for change. It is a doctrine of judicial modesty and humility. Those qualities are not evident in today's opinion. The majority has no good reason for the upheaval in law and society it sets off. *Roe* and *Casey* have been the law of the land for decades, shaping women's expectations of their choices when an unplanned pregnancy occurs. Women have relied on the availability of abortion both in structuring their relationships and in planning their lives. The legal framework *Roe* and *Casey* developed to balance the competing interests in this sphere has proved workable in courts across the country. No recent developments, in either law or fact, have eroded or cast doubt on those precedents. Nothing, in short, has changed. Indeed, the Court in *Casey* already found all of that to be true. *Casey* is a precedent about precedent. It reviewed the same arguments made here in support of overruling *Roe*, and it found that doing so was not warranted. The Court reverses course today for one reason and one reason only: because the composition of this Court has changed. *Stare decisis*, this Court has often said, “contributes to the actual and perceived integrity of the judicial process” by ensuring that decisions are “founded in the law rather than in the proclivities of individuals.” Today, the proclivities of individuals rule. The Court departs from its obligation to faithfully and impartially apply the law. We dissent.

I

. . . To hear the majority tell the tale, *Roe* and *Casey* are aberrations: They came from nowhere, went nowhere—and so are easy to excise from this Nation’s constitutional law. That is not true. . . . [T]hey are rooted in—and themselves led to—other rights giving individuals control over their bodies and their most personal and intimate associations. . . . *Roe* and *Casey* were from the beginning, and are even more now, embedded in core constitutional concepts of individual freedom, and of the equal rights of citizens to decide on the shape of their lives. Those legal concepts, one might even say, have gone far toward defining what it means to be an American. For in this Nation, we do not believe that a government controlling all private choices is compatible with a free people. . . . We believe in a Constitution that puts some issues off limits to majority rule. Even in the face of public opposition, we uphold the right of individuals—yes, including women—to make their own choices and chart their own futures. Or at least, we did once.

A

Some half-century ago, *Roe* struck down a state law making it a crime to perform an abortion unless its purpose was to save a woman’s life. . . . The Court explained that a long line of precedents, “founded in the Fourteenth Amendment’s concept of personal liberty,” protected individual decisionmaking related to “marriage, procreation, contraception, family relationships, and child rearing and education.” For the same reasons, the Court held, the Constitution must protect “a woman’s decision whether or not to terminate her pregnancy.” The Court recognized the myriad ways bearing a child can alter the “life and future” of a woman and other members of her family. A State could not, “by adopting one theory of life,” override all “rights of the pregnant woman.”

In the 20 years between *Roe* and *Casey*, the Court expressly reaffirmed *Roe* on two occasions, and applied it on many more. . . .

Then, in *Casey*, the Court considered the matter anew, and again upheld *Roe*’s core precepts. . . .

Central to that conclusion was a full-throated restatement of a woman’s right to choose. Like *Roe*, *Casey* grounded that right in the Fourteenth Amendment’s guarantee of “liberty.” That guarantee encompasses realms of conduct not specifically referenced in the Constitution: “Marriage is mentioned nowhere” in that document, yet the Court was “no doubt correct” to protect the freedom to marry “against state interference.” And the guarantee of liberty encompasses conduct today that was not protected at the time of the Fourteenth Amendment. “It is settled now,” the Court said—though it was not always so—that “the Constitution places limits on a State’s right to interfere with a person’s most basic decisions about family and parenthood, as well as bodily integrity.” Especially important in this web of precedents protecting an individual’s most “personal

choices” were those guaranteeing the right to contraception. In those cases, the Court had recognized “the right of the individual” to make the vastly consequential “decision whether to bear” a child. So too, *Casey* reasoned, the liberty clause protects the decision of a woman confronting an unplanned pregnancy. Her decision about abortion was central, in the same way, to her capacity to chart her life’s course. . . .

[The majority asserts that] *Roe* and *Casey* . . . are dismissive of a “State’s interest in protecting prenatal life.” Nothing could get those decisions more wrong. As just described, *Roe* and *Casey* invoked powerful state interests in that protection, operative at every stage of the pregnancy and overriding the woman’s liberty after viability. The strength of those state interests is exactly why the Court allowed greater restrictions on the abortion right than on other rights deriving from the Fourteenth Amendment.<sup>1</sup> But what *Roe* and *Casey* also recognized—which today’s majority does not—is that a woman’s freedom and equality are likewise involved. That fact—the presence of countervailing interests—is what made the abortion question hard, and what necessitated balancing. The majority scoffs at that idea, castigating us for “repeatedly prais[ing] the ‘balance’” the two cases arrived at (with the word “balance” in scare quotes). To the majority “balance” is a dirty word, as moderation is a foreign concept. The majority would allow States to ban abortion from conception onward because it does not think forced childbirth at all implicates a woman’s rights to equality and freedom. Today’s Court, that is, does not think there is anything of constitutional significance attached to a woman’s control of her body and the path of her life. *Roe* and *Casey* thought that one-sided view misguided. In some sense, that is the difference in a nutshell between our precedents and the majority opinion. The constitutional regime we have lived in for the last 50 years recognized competing interests, and sought a balance between them. The constitutional regime we enter today erases the woman’s interest and recognizes only the State’s (or the Federal Government’s).

## B

The majority makes this change based on a single question: Did the reproductive right recognized in *Roe* and *Casey* exist in “1868, the year when the Fourteenth Amendment was ratified”? The majority says (and with this much we agree) that the

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<sup>1</sup> [T]he majority[ argues] that our analogy between the right to an abortion and the rights to contraception and same-sex marriage shows that we think “[t]he Constitution does not permit the States to regard the destruction of a ‘potential life’ as a matter of any significance.” To the contrary. The liberty interests underlying those rights are . . . quite similar. But only in the sphere of abortion is the state interest in protecting potential life involved. So only in that sphere, as both *Roe* and *Casey* recognized, may a State impinge so far on the liberty interest (barring abortion after viability and discouraging it before). The majority’s failure to understand this fairly obvious point stems from its rejection of the idea of balancing interests in this (or maybe in any) constitutional context. The majority thinks that a woman has no liberty or equality interest in the decision to bear a child, so a State’s interest in protecting fetal life necessarily prevails.



answer to this question is no: In 1868, there was no nationwide right to end a pregnancy, and no thought that the Fourteenth Amendment provided one.

Of course, the majority opinion refers as well to some later and earlier history. On the one side of 1868, it goes back as far as the 13th (the 13th!) century. But that turns out to be wheel-spinning. First, it is not clear what relevance such early history should have, even to the majority. If the early history obviously supported abortion rights, the majority would no doubt say that only the views of the Fourteenth Amendment's ratifiers are germane. Second—and embarrassingly for the majority—early law in fact does provide some support for abortion rights. Common-law authorities did not treat abortion as a crime before “quickening”—the point when the fetus moved in the womb. And early American law followed the common-law rule.<sup>3</sup> So the criminal law of that early time might be taken as roughly consonant with *Roe*'s and *Casey*'s different treatment of early and late abortions. Better, then, to move forward in time. On the other side of 1868, the majority occasionally notes that many States barred abortion up to the time of *Roe*. That is convenient for the majority, but it is window dressing. As the same majority (plus one) just informed us, “post-ratification adoption or acceptance of laws that are inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text.” Had the pre-*Roe* liberalization of abortion laws occurred more quickly and more widely in the 20th century, the majority would say (once again) that only the ratifiers' views are germane.

The majority's core legal postulate, then, is that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did. And that is indeed what the majority emphasizes over and over again. If the ratifiers did not understand something as central to freedom, then neither can we. Or said more particularly: If those people did not understand reproductive rights as part of the guarantee of liberty conferred in the Fourteenth Amendment, then those rights do not exist.

As an initial matter, note a mistake in the just preceding sentence. We referred there to the “people” who ratified the Fourteenth Amendment: What rights did those “people” have in their heads at the time? But, of course, “people” did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation. Indeed, the ratifiers—both in 1868 and when the original Constitution was approved in 1788—did not understand women as full members of the community embraced by the phrase “We the People.” In 1868, the first wave of American feminists were explicitly told—of

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<sup>3</sup> See J. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800–1900*, pp. 3–4 (1978). The majority offers no evidence to the contrary—no example of a founding-era law making prequickening abortion a crime (except when a woman died). And even in the mid-19th century, more than 10 States continued to allow pre-quickening abortions. See Brief for American Historical Association et al. as *Amici Curiae*.

course by men—that it was not their time to seek constitutional protections. (Women would not get even the vote for another half-century.) To be sure, most women in 1868 also had a foreshortened view of their rights: If most men could not then imagine giving women control over their bodies, most women could not imagine having that kind of autonomy. But that takes away nothing from the core point. Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women’s rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship.

*Casey* itself understood this point . . . It recollected with dismay a decision this Court issued just five years after the Fourteenth Amendment’s ratification, approving a State’s decision to deny a law license to a woman and suggesting as well that a woman had no legal status apart from her husband. “There was a time,” *Casey* explained, when the Constitution did not protect “men and women alike.” But times had changed. A woman’s place in society had changed, and constitutional law had changed along with it. The relegation of women to inferior status in either the public sphere or the family was “no longer consistent with our understanding” of the Constitution. Now, “[t]he Constitution protects all individuals, male or female,” from “the abuse of governmental power” or “unjustified state interference.”

So how is it that, as *Casey* said, our Constitution, read now, grants rights to women, though it did not in 1868? How is it that our Constitution subjects discrimination against them to heightened judicial scrutiny? How is it that our Constitution, through the Fourteenth Amendment’s liberty clause, guarantees access to contraception (also not legally protected in 1868) so that women can decide for themselves whether and when to bear a child? How is it that until today, that same constitutional clause protected a woman’s right, in the event contraception failed, to end a pregnancy in its earlier stages?

The answer is that this Court has rejected the majority’s pinched view of how to read our Constitution. “The Founders,” we recently wrote, “knew they were writing a document designed to apply to ever-changing circumstances over centuries.” Or in the words of the great Chief Justice John Marshall, our Constitution is “intended to endure for ages to come,” and must adapt itself to a future “seen dimly,” if at all. That is indeed why our Constitution is written as it is. The Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning. And over the course of our history, this Court has taken up the Framers’ invitation. It has kept true to the Framers’ principles by applying them in new ways, responsive to new societal understandings and conditions.

Nowhere has that approach been more prevalent than in construing the majestic but open-ended words of the Fourteenth Amendment—the guarantees of “liberty” and “equality” for all. And nowhere has that approach produced prouder moments, for this country and the Court. Consider an example *Obergefell* used a few years ago. The Court there confronted a claim, based on *Washington v. Glucksberg* (1997), that the Fourteenth Amendment “must be defined in a most circumscribed manner, with central reference to specific historical practices”—exactly the view today’s majority follows. And the Court specifically rejected that view.<sup>4</sup> In [rejecting *Glucksberg*’s focus on specific historical practices], the Court reflected on what the proposed, historically circumscribed approach would have meant for interracial marriage. The Fourteenth Amendment’s ratifiers did not think it gave black and white people a right to marry each other. To the contrary, contemporaneous practice deemed that act quite as unprotected as abortion. Yet the Court in *Loving v. Virginia* (1967), read the Fourteenth Amendment to embrace the Lovings’ union. If, *Obergefell* explained, “rights were defined by who exercised them in the past, then received practices could serve as their own continued justification”—even when they conflict with “liberty” and “equality” as later and more broadly understood. The Constitution does not freeze for all time the original view of what those rights guarantee, or how they apply.

That does not mean anything goes. The majority wishes people to think there are but two alternatives: (1) accept the original applications of the Fourteenth Amendment and no others, or (2) surrender to judges’ “own ardent views,” ungrounded in law, about the “liberty that Americans should enjoy.” At least, that idea is what the majority sometimes tries to convey. At other times, the majority (or, rather, most of it) tries to assure the public that it has no designs on rights (for example, to contraception) that arose only in the back half of the 20th century—in other words, that it is happy to pick and choose, in accord with individual preferences.

. . . [O]ur point is . . . that applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents. The second Justice Harlan discussed how to strike the right balance when he explained why he would have invalidated a State’s ban on contraceptive use. Judges, he said, are not “free to roam where unguided speculation might take them.” Yet they also must recognize that the constitutional “tradition” of this country is not captured whole at a single moment. Rather, its meaning gains content from the long sweep of our history and from successive judicial precedents—each looking to the last and each seeking to apply the Constitution’s most fundamental commitments to new conditions. That is why Americans, to go back to *Obergefell*’s example, have a right to marry across racial lines. And it is why, to go back to Justice

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<sup>4</sup> The majority ignores that rejection. But it is unequivocal: The *Glucksberg* test, *Obergefell* said, “may have been appropriate” in considering physician-assisted suicide, but “is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.”

Harlan’s case, Americans have a right to use contraceptives so they can choose for themselves whether to have children.

... *Casey* explicitly rejected the present majority’s method. “[T]he specific practices of States at the time of the adoption of the Fourteenth Amendment,” *Casey* stated, do not “mark[ ] the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.” To hold otherwise—as the majority does today—“would be inconsistent with our law.” Why? Because the Court has “vindicated [the] principle” over and over that (no matter the sentiment in 1868) “there is a realm of personal liberty which the government may not enter”—especially relating to “bodily integrity” and “family life.” *Casey* described in detail the Court’s contraception cases. It noted decisions protecting the right to marry, including to someone of another race. In reviewing decades and decades of constitutional law, *Casey* could draw but one conclusion: Whatever was true in 1868, “[i]t is settled now, as it was when the Court heard arguments in *Roe v. Wade*, that the Constitution places limits on a State’s right to interfere with a person’s most basic decisions about family and parenthood.”

And that conclusion still held good, until the Court’s intervention here. It was settled at the time of *Roe*, settled at the time of *Casey*, and settled yesterday that the Constitution places limits on a State’s power to assert control over an individual’s body and most personal decisionmaking. A multitude of decisions supporting that principle led to *Roe*’s recognition and *Casey*’s reaffirmation of the right to choose; and *Roe* and *Casey* in turn supported additional protections for intimate and familial relations. The majority has embarrassingly little to say about those precedents. It (literally) rattles them off in a single paragraph; and it implies that they have nothing to do with each other, or with the right to terminate an early pregnancy. But that is flat wrong. The Court’s precedents about bodily autonomy, sexual and familial relations, and procreation are all interwoven—all part of the fabric of our constitutional law, and because that is so, of our lives. Especially women’s lives, where they safeguard a right to self-determination.

And eliminating that right, we need to say before further describing our precedents, is not taking a “neutral” position, as JUSTICE KAVANAUGH tries to argue. His idea is that neutrality lies in giving the abortion issue to the States, where some can go one way and some another. But would he say that the Court is being “scrupulously neutral” if it allowed New York and California to ban all the guns they want? If the Court allowed some States to use unanimous juries and others not? If the Court told the States: Decide for yourselves whether to put restrictions on church attendance? We could go on—and in fact we will. Suppose JUSTICE KAVANAUGH were to say (in line with the majority opinion) that the rights we just listed are more textually or historically grounded than the right to choose. What, then, of the right to contraception or same-sex marriage? Would it be “scrupulously neutral” for the Court to eliminate those rights too? The point of all these examples is that when it comes to rights, the Court does not act “neutrally” when it leaves everything up to the States. Rather, the Court acts neutrally when it protects the right against all comers. And to

apply that point to the case here: When the Court decimates a right women have held for 50 years, the Court is not being “scrupulously neutral.” It is instead taking sides: against women who wish to exercise the right, and for States (like Mississippi) that want to bar them from doing so. JUSTICE KAVANAUGH cannot obscure that point by appropriating the rhetoric of even-handedness. His position just is what it is: A brook-no-compromise refusal to recognize a woman’s right to choose, from the first day of a pregnancy. And that position, as we will now show, cannot be squared with this Court’s longstanding view that women indeed have rights (whatever the state of the world in 1868) to make the most personal and consequential decisions about their bodies and their lives.

Consider first, then, the line of this Court’s cases protecting “bodily integrity.” “No right,” in this Court’s time-honored view, “is held more sacred, or is more carefully guarded,” than “the right of every individual to the possession and control of his own person.” *Union Pacific R. Co. v. Botsford* (1891); see *Cruzan v. Director, Mo. Dept. of Health* (1990) (Every adult “has a right to determine what shall be done with his own body”). Or to put it more simply: Everyone, including women, owns their own bodies. So the Court has restricted the power of government to interfere with a person’s medical decisions or compel her to undergo medical procedures or treatments. See, e.g., *Winston v. Lee* (1985) (forced surgery); *Rochin v. California* (1952) (forced stomach pumping); *Washington v. Harper* (1990) (forced administration of antipsychotic drugs).

*Casey* recognized the “doctrinal affinity” between those precedents and *Roe*. And that doctrinal affinity is born of a factual likeness. There are few greater incursions on a body than forcing a woman to complete a pregnancy and give birth. For every woman, those experiences involve all manner of physical changes, medical treatments (including the possibility of a cesarean section), and medical risk. Just as one example, an American woman is 14 times more likely to die by carrying a pregnancy to term than by having an abortion. That women happily undergo those burdens and hazards of their own accord does not lessen how far a State impinges on a woman’s body when it compels her to bring a pregnancy to term. And for some women, as *Roe* recognized, abortions are medically necessary to prevent harm. The majority does not say—which is itself ominous—whether a State may prevent a woman from obtaining an abortion when she and her doctor have determined it is a needed medical treatment.

So too, *Roe* and *Casey* fit neatly into a long line of decisions protecting from government intrusion a wealth of private choices about family matters, child rearing, intimate relationships, and procreation. Those cases safeguard particular choices about whom to marry; whom to have sex with; what family members to live with; how to raise children—and crucially, whether and when to have children. In varied cases, the Court explained that those choices—“the most intimate and personal” a person can make—reflect fundamental aspects of personal identity; they define the very “attributes of personhood.” And they inevitably shape the nature and future course of a person’s life

(and often the lives of those closest to her). So, the Court held, those choices belong to the individual, and not the government. That is the essence of what liberty requires.

And liberty may require it, this Court has repeatedly said, even when those living in 1868 would not have recognized the claim—because they would not have seen the person making it as a full-fledged member of the community. Throughout our history, the sphere of protected liberty has expanded, bringing in individuals formerly excluded. In that way, the constitutional values of liberty and equality go hand in hand; they do not inhabit the hermetically sealed containers the majority portrays. So before *Roe* and *Casey*, the Court expanded in successive cases those who could claim the right to marry—though their relationships would have been outside the law’s protection in the mid-19th century. See, e.g., *Loving* (interracial couples); *Turner v. Safley* (1987) (prisoners); see also, e.g., *Stanley v. Illinois* (1972) (offering constitutional protection to untraditional “family unit[s]”). And after *Roe* and *Casey*, of course, the Court continued in that vein. With a critical stop to hold that the Fourteenth Amendment protected same-sex intimacy, the Court resolved that the Amendment also conferred on same-sex couples the right to marry. See *Lawrence*; *Obergefell*. In considering that question, the Court held, “[h]istory and tradition,” especially as reflected in the course of our precedent, “guide and discipline [the] inquiry.” But the sentiments of 1868 alone do not and cannot “rule the present.”

*Casey* similarly recognized the need to extend the constitutional sphere of liberty to a previously excluded group. The Court then understood, as the majority today does not, that the men who ratified the Fourteenth Amendment and wrote the state laws of the time did not view women as full and equal citizens. A woman then, *Casey* wrote, “had no legal existence separate from her husband.” Women were seen only “as the center of home and family life,” without “full and independent legal status under the Constitution.” But that could not be true any longer: The State could not now insist on the historically dominant “vision of the woman’s role.” And equal citizenship, *Casey* realized, was inescapably connected to reproductive rights. “The ability of women to participate equally” in the “life of the Nation”—in all its economic, social, political, and legal aspects—“has been facilitated by their ability to control their reproductive lives.” Without the ability to decide whether and when to have children, women could not—in the way men took for granted—determine how they would live their lives, and how they would contribute to the society around them.

For much that reason, *Casey* made clear that the precedents *Roe* most closely tracked were those involving contraception. Over the course of three cases, the Court had held that a right to use and gain access to contraception was part of the Fourteenth Amendment’s guarantee of liberty. See *Griswold*; *Eisenstadt*; *Carey v. Population Services Int’l* (1977). That clause, we explained, necessarily conferred a right “to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” *Casey* saw *Roe* as of a piece: In “critical respects the abortion decision is of the same character.” “[R]easonable

people,” the Court noted, could also oppose contraception; and indeed, they could believe that “some forms of contraception” similarly implicate a concern with “potential life.” Yet the views of others could not automatically prevail against a woman’s right to control her own body and make her own choice about whether to bear, and probably to raise, a child. When an unplanned pregnancy is involved—because either contraception or abortion is outlawed—“the liberty of the woman is at stake in a sense unique to the human condition.” No State could undertake to resolve the moral questions raised “in such a definitive way” as to deprive a woman of all choice.

Faced with all these connections between *Roe/Casey* and judicial decisions recognizing other constitutional rights, the majority tells everyone not to worry. It can (so it says) neatly extract the right to choose from the constitutional edifice without affecting any associated rights. (Think of someone telling you that the Jenga tower simply will not collapse.) Today’s decision, the majority first says, “does not undermine” the decisions cited by *Roe* and *Casey*—the ones involving “marriage, procreation, contraception, [and] family relationships”—“in any way.” Note that this first assurance does not extend to rights recognized after *Roe* and *Casey*, and partly based on them—in particular, rights to same-sex intimacy and marriage. On its later tries, though, the majority includes those too: “Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.” That right is unique, the majority asserts, “because [abortion] terminates life or potential life.” So the majority depicts today’s decision as “a restricted railroad ticket, good for this day and train only.” Should the audience for these too-much-repeated protestations be duly satisfied? We think not.

The first problem with the majority’s account comes from JUSTICE THOMAS’s concurrence—which makes clear he is not with the program. In saying that nothing in today’s opinion casts doubt on non-abortion precedents, JUSTICE THOMAS explains, he means only that they are not at issue in this very case. But he lets us know what he wants to do when they are. “[I]n future cases,” he says, “we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.” And when we reconsider them? Then “we have a duty” to “overrul[e] these demonstrably erroneous decisions.” So at least one Justice is planning to use the ticket of today’s decision again and again and again.

Even placing the concurrence to the side, the assurance in today’s opinion still does not work. Or at least that is so if the majority is serious about its sole reason for overturning *Roe* and *Casey*: the legal status of abortion in the 19th century. Except in the places quoted above, the state interest in protecting fetal life plays no part in the majority’s analysis. To the contrary, the majority takes pride in not expressing a view “about the status of the fetus.” The majority’s departure from *Roe* and *Casey* rests instead—and only—on whether a woman’s decision to end a pregnancy involves any Fourteenth Amendment liberty interest (against which *Roe* and *Casey* balanced the state interest in preserving fetal life). According to the majority, no liberty interest is

present—because (and only because) the law offered no protection to the woman’s choice in the 19th century. But here is the rub. The law also did not then (and would not for ages) protect a wealth of other things. It did not protect the rights recognized in *Lawrence* and *Obergefell* to same-sex intimacy and marriage. It did not protect the right recognized in *Loving* to marry across racial lines. It did not protect the right recognized in *Griswold* to contraceptive use. For that matter, it did not protect the right recognized in *Skinner v. Oklahoma ex rel. Williamson* (1942), not to be sterilized without consent. So if the majority is right in its legal analysis, all those decisions were wrong, and all those matters properly belong to the States too—whatever the particular state interests involved. And if that is true, it is impossible to understand (as a matter of logic and principle) how the majority can say that its opinion today does not threaten—does not even “undermine”—any number of other constitutional rights.

Nor does it even help just to take the majority at its word. Assume the majority is sincere in saying, for whatever reason, that it will go so far and no further. Scout’s honor. Still, the future significance of today’s opinion will be decided in the future. And law often has a way of evolving without regard to original intentions—a way of actually following where logic leads, rather than tolerating hard-to-explain lines. Rights can expand in that way. Dissenting in *Lawrence*, Justice Scalia explained why he took no comfort in the Court’s statement that a decision recognizing the right to same-sex intimacy did “not involve” same-sex marriage. That could be true, he wrote, “only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.” Score one for the dissent, as a matter of prophecy. And logic and principle are not one-way ratchets. Rights can contract in the same way and for the same reason—because whatever today’s majority might say, one thing really does lead to another. We fervently hope that does not happen because of today’s decision. We hope that we will not join Justice Scalia in the book of prophets. But we cannot understand how anyone can be confident that today’s opinion will be the last of its kind.

Consider, as our last word on this issue, contraception. The Constitution, of course, does not mention that word. And there is no historical right to contraception, of the kind the majority insists on. To the contrary, the American legal landscape in the decades after the Civil War was littered with bans on the sale of contraceptive devices. So again, there seem to be two choices. If the majority is serious about its historical approach, then *Griswold* and its progeny are in the line of fire too. Or if it is not serious, then . . . what is the basis of today’s decision? If we had to guess, we suspect the prospects of this Court approving bans on contraception are low. But once again, the future significance of today’s opinion will be decided in the future. At the least, today’s opinion will fuel the fight to get contraception, and any other issues with a moral dimension, out of the Fourteenth Amendment and into state legislatures.

Anyway, today’s decision, taken on its own, is catastrophic enough. As a matter of constitutional method, the majority’s commitment to replicate in 2022 every view about the meaning of liberty held in 1868 has precious little to recommend it. Our law



in this constitutional sphere, as in most, has for decades upon decades proceeded differently. It has considered fundamental constitutional principles, the whole course of the Nation's history and traditions, and the step-by-step evolution of the Court's precedents. It is disciplined but not static. It relies on accumulated judgments, not just the sentiments of one long-ago generation of men (who themselves believed, and drafted the Constitution to reflect, that the world progresses). And by doing so, it includes those excluded from that olden conversation, rather than perpetuating its bounds.

As a matter of constitutional substance, the majority's opinion has all the flaws its method would suggest. Because laws in 1868 deprived women of any control over their bodies, the majority approves States doing so today. Because those laws prevented women from charting the course of their own lives, the majority says States can do the same again. Because in 1868, the government could tell a pregnant woman—even in the first days of her pregnancy—that she could do nothing but bear a child, it can once more impose that command. Today's decision strips women of agency over what even the majority agrees is a contested and contestable moral issue. It forces her to carry out the State's will, whatever the circumstances and whatever the harm it will wreak on her and her family. In the Fourteenth Amendment's terms, it takes away her liberty. Even before we get to *stare decisis*, we dissent.

## II

By overruling *Roe*, *Casey*, and more than 20 cases reaffirming or applying the constitutional right to abortion, the majority abandons *stare decisis*, a principle central to the rule of law. . . . *Stare decisis* “promotes the evenhanded, predictable, and consistent development of legal principles.” It maintains a stability that allows people to order their lives under the law.

*Stare decisis* also “contributes to the integrity of our constitutional system of government” by ensuring that decisions “are founded in the law rather than in the proclivities of individuals.” As Hamilton wrote: It “avoid[s] an arbitrary discretion in the courts.” THE FEDERALIST No. 78. And as Blackstone said before him: It “keep[s] the scale of justice even and steady, and not liable to waver with every new judge's opinion.” . . .

. . . [T]he Court may not overrule a decision, even a constitutional one, without a “special justification.” *Stare decisis* is, of course, not an “inexorable command”; it is sometimes appropriate to overrule an earlier decision. But the Court must have a good reason to do so over and above the belief “that the precedent was wrongly decided.” “[I]t is not alone sufficient that we would decide a case differently now than we did then.”

The majority today lists some 30 of our cases as overruling precedent, and argues that they support overruling *Roe* and *Casey*. But none does . . . In some, the Court only

partially modified or clarified a precedent. And in the rest, the Court relied on one or more of the traditional *stare decisis* factors in reaching its conclusion. The Court found, for example, (1) a change in legal doctrine that undermined or made obsolete the earlier decision; (2) a factual change that had the same effect; or (3) an absence of reliance because the earlier decision was less than a decade old. (The majority is wrong when it says that we insist on a test of changed law or fact alone, although that is present in most of the cases.) None of those factors apply here: Nothing—and in particular, no significant legal or factual change—supports overturning a half-century of settled law giving women control over their reproductive lives. First, for all the reasons we have given, *Roe* and *Casey* were correct. . . . [T]he Court protected women’s liberty and women’s equality in a way comporting with our Fourteenth Amendment precedents. . . .

In any event “[w]hether or not we . . . agree” with a prior precedent is the beginning, not the end, of our analysis—and the remaining “principles of *stare decisis* weigh heavily against overruling” *Roe* and *Casey*. . . . No changes in either law or fact have eroded the two decisions. And tens of millions of American women have relied, and continue to rely, on the right to choose. So under traditional *stare decisis* principles, the majority has no special justification for the harm it causes.

. . . The majority barely mentions any legal or factual changes that have occurred since *Roe* and *Casey*. It suggests that the two decisions are hard for courts to implement, but cannot prove its case. In the end, the majority says, all it must say to override *stare decisis* is one thing: that it believes *Roe* and *Casey* “egregiously wrong.” That rule could equally spell the end of any precedent with which a bare majority of the present Court disagrees. . . . It makes radical change too easy and too fast, based on nothing more than the new views of new judges. The majority has overruled *Roe* and *Casey* for one and only one reason: because it has always despised them, and now it has the votes to discard them. The majority thereby substitutes a rule by judges for the rule of law.

#### A

Contrary to the majority’s view, there is nothing unworkable about *Casey*’s “undue burden” standard. Its primary focus on whether a State has placed a “substantial obstacle” on a woman seeking an abortion is “the sort of inquiry familiar to judges across a variety of contexts.” And it has given rise to no more conflict in application than many standards this Court and others unhesitatingly apply every day. . . .

. . . The *Casey* undue burden standard . . . resembles general standards that courts work with daily in other legal spheres—like the “rule of reason” in antitrust law or the “arbitrary and capricious” standard for agency decisionmaking. Applying general standards to particular cases is, in many contexts, just what it means to do law. . . .

Anyone concerned about workability should consider the majority’s substitute standard. The majority says a law regulating or banning abortion “must be sustained if

there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.” And the majority lists interests like “respect for and preservation of prenatal life,” “protection of maternal health,” elimination of certain “medical procedures,” “mitigation of fetal pain,” and others. This Court will surely face critical questions about how that test applies. Must a state law allow abortions when necessary to protect a woman’s life and health? And if so, exactly when? How much risk to a woman’s life can a State force her to incur, before the Fourteenth Amendment’s protection of life kicks in? Suppose a patient with pulmonary hypertension has a 30-to-50 percent risk of dying with ongoing pregnancy; is that enough? And short of death, how much illness or injury can the State require her to accept, consistent with the Amendment’s protection of liberty and equality? Further, the Court may face questions about the application of abortion regulations to medical care most people view as quite different from abortion. What about the morning-after pill? IUDs? In vitro fertilization? And how about the use of dilation and evacuation or medication for miscarriage management?<sup>12</sup>

Finally, the majority’s ruling today invites a host of questions about interstate conflicts. Can a State bar women from traveling to another State to obtain an abortion? Can a State prohibit advertising out-of-state abortions or helping women get to out-of-state providers? Can a State interfere with the mailing of drugs used for medication abortions? The Constitution protects travel and speech and interstate commerce, so today’s ruling will give rise to a host of new constitutional questions. Far from removing the Court from the abortion issue, the majority puts the Court at the center of the coming “interjurisdictional abortion wars.”

In short, the majority does not save judges from unwieldy tests or extricate them from the sphere of controversy. To the contrary, it discards a known, workable, and predictable standard in favor of something novel and probably far more complicated. It forces the Court to wade further into hotly contested issues, including moral and philosophical ones, that the majority criticizes *Roe* and *Casey* for addressing.

## B

When overruling constitutional precedent, the Court has almost always pointed to major legal or factual changes undermining a decision’s original basis. . . . But it is not so today. . . . The majority briefly invokes the current controversy over abortion. But it has to acknowledge that the same dispute has existed for decades: Conflict over abortion is not a change but a constant. . . . In the end, the majority throws longstanding

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<sup>12</sup> To take just the last, most medical treatments for miscarriage are identical to those used in abortions. Blanket restrictions on “abortion” procedures and medications therefore may be understood to deprive women of effective treatment for miscarriages, which occur in about 10 to 30 percent of pregnancies.

precedent to the winds without showing that anything significant has changed to justify its radical reshaping of the law.

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. . . [N]o subsequent factual developments have undermined *Roe* and *Casey*. Women continue to experience unplanned pregnancies and unexpected developments in pregnancies. Pregnancies continue to have enormous physical, social, and economic consequences. Even an uncomplicated pregnancy imposes significant strain on the body, unavoidably involving significant physiological change and excruciating pain. For some women, pregnancy and childbirth can mean life-altering physical ailments or even death. Today, as noted earlier, the risks of carrying a pregnancy to term dwarf those of having an abortion. . . . The majority briefly refers to arguments about changes in laws relating to healthcare coverage, pregnancy discrimination, and family leave. Many women, however, still do not have adequate healthcare coverage before and after pregnancy; and, even when insurance coverage is available, healthcare services may be far away. Women also continue to face pregnancy discrimination that interferes with their ability to earn a living. Paid family leave remains inaccessible to many who need it most. Only 20 percent of private-sector workers have access to paid family leave, including a mere 8 percent of workers in the bottom quartile of wage earners.

The majority briefly notes the growing prevalence of safe haven laws and demand for adoption, but, to the degree that these are changes at all, they too are irrelevant. Neither reduces the health risks or financial costs of going through pregnancy and childbirth. Moreover, the choice to give up parental rights after giving birth is altogether different from the choice not to carry a pregnancy to term. The reality is that few women denied an abortion will choose adoption.<sup>17</sup> The vast majority will continue, just as in *Roe* and *Casey*'s time, to shoulder the costs of childrearing. Whether or not they choose to parent, they will experience the profound loss of autonomy and dignity that coerced pregnancy and birth always impose.

Mississippi's own record illustrates how little facts on the ground have changed since *Roe* and *Casey*, notwithstanding the majority's supposed "modern developments." Sixty-two percent of pregnancies in Mississippi are unplanned, yet Mississippi does not require insurance to cover contraceptives and prohibits educators from demonstrating proper contraceptive use. The State neither bans pregnancy discrimination nor requires provision of paid parental leave. It has strict eligibility requirements for Medicaid and nutrition assistance, leaving many women and families without basic medical care or enough food. Although 86 percent of pregnancy-related deaths in the State are due to postpartum complications, Mississippi rejected federal funding to provide a year's worth of Medicaid coverage to women after giving birth. Perhaps unsurprisingly, health

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<sup>17</sup> A study of women who sought an abortion but were denied one because of gestational limits found that only 9 percent put the child up for adoption, rather than parenting themselves.

outcomes in Mississippi are abysmal for both women and children. Mississippi has the highest infant mortality rate in the country, and some of the highest rates for preterm birth, low birthweight, cesarean section, and maternal death. It is approximately 75 times more dangerous for a woman in the State to carry a pregnancy to term than to have an abortion. We do not say that every State is Mississippi, and we are sure some have made gains since *Roe* and *Casey* in providing support for women and children. But a state-by-state analysis by public health professionals shows that States with the most restrictive abortion policies also continue to invest the least in women's and children's health.

The only notable change we can see since *Roe* and *Casey* cuts in favor of adhering to precedent: It is that American abortion law has become more and more aligned with other nations. The majority, like the Mississippi Legislature, claims that the United States is an extreme outlier when it comes to abortion regulation. The global trend, however, has been toward increased provision of legal and safe abortion care. A number of countries, including New Zealand, the Netherlands, and Iceland, permit abortions up to a roughly similar time as *Roe* and *Casey* set. Canada has decriminalized abortion at any point in a pregnancy. Most Western European countries impose restrictions on abortion after 12 to 14 weeks, but they often have liberal exceptions to those time limits, including to prevent harm to a woman's physical or mental health. They also typically make access to early abortion easier, for example, by helping cover its cost. Perhaps most notable, more than 50 countries around the world—in Asia, Latin America, Africa, and Europe—have expanded access to abortion in the past 25 years. In light of that worldwide liberalization of abortion laws, it is American States that will become international outliers after today.

In sum, the majority can point to neither legal nor factual developments in support of its decision. Nothing that has happened in this country or the world in recent decades undermines the core insight of *Roe* and *Casey*. It continues to be true that, within the constraints those decisions established, a woman, not the government, should choose whether she will bear the burdens of pregnancy, childbirth, and parenting. . . .

## C

The reasons for retaining *Roe* and *Casey* gain further strength from the overwhelming reliance interests those decisions have created. The Court adheres to precedent not just for institutional reasons, but because it recognizes that stability in the law is “an essential thread in the mantle of protection that the law affords the individual.” So when overruling precedent “would dislodge [individuals'] settled rights and expectations,” *stare decisis* has “added force.” *Casey* understood that to deny individuals' reliance on *Roe* was to “refuse to face the fact[s].” Today the majority refuses to face the facts. “The most striking feature of the [majority] is the absence of any serious discussion” of how its ruling will affect women. By characterizing *Casey*'s

reliance arguments as “generalized assertions about the national psyche,” it reveals how little it knows or cares about women’s lives or about the suffering its decision will cause.

In *Casey*, the Court observed that for two decades individuals “have organized intimate relationships and made” significant life choices “in reliance on the availability of abortion in the event that contraception should fail.” Over another 30 years, that reliance has solidified. For half a century now, in *Casey*’s words, “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” Indeed, all women now of childbearing age have grown up expecting that they would be able to avail themselves of *Roe*’s and *Casey*’s protections.

The disruption of overturning *Roe* and *Casey* will therefore be profound. Abortion is a common medical procedure and a familiar experience in women’s lives. About 18 percent of pregnancies in this country end in abortion, and about one quarter of American women will have an abortion before the age of 45. Those numbers reflect the predictable and life-changing effects of carrying a pregnancy, giving birth, and becoming a parent. As *Casey* understood, people today rely on their ability to control and time pregnancies when making countless life decisions: where to live, whether and how to invest in education or careers, how to allocate financial resources, and how to approach intimate and family relationships. Women may count on abortion access for when contraception fails. They may count on abortion access for when contraception cannot be used, for example, if they were raped. They may count on abortion for when something changes in the midst of a pregnancy, whether it involves family or financial circumstances, unanticipated medical complications, or heartbreaking fetal diagnoses. Taking away the right to abortion, as the majority does today, destroys all those individual plans and expectations. In so doing, it diminishes women’s opportunities to participate fully and equally in the Nation’s political, social, and economic life.

The majority’s response to these obvious points exists far from the reality American women actually live. The majority proclaims that “reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.” The facts are: 45 percent of pregnancies in the United States are unplanned. Even the most effective contraceptives fail, and effective contraceptives are not universally accessible. Not all sexual activity is consensual and not all contraceptive choices are made by the party who risks pregnancy. The Mississippi law at issue here, for example, has no exception for rape or incest, even for underage women. Finally, the majority ignores, as explained above, that some women decide to have an abortion because their circumstances change during a pregnancy. Human bodies care little for hopes and plans. Events can occur after conception, from unexpected medical risks to changes in family circumstances, which profoundly alter what it means to carry a pregnancy to term. In all these situations, women have expected that they will get to decide, perhaps in consultation with their families or doctors but free from state

interference, whether to continue a pregnancy. For those who will now have to undergo that pregnancy, the loss of *Roe* and *Casey* could be disastrous.

That is especially so for women without money. When we “count[ ] the cost of [*Roe*’s] repudiation” on women who once relied on that decision, it is not hard to see where the greatest burden will fall. In States that bar abortion, women of means will still be able to travel to obtain the services they need. It is women who cannot afford to do so who will suffer most. These are the women most likely to seek abortion care in the first place. Women living below the federal poverty line experience unintended pregnancies at rates five times higher than higher income women do, and nearly half of women who seek abortion care live in households below the poverty line. Even with *Roe*’s protection, these women face immense obstacles to raising the money needed to obtain abortion care early in their pregnancy. After today, in States where legal abortions are not available, they will lose any ability to obtain safe, legal abortion care. They will not have the money to make the trip necessary; or to obtain childcare for that time; or to take time off work. Many will endure the costs and risks of pregnancy and giving birth against their wishes. Others will turn in desperation to illegal and unsafe abortions. They may lose not just their freedom, but their lives.

Finally, the expectation of reproductive control is integral to many women’s identity and their place in the Nation. That expectation helps define a woman as an “equal citizen[ ],” with all the rights, privileges, and obligations that status entails. It reflects that she is an autonomous person, and that society and the law recognize her as such. Like many constitutional rights, the right to choose situates a woman in relationship to others and to the government. It helps define a sphere of freedom, in which a person has the capacity to make choices free of government control. As *Casey* recognized, the right “order[s]” her “thinking” as well as her “living.” Beyond any individual choice about residence, or education, or career, her whole life reflects the control and authority that the right grants.

Withdrawing a woman’s right to choose whether to continue a pregnancy does not mean that no choice is being made. It means that a majority of today’s Court has wrenched this choice from women and given it to the States. To allow a State to exert control over one of “the most intimate and personal choices” a woman may make is not only to affect the course of her life, monumental as those effects might be. It is to alter her “views of [herself]” and her understanding of her “place[ ] in society” as someone with the recognized dignity and authority to make these choices. Women have relied on *Roe* and *Casey* in this way for 50 years. Many have never known anything else. When *Roe* and *Casey* disappear, the loss of power, control, and dignity will be immense.

The Court’s failure to perceive the whole swath of expectations *Roe* and *Casey* created reflects an impoverished view of reliance. According to the majority, a reliance interest must be “very concrete,” like those involving “property” or “contract.” While many of this Court’s cases addressing reliance have been in the “commercial context,”

none holds that interests must be analogous to commercial ones to warrant *stare decisis* protection. This unprecedented assertion is, at bottom, a radical claim to power. By disclaiming any need to consider broad swaths of individuals' interests, the Court arrogates to itself the authority to overrule established legal principles without even acknowledging the costs of its decisions for the individuals who live under the law, costs that this Court's *stare decisis* doctrine instructs us to privilege when deciding whether to change course.

The majority claims that the reliance interests women have in *Roe* and *Casey* are too "intangible" for the Court to consider, even if it were inclined to do so. This is to ignore as judges what we know as men and women. The interests women have in *Roe* and *Casey* are perfectly, viscerally concrete. Countless women will now make different decisions about careers, education, relationships, and whether to try to become pregnant than they would have when *Roe* served as a backstop. Other women will carry pregnancies to term, with all the costs and risk of harm that involves, when they would previously have chosen to obtain an abortion. For millions of women, *Roe* and *Casey* have been critical in giving them control of their bodies and their lives. Closing our eyes to the suffering today's decision will impose will not make that suffering disappear. The majority cannot escape its obligation to "count[ ] the cost[s]" of its decision by invoking the "conflicting arguments" of "contending sides." *Stare decisis* requires that the Court calculate the costs of a decision's repudiation on those who have relied on the decision, not on those who have disavowed it.

More broadly, the majority's approach to reliance cannot be reconciled with our Nation's understanding of constitutional rights. The majority's insistence on a "concrete," economic showing would preclude a finding of reliance on a wide variety of decisions recognizing constitutional rights—such as the right to express opinions, or choose whom to marry, or decide how to educate children. The Court, on the majority's logic, could transfer those choices to the State without having to consider a person's settled understanding that the law makes them hers. That must be wrong. All those rights, like the right to obtain an abortion, profoundly affect and, indeed, anchor individual lives. To recognize that people have relied on these rights is not to dabble in abstractions, but to acknowledge some of the most "concrete" and familiar aspects of human life and liberty. . . .

After today, young women will come of age with fewer rights than their mothers and grandmothers had. The majority accomplishes that result without so much as considering how women have relied on the right to choose or what it means to take that right away. The majority's refusal even to consider the life-altering consequences of reversing *Roe* and *Casey* is a stunning indictment of its decision. . . .

With sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection—we dissent.



# THE INDEPENDENCE AND INTEGRITY OF COURTS

DISCUSSION LEADERS

KIM LANE SCHEPPELE, CARLOS ROSENKRANTZ,  
AND PHILIP SALES

## V. THE INDEPENDENCE AND INTEGRITY OF COURTS

DISCUSSION LEADERS:

KIM LANE SCHEPPELE, CARLOS ROSENKRANTZ, AND PHILIP SALES

### **The Removal and Discipline of Judges**

#### **The Principle of the Irremovability of Judges**

European Commission v. Republic of Poland (CJEU, 2019)..... V-5

#### **Dissolving a Court or Removing Judges *en Masse***

Emily Channell-Justice, Ukraine’s Constitutional Crisis,  
Explained (2020)..... V-9

Venice Commission, Urgent Opinion on the Reform of the  
Constitutional Court Issued Pursuant to Article 14a of the  
Venice Commission’s Rules of Procedure (2020)..... V-11

Venice Commission, Ukraine Draft Law No. 4533 on the  
Constitutional Procedure (2021)..... V-14

DEJURE Foundation and Others, We Call on the President and  
the Servant of the People Party to End the Pressure on the  
Constitutional Court Against the Newly Appointed Judges  
(2021) ..... V-16

Supreme Court of Justice v. Ecuador (Inter-American Court of  
Human Rights, 2013)..... V-18

Human Rights Watch, World Report 2021: Ecuador..... V-22

Daniela Salazar Marín, The Transitory Lottery for Judicial  
Renovation (2022)..... V-23

Diego Werneck Arguelhes, Public Opinion, Criminal Procedures  
and Legislative Shields: How Supreme Court Judges Have  
Checked President Jair Bolsonaro in Brazil (2022) ..... V-24

#### **Impeachment, Removal and Discipline of Individual Judges**

Kimberly Wehle, How to Impeach a Supreme Court Justice  
(2022) ..... V-27

Robert L. Brown, From Earl Warren to Wendell Griffen: A Study  
of Judicial Intimidation and Judicial Self-Restraint (2005) ..... V-29

Saikrishna Prakash and Steven D. Smith, Removing Federal  
Judges Without Impeachment (2006)..... V-32

European Commission v. Republic of Poland (CJEU, 2021)..... V-34

Case No. 3-19-CN/20 (Ecuador, 2020) ..... V-39

Case No. 37-19-IN (Ecuador, 2021)..... V-46

Disqualification of Justice, Judge, or Magistrate Judge, 28 U.S.C.  
§ 455 (U.S.) ..... V-54

The Act on the Federal Constitutional Court, Ch. 1, § 19  
(Germany)..... V-55

Complaints Against Judges and Judicial Discipline, 28 U.S.C.  
§ 351–55 (United States)..... V-56  
Judiciary Accountability Act of 2021, H.R. 4827 (U.S.) ..... V-59  
Judicial Ethics and Anti-Corruption Act of 2022, H.R. 7706 (U.S.)..... V-61  
John Roberts, 2021 Year-End Report on the Federal Judiciary ..... V-65

**Resigning on Principle**

Rafael Solis, Public Letter of Resignation and Denunciation  
(2019) ..... V-67

**Selecting Judges**

**Judges Picking Judges**

European Network of Councils for the Judiciary, ENCJ Votes to  
Expel Polish Council for the Judiciary (2021) ..... V-71

**Appointments by Other Branches**

Xero Flor w Polsce sp. z.o.o. v. Poland (CJEU, 2021)..... V-73  
Billy Corriher and Alex Brown, Chris Christie’s War on Judicial  
Independence (2014) ..... V-75

**Appointments in Mixed Systems**

The Judiciary, Basic Law, Chapter Two: Judges (Israel) ..... V-77

**Changing the Judicial Appointments System**

Joshua Jordan, Tackling Corruption While Preserving Judicial  
Independence: Lessons from India’s Supreme Court (2022)..... V-78  
Nancy Gertner and Laurence H. Tribe, The Supreme Court Isn’t  
Well. The Only Hope for a Cure Is More Justices. (2021)..... V-80

**Time-Limited and Time-Unlimited Appointments**

Venice Commission, Compilation of Venice Commission  
Opinions and Reports Concerning Courts and Judges (2019)..... V-81  
Starrs v. Procurator Fiscal, Linlithgow (Scotland, 1999)..... V-82  
Judith Resnik, Judicial Selection and Democratic Theory:  
Demand, Supply, and Life Tenure (2005)..... V-90

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Judicial independence is a principle that is easy to formulate in the abstract and harder to specify in practice. What judicial independence entails and which practices sustain or undermine it have been debated for a long time. Given contemporary political conflicts in many regions of the world, the topic has special saliency, as arguments are made that judges have either too much or too little independence.

In this chapter, we have selected a subset of issues related to the appointment and removal of judges. These points of contact between the judiciary and the larger political environment present opportunities both for accountability and for threats to independent judging. We start with sitting judges and inquire about the circumstances under which they can be removed either individually or *en masse*, so as to understand the challenges both of ensuring the accountability of an independent judiciary in a democratic system and of enforcing disciplinary rules that require the appearance and reality of independence on the part of individual judges. We also consider appointment procedures, the role of political influence in that process, and the relevance of the length of term in office. Through recent examples of efforts to change the composition of judiciaries and to restructure the method for judicial selection and tenure, we invite exploration of structures that support the integrity of judgment and ask how those can be distinguished from efforts to undermine the independence of courts. Throughout, we inquire into how judges should be appointed as well as how judges may be disciplined and removed short of the expiration of their lawful terms of office in countries committed to democratic institutions and practices.

## **THE REMOVAL AND DISCIPLINE OF JUDGES**

### **The Principle of the Irremovability of Judges**

Once judges have been appointed, a strong presumption exists that, except for cause and with due process, they may not be removed during their lawful terms of office. As democratic backsliding spreads, however, a number of states are remodeling their judiciaries in an effort to mirror the changing regimes by populating judiciaries with individuals likely to agree with the government in power. New presidents, prime ministers, and governing parties have proffered various rationales and differing methods to remove judges from office in order to replace them with judges more to their liking. The mechanisms include making immediately effective a lower age for judicial retirement, applying new qualifications for office to sitting judges, and dissolving whole courts and creating new bodies filled with judges seen as friendly to the government and either empowered to oversee other judges or given new jurisdiction to discipline judges already holding office.

As this description suggests, some attempts to remove judges are attributable to an autocratic desire to control courts. But other efforts stem from concerns that an existing judiciary is plagued with corruption, or is determined not to let a properly elected government execute policies within its authority, or aims to carry on the legacy of a prior regime that has been removed from power for having abused it. As illustrated below, we can observe that new democratically-elected and constitutionally-inclined governments may seek to change the composition of judiciaries, as will aspirationally autocratic ones. The fact that a government seeks fundamental alterations of a judiciary does not reveal whether those efforts aim to strengthen or to undermine both

constitutional democracy and judicial independence. Thus, the questions are: When are the bases for removing judges from office appropriate? What role, if any, is played by the goals and aspirations of a new government or by the political branches' concerns about the jurisprudence of the extant judiciary?

We begin with an explanation of the principle of the irremovability of judges as defined in the 2019 judgment of the Court of Justice of the European Union. This case was brought as an infringement action by the European Commission against Poland, which had reduced the retirement age for judges of the Supreme Court, effective immediately. If allowed to go into effect, the law on retirement ages would have removed nearly one-third of the judges of the Supreme Court—thus giving the new government a chance to fill those positions and tilt the orientation of the court. Thereafter, we consider when and if exceptions to this general principle can, should, and may be made.

**European Commission v. Republic of Poland**  
Court of Justice of the European Union  
Case 619/18 (June 24, 2019)

The Court (Grand Chamber), composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Prechal (Rapporteur), M. Vilaras and E. Regan, Presidents of Chambers, E. Juhász, M. Ilešič, J. Malenovský, L. Bay Larsen, D. Šváby, C. Vajda, P.G. Xuereb, N. Piçarra, L.S. Rossi and I. Jarukaitis, after hearing the opinion of the Advocate General, ruled that:

. . . 71. The requirement that courts be independent, a requirement which the Member States must—under the second subparagraph of Article 19(1) of the TEU\* . . .—ensure is observed in respect of national courts which, like the Sąd Najwyższy (Supreme Court), are called upon to rule on issues linked to the interpretation and application of EU law, has two aspects to it.

72. The first aspect, which is external in nature, requires that the court concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.

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\* Article 19(1) of the Treaty on European Union provides, in relevant part:

. . . Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

73. The second aspect, which is internal in nature, is for its part linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.

74. Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, [and] rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.

75. In particular, that freedom of the judges from all external intervention or pressure, which is essential, requires . . . certain guarantees appropriate for protecting the individuals who have the task of adjudicating in a dispute, such as guarantees against removal from office.

76. The principle of irremovability requires, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term. While it is not wholly absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality. Thus it is widely accepted that judges may be dismissed if they are deemed unfit for the purposes of carrying out their duties on account of incapacity or a serious breach of their obligations, provided the appropriate procedures are followed.

77. In that latter respect, . . . the requirement of independence means that the rules governing the disciplinary regime and, accordingly, any dismissal of those who have the task of adjudicating in a dispute must provide the necessary guarantees in order to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions. Thus, rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter,<sup>\*</sup> in particular the

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<sup>\*</sup> Article 47 of the European Union Charter of Fundamental Rights provides:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 48 of the European Union Charter of Fundamental Rights provides:

rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary.

78. In the present case, it must be held that the reform being challenged, which provides that the measure lowering the retirement age of judges of the Sąd Najwyższy (Supreme Court) is to apply to judges already serving on that court, results in those judges prematurely ceasing to carry out their judicial office and is therefore such as to raise reasonable concerns as regards compliance with the principle of the irremovability of judges.

79. In those circumstances, . . . such an application is acceptable only if it is justified by a legitimate objective, it is proportionate in the light of that objective and inasmuch as it is not such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the court concerned to external factors and its neutrality with respect to the interests before it.

80. In the present case the Republic of Poland claims that the decision to lower to 65 the retirement age of the judges of the Sąd Najwyższy (Supreme Court) was taken with the goal of standardising that age with the general retirement age applicable to all workers in Poland and, in doing so, of improving the age balance among senior members of that court. . . .

82. . . . [F]irst, . . . as has already been observed by the European Commission for Democracy through Law . . . , the explanatory memorandum to the draft New Law on the Supreme Court contains information that is such as to raise serious doubts as to whether the reform of the retirement age of serving judges of the Sąd Najwyższy (Supreme Court) was made in pursuance of such objectives, and not with the aim of side-lining a certain group of judges of that court.

83. Secondly, it is important to note that the lowering of the retirement age of the judges of the Sąd Najwyższy (Supreme Court) who were in post at the date of the entry into force of the New Law on the Supreme Court was accompanied in the present case by the implementation of a new mechanism allowing the President of the Republic to decide, on a discretionary basis, to extend the thus-shortened period during which a judge carries out his or her duties by two consecutive 3-year periods.

84. On the one hand, the introduction of that possibility of extending by 6 years the period for which the judge carries out his or her duties at the same time as the lowering by 5 years of the retirement age of judges of the Sąd Najwyższy (Supreme Court) who were in post upon the entry into force of the New Law on the Supreme Court

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(1) Everyone who has been charged shall be presumed innocent until proved guilty according to law. (2) Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

is such as to raise doubts as to the fact that the reform made genuinely seeks to standardise the retirement age of those judges with that applicable to all workers and to improve the age balance among senior members of that court.

85. On the other hand, the combination of those two measures is also such as to reinforce the impression that in fact their aim might be to exclude a pre-determined group of judges of the Sąd Najwyższy (Supreme Court), since the President of the Republic, notwithstanding the application of the measure lowering the retirement age to all the judges of that court who were in post when the New Law on the Supreme Court came into force, retains the discretion to maintain in their post some of the persons concerned.

86. Thirdly, it must be held that the measure lowering by 5 years the retirement age of the judges of the Sąd Najwyższy (Supreme Court) who were in post at the time of the entry into force of the New Law on the Supreme Court and the shortening of the period during which those judges carry out their duties that resulted therefrom affected, immediately, almost a third of the serving members of that court, including, in particular, the First President of that court, whose 6-year mandate, guaranteed under the Constitution, was also shortened as a consequence. As the Commission submits, that finding demonstrates the potentially considerable impact of the reform at issue on the composition and the functional continuity of the Sąd Najwyższy (Supreme Court). As the Advocate General observed . . . , such a major restructuring of the composition of a supreme court, through a reform specifically concerning that court, may itself prove to be such as to raise doubts as to the genuine nature of such a reform and as to the aims actually pursued by it. . . .

90. . . . [T]he Republic of Poland has not demonstrated that the measure being challenged constitutes an appropriate means for the purposes of reducing the diversity of the age limits for the mandatory cessation of activities in respect of all the professions concerned. In particular, that Member State has not put forward any objective reason why, for the purposes of bringing the retirement age of judges of the Sąd Najwyższy (Supreme Court) into line with the general retirement age applicable to all workers in Poland, it was necessary to provide for the automatic retirement of those judges subject to a decision made on a discretionary basis by the President of the Republic to allow them to continue to carry out their duties whereas, for other workers, retirement at the age provided for by law is optional. . . .

96. Having regard to all the foregoing considerations, it must be held that the application of the measure lowering the retirement age of the judges of the Sąd Najwyższy (Supreme Court) to the judges in post within that court is not justified by a legitimate objective. Accordingly, that application undermines the principle of the irremovability of judges, which is essential to their independence. . . .



## **Dissolving a Court or Removing Judges *en Masse***

The presumption of irremovability has not prevented efforts by some governments to dissolve a court or remove its sitting judges. Below, we provide examples from Ukraine and from Ecuador.

Before Russia re-invaded Ukraine in February 2022, the government of President Volodymyr Zelenskyy was engaged in a long-running conflict with the Ukrainian Constitutional Court. Elected on an anti-corruption platform in 2019 with 73% of the vote, Zelenskyy carried his victory into the parliamentary elections later that year in which his new Servant of the People party won 56% of the seats and gained the first single-party majority in the Ukrainian Parliament since independence in 1991.

Bolstered by this double mandate, Zelenskyy promptly persuaded the sympathetic parliament to enact anti-corruption reforms. That law strengthened the National Agency for Preventing Corruption (NAPC), which requires public officials to certify asset declarations, the National Anti-Corruption Bureau (NABU), which investigates corruption allegations, and the High Anti-Corruption Court (HACC), which hears cases involving allegedly corrupt public officials. These institutions have been widely regarded as successful in rooting out corruption but came under attack by the Ukrainian courts, where many judges had been appointed by Viktor Yanukovich, the pro-Russian president who was removed from the presidency by the Parliament in 2014 as a consequence of the Maidan protests. A number of these Yanukovich-era judges were alleged to have benefited from the widespread corruption that sparked the Maidan protests and that characterized the Yanukovich regime more generally. Some of these judges were themselves subject to investigation by the new anti-corruption agencies.

### **Ukraine's Constitutional Crisis, Explained**

Emily Channell-Justice (2020)\*

... On October 27 [2020], the Constitutional Court ruled the powers of the National Agency for Preventing Corruption (NAPC) to be unconstitutional, and the Court destroyed Ukraine's asset declaration system and the penalties associated with lying in these declarations. The publicly accessible asset declarations were a cornerstone in Ukraine's anti-corruption reforms, because they allowed oversight in the appointment and election of officials, and the NAPC imposed penalties for anyone who was not truthful in their declarations. The asset declaration system was one of the requirements for Ukraine's loans from the International Monetary Fund, and its destruction may lead to the end of lending from the IMF and a cancellation of Ukraine's visa-free travel agreement with the European Union. The Constitutional Court did not

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\* Excerpted from Emily Channell-Justice, *Ukraine's Constitutional Crisis, Explained*, HARVARD UKRAINIAN RESEARCH INSTITUTE (2020), <https://huri.harvard.edu/ukraine-constitutional-court-crisis-explained>.

provide an explanation for its decision, but experts believe that judges were concerned about how they might be affected by anti-corruption prosecutions.

The Constitutional Court is the highest power in Ukraine's government—its decisions cannot be reversed or appealed . . . Judges' salaries are about 20 times the country's national average, but many of the judges' asset declarations have shown wealth incongruous with even this higher salary, and many judges have registered their property in the names of relatives so these assets would not appear on declarations. Some have noted the outsize influence of pro-Russian parties, and especially oligarch Viktor Medvedchuk's political sphere, on the court. . . [Medvedchuk had been Yanukovich's campaign manager and head of Ukraine's most pro-Russian political party. Medvedchuk was later sanctioned by the U.S., along with Yanukovich, for involvement in the Russian annexation of Crimea. Once the 2022 war broke out, Medvedchuk was arrested in Ukraine and charged with treason.]

Earlier in October, the NACP stated that certain judges from the Constitutional Court should not be making rulings on issues of asset declarations, as they themselves have conflicts of interest. Four judges were asked to recuse themselves from cases regarding asset declarations and illicit enrichment—two judges are facing criminal cases for failing to disclose major assets; two judges are charged with failing to declare changes in their assets. The head of the court, Oleksandr Tupytsky, may potentially face charges for failing to disclose . . . conflicts of interest. [Tupytsky is widely believed to have illegally bought property in Crimea after the territory had been annexed by Russia, and then failed to disclose this in his asset declarations.]

In response to the court's ruling, President Volodymyr Zelensky called an emergency national security meeting, and he promised swift action to reverse the court's decision . . . Zelensky's Cabinet . . . ordered the NACP to reopen the asset declaration system for public access and for the NACP to resume its monitoring of asset declarations, which it did despite the court's ruling. [These actions meant that the government was refusing to recognize the decision of the Constitutional Court.]

But Zelensky's biggest move was to draft a law to fire all the Court's current judges and annul their ruling. Experts agree that this bill is clearly in violation of the Ukrainian Constitution, which only allows Constitutional Court judges to be removed by a vote of two-thirds of their colleagues. . . .

The Speaker of Parliament . . . together with 100 other lawmakers, also submitted a bill to reinstate the asset declaration system, though this bill does not address any of the underlying assertions about the constitutionality of the system that prompted the Constitutional Court's decision in the first place. A different group of lawmakers later submitted a bill that would temporarily block the Court's work by increasing its quorum from 12 to 17 judges. Neither of these bills, nor Zelensky's earlier bill, was adopted by Parliament.

Response from Ukraine’s allies abroad has been mixed. . . . However, a joint statement from the heads of the European Commission for Democracy Through Law (Venice Commission) and the Group of States against Corruption (GRECO) to the Ukrainian Speaker of Parliament warned against adopting Zelensky’s bill because it is unconstitutional. . . .

**Urgent Opinion on the Reform of the Constitutional Court Issued  
Pursuant to Article 14a of the Venice Commission’s Rules of  
Procedure**

Venice Commission  
Opinion No. 1012/2020 (2020)\*

[O]n the basis of comments by Mr. Paolo Carozza (United States); Ms. Marta Cartabia (Italy); Mr. Srdjan Darmanovic (Montenegro); [and] Mr. Christoph Grabenwarter (Austria) . . . [:]

. . . 7. On 27 October 2020, on a motion filed by 47 MPs, the Constitutional Court of Ukraine . . . adopted Decision 13-r/2020 that invalidated large parts of the anti-corruption legislation in force.

8. Four of the judges of the Constitutional Court, including the judge-rapporteur, were challenged by the President of Ukraine in his capacity as a party to the proceedings on the ground of conflict of interest, having been found by the National Agency for Corruption Prevention (NACP) to have failed to make due declarations of their financial situations, with referral to the National Anti-Corruption Bureau (NABU) for possible criminal investigations in two cases. They were therefore potentially directly concerned by the legislation at issue. . . .

10. Decision 13-r/2020 . . . is somewhat hard to understand . . . . The decision annulled Article 366-1 of the Criminal Code, which provides for criminal liability for a knowingly false asset declaration by government officials. Moreover, it declared some important powers of the NACP void. In this context, it declared unconstitutional the provisions of law on the verification of officials’ e-declarations and deprived the NACP of the authority to check asset declarations and identify conflicts of interest.

11. In reaction to Decision 13-r/2020 President Zelenskyy presented draft law No. 4288 in Parliament. Draft law No. 4288 would:

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\* Excerpted from EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), URGENT OPINION ON THE REFORM OF THE CONSTITUTIONAL COURT ISSUED PURSUANT TO ARTICLE 14A OF THE VENICE COMMISSION’S RULES OF PROCEDURE, OPINION No. 1012/2020 (Dec. 11, 2020).

1. declare null and void Decision 13-r/2020, as it had been adopted in the private interests of judges of the Constitutional Court and was arbitrary and ungrounded, contradicting the principle of rule of law . . . ;
2. ensure the continuity of the annulled provisions of the Criminal Code and the Law on the Prevention of Corruption;
3. terminate the powers of the judges of the Constitutional Court; and
4. ensure the selection and appointment of new judges of the Court. . . .

13. On 31 October 2020, the . . . Venice Commission and the . . . Group of States against Corruption (GRECO) sent a joint letter to the Speaker of the Parliament insisting that “[t]erminating the mandate of the judges is in blatant breach of the Constitution and of the fundamental principle of separation of powers. . . .” . . .

17. The reasoning of Decision 13-r/2020 is incomplete and not persuasive. . . . [A]n important part of the decision refers to international standards which are not presented in a coherent manner . . . .

20. . . . [T]he decision does not explain why it annuls legal provisions that apply to all civil servants while its reasons refer to judges only. During the meetings with the rapporteurs, the Court mentioned that Decision 13-r/2020 related to judges only and would not cover the application of the invalidated provisions in respect of civil servants and a decision on civil servants would still need to be handed down but this could not yet be spelled out in Decision 13-r/2020. Such an explanation leaves the Commission somewhat perplexed. This would mean that the Court would have knowingly adopted a decision that leaves it unclear whether legal provisions remain applicable or not. . . .

22. It is the object of criticism that some judges of the Constitutional Court were allowed to sit on the case leading to Decision 13-r/2020. Three of the judges had indeed been notified by the [NACP] that their asset declarations are incomplete. . . .

24. Although recusal was formally requested by one of the parties, the Court and the individual judges in question have made no effort to justify their implicit denial of the recusal request—thus lacking transparency and explanation. . . .

32. In light of issues identified in Decision 13-r/2020, it is appropriate . . . to go beyond the . . . decision itself to discuss possible ways of addressing structural problems that are revealed by the Commission’s analysis of the decision in question.

33. The difficulties presented by the problematic Decision 13-r/2020, on the one hand, and the corresponding proposal of the President in Draft Law 4288, on the other, concern an underlying issue that in different ways arises in all constitutional democracies: “[W]ho has the final say? [T]he Constitutional Court or Parliament?” The answer depends in part on the temporal scope of the conflict: in relation to a specific

case being litigated, the final say is for the Constitutional Court. The Constitutional Court's decisions are final and binding. Its decisions are not infallible, but they are final nonetheless, even when they might be considered wrong. This principle is clearly stated in many constitutions, including the Constitution of Ukraine.

34. On the other hand, Parliament can enact legislation that replaces annulled provisions as long as they do not repeat the same provisions that have been invalidated and take into account the Court's arguments. . . .

35. Political bodies must not be allowed to terminate the powers of individual judges of the Constitutional Court (except through processes of impeachment where this is established by the constitution), or of the whole body of the Court collectively. Nor should Parliament block the activity of the Constitutional Court through financial pressure or procedural obstacles or similar efforts. This would amount to a major, severe breach of the rule of law, . . . the constitutional principles of the separation of powers and the independence of the judiciary. . . .

37. . . . [T]he rule of law therefore requires that Decision 13-r/2020 be implemented. As pointed out in the joint letter by the . . . Venice Commission and GRECO, the annulment of a decision of the Constitutional Court and the dismissal of all its judges would be unconstitutional and would contradict the rule of law.

38. The Constitutional Court cannot be "punished" for its decisions, but its working can be improved. . . .

65. In Ukraine, judges of the Constitutional Court can be dismissed only by the Court itself and it is only the Court which is empowered to take disciplinary measures against one of its judges. The adoption of disciplinary sanctions against the judges of the Court seems to be within the competence of the Standing Commission on the Rules of Procedure and Ethics of the Court but this is not spelled out. The disciplinary procedure should be regulated in the Law on the Constitutional Court, with further details set out in the Rules of Procedure.

66. The question arises whether the absence of a withdrawal in a pending case can lead to disciplinary sanctions when such withdrawal was warranted . . . . Section 44 (8) of the Rules of Procedure provide for "liability in accordance with the legislation" when the judge did not make a statement of withdrawal in a situation of a conflict of interest. As shown above, the reference to liability in accordance with the legislation seems to be moot if there is a lack in the legislation.

67. In extreme cases, that might even lead to the dismissal of the judge concerned. Article 149 of the Constitution provides that only the Constitutional Court itself, acting with a qualified majority, can dismiss a judge of the Constitutional Court . . . .

69. In the absence of a discussion of this topic in Decision 13-r/2020, it remains unclear whether there was a decision of the Grand Chamber under Section 44 of the Rules of Procedure in this case.

70. In view of the special need for integrity of the judges of the Constitutional Court, an amendment to the Law on the Constitutional Court could ensure that disciplinary proceedings and decisions regarding a judge of the Constitutional Court are transparent and always made public not only during the hearing . . . but systematically together with the adopted decision. The rulings on recusal should be reasoned in substance. . . .

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In response to the Venice Commission opinion, the Ukrainian Parliament introduced a new draft law on Constitutional Procedure:

**Ukraine Draft Law No. 4533 on the Constitutional Procedure**  
Venice Commission  
Opinion No. 1024/2021 (2021) \*

. . . Article 21–1. Disciplinary responsibility of judges of the Constitutional Court

1. The Judge of the Constitutional Court of Ukraine shall bear disciplinary responsibility for serious disciplinary misconduct, gross or systematic neglect of their duties which [are] inconsistent with their status of the Judge of the Court or show their incompatibility with the position held.

Gross disciplinary conduct . . . shall include, among other things:

1) the conduct that discredits the title of a Judge of the Constitutional Court or undermines the authority of the Constitutional Court and its judges, including in the matters of moral, honesty, integrity, conformity of the judge’s lifestyle to his/her status, observance of other ethical norms and rules of conduct ensuring public trust in the Constitutional Court, manifested disrespect towards other judges, participants and involved participants in the constitutional proceedings;

2) violation of the rights to recusal (self-recusal) determined by the Law of Ukraine “On the Constitutional Procedure”;

3) disclosure of information that came to the knowledge of the Judge of the Constitutional Court of Ukraine during case consideration at the closed plenary session,

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\* Excerpted from EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), UKRAINE DRAFT LAW NO. 4533 ON THE CONSTITUTIONAL PROCEDURE, OPINION NO. 1024/2021 (Feb. 9, 2021).

the content and course of the closed plenary session, in-camera part of the plenary session – in any form before or after the case hearing ended;

4) interference with the exercise of powers by other judges of the Constitutional Court;

5) the [J]udge failed to submit, whether entirely or on time, his/her declaration of a person authorized to perform functions of the state or local government according to the procedure envisaged by the applicable anti-corruption laws;

6) the Judge used his/her status of a Judge of the Constitutional Court with the purpose of unlawful acquisition, whether by themselves or by any third parties, of any financial or other benefits, provided that such offence cannot be classified as a crime or a criminal offence;

7) the Judge of the Constitutional Court demonstrated low integrity, including where spendings of the Judge or his/her family members exceed the income of such Judge and his/her family members; the Judge's standard of living does not correspond to his/her declared income; the Judge failed to prove the legitimate origin of his/her property;

2. A Judge of the Constitutional Court may be brought to disciplinary responsibility no later than three years after the act or omission specified in part one of this Article, excluding the time of temporary incapacity for work or leave or a period of the relevant disciplinary proceedings conducted by the Constitutional Court. . . .

3. A motion to bring a Judge of the Constitutional Court to disciplinary responsibility (hereinafter referred to as the motion) can be filed by the following actors:

- 1) The President of Ukraine;
- 2) The congress of judges of Ukraine;
- 3) One-third of the constitutional composition of the Verkhovna Rada [Parliament] of Ukraine;
- 4) At least three judges of the Constitutional Court.

The motion shall contain a substantiation of circumstances calling for disciplinary responsibility of a Judge of the Constitutional Court pursuant to part one of this Article and materials and evidence supporting such circumstances.

4. The Constitutional Court, no later than 15 calendar days following the receipt of the motion specified in part three of this Article, shall convene an ad hoc plenary session and adopt a decision to initiate disciplinary proceedings against the Judge of the

Constitutional Court and to refer this motion for consideration by a standing committee on the Court's regulations and ethics (hereinafter referred to as the Committee). . . .

[The law details the full procedure that includes consideration by a Committee, Recommendation to the Plenary of the Court and a potential decision of dismissal, with notice to and input from the judge at each stage.]

\* \* \*

In March 2021, Ukrainian President Volodymyr Zelenskyy dismissed two judges, Constitutional Court President Oleksandr Tupitsky and Judge Oleksander Kasminin. Zelenskyy did so by revoking the decrees that appointed them, issued by former President Viktor Yanukovich. Constitutional Court President Tupitsky faced corruption charges and had already been suspended by a decree of President Zelenskyy on allegations of bribery and witness-tampering. Judge Kasminin was suspected of having been illegally given a large apartment in the center of Kiev by former President Yanukovich, with the implication that judicial favors were expected in return. In July 2021, the Constitutional Court ruled that Zelenskyy's removal of Judges Tupitsky and Kasminin was unconstitutional and that the two judges therefore remained on the Court. Nonetheless, in November 2021, Zelenskyy appointed Oksana Hryshchuk and Oleksandr Petryshyn as Constitutional Court judges to replace Judges Tupitsky and Kasminin. The Constitutional Court judges refused to swear in the new appointees.

**We Call on the President and the Servant of the People Party to End  
the Pressure on the Constitutional Court Against the Newly  
Appointed Judges**

DEJURE Foundation and Others (2021)\*

NGOs call on the Office of the President and the Servant of the People political party to stop putting pressure on the Constitutional Court, demanding illegal actions, and wait for vacancies in the Constitutional Court, [so that] newly appointed judges Hryshchuk and Petryshyn can be sworn in legally.

On December 16, the . . . Servant of the People political party published a statement by Olena Moshenets, Deputy Chair of the Parliamentary Committee on Anti-Corruption Policy and a member of the party, commenting . . . that the Venice Commission supported the Constitutional Court's decision not to swear in the judges, appointed by the President of Ukraine for non-existent vacancies.

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\* Excerpted from *We Call on the President and the Servant of the People Party to End the Pressure on the Constitutional Court Against the Newly Appointed Judges*, REANIMATION PACKAGE OF REFORMS (Dec. 24, 2021), <https://rpr.org.ua/en/news/we-call-on-the-president-and-the-servant-of-the-people-party-to-end-the-pressure-on-the-constitutional-court-against-the-newly-appointed-judges>.



. . . No matter how we treat Tupitsky and Kasminin, their term[s] will expire only in May and September 2022, respectively. Bringing [new] judges to the oath of office means deepening the already massive crisis around the Constitutional Court.

The way out of the crisis will be the adoption of a draft law with a new competition procedure and the appointment of all new judges of the Constitutional Court only in accordance with it.

As we see an information campaign aimed at illegally forcing the newly appointed Constitutional Court judges to swear in the newly appointed Constitutional Court judges Hryshchuk and Petryshyn, we call on the Office of the President, the ruling party, and the government’s social media . . . to end pressure on Constitutional Court judges.

The actions of the judges of the Constitutional Court are absolutely lawful, as:

1. The presidential decree on the abolition of decrees appointing Oleksandr Tupytsky and Oleksandr Kasminin is legally null and void. According to the Constitution of Ukraine, the President has no authority to dismiss judges of the Constitutional Court.
2. Society has reasonable doubts about the integrity of Oleksandr Tupytsky and some other judges of the Constitutional Court. This is confirmed by the US sanctions imposed on Tupytsky for “significant acts of corruption, namely receiving a bribe in cash while in office in the judiciary of Ukraine.” However, according to the Ukrainian Constitution, only judges of the Constitutional Court can dismiss judges of the Constitutional Court. This means that Oleksandr Tupytsky and Oleksandr Kasminin still remain [on] the Constitutional Court.
3. The term of . . . Oleksandr Tupytsky expires in five months – in May 2022, and for Oleksandr Kasminin – in September 2022. Thus, a vacancy will be [created] in May, for which the Constitutional Court will be able to legally swear in one of the two judges appointed by the President of the Constitutional Court. . . .
4. Appointment of new judges of the Constitutional Court in the absence of relevant vacancies in the Constitutional Court under the President’s quota undermines the legitimacy of the Constitutional Court. . . .
5. For a year now, the ruling party and the President’s Office have been ignoring the Venice Commission’s conclusion on overcoming the constitutional crisis. Bill No. 4533, despite the assurances of the President’s representative in the Constitutional Court . . . , still does not contain such a procedure.

That is why we call on the President and the Servant of the People political party:

1. To stop trying to put pressure on the Constitutional Court and wait for vacancies to appear legally in it, as recommended by the Venice Commission;
2. To reform the selection procedure for the Constitutional Court by introducing into the draft law no. 4533 provisions on a single competitive procedure for the selection of judges of the Constitutional Court.

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The crisis surrounding the appointment of constitutional judges in Ukraine had not ended when Russia re-invaded Ukraine on February 24, 2022. In March 2022, former Court President Tupinsky left Ukraine without passing through formal border checks. After Ukraine had been accepted as an accession candidate by the European Union in June 2022, the Verkhovna Rada resumed its consideration of the draft bill regulating the Constitutional Court, which the European Union identified as one of the highest priority areas to settle before accession talks could proceed.

Ending the tenure of sitting judges has also been an issue in Latin America when, in December 2004, in a special session called by then-Ecuadorian President Lucio Gutiérrez, Congress removed 27 of the 31 judges on the Ecuadorian Supreme Court as part of a wholesale reorganization of the judiciary. Thereafter, Congress also removed five of the seven judges of the Supreme Electoral Tribunal and eight of the nine members of the Constitutional Tribunal. The mass dismissals occurred in the midst of a more general political crisis in which the President had just narrowly escaped being impeached; he accused the judges who were fired of having supported his political opponents. The case of the fired judges of the Ecuadorian Supreme Court came to the Inter-American Court of Human Rights.

**Supreme Court of Justice v. Ecuador**  
**Inter-American Court of Human Rights**  
**Judgment of August 23, 2013**

... [T]he Inter-American Court of Human Rights ... composed of the following judges: Diego García-Sayán, President; Manuel E. Ventura Robles, Vice-President; Alberto Pérez; Eduardo Vio Grossi; Roberto F. Caldas; Humberto Antonio Sierra Porto, Judge, and Eduardo Ferrer Mac-Gregor Poisot ... renders the following Judgment ... :

... 41. ... The instant case focuses on the dismissal of the judges of the Supreme Court of Justice on December 8, 2004. In this regard, the Court considers it necessary to describe the processes that preceded these events. ...

64. ... [O]n November 9, 2004, the opposition parties in the National Congress were preparing to impeach the President of the Republic, Lucio Gutiérrez, for the crime of embezzlement. ... In order to prevent his impeachment, the government managed to

secure a parliamentary majority and made political deals . . . to dismiss the judges and appoint a “new” [Supreme] Court [of Justice]. . . .

65. On November 23, 2004, . . . Gutiérrez announced the government’s intention to promote . . . the reorganization of the Constitutional Tribunal, the Supreme Electoral Tribunal and the Supreme Court of Justice. On November 25, 2004, the National Congress adopted a resolution declaring that . . . the Constitutional Tribunal had been illegally appointed in 2003 and terminat[ed] the appointments of all its full and alternate members, some of whom were subsequently impeached by Congress. . . .

66. It also resolved to “declare the termination of the duties of the full judges of the Supreme Electoral Tribunal . . . on the grounds that they were appointed without observing the provisions of Article 209 of the Constitution of the Republic . . . ; and to proceed to appoint them in accordance with that constitutional provision . . . .” . . .

81. Some lawmakers who did not support the resolution . . . explained that the purpose of dismissing all the members of the Supreme Court of Justice was to appoint new judges in line with the interests of the political majority. . . .

83. That same day, the National Congress issued Resolution No. R-25-181 dismissing all the judges of the Supreme Court of Justice. . . .

86. That same resolution also appointed the new judges of the Supreme Court of Justice. . . .

91. The dismissal of members of the Supreme Electoral Tribunal, the Constitutional Court and the Supreme Court of Justice, triggered a political and social crisis marked by institutional instability. . . .

94. In that context, on April 15, 2005, . . . Gutiérrez issued Executive Decree No. 2752, dismissing the Supreme Court of Justice elected on December 8, 2004. . . .

96. At the same time, on April 17, 2005, Congress annulled the resolution of December 8, 2004, regarding the appointment of the new Supreme Court of Justice. However, it did not order the reinstatement of the justices who had been dismissed . . . .

100. On November 30, 2007, a National Constituent Assembly was convened for the purpose of drafting the new Constitution of the Republic of Ecuador. The National Constituent Assembly . . . confirmed the judges of the 2005 Court in their positions.

101. The new Constitution entered into force on October 20, 2008. . . .

144. In its case law, the Court has indicated that the scope of judicial guarantees and effective judicial protection for judges must be examined in relation to the standards on judicial independence. . . . [T]he Court [has] emphasized that judges, unlike other

public officials, enjoy specific guarantees due to the independence required of the judiciary, which the Court has understood as “essential for the exercise of the judiciary.” The Court has reiterated that one of the main objectives of the separation of public powers is to guarantee the independence of judges. The purpose of protection is to ensure that the judicial system . . . [is] not subject to possible undue restrictions in the exercise [of] their duties by bodies outside the Judiciary, or even by judges who exercise functions of review or appeal. In line with the case law of this Court . . . the following guarantees are derived from judicial independence: an appropriate process of appointment, guaranteed tenure and guarantees against external pressures. . . .

155. Bearing in mind the aforementioned standards, the Court considers that: i) respect for judicial guarantees implies respect for judicial independence; ii) the scope of judicial independence translates into a judge’s subjective right to be dismissed from his position exclusively for the reasons permitted, either by means of a process that complies with judicial guarantees or because the term or period of his mandate has expired, and iii) when a judge’s tenure is affected in an arbitrary manner, the right to judicial independence enshrined in Article 8(1) of the American Convention is violated, in conjunction with the right to access and remain in public office, on general terms of equality, established in Article 23(1)(c) of the American Convention.\*

156. Having defined the general standards on judicial independence, the Court will now proceed to determine whether the resolution adopted by Congress, in which it declared the dismissal of the judges, constituted an arbitrary action that violated the alleged victims’ right to a fair trial. . . .

159. In the instant case, the representatives and the Commission have argued that Congress did not have the authority to investigate, try or punish the judges, and therefore it arrogated to itself a power that did not belong to it. Indeed, one of the amendments made to the 1998 Constitution, specifically Article 130 thereof, removed the National Congress’s authority to impeach justices of the Supreme Court. The National Congress’s lack of authority to impeach the Supreme Court justices was so clearly established, that after having taken the decision to dismiss them through the application of Transitory Provision 25 [of the new Constitution], the congressmen immediately, and without it being on the agenda, presented a motion for constitutional

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\* Article 8(1) of the American Convention on Human Rights provides:

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 . . . .

Article 23(1)(c) of the American Convention on Human Rights provides:

1. Every citizen shall enjoy the following rights and opportunities: . . . c. to have access, under general conditions of equality, to the public service of his country.

reform so that Congress would again have jurisdiction to impeach the Supreme Court of Justice, which implied a constitutional amendment. . . .

160. Furthermore, given that Congress could not impeach the Supreme Court justices in the event that they might commit some disciplinary infraction, on September 22, 2003 the Supreme Court decided to regulate the procedure for hearing complaints submitted against judges. The Supreme Court, bearing in mind Articles 120 and 199 of the Constitution, which established that no public servant or official would be exempt from responsibilities and the independence of the judicial bodies, decided to regulate, via the Resolution of September 22, 2003, the proceeding for denouncing, trying and punishing judges. . . .

161. Furthermore, in that decision, the Supreme Court ruled that a Committee would be appointed to conduct the procedure, recognized the judge's right to defend himself, granted the Commission the power to present a report before the plenary of the Supreme Court and to decide by two-thirds of the votes regarding the judge's dismissal. According to the information contained in the case file, only one investigation was carried out using this procedure, involving a judge who was accused of having exerted undue influence in the courts of justice. . . .

162. In accordance with the foregoing, and bearing in mind the State's acknowledgment that Congress had created an ad-hoc mechanism, it is possible to conclude that Congress was not authorized to dismiss the Supreme Court justices, given that the new Constitution had removed its power to do so and, furthermore, a proceeding already existed which stipulated the process and grounds on which a judge could be dismissed. . . . In order to determine the scope of the violations in this case, the Court will proceed to analyze the ad-hoc mechanism used by Congress to dismiss the judges. . . .

174. . . . [T]he Court emphasizes . . . that at the time when the judges were dismissed, Ecuador was going through a period of political instability, stemming from the removal of several Presidents and the amendment, on several occasions, of the Constitution in response to the political crisis. Moreover, the alliance between the government and the political party led by former President Bucaram suggests possible motives . . . for wishing to remove the . . . justices, particularly the interest in annulling the criminal proceedings conducted by the Supreme Court against . . . Bucaram.

175. Furthermore, the Court points out that within a period of 14 days, not only was the Supreme Court dismissed, but also the Electoral Tribunal and the Constitutional Tribunal, something that constitutes a totally unacceptable and untimely action. All these facts undermine judicial independence. This allows the Court to conclude . . . that at that time there was a climate of institutional instability in Ecuador which affected important institutions. Likewise, the judges were prevented from filing an amparo remedy to challenge any decisions that Congress might take against them. . . .

177. Bearing in mind the foregoing, the resolution by means of which the judges were dismissed was the result of a political alliance that was intended to create a Supreme Court sympathetic to the political majority existing at that time and to impede criminal proceedings against the acting president and a former president. The Court has confirmed that Congress's resolution was not adopted by virtue of an exclusive assessment of specific factual evidence in order to ensure full compliance with the existing legislation, but that it pursued a completely different objective, related to an abuse of power. . . . Thus, the Court emphasizes that these elements support the affirmation that a mass and arbitrary dismissal of judges is unacceptable given its negative impact on judicial independence in its institutional aspect. . . .

180. The Court concludes that in this case the Supreme Court justices were dismissed by means of a resolution of the National Congress, which lacked the proper jurisdiction to do so, through the erroneous and arbitrary application of a legal provision and without being granted the right to be heard; therefore, the State violated Article 8(1) in conjunction with Article 1(1) of the American Convention,\* to the detriment of the 27 victims in this case, because they were dismissed from office by an incompetent body that did not grant them an opportunity to be heard. . . .

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### **World Report 2021: Ecuador** Human Rights Watch (2021)\*\*

Since taking office in 2017, President Lenín Moreno has implemented policy changes aimed at repairing the damage suffered by democratic institutions during former President Rafael Correa's decade in power. Reforms have restored the independence of key institutions, though implementation challenges remain. . . .

Corruption, inefficiency, and political interference have plagued Ecuador's judiciary for years. During the Correa administration, high-level officials and Judiciary Council members interfered in cases affecting government interests, and in the appointment and removal of judges.

Under President Moreno, a transitional Council of Citizen Participation was tasked with evaluating the performance of key institutions and authorities, including the

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\* Article 1(1) of the Convention provides:

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

\*\* *World Report 2021: Ecuador*, HUMAN RIGHTS WATCH (2021), <https://www.hrw.org/world-report/2021/country-chapters/ecuador>.

Judiciary Council, Constitutional Court, and Prosecutor’s Office. [This body replaced all of the members of the Judiciary Council that appoints judges, finding that they were all loyal to the Correa Administration, but the instability of the Judiciary Council has continued. The transitional Council of Citizen Participation also removed all nine members of the Constitutional Court, despite not having the Constitutional Court within its remit. It then replaced the entire bench with new members early in 2019.]

. . . [P]roblems remained, including a flawed Judiciary Council process to select, evaluate, and appoint temporary National Court of Justice judges, allegations of improper pressure exerted by government officials on courts, and claims of lack of due process in high profile corruption cases. . . .

\* \* \*

Sortition—the selection of leaders by lottery—got its start in ancient Athens, and it has been making a comeback as political philosophers are increasingly advocating that choosing citizens by lot to govern would improve upon government by professional politicians. The practice has not generally been used to select judges. Nonetheless a lottery system is now being used in Ecuador, dating from a transitional rule contained in the 2008 Constitution, to determine which already-appointed judges should remain on the Constitutional Court. This lottery process began after a new Constitutional Court was designated in 2019, but a shift to staggered terms for judges is the long-term ideal. Choosing which judges stay and which leave on the basis of a lottery is one way to avoid making a political decision about the term lengths of the original judges on the bench.

### **The Transitory Lottery for Judicial Renovation**

Daniela Salazar Marín (2022)\*

The 2008 Constitution states that the period for a constitutional judge is nine years. All judges are designated by a merits-based process (curriculum vitae, written exams and oral exams).

However, the Constitution also says that there should be a partial renovation of thirds (three judges) every three years. In theory, all judges should stay for nine years, and there should not be an abrupt change, but rather every three years three judges leave and three judges come in. Therefore, the 2008 Constitution included a transitory rule stating that the first composition of the Constitutional Court (meaning the judges designated after the Constitution was in force) should “sacrifice” itself and its judges should go into a lottery system which would determine three judges to leave after three years and three more to leave after six years. This means that after this “sacrifice” of the first nine judges, all judges should be able to complete the nine years and at the same time this would allow for the partial renovation every three years.

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\* Overview provided by Justice Daniela Salazar Marín, Spring 2022.

Now, judicial independence is a chimera in Ecuador. The highest courts (National Court and Constitutional Court) have been ceased for different reasons before judges could finish their [terms] (there are already two cases against Ecuador by the Inter-American Court related to the removal of justices, and there are more pending). As judges, we write difficult decisions as if they were the last ones.

In 2018, the Constitutional Court ceased to be after an evaluation carried on by a transitory council mandated by a referendum. As a citizen, I voted against the referendum; as a law professor, I criticized the removal of the Court. The Constitutional Court was vacant for seven months, and after that process a new Court was designated in February 2019 through a merits process. I have been a part of the Court since 2019. Since the nine of us started at the same time, we decided to apply the transitory rule of the 2008 Constitution: we did a lottery so three judges left in February 2022 and three more shall leave in February 2025. After that, all judges should be able to complete their nine-year terms, if the Court builds up enough legitimacy to resist backlash and threats to independence.

**Public Opinion, Criminal Procedures and Legislative Shields:  
How Supreme Court Judges Have Checked  
President Jair Bolsonaro in Brazil  
Diego Werneck Arguelhes (2022)\***

In his 2018 electoral campaign, Jair Bolsonaro stirred tension with the Brazilian Supreme Court (*Supremo Tribunal Federal*, “STF”) by openly defending packing it with new appointees. He said he would expand the STF from 11 to 21 judges to “change the fate of Brazil.” Since then, presidential threats against the court have become a recurring feature of Brazilian politics under Bolsonaro.

In 2021, the president targeted two specific judges, Luís Roberto Barroso and Alexandre de Moraes. Judge Barroso and Bolsonaro had already clashed in 2020, when Barroso became president of the Superior Electoral Court (TSE), the institution in charge of organizing and supervising elections. Bolsonaro falsely claimed to have uncovered evidence of fraud in the electronic voting system, and [said] that the TSE was behind it. After Barroso allied with other authorities and social actors to defend the electoral system, and argued against amendment proposals requiring “print receipts” for each vote in the electronic ballots, Bolsonaro renewed his attacks on the judge. . . .

Bolsonaro has also targeted Judge Moraes, who in July 2021, using reports from the federal police, pointed to the possible existence of a “digital criminal

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\* Excerpted from Diego Werneck Arguelhes, *Public Opinion, Criminal Procedures and Legislative Shields: How Supreme Court Judges Have Checked President Jair Bolsonaro in Brazil*, GEORGETOWN JOURNAL OF INTERNATIONAL AFFAIRS (2022), <https://gjia.georgetown.edu/2022/04/25/public-opinion-criminal-procedures-and-legislative-shields-how-supreme-court-judges-have-checked-president-jair-bolsonaro-in-brazil>.



organization” formed to promote disinformation, involving the president and key political allies. In response to these investigations, Bolsonaro renewed his threats, encouraged mass protests, and mobilized his followers against the court. . . .

What has Bolsonaro accomplished with these years of public attacks and threats against the STF? While he has brought far right, illiberal, and anti-democratic views into the mainstream, Bolsonaro has so far been unable to curb, pack, or reform the STF. Notably, no other president since Brazil’s democratization in 1985 has suffered so many judicial defeats. . . .

Since March 2020, COVID-19 has caused more than 655,000 deaths in Brazil. Throughout this crisis, Bolsonaro has denied scientific evidence on COVID-19, public health risks, official statistics, and the efficacy and safety of vaccines. He has rejected the use of the most restrictive measures to fight the public health crisis.

Though his government fought in court against mandatory vaccination and mask use, among other restrictions, he was widely unsuccessful. The STF unanimously affirmed, for example, that local governments could adopt their own restrictive measures, considering available scientific evidence, international guidelines, and local realities. . . .

Beyond disinformation and attacks on democratic institutions, the STF is also investigating Bolsonaro due to accusations of his interference with the federal police to protect relatives and political allies. Four of Bolsonaro’s sons have been investigated by the STF and other courts on charges ranging from corruption to illegal dissemination of disinformation.

Though the 1988 Constitution created a vibrant system of judicial review in Brazil, the court’s main resource to constrain Bolsonaro has not been its judicial review, but rather its criminal jurisdiction. The STF retains sole power over most criminal investigations and proceedings against all senators, deputies, ministers of state, and the president himself. While the court has used these powers against politicians in the past, the STF has expanded its jurisdiction throughout the Bolsonaro presidency to directly initiate and control certain investigations. In April 2019, for example, Chief Justice Dias Toffoli announced that, in cases of online crimes against the judges, their families, or the “honor” of the STF, he could appoint a fellow judge (Moraes, in this case) to head investigations, which previously had to be initiated by the Attorney General’s office or the federal police before a lower court. Those initial investigations have since spawned several others, affecting Bolsonaro and many of his allies. While that initial expansion of power over criminal proceedings was presented as necessary to protect the “honor” of individual STF judges, since 2019 these new powers have been reconfigured. The court has been able to present them to the Brazilian public as tools to protect democratic institutions in general.

The STF's expansive use of its criminal jurisdiction against Bolsonaro and his allies would not be possible without at least some political support from Brazil's Congress. However, in a clash between the court and the president, one would expect this Congress—the most conservative in decades—to pick Bolsonaro's side. Though Bolsonaro has failed to build a solid legislative coalition to push his legislative agenda, he has maintained enough congressional support to discourage impeachment attempts, which must be authorized by a 2/3 majority of the House of Representatives.

Bolsonaro has built an effective “legislative shield” against impeachment. However, he has not succeeded in turning this shield into a sword against the STF. Congress has consistently signaled it will not support attacks on the court. . . .

In an unprecedented move, Bolsonaro filed an impeachment petition in the Senate against Judge Moraes. But the Senate's president unceremoniously dismissed the petition, considering the charges manifestly lacked in substance. . . .

While confidence in the STF has increased during the pandemic, according to the latest Justice Confidence Index, it is still lower than it was in 2011, before the rise of high-profile criminal cases. Moreover, 49% of respondents agreed that “STF justices are like any other politician.” Many people might now trust the court on pragmatic grounds: they might agree the STF should check Bolsonaro by any means possible, regardless of if it is the constitution or political necessity driving these decisions. . . .

. . . [W]hile criminal powers have been useful to check the president in the short run, it is dangerous to concentrate so much of it in a single institution. In the case that Bolsonaro gets re-elected, he will have the chance to make several appointments to the court, in addition to the two he has already made (Judges Marques, in 2020, and Mendonça, in 2021). With another mandate, he would be able to increasingly shape how the STF deploys its criminal powers, which might then be used against Bolsonaro's own political adversaries. Over time, elections can transform this powerful court from an independent check into a presidential ally.

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## **Impeachment, Removal and Discipline of Individual Judges**

Removing judges individually is a more common practice than removing judges *en masse*. A decision about whether to seek to impeach, otherwise discipline, or terminate the tenure of an individual jurist may be prompted by concerns about whether that person's behavior is alleged to be at odds with the office. That removal effort may also aim to encourage sitting judges to conform their own judgments to those of governing powers. Given that mechanisms must be in place to respond to judicial misconduct, what are means to do so that also maintain judicial independence? What

standards should be used to end a person’s tenure or impose other sanctions on a judge? Again, examples come from diverse jurisdictions.

## **How to Impeach a Supreme Court Justice** Kimberly Wehle (2022)\*

Revelations that [Ginni] Thomas exchanged at least 29 (known) text messages with former White House chief of staff Mark Meadows, urging disruption of the November 2020 election results favoring President Joe Biden, have created a conflict-of-interest scandal surrounding the Supreme Court, where her husband Clarence Thomas is an associate justice. Justice Thomas’[s] participation in multiple cases related to the outcome of the election, including his lone vote to prevent the Jan. 6 committee from accessing White House records relevant to its investigation of the riot at the Capitol, has led to calls for ethics reforms at the court—as well as his resignation. Given the unlikelihood of an admission of impropriety from Thomas, there is a more extreme avenue available to lawmakers who would seek to hold him accountable for compromising the neutrality and legitimacy of the court: impeachment. . . .

. . . Democrats in Congress are so far unwilling to venture down this politically fraught path, but the precedent exists, and it is worth studying as new damning details emerge about [Ginni] Thomas’s . . . campaign to overturn the election.

Over the country’s history, fifteen federal judges have been impeached, and eight removed from office; others resigned in the wake of scandal instead. So one thing, at least, is clear: Unlike for presidents, there is ample precedent for firing federal judges via impeachment. Though no Supreme Court justice has ever been removed this way, there have been two attempts. Thomas is not immune to this constitutional remedy simply by virtue of sitting on the nation’s highest court.

Moreover, the standard governing judges’ removal is arguably lower than that for presidents. To be sure, Article I’s reference to “Treason, Bribery, or other high Crimes and Misdemeanors” governs judges and presidents alike—as does the two-step procedure outlined in the Constitution, whereby articles of impeachment pass the House of Representatives on a bare majority vote, and conviction in the Senate occurs after trial by a two-thirds supermajority. The supermajority threshold ensures that Thomas would almost certainly never be removed from office, however ugly the facts are upon investigation, because it’s inconceivable Senate Republicans would vote against Thomas and give Biden another Supreme Court pick.

But Article III of the Constitution injects a separate standard for federal judges keeping their jobs, expressly providing that they “shall hold their Offices during good

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\* Excerpted from Kimberly Wehle, *How to Impeach a Supreme Court Justice*, POLITICO (Mar. 30, 2022), <https://www.politico.com/news/magazine/2022/03/30/impeach-supreme-court-justice-clarence-thomas-00021480>.

Behaviour.” Arguably, “high Crimes and Misdemeanors” should be read with this gloss when it comes to judges, as the Constitution rarely offers such particularized clues as to the thrust and meaning of its terse prose.

Congress looked deeply into the grounds for impeaching federal judges in 1970, during an inquiry by a special subcommittee of the Judiciary Committee into the conduct of Associate Supreme Court Justice William O. Douglas. . . . After a six-month investigation, the majority-Democratic committee voted along party lines to take no action.

But the committee did produce a lengthy report that actually helped clarify the standard for removal. It opined on the behavior for which judges can be impeached, that is, for criminal conduct (either in connection with their judicial role or privately) or for abuse of public duty. The report also cited the federal statute governing federal judicial recusals, 42 U.S.C. § 455. It still provides: “Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality may reasonably be questioned.” By its terms, then, this law applies to Supreme Court justices, though there exists no means of enforcing it short of impeachment. . . . The statute goes on to state that a justice should recuse himself “[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding” or “[h]e knows that he . . . or his spouse has [an] interest that could substantially be affected by the outcome of the proceeding.”

Ginni Thomas’s far-right activism is well-known. Earlier this month, Thomas told an interviewer that she attended a Jan. 6 “Stop the Steal” rally in Washington, though she says she was cold and left before the Capitol was breached. In December, she co-signed a letter calling for House Republicans to expel Rep. Liz Cheney (R-Wyo.) and Rep. Adam Kinzinger (R-Ill.) simply because they joined the House Select Committee investigating the Jan. 6 attack on the Capitol. . . .

. . . Three days after the election, she texted Meadows: “Do not concede. It takes time for the army who is gathering for his back.” And later: “Make a plan. Release the Kraken and save us from the left taking America down.” On Nov. 10, 2020, Thomas texted Meadows: “Help This Great President stand firm, Mark!!! . . . You are the leader, with him, who is standing for America’s constitutional governance at the precipice. The majority knows Biden and the Left is attempting the greatest Heist of our History.” . . .

If Ginni Thomas was simultaneously discussing these efforts with her husband . . . it means, first, that Clarence Thomas—at a minimum—was aware of concerted efforts to thwart a legitimate presidential election on factually erroneous grounds and did not make that known.

Second, and worse, the texts call into question the grounds for Thomas’s votes in a number of cases that came to the court regarding the 2020 election. Thomas and Justice Samuel Alito were the sole two dissenters in Texas Attorney General Ken

Paxton's failed bid to file a lawsuit seeking to overturn the election results in four other states. (The problem with that lawsuit, in part, was that there exists no legal cause of action for one state to reach out and cancel votes in another state; so the suggestion that Thomas was just applying established law is dubious.) Thomas also dissented at length to the court's refusal to upset Pennsylvania's acceptance of mail-in ballots that arrived after Election Day, calling the majority's decision "inexplicable." And most disturbingly, Thomas was the only justice to dissent—without explanation—from the court's decision backing the National Archives' release of Trump administration documents to the select committee. . . . The compelling question is whether Thomas had improper ulterior motives when he voted in these very consequential cases.

Federal judges have been impeached and removed for transgressions that, although serious, seem much less impeachable because they had no bearing on the viability and stability of American democracy. This stands in stark contrast to what could amount to Thomas's judicial cover-ups for his wife's activities and apparent complacency about events leading up to the Jan. 6 insurrection. . . .

The only Supreme Court justice to be successfully impeached was Samuel Chase in 1804, on charges of arbitrary and oppressive conduct during trials . . . . The Senate acquitted him. In 1969, after President Lyndon B. Johnson nominated him to replace Earl Warren as the chief justice, Associate Justice Abe Fortas resigned from the court under threat of impeachment. Although conservative senators ostensibly filibustered Fortas' nomination to be chief justice based on his acceptance of a \$15,000 fee for attending university seminars, he was under scrutiny for his close relationship with Johnson while on the court. If Congress probes more deeply into the scandal of today, Thomas's career could similarly be in jeopardy—even if formal conviction and removal is a practical impossibility. . . .

**From Earl Warren to Wendell Griffen:  
A Study of Judicial Intimidation and Judicial Self-Restraint**

Robert L. Brown (2005)\*

. . . I went to law school in the mid-sixties, some ten years after the two *Brown* decisions and after *Reynolds v. Sims*, *Mapp v. Ohio*, and the other landmark decisions of the Warren Court. The *Miranda* decision would soon follow. The tumult from these decisions, and particularly the two *Brown* decisions followed by *Cooper v. Aaron*, which called for immediate desegregation of the Little Rock schools, was cacophonous and far reaching. "What have these activist judges on the United States Supreme Court wrought?" was the battle cry. How can they simply strike down the Jim Crow way of life that was so deeply embedded in the culture of so many states for centuries with the sweep of a judicial pen? Wasn't that a matter for legislation and congressional action? The Supreme Court, in the minds of many, had gone way too far and had made a

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\* Robert L. Brown, *From Earl Warren to Wendell Griffen: A Study of Judicial Intimidation and Judicial Self-Restraint*, 28 U. ARK. LITTLE ROCK L. REV. 1 (2005).

mockery of the separation of powers in that the Court was now legislating and usurping the role of Congress. These were activist judges, the critics said, and that was clearly meant to be a pejorative term. Surely, the framers of the Constitution had never intended judicial interpretation of the Constitution to have such far-reaching consequences, they railed. Because the Justices had violated their oaths of office, they should be impeached.

Earl Warren, as Chief Justice of the Court and author of the two *Brown* decisions, became the poster child for the impeachment effort in the 1950s. “Impeach Earl Warren” was the mantra, and signs to that effect, sponsored by the private right-wing organization known as the John Birch Society, popped up around the country and especially in the South. Drive him from office, the critics howled, because he had expanded his judicial authority unconscionably and exponentially. Never mind that the Warren Court was unanimous in the *Brown* opinions and had performed its role of interpreting state law in light of the United States Constitution. This, of course, dated back to Federalist Paper No. 78 and to Chief Justice John Marshall, who wrote in the seminal case of *Marbury v. Madison* that the Constitution controls any legislative act “repugnant to it” and that it was the province of the Supreme Court to say what the law is. Never mind that the “separate but equal” doctrine was odious and pernicious and clearly flew in the face of the Fourteenth Amendment, as Mr. Justice Harlan had so perceptively understood and so eloquently put it in his dissent in *Plessy v. Ferguson* in 1896 where he alluded to our “color-blind” Constitution.

It was abundantly clear that Earl Warren’s critics sought to retaliate against the Chief Justice personally and the Court as a whole for decisions they found to be abhorrent. It was retaliation, but it was also calculated in years to come and to stand judicial independence on its head. Looking back these fifty years, it seems incredible that this effort to impeach Earl Warren would have gained any traction, but it certainly did. More than a million Americans signed a petition for his ouster.

The Earl Warren impeachment effort was a frontal assault on judicial independence, and we are all fortunate that it was unsuccessful. It failed, in part, because wiser heads in Congress prevailed. . . .

# WANTED

## for Impeachment



### EARL WARREN

OCCUPATION: Chief Justice of U.S. Supreme Court. PREVIOUS JUDICIAL EXPERIENCE: None. Warren reportedly leans heavily upon the writings of alien sociologists as authority for many of his court decrees.

#### DESCRIPTION

WARREN IS CONSIDERED TO BE A DANGEROUS AND SUBVERSIVE CHARACTER. HE IS AN APPARENT SYMPATHISER OF THE COMMUNIST PARTY AND HAS RENDERED NUMEROUS DECISIONS FAVORABLE TO IT. HIS ACCOMPLICES INCLUDE JUSTICE FELIX FRANKFURTER, WHO IS A FORMER DEFENSE ATTORNEY FOR COMMUNISTS, AND JUSTICE HUGO BLACK, WHOSE SISTER-IN-LAW IS A REGISTERED COMMUNIST.

WARREN IS A RABID AGITATOR FOR COMPULSORY RACIAL MONGRELIZATION AND HAS HANDED DOWN VARIOUS DECISIONS COMPELLING WHITES TO MIX WITH NEGROES IN THE SCHOOLS, IN PUBLIC HOUSING, IN RESTAURANTS AND IN PUBLIC BATHING FACILITIES. HE IS KNOWN TO WORK CLOSELY WITH THE N.A.A.C.P. AND FAVORS THE USE OF FORCE AND COERCION TO COMPEL WHITE SCHOOL CHILDREN TO MINGLE INTIMATELY WITH NEGROES.

#### CRIMINAL RECORD

WARREN HAS BEEN ACCUSED OF GIVING AID AND COMFORT TO THE COMMUNIST PARTY ON FREQUENT OCCASIONS. HE IS GUILTY OF PROMOTING AND INCITING RIOT, DISORDER AND ANARCHY IN LITTLE ROCK AND ELSEWHERE IN THE SOUTH THROUGH HIS ATTEMPTS TO IMPOSE JUDICIAL TYRANNY UPON WHITE SOUTHERNERS. HE HAS ILLEGALLY TRANSFORMED THE SUPREME COURT INTO A SOVIET-TYPE POLITBURO WITH POWER OVER THE CONGRESS AND OVER THE VARIOUS STATE GOVERNMENTS. AT HIS INSTIGATION FEDERAL MARSHALS AND BAYONET-EQUIPPED FEDERAL TROOPS HAVE BEEN EMPLOYED TO TERRORIZE AND INTIMIDATE WHITE CITIZENS OPPOSED TO HIS INTEGRATION DECREES.

#### CAUTION

EARL WARREN IS A PANATIC WHO WILL STOP AT NOTHING TO ACHIEVE HIS GOALS. HE SHOULD BE HANDLED WITH EXTREME CAUTION, AND ALL DECREES AND DECISIONS HANDED DOWN BY HIM SHOULD BE REGARDED AS SUSPECT. PERSONS WISHING TO AID IN BRINGING HIM TO JUSTICE SHOULD CONTACT THEIR CONGRESSMEN TO URGE HIS IMPEACHMENT FOR TREASON.

Extra copies: 20 for \$1.00; 100 for \$3.00 \*\*\* American Nationalist, Box 301, Inglewood, Cal.

## **Removing Federal Judges Without Impeachment**

Saikrishna Prakash and Steven D. Smith (2006)\*

... Contrary to the orthodoxy, nothing in the Constitution mandates that impeachment be the exclusive method for removing misbehaving judges.

The Constitution authorizes the impeachment of federal judges, but it nowhere says that they can be removed only through impeachment. Nor do the Constitution's relevant provisions easily lend themselves to any such reading.

Articles I, II, and III respectively define the tenures, including the conditions that can terminate tenure, for the principal legislative, executive, and judicial officials. For example, Article I provides that a Senator's tenure terminates upon the expiration of a six-year term, by "Resignation, or otherwise," or (in the case of a Senator appointed to fill a vacancy) upon "the next Meeting of the [state] Legislature." Similarly, Article III conditions a judge's tenure on continued "good Behaviour"; the clear implication is that misbehavior can terminate a judge's stay in office.

In addition to other tenure-terminating contingencies, Article II, Section 4 provides for impeachment as an alternative means of removal: "The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." This additional means of removal does not negate or displace other tenure-terminating provisions. Everyone concedes this point with respect to executive officials; no one thinks that because a Secretary of State can be impeached, he or she can be removed only through impeachment. There is no reason for a different conclusion with respect to judges. In fact, the impeachment provisions do not single out or even expressly mention judges: like Secretaries of State, judges are simply included in the general category of "civil officers of the United States."

Nor does Article III's good behavior provision suggest that it merely cross-references Article II's impeachment provision. To the contrary, the "good Behaviour" requirement is manifestly not identical to the standard for impeachment: "treason, bribery, or other high crimes and misdemeanors." The separate standards corroborate what the natural reading of the separated impeachment and "good Behaviour" provisions already suggests, namely, that these provisions refer to independent tenure-terminating contingencies.

Those who think judges may only be removed by impeachment might suppose that history reveals that "good Behaviour" was a term of art that meant something like

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\* Excerpted from Saikrishna Prakash & Steven D. Smith, *Removing Federal Judges Without Impeachment*, 166 YALE LAW JOURNAL FORUM 72 (2006), <https://www.yalelawjournal.org/forum/removing-federal-judges-without-impeachment>.



“tenure for life defeasible only by impeachment.” History actually proves that good behavior was independent of impeachment. . . .

Our reading of Article III’s grant of good behavior tenure may be hard for some to swallow, especially those with muscular conceptions of judicial independence. Others, however, may embrace a more historically grounded and nuanced account of judicial independence. For example, members of Congress recently proposed an independent Inspector General for the judicial branch. Some prominent judges, including Justice Ruth Bader Ginsburg, have hinted that there is something seriously amiss with this proposal. After all, how can judges remain independent if they stand in constant fear of an Inspector General investigation?

There is nothing constitutionally suspect about government officials investigating allegations of judicial misconduct and then making reports to Congress and the executive branch. Under any reading of the Constitution, the political branches have the authority to investigate and sanction judges. The chambers of Congress can impeach, convict, and remove based on proper evidence of high crimes and misdemeanors. And whatever Congress decides, the executive may prosecute any judges whom it believes has violated the law. The proposed Inspector General would merely make it easier to prosecute and convict miscreant judges. Moreover, under our reading of good behavior, information gathered by the Inspector General also could be used to prove in court that a judge had misbehaved and had thereby violated the terms of her tenure.

But what about the cherished independence of federal judges? Too much emphasis has been laid on the independence of judges and not enough on the Constitution’s provisions that promote judicial accountability, which include the grant of life tenure subject to termination for misbehavior. Judges do enjoy a certain type of independence—they cannot be punished for the judgments they issue. But the Constitution makes clear that federal judges do not have an absolute or a boundless independence. If an Inspector General would further judicial accountability, that fact counts in favor of the Inspector General proposal.

Congress clearly can adopt measures to help the chambers impeach and convict. But Congress can go further and adopt statutes that remove judges upon proof of judicial misbehavior. Any such procedures would have to afford an accused judge the due process rights associated with conviction for a serious offense. But a procedure meeting those demanding requirements could culminate in removal—without the need for a wholly independent impeachment procedure. . . .

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The process of impeachment often entails specified procedures, such as designating national legislatures as the impeaching authorities. Many other methods exist to discipline sitting judges. Some are prompted by complaints filed by individuals

about alleged breaches of oaths of office and ethical rules of conduct. In some jurisdictions, those concerns are investigated by other judges who decide whether an impropriety has occurred and if so, what sanction to impose. The reliance on judges and on processes internal to judiciaries aim to protect judges from political assaults and enable the judiciary to set and guard its own standards. Like other professional self-assessments, judge-run disciplinary procedures raise concerns.

Despite the principle that judges have a unique form of professional independence, potential efforts to undermine that judicial independence can come from within judiciaries as well as from without. For example, the Polish Law and Justice Party (PiS) government has been pressuring the judiciary to toe the governing party line ever since it came to power in 2015. In 2017, the PiS-dominated Polish Parliament passed a law establishing a new Disciplinary Chamber of the Supreme Court, created after the government had changed the composition of the Polish National Council of the Judiciary (the KRS)—the appointment body for ordinary judges that consists only of judges—so that it reliably selected only government-friendly judges. The KRS then named to the new Disciplinary Chamber judges whom the government trusted. The Disciplinary Chamber has since pursued investigations against a number of judges who had been outspoken critics of the judicial reforms or who have sent reference questions to the European Court of Justice that are interpreted as critical of the PiS government, and the Disciplinary Chamber has disciplined and even removed a number of judges. The European Commission brought to the Court of Justice an infringement procedure against Poland for violating the independence of the judiciary with this new Disciplinary Chamber filled with judges appointed by the newly politicized KRS.

### **Commission v. Poland (Disciplinary Regime for Judges)**

Court of Justice of the European Union

Case C-791/19 (July 15, 2021)

The Court (Grand Chamber), composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Arabadjiev, A. Prechal (Rapporteur), M. Vilaras, M. Ilešič, A. Kumin and N. Wahl, Presidents of Chambers, T. von Danwitz, C. Toader, K. Jürimäe, C. Lycourgos, N. Jääskinen, I. Ziemele and J. Passer, . . . gives the following Judgment:

. . . 80. . . . [I]t is for every Member State, under the second subparagraph of Article 19(1) [of the Treaty of the European Union (TEU)], to ensure that the disciplinary regime applicable to judges of the national courts which come within their judicial systems in the fields covered by EU law observe[s] the principle of the independence of judges . . . by guaranteeing that decisions issued in the context of disciplinary proceedings initiated in respect of judges of those courts are reviewed by a body which itself meets the requirements inherent in effective judicial protection, including the requirement of independence . . . .

84. . . . [T]he Commission submits, in essence, that, in the light of the particular context in which the Disciplinary Chamber was created, certain characteristics of that chamber, and the process leading to the appointment of the judges called upon to sit in that chamber, that body does not meet the requirements of independence and impartiality thus required . . . .

86. . . . [T]he Court has ruled, in that regard, that a body does not constitute an independent and impartial tribunal . . . where the objective circumstances in which that body was created, the characteristics of that body, and the way in which its members have been appointed are capable of giving rise to reasonable doubts in the minds of individuals as to the imperviousness of that body to external factors, in particular, as to the direct or indirect influence of the legislature and the executive, and its neutrality with respect to the interests before it. Such doubts may thus lead to that body's not being seen to be independent or impartial, which is likely to prejudice the trust which justice in a democratic society must inspire in those individuals. . . .

88. For the purpose of determining whether the Disciplinary Chamber fulfils the criteria of independence and impartiality thus required under EU law, as the body responsible for reviewing decisions issued in the context of disciplinary proceedings initiated in respect of judges who may be called upon to rule on the interpretation and application of EU law, it should be recalled at the outset that, as has been argued by the Commission, the creation of that chamber, by the new Law on the Supreme Court, took place in the wider context of major reforms concerning the organisation of the judiciary in Poland . . . .

89. In that context, it is important . . . to note that . . . the Disciplinary Chamber thus created . . . has been specifically granted . . . exclusive jurisdiction to hear both disciplinary cases and labour law and social security and retirement cases concerning judges of the Sąd Najwyższy (Supreme Court), as well as jurisdiction to hear . . . disciplinary cases concerning judges of the ordinary courts.

90. It should be borne in mind . . . that . . . the assigning to the Disciplinary Chamber of jurisdiction to hear those cases took place alongside the adoption of the provisions of the new Law on the Supreme Court which lowered the retirement age of judges of the Sąd Najwyższy, applied that measure to judges currently serving in that court, and conferred on the President of the Republic the discretionary power to extend the performance of active judicial duties by those judges beyond the new retirement age set by that law. In that regard, the Court held . . . that, by adopting those provisions of national legislation, the Republic of Poland had undermined the irremovability and independence of judges of the Sąd Najwyższy . . . and failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU. . . .

94. . . . [I]t is necessary to emphasise the fact . . . that, under Article 131 of the new Law on the Supreme Court, the Disciplinary Chamber . . . was required, when it

was initially established, to be made up solely of new judges appointed by the President of the Republic . . . .

96. In accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must in particular be ensured in relation to the legislature and the executive. . . .

97. Concerning, more specifically, the circumstances in which decisions to appoint judges of the Sąd Najwyższy (Supreme Court) and, in particular, of the Disciplinary Chamber, are made, . . . the mere fact that the judges concerned are appointed by the President of a Member State does not give rise to a relationship of subordination of those judges to the latter or to doubts as to the judges' impartiality, if, once appointed, they are free from influence or pressure when carrying out their role. . . .

98. However, the Court has stated that it is still necessary to ensure that the substantive conditions and procedural rules governing the adoption of those appointment decisions are such that they cannot give rise to reasonable doubts in the minds of individuals as to the imperviousness of the judges concerned to external factors and their neutrality with respect to the interests before them, once they have been appointed as judges, and that it is important . . . in that perspective, that those conditions and procedural rules should be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned. . . .

99. . . . [T]he judges of the Sąd Najwyższy . . . are to be appointed by the President of the Republic on a proposal from the KRS, . . . the body entrusted under Article 186 of the Constitution with the task of safeguarding the independence of courts and judges . . . [and] the participation of such a body, in the context of a process for the appointment of judges, may, in principle, be such as to contribute to making that process more objective, by circumscribing the President of the Republic's discretion in exercising the powers of his or her office.

100. . . . [H]owever, . . . this is not the case unless . . . that body is itself sufficiently independent of the legislature and the executive and of the authority to which it is required to deliver such an appointment proposal.

101. In that regard, it should be noted that, under Article 179 of the Constitution, the act by which the KRS puts forward a candidate for appointment to a judge's post at the Sąd Najwyższy . . . is an essential condition for that candidate to be appointed to such a post by the President of the Republic. The role of the KRS in that appointment process is therefore decisive. . . .

102. In such a context, the degree of independence enjoyed by the KRS in respect of the Polish legislature and executive in performing the tasks thus entrusted to it may become relevant when ascertaining whether the judges which it selects will

themselves be capable of meeting the requirements of independence and impartiality derived from EU law. . . .

104. In that regard, it should be noted, first, that . . . whereas the 15 members of the KRS [were] selected from among the judges previously selected by their peers, the Law on the KRS has recently been amended, so that . . . those 15 members are now appointed by a branch of the Polish legislature, with the result that 23 of the 25 members of the KRS in that new composition have been appointed by the Polish executive or legislature or are members thereof. Such changes are liable to create a risk . . . of the legislature and the executive having a greater influence over the KRS and of the independence of that body being undermined.

105. Secondly . . . , it is apparent . . . that the thus newly constituted KRS was established through the shortening of the existing four-year term of office . . . of the members which had, until that point, made up that body. . . .

106. Thirdly, it is important to point out that the legislative reform which thus governed the process whereby the KRS was established in that new composition took place at the same time as the adoption of the new Law on the Supreme Court which carried out a wide-ranging reform of the Sąd Najwyższy . . . including . . . the creation, within that court, of two new chambers, one being the Disciplinary Chamber, and the introduction of the mechanism, since held to be contrary to the second subparagraph of Article 19(1) TEU . . . , providing for a lowering of the retirement age for judges of the Sąd Najwyższy . . . and the application of that measure to serving judges of that court.

107. It is, accordingly, common ground that the premature termination of the terms of office of certain then-serving members of the KRS and the reorganisation of the KRS in its new composition took place in a context in which it was expected that numerous posts would be soon be vacant within the Sąd Najwyższy . . . , and in particular within the Disciplinary Chamber . . . .

108. It must be held that the factors . . . of the present judgment are such as to give rise to legitimate doubts as to the independence of the KRS and its role in an appointment process such as that . . . of the members of the Disciplinary Chamber. . . .

112. . . . [T]aken together, the particular context and objective circumstances in which the Disciplinary Chamber was created, the characteristics of that chamber, and the way in which its members were appointed are such as to give rise to reasonable doubts in the minds of individuals as to the imperviousness of that body to external factors, in particular the direct or indirect influence of the Polish legislature and executive, and its neutrality with respect to the interests before it and, thus, are likely to lead to that body's not being seen to be independent or impartial, which is likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in those individuals. . . .

113. It follows . . . that, by failing to guarantee the independence and impartiality of the Disciplinary Chamber which is called upon to rule, at first instance and at second instance, in disciplinary cases concerning judges of the Sąd Najwyższy . . . and, depending on the case, either at second instance or both at first instance and at second instance, in disciplinary cases concerning judges of the ordinary courts and by thereby undermining the independence of those judges at, what is more, the cost of a reduction in the protection of the value of the rule of law . . . , the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU. . . .

\* \* \*

Since this decision of the European Court of Justice was handed down, the Polish government has refused to follow it. The (packed) Polish Constitutional Tribunal (about which, more below) has issued a decision that the Polish Constitution is superior to EU law where the two conflict, particularly with regard to judicial reforms which both the Polish government and its Constitutional Tribunal regard as a matter of domestic law alone. The Disciplinary Chamber has continued to discipline and punish Polish judges who have resisted the government's attempts to capture the judiciary and who have continued to refer cases to the Court of Justice to assess the legality under EU law of these reform efforts. The European Commission, after a long delay, finally returned to the Court of Justice to seek penalty payments against the Polish government for non-compliance with the ECJ's decision, and the ECJ agreed to penalty payments of €1 million/day to continue as long as the government refuses to disband the Disciplinary Chamber. In June 2022, the European Commission agreed to allow Poland to receive EU funds under a Covid recovery scheme, conditional on the Polish government's abolition of the Disciplinary Chamber. The Polish parliament has since passed a law dissolving the Disciplinary Chamber but replacing it with another disciplinary body that raises many of the same concerns. On preliminary review of the new institution, the European Commission has indicated that Poland remains in violation of the ECJ decision.

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As we have seen, the Constitutional Court of Ecuador has had a difficult history. Since the Court was reconstituted in 2019, its judges have been determined to restore judicial independence in Ecuador, not only for their own Court, but also for the ordinary courts. The 2009 Organic Law on the Judicial Function (COFJ) specifies in Article 109 a list of grave offenses that can justify dismissal of those working in the judicial branch. Article 109(7) identifies as one of those grave offenses "intervening in a case in which one must act as a judge, prosecutor or public defender with malice, manifest negligence or inexcusable error." For ten years, the Judiciary Council, an administrative body, used this broad rule to suspend or remove hundreds of justice officials. In the case below, the Court ruled that the Judiciary Council does not have the power to sanction a judge, prosecutor, or public defender without a prior judicial decision establishing justice officials had in fact committed an "inexcusable error."

**Case No. 3-19-CN/20**  
Constitutional Court of Ecuador  
July 29, 2020

[The Constitutional Court of Ecuador comprising justices Hernán Salgado Pesantes, Daniela Salazar Marín, Teresa Nuques Martínez (dissenting), Ramiro Ávila Santamaría, Karla Andrade Quevedo, Agustín Grijalva Jiménez, Enrique Herrería Bonnet (dissenting) and Ali Lozada Prado delivers the following judgment].

[After a lower court judge was dismissed from her position, the Civil Court judge hearing the appeal referred the case to the Constitutional Court for an assessment of the constitutionality of the law under which the lower court judge was dismissed.]

22. [Before this Court is] a query on the constitutionality of a legal provision that provides for the dismissal of judges, prosecutors, and public defenders when they intervene in the cases in which they must act . . . with malice, manifest negligence, or inexcusable error. Given the importance of the tenure of judges as a guarantee of judicial independence . . . , the Court will first carry out an analysis of the relationship between judicial independence and responsibility.

23. This Constitutional Court highlights the fundamental importance that the Constitution of Ecuador . . . grant[s] to judicial independence. . . . Judicial independence is especially relevant given the judicial and political history of Ecuador, in which such independence has unfortunately been recurrently limited or openly violated, thus weakening the constitutional state and, therefore, the protection of the rights of citizens as well as democracy.

24. [A]rticle 168\* [of the Constitution] makes express reference to institutional judicial independence, that is, that of the organs of the [judiciary]. . . . This independence may be internal, that is, independence that the jurisdictional bodies of the Judicial Branch have among themselves and in relation to other bodies of the same Branch. This independence is inevitably complemented by external judicial independence, which

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\* Article 168 of the Constitution of the Republic of Ecuador provides, in relevant part:

The administration of justice, in compliance with its duties and in the exercise of its attributions, shall apply the following principles:

1. The bodies of the Judicial Branch shall benefit from both internal and external independence. Any breach of this principle shall entail administrative, civil, and criminal liability, in accordance with the law.
2. The Judicial Branch shall benefit from administrative, economic and financial autonomy.
3. By virtue of the jurisdictional unity, no authorities of the other branches of government shall be able to perform duties for the ordinary administration of justice, without detriment to the jurisdictional powers recognized by the Constitution.

refers to the independence of the Judicial Branch with respect to other functions of the State and, in general, with respect to interference from outside the Judicial Branch.

25. Institutional judicial independence, both internal and external, is essential, in turn, to guarantee the individual or functional independence of judges, so that defendants can exercise their right to an independent, impartial, and competent judge, in accordance with the Article 76 . . . of the Constitution\* . . . .

26. Judicial independence constitutes, therefore, a basic guarantee of due . . . process, not only because of the specific right to be tried by an independent judge, but also because the independence of the judge depends, in turn, on the due protection of other rights and principles, some of which are part of due process.

27. Indeed, without an independent judge, the guarantees of due process, such as the guarantee of compliance with the rules and the rights of the defendants by the judicial authorities, . . . cannot be fulfilled, since these and other guarantees require that the judge be able to interpret the law and argue in a legally autonomous manner (positive independence). In a broader sense, it is each and every one of the constitutional rights that can be affected by violations of judicial independence, which in turn affects access to justice and effective, impartial and expeditious judicial protection of rights and interests of the defendants.

28. Due to the great importance of judicial independence, the framework for its proper exercise is formulated in the legal system itself. Consequently, the independent judge is characterized by administering justice free of interference (negative independence) and in accordance with the law (principle of legality), that is, “*subject to the Constitution, international human rights instruments and the law*” (positive independence), as described in article 172 of the Constitution.\*\* . . .

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\* Article 76 of the Constitution of the Republic of Ecuador provides, in relevant part:

In all processes where rights and obligations of any kind are set forth, the right to due process of law shall be ensured, including the following basic guarantees: . . .

- 7. The right of persons to defense shall include the following guarantees:
  - k. To be judged by an independent, impartial and competent judge. No one shall be judged by special courts or by special commissions created for the purpose.

\*\* Article 172 of the Constitution of the Republic of Ecuador provides:

Judges shall administer justice subject to the Constitution, international human rights instruments and the law.

The public servants of the judiciary, which include judges and other [employees of the judicial branch], shall apply the principle of due diligence in the processes of administering justice.

The judges shall be responsible for damages to the parties as result of delays, neglect, denial of justice, and lawbreaking.



29. The independence of judges and the autonomy of other judicial officials is therefore structured by the legal order and, in particular, by the Constitution. . . . For this Court, the constitutional principles of judicial independence, as well as of legality, diligence and responsibility of the actions of judicial servants make up the indispensable constitutional framework for the examination of the constitutionality of the norm challenged by the plaintiff. . . .

31. . . . To guarantee this independence, judges must have proper appointment processes, with an established duration in office and with guarantees against external pressures, among which stability and tenure in office stand out.

32. Along the same lines, it should be noted that, although judges enjoy stability and tenure, these guarantees are not absolute. . . .

33. Regarding the possible removal of judges, the Inter-American Court has warned that this process must be conducted by competent, independent and impartial bodies, which act within the framework of the legally established procedure. The Inter-American Court also emphasized that, during the dismissal process, the States must guarantee the judges due process and the full exercise of the right to defense, since the free and arbitrary dismissal of judges violates judicial independence. . . .

36. Disciplinary control over judges, prosecutors and public defenders, in particular, has often been distorted and instrumentalized as a totally undue interference mechanism to direct, sanction, limit and generally influence or determine jurisdictional decisions or actions directly linked to them.

37. Hence, the Judicial Council (CJ) has a decisive role in this constitutional framework of complementarity between judicial independence and responsibility. The CJ must always contribute to the creation of suitable institutional and administrative conditions for an adequate exercise of judicial independence. Under no circumstances, can or should their actions violate judicial independence, nor can or should their actions contribute such violation; but it is up to the CJ, within the strict framework of its powers, to act to make effective the principle of responsibility established in articles 168 and 172 of the Constitution. . . .

38. In short, in order to fully fulfill its constitutional function, it is essential that the CJ act with independence, impartiality and strict adherence to the legal order in the judgment of disciplinary infractions of judicial officials. Consequently, the basic guarantees of the right to due process established in article 76 of the Constitution are mandatory for the CJ in the administrative disciplinary procedures that it develops. The Court especially emphasizes for these purposes the importance of the presumption of innocence, proportionality between infractions and sanctions, the right to a defense, the obligation to justify decisions, the possibility of appeal by the subject of the investigation and the guarantees of the due process in general. . . .

[The referring judge and others argued that the provision of the COFJ allowing dismissal of a judge for “inexcusable error” was vague and not well-defined, violating the principle of legal certainty.]

64. As for inexcusable error . . . , the error can be understood as the mistake generally attributable to a judge or court in the exercise of its jurisdictional functions and consisting, in a broad sense, in an unacceptable interpretation or application of legal norms, or alteration of the facts referred to the litigation. It can imply, given certain conditions, not only the responsibility of the judicial officer but also of the State. For a judicial error to be inexcusable, it must be serious and damaging, [and an error] for which the judge, prosecutor or defense attorney is responsible. It is serious because it is an obvious and irrational error, and therefore indisputable, being outside the logical and reasonable possibilities of interpreting the rules or assessing the facts of a case. Finally, it is harmful because, being a serious error, it significantly harms the administration of justice, the defendants, or third parties. . . .

68. . . . [Inexcusable errors are] clearly arbitrary judgments and contrary to the common and general understanding of Law. For this reason, the inexcusable error is recognized unanimously or by a majority by the community of legal [experts] as absurd and arbitrary, since it is outside the interpretative possibilities or factual findings generally recognized as legally reasonable and acceptable.

70. This Court warns that the inexcusable error should not be confused with the legitimate exercise of the interpretive faculties inherent in judges, which are an integral part of judicial independence. The *legitimate interpretation* of a judge, unlike the inexcusable error, does not constitute a judicial error, but on the contrary is based on an understanding and duly argued assessment of the legal provisions and the facts applicable to the case. For this reason, the *legitimate interpretation* of a judge, even though debatable or even controversial, does not generate the widespread rejection that the inexcusable error provokes. Interpretive differences are normal and frequent in judicial activity and, therefore, give rise to the filing of appeals and a debate in the community of legal [experts]. The inexcusable error, on the other hand, is recognized by the majority of that community as a very serious and legally unjustifiable mistake, about which there is no discussion. . . . Consequently, sanctioning a judge for inexcusable error must never undermine judicial independence, but must exclusively prevent an inexcusable error from resulting in the violation of rights.

71. It is absolutely essential that the judge who makes the jurisdictional declaration of the inexcusable error demonstrate exhaustively that the decision of the judge, prosecutor, or public defender constitutes an unacceptable judicial error and not merely a possible interpretation, since, as indicated previously, the possibility of interpreting legal provisions is an important dimension of judicial independence that could be affected or transgressed if it is confused with inexcusable error. [A judgment in this matter], therefore, must be made with the utmost seriousness and

responsibility, . . . adequately motivated, processed promptly and impartially and in accordance with the relevant procedure. . . .

72. The Court also specifies that not every judicial error constitutes an inexcusable error. Indeed, it is inevitable that errors will eventually be made in judicial activity, that is to say, excusable errors or at least errors that are comparatively less serious. These judicial errors may be due to factors such as, for example, false or incomplete information, the volume or complexity of cases, the level of experience of the judicial officer, or inadequate conditions for their work; that is, factors other than marked incapacity or ignorance, characteristic of inexcusable error. . . . [U]nlike the inexcusable error, these errors are correctable and do not cause serious damage. . . . [F]requently, the procedural system makes it possible to correct these errors through the filing of various means of challenge.

73. For this reason, it is necessary to differentiate jurisdictional control that must exist over the decisions of the judges in ordinary justice [through appeals of their decisions] from disciplinary administrative control [through the processes identifies in the COFJ to discipline the judge]. The purpose of jurisdictional control is to control the correctness of the decisions of lower judges through the various ordinary and extraordinary means of appeal. . . .

74. Unlike the jurisdictional control of judicial decisions, the purpose of disciplinary control is to assess the “*conduct, suitability and performance*” of the judge, prosecutor or public defender as a public official. . . .

75. This essential difference between the [correction of an] inexcusable error [on appeal] and the [administrative procedure that might discipline the judge] implies that [when] an inexcusable error is identified [on appeal], this should not always and necessarily lead to a . . . sanction for the deciding judge. . . .

76. Indeed, if [the determination of an] inexcusable error [on appeal] was sufficient to impose the automatic and immediate dismissal of the judge, both the administrative [procedure] carried out by the CJ and the . . . sanction that takes place within the framework of this procedure, would be unnecessary. . . .

84. In summary, this Court finds that the open classification of malice, manifest negligence and inexcusable error contained in article 109(7) of the COFJ is not contrary to the constitutional principles of legality and legal certainty, nor is it a violation of the independence of judges, prosecutors and public defenders. . . . [as long as] a procedure conforming to the Constitution is followed . . . .

89. . . . [It is in] direct disciplinary action before the CJ, where difficulties of a constitutional nature arise for this Court. . . .

90. . . . When the CJ acts *ex officio*, even if it requests a judge’s assessment prior to the start of an administrative proceeding, the fact that the CJ itself indicates to

the assessing judge its own opinion that a particular judge acted with malice, manifest negligence or inexcusable error unduly interferes in the assessing judge's sphere of activities and could also signal a prejudgment. This initial step of the CJ, inherent to the ex officio action, constitutes a focused interest and even undue pressure, although implicit and not necessarily deliberate, both on the judge who committed the alleged infraction, as well as on the one who assesses it, and against the other judges, who will fear being punished in the same way.

91. This Constitutional Court establishes, therefore, that for the application of Article 109(7) of the COFJ, the ex officio action of the CJ challenges the constitutional principle of judicial independence. . . and especially of internal judicial independence, by allowing undue interference in the management and administration of a judicial body. This interference creates, in turn, an unacceptable pressure on the judicial actions of judges, prosecutors and public defenders, which not only violates the right to an independent judge, but also seriously jeopardizes the rights that judges must protect. Consequently, the respective procedural rules of the COFJ regarding the ex officio action of the CJ may not be applied with regard to Article 109(7) of the COFJ.

92. . . . It is clear that the public authorities, the defendants and the affected third parties have the legitimate right to claim that the actions of judges, prosecutors and public defenders, could be grossly irregular and that, therefore, they can inflict serious harm on the complainants, thus violating the constitutional right to an impartial judge, distorting the judicial system itself and damaging the very foundations of the constitutional state. For this reason, article 113 of the COFJ establishes the possibility of a *complaint* against judges by certain public authorities as well as the *complaint* on the part of those who have a direct interest in a trial.

93. The Constitution does not enable the CJ to exercise judicial powers. Therefore, it is clear that this administrative body cannot declare by itself the existence of malice, manifest negligence or inexcusable error referred to in article 109(7) of the COFJ in any case. This declaration can only be made by those who have jurisdiction and know the specific case . . . , that is, the judges and courts. Consequently, any intervention of this type in judicial cases by the CJ constitutes a violation of the constitutional principle of judicial independence. . . .

95. The Court reiterates that, in cases of complaint or denunciation of malice, manifest negligence or inexcusable error against these judicial officials, a prior determination must always and necessarily be made by the judge or court that hears the respective challenge . . . .

97. . . . [T]here is no doubt that the CJ has sanctioning administrative powers over these judicial officials, granted both by the Constitution in article 181(3) and by law. Among these sanctioning powers is dismissal . . . .

98. This clear differentiation between, on the one hand, the prior judicial determination of the existence of malice, manifest negligence or inexcusable error and, on the other hand, its subsequent administrative sanction is essential in constitutional terms precisely because it preserves judicial independence. This prevents the judge, the prosecutor and the public defender, who participate directly in the judicial process, from being controlled, conditioned, directed or subordinated, in their actions, to administrative or political bodies and criteria outside the legal parameters of the judicial process.

99. Therefore, the Constitutional Court determines that this prior judicial determination is essential not only in the case of inexcusable error, but also when a judge, prosecutor or public defender is charged with malice or gross negligence for their intervention in a court case. . . .

103. As a general rule, the prior judicial determination of the existence of malice, manifest negligence or inexcusable error must be made by the judge or court at the appellate level. . . .

[The case generated dissents from two judges. One (Justice Teresa Nuques Martínez) argued that the requirement that a judicial determination precede a disciplinary action by the CJ can act may not be possible in all cases so an absolute prohibition on the exercise of *ex officio* powers by the CJ is unwise. The other (Justice Enrique Herrería Bonnet) argued that the *ex officio* powers of the CJ are grounded in the constitution itself, and so therefore it cannot be unconstitutional for the CJ to exercise those powers absent a prior judicial determination of the violation in question.]

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The Ecuadorian Constitutional Court was soon faced with another case about judicial independence and the role of the Council of the Judiciary in the removal of judges, this time involving an assessment procedure through which judges were deemed unqualified and dismissed if they failed to pass required performance assessments.

The Council of the Judiciary, pursuant to its powers to evaluate judges of the National Court of Justice, issued regulations providing an evaluation methodology for this task. Under this methodology, which has both qualitative and quantitative components, judges who failed to score 80 out of 100 points would be dismissed. An expert committee making these assessments consisted of both judges and university professors. The plaintiffs argue, among other things, that the criteria used for the assessment of judges went beyond those permitted under the Organic Law on the Judicial Function (COFJ) (particularly those listed in Articles 107-109 defining minor and serious violations) and that the delegation of power from the Council of the Judiciary to an expert committee was also unconstitutional.

**Case No. 37-19-IN**  
Constitutional Court of Ecuador  
December 21, 2021

[The Constitutional Court of Ecuador, comprising Karla Andrade Quevedo, Ramiro Avila Santamaría, Carmen Corral Ponce, Agustín Grijalva Jiménez (concurring), Enrique Herrería Bonnet (concurring), Alí Lozada Prado (concurring), Teresa Nuques Martínez and Daniela Salazar Marín (concurring), delivers the following judgment:]

86. In the present case . . . the plaintiff . . . considers that the Council of the Judiciary violated constitutional, legal, and normative precepts with respect to the process of evaluating the judges . . . of the National Court of Justice [the highest ordinary court]. . . .

87. . . . Among the main objectives of the separation of powers is the guarantee of judicial independence . . . which must be respected by the state “both in its institutional facet, that is, in relation to the judiciary as a system, and in its individual aspect, that is, in relation to . . . the specific judge. . . . [The] objective of [this] protection lies in preventing the judiciary in general and its members in particular from being subjected to possible undue restrictions on the exercise of their function by bodies outside the judiciary or even by those who exercise functions of review or appeal” [quoting the Inter-American Court of Human Rights].

88. Ecuador is no stranger to the recognition of this guarantee; thus, Article 168 of the [Constitution] provides that the Administration of Justice, in the performance of its duties and in the exercise of its powers, shall apply, among other principles, the guarantee of judicial independence . . . .

[With regard to the question on whether the Council of the Judiciary had unconstitutionally delegated the powers of assessment to a committee of experts outside the judiciary, the Court found that the committee of experts only served an advisory function and that all key decisions were made by the Council of the Judiciary itself.]

105. In short, the Council of the Judiciary has retained for itself the final competence to evaluate the judges and associate judges of the National Court of Justice, the [contested] regulations have provided for the participation of the Directorates, Units, [their] servants and servants of that body of public power to contribute and assist in the task of the Committees. The final decision of the entire evaluation process has corresponded to the Plenary of the Council of the Judiciary, the administrative body of the Judicial Function competent to do so, keeping in accordance with articles 178, 181 numbers 2, 3 and 5; and, 187 of the Constitution. . . .\*

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\* Articles 178 and 181 of the Constitution of Ecuador provide, in relevant part:

[With regard to the question on whether the evaluation criteria exceeded those permitted by law.]

. . . 113. On many occasions, citizen opinion regarding the administration of justice is related to complaints regarding poor user service, slowness in resolving conflicts, ineffective execution of decisions, poor accessibility, high costs, poor quality or partiality. of its failures, and the corruption of the majority of its members; which results in the weakening of legitimacy with respect to those who administer justice. Precisely to show what changes must be carried out and how to improve them, evaluation mechanisms are instruments that make it possible to verify that the roles of the administration of justice are fulfilled and thus improve this service to citizens. . . .

114. Article 187 of the Constitution . . . stipulates that judicial servants [all those who work in the judicial branch] shall be subject to an individual and periodic evaluation of their performance, in accordance with the technical parameters prepared by the Council of the Judiciary . . . . [T]he Judicial Council as a governing body can determine the methods and procedures to carry out the evaluation according to quantitative and qualitative criteria. . . .

116. On June 18, 2019, the Council of the Judiciary—through Resolution 94-2019—approved the “Final Report corresponding to the methodology of

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Article 178: The jurisdictional bodies, without detriment to the other bodies with equal powers recognized in the Constitution, are those in charge of administering justice and they shall be as follows:

1. The National Court of Justice.
2. The provincial courts of justice.
3. The courts and tribunals provided for by law.
4. The justices of the peace.

The Judiciary Council is the body for the governance, administration, surveillance and discipline of the Judicial Branch.

Article 181: In addition to those powers established by law, the Judiciary Council shall also be empowered to:

1. Define and implement policies for the improvement and modernization of the judicial system.
2. Be informed of and approve the draft of the Judiciary’s budget, with the exception of the autonomous bodies.
3. To direct the selection process for judges and other public officers of the Judiciary, as well as their evaluation, promotion and sanctioning. All processes shall be public and decisions shall be reasoned.
4. To administer the judicial career and professionalization, and organize and manage schools for judicial training.
5. To monitor the transparency and efficiency of the Judiciary.

The Judiciary Council’s decisions shall require a simple majority approval.

Article 187: The public servants of the judiciary shall be entitled to remain in their posts as long as there are no legal grounds for dismissing them; they shall be subject to individual and periodic evaluation of their performance in line with the technical parameters drawn up by the Judiciary Council and subject to social control Those who do not comply with minimum requirements shall be dismissed.

comprehensive evaluation of the judges . . . of the National Court of Justice . . . ”; this document establishes . . . quantitative . . . and qualitative [evaluation criteria] . . . . [These criteria include “analysis of the quality of sentences.”] Regarding the analysis of the quality of sentences, the indicators used for the judges of the criminal and non-criminal chambers were: 1. Formal standard of the sentence; 2. Identification of the legal problem and the sources of law; and, 3. Motivation. For the judges of the criminal review chambers, they were: 1. Management of the oral hearing; 2. Formal standard of the sentence; 3. Identification of the legal problem and the sources of law; and, 4. Motivation. . . .

118. . . . [The] plaintiffs argue that the qualitative [criterion evaluating] the quality of sentences violates the principle of judicial independence . . . . In this regard, this Court does not agree that the actions carried out by the Council of the Judiciary in Resolution 10-2019 determining the criteria for comprehensive evaluation . . . violate judicial independence, since . . . no judicial decision . . . was corrected in any way and the rights of the parties were not affected. . . .

120. . . . In the matter under analysis, it is observed that the decisions used by the Council of the Judiciary could not generate any type of influence or interference in the judicial process, because the decisions analyzed were already executed at the time of the evaluation. Therefore, the right to judicial independence of those evaluated was respected, as well as the right to legal certainty of the procedural parties that received decisions by the judges and associate judges who were being evaluated. Additionally, it is not observed how this criterion could generate a violation of judicial independence in subsequent situations, since the evaluation did not issue indications or recommendations to the judges regarding how to resolve the legal problems present in the cases analyzed. . . .

123. [Next], the plaintiff suggests that the evaluation process has been used for a sanctioning purpose, because the . . . Council of the Judiciary . . . remov[ed] the judges who did not reach the minimum evaluation score [on the tests required to maintain one’s position as a judge] . . . .

125. In order to address the concern raised, it is necessary to consider the constitutional and legal articles that supported the evaluation process. Article 182 of the Constitution provides: “*Art. 182.- The National Court of Justice will be made up of judges in the number of twenty-one, who will be organized in specialized chambers, and will be appointed for a period of nine years; They cannot be re-elected and will be renewed by thirds every three years. They will cease in their positions in accordance with the law. . . .*”

127. . . . [The Constitution in Article 187 . . . provides that public officials in general and judicial officials specifically will be subject to individual and periodic performance evaluations, and those who do not reach the minimum level required will be removed.]



131. With regard to removal as a result of an evaluation, this Court considers, on the basis of Article 187, that the [evaluation] itself does not undermine the guarantee of stability in office as part of judicial independence, provided that it arises from an administrative procedure that is framed with respect for due process, and is carried out at the appropriate time in accordance with the law.

132. . . . [I]t should be recalled that the Constitution enshrines the right to due process and its various guarantees in Article 76; a right whose application is not limited to judicial remedies in the strict sense, but to the set of requirements that must be observed in procedural instances so that persons can adequately defend themselves against any type of act . . . from the State that may affect their rights. . . .

133. Thus, Article 76 of the [Constitution] contemplates the right to defense; which is composed of various guarantees; among these are “*a. No one may be deprived of the right to a defense at any stage or degree of the proceedings*”; and, “*k. [The right to be] tried by an independent, impartial and competent judge.*” . . .

137. . . . [T]he purpose of the constitutional state of rights and justice is to guarantee and respect the rights of its members. In this respect, the Court observes that [the challenged resolution of the Council of the Judiciary] guaranteed the right to defense of those evaluated and provided for a reconsideration of the result obtained in the evaluation.

138. . . . [I]t should [also] be remembered that the National Court of Justice is the highest body for the administration of ordinary justice . . . . Its members are elected through a public competition of opposition and merits, challenge and social control; this means that those who are part of this Tribunal are men and women with vast experience and knowledge in law. For this reason, they [need not] pass the general and special training courses or theoretical, practical and psychological tests provided for in the Constitution of the Republic to be part of the judicial function . . . .

139. As such, experience and knowledge of the law are understood to be demonstrated by the fact that to occupy this appointment, [one must] “. . . have exercised with evident probity the profession of lawyer, jurist, or university faculty in legal sciences, for a minimum period of ten years”; in this sense, it is constitutionally valid . . . that [judges] be subject to evaluation in view of the fact that the administration of justice is a public service that must guarantee quality in its resolutions. Consequently, [we do not believe] that the effect of the evaluation contained in [the challenged resolution], that is, the removal from office of judges . . . of the National Court who have not reached the minimum scores violates, per se, the right to independence, since [the procedure guaranteed] due process, and was also framed in a clear and prior norm . . . .

140. Notwithstanding the foregoing, this [performance] evaluation contemplated in the Constitution may not be carried out at any time . . . .

141. In the present case . . . , it is observed that, constitutionally and legally, [the] appointment [of judges to the Constitutional Court] has been established for a fixed period of nine years; without the possibility of re-election. The renewal of judges will be carried out by thirds every three years [with one-third being replaced every three years] . . . . Irremovability as part of judicial independence . . . seeks . . . permanence in office and the avoidance of dismissal or removal in an unjust manner. . . .

143. In this sense, the legal framework that protected the carrying out of an evaluation process was the one established by the Constitution, that is, at the time of renewal by thirds every three years; a situation that was not observed by the Council of the Judiciary at the time of issuing [the challenged resolution]; and therefore, generated the violation of legal certainty, because the realization of an evaluation process on all the members of the National Court of Justice, whose consequence was removal and whose opportunity and frequency was unpredictable, would be equivalent to relativizing the duration of their mandates, with the same effects as a “ratification.” . . .

144. Consequently, this Court concludes that [the challenged resolution], which regulated the evaluation process for the judges and associate judges of the National Court of Justice, did not contemplate the constitutional mandate that determined the moment in which the evaluation would be carried out. evaluation; therefore, [the challenged resolution] is incompatible in relation to the right to legal security, a situation that makes it unconstitutional in an integral manner.

[Because the Organic Law on the Judicial Function was amended subsequent to the initiation of this case, however, the judges deemed that the problem had been fixed by law already. That said, those already dismissed under the operation of the challenged resolution were entitled to remedies.]

[Justices Daniela Salazar Marín and Alí Lozada Prado deliver the following opinion concurring in part and dissenting in part:]

. . . 4. . . . To the extent that the Court identified violations of constitutional rights and ordered their reparation, we agree with the decision adopted. However, we see the need to [explain with our] vote the reasons why we depart from his argument. . . .

13. As has been pointed out on other occasions, the fact that the analysis of constitutionality is abstract in nature does not mean that it should be carried out ignoring the historical and institutional context in which certain norms are issued. Sometimes, considering these scenarios is essential to understand the true dimension and impact of certain measures, as well as the effects that the authorities expect from them. In this case, there is in Ecuador a historical context of recurring effects on judicial independence. . . .

14. In this case, the analysis of the Court could not ignore the particular historical background in Ecuador. . . . [Questions of judicial independence have] become a

recurring phenomenon in our country every time there is a change in the political control of the State. It is not at all an exaggeration to state that, in Ecuador, it is exceptional for a member of a High Court to finish his pre-established period in the legal system. . . .

17. In this historical context, the process of evaluation and subsequent removal of judges from an Ecuadorian High Court initiated by the Council of the Judiciary in 2019 is inserted. This background made a careful review of the process necessary, given the plausible risk that it could become a new interference in judicial independence. This time, under the heading of “evaluation,” the same thing was done again: massively changing judges of an Ecuadorian High Court before their normal terms expire. The result is that, through a professional performance evaluation, once again a large majority of the highest body for the administration of ordinary justice is removed from office outside the appointment period established in the Constitution. Although there would have been compelling reasons to doubt the independence of several of the removed magistrates, this does not justify affecting judicial independence as a whole, nor does it assure us that this will indeed be the last time.

18. This justification of “the last time” responds to a short-term attitude towards institutions: in the Ecuadorian political culture it is often believed that what is patriotic is to seek the common good even at the cost of legality. With this, the realization of the most cardinal and permanent values of the Constitution is frustrated. All patriotism must always be constitutional and that implies a long-term attitude towards institutions: respect for legality is the only way, although it is not always the shortest, towards the common good.

19. In light of this historical context, we proceed to explain why we consider that the evaluation process object of the resolutions challenged in this case violated the guarantee of irremovability of national judges, as well as the guarantee against external pressures.

20. We agree with the ruling that removal [following] evaluation . . . “does not undermine the guarantee of stability in office as part of judicial independence, as long as it comes from an administrative procedure that is framed in respect for due process, and is carried out at the appropriate time in accordance with the law.”

21. Despite identifying these two essential elements for the guarantee of irremovability . . . and recognizing that the evaluation process was not carried out in the periods provided for by the Constitution and did not respect due process, the majority concludes that the guarantee of irremovability was not violated. We disagree . . . because . . . the evaluation and subsequent removal occurred in violation of due process and outside the opportune moments established in the Constitution. . . .

23. First, the judgment itself acknowledges that the evaluation . . . infringed legal certainty . . . because it was unpredictable for the subjects evaluated . . . .

24. Second, there were no previous rules. While in office, the [National Court of Justice judges] did not know under what criteria they were to be evaluated. Since the Council of the Judiciary introduced new evaluation criteria when regulating the evaluation process, the judges evaluated were only aware that additional criteria to those established in the law would be used once the evaluation process itself began.

25. Third, the evaluation and removal process violated the procedure established in Article 87 of the [Organic Law on the Judicial Function], which, [in] 2019, was [made] applicable to the judges of the National Court of Justice. According to this rule, before public servants of the judiciary can be removed for not reaching the minimum required in an evaluation process, they must “be evaluated again within a period of three months. If a poor grade is maintained, they will be removed.” In our opinion, it would be absurd to maintain that all public servants of the judiciary have the right to be subject to two continuous evaluations prior to their removal, except for . . . the highest Court . . . .

26. For these reasons, the evaluation and removal process did not respect the right to due process of the [National Court of Justice] judges evaluated. . . .

30. We believe that the mere fact that judges have been removed outside the renewal periods established in article 187 of the Constitution is more than enough to configure, by itself, a violation of the guarantee of tenure. The unforeseen and arbitrary conduct of a comprehensive evaluation process outside the constitutionally established periodicity constitutes a breach of the state obligation to refrain from separating judges for reasons other than the completion of the period or the commission of very serious offenses.

31. Furthermore, this may cause doubt in a reasonable observer as to the motivations behind the evaluation process. As we said, in the international arena the risk that this type of process can be used as covert sanctions has been recognized. But, in addition, the matter acquires an even greater seriousness since it has dealt with the removal of the judges and associate judges belonging to one of the Ecuadorian High Courts.

33. . . . [W]e are convinced that the judges of the High Courts must have a particularly reinforced guarantee of tenure. Due to their weight in the justice system as closure bodies, the undue control of the High Courts is of particular interest to political powers. The historical episodes affecting judicial independence that we have mentioned in this opinion show that the intervention, control and violations of judicial independence that have occurred in our country have been particularly directed towards the High Courts. Given the greater risk that their independence maybe affected, we consider that their guarantee of tenure should be reinforced.

34. It is extremely relevant to consider that the process under examination in this case culminated in the removal of more than 70% of the evaluated judges. Undoubtedly,

what happened can be described as a massive removal of judges . . . from the National Court of Justice, the highest body for the administration of ordinary justice, which is extremely worrying. . . .

36. Although this process of evaluation and removal is not equivalent to the frontal attack on the separation of powers that past cases represented, without a doubt these experiences should function as alerts when there is a mass dismissal of magistrates. Regardless of whether it is an external body such as the political branches or an internal body of the judicial branch such as the Council of the Judiciary, mass dismissals of judges in irregular periods can have a destabilizing effect on democracy and the republican form of government, guaranteed in our Constitution.

37. [Finally], [t]he judgment concludes that the criterion for evaluating the quality of the judgments . . . did not violate the principle of judicial independence. . . .

39. However, it is no less true that evaluating the quality of the rulings of a High Court can conflict with judicial independence because it generates a chilling effect on judges. The control of the quality of judgments may bind judges to the power of the day. If a national judge is aware that the Council of the Judiciary may in the future use its legal criteria for his or her removal from office, this generates external pressure, insofar as it may require the predisposition of judges to take decisions that are not to the liking of the Council of the Judiciary or even of the political power of the day. . . .

40. It is important to consider the weight that the [qualitative analysis had in the overall assessment. [It] corresponded to 80% of the evaluation and, of this, 65% corresponded to the analysis of the quality of the judgments. Therefore, the evaluation was mainly based on analyzing the quality of the judgments. Thus, it depended entirely on that element to pass the evaluation or not. Although, under objective criteria, the quality of the ruling may be one of the elements of an evaluation, it should not be the determining criterion under which a judge is removed from a High Court, to the extent that the discretionary space of the removal decision. . . .

43. It has been a constant in recent Ecuadorian history that judges are punished for the decisions they adopt . . . , both by political bodies and by administrative bodies, such as the Council of the Judiciary. There is then a risk that the use of . . . the quality [of decisions] as an evaluation criterion will become the new weapon for the political powers to negatively influence the exercise of jurisdictional power.

44. Therefore, we consider that the method of evaluating the quality of the judgments, as a determining element to overcome the minimum grade required to avoid removal, generates external pressure on the judges . . . .

45. To conclude the analysis . . . , it seems necessary to highlight another harmful effect on judicial independence that resulted in the irregular process of evaluation and removal carried out by the Council of the Judiciary in 2019. As 21

judges . . . were removed . . . outside the periods provided for in the Constitution, the Council of the Judiciary considered it necessary to appoint . . . temporary judges, who acted between November 28, 2019 and January 28, 2021. The temporary nature of judges and the absence of a fixed term of office put judicial independence [further] at risk. . . .

[The concurring opinions of Justices Agustín Grijalva Jiménez and Enrique Herrera Bonnet are omitted.]

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Below, to sharpen the question of what forms of accountability are appropriate for judges, we contrast efforts to impose discipline on life-tenured federal judges in the United States with other jurisdictions. What structures should be put into place to mark the special situation of judges—who sit in judgment of the government that empowers them and need be protected from it, yet also must be held accountable when they themselves breach norms?

One issue is recusal. In the United States, if judges have conflicts of interest in particular cases, recusal is the usual remedy. But how are recusals accomplished? A U.S. federal statute directs judges to remove themselves from particular cases when their “impartiality might reasonably be questioned.” The request to recuse, under current practice, goes to the judge whom litigants ask to step aside and it is often the challenged judge alone who makes the decision whether to recuse.

### **Disqualification of Justice, Judge, or Magistrate Judge**

28 U.S.C. §§ 455 (United States)

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy . . . .

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

- (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
- (ii) Is acting as a lawyer in the proceeding;
- (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
- (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household. . . .

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter . . . disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

\* \* \*

In contrast to the U.S. practice, decisions about recusals at the Federal Constitutional Court of Germany are not left up to the challenged judge but instead are decided by the rest of the Senate in which the challenged judge sits:

### **The Act on the Federal Constitutional Court** Ch. 1, § 19 (Germany)\*

(1) If a Justice of the Federal Constitutional Court is challenged on the grounds of possible bias, the Court shall decide in that Justice's absence; in the event of a tied vote, the presiding Justice shall have a casting vote.

(2) The reasons for the challenge shall be stated. The challenged Justice shall comment on the challenge. The challenge shall not be considered if it is made after the oral hearing has commenced.

(3) If a Justice who has not been challenged recuses himself or herself, subsection 1 shall apply accordingly.

(4) If the Federal Constitutional Court has declared a challenge or self-recusal to be well-founded, lots shall be drawn to select a Justice from the other Senate as a substitute. The presiding Justices of the Senates cannot be designated as substitutes. Further details shall be set out in the Rules of Procedure.

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\* Translation provided by the Constitutional Court.

If judges have misbehaved, in many jurisdictions disciplinary actions may be brought against them. In the 1970s in the United States, after impeachment proceedings were brought in Congress to end the tenure of a few lower court federal judges who were accused of corruption and misuse of their office, Congress enacted a law that created a procedure for anyone to be able to file complaints that would result in investigating and potentially sanctioning judges as well as referring a judge to Congress for potential impeachment. Other provisions of this law focused on addressing the problem of life-tenured judges who were disabled but had not left the bench.

In the 1980s, some commentators argued that this law was unconstitutional and undermined judicial independence. By 2018, the statute had become the focus of significant criticism, as these mechanisms of self-discipline were seen to be insufficient. Below are a few excerpts of that 1980 legislation.

### **Complaints Against Judges and Judicial Discipline**

28 U.S.C. §§ 351–55 (U.S.)

[351(a)] Filing of Complaint by Any Person.—Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such judge is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct. . . .

[352(a)] . . . In determining what action to take, the chief judge may conduct a limited inquiry for the purpose of determining . . .

(1) whether appropriate corrective action has been or can be taken without the necessity for a formal investigation; and

(2) whether the facts stated in the complaint are either plainly untrue or are incapable of being established through investigation.

. . . . The chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute.

[352(b)] Action by Chief Judge Following Review.—. . . [T]he chief judge, by written order stating his or her reasons, may . . .

(1) dismiss the complaint . . .

(A) if the chief judge finds the complaint to be—. . .

(ii) directly related to the merits of a decision or procedural ruling; or

(iii) frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred, or containing allegations which are incapable of being established through investigation; or

(B) when a limited inquiry conducted under subsection (a) demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence; or



(2) conclude the proceeding if the chief judge finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events. . . .

[352(c)] Review of orders of chief judge.—A complainant or judge aggrieved by a final order of the chief judge under this section may petition the judicial council of the circuit for review thereof. The denial of a petition for review of the chief judge’s order shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

[352(d)] Referral of petitions for review to panels of the judicial council.—Each judicial council may, pursuant to rules prescribed [below], refer a petition for review filed under subsection (c) to a panel of no fewer than 5 members of the council, at least 2 of whom shall be district judges. . . .

[353(c)] Investigation by Special Committee.—Each committee appointed . . . shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee’s recommendations for necessary and appropriate action by the judicial council of the circuit.

[354(a)] Actions Upon Receipt of Report.—

(1) . . . [T]he judicial council of a circuit, upon receipt of a report filed under section 353(c)— [may conduct additional investigation, dismiss the complaint, or, if the complaint is not dismissed, shall take expeditious action, to include:]

(2) Description of Possible Action if Complaint Not Dismissed. —

(A) In general . . .

(i) ordering that, on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint;

(ii) censuring or reprimanding such judge by means of private communication; and

(iii) censuring or reprimanding such judge by means of public announcement. . . .

(B) For Article III judges.—If the conduct of a judge appointed to hold office during good behavior is the subject of the complaint, action by the judicial council . . . may include—

(i) certifying disability of the judge pursuant to the procedures and standards [provided elsewhere in this law] and

(ii) requesting that the judge voluntarily retire . . . .

(3) Limitations on judicial council regarding removals.—

(A) Article III judges.— Under no circumstances may the judicial council order removal from office of any judge appointed to hold office during good behavior. . . .

[354(b)] Referral to Judicial Conference— . . . .

(2) Special circumstances.—In any case in which the judicial council determines, on the basis of a complaint and an investigation under this chapter, or on the basis of information otherwise available to the judicial council, that a judge appointed to hold office during good behavior may have engaged in conduct—

(A) which might constitute one or more grounds for impeachment under [A]rticle II of the Constitution, or

(B) which, in the interest of justice, is not amenable to resolution by the judicial council, the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States. . . .

[355(a)] In general.—Upon referral or certification of any matter under section 354(b), the Judicial Conference . . . shall by majority vote take such action, as described [above] as it considers appropriate.

[354(b)] If impeachment warranted.—

(1) In general.—If the Judicial Conference concurs in the determination of the judicial council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary. . . .

(2) In case of felony conviction.—If a judge has been convicted of a felony under State or Federal law and has exhausted all means of obtaining direct review of the conviction, or the time for seeking further direct review of the conviction has passed and no such review has been sought, the Judicial Conference may, by majority vote . . . , transmit to the House of Representatives a determination that consideration of impeachment may be warranted . . . whatever action the House of Representatives considers to be necessary.

\* \* \*

Efforts to limit harassment at judicial workplaces in the United States became vivid during the last decade. In the federal judiciary, a sitting judge was publicly accused of having sexually harassed his clerks for many years. Many commentators believed that other members of the judiciary knew of the behaviour but had not acted upon this knowledge. After that judge's resignation and a great deal of public discussion, the Judicial Conference of the United States, tasked by statute with handling disciplinary cases within the judiciary, created a committee to review its workplace rules and norms.

Nonetheless, some members of the U.S. Congress have sought to create another mechanism. As of the summer of 2022, a bill pending before the Congress proposed that allegations of sexual harassment would be heard by a novel body, called the "Commission on Judicial Integrity" that, while formally inside the judicial branch,

would not be comprised solely of federal judges nor would its membership be determined by federal judges. This new body would develop policies and standards, and would report some information about particular cases publicly. Some members of the judiciary have, in turn, raised concerns that doing so would undermine judges' independence.

## **Judiciary Accountability Act of 2021**

H.R. 4827 (United States)

### Section 4. Establishment of the Commission on Judicial Integrity.

(a) Commission.—There is established in the judicial branch of the Federal Government the Commission on Judicial Integrity.

(b) Membership.—The membership of the Commission consists of the following 16 members:

(1) Presidential Appointment.—The following 3 members appointed by the President:

(A) A Chair selected from a list of not more than 3 candidates recommended by the concurrence of the Council of the Inspectors General on Integrity and Efficiency.

(B) A Vice Chair selected from a list of not more than 3 candidates recommended by the Equal Employment Opportunity Commission.

(C) A Vice Chair selected from a list of not more than 3 candidates recommended by the United States Commission on Civil Rights.

(2) Expert Representation.—The following 7 members selected by a recorded vote . . . of the Judicial Conference of the United States after consultation with the majority and minority leaders of the Senate, the Speaker and minority leader of the House of Representatives, the Council of the Inspectors General on Integrity and Efficiency, the Equal Employment Opportunity Commission, and the United States Commission on Civil Rights:

(A) 2 members with substantial experience in alternative dispute resolution regarding workplace misconduct.

(B) 2 members with substantial experience in enforcing and investigating civil rights laws against workplace discrimination, including 1 member with experience representing employees.

(C) 1 member with substantial experience working in the office of an inspector general of an agency.

(D) 1 member with substantial experience on a State judicial conduct commission or equivalent State body.

(E) 1 member with experience providing licensed counseling and other support for victims of harassment, sexual assault, discrimination, or retaliation.

(3) Judicial Representation.—2 Federal judges selected by the members appointed under paragraphs (1) and (2) from a list of 6 judges recommended by a recorded vote of the Judicial Conference, who—

- (A) do not serve in the same judicial district or circuit; and
- (B) have not been found to have engaged in judicial misconduct, including workplace misconduct.

(4) Employee Representation.—The following 4 members selected by the Chair and Vice Chairs:

- (A) 2 current employees of the judicial branch of the Federal Government who—
  - (i) do not serve in the same court, circuit, agency, or office;
  - (ii) have been employed by the judicial branch of the Federal Government for at least 5 years; and
  - (iii) do not serve in senior executive positions.
- (B) 2 members who have completed a judicial clerkship within the 4 years immediately preceding such selection. . . .

(f) Duties.—The Commission shall oversee a workplace misconduct prevention program that is consistent with prevailing best practices and that includes—

- (1) a comprehensive workplace misconduct policy;
- (2) a nationwide confidential reporting system that is readily accessible to current and former employees of the judicial branch of the Federal Government, law schools, and other potential complainants, including those who may interact with judges and senior executives in professional settings outside the judicial branch of the Federal Government;
- (3) a comprehensive training program on workplace behavior and bystander intervention;
- (4) metrics for workplace misconduct response and prevention in supervisory employees' performance reviews;
- (5) a system for independently investigating reports of workplace misconduct that ensures such investigations are comprehensive, timely, effective, and trusted;
- (6) standards for the imposition of prompt, consistent, and proportionate disciplinary and corrective action if workplace misconduct is determined to have concurred;
- (7) making publicly available, not less frequently than annually, anonymized reports of aggregate formal and informal complaints of workplace misconduct received and responsive actions taken . . . .

\* \* \*

Many critics believe that more is needed. Because the Supreme Court is not currently governed by the Code of Conduct applicable to lower court judges, one proposal pending before Congress would extend the Code of Conduct to the Supreme

Court justices and also broaden the conflict-of-interest rules applicable to the entire federal judiciary.

**Judicial Ethics and Anti-Corruption Act of 2022**  
H.R. 7706 (United States)

Section 2. Conflicts of Interest Rules for Judges and Justices . . .

(a) Required Divestments of Conflicted Assets.—

(1) Stocks and Securities.— No judge or justice may own an interest in or trade . . . any stock, bond, commodity, future, and other form of security, including an interest in a hedge fund, a derivative, option, or other complex investment vehicle, except nonconflicted assets allowed under subsection (b).

(2) Commercial Real Estate.—No judge or justice may maintain ownership in commercial real estate, . . .

(3) Trusts.—

(A) In general.—No judge or justice may maintain a financial interest in any trust, including a family trust, if the Judicial Conference of the United States determines that the trust includes any—

- (i) asset that might present a conflict of interest; or
- (ii) stock, bond, commodity, future, and other form of security, including an interest in a hedge fund, a derivative, option, or other complex investment vehicle, except nonconflicted assets allowed under subsection (b). . . .

(4) Businesses and Companies.—

(A) Privately owned or closely held corporation.—No judge or justice may maintain ownership in a privately owned or closely held corporation, company, firm, partnership, or other business enterprise.

(B) Board members.—No judge or justice may serve on the board of directors of any for-profit entity, including any corporation, company, firm, partnership, or other business enterprise. . . .

(b) Nonconflicted Assets.—

(1) In General.—A judge or justice may maintain assets that do not present a conflict of interest, including—

(A) A widely held investment fund— . . .

- (iii) that is diversified because the fund does not have a stated policy of concentrating the investments of the fund in any industry, business, single country other than the United States, or bonds of any single State;

- (B) noncommercial real estate, including real estate used solely as a personal residence;
- (C) cash, certificates of deposit, or other forms of savings accounts;
- (D) a federally managed asset, including—
  - (i) financial interests in or income derived from—
    - (I) any retirement system [listed under specific provisions of the US Code]
  - (ii) benefits received under the Social Security Act . . .
- (E) bonds, bills, and notes issued by governmental sources, such as the Federal Government, State, or other municipality; . . .

(c) Civil Fines.—The Attorney General or the Special Counsel may bring a civil action in the appropriate United States district court against any judge or justice who engages in conduct constituting a violation of this section and, upon proof of such conduct by a preponderance of the evidence, such judge or justice shall be subject to a civil penalty of not more than \$50,000 for each violation. The imposition of a civil penalty under this subsection does not preclude any other criminal or civil statutory, common law, or administrative remedy, which is available by law to the United States or any other person.

#### Section 5. Code of Conduct

(a) Sense of Congress.—It is the sense of Congress that in order for justices and judges, both of the supreme and inferior courts, to hold their offices during “good behaviour” under section 1 of article III of the Constitution of the United States, the judges and justices shall, among other requirements, adhere to the Code of Conduct for United States Judges adopted by the Judicial Conference of the United States described in this section.

(b) Applicability.—The Code of Conduct for United States Judges adopted by the Judicial Conference of the United States shall apply to the justices of the Supreme Court of the United States to the same extent as such Code applies to circuit and district judges.

(c) Enforcement.—The Judicial Conference shall establish procedures . . . under which—

- (1) complaints alleging that a justice of the Supreme Court of the United States has violated the Code of Conduct referred to in subsection (a) may be filed with or identified by the Conference;
- (2) such material, nonfrivolous complaints and any accompanying material are immediately referred to the Supreme Court Review Committee established in section 10; and
- (3) further action, where appropriate, is taken by the Conference, with respect to such complaints. . . .

#### Section 6. Improving Disclosure

(a) Recusal Decisions.—Section 455 of title 28, United States Code, is amended by adding at the end the following:

“(g) Recusal Lists.—

(1) Each justice, judge, and magistrate judge of the United States shall maintain and submit to the Judicial Conference a list of each association or interest that would require the justice, judge, or magistrate to be recused . . . , including any financial interests of the judge, the spouse of the judge, or any minor child of the judge residing in the household of the judge.

(2) The Judicial Conference shall maintain and make publicly available online, at no cost, each list required under this subsection that is filed with the Judicial Conference in a format that is searchable, sortable, machine-readable, downloadable, and accessible format, and accessible in multiple languages and to individuals with disabilities. . . .”

(d) Publicizing Case Assignment Information.—

(1) In General.—Not later than 180 days after the date of enactment of this Act, the Judicial Conference of the United States shall promulgate regulations requiring each court of the United States to make case assignment data available to the public online, at no cost, in a format that is searchable, sortable, machine-readable, downloadable, and accessible in multiple languages and to individuals with disabilities.

(2) Contents.—The case assignment data made available under paragraph (1) shall include, at a minimum, and to the extent available, the case title, docket number, case origin, filing date, and name of each authoring judge, concurring judge, and dissenting judge for each opinion issued in the case. . . .

## Section 10. Supreme Court Complaints Review Committee

(b) Establishment.—For the purpose of assisting the House of Representatives in carrying out its responsibilities under section 2 of article I and section 4 of article II of the Constitution of the United States [specifying the procedures for impeachment], there is established in the legislative branch to be known as the Supreme Court Complaints Review Committee under the general supervision of the Committee on the Judiciary of the House of Representatives.

(c) Members.—

(1) In General.—The Review Committee shall consist of 5 members, of whom—

(A) 2 shall be appointed by the Speaker of the House of Representatives;

(B) 2 shall be appointed by the minority leader of the House of Representatives; and

(C) 1 shall be appointed by agreement of the Speaker of the House of Representatives and the minority leader of the House of Representatives.

- (2) Qualifications of Review Committee Members.—
  - (A) Expertise.—Each member of the Review Committee shall be an individual of exceptional public standing who is specifically qualified to serve on the Review Committee by virtue of the individual's education, training, or experience . . . .
- (g) Duties of Review Committee.—
  - (1) In General.—The Review Committee shall review each complaint made against the Chief Justice of the United States or a Justice of the Supreme Court of the United States through the review process described [later in the statute]. . .
  - (2) Hearings.—The Review Committee may hold such hearings as are necessary and may sit and act only in executive session at such times and places, solicit such testimony, and receive such relevant evidence, as may be necessary to carry out its duties. . . .
- (i) Duties and Powers of the Review Committee.—
  - (1) In General.—The Review Committee is authorized—
    - (A) to establish a process for receiving and reviewing complaints from any person regarding allegations of misconduct by a justice of the Supreme Court of the United States;
    - (B) to conduct a review of material complaints regarding alleged misconduct by a justice of the Supreme Court of the United States; and
    - (C) in any case where the Review Committee determines, on the basis of the review described [below] that a justice may have engaged in conduct which might violate the Code of Conduct for United States Judges adopted by the Judicial Conference of the United States or constitute 1 or more grounds for impeachment under article II of the Constitution of the United States, or which, in the interest of justice, is not amenable to resolution by the Review Committee, the Review Committee shall promptly certify such determination, together with any complaint and a record of any associated proceedings to the Committee on the Judiciary of the House of Representatives.
  - (2) Referrals to Law Enforcement Officials.—
    - (A) In General.—Upon a majority vote of the Review Committee, the Review Committee may refer potential legal violations committed by a justice to the Department of Justice or other relevant Federal or State law enforcement officials, which referral shall include all appropriate evidence gathered during any review or preliminary investigation conducted under this subtitle.
    - (B) Notification.—The Review Committee shall notify the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives of all referrals under this subsection.



(3) Limitations on Review.—No review may be undertaken by the Review Committee of any complaint—

(A) that is primarily concerned with challenging the merits of a decision or procedural ruling;

(B) that is frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred, or containing allegations that are incapable of being established through investigation. . . .

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The current Chief Justice, John Roberts, is a proponent of control from within the judiciary itself. Excerpts of his views are below.

### **2021 Year-End Report on the Federal Judiciary**

Chief Justice John Roberts (2021)\*

A century ago, in the summer of 1921, President Warren G. Harding appointed former President William Howard Taft as Chief Justice of the United States. . . .

. . . Taft knew that no one seriously questioned that judges “should be independent in their judgments.” Decisional independence is essential to due process, promoting impartial decision-making, free from political or other extraneous influence. But Taft recognized that courts also require ample institutional independence. The Judiciary’s power to manage its internal affairs insulates courts from inappropriate political influence and is crucial to preserving public trust in its work as a separate and coequal branch of government. . . .

From the start of taking office, Chief Justice Taft campaigned for a governing body within the Judiciary to focus on administration of the Judiciary’s work. He envisioned that “executive direction” would come from a corps of the most experienced judges, drawn from across the Nation. His energetic efforts immediately bore fruit. Early in 1922, Congress enacted a law championed by Taft providing for a “Conference of Senior Judges,” which later became the Judicial Conference of the United States. That Conference, initially composed of the chief judges from each circuit and presided over by the Chief Justice, was charged by law with ensuring efficient administration of justice in the courts and creating managerial policy for the Judiciary.

In later years, Congress fortified the Judiciary’s institutional independence. It enacted the Rules Enabling Act of 1934, which empowered the Judiciary to develop its rules of procedure with a mechanism for expedited congressional review. Congress also authorized the establishment of Circuit Judicial Councils and the Administrative Office of the U.S. Courts. And Congress empowered the Judicial Conference and the Circuit

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\* Excerpted from CHIEF JUSTICE JOHN ROBERTS, 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2021).

Judicial Councils to respond to complaints of judicial misconduct. Those innovations have enabled the Judicial Conference to more effectively perform its administrative, budget, and regulatory work. At the same time, consistent with the principles of checks and balances embedded in our constitutional structure, Congress has continued to exercise oversight of the Judiciary's operations, promoting a useful dialogue characterized by mutual respect in matters of administration. This century-old relationship, reflecting inter-branch comity and deference, has served both branches well.

. . . Today, the agenda is much more varied and intensive, demanding the time and energy of 25 different committees with portfolios ranging from the rules of procedure to budget, security, conduct and disability, information technology, and space utilization.

. . . I would like to highlight . . . topics that have been flagged by Congress and the press over the past year . . . [that] will receive focused attention from the Judicial Conference and its committees in the coming months.

The first is a matter of financial disclosure and recusal obligations. Beginning this past September, the Wall Street Journal published a series of articles stating that, between 2010 and 2018, 131 federal judges participated in a total of 685 matters involving companies in which they or their families owned shares of stock. That was inconsistent with a federal ethics statute, 28 U.S.C. § 455, which requires that a judge recuse in any matter in which the judge knows of a personal financial interest, no matter how small. Let me be crystal clear: the Judiciary takes this matter seriously. We expect judges to adhere to the highest standards, and those judges violated an ethics rule. . . .

The second topic is the continuing concern over inappropriate behavior in the judicial workplace. In 2017, I directed the creation of the Federal Judiciary Workplace Conduct Working Group, consisting of judges and senior judicial administrators, to address allegations of serious misconduct within the judicial workplace. In my 2018 Year-End Report, I summarized the Working Group's findings and recommendations. Briefly stated, the Working Group recognized the seriousness of several high-profile incidents, but found that inappropriate workplace conduct is not pervasive within the Judiciary. Nevertheless, new protections could help ensure that every court employee enjoys a workplace free from incivility and disrespect. The Working Group made more than 20 recommendations in three primary areas, proposing that the Judiciary: (1) revise its codes of conduct and other published guidance to delineate more clearly the principles of appropriate behavior; (2) strengthen and streamline its internal procedures for identifying and correcting misconduct; and (3) expand its training programs to raise awareness of conduct issues. It also recommended that employees have multiple channels to raise their concerns, and endorsed prohibitions on any retaliation for calling out misconduct. The Judicial Conference adopted those recommendations in 2019, and the Working Group remains in place to continue to monitor the progress. . . .

As Chief Justice, Taft took vital steps to ensure that the Judicial Branch itself could take the lead in fulfilling that duty. The Congress of his era appreciated the Judiciary's need for independence in our system of separate and co-equal branches, and it provided a sound structure for self-governance. Since that time, the Judicial Conference has been an enduring success. It is up to the task of addressing the . . . topics I have highlighted, as well as the many other issues on its agenda. . . .

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## **Resigning on Principle**

As discussed above, judges may be required to leave the bench for reasons of misconduct. On some occasions, however, judges have resigned so as to call attention to the conditions that they believe undermine their ability to be fair-minded jurists.

One example comes from Nicaragua. In 2006, President Daniel Ortega and his Sandinista Party returned to power and they have been steadily moving the country in an autocratic direction, imposing partisan control over the police and army, cracking down on dissent, and rigging elections. One of Ortega's strongest allies was Rafael Solis, who had backed Ortega from his position as a judge at the Supreme Court of Justice and who was widely believed to have worked with Ortega to fill the judiciary with more Sandinista-sympathetic judges.

On April 17, 2018, protestors went to the streets to object to changes in the pension system and were met with unrestrained police violence. At least twenty-six people (the opposition claims sixty-three) were killed and more than 400 were injured. Subsequent protests were met with an even more severe crackdown as all protests were declared "illegal" and strong measures were taken against dissenters. On January 9, 2019, Solis resigned and made his reasons public.

## **Public Letter of Resignation and Denunciation**

Rafael Solis (2019)\*

Since April 17, 2018 . . . I have contemplated possibly resigning. . . .

. . . [However], I always had the feeling that . . . the presiding government . . . would be able to right the . . . wrongs committed throughout this period. Nevertheless, 2018 came to an end, and none of that took place; in fact, the opposite happened: the government maintained its positions and brought us to the point

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\* Excerpted from Letter from Rafael Solis, Former Magistrate, Nicaraguan Supreme Court of Justice, to Daniel Ortega Saavedra, President of Nicaragua (Jan. 8, 2019), <https://havanatimesenespanol.org/reportajes/el-magistrado-sandinista-rafael-solis-renuncia-a-csj-y-al-fsln>.

of almost complete international isolation, and I do not foresee . . . that in 2019 there will be a sincere . . . national dialogue that will bring peace, justice, and reconciliation to our country.

It is for that reason that I present my immediate resignation . . . as Magistrate of the Supreme Court of Justice . . . .

The reality is that beyond the number of dead I so deeply mourn . . . the great majority of which stood opposite the government in circumstances where they might have been assassinated . . . ; beyond the over 500 politicians jailed for their opposition . . . I still always thought that civility could be restored by you and lead to a political negotiation that would permit elections and other demands put forward by the opposition, but experience has demonstrated only the contrary, and a State of Terror, with the use of excessive force by paramilitary groups or the police itself with military arms, has sewn fear in our country, . . . with the inevitable consequence of the installation and consolidation of a dictatorship, . . . an absolute monarchy of two kings that has made all powers of the state disappear, allowing the judicial power of which I am part to be reduced to an expression of their own whims. . . .

You . . . did not, as in the 80s, look for international mediators . . . but rather decided to end popular protests . . . through blood and fire with excessive use of force and by irresponsibly arming youths and retired Sandinistas, who participated with the police in repression.

. . . [T]hen afterward began the trials, the vast majority of them political . . . , of a large number of detainees facing a series of absurd accusations over crimes they never committed, substituting yourselves over the judicial power in the decision-making, including over our own judges whom I defend here because they had no alternative other than to obey the orders coming from [the political branches] or otherwise face removal.

The Magistrates . . . can still reverse these decisions, but it is extremely difficult for any of them to dare do so due to the State of Terror currently imposed . . . so these sentences will surely be ratified, though hopefully the detained will not remain so for much time (the majority are sentenced for 30 years). . . .

I do not wish for this civil war but it is quite clear that you are venturing in that direction and with an army which for some reason has not disarmed the paramilitary groups, and it is also logical to expect that the opposition will look for ways to arm itself and the country will revert to forty years ago and return, if we are not there already, to those cycles of violence so characteristic of our history.

Sooner or later, the [Organization of American States] is going to end up expelling Nicaragua . . . and the United States will continue its policy of applying sanctions until the country is drowning economically while the armed forces gain strength, you all cling to power and refuse to leave . . . .

I have already lived through this so many years ago when I fought against a dictatorship, and I never believed that history would repeat itself because of those who also fought against that same dictatorship but now I am very clear that the solution is headed in that direction and I do not wish to participate . . . on the side of a government that no longer has the reason or the right, nor the majority support of the people, and that relies solely on the use of force to stay in power.

It is for this reason and not because of cowardice or treason that I am resigning, because if it had been a failed coup or an external aggression and so many people had not been killed, I would be with you and continue in the Court . . . but there was no such coup, nor external aggression, but rather an irrational use of force, and you will continue making things worse, driving the country to a civil war in which I do not wish to participate, let alone on your side. . . .

## **SELECTING JUDGES**

Having considered a variety of ways that judges can leave the bench, we now turn to the variety of ways that judges can be selected to serve. Are some methods for appointing judges to both apex and ordinary courts to be preferred to others in democracies?

Judicial selection can be a vulnerable moment for the independence of the judiciary. Some view political involvement in the appointments process as conferring legitimacy and an important part of the process, while others worry that political influence results in judges being appointed who are pre-committed to specific political views. Finding the balance between political and legal assessments in appointing judges is difficult. In this section, we consider some of the different methods of appointment, their strengths, and their vulnerabilities.

One common mechanism is for sitting judges to play a primary role in screening prospective judges for service. For example, in some instances (such as in the U.S. federal system), life-tenured judges select lower tier magistrate and bankruptcy judges. In many civil law systems, the appointment and promotion of ordinary judges is carried out entirely within the judiciary. Sometimes judges must refer candidates to the political branches to make the appointments, but those appointments are often limited to the candidates already approved by the judiciary.

Yet another system relies on “independent commissions,” sometimes specified by legislation, often drawn from the various branches of government and often including representatives of the bar, academia, and other interested groups. And in other jurisdictions, elected representatives and their aides vet individuals and urge executive branch actors, such as the president or prime minister, to appoint the judges. Executives

may have the power to appoint directly or appointment may require the involvement of one or both houses of the legislature.

All these methods have critics. At times, commentators in some countries that rely on executive branch appointments invoke the democratic values of accountability and transparency to call for a diminution in that control. In the nineteenth-century United States, for example, reformers in many states opted for direct election of state judges to wrest control from state legislatures and therefore end patronage appointments. As for US federal judges, Article III of the Constitution's text directs that the President nominate—with the advice and consent of the Senate—life-tenured federal judges. Bitter conflicts about particular nominees have produced many proposals for changes of that system. Moreover, while concerns focus on funding and campaigning in state court elections in the US, federal appointees are reliant on political connections and concerted campaigns that also involve fundraising and campaigning of a sort.

Judicial appointments made exclusively within the judiciary risk the opposite problem: maintaining a judiciary that is increasingly insular and out of touch with democratic politics. As we will see below, the Indian judiciary has long suffered from this critique, and Prime Minister Narendra Modi set out to change it, though he did not succeed. Appointments by judicial commission are more recent and, while they are lauded in theory, pressures to increase political input in judicial selection are common in systems that have adopted this method.

In short, both globally and locally, democracies debate the legitimacy and wisdom of various methods used to endow individuals with the state's power of adjudication.

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## **Judges Picking Judges**

In Poland after 1989, ordinary judges were appointed to their positions by a National Council of the Judiciary (KRS) consisting entirely of judges. As we saw above in the European Court of Justice Case C-791/19, *Commission v. Poland (Disciplinary Regime for Judges)*, the Polish government in 2017 changed the composition of the KRS so that it consists almost entirely of judges who have been chosen by the governing political party and who have appointed only judges who were willing to approve the government's controversial judicial reforms. The European Court of Justice found that the method of appointment of judges to the KRS violated the principle of judicial independence guaranteed by Union law and therefore also found that the Disciplinary Chamber of the Supreme Court, consisting of judges appointed entirely by the KRS, did not itself have the requisite independence to play a decisive role in the appointment of judges. This decision created standards for assessing when appointments carried out by

judges may themselves be politically tainted and therefore a violation of the independence of the judiciary.

Before the ECJ ruled in this case, the European Network on Councils of the Judiciary (ENCJ), consisting of the judicial councils across the EU that are themselves composed of judges with a role in appointments, assessment, promotion and discipline of judges, had been monitoring the situation in Poland and making professional reports on the developments there. In 2018, the ENCJ suspended Poland's membership in the organization and in 2021, it expelled the KRS from the organization altogether.

### **ENCJ Votes to Expel Polish Council for the Judiciary European Network of Councils for the Judiciary (2021)\***

It is a condition of ENCJ membership, that institutions are independent of the executive and legislature and ensure the final responsibility for the support of the judiciary in the independent delivery of justice.

The ENCJ has found that that the KRS does not comply with this statutory rule anymore. The KRS does not safeguard the independence of the Judiciary, it does not defend the Judiciary, or individual judges, in a manner consistent with its role as guarantor, in the face of any measures which threaten to compromise the core values of independence and autonomy. . . .

The ENCJ has been set up to improve cooperation between, and good mutual understanding amongst, the Councils for the Judiciary and the members of the Judiciary of the European Union Member States. To exclude a Council from this cooperation is counterintuitive and is not a decision that has been taken lightly. . . .

Councils for the Judiciary should support any judiciary which is under attack and do all they can to persuade the executive and legislature to support the action which they are taking in this regard. The prudent convention that judges should remain silent on matters of political controversy should not apply when the integrity and independence of the judiciary is threatened. There is a collective duty on the European judicial community to state clearly and cogently its opposition to proposals from governments which tend to undermine the independence of individual judges or Councils for the Judiciary.

The ENCJ wants to make absolutely clear that it remains committed to defending the independence of the Polish Judiciary. . . . Once a Council for the Judiciary in Poland fulfils the requirement that it is independent from the Executive and Legislature, and actually supports the values of the ENCJ, the ENCJ will be happy to welcome any such Council back as a member. . . .

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\* Excerpted from EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY, ENCJ VOTES TO EXPEL POLISH COUNCIL FOR THE JUDICIARY (2021), <https://www.encj.eu/node/605>.

## **Appointments by Other Branches**

While many constitutional systems lodge the responsibility for selecting judges for high courts in the political process, in recent years conflict has emerged about how that system should proceed. In the United States, after Justice Antonin Scalia died unexpectedly in early 2016, Democratic President Barack Obama nominated Judge Merrick Garland, then sitting as the Chief Judge of the Court of Appeals for the District of Columbia, for the Supreme Court. For the nine months remaining in the President's term, the Republican-dominated Senate refused to proceed with a confirmation vote based on a view that a Supreme Court vacancy ought not to be filled during those last months of a presidential term. In contrast, when Justice Ruth Bader Ginsburg died only six weeks before the 2020 presidential election, the Senate, still dominated by Republicans, raced through onto the Court Republican President Donald Trump's nominee Amy Coney Barrett. In practice, these two examples demonstrated that, when the President and the Senate were of different parties, the Senate did not see itself as obliged to provide a hearing for a presidential nominee in an election year. When the President and the Senate were of the same party, however, the Senate chose to speed a nomination through the process, even when close to a presidential election.

The United States presents but one example of gaming the conventions or rules of judicial appointments so that a party in power can maximize its influence over the courts. When the (liberal) Civic Platform government in Poland realized that it would probably lose the 2015 election, it changed the rules for Constitutional Tribunal appointments to give itself not just the three seats it was legally entitled to fill as its term wound down, but also two additional seats that were scheduled to come open just after the election. When the (nationalist) PiS party won both the presidential election and then both houses of the parliament in 2015, new President Andrzej Duda first refused to swear in any of the five judges elected by the outgoing Civic Platform government and then swore in five new judges swiftly elected by the PiS parliament.

The Constitutional Tribunal refused to seat the two judges who were, in its view, illegally elected by the outgoing Civic Platform government on its way out and also refused to seat the three judges who, again in its view, were illegally elected by PiS government on its way in. The PiS government then refused to publish or follow the decisions of the Court and the PiS-dominated Parliament then passed a law to limit the Constitutional Tribunal's powers. Thereafter, the PiS government installed its handpicked loyalist into the Court presidency and pushed its hand-picked judges onto the Court. It has since appointed other judges to that Court who are friendly to the government's attacks on the judiciary and the Court has in general acted as a rubber-stamp for the government's views. In the case excerpted below, decided by the European Court of Human Rights, the applicant company asked whether the Polish



Constitutional Tribunal was still independent in light of the way that its judges had been selected.

**Xero Flor w Polsce sp. z.o.o. v. Poland**  
Court of Justice of the European Union  
Case C-4907/18 (August 7, 2021)

The European Court of Human Rights (First Section), sitting as a Chamber composed of: Ksenija Turković, President, Krzysztof Wojtyczek, Gilberto Felici, Erik Wennerström, Raffaele Sabato, Lorraine Schembri Orland, Ioannis Ktistakis, judges, and Renata Degener, Section Registrar, . . . [d]elivers the following judgment . . . :

1. In order to assess whether the irregularities in a given judicial appointment procedure were of such gravity as to entail a violation of the right to a tribunal established by law . . . [this] Court developed a threshold test . . . of three criteria . . . .

2. In the first place, there must . . . be a manifest breach of the domestic law, in the sense that the breach must be objectively and genuinely identifiable. However, the absence of such a breach does not rule out the possibility of a violation of the right to a tribunal established by law, since a procedure that is seemingly in compliance with the domestic rules may nevertheless produce results that are incompatible with . . . that right . . . .

3. Secondly, the breach in question must be assessed . . . to ensure the ability of the judiciary to perform its duties free of undue interference . . . . Accordingly, breaches of a purely technical nature that have no bearing on the legitimacy of the appointment process must be considered to fall below the relevant threshold. . . .

4. Thirdly, the review conducted by national courts, if any, as to the legal consequences—in terms of an individual’s Convention rights—of a breach of a domestic rule on judicial appointments plays a significant role in determining whether such a breach amounted to a violation of the right to a “tribunal established by law,” and thus forms part of the test itself. . . .

5. In the present case the alleged violation of the right to a “tribunal established by law” concerns a judge of the [Polish] Constitutional Court. In particular, the issue before the Court pertains to an allegation that the relevant domestic law was breached during the process of electing three judges, including Judge M.M. . . . on 2 December 2015.

6. Accordingly, the Court will examine whether the irregularities encountered in the judicial election procedure at issue had the effect of depriving the applicant . . . of its right to a “tribunal established by law”. . . .

7. The Court firstly has to determine whether the relevant domestic law was contravened during the process of Judge M.M.’s election . . .

8. . . . [T]he Court notes that at the end of 2015 five seats at the Constitutional Court were to become vacant: the term of office of three judges would end on 6 November, and the term of office of two judges would end on 2 and 8 December respectively. The seventh-term *Sejm* adopted the Act of 25 June 2015 on the Constitutional Court, which granted it the power to elect judges to all seats becoming vacant in 2015. The outgoing seventh-term *Sejm* then elected five judges to the Constitutional Court during its last session on 8 October 2015. The President of the Republic did not receive the oath of office from any of those judges, and consequently they did not take up their judicial duties . . . .

9. A new eighth-term *Sejm*, with a different majority, was elected on 25 October 2015 and had its first sitting on 12 November 2015. On 25 November 2015 the eighth-term *Sejm* passed five resolutions on the “lack of legal effect” of the resolutions on the election of five judges of the Constitutional Court adopted by the previous *Sejm* on 8 October 2015. Subsequently, on 2 December 2015, the eighth-term *Sejm* proceeded to elect five new judges, including Judge M.M., to the Constitutional Court. The President of the Republic immediately received the oath of office from . . . those judges . . . .

10. The Court notes that the Constitutional Court found . . . that the domestic law had not been complied with in three respects in the process of the election of Constitutional Court judges on 2 December 2015. These contraventions were objectively and genuinely identified by the Constitutional Court. The Court sees no reason to call into question the Constitutional Court’s interpretation of the relevant provisions of the domestic law, in particular those of constitutional rank. It therefore concludes that the contraventions at issue should be regarded as manifest breaches of the domestic law for the purposes of the first step of the test.

11. When determining whether a particular defect in the judicial appointment process was of such gravity as to amount to a violation of the right to a “tribunal established by law”, regard must be had . . . to the purpose of the law breached, that is, whether it sought to prevent any undue interference by the executive or the legislature with the judiciary, and whether the breach in question undermined the very essence of the right to a “tribunal established by law” . . . .

12. The Court finds that the breaches of the domestic law that it has established above concerned a fundamental rule of the election procedure, namely the rule that a judge of the Constitutional Court was to be elected by the *Sejm* whose term of office covered the date on which his seat became vacant. This fundamental rule deriving from . . . the Constitution was recognised by the Constitutional Court in its judgment of 3 December 2015 . . . and confirmed in . . . four subsequent rulings . . . .

13. The Court has further established that the President of the Republic also acted, in essence, in contravention of the same fundamental rule when refusing to swear in the three judges elected on 8 October 2015 and receiving the oath of office from the three judges elected on 2 December 2015 . . . .

14. The Court has established that the fundamental rule applicable to the election of Constitutional Court judges was breached, particularly by the eighth-term *Sejm* and the President of the Republic . . . . The eighth-term *Sejm* proceeded to elect three Constitutional Court judges, including M.M., on 2 December 2015, even though the respective seats had already been filled by the three judges elected by the previous *Sejm*. The President of the Republic refused to swear in the three judges elected by the previous *Sejm*, and received the oath of office from the three judges elected on 2 December 2015.

15. In the light of the foregoing, and having regard to the three-step test . . . , the Court considers that the applicant company was denied its right to a “tribunal established by law” on account of the participation in the proceedings before the Constitutional Court of Judge M.M., whose election was vitiated by grave irregularities that impaired the very essence of the right at issue.

### **Chris Christie’s War on Judicial Independence** Billy Corriher & Alex Brown (2014)\*

[During his campaign for governor of New Jersey, Chris Christie criticized *Abbott* and *Mount Laurel*, New Jersey Supreme Court decisions requiring state and local governments to provide affordable housing and equitable education financing] and accused the state supreme court of “legislating from the bench.” . . . Christie also made clear that he believes the state constitution allows the governor to decide whether to reappoint a justice based solely on whether the governor agrees with the justice’s decisions. He pledged to use this authority to change the composition of the state supreme court. . . .

When [Supreme Court] Justice John Wallace’s initial seven-year term ended five months into Christie’s first term, the new governor did not disappoint critics of the court. Christie refused to renominate Justice Wallace—the court’s only African-American member and a widely respected jurist—and instead nominated Anne Patterson, an attorney without any judicial experience. . . . Christie accused [Justice Wallace] of contributing to “out of control” activism on the court but refused to specify how he had done so. . . .

Eight former members of the court called on Christie to reconsider. The retired justices quoted the framers of the 1947 state constitution and concluded, “There is

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\* Billy Corriher & Alex Brown, *Chris Christie’s War on Judicial Independence*, CENTER FOR AMERICAN PROGRESS (February 2014), <https://www.americanprogress.org/wp-content/uploads/2014/01/ChristieJudicial-report-Feb.pdf>.

simply no question about the intent of the framers of our Constitution: reappointment would be denied only when a judge was deemed unfit, a standard that ensured the independence of the State's judiciary." . . . For this reason, every governor since 1947 had reappointed the justices after their initial terms, even when they disagreed with the justices' decisions.

The Democrats on the Senate Judiciary Committee were furious and refused to even consider Patterson's appointment until Justice Wallace's term would have expired. . . .

The stalemate lasted through 2010. In the meantime, Chief Justice Stuart Rabner appointed a retired lower-court judge to fill Justice Wallace's former seat. [Supreme Court] Justice Roberto Rivera-Soto [declared] in December 2010 that he believed the chief justice did not have the authority to appoint the judge on a temporary basis . . . [and] pledged to abstain from every decision until the chief justice removed the [temporarily-appointed] judge. He backtracked on this stance after harsh criticism, but the damage was done. Justice Rivera-Soto stated that he would not seek reappointment when his initial seven-year term ended in the summer of 2011. Christie and [then-State-Senate President Stephen] Sweeney worked out a deal to confirm Patterson for Justice Rivera-Soto's seat instead of Justice Wallace's seat.

Justice Patterson's confirmation left the court with no racial diversity. In 2012, Christie nominated Phillip Kwon, who would have been the court's first Asian American justice, and Bruce Harris, an African American who is openly gay. Although Democratic legislators commended the diversity of the nominees, they objected to the fact that they would have upset the long-standing tradition of a 4–3 partisan split. If confirmed, the nominees would have been part of a court with three Republican justices, two independent justices who had been Republicans at some point before their nominations, and only two Democratic justices.

Christie's actions were inconsistent with the bipartisan tradition of keeping a roughly even political balance on the court—a tradition that predates the 1947 state constitution. The eight retired justices who urged Christie to reappoint Justice Wallace stated that this tradition is "a powerful restraint on court 'packing' or other means of exerting political pressure on an independent judiciary." . . . The Senate Judiciary Committee rejected the nominations of both Kwon and Harris. . . .

Despite Christie's efforts, all of the justices recently ruled against his administration in one politically charged case. On October 18, 2013, the court ruled that the state constitution requires New Jersey to allow same-sex couples to marry. . . .

Just days after the decision, Christie won re-election in a landslide—a victory which he could have interpreted as a mandate to continue his quest to pack the court. Yet the state senate remained in the hands of Democrats, who have criticized the governor for politicizing the courts. . . .

\* \* \*

In 2015, a New Jersey State Bar Association task force released a report on threats to judicial independence; it concluded that no major changes were needed. And in 2016, after a four-year standoff with Democrats, Christie nominated a Democrat to the Supreme Court. In a statement on the nomination, Christie said that “there’s no secret that I would have preferred to nominate a Republican. . . . But then you have to get down to what’s going to work. I’ve decided to work with the Senate president on this.”\* Under term limits, Christie ended his eight years as governor of New Jersey, and Phil Murphy, a Democrat, took office in 2018.

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## **Appointments in Mixed Systems**

In an effort to balance between politically driven appointment processes and judicially driven processes, a number of countries have turned to judicial selection commissions that contain a mix of politicians, judges and other interested parties. Israel is one example.

### **Chapter Two: Judges** **The Judiciary, Basic Law (Israel)**

#### . . . 4. Appointment of Judges

(a) A judge shall be appointed by the President of the State upon election by a Judges’ Election Committee.

(b) The Committee shall consist of nine members, namely, the President of the Supreme Court, two other judges of the Supreme Court elected by the body of judges thereof, the Minister of Justice and another Minister designated by the Government, two members of the Knesset elected by the Knesset and two representatives of the Chamber of Advocates elected by the National Council of the Chamber. The Minister of Justice shall be the chairman of the Committee.

(c) The Committee may act even if the number of its members has decreased, so long as it is not less than seven. . . .

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\* Katie King, *Chris Christie Nominates Democrat to New Jersey Supreme Court*, WALL STREET JOURNAL (Apr. 11, 2016, 9:25PM ET), <https://www.wsj.com/articles/chris-christie-nominates-democrat-to-new-jersey-supreme-court-1460423587>.

## **Changing the Judicial Appointments System**

Once an established system for judicial selection is in place, attempts to change that system are often met with accusations that the party advocating the change is trying to interfere with the independence of the judiciary. In a famously insular system, judicial appointments in India have long been controlled almost entirely by the judiciary itself. Critics argued that the bench was self-replicating and had become unaccountable. When Narendra Modi became Prime Minister in 2014, he took steps to make the judicial selection process more open, which prompted his critics to charge that he was trying to politicize the judiciary.

Below is a discussion that raises questions of how to think about the role of motives when changes to a judicial selection process take place. Some argue the “reforms” are motivated by an attempt by the moving party to capture the judiciary, while others insist that the changes are good-government attempts to fix a broken system and still others see that both rationales are at play.

### **Tackling Corruption while Preserving Judicial Independence: Lessons from India’s Supreme Court** Joshua Jordan (2022) \*

In India, Justices of the Supreme Court and judges of India’s 25 regional High Courts are appointed through a process known as the Collegium System. Although the Constitution vests the appointment power in the President of India, the President may only appoint a Supreme Court or High Court nominee recommended by a body called the Collegium, which consists of the Chief Justice, the four other senior-most Supreme Court Justices, and, in the case of High Court nominees, the senior-most judge on the High Court of the prospective appointee.

This system, which developed over the 1980s and 1990s as part of a decades-long tug-of-war between the branches of government, is controversial. Some critics have argued that the Collegium, which operates largely as a black box, leads to the selection of judges based on cronyism and quid pro quos . . . [Critics also say that ] the Collegium System allows for the appointment of corrupt judges because the secrecy of the Collegium’s deliberations prevents accusations of impropriety against those nominees from becoming public. . . . Critics also contend that the Collegium System

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\* Excerpted from Joshua Jordan, *Tackling Corruption while Preserving Judicial Independence: Lessons from India’s Supreme Court*, GLOBAL ANTICORRUPTION BLOG (March 14, 2022), <https://globalanticorruptionblog.com/2022/03/14/tackling-corruption-while-preserving-judicial-independence-lessons-from-indias-supreme-court>.

exacerbates judicial corruption through another, more indirect channel: The Collegium's slow pace has left hundreds of High Court seats vacant, which exacerbates the Indian court system's extreme case backlog. That backlog, in turn, encourages petty bribery, as many frustrated litigants would prefer to bribe a judge or court official to jump the line or get a case dismissed rather than wait years for a final resolution. . . .

In response to these concerns, the Indian Parliament, led by Prime Minister Narendra Modi, voted overwhelmingly in 2014 to amend the Indian Constitution to replace the Collegium with a National Judicial Appointments Commission (NJAC) composed of representatives from all three branches. But before the law could go into effect, the Supreme Court ruled it an unconstitutional threat to judicial independence. While calls for reform temporarily abated, just last December a member of Modi's cabinet expressed support for reintroducing the NJAC amendment to replace the Collegium System.

Any such attempt, however, would be misguided. Anti-Collegium reforms like the NJAC would undermine India's hard-won judicial independence, and the corruption problem these reforms would purport to solve has been greatly exaggerated. . . .

The Collegium System was developed in response to the executive overreach that characterized the [Indira] Gandhi era [and the state of emergency she presided over]. Over the two decades following Gandhi's leadership, the Supreme Court developed the Collegium System to reclaim its independence. To the Court, the only way to do this was to cut the other branches out of the appointment process entirely.

A reform like the NJAC would risk reversing the decades of post-Emergency progress. The NJAC amendment would allow Parliament to make changes to the appointment process through ordinary legislation—that is, with a simple majority vote. Given that the Prime Minister's party typically holds a majority in Parliament, this provision would shift full control of the appointment process to the central government. . . .

To be sure, the critics have a point when they complain about the opacity of the Collegium System. . . . But it would be possible to address this concern with reforms that increase the transparency of the Collegium process, for example by requiring the Collegium to publish reports of its findings, deliberations, and selection criteria. . . .

In sum, while the Collegium System is far from perfect, and judicial corruption and inefficiency are serious problems, these problems can and should be addressed without sacrificing the Indian judiciary's hard-won independence. Better alternatives exist to increase accountability and reduce corruption in India's highest courts.

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When Joseph Biden was elected President of the United States, many Democrats urged him to expand the number of seats on the Supreme Court in order to counter the

actions of the Senate Republicans who had approved – illegitimately in their view – a clear majority on the Court. In response, President Biden appointed a Presidential Commission on the Supreme Court, tasked with reviewing the suggested alternatives for reform of the Court but not asked to recommend concrete changes. While the Commission as a whole was not asked to recommend changes, two of the Commission’s members, Harvard Law Professor emeritus Laurence Tribe and former federal judge Nancy Gertner, explained in a separate op-ed why they believed that the expansion of the Court should be considered.

**Summary of The Supreme Court Isn’t Well.  
The Only Hope for a Cure Is More Justices.  
Nancy Gertner and Laurence H. Tribe (2021)\***

In an opinion piece in the *Washington Post*, Nancy Gertner—a retired judge for the U.S. District Court for the District of Massachusetts—and Laurence H. Tribe—the Carl M. Loeb University Professor, Emeritus, at Harvard Law School—argue that Congress should swiftly expand the number of justices on the Supreme Court. They reached this conclusion over the many months that they served on President Biden’s Supreme Court Commission on judicial term limits.

The article makes clear that while the report the Commission submitted to President Biden was thorough and deliberative, it did not signal confidence in the Supreme Court itself. Judge Gertner and Professor Tribe highlighted three areas where they had lost confidence in the court: 1) “dubious” judicial appointments, 2) the influence of politics, and 3) the trend towards anti-democratic decisions about critical issues such as voting rights and dark money in politics.

In the view of the authors, these three issues have contributed to the domestic political system’s slide towards oligarchy and dysfunction. They underscore that the Court’s recent decisions, particularly on voting rights issues, will entrench the power of the Republican party by limiting protections for people of color. In their view, the Supreme Court has been packed by the Republicans, with little hope for reform through ordinary processes. By putting democracy in peril, the actions of the Court demand an extraordinary reaction.

More minor reforms, such as implementing term limits, increasing transparency of Court proceedings, reducing the court’s ability to choose its own docket, or restricting the Court’s use of the “shadow docket” all fall short of what is required right now. Instead, a more dramatic step is required: expanding the size of the court.

The authors do not share the common fear that the Court will lose public legitimacy if its size is increased. Instead, they focus on the dangers of acting as if the

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\* Summary of Nancy Gertner & Laurence H. Tribe, *The Supreme Court Isn’t Well. The Only Hope for a Cure Is More Justices*, WASHINGTON POST (Dec. 9, 2021).



soft norms constraining the Court have not rapidly deteriorated over the last several years, including partisan manipulation of its composition and the rapid abandonment of precedent. The authors emphasize that: “[j]udicial independence is *necessary* for judicial legitimacy but *not sufficient*.” And they further explain that judicial independence is better-served when political actors are willing to dispel artificial impressions of impartiality when a court has succumbed to external political influence.

The article ends by the authors’ declaration that it is clear that “all is not well with the court.” Although expanding the size of the Court may lead to temporary harm to the respect or authority of the Court that risk is worth taking given the ongoing, anti-democratic harm being inflicted by the Court.

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## **Time-Limited and Time-Unlimited Appointments**

Judicial independence and judicial accountability come into conflict when judges are appointed to probationary terms of office that enable colleagues or others to assess whether temporary judges should be reappointed or installed in more permanent positions. But “ad hoc” judges are commonplace in many courts and often provide important resources to meet the demands of overloaded dockets. What role does and should contingency play? What about short and long tenure in office? How do values of independence translate into length of tenure and mechanisms for reappointment? Should appointments, as is common in some constitutional judiciaries, be only for fixed, non-renewable terms?

We begin with a document from the European Commission for Democracy through Law (the Venice Commission) that compiles in one place its advice with regard to contingent or probationary judiciary appointments given across many different national assessments so that the systematic nature of their advice is clear.

### **Compilation of Venice Commission Opinions and Reports Concerning Courts and Judges Venice Commission (2019)<sup>\*</sup>**

... The Venice Commission considers that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way . . . .

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<sup>\*</sup> Excerpted from EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, COMPILATION OF VENICE COMMISSION OPINIONS AND REPORTS CONCERNING COURTS AND JUDGES (Dec. 11, 2019) (emphasis in original).

This should not be interpreted as excluding all possibilities for establishing temporary judges. In countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable, a ‘refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office.’

The main idea is to exclude the factors that could challenge the impartiality of judges: *‘despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value.’ . . .*

In order to reconcile the need of probation / evaluation with the independence of judges, it should be pointed out that some countries like Austria have established a system whereby candidate judges are being evaluated during a probationary period during which they can assist in the preparation of judgements but they cannot yet take judicial decisions which are reserved to permanent judges. . . .

“. . . . Submitting a candidate’s performance as a judge to scrutiny by the general public, i.e. including by those who have been the object of unfavourable rulings, constitutes a threat to the candidate’s independence as a judge and a real risk of politicisation.” . . .

**Starrs v. Procurator Fiscal, Linlithgow**  
Scottish High Court of Justiciary  
[1999] ScotHC 242

[Before Cullen, Lord Justice Clerk, Lord Prosser, and Lord Reed:]

[Opinion of Cullen, Lord Justice Clerk]:

1. . . . In the present proceedings the main point at issue is whether the Lord Advocate has acted in a way which was incompatible with the rights of the accused under Article 6(1)\* of the [European Convention on Human Rights] to fair trial by “an independent and impartial tribunal” . . . .

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\* Article 6(1) of the European Convention on Human Rights provides, in relevant part:

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 . . . .

6. . . . [T]he main issue [is] whether a temporary sheriff such as Temporary Sheriff Crowe, was an “independent and impartial tribunal” . . . .

9. Section 11 of the 1971 [Sheriff Courts (Scotland) Bill] . . . makes provision . . . for the appointment of a temporary sheriff principal where there is a vacancy or the sheriff principal is unable to perform . . . all or some part of his duties. . . .

22. . . . [T]emporary sheriffs were paid *per diem* and did not qualify for a pension, unlike permanent sheriffs . . . . [S]ome temporary sheriffs . . . were dependent on their earnings from that source. . . . [S]ome temporary sheriffs were seeking preferment to permanent appointments as sheriffs. . . . If a person were to apply for a permanent appointment without having previously served as a temporary sheriff, then he might be encouraged to seek a temporary appointment first, effectively as a form of probationary service. . . .

39. . . . Sub-section (4) [of Section 11] confers a power of recall [of the temporary sheriff] which . . . is without any qualification as to the circumstance in which it may be exercised, the test which is to be applied or the means by which the justification for its exercise may be investigated. It is doubtful how far its exercise is susceptible of judicial review. The terms . . . stand in stark contrast to . . . the case of a permanent sheriff . . . .

40. . . . [T]he fact that a temporary sheriff is appointed for only one year at a time . . . has made it unnecessary for the executive to take the formal step of recalling the appointment. The temporary sheriff is simply not re-appointed. Further . . . an immediate instruction can be given that he is not to be used. . . . In the result, for a temporary sheriff not to be re-appointed has the same practical effect as recall. . . .

44. It is clear that in other parts of the world time-limited appointments of judges have given cause for concern. . . . [T]he use of the one-year term suggests a reservation of control over the tenure of office by the individual, enabling it to be brought to an end within a comparatively short period. This reinforces the impression that the tenure of office by the individual temporary sheriff is at the discretion of the Lord Advocate. . . .

45. Then there are . . . the restrictions . . . in determining whether a temporary sheriff qualifies for re-appointment . . . the minimum period of work which the temporary sheriff is expected to perform and the age limit of 65 years. . . . Neither is sanctioned by statute. They are matters of ministerial policy. They may change as one Lord Advocate succeeds another. . . . [These restrictions tend] to eliminate the temporary sheriff who would prefer to sit only occasionally, and to encourage the participation of those who are interested in promotion to the office of permanent sheriff, or at least in their re-appointment as a temporary sheriff. . . .

46. [T]he limits imposed . . . encourage the perception that temporary sheriffs who were interested in their advancement might be influenced in their decision-making to avoid unpopularity with the Lord Advocate. . . .

47. . . . [A]ppointment by the executive is consistent with independence only if it is supported by adequate guarantees that the appointed judge enjoys security of tenure. It is clear that temporary sheriffs are appointed in the expectation that they will hold office indefinitely, but the control which is exercised by means of the one year limit and the discretion exercised by the Lord Advocate detract from independence. . . .

49. I have reached the view that a temporary sheriff, such as Temporary Sheriff Crowe, was not an “independent and impartial tribunal” within the meaning of Article 6(1) of the Convention. . . .

[Opinion of Lord Prosser:]

. . . 8. . . . [M]embership of the pool of temporary sheriffs has increasingly come to be coveted as a step on the road towards a permanent appointment, and on the Lord Advocate’s side it has equally come to be seen to some extent as, in effect, a probationary period during which potential candidates for a permanent appointment can be assessed. . . .

22. . . . Temporary appointments are however apt to create particular problems . . . where the duration of the appointment is not fixed so as to expire upon the completion of a particular task or upon the cessation of a particular state of affairs . . . but is a fixed period of time of relatively short duration. . . .

24. . . . [T]he system of short renewable appointments creates a situation in which the temporary sheriff is liable to have hopes and fears in respect of his treatment by the Executive when his appointment comes up for renewal: in short, a relationship of dependency. This is in my opinion a factor pointing strongly away from “independence” within the meaning of Article 6. . . .

32. . . . [A] temporary sheriff can be removed from office at any time for any reason. . . . [A] temporary sheriff can be appointed on an annual basis and that his allocation to courts, and the renewal of his appointment, are thereafter within the unfettered discretion of the Executive. . . .

33. There can be no doubt as to the importance of security of tenure . . . : it can reasonably be said to be one of the cornerstones of judicial independence. . . .

38. . . . It is apparent that the system as operated depends on an assessment by the Scottish Executive, or in practice an assessment by the Lord Advocate, of what should be regarded as grounds for removal from office . . . , and of what general policies should be followed . . . . I do not doubt that the system has been operated by successive Lords Advocate with integrity and sound judgment . . . . There is however no objective

guarantee of security of tenure . . . and I regard the absence of such a guarantee as fatal. . . .

39. Judicial independence can be threatened not only by interference by the Executive, but also by a judge’s being influenced, consciously or unconsciously, by his hopes and fears as to his possible treatment by the Executive. It is for that reason that a judge must not be dependent on the Executive, however well the Executive may behave: “independence” connotes the absence of dependence. . . .

[Opinion of Lord Reed:]

. . . 2. The issue arises in consequence of the enactment of the Scotland Act 1998. Section 57(2) of that Act provides:

“A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with community law.”

The Lord Advocate is a member of the Scottish Executive. . . . It is conceded by the Solicitor General for Scotland, who represented the Lord Advocate in the proceedings before us, that the prosecution of a trial by a procurator fiscal or one of his or her deputies involves a number of steps which amount to “acts” within the meaning of section 57(2), and that those acts are to be treated as the acts of the Scottish Executive for the purposes of that provision. The “Convention rights” to which section 57(2) refers include the rights guaranteed by Article 6 of the European Convention on Human Rights. . . . Accordingly . . . it is *ultra vires* for a procurator fiscal to prosecute a trial before a temporary sheriff if such a sheriff is not an independent and impartial tribunal within the meaning of Article 6. . . .

4. Section 11(3) [of the statute] stipulates the formal qualification for appointment as a temporary sheriff, namely qualification as an advocate or solicitor for at least five years. This is a lesser requirement than for appointment on a permanent basis, for which the minimum period is ten years. . . .

Under section 12, a permanent sheriff can be removed from office only by an order which is subject to annulment in pursuance of a resolution of either House of Parliament. Such an order can only be made on a report by the Lord President and the Lord Justice Clerk to the effect that the sheriff is unfit for office by reason of inability, neglect of duty or misbehaviour. Such a report can only be made following an investigation by the Lord President and the Lord Justice Clerk. These provisions . . . strengthened the protection previously given to sheriffs. . . . Temporary sheriffs are expressly excluded from the scope of these provisions. . . .

[The opinion summarizes a number of statutory provisions that do not provide the same protections for temporary sheriffs as for sheriffs. The opinion also provides a history of the office of temporary sheriff that indicates temporary sheriffs were

originally interim substitutes for permanent sheriffs who could not fulfil their duties for a short period of time and these officials were not considered established positions within the sheriff system. Interim sheriffs were only appointed and their powers only exercised in an emergency when the permanent sheriff was not available.]

12. . . . It appears to me to be questionable in particular whether Parliament can have intended [the statute] to authorise the appointment of so-called temporary sheriffs who in reality hold office on annual commissions whose renewal is “virtually automatic,” and who are appointed not in order to deal with any particular problem of a temporary nature which has been identified in any particular sheriffdom, but so as to be available to supplement the work of the permanent sheriffs to the extent of performing one quarter of the entire work of the Sheriff Court. The appointment of such sheriffs would appear to me to be a constitutional innovation . . . .

17. I turn next to consider whether the temporary sheriff is an “independent and impartial tribunal” within the meaning of Article 6 paragraph 1 of the Convention. It should be noted at the outset that it is not sufficient for the purposes of Article 6 that an independent and impartial tribunal is available at the level of an appellate court, where the subject matter of the proceedings is a criminal charge. The accused person is entitled to be tried at first instance by a court which fully meets the requirements of Article 6 paragraph 1. . . .

18. In order to establish whether a body can be considered to be “independent,” regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence . . . .

20. So far as the initial appointment (rather than the subsequent renewal of appointments) of temporary sheriffs is concerned, I agree that appointment by the Executive is not inherently objectionable. . . . There may be a risk, in any situation where judges are appointed by the Executive, that they may be perceived as having attained their position as a result of the Executive’s favour, and therefore as being obligated to the Executive. Perceptions, in this context, are of course relevant only if they have some objective justification, rather than being the product of mere cynicism. The degree of risk will reflect the safeguards built into the system; and in that regard the involvement of an independent judiciary in the process of selection of most temporary sheriffs is a significant safeguard. . . . I therefore conclude that the manner of appointment of temporary sheriffs does not point towards any lack of judicial independence. . . .

22. A short term of office is not, in my opinion, necessarily objectionable. . . . Indeed, the Convention itself provides for the appointment of *ad hoc* judges to sit on the European Court of Human Rights, appointed for the purpose of a particular case. . . . Temporary appointments are however apt to create particular problems from the point of view of independence, particularly where the duration of the

appointment is not fixed so as to expire upon the completion of a particular task or upon the cessation of a particular state of affairs (such as some emergency or exigency), but is a fixed period of time of relatively short duration. In particular, such a term of office is liable to compromise the judge's independence where the appointment can be renewed. . . .

Other international instruments demonstrate an equal awareness of these dangers. For example, the Universal Declaration on the Independence of Justice, . . . provides (at para. 2.20):

The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they should be phased out gradually.

. . . I also note that the United Kingdom practice of appointing temporary judges appears to be unusual within a European context . . . . [I]t appears that in almost all the other systems surveyed the appointment of a temporary judge by the Executive for a period of one year, renewable at the discretion of the Executive, would be regarded as unconstitutional.

23. . . . What to my mind is of critical importance, however, is that renewal is both possible and expected, but is at the discretion of the Executive. In effect, temporary sheriffs have their judicial careers broken up into segments of one year, so as to provide the Executive with the possibility of re-considering their appointment on an annual basis. This has obvious implications for security of tenure. . . .

24. Given that temporary sheriffs are very often persons who are hoping for graduation to a permanent appointment, and at the least for the renewal of their temporary appointment, the system of short renewable appointments creates a situation in which the temporary sheriff is liable to have hopes and fears in respect of his treatment by the Executive when his appointment comes up for renewal: in short, a relationship of dependency. This is in my opinion a factor pointing strongly away from “independence” within the meaning of Article 6. . . .

32. [Though there might be a way to interpret the statute to include more protections for temporary sheriffs, those interpretations were not argued before this court.] . . . Therefore, I am prepared to proceed on the basis that a temporary sheriff does not, as a matter of law, enjoy anything which constitutes security of tenure in the normally accepted sense of that term.

33. There can be no doubt as to the importance of security of tenure to judicial independence: it can reasonably be said to be one of the cornerstones of judicial independence. The critical importance of judicial security of tenure has been recognised in Scots law since at least the declaration in Article 13 of the Claim of Right 1689\* . . .

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\* Article 13 of the Claim of Right 1689 provides:

[And it is also recognized in the U.N. Basic Principles on the Independence of the Judiciary 1985, the Latimer House Guidelines 1998 as well as the European Court of Human Rights case law. Domestic precedent was offered for the proposition that some temporary appointments to the judiciary, however, are permissible]. . . .

38. None of these [domestic] cases can in my opinion be regarded as establishing that the practice described to us is an adequate substitute for legal security of tenure. . . . I do not doubt that the system has been operated by successive Lords Advocate with integrity and sound judgment, free from political considerations, and with a careful regard to the need to respect judicial independence. That is no doubt why it has operated for so long without occasioning any widespread expression of public concern . . . . There is however no objective guarantee of security of tenure . . . and I regard the absence of such a guarantee as fatal to the compatibility of the present system with Article 6.

39. The Solicitor General emphasised that it is inconceivable that the Lord Advocate would interfere with the performance of judicial functions. I readily accept that; but that is not the point. Judicial independence can be threatened not only by interference by the Executive, but also by a judge's being influenced, consciously or unconsciously, by his hopes and fears as to his possible treatment by the Executive. It is for that reason that a judge must not be dependent on the Executive, however well the Executive may behave: "independence" connotes the absence of dependence. It also has to be borne in mind that judicial independence exists to protect the integrity of the judiciary and confidence in the administration of justice, and thus society as a whole, in bad times as well as good. The adequacy of judicial independence cannot appropriately be tested on the assumption that the Executive will always behave with appropriate restraint. . . . In short, for the judiciary to be dependent on the Executive flies in the face of the principle of the separation of powers which is central to the requirement of judicial independence in Article 6. . . .

46. My conclusion is fortified by the requirement under Article 6 that the tribunal must present an appearance of independence. I understand this requirement to mean that the test of independence must include the question whether the tribunal should reasonably be perceived as independent. The importance of that question is that the tribunal must be one which commands public confidence. . . . Even if I were mistaken in my conclusion that the necessary objective guarantees of independence were lacking, it seems to me that the need for the temporary sheriff's appointment to be renewed annually at the discretion of the Executive, and his lack of security of tenure, are in any event factors which could give rise to a reasonable perception of dependence upon the

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Executive. The necessary appearance of independence is therefore in my opinion absent. . . .

60. . . . [T]he appropriate procedure is for the sheriff to discharge the trial diet and remit the case to proceed at a fresh trial diet before another sheriff . . . .

61. . . . I wish to make it plain that I am not suggesting that any temporary sheriff has ever allowed his judicial conduct to be influenced by any consideration of how he might best advance his prospects of obtaining the renewal of his appointment, or his promotion to a permanent appointment. Nor am I suggesting that any official or Minister has ever sought to interfere with the judicial conduct of a temporary sheriff or would ever be likely to do so. There is however no objective guarantee that something of that kind could never happen; and that is why these appeals must succeed. . . .

\* \* \*

Shortly following the *Starrs* decision, the Scottish Parliament passed legislation eliminating the position of temporary sheriff. In that same Act, the Scottish Parliament created a new position, part-time sheriffs, who are appointed for five-year terms by Scottish Ministers. However, after the passage of the 2000 Act, questions remained about whether the new office of part-time sheriff conformed with Article 6 of the European Convention on Human Rights. Today, the major rules governing the position of part-time sheriff are in the 2008 Judiciary and Courts (Scotland) Act and the 2014 Courts Reform (Scotland) Act, the latter of which has been described as one of the most significant pieces of Scottish court-reform legislation in recent years.

Under the statutory scheme provided by both Acts, the Judicial Appointments Board for Scotland recommends candidates for appointment as part-time sheriff to the Scottish Ministers for five-year terms. Part-time sheriffs may also be removed before the end of their terms through a statutory procedure. First, a tribunal must be requested to be formed by the Lord President of the Court of Session or the First Minister, which must consist of judges, advocates or solicitors, and nonlawyers. The tribunal makes a recommendation to the First Minister on the judge's unfitness for office by reason of inability, neglect of duty, or misbehavior, after which the First Minister lays the report before the Scottish Parliament and then makes a decision on removal. The Courts Reform (Scotland) Act 2014, also broadened the exclusive jurisdiction of the sheriff court to include all civil cases with a monetary value up to £100,000. Analogous provisions of the 2008 Judiciary and Courts (Scotland) Act apply to the appointment, tenure and removal from office of temporary judges of the Court of Session, who are the Scottish equivalent of deputy judges of the High Court in England and Wales.

The justice system in England and Wales makes extensive use of part time appointments at every level. Though the terms vary from post to post, many are both time-limited and renewable.

**Judicial Selection and Democratic Theory:  
Demand, Supply, and Life Tenure**  
Judith Resnik (2005)\*

How ought a democracy select its judges? Critics in Canada, England, and Wales invoke the democratic values of accountability and transparency to call for a diminution in prime ministerial control over judicial appointments. In the United States, Article III of the Constitution's text directs that the President nominate—with the advice and consent of the Senate—life-tenured federal judges. Bitter conflicts about particular nominees have produced many proposals for changes of that system. And in those states that rely on various forms of judicial election, concerns focus on funding and campaigning. In short, both globally and locally, democracies debate the legitimacy and wisdom of various methods used to endow individuals with the state's power of adjudication.

This diversity of techniques for judicial selection illuminates the complex relationship of adjudication to democracies. Democracy tells one a good deal about rights to justice, equality before and in the law, and constraints on the power of the state, its courts included. But absent a claim that all government officials in a democracy must be elected, it is difficult to derive from democracy any particular process for picking judges. In contrast, democratic principles do rule out a few procedures for judicial selection—such as by inheritance or through techniques that systematically exclude persons by race, sex, ethnicity, and class.

In addition to examining the interaction between democratic theory and judicial selection [in this Article], I detail the degree to which the life-tenured (or “Article III”) judiciary in the United States has become anomalous, both when compared to high court judgeships in other countries and to other kinds of federal judges—magistrate and bankruptcy judges—in this country. Article III judges have no mandatory age for retirement nor a fixed, non-renewable term of office. Rather, they serve relatively long terms—often of more than twenty years. In addition, they control the timing of their resignations, enabling them to bestow political benefits on a particular party. Further, Article III judges now have the authority to appoint hundreds of non-life-tenured federal judges. . . .

A first conclusion is that conflict over life-tenured judgeships is neither surprising nor necessarily inappropriate. Given the nature and form of power held by Article III judges, the political import of federal courts in the United States, the constitutional allocation of power to both the President and the Senate, and disagreements about what good governance entails, judicial selection is a ready opportunity for political signaling.

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\* Excerpted from Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 *CARDOZO LAW REVIEW* 579 (2005).

Second, debates about individuals seeking confirmation have been repeatedly used as a means of articulating legal norms. From the legality of the Jay Treaty in the eighteenth century to the role of railroads and unions in the nineteenth century to the rights of women in the twentieth century and gay marriage in the twenty-first, conflict over nominations has helped to identify certain issues as powerfully divisive and others as so settled as to be seen as nonpolitical.

Third, to see utility in debate about who shall serve as life-tenured judges does not mean that the current structure is optimal. . . . [W]hile the fact of a democracy does not drive specific selection methods for judges, it does inform rules about the terms of service and the mode of action of judges. Democracy teaches that no one person (judges included) ought to hold too much power for too long. . . .

How long do people actually sit as life-tenured jurists? For the first twenty years of the life of the United States, between 1789 and 1809, the sixteen justices who served on the Supreme Court sat for an average of fourteen years apiece. Turning to the lower courts, where forty-seven judges served during that twenty year period, their time in office averaged sixteen years but the lengths of service were uneven across that group. Just under half (twenty-two) served fewer than ten years and seven served more than forty years.

Moving centuries forward to the period from 1983 to 2003 and having to deal with a larger group of people coming and going, the average term for the six Supreme Court justices whose service finished during that time period nearly doubled—to about twenty-four years. The current Chief Justice [then William Rehnquist] has had a seat on the Court for more than thirty years. For the lower courts (again on average and again with some judgments about how to calculate the relevant intervals), Article III judges served twenty to twenty-five years before opening a seat for another life-tenured appointment.

Of course, measuring these two time periods provides snapshots of judiciaries of very different sizes. While forty-seven people were in our database of lower court judges serving between 1789 and 1809, 530 were in the set we considered in the late twentieth century. Further, to capture a sense of the difference between those whose commissions dated from 1789 and those who served in the last twentieth century, we looked at the first twenty years, beginning in 1789 and then chose a group whose commissions ended by 2003 . . . by using a termination date of between 1833 and 1853. . . . Of that group of nine justices whose service ended between 1833 and 1853, the average length of service on the Supreme Court was twenty years. Of the group of thirty-six lower court judges falling within that time frame, the length of service averaged fourteen years. . . .

Many factors account for the growing length of service. More people are appointed as judges and life spans have lengthened. Further, a trend has emerged in which judges serving at a lower court are promoted to a higher court—making for a

career ladder in judging that helps to produce more years in office. Moreover, judges understand the heavy workload of their colleagues, and while many take “senior status,” they continue to shoulder a large proportion of the work. And being a federal judge may correlate with longevity and even be good for one’s health.

In sum, in the United States, life tenure translates into a very long term of service. Having long ago refused to have a Queen, this democracy does not offer many government officials guaranteed jobs for life. Members of Congress and the Executive can stay in power only as long as they can convince voters to reelect them. Further, term limits exist in both the federal system (for presidents) and in some states (for elected officials) to ensure turnover for certain kinds of jobs. Yet in the United States, as we currently read our constitutional provisions, Article III judges can hold their positions indefinitely. . . .

[A final note is that] while *interest* in changing selection systems may come from those concerned about the structure of authority more generally, the *energy* to make changes usually comes from those who hope that through changed processes come changes in the people selected to judge and therefore in the judgments made.

## OPINIONS EXCERPTED

AG of Saskatchewan v. AG of Canada (Canada, 2020).....	I-39
Amparo en Revisión 807/2019 (Mexico, 2020).....	III-25
Biden v. Missouri et al. (U.S., 2022).....	II-27
British Columbia Birth Registration No. 2018-XX-XX5815 (Canada, 2021) .....	III-32
Bushfire Survivors for Climate Action Incorporated v. Environmental Protection Authority (Land and Environmental Court of New South Wales, Australie, 2021).....	I-29
C.A. v. C.P. (California Court of Appeal, U.S., 2018).....	III-15
Carvalho and Others v. European Parliament (European Court of Justice, 2021).....	I-37
Case No. 3-19-CN/20 (Ecuador, 2021) .....	V-39
Case No. 37-19-IN/21 (Ecuador, 2021) .....	IV-46
Case of Manuela et al. v. El Salvador (Inter-American Court of Human Rights, 2021) .....	IV-33
Commune de Grande-Synthe v. France (France, 2021).....	I-27
Case on the Crimes of Abortion (South Korea, 2019) .....	IV-34
Declaration of Unconstitutionality 148/2017 (Mexico, 2021) .....	IV-16
Dhikta v. Government of Nepal (Nepal, 2009) .....	IV-37
Dobbs v. Jackson Women’s Health Organization (United States, 2022).....	IV-50
E.N. v. T.R. (Md. 2020) .....	III-27
European Commission v. Republic of Poland, (CJEU, 2019). .....	V-5
European Commission v. Republic of Poland (CJEU, 2021). .....	V-34
Extraordinary Appeal No. 898.060 Santa Catarina (Brazil, 2016).....	III-12
F., F.C., and Others (Argentina, 2020).....	III-8
Feilazoo v. Malta (ECtHR, 2021).....	II-52
Fenech v. Malta (ECtHR, 2022).....	II-54
FIDA Kenya v. Attorney General (Kenya, 2019) .....	IV-39
Gateway Bible Baptist Church v. Manitoba (Court of Queen’s Bench of Manitoba, Canada, 2021) .....	II-45
Greenpeace v. United Kingdom (Scottish Court of Session, 2021).....	I-40

Honner v. France (ECHR, 2021).....	III-34
In Re: Contagion of Covid 19 Virus in Prisons (India, 2021).....	II-50
Incident under Review R.A.(I) 81/2021 (Eleventh Collegiate Court of the First Circuit in Administrative Matters, Mexico, 2021) .....	I-7
Judgment No. 32 of 2021 (Italy, 2021) .....	III-37
Judgment No. 33 of 2021 (Italy, 2021) .....	III-4
Judgment No. 79 of 2022 (Italy, 2022) .....	III-41
Judicial Initiative on Act LXXIX of 1992 (Hungary, 2021).....	IV-43
Juliana v. United States (U.S. Court of Appeals for the Ninth Circuit, 2020) ...	I-41
Kassam v. Hazzard (Court of Appeal of New South Wales, Australia, 2021)..	II-21
Kassam v. Hazzard (Supreme Court of New South Wales, Australia, 2021) ...	II-24
Michael H. v. Gerald D. (U.S., 1989).....	III-14
Milieudefensie et al. v. Royal Dutch Shell (District Court of the Hague, 2021)	I-51
Minister for the Environment v. Sharma and Others (Full Court of the Federal Court of Australia, 2022) .....	I-14
National Federation of Independent Businesses v. Department of Labor, Occupational Safety and Health Administration (U.S., 2022) .....	II-31
No. 2021-911/919 QPC (France, 2021) .....	II-66
No. 2022-835 DC (France, 2022).....	II-25
Notre Affaire à Tous and Others v. France (Administrative Court of Paris, 2021).....	I-5
Order of the First Senate of 24 March 2021 (Climate Change) (Germany, 2021).....	I-24
Philip v. Scottish Ministers (Scotland, 2021).....	II-41
Plan B Earth and Others v. Secretary of State for Transport (UK, 2018) .....	I-31
R (on the Application of ClientEarth) v. Secretary of State (UK, 2021) .....	I-34
Ref. No. K 1/20 (Poland, 2020).....	IV-40
Writ of Mandamus No. 28312-DF (Superior Court of Justice of Brazil, 2021)II-	12
Ruling C-055 of 2022 (Colombia, 2022) .....	IV-29
Case No. 34-19-IN/21 and Accumulated (Ecuador, 2021) .....	IV-9
Sacchi v. Argentina (Committee on the Rights of the Child, 2021).....	I-34
Sharma and Others v. Minister for the Environment (Federal Court of Australia, 2021).....	I-9

*Excerpted Materials*

---

Starrs v. Procurator Fiscal, Linlithgow (Scotland, 1999)..... V-82

South Bay United Pentecostal Church v. Newson (U.S., 2021)..... II-38

Supreme Court of Justice v. Ecuador (Inter-American Court of Human Rights, 2013) ..... V-18

Thomson v. Minister for Climate Change Issues (New Zealand, 2015) ..... I-20

Unconstitutional Action 16/2016 (Mexico, 2021) ..... III-21

Valdís Fjölfnisdóttir and Others v. Iceland (ECHR, 2021) ..... III-18

Vavříčka and Others v. The Czech Republic (ECtHR, 2021)..... II-17

V.M.A. v. Stolichna Obsthina, Rayon Pancharevo (CJEU, 2021)..... III-22

VZW Klimaatzaak v. Kingdom of Belgium and Others (Brussels Court of First Instance, 2021)..... I-17

Xero Flor v. Polsce sp. z.o.o. v. Poland (European Court of Human Rights, 2021)..... V-73

## STATUTES EXCERPTED

The Act on the Federal Constitutional Court, Ch. 1, § 19 (Germany) .....	V-55
Complaints Against Judges and Judicial Discipline, 28 U.S.C. § 351–55 (U.S.) .....	V-56
Connecticut Parentage Act, § 23 (U.S., 2022) .....	III-40
Disqualification of Justice, Judge, or Magistrate Judge, 28 U.S.C. § 455 (U.S.) .....	V-54
Judicial Ethics and Anti-Corruption Act of 2022, H.R. 7706 (U.S., 2022) .....	V-61
Judiciary Accountability Act of 2021, H.R. 4827 (U.S., 2021) .....	V-59
The Judiciary, Basic Law, Chapter Two: Judges (Israel).....	V-77
Surrogates’ Bill of Rights, N.Y. State Assembly Bill No. A9506B (U.S., 2020).....	III-20



## COMMENTARY AND ADDITIONAL MATERIALS EXCERPTED

Diego Werneck Arguelhes, <i>Public Opinion, Criminal Procedures and Legislative Shields: How Supreme Court Judges Have Checked President Jair Bolsonaro in Brazil</i> (2022) .....	V-24
Luís Roberto Barroso, <i>Technological Revolution, Democratic Recession, and Climate Change: The Limits of Law in a Changing World</i> (2020) .....	I-62
Robert L. Brown, <i>From Earl Warren to Wendell Griffen: A Study of Judicial Intimidation and Judicial Self-Restraint</i> (2005).....	V-29
Emily Channell-Justice, <i>Ukraine’s Constitutional Crisis, Explained</i> (2019) .....	V-9
Billy Corriher & Alex Brown, <i>Chris Christie’s War on Judicial Independence</i> (2014) .....	V-75
DEJURE Foundation and Others, <i>We Call on the President and the Servant of the People Party to End the Pressure on the Constitutional Court against the Newly Appointed Judges</i> (2021) .....	V-16
Daniel C. Esty, <i>Should Humanity Have Standing? Securing Environmental Rights in the United States</i> (2022) .....	I-44
European Network of Councils for the Judiciary, <i>ENCJ Votes to Expel Polish Council for the Judiciary</i> (2021) .....	V-71
Shaun Fluker and Lorian Hardcastle, <i>Executive Lawmaking and COVID-19 Public Health Orders in Canada</i> (2020) .....	II-67
Nancy Gertner and Laurence H. Tribe, <i>The Supreme Court Isn’t Well. The Only Hope for a Cure Is More Justices</i> (2021).....	V-80
Barry Godfrey, Jane C. Richardson & Sandra Walklate, <i>The Crisis in the Courts: Before and Beyond Covid</i> (2021).....	II-61
Linda Hale and Jonathan Sumption, <i>Constitutional Implications of COVID-19</i> (House of Lords, 2020).....	II-4
Human Rights Watch, <i>World Report 2021: Ecuador</i> .....	V-22
Joshua Jordan, <i>Tackling Corruption While Preserving Judicial Independence: Lessons from India’s Supreme Court</i> (2022) .....	V-78
Courtney G. Joslin & Douglas NeJaime, <i>The Next Normal: States will Recognize Multi-Parent Families</i> (2022) .....	III-10
Joe McIntyre, Anna Olijnyk & Kieran Pender, <i>Civil Courts and COVID-19: Challenges and Opportunities in Australia</i> (2020) .....	II-63
Jaimie Meyer, Marisol Orihuela & Judith Resnik, <i>Tolerating the Harms of Detention: With and Without COVID-19</i> (2022) .....	II-57

Douglas NeJaime, <i>The Constitution of Parenthood</i> (2020) .....	III-29
Douglas NeJaime and Reva B. Siegel, <i>Conscience Wars in the Americas</i> (2020) .....	IV-26
Joy Neumeyer, <i>Poland’s Abortion Ban—And the Women’s Strike—One Year</i> <i>On</i> (2021) .....	IV-41
Eric Posner & Kenny Mok, <i>Constitutional Challenges to Public Health</i> <i>Orders in Federal Courts During the COVID-19 Pandemic</i> (2022) .....	II-73
David E. Pozen and Kim Lane Scheppelle, <i>Executive Underreach</i> (2020) .....	II-8
Saikrishna Prakash and Steven D. Smith, <i>Removing Federal Judges Without</i> <i>Impeachment</i> (2006).....	V-32
Judith Resnik, <i>Judicial Selection and Democratic Theory: Demand, Supply,</i> <i>and Life Tenure</i> (2005).....	V-90
John Roberts, 2021 Year-End Report on the Federal Judiciary .....	V-65
Alba Ruibal, <i>Movement and Counter-Movement: A History of Abortion Law</i> <i>Reform and the Backlash in Colombia 2006-2014</i> (2014).....	IV-6
Daniela Salazar, <i>The Transitory Lottery for Judicial Renovation</i> (2022) .....	V-23
Lord Sales, <i>Directors’ Duties and Climate Change: Keeping Pace with</i> <i>Environmental Challenges</i> (2019).....	I-57
Kim Lane Scheppelle, <i>The New Judicial Deference</i> (2012) .....	II-62
Syed Mansoor Ali Shah, <i>Foreword to Climate Change Litigation in the Asia</i> <i>Pacific</i> (2020).....	I-56
Don C. Smith, <i>Courts Must Provide Climate Change Leadership in the</i> <i>Absence of Law-making Progress</i> (2019) .....	I-53
Rafael Solis, <i>Public Letter of Resignation and Denunciation</i> (2019).....	V-67
Scott Stephenson, <i>The Relationship Between Federalism and Rights During</i> <i>COVID-19</i> (2021).....	II-13
Barbara Sutton and Nayla Luz Vacarezza, <i>Abortion Rights in Images</i> (2020) .....	IV-7
UN Human Rights Office of the High Commissioner, <i>Women’s Autonomy,</i> <i>Equality and Reproductive Health in International Human Rights</i> (2017) .....	IV-46
Venice Commission, <i>Compilation of Venice Commission Opinions and</i> <i>Reports Concerning Courts and Judges</i> (2019) .....	V-81
Venice Commission, <i>Ukraine Draft Law No. 4533 on the Constitutional</i> <i>Procedure</i> (2021).....	V-14
Venice Commission, <i>Urgent Opinion on the Reform of the Constitutional</i> <i>Court Issued Pursuant to Article 14a of the Venice Commission’s Rules of</i> <i>Procedure</i> (2020).....	V-11

*Excerpted Materials*

---

Kimberly Wehle, *How to Impeach a Supreme Court Justice* (2022) ..... V-27  
Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the  
Case Against “Suspending” Judicial Review* (2020)..... II-70

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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 Roberto Barroso** is a Justice of the Federal Supreme Court of Brazil who began his term in 2013 and is also a Professor of Constitutional Law at Rio de Janeiro State University. He holds an LL.M. from Yale Law School (1988-1989) and an S.J.D. from Rio de Janeiro State University (1990). He has written over twelve books on Brazilian constitutional law and several dozen articles, published in Brazil, France, Spain, Portugal, Colombia and Mexico. In the United States and in the UK, he has also published several articles, including: “In defense of the Amazon” (62 *Harvard International Law Journal*, 2021); “Technological Revolution, Democratic Recession and Climate Change: The Limits of Law in a Changing World” (18 *International Journal of Constitutional Law* 334, 2020); “Countermajoritarian, Representative, and Enlightened: The Role of Constitutional Courts in Democracies” (67 *American Journal of Comparative Law* 109, 2019); *Democracy, Political Crisis, and Constitutional Jurisdiction: The Leading Role of the Brazilian Supreme Court*, in Christine Lanfried (ed.), *Judicial Power*, 2019; *Reason without Vote: The Representative and Majoritarian Function of Constitutional Courts* in Thomas Bustamante (ed.), *Democratizing Constitutional Law*, 2016; “Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse” (*Boston College International and Comparative Law Review*, 2012). He was a Visiting Scholar at Harvard Law School (2011) and is a Senior Fellow at the Harvard Kennedy School since 2018.

**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.

**Professor Dan Esty** is the Hillhouse Professor at Yale University with primary appointments at Yale’s Environment and Law Schools and a secondary appointment at the Yale School of Management. He serves as director of the Yale Center for Environmental Law and Policy and co-director of the Yale Initiative on Sustainable Finance. Professor Esty is the author or editor of twelve books and dozens of articles on environmental protection, regulatory reform, energy policy, and sustainability metrics -- and their connections to corporate strategy, competitiveness, trade, and economic success.

His prizewinning volume, *Green to Gold: How Smart Companies Use Environmental Strategy to Innovate, Create Value, and Build Competitive Advantage*, was recently named the top “green business” book of the past decade. His current research and writing offers cutting-edge thinking about climate change, sustainable investing, innovation in the energy/environmental context, corporate sustainability, and new approaches to environmental protection -- including a widely hailed article, “Red Lights to Green Lights: From 20th Century Environmental Regulation to 21st Century Sustainability” as well as a 2019 edited book, *A Better Planet: 40 Big Ideas for a Sustainable Future*. From 2011 to early 2014, Professor Esty served as Commissioner of Connecticut’s Department of Energy and Environmental Protection where he earned a reputation for fresh thinking and practical results. His policy innovations include the launch of Connecticut’s first-in-the-nation Green Bank to promote clean energy using limited public funding to leverage private capital and the “LEAN” restructuring of all of Connecticut’s environmental permitting programs to make the state’s regulatory framework lighter, faster, more efficient, and effective. Prior to taking up his Yale Professorship in 1994, Professor Esty served in a variety of senior positions at the US Environmental Protection Agency where he helped to manage the agency’s regulatory programs and negotiate the 1992 Framework Convention on Climate Change. He also worked as a senior fellow at the Peterson Institute for International Economics in Washington, D.C., where he did breakthrough work on the links between trade and environmental issues and the broader challenges of globalization.

**President Laurent Fabius** is a former student of the École Normale Supérieure of the Rue d'Ulm, holder of an Agrégation higher degree in French Language and Literature and a former student of the École Nationale d'Administration. A member of the Conseil d'État, Laurent Fabius occupied several governmental positions in France: Minister for the Budget (1981-1983), Minister of Industry and Research (1983-1984), Prime Minister (1984-1986), Minister for the Economy, Finance and Industry (2000-2002), Minister of Foreign Affairs and International Development (2012-2016). He was also Member of Parliament from 1978 to 2012 and served twice as President of the French National Assembly, from 1988 to 1992, and again from 1997 to 2000. In 2015, as President of the COP 21, he played a crucial role in the negotiations that led to the Paris Climate Agreement, the first universal agreement to fight against climate change. In February 2016, he was appointed President of the Constitutional Council of the French Republic.

**Professor Abbe R. Gluck** is the Alfred M. Rankin Professor of Law and the Faculty Director of the Solomon Center for Health Law and Policy at Yale Law School (on public service leave). She is also Professor of Internal Medicine (General Medicine) at Yale Medical School 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. Professor Gluck 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 chair of Section on Legislation and the Law of the Political Process for the Association of American Law Schools. Gluck has extensive experience working as a lawyer in all levels of government. 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. Prior to law school, she worked in the U.S. Senate for Senator Paul S. Sarbanes of Maryland. 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. Gluck's scholarship has been published in the Yale Law Journal, the Harvard Law Review, the Stanford Law Review, the Columbia Law Review, and many other journals. Among her most recent work is the most extensive empirical study ever conducted about the realities of the congressional law-making process (published in the Stanford Law Review) and the Harvard Law Review's Supreme Court issue comment on *King v. Burwell*, the 2015 challenge to the Affordable Care Act. She also served as co-counsel on a Supreme Court brief in both *King* and the 2012 ACA challenge, *NFIB v. Sebelius*. In 2015, Gluck was both appointed by Gov. Malloy to serve on the Uniform Law Commission and elected to the American Law Institute.

**Linda Greenhouse** is a Senior Research Scholar in Law at Yale Law School, where she has taught since 2009. She spent 30 years as the Supreme Court correspondent for The New York Times, winning several major journalism awards including a Pulitzer Prize. Currently she writes frequent op-ed essays for The Times. Her work has also recently appeared in the New York Review of Books and The Atlantic. 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 most recent 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*, was published in 2021 by Random House. She serves on the council of the American Academy of Arts and Sciences and, since 2018, as president of the American Philosophical Society.

**Professor Doug Kysar** is Joseph M. Field '55 Professor of Law at Yale Law School and faculty co-director of the Law, Ethics and Animals Program. His teaching and research areas include torts, animal law, environmental law, climate change, products liability, and risk regulation.

**The Honorable Goodwin Liu** is an Associate Justice of the California Supreme Court. Nominated by Governor Jerry Brown, Justice Liu was sworn into office in 2011 and retained by the electorate in 2014. Before joining the state's highest court, Justice Liu was Professor of Law and Associate Dean at the U.C. Berkeley School of Law. His primary areas of expertise are constitutional law, education law and policy, and diversity in the legal profession. The son of

Taiwanese immigrants, Justice Liu grew up in Sacramento, where he attended public schools. He went to Stanford University and earned a bachelor's degree in biology in 1991. He attended Oxford University on a Rhodes Scholarship and earned a masters degree in philosophy and physiology. Upon returning to the United States, he went to Washington, D.C., to help launch the AmeriCorps national service program and worked for two years as a senior program officer at the Corporation for National Service. Justice Liu graduated from Yale Law School in 1998, becoming the first in his family to earn a law degree. He clerked for Judge David Tatel on the U.S. Court of Appeals for the D.C. Circuit and then worked as Special Assistant to the Deputy Secretary of the U.S. Department of Education. He went on to clerk at the U.S. Supreme Court for Justice Ruth Bader Ginsburg during the October 2000 Term. From 2001 to 2003, he worked in the litigation practice of O'Melveny & Myers in Washington, D.C. Justice Liu continues to teach constitutional law as a visiting professor at Harvard Law School. He is an elected member of the American Philosophical Society, American Academy of Arts and Sciences, and the American Law Institute. He serves on the Council of the American Law Institute, on the Board of Directors of the James Irvine Foundation, and on the Yale University Council. He has previously served on the California Commission on Access to Justice, the National Academy of Sciences Committee on Science, Technology, and Law, the Board of Trustees of Stanford University, and the governing boards of the American Constitution Society, the National Women's Law Center, and the Public Welfare Foundation.

**Professor Douglas NeJaime** is Anne Urowsky Professor of Law at Yale Law School, where he teaches in the areas of family law, legal ethics, law and sexuality, and constitutional law. Before joining the Yale faculty in 2017, NeJaime was Professor of Law at UCLA School of Law, where he served as Faculty Director of the Williams Institute, a research institute on sexual orientation and gender identity law and public policy. He has also served on the faculties at UC Irvine School of Law and Loyola Law School in Los Angeles and was Visiting Professor of Law at Harvard Law School. NeJaime is the co-author of *Family Law in a Changing America* (with Ralph Richard Banks, Joanna Grossman, and Suzanne Kim), *Cases and Materials on Sexuality, Gender Identity, and the Law* (with Carlos Ball, Jane Schacter, and William Rubenstein), and *Ethical Lawyering: Legal and Professional Responsibilities in the Practice of Law* (with Paul Hayden). His recent scholarship includes: "How Parenthood Functions," 122 *Columbia Law Review* (forthcoming 2023); *Answering the Lochner Objection: Reexamining Substantive Due Process and the Role of Courts in a Democracy*, 96 *N.Y.U. Law Review* 1902 (2021), with Reva Siegel; "The Constitution of Parenthood," 72 *Stanford Law Review* 261 (2020); "The Nature of Parenthood," 126 *Yale Law Journal* 2260 (2017); "Marriage Equality and the New Parenthood," 129 *Harvard Law Review* 1185 (2016); "Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics," 124 *Yale Law Journal* 2516 (2015), with Reva Siegel; and "Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage," 102 *California Law Review* 87 (2014). NeJaime has been a leader on national efforts to reform parentage laws to accommodate families that feature nonbiological parent-child relationships, including those formed by same-sex couples and through assisted reproduction. He led the effort to pass comprehensive parentage reform in Connecticut, serving as the principal drafter of the Connecticut Parentage Act, Public Act 21-15, which took effect in 2022.



**Professor Robert Post** is a Sterling Professor of Law at Yale Law School and served as the School's 16<sup>th</sup> dean, from 2009 until 2017. Before coming to Yale, he taught at the University of California at Berkeley School of Law. Professor Post's subject areas are constitutional law, First Amendment, legal history, and equal protection. He has written and edited numerous books, including *Citizens Divided: A Constitutional Theory of Campaign Finance Reform* (2014), which was originally delivered as the Tanner Lectures at Harvard in 2013. Other books include: *Democracy, Expertise, Academic Freedom: A First Amendment Jurisprudence for the Modern State* (2012); *For the Common Good: Principles of American Academic Freedom* (with Matthew M. Finkin, 2009); *Prejudicial Appearances: The Logic of American Antidiscrimination Law* (with K. Anthony Appiah, Judith Butler, Thomas C. Grey & Reva Siegel, 2001); and *Constitutional Domains: Democracy, Community, Management* (1995). He publishes regularly in legal journals and other publications; articles and chapters include "Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics" (*California Law Review*, 2010); "Constructing the European Polity: ERTA and the Open Skies Judgments" in *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Miguel Poiarés Maduro & Loïc Azuolai eds., 2010); "Roe Rage: Democratic Constitutionalism and Backlash" (with Reva Siegel, *Harvard Civil-Rights Civil-Liberties Law Review*, 2007); "Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era" (*William & Mary Law Review*, 2006); "Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law" (*Harvard Law Review*, 2003); and "Subsidized Speech" (*Yale Law Journal*, 1996). He is a member of the American Philosophical Society and the American Law Institute and a fellow of the American Academy of Arts and Sciences. He is a Trustee of the Meta Oversight Board and a co-reporter for the *Restatement of Torts (Third): Defamation and Privacy*.

**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), reissued in 2022 as an e-book, and *Migrations and Mobilities: Citizenship, Borders, and Gender* (2009, with Seyla Benhabib). Recent essays include *Representing What? Gender, Race, Class, and the Struggle for the Identity and the Legitimacy of Courts, Law and Ethics of Human Rights* (2021); *Constituting a Civil Legal System Called "Just": Law, Money, Power, and Publicity*, in *New Pathways to Civil Justice in Europe* (Xandra Kramer, Alexandre Biard, Jos Hoevenaars, and Erlis Themeli, eds., Springer, 2021); 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, since its inception, has supported more than 170 Yale Law School graduates for year-long fellowships working on behalf of communities and individuals in need of assistance. The Liman Center convenes colloquia, teaches classes, and does research. Its 2020 volume, *Money and Punishment*, and its 2019 book,

*Ability to Pay*, are available as e-books, as are several monographs compiling survey data on the use of solitary confinement in the United States. Professor Resnik received an Andrew Carnegie Fellowship for two years to support writing her book, “Impermissible Punishments,” exploring how incarcerated people, insisting on their status as constitutional rights-holders, have affected the theory and practices of 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 Carlos Rosenkrantz** currently serves as the Vice-President to the Supreme Court of Argentina. He was nominated in December 2015 and confirmed in June 2016. In September 2018, he was promoted to Chief Justice. Prior to this, he was a law professor at the University of Buenos Aires and, since 2008, has been a Rector of the University of San Andrés. He obtained his J.D. from the University of Buenos Aires, where he graduated first in his class. He received both his LL.M. and J.S.D. from Yale University. In 1984, Justice Rosenkrantz joined the working group of Carlos Santiago Nino in his project on deliberative democracy to draft standards for structural reform at the end of the military dictatorship. In 1994, Justice Rosenkrantz served as an advisor for President Alfonsín at the National Constitutional Convention. He founded Bouzat, Rosenkrantz & Asociados, a law firm that represented several large companies. He was an arbitrator and counsel in many different international cases. Justice Rosenkrantz is an expert in constitutional litigation and complex cases. Justice Rosenkrantz was a Global Law Professor at New York University Law School and has been a visiting professor at several other universities. He has, since 2013, been a member of the Fulbright Commission, Argentina, and he was an associate founder and board member of the Association for Civil Rights.

**The Honorable Daniela Salazar Marín** is a judge of the Constitutional Court of Ecuador. She was Vice President of the Court between 2019 and 2022. She is a law professor at Universidad San Francisco de Quito (USFQ) in Quito, Ecuador and served as the USFQ Law School’s Vice Dean until February 2019. While at the Law School, she was Co-Director of the USFQ’s Legal Clinic. She received her law degree from USFQ and a master’s degree (LL.M) from Columbia University in New York. She obtained a Fulbright scholarship in relation to her studies at Columbia University. Between 2005 and 2009, she worked as a human rights specialist for the Inter-American Commission of Human Rights, for which she received a Rómulo Gallegos scholarship.

**The Honorable Philip Sales** is was appointed as a Justice of the Supreme Court of the United Kingdom in January 2019. Philip studied Law at Cambridge University and Oxford University in the early 1980s. He was called to the Bar of England and Wales in 1985 and practiced as a barrister in corporate and commercial law. In 1997 he was appointed First Treasury Junior Counsel (official nickname: The Treasury Devil), the principal barrister advising and representing the Government, and from then on specialized in public law. He acted for the Government in many of the early cases under the Human Rights Act 1998 and appeared as counsel for the UK in the Court of Justice of the European Union and the European Court of Human Rights. In 2008 Philip was appointed as a judge of the High Court of England and Wales, Chancery Division. His judicial work was focused

on corporate/commercial law and public law. Prior to this appointment he had undertaken part-time judicial roles in the criminal courts (Crown Court) from 1999 and in the civil courts as a Deputy High Court Judge from 2004. In 2014 he was promoted to be a Lord Justice of Appeal in the Court of Appeal for England and Wales. He was a member of the Competition Appeal Tribunal between 2008 and 2015, and Vice-President of the Investigatory Powers Tribunal (responsible for judicial supervision of the intelligence agencies) between 2014 and 2015. Between 2009 and 2014 Philip was head of the Boundary Commission for England, the body responsible for establishing the constituencies for parliamentary elections.

**Professor Kim Scheppele** is the Laurance S. Rockefeller Professor of Sociology and International Affairs in the School of Public and International Affairs and the University Center for Human Values at Princeton University. Scheppele's work focuses on the intersection of constitutional and international law, particularly in constitutional systems under stress. After 1989, Professor Scheppele studied the emergence of constitutional law in Hungary and Russia, living in both places for extended periods. After 9/11, she researched the effects of the international "war on terror" on constitutional protections around the world. Since 2010, she has been documenting the rise of autocratic legalism first in Hungary and then in Poland, as well as its spread around the world. Most recently, she has written extensively about the response of European Union institutions and European law to rule of law challenges. Her many publications in law reviews, in social science journals, and in many languages cover these topics and others. Professor Scheppele is an elected member of the American Academy of Arts and Sciences and the International Academy of Comparative Law. In 2014, she received the Law and Society Association's Kalven Prize for influential scholarship. She held tenure in the political science department at the University of Michigan, was a professor of law at the University of Pennsylvania, was the founding director of the gender program at Central European University Budapest, directed the Program in Law and Public Affairs at Princeton for a decade, and has held visiting faculty positions in the law schools at Michigan, Yale, Harvard, Erasmus/Rotterdam, and Humboldt/Berlin. From 2017-2019, she was the elected President of the Law and Society Association. She is currently a member of the Executive Committee of the International Association of Constitutional Law, elected as a "global jurist."

**The Honorable Syed Mansoor Ali Shah** was elevated to the bench at the Lahore High Court in 2009 and, after serving as the Chief Justice of the Lahore High Court for almost two years, was elevated to the Supreme Court of Pakistan in early 2018. He did his schooling at Aitchison College, Lahore and got his law degree from the University of Cambridge, UK, as well as the University of the Punjab, where he also obtained a degree in Masters in Economics. As a corporate litigator, he was a partner at Afrid, Shah & Minallah and took keen interest in public interest litigation with special focus on environmental issues and sustainable development. He has a passion for teaching and taught law for almost two decades at various institutions including: Lahore University of Management Sciences (LUMS), Punjab Law College, Pakistan College of Law, Lahore, and at the Civil Services Academy, Lahore. He was also part of the steering committee that established the law school at LUMS, now called Syed Ahmed Hassan School of Law & Policy (SAHSOL). His areas of special interest are constitutional law, human rights, climate and water justice, environmental sustainability, disability rights, criminology, digital

surveillance, privacy, and proportionality. He believes in continuous judicial reforms; as the Chief Justice of the Lahore High Court, he spearheaded the formation of Alternate Dispute Resolution Centers (ADRC) in Punjab. This was to provide an alternative to litigation to reduce the chronic backlog and staggering pendency of cases. He also set up the first ever Gender Based Violence Court (GBV) and a Child Court at Lahore besides Criminal and Civil Model Courts to create working coordination between stakeholders to speed up dispensation of justice. He introduced Case Management and Court Automation Systems in Punjab both at the Lahore High Court and the District Courts, installed the Enterprise IT System with the help of Punjab Information Technology Board (PITB) to sustain the IT vision of the court for the next decade and to make the judicial system open, transparent, smart, and fully connected at all levels. To provide access to justice to ordinary litigants and lawyers, an online Call Centre, Judicial Mobile App, and online *Sahulat* (care) Center were established. He underlines the need for Information Technology, Artificial Intelligence, Video Linking, Human Resource Development, and Restructuring of the District Judiciary as the effective engines of change for the future and would like them to be mainstreamed to achieve state of the art judicial governance. He lays great emphasis on empowering the District Judiciary by enhancing their capacity through international and domestic training based on performance indicators, and by providing them a secure and conducive working environment, especially for the women judges. He feels that we need to increase judges per capita to improve the quality and speed of dispensation of justice in the country. He helped restructure the curriculum at the Punjab Judicial Academy and brought it in line with the global best practices, building a sustainable platform for judicial capacity-building of the members of the District judiciary and the ministerial court staff. He places special emphasis on research and played a foundational role in setting up the Lahore High Court Research Centre (LHCRC). At the Supreme Court of Pakistan, he has helped establish e-courts by video linking the Principal Seat of the Supreme Court with all the Provincial Registries of the Supreme Court, which has helped save travel cost to Islamabad from all over the country and has brought relief to the working schedule of the lawyers who can attend to more cases, and work more efficiently by avoiding adjournments. This was done prior to Covid-19 and has attained exceptional utility during the pandemic. The new SC Judicial Mobile Application helps lawyers and litigants navigate their way through the cause lists and court rosters and has enhanced their access to justice. Research and scholarship are the hallmarks of any apex court in the country, hence Research Centre (SCRC) at the Supreme Court was established, manned by bright and promising Civil Judges from across Pakistan. SCRC carries the vision to eventually provide and support research to all the courts in the country, thereby enriching the jurisprudence and the scholarship of judges. Justice Shah is an accredited mediator from CEDR, London; an Honorary Bencher of Lincoln's Inn, UK; a judicial member of the Global Judicial Institute on Environment (GJIE) (Brazil); and a member of the Rhodes Scholarship Committee for Pakistan (2019-).

**Professor Reva Siegel** is the Nicholas deB. Katzenbach Professor of Law at Yale Law School. Her recent articles include: *Equal Protection in Dobbs and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 *Colum. J. of Gender & the Law* (forthcoming 2023) (with Serena Mayeri & Melissa Murray) (discussing equal protection argument of our amicus brief in *Dobbs*: Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondent, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392, 2021 WL 4340072 (2021); *Race and Guns, Courts and Democracy*, 135 *Harv. L. Rev. F.* 449 (2022) (with Joseph Blocher); *The Politics of Constitutional Memory*, 20 *Geo. J. L. & Pub. Pol’y* 19 (2022); *Answering the Lochner Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 *N.Y.U.L. Rev.* 1902 (2021) (with Douglas NeJaime); *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under Heller*, 115 *Nw. L. Rev.* 139 (2021) (with Joseph Blocher); *The Constitutionalization of Disparate Impact—Court-Centered and Popular Pathways*, 106 *Cal. L. Rev.* 2001 (2019); and *Community in Conflict: Same-Sex Marriage and Backlash*, 64 *U.C.L.A. L. Rev.* 1728 (2017). Her books include *Processes of Constitutional Decisionmaking* (8th ed. 2022) (with Sanford Levinson, Jack Balkin, Akhil Amar & Cristina Rodriguez); *Reproductive Rights and Justice Stories* (2019) (co-edited with Melissa Murray & Kate Shaw), and *Before Roe v. Wade: Voices That Shaped the Abortion Debate Before the Supreme Court’s Ruling* (2d ed. 2012) (with Linda Greenhouse). Professor Siegel is a member of the American Philosophical Society, a fellow of the American Academy of Arts and Sciences, and an honorary fellow of the American Society for Legal History. She serves on the board of Advisors and the Board of Academic Advisors of the American Constitution Society and on the General Council of the International Society of Public Law.

**The Honorable Francesco Viganò** is a justice at the Italian Constitutional Court and a professor of criminal law. He was appointed in his current position by the Italian President in February 2018. He has taught at various Italian universities, among which the Università degli Studi in Milan and, most recently, the Bocconi University in the same city. He was the Secretary General of the Société Internationale de Défense Sociale (2012-2018) and a member of several international research teams. He co-founded the leading Italian criminal law review “*Diritto penale contemporaneo – Rivista trimestrale*,” of which he was the editor in chief between 2011 and 2018. Along with many articles and chapters, he has authored, co-authored or co-edited 14 books, among which a recent book (2021) on the proportionality of penalties as a constitutional constraint. His research currently focuses on the interactions between criminal law, constitutional law and human rights law.

**Lucía Baca** is a second-year student at Yale Law School. She graduated from Yale College in 2017 with a B.A. in Global Affairs and Latin American Studies, where she focused on the intersections of gender, international security, and human rights. After graduating from college, Lucía spent four years advancing LGBT-inclusive peace building and transitional justice at Colombia Diversa, a leading LGBT rights organization in the country. At Yale Law School, she serves as Articles Editor for the *Yale Journal on Regulation*, Student Director for the Schell Center for International Human Rights, and Political Action Chair for the Latinx Law Students Association. She is also a member of the Reproductive Rights and Justice Project. During the summer of 2022, Lucía interned with the Complex and Affirmative Litigation Team at the San Francisco City Attorney's Office.

**Aletta Brady** is a second-year student at Yale Law School. They graduated from Wesleyan University with a B.A. in Political Science with honors in 2015. In 2016, they founded the organization Our Climate Voices, which sought to humanize the climate crisis through storytelling and won the J.M.K. Innovation Prize. While holding a Fulbright Research Fellowship in Jordan in 2017, Aletta studied the intersection between gender justice and water scarcity. At Yale Law School, Aletta is a board member of the Yale Environmental Law Association, a member of the Environmental Law Clinic, and the first transgender student elected to serve the student body as an elected representative. Aletta is spending the summer of 2022 as an intern with the California Department of Justice's Environmental Division.

**Braden Currey** is a third-year student at Yale Law School. After graduating from Yale College in 2017 with a B.A. in Global Affairs, Braden worked at Dalberg Advisors, a social-sector management-consulting firm, where he helped develop program strategies for multilateral organizations, foundations, and governments. At the Law School, Braden has served as an Articles & Essays Editor for the *Yale Law Journal*, a Symposium Editor for the *Yale Journal on Regulation*, a Coker Fellow in Constitutional Law, and a speechwriter for the Dean's Office. He has also received the William K.S. Wang Prize in corporate law. Braden spent the summer of 2022 at Williams & Connolly LLP and the Federal Programs Branch of the U.S. Department of Justice, and the summer of 2021 at the Civil Division of the U.S. Attorney's Office for the Central District of California.

**Ram Dolom** is a third-year student at Yale Law School. He graduated *summa cum laude* from the University of California, Los Angeles, with a B.A. in International Development and a minor in English Literature. He then worked at Teach For America as the National Director of Humanities, where he helped to establish and utilize pedagogical standards in English, Social Studies, and World Languages instruction. At Yale Law School, Ram has served as director of the International Refugee Assistance Project, submissions editor for the *Yale Journal of International Law*, and lead editor for the *Yale Law & Policy Review*. He has been a member of the Allard K. Lowenstein International Human Rights Clinic. Ram spent the summer of 2021 at the Forest Peoples Programme's Strategic Legal Response Centre, the spring of 2022 at the Department of Justice—Office of Foreign Litigation, and the summer of 2022 at Skadden, Arps, Slate, Meagher & Flom LLP and the National Union of Peoples' Lawyers in the Philippines.

**Alexis Kallen** is a third-year student at Yale Law School. She graduated from Stanford University with a B.A. in Political Science with honors in 2018 and earned an M.Phil. in International Development with honors in 2020 from the University of Oxford, where she was a Rhodes Scholar. At Yale, Alexis is a member of the Veterans Legal Services Clinic and the San Francisco Affirmative Litigation Project. She also serves as an Articles & Essays Editor on the *Yale Law Journal*, the president of the Disabled Law Students Association, 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 Program and the summer of 2022 at Kirkland & Ellis LLP.

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