# BERKELEY JOURNAL OF INTERNATIONAL LAW

## CONTENTS

### Articles

**SAME-SEX MARRIAGE: BUILDING AN ARGUMENT BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS IN LIGHT OF THE US EXPERIENCE**
Emmanuelle Bribosia, Isabelle Rorive & Laura Van den Eynde .................................................. 1

**SHOULD ICSID GO GANGNAM STYLE IN LIGHT OF NON-TRADITIONAL FOREIGN INVESTMENTS INCLUDING THOSE SPURRED ON BY SOCIAL MEDIA? APPLYING AN INDUSTRY-SPECIFIC LENS TO THE SALINI TEST TO DETERMINE ARTICLE 25 JURISDICTION**
Helena Jung Engfeldt ......................................................................................................................... 44

**THE EURO-CRISIS AND THE COURTS: JUDICIAL REVIEW AND THE POLITICAL PROCESS IN COMPARATIVE PERSPECTIVE**
Frederico Fabbrini ............................................................................................................................. 64

**THE SUPPORT MODEL OF LEGAL CAPACITY: FACT, FICTION, OR FANTASY?**
Elionóir Flynn & Anna Arstein-Kerslake ......................................................................................... 124

**ABSTENTION, PARITY, AND TREATY RIGHTS: HOW FEDERAL COURTS REGULATE JURISDICTION UNDER THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION**
Sam F. Halabi ...................................................................................................................................... 144

**RELIGIOISTY AND SAME-SEX MARRIAGE IN THE UNITED STATES AND EUROPE**
David B. Oppenheimer, Alvaro Oliveira & Aaron Blumenthal ......................................................... 195

### Reviews

**REVIEW OF THE DEMOCRATIC FOUNDATIONS OF POLICY DIFFUSION: HOW HEALTH, FAMILY AND EMPLOYMENT LAWS SPREAD ACROSS COUNTRIES BY KATERINA LINOS**
Theresa Cheng ....................................................................................................................................... 239

**REVIEW OF INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE BY DAVID L. SLOSS, MICHAEL D. RAMSEY & WILLIAM S. DODGE (EDS.)**
Riddhi Dasgupta .................................................................................................................................... 253

**REVIEW OF THE NEW GLOBAL LAW BY RAFAEL DOMINGO**
Shams Al Din Al Hajjaji ..................................................................................................................... 268

**REVIEW OF NEW MEDIA, OLD REGIMES BY LYOMBE EKO**
Lexi Rubow ........................................................................................................................................... 281
Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience

Emmanuelle Bribosia
Isabelle Rorive
Laura Van den Eynde
Same-Sex Marriage: Building an Argument before the European Court of Human Rights in Light of the US Experience

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INTRODUCTION

In 2013 the question of whether same-sex couples should be able to enter into a legal marriage was still a much-disputed societal issue at the forefront of legal discourse in many democratic countries belonging to the Council of Europe, as well as in numerous states in the United States.¹ This may come as a

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surprise in a time of liberalization of mores and desacralization of marriage that has seen the number of both de facto unions and divorces increase dramatically (although the situation varies from country to country). However, it is essential to recall that the criminalization of homosexual relations between consenting adults was only formally outlawed in 1981 at the Council of Europe level and in 2003 for the entire United States. A report published by the European Union Agency for Fundamental Rights in 2011 noted that negative attitudes towards lesbian, gay, bisexual and transgender (LGBT) persons manifest themselves in various ways, including abusive behavior and crime. These facts, coupled with the persistence of hate-motivated violence, remind us that the achievements during past decades to suppress discrimination based on sexual orientation remain fragile.

The violent actions undertaken against same-sex couples in some European countries show that peaceful recognition of non-mainstream ways of life has yet to be fully achieved. Opposition to same-sex marriage does not stem exclusively from the streets; it also takes on legislative forms. In January 2013, for example, the lower house of the Polish parliament refused to legalize civil unions between same-sex partners. In June of the same year, the Russian Duma passed a law banning “gay propaganda” while similar legislation had already come into effect in several regions of Russia. The virulence of certain statements made at the French National Assembly in the context of the debates concerning “marriage

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europe.org/home/guide europe/country by country (for a summary country by country on the International Lesbian, Gay, Bisexual, Trans, and Intersex Association-Europe). See also, COUNCIL OF EUROPE, DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION OR GENDER IDENTITY IN EUROPE: COUNCIL OF EUROPE STANDARDS, 91 (2nd ed. 2011).


6. Political and legal developments are not necessarily linear; in 1932, Poland became the first country in 20th century Europe to decriminalise homosexual activity. THE OXFORD COMPANION TO POLITICS OF THE WORLD 308 (Joel Krieger ed., 2nd ed. 2001).

for everyone." shows the degree to which the same-sex marriage debate remains sensitive in a European state like France, which purports to be the cradle of fundamental freedoms and takes pride in the claims of the country’s supposed separation of political and religious affairs. Forty-five years after the civil uprisings of May 1968, which symbolizes among other things the struggle for emancipation and sexual liberation, the right to individual autonomy as part of the right to private life is still in the process of being fully realized. As the French example shows, the arguments against granting the right to marry to same-sex couples sometimes involve hints of homophobia, which call us to deconstruct this narrative in light of the right to non-discrimination.

Although legislative avenues to advocate for same-sex marriage have been and are still relevant in many countries, as recently illustrated by the votes in the French National Assembly in favor of “marriage for everyone” during Spring 2013, or those cast in the House of Commons in the United Kingdom, litigation remains of interest to many activists. Indeed, many of

8. This is a translation of how the bill was commonly referred to in the press and in public opinion in France. Its full name is “Loi n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe” which can be translated as “Opening Marriage to Couples of Same Sex, Act No. 2013-404 (2013).”


the victories for LGBT equality have been achieved through judicial decisions.\textsuperscript{15} The judicial review (and invalidation) of current laws prohibiting marriage or any form of legal recognition of same-sex couples is a positive step, as judicial recognition can prevent the popular vote from becoming a “dictatorship of the majority.”\textsuperscript{16} Around the world the highest courts in a variety of countries are confronting these questions of equality in light of existing laws that prevent the recognition of same-sex marriages.

The ECtHR “has been considering whether same-sex couples should . . . be recognized as a family under the ECHR for over thirty years.”\textsuperscript{17} In 2010, the ECtHR issued its first judgment on the specific question of the right of same-sex couples to marry, ruling in the \textit{Schalk and Kopf} case that contracting states are not obliged to grant same-sex couples access to marriage.\textsuperscript{18} However, incremental changes in the ECtHR’s case law are noticeable and the court went as far as holding that the right to marry is not necessarily limited to marriage between persons of the opposite sex.\textsuperscript{19} The 2013 case \textit{X v. Austria},\textsuperscript{20} concerning the adoption of a child by the female partner of his biological mother, confirms the fact that the court seems open to evolution.\textsuperscript{21} Particularly in non-discrimination law, the ECtHR tends to make smooth transitions by signaling change prior to formally recognizing the right. Sometimes, it sends out an alarm signal by alluding to an emerging European consensus or an international trend.

\textsuperscript{15} See Michael J. Klarman, \textit{Brown and Lawrence (and Goodridge)}, 104 MICH. L. REV. 431, 431 (2005). This does not deny that litigation has sometimes ignored grassroots efforts, proven counterproductive, or created backlash. \textit{Id.} at 459. See also \textit{MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE} (2012).

\textsuperscript{16} See, e.g., Chambers v. Florida, 309 U.S. 227, 241 (1940) (“Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement”).


\textsuperscript{18} “The Court starts from its findings above, that States are still free, under Article 12 of the Convention as well as under Article 14 taken in conjunction with Article 8, to restrict access to marriage to different-sex couples.” \textit{Schalk and Kopf} v. Austria, 53 Eur. Ct. H.R. 20, ¶ 108 (2011). For an extensive commentary see Loveday Hodson, \textit{A Marriage by Any Other Name?} \textit{Schalk and Kopf} v. Austria, 11 HUM. RTS. L. REV. 170 (2011).


\textsuperscript{20} \textit{X v. Austria}, 57 Eur. Ct. H.R. 14 (2013). In \textit{X v. Austria}, it was held that laws which exclude same-sex couples from second-parent adoption while affording that right to unmarried different-sex couples amount to discrimination in violation of the Convention. This case will be further discussed in later sections of this Article.

\textsuperscript{21} See \textit{id.}, at ¶¶ 112-153.

http://scholarship.law.berkeley.edu/bjil/vol32/iss1/1
Although it dismisses the claimant in casu; sometimes it paves the way for a coming evolution though waiting for future cases to activate its potential.22

This Article argues that three years after Schalk and Kopf, and amidst other courts’ decisions and the current debate in the United States,23 the ECtHR should recognize the right of same-sex partners to marry.24 We argue that this is an unavoidable step to achieving legal consistency in accordance with “the doctrine of the [European] Convention [on Human Rights] as a living instrument and the principle of dynamic and evolutive interpretation.”25 Our argument is built so as to help the ECtHR decide future cases on same-sex marriage. But the arguments put forth in this article should also feed the efforts of civil society organizations striving for equality, whose goals and strategies are experiencing a growing transnationalization.26

Two cases involving this issue are currently pending before the ECtHR: Chapin and Charpentier v. France27 and Ferguson v. the United Kingdom.28


24. Without entering the debate, we do recognize that many scholars and activists, for various reasons, do not advocate or prioritize the goal of same-sex marriage. For a short overview of the critiques from the LGBT movement itself see Erez Ben Zion Aloni, Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage, 18 DUKE J. GENDER L. & POL’Y 105 (2010); CRAIG RIMMERMAN, LESBIAN AND GAY MOVEMENTS: ASSIMILATIONIST OR LIBERATIONIST STRATEGIES FOR CHANGE (2009); for a response see Darren Rosenblum, Queer Legal Victories in Queer Mobilizations: LGBT Activists Confront the Law, 35, 47-48 (Scott Barclay et al. eds., 2009). See also Melissa Murray, Marriage as Punishment, 112 COLUM. L. REV. 1 (2012).


The first, known as the “Bègles gay couple case,” is named for a municipality of the French department of Gironde, where the mayor, in the spirit of civil disobedience, performed the marriage ceremony of M. Chapin and M. Charpentier. This marriage was later annulled and the French Cour de Cassation confirmed that “according to French law, marriage is the union of a man and a woman.” The second case, highly publicized in the Equal Love Campaign organized by the LGBT organization Outrage!, was filed by sixteen people (four opposite-sex couples and four same-sex couples) in the United Kingdom with the help of Robert Wintemute, professor of Human Rights Law at King’s College London and a well-known defender of LGBT rights. This case, which was directly taken to the ECtHR, is slightly different from Chapin and Charpentier. As Professor Wintemute argued: “Our case is that the combination of the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004 creates a system that segregates couples into two separate legal institutions, with different names but identical rights and responsibilities.”

The segregation argument is made in strong terms:

Same-sex couples are excluded from marriage, which is the universal system for legally recognizing a loving, committed, sexual relationship between two adults. This legal segregation is similar to having separate beaches and drinking fountains for white and black people, as existed in South Africa under apartheid. It is comparable to having a system of marriage for Christians and civil partnership for non-Christians.

As the Chapin and Charpentier and Ferguson cases both concern countries that legalized same-sex marriage in 2013, the ECtHR could easily evade the broader issue of the right of same-sex partners to marry and instead rule on the specific facts of each case. However, in Ferguson, the ECtHR will at a minimum need to address whether barring heterosexuals from accessing civil partnerships is discriminatory. Regardless, in time, the ECtHR will be pressed to tackle the question of equal rights for opposite-sex and same-sex couples.


31. See The Legal Case, EQUAL LOVE, http://equallove.org.uk/the-legal-case/ (last accessed October 16, 2013) (for the explanation of Robert Wintemute on how and why this case was directly taken to the ECtHR).

32. Id.

33. Id.
Without entering into the larger debate on judicial dialogue and citations to foreign law, we are of the opinion that courts can turn to foreign discussions and decisions for information and guidance (and also to become aware of paths to avoid). This Article contributes to the circulation of arguments and reasoning across courts by highlighting aspects of the American situation that could assist the ECtHR. Various scholarly articles undertake a similar exercise, but they are directed to US courts and scholars. A look at the debates and cases in relation to recent US judgments can provide a roadmap for litigation strategies and judicial interpretation that might be employed by advocates and judges, respectively, at the ECtHR. Arguments discussed in the American context can fuel the ongoing reflection held in legislative bodies, among activists, and in courts in Europe. Indeed, the reasoning deployed in recent US cases could inspire the respective courts in Europe.

34. See e.g., THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudry ed. 2011); Cheryl Saunders, Judicial Engagement With Comparative Law, in COMPARATIVE CONSTITUTIONAL LAW, 571 (2011); Jean-François Flauss, La Présence de la Jurisprudence de la Cour Suprême des États-Unis d’Amérique dans le Contentieux Européen des Droits de l’Homme, REV. TRIM. DR. H., at 313 (2005).

35. These external sources are not binding. We also recognize that “decisions hostile to same-sex relationship rights may also form part of the global conversation.” Kenji Yoshino & Michael Kavey, Immodest Claims and Modest Contributions: Sexual Orientation in Comparative Constitutional Law, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1079 (Michel Rosenfeld & András Sajó eds., 2012).


37. Observers have already mentioned that the two recent US Supreme Court rulings “have the potential to influence the jurisprudence of courts around the world.” Matthew Flinn, US Supreme Court Opens Door to Marriage Equality, UK Coming Next, UK HUMAN RIGHTS BLOG, (June, 29, 2013), http://ukhumanrightsblog.com/2013/06/29/us-supreme-court-opens-door-to-marriage-equality-uk-coming-next/.


In addition, it is an appropriate time to inform questions of same-sex marriage in Europe through engagement with the US debate. Although not binding precedents for the ECtHR, the decisions rendered in the United States as well as the arguments developed by US parties can provide insights for adjudicating the cases pending before the ECtHR. The United States Supreme Court recently decided two cases involving the right for same-sex couples to marry: 39 Hollingsworth v. Perry 40 and United States v. Windsor. 41 The first case involved Proposition 8, a California state ballot initiative amending the state constitution to restrict the recognition of marriage to opposite-sex couples. 42 The second case challenged the Defense of Marriage Act (DOMA), a federal act defining marriage as the union between a man and a woman. 43 The California case, Perry, was disposed of on narrow procedural grounds, 44 and while the Court said nothing about the constitutionality of Proposition 8, the ruling had the effect of finalizing the 2010 US district court decision nullifying the measure. 45 The district court judgment, which included some eighty findings of fact based upon lengthy review of detailed evidence, 46 ruled that Proposition 8 violated several constitutional provisions and doctrines, principally the Due Process Clause and the Equal Protection Clause. 47 In the second case the US Supreme Court struck down the central section of DOMA because it was contrary to the Fifth Amendment of the US Constitution. Writing for a five-to-

39. Previously, the Court had heard arguments in four significant cases on LGBT civil rights, but none of them directly touched upon the marriage issue: Bowers v. Hardwick, 478 U.S. 186 (1986); Romer v. Evans, 517 U.S. 620 (1996); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); Lawrence v. Texas 539 U.S. 558 (2003). For next year’s term, the Court has denied petition to hear a case from Arizona that raised the issue of domestic partner benefits of state employees. See Brewer v. Diaz, 656 F.3d 1008 (9th Cir. 2011), cert. denied, 133 S.Ct. 2884 (2013). One can observe a wave of lawsuits in other courts across the country.


42. See Hollingsworth v. Perry, 570 U.S. ___, at 2 (2013) (No. 12-144) (slip. op.). The issue presented to the parties was “[w]hether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman.”

43. United States v. Windsor, 570 U.S. ___, at 2 (2013) (No. 12-307) (slip. op.). In addition to procedural questions of standing, the main issue was “[w]hether Section 3 of the Defense of Marriage Act (DOMA) violates the Fifth Amendment’s guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State.”

44. Hollingsworth v. Perry, 570 U.S. ___, at 17 (2013) (No. 12-144) (slip. op.). State officials had refused to defend the Proposition or recognize that it was unconstitutional. The district court permitted the original proponents of Prop 8 to intervene and the Ninth Circuit found they had standing after asking the California Supreme Court whether they were authorized to represent California under state law. The US Supreme Court disagreed.


46. Flinn, supra note 37.

four majority, Justice Kennedy argued that DOMA’s “principal purpose is to impose inequality” and found that no sufficient justification was provided to sustain this “deprivation of liberty.”

Our argument for the ECtHR and for advocates unfolds in seven points. First, the ECtHR needs to recognize that the right to marry is gender neutral (point one), and that same-sex relationships fall into the ambit of family life, protected by the European Convention on Human Rights (point two). Following the traditional reasoning applied by the ECtHR in cases raising discrimination issues, we then show that same-sex relationships are comparable to heterosexual relationships with respect to the need for legal recognition (point three). Along with many authors, we urge the ECtHR to apply strict scrutiny (point four), and to stop deferring to the “European consensus” in its assessment of the discrimination (point five). We then discuss which potentially serious reasons could be invoked to justify the difference in treatment (point six). Following these analyses, we conclude that the exclusion of same-sex couples from marriage is discriminatory because it does not meet the justification requirements of non-discrimination under Article 14 of the ECHR.

This leads us to review the concrete options available to the ECtHR to deliver a judgment that meets the demands of equality while taking into account political realities (point seven). As Jonas Christoffersen explains, “[t]he development and elucidation of general standards sits ill with the [ECtHR]’s general reluctance to intervene in domestic matters, just as there are limits to how far the [ECtHR]’s legitimacy can carry it into the field of dynamic interpretation.” The ECtHR must indeed be careful when promoting new human rights standards.

I.
THE RIGHT TO MARRY IS GENDER NEUTRAL

Article 12 of the Convention provides as follows: “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.” Although Article 12 does not clearly address whether this right can be regarded as gender neutral, the

49. Id. at 25.
50. Throughout this Article, “ECHR” and “the Convention” will be used interchangeably to refer to the European Convention on Human Rights.
ECtHR, in the Schalk and Kopf decision opened the door—albeit just a crack—to the possibility that the right to marry might be gender neutral.53

At the time of the Schalk and Kopf decision the ECtHR had already broken the first barrier in a case concerning the rights of transsexual persons. In the 2002 Goodwin v. United Kingdom case, the ECtHR held that “the inability of any couple to conceive or parent a child cannot be regarded as per se removing the right to marry.”54 However, this finding was not in itself sufficient to grant the right to marry to same-sex couples. The Schalk and Kopf case gave the ECtHR the opportunity to break down a second barrier without completely opening the door to the recognition of same-sex marriage. Focusing on a reading in light of present-day conditions,55 the ECtHR held somewhat ambiguously that it “would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex.”56 To reach this conclusion, the ECtHR referenced an external source not legally binding in the ECHR framework.57 Specifically, the court in Strasbourg invoked an open formulation of Article 9 of the Charter of Fundamental Rights of the European Union, which deliberately dropped the reference to “men and women.”58 The ECtHR’s reference was two-fold. On one hand, the ECtHR deduced that Article 12 of the ECHR should be interpreted as “gender neutral” from now on. But, on the other hand, it used the reference to national laws contained in Article 9 of the Charter to justify allowing a margin of discretion to member states in the absence of a European consensus on this issue.59

In the United States, Judge Walker used similar reasoning in Perry v. Schwarzenegger when he stated that “[g]ender no longer forms an essential part of marriage; marriage under law is a union of equals.”60 Similarly, the California Supreme Court defined the right to marry—without reference to

57. Id. at ¶¶ 24-25.
58. Article 9 of the Charter of Fundamental Rights of the European Union provides: “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.” See also The EU Network of Independent Experts on Fundamental Rights, Commentary of the Charter of Fundamental Rights of the European Union, 98-104 (June 2006).
gender—as "the right to enter into a relationship that is 'the center of the personal affection that ennoble and enrich human life.'"\textsuperscript{61}

By taking a non-gendered approach to marriage in \textit{Schalk and Kopf}, and by harmonizing the interpretation of Article 12 of the ECHR and Article 9 of the Charter of Fundamental Rights of the European Union, the ECtHR paved the way for future developments in same-sex marriage claims. Because marriage between same-sex persons falls "within the ambit" of Article 12 of the ECHR, the refusal to recognize same-sex marriage can therefore be examined from the viewpoint of Article 12 of the ECHR (right to marry), combined with Article 14 of the ECHR (prohibition of discrimination).\textsuperscript{62}

II.
SAME-SEX RELATIONSHIPS ARE PROTECTED AS PART OF THE RIGHT TO RESPECT FOR FAMILY LIFE\textsuperscript{63}

Assuming that the ECtHR continues to refuse equal access to marriage, the concept of family life and the question of its scope must be addressed. Article 8 of the ECHR provides that everyone has the right to respect for his private life and family life.\textsuperscript{64}

In established case law, the ECtHR has held that "in respect of different-sex couples . . . the notion of family under [Article 8 of the ECHR] is not confined to marriage-based relationships and may encompass other \textit{de facto} 'family' ties where the parties are living together out of wedlock."\textsuperscript{65} However, for lack of a European consensus on the legal recognition of stable relationships between same-sex persons, the ECtHR had—until recently—considered the relationships of same-sex couples exclusively from the viewpoint of the right to respect for private life but not from that of the right to respect for family life.\textsuperscript{66} The \textit{Schalk and Kopf} case was a step forward in that regard. Appreciating the "rapid evolution of social attitudes towards same-sex couples in many [M]ember States," and certain provisions of EU law reflecting the "growing tendency to include same-sex couples in the notion of 'family,'"\textsuperscript{67} the ECtHR held that a stable relationship between same-sex partners falls within the scope of the

\textsuperscript{61} In Re Marriage Cases, 43 Cal.4th 757, 827 (2008).


\textsuperscript{64} Convention for the Protection of Human Rights and Fundamental Freedoms, \textit{supra} note 10.


\textsuperscript{66} Id. at ¶ 92.

\textsuperscript{67} Id. at ¶ 93. See also, G. Willems, \textit{La Vie Familiale des Homosexuels au Prisme des Articles 8, 12 et 14 de la Convention Européenne des Droits de l'Homme: Mariage et Conjugalité, Parenté et Parentalité}, 24 REV. TRIM. DR. H. 65 (2013).
concept of family life just like a stable relationship between opposite-sex persons.\textsuperscript{68} This position was restated by the same First Section Chamber in 2010 in \textit{P.B. v. Austria},\textsuperscript{69} and was confirmed by the Grand Chamber in 2013 in \textit{X v. Austria}.\textsuperscript{70} In \textit{X v. Austria}, “the Court reiterates that the relationship of a cohabiting same-sex couple living in a stable \textit{de facto} relationship falls within the notion of ‘family life’ just as the relationship of a different-sex couple in the same situation would.”\textsuperscript{71}

By acknowledging that family models vary and are not exclusively built around a heterosexual relationship, the ECtHR is acknowledging societal developments and taking into account the realities of contemporary family life in Europe.\textsuperscript{72} Besides the symbolic value of such an acknowledgment, its impact on the opening of marriage to same-sex persons is two-fold. First, it supports the claim that situations of cohabiting couples living in stable \textit{de facto} relationships, whether they are opposite-sex or same-sex, are comparable.\textsuperscript{73} Second, the acknowledgment that the stable relationship of a same-sex couple falls within the notion of family life can be used to deduce that states have a positive obligation to legally recognize these different family models.\textsuperscript{74} The latter point was highlighted in the dissenting opinion in \textit{Schalk and Kopf}.\textsuperscript{75} The dissent argues that, as soon as the ECtHR held that a same-sex relationship “falls within the notion of ‘family life,’” it should have drawn inferences from this finding and deduced a “positive obligation to provide a satisfactory framework, offering the applicants, at least to a certain extent, the protection any family should enjoy.”\textsuperscript{76}

Still, a number of uncertainties remain. First, acknowledging that there are various family makeups does not necessarily imply that a positive obligation to open marriage to same-sex persons is comprised in Article 8 (the right to respect for family life) and Article 14 of the ECHR (the prohibition of discrimination). When the dissenting judges refer to a “satisfactory framework” intended to protect the family life of stable same-sex couples, they do not specify which type of legal recognition would be judged compatible with the requirements of

\begin{itemize}
\item \textsuperscript{70} X v. Austria, 57 Eur. Ct. H.R. 14 (2013).
\item \textsuperscript{71} Id. at ¶ 129. In its earlier case-law, the ECtHR had already underlined that “the relationship of a couple, including a same-sex couple” is “qualitatively of a different nature” to “relationship between two sisters living together.” Burden v. United Kingdom, 2008-III Eur. Ct. H.R. 49, 75.
\item \textsuperscript{72} X v. Austria, 57 Eur. Ct. H.R. 14 at ¶ 139 (2013).
\item \textsuperscript{74} Hervieu, \textit{supra} note 22. See also Cooper, \textit{supra} note 38, at 63-65.
\item \textsuperscript{76} Id.
\end{itemize}
Bribosia et al.: Same-Sex Marriage: Building an Argument Before the European Court

SAME-SEX MARRIAGE: IN LIGHT OF THE US EXPERIENCE

III. SAME-SEX RELATIONSHIPS ARE COMPARABLE TO HETEROSEXUAL RELATIONSHIPS

In discrimination cases, a classic question is whether the complainant is in a relatively similar or analogous situation with another group of persons who are treated more favorably (the “but for” test). Problematically, in the ECtHR case law, this analysis is often missing or inconsistent in cases involving sexual orientation.78 Nevertheless, the way the ECtHR tackles this issue is evolving and depends on the question at stake.

With respect to economic benefits, the ECtHR considered that same-sex couples who have entered into civil partnerships are in a similar situation to married heterosexual couples in the United Kingdom. Yet, the ECtHR ultimately ruled in the Grand Chamber that:

[r]ather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature . . . [T]here can be no analogy between married and Civil Partnership Act couples, on the one hand, and heterosexual or homosexual couples who choose to live together but not to become husband and wife or civil partners, on the other hand.79

As to adoption and parental rights, one paradoxical effect of the ECtHR’s non-discriminatory approach is that, until recently, it has been more supportive of single homosexuals adopting a child80 than of same-sex couples adopting a child. For instance, in Gas and Dubois, the ECtHR considered an application by two women in a long-term registered partnership where, although both provided full-time care for one party’s biological child, the non-biological parent was unable to legally adopt the child.81 The specific status of marriage in French society, defined at the time as a union between a man and a woman, led the ECtHR to determine that the applicants were not in a situation comparable to

77.  Bamforth, supra note 63, at 137.
78.  With respect to the Court’s case law related to sexual orientation, see PAUL JOHNSON, HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS, 124-25 (2012).
that of a married couple. Regarding the difference in treatment between the same-sex applicants and a heterosexual couple in a registered partnership, there is, according to the ECtHR, neither direct discrimination (in both cases, the simple adoption was denied) nor indirect discrimination (no conventional obligation weighing on France to open marriage to same-sex couples). However, the ECtHR went a step further in X v. Austria:

observ[ing] that, in contrast to the comparison with a married couple, it has not been argued that a special legal status exists which would distinguish an unmarried heterosexual couple from a same-sex couple. Indeed, the Government did not dispute that the situations were comparable, conceding that, in personal terms, same-sex couples could in principle be as suitable or unsuitable for adoption, including second-parent adoption, as different-sex couples. The Court accepts that the applicants, who wished to create a legal relationship between the first and second applicants, were in a relevantly similar situation to a different-sex couple in which one partner wished to adopt the other partner’s child.

If we turn now to the issue of access to marriage, the ECtHR expressly admitted in Schalk and Kopf that “same-sex couples are just as capable as different-sex couples of entering into stable committed relationships. Consequently, they are in a relevantly similar situation to a different-sex couple with regard to their need for legal recognition and protection of their relationship.”

In our view, equating same-sex and different-sex couples is the only tenable position after having acknowledged that family models are not exclusively built around heterosexual relationships. At present, the ECtHR’s case law clearly suggests that situations of cohabiting couples living in a stable de facto relationship, whether they are heterosexual or homosexual, are comparable in their need for legal status and legal protection.

82. Id. at ¶¶ 65-68. This somewhat tautological reasoning of the ECtHR on the non-comparability of couples in registered partnerships with married couples stands in contrast to the perspective adopted by the Court of Justice of the European Union. See Case C-267/06, Maruko v. Versorgungsanstalt der deutschen Bühnen, 2008 E.C.R. I-01757 and Case C-147/08, Römer v. Freie und Hansestadt Hamburg, 2011 E.C.R. I-03591. While leaving the final word to the national court, the European Union Court of Justice suggested that the same-sex life partnership in Germany was comparable to marriage, at least concerning survivor’s benefits granted under an occupational pension scheme, and concluded that there was a direct discrimination based on sexual orientation.

83. The so-called ‘PACS’ in France (for ‘pacte civil de solidarité’).


IV.
THE EUROPEAN COURT OF HUMAN RIGHTS SHOULD TAKE THE SUSPECT CRITERIA SERIOUSLY

A legal system that refuses to grant same-sex persons access to marriage leads to a difference in treatment that is directly based on sexual orientation. While discrimination based on sexual orientation is not explicitly on the list of grounds contained in the ECHR Article 14, the ECtHR has long held that discrimination based on sexual orientation is covered by this provision.

Moreover, throughout its case law on this matter, the ECtHR has highlighted the particularly suspect nature of differential treatment based on sexual orientation. Recently, the ECtHR emphasized that it “has repeatedly held that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification or, as is sometimes said, particularly convincing and weighty reasons.” If one takes the suspect criteria seriously, this should mean that “where a difference of treatment is based on sex or sexual orientation the State’s margin of appreciation is narrow.” The ECtHR went even further, by stating that the “differences based solely on considerations of sexual orientation are unacceptable under the Convention.”

By requiring member states to provide weighty reasons to justify different treatment on the basis of sexual orientation, the ECtHR takes a principled stand that is more clear-cut than that resulting from current US case law (though the ECtHR is not always consistent when drawing the consequences of such a principled stand). Courts in the United States have long “refused to recognize

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92. Id.
93. See Schalk and Kopf v. Austria, 53 Eur. Ct. H.R. 20, ¶¶ 97-98 (2011) (citations omitted) ("On the one hand the Court has held repeatedly that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification. On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the..."
sexual orientation as the basis for heightened scrutiny. As a consequence, lesbian and gay rights activists have been forced to assert and defend analogies to other ethnic groups . . . .”94 The majority of US Circuit Courts of Appeals still apply rational basis review95 to differential treatment based on sexual orientation.96 Nevertheless, there is an emerging trend in some US courts to depart from this view and apply a more demanding standard of review to marriage laws that create differential treatment of same-sex couples. For example, the high courts of California, Connecticut, and Iowa have applied a seemingly heightened scrutiny, and “all concluded that the differential treatment is not sufficiently related to advancing any important government interests.”97

Similarly, in Windsor, the Court of Appeals for the Second Circuit decided to examine Section 3 of the Defense of Marriage Act using intermediate scrutiny.98 It emphasized that “several courts have read the Supreme Court’s recent cases in this area to suggest that rational basis review should be more demanding when there are ‘historic patterns of disadvantage suffered by the group adversely affected by the statute.’”99 The Second Circuit concluded that Section 3 of DOMA requires heightened scrutiny based on factors used by the Supreme Court to decide whether a group classification qualifies as a quasi-suspect class:

(a) whether the class has been historically “subjected to discrimination,” (b) whether the class has a defining characteristic that “frequently bears a relation to ability to perform or contribute to society,” (c) whether the class exhibits “obvious, immutable or distinguishing characteristics that define them as a discrete group”, and (d) whether the class is “a minority or politically powerless.” Immutability and lack of political power are not strictly necessary factors to


95. The appropriate standard of review, however, is debated. Some courts consider the actual purpose of the law under heightened rational basis review (this standard is distinct from intermediate scrutiny). Robert Farrell, The Two Versions of Rational-Basis Review and Same-Sex Relationships, 86 WASH. L. REV. 281, 288 (2011). For more on this rational basis “with bite” see Collin Callahan & Amelia Kaufman, Equal Protection, 5 GEO. J. GENDER & L. 17 (2004).

96. See Sarah L. Cooper, supra note 38, at 67.


98. Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012). Note that this federal appellate court has jurisdiction over three states that recognize same-sex marriage.

99. Id. at 180.
identifying a suspect class. The Second Circuit found that all four factors justify that homosexuals should be a class subject to heightened scrutiny. The US Supreme Court decision in *Windsor* was less explicit and did not indicate what standard of review it applied to DOMA.

The situation in the United States is thus still in flux regarding the standard of review. In comparison, as noted above, European human rights law seems more demanding. However, in our view, the ECtHR in *Schalk and Kopf* did not apply the equivalent of strict scrutiny and, though they should have, failed to seriously consider LGBT people as a suspect class. Instead, “the [ECtHR] granted Austria a wide margin of appreciation to determine whether its differential treatment of same-sex and different-sex couples could be justified” under ECHR Article 8 (right to respect for family life) and Article 14 (prohibition of discrimination). However, “[this] deference in the non-discrimination context was particularly misplaced.” When a differential treatment is based on suspect ground such as sexual orientation, the ECtHR should apply heightened scrutiny, shifting the burden of proof onto the government’s shoulders. As the dissenting Judges in *Schalk and Kopf* put it, “in the absence of any cogent reasons offered by the respondent Government to justify the difference of treatment, there should be no room to apply the margin of appreciation.”

In areas where what is at stake is the protection of minorities or vulnerable groups, recognizing an important national margin of discretion (as in Europe) or giving free rein to states by applying a standard that is rather undemanding (as in the United States) does not appear to be satisfactory because it might leave the protection of minorities in the hands of majorities, who sometimes show little concern for the rights of people belonging to minorities.

100. *Id.* at 181 (citations omitted).

101. *Id.* at 185.

102. “The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.” United States v. *Windsor*, 570 U.S. ___, at 17 (2013) (No. 12-307) (slip. op.) (Scalia, J., dissenting).

103. *Lau*, supra note 97, at 244.

104. *Id.*


In Schalk and Kopf, the absence of a European consensus regarding same-sex marriage—no more than six out of forty-seven Convention states allowed same-sex marriage at the time—played a crucial role in the ECtHR’s reasoning. According to the ECtHR, a lack of consensus combined with the deep-rooted social and cultural connotations of marriage, “which may differ largely from one society to another,” result in a wide margin of appreciation to member states in this field. Consequently, the ECtHR stated that Article 12 of the ECHR should not, in present-day conditions, be read as granting same-sex couples access to marriage or, in other words, as obliging member states to provide for such access in their national laws.

However, in Schalk and Kopf, the ECtHR’s ruling only concerned whether the right to marriage had been violated (Article 12 of the ECHR read alone). It did not address the issue of discrimination (Article 12 taken in conjunction with Article 14 of the ECHR). We suggest that, because these cases concern the rights of minorities, the question of whether states can refuse to open marriage to same-sex couples should be examined by the ECtHR from the viewpoint of non-discrimination. This would allow “the Court to focus on the reason why the minority has been excluded from an opportunity (falling ‘within the ambit’ of another Convention right) that is provided to the majority.” Like other authors, or third parties intervening in the Chapin and Charpentier case,

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108. The notion of “consensus” refers to an interpretative principle used by the ECtHR, which implies a search for the existence of rights-enhancing practices among member states. When a certain measure of uniformity is reached, the ECtHR raises the standard of rights protection. The ECtHR has used this tool extensively but also incoherently, mainly as a basis for deference to the states. See Laurence Helfer, Consensus, Coherence and the European Convention on Human Rights, 26 CORNELL INT’L L.J. 133-165 (1993); George Letsas, A Theory of Interpretation of the European Convention on Human Rights (2007); George Letsas, The Truth in Autonomous Concepts: How To Interpret the ECHR, 15 EUR. J. INT’L L NO. 2 279, 295-305 (2004).


110. Id. at ¶ 105 (“The Court cannot but note that there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes”).

111. Id. at ¶ 62.

112. Id. at ¶¶ 57-58.


114. See Johnson, supra note 78, at 77-83; Lau, supra note 97, at 247-249; Bamforth, supra note 63, at 140.

we defend the position that consensus is not relevant to the question of discrimination based on sexual orientation regarding access to marriage.

Interestingly, this argument mirrors that of the three dissenting Judges in Schalk and Kopf. They emphasized that in the case of differential treatment based on sexual orientation, and in the absence of very cogent reasons alleged by the government to justify it:

there should be no room to apply the margin of appreciation. Consequently, the “existence or non-existence of common ground between the laws of the Contracting States” (citation omitted) is irrelevant as such considerations are only a subordinate basis for the application of the concept of the margin of appreciation. Indeed, it is only in the event that the national authorities offer grounds for justification that the Court can be satisfied, taking into account the presence or the absence of a common approach, that they are better placed than [the ECtHR] is to deal effectively with the matter.

It seems to us that this rejection of the consensus argument is all the more justified as the use of the consensus argument is often fraught with methodological imprecision and is often a means to conceal or justify a moral positioning of ECtHR judges.

It is obvious that the consensus argument is not without merit and remains a vital force in judicial policy that the ECtHR uses when it fears that going against consensus will render its rulings ineffectual. As Professor R. Wintemute put it, “European consensus’ serves to anchor the [C]ourt in legal, political and social reality on the ground.” Furthermore, “[i]f the [C]ourt appeared to force the views of a small minority of countries on all 47, it would risk a political backlash, which could cause some governments to threaten to leave the convention system.” This is probably the ECtHR’s concern when it emphasizes in Schalk and Kopf that “it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to


117. Id. 18 at § 8.

118. JOHNSON, supra note 78, at 140.


121. Id. The headlines of some British newspapers attest to this risk. See Simon Walters, A great day for British justice: Theresa May vows to take UK out of the European Court of Human Rights, DAILY MAIL (Mar. 2, 2013), http://www.dailymail.co.uk/news/article-2287183/A-great-day-British-justice-Theresa-May-vows-UK-European-Court-Human-Rights.html.
assess and respond to the needs of society.”

And, indeed, parliaments and national courts already play a very important role as guarantors of ECHR rights. One cannot lose sight of the fact that the principle of subsidiarity is at the core of a very sensitive debate calling into question the authority and the legitimacy of the ECtHR. The use of the consensus approach might be reinforced in the coming years; recently a symbolic recital has been added to the Convention’s Preamble that refers to the national margin of appreciation that States enjoy.

However, the argument that national parliaments are better placed to assess and respond to the needs of society does not, in our view, seem relevant when differential treatment of minorities is at stake. The same applies to the argument, which often comes up in the debate about same-sex marriage, that by exercising tight judicial control, the ECtHR impinges on the democratic functioning of individual states. These two arguments should be revisited when minority rights are at stake. As a matter of fact, “[l]aws that differentiate people based on [sexual orientation] often reflect flawed democratic deliberations. Accordingly, judicial review of such laws ameliorates democratic deficits instead of undermining deliberative democracy.”

Two reasons justify not leaving the decisions concerning minority rights, including the rights of the LGBT population, exclusively in the hands of national authorities and particular legislators. First, minority groups are often less well-placed to defend their rights via classical parliamentary channels where the majority prevails. Second, parliamentary debates are often fraught with stereotypes about sexual orientation, as evidenced by the recent debates in the French, British, Polish and Russian national assemblies. A third-party intervention by international human rights advocates in Perry stated “the possibility of legislative action does not justify judicial abdication. . . . Respect for democracy has never meant that courts must permit discrimination.”

The brief goes on by citing countries where legislatures crafted laws to recognize same-sex marriage after courts determined that such recognition was constitutionally required. If the primary responsibility of protecting human rights in Europe lies with states, and specifically with domestic constitutional courts, the ECtHR remains the ultimate guardian of those rights.


124. Lau, supra note 97, at 248.


126. Id.

127. Brief of International Human Rights Advocates, supra note 38, at 18.

128. Id.
Although we believe that the reference to the consensus is not legally relevant to the issue of discrimination against LGBT individuals, we acknowledge that judicial politics could lead the ECtHR to make such a reference. If this were the case, two options would be open to the ECtHR.

The first option was developed by Holning Lau in his rewriting of the Schalk and Kopf ruling. He suggests that the ECtHR Court should explicitly state that same-sex couples have a right to marriage equality but that the absence of European consensus should be taken into account when implementing marriage equality. Thus the idea, based on the device of prospective overruling—i.e., a court changes a legal rule but only for future cases—is not to immediately condemn the states that have not opened marriage to homosexual couples, but rather to grant them a grace period for implementation. In the absence of a follow-up or monitoring mechanism within the ECtHR system, it is proposed not to specify ex ante a period of expiry, at which all states should have opened marriage to homosexuals in their legal order, but instead to take into account the evolution of the consensus among the Council of Europe’s member states to determine this period in an evolving manner. Therefore, as soon as a consensus emerges among the high contracting parties on establishing a registered partnership open to same-sex couples, the states that have not yet introduced it in their legislation would no longer have a margin of discretion and would be required to establish a registered partnership open to same-sex couples.

The same reasoning could apply to the opening of marriage to persons of the same sex. However, as Holning Lau acknowledges, although the proposition

129. Lau, supra note 97.
130. Id. at 255.
132. For instance, see Stec v. United Kingdom, where the court considered that the timing of correcting the inequality (the difference in pension ages for men and women) might be reasonable and fall within the national margin of appreciation. Stec. V. United Kingdom, 2006-VI Eur. Ct. H.R. 131, 151-52.
133. It should be noted that the option of a precise deadline for the introduction of same-sex marriage in the legal order by the legislator has been the choice of both the Constitutional Court of South Africa and the Constitutional Court of Colombia. See Fourie v. Minister of Home Affairs 2005 (3) SA 429 (CC) at ¶ 156 (S. Afr.). See also Corte Constitucional [C.C.] [Constitutional Court], julio 26, 2011, Sentencia C-577/1, available at http://english.corteconstitucional.gov.co/sentences/C-577-2011.pdf. (Colom.) (“Resuelve: . . . Cuarto – Exhortar al Congreso de la República para que antes del 20 de junio de 2013 legisle, de manera sistemática y organizada, sobre los derechos de las parejas del mismo sexo con la finalidad de eliminar el déficit de protección que, según los términos de esta sentencia, afecta a las mencionadas parejas. Quinto. Si el 20 de junio de 2013 el Congreso de la República no ha expedido la legislación correspondiente, las parejas del mismo sexo podrán acudir ante notario o juez competente a formalizar y solemnizar su vínculo contractual.”). The Colombian Court exhorted Congress to legislate on the rights of same-sex couples before June 20, 2013, in a systematic and organized way, so as to eliminate the lack of protection which these couples suffer. In July 2013, a Bogota judge ordered notaries to marry same-sex couples after couples petitioned the judge because Congress failed to pass the bill. Id.
134. Lau, supra note 97, at 253-57.
has the merit of considering the institutional and political constraints on the ECtHR, it involves risks. It could lead to the mobilization of conservative forces in countries where reforms are currently being debated to prevent a consensus from being reached at the supranational level. Furthermore, this makes the implementation of non-discrimination dependent on the whims of majorities at a national level, which does not, as we have emphasized, constitute a sufficient guarantee for the protection of minorities or vulnerable groups. In addition, and beyond the technical pitfalls linked to the kind of measures the ECtHR is competent to impose on member states, such a path is likely, de facto, to undermine the power of the ECtHR to supervise the execution of its judgments.

The second option for the ECtHR is to address consensus, not according to an arithmetic rule, but rather by taking into account the emergence of a European and international tendency in the direction of the legal recognition of same-sex couples and the opening of marriage to those couples. The ECtHR applied the consensus doctrine in this manner in the case of *Christine Goodwin v. United Kingdom*. That case concerned the lack of legal recognition of the change of gender of a post-operative transsexual. To support the evolution of its case law, the court held that it:

attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favor not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.

In *Schalk and Kopf*, even though the ECtHR concluded that “there is not yet a majority of States providing for legal recognition of same-sex couples,” it acknowledged the existence of “a tendency that has developed rapidly over the past decade,” and “an emerging European consensus towards legal recognition of same-sex couples.” In addition to observing the changes which have occurred within the contracting parties of the Council of Europe since *Schalk and Kopf*, the ECtHR could thus take into consideration international evolution, such as the number of foreign countries which recognize same-sex marriage, the

135. *Id.* at 257.

136. For a clear overview of the measures the ECtHR can impose on member states and the supervision mechanism of the execution of judgments, see ELISABETH LAMBERT ABDELGAWAD, *HUMAN RIGHTS FILES 19, THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS* (Council of Eur. Publishing 2d ed. 2008).

137. On the importance of this issue, see Justice Pinto De Albuquerque’s concurring opinion.


139. *Id.* at ¶ 85.

case law of national courts within the Council of Europe, and the case law of foreign supreme courts. In the United States, too, some advocates plead in favor of taking into account a tendency rather than an arithmetically interpreted consensus. In the recent Perry case, an amicus curiae brief by international advocates urged the US Supreme Court to “solidify” an established and accelerating international trend toward equal marriage rights for same-sex couples. These five human rights advocacy organizations, based in the United States, the United Kingdom, Canada, South Africa, and Argentina, believe that an international consensus weighs in favor of heightened scrutiny and the recognition of marriage equality. The advocates find evidence of the emerging international consensus in adopted and pending bills in many countries, and in trends in international law. Though international law does not yet require recognition of same-sex marriages, the advocates encourage the Supreme Court to take leadership in the development of these norms.

The ECtHR should not opt for the consensus approach. When states treat individuals differently based on sexual orientation, the ECtHR should not give deference to a national margin of discretion and the (in)existence of a consensus should not play a role. Rather, the ECtHR should review this differential treatment using a strict scrutiny test.


142. Regarding Eighth Amendment jurisprudence, see e.g. Atkins v. Virginia, 536 U.S. 304, 315-16 (2002) (“[i]t is not so much the number of jurisdictions that adopt a rule that is significant, but the consistency of the direction of change.”).

143. Brief of International Human Rights Advocates, supra note 38, at 6.

144. The International Center for Advocates Against Discrimination, the National Council for Civil Liberties (often present before the European Court of Human Rights), the Canadian Civil Liberties Association, the Legal Resources Center and the Center for Legal and Social Studies.


146. Id. at 4.

VI.
WHICH SERIOUS REASONS COULD BE INVOKED TO JUSTIFY THE DIFFERENCE IN TREATMENT?

In certain cases involving homosexuality, some have argued that the European Court of Human Rights tends to merge the analysis of serious reasons (if a suspected discrimination ground is involved) on one hand, and the margin of appreciation on the other. Concretely, it uses the margin of appreciation to bypass the review of serious reasons, which could justify the difference of treatment. This juxtaposition gives discretion to states that could be acting on pure prejudice,148 or “on the basis of erroneous or even discriminatory reasons.”149 Meanwhile, no robust justification was required in Schalk and Kopf.150 The government of Austria mainly relied on the fact that the right to marry is “by its very nature” limited to opposite-sex couples.151 In reaction, the applicants in the pending case of Ferguson v. United Kingdom152 expressly designed their complaint in the hope that the government will be required to provide a justification for the difference in treatment.

In the meantime, it is worthwhile to look at the arguments that have been brought before American courts to see how they have been received. Various arguments are to be found in case law, in petitions, in the scholarly literature,153 and in the amicus curiae briefs submitted to the courts.154 We focused on recent material as well as the two cases decided by the US Supreme Court. We

148. In some instances, however, the EctHR will strike down policies it believes are highly prejudicial. In Smith and Grady, the ECHR condemned the absolute policy against the participation of homosexuals in the UK armed forces. It noted that “[t]o the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants’ rights.” Smith v. United Kingdom, 1999-VI Eur. Ct. H.R. 45, ¶ 97 (1999). See also Markin v. Russia, Eur. Ct. H.R. Appl. No. 30078/06, filed Oct. 7, 2010, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109868 (another case decided by the court involving gender stereotypes).

149. Hamilton, supra note 107, at 47.


identified two principal arguments advanced to justify the restriction of marriage to opposite-sex couples which could be relevant in the European context too: 155

(a) to preserve the traditional definition of marriage (we include in this the references to “tradition” in general), and (b) to encourage responsible procreation.

A. The Preservation of the Traditional Definition of Marriage

In cases that did not directly involve same-sex marriage, the European Court of Human Rights has accepted that “protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment.” 156 However, it immediately added that the principle of proportionality 157 must be respected and that “[t]he aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it.” 158 Although the ECtHR recognizes that “the institution of the family is not fixed, be it historically, sociologically or even legally,” 159 and that it has shown some openness, it seems to leave latitude to maintain “the strongest traditions of the old European nations.” 160 In this vein, it is also noteworthy that the ECtHR, in the case of Chapman v. United Kingdom, included respect for the “traditional way of life” in the ambit of article 8, 161 which concerns respect for private and family life. 162 However, this case concerned the traditional lifestyle of Gypsies. It might be that the ECtHR should adopt different reasoning when this argument is invoked by a state, instead of by a member of a minority group who invokes the argument for protection. This is exactly what applicants and third party intervenors argue in the same-sex marriage cases: “The possible desires of the

155. We have omitted issues that are more US-specific, such as standing and the Due Process Clause.
157. Here, the principle of proportionality refers to a proportionality test that must be conducted to check whether an interference with a right is proportionate to the legitimate aim pursued (protection of the family in the traditional sense) by the restriction. See BREMS, supra note 119, at 365. See generally ARAI-TAKAHASHI, supra note 119.
heterosexual majority to maintain a tradition that favors it, or to impose dominant religious beliefs on the lesbian and gay minority, cannot be valid justifications."

The following paragraphs show how US judges have assessed arguments related to the preservation of the definition or the tradition of marriage. First, in regards to the insistence of some that marriage is, as a matter of definition, the legal union of a man and a woman, Judge Greaney, concurring in the first US case finding that same-sex couples had the right to marry, wrote that “[t]o define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question we are asked to decide.” In order to demonstrate the absurdity of this line of reasoning, the current debate is sometimes linked to the miscegenation laws which historically prohibited interracial marriages, by suggesting that, following this argument, the US Supreme Court would have held that the right to marry cannot extend to a person of a different race, because by definition, a marriage relates to two people of the same race. In 2008, the Supreme Court of Connecticut stated that:

[c]ivil marriage has traditionally excluded same-sex couples—i.e., that the ‘historic and cultural understanding of marriage’ has been between a man and a woman—cannot in itself provide a [sufficient] basis for the challenged exclusion. To say that the discrimination is ‘traditional’ is to say only that the discrimination has existed for a long time. A classification, however, cannot be maintained merely ‘for its own sake’. Instead, the classification ([that is], the exclusion of gay [persons] from civil marriage) must advance a state interest that is separate from the classification itself. Because the ‘tradition’ of excluding gay [persons] from civil marriage is no different from the classification itself, the exclusion cannot be justified on the basis of ‘history.’ Indeed, the justification of ‘tradition’ does not explain the


165. Id. at 348 (J. Greaney, concurring). The ECtHR has also been confronted with this type of argument. In a case involving a pension claim from a “resident non-citizen,” the Latvian government’s argument was that it would be sufficient for the applicant to become a naturalized Latvian citizen in order to receive the full pension. The ECtHR Grand Chamber did not accept this argument and held that “the prohibition of discrimination enshrined in Article 14 of the Convention is meaningful only if, in each particular case, the applicant’s personal situation in relation to the criteria listed in that provision is taken into account exactly as it stands. To proceed otherwise in dismissing the victim’s claims on the ground that he or she could have avoided the discrimination by altering one of the factors in question – for example, by acquiring a nationality – would render Article 14 devoid of substance.” Andrejeva v. Latvia, Eur. Ct. H.R. Appl. No. 55707/00, filed Feb. 18, 2009, ¶ 91, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91388.

166. Loving v. Virginia, 388 U.S. 1 (1967) (holding that such statutes were unconstitutional).

classification; it merely repeats it.167

A year later, the Iowa Supreme Court called this type of approach “an empty analysis.” 168

A specific tradition sought to be maintained cannot be an important governmental objective for equal protection purposes, however, when the tradition is nothing more than the historical classification currently expressed in the statute being challenged. When a certain tradition is used as both the governmental objective and the classification to further that objective, the equal protection analysis is transformed into the circular question of whether the classification accomplishes the governmental objective, which objective is to maintain the classification.169

These excerpts show that many versions of the “tradition” argument have been advanced and that they have not been found persuasive. For example, in the case of Perry v. Schwarzenegger, it was argued that “Proposition 8 is rational because it preserves: (1) ‘the traditional institution of marriage as the union of a man and a woman’; (2) ‘the traditional social and legal purposes, functions, and structure of marriage’; and (3) ‘the traditional meaning of marriage as it has always been defined in the English language.’”170 The district court did not accept this argument, finding that “[t]radition alone, however, cannot form a rational basis for a law…. The ‘ancient lineage’ of a classification does not make it rational…. Rather, the state must have an interest apart from the fact of the tradition itself.”171

DOMA’s stated purpose was to promote an “interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.” 172 In the case challenging it, the Court of Appeals for the Second Circuit made a similar statement:

Ancient lineage of a legal concept does not give [a law] immunity from attack for lacking a rational basis. . . . A fortiori, tradition is hard to justify as meeting the more demanding test of having a substantial relation to an important government interest. Similar appeals to tradition were made and rejected in litigation concerning anti-sodomy laws.173

The court then quoted a powerful line from Justice Stevens, dissenting in Bowers v. Hardwick: “[T]he fact that the governing majority in a [s]tate has traditionally viewed a particular practice as immoral is not a sufficient reason for


169.  Id.

170.  Id (citations omitted). The district court judge then made an analogy to the tradition of gender restriction. See also the analysis of Paul Johnson, according to whom the district court judgment shows that the court adopted a critical standpoint in respect of heteronormativity. Paul Johnson, Challenging the Heteronormativity of Marriage: The Role of Judicial Interpretation and Authority, 20 SOC. & LEGAL STUD. 349, 358 (2011).

upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.”

The claims related to tradition and history present thorny issues. First, these arguments sometimes do not gather consensus or can be used to reach opposite results. For example, William Eskridge, Professor of Jurisprudence at Yale Law School, uses the “tradition” argument to demonstrate that same-sex unions have been a valuable institution for most of human history and in most known cultures. Similarly, the historical evidence and academic narrative of sexual identities marshaled in Bowers v. Hardwick, and then seventeen years later in Lawrence v. Texas, highlight how this scholarship can have problematic implications. As Daniel Hurewit notes, “[h]istorical arguments are, by definition, interpretations, and eventually any analytic consensus will be replaced by another.”

In addition to the fact that history can be relied upon to arrive at contradictory conclusions, there is another paradox. In cases brought for violations of the Fourteenth Amendment, individuals often support their claim by referring to the state’s long-standing history of discrimination. This is because a group must demonstrate a historic pattern of discrimination in order to benefit from certain types of judicial scrutiny. Likewise, many historical references are to be found throughout the US cases, such as references to the historical prevalence of race restrictions on marital partners.

B. Encouraging Responsible Procreation and Child-Rearing

In Europe, the argument that denying same-sex couples the right to marry will encourage responsible procreation and child-rearing should easily be dismissed. As developed earlier in this Article, in Christine Goodwin v. United Kingdom the ECtHR stated that “the inability of any couple to conceive

179. Id. at 211.
180. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 992 (N.D. Cal. 2010) (“... once common in most states (they) are now seen as archaic, shameful or even bizarre”).
181. We acknowledge that, by reviewing these arguments, we enter into the field of “the protection of family” and other delicate questions such as filiation or interest of the child we cannot explore in detail.
182. In addition, according to Jernow and Rafiq, procreation is not the heart of the controversy in Europe, where legislatures would be more concerned by filiation issues (as the recent debates at the French National Assembly also demonstrate). Alli Jernow and Arianna Rafiq, The Kids-Marriage Conundrum and the Limited Reach of American Reasoning, 3 CITY U. H.K. L. REV. 213, 235 n.2 (2012).
or parent a child cannot be regarded as *per se* removing their right [to marry].”\(^{183}\) Article 12 provides that “[m]en and women of marriageable age shall have the right to marry and to found a family,” but the ECtHR has separated the right to marry from the right to found a family. Similarly, concerning the suitability or unsuitability of same-sex couples to raise children, the ECtHR concluded in *X. v. Austria* that “[t]he Government did not adduce any specific argument, any scientific studies or any other item of evidence to show that a family with two parents of the same sex could in no circumstances adequately provide for a child’s needs.”\(^{184}\)

In the United States, the first case of a state court finding that same-sex couples had the right to marry disagreed with the Superior Court judge who had endorsed the rationale that “the state’s interest in regulating marriage is based on the traditional concept that marriage’s primary purpose is procreation.”\(^{185}\) Chief Justice Margaret Marshall wrote that the “laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family.”\(^{186}\) She added that applicants for a marriage license are not required to attest to their ability or intention to conceive children by coitus and that “[f]ertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married.”\(^{187}\) The Court of Appeals for the Second Circuit concedes that procreation can be an important government objective, but does not see how DOMA is substantially related to it. “Incentives for opposite-sex couples to marry and procreate (or not) were the same after DOMA was enacted as they were before.”\(^{188}\)

Over time, opponents of same-sex marriage have refined the procreation argument. For example, proponents of Proposition 8 in California asserted that the essential purpose of maintaining a separate legal definition for same-sex partnerships is to protect traditional, natural, and important arrangements for heterosexual marriage that are vital to society. They argued that marriage is

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183.  Goodwin v. United Kingdom, 35 Eur. Ct. H.R. 18, ¶ 98 (2002). *See point 1, above.* According to Ludovic Hennebel “It is interesting to note that apart from the arguments relating to the evolution of science, all the arguments raised by the Court are transferable to the claims of access to the institution of marriage for the benefit of homosexuals.” Ludovic Hennebel, *Conjugalités en Droit International des Droits de l’Homme,* in ALAIN-CHARLES VAN GYSEL, *CONJUGALITÉS ET DISCRIMINATIONS* 67, 73 (2012).


186.  *Id.*

187.  *Id.* The procreation argument, raised by the lawyer for the proponents of Proposition 8 during the oral arguments before the Supreme Court, led to a comical exchange with the justices, in particular Justice Kagan: “No, really, because if the couple—I can just assure you, if both the woman and the man are over the age of 55, there are not a lot of children coming out of that marriage.” *See* Transcript of Oral Argument at 24-27, Hollingsworth v. Perry, 570 U.S. ___ (2013) (No. 12-144).

188.  Windsor v. United States, 699 F.3d 169, 188 (2d Cir. 2012).
essential to “promote[] stability in relationships between a man and a woman because they naturally (and at times unintentionally) produce children,” and because “it promotes ‘statistically optimal’ child-rearing households; that is, households in which children are raised by a man and a woman married to each other.”

Some courts have accepted the latter argument. For example, the state Court of Appeals of Indiana concluded that since opposite-sex reproduction may be accidental, the institution of marriage should be preserved for heterosexuals as a way of ensuring that heterosexual reproduction occurs in a stable environment. Additionally, since same-sex couples can only reproduce responsibly, marriage is unnecessary to create a responsible environment for children of same-sex couples because the manner in which they reproduce already ensures this.

On the point that children must have both a father and a mother, the US District Court for the Northern District of California found that these opinions were “not supported by reliable evidence or methodology’ and were therefore ‘unreliable and entitled to essentially no weight.’” In a historic document, the Obama Administration filed a brief as amicus curiae in the Perry case reinforcing these positions. The Administration argued that classifications based on sexual orientation should be subject to heightened scrutiny, and that Proposition 8 fails heightened scrutiny because “marriage is far more than a societal means of dealing with unintended pregnancies. . . . Even assuming, counterfactually, that the point of Proposition 8 was to account for accidental offspring by opposite-sex couples, its denial of the right to marry to same-sex couples does not substantially further that interest.” Regarding “favoring child-rearing by married opposite-sex couples,” the Administration continued, “Proposition 8 neither promotes that interest nor prevents same-sex parenting. The overwhelming expert consensus is that children raised by gay and lesbian parents are as likely to be well adjusted as children raised by heterosexual parents.” The previous point highlighted the problematic role of historical evidence, and this point shows the significant role social sciences evidence can play.

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190. Id.
192. Johnson, supra note 171, at 358 (quoting Perry v. Schwarzenegger, 704 F. Supp.2d 921, 950 (N.D. Cal., 2010)).
193. The Administration was under no legal obligation to file anything, as it is not a party.
195. Id. at 8.
C. Other Arguments

As explained above, opponents of same-sex marriage have brought forth many other arguments against the recognition of a right to marry for same-sex couples, as demonstrated by the briefs submitted before the US Supreme Court. For example, some briefs argue that it is important to “proceed with caution.” This argument has two prongs. The first rests on the idea that there is not enough evidence of the implications of recognizing same-sex marriage and that proceeding with caution can avoid the “unknown consequences of a novel redefinition of a foundational social institution.”

Regarding the latter concern, the United States’ brief submitted to the Supreme Court in the Perry case reminds us that “similar calls to wait have been advanced—and properly rejected—in the context of racial integration, for example.” The second prong rests more on a general call for judicial restraint in these highly debated topics. We imagine that this argument would not be brought before the ECtHR at this stage of the analysis, but would be used to support the request for a wide margin of appreciation.

Lastly, some briefs argue that the rights of believers should be protected. Indeed, same-sex marriage legislations in the various US states often include exemptions afforded to religious groups. It is a sensitive issue. However, the extent to which religious organizations might be compelled to perform same-sex marriage ceremonies is a completely different question, which raises specific issues regarding the separation of the church and state and the position of minorities within their own religious organizations. In Europe, religious

196. Brief on the merits for Respondent of the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 41, United States v. Windsor, 570 U.S. ___, (2013) (No. 12-307) (slip. op.). A related argument is the “slippery slope” argument, threatening that opening marriage to same-sex couples opens the door to polygamous and incest. This argument is easily dismissed because of public health and other imperative rights. Moreover, these marriages trigger specific, different reasons, which must be evaluated on their own merits and as such cannot be advanced to exclude same-sex couples from the right to marry.


198. For example, the amicus curiae brief of fifteen states says “[j]udicial reluctance to circumscribe state sovereignty should be at its apex when doing so cuts short vigorous democratic debates and uses of political processes. This principle recognizes that courts disrupt the democratic process and deprive society of the opportunity to reach consensus when they prematurely end valuable public debate over moral issues.” Brief of Indiana et al. as Amici Curiae in Support of the Petitioner at 27, Hollingsworth v. Perry, 570 U.S. ___ (2013) (No. 12-144) (slip. op.).

199. This point will be further analyzed in Section VII.


organizations have the choice to perform (or not to perform) same-sex weddings and blessings. For instance, since 2007, the Church of Sweden has offered same-sex couples a religious blessing of their union. More recently, the Church of Sweden decided to conduct wedding ceremonies for both opposite-sex and same-sex couples.  

Since the states have not yet provided arguments before the ECtHR to justify their denial of the right to marry to same-sex couples, we have drawn on arguments brought before US courts. In case those arguments are brought before the ECtHR (and, as the ECtHR repeated in X. v. Austria, the burden of proof rests on the state), the ECtHR will have to assess whether they can be qualified as “serious reasons” justifying the difference in treatment. Many US courts have found these arguments unconvincing because of fallacious or circular reasoning, or because the arguments were based on unproven assumptions. In addition, denying same-sex couples access to the right to marry does not seem to advance the claimed interests of encouraging responsible procreation and optimal households. Some even argue that legalizing same-sex marriages would further the latter interests.

VII. THE OPTIONS AVAILABLE TO THE EUROPEAN COURT OF HUMAN RIGHTS

In this final section, we examine the different options available to the ECtHR, and indicate which options should be favored and which could alternatively be considered.

In order to address the lack of access to marriage for same-sex couples, the ECtHR could decide the question under Article 12 (the right to marry) in conjunction with Article 14 of the ECHR (the prohibition of discrimination) (option a). However, it is also possible that the ECtHR will apply the same reasoning as in Schalk and Kopf, thus adopting a position of self-restraint on access to marriage until a consensus is reached within the member states of the Council of Europe. Under the latter approach, the ECtHR would apply a combination of Article 8 (the right to family life) and Article 14 of the ECHR to assess the discriminatory aspect (or lack thereof) of either a legal alternative to marriage or the lack of legal recognition of stable relationships between persons of the same sex (option b).

202. Svenska Kyrkan [Swedish Church], Wedding and Marriage, Church Synod Liturgy Comm. Report 2009:2. (Swed.), available in English at http://www.svenskakyrkan.se/default.aspx?id=673793. On the other hand, the United Kingdom Marriage Bill currently awaiting approval from the House of Lords makes it illegal for the Church to conduct gay marriage but foresees a system of “opt-in” if its own canon law changes (the Quakers and the Unitarians for example have decided to opt-in).
A. The Right to Marry for Same-Sex Couples (ECHR Article 12 and Article 14)

The EctHR should address the question of whether excluding same-sex couples from marriage is discriminatory. Given the EctHR’s case law, it seems highly unlikely that the objectives pursued by a national law would be found illegitimate. Indeed, “the protection of the traditional family” will most likely be accepted as a legitimate goal. But then, the EctHR should resolve the following question: can the exclusion of same-sex persons from marriage be considered necessary and proportionate to the achievement of this goal? This question engenders a proportionality test in the broad sense. In this paper, we advocate that it cannot, and that the right to marry should be open to persons of the same sex. Otherwise, discrimination based on sexual orientation will persist. If, however, for reasons of judicial policy, the EctHR does not follow this principle, we consider two alternative options below that could be used to adjudicate same-sex marriage rights claims.

Indeed, we know that the EctHR must take into account contextual factors that directly impact the effectiveness of its judgments. Professor Wintemute highlighted that “if the Court appeared to force the views of a small minority of countries on all 47 contracting states it would risk a political backlash, which could cause governments to threaten to leave the convention system.” In this context, other options could be favored, which less directly attack the political and legal systems of states that refuse gay marriage. The same discussion animated advocates of same-sex marriages in the United States. The discussion involved not only whether courts should decide this issue, but also to what extent courts should be involved and to what extent they should or could impose far-reaching rulings. Noting that the cultural ground has shifted deeply and rapidly in recent years, some authors argue that:

the Supreme Court would simply lack credibility were it to claim that the equal protection of the laws and the Constitution’s protection of fundamental liberty interest could be satisfied by relegating same-sex couples either to a second-class form of civilly sanctified relationship or to a social space in which their love, commitment, and dignity are denied any legal recognition at all.

Additionally, fears of socio-political backlash as a basis for judicial inaction become very difficult to defend. Other commentators advocate an incremental approach. Along these lines, William Eskridge argues that such incrementalism is desirable because legal reform helps to cultivate inclusive

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203. More than that, the court expressly states that “[t]he Court has accepted that the protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment,” and refers to various previous judgments. X v. Austria, 57 Eur. Ct. H.R. 14, ¶ 138 (2013).

204. See ARAI-TAKAHASHI, supra note 119.

205. See Wintemute, supra note 120.


207. Id.
social attitudes that prevent popular backlash against same-sex marriage. During the oral arguments before the US Supreme Court this year, Justice Samuel Alito said “[t]he Court should not move too fast. . . . You want us to step in and render a decision based on an assessment of the effects of this institution, which is newer than cellphone and the Internet.” Lawrence Friedman wrote, “there may be advantages in moving slowly. Slowness allows time for public acceptance, if not approval.” Related concerns have arisen about the potential harm to the courts’ legitimacy. Friedman adds that “[a] court’s prestige is critical, particularly when its budget and daily functioning may depend upon the good will of those legislators who disagree with its decision-making.” This dilemma surely resonates among ECtHR judges.

B. The Right to Marry as a Matter of Principle

The issue of proportionality requires asking the following question: “How does excluding same-sex couples from access to legal marriage ‘protect’ different-sex couples, or in any way improve their lives?” Is this exclusion necessary to the protection of opposite-sex couples? Aren’t there less restrictive alternatives to achieve this end? As was bluntly stated by a third party intervenor in Schalk and Kopf: “[t]here is no shortage of marriage licenses and no need to ration them.” The question was also explicitly raised during the oral arguments held before the Supreme Court this year. Justice Kagan asked the petitioners’ attorney: “What harm [do] you see happening and when and how and . . . what harm to the institution of marriage or to opposite-sex couples, how does this cause and effect work?” We push the ECtHR to ask the same question, which should lead to the conclusion that no valid reason can be invoked to deny same-sex couples the right to marry. Further, it will also

210. Friedman, supra note 97, at 74.
211. Id. at 75.
212. Written Comments of FIDH, ICJ, AIRE Centre & ILGA-Europe, supra note 115, at ¶ 17.
213. Id. The Court of Appeal for Ontario similarly said: “The question to be asked is whether the law takes into account the actual needs, capacities and circumstances of same-sex couples, not whether the law takes into account the needs, capacities and circumstances of opposite-sex couples.” Halpern v. Canada (Att’y Gen.) (2003), 60 O.R. 3d 321, ¶¶ 91, 94, 108 (Can. Ont. C.A.). It added: “Denying same-sex couples the right to marry perpetuates the . . . view . . . that same-sex couples are not capable of forming loving and lasting relationship, and thus same-sex relationship are not worthy of the same respect and recognition as opposite-sex relationships.” Id. at ¶ 94. It ultimately ruled that the common-law definition of marriage as “the voluntary union for life of one man and one woman to the exclusion of all others” violates the principle of equality and non-discrimination enshrined in the Canadian Charter of Rights and Freedoms. Id. at ¶108.
demonstrate that it is difficult to devise a strict proportionality test that would validate the views of the majority if they are at the expense of a vulnerable minority group’s rights.

At the end of the day, this issue touches upon the dignity of same-sex couples and the core of the equality principle. The majority in United States v. Windsor did not mince its words when writing that marriage:

is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community’s considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.215

C. The Right to Marry Implemented Incrementally

Incremental implementation of a right to marriage is the option proposed by Holning Lau in his exercise of “rewriting” Schalk and Kopf. As explained above in more detail, Lau suggests that the ECtHR adopt an incremental approach by shifting the locus of judicial restraint from determinations about whether a right should be protected to determinations about how and when to implement protections of that right.216 His proposal may be summarized as follows: the ECtHR should explicitly state that same-sex couples have a right to marriage equality but, at the same time, should take into account the absence of European consensus at the stage of implementing this principle. Thus, the idea is not to immediately condemn the states that have not opened marriage to homosexual couples, but rather to grant them a grace period to implement it.217

D. The Right to Marry Derived from the Need for Consistency and the Prohibition of Segregation

This third option would initially require only some states to grant the right to marry to persons of the same sex. A state that has made the choice to create a legal framework for stable same-sex relationships (i.e. a different but equivalent recognition of marriage) should open marriage to homosexuals in the name of the prohibition of segregation and the need for consistency. Under this approach,


216. Lau, supra note 97, at 244.

217. Id. at point 4.
states are not required to open marriage to same-sex couples overnight. However, when a state does give quasi-identical rights to same-sex couples and married couples, it must take this reasoning to its logical conclusion and give them access to marriage as such. This therefore avoids the persistence of a “separate but equal” system.

The ECtHR could consider this option in the pending case of Ferguson v. United-Kingdom. This argument is explained in detail in the Ferguson application before the court. First, the fact that same-sex civil partners and different-sex spouses in the United Kingdom enjoy virtually identical rights and obligations is stated as a premise. On the basis of this premise, the applicants argue that “[t]here are no ‘particularly serious reasons’ that could justify excluding same-sex couples from the traditional, public, legal institution of marriage, and different-sex couples from the new, public, legal institution of civil partnership.” According to them, “[t]he only reason for maintaining the two forms of exclusion is to use the law to stigmatize: to mark same-sex couples as inferior, and different-sex couples as superior.” They further insist that “[u]sing the law to maintain a social hierarchy based on sexual orientation is not a legitimate aim of government, for the purposes of Article 14, Article 12 or Article 8.” The application concludes that “the [ECtHR] should, as a matter of consistency and to preclude pettiness, require the United Kingdom, and any other Council of Europe member states in the same position . . . to take the final step and grant access to the traditional, public, legal institution and word ‘marriage.’”

In the United States, this option was the so-called “eight-state solution” suggested to the Supreme Court in Hollingsworth v. Perry. Martin Lederman explained that:

the Court could conclude that once a state has offered same-sex couples all or virtually all of the incidents of marriage that it offers to similarly situated opposite-sex couples, there is no legitimate justification for denying those couples the status of ‘marriage’ itself, and that therefore it is fair to conclude that such a denial is designed only to stigmatize, or to deny respect, on the basis of sexual orientation, which the Constitution forbids.

Such a statement “would directly affect only those states (California, Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon, and Rhode Island) that already treat same-sex couples the same as opposite-sex couples in virtually all ways but

219. Id.
220. Id., at ¶ 145.
221. Id.
222. Id., at ¶ 147.
Bribosia et al.: Same-Sex Marriage: Building an Argument Before the European Court

SAME-SEX MARRIAGE: IN LIGHT OF THE US EXPERIENCE 37

one."\textsuperscript{224} Earlier during the litigation, in Perry v. Schwarzenegger, such a line of argumentation had been adopted under the due process obligation:

the evidence shows that the withholding of the designation ‘marriage’ significantly disadvantages plaintiffs. The record reflects that marriage is a culturally superior status compared to a domestic partnership. California does not meet its due process obligation to allow plaintiffs to marry by offering them a substitute and inferior institution that denies marriage to same-sex couples.\textsuperscript{225}

This passage shows that the solution of condemning states that have already introduced a parallel legal framework for same-sex couples is plausible in the eyes of some advocates and judges. However, while the Supreme Court ultimately did not rule on the merits of this case, it was apparent in oral argument that the Justices were not convinced by the suggested solution of condemning states that already grant most rights to same-sex couples. As Justice Breyer declared, “a [s]tate that does nothing hurts them much more, and yet your brief seems to say it’s more likely to be justified under the Constitution.”\textsuperscript{226} Justice Sotomayor underlined the ironic point that states that grant more rights would then have fewer rights.\textsuperscript{227}

E. Granting Legal Recognition to Same-Sex Couples (ECHR Article 8 and Article 14)

As argued above, at least since the Schalk and Kopf case, same-sex relationships have been protected as part of family life in the ECHR system. As emphasized by Judges Rozakis, Spielmann, and Jebens in their dissenting opinion in Schalk and Kopf, the ECtHR should have drawn inferences from the latter finding and deduced a “positive obligation to provide a satisfactory framework, offering the applicants, at least to a certain extent, the protection any family should enjoy.”\textsuperscript{228} Of course, this statement leaves numerous questions unanswered and in particular does not clarify which type of legal recognition

\textsuperscript{224} Id. In addition, four of the eight states that provide same-sex couples with virtually all incidents of marriage (Delaware, Illinois, and Oregon, in addition to California), and which would thus be concerned by such a solution, filed amicus curiae briefs urging the Court to affirm the judgment declaring that Proposition 8 was invalid. See Brief of Massachusetts et al. as Amici Curiae in Support of Respondents, Hollingsworth v. Perry, 570 U.S. ___ (2013) (No. 12-144) (slip. op.); see also Brief for the State of California as Amici Curiae in Support of Respondents, Hollingsworth v. Perry, 570 U.S. ___ (2013) (No. 12-144) (slip. op.). “The eight-state holding would permit the Court to avoid for now any decision on whether some other states might have a sufficient justification for denying same-sex couples substantial benefits and privileges that they offer to opposite-sex couples . . . .” Id. This solution would obviously raise many questions regarding the constitutions and laws of the other thirty-three states but the Court would not have to resolve constitutional. Id.

\textsuperscript{225} Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 994 (N.D. Cal. 2010).

\textsuperscript{226} Transcript of Oral Argument at 53, Hollingsworth v. Perry, 570 U.S. ___ (2013) (No. 12-144) (slip. op.).

\textsuperscript{227} Id. at 54-55.

would be held as a “satisfactory framework,” and therefore judged compatible with the requirements of the Convention under Articles 8 and 14.

Following this reasoning, it seems obvious that states that are parties to the Convention should at least provide some kind of legal recognition. A 2010 Committee of Ministers of the Council of Europe recommendation on measures to combat discrimination on the grounds of sexual orientation or gender identity supports this argument. Where national legislation neither recognizes nor confers rights or obligations on registered same-sex partnerships and unmarried couples, the Committee invites member states “to consider the possibility of providing, without discrimination of any kind, including against different sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live.”

It is rather difficult to draw the line between a legal recognition that would be acceptable and a legal recognition that would be held incompatible with the requirements of the Convention. In Schalk and Kopf, the ECtHR acknowledged “an emerging European consensus towards legal recognition of same-sex couples.” Nevertheless, in the absence of a majority of states providing for legal recognition of same-sex couples, it granted a margin of appreciation to the states “in the timing of the introduction of legislative changes.” Moreover, the ECtHR held “that [s]tates enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition” of same-sex couples.

In the United States, twenty states and the District of Columbia recognize some form of civil union between same-sex couples. In most of them, this form of recognition originated from legislative action. In 1999, the Vermont Supreme Court ruled that same-sex couples had the right to a treatment equivalent to that afforded to different-sex couples but left the legislature the choice to allow marriage or to implement an alternative legal mechanism. In 2000, the

229. To recall, in Schalk and Kopf the court expressly stated that it “is not called upon to examine whether the lack of any means of legal recognition for same-sex couples would constitute a violation of Article 14 taken in conjunction with Article 8.” 53 Eur. Ct. H.R. at ¶ 103.


231. Id. at § 25.


233. Id.

234. Id. at ¶ 108.


236. “We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate, other than to note that the record here refers to a number of potentially constitutional statutory schemes from other jurisdictions.” Id. at 39.
legislature voted in favor of civil unions. In 2009, Vermont legalized same-sex marriage.\(^{237}\) In 2006, the Supreme Court of New Jersey held that:

> denying to committed same-sex couples the financial and social benefits and privileges given to their married heterosexual counterparts bears no substantial relationship to a legitimate governmental purpose . . . committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples.\(^{238}\)

The court let the legislature choose the name to give to “the statutory scheme that provides full rights and benefits to same-sex couples.”\(^{239}\) Again, these instances show that legal recognition may take various paths.

In the system of the Council of Europe, would it be acceptable to have only a legal recognition equivalent to the one open to unmarried heterosexual couples? If the ECtHR opts for an incremental approach, it may accept such a recognition, at least until a consensus on a more formalized form of recognition (marriage or partnership) emerges within the Council of Europe. Moreover, the Committee of Ministers of the Council of Europe recommended that “[w]here national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor’s pension benefits and tenancy rights.”\(^{240}\)

In conforming with this incremental approach, the Committee of Ministers of the Council of Europe recommends to member states that recognize registered same-sex partnerships that they “seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation.”\(^{241}\)

Yet this statement is unclear; what is meant by “heterosexual couples in a similar situation?” Is the Committee using heterosexual couples who have entered into a registered partnership as the reference point for the rights that should be afforded to registered same-sex partners? It is from this standpoint that the Grand Chamber of the ECtHR will be called upon to rule on this question in *Vallianatos v. Greece* and *C.S. v. Greece*, currently pending, which address the question of the discriminatory character (Article 8 in conjunction

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239. Id. at 224.


241. Id. at § 24.
with Article 14 of the ECHR) of the Greek “pact of common life,” open only to heterosexual couples.242

Registered partnerships are sometimes created solely for the benefit of same-sex couples, as in the United Kingdom.243 In such a case, is the “homosexual couple in a comparable situation” with the married heterosexual couple? In Schalk and Kopf, the ECtHR did not take the reasoning to its logical conclusion in this regard. It held that the applicants had “the possibility to obtain a legal status equal or similar to marriage in many respects,”244 noting slight differences with respect to material consequences but also some substantial differences in respect of parental rights.245 Since the ECtHR was not required to examine all the differences between the registered partnership and marriage, it decided that there was no evidence that “the respondent [s]tate exceeded its margin of appreciation in its choice of rights and obligations conferred by registered partnership.”246

If we follow the recommendation of the Committee of Ministers cited above, it seems difficult to identify which rights or obligations stemming from marriage—if any—could be denied to homosexual couples engaged in a registered partnership. In addition, the argument of indirect discrimination would certainly be raised, to the extent that homosexual couples—unlike heterosexual couples—do not have access to marriage.247 Could we reasonably argue that it is necessary and proportionate to achieve the protection of the traditional family or the interest of the child to exclude same-sex couples from the right to adopt or to access medically assisted procreation techniques? In light of the jurisprudence of the ECtHR, especially in the cases EB v. France and X v. Austria, we do not see which compelling reasons would justify such discrimination based on sexual orientation in matters of filiation, because “in personal terms, same-sex couples could in principle be as suitable or unsuitable for adoption, including second-parent adoption, as different-sex couples.”248

Therefore, if a state in which marriage is not open to same-sex couples creates a registered partnership for their benefit, it would, in principle, be required to attach to it all the rights and obligations associated with marriage. However, in this case, we fall back on arguments about the risk of segregation

245. Id.
246. Id.
247. See also Written Comments of FIDH, ICJ, AIRE Centre & ILGA-Europe, supra note 115.
(separate but equal) developed above, which would ultimately impose upon those states the duty to open marriage to same-sex couples.\textsuperscript{249}

It thus appears very difficult to design a type of alternative legal recognition to marriage that satisfies the requirements of the protection of family life and the prohibition of discrimination. The gradual approach the ECtHR could opt for, in order to take into account the lack of consensus on the matter, also has drawbacks and may even lead to paradoxical effects. Indeed, it appears that a state opting for a form of registered partnership thereby loses almost all its discretion and must—because of the requirement of consistency, prohibition of indirect discrimination, and segregation—open marriage to same-sex couples. These consequences could be a “bonus” to immobility and encourage mobilization against the adoption of LGBT rights. As highlighted by Nicolas Hervieu, “[t]he discriminatory prism can . . . produce paradoxical effects [in that] it [may] punish the states which have recognized more rights without affecting those who are less generous.”\textsuperscript{250}

Ultimately, the tenuous nature of an alternative form of legal recognition is an additional argument in support of the principled solution that we encourage the court to adopt.

CONCLUSION

The case law of the ECtHR has provided steadily increasing recognition of fundamental rights of LGBT persons.\textsuperscript{251} Today, the court is confronted with the contentious issue of same-sex marriage. This Article comes to the conclusion that the ECtHR should find state laws that prohibit same-sex marriages or that provide only some form of registered partnerships in violation of the European Convention on Human Rights. This conclusion is grounded on legal arguments—which, we acknowledge, are in many respects delicate and difficult to make given the political situation. This conclusion, however, could be reached by application of the ECtHR’s own methods of interpretation and precedents.

The ECtHR has already found that the right to marry is gender neutral and that same-sex relationships are protected under family life. The ECtHR has established that same-sex couples are in a relatively similar situation compared to opposite-sex couples regarding their need for legal recognition and protection of their relationships. The refusal to grant access to marriage to same-sex couples is thus a difference in treatment based on sexual orientation. Differences based on sexual orientation require particularly serious justification. And this is the sticking point. By claiming that states should provide convincing and

\textsuperscript{249}. Id. at point 7 (a right to marriage is derived from the need for consistency and the prohibition of segregation).

\textsuperscript{250}. Hervieu, supra note 22.

\textsuperscript{251}. Helfer & Voeten, supra note 14, at 2.
weighty reasons, the ECtHR takes a more principled stand than the US Supreme Court, which still struggles to define what standard of scrutiny it applies in sexual orientation cases. However, the reality is that the ECtHR does not take sexual orientation as suspect criteria seriously and instead, on the basis that no European consensus exists on this issue, grants states a wide margin of appreciation. We join other authors in deploring reliance on these concepts in same-sex marriage cases. We believe they are misplaced, as minority rights are at stake and the concrete application of these concepts lacks clarity. In addition, in practice, this means that the ECtHR does not investigate the reasons behind states’ same-sex marriage decisions and that states could thus be acting on the basis of erroneous or even discriminatory reasons.  

Looking at the American situation, it is clear that “[t]he litigation process has served the useful purpose of airing the rationalizations for discriminating against homosexuals.” Many US judges have found the main arguments brought against same-sex marriage—to maintain the traditional definition of marriage and to encourage responsible procreation and child-rearing—unconvincing. US courts have been labeled as “bastions of rationality in dealing with same-sex marriage, as compared to other governmental actors,” and we would like to see the ECtHR take a similar approach. The ECtHR could at the very least require the states to provide a justification for not granting the same rights to same-sex couples. Publicly setting out the reasons in briefs and in judgments, as a beginning, can create moments of opportunity for a wide range of actors within specific legal and political contexts. After evaluating these justifications, the ECtHR could, at the stage of the proportionality analysis, come to the conclusion that “[i]n the absence of evidence on the part of the [s]tates showing how differential treatment leads to the protection of very weighty interests not amenable to being otherwise served, the interests of the Government need take second place to those of the applicant alleging discrimination.”

In terms of judicial policy, we realize how sensitive it could be for the ECtHR to find a right to marry for same-sex couples based on the Convention. We therefore reviewed the alternative options available to the ECtHR. The ECtHR could explicitly state that same-sex couples have an equal right to marry but, in the absence of a European consensus, grant the states a grace period to implement it. Another option would be to require states that already possess a

252. Hamilton, supra note 107, at 49.
legal framework for stable same-sex relationships to grant same-sex couples access to marriage. The argument, which is based on the need for consistency and the prohibition of segregation, has been made both before the US Supreme Court and the ECtHR. Finally, on the basis of the obligation to protect family life, the ECtHR could require member states to at least provide for some degree of legal recognition to same-sex couples. However, these alternative options all have serious flaws in their principle, their practicability, or their consequences, and ultimately the principled solution—that same-sex couples have the right to marry—is the only defensible solution from a legal point of view.

Such a decision would no doubt be controversial, especially in countries where backlash against LGBT individuals is present and even growing. It also raises the debate of whether courts should lead or merely reflect public opinion. The ECtHR’s rulings have already been “instrumental in socializing a pan-European consensus on intimate and sexual privacy” for LGBT individuals and should continue to have an agenda-setting effect that catalyzes domestic mobilization in favor of policy changes. In addition, particularly in the same-sex marriage debate, words carry particular weight and court rulings convey powerful discursive resources. This Article has provided some excerpts of the debate currently taking place in the United States in the hope that some elements will be echoed in Europe.

258. See Helfer & Voeten, supra note 14, at 7.
Should ICSID Go Gangnam Style in Light of Non-Traditional Foreign Investments Including Those Spurred on by Social Media? Applying an Industry-Specific Lens to the Salini Test to Determine Article 25 Jurisdiction

Helena Jung Engfeldt
Should ICSID Go Gangnam Style in Light of Non-Traditional Foreign Investments Including Those Spurred on by Social Media? Applying an Industry-Specific Lens to the Salini Test to Determine Article 25 Jurisdiction

Helena Jung Engfeldt*

INTRODUCTION

On July 15, 2012, Korean pop artist Psy’s music video “Gangnam Style” was uploaded to YouTube. Three months later it had been viewed over 400 million times and five months later it had been viewed over one billion times. After only ten weeks online, Psy’s video held the world record for most “likes” on YouTube. The video is now the most viewed video in the history of the Internet.

The connection between “Gangnam Style” and economic development may not be readily apparent; however, Psy’s YouTube video provides an insightful lesson for refining the definition of investment under Article 25 of the Convention on the Settlement of Investment Disputes between States and

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National of Other States (ICSID Convention). This Article argues that new types of foreign investments have become possible thanks to social media. The spread of Korean pop videos, for example, has opened up a market for international entertainment investments that would not have taken place without social media. In light of these developments, the definition of “investment” should include non-traditional investments for two reasons: (1) the ICSID Convention was drafted to be inclusive, and (2) the judicially created Salini test, designed to determine the presence of Article 25 investments, was developed before anyone thought about entertainment investments.

Delegates to the World Bank drafted the ICSID Convention in the 1960s. The purpose of the Convention was to provide a procedural framework for arbitration of investment disputes that would give foreign investors an option to resolve disputes in an international forum rather than in a domestic court in a host state. The ICSID framework was limited to investment disputes, but the term “investment” was left undefined.

The delegates may not have considered entertainment ventures when they drafted the Convention, yet entertainment and other projects made possible by information-sharing on social media should benefit from ICSID arbitration. An entertainment company can market its content to an international audience on social media before branching out to set up business ventures in a host state. The international Korean entertainment industry is used as the illustrative example in this Article because Korean companies have successfully invested in host states after their entertainment products became popular in those countries with the help of social media. Currently, Korean companies cooperate with host state entities to develop host state broadcasting industries. It is argued here that investments made possible by social media should benefit from access to ICSID arbitration when they are found to positively impact host state development and the parties agree on ICSID jurisdiction.

While there is no definition of “investment” in the Convention itself, defining entertainment ventures dependent on social media as “investments” may mean a departure from a developing jurisprudence on the meaning of the term under ICSID’s Article 25. Most commentators, and arbitration awards, suggest that there is an objective definition of “investment” under Article 25.

4. For the purposes of this Article, social media is understood as a term that includes platforms, forums, and communities that allow users to communicate and share content over the Internet.

5. When referring to investments dependent on, or made possible thanks to, social media, the author refers broadly to international business ventures and cooperation between governments and foreign companies that would not likely have taken place without social media. The author does not refer to economic activity that reaches into a host state solely through the Internet.

Engfeldt: Should ICSID Go Gangnam Style in Light of Non-Traditional Foreign
and that the definition must be met for an investor to gain access to ICSID arbitration.\footnote{7} Arbitration tribunals opine that certain features, collectively referred to as the Salini test, indicate investment activity.\footnote{8} To be considered investment activity under the Salini test the project should: (1) involve a substantial contribution, (2) involve risk other than commercial risk, and (3) have a minimum duration of two years.\footnote{9} A fourth feature, which some tribunals require before they determine something to be an “investment,” is the potential for a positive impact on host state economic development.\footnote{10} Some tribunals contend that unless all three, or for certain tribunals all four, features of the Salini test are present, ICSID jurisdiction cannot be established.\footnote{11} Others claim that the Salini features should not be treated as mandatory criteria for a finding of investment under Article 25, but rather should guide the determination of a particular activity’s status as an investment.\footnote{12}

\footnote{7} This is known as the “double keyhole approach,” where an activity must meet the definition of investment both under the parties’ consent document and under Article 25 of the ICSID Convention. See Global Trading Res. Corp v. Ukraine, ICSID Case No. ARB/09/11, Award, ¶ 43 (Dec. 1, 2010). See also Quiborax S.A v. Plurinational State of Bolivia (Quiborax), ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶¶ 211-217 (Sept. 27, 2012); Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law 61-62 (2008).

\footnote{8} Tribunals use varying language when referring to the different parts of the Salini test. For consistency, the author refers to the parts as “features” since that was the term originally used by commentators when referring to parts of the Salini test. See Christoph Schreuer, Commentary on the ICSID Convention, 11 ICSID REV. 318, 372 (1996).

\footnote{9} See Salini Costruttori v. Kingdom of Morocco (Salini), ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶¶ 52-54 (July 23, 2001). See also Joy Mining Machinery Ltd. v. Arab Republic of Egypt (Joy Mining Machinery Ltd.), ICSID Case No.ARB/03/11, Award on Jurisdiction, ¶ 57 (Aug. 6, 2004); Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (Bayindir), ICSID Case No. ARB/03/29, Decision on Jurisdiction ¶ 137 n.54 (Nov. 14, 2005); Saba Fakes, ICSID Case No. ARB 07/20, Award, ¶ 110 (July, 14 2010); Quiborax, ICSID Case No. ARB/06/2 at ¶¶ 219, 227.

\footnote{10} See, e.g., Saba Fakes, ICSID Case No. ARB 07/20 at ¶ 111; Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶¶ 84-86 (Apr. 15, 2009); Mitchell v. Democratic Republic of Congo, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, ¶ 33 (Nov. 1, 2006).

\footnote{11} See, e.g., Quiborax, ICSID Case No. ARB/06/2 at ¶ 219; LESI-Dipenta v. Algeria (LESI-Dipenta), ICSID Case No. ARB/04/08, Award, ¶ II.13(iv) (Jan. 10, 2005); Victor Pey Casado v. Chile, ICSID Case No. ARB/98/2, Award, ¶ 233 (May 8, 2008); Jan de Nul N.V. v. Arab Republic of Egypt (Jan de Nul N.V.), ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶¶ 91-95 (June, 16 2006).

\footnote{12} See, e.g., Biwater Gauff Ltd. v. United Republic of Tanzania (Biwater Gauff), ICSID Case No. ARB/05/22, Award, ¶¶ 312-313 (July 24, 2008); MCI Power Group LC v. Ecuador, ICSID Case No. ARB/03/6, Award, ¶ 165 (July 31, 2007). The Ad Hoc Committee in Malaysian Historical Salvors adopted a particularly flexible and inclusive definition of Article 25 investments. See Malaysian Historical Salvors v. Malaysia (Malaysian Historical Salvors), ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶ 80 (Apr. 16, 2009). At ¶ 69, the Ad Hoc Committee noted that while Article 25 was meant to indicate some outer limits to ICSID’s jurisdiction, “little more about the nature of outer limits is indicated in the travaux than is contained in Article 25(1).” At ¶ 72, the Ad Hoc Committee concluded that it views the outer limits to require that a dispute be a legal dispute, that the parties to the dispute must be a contracting state and a national of another contracting state, and that the term “investment” does not mean “sale.”
The Salini test was developed in response to a lack of a definition of “investment” in the ICSID Convention itself and evidence in the Convention’s negotiation history suggests that Article 25 jurisdiction has outer limits. While some commentators argue that the Convention text, and its negotiation history, support an inclusive understanding of investment to include any “activity or asset” that is “colorably economic in nature,” the prevailing view is that “purely commercial” transactions, like a one-time shipment of goods, do not qualify as Article 25 investments. In an effort to establish some guidance on what the outer limit of Article 25 jurisdiction should be, Professor Christopher Schreuer, in the preliminary publication of what has become the most referenced scholarly work in investment arbitration awards, The ICSID Convention: A Commentary, first identified the features that make up the Salini test. Building from the 1997 decision in Fedax v. Venezuela to the 2012 decision in Quiborax v. Bolivia, tribunals seem to agree that the features of contribution, risk, and duration reflect a commonsense understanding of “investment” that was intended by the Convention’s drafters. What is less clear, and what this Article addresses, is how to use these features to distinguish “purely commercial” activities from “investments.”

This Article argues that modern investment activities centered on intellectual property—and promoted by social media—are unlikely to have the same features as investments, which arbitrators may have envisioned when the Salini test became popular. When much of the Salini case law was decided, investments through social media did not exist, and the cases before tribunals did not prompt arbitrators to consider whether the types of activities discussed in this Article amounted to Article 25 investments. Instead, the Salini features and their boundaries were developed based on a model of brick-and-mortar industrial activity.

15. This was perhaps most clearly asserted when the ICSID Secretary General refused to register a request for arbitration of a dispute arising from a sale of goods transaction as manifestly outside ICSID’s jurisdiction. See I.F.I. Shihata & A. Para, The Experiences of the International Centre for Settlement of Investment Disputes, 14 ICSID REV. 299, 308 (1999).
18. See Fedax v. Republic of Venezuela, ICSID Case No. ARB/96/3, Decision on Jurisdiction, ¶ 43 (July 11, 1997). See also LESI-Dipenta, ICSID Case No. ARB/04/08 at ¶ II 13 (iv); Saba Fakes v. Republic of Turkey (Saba Fakes), ICSID Case No. ARB/07/20 at ¶ 110; Quiborax, ICSID Case No. ARB/06/2 at ¶ 219.
To find the objective meaning of investment under ICSID’s Article 25 in 2014, we should continue to consider the features suggested in Salini as a starting point and follow the line of cases that support a flexible, holistic application of test features, eschewing cases that require each feature to be met to confer Article 25 jurisdiction. As noted by the tribunal in Biwater Gauff v. Tanzania, approaching the Salini features as mandatory requirements “risks the arbitrary exclusion of certain types of transaction from the scope of the Convention.”19 Beyond emphasizing the importance of flexibility to encompass less traditional investments, like the entertainment ventures discussed here, the tool of industry-specific analysis is offered to guide tribunals in distinguishing between activities that are not typically investments, such as the sale of goods, and activities that should be considered investments. What is suggested here is not an expansion of the Article 25 definition of investment, but rather a way to apply the Salini features to new economic activities.

Recently, some tribunals have rejected the development feature as a necessary condition for finding Article 25 “investment.”20 While requiring the development feature would be unnecessary, the potential for host state development should always be considered when ICSID jurisdiction is disputed. Since ICSID was set up by an organization with a development focus, ICSID is different from other international arbitration frameworks. A desire to have private investment fuel host state development was a driving force behind the ICSID Convention. Even if a development feature cannot be read into the term investment itself, when interpreting investment under Article 25, a development feature should be considered.21 However, as suggested by Professor Schreuer, we should not limit our analysis to readily measurable contributions to GDP, but instead “should include development of human potential, political and social development, and the protection of the local and the global environment.”22 Activity that has significant potential to positively impact host state development should favor a finding of Article 25 jurisdiction.

Investment activities fueled by information sharing on social media often furthers the ICSID Convention’s goal of positively impacting economic development, but it may not meet the Salini test’s most agreed upon features of substantial contribution, risk, and duration. International entertainment projects

20. Quiborax, ICSID Case No. ARB/06/2 at ¶¶ 220-225.
22. CHRISTOPH SCHREUER, THE ICSID CONVENTION – A COMMENTARY 134 (2nd ed. 2009) (noting that in the 2009 Malaysian Historical Salvors annulment at ¶ 80(b), the arbitrator rejected ICSID jurisdiction because he found no contribution to host state development. The annulment was based in part on the arbitrator’s interpretation of “the alleged condition of a contribution to the economic development of the host state” as excluding small contributions and those of a cultural and historical nature).
spurred on by social media positively impact the development of host state broadcasting industries and host state talent; however the contributions may seem smaller, the risks involved may be harder to quantify, and the duration may be shorter compared to industrial contracts.

Placing an industry-specific lens on the Salini features to determine Article 25 jurisdiction would best help us use the Salini case law to evaluate new economic activities like those mentioned in this Article. Salini features are present in different ways depending on the industry, so when assessing an activity’s features an industry-specific lens is appropriate to determine whether the activity is an investment.

Some have rejected an industry-specific approach. In the later-annulled decision of _Malaysian Historical Salvors v. Malaysia_, the sole arbitrator of the case specifically rejected an industry-specific analysis when discussing the development feature of the Salini test. Instead, the litmus test must be the investment’s “overall contribution to the economy of the host state” and “the frame of reference for the purposes of determining investment under the ICSID Convention cannot depend on whether the contract is the largest ever made within its particular industry.” However, without an industry-specific approach to assess the features of an investment, a rigid interpretation of the Salini features may result that does not account for variances between industries. This will be to the detriment of industries whose activities may not exhibit the same features as traditional investments. While much language in arbitration awards and commentary cautions against a checklist-like approach to the Salini features of investment, some case law treats the features as a mandatory test. As one tribunal noted, “to qualify as an investment, the project in question must constitute a substantial commitment on the side of the investor.” Any investment project, it elaborated, “must have a certain duration.” Another arbitrator noted that “the classical Salini hallmarks are not a punch list of items which, if completely checked off, will automatically lead to a conclusion that there is an ‘investment.’ If any of these hallmarks are absent, the [t]ribunal will hesitate (and probably decline) to make a finding of ‘investment.’ However, even if they are all present, a [t]ribunal will still examine the nature and degree of their presence in order to determine whether, on a holistic assessment, it is satisfied that there is an ICSID ‘investment.’” Similarly, a different arbitrator considered the four Salini features as “requirements for an investment to benefit from the international protection of ICSID.” With this kind of mandatory

23. ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶ 135 (May 17, 2007).
24. Id.
26. Id.
27. Malaysian Historical Salvors, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶ 106(e) (May 17, 2007).
28. Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶¶ 114-115
language, combined with de facto precedent-building in investment law, the Salini features may over time solidify as mandatory requirements. Without access to ICSID arbitration, firms in the entertainment industry may find it hard to remedy any losses incurred by adverse host state action. As a result, new economic activities may become less prevalent. In some ways, the loss to these firms can be written off as money spent on developing entertainment content and setting up partnerships with host state entities and private entities within the host state. In other ways, the losses are non-traditional in that they include more loss of human capital than traditional investments. Developing an entertainment talent for a particular market could be a wasted effort, especially if the foreign firm is shut out of host state Internet domains or if intellectual property is unlawfully copied. Entertainment firms dependent on social media for their business model may be particularly vulnerable and in need of an effective dispute resolution mechanism to protect them from Internet shutdowns and unlawful copying. Figuring out how to calculate damages in these cases may prove challenging, but any difficulty in this regard should not stand in the way of protecting these activities in the first place.

Should an investment spurred on by, and dependent on, social media not pass the Salini test, and therefore not have access to ICSID arbitration, other international arbitration options may be available depending on the underlying contract or treaty. Parties may be able to resolve disputes that do not qualify as Article 25 investment disputes via alternative frameworks, such as arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL) or the Stockholm Chamber of Commerce (SCC). However, ICSID is the most transparent system currently in place, and a shift towards

(Apr. 15, 2009).

29. A rule change in 2006 requires ICSID to “promptly include in its publications excerpts of the legal reasoning of the Tribunal” even when party consent for full publication cannot be obtained. See Rule 48(4) of THE ICSID RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS (2006). Such excerpts appear to be inclusive. See OKI Paniki Oyi v. Republic of Estonia, ICSID Case No. ARB/04/6, Award, (Nov. 2007), 22 ICSID Rev. 466 (2007), where the excerpt comprises thirty-three pages of the tribunal’s reasoning. Recently, the United Nations Commission on International Trade Law (UNCITRAL) has worked towards transparency in investment arbitrations. However, new UNCITRAL rules on transparency will currently only apply to investment treaties concluded on or after April 1, 2014 unless the parties voluntarily opt-in to the new rules. See PRE-RELEASE PUBLICATION OF UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION (2013), available at http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/pre-release-UNCITRAL-Rules-on-Transparency.pdf. The Arbitration Rules of the Stockholm Chamber of Commerce (SCC) provide that unless otherwise agreed to by the parties, the SCC and the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award. See ARTICLE 46 OF THE SCC ARBITRATION RULES 20 (2010), available at http://www.sccinst.org/filearchive/3/35894/K4_Skiljedomsregler%20en%20ARB%20TRYC K_1_100927.pdf. The London Court of International Arbitration Rules (LCIA) provide that unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to maintain confidentiality. Also, the LCIA does not publish any part of an award without the prior written consent of all parties and the arbitral tribunal. See ARTICLE 30 OF THE LCIA ARBITRATION RULES 14 (1998), available at http://www.lcia.org/Dispute_Resolution_Services/
solving investment disputes under other frameworks could mean a step back towards secrecy. To the extent that secrecy is equated with a less legitimate dispute resolution mechanism, investment arbitration would be undermined by such a shift. Further, to the extent that other international arbitration options are unavailable, effective dispute resolution may be unattainable and economic development would consequently be stifled.

I.

A SHIFT TOWARDS INTANGIBLE FOREIGN INVESTMENT

Any definition of the term “investment” will necessarily be limited by society’s experience of different kinds of entrepreneurial activity. During the drafting of the ICSID Convention, then World Bank General Counsel and the Convention’s primary architect, Aaron Broches, noted that attempts to define investment “were always directed towards particular facts or situations which the parties or governments had in mind while the matter envisaged by this Convention was more fluid.”

We should continually evaluate how new activities align with our understanding of the term “investment” and the development goal behind the ICSID Convention. New entrepreneurial activities may not fit the model of traditional investment projects like infrastructure projects, but they can still be the kinds of activities that serve the same broad policy goal of host state economic development. The industrial side of foreign investment continues, but new activities focused on information and intellectual property will increasingly share the stage of investment projects. Some of these new activities have become possible thanks to social media, as in the following example of international partnerships in the entertainment industry.

A. Activities Spurred on by Social Media as Article 25 Investments: the Korean Entertainment Example

The term “Hallyu,” which is Korean for “wave,” initially came from the title of a CD published by the Korean Ministry of Culture, Sports and Tourism in 1999 and was adopted by Chinese reporters to describe an emerging international Korean entertainment phenomenon. The reporters were amazed at the fast-growing popularity of Korean entertainment products and Korean culture in China. This entertainment wave was driven by Korean pop music,

33. Id.
Engfeldt: Should ICSID Go Gangnam Style in Light of Non-Traditional Foreign

known as K-pop, and by Korean TV dramas and Korean movies. More so than other Hallyu content, K-pop has captured an international audience through the Internet. Social media has allowed artists to bypass traditional media and move straight to creating a fan base online. “Social-media-savvy K-pop stars are now tweeting, YouTubing, and Facebooking their way up music charts across and beyond Asia.”

Korean labels have found social media sites to be effective tools to market their artists around the globe. Fans “going gaga” for K-pop in places as diverse as France and Peru and Facebook-orchestrated K-pop flash mobs erupting everywhere from Sweden to the United States demonstrate the extent of K-pop’s global success, facilitated by social media.

In 2011, K-pop label S.M. Entertainment held a sold-out concert at Madison Square Garden in New York City, an event that was high profile, but not wholly unique. K-Pop concerts have sold out venues around the world, and in places where the labels have not yet ventured, locals stage their own K-Pop cover concerts and thousands show up.

Building on their viral success, Korean entertainment companies now collaborate with foreign governments, and foreign companies, for mutual benefit. Broadcast content is the latest commodity between Korea and


Colombia, and the two countries are engaged in international co-productions to produce content for both markets. Colombia and Korea have agreed to quickly implement a newly signed Free Trade Agreement (FTA), which includes a section on investment arbitration and stronger protections of intellectual property specifically to protect K-pop in Colombia. Article 15.4 of the FTA obligates the parties to “grant and ensure adequate, effective, and non-discriminatory protection of intellectual property rights, and provide for measures for the enforcement of such rights.”

By bringing their entertainment industry expertise along with technical support, the Korean investors are developing a market for their entertainment content, while at the same time helping Colombia develop its domestic entertainment and broadcasting industries. Besides Colombia benefitting from Korean companies’ expertise on an industry level, the K-pop movement in Colombia appears to be a way to develop Colombian entertainment talent. As part of Korean companies’ foreign strategy, they host K-pop contests where K-pop fans around the world compete for a chance to go to Korea and perform. According to participant Andrea Velasquez Garcia, who participated in a Colombian K-pop reality show, the dream for singers in those kinds of shows “is to grow as a group and represent Colombia in other countries.”

Peru represents a recent example of how social media is paving the way for Korean entertainment investments. Peruvians found K-pop on YouTube and they became fans at a time when no K-pop artist had ever set foot on Peruvian soil. By late 2012, K-pop group Super Junior drew a crowd of 14,000 in Lima, and in April 2013, 13,000 fans attended K-pop group Big Bang’s Lima concert.

While Latin America is a new partner and emerging consumer of Korean entertainment content, Japan remains the biggest foreign market. Continued success has prompted Korean artists and actors to set up long-term presence in
Japan. Most male Korean K-pop stars have their own official stores in Tokyo. Some Korean artists now produce content specifically tailored to the Japanese market, featuring Japanese language songs. Reportedly, 84 percent of K-pop profits in Japan go to Japanese distributors and 8 percent to Japanese promoters, showing that Hallyu benefits host states receiving the Korean investments.

So how would these activities give rise to breaches of investment law obligations? While this author cannot predict any particular disputes that may arise, some potential scenarios demonstrate breaches of investment law obligations. In the case of Korean entertainment investments in Japan, some people oppose the Korean influence on Japanese culture and have protested outside TV stations to limit Korean TV content. In 2011, up to 6,000 protesters gathered outside Japanese Fuji Television Network to protest the amount of Hallyu content shown on TV and demand that the station air more Japanese content and that the government cancel Fuji TV’s broadcasting license on account of its airing too much Hallyu programming. If these kinds of demands were satisfied, or if a government TV station would breach contracts made with Korean companies directly, a case could be made that an investment law obligation has been violated. In 2006, Chinese officials, celebrities, and media complained about what they viewed as Korean culture’s extensive influence over China. Chinese legislators considered banning or limiting foreign drama TV during prime time, between eight and ten p.m. Should such legislation come into effect, one could argue that an investment law obligation, such as national treatment, has been violated.

Besides direct state measures aimed at Korean entertainment interests, the Colombia-Korea FTA contains clear language obligating the state parties to enforce intellectual property rights, and a passage in the new trilateral

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53. Id.
54. Article 15.4 of the draft agreement endeavors to “grant and ensure adequate, effective, and non-discriminatory protection of intellectual property rights, and provide for measures for the enforcement of such rights.” Intellectual Property Rights, Colombia-Korea Free Trade Agreement,
Should ICSID Go Gangnam Style?

investment agreement between China, Japan, and Korea could be interpreted to suggest an active duty on the state parties to protect foreign intellectual property rights under its domestic law. Any failure on the part of Colombia, China, or Japan to protect the copyright of Korean entertainment content within its respective borders could give rise to an investment claim.

II.

Applying an Industry-Specific Lens to the Salini Test

As the recent FTA between Colombia and Korea indicates, at least these countries want to give entertainment partnerships the assurance of access to international arbitration. Such access may nevertheless be denied under the ICSID Convention if a tribunal applies Salini case law without considering industry-specific features of the entertainment industry. While partnerships that have resulted from online sharing in the entertainment industry may not fit within the boundaries of existing Salini test case law, they would fit if we put on an industry-specific lens in applying the Salini features.

ICSID tribunals have examined Salini’s substantial contribution feature in a number of cases. Tribunals have considered contributions including know-how, personnel, equipment, money spent, and loans. The amount of physical work involved in a project has also been considered to show a “substantial contribution.” In some cases, contributions have been considered insufficient when compared with “commercial” contracts or contracts for concession of public services. One arbitrator considered that if one or several of the Salini features were weakly present, as he found the substantial contribution feature to

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56. See Salini, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 53 (July 23, 2001). See also Malaysian Historical Salvors v. Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶ 109 (Apr. 16, 2009); Bayindir, ICSID Case No. ARB/03/29, Decision on Jurisdiction ¶ 131 (Nov. 14, 2005); Quiborax S.A. v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶¶ 229-231 (Sept. 27, 2012).

57. Jan de Nul N.V., ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶ 92 (June 16, 2006) (noting that “the amount of work involved [including the mobilization of two heavy ships for a period of approximately 19 months] and the related compensation show that the Claimants’ contribution was substantial”).

58. Malaysian Historical Salvors, ICSID Case No. ARB/05/10 at ¶ 109.

59. Joy Mining Machinery Ltd., ICSID Case No. ARB/03/11 at ¶ 59.
be in the case before him, other Salini features must be more clearly present to find an Article 25 investment.\footnote{60} The industry-specific lens is particularly useful in providing a more precise analysis of the Salini feature of substantial contribution. A substantial contribution for an entertainment company may appear unsubstantial compared with industrial investments. However, when a foreign firm has spent time and money developing entertainment content for a particular host state market,\footnote{61} their activity should be compared with other entertainment ventures and not other industrial ventures.

A foreign firm’s investment in developing broadcast content and local talent in Colombia appears substantial when compared with entertainment industry projects where content is simply sold to foreign markets. In the entertainment industry, simply selling content abroad or going on tour abroad are the common international aspects of the industry. Going beyond these activities and engaging in co-productions with a host state appear substantial in comparison. Rather than comparing each activity with previous investments that have been subject to ICSID arbitration, or comparing each time to concession contracts of public services, the industry-specific lens advanced here suggests that an activity should be compared with other activities within its same industry.

Drafters of the Convention suggested that Article 25 jurisdiction should only extend to claims that exceed a certain monetary limit, but that idea was rejected.\footnote{62} The particular limit discussed was $100,000, but imposing any limit was rejected “because disputes involving small amounts could be important as test cases, whereas there would be other cases in which it would be impossible to place a pecuniary value on the subject-matter of a dispute.”\footnote{63} Just as the quoted passage predicts, putting a price tag on some projects may be difficult, but this should not necessarily preclude Article 25 jurisdiction. Tribunals naturally list quantifiable contributions, because they are measurable. However, such listings do not mean that contributions that are not easily quantifiable are not important when evaluating the contribution feature.\footnote{64}

The substantiality of the contribution may be more difficult to determine at the outset of an entertainment project because it is harder to price intellectual

\footnote{60. Microvision Holding Corp. v. Philippines, ICSID Case No. ARB/05/10 at ¶ 112.}


\footnote{62. \textit{History of the ICSID Convention} 567 (Vol. II-1 2008).}

\footnote{63. Id.}

\footnote{64. See \textit{Quiborax}, ICSID Case No. ARB/06/2 at ¶¶ 229-231. See also \textit{Jan de Nul N.V.}, ICSID Case No. ARB/04/13 at ¶ 92 (providing examples of quantifiable contributions).}
property and a transfer of know-how than it is to price tangible property involved in an industrial project. For many industrial projects, a transfer of know-how is part of the contribution that an investor makes to a host state, but it is rarely the main part. Tribunals tasked with evaluating the Salini contribution feature have not considered if a transfer of know-how could be enough to meet the contribution feature on its own. In *Salini Costruttori and Italcstrade v. Morocco, Malaysian Historical Salvors v. Malaysia and Bayindir Insaat Ticaret Ve Sanayi v. Pakistan*, the tribunals all stated that the claimants had used their know-how, or contributed their know-how, as part of a contribution to the host state, but no tribunal has addressed how to treat a transfer of know-how as the sole contribution.\(^65\) When evaluating the contribution feature for an entertainment project, tribunals may struggle to measure the contribution if most of it comprises intellectual property or know-how. This is especially true if a conflict arises early in a project, before the project has had a chance to produce its expected benefits. In that situation, a tribunal should consider a project’s potential to positively impact host state development as a tiebreaker when determining Article 25 jurisdiction. Unlike the approach taken by the sole arbitrator in *Malaysian Historical Salvors v. Malaysia*, where the arbitrator suggested that a weak presence of one or more Salini features required a stronger presence of other features,\(^66\) the approach suggested here is that the development feature specifically be given more weight when another feature is difficult to evaluate because of the particularities of an industry or when another feature is less important for a finding of an investment.

The risk feature of Salini has also been examined in a number of cases. Considered risks include increases in labor costs, modifications in host state law, damage done to physical investment property, long project duration, risk allocated solely to the investor, and the magnitude and complexity of a project.\(^67\) These cases seem to require particular risk that is different from ordinary commercial risks.\(^68\) However, while a risk for contractual breach could surely be viewed as a commercial risk, a foreign investor always faces additional risks. Contracting with a host state as opposed to a private entity carries a greater risk because a host state will not act as a private entity. A state entity dealing with a foreign investor will be subject to different pressures, consider different values, and face different reputational concerns compared with a private entity.

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\(^65\). *See Salini, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 53 (July 23, 2001). See also Malaysian Historical Salvors, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶ 109 (Apr. 16, 2009); Bayindir, ICSID Case No. ARB/03/29, Decision on Jurisdiction, ¶ 131 (Nov. 14, 2005).*

\(^66\). *Malaysian Historical Salvors, ICSID Case No. ARB/05/10 at ¶ 112.*

\(^67\). *See, e.g., id, Salini, ICSID Case No. ARB/00/4 at ¶¶ 55-56; Jan de Nul N.V., ICSID Case No. ARB/04/13 at ¶ 92; Bayindir, ICSID Case No. ARB/03/29 at ¶ 136.*

\(^68\). *See, e.g., Malaysian Historical Salvors, ICSID Case No. ARB/05/10 at ¶ 112; Joy Mining Machinery Ltd., ICSID Case No. ARB/03/11 at ¶ 57.*
Even though risks may be harder to quantify, social media driven investments may be particularly vulnerable to adverse host state activities. Copying intellectual property or blocking access to a social media website is probably easier to do than expropriating tangible investment property such as a railroad project or a mining operation. Once intellectual property is shared, its owner hopes that it was shared with a trustworthy partner, and if not, the owner would want to make sure there are effective ways to remedy any harm. Investments dependent on Internet access could be effectively shut out of a host state market where the investments used to be welcome in the event that government officials instruct host state Internet Service Providers to turn off the power to Internet infrastructure. The world has seen Internet shutdowns happen when a host state disapproves of particular content shared on social media, as happened at the start of the Arab Spring in 2011 and in Pakistan and Syria in 2012. Depending on how centralized or decentralized the Internet is in a particular host state, it is either easier or more difficult for the host state government to shut down Internet platforms. Consequently, the likelihood of an Internet shutdown should be part of the risk analysis for any social media dependent investments.

If particular risk is required, putting an industry-specific lens on the risk feature shows that entertainment firms investing through social media face the particular risk of Internet censorship. That risk could typically only materialize through adverse state action, as opposed to actions by private entities. If particular risk is required, an industry-specific approach to the risk feature of the Salini test suggests that we should look specifically at entertainment industry risks, such as lost intellectual property and Internet censorship, to see if those kinds of risks are present in a particular project.

A passage from Salini Costruttori v. Morocco about the duration of a construction project suggests that an industry-specific approach to the features is proper. As the tribunal noted, “a construction contract that stretches out over many years, for which the total costs cannot be established with certainty in advance, creates an obvious risk for the [c]ontractor.” In this passage, the tribunal distinguishes long-term construction projects from those of a normal duration and in doing so suggests an industry-specific approach to determining the level of economic risk. While construction projects may carry the risks of unanticipated costs, and general uncertainty due to long project duration, other projects carry different risks. Risks in a broadcasting project are less likely to

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69. It is easier to reproduce copyrighted material or turn off the power to Internet infrastructure than it is to force workers off a construction site or take control over foreign-owned physical property.


71. Salini, ICSID Case No. ARB/00/4 at ¶ 56.
involve unanticipated costs, or general risks from long duration, but instead may involve risks of lost intellectual property and Internet censorship.

The duration feature of Salini has also been considered in a number of cases. A construction contract for thirty-two months, and later extended to thirty-six months, was found to have “complied with the minimal length of time of 2-5 years.”72 One tribunal considered a project to have insufficient duration because the contract was paid in full at an early stage.73 In the subsequently annulled decision in Malaysian Historical Salvors v. Malaysia, a four-year contract was found to “satisfy” the duration “factor” of Salini only in a quantitative sense.74 The original contract was for eighteen months, and “the [c]ontract was only able to meet the minimum length of time of two years” because the contract was later extended.75 The arbitrator considered that time extensions should only be allowed to count towards satisfying the duration feature when the underlying contract positively impacts the economy and development of the host state.76 As one tribunal noted, “duration is the paramount factor which distinguishes investments within the scope of the ICSID Convention and ordinary commercial transactions.”77

Under these cases, no activity has failed the Salini test because the activity was of insufficient duration. Two years appears to be the shortest duration that satisfies the Salini test.78 However, a case of shorter duration may be accepted should it be tested. How would an entertainment investment be viewed in light of a two-year minimum duration?

While certain duration may be a natural consequence of any substantial industrial project, a shorter duration should not disfavor a finding of investment in the entertainment industry. Instead, because no tangible property is involved, an entertainment project may make a substantial contribution in a shorter time. The duration of an international entertainment project may not be determined at the start of a project, or it may initially be given a short duration to test how viable the particular project is. How should we evaluate such a project for purposes of the duration feature? The arbitrator in Malaysian Historical Salvors v. Malaysia suggested that planned duration, rather than actual duration, matters.79 If planned duration were the standard, how should we view planned duration of an entertainment contract without a longer specified duration?

72. Id. at ¶ 54. However, see also Jan de Nul N.V., ICSID Case No. ARB/04/13 at §§ 93-95 (finding an activity that took place for slightly less than two years still qualified as an “investment” under Article 25).
73. Joy Mining Machinery Ltd., ICSID Case No. ARB/03/11 at ¶ 57.
74. Id. See also Malaysian Historical Salvors, ICSID Case No. ARB/05/10 at ¶ 110.
75. Malaysian Historical Salvors, ICSID Case No. ARB/05/10 at §§ 110-111.
76. Id.
77. Bayındır, ICSID Case No. ARB/03/29 at ¶ 133.
78. See, e.g., Salini, ICSID Case No. ARB/00/4 at ¶ 54; Jan de Nul N.V., ICSID Case No. ARB/04/13 at §§ 93-95.
79. Malaysian Historical Salvors, ICSID Case No. ARB/05/10 at ¶ 110.
According to a Colombian director, the K-pop program in Colombia started out as an experiment that turned into a long-term project when it proved successful.\textsuperscript{80} If a conflict attributable to Colombian state action arises six months into a project initially set for one year, should we deny ICSID jurisdiction because the project fails to comply “with the minimal length of time upheld by the doctrine, which is from 2 to 5 years?”\textsuperscript{81} Doing so would mean that any project without an initially long timeline would be viewed as less likely to be an Article 25 investment compared with projects that have a longer timeline determined at the outset. If the realities of certain industries make long-term, firm timelines less common, that should not preclude activities in those industries from being viewed as Article 25 investments. There is no indication in the text or negotiation history of the ICSID Convention that its jurisdiction should be limited to investment projects in certain sectors of the economy. A draft proposal of the Convention suggested that a duration requirement be imposed, but several delegates opposed any specific time limit, and rejected this proposal.\textsuperscript{82}

While duration may be an illustrative feature of some investments, it may be less important for others. For an industrial investment, such as the highway construction contract in \textit{Bayindir Insaat Ticaret Ve Sanayi v. Pakistan}, duration may be illustrative, and even a paramount factor for finding an Article 25 investment.\textsuperscript{83} Duration could be used as one way to distinguish between situations where a foreign firm plays a bigger role in an industrial project, compared with when the firm is simply selling building components to be used in a project. However, examining the duration of intangible investment projects may be less illustrative. A foreign firm may provide significant intangible contribution in much shorter time than if it were to provide a tangible contribution in a field like construction. That is why instead of comparing the duration of an entertainment venture to the duration of a typical industrial investment, duration should be evaluated through an industry-specific lens. An

\begin{itemize}
\item \textsuperscript{80} Airang Today, \textit{Hallyu in Colombia}, \textit{YouTube} (June 12, 2012), http://www.YouTube.com/watch?v=HsL_MzfRVCo.
\item \textsuperscript{81} \textit{Salini}, ICSID Case No. ARB/00/4 at ¶ 54.
\item \textsuperscript{82} \textit{HISTORY OF THE ICSID CONVENTION} 116, 705, 707 (Vol. I 2008) (noting that “investment” was defined as “any contribution of money or other asset of economic value for an indefinite period or, if the period be defined, for not less than five years”).
\end{itemize}
industry-specific lens may suggest that a shorter duration is appropriate because the realities of the entertainment industry preclude fixed contracts of longer duration. In addition to being less common, long-term fixed contracts simply may not be necessary. Without a need to build tangible structures, an entertainment project can become productive faster than an industrial project. If a project positively impacts the development of a host state broadcasting industry in a short time, it seems counter to the World Bank’s and ICSID’s development goal to deny Article 25 jurisdiction.

Finally, the disputed feature of positive impact on host state economic development has been dealt with in a number of cases. Tribunals have found activities positively impacting development to include infrastructure construction, transfer of know-how, and development of host state banking infrastructure. Activities that tribunals have found not to exhibit the development feature include issuance of a bank guarantee, a marine salvage contract of perceived low monetary value, and operating a law firm in a host state.

In *Malaysian Historical Salvors v. Malaysia*, the arbitrator required a significant impact on host state development to satisfy Salini’s development feature. Without requiring significance, it was argued that any transaction that contributes to host state GDP would contain the development feature. The arbitrator found no significant impact, and discounted cultural and historical contributions for failing to significantly impact Malaysia’s economic development. The arbitrator rejected the claimant’s submission that its contribution “must be measured in the context of the fact that it was the largest in the industry.” The arbitrator asserted that “whether the [c]ontract is an ‘investment’ under the ICSID Convention cannot depend on whether the [c]ontract is the largest ever made within its particular industry.” The arbitrator also distinguished between those benefits that last, and those that do not, and argued that certain projects like public and banking infrastructure are likely to provide positive economic development while the marine salvage contract’s ability to lead to a thriving tourism industry, as argued by the claimant in the case, was more speculative. Had the arbitrator accepted an industry-specific

84. *See generally Salini*, ICSID Case No. ARB/00/4 at ¶ 57; Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, ¶ 88 (May 24, 1999); *Jan de Nul N.V.* ICSID Case No. ARB/04/13 at ¶ 92; *Bayindir*, ICSID Case No. ARB/03/29 at ¶ 137.

85. *Joy Mining Machinery Ltd.*, ICSID Case No. ARB/03/11 at ¶¶ 54-62.

86. *Malaysian Historical Salvors*, ICSID Case No. ARB/05/10 at ¶ 110.


88. *Malaysian Historical Salvors*, ICSID Case No. ARB/05/10 at ¶ 110.

89. *Id.* at ¶¶ 132, 138.

90. *Id.* at ¶ 135.

91. *Id.* at ¶ 144.
Engfeldt: Should ICSID Go Gangnam Style in Light of Non-Traditional Foreign Analysis, he would likely have found the marine salvage contract in the case to contribute to economic development.

The annulment committee in Patrick Mitchell v. DRC only required some form of contribution to host state development, but despite setting a lower bar, the committee concluded that because the award failed to show that the claimant, through his know-how, specifically assisted DRC in getting investors, the claimant had not made any contribution to DRC’s development.\textsuperscript{92} Again, an industry-specific lens may have yielded a different outcome.

While the development feature is the most disputed prong of the Salini test, it could offer particular guidance for distinguishing purely commercial activities from investments when the other Salini features are more difficult to apply. In most cases, a claimant’s use of, or transfer of, particular know-how is mentioned as a benefit to a host state, but it does not appear to be given much weight compared with more tangible contributions like building a highway. This happens because tangible benefits are apparent, and there is no need to engage in the more difficult assessment of what benefit a host state would likely get from a transfer of know-how or intellectual property. However, for new economic activities, the intangible benefits are likely to dominate over tangible ones, and a tribunal would need to determine what expected benefits, if any, would come from a project. While an infrastructure project may provide substantial benefit for a long time, a transfer of knowledge, intellectual property, or know-how may provide substantial benefit for an indefinite period of time. A knowledge transfer, without any accompanying tangible project, could potentially contribute more to host state economic development than a tangible project without a knowledge transfer.

What positively impacts host state development differs depending on the sector of the economic project. Evaluating an activity within a particular industry would more easily include all development-friendly activities, such as the above described entertainment projects, or other projects with intangible benefits. There is nothing in the negotiation history of the ICSID Convention that suggests the drafters had entertainment projects in mind in the 1960s. However, by leaving the term “investment” undefined, the Convention has the potential to remain relevant as new kinds of investments emerge.

CONCLUSION

Some 2014 investments may have different features compared with the features typical of investments when the Salini case was decided in 2001. While contribution, risk, and duration may be commonsense features of an investment, these features should be viewed through an industry-specific lens to encompass new types of investments emerging in the economy. In the entertainment industry, contributions may be smaller in monetary terms, compared with

\textsuperscript{92.} Democratic Republic of Congo, ICSID Case No. ARB/99/7 at ¶¶ 33, 39.
industrial projects, but they may still be substantial when compared with other entertainment ventures. Particular risks may include a possibility of infringement on intellectual property laws and Internet censorship rather than possible loss of money put toward tangible structures. Long project duration may be less likely to be contractually fixed at the outset since the success of entertainment projects depends on consumer behavior and preferences.

Evaluating the Salini features of contribution, risk, and duration may prove more difficult for information-age driven activities. When they are evaluated, Salini’s development feature could serve as a tiebreaker to distinguish purely commercial activities, such as a simple sale of goods, from activities that should be considered investments. Investment activities made possible thanks to information-sharing on social media will likely positively impact host state development of human capital and the spreading of knowledge. Developing intangible values promotes the Convention’s goal of cooperation for economic development. Entertainment project disputes should not be shut out of ICISD on account of a jurisdictional test that may not be well suited for these new activities.
The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective

Frederico Fabbrini
The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective

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INTRODUCTION

Since 2009, the European Union (EU), and especially the member states using the Euro as their currency, has been at the center of a major budgetary, financial, and economic crisis. Because the crisis was triggered and magnified by structural inadequacies of the Economic & Monetary Union (EMU), the EU institutions and member states reacted by introducing major changes to the EU fiscal constitution—meaning the fundamental norms governing the action of EU institutions and member states in the fiscal domain.1 Through a series of legal reforms, the political branches at the national and supranational level have attempted to strengthen the budgetary constraints that guide state fiscal policies, endow the EU with new mechanisms of financial stabilization, and set up a framework for economic adjustment aimed at driving countries in serious economic difficulties out of the crisis through ad hoc programs of assistance. However, the legal measures enacted by the EU institutions and member states to respond to the crisis have increasingly fallen prey to the scrutiny of courts, both at the national and at the supranational level.

The purpose of this Article is to examine how courts have responded to the legal measures adopted by the political branches to tackle the Euro-crisis and to discuss the role of the judiciary in the fiscal domain. To this end, this Article

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1. I am drawing the expression “fiscal constitution” from US constitutional law scholarship and using it here in a broad sense to include the fundamental norms governing policy-making action in budgetary, financial, and economic affairs. See, e.g., David Super, Rethinking Fiscal Federalism, 118 HARVARD L. REV. 2544 (2005).
THE EURO-CRISIS AND THE COURTS

analyzes a plurality of rulings dealing with various aspects of the new legal architecture of the EMU and delivered in the period from the outburst of the Euro-crisis until the end of 2013. In particular, it considers decisions by high courts in Estonia, France, Germany, Ireland, and Portugal, plus the judgment of the EU Court of Justice (ECJ) in the recent Pringle case, and seeks to map judicial reactions to the transformations of the constitutional architecture of the EMU. As the Article argues, a trend of increasing judicial involvement in the fiscal domain has emerged throughout Europe as exemplified by the countries considered in this Article. Courts have largely upheld the measures under review, validating the reforms of the EMU introduced by the EU institutions and member states. Nevertheless, over time, courts have also expressed their discomfort with specific aspects of the new EMU fiscal rules, especially those on financial stabilization and economic adjustment—and in some recent cases have even introduced important conditions on the validity of the measures under review or struck them down tout court.

As the Article explains, the main cause for this high degree of judicial intervention in fiscal and economic affairs lies, paradoxically, in the “intergovernmental method” of governance followed in response to the Euro-crisis. In devising responses to the Euro-crisis, the EU member states have largely operated along an intergovernmental logic, which put at the center the powers of the member states acting in the European Council and their freedom to resort to international agreements outside the EU legal order. One of the central tenets of intergovernmentalism in EU governance is that the executive branches will dominate decision-making, to the detriment of legislatures and courts. Yet, the outcome of an intergovernmental management of the Euro-crisis has resulted, in reality, in an increasing involvement of the courts, in a way that would have been impossible had the member states acted through the “community method.” In fact, as this Article highlights, the courts were mainly asked to rule on fiscal issues because the political branches adopted reforms to the EMU architecture via international agreements, which—contrary to EU law—are amenable to domestic judicial review.


3. Following the seminal work of Joseph H.H. Weiler, The Transformation of Europe, 100 YALE L. J. 2403, 2423–24 (1990), I consider as intergovernmental a system of decision-making in which (1) the political impetus for a policy; (2) the technical elaboration of policies and norms; (3) the formulation of a formal proposal; (4) the adoption of the proposal; and (5) the execution of the adopted proposal, is firmly in the hand of the member states.

4. For the paradigmatic definition of the “community method” see Renaud Dehousse, The Community Method at Sixty, in THE COMMUNITY METHOD 3 (Renaud Dehousse ed., 2011), defining the “community method” as the default process by which law making is accomplished in the EU, which involves the power of the Commission to propose legislation, the power of the Council—and now, in most of the cases the Parliament—to approve it, and the power of the ECJ to review it.
As the Article makes clear, the best evidence of how intergovernmentalism produced an unprecedented degree of judicialization in the EMU emerges from a comparative perspective. Indeed, the role of courts in the fiscal affairs of the EMU far exceeds what one finds even in the country regarded as the example par excellence of a strong system of judicial review: the United States. In the United States, courts have—at least since the 1930s—adopted a deferential position in the economic field, on the understanding that the political process is better placed than the judicial process in answering fundamental budgetary, financial, and economic questions. While, of course, major differences exist between the EU and the United States—notably the fact that the political process is more imperfect in the EU, precisely due to the more intergovernmental and less democratic modes of decision making in the economic domain—the Article suggests that there are still compelling constitutional arguments for why courts in the EMU should also defer to the political branches in the fiscal arena. Because considerations of expertise, voice, and rights plead in favor of letting the political process take the lead in fiscal affairs, this Article critically evaluates the current trend of increasing judicial involvement in the EMU.

Drawing lessons from the analysis of how courts got involved in adjudicating issues related to the new legal architecture of EMU, this Article indicates a strategy for the political branches to minimize future judicial interference, with the threats that this implicates, by adopting legal measures in the framework of EU law. By devising future responses to the Euro-crisis through the community method and EU legislation, therefore, the EU institutions and member states can resort to a procedure that is both more legitimate in democratic terms (because of the political guarantees that surround law making in the EU context) and more secure in judicial terms (because of the more limited space for judicial overreach). Nevertheless—as acknowledged in a recent report by the European Council President entitled “Towards a Genuine EMU”—this Article also emphasizes the shortcomings of the EU political process and concludes by emphasizing that reforms are needed to improve its legitimacy and democracy. As this Article seeks to make clear, criticizing judicial interferences in fiscal affairs and stressing the legitimacy of the ordinary EU law-making procedure in no way implies idealizing it. On the contrary, the legitimacy of the EU political process urgently needs to be improved. However, this should be achieved through greater democratization, rather than greater judicialization.

The Article is structured as follows. Part I provides an overview of the main reforms adopted by the EU institutions and member states to tackle the

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5. On the notion of judicialization see notably MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS AND JUDICIALIZATION 71 (2002), defining judicialization as the process of mutation of the role of the judicial power with its growing capacity to shape strategic behavior of political actors.

Euro-crisis and classifies the three main innovations brought about to the constitution of EMU: tighter budgetary constraints, new mechanisms of financial solidarity, and an enhanced framework for economic adjustment. Part II analyzes court decisions and describes in some detail the legal reasoning and substantive outcomes of cases dealing with the new EU fiscal constitution delivered by high courts in Estonia, France, Germany, Ireland, and Portugal, as well as by the ECJ. Part III compares the decisions of courts to identify a rising trend of judicial involvement and explains its cause in the intergovernmental strategy that was followed in response to the Euro-crisis. Here, after a brief *excursus* on judicial review and the economic constitution in the United States, the Article evaluates the comparative advantages of the political process over the courts in the fiscal domain and considers the avenues that are open to the political branches to devise future responses to the Euro-crisis which are both more democratic and less subject to the whims of the judiciary. Finally, Part IV sketches how future reforms should focus on improving the responsiveness of the EU political process as an alternative to greater judicial involvement in the fiscal arena.

I. THE NEW CONSTITUTION OF THE EMU

Since the outburst of the crisis in 2008-2009, EU institutions and member states have engaged in a major effort to overhaul the architecture of fiscal governance in Europe. As a result, the fiscal constitution of the EMU has been profoundly changed in order to adapt to new circumstances. The constitution of the EMU designed in Maastricht—while setting up a purely federal framework on monetary affairs, centered on a common currency and the role of the European Central Bank (ECB) to maintain “price stability”—relied, in fiscal affairs, on mild budgetary constraints, economic policy coordination, and unlimited faith in the capacity of the markets to rein in governmental fiscal mismanagement. The fiscal constitution that has recently emerged from the responses to the Euro-crisis, on the other hand, is based on three main components. First, the EMU is characterized by tighter budgetary constraints, which subject state budgetary policies to hard domestic limits and pervasive supranational controls. Second, it is endowed with novel instruments of


10. See infra Part I.A.
Fabbrini: The Euro-Crisis and the Courts: Judicial Review and the Political

financial stabilization, aimed at providing solidarity to countries in economic difficulties and preventing contagious effects in the EMU. Third, it provides a clear mandate for economic adjustment, introducing powers for the EU institutions to dictate—and, simultaneously, duties for the member states (especially those which receive financial support) to implement—reforms to their economies as a condition for benefitting from transnational aid. A few words will suffice here to describe each of these three features.

A. Budgetary Constraints

On the assumption that the root causes of the crisis lay in unsustainable public finances, one of the main reforms adopted by both the member states and the EU institutions since 2009 has been the introduction of tighter budgetary constraints aimed at strengthening fiscal discipline and limiting government spending. The objective of ensuring the sustainability of state budgets was already enshrined in the Stability and Growth Pact (SGP) originally enacted in two Council regulations in 1997, and currently attached as Protocol 12 to the EU Treaties, which requires the member states of the EMU to maintain their public deficit below the yearly ratio of 3 percent of GDP and the total public debt below 60 percent of GDP. The weaknesses of the enforcement mechanisms of the SGP, however, ensured widespread non-compliance by EMU countries with the SGP debt and deficit criteria. In response to the failure of the existing legal mechanism, the EU institutions and the member states adopted a two-pronged legal strategy.

On the one hand, several EU legislative acts were enacted to improve the capacity of the EU institutions to supervise and correct budgetary policies of the member states. Pursuant to the so-called “Six Pack” of five regulations and one directive of November 2011, the preventive and corrective limbs of the SGP

11. See infra Part I.B.
12. See infra Part I.C.
were changed, creating new capacities for the EU Commission to sanction and fine member states for breaches of the deficit and debt rules, as well as establishing a new “macro-economic imbalance procedure” to alert member states of the destabilizing elements of their economies. At the same time, EU law introduced minimum requirements for the design and operation of state budgetary laws, which will be assessed in the framework of the so-called “European semester” in which member states submit their draft budgets to the Commission for compliance with the broader economic forecasts of the EU. Moreover, pursuant to the so-called “Two Pack” of regulations of May 2013, the Commission’s power of surveillance over the budgetary policies of the member states was increased even further, with the ability to object to budget bills drafted by national governments and to require further changes before they are tabled for approval in state parliaments.

On the other hand, new rules were introduced in the domestic legislation of member states to secure balanced budget obligations and internal mechanisms of automatic correction. The Euro-Plus Pact, adopted by the European Council in March 2011, encouraged member states to enhance the sustainability of public finances by translating EU fiscal rules into national legislation. Nevertheless, it was especially the Treaty on the Stability, Coordination and Governance of the EMU, the so-called Fiscal Compact signed by twenty-five EU Heads of State and Government in March 2012, that required member states to tighten internal fiscal controls. The Fiscal Compact mandated that signatory parties enact at the state level a balanced budget requirement through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected throughout the national budgetary process. The Fiscal Compact, moreover, empowered the ECJ to review whether member states duly comply with this obligation. As a result of these pressures, following the German reform of 2009, most EU member states have amended their fiscal rules.

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20. Fiscal Compact, Art. 3(2).


22. Gesetz zur Anderung des Grundgesetz (Artikel 91c, 91d, 104b, 109, 109a, 115, 143d),
their domestic constitutions to include a balanced budget requirement, prohibiting structural deficits and the accumulation of excessive debt. In September 2011, Spain quickly revised Article 135 of its Constitution to ensure that all public administrations would align their actions to the principle of budgetary stability. Similarly, in April 2012, Italy approved an amendment to Article 81 of its Constitution to tighten the balance between revenues and expenditures and to improve the sustainability of the public debt, confirming a trend of increasing constitutionalization of European budgetary constraints.

B. Financial Stabilization

On the understanding that the sovereign debt failure of one Euro-zone country could produce deleterious, contagious effects throughout the EMU, EU institutions and member states have worked in a second direction, devising new legal tools to provide support to states in financial difficulties and thus ensure the stability of the Euro-zone. These mechanisms of financial stabilization represent an entirely new addition to the architecture of the EMU constitution. The original design of the EMU was based on the idea—enshrined in Article 125 of the Treaty of the Functioning of the European Union (TFEU), the so-called “no bail-out clause”—that member states would be solely responsible for the service of their debt and that other EU member states or the ECB would be prohibited from taking up the debt burden of another state. Nevertheless, the eruption of the Euro-crisis and the complex interconnection between sovereigns and banks revealed that it was actually much easier on paper than in reality to let a country of the Euro-zone default without this producing a

BGBl. I S. 2248 (Nr. 48), 29 July 2009.

23. For more on this see generally Federico Fabbrini, The Fiscal Compact, The ‘Golden Rule’ and the Paradox of European Federalism, 36 BOSTON COLLEGE INT’L & COMP. L. REV. 1 (2013). For a comprehensive comparative examination of the constitutionalization of EU budgetary constraints in the domestic legal systems of the EU member states see THE CONSTITUTIONALIZATION OF EUROPEAN BUDGETARY CONSTRAINTS (Maurice Adams, Federico Fabbrini & Pierre Larouche eds., 2014), which reviews incorporations of balanced budget rules in the domestic systems of, among others, Germany, France, Italy, Spain, Poland, Slovakia, Hungary, Greece, the Netherlands, and Ireland.


27. See Article 125 of the TFEU (stating that “[t]he Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State.”). See also Article 123 TFEU (stating that “[o]verdraft facilities or any other type of credit facility with the European Central Bank [. . .] in favour of Union institutions [. . .]central governments [. . .] shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.”).

systemic effect on the stability of the Euro-zone as a whole. Hence, the EU institutions and the member states endowed themselves with new mechanisms to face this challenge.

The legal response proceeded in several steps. In May 2010, the Council of the EU adopted, on the basis of the powers of Article 122(2) TFEU, a regulation establishing a European Financial Stabilization Mechanism (EFSM) to grant immediate bilateral financial assistance to Greece. Subsequently, through a private company incorporated under Luxembourg law, the Heads of State and Government of the Euro-zone established a European Financial Stability Facility (EFSF), charged to operate beyond the short-term emergency which had prompted the creation of the EFSM and effectively providing support to Ireland, Portugal, and (for a second time) Greece. Finally, with the aim to set up a long-term mechanism to stabilize the Euro-zone, and on the assumption that a brand new legal basis was needed in the Treaty to avoid incompatibilities with Article 125 of the TFEU, the twenty-seven EU member states secured through a simplified revision procedure an amendment to Article 136 of the TFEU. This allowed the establishment of a permanent stability mechanism for the EMU. On this basis, the seventeen Euro-zone countries created a European Stability Mechanism (ESM) through an international treaty.

As any international organization, also the ESM enjoys several privileges, including the immunity of...
and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States.” 38 Euro-zone member states contribute to the authorized capital stock of the ESM—totalling 700 billion Euros 39—pro-quota on the basis of the subscription by their national central banks to the ECB’s capital. 40 The ESM can grant financial support to a state in need, 41 provide precautionary financial assistance, 42 directly (but subject to the existence of a single EU supervisory mechanism) recapitalize banks, 43 grant loans, 44 and purchase government bonds on the primary and secondary market. 45 Decisions about the ESM are mainly made by the Board of Governors—consisting of the Ministries of Finance of the Euro-zone member states—on the basis of unanimity rule. Nevertheless, pursuant to Article 4(4), “an emergency voting procedure shall be used where the Commission and the ECB both conclude that a failure to urgently adopt a decision to grant or implement financial assistance [ . . . ] would threaten the economic and financial sustainability of the euro area.” In this case, a decision requires only a qualified majority of 85 percent of the votes cast, calculated on the basis of the contributing shares to the ESM capital. Any dispute involving the ESM Treaty can, however, be subject to adjudication before the ECJ, 46 thus contributing to the constitutional anchoring of the ESM to the EU institutional regime. 47

C. Economic Adjustment

The introduction of mechanisms of financial assistance and the possibility for member states facing financial difficulties to receive aid from the EU and its member states, however, did not come free. A third important component of the new constitution of EMU emerging from the Euro-crisis is the introduction of the principle of conditionality as the counterweight to increasing financial solidarity. 48 Pursuant to this criterion, Euro-zone member states that obtain

persons (ESM Treaty art. 35), the inviolability of the premises (ESM Treaty art. 32) and the privilege of professional secrecy (ESM Treaty art. 34).

38. ESM Treaty art. 3.
39. ESM Treaty art. 8.
40. ESM Treaty art. 11 & Annex 1.
41. ESM Treaty art. 13.
42. ESM Treaty art. 14.
43. ESM Treaty art. 15.
44. ESM Treaty art. 16.
45. ESM Treaty arts. 17 & 18.
46. ESM Treaty art. 37.
47. Otherwise, pursuant to ESM Treaty art. 44, any new state of the EU who adopts the Euro as its currency shall become a member to the ESM by ratifying its founding Treaty.
48. See Vestert Borger, How the Debt Crisis Exposes the Development of Solidarity in the
financial aid to address a situation of quasi-default are not only required to enact tight budgetary constraints (as any other country of the EU), but are also subject to specific economic adjustment programs designed to reform the fundamentals of their economy and address structural weaknesses in their domestic systems in areas as far ranging as the flexibility of the labor market, the effectiveness of tax collection, the size and organization of the public administration, the nature and degree of social entitlements, and the characteristics of the banking sector. The last component of the legal response to the Euro-crisis designed in EU legislation and treaties, therefore, comprises a set of measures whereby the EU institutions (mostly together with the IMF) are empowered to elaborate country-specific programs of economic adjustments and member states contractually agree to implement them within their domestic regimes under supranational supervision.

Besides Article 5(2) of the Fiscal Compact, which foresees the possibility of adopting an economic partnership program, the ESM Treaty now codifies the general legal template for the negotiation of a program of economic adjustment. Pursuant to Article 13(3), if the ESM Board of Governors decides to grant assistance to a Euro-zone member state, it shall entrust the European Commission—in liaison with the ECB and, wherever possible, together with the IMF—with the task of negotiating, with the ESM Member concerned, a memorandum of understanding (an ‘MoU’) detailing the conditionality attached to the financial assistance facility. The content of the MoU shall reflect the severity of the weaknesses to be addressed and the financial assistance instrument chosen.

As the MoUs signed by Greece, Portugal, Ireland, Spain, and now Cyprus make clear, these instruments constitute a binding road map that member states receiving financial assistance must respect in order to continue obtaining financial assistance. The MoU shall be fully consistent with the measures of economic policy coordination provided for in the TFEU, in particular with any act of EU law, including any opinion, warning, recommendation or decision addressed to the state concerned. At the same time, the EU Commission, the ECB and the IMF—the so-called “troika”—are empowered to constantly

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49. See supra Part I.A.
50. See Damian Chalmers, The European Redistributive State and a European Law of Struggle, 18 E. L. J. 667 (2012) (emphasizing capacity of the EU institutions to dictate to member states policy reforms in a broad range of fields).
51. See Euro Summit, Statement, Oct. 26, 2011 (outlining policies that states must adopt to tackle the crisis).
52. See supra Part I.B.
54. ESM Treaty Art. 13(3).
monitor progress by the state under an assistance program and demand the adoption of new policies aimed at reaching the agreed goals.55

Economic adjustment programs are carried out domestically by national governments and legislatures through appropriate legislation. Nevertheless, as Kenneth Armstrong has underlined:

[f]or those Eurozone states that have received financial support to stabilize their economies, the degree and manner of the constraint on their policy autonomy is significantly heightened. Indeed, the regular mechanisms of accountability and governance are typically suspended for such states which are subject instead to the discipline imposed via [MoU] and controls exercised in the context of 'macroeconomic adjustment programmes.'56

In sum, a relevant component of the new EMU fiscal constitution consists of novel competences for the EU institutions to dictate comprehensive adjustment programs. To address the crisis, states receiving financial support are mandated to implement domestically these programs—which often include a profound restructuring of the welfare state system.57

II. 
THE NEW CONSTITUTION OF EMU UNDER JUDICIAL SCRUTINY

The previous section summarized how EU institutions and member states responded to the Euro-crisis and explained the main features of the new constitutional architecture of the EMU. This section explores how courts have responded to the new fiscal rules of the EMU and resolved challenges on the legality of various features of the new legal measures of budgetary constraints, financial stabilization, and economic adjustment. Courts interact with the new EMU fiscal rules in at least two circumstances. On the one hand, judicial bodies are often required to approve ex ante the adoption of legal instruments that contain new fiscal obligations. In many state jurisdictions, the ratification of international treaties such as the Fiscal Compact or the ESM, is subject to prior judicial review by national high courts.58 At the same time, both national and supranational courts can be asked whether legislation enacted in the field of EMU is consistent with domestic constitutional norms or with general principles of EU law.59 On the other hand, judicial bodies are vested with powers ex post,

55. ESM Treaty Art. 13(7)
57. See Klaus Bush et al., Euro Crisis, Austerity Policy and the European Social Model: How Crisis in Southern Europe Threatens the EU’s Social Dimension, Friederich Ebert Stiftung International Policy Analysis (2013) (discussing the threat that austerity policies produce on the welfare state).
58. See, e.g., 1958 CONST., art. 54 (Fr.) (stating that if the French Constitutional Council declares a provisions of an international treaty incompatible with the Constitution, ratification can only be undertaken after amending the Constitution itself).
59. See, e.g., TEU art. 267 (stating that the ECJ shall have the power to give preliminary
that is, after the establishment of new fiscal rules. In almost all EU member states, and in the EU legal order, courts can review legislation and are thus required to take into account new fiscal commitments and balance them with other, competing constitutional values. Moreover, since the introduction of constitutional balanced budget obligations, courts can be asked to review whether national governments have complied with new budgetary constraints.

In what follows I will attempt to map early decisions by European courts dealing with the new fiscal constitution of the EMU. To this end, I examine rulings by high courts in Estonia, France, Germany, Ireland, Portugal, and the EU. Besides several pragmatic factors, the following methodological considerations justify choosing these six case studies as test cases to examine the role of courts in the Euro-crisis. Taken together, these case studies—and especially the five member states chosen—provide a comprehensive picture of the plurality of political, economic, and legal conditions characterizing the EU. In political terms, France and Germany are founding members of the EU, while Portugal and Ireland joined in the enlargements of the 1970s and 1980s and Estonia is a new member since 2005. In economic terms, France and Germany (the two biggest economies of the Euro-zone) are net contributors to the EU financial stabilization regime, as is Estonia (which has however a tiny economy), while Portugal and Ireland are two states under financial assistance programs. In legal terms, finally, France and Germany are jurisdictions with ad

rulings concerning the validity and interpretation of acts adopted by the EU institutions).


61. See, e.g., Fiscal Compact art. 8 (empowering the ECJ to police the obligation of signatory states to incorporate the “golden rule” in their domestic legal system). See Fabbrini, supra notes 23, 25.

62. For each of these cases, in fact, full text decisions by high courts are publicly available in a language I could read. See however Lina Papadopoulou, Can Constitutional Rules, even if ‘Golden’ Tame Greek Public Debt?, in THE CONSTITUTIONALIZATION OF EUROPEAN BUDGETARY CONSTRAINTS 223 (Maurice Adams, Federico Fabbrini & Pierre Larouche eds., 2014), for a description of a 2012 unpublished decision in Greek by the Greek Council of State upholding the legality of the Greek statute ratifying the MoU with the troika.

63. For additional cases dealing with legal measures adopted in response to the Euro-crisis, or at least related to it, include see Verfassungsgerichtshof [VG]H [Constitutional Court], Apr. 3, 2013, ERKENNTNISSE UND BESCHLUSSE DES VERFASSUNGSGERICHTS [VF]G No. SV 2/12 (Austria) (declaring the constitutionality of the ESM Treaty) and Corte Cost., 11 ottobre 2012, n. 223/2012, Racc. uff. corte cost. (It.) (striking down a measure freezing the salaries of judges and public managers adopted in the framework of the strategy of economic readjustment undertaken by the technocratic government of Mr. Monti).


65. See ESM Treaty, Annex I (indicating that Germany contributes to the ESM capital with a share of 27 percent and France with a share of 20 percent) and Annex II (indicating that Germany contributes to the ESM capital with 190 billion Euros and France with 142 billion Euros).
hoc centralized Constitutional Courts empowered to exercise judicial review of legislation,⁶⁶ as is (partially) Portugal,⁶⁷ whereas Ireland and Estonia endow their ordinary Supreme Courts with special powers of review.⁶⁸

By taking into account judicial deliberations in jurisdictions that are varied politically, economically, and legally, this Article seeks to provide a comprehensive picture of how courts reacted to the new fiscal constitution of EMU. As such, this Article follows what Ran Hirschl has defined as the “most-different-cases logic of comparison”⁶⁹ whereby cases that differ under a plurality of variables are compared to emphasize the common determinant of an independent variable. In this case, the point I will seek to stress is the following: regardless of the political context of the jurisdiction in which they operate, of the economic conditions, and of the peculiarities of its system of judicial review, courts have become increasingly involved in adjudicating budgetary, financial, and economic questions. By exploring a plurality of rulings delivered by courts since the outbreak of the Euro-crisis, therefore, this Part lays the foundation for a critical discussion—to be carried out in the next Part—on the role of the judiciary and of the political process in the fiscal domain.

A. Estonia

The first challenge against the new architecture of the EMU took place before the Supreme Court of Estonia (Riigikohus). In a request submitted on February 2, 2012 (before the ratification of the ESM Treaty), the Chancellor of Justice had asked the Court to rule whether the ESM Treaty, and notably its Article 4(4), was in violation of the Estonian Constitution. The contested provision introduces, by way of derogation to the ordinary decision-making rule adopted in the ESM governing bodies (which requires unanimity), the possibility to resort to an emergency voting procedure,⁷⁰ in particular, when:

[T]he Commission and the ECB both conclude that a failure to urgently adopt a decision to grant or implement financial assistance […] would threaten to a significant extent the economic and financial sustainability of the euro area [t]he

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⁶⁷. See Antonio Cortes & Teresa Violante, Concrete Control of Constitutionality in Portugal: A Means Toward Effective Protection of Fundamental Rights, 29 Penn St. Int’l L. Rev. 759 (2011) (explaining how under the Portuguese Constitution both ordinary courts and the Constitutional Court can review legislation, albeit in different situations and with different effects attached to their rulings).


⁷⁰. See ESM Treaty art. 4(4).
adoption of a decision by mutual agreement by the Board of Governors [..] requires a qualified majority of 85% of the votes cast.

In his request, the Chancellor of Justice, noticing that Estonia’s contribution to the capital of the ESM (despite amounting to almost 8.5 percent of the domestic GDP) was only 0.186 percent, underlined how the Estonian vote was not decisive under the procedure and therefore raised the question whether Article 4(4) ESM Treaty was compatible with the principle of parliamentary democracy protected by the Estonian Constitution. In a very articulate decision of July 12, 2012, the majority of the nineteen-judge Supreme Court dismissed the request of the Chancellor of Justice, holding that the clause of the ESM Treaty was compatible with the Estonian Constitution.

The Supreme Court began its opinion by summarizing the main provisions of the ESM Treaty, including its relation with EU law, and declared the request of the Chancellor of Justice admissible. The Court then outlined the “principles of the Constitution which it deem[ed] the most relevant in the adjudication of this case.” First, the Court identified the principle of sovereignty, as protected by § 1(1) of the Estonian Constitution, but clarified that this provision had to be interpreted in “the present day context” and therefore rejected the idea that sovereignty ought to be regarded as absolute. Second, the Court recalled the principle of a democratic state and clarified that this meant “that the general principles of law that are recognized in the European legal space are valid in Estonia.” Third, the Court drew from the previous two principles, “the principle of reservation by parliament” and underlined how, according to the Estonian Constitution, it was the prerogative of Parliament to pass the national budget. Moreover, the Court remarked that “the budgetary powers of the [Estonian Parliament] are one of the core competences of the [Parliament]” and concluded that the “financial competence of the [Parliament] is closely related to the state’s financial sovereignty and the principles of a democratic state subject to the rule of law and of reservation by the parliament.”

In light of this framework, the Supreme Court examined whether Article 4(4) of the ESM Treaty conflicted with the Estonian constitutional principles. In this regard, the Court found that the above-mentioned clause “interfere[d] with

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71. Judgment of the Supreme Court of Estonia en banc from 12 Jul. 2012, in the case 3-4-1-6-12 (English translation provided by the Court) [hereinafter: Est. Sup Ct., ESM judgment].
72. Id. §§ 94-107.
73. Id. §§ 108-121.
74. Id. § 126.
75. Id. § 128.
76. Id. § 131.
77. Id. § 133.
78. Id. § 136.
79. Id. § 140.
the financial competence of the [Estonian Parliament].”

Because “[d]ecisions are taken under Article 4(4) of the Treaty by a qualified majority of 85% […] Estonia may not affect the decisions of the ESM.” Therefore, by ratifying the Treaty, and contributing to the ESM capital with a substantial share of domestic financial resources, the Estonian Parliament’s possibility to make new future political choices on those resources was restricted because the decision could be adopted without the need of Estonia’s agreement.

The composition of the [Estonian Parliament] which passes a law giving rise to the state’s long-term financial obligations does not thereby restrict only its own possibilities for exercising financial competence within the same year’s state budget, but also restricts the budgetary political choices of next compositions of the [Estonian Parliament].

According to the Court, this contrasted “with the principle of a democratic state subject to the rule of law and of the state’s financial sovereignty since indirectly the people’s right of discretion is restricted.”

Nevertheless, having identified an interference by Article 4(4) of the ESM Treaty with the Constitution, the Supreme Court moved on to assess whether this interference could be regarded as justified on the basis of the proportionality test. In this regard, the Court explored the purpose of Article 4(4) and underlined how this clause introduced, by way of derogation, a voting procedure to be used only when the Commission and the ECB agree that action is needed to preserve the stability of the Euro-area. As such “Article 4(4) of the Treaty seeks to ensure the achievement of the goals of the ESM in an emergency.” According to the Court, “the economic and financial sustainability of the euro area is contained in the constitutional values of Estonia as of the time Estonia become a euro area Member State.” Moreover, because “Estonia is a part of the euro area and therefore economically and financially integrated with the other euro area Member States,” the Court held that “[a] threat to the economic and financial sustainability of the euro area is also a threat to the economic and financial sustainability of Estonia.” In the view of the Court, therefore, very pragmatic reasons weighed in favor of justifying the provisions of the ESM Treaty:

Estonia’s economy and finance are closely related to the rest of the euro area and if there are economic and financial problems in the euro area, then it inevitably affects Estonia – export and import of goods and services, state budget, and thereby also social and other fields. Problems in the euro area harm also Estonia’s competitiveness and reliability. The ESM as a financial assistance system may help to ensure that the euro area as a whole as well as a part of it, Estonia, would

80. Id. § 149.
81. Id. § 150.
82. Id. § 151.
83. Id. § 153.
84. Id. § 162.
85. Id. § 163.
86. Id. § 164.
87. Id. § 165.
be economically and financially competitive. It is necessary to guarantee people’s income, quality of life and social security. In a situation where the rest of the euro area would be in difficulties it is not probable that Estonia would be financially or economically successful, including in the field of people’s income, quality of life and social security.\textsuperscript{88}

At the same time, according to the Court, economic stability and success were clearly instrumental to the preservation of a supreme constitutional value, namely the protection of fundamental rights. As the Court remarked, “[e]xtensive and consistent guarantee of fundamental rights is extremely complicated, if not impossible, without a stable economic environment.”\textsuperscript{89} From this point of view: “The common purpose of the euro area Member States to counter threats endangering the economy and financial stability, including by way of efficient decision-making in an emergency, coincides with the [constitutional] purpose of Estonia […], to guarantee rights and freedoms.” According to the Court, therefore:

[b]y disregarding the common purpose of the euro area Member States or the measure planned for the achievement thereof, Estonia cannot follow its objectives arising from the Constitution. Consequently, the purpose of safeguarding the efficiency of the ESM also in case the states are unable to take a unanimous decision to eliminate a threat to the economic and financial sustainability of the euro area, including of Estonia, is legitimate.\textsuperscript{90}

These strong arguments of justification for Article 4(4) of the ESM Treaty fundamentally determined the result of the Court’s proportionality analysis. The Estonian Supreme Court held that the contested provision was suitable to achieve the objective of the Treaty,\textsuperscript{91} and was necessary to that end, since there were no alternative less restrictive means.\textsuperscript{92} As a matter of fact, “because Estonia’s contribution to the ESM is 0.1860\% [in] essence, the seriousness of the interference for Estonia would decrease only if unanimous decisions would be provided for in Article 4(4) of the Treaty.”\textsuperscript{93} This option, however, would contrast with the very logic of that provision. Hence in weighing, on the one hand, the purpose of the treaty—namely “the financial stability of the euro area, including of Estonia”—with, on the other hand the principles of the Constitution—namely “the preservation of Estonia’s right to decide on its public funds”—the Supreme Court concluded that Article 4(4) did not disproportionately interfere with the Estonian Constitution.\textsuperscript{96} The Court

\textsuperscript{88}. \textit{Id.} § 165.
\textsuperscript{89}. \textit{Id.} § 166.
\textsuperscript{90}. \textit{Id.} § 168.
\textsuperscript{91}. \textit{Id.} §§ 177-180.
\textsuperscript{92}. \textit{Id.} §§ 181-185.
\textsuperscript{93}. \textit{Id.} § 184.
\textsuperscript{94}. \textit{Id.} § 188.
\textsuperscript{95}. \textit{Id.}
\textsuperscript{96}. \textit{Id.} § 202.
Fabbrini: The Euro-Crisis and the Courts: Judicial Review and the Political

underlined how Article 4(4) was an emergency procedure.\(^97\) It stressed that financial assistance under Article 4(4) required strict conditionality.\(^98\) And it recalled how the Fiscal Compact subjected the possibility of obtaining aid under the ESM only to countries that had incorporated a “golden rule” in their Constitution.\(^99\) Finally, the Court emphasized that:

Estonia’s interests are advanced by cooperation with various international organizations and other states. This is the way to carry out the foreign and security policy which is at the final stage aimed at guaranteeing the preservation of the Estonian people, the Estonian language and the Estonian culture through the ages provided for in the preamble to the Estonian Constitution. International cooperation ensures that Estonia has in the international environment better chances of surviving and achieving its objectives.\(^100\)

The Court hence concluded that the ESM Treaty did not violate the Estonian Constitution.\(^101\)

The decision of the Court, nevertheless, prompted five dissenting opinions, including one supporting the substantive outcome of the case but arguing that the Court should have declared the case inadmissible.\(^102\) In a short and poignant dissent, Judge Jüri Ilvest rejected the idea that sovereignty was reshaped by globalization, criticized the lack of unanimity under Article 4(4) and concluded that it should have been only up to the Estonian people via referendum to decide whether to ratify the ESM Treaty.\(^103\) Equally, six other judges criticized the majority opinion in a joint concurrence, which notably rejected the use of proportionality analysis used to support the constitutionality of Article 4(4).\(^104\)

In their dissent, the six judges emphasized how the Court should have “assessed whether the contested emergency procedure which leaves the state of Estonia out of the decision-making outweighs the sovereignty of the state of Estonia, including the financial competence of the [Estonian Parliament] and the principle of a state subject to the rule of law which are one of the most

97. Id. § 192.
98. Id. § 193.
99. Id. § 194.
100. Id. § 201.
101. Although the issue was, strictly speaking, beyond the reference raised by the Chancellor of Justice, the Supreme Court devoted a final paragraph of its opinion to comment upon the relationship between the EU legal order and the Constitution of Estonia. Even if the ESM was technically neither primary nor secondary law of the EU, the Court expressed its view that the Treaty substantially “concerned EU law and thereby Estonia’s membership of the [EU].” Id. § 221. In this light, the Court clarified that while the constitutional referendum allowing Estonia to accede the EU “allowed Estonia to be part of the changing EU […] if it becomes evident that the new founding treaty of the EU or the amendment to a founding treaty of the EU gives rise to a more extensive delegation of the competence of Estonia to the EU and a more extensive interference with the Constitution, it is necessary to seek the approval of the holder of supreme power, i.e. the people, and presumably amend the Constitution once again.” Id. § 223.
102. Id. (Kõve, J., dissenting).
103. Id. (Ilvest, J., dissenting).
104. Id. (Jõks, Järvesaar, Kergandberg, Kivi, Kull, and Laarmaa, Js., dissenting).
substantial principles” and made clear that in their view the answer to that question ought to be negative.105 According to the dissenting opinion, there was no univocal economic-scientific analysis at the basis of the decision of the Court.106 Moreover, while the dissenters acknowledged that “participation in international cooperation is without a doubt an argument in favour of accession to the ESM Treaty,” they voiced their worry that Estonia would never be able to enjoy the benefits of participation in the ESM, since, given the sheer size of its economy, a financial crisis in Estonia would not amount to a threat to the euro area as a whole.107

In a fourth dissenting opinion, Judge Tampuu criticized the decision of the Court, arguing that the proportionality test is suitable for constitutional review “where the matter of an interference with a person’s fundamental rights is being adjudicated.”108 In the present case, on the contrary, the question was whether the Estonian Parliament could “waive part of its budgetary powers to the ESM.”109 According to Judge Tampuu, the answer ought to be in the negative, because the popular referendum by which Estonia had accessed the EU did not authorize the transfer “of budgetary powers to the [EU]”110 with the result that ratification of Article 4(4) ESM Treaty could only be permitted through a constitutional amendment. Particularly critical of the majority opinion, finally, was the dissent by Judge Luik. In his view, the Estonian Constitution introduced an absolute prohibition on the alienation of sovereignty, which ought to be read in light of the history of Soviet occupation of the country.111 Moreover, according to Judge Luik, the ESM Treaty created a situation in which only wealthy countries of the euro area would benefit—running afoul of the principle of solidarity. As he remarked, “as of the adoption of the euro the consumer prices have constantly risen in Estonia. [Moreover] Estonia is without a doubt one of the poorest countries in the euro area.”112 Yet, with the ESM Treaty “Estonia undertakes to guarantee with the taxpayer’s money the sustainability of the states of the euro area which are many times wealthier than Estonia, including the sustainability of the private sector (banks) of the said states.”113 Hence, Judge Luik rejected the trust of the Court’s majority opinion in the “mystical efficiency of the ESM”114 and conclusively expressed the dissent’s disbelief in the capacity of the ESM to safeguard the prosperity of Estonia.

105. Id. § 8.
106. Id. § 11.
107. Id. § 12.
108. Id. § 2 (Tampuu, J., dissenting).
109. Id.
110. Id. § 3.
111. Id. §§ 5-6 (Luik, J., dissenting).
112. Id. § 16.
113. Id. § 17.
114. Id. § 19.
The decision of the Supreme Court of Estonia on the compatibility of Article 4(4) of the ESM Treaty with the Constitution of Estonia, if read together with the multiple dissenting opinions, reveals a favorable—but hard-fought—stand vis-à-vis the new architecture of fiscal governance in the EMU. Whereas nine dissenting judges emphasized the limitation to national sovereignty, as well as the potential economic burdens that participation in the ESM would cause to Estonia, a bare majority of ten judges emphasized the social and political advantages that would ensue from Estonian involvement in the ESM and concluded that ratification of the ESM pursued a purpose of constitutional value. In this regard, the majority opinion sent a message of openness toward the new mechanisms of financial stability being set up at the EU level and indicated that Estonian involvement in this new venture was a necessary condition for the future economic and financial prosperity of the country.

Despite the sovereigntist concerns of a large part of the court, in the end, the Riigikohus, as the Supreme Court of one of the smallest member states of the Euro-zone, opted for a decision embedding the participation of Estonia in the new European fiscal architecture and simultaneously reflected the hope that a positive solution of the Euro-crisis would also favor the economic and social development of Estonia.

B. France

In July 2012, the President of the Republic asked The French Constitutional Council (Conseil Constitutionnel) to decide whether the ratification of the Fiscal Compact was compatible with the French Constitution. Pursuant to Article 54 of the 1958 French Constitution, the Constitutional Council can be asked to decide (upon referral of the President, the Prime Minister, the President of each of the two chambers of Parliament or sixty deputies or sixty senators) whether the ratification of an international treaty “contains a clause contrary to the Constitution,” in which case ratification of the treaty must be preceded by a constitutional amendment. In its (short) decision of August 9, 2012, the Constitutional Council ruled that the Fiscal Compact did not require a constitutional change, hence validating French accession to the treaty.

The Constitutional Council began its decision by outlining the frames of reference it would use in its review. The Council recalled that Article 3 of the 1789 Declaration of the Rights of Man and Citizen proclaimed that “the principle of all sovereignty resides essentially in the nation” and that Article 3 of

117. See 1958 CONST. art. 54 (Fr.).
the 1958 Constitution declares that “national sovereignty belongs to the people.” At the same time, it emphasized that the Preamble to the 1946 Constitution clarified that France “conforms to the rules of public international law” and “under conditions of reciprocity […] consents to limitations of sovereignty necessary to the organization and defense of peace.” Furthermore, it remarked that subsequent constitutional amendments to the 1958 Constitution had “enshrined the existence of a legal order [of the EU] integrated to the domestic legal order and distinct from the international legal order.” According to the Council, these constitutional provisions “while confirming the position of the Constitution at the summit of the domestic legal order, […] allowed France to participate in the creation and development of a permanent European organization, endowed with legal personality and vested with decision-making powers by the transfer of competences accorded by the member States.” While the Council recognized that the Fiscal Compact was not technically part of EU law, it thus clarified that its review would not extend to those “clauses of the treaty which replicated obligations already subscribed by France.”

On the merits of the case, the Council chose to focus its attention on Article 3 of the Fiscal Compact, neutralizing potential incompatibilities between this clause and the French Constitution. To begin with, the Council stated that the requirement of Article 3 to strengthen the domestic budgetary constraints did not add any novel obligation for France:

France is already required to respect the rules of Article 126 [TFUE], relating to the containment of excessive States deficits, as well as Protocol n° 12, annexed to the [Treaties], on the procedure concerning the excessive deficits [and] these rules include a standard of reference set at 3% for the ratio between the foreseen or effective public deficit and the gross domestic product at market prices.

119. 1958 Const., art. 3 (Fr.).
120. 1946 Const., Preamb. (Fr.). Notice that the French Constitutional Court has recognized that the Preamble of the French Constitution of 1946 constitutes part of the constitutional principles on the basis of which it carries out its review. See on this ALEC STONE SWEET, THE BIRTH OF JUDICIAL POLITICS IN FRANCE (1992).
122. Id. § 9 (my own translation) (“confirmant la place de la Constitution au sommet de l’ordre juridique interne, ces dispositions constitutionnelles permettent à la France de participer à la création et au développement d’une organisation européenne permanente, dotée de la personnalité juridique et investie de pouvoirs de décision par l’effet de transferts de compétences consentis par les États membres.”).
123. Id. § 11 (my own translation) (“stipulations du traité qui reprennent des engagements antérieurement souscrits par la France”).
124. Id. § 15 (my own translation) (“La France est d’ores et déjà tenue de respecter les exigences résultant de l’article 126 du [TFUE], relatif à la lutte contre les déficits excessifs des États, ainsi que du protocole n° 12, annexé aux [TUE], sur la procédure concernant les déficits excessifs [et] ces exigences incluent une valeur de référence fixée à 3% pour le rapport entre le déficit public prévu ou effectif et le produit intérieur brut aux prix du marché.”).
Moreover, the Council indicated that the “Six Pack” had tightened the deficit brake under EU law.125 As a result, according to the Council, the provisions of the Fiscal Compact simply re-affirmed and reinforced “the provisions putting in place the obligations of the [M]ember States of the [EU] to coordinate their economic policies pursuant to Articles 120 to 126 [TFUE].”126 From which it followed “that, no more than the previous budgetary obligations, the duty to respect these new rules does not challenges the essential conditions for the exercise of national sovereignty.”127

Secondly, the Council rejected a possible incompatibility between Article 3(2) of the Fiscal Compact, demanding the incorporation of the “golden rule” at the domestic level, and the French Constitution.128 As the Council clarified, after the ratification of the Fiscal Compact “France will be, pursuant to the rule pacta sunt servanda, bound by these obligations”129 with the result that “it belongs to the various State institutions to ensure, in the framework of their respective competences, the application of the treaty.”130 Nevertheless, on the specific duty to incorporate the “golden rule,” the Constitutional Council underlined how Article 3(2) of the Fiscal Compact introduced:

an alternative on the basis of which the contracting States commit to give effect to the rule enshrined in Article 3(1) in their national legal order, either ‘through provisions of binding force and permanent character, preferably constitutional,’ or through provisions ‘otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes.’131

If the French government was following the first option, “choosing to incorporate the rules enshrined in Article 3(1) through provisions of binding force and permanent character, the authorization to ratify the treaty ought to be

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125. See supra text accompanying note 16.
127. Id. § 16 (my own translation) (“que, pas plus que les engagements antérieurs de discipline budgétaire, celui de respecter ces nouvelles règles ne porte atteinte aux conditions essentielles d’exercice de la souveraineté nationale.”).
128. See supra text accompanying note 20.
129. Conseil constitutionnel decision [CC] [Constitutional Court] No. 2012653DC, Aug. 9, 2012, Rec. § 18 (Fr.) (my own translation) (“la France sera, en application de la règle « pacta sunt servanda », liée par ces stipulations”).
130. Id. § 18 (my own translation) (“il appartiendra aux divers organes de l’État de veiller dans le cadre de leurs compétences respectives à l’application de ce traité.”).
131. Id. § 19 (my own translation) (“une alternative selon laquelle les États contractants s’engagent à ce que les règles énoncées au paragraphe 1 de l’article 3 prennent effet dans leur droit national, soit au moyen de dispositions contraignantes et permanentes, de préférence constitutionnelles’, soit au moyen de dispositions ‘dont le plein respect et la stricte observance tout au long des processus budgétaires nationaux sont garantis de quelque autre façon’.”).
preceded by a revision of the Constitution.”132 On the other hand, if it was following the second, no constitutional revision was needed.133

As the Constitutional Council made clear, the French legal order included a legal source, the organic law (loi organique), which allowed the faithful incorporation of the “golden rule” without demanding a constitutional revision. Article 34(22) of the Constitution made possible the adoption “of an organic law [. . .] to set up the framework for the program laws relating to the multiannual orientation of public finances.”134 According to the Council these provisions could serve as the benchmark to assess the constitutionality of the budgetary laws adopted by Parliament. In fact, the Constitutional Council re-affirmed its duty under Article 61 of the French Constitution “to review conformity with the Constitution of the program laws on the multiannual orientation of public finances, of the budget laws and the laws for the financing of social security.”135 Moreover, it signaled its commitment to exercise this task carefully, including “by taking into account the advice of independent institutions”136—whose creation was also demanded by the Fiscal Compact.

Having concluded that the incorporation of Article 3(2) could be accomplished simply with an organic law, the Constitutional Council also indicated that Article 8 of the Fiscal Compact, which empowers the ECJ to review the incorporation of Article 3(2) and to sanction disobedient states, raised no constitutional problem.137 According to the Council:

taking into account that Article 3(2) does not require a constitutional revision, the provisions of Article 8 do not have the effect of empowering the [ECJ] to assess, in this context, the conformity of the Constitution with the obligations of this treaty. [. . .] As a result, if France decides to give effect to the rules of Article 3(1) of the treaty with the modalities foreseen by the second branch of the alternative of the first sentence of Article 3(2), then Article 8 does not challenge the essential conditions for the exercise of national sovereignty.138

132. Id. § 21 (my own translation) (“fai[sant] le choix de faire prendre effet aux règles énoncées au paragraphe 1 de l’article 3 au moyen de dispositions contraignantes et permanentes, l’autorisation de ratifier le traité devra être précédée d’une révision de la Constitution.”).
133. Id. § 28.
134. Id. § 24 (my own translation) (“des dispositions de nature organique [. . .] pour fixer le cadre des lois de programmation relatives aux orientations pluriannuelles des finances publiques”).
135. Id. § 27 (my own translation) (“de contrôler la conformité à la Constitution des lois de programmation relatives aux orientations pluriannuelles des finances publiques, des lois de finances et des lois de financement de la sécurité sociale”).
136. Id. § 27 (my own translation) (“en prenant en compte l’avis des institutions indépendantes”).
137. See supra text accompanying note 21.
138. Conseil constitutionnel decision [CC] [Constitutional Court] No. 2012-653DC, Aug. 9, 2012, Rec. § 30 (Fr.) (my own translation) (“[c]onsidérant que, le paragraphe 2 de l’article 3 n’imposant pas qu’il soit procédé à une révision de la Constitution, les stipulations de l’article 8 n’ont pas pour effet d’habiliter la [CJUE] à apprécier, dans ce cadre, la conformité de dispositions de la Constitution aux stipulations du présent traité. [. . .] Par suite, si la France décide de faire prendre effet aux règles énoncées au paragraphe 1 de l’article 3 du traité selon les modalité fixées à
With this réserve d’interprétation, the Council then briefly surveyed the other provisions of the Fiscal Compact, and found that none of them included “new binding provisions which add upon the provisions included in the [EU] Treaties.” As a result, it concluded that the Fiscal Compact “does not include any clause contrary to the Constitution.”

The decision of the Constitutional Council with respect to the Fiscal Compact validated the entry into force of a central feature of the new fiscal constitution of the EMU. By interpreting the obligation of Article 3(2) as requiring simply the adoption of a loi organique, rather than a constitutional amendment, the Council largely eased the task for the French government in adopting the domestic legal instruments necessary to comply with the Fiscal Compact. At the same time, the Constitutional Council took the opportunity to reaffirm its position as the institution charged to review the constitutionality of budgetary laws approved by the French Parliament. Moreover, it attempted to reduce the powers of the ECJ under Article 8 of the Fiscal Compact through a restrictive reserve of interpretation (réserve d’interprétation) of that treaty. Whether this réserve d’interprétation with regard to the powers of the ECJ has any bite is doubtful. Pursuant to Article 8 of the Fiscal Compact, the ECJ will still be required to verify whether the loi organique adopted by France is compatible with the principles of Article 3(2). Nevertheless, by clarifying that the Fiscal Compact demanded a scrutiny of compatibility of ordinary budgetary legislation with the “golden rule” and by indicating its commitment to exercise this scrutiny attentively, the Constitutional Council seized the opportunity offered by the new European fiscal architecture and readily welcomed these institutional changes to expand its domestic powers of review.

C. Germany

Among the European courts, the most active one in reviewing legislation adopted in the framework of the new architecture of the Euro-zone has been the Constitutional Court of Germany (Bundesverfassungsgericht). To begin with, on September 7, 2011, the Constitutional Court delivered a judgment on the compatibility with the German Basic Law of the first rescue package adopted to aid Greece. The case concerned the legislation adopted by the German

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139. Id. § 35 (my own translation) (“contient de clause nouvelle contraignante qui s’ajouteraient aux clauses contenus dans les traités relatifs à [l’UE].”).
140. Id. § 36 (my own translation) (“ne comporte pas de clause contraire à la Constitution.”).
142. See supra notes 23, 25.
143. See also infra Table 1.
144. BVerfG, Case No. 2 BvR 987/10, judgment of 7 Sept. 2011 (upholding the EFSF and the Euro-rescue package) [hereinafter BVerfG, EFSF judgment].
Parliament to implement the EFSF and to allow the payment of an emergency loan for the financial assistance of Greece.\textsuperscript{145} Through individual complaints (Verfassungsbeschwerde), a number of citizens had challenged the constitutionality of these domestic measures as a violation of the right of the German Parliament to make decisions about the budget, and therefore as an interference with the right to democracy protected (as inviolable) by the Basic Law. The Second Senate of the Constitutional Court declared the case admissible but rejected the constitutional complaints, holding that the two pieces of legislation under review did not violate the Parliament’s budgetary autonomy.\textsuperscript{146} The Court, however, affirmed that any large amount of financial aid had to be approved by Parliament as the locus of democratic legitimacy, and thus required an interpretation of the legislation as imposing prior involvement of the Parliament on every decision by the Federal Government to accord financial guarantees under the EFSF.\textsuperscript{147}

Moreover, the Constitutional Court was also at the center of public attention in 2012 when it was asked to review the constitutionality of the ESM Treaty and the Fiscal Compact.\textsuperscript{148} This case, which had originated from an inter-institutional proceeding (Organsstreit) brought by the parliamentary group Die Linke and by five individual constitutional complaints, sought to obtain a temporary injunction preventing the German Federal President from signing the Fiscal Compact, the ratification of the amendment to Article 136(3) TFEU, and the ESM Treaty. While from the procedural point of view the case only required a decision on preliminary measures (pending decision on the merits), the Constitutional Court carried out a summary review of the complaints, de facto undertaking a substantive control of the legislation pending before it.\textsuperscript{149}

\textsuperscript{145} For a comment to the decision see Sebastian Recker, Casenote—Euro Rescue Package Case: The German Federal Constitutional Court Protects the Principle of Parliamentary Budget, 12 GER. L.J. 2071 (2011).

\textsuperscript{146} BVerfG, EFSF judgment, §§ 94, 119.

\textsuperscript{147} The decision opened a stream of litigation before the Constitutional Court on the precise role of the Parliament vis-à-vis the Government on issues related to the responses to the Euro-crisis. See BVerfG, Case No. 2 BvE 8/11, Feb. 28, 2012 (holding that legislation allowing a special 9-member committee of the Bundestag to authorize, in cases of emergency, the government to act in the management of the EFSF violated the right of the Parliament, as a whole, to be involved in decisions relating to the EFSF); BVerfG, Case No. 2 BvE 4/11, June 19, 2012 (holding that the Government had violated the right of the Parliament to be fully and comprehensively informed about the negotiation undertaken at the EU level for the adoption of the Euro-plus Pact and of the ESM Treaty). See Susanne Schmidt, A Sense of Déjà Vu? The FCC’s Preliminary European Stability Mechanism Verdict, in 14 GER. L. J. 1, 10-11 (2013).

\textsuperscript{148} As acknowledged in an interview by Andreas Vosskuhle, the President of the German Constitutional Court: See Frédéric Lamaître, L’Europe à l’épreuve des tribunaux, LE MONDE, 2 Oct. 2012 (emphasizing how the judgment had been awaited all over the world and how the Court had a special responsibility).

\textsuperscript{149} The German Constitutional Court is expected to deliver its final judgment on the case in 2014. Because the ruling was, albeit summary, very detailed, it is expected that the final judgment will largely confirm the interim decision. However, a thorny issue which the Bundesverfassungsgericht has decided to address incider tantum in its final case, concerns the
Fabbrini: The Euro-Crisis and the Courts: Judicial Review and the Political

judgment of September 12, 2012, the Constitutional Court rejected the request for temporary injunction, holding that the Fiscal Compact, the amendment to the Article 136(3) TFEU, and the ESM Treaty were compatible with the German Basic Law, although in the case of the latter, the Court indicated two conditions that Germany had to clarify with a declaration under international law.\footnote{150}{BVerfG, Case No. 2 BvR 1390/12 et al., judgment of Sept. 12, 2012 [hereinafter BVerfG, ESM judgment] (English translation partially provided by the court. Please note that, unless otherwise stated, the citations below are all drawn from the English translation of the judgment. Please also note that, because not the entire decision is translated in English, the numbering of the paragraphs in the German and the English versions of the judgment do not correspond. When the text cites the decision in German, the footnote will cite explicitly to the German version with the corresponding number referring to the German version).}

The Court, after describing in detail the facts leading to the adoption of the ESM Treaty and of the Fiscal Compact,\footnote{151}{Id. §§ 2-10.} their content,\footnote{152}{Id. §§ 11-107.} as well as the legislation adopted by the German Parliament to implement them at the domestic level,\footnote{153}{Id. §§ 108-145.} outlined the constitutional principles that it would consider in its review. Here, by building on its previous decisions on EU integration,\footnote{154}{See generally Erich Vranes, German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis, 14 GER. L. J. 74 (2013).} the Court stated that the right to elect the German lower house of Parliament (Bundestag) enshrined in Article 38(1) of the German Basic Law is “a right equivalent to a fundamental right, guarantees the citizens’ self-determination and guarantees free and equal participation in the state authority exercised in Germany.”\footnote{155}{BVerfG, ESM judgment, § 192.} As such, in the Court’s view, Article 38(1) renders justiciable the principle of democracy of Article 20 of the Basic Law, which is “protected by Article 79(3) of the Basic Law as the identity of the constitution even against interference by the constitution-amending legislature.”\footnote{156}{Id. § 192.} Furthermore, the Court clarified that “[t]here is a violation of Article 38(1) of the Basic Law in particular if the German Bundestag relinquishes its parliamentary budget responsibility with the effect that it or a future Bundestag can no longer exercise the right to decide on the budget on its own responsibility.”\footnote{157}{Id. § 194.} According to the Constitutional Court, in fact, “[t]he decision on public revenue and public expenditure is a fundamental part of the ability of a constitutional state to democratically shape itself.”\footnote{158}{Id. § 194.}

As a corollary to this, the Court made five additional statements which developed notions already advanced in its decision of September 7, 2011. First, it held that “[a]s representatives of the people, the elected Members of the power of the ECB to undertake non-conventional monetary policies. See infra note 183. 
German Bundestag must retain control of fundamental budgetary decisions even in a system of intergovernmental governing.\textsuperscript{159} Second, it noticed that the “Bundestag may not deliver itself up to any mechanisms with financial effect which [. . .] may result in incalculable burdens with budget significance without prior mandatory consent.”\textsuperscript{160} Third, it emphasized the need for the “budget legislature [to] make[] its decisions on revenue and expenditure free of other-directedness on the part of the bodies and of other Member States of the European Union [so as to] remain[] permanently ‘the master of its decisions.’”\textsuperscript{161} Fourth, it repeated that the “Bundestag must individually approve every large-scale federal aid measure on the international or European Union level made in solidarity resulting in expenditure.”\textsuperscript{162} And finally, it underlined that the Bundestag ought to be able to have access to the information needed to exercise its budgetary competence.\textsuperscript{163} Nevertheless, the Constitutional Court acknowledged that the Bundestag enjoyed “latitude” in deciding what budgetary commitments to undertake vis-à-vis the EU partners,\textsuperscript{164} and—after emphasizing how the EU Treaties provisions on EMU had established a “stability community,”\textsuperscript{165} aimed at protecting the Bundestag’s overall budget responsibility—it stated that “[i]t is for the legislature to decide how possible weaknesses of the monetary union are to be counteracted by amending [EU] law.”\textsuperscript{166}

In light of this framework of reference, the Constitutional Court held that the legislation implementing the ESM Treaty “essentially [took] account of the requirements of Article 38(1), Article 20(1) and (2) in conjunction with Article 79(3) of the Basic Law.”\textsuperscript{167} Nevertheless, since certain interpretations of the provisions of the ESM Treaty might violate the Bundestag’s overall budgetary responsibility, the Court required that this “be effectively precluded by declarations under international law made upon ratification of the Treaty.”\textsuperscript{168} One set of provisions of the ESM to be clarified was that on revised increased capital calls (Article 9(2) and (3), sentence one in conjunction with Article 25(2) of the ESM Treaty).\textsuperscript{169} Although Article 8 of the ESM Treaty “bindingly limit[ed]” Germany’s budgetary commitments to 190 billion euros,\textsuperscript{170} the Court indicated that the Basic Law prohibited any increase beyond that “without the

\textsuperscript{159} BVerfG, ESM judgment, § 195.
\textsuperscript{160} Id. § 196.
\textsuperscript{161} Id. § 197.
\textsuperscript{162} Id. § 198.
\textsuperscript{163} Id. § 199.
\textsuperscript{164} Id. § 201.
\textsuperscript{165} Id. § 203.
\textsuperscript{166} Id. § 206.
\textsuperscript{167} Id. § 208.
\textsuperscript{168} Id. § 209.
\textsuperscript{169} See supra text accompanying note 39.
\textsuperscript{170} BVerfG, ESM judgment, § 212.
ratification of the Bundestag." As such, the Court demanded that the German government, at the act of ratification of the ESM Treaty and "to remove [. . .] doubts," declare that the "provisions of this Treaty [. . .], may only be interpreted or applied in such a way that no higher payment obligations are established for [. . .] Germany." 172

Another set of provisions of the ESM to be clarified was the inviolability of documents (Articles 32(5) and 35(1)) and the professional secrecy of the legal representatives of the ESM (Article 34). 173 While these provisions admitted "an interpretation which makes sufficient parliamentary monitoring of the [ESM] by the German Bundestag possible," the Court held that, since the Treaty made no "exception in favour of the national parliaments," a specific declaration ought to secure this possibility. According to the Court, the secrecy of the ESM only intended to "prevent a flow of information to unauthorized third party," but could not be opposed vis-à-vis "the parliaments of the Member States, including the Bundestag." The duty to keep the national parliaments, as holders of budgetary authority, fully informed about the ESM, otherwise, was all the more important for the following reason: "due to the form chosen for the treaty – that of an international treaty complementing the integration programme of the European Union [. . .] – no monitoring by the European Parliament is possible." 175 For this reason, the Court required the German government, at the act of the ratification of the ESM Treaty, to make a declaration interpreting the Treaty in a way "which guarantees that with regard to their decisions, [both chambers of the German Parliament] will receive the information which they need to be able to develop an informed opinion." 176

The Constitutional Court, instead, held that Article 4(8), which suspends voting rights for states that failed to meet their obligations to pay the ESM, was not incompatible with the German Basic Law. 177 Moreover, it held that the Bundestag was free to decide to contribute up to 190 billion euros to the ESM capital. According to the Court:

The Bundestag and the Federal Government stated in detail that the risks involved with making available the German shares in the [ESM] were manageable, while without the granting of financial facilities by the [ESM] the entire economic and social system was under the threat of unforeseeable, serious consequences. Even

171. Id. § 222.
172. Id. § 220.
173. Id. § 222.
174. See supra text accompanying note 38.
175. BVerfG, ESM judgment, § 223.
176. Id. § 225.
177. Id. § 226.
178. Id.
179. Id.
180. Id. §228.
181. Id. §§ 230-239.
though these assumptions are the subjects of great controversy among economic experts, they are at any rate not evidently erroneous. Therefore the Federal Constitutional Court may not replace the legislature’s assessment by its own.  

Finally, the Court summarily rejected the complaint raised against other provisions of the ESM Treaty for alleged violation of the prohibition of monetary financing, but already signaled its attention towards the issue of a circumvention of Article 123 of the TFEU by the ECB. Here the Court held inter alia that “[t]he ban on monetary financing as an important element for safeguarding the constitutional requirements of the precept of democracy under EU law [. . .] was not affected by the Treaty establishing the [ESM].” And, citing the ECJ in support of the statement that “[a]s an internal agreement between EU Member States, the Treaty establishing the [ESM] must at any rate be interpreted in conformity with [EU] law,” it stressed that the ESM could not bypass the prohibition of monetary financing by the ECB enshrined in the EU Treaties.

Unsurprisingly, then, the German Constitutional Court in its decision of September 12, 2012, also gave its approval to the ratification of the Fiscal Compact. As I argued elsewhere, in fact, the main provisions of the Fiscal Compact were modeled on the balanced budget rules introduced in the German Basic Law with the Federalism Reform of 2009. The Constitutional Court, therefore, acknowledged that Article 3(2) Fiscal Compact was almost identical with the existing requirements of the German Basic Law, and simultaneously underlined how the other provisions of the Fiscal Compact replicated requirements already existing under EU law. Moreover, cross-referencing the

182. Id. § 240.
183. See supra note 27. The question whether action by the ECB is in violation of Article 123 of the TFEU is now at the core of another major case pending before the German Constitutional Court. See 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvR 1824/12 and 2 BvE 6/12 [Cases 2 BvR 1390/12 et al.]. The case concerns the decision by the ECB to activate a program called Outright Monetary Transaction (OMT), which allows the purchase of government bonds on the secondary market to secure the effective transmission of the ECB monetary policy. See ECB, Press Release, Technical Features of Outright Monetary Transaction, 6 Sept. 2012, available at: http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html. The legality of the OMT has been discussed in hearings before the German Constitutional Court in June 2013. See Michael Steen, ‘ECB Heavyweights Slug it out in German Court’, The FIN. TIMES, June 10, 2013, at 6.
184. Id. § 245.
186. BVerfG, ESM judgment, § 245.
187. On the challenges associated with the forthcoming decision of the German Constitutional Court in the so-called OMT case, see Alexander Koch, A Guide for the German Constitutional Court Hearing on the OMT, UNICREDIT Research Paper, June 5, 2013.
188. See supra notes 23, 10 (explaining that the German constitutional reform of 2009 functioned as the model for the text of the Fiscal Compact).
189. BVerfG, ESM judgment, § 301 [German version of the judgment].
190. Id. § 303 [German version of the judgment].
decision of the French Constitutional Council on the matter, the German Constitutional Court excluded that the Fiscal Compact empowered EU institutions to take action that had a direct effect on national budgetary legislation.\textsuperscript{191}

In sum, in all its decisions reviewing the legal measures adopted at the EU level, and implemented in Germany, to respond to the Euro-crisis, the German Constitutional Court eventually upheld the contested provisions as in conformity with the Basic Law.\textsuperscript{192} Nevertheless, while the pressures of the events probably forced the Bundesverfassungsgericht to reach these conclusions, the Court, as it has become customary in its decisions related to EU integration, also did not fail to express its skepticism toward the most recent developments occurring in the EU constitutional framework. It repeatedly acted to strengthen the role of the Bundestag, as the authority vested with the constitutionally reserved function to make fundamental decisions on budgetary issues and as the only institution—in the Court’s view— which enjoys legitimacy to decide about financial matters.\textsuperscript{193} And, in the case of the ESM Treaty, it explicitly required the German government to accompany its ratification with two declarations under international law clarifying that nothing in the Treaty could be interpreted as increasing the share of Germany to the ESM capital without the approval of the Bundestag or as depriving the Bundestag of the right to obtain all information about the internal functioning of the ESM.\textsuperscript{194} The Court certainly recognized that the political branches have the lead in devising strategies to address the crisis,\textsuperscript{195} but it confirmed that ultimately it will be up to the Court to sanction whatever legal measure is adopted—as is currently the case with the OMT policy of the ECB.\textsuperscript{196} As further crucial decisions on the new EMU by the highest German court are expected in the near future, the forecasts do not look promising.\textsuperscript{197}

\begin{thebibliography}{99}
\bibitem{191} Id. § 311 [German version of the judgment].
\bibitem{195} See Wendel, \textit{supra} notes 188, 42.
\bibitem{196} See Francesco Giavazzi et al., \textit{The Wisdom of Karlsruhe: the OMT Court case should be dismissed}, VOYEUX.ORG, June 12, 2013.
\bibitem{197} See also Bruce Ackerman & Miguel Maduro, \textit{Broken Bond}, FOREIGN POLICY, Sept. 17, 2012 (arguing that “Germany’s Constitutional Court may have just saved the euro, but it may also have set the stage for the end of Europe as we know it.”).
\end{thebibliography}
The legality of the ESM Treaty was also at the heart of a constitutional challenge in Ireland. On April 13, 2012, Mr. Pringle, a member of the Irish Parliament, commenced an action before the High Court of Ireland against the ratification of the ESM Treaty, arguing that this was in violation of the Irish Constitution as well as EU law. In particular, Mr. Pringle complained that Ireland’s participation in the ESM involved a delegation of sovereignty and a transfer of powers in violation of the Irish Constitution, that the obligations stemming from the ESM Treaty were in contravention of EU law and, moreover, that the Decision 2011/199/EU of the European Council—modifying through a simplified revision procedure Article 136 TFEU to allow the Euro-zone member states to establish a stability mechanism—was adopted unlawfully and was inconsistent with provisions of the Treaties and with the general principles of EU law. For these reasons, Mr. Pringle sought an injunction restraining the Irish government from ratifying the ESM Treaty. The High Court heard the case and, in a judgment of July 17, 2012, dismissed the appellant’s claim under all headings.198

After analyzing in detail the provisions of the ESM Treaty and the constitutionally entrenched principles of the TFEU, the High Court declared itself “satisfied that the plaintiff’s claim that the ESM Treaty is incompatible with [EU] law has not been established.”199 At the same time, the High Court rejected the petitioner’s claim with regard to a breach of the Irish Constitution. First, the Court excluded that the ESM affected a limitation of Irish sovereignty, arguing that the “participation of the State in the ESM Treaty [made] its consent [. . .] necessary in all cases (with the exception of the application of Article 4(4)) where significant decisions must be made.”200 Second, the Court denied that the ratification of the ESM determined a transfer of budgetary powers from the legislature to the executive emphasizing how the “limit on payments by the State to the ESM [. . .] cannot be exceeded without the approval of [the Irish Parliament].”201 Third, the Court held that, because the ESM Treaty was not incompatible with EU law, “an amendment of the Constitution approved of by the people in a referendum [was] not necessary before [Ireland could] ratify[.]”202 The Court then considered the legality of the European Council decision modifying Article 136 TFEU and found it “‘completely valid’ in accordance with [EU] law.”203 As such, citing Foto-Frost,204 the Court discarded the plaintiff’s request for a preliminary reference.

199. Id. § 90.
200. Id. § 128.
201. Id. § 133.
202. Id. § 140.
203. Id. § 163.
Mr. Pringle appealed the decision to the Irish Supreme Court, which on July 31, 2012, delivered its judgment.\textsuperscript{205} In its ruling, the Supreme Court summarily upheld the decision of the High Court, rejecting the sovereignty claim of Mr. Pringle and his request for an injunction preventing the ratification of the ESM Treaty.\textsuperscript{206} At the same time, the Supreme Court decided to stay proceedings and submit a reference to the ECJ on the question of the compatibility of the ESM Treaty and of European Council Decision 2011/199/EU with the EU Treaties.\textsuperscript{207} In particular, the Supreme Court asked the ECJ whether European Council Decision 2011/199/EU was valid having regard to the use of simplified revision procedure and the content of the amendment. Moreover, it asked the ECJ whether, in light of the provisions of the EU Treaties regulating the EMU and the general principles of EU law, a member state like Ireland was entitled to enter into and ratify an international agreement such as the ESM Treaty. Finally, it asked the ECJ to clarify whether the ratification of the ESM Treaty was subject to the entry into force of the amendment of Article 136 TFEU introduced by Decision 2011/199/EU. Taking into account that “the ESM Treaty Members, including Ireland, and the Member States of the European Union all have pressing interest in Ireland’s timely ratification of the ESM Treaty and that the stability of the euro area would be seriously damaged by delayed ratification” and noticing that the ESM Treaty is “of the utmost importance for other Members of the ESM, and, in particular, the Members who are in need of financial assistance,” the Supreme Court asked the ECJ to submit its reference to the accelerated procedure, in order to solve as soon as possible a “matter [. . .] of exceptional urgency.”\textsuperscript{208}

The position of the Irish judiciary, as emerging both from the decision of the High Court and of the Supreme Court, reveals the interconnections between domestic and EU questions relating to the legality of the ESM Treaty.\textsuperscript{209} While the High Court held that no need arose for a preliminary reference to the ECJ, because the ESM was fully valid, it systematically analysed the provisions of the ESM Treaty and of the TEU and the TFEU also in light of the case law of the ECJ, and rejected any form of incompatibility with the Irish Constitution or with EU law. The Supreme Court, instead, reflecting more concerns about the legality of the ESM, decided to make direct recourse to the preliminary reference procedure, thus exploiting the institutional machinery specifically designed under the TFEU to ensure the dialogue between state courts and the ECJ, to demand the opinion of the ECJ in the resolution of a legal matter affecting the

\textsuperscript{205} Pringle v. The Gov’t of Ireland, [2012] IESC 47 [hereinafter: Ir. S. Ct., Pringle].

\textsuperscript{206} Id. (ruling).

\textsuperscript{207} Id. (preliminary reference).

\textsuperscript{208} See also CJEU Pringle, supra note 2 (order of reference).

entire Euro-zone. The Supreme Court’s decision, therefore, settled the constitutional question surrounding the ESM Treaty and simultaneously offered to the ECJ the opportunity to be involved in the debate about the legality of the ESM. We now turn to the decision of the ECJ.

E. The European Court of Justice

The ECJ accepted to hear the preliminary reference of the Irish Supreme Court through the accelerated procedure and delivered its decision on November 27, 2012. Given the relevance of the case, reflected in the intervention before the ECJ of twelve governments and all three EU institutions, the ECJ chose to decide as a full court, composed of all twenty-seven judges. The ECJ began by outlining the legal context. It then addressed separately the three preliminary questions raised by the Irish Court. First, whether Decision 2011/199/EU was valid with regard to the use of the simplified revision procedure pursuant to Article 48(6) of the TEU and, in particular, whether the proposed amendment to Article 136 to the TFEU involved an increase in the competences conferred on the EU in the Treaties or a violation of the Treaties and general principles of EU law. Second, whether a member state of the EU was authorized to ratify the ESM Treaty, having regard to Treaty provisions relating to the EU exclusive competence, those relating to economic policy, those concerning the role of the institutions, as well as the principles of sincere cooperation and of effective judicial protection. And, third, whether the ratification of the ESM Treaty could be undertaken before the entry into force of Decision 2011/199/EU. The ECJ responded in the affirmative to all three questions.

To respond to the first question, the ECJ started with a clarification of its jurisdiction. Rejecting the position of several states’ governments, the ECJ held it was competent to examine the validity of European Council Decision 2011/199/EU. On the one hand, the ECJ recalled how the decision was an act of an institution, and thus fell within its purview under Article 267 of the TFEU. On the other, the ECJ noted that, because Article 48(6) of the TEU set a number of conditions on the use of the simplified revision procedure to amend the Treaties, “it fell to the Court, as the institution which, under the first subparagraph of Article 19(1) TEU, is to ensure that the law is observed in the interpretation and application of the Treaties, to examine the validity of a decision of the European Council based on Article 48(6) TEU.” In particular, the ECJ indicated that its task was to verify:

[F]irst, that the procedural rules laid down in Article 48(6) TEU were followed

210. On the use of preliminary references by Irish courts see ELAINE FAHEY, PRACTICE AND PROCEDURE IN PRELIMINARY REFERENCES TO EUROPE: 30 YEARS OF ARTICLE 236 EC CASELAW FROM THE IRISH COURTS (2007), which emphasizes the role of the preliminary reference procedure as the institutional mechanism to connect national courts with the ECJ.

211. CJEU Pringle, supra note 2.

212. Id. § 35.
and, secondly, that the amendments decided upon concern only Part Three of the FEU Treaty, which implies that they do not entail any amendment of provisions of another part of the Treaties on which the European Union is founded, and that they do not increase the competences of the Union.213

Having firmly established its jurisdiction to review the legality of Treaty amendments, the ECJ moved to consider the substance of the challenge on Decision 2011/199/EU.214 Here, the ECJ separately examined whether the amendment of the TFEU envisaged by Decision 2011/199 solely concerned provisions of Part Three of the TFEU and whether it increased the competences conferred on the EU in the Treaties. On the former, the ECJ remarked that Decision 2011/199/EU formally introduced a change to Article 136 of the TFEU, which is a provision of Part III of the TFEU.215 However, the ECJ also examined whether the Decision substantially affected other parts of the TFEU, notably the monetary policy indicated by Article 3(1)(c) of the TFEU as an area of exclusive competence of the EU. According to the ECJ the objectives pursued (and the instruments foreseen) by the stability mechanism envisaged by Decision 2011/199/EU served “to complement the new regulatory framework for strengthened economic governance of the Union”216 and therefore fell “within the area of economic policy.”217 Otherwise, the ECJ underlined how “the provisions of the EU and FEU Treaties d[id] not confer any specific power on the Union to establish a stability mechanism of the kind envisaged by Decision 2011/199.”218 As a result, the “Member States whose currency is the euro are entitled to conclude an agreement between themselves for the establishment of a stability mechanism of the kind envisaged by Article 1 of Decision 2011/199.”219 In addition, on the question of whether the decision increased the competences conferred on the Union in the Treaties, the ECJ stated that the new Article 136(3) of the TFEU simply “confirm[ed] that Member States have the power to establish a stability mechanism and is further intended to ensure, by providing that the granting of any financial assistance under that mechanism will be made subject to strict conditionality, that the mechanism will operate in a way that will comply with [EU] law.”220 Hence, the

213. Id. § 36.
214. The ECJ also preliminarily discarded the procedural argument raised by the Irish government that the case was inadmissible, because the applicant should have directly challenged Decision 2011/199/EU with an action under Article 163 of the TFEU. As the ECJ argued, in fact, “it [wa]s not evident that the applicant in the main proceedings had beyond doubt standing to bring an action for the annulment of Decision 2011/199 under Article 263 TFEU”: Id. § 42.
215. Id. § 46.
216. Id. § 58 (citing the “Six Pack”).
217. Id. § 60.
218. Id. § 64.
219. Id. § 68.
220. Id. § 72.
ECJ concluded that Decision 2011/199/EU was lawfully adopted in compliance with the simplified revision procedure.\footnote{Id. \textsection 76.}

To respond to the second question raised by the Irish Supreme Court, the ECJ examined one by one a multiplicity of provisions of the EU Treaties indicated by the referring court, in order to assess whether any of them precluded an EU member state from ratifying the ESM Treaty. According to the ECJ, none of these provisions produced such an effect. First, the ECJ restated that the ESM was not incompatible with Articles 3(1)(c) and 127 of the TFEU regulating the EU monetary policy, including its primary objective of price stability, since “[e]ven if the activities of the ESM might influence the rate of inflation, such an influence would constitute only the indirect consequence of the economic policy measures adopted.”\footnote{Id. \textsection 97.} Second, the ECJ discarded the argument that the ESM conflicted with Article 3(2) of the TFEU, which gives to the EU exclusive jurisdiction in concluding international agreements in the fields in which it has exclusive internal powers, holding that—since no “provision of the [...] Treaties confer[red] a specific power on the Union to establish a permanent stability mechanism such as the ESM [...] the Member States [we]re entitled [...] to act in this area”\footnote{Id. \textsection 105.} while, at the same time, nothing “prevented the Union from exercising its own competences in the defence of the common interest.”\footnote{Id. \textsection 106.} Third, the ECJ held that the ESM was not incompatible with Treaty provisions on economic policy—Articles 2(3), 119, 120, 121 and 126 of the TFEU. The ECJ reiterated that “the Member States have the power to conclude between themselves an agreement for the establishment of a stability mechanism such as the ESM [...] are consistent with [EU] law”\footnote{Id. \textsection 109.} and noted that, because “the ESM is not concerned with the coordination of the economic policies of the Member States, but rather constitutes a financing mechanism”\footnote{Id. \textsection 110.} no problem of compatibility arose.

Most importantly, however, the ECJ rejected the argument that the ESM violated Articles 122, 123 and 125 of the TFEU, which concern the well-known rules of solidarity assistance, prohibition of monetary financing, and prohibition of bail-out.\footnote{See supra notes 27, 31.} On Article 122, the ECJ held that since that clause did:

\begin{quote}
not constitute an appropriate legal basis for any financial assistance from the Union to Member States who are experiencing, or are threatened by, severe financing problems, the establishment of a stability mechanism such as the ESM does not encroach on the powers which that provision confers on the Council.
\end{quote}

\footnote{CJEU Pringle, \textsection 116.}
On Article 123, the ECJ underlined how this clause was textually phrased to prohibit the ECB and other central banks from directly purchasing governments’ bonds, so that “[t]he grant of financial assistance by one Member State or by a group of Member States to another Member State [was] not covered by that prohibition.” On Article 125, then, the ECJ stated that this clause was “not intended to prohibit either the Union or the Member States from granting any form of financial assistance whatever to another Member State.” This reading was supported by both a systematic interpretation of the Treaty—given that among others Article 122 of the TFEU did provide for forms of assistance—and an analysis of the original intent of the Treaty drafters. According to the ECJ, from the preparatory work of the Maastricht Treaty it emerged that “[t]he prohibition laid down in Article 125 TFEU [was designed to] ensure[] that the Member States remain subject to the logic of the market when they enter into debt.” Hence, Article 125 of the TFEU only prohibited those grants of financial assistance “as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy [would] diminish[].” This was not, however, the case of the ESM. In fact, on the basis of the ESM Treaty:

stability support may be granted to ESM Members which are experiencing or are threatened by severe financing problems only when such support is indispensable to safeguard the financial stability of the euro area as a whole and of its Member States and the grant of that support is subject to strict conditionality appropriate to the financial assistance instrument chosen.

The ESM did not act as a guarantor of the debts of the recipient member state, and no other state would be liable for the commitments of an ESM state facing default. In light of this, the ECJ concluded that Article 125 of the TFEU was no obstacle to the adoption of the ESM Treaty.

The ECJ also set aside the concern that the ESM Treaty was incompatible with the principle of sincere cooperation (Article 4(3) of the TEU). It ruled that the attribution by the ESM Treaty of specific tasks to some EU institutions (the ECB, the Commission and the ECJ) did not violate Article 13 of the TEU, stressing that its case law, or specific provisions of the Treaty such as Article 273 of the TFEU, entitled the member states, “in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institutions, outside the framework of the Union, […] provided that those tasks do not alter the essential character of the powers conferred on those institutions by the EU

229. *Id.* § 125.
230. *Id.* § 130.
231. *Id.* § 135.
232. *Id.* § 136.
233. *Id.* § 142.
234. *Id.* § 138.
235. *Id.* § 146.
236. *Id.* § 152.
and FEU Treaties." 237 Last but not least, the ECJ denied that the ESM Treaty ran afoul of the general principle of judicial protection enshrined in the EU Charter of Fundamental Rights. In fact, in the view of the ECJ, the Charter is addressed “to the Member States only when they are implementing Union law.” 238 Yet, in establishing the ESM, the member states were not implementing EU law, and, as a result, they were not subject to the scope of application of the Charter. 239 On the third question raised by the Irish Supreme Court, then, the ECJ briefly answered that Ireland was entitled to conclude and ratify the ESM Treaty before the entry into force of the amendment of Article 136 of the TFEU. Because Decision 2011/199/EU simply confirmed the existence of a power possessed by the member states and did “not confer any new power on the[m]” 240 according to the ECJ, the right of a Member State to sign and ratify that Treaty was not conditional on the entry into force of Decision 2011/199/EU. 241

In conclusion, the ruling of the ECJ attentively addressed all the questions raised by the Irish Supreme Court in its preliminary reference and set aside any doubt about the compatibility of the ESM Treaty with EU law. 242 thus giving its (ex post) blessing to its entry into force. 243 The reasoning of the ECJ—astutely neutralizing questions of incompatibility between the ESM and the provisions of the TEU and TFEU—suggests a favorable stand vis-à-vis the ESM—an instrument which, although developed outside the framework of the EU law, directly contributes to the financial stability of the euro-zone. 244 At the same time, while the ECJ concluded that the amendment of Article 136 of the TFEU, as brought about by Decision 199/2011/EU, was purely declaratory, confirming a power that the member states already had, it took the opportunity presented by the case to emphasize its role in reviewing the constitutionality of treaty amendments pursuant to the simplified revision procedure. 245 In the end, nevertheless, following previous practice by the ECJ in the field, 246 the ruling ensured a wide margin for member states to maneuver in responding to the

237. Id. § 158.
238. Id. § 179.
239. Id. § 180.
240. Id. § 184.
241. Id. § 185.
243. The ESM Treaty had entered into force on September 27, 2012, after the German deposit of the instrument of ratification. See supra text accompanying note 36.
244. See Paul Craig, Pringle: Legal Reasoning, Text, Purpose and Teleology, 20 MAASTR. J. EUR. & COMP. L. 3 (2013).
245. See also Verstert Borger, The ESM and the European Court’s Predicament in Pringle, 14 GER. L. J. 113 (2013).
246. See, e.g., Case C-27/04, Comm’n v. Council of the EU [2004] E.C.R. I-6649 (recognizing wide discretion to the Council whether to impose sanctions under the SGP or held in abeyance the excessive deficit procedure against two member states recommended by the Commission).
turmoil of the Euro-zone, minimizing the legal obstacles at the EU level toward a satisfactory solution of the crisis.\textsuperscript{247}

\textbf{F. Portugal}

While neither the new budgetary rules nor the legal framework of financial stabilization were at issue in Portugal, the Portuguese Constitutional Tribunal (\textit{Tribunal Constitucional}) recently delivered several decisions dealing with the legality of measures adopted in response to the Euro-crisis. In the framework of the Program of Financial and Economic Assistance that Portugal negotiated with the EU Commission, the ECB and the IMF to obtain financial aid,\textsuperscript{248} the Portuguese government enacted a series of domestic budgetary measures, aimed at reducing state deficit and improving the economic outlook of the country, which were subject to review by the Constitutional Tribunal. While these measures were technically national, they were in reality enacted by Portugal upon demand of the EU and international institutions, and reflected the policy strategy (embedded in the principle of conditionality of the mechanisms of financial assistance such as the ESM) of adjusting the economic outlook of the country pursuant to the action plan agreed upon in the MoU. In its decisions, however, the Constitutional Tribunal expressed its increasing discontent for the effects that these domestic measures would produce on domestic guarantees, such as the principles of equality and the protection of social rights, enshrined in the Portuguese Constitution.

On July 5, 2012,\textsuperscript{249} the Constitutional Tribunal, upon referral of the parliamentary opposition, ruled on the constitutionality of a provision adopted in the budget law for 2012, suspending payment of the thirteenth and fourteenth monthly salary for public sector employees.\textsuperscript{250} The Constitutional Tribunal acknowledged that the measure under scrutiny was adopted under exceptional circumstances, in the framework of the MoU signed by the EU Commission, the ECB, and the IMF\textsuperscript{251} “as a condition for the obtainment of the loans accorded by the EU and the IMF.”\textsuperscript{252} Nevertheless, it reviewed the measure for its compatibility with the principle of equality, which required that the government treat “similar situations alike and different situations differently, subject to the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{247} See also Bruno de Witte & Thomas Beukers, \textit{The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: Pringle, 50 COMMON MARKET L. REV. 805 (2013)}.
\item \textsuperscript{250} Lei do Orçamento de Estado, n° 64-B/2011, (budget law for 2012).
\item \textsuperscript{251} Pt. Const. Ct., \textit{judgment of 2012}, §2.
\item \textsuperscript{252} \textit{Id.} § 3 (my own translation) (“os quais condicionam a concretização dos empréstimos faseados acordados com a União Europeia e com o Fundo Monetário Internacional.”).
\end{enumerate}
\end{footnotesize}
principle of proportionality.”

Because the reduction of the monthly salaries only affected the employees of the public sector, leaving untouched those of the private sector, the Tribunal found that the provisions of the budget law failed to comply with the principle of proportionality. As the Tribunal stated:

The need to adopt measures to address in an effective manner the crisis, cannot be the basis to exempt the legislature from respecting fundamental rights and the principles of the Rule of Law, notably the principles of equality and proportionality. The Constitution is certainly not blind to the economic and financial reality and especially to a situation that may be considered of great difficulty. But it possesses a specific normative force that prevents economic and financial objectives from prevailing, without limits, on the principles such as equality, which the Constitution defends and must accomplish.

Yet, having found the measure under scrutiny unconstitutional, the majority of the Constitutional Tribunal decided to suspend the effect of its ruling for 2012. Pursuant to Article 282(4) of the Portuguese Constitution, in fact, the Tribunal can delay the effects of its decisions—a possibility that came in handy under the circumstances, given “the exceptional public interest” of the Portuguese state, the current context of grave emergency, and the need to continue to keep open access to external financial aid.

The Constitutional Tribunal, however, did not accommodate the arguments of the government in subsequent rulings. Upon referral of the President of the Republic and by the opposition party, the Constitutional Tribunal delivered a decision on April 5, 2013, which declared, this time with immediate effects, the unconstitutionality of several provisions of the budget law for 2013. Much like the budget law of 2012, the budget law of 2013—which had been agreed upon by the Portuguese government with the EU Commission, ECB and IMF—included provisions aimed at containing government deficit by, among other things, a reduction of the stipends and a suspension of the thirteenth and

253. Id. § 5 (my own translation) (“tratem por igual as situações substancialmente iguais e que, a situações substancialmente desiguais se dé tratamento desigual, mas proporcionado.”).

254. Id. § 6 (my own translation) (“A referida situação e as necessidades de eficácia das medidas adoptadas para lhe fazer face, não podem servir de fundamento para dispensar o legislador da sujeição aos direitos fundamentais e aos princípios estruturantes do Estado de Direito, nomeadamente a parâmetros como o princípio da igualdade proporcional. A Constituição não pode certamente ficar alheia à realidade económica e financeira e em especial à verificação de uma situação que se possa considerar como sendo de grave dificuldade. Mas ela possui uma específica autonomia normativa que impede que os objetivos económicos ou financeiros prevaleçam, sem quaisquer limites, sobre parâmetros como o da igualdade, que a Constituição defende e deve fazer cumprir.”).

255. See Const., art. 282(4) (Pt.) (stating that “[w]hen required for the purposes of legal certainty, reasons of fairness or an exceptionally important public interest, the grounds for which shall be given, the Constitutional Court may rule that the scope of the effects of the unconstitutionality or illegality shall be […] restricted”).


fourteenth monthly salary of public employees. While the Constitutional Tribunal upheld a plurality of measures adopted in the budget law as falling within the discretionary powers of the government, by drawing on its previous decision of July 2012, it subjected the measure affecting the salary of public employees to a proportionality review aimed at verifying their consistency with the principle of equality. In fact, the Tribunal noticed that, “also for the year 2013 public sector workers will be asked to bear an additional effort [in salary reduction] which is not asked to [...] private sector workers in the same economic conditions.” Since the previous case had made clear that this situation did not comply with the principle of proportionality, the Tribunal simply restated its conclusion from 2012, holding that the measure under review “failed to comply with the principle of equality as demanding a proportional sharing of the burden of the public charges.” In the same case, the Tribunal also reviewed a provision of the budget law aimed at limiting workers’ disease and unemployment benefits and struck it down as violating the minimal protection of social right enshrined in the Constitution.

Moreover, on August 29, 2013, the Constitutional Tribunal struck another blow to the economic adjustment measures carried out by the Portuguese government in the framework of the MoU, by declaring unconstitutional a statute introducing the mobility of public workers for violations of the principle of proportionality and legitimate expectations. And on December 19, 2013, the Constitutional Tribunal once more blocked parts of the budget law adopted by Parliament for the following fiscal year – and implementing the demands of the “troika” of foreign lenders – holding that the reduction of the pensions of public sector workers infringed the principle of legitimate expectations and was therefore unconstitutional.

The decisions of the Portuguese Constitutional Tribunal, therefore, signaled the growing unease of the supreme judicial body for the measures that were enacted nationally, but requested by the EU and international institutions to address the Euro-crisis and re-establish the financial standing of the country. While in its first decision the Constitutional Tribunal aptly made use of the powers it enjoys under the Portuguese Constitution to suspend the effect of its

258. Lei do Orçamento de Estado n° 66-B/2012 (budget law for 2013).
259. Id. § 40 (my own translation) (“para o ano de 2013, continuará a exigir-se de quem recebe remunerações salariais de entidades públicas um esforço adicional que não é exigido aos [...] titulares de rendimentos idênticos provenientes do trabalho, no âmbito do setor privado.”).
261. Id. § 95.
264. See Fabrizio Galimberti, Se anche il potere giudiziario critica il rigore, Il SOLE 24 ORE, Apr. 7, 2013, at 10 (discussing the implications of the ruling by the Portuguese Constitutional Court).
ruling of unconstitutionality, de facto giving a one-off free-pass to the legislation adopted by the government, in subsequent decisions the Tribunal did not refrain from declaring several provisions of the budgetary law to be in violation of the Constitution and therefore immediately void. By interpreting in an activist manner the principle of equality and the guarantees of the protection of social rights of the Portuguese Constitution the Constitutional Tribunal placed heavy limits on the capacity of the national executive and legislature (and, indirectly, of the EU and international institutions coordinating the rescue measures of Portugal) to respond adequately to the fiscal crisis. 265 With its jurisprudence, therefore, the Tribunal signaled that the future of at least one of the central features of the legal responses to the Euro-crisis, that concerning the economic adjustment measures that debtor countries shall adopt as a condition to obtain financial support, may be standing on shaky ground.

III.
JUDICIAL REVIEW AND THE POLITICAL PROCESS IN A COMPARATIVE PERSPECTIVE

The previous Part analyzed decisions by courts at both the national and supranational level reviewing the legality of various components of the new EMU fiscal regime. Building on that detailed analysis of the case law, this Part attempts to identify a trend of increasing judicial involvement in fiscal affairs, to explain its rationale and to critically evaluate it by discussing the relationship between judicial review and the political process in the fiscal and economic domain. Needless to say, a comparison of judicial decisions dealing with aspects of the new architecture of the EMU should be undertaken with some caveats: the nature of the specific measure under review and the scope of the scrutiny carried out by courts differed from one jurisdiction to another, and reflects differences in procedural powers, modes of legal reasoning, and conceptions of the role of the judiciary in a constitutional system. 266 Yet, an overview of judicial decisions in systems that are as varied as Estonia, France, Germany, Ireland, Portugal, and the EU can provide important insights on how, regardless of the many differences between the various case studies, courts have so far reacted similarly to the reforms of the EMU by expanding significantly their powers to review,


and possibly void, measures adopted by the political branches in the fiscal and economic domain.267

As I will report,268 a broad-brush assessment of judicial rulings in the field of budgetary constraints, financial stabilization, and economic adjustment reveals that, by and large, courts have validated the new policies followed by the EU institutions and member states in response to the Euro-crisis. Yet, closer scrutiny also reveals that courts have expressed more discomfort when reviewing measures concerning financial stabilization and economic adjustment and that, in a diachronic perspective, this discomfort has gradually grown bigger—with some final decisions even striking down the measures under review. How can we make sense of this development? And how should we evaluate it? As I argue,269 the main explanation for the rising tide of judicial intervention in the field of the EMU lies, paradoxically, in the choice by the member states to respond to the Euro-crisis with an intergovernmental approach and with legal measures adopted mainly outside the legal framework of the EU. In a context of intergovernmental governance, courts have found more leeway to become enmeshed in the scrutiny of states’ measures than what would have been possible had the member states acted within the EU legal order. In fact, as I shall point out, the paradoxical degree of judicial involvement in EMU affairs generated by an intergovernmental response to the Euro-crisis is made all the more evident when compared with the role that courts have, over the last eighty years, played in the United States—a system where the judiciary enjoys almost unparalleled powers of review.

Hence, the analysis of judicial review of legal measures adopted so far in responses to the Euro-crisis yields an important suggestion: if the political branches want to minimize the scope for judicial overreach, in the future they should respond to the Euro-crisis by working within the framework of the EU. As I will claim,270 in fact, judicial involvement in the fiscal domain raises a number of constitutional concerns. The political branches have greater expertise and instrumental capacity than courts to make decisions in fiscal matters. At the same time, in this context, the political process is better able to represent the voice of the people and does not seem to be subject to a structural bias against insular minorities, which would justify greater oversight by courts on rights-protecting grounds. However, these considerations do not absolve the EU political process from the need of further reforms. Indeed, the legitimacy and democracy of the EU political process urgently need to be improved. But these

267. On the analytical value connected to the “most-different-cases” logic of comparison see Hirschl, supra note 69. See also generally PRACTICE AND THEORY IN COMPARATIVE LAW (Maurice Adams & Jacco Bomhoff eds., 2012).
268. See infra Part III.A.
269. See infra Part III.B.
270. See infra Part III.C.
reforms require increasing responsiveness and accountability of the EU political process, rather than increasing review and interference by courts.  

A. Identifying the Trend: Increasing Judicial Involvement Across Europe

Based on the analysis undertaken above, it is possible to identify a trend of judicial involvement in fiscal matters across Europe. Table 1 summarizes this state of affairs by reporting (in the vertical column) the countries whose courts have been considered as case studies and (in the horizontal column) the measures that have been subject to review. At first glance, it is noticeable how often courts have been called to adjudicate pieces of the new constitutional architecture of the EMU. In terms of the effects of the decisions, as the previous Part has made clear, courts have, by and large, validated the new legal measures adopted in response to the Euro-crisis. This is reflected in the rate of “approvals” reported in Table 1. National and supranational courts have given their green light to the enactment and entry into force of a variety of legal measures aimed at strengthening budgetary discipline, introducing new mechanisms of financial stabilization, and prescribing strict programs of economic adjustment. With the exception of the latest decisions of the Portuguese Constitutional Court (discussed below), the rulings analyzed above have validated the legal measure under review. A broad-brush assessment of the role of courts in the framework of the new EMU constitution seems to suggest, therefore, that the judiciary has deferred to the political branches, upheld their action and provided them with leeway in devising responses to the Euro-crisis.

271. See infra Part IV.
Nevertheless, if we include a qualitative analysis of the courts’ reasoning, it is evident that judicial support for the new fiscal constitution of the EMU has been much less enthusiastic. This emerges not only from decisions such as those of the German Constitutional Court or the Portuguese Constitutional Tribunal, which placed explicit limits on the validity of the measures under review, or by...
the preliminary reference of the Irish Supreme Court, which suggested worries about the legality of the ESM Treaty. It also emerges from the case law of the Estonian Supreme Court and the French Constitutional Council, which appeared, overall, to embrace a Europarechtsfreundliche approach. In fact, while the decision of the Estonian Supreme Court is certainly one of the more open toward the constitutional reforms undertaken in the EU in response to the Euro-crisis, the judgment was delivered by a harshly divided court, with nine judges out of nineteen fundamentally objecting to the wisdom of the decision, and one judge (casting the decisive ballot for the majority) arguing that the case ought to have been dismissed on procedural grounds. Similarly, the French Constitutional Council, while largely upholding the Fiscal Compact, added several réserves d’interprétation which potentially restrict (although it is yet unclear with what legal effects) the scope of the EMU reform.

Specifically, two main features seem to emerge from a qualitative analysis of courts’ decision in the fiscal arena. First, judicial institutions have generally been supportive of new EMU measures introducing tighter budgetary constraints, but have expressed more discomfort towards measures of financial stabilization and economic adjustment. Hence, while neither the French Conseil Constitutionnel nor the German Bundesverfassungsgericht raised fundamental objections to the ratification of Fiscal Compact, the latter put important caveats on the ESM Treaty—which recalled analogous skepticism in the dissenting opinions of the Estonian Supreme Court and in the preliminary reference of the Irish Supreme Court to the ECJ. At the same time, of course, the Portuguese Constitutional Court repeatedly underlined the problematic aspects of the budgetary legislation adopted to implement domestically the economic adjustment program agreed to by Portugal and the troika.

Second, while courts have overall backed the responses to the crisis devised by the EU member states and institutions, over the years courts have also revealed a greater unwillingness to let political branches have it their way. This evolution in judicial approach is, of course, evident in the case law of the German Constitutional Court: in its September 2011 decision, the Court validated, albeit with its customary lecturing tone, the Bundestag’s approval of the German guarantees to the EFSF without putting any specific condition on this. But in September 2012, it demanded ratification of the ESM Treaty to be accompanied by two binding declarations under international law, clarifying for


273. Moreover, the Constitutional Council took the opportunity of the case to strengthen its powers vis-à-vis the political branches in the fiscal domain, a step with potential implications for the future. See supra note 135.
the avoidance of any doubt the maximum limit of German contribution to the ESM fund and the enduring right of the Bundestag to access documents handled by the ESM institutions, despite the duty to protect confidential information by ESM bodies.

The case of the Portuguese Tribunal Constitucional, however, epitomizes this judicial shift: as the length of the Euro-crisis, and arguably the harshness of the measures of economic adjustment adopted to tackle it grew, the Constitutional Tribunal became more impatient toward the action of the political branches. In its first ruling from July 2012 (soon after Portugal had entered into a program of financial assistance with the EU and the IMF), the Court resorted to procedural powers it enjoys under the Portuguese Constitution to suspend the effect of a decision of unconstitutionality of a budget law for violation of the principles of equality and proportionality. Nine months later, in April 2013, however, the Court did not refrain from striking down another identical measure. And in August 2013, and then December 2013 the Court struck a few other blows to the economic policy of the Portuguese government, leaving it in the very difficult situation of having to find new revenue sources for its budget. These decisions signaled that the emergency conditions that had justified restrictions of constitutional principles could not be extended forever and shed some pessimistic light on the willingness of courts—in Portugal but perhaps also elsewhere—to uphold those parts of the new fiscal constitution of the EMU requiring the adoption of tough measures of economic adjustment for countries under financial assistance.274

A number of economic and institutional reasons may explain these two dynamics. On one side, it is plausible that courts face fewer incentives to oppose budgetary constraints (such as those dictated by the Fiscal Compact) that demand only negative action by their governments in the future. In contrast, they adopt a heightened scrutiny vis-à-vis either measures of financial stabilization (like the ESM Treaty), which require positive action by the states in the form of financial contributions, or measures of economic adjustment (as those agreed under the MoUs), which require immediate implementation.275 At the same time, while courts may actually benefit from the introduction of budgetary rules, by seeing their institutional position vis-à-vis the political branches strengthened,276 they can perceive a threat from the adoption of measures of economic adjustment or financial stabilization which restrict fundamental social rights (either because of the austerity measures to be adopted in the

274. See Euro Wobbles, Portugal’s Constitutional Court Creates New Problem for the Euro, THE ECONOMIST, Apr. 13, 2013 (discussing the decision of the Portuguese Constitutional Court in context).

275. See Alicia Hinarejos, The Euro Area Crisis and Constitutional Limits to Fiscal Integration, CAMBRIDGE YBK EUR. LEG. ST. (2011) (underlying greater easiness in the integration of budgetary rules, compared to the integration of other fiscal policies which have redistributive effects).

276. See Fabbrini, supra note 23, 22.
implementation of an economic adjustment program, or because of the reduced capacity of the state budget to provide social protections due to the contributions to a stability fund). Since a core function of courts in constitutional regimes is to protect rights, taking this task seriously even in the face of economic emergencies may be perceived by courts as a necessary step to consolidate their position in the constitutional system.

On the other side, the increased uneasiness of courts vis-à-vis several aspects of the new fiscal constitution of the EMU may be the result of economic and institutional factors. While in the aftermath of an economic emergency courts may trust policy-makers to have better knowledge of how to handle the crisis and therefore be more willing to let them take decisions, over time courts raise the threshold of legality that political branches must respect in order for their action to pass judicial muster. Because the Euro-crisis, and the attempts to address it, have lasted for more than five years now, courts may become less concerned with the economic risk that their decisions could produce, and therefore turn more vocal in expressing their discontent to the policy strategies followed by the EU institutions or member states. At the same time, courts may be more willing to intervene and sanction alleged illegalities in the measures adopted to reform the EMU legal architecture as they perceive the political process—that is, the set of procedures by which representative institutions adopt decisions—to be malfunctioning.

Be that as it may, the previous analysis yields a central conclusion: regardless of the political, economic, or legal characteristic of the cases considered, the judiciary has acquired an extensive and pervasive influence in the fiscal and economic domain. This state of affairs is also reflected in the great preoccupation with which policy-makers and financial markets alike have awaited most of the judgments considered above. In some cases, e.g. in Estonia or France, the rulings of courts were technically not essential for the entry into force of the measure under review, but, rather, affected the capacity of the state to become a party to the challenged treaty. In others, however, the

277. See Est. Sup. Ct., ESM judgment, §§ 165-66 (emphasizing the importance of a well-functioning economy for the protection of fundamental rights); Pt. Const. Ct., judgment of 2013, §§ 92-95 (discussing restrictions on pre-existing minimum protections of social rights).


279. See ceteris paribus, Federico Fabbrini, The Role of the Judiciary in Times of Emergency: Judicial Review of Counter-Terrorism Measures in the United States Supreme Court and the European Court of Justice, 28 OX. YB K. EUR. L. 664 (2009) (explaining how courts are more deferent to the political branches in the aftermath of a national security emergency, but that they become more demanding in their scrutiny as time goes by).

280. See infra text accompanying notes 315, 316.

281. See, e.g., European Economics Strategy: Concerns about the German Constitutional Court, Morgan Stanley report, Aug. 30, 2012 (emphasizing major financial risks if the German Constitutional Court strikes down the ESM Treaty).

282. The Fiscal Compact, art. 14(2) required the ratification of only twelve member states of
decisions of courts such as the Bundesverfassungsgericht or the ECJ have kept all the relevant stakeholders waiting with bated breath, by threatening to invalidate a whole scheme of regulation adopted to respond to the Euro-crisis. In conclusion, a clear trend of rising judicial involvement in fiscal affairs seems to emerge throughout Europe.

B. Explaining the Trend: the Intergovernmental Method and its Outcomes

How can we make sense of this trend of judicial involvement in the fiscal domain across Europe? The main explanation for this trend lies, in my view, in the overall strategy pursued by the EU member states in responding to the Euro-crisis. As Part I indicated, while a number of reforms to the architecture of EMU have been carried out in the framework of EU law, the member states have decided to act to a large extent outside the EU legal order, tightening budgetary constraints, establishing new mechanisms of financial stability, and setting up a framework for economic adjustment for countries in fiscal troubles through international agreements. This strategy is consistent with an intergovernmental model for the management of the Euro-crisis, which has stressed the centrality of national governments (in the European Council) and their freedom to act through agreements outside EU law, rather than the centrality of the EU institutional machinery and the potentials of EU law to address the crisis. As Sergio Fabbrini has argued: “The extremely complex system of economic governance set up during the euro crisis [...] has been largely motivated and defined on the basis of the intergovernmental logic and decided through and within the intergovernmental institutional framework.”

Yet, responding to the Euro-crisis through an intergovernmental approach has come with a high price in terms of judicialization. As made clear at the beginning of Part II, in most state jurisdictions, supreme or constitutional courts are empowered to review a priori international treaties. On the contrary, it is a core principle of EU law that national courts cannot review the legality of EU legislation: national courts can refer a preliminary question to the ECJ, but only the ECJ can declare an EU act void. Actually, this state of affairs is

284. See Shapiro & Stone Sweet, supra note 5, at 71.
285. See supra text accompanying note 58.
captured well by Table 1 above. As Table 1 makes clear, in fact, legislation adopted in the EU legal framework has entirely escaped judicial review. This is the case both for the Six Pack and Two Pack (introducing tighter budgetary rules), and for the EFSM (setting up a mechanism of financial stabilization). On the contrary, courts have been asked on multiple occasions to adjudicate international agreements such as the Fiscal Compact, and the ESM (or the European Council Decision amending Article 136(3) of the TFEU).

At the same time, courts have been asked to review domestic policies implementing measures of economic adjustment agreed through international agreements—witness the Portuguese Constitutional Tribunal’s review of budgetary laws in 2012 and 2013. Of course, technically these measures were domestic bills adopted by the Portuguese legislature. Yet, it does not go unnoticed that their content largely reflected what the Portuguese government and the troika had agreed to in the MoU. In fact, however, a MoU is nothing more than a contractual agreement, under public international law, between a debtor state and its international lenders to obtain financial assistance in exchange for economic reforms. As such, we are dealing, once again, with an international agreement adopted outside the framework of EU law and pragmatically devised to commit a member state to a program of economic adjustment perceived as necessary to address its fiscal troubles. In this situation, the shift “from legislation to contract” also implied that the relevant domestic court found itself empowered to review the national measure implementing the MoU in a way which would have been unlikely had the measure under review been grounded in EU law stricto sensu.

Resort by the member states to international agreements outside the EU legal order is in itself nothing new. However, it is argued here a contrario that, if legal measures to respond to the Euro-crisis had been adopted through ordinary EU legislation, they would have been untouchable by national courts, save by raising a preliminary reference to the ECJ. As several scholars have underlined, in fact, EU law potentially offered room for the adoption of these measures as EU legislation. In the case of the Fiscal Compact, enhanced cooperation provided the ideal framework for enacting the substantive measures

287. See supra notes 16, 17, and 32.
288. See Papadopoulou, supra note 62.
290. See also Bruno de Witte, International Treaties on the Euro and the EU Legal Order (2012) (unpublished manuscript on file with author) (underlying how resort to international treaties adopted outside the EU legal order proper has a long pedigree in the history of EU integration).
codified therein. In the case of the ESM, arguably Article 122(2) of the TFEU—which allows the EU to provide financial assistance “[w]here a Member State is having difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control”—offered a sufficient legal basis to enact a mechanism to stabilize the Euro-zone in the framework of EU law.

After all, this clause was considered a legitimate basis for the EFSM, so political considerations more than legal arguments seemed to trump recourse to this clause as a basis for the ESM. Finally, in the case of the measures of economic adjustment included in the MoU, it could be argued that a directive (or, possibly, another EU binding legal measure pursuant to Article 136 of the TFEU) could have been employed to demand structural reforms to a member state through an instrument firmly grounded in EU law.

Hence, the choice by the EU member states to respond to the Euro-crisis through a strategy of intergovernmental governance, and with systematic recourse to international agreements outside the EU legal order, has resulted in increasing judicial involvement in fiscal affairs. In the context of the new constitutional architecture of the EMU, courts have found ample leeway to become involved in the adjudication of measures adopted so far to tackle the Euro-crisis. The limits of intergovernmentalism in managing the Euro-crisis

292. See Federico Fabbrini, Enhanced Cooperation Under Scrutiny, 40 LEG. ISSUES OF ECON. INTEGR. 197 (2013) (explaining how the option to resort to enhanced cooperation was open for the adoption of the Fiscal Compact but that member states resorted to a treaty mainly for political reasons). See also Anna Kocharov et al., Another Legal Monster? An EUI Debate on the Fiscal Compact, (EUI Working Papers Law No. 09 2012).

293. See supra note 31. See also Roland Bieber, Observer – Policeman – Pilot? On Lacunae of Legitimacy and the Contradictions of Financial Crisis Management in the European Union, 18 (EUI Working Papers Law No. 16 2011) (explaining that, if Article 122 of the TFEU was a sufficient basis for assistance to Greece in 2010, it could have been used also in subsequent rescue measures and that therefore there was no need to amend Article 136(3) of the TFEU to empower the states to establish, outside the EU framework, the ESM).

294. A major problem connected to the use of Article 122 TFEU for the creation of a stability mechanism in the framework of EU law is due to the fact that, pursuant to that provision, money for the mechanism would have to be appropriated from the EU budget. As it is well known, the EU budget is currently razor thin—so it would have been impossible to establish a stability mechanism with a “firepower” of 700 billion Euros, i.e. the size of the ESM. However, it is remarkable to notice that almost at the same time in which the member states debated the creation of the ESM outside EU law, the renewal of the EU multi-annual financial framework was at stake in the context of the EU. Member states could have therefore increased their contributions to the EU budget (so that it could support an EU stability mechanism), instead of diminishing—as they did—the EU budget and simultaneously contributing outside the EU framework to the capital of the ESM. See Hélène Mulholland, David Cameron Vows to Fight EU Budget Increase, THE GUARDIAN, Oct. 27, 2010 (outlining interconnections between EU budget fights and the ESM).

295. See Article 288 TFEU (stating that “[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”) and Article 136 TFEU (stating that “[i]n order to ensure the proper functioning of economic and monetary union, and in accordance with the relevant provisions of the Treaties, the Council shall [. . .] adopt measures specific to those Member States whose currency is the euro.”)
effectively and legitimately have been emphasized repeatedly. This Article joins this chorus but from another perspective, underlining how an intergovernmental approach to the Euro-crisis also generated growing judicialization. In the next subsection I will discuss why this development should be evaluated with some skepticism. What I would like to point out now, instead, is how the degree of judicial involvement taking place in the new EMU institutional architecture is paradoxical. One of the central tenets of intergovernmentalism in EU governance is that the executive branches (acting within the European Council) will dominate decision-making to the detriment of legislatures and courts. Yet, the outcome of intergovernmentalism has been an increasing involvement of courts—in a way which would have been impossible had the member states acted through the Community method.

Comparative law provides the best evidence of how paradoxical the deep involvement of the national and supranational courts in the EU in the field of economic governance is. In fact, the degree of involvement of courts in EMU affairs (with the latest judicial rulings in Germany and Portugal restricting severely, or striking down tout court, legislation adopted in the economic domain) is far greater than what one finds even in a country such as the United States, which is generally credited as having one of the strongest systems of judicial review world-wide.

If one considers the case of the US, it is remarkable to notice how small a role the judiciary has played over the last eighty years in the field of fiscal and economic policy. Since the New Deal, a central tenet of both state and federal courts has been to defer widely to the political branches in matters dealing with the economy, the budget, and fiscal rules. As famously signaled by the US Supreme Court in the Carolene Products case, courts are to adopt a more exacting scrutiny in matters dealing with individual rights, where the political process is unable to internalize the interests of insular minorities, while giving legislative determinations in matters of economic affairs broad deference.

The retreat of courts from the arena of economic governance was the result of a long fought battle by the political branches over judicial overreaching.
From the early 1900s until after the Great Depression, courts had systematically hampered the capacity of the state and federal governments to manage the economy and adopt adequate policy responses to the crisis of 1929, by interpreting the US Constitution as embracing a specific economic theory. Most famously, in the *Lochner* case, the US Supreme Court read the Due Process Clause of the Fifth and Fourteenth Amendments as enshrining a substantive commitment to free market and free contract, and thus largely imposed a *laissez-faire* reading of the Constitution that prevented the US government from taking action in the economic and social sphere. However, as is well-known, the FDR revolution, and the threat to change the composition of the US Supreme Court, eventually prompted the judiciary to change course and validate the New Deal transformation of the US (institutional and economic) Constitution. Since then, it has been customary for US courts to back-off from reviewing legislation that has economic implications on the assumption that the “[C]onstitution is not intended to embody a particular economic theory.”

The most explicit declaration of judicial retreat from the adjudication of economic questions, which are better left to the judgment of the political branches of government, can be found in the 1942 decision of *Wickard v. Filburn*. In this case the Supreme Court upheld a federal regulation on agricultural production stating that economic affairs “are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determinations. And with the wisdom, workability and fairness of the plan of regulation we have nothing to do.” This tradition of judicial restraint has largely survived until today. Arguably this was confirmed in the June 2012 decision by the US Supreme Court in the case of *National Federation of Independence Business v. Sebelius*, which dealt with the single most important piece of economic legislation in decades: the Affordable Care Act. Although in a ruling which was not exempted from criticism, the Supreme


307. *Lochner*, at 75 (Holmes J. dissenting).


309. *Id.* at 129 (footnotes omitted).


Court ultimately upheld the law as an exercise of the federal government’s taxing power under the US Constitution and made clear that its task was “not [to] consider whether the Act embodies sound policies. That judgment is entrusted to the Nation’s elected leaders.”

In conclusion, to the extent that the EU institutions and the member states will have to enact new measures to tackle the future challenges emerging in the EMU, the analysis of courts’ decisions and the explanation of its rationale provide an important lesson. If the political branches want to minimize the threat of judicial invalidation—a threat that kept policy-makers and financial markets alike waiting with bated breath for most of the judgment described in Part II—they should develop policies in the framework of the EU legal order and resort to ordinary EU legislation. In this framework, not only is the legitimacy of decision-making at its best (given the involvement of the Commission, the Council and the Parliament, each representing different interests and constituency), but also the risk of judicial overreach is reduced, with the ECJ as the only court empowered to review the legality of EU laws. Therefore, utilitarian arguments, if not idealistic concerns, should convince the member states to abandon the intergovernmental framework and resort to the ordinary legislative procedure under the Economic Policy Chapter of the TFEU to enact future reforms of the EMU.

C. Evaluating the Trend: the Political Process and its Advantages

Having identified a trend of increasing judicial involvement in fiscal affairs, and explained it in light of the turn toward intergovernmentalism, how should we evaluate this state of affairs? It is my argument that the current high degree of judicial involvement in the fiscal domain should be approached with skepticism. One could emphasize the practical concerns that this involvement...
Fabbrini: The Euro-Crisis and the Courts: Judicial Review and the Political

may place on future reforms of the EMU at a time when the EU institutions and member states move on to debate new instruments to address the Euro-crisis—e.g. through a Banking Union and a fiscal capacity for the EMU.\(^{318}\) The risk that the over-expansive role of the judiciary may constitute an obstacle to future measures adopted in response to the Euro-crisis is readily visible in the recent quarrel over whether the adoption of the so-called Banking Union—that is, the set of legal measures aimed at creating at the EU level a single bank supervisory mechanism, a common resolution system and a deposit guarantee scheme—should be preceded by a Treaty change. It does not seem far-fetched to argue, in fact, that the requests by the German government to introduce a Treaty amendment before enacting the Banking Union are motivated by fear of judicial invalidation by the German Constitutional Court.\(^{319}\)

But the real point is that strong constitutional arguments plead in favor of letting the political branches, rather than the courts, take fundamental decisions in the fiscal arena. As Daniel Halberstam has explained, in separation-of-powers systems three main considerations should guide the allocation of competences among alternative institutions: expertise, voice and rights.\(^{320}\) The first consideration asks which actor has the better claim of knowledge or instrumental capacity to make a decision in a given field. The second asks which actor has the better claim of representing the relevant political will. And the third asks which actor is better placed to protect rights. In the fiscal domain, the first and second considerations (expertise and voice) strongly plead in favor of letting the political branches, rather than the courts, make decisions. At the same time, the third consideration (rights) does not play a fundamental enough role in the economic domain so as to change the balance of institutional capacities in favor of greater judicial involvement.

First, political institutions are endowed with greater expertise than courts in the fiscal domain.\(^{321}\) By expertise, I mean the technical knowledge to understand economic phenomena and to take informed decisions on them and the institutional capacity to administer effectively measures which achieve the desired results.\(^{322}\) Governments, parliaments, and central banks at the national

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\(^{319}\) See Alex Barker, *Berlin Demands Treaty Change for Bank Reforms*, FIN. TIMES, Apr. 14, 2013 (discussing Germany’s request for a Treaty change before adopting the Banking Union).


\(^{321}\) See Neil Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (1994) (advising a comparative institutional analysis to identify which institution—the courts, the political process or the market—is better placed to take decision in a given domain).

\(^{322}\) See also Miguel Poiares Maduro, *Courts and Pluralism: Essay on a Theory of Judicial
level, and the Commission, the Council, the Parliament, and the ECB at the supranational level, have the resources and institutional capacity to undertake this activity. Unlike courts—which are generalist institutions, with knowledge mainly in the legal field—political branches work under the support of ad hoc research units, staffed with economists, statisticians and social scientists, which monitor fiscal phenomena, and—through impact assessments and scientific evidence—can predict the effects of specific fiscal policies. Moreover, unlike courts—which are by definition re-active institutions, since they can only respond to legal challenges—political branches can adopt proactive approaches, aimed at anticipating specific phenomena and creating incentives or disincentives toward virtuous economic results. Finally, unlike courts—which are generally ill equipped with instruments to take decision in the policy field—political branches can resort to a broad swath of policy and legal measures to achieve their goals.

Second, while the democratic deficit of intergovernmental decision-making in the EU should not be obliterated, and has been in fact magnified by the Eurocrisis, still it appears that political branches enjoy greater voice—meaning the capacity to represent the political will of the people—than courts. Indeed, recent signs of inter-institutional conflict and democratic contestation reveal some capacity of the EU regime to respond to popular and democratic pressures in the economic domain. A prime example of this dynamic is reflected in the recent decision by the EU Parliament to reject the multiannual financial framework agreed upon by the European Council which reduced the EU budget for this first time ever. With this act, in fact, the EU Parliament outlined a political vision alternative to that defended by a majority of member states in the European Council, politicizing fundamental decisions on fiscal issues. At the

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Adjudication in the Context of Legal and Constitutional Pluralism, in RULING THE WORLD 356, 372 (Jeffrey Dunoff & Joel Trachtman eds., 2009) (discussing the institutional capacity of courts vis-à-vis that of other institutions).

323. See MAURO CAPPELLETTI, IL CONTROLLO GIUDIZIARIO DI COSTITUZIONALITÀ DELLE LEGGI NEL DIRITTO COMPAREATO 9 (1972) (emphasizing the fact that a legal challenge is the necessary conditions for courts’ activity, and that conversely: *ubi non est actio, ibi non est jurisdictio*).

324. See supra text accompanying note 286.

325. See Peter Lindseth, Of the People: Democracy, the Euro-zone and Lincoln’s Threshold Criterion, 22 BERLIN JOURNAL 4, Spring 2012; (emphasizing how, despite the Euro-crisis, the EU features pretty well in terms of input legitimacy and output legitimacy, while being still deficient in demos-legitimacy); Wojciech Sadurski, Democratic Legitimacy of the European Union: A Diagnosis and Some Modest Proposals, 32 POL. YBK OF INT’L L. (2013) (emphasizing mechanisms of direct and indirect democratic legitimacy in the EU).


327. See Beda Romano, Strasburgo boccia il budget, IL SOLE 24 ORE, Mar. 14, 2013, at 13 (discussing the political implications of the vote by the European Parliament to reject the budget deal agreed by the European Council).
same time, one can think of several national elections that, since the outburst of
the Euro-crisis, have shifted governmental powers to political coalitions
advancing economic agendas which oppose the policies pursued so far in the
reform of the EMU.328 Albeit very imperfectly, the EU political process
provides a venue for legitimate decision-making that courts can hardly replace.

Third, while of course major weaknesses characterize the EU political
process and ought to be addressed in the next institutional reforms of the EMU,
it is unclear to what extent the democratic deficit of the EU political process
would be cured by greater oversight by institutions like courts, which by
definition are non-democratic.329 As it is well-known, the counter-majoritarian
nature of courts is a valuable asset especially in the protection of fundamental
rights, which are claims that individuals must invoke against majority rule.330 As
argued by many legal scholars, a crucial constitutional task of courts is to check
and review action by the political branches in order to secure the rights of those
individuals whose interests the political process is unable to internalize.331 In
these situations, thanks to their greater capacity to protect rights, courts can
correct the distortions produced by the political process and its bias against
insular minorities. In the fiscal domain, however, there seems to be no evidence
that the political process is biased by structural failures and by the tendency to
systematically underrepresent specific interests. In other words, regardless of the
content of the legal measures falling under the review of European courts, it
seems that in the area of fiscal governance the political process is generally able
to internalize the interests of the affected stakeholders and to ensure that no
group of citizens has its voice systematically discarded in the policy-making
process. As a result, courts should play a restrained role and hold their fire for
other fields where instead action is needed to correct the deficiencies of the
political process on rights protecting grounds.332 This is the legacy of the

328. See Andrew Higgins, Europe Pressed to Reconsider Cuts as Cure, THE NEW YORK
  TIMES, Apr. 27, 2013 (discussing increased political malaise vis-à-vis the strategy so far adopted to
  address the Euro-crisis).
329. See also infra text accompanying note 327.
330. On the counter-majoritarian nature of courts see especially ALEXANDER BICKEL, THE
331. See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW
  (1980); JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980).
332. Of course, legal challenges against many features of the new constitutional architecture of
  the EMU were clothed in rights terms—witness the petitioners before the Bundesverfassungsgericht
  in the ESM case who claimed that the ESM restricted their right to vote. However, it has been
  emphasized how, in fact, the Constitutional Court has been skewing its procedural rules in order to
  adjudicate as fundamental-rights-questions issues which instead concern the structure of powers or
  the governance of the economy. See Wendel, supra notes 193 and 24. See also the interview to the
  President of the Bundestag, Karl Lamer: Heriber Prantl, Karl Lamers rügt Verfassungsrichter,
  SÜDDEUTSCHE ZEITUNG, Sept. 1-2, 2012, at 5, which criticizes the interference by the German
  Constitutional Court.
Carolene Products case in the US but its rationale well applies in the EU context too.

Granted, while in the US courts can defer to a reasonably well functioning political process to take decisions in the economic domain, in the EU the capacity and legitimacy of political institutions is much more questionable. In the US, policy-making decisions are taken by a federal government composed of a directly elected legislature and a President who is responsible to the people at periodic elections. In the EU, on the contrary, economic policy is mainly decided through intergovernmental decision-making and is thus centered on the role of the European Council (the body representing state governments) to the detriment of the Parliament (representing EU citizens). In fact, as I mentioned previously, the main explanation for the high degree of judicial involvement in the fiscal domain lies paradoxically in the intergovernmental strategy pursued by the EU member states to respond to the Euro-crisis, based on the European Council and international agreements, rather than on the Community method and EU law. However, as much as the EU political process is urgently in need of reform, it is unclear to what extent its deficiencies could be cured by greater judicial fiat. An intergovernmental system of governance suffers from major legitimacy gaps. Since considerations of expertise, voice, and rights indicate that the political process ought to maintain the lead in the fiscal and economic field, reforms should be adopted in order to increase the legitimacy of the EU political process and its capacity to provide a well-functioning arena for democratic decision-making and contestation.

CONCLUSION: REFORMING THE EU POLITICAL PROCESS WITHOUT THE COURTS

This Article has analyzed the role that courts have so far played in the context of the Euro-crisis. As Part I has explained, the EU institutions and member states have responded to the Euro-crisis by adopting important reforms

333. See Carolene Products, 152 fn. 4. For a comment on the most famous footnote in US constitutional history See also Bruce Ackerman, Beyond the Carolene Products, 98 HARV. L. REV. 713 (1985).
334. See generally LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW. VOLUME 1: CONSTITUTIONAL STRUCTURES, SEPARATED POWERS AND FEDERALISM ch. 6 (2005).
335. See also Deirdre Curtin, Challenging Executive Dominance in European Democracy, 77 MODERN L. REV. 1 (2014).
337. See supra text accompanying notes 287-288.
in the fiscal constitution of the EMU, by strengthening budgetary constraints, introducing new mechanisms of financial stability and setting up a framework of economic adjustments for countries in troubled fiscal conditions. In each of these areas, legal challenges have been raised, and courts have been asked to intervene. As Part II has detailed with reference to high courts’ decisions in Estonia, France, Germany, Ireland, Portugal and the EU, courts have been at center stage. National and supranational courts adjudicated issues as varied as the legality of the constitutional changes brought about by the Fiscal Compact, the constitutionality of the ESM Treaty, the admissibility of a simplified amendment process to the TFEU, and the validity of major wage cuts enacted through budgetary legislation implementing domestically the adjustment programs agreed upon by a state government and the troika of international lenders.

As Part III has emphasized, courts throughout the EU have, by and large, validated the measures under review, permitting the reforms to the EU fiscal constitution to go forward. Nevertheless, a qualitative analysis of legal reasoning and judicial rulings has also revealed that courts have grown increasingly dissatisfied with features of the new legal architecture of the EMU, especially measures of financial stability and economic adjustment, and in some recent cases have ended up placing important conditions on the validity of the measures under review or struck them down tout court. As I argued, the main explanation for this development lies in the intergovernmental strategy followed by the EU member states to respond to the Euro-crises, with the systematic recourse to international agreements adopted outside the EU legal and amenable to domestic judicial review. Paradoxically, intergovernmentalism has created room for judicialization. Had the member states made more use of the “community method” and the ample possibility offered by EU law to enact measures to address the Euro-crisis, the space for judicial interference—and the threat that came with it—would have been largely reduced.

In fact, the paradoxical degree of involvement of national and supranational judiciaries in EMU affairs becomes all the more visible when compared with the role that courts play in the United States. Although the United States is endowed with one of the most powerful and pervasive systems of judicial review worldwide, since at least the 1930s courts have widely deferred to the political branches in the economic domain, on the understanding that the political process is better placed than the judicial one to answer fundamental budgetary, financial, and economic questions. As I have claimed, however, also in the EMU strong constitutional arguments relating to expertise, voice and rights plead in favor of courts maintaining, or reverting to, a deferent approach vis-à-vis the political branches in the fiscal arena. A lesson that should be learned from the analysis of judicial review of new EMU measures is thus that, in the future, the EU member states should respond to the challenges of the Euro-crisis by adopting ordinary
legislation in the framework of EU law. But make no mistake: criticizing judicial interferences in the fiscal domain and stressing the advantages of the ordinary EU law-making process does not imply idealizing it: quite the contrary. As I have repeatedly noted, the EU political process is urgently in need of reform. As acknowledged by the June 2012 report “Towards a Genuine EMU” written by the President of the European Council, strengthening the legitimacy and accountability of the EU decision-making process in the fiscal field is a necessary step in the future reforms of the EMU.

Decisions on national budgets are at the heart of Europe’s parliamentary democracies. Moving towards more integrated fiscal and economic decision-making between countries will, therefore, require strong mechanisms for legitimate and accountable joint decision-making. Building public support for European-wide decisions with a far-reaching impact on the everyday lives of citizens is essential.”

An echo of the same concerns is also evident in the November 2012 Commission Communication outlining a blueprint for a deep and genuine EMU and opening a debate on future reforms. Here, it is stated that further proposals for fiscal integration “must be accompanied by commensurate political integration, ensuring democratic legitimacy and accountability.”

How these demands for greater legitimacy and accountability should be implemented in institutional terms has been the object of an increasingly lively debate. A number of proposals have been voiced both by national and EU politicians and by prominent scholars. These proposals range from the suggestion to introduce a direct election of the President of the EU Commission, or at least to tie the choice of the Commission President to the
result of the EU Parliament elections—a Commission’s Communication—to the proposal for improving the legitimacy of the President of the European Council, through some forms of indirect popular election. Discussing the pros and cons of each of these proposals is not the aim of this Article. What is relevant for the purpose of this Article is that this debate is ongoing. In fact, this debate should go on, and it should quickly evolve from mere academic or policy-making discussion into tangible legal reforms. What is also relevant, however, is that each and every of these proposals aims at improving the democratic legitimacy of decision-making, which implies as a primary matter enhancing popular voice “at the level [of government] at which the decisions are taken.”

Courts play a crucial function in any constitutional regimes, especially in protecting the rights of those individuals who cannot adequately defend themselves through the political process. Yet, the judicial function has limits. In the fiscal arena, the political branches are better placed than courts to take decisions and should therefore be given wide room to decide on how to respond to the Euro-crisis. As the Article has suggested, the political branches can reduce the occasions for judicial interference in the budgetary, financial, and economic domain by adopting, in the future, legal measures in the framework of EU law. Contrary to international agreements (like the ESM Treaty or the Fiscal Compact) which are amenable to domestic judicial review, EU laws (such as the Six Pack, the Two Pack or the EFSM) are only subject to scrutiny by the ECJ. Moreover, because EU laws are adopted through a complex institutional procedure that sees the involvement, and balances the interests, of multiple bodies (including—in most of the cases—the EU Parliament), adopting legislation in this framework also reduces legitimacy concerns. Yet, it does not


350. Note that four out of six of the legal acts adopted in the Six Pack, and both legal acts comprising the Two Pack were enacted pursuant to the co-decision procedure, which involves both the European Parliament and the Council on equal grounds, as co-legislator. The remaining measures of the Six Pack, and the regulation establishing the EFSM, however, were enacted only by the Council, without the active involvement of the European Parliament. See supra notes 16, 17 & 32. For a criticism of the incomplete involvement of the European Parliament in the governance of EMU and a plea for reform see Miguel Maduro, A New Governance for the European Union and the Euro: Democracy & Justice, report commissioned by the Constitutional Affairs Committee of the European Parliament PE 462.484 (2012).
entirely solve them. Responding to the Euro-crisis requires greater democracy and electoral accountability for the fundamental decisions taken in the fiscal field. It would be ironic if courts, by reviewing the future reforms of the constitutional architecture of the EMU, were to prevent this.
2014

The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?

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Recommended Citation

Available at: http://scholarship.law.berkeley.edu/bjil/vol32/iss1/4

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The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?

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INTRODUCTION

Since the entry into force of the 2007 United Nations Convention on the Rights of Persons with Disabilities (CRPD), there is an emerging consensus in international human rights discourse on the notion that all human persons, regardless of their decision-making capabilities, should enjoy “legal capacity” on an equal basis—that is, the right to be recognized as a person before the law and the subsequent right to have one’s decisions legally recognized.¹ The United Nations Committee on the Rights of Persons with Disabilities has stated that the right to legal capacity on an equal basis with others requires that decision-making mechanisms based on a philosophy of “support” replace substituted mechanisms such as adult guardianship.² “Support” in the exercise of legal capacity refers to a broad cluster of decision-making arrangements, all of which have at their core the will and preferences of the individual. By contrast,
substitute decision-making regimes permit the removal of legal capacity from certain individuals and vest it in third parties, who generally base decisions on the perceived objective best interests of the person. Most legal systems in the world have not yet made the shift from substitute decision-making to a support model, and many have questioned whether such a radical reform is even possible.\footnote{This statement is based on authors’ experiences engaging in legal capacity law reform around the globe. For a discussion of the challenges of reform specifically in the United Kingdom see Peter Bartlett, The United Nations Convention on the Rights of Persons with Disabilities and the Future of Mental Health Law, 8 PSYCHIATRY 496 (2009).}

In this Article, we explore a plausible legal framework within which to ground a support model of legal capacity and fully replace regimes of substituted decision-making. We ground our argument in the lived experience of people labeled with a disability. We focus particularly on individuals with cognitive disabilities, as they are generally more likely to have their decision-making ability called into question, and consequently, to have their legal capacity denied. However, we claim that such a system of support will ultimately benefit all individuals, not just persons with disabilities. The Article further examines reform efforts underway and the contributions of legislative change and judicial activism. Since the entry into force of the CRPD, many countries have begun to reform their laws on legal capacity, as described below in Section III. While significant challenges remain to ensure the full replacement of substitute decision-making regimes, international developments described in Sections III and IV, are clearly trending towards the recognition of support to exercise legal capacity.

The denial of legal capacity to certain groups of persons on the basis of perceived characteristics of inferiority is not a new phenomenon. Indeed, women, slaves, and racial and ethnic minorities, among other groups, have long been denied legal capacity. However, at present, it appears that a diagnosis of a disability, and in particular a cognitive disability, is the one remaining characteristic upon which contemporary society is willing to justify stripping legal capacity from a person. Take for instance the following example, adopted from the facts of a European Court of Human Rights case, as reported by the Mental Disability Advocacy Center:\footnote{Sýkora v. Czech Republic, Appl. No. 23419/07, Nov. 22, 2012, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114658; see Kafka Storyline at The European Court of Human Rights, MENTAL DISABILITY ADVOC. CENTER, http://www.mdac.info/en/22/11/12/kafka-story-line-european-court-human-rights (last visited Dec. 28, 2013).}

You have a verbal argument with your girlfriend. She calls the police, and when they arrive, she explains that you have a diagnosis of schizophrenia, so they take you to a psychiatric hospital. On arrival at the hospital, you refuse to

\footnote{In this article, the term cognitive disability is used to describe a broad range of disabilities, including psycho-social (mental health) disabilities, developmental disabilities, acquired brain injuries, and dementia.}
 Flynn and Arstein-Kerslake: The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?

126 BERKELEY JOURNAL OF INTERNATIONAL LAW

take neuroleptic drugs because when you took these during your previous hospital stays they negatively impacted your eyesight. The psychiatrists ignore your wishes, stating that your illness means you do not understand the treatment required, and that you do not have legal capacity to make this kind of decision. They forcibly administer the medication, and as a result your vision is impaired for a year. You are detained for twenty days inside the psychiatric hospital. You cannot complain to a court because your guardian (a local government bureaucrat you have never met) has consented to your placement in the hospital and your treatment, so you are considered a “voluntary” patient.

As the above example demonstrates, the removal of legal capacity can have significant consequences, even when it occurs in relation to a single decision or area of decision-making (e.g., consent to medical treatment or financial decision-making). Where legal capacity is removed, one’s ability to challenge the removal or appointment of a guardian is, at best, compromised and often non-existent. Similarly, a disabled person’s views with respect to treatment are often inappropriately ascribed to the illness or disability, equated with a lack of understanding of the situation, and therefore ignored.

In the case above, the circumstances in which the plaintiff found himself are certainly not unique to the Czech Republic, where the case occurred. Similar instances take place daily in other countries, including the United States, where a combination of adult guardianship provisions7 and mental health laws,8 allow for individuals to be detained and treated against their will. Once detained, individuals have little recourse to legal redress when a guardian has consented to detention and treatment. These grievous human rights violations cannot be addressed simply by introducing more due process protections or merely allowing more weight to be given to the individual’s wishes. These types of incremental changes, while important, will not address the totality of the discrimination experienced by persons with disabilities, and those with cognitive disabilities in particular. The denial of legal capacity is a serious interference with an individual’s civil rights. It is paramount to the denial of personhood because it leaves the individual stripped of the freedom to engage with society to


have her will and preferences realized on an equal basis with others. Only by a radical re-balancing of autonomy, and protection across various legal frameworks, and through recognition of legal capacity as a universal attribute inherent in all individuals by virtue of their humanity, can true reform be achieved.

I. THE CASE FOR A SUPPORT MODEL OF LEGAL CAPACITY

Legal capacity includes both the ability to hold rights and to be an actor under the law (e.g., to enter into contracts, vote, and marry). The law’s recognition and validation of an individual’s will and preference is the key to accessing meaningful participation in society. Mental capacity—the decision-making ability of an individual—is distinct from legal capacity: mental capacity naturally varies among individuals, and may differ depending on environmental factors.

In modern times, the use of the functional approach to legal capacity denial has conflated the concepts of mental and legal capacity. The functional approach came into widespread use only in the late twentieth century, and the CRPD is the first major international human rights instrument to bring attention to the violations that occur under such an approach. The functional approach purports to assess mental capacity and deny legal capacity accordingly. An individual’s decision-making skills are accepted as a legitimate basis for denying legal capacity, and lowering one’s status as a person before the law. Because functional tests of mental capacity require either a “mental disability” or a finding of an “impairment of the mind or brain,” it is almost exclusively people with cognitive disabilities who have their legal capacity restricted on the basis of perceived decision-making skills.


10. Other approaches to legal capacity have also embraced the conflation of legal and mental capacity. For a discussion of the functional approach as well as other approaches to legal capacity law, see Dhandha, supra note 1.

11. For a discussion of the functional approach in US law, and the need to move to a system compliant with Article 12 of the CRPD, see Kristen Booth Glen, Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship and Beyond, 44 COLUM. HUM. RTS. L. REV. 93 (2012).

12. The England and Wales Mental Capacity Act allows third parties to make ad hoc determinations that an individual’s decision-making skills or mental capacity are lacking. The third party may then impose her own determination of what is in the best interests of the individual, with no obligation to follow the will and preference of the person. See Mental Capacity Act 2005, c. 9, §§ 2-4 (Eng.); COURT OF PROTECTION PRACTICE: 2012 126 (Gordon Ashton ed., 2012).

13. See, e.g., Mental Capacity Act 2005, c. 9, § 2(1) (Eng.); N.Y. MENTAL HYG. LAW §81.02 (4)(III) (McKinney through L.2013, chapters 1 to 340); CAL. PROB. CODE § 1828.5(a).

14. In 2012, 375 people in Ireland had their legal capacity removed and were placed under wardship. Only seven of those people were reported as being placed under wardship for reasons...
The most obvious human rights violation perpetrated by the functional approach is its facially discriminatory nature. Article 12 of the CRPD requires respect for the legal capacity of people with disabilities on an equal basis with others. Discrimination is defined in Article 2 of the CRPD as “any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” Functional approaches that permit legal capacity denial only to individuals with cognitive impairments are facially discriminatory and interfere with the right to equal recognition before the law, guaranteed in Article 12.

If a functional approach were made facially neutral by eliminating the requirement of “impairment,” it would allow for the denial of legal capacity to any individual perceived to not understand the nature and consequences of her actions. Non-disabled people may realize what a high standard this is only when faced with having to meet it themselves—yet, as a society, we have continued to apply this high standard to individuals with cognitive disabilities. Due to stigma related to disability, there would still be a high risk of this system being discriminatorily applied to individuals with disabilities. Furthermore, even a facially neutral functional test of capacity that adequately deals with the stigma of disability would not adhere to Article 12 in its entirety. Article 12 calls for not only the respect for legal capacity on an equal basis but also places an obligation on states to provide access to the support necessary for the exercise of legal capacity.

The monitoring body of the CRPD has deemed substituted decision-making regimes incompatible with Article 12 of the Convention. Although the other than cognitive disability (two had experienced residential abuse and five were minors). Ireland Courts Service, Annual Report (2012), available at http://www.courts.ie/Courts.ie/library3.nsf/WebFiles)/87BE463114EF96FF80257BA20033953B/$FILE/Courts%20Service%20Annual%20Report%202012.pdf.


17. An example of such an approach, which uses the criterion of “impairment of, or a disturbance in the functioning of, the mind or brain,” is the functional test of mental capacity in the Mental Capacity Act 2005, c. 9, § 2(1) (Eng.).

18. The type of functional test that is used varies by jurisdiction and not all use the term “impairment.” As discussed, England and Wales use this term, whereas the Irish Assisted Decision-Making (Capacity) Bill 2013 contains an assessment of “mental capacity” which does not include a diagnostic step of identifying an impairment in the functioning of the mind or brain.


Committee on the Rights of Persons with Disabilities has not yet provided a conclusive definition of substituted decision-making regimes, a tentative proposal has been made in the Committee’s Draft General Comment on Article 12. In this document, the Committee states that a substituted decision-making regime is a system where: (1) legal capacity is removed from the individual, even if just in respect to a single decision, (2) a substituted decision-maker can be appointed by someone other than the individual, and, (3) any decision made is bound by what is believed to be in the objective “best interests” of the individual as opposed to the individual’s own will and preferences.\footnote{Draft General Comment on Article 12: Advance Unedited Version, Committee on the Rights of Persons with Disabilities (CRPD), 10th Sess., (Sept. 2-13, 2013), at ¶ 23, available at http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx} The Committee’s Draft General Comment also states that “functional tests of mental capacity . . . that lead to denials of legal capacity violate Article 12 if they are either discriminatory or disproportionately affect the right of persons with disabilities to equality before the law.”\footnote{Id. at ¶ 21.}

Instead of systems of substituted decision-making, the CRPD calls for support to exercise legal capacity.\footnote{See, e.g., Consideration of Reports, Tunisia, supra note 19 at 4; Consideration of Reports, Spain, supra note 19 at 5.} In a legal system that follows the support paradigm, there would be no denials of legal capacity; instead, it would be accepted as a universal attribute.\footnote{Id. at ¶ 25(g).} Supports for exercising legal capacity would be offered to the individual, but not imposed.\footnote{For an example, see supported decision-making agreements under the British Columbia Representation Agreement Act. Representation Agreement Act, R.S.B.C. 1996, c. 405 (Can.).} These supports could include relatively minor accommodations, such as accessible information and additional time to make a decision, or more formal measures, such as supported decision-making agreements nominating one or more supporters to assist the individual in making certain decisions and communicating them to others.\footnote{The concept of facilitated decision-making was conceptualized by Michael Bach & Lana Kerzner, A New Paradigm for Protecting Autonomy and the Right to Legal Capacity, Law Comm’n of Ontario (Oct. 2010), available at http://www.lco-cdo.org/disabilities/bach-kerzner.pdf.} “Facilitated” decision-making\footnote{Convention on the Rights of Persons with Disabilities art. 2, opened for signature Mar. 30, 2007, 46 I.L.M. 443.} would be available where someone could be appointed to make a decision on behalf of another individual as a last resort. Safeguards would be in place to ensure that the decision fully respects the individual’s “rights, will and preferences,”\footnote{http://scholarship.law.berkeley.edu/bjil/vol32/iss1/4} as far as they can be ascertained. Facilitated
decision-making would be used only as a last resort when others cannot
determine the will and preference of the individual after exhausting all efforts.29

II.
THE SUPPORT MODEL IN PRACTICE: POSITIVE REFORM TRENDS

When the law recognizes an individual’s competency to make her own
decisions there are broad effects. Legal recognition of an individual’s power to
make decisions fosters capability development across many areas of life. Amita
Dhanda argues that “capability development can happen only if every human
being is accorded the opportunity to so live life as to realize his or her own inner
genius.”30 The legal recognition of an individual as competent to make decisions
also affirms the power of choice, thereby enabling individual development.31
The support paradigm fosters social solidarity without sacrificing the
recognition of equal legal capacity. By offering the choice of assistance, the
supported decision-making paradigm removes the illusion that legal capacity
can be exercised only through self-sufficiency. This opens the door for a societal
dialogue about the interdependence of all individuals.32

The paradigm of support adapts to a sliding scale of abilities,33 rather than
being a binary model of capacity or incapacity as many substituted decision-
making models are.34 It does not create a separate category of people who are
“legally incapacitated” with regard to some or all decisions—which has been
argued to amount to institutionalized discrimination and subordination.35 This
categorization of individuals, whereby there is one category of persons whose

29. Amnesty Int’l Ireland & The Ctr. for Disability Law & Policy, NUI Galway, Essential
30. See Dhanda, supra note 1, at 436.
31. See Bruce Winick, The Side Effects of Incompetency Labeling and the Implications for
Mental Health Law, 1 PSYCHOL., PUB. POL’Y, & L. 6, 41–42 (1995); Richard M. Ryan & Edward L.
Deci, Self-Determination Theory and the Facilitation of Intrinsic Motivation, 55 AM. PSYCHOLOGIST
68, 70 (2000); Edward L. Deci & Richard M. Ryan, The “What” and “Why” of Goal Pursuits:
Human Needs and the Self-Determination of Behaviour, 11 PSYCHOLOGICAL INQUIRY 227, 230–31
(2000).
32. Gerard Quinn, Rethinking Personhood: New Directions in Legal Capacity & Policy 5
lawandpolicy-gerardquinn-april2011.docx; Gerard Quinn & Anna Arstein-Kerslake, Restoring the
‘Human’ in ‘Human Rights’: Personhood and Doctrinal Innovation in the UN Disability
Convention, in THE CAMBRIDGE COMPANION TO HUMAN RIGHTS (Conor Gearty & Costas Douzinas
eds., 2012).
33. See, e.g., Bach & Kerzner, supra note 27.
34. See S. Herr, Self Determination, Autonomy, and Alternatives for Guardianship, in THE
HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES 440 (Stanley S. Herr et. al., eds.,
2003); Dhanda, supra note 1, at 433, 459-60.
35. Minkowitz, supra note 1 at 406.
decisions are recognized and another category of persons whose are not, is fraught with pitfalls, and can be profoundly disempowering for the group of people labeled “incapacitated.” The support paradigm requires that the system begins with the assumption that all individuals have a decision-making ability and then determines what support each individual needs in augmenting that ability and expressing her preferences. In this system, no labels are needed; instead, the goal is merely to determine what type of support an individual might need.

When an individual is faced with challenges in exercising her legal capacity, according to the support paradigm, the solution is not forced intervention or substituted decision-making. Instead, in a supported decision-making system, outside assistance for decision-making should generally be minimal and based on the needs of the individual. The individual is the center of the decision-making process and the support person is not permitted to utilize her judgment in place of the individual’s judgment. Rather, the support person is merely an interpreter of the will and preferences of the individual.

There are some people who require almost complete outside support for decision-making, such as those with impairments that significantly affect communication. For people in this situation, the support person should, to the fullest extent possible, still enable the individual to exercise her legal capacity. This may mean a variety of things, including spending time learning the individual’s communication methods (e.g., movements of the eyelids, hand squeezing, and smiling), researching past communications, and any other means to ascertain the individual’s desires and decisions. The support person should try to ascertain, by any means available, the wishes of the individual. If it is not possible to discover the wishes of the individual, the support person should make a decision not based on what she believes are the best interests of the individual but instead on what she believes to be the individual’s true wishes. Even where communication is minimal or difficult to interpret, the support


40. Id.
person must search for indications of the individual’s will and preferences—including speaking to those who know the person well, considering the person’s values and belief systems, and taking into account any previous expressions the person may have made about her wishes which could be applied to the present situation.

There are many different possible forms of supported decision-making systems. However, because substituted decision-making regimes dominate modern legal frameworks, there are very few clear, functioning examples of what a supported decision-making system should look like.\(^{41}\) States must establish supported decision-making systems that conform to their particular cultural and political landscapes.

We argue that in order to ensure that states adopt the support paradigm of legal capacity, some basic guarantees must be met. These include the replacement of substituted decision-making regimes (including adult guardianship, trusteeship, or mechanisms based on the functional approach to removal of legal capacity) with supports to exercise legal capacity, including supported decision-making. The introduction of supported decision-making in parallel with the retention of substitute decision-making is not sufficient to ensure compliance with Article 12 of the CRPD.\(^ {42}\) Another key component of the support model is the guarantee that supports must be offered to the individual, but never imposed against her will. This paradigm may also allow for emergency interventions where an individual’s life, well-being, or safety is at risk of serious adverse effects. However, these interventions must be very carefully designed to ensure that they are used only in exceptional cases with appropriate safeguards and do not permit a return to “best interests” or substitute decision-making.

III. LEGAL CAPACITY LAW REFORM PROCESSES

Since the entry into force of the CRPD, many countries have initiated legal capacity law reform processes, either in preparation for ratification of the CRPD or following ratification. Three examples of such reform processes are briefly outlined here to illustrate the multiplicity of approaches state parties can take to address Article 12 of the CRPD.

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41. For a discussion of the support paradigm of Article 12 and supported decision-making mechanisms, see generally CTR. FOR DISABILITY LAW & POLICY, NUI GALWAY, SUBMISSION ON LEGAL CAPACITY: THE OIREACHtas COMMITTEE ON JUSTICE, DEFENCE & EQUALITY 55 (2011).

BERKELEY JOURNAL OF INTERNATIONAL LAW, Vol. 32, Iss. 1 [2014], Art. 4

THE SUPPORT MODEL OF LEGAL CAPACITY

A. Ireland

Prior to ratifying the Convention, Ireland committed to reform its outdated substitute decision-making regime, known as the “ward of the court” system.\textsuperscript{43} The Minister for Justice, Alan Shatter, stated in parliament that Ireland would not ratify the CRPD until the necessary legislative reforms were completed: “Ireland does not become party to treaties until it is first in a position to comply with the obligations imposed by the treaty in question, including by amending domestic law as necessary.”\textsuperscript{44} When the present government came to power in 2011, its Programme for Government included a commitment to introduce a “Capacity Bill that is in line with the UN Convention on the Rights of Persons with Disabilities.”\textsuperscript{45}

In August 2011, the parliamentary Joint Committee on Justice, Defence and Equality (the Justice Committee) called for submissions from interested parties on the content of what was then referred to as the Mental Capacity Legislation.\textsuperscript{46} In response, the Centre for Disability Law and Policy and Amnesty Ireland co-chaired a coalition of organizations and individuals in the fields of intellectual disability, mental health, and older people. This group came together to discuss whether a joint approach to legal capacity reform could be developed across their interest groups. The result was the publication of a set of Essential Principles for Legal Capacity Reform in April 2012, which set out ten key principles that legislation should adhere to in order to comply with Article 12 of the CRPD.\textsuperscript{47} Many of the groups involved presented at oral hearings convened by the Justice Committee in February 2012.\textsuperscript{48} The Justice Committee subsequently published a report based on the oral hearings, requiring a shift away from the “best interests” model of substitute decision-making and endorsing the support model of legal capacity toward an approach that respects the will and preferences of the individual.\textsuperscript{49}

\textsuperscript{43}Lunacy Regulation (Ireland) Act 1871, 34 Vict., c. 22.

\textsuperscript{44}Written Answers: National Disability Strategy, DAIL DEBATES (MAY 22, 2012), available at http://debates.oireachtas.ie/dail/2012/05/22/00318.asp.


\textsuperscript{47}AMNESTY INT’L IRELAND & THE CTR. FOR DISABILITY LAW & POLICY, supra note 29.


Flynn and Arstein-Kerslake: The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?

The Assisted Decision-Making (Capacity) Bill was published in July 2013. It presents an interesting mix of supports (including the option of entering binding assisted decision-making agreements\(^{50}\) and co-decision-making agreements\(^{51}\)) and substitute decision-making (such as decision-making representatives\(^{52}\) and informal decision-makers\(^{53}\)), but continues to be premised on the individual reaching a certain standard of mental capacity as a prerequisite for retaining legal capacity with respect to a given decision. The definition of capacity does not include a diagnostic step (i.e., impairment in the functioning of the mind or brain). On the one hand, this makes it less obviously discriminatory, but on the other hand, any of the forms of decision-making prescribed under the Bill may occur only where the individual considers that her capacity is either “in . . . question” or “shortly [may] be . . . in question,”\(^{54}\) which seems to imply that the main group of individuals affected by the legislation will be those with impaired decision-making ability and especially persons with cognitive disabilities.

A detailed discussion of the legislation is outside the scope of this Article, but it is important to note that even in the substitute decision-making provisions of the Bill, intervenors are obliged to act in conformity with the guiding principles of the Bill, which include respect for the will and preferences of the individual (albeit with the qualifier that this should be done only when “all practicable steps have been taken”).\(^{55}\) It is also significant that “best interests” does not appear as a principle for guiding decision-making under the Bill.

The definition of capacity set out in Section 3 of the Bill reveals that the underlying premise of the legislation is that a certain standard of mental capacity is a prerequisite for the recognition of an individual’s legal capacity\(^{56}\)—a premise which is not, in our view, compatible with the CRPD’s interpretation of Article 12. Nevertheless, legal recognition of the various supports necessary to exercise legal capacity (such as assisted decision-making and co-decision making) is provided in the Bill,\(^{57}\) which is certainly a positive step forward.

B. Canada

In the Canadian Province of Newfoundland and Labrador, the Minister for Justice, Felix Collins, made a commitment to reform at a symposium in 2011.\(^{58}\)

\(^{51}\). Id. at § 18.
\(^{52}\). Id. at § 24.
\(^{53}\). Id. at § 53.
\(^{54}\). Id. at § 2 (see definition of “relevant person”).
\(^{55}\). Id. at § 8.
\(^{56}\). Id. at § 3.
\(^{57}\). Id.
\(^{58}\). See Securing Citizenship and Legal Capacity for All, CANADIAN ASS’N OF CMTY. LIVING...
Collins committed to work collaboratively with community actors to develop model legislation for legal capacity reform in the province, which could be subsequently used as an example of good practice for other Canadian provinces and jurisdictions outside of Canada. Subsequently, a working group, which included Article 12 scholars Michael Bach and Lana Kerzner, developed a policy document that was submitted to the provincial government in early 2013.

While the contents of the submission have not yet been made public, it is expected that it will build on the existing work of Bach and Kerzner, who in 2010 proposed to the Ontario Law Commission that legislation to support the exercise of legal capacity and comply with Article 12 of the CRPD could recognize three key ways to exercise legal capacity. The first is where an individual is legally independent and requires only minor accommodations, such as accessible information, in order to make and communicate a decision. The second is a formal supported decision-making arrangement, where the individual makes an agreement with one or more supporters about the areas of decision-making with which she would like assistance, while retaining full legal capacity. The third is facilitated decision-making, which applies as a last resort when the person is not legally independent or in a support arrangement. In this case, a facilitator will attempt to interpret the will and preferences of the individual and make a decision that she believes in good faith represents the wishes of the person.

C. India

In India, the draft Rights of Persons with Disabilities Bill 2011 and the proposed amendments to the National Trust Act (establishing a support organization for persons with disabilities with high support needs) envisage a shift to universal legal capacity and supports to exercise legal capacity to replace substituted decision-making. The 2011 Bill proposes the abolition of plenary...
Flynn and Arstein-Kerslake: The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?

136 BERKELEY JOURNAL OF INTERNATIONAL LAW [Vol. 32:1

guardianship and the transition of all those currently under plenary guardianship to a newly established limited form of guardianship, based on “joint decision making which operates on mutual understanding and trust between the guardian and the person with disability.” In this new system, guardians are under a legal obligation to closely consult with persons with a disability to determine their will and preference. While the principles in this system reflect a move towards the support model, we are concerned that it may function as a substituted decision-making regime in violation of Article 12.

Importantly, no new entrants to limited guardianship will be permitted as this system is purely transitional for those currently under plenary guardianship. Limited guardianship did not exist prior to the new Bill. Individuals under limited guardianship will be supported to develop skills to enable them to transition out of limited guardianship into more progressive supported decision-making arrangements. The 2011 Bill envisages that all those currently not under plenary guardianship (i.e., new entrants to the system) will be provided with supported decision-making options instead of being placed into limited guardianship. The Bill also provides for a review of limited guardianship by the appropriate authorities designated by the government to establish whether this new system is effective in assisting “such persons with disabilities in establishing suitable support arrangements to exercise their legal capacity” and thus enabling them to transition out of limited guardianship.

D. Summarizing the Legal Capacity Reform Processes

These law reform processes and others developing throughout the world, including pilots of supported decision-making models, indicate positive steps


68. Id. at § 19(3).

69. The Rights of Persons with Disabilities Bill 2011 mandates state authorities to provide assistance to persons who have exited plenary guardianship to move to support arrangements other than limited guardianship. Id. § 20(1)(b). Draft amendments would grant funding for programs to train limited guardians on informed consent and arriving at decisions in accordance with the will and preference of the individual. Draft National Trust Act Amendments 2011, supra note 66, at Ch. IV, § 11(2)(e)(ii-iii).

70. The Rights of Persons with Disabilities Bill 2011 mandates state authorities to “establish or designate one or more authorities to mobilize the community and create social networks to support persons with disabilities in the exercise of their legal capacity.” The Rights of Persons with Disabilities Bill 2011, supra note 67, at § 20(1). This Bill eliminates plenary guardianship by stating that “any act, order or proceedings which has the effect of denying the legal capacity of a person with disability in any matter or which questions the legal capacity of a person with disability on the grounds of disability shall be void.” Id.

71. Id. at § 20(1)(c).

72. Id. at § 9(2)(ii).

73. MARGARET WALLACE, OFFICE OF THE PUBLIC ADVOCATE (SOUTH AUSTRALIA),
toward the replacement of substitute decision-making regimes with the support model of legal capacity. However, it should be acknowledged that none of these examples represent a flawless reform process, and that in each case certain political compromises may be made, for example, in terms of the scope of the legislative reform. Legal capacity is a fundamental issue at the core of our legal frameworks, and, consequently, legal capacity reform will have a knock-on effect on many areas of law (family law, inheritance and property law, marriage, consent to sex, and consent to medical treatment to name just a few). While acknowledging the limitations of any law reform process, the above examples demonstrate that law reform plays a vital role in ensuring the principles of Article 12 are enshrined in domestic legal frameworks. These examples also point toward changes in the ways in which people with disabilities interact with the law and receive support to exercise their legal capacity.

IV. LEGAL CAPACITY REFORM AND THE COURTS

Both legislative reform and strategic litigation can play a role in securing the rights in Article 12. Legislative reform is particularly critical for the right to support in exercising legal capacity. The positive obligations that the right carries make it difficult to imagine how supported decision-making could be implemented and formally recognized without statutory language. It is absolutely critical that legislative safeguards are in place to ensure that supports to exercise legal capacity respect the “rights, will and preferences” of the individuals using the support.74 It is equally important to abolish substituted decision-making laws and discriminatory denials of legal capacity.

Particularly in common law jurisdictions, the precedential power of case law can also effectively chip away at the substituted decision-making edifice.75 Strategic litigation may be powerful for establishing negative obligations on states, such as the duty to refrain from discriminatory denials of the right to legal capacity. Such litigation has already proven influential for the duty to refrain from certain interferences with the correlating rights to a fair trial,76 private

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75. For a discussion of progressing legal capacity law through litigation see Oliver Lewis, Advancing Legal Capacity Jurisprudence, 6 EUR. HUM. RTS. L. REV. 700, 700-14 (2011).

Flynn and Arstein-Kerslake: The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?

life, and liberty. However, strategic litigation also has the potential to be a tool for the recognition of positive obligations, such as the right to supports to exercise legal capacity.

We have not yet seen the full application of Article 12 in a judicial decision. However, the importance of the rights and obligations in Article 12 of the CRPD is permeating the minds of the judiciary in domestic courts of first instance, as well as in regional human rights courts. Courts at many different levels and jurisdictions are actively challenging the antiquated regimes of substituted decision-making and discriminatory legal capacity denial. Two notable examples are the groundbreaking decision by the New York County Surrogate’s Court in 2012, and the ever-expanding body of cases at the European Court of Human Rights (ECtHR).

In Matter of Dameris L., the New York County Surrogate’s Court interpreted New York law to essentially include a right to supported decision-making. Building on prior decisions, the court used the CRPD as a lens through which to analyze Article 17A of the New York Surrogate’s Court Procedure Act (SCPA). Article 17A is inconsistent with Article 12 CRPD in a variety of ways. It allows for the denial of legal capacity and the imposition of a guardian based on the discriminatory basis of the existence of disability. Moreover, it provides very few due process protections and does not include any language on support. Although the scope of Dameris L. does not allow for a


78. See, e.g., Shhtukaturov, supra note 76, at ¶ 108; Stanev, supra note 76, at ¶ 132.


80. Such as the European Court of Human Rights. See supra notes 76-78.


82. See, e.g., Stanev, supra note 76, at 46.

83. Dameris, 38 Misc. 3d at 570.

84. Id. at 576. The presiding judge in the case has recently written on the rights in the CRPD. See Kristin Booth Glen, Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship and Beyond, 44 COLUM. HUM. RTS L. REV. 93 (2012).


86. See N.Y. SURT. PROCT. ACT LAW § 1750 (McKinney through L.2013, chapt. 1-340).

87. See generally id.
holistic examination of the human rights violations under 17A, the court was able to succinctly acknowledge the suspect nature of the legislation.

In the case, Dameris, a twenty-nine-year-old woman, had previously consented to being placed under the co-guardianship of her mother and husband. Dameris could take care of many of her daily needs, but the court found that she needed assistance with financial and medical affairs. Through the help of social services, family, and neighbors, Dameris and her family created a stable home and supportive environment for Dameris and her decision-making. It is significant that the court was involved in this case for three years, from the time that Dameris’ mother first petitioned the court for guardianship in 2009. Although the law did not require it, in accordance with the principles of Article 12, the court sought Dameris’ consent for her placement under guardianship. The court also encouraged the development of a support network for Dameris and her family. Additionally, the court appointed several monitors for the progress of the family and provided the family with translation services for interactions with the court because the family is primarily Spanish speaking. The court ultimately found in Dameris L. that Dameris was no longer in need of the guardianship, which it terminated.88

This case demonstrates the power of courts to promote human rights norms in rulings, even in the United States, which has not ratified the CRPD and is generally resistant to embracing international human rights law within its borders.89 In a jurisdiction that is bound by the CRPD and is upholding a support paradigm compliant with Article 12, guardianship and other forms of substituted decision-making would not be available as in Dameris. Instead, legislation would empower the relevant court or tribunal to provide for supports for the exercise of legal capacity. The court or tribunal would also act as an oversight mechanism to safeguard individuals in supported decision-making and ensure that their will and preferences are fully respected.

In a series of cases, the ECtHR has also been inching its way toward the protection of the rights enumerated in Article 12. The ECtHR’s task is to interpret the European Convention on Human Rights (ECHR),90 which is binding in all countries that are members of the Council of Europe.91 Not all of these countries have ratified the CRPD and the ECtHR is not bound by the

88. Dameris, 38 Misc. 3d at 570.
While the ECHR does include a non-discrimination clause, it has no specific right to equal recognition before the law. However, the court has interpreted certain restrictions on legal capacity as interfering with rights to privacy and family life, liberty, and a fair trial. Although the ECtHR cases to date have been tinkering only around the edges of violations related to the right to legal capacity, the court appears to be slowly heading in the direction of Article 12 of the CRPD. The ECtHR has found an interference with the right to a fair trial where an individual does not have standing to engage the judicial system except through her appointed guardian. It has also found that a deprivation of legal capacity can amount to a violation of the right to private life. Finally, the ECtHR has held that the right to liberty is violated when an individual is stripped of her legal capacity and a guardian consents to her placement in an institution against her will.

These findings all describe positive steps in the journey toward the protection of the right to legal capacity and equality before the law, set forth in Article 12 of the CRPD. Unfortunately, the ECtHR has not yet interpreted the ECHR to include the right to legal capacity on an equal basis with others. One way the court could accomplish this, if a future case were to allow it, is through a finding that the denial of legal capacity to persons with disabilities is a violation of the right to freedom from discrimination. This could be a very powerful holding. In order to find a violation of the right to freedom from discrimination in the ECHR, the discrimination must occur in relation to the enjoyment of another ECHR right. The discrimination can be direct or indirect. In order for a state to justify the discrimination, it must show that

92. The ECtHR is mandated to interpret only the ECHR. It is not bound by the CRPD because the CRPD binds only states and regional bodies that have signed and ratified the CRPD. The monitoring body for the CRPD is the UN Committee on the Rights of Persons with Disabilities.


94. Id. at art. 8.

95. Id. at art. 5.

96. Id. at art. 6.


98. Lashin, supra note 76, at ¶ 98-122; Shtukaturov, supra note 76, at ¶ 83.

99. Shtukaturov, supra note 76, at ¶ 108-9; Stanev, supra note 76, at ¶ 132.


101. Id.

there is an “objective and reasonable” justification which pursues a legitimate purpose and satisfies the proportionality test.\textsuperscript{103} A violation of the right to freedom from discrimination would, therefore, require a preliminary finding that the denial of legal capacity is itself a violation of ECHR rights—for example, the rights to privacy\textsuperscript{104} and liberty.\textsuperscript{105} It would then require a finding that people with disabilities are actually being discriminatorily denied legal capacity, thereby being discriminatorily denied their ECHR rights to privacy and liberty. Statistics on deprivations of legal capacity can often provide evidence for this claim, as they can clearly show that people with cognitive disabilities are disproportionately denied legal capacity.\textsuperscript{106} 

\textit{Prima facie} evidence would consist of any laws that are facially discriminatory and require a finding of cognitive disability before depriving legal capacity.

The state may assert that there are objective and reasonable justifications to permit discriminatory denials of legal capacity of people with cognitive disabilities. For example, it may claim that denying legal capacity to persons with cognitive disabilities is justified in the interest of public safety, prevention of disorder or crime, or protection of health and morals. Evidence against these assertions is that legal capacity denials are profoundly marginalizing and create an underclass of individuals whose safety is jeopardized because they are left vulnerable to those controlling their legal capacity (guardians, conservators, institutions, and others) often without legal or other recourse.\textsuperscript{107}

In the alternative, the ECtHR may find that discriminatory legal capacity denials do pursue a legitimate aim but do not pass the proportionality test and are therefore not “objective and reasonable.”\textsuperscript{108} It should find that the aim is not “objective and reasonable” because the deprivation of legal capacity is a disproportionately harsh measure to achieve such an aim.\textsuperscript{109} Here, it should be emphasized that the right to legal capacity is an element of the right to equal recognition before the law, which is a civil right that is present in major human rights instruments.\textsuperscript{110} Therefore, the right to legal capacity should be of the


\textsuperscript{104} European Convention on Human Rights, supra note 90, art. 8.

\textsuperscript{105} Id. at 5.

\textsuperscript{106} See supra note 14.

\textsuperscript{107} See Winick, supra note 31, at 6–42, 41–42. For information on guardianship abuse in the United States see U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-1046, GUARDIANSHIPS: CASES OF FINANCIAL EXPLOITATION, NEGLECT, AND ABUSE OF SENIORS (2010).

\textsuperscript{108} See, e.g., James, § 75.

\textsuperscript{109} See, e.g., id. § 50.

Flynn and Arstein-Kerslake: The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?

142 BERKELEY JOURNAL OF INTERNATIONAL LAW [Vol. 32:1

utmost importance and denial should be strictly scrutinized. Evidence could also be provided showing that the provision of support is more effective in creating citizens who are active participants in society and are at a lower risk of being significantly dependent on others or on government benefits.111

In order to fully protect the right to legal capacity, the finding of an ECHR violation must apply to denials of legal capacity that are discriminatory in either purpose or effect.112 It is not enough to only create facially neutral laws because they could have the effect of disproportionately denying legal capacity to people with cognitive disabilities. There is currently work being done by NGOs and academics to bring strategic cases before the ECtHR to encourage such a finding.113

CONCLUSION

The legal reforms underway throughout the world, in combination with strategic litigation related to the deprivation of legal capacity, demonstrate a growing trend in favor of the support model of legal capacity set out in Article 12 of the CRPD. Research and pilot projects on supported decision-making have shown how the viability of the support model and its effectiveness in protecting human rights outweighs current approaches based on substitute decision-making. This is due to the fact that the cornerstone of the support model is to enhance the autonomy of the person by respecting her will and preference.

Naturally, a system that attempts to move away from the paternalistic approach of substitute decision-making to rebalance autonomy and protection entails certain risks. Some argue that the risks that flow from universal recognition of legal capacity are too great.114 However, we argue that the support model simply seeks to restore to people with cognitive disabilities the “dignity of risk,” which we are all afforded in our daily lives. Everyone deserves the right to make risky, bad, or unwise decisions, once he or she has been given the relevant information and offered the support needed to make a particular decision. It should also be noted that the support model of legal capacity will require safeguards to prevent the exploitation and abuse of individuals using supports. The key difference between safeguards in the support model and those

with Disabilities in the EU, in 5 EUROPEAN YEARBOOK OF DISABILITY LAW (Gerard Quinn et al. eds.) (forthcoming 2014).

111. Although very little research has been done in this area, the successful supported decision-making pilot program in South Australia is evidence of this. See WALLACE, supra note 73.

112. In Hugh Jordan v. United Kingdom, 2001 Eur. Ct. H.R. 327, the court found that “where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory, notwithstanding that it is not specifically aimed or directed at that group.”


114. This is based on the authors’ experiences of engaging in legal capacity law reform around the globe.
which have existed in substitute decision-making regimes is that safeguards for support are based on the core principle of respect for the individual’s will and preferences, no matter what level of decision-making ability she holds. For example, in a support model there must be an adjudication mechanism for challenging support people if they fail to respect the will and preference of the individual. In contrast, adjudication in most current substituted decision-making regimes focuses on “protecting” the individual and discovering what is in her “best interest,” with little importance placed on her will and preference.\textsuperscript{115} As set out in Section II, the support model does not preclude emergency interventions in exceptional circumstances to preserve the life, immediate safety, or well-being of the individual. However, further research is needed to determine a coherent basis for such interventions with appropriate safeguards to protect against a return to substituted decision-making regimes based on an objective-best-interests approach.

In order for the support paradigm of legal capacity to take root in legal systems universally, wider reform beyond the abolition of adult guardianship is required. This includes reform of criminal law (especially related to mens rea and consent), medical treatment, mental health law, and property law. However, a detailed consideration of these areas for reform is beyond the scope of this Article. Therefore, the arguments we present in favor of a support model of legal capacity are intended as a starting point for future research. The support model is possible and feasible and should be used as a framework for further discussions on legal capacity law reform.

\textsuperscript{115} This can be seen in case law from the England and Wales Court of Protection. See, e.g., Re E (Medical Treatment: Anorexia), [2012] EWHC 1639 (COP).

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INTRODUCTION

In 2010, the US Supreme Court decided a child custody case, *Abbott v. Abbott*, despite its traditional preference that state law and state courts handle family law matters.¹ In that case, the Supreme Court resolved a specific issue with respect to child custody: whether or not a term in a custodial decree giving a noncustodial parent the right to prohibit a child’s travel nevertheless constituted a “right of custody.”² Under most circumstances, that issue would be resolved by a state court of general jurisdiction or a state family court. The Abbots, however, came to the Supreme Court by way of a treaty the United States joined in 1988 and an implementing statute that gave federal and state courts concurrent original jurisdiction over claims made under that treaty.³ This Article explores the problems posed by regulating family law through international treaties—a practice that sets federal courts’ historical authority to uphold the United States’ international commitments on a collision course with the traditional role states play in family law matters. It argues that federal courts view international treaties as fundamentally tied to their Article III judicial

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¹. *In re Burrus*, 136 U.S. 586, 593-94 (1890) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”).


³. *Id.*
power and will narrowly construe Congressional efforts to share or reallocate that jurisdiction to state courts.

The treaty at issue in Abbott—the 1980 Convention on the Civil Aspects of International Child Abduction—has, over the course of its twenty-five years in federal and state courts, generated two related problems that tie into deeper, historical constitutional conflicts. The first is the tension in Article III of the US Constitution between the separation of powers principle embodied in the establishment of the judicial power and Congress’s ability to limit that power. The second is the capability or inclination of state courts to vindicate federal rights—the so-called “parity” problem. While there is an enormous literature committed to both of these questions, there is relatively modest attention paid to federal rights arising under international treaties. Because treaties are increasingly used to impart and shape domestic rights—including parental rights—attorneys, judges, legislators, and scholars alike will benefit from understanding the alternatives available to Congress when allocating jurisdiction under treaties, as well as understanding the strength and form judicial resistance to those alternatives may take.

4. Ann Althouse, How to Build a Separate Sphere: Federal Courts and State Power, 100 HARV. L. REV. 1485, 1486-87 (1987) (“Judicial doctrines of federal jurisdiction operate similarly to adjust—to redraw—the boundary that circumscribes the states’ independent functioning. The courts’ interpretive role regarding jurisdictional grants is well established. Although Congress initially prescribes the jurisdiction of the federal courts, the courts themselves find extensive room for interpretation of these grants of jurisdiction.”); Tara Leigh Grove, The Structural Safeguards of Federal Jurisdiction, 124 HARV. L. REV. 869, 870 (2011) (noting a “recurring concern among scholars of federal courts and federal jurisdiction that Article III is at war with itself”).


7. See, e.g., Golan v. Holder, 132 S. Ct. 873 (2012). In Golan, the US Supreme Court determined that Congress was empowered to move copyrighted works from the public domain back into private copyright holders’ possession through ratification of the Uruguay Round Agreements Act (URAA), adopting as federal law certain treaty-based copyright protections. Plaintiff orchestra conductors, musicians, publishers, and others who formerly enjoyed free access to works removed from the public domain argued that the URAA violated their First Amendment rights to freedom of expression. The US Supreme Court, 6-2, held that the URAA survived First Amendment scrutiny because it was narrowly tailored to fit the national interest in protecting US copyright holders’ interests abroad. Curtis A. Bradley, The Treaty Power and American Federalism, 97 MICH. L. REV. 390, 396-98 (1998) (“Moreover, many of these treaties take the form of detailed multilateral instruments negotiated and drafted at international conferences. These treaties resemble and are designed to operate as international “legislation” binding on much of the world.”) (citations omitted); David Sloss, Domestic Application of Treaties, in THE OXFORD GUIDE TO TREATIES 367 (Duncan Hollis ed., 2012).
The 1980 Convention on the Civil Aspects of International Child Abduction (Hague Child Abduction Convention) vividly illustrates the tensions involved when the federal government uses treaties to regulate wider swaths of national and international problems. In plain terms, parents were increasingly taking their children across international borders in an attempt to obtain more favorable custody determinations. The treaty aimed to deprive the abducting parent of any advantage by requiring the return of the child, and in the case of visitation rights, to ensure respect for those rights. The United States signed the treaty in 1981 and Congress passed an implementing statute, the International Child Abduction Remedies Act (ICARA), in 1988. ICARA gave federal and state courts concurrent original jurisdiction over treaty claims and required them to respect each other’s judgments. Congress did not specify what federal courts should do when treaty claims appear in both federal and state court litigation. It should have.

Parallel federal and state litigation occurs because state court plaintiffs join Hague Child Abduction Convention claims with their divorce and child custody petitions, and state court defendants raise treaty claims in their responsive pleadings. State court losers go to federal court to re-litigate unfavorable rulings. Citing fundamental state interests, “wise judicial administration,” and clear Congressional acknowledgment as to the adequacy of state courts for vindicating rights under the treaty, federal district courts regularly deferred to state proceedings in which treaty claims initially appeared. Federal appellate courts overwhelmingly rejected these “abstention” decisions, emphasizing state courts’ role in making child custody determinations and the risk that they would prioritize that role over respecting the United States’ international obligations.


9. Id. at art. 1. In the treaty, rights known as “visitation” rights in the United States are described as rights of “access.”


11. The applicability of the federal removal statute 28 U.S.C. § 1441 et seq. is unclear under the implementing legislation. I speculate that it is rarely used because it would place the state court defendant at an evidentiary disadvantage under the statute. See Lops v. Lops, 140 F.3d 927, 965 (11th Cir. 1998) (Kravitch, J., dissenting) (arguing that federal removal policy applies to Hague claims); In re Mahnoud, No. 96-4165, 1997 U.S. Dist. LEXIS 2158, at *3 (E.D.N.Y. Jan. 29, 1997) (“The federal removal statute, 28 U.S.C. § 1441a authorizes removal by the defendant to federal court if original jurisdiction exists in the district court, except ‘as otherwise expressly provided.’ Neither the Hague Convention nor ICARA prohibits removal.”) (citations omitted).

12. See, e.g., Silverman v. Silverman, No. 00-2274 (PAM/JGL) (D. Minn. Nov. 13, 2000) (“He can and was afforded the opportunity to raise his Hague Convention petition in state court, but instead chose to file his petition in federal court—interestingly enough, on the same day as the state hearing.”).

13. See, e.g., Silverman v. Silverman, 338 F.3d 886, 895 (8th Cir. 2003); Yang v. Tsui, 416 F.3d 199 (3d Cir. 2005); Gaudin v. Remis, 415 F.3d 1028 (9th Cir. 2005); Holder v. Holder, 305 F.3d 854 (9th Cir. 2002).
The separation of powers problem posed by these decisions is that federal courts are exercising jurisdiction over claims Congress allocated to state courts for good reasons. First, Congress desired to make available as many courts as possible to resolve treaty claims. Second, it sought to create an avenue by which state competence and expertise in family law could aid in the federal effort to meet treaty obligations. Federal courts’ exercise of jurisdiction over claims brought in state court is in tension not only with these objectives, but also with prudential doctrines favoring conservation of judicial resources and Congressional limitations on lower federal courts’ appellate jurisdiction over state judgments. The immediate injury to federal interests is the substantial delay caused by allowing parents to litigate in state court and then turn to federal court when they are unhappy with the results. The treaty contemplates a six-week adjudication period. The United States is among the slowest to resolve treaty claims.

The judicial federalism problem posed by these decisions is that, statutory parity notwithstanding, federal appellate courts are shaping jurisdiction under the treaty based on an implied Article III power to uphold the United States’ international obligations. In their view, state courts are less capable, less trustworthy, or both. State interests in administering their own judicial systems and family law regimes suffer as litigants use the federal courts to undermine state judicial authority. In the long term, the process by which federal appellate courts have narrowed state jurisdiction under the treaty is likely to reinforce the view that state courts are not legitimate participants in the application of international law. Congress clearly wanted state courts involved in the execution of the Hague Child Abduction Convention. Indeed, state courts’ participation makes sense as treaties increasingly regulate issue areas, like family law, where state control is generally assumed and preferred. Moreover, in the Hague Child Abduction Convention context, federal appellate decisions wrongly assume the worst. State judges order the return of children abroad at a slightly higher rate than federal judges and reject affirmative defenses under the treaty at a nearly identical rate.

I explore these arguments through two methods. First, qualitatively, I analyze federal appellate decisions reviewing federal district court decisions to abstain from hearing treaty claims in favor of state proceedings. Of course, one can always dispute the reasoning a court uses to reach its conclusions, and therefore dispute the conclusions themselves. However, in the case of Hague Child Abduction Convention abstention jurisprudence there is an identifiable pattern of federal appellate courts: (1) drawing a sharp distinction between

15. NIGEL LOWE, A STATISTICAL ANALYSIS OF APPLICATIONS MADE UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (2011) (“It took far longer to conclude a case than the global average and this was found to be true for all outcomes in both return and access applications.”).
16. See infra Part IV.
custody and “habitual residence” under the treaty in order to reject abstention decisions, (2) narrowly construing a litigant’s invocation of the treaty in a state court proceeding, and (3) emphasizing the role of federal courts in upholding international commitments.  

Second, quantitatively, I collected all reported cases in which federal and state judges adjudicated claims brought under the Hague Child Abduction Convention in order to test the hypothesis that state judges enforce international commitments less robustly than federal judges. If it were true that state judges favored domestic resolution of custody disputes in contravention of the treaty’s plan, we would observe state judges returning children abroad less frequently than federal judges. A state judge might achieve that outcome either through determining that the treaty was inapplicable or by applying one of the affirmative defenses available under the treaty to prevent return.

Therefore, the empirical part of this Article is a “parity” analysis. There is a large and controversial literature addressing parity between federal and state courts’ ability and inclination to vindicate federal rights. Most of this literature is devoted to federal constitutional and “domestic” statutory rights. But, there is some discussion of state courts’ willingness to enforce treaty rights, especially post-independence British creditors’ rights and recent cases involving the Vienna Convention on Consular Relations. However, in general, there have been few experiences with sufficient state judicial participation upon which a study might be undertaken.

17. See infra Part III.

18. Rene Lettow Lerner, International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade, 2001 BYU L. Rev. 229, 253 (“There is a large literature on the relative merits of federal and state courts. These scholars are addressing the question of whether state courts are capable of adequately enforcing federal rights and of deciding diversity cases. Many writers have concluded that state judges are quite capable of handling these cases; a sizable contingent has argued the opposite.”).


20. David Sloss and Paul Stephan have argued, using both qualitative and quantitative methodologies, that courts are more likely to enforce international treaties against private parties than against the government. DAVID SLOSS, Treaty Enforcement in U.S. Courts: An Empirical Analysis in THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY (David Sloss ed., 2009); Paul B. Stephen, Treaties in the Supreme Court, 1946-2000, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT, 317-52 (David Sloss, Michael D. Ramsey, & William Dodge, eds., 2009). These analyses do not distinguish between federal and state enforcement and, indeed, the latter is focused exclusively on US Supreme Court cases.
The parity literature is therefore tilted in favor of abstract institutional characterizations over empirical analysis.21 This is understandable. One may extrapolate a set of expected behaviors resulting from life tenure, method of judicial selection, and, somewhat more arbitrarily, “technical competence.”22 While some scholars who have undertaken empirical analyses of federal and state court parity are at pains to emphasize the limited applicability of their findings,23 other scholars reject even the possibility of objectively comparing federal and state courts’ treatment of federal rights.24 Conceding these difficulties, this Article nevertheless takes the view that in limited circumstances it is possible to draw meaningful conclusions from studies of reported cases. In the case of Hague Child Abduction Convention jurisprudence, the relatively limited universe of adjudications and the treaty’s young life improve the chance that a representative picture of federal and state judicial management will emerge.

This argument implicates a wider theoretical debate on the law of federal jurisdiction in the treaty context, but also raises more immediate, practical questions about the effectiveness of ICARA’s jurisdictional scheme—questions that are especially important to resolve in light of the family law treaties now awaiting ratification and implementation. These latter questions are the focus of this Article, which argues that ICARA has failed to effectively or efficiently balance federal and state interests. By granting concurrent original jurisdiction over Hague Child Abduction Convention claims, Congress invited the jurisdictional conflicts it claimed it hoped to avoid. Federal appellate decisions rejecting federal district courts’ abstention orders are not only inconsistent with the jurisdictional statute, they also mandate duplication of judicial resources and undermine state schemes constructed to protect children and effectively adjudicate treaty claims.25 I conclude by suggesting that, as the United States enters more family law treaties, as it is now poised to do, Congress consider the lessons of the Hague Child Abduction Convention when determining which courts are best suited to adjudicate family law claims. If it again decides that concurrent original jurisdiction between federal and state courts is best,


23. Gerry, supra note 21.

24. Chemerinsky, supra note 21, at 236 (“[T]he debate about parity is unresolvable because parity is an empirical question for which there is no empirical answer.”).

25. See Full Faith and Credit Act, 28 U.S.C. § 1738 (1948) (requiring a federal court to give the same preclusive effect to a state court judgment as another court of that state would give); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813-17 (1976).
Congress should make more explicit the standards by which federal courts may or must abstain.

Part I of this Article provides background to both the increasing influence of international law on traditional state authority and the United States’ increased engagement with international family law treaties. Part II analyzes federal appellate decisions from the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuit Courts of Appeal rejecting abstention under the treaty. Part III discusses the methodology used to study federal and state judicial management of Hague Child Abduction Convention claims. Part IV applies the lesson of Hague Child Abduction Convention abstention to family law treaties the United States has either signed or already ratified. Part V takes stock of recent US participation in family law treaties and provides a glimpse into the complications that the future may hold for federal court, state court, and treaty jurisdiction over family law.

I.

THE INCREASING INFLUENCE OF INTERNATIONAL LAW ON STATE LAW AND THE IMPLEMENTATION OF THE HAGUE CHILD ABDUCTION CONVENTION

A. Constitutional Structure and Federal Treaties

To understand the difficulties raised by concurrent jurisdiction in the Hague Child Abduction Convention context, it is necessary to review the constitutional framework for the implementation of treaties and the spread of international law into the traditionally state-dominated family law sphere. The US Constitution originated in significant part because the Articles of Confederation tolerated competition and conflict between the newly independent states in ways that threatened long-term unity and invited external interference. The Founders, as part of a relatively comprehensive displacement of state sovereignty over foreign relations, stripped away the states’ powers to conclude treaties and regulate foreign commerce and vested them in Congress and the President. For example, Article I, Section 8 of the US Constitution authorizes Congress to regulate foreign commerce and to define and punish offenses against the law of nations, and Article II provides for a joint treaty-making process between the


28. The Articles of Confederation had also attempted to limit state authority over foreign affairs with relatively limited success. Akhil Reed Amar, Of Sovereignty and Federalism, 96 YALE L.J. 1425, 1446 (1987); Thomas H. Lee, Making Sense of the Eleventh Amendment: International Law and State Sovereignty, 96 NW. U. L. REV. 1027, 1050-51 (2002) (“Because state legislatures—not Congress—were the original repositories of legislative sovereignty transferred from Parliament by revolution, the dogma of exclusive sovereignty (in thirteen iterations) stood as an impediment to the creation of a ‘more perfect Union.’”)
President and the Senate. 29 As in the Articles of Confederation, states were prohibited from entering into any “agreement or compact” with a foreign power or engaging in war without Congressional consent.30 

Article III’s enumerated classes of Supreme Court jurisdiction established federal judicial control over disputes most likely to affect international relations.31 For example, maritime and admiralty disputes were fundamentally tied to both commercial and security interests of the United States as a unitary sovereign under the law of nations. Thus, the judicial power was always intertwined with the United States’ international obligations.32 

Article VI of the Constitution bound state judiciaries to give effect to actions taken by the political branches in executing these functions.33 However, initial state judicial resistance to the enforcement of British creditors’ treaty-based rights after independence established a long tradition of skepticism about whether state judges would robustly enforce international commitments—especially when doing so threatened important state interests.34 When states threatened the United States’ international obligations through executive, legislative, or judicial action, federal judges readily invalidated those measures by applying one of several doctrines of conflict or field preemption flowing from Article VI.35

32. Id.
33. U.S. CONST. art. VI, cl. 2. In United States v. Curtiss-Wright, the US Supreme Court ruled that federal authority over foreign affairs existed prior to and beyond the textual limits imposed by the US Constitution. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). Curtiss-Wright has never been overruled, but Justice Jackson’s concurrence in Youngstown Sheet and Tube v. Sawyer is now regarded as the most important precedent as to the extent of federal foreign affairs authority flowing from delegated powers under Article I and Article II. 343 U.S. 579 (1952).
Halabi: Abstention, Parity, and Treaty Rights: How Federal Courts Regulate Domestic Consequences of International Law

There were both explicit and implicit safeguards built into the Constitution to prevent the abuse of international lawmaking powers. Explicitly, states enjoyed participation in Congress through their elected delegations—the “political safeguards of federalism” which protected state interests when Congress, for example, regulated foreign commerce or codified customary international law. With respect to treaties, for example, a super-majority of Senators were required to approve agreements entered into by the President. Implicitly, it was understood that treaties covered a relatively narrow class of national interests, limiting the areas for which this non-bicameral form of law-making might be used. The judiciary fashioned its own methods to enforce that implicit understanding, principally the doctrine of “self-execution” under which courts determined whether or not treaties required additional action from Congress to have domestic legal effect.

History wrought a number of changes to this balance. The Civil War (and the Reconstruction Amendments that followed) extinguished a number of...


39. David M. Golove, Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power, 98 Mich. L. Rev. 1075 (2000); Oona Hathaway et al., supra note 36 (“Madison conceded that ‘[t]he exercise of the power must be consistent with the object of the delegation,’ which was ‘the regulation of intercourse with foreign nations,’ and he agreed that the power did not include the power ‘to alienate any great, essential right.’”).

40. Some treaties are “self-executing” which means no additional legislation from Congress is required to impart individually enforceable federal rights. Asakura v. City of Seattle, 265 U.S. 332, 341 (1924). The Court noted:

The rule of equality established by [the treaty] cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.

Curtis Bradley, Chevron Deference and Foreign Affairs, 86 Va. L. Rev. 649, 656 (2000) (“Courts vary to some extent in the precise test they use to determine whether a treaty is self-executing. Typically, courts consider a variety of factors, such as the treaty’s language and purpose, the nature of the obligations that it imposes, and the domestic consequences associated with immediate judicial enforcement.”).

lingering constitutional questions regarding the preeminence of the national government over the states. Diminishing barriers to the movement of goods and people encouraged the national government to enter into a greater number of international agreements that coordinated, protected, and regulated interests implicated by these movements. These international agreements inevitably encroached upon states’ legal authority. The Supreme Court facilitated this encroachment. In 1921, it held in Missouri v. Holland that the federal government could accomplish through treaty what the Constitution otherwise allocated to the states. In Zschernig v. Miller, which was later reaffirmed on narrower preemption grounds in American Insurance Association v. Garamendi, state statutes and administrative measures face a significant risk of preemption if they impose more than an “incidental effect” on foreign relations, even where they do not directly conflict with a treaty or federal statute.45 Because state courts are, ex post, structurally empowered to harmonize treaties with state legal regimes, the expansion of federal power has placed them at the center of longstanding debates over the proper uses of treaties.46

42. See United States v. Pink, 315 U.S. 203 (1942) (rejecting N.Y. State Insurance Commissioner’s receivership over assets held by nationalized Russian insurance company based on the preemptive effect of a sole executive agreement); Curtis A. Bradley, The Treaty Power and American Federalism, 97 Mich. L. Rev. 390, 398, 441-42 (1998) (describing areas where the federal government may use the treaty power to regulate in areas traditionally occupied by the states).

43. In Missouri v. Holland, 252 U.S. 416 (1921), the US Supreme Court decided that the federal government’s ability to make treaties, in that case, the Migratory Bird Treaty Act, is supreme over states’ rights arising under the Tenth Amendment.


To be sure, the clause looked to the judges in the states to enforce this supreme law of the land. It thus set up a procedural overlap between the two levels of government . . . The judges might be nodes of connection between the functional levels of government, but their more significant role was as nodes of separation between the supreme (national, enumerated) law of the land and the (ordinary) state law that operated in all other contexts.


http://scholarship.law.berkeley.edu/bjil/vol32/iss1/5
B. US Engagement with Family Law Treaties

Family law is an area over which states have historically enjoyed virtually unfettered authority. Diplomatically, the United States protected state family law through reservations, understandings, and declarations stating that any international agreement was subject to principles of federalism or by rejecting agreements which overstepped traditional understandings of the division between federal and state authority. This was especially true of family law treaties, which had long been a focus of the Hague Conference on Private International Law, an international organization committed to the harmonization and unification of choice of law rules.

Major federal interventions into family law arose in part because some states abused this authority, giving little or no deference to family adjudications in other states, creating precisely the kind of full faith and credit problem the federal constitution was designed to address. Aggrieved parents absconded with their children to haven states in search of a more favorable custody or maintenance determination. Judicially mandated child and family support obligations also emerged as an important barrier between self-sufficiency and eligibility for federal assistance.

Over the last three decades, the federal government has increasingly regulated family law with a range of mandatory and permissive legal regimes aimed at these federal interests. For example, citing the relationship between


48. See, e.g., UN, International Covenant on Civil and Political Rights 999 Treaty Series 171 (1966) (“That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments”).

49. Ann Laquer Estin, Sharing Governance: Family Law in Congress and the States, 18 CORNELL J. L. & PUB. POL’Y 267, 269-70 (2009) (“Until recently, family law was viewed as the province of state governments. In the tradition of dual federalism, states were sovereign in this area, and the national government played a relatively minor role.”); Ann Laquer Estin, Families and Children in International Law, 12 TRANSNAT’L L. & CONTEMP. PROBS. 271, 276 (2002) (“Although the United States has participated in the Hague Conference since 1964, it has not ratified any of the marriage and divorce treaties, most likely because family law is understood in the United States to be a subject of state jurisdiction while international treaty-making is the province of the federal government.”).


52. MAUREEN DABBAGH, PARENTAL KIDNAPPING IN AMERICA: AN HISTORICAL AND CULTURAL ANALYSIS (2012).

53. Estin, Sharing Governance, supra note 49, at 279-80 (2009) (“State laws governing paternity, adoption, foster care, child support, and child protection now evolve based on a federal design, as do laws regulating family behavior of individuals who receive federally supported welfare benefits. The cost of these programs to the national government shows a substantial federal
delinquent family maintenance obligations and federal welfare assistance, Congress imposed a mandatory regime that requires states to actively pursue individuals who are delinquent in family maintenance payments.\(^5^4\) With respect to child custody decisions, Congress passed the Parental Kidnapping Prevention Act (PKPA) to eliminate haven states by requiring state judges to defer to the continuing jurisdiction of any decree issued by a previous state judge with jurisdiction over the case.\(^5^5\) Although the PKPA itself does not provide mechanisms for enforcement, the PKPA makes the Federal Parent Locator Service available in all custody cases and makes the federal Fugitive Felony Act applicable to interstate child abductions.\(^5^6\)

The two interests that caused the federalization of certain aspects of family law domestically—recovery of maintenance obligations and elimination of haven states—also necessitated protection at the international level.\(^5^7\) As marriages between people from different countries became more common and families became more mobile, so did the need to reach parents in foreign countries when those marriages ended.\(^5^8\) As a result, the executive branch has

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54. Id. at 275-76, 282. Professor Estin notes:
Following its first ventures into family policy in the nineteenth and early twentieth centuries, Congress claimed a more significant role with the Aid to Dependent Children program . . . this narrow focus began to widen in 1974 when Congress instituted a series of new programs to improve child support enforcement and paternity determination, protect children from neglect and abuse, and increase delinquency prevention efforts and improve state juvenile justice systems. Since 1974, these programs have expanded significantly, with Congress frequently drawing on sources of authority beyond its spending power to legislate in a range of family law contexts . . . As the AFDC program expanded and national politics shifted, Congress began to search for ways to contain or reduce costs. (citations omitted).

55. Congress enacted the Parental Kidnapping Prevention Act (PKPA), and the Uniform Child Custody Jurisdiction and Enforcement Act, 28 U.S.C. § 1738A (1980), to assist parents to regain their children when unlawfully taken by the other parent. The PKPA reaffirms a court’s duty to give full faith and credit to a decree rendered by a state court and provides that a court of another state must defer to the continuing jurisdiction of the state that rendered the original decree. Congress specifically invoked its Article IV power to effect full faith and credit between the states.


57. See Judith Resnik, Categorical Federalism, Jurisdiction, Gender and the Globe, 111 Yale L.J. 619, 621 (2001) (challenging the assertion that family law is “truly” a subject of local jurisdiction and suggesting that globalization will engender greater US engagement with international and transnational family law).

shown greater openness to participation in treaties previously regarded as excessively intrusive into states’ family law authority. The United States has ratified the Hague Child Abduction Convention as well as the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. 59

The United States has signed (but not ratified) two additional treaties that upon adoption will regulate important aspects of state family law: the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children;60 and the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.61 The purpose of the first treaty is to protect children over whom citizenship, residency, and parental rights involve more than one state, and to “[a]void conflicts between their legal systems in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of children” through international cooperation and promotion of the “best interests of the child.”62 The second treaty aims to effectuate the “recovery of child support and other forms of family maintenance” in the international setting by establishing a system of cooperation between the contracting states, which will ensure that they make available applications for child support and other forms of family maintenance, recognize

CHILD ABDUCTIONS (DeHart ed., 1993) (“This world-wide phenomenon is the consequence of ease of international travel and the multiplication of bi-national marriages, many of which suffer from cultural and religious friction, and the vulnerability of dual national children with two passports.”).


child support and other family maintenance orders, and effectively enforce the orders when necessary.\textsuperscript{63}

\textit{C. The Hague Child Abduction Convention and the International Child Abduction Remedies Act}

Drafted in response to the growing phenomenon of parents in domestic disputes taking children across international borders in order to prejudice custody determinations, the Hague Child Abduction Convention requires the return of a child who was living in one party state, but was removed to or retained in another party state in violation of the left-behind parent’s custodial rights.\textsuperscript{64} Once returned, child custody can then be resolved in the courts of that jurisdiction.\textsuperscript{65} The Hague Child Abduction Convention does not authorize a court to determine the merits of the underlying custody claim.\textsuperscript{66} The court is limited to deciding whether the child should be returned to his or her state of habitual residence.\textsuperscript{67} The Hague Child Abduction Convention divides parental rights into “rights of custody” and “rights of access.”\textsuperscript{68} Article 3 of the treaty by its terms limits a “wrongful” removal to one violating “rights of custody.”\textsuperscript{69} The Hague Child Abduction Convention does not mandate any specific remedy.

\begin{thebibliography}{99}
\bibitem{63} Hague Conference 2007, \textit{supra} note 61, preamble.
\bibitem{64} Abbott v. Abbott, 560 U.S. 1 (2010).
\bibitem{65} \textit{Id}.
\bibitem{66} Hague Child Abduction Convention, \textit{supra} note 8, art. 16. See also ICARA, 42 U.S.C. § 11601(a)(4) (1988).

The child is then to be returned to the state of habitual residence—not to the custody of the left-behind parent—for judicial determination of custody over the child. Of course, the return of the child to the forum of habitual residence does not automatically trigger the application of that state’s law to the proceedings. Rather conflict of laws rules and the possibility of the presence of the doctrine of renvoi within the lex fori determine the applicable law. The Child Abduction Convention establishes only the forum.


\bibitem{68} Hague Child Abduction Convention, \textit{supra} note 8 (“The objects of the present convention are . . . to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”).
\bibitem{69} \textit{Id.} at art. 3.
\end{thebibliography}

Berkeley Journal of International Law [Vol. 32:1

when a noncustodial parent has established interference with rights of access.

Rather, nations are instructed in Article 21 to “promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject,” as well as to “take steps to remove, as far as possible, all obstacles to the exercise of such rights.”

The Reagan Administration, which signed the treaty, argued that claims brought under the treaty belonged exclusively in state courts because key aspects of the treaty implicated state expertise and state interests.

The original House bill, H.R. 3971, gave state courts jurisdiction over all actions requesting the return of an abducted child and vested federal district courts with jurisdiction “to the extent” a question of treaty interpretation or diversity of citizenship arose.

The Senate, however, included concurrent, original federal and state jurisdiction both in its initial version of the law and as an amendment to the version eventually passed by both chambers.

While it is difficult to identify the reason, the Congressional record strongly hints that the State Department’s skepticism toward state judicial enforcement explains the Senate position.

Both chambers were clear on the issue of state competence, expertise, and interest.

Then-Representative Ben Cardin emphasized:

[We have no intention of expanding Federal court jurisdiction into the realm of family law. In fact, Congress reaffirms its view that States have traditionally had,

70 See, e.g., Viragh v. Fordes, 612 N.E.2d 241, 246-47 (Mass. 1993). In Viragh, the custodial parent moved with her two children from Hungary to the United States notwithstanding a Hungarian court’s award of visitation to the noncustodial parent. When she informed her ex-husband that she would not return to Hungary with the children, he brought an action in Massachusetts Family Court seeking enforcement of a right of return under the Hague Child Abduction Convention. The Family Court judge rejected the requested relief on the ground that the father’s rights were “rights of access,” not “rights of custody,” under the treaty and therefore ineligible for the return remedy.


73 See Jean Galbraith, Prospective Advice and Consent, 37 Yale J. Int’l L. 247 (2012) (detailing the Senate’s bargaining options with respect to multilateral treaties).
and continue to have, jurisdiction and expertise in the area of family law. Here we are not intruding into this jurisdiction. Rather, we are simply providing through simple and unambiguous language that in the special circumstance where international child abduction is alleged, both the Federal and State courts should be available to resolve the claims. As a matter of fact, the State courts will often provide the best fora for these cases because their backlogs are often substantially less than those of the Federal courts in many parts of the country.76

Senator Orrin Hatch noted the treaty’s “custody-related questions” were “traditionally . . . handled by the states,” but encouraged passage of the law despite the “close question” of federal or state jurisdiction.77 Congress appeared to embody this intent with 42 U.S.C. § 11603(g), which provides that: “[f]ull faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this Act.”78

Congress also authorized courts to enter provisional remedies to prevent harm to children and prejudice to parental rights:

Limitation on authority. No court exercising jurisdiction of an action . . . may . . . order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.79

The implementing legislation additionally directed the President to establish a “Central Authority” for cooperating with other contracting states with respect to upholding treaty obligations, reporting to Congress and the Hague Conference, and coordinating across agencies. ICARA’s principal purpose, however, is to regulate judicial proceedings under the treaty.80

Under ICARA, any person seeking the return of a child may commence a civil action by filing a petition in a court authorized to exercise jurisdiction in the place where the child is located.81 The petitioner bears the burden of

76. Cardin, supra note 73.
79. ICARA, 42 U.S.C.A. § 11604(b) (West 2013). See also International Child Abduction Act of 1988: Hearing on H.R. 2673 and H.R. 3971 Before the Subcommittee on Admin. Law and Governmental Relations of the Committee on the Judiciary, 100th Cong. 30 (1988) (statement of Peter Pfund, Assistant Legal Advisor for Private International Law, Department of State) (“The federal legislation seeks to intrude as little as possible on relevant aspects of State law and procedure.”).
80. While Congress viewed ICARA as an implementing statute, the State Department took the position that the treaty was self-executing and therefore ICARA was “facilitating” legislation. See John Coyle, Incorporative Statutes and Borrowed Treaty Rule, 50 VA. J. INT’L L. 655 n. 45 (2010).

(1) A petitioner in an action brought under [the treaty] shall establish by a preponderance of the evidence—

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and
(B) in the case of an action for arrangements for organizing or securing the
showing by a preponderance of the evidence that a child’s removal or retention was wrongful. The respondent must show by clear and convincing evidence that one of a limited number of exceptions apply. ICARA grants to state courts and US district courts “concurrent original jurisdiction of actions arising under the Convention.” The statute made only modest modifications to the treaty text, requiring simply that courts “shall decide the case in accordance with the Convention.”

Under the treaty, judges may refuse to order return of a child through two principal means. Article 3 of the Hague Child Abduction Convention gives left-behind parents a right to have a child returned if: (1) a child’s removal from a contracting state is “wrongful” and (2) the removal “is in breach of rights of custody.” Judges may therefore render the treaty inapplicable by determining that a removal was not “wrongful” or that a left-behind parent did not have “rights of custody,” which are characterized (but not defined) in the treaty. For example, if a court determines that a left-behind parent’s rights are actually rights of visitation, and not custody, then the parent would not have a right to have a child returned. Similarly, if a taking parent traveled to a foreign country with a child, a left-behind parent would not have a right to have the child returned if a judge determined that the taking parent was traveling with the consent of the left-behind parent or pursuant to a custody agreement because the removal would not be “wrongful.”

Assuming the treaty applies and a left-behind parent has established a wrongful removal in breach of rights of custody, judges still might not order effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing—

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

Most often claimed is that the child’s return would result in grave danger of psychological harm. Id. § 11603(e)(1)(A)-(2)(A). See Friedrich v. Friedrich, 78 F.3d 1060, 1063-64 (6th Cir. 1996); Feder v. Evans-Feder, 63 F.3d 217, 221 (3rd Cir. 1995).

82. Hague Child Abduction Convention, supra note 8. Article 13b provides that a court may refuse to return a child where there is a grave risk of physical or psychological harm or placement of the child in an intolerable situation. Article 20 allows a court to refuse to return a child where doing so would violate the requested state’s principles regarding human rights and fundamental freedoms. Article 12 imposes a one-year time limit under which the remedy of return is most readily available, while the remaining exceptions under Article 13 apply to acquiescence in the removal or the child’s objection where a sufficiently mature child meaningfully objects to the return. When Congress codified the treaty, it placed differing evidentiary burdens on parties seeking return or invocation of one or more exceptions. See ICARA, 42 U.S.C.A. § 11603(b) (West 2013).

83. ICARA, 42 U.S.C.A. § 11603(a) (West 2013).
84. ICARA, 42 U.S.C.A. § 11603(d) (West 2013).
85. Hague Child Abduction Convention, supra note 8, art. 3.
86. See Mozes v. Mozes, 239 F.3d 1067, 1073 (9th Cir. 2001) (outlining inquiries a court should undertake when determining whether a removal is wrongful).
removal under one of the aforementioned affirmative defenses. For example, if a left-behind parent fails to prosecute a Hague Child Abduction Convention claim in a year and the court determines that the child had settled in his or her new environment, the treaty permits the court to refuse to return the child.87 A judge may also refuse return where a parent shows by clear and convincing evidence that the other parent acquiesced in the removal, or that the removal would pose a grave risk of physical or psychological harm to the child of placing the child in an “intolerable situation,” or would violate the repatriating state’s view of human rights or fundamental freedoms.88

II. FEDERAL DISTRICT COURT ABSTENTION UNDER THE HAGUE ABDUCTION CONVENTION

Hague Child Abduction Convention petitioners may file with the State Department as well as raise a treaty claim before a state and/or federal court. Indeed, part of the problem with the treaty as it functions in the United States is that petitioners often file in all three of these uncoordinated fora.89 ICARA invites jurisdictional tensions between state courts, where Hague Child Abduction Convention claims are brought in conjunction with divorce and child custody actions, and federal courts, where state court defendants may bring original actions as federal plaintiffs. Litigants have exploited this procedural structure to introduce treaty claims at the state court level, and then use federal court litigation to re-litigate unfavorable state court orders.

Where Hague Child Abduction Convention claims appear in state litigation, federal district courts have used both formal and informal methods to decide whether to exercise jurisdiction. In Aldogan v. Aldogan, for example, the federal district court held a hearing in order to determine if either party objected to a state family court having the first opportunity to decide the Hague Child Abduction Convention claim because the court already had jurisdiction over the underlying child custody suit.90 Both parties assented to the transfer.91 Federal district courts have also applied formal abstention doctrines permitting, and in some circumstances requiring, deference to state court proceedings.92 Based on the statutory scheme, and where other criteria are met, dismissal in favor of state

87. Hague Child Abduction Convention, supra note 8, art. 12.
91. Id.
92. See infra Part II-A.
adjudication would not appear to threaten federal interests under the treaty.93 Certainly, where state court proceedings have advanced beyond the pleading stage, avoidance of duplication and waste as well as comity and federalism concerns would weigh in favor of dismissal.94 These represent the contexts in which federal district courts have declined jurisdiction in favor of state family, juvenile, or general trial court proceedings, roughly corresponding to Colorado River, Rooker-Feldman, and Younger abstention.95

Federal district courts have often referred to state interests in child custody adjudication as the state interest justifying abstention. It is almost certainly true that a state’s interest in an initial custody determination is insufficient to justify abstention. Child custody determinations are, by nature, case specific. In any event, the Hague Child Abduction Convention bars final decisions on the merits of custody disputes until the removal claim is resolved.96 Yet, child custody inquiries frequently implicate other arguably more relevant state schemes for assessing a child’s maturity and risk of psychological or physical harm as well as use of temporary or foster care pending resolution of Hague Child Abduction Convention or custody claims.97 With respect to custody arrangements in which state courts have already established original and continuing jurisdiction, state interests in those determinations are more developed.98 These factors matter because abstention decisions under Younger and Colorado River frequently turn

95. While it has not yet come before a district court, Burford abstention may also be warranted given the specialized courts many states have established to adjudicate family law claims, the conditions under which state departments of child, family, and social services are authorized to intervene on behalf of children, and the allocation of jurisdiction between juvenile courts, family courts, and general jurisdiction trial courts. See Ankenbrandt ex rel. L.R. v. Richards, 504 U.S. 689, 705-06 (1992) (“It is not inconceivable, however, that in certain circumstances, the abstention principles developed in Burford v. Sun Oil Co., 319 U.S. 315 (1943), might be relevant in a case involving elements of the domestic relationship even when the parties do not seek divorce, alimony, or child custody. This would be so when a case presents ‘difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.’”).
96. Hague Child Abduction Convention, supra note 8, art. 16; Centenaro v. Poliero, 901 N.Y.S.2d 905 (Sup. Ct. 2009).
97. Bouvagnet v. Bouvagnet, No. 01 C 4685, 2001 U.S. Dist. LEXIS 17095, at *9 (N.D. Ill. 2001) (“Finally, the Court notes that the proceedings here are somewhat similar because the evidence that will be used to determine whether the children are settled in their new environment, a determination required by the Hague Convention under the present circumstances, will also be used for the required determination of the best interests of the children in the custody proceedings.”).
98. See, e.g., Gaudin v. Remis, 415 F.3d 1028, 1035-36 (9th Cir. 2005). In Gaudin, the Hawaii state court had entered a determination that return of children to Canada would “pose a grave risk of psychological harm” under the treaty. While the district court did not, and was not asked to, abstain in favor of state proceedings, it did rely on the state court “grave risk” determination.
on the presence of state interests or the application of state law in parallel state proceedings. In addition to safeguarding state interests in family law schemes and in the administration of their judicial systems, abstention furthers treaty interests in the efficacious adjudication of removal claims.

A. Federal District Court Abstention in Hague Abduction Convention Cases

Federal district courts have deferred to state courts under three principal doctrines—Younger, Colorado River, and Rooker-Feldman. These doctrines are briefly summarized below and discussed in the context of the typical circumstances under which they are invoked. The factual backgrounds of the cases are provided to emphasize the usefulness of abstention in furthering both federal and state interests under the treaty.

1. Younger Abstention Based on State Custody and Dependency Interest

In Younger v. Harris, a California criminal defendant brought an initial action for injunctive relief in federal district court instead of raising a First Amendment defense in his state criminal prosecution. The district court issued the injunction and invalidated California’s Criminal Syndicalism Act for unconstitutional vagueness. The Supreme Court reversed. Speaking through Justice Black, the Court emphasized that Congress had historically allowed few and minor exceptions allowing federal courts to interfere with state proceedings and that:

This, perhaps for lack of a better and clearer way to describe it, is referred to by many as “Our Federalism,” and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of “Our Federalism.” The concept does not mean blind deference to “States’ Rights” any more than it means centralization of control over every important issue in our National Government and its courts.

99. See, e.g., Witherspoon v. Orange Cnty. Dep’t of Soc. Servs., 646 F. Supp. 2d 1176, 1180 (C.D. Cal. 2009) (“Federalism gives states authority over matters of marriage, family, and child welfare. This case deals with those interests . . . . the state proceeding gives Ms. Witherspoon an adequate opportunity to raise the issues she seeks to raise here in federal court.”); Grieve v. Tamerin No. 00-3824, 2000 U.S. Dist. LEXIS 12210 (E.D.N.Y. Aug. 25, 2000) (holding that Younger abstention was appropriate where the petitioner had filed a Hague Convention petition in state court previous to filing it in federal court); Cerit v. Cerit, 188 F. Supp. 2d 1239 (D. Haw. 2002) (ruling that it was appropriate to abstain from ruling on a Turkish man’s ICARA petition when he had already made an ICARA argument in Hawaii state court) contra Hazbun Escaf v. Rodriquez, 191 F. Supp. 2d 685, 688, 692 (E.D. Va. 2002) (criticizing Cerit and denying motion to dismiss based on abstention).


102. Id. at 40.

103. Id.
The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.\textsuperscript{104} Younger has been controversial since it was decided.\textsuperscript{105} The Anti-Injunction Act of 1793 prohibited federal courts from issuing anti-suit injunctions against state proceedings unless “expressly authorized by an Act of Congress.”\textsuperscript{106} In Younger, that exception was asserted to be the Civil Rights Act of 1871.\textsuperscript{107} Even assuming federal courts obtained equitable jurisdiction over a state proceeding under that exception, they may still refuse to issue an injunction for the same reason courts sitting in equity often refuse to do so—there is already an adequate remedy at law. Justice Black’s opinion might be read narrowly to establish the scope of the “irreparability” inquiry federal courts must undertake when asked to enjoin state proceedings.\textsuperscript{108} A second, broader reading suggests that Justice Black’s opinion is actually based upon a general Article III responsibility given to federal courts to ensure the protection of federal rights while interfering as little as possible with state courts.\textsuperscript{109} It is fair to say that, at least in Justice Black’s view, federal courts may not equitably enjoin a state criminal proceeding where it poses no imminent or irreparable threat to a state defendant’s ability to vindicate a federal right.\textsuperscript{110} The Supreme Court extended Younger abstention to state civil proceedings in \textit{Huffman v. Pursue, Ltd.},\textsuperscript{111} and state family law proceedings in \textit{Moore v. Sims}.\textsuperscript{112} While federal appellate courts have diverged in the precise wording of Younger criteria and the depth of

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 44.
\item Mark Tushnet, \textit{Constitutional and Statutory Analyses in the Law of Federal Jurisdiction}, 25 UCLA L. Rev. 1301, 1304-05 (1978) (discussing the Supreme Court’s decision not to decide Younger as a statutory exception to the Anti-Injunction Act).
\item \textit{Id.}
\item \textit{Id.}
\item Younger, 401 U.S. at 45 (“The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection.”).
\item Moore v. Sims, 442 U.S. 415 (1979). In \textit{Pennzoil v. Texaco}, 481 U.S. 1 (1987), the U.S. Supreme Court extended Younger abstention to a state’s fundamental interest in “administering certain aspects of their judicial systems.” In 2013, the U.S. Supreme Court narrowed the applicability of Younger in \textit{Sprint Communications, Inc. v. Jacobs}, although it appears that even within its narrower confines it would easily protect actions by state agencies to protect children as in Witherspoon.
\end{enumerate}
\end{footnotesize}
involvement required by states and their agencies, three general inquiries have emerged in the Hague Child Abduction Convention context: (1) there is a judicial proceeding to which the federal plaintiff is a party and with which the federal proceeding will interfere, (2) the state proceeding must implicate important state interests, and (3) the state proceeding must afford an adequate opportunity to raise federal claims. Federal district courts have abstained under this doctrine to preserve state interests in maintaining the integrity of their judicial systems and their interests in using dependency systems to protect minors from abuse.

i. Witherspoon v. Orange County Department of Social Services

In Witherspoon v. Orange County Department of Social Services, a mother attempted to use litigation in federal court to undermine a state court order entered to protect her children. Danny Witherspoon brought a divorce suit in state court and sought custody over two minor children after they had been returned to him from Germany. Their mother, a US soldier, had taken them to a hospital where they showed signs of mistreatment, and Ms. Witherspoon, demonstrating “intoxicated, hostile, and bizarre” behavior, threatened to harm herself and the children. Ms. Witherspoon raised a claim under the Hague Child Abduction Convention in that proceeding, arguing that the children’s habitual residence was Germany, which was therefore the jurisdiction for any custody dispute. In a parallel proceeding, a California juvenile court ordered the state to take temporary custody of the children, placing them first in a shelter and then in foster care.

The state court agreed with Ms. Witherspoon that Germany was the children’s habitual residence under the treaty because the children had lived and attended school there for the previous four years. On appeal, a California appellate panel determined that the trial judge had failed to adequately consider the exceptions to return under the treaty—especially Article 13b’s “grave risk” exception. The appellate panel further ordered the state court to stay proceedings pending the resolution of the juvenile dependency proceeding.

The juvenile court ultimately determined the children to be dependents of the

115. Id. at 1178.
116. Id.
118. Witherspoon, 646 F. Supp. 2d at 1178.
119. Id. “[The grave risk exception] is the most widely litigated defense to an application for return of a child to his or her place of habitual residence.” Michael R. Walshand & Susan W. Savard, International Child Abduction and the Hague Convention, 6 BARRY L. REV. 29, 38 (2006).
120. Witherspoon, 646 F. Supp. 2d at 1178.
state and adopted a plan for both parents that included therapy and classes.\footnote{121} The juvenile court also ordered Ms. Witherspoon to undergo substance abuse treatment.\footnote{122}

Ms. Witherspoon subsequently filed a Hague Child Abduction Convention petition in federal district court, requesting immediate return of the children to Germany.\footnote{123} The federal district judge abstained under \textit{Younger}:

This case concerns domestic relations, conflicts between fathers and mothers, and the state’s role ensuring the health and welfare of the Minors . . . States allocate considerable resources to family and juvenile courts so they can effectively navigate these often troubled waters. State courts have access to child welfare and social workers, and available foster parents and shelters.\footnote{124}

Noting cases in which the Ninth Circuit Court of Appeals had rejected \textit{Rooker-Feldman, Younger,} and \textit{Colorado River} abstention, the district judge observed that “the juvenile court proceedings that have delayed the ICARA proceedings are not custody proceedings, but dependency proceedings.\footnote{125} The purpose of custody proceedings is to determine which parent, or private party, should retain custody of children.\footnote{126} In contrast, a juvenile court initiates dependency proceedings to determine if the state—not private individuals—should have custody of children to shield them from harm.”\footnote{127}

\begin{itemize}
  \item \footnote{121} \textit{Id.}
  \item \footnote{122} \textit{Id.} at 1179.
  \item \footnote{123} \textit{Id.}
  \item \footnote{124} \textit{Id.} at 1180.
  \item \footnote{125} \textit{Id.} at 1181.
  \item \footnote{126} \textit{Id.}
  \item \footnote{127} \textit{Id.} at 1181. \textit{See also} Grieve v. Tamerin, No. 00-CV-3824 JG, 2000 U.S. Dist. LEXIS 12210 (E.D.N.Y. Aug. 25, 2000) \textit{aff’d on other grounds}, Grieve v. Tamerin, 69 F.3d 149 (2d Cir. 2001) (citing Neustein v. Orbach, 732 F. Supp. 333, 341 (E.D.N.Y. 1990)) (quoting Mendez v. Heller, 530 F.2d 457, 461 (2d Cir. 1976) (Oakes, J., concurring) (“In this narrow area of law [child custody], we should be especially careful to avoid unnecessary or untimely interference with the State’s administration of its domestic policies.”)). The federal district court noted:
  \begin{quote}
    At oral argument, Grieve’s new counsel contended that his client had made no Hague Convention application to the state court. That contention is contradicted by Exhibit T, which is a July 24, 2000, letter from Grieve to Justice Garson stating that he made the Hague Convention application in May and asking for a written decision on the application. (The fact that Grieve did not use the word “petition,” the term of art used the in Convention is immaterial, especially given Grieve’s \textit{pro se} status at the time.) Counsel’s assertion is further contradicted by Paragraph 25 of his client’s declaration, dated July 27, 2000, in which he states: “Recently, I brought an Order to Show Cause, in the State Supreme Court, requesting the Court to invoke the provisions of the Hague Convention, and return my passport so that my son may be returned to me and we can go back home. This was despite my objections, when acting \textit{pro se}, that this delay was in contravention of the Hague Agreement and Article 11, which requests \textit{expeditious consideration} thereof. . . . I have also requested a ‘Statement of Reason’ from the Hon. Judge Gerald Garson (Exhibit T), asking him to give reason for the delay in making a decision regarding a previous attempt to invoke the Hague Convention, in terms of Article 11 of the Convention.” \textit{Id.} at *4 n.1.
  \end{quote}
\end{itemize}
In Barzilay v. Barzilay, the Circuit Court of St. Louis County, Missouri entered a divorce decree that dissolved the marriage between two Israeli citizens, Sagi and Tamar Barzilay, and provided joint custody for their three minor children. The Barzilays had moved to Missouri in 2001 and divorced in 2005. The children had lived in Missouri since 2001; the younger two had never lived in Israel. During the children’s visit to Israel during 2006, Sagi Barzilay secured an order from an Israeli court prohibiting the children’s return to the United States, which he used to secure a modified visitation schedule with the children and an agreement from Tamar to repatriate to Israel with the children by August, 2009. When she returned to the United States, she filed a motion with the Circuit Court of St. Louis to modify the divorce decree to restrict Sagi’s access to the minor children based in part on the Hague Child Abduction Convention. Sagi filed a motion to dismiss Tamar’s state petition also based on the treaty. One day after the state court determined that the children’s habitual residence was the United States, denying Sagi’s ICARA claim, Sagi filed a suit in the US District Court for the Eastern District of Missouri, requesting return of the children to Israel.

The federal district court dismissed the claim, concluding that the final state order left Sagi’s only available course of action appeal in the Missouri courts. Although the district court did not specifically invoke Younger, and, indeed, the procedural history suggests the application of the Rooker-Feldman doctrine, the district court focused on the presence of the Hague Child Abduction Convention issues in an ongoing state custody proceeding, the relatively flagrant attempt to undermine the state custody determination through the use of foreign judicial process, and Congress’s clear intent that state courts share jurisdiction over Hague Child Abduction Convention claims with federal courts.

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129. Id.
130. Id. at *1-2.
131. Id. at *2-3.
132. Id. at *4.
133. Id. at *5. See also Barzilay v. Barzilay, 04FC10567 (St. Louis Cnty. Oct. 16, 2007).
135. Id. at *15. (“[T]he state court held that the mere presence of the minor children on vacation in Israel is insufficient to establish a ‘habitual presence’ so as to fall under the purview of International Child Abduction Remedies Act. . . . While the state court does not specifically make a finding of whether the minor children were wrongfully removed to, or wrongfully retained in, the United States, it necessarily follows from a finding of habitual presence in the United States that the minor children were not wrongfully removed from Israel. If the Plaintiff is not satisfied with the state court ruling, then the Plaintiff’s only available course of action is to appeal that decision.”) Id. at *13-14.
136. Id. at *10.
B. Advanced State Proceedings and Abstention under Colorado River

Unlike Younger abstention, the Colorado River doctrine is prudential and discretionary, and is driven in significant part by arguments disfavoring piecemeal litigation or duplication of judicial resources. Indeed, it is not technically a form of “abstention” at all, but history and judicial shorthand have eclipsed the nominal distinction. In Colorado River, the state of Colorado had divided the major water basins within its territory into seven districts for purposes of adjudicating disputes over water rights. The United States filed suit in federal district court to protect its own water rights and those under its authority. After the United States filed suit, a defendant filed a motion in Colorado state court seeking to join the federal government as a defendant in a state court proceeding, adjudicating the rights of all parties in Colorado’s District 7. Congress had specifically authorized such joinder. Several defendants then filed a motion to dismiss the federal action on abstention grounds. The US Supreme Court upheld the district court’s decision to abstain. Rejecting the application of existing abstention doctrines, Justice Brennan nevertheless justified dismissal of the government’s suit on the basis of “wise judicial administration” and “conservation of judicial resources” based on Congress’s assent to joinder in state court on a matter in which states maintain “comprehensive state systems for adjudication of water rights . . .”

Beyond Congressional intent, the Court also noted the preliminary nature of proceedings in the federal district court—the extensive “involvement of state water rights occasioned by this suit naming 1,000 defendants,” and the “300-mile distance between the District Court in Denver and the court in Division 7”. Where parallel state proceedings exist, federal appellate courts have interpreted these parts of the Brennan opinion to require consideration of at least six factors of unequal and somewhat unpredictable significance.

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138. Justice Brennan’s majority and Justice Stewart’s dissent both rejected the application of existing abstention doctrines.
139. Lops v. Lops, 140 F.3d 927 n. 21 (11th Cir. 1998) (“However, since prior decisions of this court label a federal court’s deference to a parallel state court litigation as a type of abstention, we do likewise.”).
141. Id.
142. Id. at 807.
144. 28 U.S.C. § 1345 (1948).
146. Id. at 818, 820.
147. Id.
148. Linda S. Mullenix, A Branch Too Far: Pruning the Abstention Doctrine, 75 GEO. L.J. 99, 104 (1986) (“Confronted with a list of ambiguous and overly broad factors, many lower courts have inferred that the Supreme Court has implicitly approved abstention from adjudicating properly filed
Congress’s plan to distribute treaty jurisdiction between state and federal courts mirrors several aspects of the distribution of authority which led to the US Supreme Court’s decision in *Colorado River*. Particularly in cases that have been extensively adjudicated in state courts, *Colorado River* strongly suggests that federal courts should dismiss petitions filed by state court parties in parallel litigation.

1. Holder v. Holder

In *Holder v. Holder*, Jeremiah Holder sought the return of his children to Germany, where he was stationed with the US Army. His wife Carla had left Germany with their two sons during what he thought to be a vacation in Washington State. Jeremiah filed for divorce and custody in California, where he and Carla had met and where their two children had been born. The California court ordered mediation regarding a custody and visitation plan. Jeremiah consented to the arrangement proposed by the mediator, which provided Carla with custody of the children in Washington and became part of the state trial court custody order on August 9, 2000. Jeremiah then obtained new counsel and filed a motion to reconsider the California order. At the hearing for reconsideration, Holder’s counsel informed the state court that he had filed a Hague Child Abduction Convention petition with the US State Department, to which the state court judge noted that Carla would be allowed to brief and argue the Hague claim since Holder had raised it. The trial court raised the Hague Child Abduction Convention issue four times in the course of the reconsideration hearing, and each time, Holder’s counsel refused to discuss the claim.

Jeremiah then filed a Hague Child Abduction Convention petition in the US District Court for the Western District of Washington at the same time that
he appealed the initial California custody order. In the petition, he asserted that Germany was the children’s habitual residence under the treaty and that therefore German courts should adjudicate custody. The federal district judge abstained under *Colorado River*, determining that California state courts had obtained jurisdiction before the US district court, and that the litigation of the Hague Child Abduction Convention claim in Washington would be both inconvenient and result in piecemeal litigation. While the treaty was federal law, Congress had vested both federal and state courts with original jurisdiction over treaty claims. Under California waiver law, Holder had abandoned his treaty claim when he failed to bring it with his divorce and custody action. “Comity and federalism” required deference to the California judgment because Holder had used the treaty to get a “second bite at the custody apple.”

2. *Cerit v. Cerit*

In *Cerit v. Cerit*, the federal plaintiff had initially filed his Hague Child Abduction Convention petition as part of his answer in state court divorce proceedings. After the state judge ordered hearings on the children’s habitual residence, appointed a guardian *ad litem* to investigate the psychological harm exception, and entered an order granting temporary custody to the state court plaintiff, the federal plaintiff filed a treaty petition in the US District Court for the District of Hawaii. The district court abstained, noting that the state court had undertaken significant effort toward resolution of the treaty claim and that the federal plaintiff “vigorously litigated his ICARA petition in state court for three months prior to seeking resolution of the matter in federal court.” The court also noted: “[i]t appears from the record that petitioner, unhappy with the proceedings in state court, is attempting to obtain a different result from the federal court.”

3. *Copeland v. Copeland*

In *Copeland v. Copeland*, Berengere Copeland filed a Hague Child Abduction Convention claim in her response to Sean Copeland’s divorce and custody suit in North Carolina state court. The state court denied her petition

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158. *Id.*
159. *Id.*
160. *Id.* at 867.
161. *Id.* at 875.
163. *Id.*
164. *Id.*
165. *Id.* (The federal district judge also abstained under *Younger*, noting Hawaii’s specialized family court system was “especially implicated” in deciding to abstain from hearing a Hague Abduction Convention petition.).
and granted temporary custody to Sean. Berengere then filed a treaty petition in the US District Court for the Western District of North Carolina, alleging that Sean had wrongfully removed their son from France.167

The federal district court abstained under Colorado River, determining that not only had the state court proceeding commenced two years before the federal action, but that “abstention would promote the objective of avoiding piecemeal litigation.”168 The federal district court emphasized that, although the case involved a treaty, it did not involve foreign relations subject matter typically associated with federal courts’ greater specialization in international law.169

C. Abstaining in Deference to State Judgments under Rooker-Feldman

As with Colorado River, Rooker-Feldman is not strictly speaking an abstention device. The doctrine, which takes its name from two US Supreme Court cases decided 60 years apart, prohibits litigants from using federal courts to re-litigate issues they lost in state court proceedings. Rooker-Feldman erects a jurisdictional bar to lower federal courts’ review of state court judgments based on Congress’s decision to vest only the US Supreme Court with appellate jurisdiction over those judgments.170

In Rooker, two Indiana residents sought to have a federal district court declare “null and void” a state court judgment against them on the bases that it gave effect to an unconstitutional state statute and failed to follow prior Indiana precedent.171 The district court determined that it lacked subject matter jurisdiction and the Supreme Court affirmed on the basis that Congress had chosen to vest appellate jurisdiction in the US Supreme Court only.172 The Rooker doctrine, such that it was, remained fallow for most of the next sixty years.

In 1983, the Supreme Court rejected federal jurisdiction over claims by two applicants to the District of Columbia bar who, in order to sit for the exam, faced a special requirement for graduates of unaccredited law schools.173 This special requirement allowed a graduate of an unaccredited law school (or, in Feldman’s case, Virginia’s alternative attorney credentialing system) to sit for the bar exam “only after receiving credit for 24 semester hours of study in a law school that at the time was approved by the ABA . . . “174 There was a waiver

167. Id.
168. Id.
172. Id.
173. The Supreme Court did not extensively reference Rooker in the Feldman decision.
process for this requirement, but the DC Court of Appeals had ended that waiver program shortly before the plaintiffs applied to sit for the exam. They challenged the waiver denial and the underlying requirement in federal district court as a violation of both constitutional rights and antitrust laws. The district court dismissed for lack of subject matter jurisdiction and the DC Court of Appeals reversed, determining that the proceedings under which Feldman’s waiver was denied were not sufficiently “judicial” to divest federal courts’ jurisdiction over their federal claims.

The Supreme Court reversed on the issue of the waiver denial. Feldman’s petition “involved a ‘judicial inquiry’ in which the [DC Court of Appeals] was called upon to investigate, declare and enforce” DC law.

If the constitutional claims presented to a United States district court are inextricably intertwined with the state court’s denial in a judicial proceeding of a particular plaintiff’s application for admission to the state bar, then the district court is in essence being called upon to review the state-court decision. This the district court may not do.

Feldman expanded the rule announced in Rooker. Not only did state court judgments provide a jurisdictional bar to federal district courts, the bar also applied to claims “inextricably intertwined” with prior state court judgments. Plaintiffs were theoretically prohibited from recasting their state appeals as new federal claims. Although it was several years before the doctrine went by the name Rooker-Feldman, federal district courts frequently applied it to prevent end-runs around state court judgments.

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175. Id.
176. Id.
177. Id.
178. Id.
179. Feldman, 460 U.S. at 479.
180. Id. at 462, 486-87 n. 16.
181. Id.
183. In 2005 and 2006, the US Supreme Court narrowed the applicability of Rooker-Feldman in two cases, Exxon Mobil Corp. v. Saudi Basic Industries, 544 U.S. 280, 284 (2005) and Lance v. Dennis, 546 U.S. 459, 465 (2006). In Exxon, the Court rejected the Third Circuit’s application of Rooker-Feldman to a federal appeal where the federal litigation had commenced before entry of the state court judgment. The Court clarified that Rooker-Feldman was distinct and separate from abstention and preclusion doctrines and was limited to “cases brought by state court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.” Exxon Mobil Corp., 544 U.S. at 284. In Lance v. Dennis, the Supreme Court allowed a federal suit by Colorado citizens challenging the Colorado Supreme Court’s invalidation of Colorado’s redistricting plan. The district court applied Rooker-Feldman on the basis that the parties to the federal suit stood “in privity” with the state court losers. The Supreme Court reversed, rejecting the application of privity, a preclusion principle, in the Rooker-Feldman context. The “plaintiffs were plainly not
1. White v. White

In White v. White, a federal district court abstained under the Rooker-Feldman doctrine when Kevin White sought to challenge a state court custody determination in favor of Gabriela White that had been based in part on the state court’s adoption of an initial Hague Child Abduction Convention petition brought in German court. The district court applied the US Supreme Court’s most recent articulation of the Rooker-Feldman doctrine, which barred “cases brought by state court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.”

The district court determined that Kevin had “lost” arguments regarding the proper construction of the German case which he asserted before the New York Supreme Court; that this “loss” caused his injuries (failure to return his children to him); and, that he urged the district court to circumvent the state custody determination through a Hague Child Abduction Convention return order.

2. Gaudin v. Remis

The inquiries authorized or mandated by the treaty produce other likely Rooker-Feldman scenarios. For example, judicial authorities considering Hague Child Abduction Convention petitions may not reach underlying custody claims, but in order for the treaty to apply, a court must determine whether a left-behind parent had, and was exercising, custody rights at the time of a wrongful removal and retention. Because the US Supreme Court has not specified which state judgments enjoy Rooker-Feldman protection, cumulative determinations may weigh against federal jurisdiction. For example, in

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185. Id.
186. Id.

Gaudin v. Remis, a Hawaii Family Court determined on evidence adduced by a guardian ad litem that there was “a grave risk of psychological harm if the children [were] returned to their mother” in Canada.\footnote{Gaudin v. Remis, 00-00765-SPK (D. Haw. 2000) (citing Gaudin v. Remis, FC-P 93-0625 (Fam. Ct. Haw. 2000)).} The district court noted that if the state court judge had applied a “clear and convincing” evidentiary standard, it could not have reviewed that determination under Rooker-Feldman.\footnote{191. Because it was not clear which evidentiary standard the state court applied, the district court undertook its own review of the evidence establishing the grave risk exception and reached the same conclusion. Gaudin v. Remis, 379 F.3d 631, 634 (9th Cir. 2004).} Similar variations on these facts are likely.\footnote{192. In re Lehmann, No. 16353 / 16365, 1997 Ohio App. LEXIS 1083 at *5 (Mar. 21, 1997) (“Although the federal court denied Rolf’s requested relief, citing its concern that the Rooker-Feldman doctrine deprived it of subject matter jurisdiction, the court engaged in lengthy settlement negotiations and the parties resolved their dispute.”).}

If a party raises a treaty claim in connection with a state custody proceeding, and a trial court issues simultaneous rulings giving temporary custody to the adverse party and orders a hearing on “habitual residence,” is a federal district court divested of subject matter jurisdiction because the party has “lost” in the state court proceeding?\footnote{193. Barzilay v. Barzilay, No. 4:07CV01781 ERW, 2007 U.S. Dist. LEXIS 89304 (E.D. Mo. Dec. 4, 2007).}

III.

FEDERAL APPELLATE COURT REJECTION OF ABSTENTION UNDER THE HAGUE ABDUCTION CONVENTION

Whatever the balance federal district courts have attempted to strike while weighing state interests and judicial economy with federal interests in treaty commitments, federal appellate courts have been overwhelmingly hostile to abstention decisions.\footnote{194. See, e.g., Silverman v. Silverman, 338 F.3d 886, 895 (8th Cir. 2003); see also Yang v. Tsui, 416 F.3d 199 (3d Cir. 2005); Gaudin v. Remis, 415 F.3d 1028 (9th Cir. 2005); Holder v. Holder, 305 F.3d 854 (9th Cir. 2002). Justice Ginsburg effectively advocates that position in her Garamendi dissent. See also El Al Israel Airlines v. Tseng, 525 U.S. 155, 175 (1999) (“Our home-centered preemption analysis, therefore, should not be applied, mechanically, in construing our international obligations.”).}

Every federal appellate court before which Younger and Rooker-Feldman abstentions have been raised has rejected them. Indeed, the Eighth and Ninth Circuit Courts of Appeal have adopted per se rules prohibiting the application of Rooker-Feldman. The Seventh, Eighth, and Ninth Circuits have announced per se rules barring Younger abstention.\footnote{195. The Seventh Circuit announced its rule in an opinion issued on July 26, 2002 after the parties had settled, but before the court had received notice of the settlement. Therefore, the opinion seeks to enjoin the state proceeding, and state appeals are still pending? In this case, as we have already seen, Younger does not apply, and in some states interlocutory or appealable orders are given no preclusive effect. Here the Rooker-Feldman doctrine, as it is generally used in the lower courts, seems both necessary and appropriate.”).}
Court of Appeals alone has affirmed a district court abstention decision—based on *Colorado River*—but more recently affirmed a district court decision to deny both *Colorado River* and *Younger* abstention based on reasoning similar to that adopted by other federal appellate courts.\(^{196}\)

To be sure, ICARA vests a party with the option to raise his or her claim in either federal or state court. The treaty also prohibits a court from adjudicating the merits of a custody suit pending the resolution of the wrongful removal claim. So, even if a state court plaintiff initiates divorce and child custody proceedings, the state court defendant may bring a separate action in federal court. These circumstances, without more, might not justify abstention. Indeed, the Third Circuit in *Yang v. Tsui* explained the pattern in federal appellate decisions not by which sovereign was better able to enforce international obligations, but by whether or not a Hague Convention petition had been filed in state court.\(^{197}\) In *Yang*, the Third Circuit could rightly point to the fact that not only had no party raised a Hague Convention petition in the underlying state custody proceeding, but that a final judgment had been entered resolving the entire custody dispute and thus no specter of a Hague claim in state court existed.\(^{198}\)

**A. Narrow Construction of Hague “Petitions” in State Courts**

But federal appellate decisions have rejected abstention even in cases where a left-behind parent initially selected a state forum or substantially engaged state judicial process in pursuance of a Hague Child Abduction Convention claim. Article 8 of the treaty specifies the information required of a return application to a central authority, but Congress made no association between those requirements and pleading under the Federal Rules of Civil Procedure.\(^{199}\) Congress included only a permissive provision regarding a Hague Child Abduction Convention claim, noting that a claimant “may . . . [file] a

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\(^{197}\) *Yang v. Tsui*, 416 F.3d 199, 204 (3d Cir. 2005).

\(^{198}\) *Id.* at 204.

\(^{199}\) Hague Child Abduction Convention, *supra* note 8, art. 8, requires an application to a Central Authority to include information concerning the identity of the applicant, the child, and the person alleged to have removed or retained the child. Where available, the date of birth of the child, the grounds on which the applicant’s claim for return of the child is based, and all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be should be included. The application may be accompanied or supplemented by an authenticated copy of any relevant decision or agreement, a certificate or affidavit emanating from a Central Authority, other competent authority of the State of the child’s habitual residence, or from a qualified person, concerning the relevant law of that State, and any other relevant document.

http://scholarship.law.berkeley.edu/bjil/vol32/iss1/5
petition for the relief sought in any court which has jurisdiction . . . ." 200 The State Department’s legal analysis suggests that applicants provide as much information to a court as Article 8 requires, but notes “the informal nature of the pleading and proof requirements; Article 8(c) merely requires a statement in the application to the Central Authority as to ‘the grounds on which the applicant’s claim for return of the child is based.’” 201 Federal appellate courts, however, have adopted fatal scrutiny in cases where a federal district court abstained without a Hague Child Abduction Convention claim being brought in the form recommended in Annex A to the State Department’s legal analysis. 202

1. Barzilay v. Barzilay

In the aforementioned case of Barzilay v. Barzilay, for example, the state court plaintiff brought her Hague Child Abduction claim in her motion for modification of the divorce decree while the state court defendant raised his request for return in his answer to her motion. 203 The state court entered an order rejecting the state court defendant’s assertion that Israel was the children’s habitual residence under the treaty. 204 The federal district court abstained, ruling that the state court defendant (the federal court plaintiff) was required to appeal through Missouri courts. 205 The Eighth Circuit reversed, adopting a per se rule that abstention was inappropriate in Hague Child Abduction Convention cases. 206 The Eighth Circuit appeared aware of the tension between the state court judgment and its own refusal to affirm the abstention decision:

Tamar stated that Sagi used the Israeli court system “to fraudulently procure a judgment giving Israel exclusive jurisdiction over the custody of the minor children . . . in blatant defiance of . . . the Hague Treaty on Child Abduction.” She did not reference the terms of the Hague treaty or explain how Sagi’s use of the Israeli court system implicated the treaty. In her motion for a temporary restraining order, Tamar argued that the Israeli judgment . . . should have deferred to the Missouri court given its existing custody judgment and the habitual residence of the children. She also complained that Sagi’s use of the Israeli court

202. See, e.g., Burns v. Burns, No. 96-6268, 1996 U.S. Dist. LEXIS 18116, at *9-10 (E.D. Pa. Dec. 6, 1996) (rejecting the mother’s attempt to re-litigate a Hague Child Abduction claim on the basis that “she clearly stated the source of her alleged custody rights and the date of the alleged wrongful retention, and requested in her prayer for relief that she be allowed to return to the United Kingdom with the four children.”).
204. Id.
206. Barzilay v. Barzilay, 536 F.3d 844 (8th Cir. 2008) (“The controlling case in our circuit is Silverman I, which concluded that abstention was inappropriate in Hague Convention cases.”).
The decision turned in significant part on the role of federal courts in upholding international commitments:

Moreover, given that Sagi obtained a custody determination from an Israeli court and Tamar has obtained a custody determination from a state court in this country, the federal district court is uniquely situated to adjudicate the question of whether Israel or Missouri is the habitual residence of the Barzilay children and whether they were wrongfully removed from that residence. Although the state clearly has an important interest in child custody matters, that interest has not been considered to be a significant factor in terms of abstention where ICARA is involved.

It is not clear why a federal district court judge would be better “situated” to determine the habitual residence of children where domestic and foreign custody orders conflict—a situation state courts face with some frequency and to which federal courts hearing claims based on diversity of citizenship apply so-called “domestic relations” abstention.

2. Silverman v. Silverman

In Silverman v. Silverman, the federal plaintiff had initially asserted Israel to be the “habitual residence” of the children under the Hague Child Abduction Convention in Minnesota state court, and had defended his claim of a “wrongful removal” from Israel before a state court magistrate. He filed a Hague Child Abduction Convention petition motion in federal court on the day of the state court hearing. The state court later entered an order granting temporary custody to the state court plaintiff and scheduled a hearing for the remaining claims. On this basis, the federal district court dismissed under Younger.

207.  Id. at 851.
208.  Barzilay, 536 F.3d at 844 (internal citations omitted).
209.  See, e.g., Cshi v. Fustos, 670 F.2d 134 (9th Cir. 1982) (applying domestic relations abstention in a suit by Romanian citizens against California residents to determine marital status); In re D.M.T.-R., M.C., 802 N.W.2d 759, 764-765 (Minn. Ct. App. 2011). The Minnesota court noted: For example, the domestic relations exception to federal diversity jurisdiction divests federal courts of subject matter jurisdiction over child custody decrees. Thus we conclude that the UCCJEA confers to state courts subject matter jurisdiction over child custody proceedings, including the termination of parental rights involving a child who is not a United States citizen but who is in Minnesota. See also Maqsudi v. Maqsudi, 830 A.2d 929 (N.J. Super. Ct. Ch. Div. 2002) (adjudicating dispute between New Jersey and Uzbekistan custody decrees).
210.  Silverman v. Silverman, 267 F.3d 788, 790 (8th Cir. 2001) (“At the hearing before a state-court referee on October 10, Robert’s attorney argued the jurisdictional issue, and the referee engaged her in a discussion of the facts surrounding the parties’ move to Israel, the bankruptcy, and the status of the children in Minnesota at the time. Counsel repeatedly asserted that the court should not reach the merits of the custody issue, noting that the children’s physical presence in Minnesota was the result of an allegedly wrongful removal from Israel.”).
211.  Silverman v. Silverman, No. 00-2274 (PAM/JGL) at 7 (D. Minn. Nov. 13, 2000).
212.  Id.

178 BERKELEY JOURNAL OF INTERNATIONAL LAW [Vol. 32:1

The Eighth Circuit reversed, determining that Younger abstention did not apply because federal courts enjoyed no equitable discretion under the treaty.\(^2^{14}\) The court did not discuss the jurisdictional issue and ultimately concluded that “because the Hague issue has not been addressed . . . we believe the appropriate course of action is to remand the matter to the district court to consider whether the Silverman children were wrongfully removed. We note that nearly a year has passed since Robert filed his petition under the Hague Convention, due in no small part to our own consideration of the case.”\(^2^{15}\)

After the case was remanded, the Minnesota trial court entered a final custody determination, including a finding that Minnesota was the children’s “home state” under Minnesota law.\(^2^{16}\) Reviewing the district court’s later denial of the Hague Child Abduction Convention claim, the Eighth Circuit analyzed the effect of the state court’s “home state” determination on the “habitual residence” inquiry under the treaty.\(^2^{17}\) While the court concluded that those questions were not “inextricably intertwined” within the meaning of Rooker-Feldman, it took the additional step of establishing the doctrine’s per se inapplicability because “Congress adopted the Hague Convention, an international treaty, making it, under the Constitution, part of the ‘supreme Law of the Land’”\(^2^{18}\) and therefore Rooker-Feldman did not apply outside of the implementing statute’s full faith and credit clause.\(^2^{19}\)

B. The Role of the Federal Courts in Upholding Treaty Obligations

The recurrent theme in federal appellate decisions is that—Congress’s explicit grant of concurrent original jurisdiction notwithstanding—responsibility for upholding international obligations is a fundamental function of the federal courts. These decisions are relatively vague as to which federal treaty interests need protecting—uniformity in interpretation, reciprocity between contracting

\(^2^{12}\) Silverman v. Silverman, 338 F.3d 886, 892 (8th Cir. 2003).
\(^2^{13}\) Silverman, No. 00-2274 (PAM/JGL) at 9 (D. Minn. Nov. 13, 2000).
\(^2^{14}\) Silverman, 267 F.3d at 788. The Eighth Circuit rejected Younger abstention on the basis that relief under the treaty is mandatory and therefore there is no equitable discretion. Even if the Eighth Circuit’s analysis as to its equitable powers under treaties in general is correct, the treaty provides a number of discretionary forms of relief to judicial authorities and Congress specifically vested both federal and state courts with the power to impose provisional remedies. See, e.g., Merle H. Weiner, Uprooting Children in the Name of Equity, 33 FORDHAM INT’L. L.J. 409 (2010) (discussing federal courts’ use of equitable estoppel and tolling under certain treaty provisions).
\(^2^{15}\) Silverman, 267 F.3d at 792.
\(^2^{16}\) Silverman, 338 F.3d at 886, 892.
\(^2^{17}\) Id.
\(^2^{18}\) Id. at 894.
\(^2^{19}\) Silverman, 338 F.3d at 886, 892. State court orders under the treaty, it determined, were limited to those falling under 42 U.S.C. § 11603(g) (2006) providing that “full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child pursuant to the Convention, in an action brought under this Act.”
states, or the treaty provisions that federal courts are uniquely able to adjudicate and enforce. The emphasis is instead on the general constitutional entrustment of treaty obligations to the federal courts and skepticism that state courts will respect the United States’ international commitments.

In Grieve v. Tamerin, the Second Circuit grudgingly affirmed an abstention decision by the US District Court for the Southern District of New York because the state court rendered a final decision on the Hague Child Abduction Convention petition after the abstention order. The Second Circuit noted the role of the federal judiciary in enforcing the United States’ international obligations:

Grieve’s claim implicates a paramount federal interest in foreign relations and the enforcement of United States treaty obligations. Deference to a state court’s interest in the outcome of a child custody dispute would be particularly problematic in the context of a Hague Convention claim inasmuch as the merits of the Hague Convention claim have been resolved. New York State’s interests do not, then, appear to raise the sort of substantial comity concerns that require Younger abstention. We are nonetheless constrained to affirm the judgment of the district court. The Southern District’s decision in Grieve’s action there, a final judgment on the merits subject to no further review holding that, once the Hague Convention had been raised in the state court litigation, Younger required the court’s abstention from further adjudication of Grieve’s Convention-based claims, collaterally estops the plaintiff from further asserting the contrary here.

In its one decision addressing abstention under the Hague Child Abduction Convention—a case in which the federal plaintiff was convicted of murdering the children’s mother, fleeing to Mexico, and violating numerous state court orders regarding the custody of his children in the process—the Sixth Circuit did not engage in any extensive analysis of the appellants’ abstention claim, but hinted that it would be disinclined to defer to state court proceedings.

220. Sanchez-Llamas v. Oregon, 548 U.S. 331, 383 (2006) (“[U]niformity is an important goal of treaty interpretation.”); Vicki Jackson, World Habeas Corpus, 91 CORNELL L. REV. 303, 356 (2006) (“A basic premise of the constitutional system has long been that appellate review of state court decisions is particularly important where treaty rights are asserted, both to assure a uniformity of interpretation and to minimize the possibilities of error in sensitive areas affecting foreign relations.”); Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 262 (1984) (Stevens, J., dissenting) (“The great object of an international agreement is to define the common ground between sovereign nations.”).

221. Grieve v. Tamerin, 269 F.3d 149 (2d Cir. 2001). The litigant filed a habeas petition in the Eastern District of New York raising the same issues as his petition in the Southern District. By that time, the New York Supreme Court had entered a judgment on the Hague Abduction Convention claim.

222. Id. at 149, 153.

223. March v. Levine, 249 F.3d 462 (6th Cir. 2001); In re S.L.M., 207 S.W.3d 288 (Tenn. Ct. App. 2006) (detailing how Perry March murdered his wife then fled to Mexico to escape criminal prosecution and civil liability, lost custody battles with the maternal grandparents in Illinois and Tennessee courts, and then used the Hague Child Abduction Convention to have the children returned to Mexico).

find the circumstances surrounding the entry of this default, like the circumstances surrounding the Tennessee contempt orders, highly unusual, and suggestive of the home court advantage that the treaty was designed to correct.”

Similarly, the Seventh Circuit rejected district court abstention on the basis that:

It was to curb [international parental kidnapping] that the United States assumed a treaty obligation to cooperate with other nations states to adopt a mutual policy in favor of restoring the status quo by means of the prompt return of abducted children to the country of their habitual residence and in this way depriving custody decrees of states to which a parent has removed a child “of any practical or juridical consequences.” Indeed, although the state to which the child has been taken no doubt has an important interest in adjudicating the custody of a child within its borders, it now shares, with the other states of the Union, an even more important interest in ensuring that its courts are not used to escape the strictures of a custody decree already rendered by another nation-state or to otherwise interfere with the custody rights that a parent enjoys under the law of another country. We hold, therefore, in agreement with the other Circuits that have confronted the issue, that a Hague petition simply does not implicate the Younger abstention doctrine.

While the Seventh, Eighth and Ninth Circuits have adopted per se rules against Younger abstention, the Eighth, Ninth and Eleventh Circuit Courts of Appeals have implicitly foreclosed Colorado River abstention.

In Lops v. Lops, a left-behind parent initially brought her Hague Child Abduction Convention petition in a Georgia state court, which determined that it did not have jurisdiction over the case, and transferred the matter to the South Carolina Family Court which did have jurisdiction. As in Silverman, the state trial court granted the taking parent temporary custody pending a later hearing. The left-behind parent then filed a Hague Child Abduction Convention petition in the federal district court in Georgia. The Lops court noted: “After all, the act and the treaty, which the Petitioner seeks to enforce, are creatures of the federal sovereign as opposed to any state’s sovereignty.”

224. March, 249 F.3d at 472.


226. Holder v. Holder, 305 F.3d 854 (9th Cir. 2002). The court noted:

In light of the Hague Convention policy that signatory countries should return wrongfully removed children expeditiously and through any appropriate remedy, we reject the claim that a left-behind parent is precluded or barred from raising his Hague Convention claim in the court of his choice, or that “wise judicial administration” is furthered by staying a federal Hague petition, simply because that left-behind parent has pursued the return of his children through multiple legal avenues.

227. Lops v. Lops, 140 F.3d 927, 934 (11th Cir. 1998).

228. Id. at 933.

229. Id.

230. Id. at 943 n. 22.
In *Holder v. Holder*, the Ninth Circuit rejected federal district court abstention on the basis of *Colorado River* even though the federal plaintiff had initiated state custody and divorce proceedings, was given the opportunity to brief the petition claim in state proceedings, and the state appellate panel had considered the views of the United States as amicus on the Hague Convention claim.\(^{231}\) The decision forced litigation in both California state court and Washington federal court—a result which weighed against the convenience of the federal forum and consolidated litigation.\(^{232}\) The Ninth Circuit determined that it need not apply “general res judicata principles” where “the implementation of federal statutes representing countervailing and compelling federal policies justifies departures from a strict application.”\(^{233}\) Similarly, the majority held that *Rooker-Feldman* did not apply in the Hague Child Abduction Convention context because “Congress has expressly granted the federal courts jurisdiction to vindicate rights arising under the Convention.”\(^{234}\) Thus, federal courts must have the power to vacate state custody determinations and other state court orders that contravene the treaty.\(^{235}\)

This conclusion sits uneasily with the statutory language. ICARA established concurrent original jurisdiction between federal and state courts. Its full faith and credit provision does not establish a hierarchy between federal and state courts; instead, it requires horizontal parity between state judgments and vertical parity between federal and state courts. As the United States noted in its amicus brief in *Holder*, the full faith and credit provision was included because a court may exercise jurisdiction over a treaty claim even where the children are physically located elsewhere.\(^{236}\) The statute simply confirmed that a second action was unnecessary. Also, Congress vested federal district courts with original jurisdiction, leaving in place *Rooker-Feldman*’s admonition to lower federal courts to not exercise appellate jurisdiction over state court judgments.

The *Holder* dissent noted that the federal plaintiff, an American citizen, plainly used his federal petition to undermine an unfavorable custody judgment issued by the California forum he had chosen—a result not only inconsistent with the treaty’s purpose, but also only justifiable by subordinating state courts

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\(^{231}\) In that brief, the United States argued that the Hague Abduction Convention was not meant to be used to give a litigant an opportunity to re-litigate custody.


\(^{233}\) *Holder v. Holder*, 305 F.3d 864 (9th Cir. 2002).

\(^{234}\) *Id.* (citing Mozes v. Mozes, 239 F.3d 1067, 1085 n. 55 (9th Cir. 2001)) (“Congress has expressly granted the federal courts jurisdiction to vindicate rights arising under the Convention. Thus, federal courts must have the power to vacate state custody determinations and other state court orders that contravene the treaty.” It clearly follows that, if a prior state court custody order cannot bar a federal court from vacating the state court order, then it cannot bar federal adjudication of the Hague Convention claim).

\(^{235}\) *Id.*


C. Rejecting Jurisdiction over Rights of Access

This jurisprudence is in contrast with emerging federal appellate decisions rejecting jurisdiction over “rights of access” under ICARA and the Hague Child Abduction Convention. Although ICARA makes clear that a petitioner may pursue, in federal or state court, “an action for arrangements for organizing or securing the effective exercise of rights of access” and an action for return after a wrongful removal or retention, federal courts have determined that, because the treaty lacks a specific remedy for violation of access rights, the federal courts lack subject matter jurisdiction entirely.238

It is possible to read their jurisdictional mandate in that way if federal courts turn their inquiry on the Congressional mandate to “decide cases in accordance with the Convention.”239 The treaty’s provisions speak at greater

237. Holder, 305 F.3d at 875. The Judiciary Committee’s House report noted:
[Section 11603(g)] means, for example, that if a court in one jurisdiction has ordered the return of a child and the child is located in another jurisdiction in the United States before that order has been executed, the order shall be given full effect in the second jurisdiction without the need to initiate a new return action there pursuant to the Convention and [ICARA], H.R. Rep. No. 100-525, at 12 (1988). In other words, the provision exists to reinforce the importance that a return order under ICARA be effected with haste and to close the door on any possible delay or manipulation by the allegedly abducting parent. It is unreasonable to assume that Congress intended to create a singular exception to a large body of statutory and common law but declined to mention this intent in any way. Additionally, an amicus brief filed by the United States in Holder and cited by the dissent stated that:

the Hague Convention was not intended to allow the “left-behind parent” a second bite at the custody apple just because, after specifically electing to litigate custody in a forum that otherwise had jurisdiction, the parent suffered an adverse result... The majority opinion... gives the left-behind parent a windfall by providing him with two opportunities to litigate custody: once in state court, and if he is unhappy with the result, all over again in another forum under the Hague Convention. Holder, 305 F.3d at 875 (Thompson, J., dissenting) (quoting Brief of Amicus Curiae United States) (unpublished decision).

Hague Child Abduction Convention, supra note 8, art. 1. (“The objects of the present convention are... to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”).

238. Croll v. Croll, 229 F.3d 133, 135 (2d Cir. 2000) (“Because courts in the United States have jurisdiction to enforce the Convention by ordering a child’s return to her habitual residence only if the child has been removed in breach of a petitioning parent’s custodial rights, the district court lacked jurisdiction to order return in this case.”); Cantor v. Cohen, 442 F.3d 196, 202 (4th Cir. 2006).

239. Cantor, 442 F.3d at 202; In re S.E.O., 873 F. Supp. 2d 536, 545-46 (S.D.N.Y. 2012) (“Given the language of the statute, this Court finds that it has jurisdiction to enforce Petitioner’s rights of access to the Children, and orders Respondent to comply with the visitation rights set forth by the Turkish Court’s May 13, 2011 Order, so long as the Children remain in the United States.”). The Second Circuit affirmed the district court’s conclusion in S.E.O., but recast the case as a custody rights case. See Ozaltin v. Ozaltin, 708 F.3d 355 (2013).
length to judicial conduct governing return actions than access actions.\textsuperscript{240} Article 21, covering actions for rights of access, suggests a prominent role for “Central Authorities” and international cooperation, but refers explicitly to that cooperation in “proceedings” aimed at ensuring access.\textsuperscript{241} Even if it were the case that the treaty exclusively committed access rights to “Central Authorities”—the US State Department as opposed to judicial authorities—that reading would apply equally to federal and state courts. Federal courts have not, however, ruled that ICARA does not vest courts with jurisdiction over access claims. Indeed, it would be difficult to do so given the statutory language. Instead, federal courts have determined that access claims are intended for state court adjudication:

With the exception of the limited matters of international child abduction or wrongful removal claims, which is expressly addressed by the Convention and ICARA, other child custody matters, including access claims, would be better handled by the state courts which have the experience to deal with this specific area of the law . . . a state court would have the ability to weigh the children’s interests, the parent’s interests, and other familial considerations. Therefore, we find it best not to move domestic relations litigation to federal courts.\textsuperscript{242}

In \textit{Abbott v. Abbott}, the US Supreme Court’s only decision in interpreting the Hague Child Abduction Convention, the Court mentioned remedies available for violations of rights of access by referring to a Massachusetts Supreme Judicial Court case, but did not otherwise address federal court refusal to hear access claims.\textsuperscript{243}

It might be that rights of access under the treaty fall within the core issues of child custody decrees, divorce, and marriage to which “domestic relations” abstention is applicable.\textsuperscript{244} Yet the treaty itself draws relatively sharp lines between “rights of custody” and “rights of access.”\textsuperscript{245} Federal appellate courts have emphasized the distinction in the return context to extend federal jurisdiction deep into state adjudications of treaty claims. If federal courts are applying “domestic relations” abstention, they are doing so somewhat

\textsuperscript{240} Hague Child Abduction Convention, \textit{supra} note 8, art. 12-20.,

\textsuperscript{241} Id. art. 21.

\textsuperscript{242} Cantor v. Cohen, 442 F.3d 196, 202 (4th Cir. 2006); Fernandez v. Yeager, 121 F. Supp. 2d 1118, 1126 (W.D. Mich. 2000) (matters relating to access are best left to the state courts, which are more experienced in resolving these issues); Bromley v. Bromley, 30 F. Supp. 2d 857, 862 (E.D. Pa. 1998) (“The arena of child custody matters, except for the limited matters of international abduction expressly addressed by the Convention, would better be handled by the state courts which are more numerous and have both the experience and resources to deal with this special area of the law.”); Croll v. Croll, 229 F.3d 133, 138 (2d Cir. 2000) (“One such remedy is a writ ordering the custodial parent who has removed the child from the habitual residence to permit, and to pay for, periodic visitation by the non-custodial parent with access rights.”) (citation omitted); Wiezel v. Wiezel-Tymauer, 388 F. Supp. 2d 206 (S.D.N.Y. 2005).


\textsuperscript{245} Hague Child Abduction Convention, \textit{supra} note 8, art. 3.
unconventionally as that doctrine is generally applied where federal courts sit in
diversity—not in suits seeking rights arising under a federal treaty. Federal
courts’ refusal to hear access claims provides additional evidence that, in the
treaty context, federal courts see themselves playing an independent
constitutional role in managing their jurisdiction.

D. Rejection of Abstention and the Frustration of Federal and State Interests

Federal appellate decisions rejecting abstention ultimately frustrate the
realization of the federal and state interests Congress had sought to protect. With
respect to federal interests under the treaty, the application of abstention is
consistent with the treaty’s requirement that wrongful removal claims be
adjudicated expeditiously. The United States is among the slowest contracting
states with respect to the resolution of claims. Even in cases where the state’s
interests focus on a generalized concern with custody adjudications, Colorado
River abstention may be the best way to promote the treaty’s purpose of rapid
adjudication. Raising (or re-raising) a Hague Child Abduction Convention
claim in federal court adds to the delay in a treaty that contemplates a six-week
adjudication period. The Barzilay and Holder cases provide good illustrations.
The Eighth Circuit affirmed the district court’s conclusion that the Barzilay
children’s habitual residence was Missouri on April 2, 2010, two and a half
years after the state trial court had reached the same conclusion. The Ninth
Circuit affirmed the district court’s conclusion that the Holder children were not
habitual residents of Germany on December 9, 2004, nearly three years after the
decision of the California appellate panel.

State interests in Hague Child Abduction Convention cases also take a
stronger form than generalized interests in child custody. In Witherspoon v.
Orange County Department of Social Services, the state agency participated in
the litigation in its role of protecting children from domestic abuse. The state
plaintiff, losing her treaty claim in state court, filed her federal treaty claim after

246. See Meredith Johnson Harbach, Is the Family a Federal Question?, 66 WASH. & LEE L.
REV. 131 (2009).
International Child Abduction Cases Should be Heard Exclusively by Federal Courts, 49 FAM. CT.
REV. 170, 174 (2010).
248. Ion Hazzikostas, Note, Federal Court Abstention and the Hague Child Abduction
249. See Barzilay v. Barzilay, 04FC10567 (St. Louis Cnty. Oct. 16, 2007) (rejecting Sagi
Barzilay’s request for return); Barzilay v. Barzilay, 600 F.3d 912 (8th Cir. 2010) (upholding district
court determination that Israel was not children’s habitual residence).
2002) (holding that Jeremiah Holder waived his Hague Convention claim); Holder v. Holder, 392
F.3d 1009 (9th Cir. 2004) (upholding federal district court determination that Germany was not the
Holder children’s habitual residence).
10, 2009).
the state appellate court had vacated the trial court order. Under current law, abstention alternatives available to the federal district court are limited and heavily scrutinized. In the Seventh and Eighth Circuits, Younger abstention would not be available to safeguard the state’s interest in protecting minors from abuse, and in the Ninth Circuit—where the suit originated—neither Colorado River nor Rooker-Feldman would permit abstention based on judicial economy, Congressional intent with adjudication of treaty claims in state court, or the existence of a state return order (because it had been vacated).

This is problematic because it upends the Congressional purpose behind the grant of original jurisdiction to both federal and state courts. It is possible to read the statutory language to authorize federal jurisdiction over any and all aspects of a Hague Child Abduction Convention claim short of a final state judgment, but that reading is in tension with aspects of ICARA that require deference to state law and statutory and common law prohibitions against re-litigation of claims. The requirement that federal and state courts give full faith and credit to each other’s grant or denial of return orders cannot mean that Congress intended federal courts to exercise jurisdiction over Hague Child Abduction Convention claims brought in state court up to the point that the trial court grants or denies a petition.

Federal appellate courts’ dicta that custody interests alone cannot justify abstention are almost certainly correct. By its terms, the treaty separates habitual residence and custody determinations, despite the significant overlap between the factual findings necessary to determine both. Federal appellate courts have used this distinction to suggest that because the treaty does not allow a court to adjudicate the merits of a custody dispute before a decision on return, the statutory scheme opens only a narrow window for state court jurisdiction. The effect of this line of reasoning is to upend the legislative purpose behind state court jurisdiction in the first place. Instead of using state courts’ general authority and expertise in child custody adjudications as a reason to vest them with original jurisdiction over Hague Child Abduction Convention claims, it is used to strip away treaty claims to federal court, often with the disruptive, dilatory, and fracturing effects abstention was fashioned to prevent.

252. Id.
253. In Gaudin v. Remis, which did not involve Younger abstention, the Ninth Circuit suggested that the doctrine would be inapplicable to Hague Child Abduction Convention claims. The district court in Witherspoon emphasized that the state interest justifying Younger abstention was dependency, not custody. Gaudin v. Remis, 415 F.3d 1028 (9th Cir. 2005).
254. Yang v. Tsui, 416 F.3d 199, 203 (3d Cir. 2005) (“It is clear that if the state proceeding is one in which the petitioner has raised, litigated and been given a ruling on the Hague Convention claims, any subsequent ruling by the federal court on the same issues would constitute interference.”).
255. See id. at 204.
256. Friedrich v. Friedrich, 983 F.2d 1396, 1402 (6th Cir. 1993).
In short, because state courts deal with child custody, they cannot be trusted to deal with child custody. 257

IV. STATE AND FEDERAL JUDICIAL MANAGEMENT OF THE HAGUE ABDUCTION CONVENTION

Doing away with abstention might make more sense if state courts were truly guilty of undermining federal commitments under the treaty. The measurable reality is that they are not. Based on cases reported in major databases, state trial courts order return of children abroad and reject affirmative defenses at the same rate as federal trial courts. While any empirical study of published orders must necessarily be taken for the imperfect exercise it is, empirical comparisons can give us at least some picture of how federal and state courts approach treaty claims.

The first difficulty is identifying all claims for return of a child. Because a petitioner is not required to exhaust or even resort to the State Department’s diplomatic processes, data on the number of Hague Child Abduction Convention cases pending in the United States is never precise. 258 A 2008 study undertaken by the Hague Conference estimated 329 incoming cases to the United States each year, and that approximately one-fifth of those applications end in a voluntary return of the child. 259 This leaves approximately 6,300 cases over a twenty-four year period in which parties sought judicial resolution. 260 There were only 373 federal or state trial judgments under the treaty reported in LEXIS and Westlaw, suggesting that approximately six percent of the cases go to trial. 261 That rate is higher than the general rate of civil claims going to trial in federal courts, but is consistent with the rate at which divorce petitions go to trial. 262

257. The US Supreme Court’s only decision regarding the treaty, Abbott v. Abbott, was necessary because federal appellate courts determined with one exception that a non-custodial parent’s right to prevent a custodial parent’s foreign travel did not give the left-behind parent a right to demand return of a child. Abbott v. Abbott, 560 U.S. 1 (2010).

258. Walshand & Savard, supra note 119, at 30 (noting difficulty in accurately measuring international child abductions).


261. This quotient is derived by dividing 384 by 6,300.

A second difficulty is ascertaining factors like settlement rates and resolutions occurring short of a final court order. The analysis provided herein is premised upon the Hague Child Abduction Convention petitions filed in state or federal trial courts that reach final judgment. The analysis is therefore not representative of the relative ability of federal or state judges to facilitate pre-judgment settlement, and does not answer whether, in aggregate, state court parties settle at the same rate as federal court parties. Indeed, given the idiosyncratic nature of family disputes that give rise to international abductions, it is difficult to see how the broader picture might be accurately assessed. The analysis is also indifferent as to the United States or a state agency acting as an amicus curiae or litigant in a Hague Child Abduction Convention proceeding. Those limitations aside, this discussion proceeds on the assumption that these influences would affect federal and state adjudications in the same manner.

The evidentiary division between remedies and affirmative defenses under ICARA frames the empirical part of this Article. The following hypothesis is tested: state judges order fewer returns of children abroad than federal judges either by finding the treaty inapplicable or by liberally interpreting affirmative defenses available to the taking parent. In order to test this hypothesis, I collected all federal and state trial court cases in which Hague Child Abduction Convention claims were raised through August 16, 2012. In this set, I separately analyzed cases in which parties raised affirmative defenses under the treaty.

A. State Judicial Management of Hague Child Abduction Convention Claims

In ninety-five state trial court judgments, state judges determined that the treaty applied in seventy-five cases, or 78.9 percent, of cases brought before them. In the twenty, or 21.1 percent, of cases where the state court rejected the treaty’s application, four decisions were based on what I consider to be objectively clear rules under the treaty. For example, state judges dismissed Hague Child Abduction Convention petitions where claims were brought to
return children to non-party states, or where attempts were made to invoke the treaty to enforce rights over a child who had reached sixteen years of age.\footnote{264}{See In re Gold, No. 1 CA-CV 10-0471, 2011 WL 2462474 (Ariz. Ct. App. June, 21 2011) (Ghana is not a party to the Hague Convention); In re David B., 164 Misc. 2d 566 (N.Y. Fam. Ct. 1995) (Nigeria is not a party to the Hague Convention); In re R.P.B., 2010, No. CA2009-07-097, 2010 WL 339812 (Ohio Ct. App. Feb. 1, 2010) (unpublished) (the Ohio juvenile court dismissed a father’s Hague Convention petition because the child had reached the age of sixteen and therefore relief was unavailable under the treaty); Terron v. Ruff, 116 Wash. App. 1019 (2003).}

Even where state courts determined that the treaty was not applicable, that conclusion resulted in deference to a foreign jurisdiction to adjudicate custody in two cases. In \textit{L.H. v. Youth Welfare Office}, a New York Family Court determined that there was no wrongful removal of the child under Article 3 of the Convention, and deferred to German proceedings after lengthy communications with the German family court judge.\footnote{265}{L.H. v. Youth Welfare Office, 150 Misc. 2d 490 (N.Y. Fam. Ct. 1995).} Similarly, a Minnesota trial court rejected a mother’s effort to prevent the removal of her child to Canada because the dispute involved visitation rights (return is not a mandated remedy under the treaty).\footnote{266}{In re T. G. M. D., 2011 Minn. App. LEXIS 329 (2011).} In the remaining cases, the determination that the Hague Child Abduction Convention did not apply resulted in either the retention of children in the United States or an order that they be returned to the United States, a conclusion consistent with the hypothesis that state judges tend to retain children in the United States even where doing so is in tension with treaty obligations.

In the seventy-five cases where it was determined that the treaty applied, state trial judges ordered the return of a child to a foreign country in fifty-five, or 73.3 percent, of them. Those repatriation orders were issued from jurisdictions in which trial judges are elected in partisan elections,\footnote{267}{New York and Texas.} elected in non-partisan elections,\footnote{268}{Arkansas, Michigan, Minnesota, Nevada, North Carolina, Ohio, and Washington.} selected through merit screening,\footnote{269}{Colorado and Nebraska.} selected by a judicial commission, nominated by a governor but ultimately receiving legislative appointment,\footnote{270}{Connecticut.} exclusive legislative selection,\footnote{271}{Virginia.} or gubernatorial appointment with senatorial or judicial commission approval.\footnote{272}{California, Massachusetts, and New Jersey.}

In thirty-three proceedings, litigants raised one or more of the affirmative defenses authorized by the Hague Abduction Convention. State courts rejected these affirmative defenses in twenty-three of these proceedings, or 69.7 percent of the time. In Hague Child Abduction Convention cases, defendants frequently raise the Article 13(b) affirmative defense, asserting a “grave risk that the child’s return would expose the child to physical or psychological harm or
otherwise place the child in an intolerable situation.”273 This claim can take the form of harms ranging from a child not wishing to return to his or her state of habitual residence to physical abuse at the hand of the left-behind parent. In approximately two-thirds of the cases, the taking parent is the mother, a fact which has caused some to argue that the Hague Child Abduction Convention insufficiently protects mothers fleeing domestic abuse.274

B. Federal Judicial Management of Hague Abduction Convention Claims

In 278 federal trial court judgments, federal district court judges determined that the treaty applied in 229 cases, or 82.4 percent, of the time. In the forty-nine cases (17.6 percent) where the federal district court rejected the treaty’s application, a similarly small number of decisions were based on clear prohibitions on jurisdiction under the treaty.275 Federal district courts, like state family or trial courts, find the treaty inapplicable primarily where the left-behind parent did not have custody rights or where they determine that the child’s habitual residence was the United States.276


In the 229 cases in which it was determined that the treaty applied, federal
district court judges ordered the return of a child to a foreign country in 163 of
them, or 71 percent of the cases. In 177 proceedings, litigants raised one or more
of the affirmative defenses authorized by ICARA. Federal district courts
rejected these affirmative defenses in 123 of these proceedings, or 69.5 percent
of the cases.

On all of these metrics, state judges demonstrate close parity with federal
judges. Based on reported cases, state judges order the return of children abroad
at a slightly higher rate (73.3 percent to 71 percent) than federal judges, an
outcome that suggests that plaintiffs have no greater difficulty vindicating treaty
rights in state courts than in federal courts. State judges reject affirmative
defenses under the treaty at a marginally higher rate than federal judges (69.7
percent to 69.5 percent), giving effect to the treaty drafters’ intent that
exceptions be narrowly construed.277 As Thomas Johnson observed at the
twentieth anniversary of the treaty, “both federal and state courts in the United
States have given foreign parents and their governments little to complain
about . . . .”278

V.
THE FUTURE OF ABSTENTION AND FAMILY LAW TREATIES

All of this might be of modest import if the Hague Child Abduction
Convention represented the end of US participation in family law treaties. But
the increasing role of Congress and the President in these areas of family law
has facilitated the US government’s engagement with at least three additional
Hague Conference family law treaties.279 The United States has ratified the
Convention on Protection of Children and Co-operation in Respect of
Intercountry Adoption (Hague Adoption Convention).280 Congress passed the

limited to the level of safety in the state of habitual residence); Salkin supra note 273 (citing in equal
measure state and federal courts narrowing the scope of inquiry under the affirmative defenses);
(denying the grave risk defense based on relocation).

278. Thomas Johnson, The Hague Child Abduction Convention: Diminishing Returns and

279. Estin, Sharing Governance, supra note 49, at 279-80 (“State laws governing paternity,
adoption, foster care, child support, and child protection now evolve based on a federal design, as do
laws regulating family behavior of individuals shows a substantial federal commitment to family
policy and children’s welfare.”); David F. Cavers, International Enforcement of Family Support, 81
COLUM. L. REV. 994, 1000-02, 1007-12 (1981); see also Gloria Folger DeHart, Comity,
Conventions, and the Constitution: State and Federal Initiatives in International Child Support
Enforcement, 28 FAM. L.Q. 89, 110 (1994) (state governments are allowed to enter into compacts
with foreign governments).

Protection of Children and Co-operation in Respect of Intercountry Adoption: Status table,
implementing Intercountry Adoption Act (IAA) in 2000 even though the State Department has only finalized implementing regulations relatively recently.\textsuperscript{281} The IAA explicitly preempts state laws only to the extent they are inconsistent with the IAA, and acknowledges the particular role of state courts in regulating emigration of US children to Convention countries.\textsuperscript{282} There is no concurrent jurisdictional statute, and private rights of action are not authorized. The existence of an extensive federal regulatory scheme for intercountry adoption, including participation by state regulatory agencies in the comment process, suggests that federalism questions under the treaty are more likely to center around preemption than jurisdiction.\textsuperscript{283}

The United States has also signed the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children,\textsuperscript{284} and the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance\textsuperscript{285}—both of which will invite similar difficulties in drawing the boundary between national interests in the treaty’s observance and state interests in the treaty’s underlying legal problems. As Ann Laquer Estin has noted, harmonization of these treaties with domestic US law will be difficult because of “our approach to federalism and the traditional role of state governments in family law.”\textsuperscript{286} This entire picture becomes even more muddled


\textsuperscript{281} 42 U.S.C.A. §§ 14901-14954 (West 2000). The IAA’s purpose is to “protect the rights of, and prevent abuses against children, birth families, and adoptive parents involved in adoptions (or prospective adoptions) subject to the Convention, and to ensure that such adoptions are in the children’s best interests,” and to “improve the ability of the Federal Government to assist United States citizens seeking to adopt children from abroad and residents of other countries party to the Convention seeking to adopt children from the United States.” The IAA accomplishes these goals by regulating the accreditation and approval of adoption agencies, recognizing Convention adoptions, providing administrative and enforcement procedures to uphold the IAA. Id.


\textsuperscript{283} The regulations set forth a detailed dispute resolution procedure which contemplates final resolution in federal courts.


\textsuperscript{286} Estin, Families Across Borders, supra note 74, at 50
once we consider the potentially preemptive effect of federal common law,\textsuperscript{287} which is now being developed with respect to the Hague Child Abduction Convention.\textsuperscript{288}

The Hague Child Abduction Convention may be viewed in part as a victory for bicameral international lawmaking.\textsuperscript{289} The large Congressional majorities behind the implementing legislation represent an underlying interest by states in increasing the tools available to reach abducted children.\textsuperscript{290} Compared to federal judges, state judges have applied the treaty with an understanding of the importance of mutuality and reciprocity in making sure child custody is adjudicated in the appropriate forum.\textsuperscript{291} A similarly inclusive process governed the ratification of the Hague Adoption Convention.\textsuperscript{292}

Yet the treaty has not been a story of the success of judicial federalism. Without wading into the much wider (and more perilous) debate surrounding the use of legislative history for purposes of statutory interpretation, it is fair to say that federal appellate courts have been relatively indifferent to the implicit

\begin{itemize}
\item \textsuperscript{288} \textit{See} Samuel P. Jordan, \textit{Reverse Abstention}, 92 B.U. L. REV. 1771 (2012) (analyzing circumstances under which federal procedural common law accompanying enforcement of a federal right is applicable only in a federal forum); Anthony J. Bellia, Jr., \textit{State Courts and the Interpretation of Federal Statutes}, 59 VAND. L. REV. 1501, 1505-06 (2006). Bellia and Clark, supra note 31, at 9 (“Taken in historical context, the best reading of Supreme Court precedent dating from the founding to the present is that the law of nations does not apply as preemptive federal law by virtue of any Article III power to fashion federal common law, but only when necessary to preserve and implement distinct Article I and Article II powers . . .”).
\item \textsuperscript{290} Peter H. Pfund, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494, 10498 (Mar. 26, 1986) (“In reply to a State Department letter inquiring whether and how the states of the United States could assist in implementing the Convention if it were ratified by the United States, officials of many states welcomed the Convention in principle and expressed general willingness to cooperate with the federal Central Authority in its implementation.”).
\item \textsuperscript{291} \textit{See, e.g.}, Tahan v. Duquette, 259 N.J. Super. 328, 334 (1992) (“Although we are not bound by the decisions of courts in other states or by the manner in which a treaty has been interpreted in other nations, a proper regard for promoting uniformity of approach in addressing a treaty of this kind requires that the views of other courts receive respectful attention.”) (citations omitted).
\item \textsuperscript{292} Estin, \textit{Families Across Borders}, supra note 74, at 75-76 (describing Congressional remedial action on the treaty).
\end{itemize}
CONCLUSION

If it is true that Congress wishes to safeguard state family law to the greatest extent possible as it enters more treaties dealing with child custody, family maintenance obligations, and divorce and marriage, then the experience with the Hague Child Abduction Convention counsels against a reliance on judicial federalism to accomplish that objective. The empirical part of this paper suggests that exclusive state court jurisdiction poses no threat to federal interests in uniformity and mutuality of decisions with other contracting states. Of course,


294. See Fawcett v. McRoberts, 326 F.3d 491, 500 (4th Cir. 2003); Gonzalez v. Gutierrez, 311 F.3d 942, 949 (9th Cir. 2002). The Court of Appeals for the Eleventh Circuit adopted the reasoning of then Judge Sotomayor’s Croll dissent. Furnes v. Reeves, 362 F.3d 702, 720, n.15 (11th Cir. 2004). Linda Silberman, Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA, 38 TEX. INT’L L.J. 41, 49 (2003) (“Federal courts in the United States have held that they do not even have jurisdiction to hear a claim for enforcement of access rights.”).


296. Walshand & Savard, supra note 119, at 38 (noting cases in which European jurisdictions especially have not complied with treaty mandates).

297. Estin, Families Across Borders, supra note 74, at 80-81, 90-91 (“[I]ndividual states began to enter reciprocal arrangements with foreign governments to establish, recognize, and enforce child support orders, following a trail blazed by Gloria DeHart, who negotiated many of these agreements as Deputy Attorney General in California.”).
This is not Congress’s only option. A second option is exclusive federal jurisdiction, a course which would at least eliminate delays caused by abstention adjudication. As Congress recognized in 1986, this option also engenders substantial federal intrusion into areas where states are generally better situated to administer the treaty’s purpose in part because they have oriented more resources toward doing so. Many Hague Conference participants recommend a specialized court to adjudicate petitions. Exclusive federal jurisdiction would reduce the time required for petitions to reach final conclusion and end the long delays caused by abstention and opportunistic forum shopping. Finally, Congress may attempt to draw jurisdictional lines between federal and state courts. It is not clear that ICARA’s original House version, which limited federal jurisdiction to a residual role over claims that did not involve a request for return of a child, would have avoided the jurisdiction problems caused by concurrent original jurisdiction. Congress has certainly shown itself able to craft an abstention statute where federal and state interests regularly and predictably collide. Future family law treaties represent a fruitful area for the collaborative political process leading to the Hague Child Abduction Convention to go a bit further.

298. As in the domestic context, uniformity is asserted as an important goal of federal court jurisdiction over treaties without that rationale having been tested to any significant extent. In Medellín, for example, the US Supreme Court rejected individual enforceable remedies under the Vienna Convention on Consular Relations which was inconsistent with a “uniformity” rationale. The International Court of Justice had determined, in a case against the United States, that treaty claims required judicial authorities to evaluate any prejudice caused by a denial of treaty rights. For critical views of the uniformity rationale in the domestic context, see John Preis, *Reassessing the Purposes of Federal Question Jurisdiction*, 42 WAKE FOREST L. REV. 247 (2007) (empirically questioning the validity of the uniformity justification); Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008) (analyzing constitutional structure with respect to a purported federal interest in uniformity).


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Recommended Citation
Available at: http://scholarship.law.berkeley.edu/bjil/vol32/iss1/6

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Religiosity and Same-Sex Marriage in the United States and Europe*

David B. Oppenheimer,** Alvaro Oliveira,† and Aaron Blumenthal‡

INTRODUCTION

There has been a sea change in marriage equality in recent years, so much so that it is difficult to keep up with all the recent advancements. Twenty years ago, no country in the world and not a single US state had authorized same-sex marriage. Ten years ago, only a small number of countries and states did so. Today, the number of places where same-sex marriage is legal is growing so quickly that by the time this Article is published, it will almost certainly be out-of-date.||

Currently in the United States, thirteen states and the District of Columbia permit same-sex marriage, enabling same-sex couples to enjoy the full and complete benefits of marriage,1 although their marriages may not be recognized in some other states. Another seven states provide varying levels of recognition of same-sex relationships (through civil union and domestic partnership laws).2 An overlapping thirty-five states have adopted restrictive language defining

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* Earlier versions of this paper were presented to the University of Paris X (Nanterre)’s comparative law workshop, Rutgers Camden Law School and Temple University’s Workshop on European Law, supported by the European Union Center of Excellence, and the Berkeley Comparative Anti-Discrimination Law Virtual Study Group. We are grateful to the participants, and to Russell Robinson, for their comments.

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|| We note that as this Article was going to press, New Jersey legalized same-sex marriage.


marriage as “between a man and a woman” (twenty-nine through state constitutional amendments and an additional six by statute).3

Currently in Europe, ten nations permit same-sex marriage.4 An additional thirteen nations provide varying levels of recognition of same-sex partnerships.5 But ten nations have adopted constitutional bans on same-sex marriage.6 As in the United States, the current trend in Europe is towards more marriage equality. Two of the largest and most influential nations in Europe—the United Kingdom and France—have recently legalized same-sex marriage. Yet many other European states are completely resistant to marriage equality, and even in states that embrace it, there are large vocal minorities that express strong opposition. The same-sex marriage legislation in France, for example, sparked large protests, and a greater participation in politics by the Catholic Church than is common in secular France.7

Part I of this paper traces the change in law and attitudes in the United States. Part II does the same for Europe. Part III examines the role of the courts in marriage equality. Part IV asks whether we can explain the differences among US and European states by looking at attitudes about secularism and religiosity.

In brief, we recognize that while correlation is not causation, the correlations are dramatic here. In the United States, most of the states that are


5. These countries are Andorra, Austria, Croatia, Czech Republic, Finland, Germany, Hungary, Ireland, Liechtenstein, Luxembourg, Slovenia, Switzerland, and the United Kingdom (Scotland & Northern Ireland). See Current Status Around-the-World (International), MARRIAGE EQUALITY, USA (Sept. 17, 2012), http://web.archive.org/web/20130117184309/http://www.marriageequality.org/Around%20the%20World (there are varying levels of recognized rights for same-sex couples in Austria, Croatia, Czech Republic, Finland, Germany, Hungary, Ireland, Liechtenstein, Luxembourg, Slovenia, and Switzerland); Rainbow Europe Index 2013, ILGA-EUR, http://www.ilga-europe.org/home/publications/reports_and_other_materials/rainbow_europe (last visited Oct. 20, 2013) (Andorra has registered partnerships); Civil Partnership, EQUALITY NETWORK, http://archive.is/7MBtW (last visited Oct. 20, 2013) (Scotland has civil unions); Guidance on civil partnerships in Northern Ireland, NIDIRECT, http://archive.is/eSeyN (last visited Oct. 20, 2013) (Northern Ireland has civil unions).

6. These countries are Belarus, Bulgaria, Hungary, Latvia, Lithuania, Moldova, Montenegro, Poland, Serbia, and Ukraine. See MARRIAGE EQUALITY USA, supra note 5 (for constitutional same-sex marriage bans in Belarus, Bulgaria, Latvia, Lithuania, Moldova, Montenegro, Poland, Serbia, and the Ukraine). See also New Hungarian constitution comes into effect with same-sex marriage ban, PINK NEWS (Jan. 3, 2012), http://archive.is/Qq2dW (for Hungary’s constitutional same-sex marriage ban).

relatively non-religious or secular now permit same-sex marriage, while most that are highly religious prohibit it. Of the twelve most religious states, all have constitutional bans on same-sex marriage. Of the twelve least religious states, eleven have some recognition of same-sex relationships: eight have same-sex marriage, two have domestic partnerships, and one has civil unions. The same trend is largely true in Europe. We thus conclude that there is a close correlation between religiosity and support for same-sex marriage and that further research is appropriate to examine whether it is causative.

I. THE CHANGE IN LAW AND ATTITUDES IN THE UNITED STATES

Twenty years ago in the United States, no state permitted same-sex marriage, nor had any legal provision to recognize same-sex relationships. In general, same-sex couples could not visit each other as family in hospitals, or participate in end-of-life decisions, could not be the legal parents of each other’s children, and could not have any of the Social Security, insurance, estate tax, income tax, or property tax benefits of marriage.

In the last few years of the twentieth century, things began to change. In 1992, the District of Columbia City Council passed a limited domestic partnership law. In 1997, the Hawaii Supreme Court required the Hawaii legislature to provide certain contract rights to same-sex couples. In 1999, California passed a domestic partnership law. In 2000, the Vermont Supreme Court required the Vermont legislature to authorize either same-sex marriage or civil unions (they chose civil unions).

As we entered the twenty-first century, a small trickle became a mighty river. In 2003, the Massachusetts Supreme Judicial Court required the legislature to allow same-sex marriage (effective mid-2004), holding that limiting marriage to opposite-sex couples is a violation of equal protection and due process under the state constitution. The Massachusetts decision opened a floodgate. By the end of 2004, there was legal same-sex marriage in Massachusetts, and civil union or domestic partnership laws in Maine, Vermont, Hawaii, the District of Columbia, and California. In 2005, Connecticut joined the list with civil unions by court order. In 2006, New Jersey joined with civil unions by court order. In 2007, the Washington legislature passed a domestic partnership law. In 2008, the Oregon and Maryland legislatures passed domestic partnership laws, New Hampshire’s legislature passed a civil union law, and the Connecticut Supreme Court ruled in favor of full same-sex marriage rights. In 2009, the Vermont...
legislature passed a same-sex marriage law, the Iowa Supreme Court ruled that same-sex couples are entitled to full marriage, the Colorado legislature passed limited partnership rights for same-sex couples, and the Nevada and Wisconsin legislatures passed domestic partnership laws. In 2010, the New Hampshire legislature passed a same-sex marriage law. In 2011, the Illinois, Delaware, Rhode Island, and Hawaii legislatures passed civil union laws, while the New York legislature passed a full marriage rights law. In 2012, the Washington and Maryland state legislatures passed same-sex marriage laws (which were upheld by voter referenda in both states) and Maine voters approved a ballot initiative legalizing same-sex marriage. In March 2013, Colorado passed legislation to allow civil unions. In May 2013, Rhode Island, Delaware, and Minnesota all legalized same-sex marriage. And in June 2013, the US Supreme Court’s decision in Hollingsworth v. Perry resulted in the legalization of same-sex marriage in California.

The procession has not been one way, however. In Iowa, voters removed three of the seven Supreme Court Justices who voted in favor of same-sex marriage, as a result of a well-funded campaign against their re-election. Approximately three-fourths of the states have passed statutes, referenda, or constitutional amendments prohibiting same-sex marriage. These states include the entire South (Virginia, North Carolina, South Carolina, Georgia, Florida, Mississippi, Alabama, Louisiana, Texas, Arkansas, Oklahoma, Missouri, and Tennessee), most of the Mountain West and Great Plains (Nevada, Arizona, Utah, Idaho, Colorado, Montana, Wyoming, North Dakota, South Dakota, Nebraska, and Kansas), much of the Mid-West (Wisconsin, Michigan, Indiana, Illinois, and Ohio), much of the Middle Atlantic (Pennsylvania, Kentucky, and West Virginia), and four Pacific Coast states (Oregon, Hawaii, Alaska, and California). The federal Defense of Marriage Act provides that such states—that do not recognize same-sex marriage—need not give full faith and credit to same-sex marriages performed in states that do allow them. The
Supreme Court’s recent decision in United States v. Windsor does not affect the full faith and credit portion of the Defense of Marriage Act.\footnote{17} Despite the prohibitions by these thirty-five states, public opinion in the United States appears to be shifting rapidly. The 2012 Washington, Maryland, and Maine ballot initiatives are significant because they mark the first time that voters have approved same-sex marriage by popular vote. These initiatives show how US public opinion has changed in recent years. In fact, Maine voters had \textit{repealed} a same-sex marriage law, passed by their state legislature, only two years prior to the ballot initiative legalizing same-sex marriage.\footnote{18} Prior to the Washington, Maryland, and Maine ballot initiatives, same-sex marriage had lost on previous ballot initiatives in US states thirty-two times.\footnote{19} Many of these initiatives involved state constitutional amendments banning same-sex marriage. Yet, support for such initiatives has eroded over time. Since 2005, the average support for ballot initiatives banning same-sex marriage has decreased by 16 percentage points.\footnote{20} In 2012, Minnesota became the first state to reject a ballot initiative seeking to amend the state constitution to ban same-sex marriage.\footnote{21}

The rapid progress towards increased marriage equality reflects a recent and significant shift in public attitudes. In 2003, 58 percent of Americans opposed same-sex marriage and only 33 percent were in favor.\footnote{22} By 2013, opposition had switched to support, with 50 percent of Americans in favor of same-sex marriage and only 43 percent opposed.\footnote{23} A large share of this shift occurred in only the last four years (with support growing from 37 percent in 2009 to 50 percent in 2013).\footnote{24}

According to Nate Silver, this shift has led some people to speculate that growth in support for same-sex marriage is now rising at a faster rate than in previous years.\footnote{25} However, according to a regression analysis performed by Silver, the increase in support has actually been relatively constant since about 2004, when the Massachusetts Supreme Court first brought the issue of gay marriage to a public vote.

\footnote{17} Windsor dealt with whether the federal definition of marriage in 1 U.S.C. § 7 could constitutionally deny federal benefits to same-sex couples who were legally married in a state that allowed such marriages. See United States v. Windsor, 133 S. Ct. 2675, 2692-93 (2013).
\footnote{18} Michael Falcone, \textit{Maine Vote Repeals Gay Marriage Law}, POLITICO (Nov. 4, 2009), http://archive.is/3pVWA.
\footnote{19} Rachel Weiner, \textit{Why does gay marriage keep losing at the ballot box?} WASH. POST (May 9, 2012), http://archive.is/3wJ1g.
\footnote{21} Don Davis, \textit{Minnesota becomes first state to reject constitutional gay-marriage ban}, HASTINGS STAR GAZETTE (Nov. 7, 2012), http://archive.is/8xjM.
\footnote{22} \textit{Changing Attitudes on Gay Marriage}, PEW RESEARCH CTR. (June 2013), http://archive.is/AJzmA.
\footnote{23} \textit{Id}.
\footnote{24} \textit{Id}.
marriage to the fore by becoming the first state to legalize same-sex marriage. According to Silver’s calculations, same-sex marriage support has risen at a rate of about 2 percentage points a year since that time.

The upward shift in support is consistent across all age groups. Today, the silent generation (born 1928-1945) is 8 percentage points more supportive of same-sex marriage than it was in 2003; baby boomers (born 1946-1964) are 6 percentage points more supportive; generation X (born 1965-1980) is 8 percentage points more supportive, and millennials (born 1981 and after) are 19 percentage points more supportive. However, there are huge variations between generations, with millennials more than twice as supportive of same-sex marriage as their grandparents. According to Nate Silver, about half of the increase in support for same-sex marriage is due to generational turnover and about half is due to changes in attitudes within generations.

Some of the recent shift in public attitudes likely has to do with the decreased stigma of homosexuality. A greater number of Americans are likely to personally know someone who identifies as homosexual. In 2009, 49 percent of Americans responding to a poll answered that they knew a close friend or family member who was gay or lesbian, whereas by 2012, that number had increased to 60 percent. Of the people who have changed their minds about same-sex marriage in the last 10 years, 32 percent said it was because they know someone who was homosexual. Not only is homosexuality more pertinent on a personal level to Americans, but it has become more prominent on the national stage. In November 2012, Wisconsin became the first state to elect an openly gay Senator. President Obama also recently became the first president to openly support gay marriage, even going so far as to incorporate marriage equality into his inaugural address and to file an amicus brief to the Supreme Court urging it to overturn the Defense of Marriage Act.

26. Id.
27. Id.
28. Growing Support for Gay Marriage: Changed Minds and Changing Demographics, PEW RESEARCH CTR. (Mar. 20, 2013), http://archive.is/YKcxM. Millennial support for same-sex marriage increased from 51 percent in 2009 to 70 percent in 2013; generation X support increased from 41 percent to 49 percent; baby boomer support increased from 32 percent to 38 percent; silent generation support increased from 23 percent to 31 percent.
29. Seventy percent of millennials support same-sex marriage, compared to 31 percent of the silent generation.
30. Silver, supra note 25.
32. PEW RESEARCH CTR., supra note 28.
34. Brett LoGiurato, There’s Been an Unprecedented Shift in Attitudes About Gay Marriage, BUS. INSIDER (Feb. 24, 2013), http://www.businessinsider.com/polls-obama-gay-marriage-brief-
inauguration for his second term, “Our journey is not complete until our gay
brothers and sisters are treated like anyone else under the law — for if we are
truly created equal, then surely the love we commit to one another must be equal
as well.”35 Public attitudes and discourse have changed dramatically in the
United States since 2008 when a slightly younger Senator Obama said during his
2008 presidential campaign, “I believe marriage is between a man and a woman.
I am not in favor of gay marriage.”36

Perhaps decreased stigma and increased national attention have contributed
to the recent increase in support for gay marriage. But what explains the more
persistent differences in attitude, such as between the silent generation and
millennials or between Southern states and Western states (where ballot
initiatives to ban gay marriage passed with an average of 75 percent of the vote
in the former, but only 58 percent of the vote in the latter)?37 One of the most
likely culprits to explain these fundamental attitudinal differences is religiosity,
as discussed in Part IV.

These are important questions to ask in an age where public opinion is
increasingly important to marriage equality. Ballot initiatives have been used to
overturn same-sex marriage court decisions, such as in California in 2008.38
Ballot initiatives have been used to repeal state legislation legalizing same-sex
marriage, such as in Maine in 2010.39 And ballot initiatives are the main source
of state constitutional amendments to ban same-sex marriage. Increasingly,
same-sex marriage law in the United States has tracked public opinion. Nate
Silver projects that if current trends continue, by 2016, a majority of voters in 32
states will support same-sex marriage (up from 21 states in 2012), and by 2020,
a majority of voters in 44 states will do so.40

II.
CHANGES IN LAW AND ATTITUDES IN EUROPE

A. The Changing Legal Landscape

Unlike in the United States, marriage equality in Europe has come
exclusively from legislatures, and not from the judiciary or public referenda. In
the twentieth century, Europe broke major ground in providing rights for same-sex couples, but progress was initially slow. In 1989, Denmark became the first country in the world to grant any official rights to same-sex couples by providing that same-sex individuals could enter civil unions. Ten years later, in 1999, France recognized civil unions—called civil solidarity pacts (or “PACS”)—for all couples, regardless of sex.

As in the United States, progress accelerated in the first decade of the twenty-first century, and appears to be developing even more rapidly in the second decade. In 2001, the Netherlands became the first country in the world to allow same-sex marriage, and in the same year, Germany created registered partnerships for same-sex couples. In 2002, Finland created registered partnerships. In 2003, Belgium allowed same-sex marriage, and Croatia extended limited unregistered cohabitation rights to same-sex couples. In 2004, Luxembourg recognized registered partnerships. In 2005, Spain extended marriage to same-sex couples, the United Kingdom passed a registered partnership law, and Andorra created civil unions.

In 2006, Slovenia and the Czech Republic passed registered partnership laws, as did Switzerland in 2007. In 2009, Norway and Sweden extended marriage to same-sex couples, and Hungary effectuated a registered partnership law. 2010 saw Iceland and Portugal legalizing same-sex marriage and Austria creating registered partnerships. In 2011, Ireland and Lichtenstein recognized same-sex registered partnerships. Finally, in 2012, twenty-three years after becoming the first nation to recognize civil unions, Denmark legalized same-sex marriage.

Furthermore, 2013 is becoming an exciting year for marriage equality in Europe. The United Kingdom and France, two of the most influential states in

41. MARRIAGE EQUALITY USA, supra note 5.
43. MARRIAGE EQUALITY USA, supra note 5.
44. Id.
45. Id.
47. See MARRIAGE EQUALITY USA, supra note 5 (for information on Slovenia and the Czech Republic); Switzerland, GLBTQ (2008), http://archive.is/pDYVv (the Swiss registered partnership law went into effect in 2007).
48. MARRIAGE EQUALITY USA, supra note 5.
49. Id.
50. See id. (for information on Lichtenstein); Becoming an Irish Citizen Through Marriage or Civil Partnership, CITIZENS INFO. BD. OF IRELAND, http://archive.is/3IkqQ (last visited Oct. 20, 2013) (for information on Ireland).
51. MARRIAGE EQUALITY USA, supra note 5.
Europe, are making waves for same-sex marriage. On May 18, President Hollande signed France’s “marriage for all” act into law. And on July 15, the British Parliament passed a bill to legalize same-sex marriage in England and Wales. The first same-sex marriages will begin in summer 2014. The British Parliament, however, does not have jurisdiction to dictate marriage policies for the rest of the United Kingdom (Scotland and Northern Ireland). Scotland is attempting to fast-track a same-sex marriage bill through its parliament. The legislation enjoys wide cross-party support and is slated to pass by March 2014.

While these developments may appear to be cause for celebration for supporters of same-sex marriage, not every glimmer of progress solidifies into an actual recognition of rights. For example, Slovenia’s legislature passed a new family code in 2011 that would have provided completely equal rights to same-sex couples in domestic partnerships, but the proposal was rejected by a referendum of Slovenia’s voters in 2012. Luxembourg had a parliamentary proposal in 2010 to legalize same-sex marriage, but the bill has gone nowhere. A Finnish same-sex marriage proposal in 2013 recently died in committee, on a narrow vote.

In addition, the push for marriage equality in Germany has been met with resistance from the legislature’s conservative wing. Initially, there were some indications in Germany that Chancellor Angela Merkel might reverse course in her party’s firm stance against marriage equality. In 2012, Germany’s highest court (the Federal Constitutional Court) ruled that registered partners must be granted the same tax exemptions in property transfers that are granted to married couples. This decision prompted thirteen members of Merkel’s party—

53. *Supra* note 4, Associated Foreign Press.
54. *Id*.
55. *FAQ: Why will same-sex marriage be legal only in England and Wales? And other questions*, PINK NEWS (July 20, 2013), http://archive.is/eqA1K.
57. *Id*. Northern Ireland, however, is unlikely to follow suit. PINK NEWS, supra note 55.
59. See Timothy Kincaid, *Luxembourg takes next step towards marriage equality*, BOX TURTLE BULLETIN (Aug. 14, 2010), http://archive.is/eCOo (stating that the Luxembourg legislation had introduced same-sex marriage legislation); *Adoption et mariage gay devront attendre*, L’ESSENTIEL ONLINE (July 25, 2013), http://archive.is/Oa7nY (the bill never became law and Luxembourg has still subsequently been unable to pass same-sex marriage legislation) (Fr.).
60. *Parliamentary committee narrowly blocks same-sex marriage*, YLE UUTISET (Feb. 27, 2013), http://archive.is/IGQJf (Fin.).
Christian Democratic Union (or CDU)—to call for income tax equality for registered same-sex partners.\textsuperscript{62} The thirteen members wrote that it was unacceptable that Merkel’s government “again has to be ordered by the constitutional court to abolish inequalities.”\textsuperscript{63} Then in 2013, the Constitutional Court ruled that same-sex partners have the right to adopt their partner’s children and ordered parliament to change the law to so-reflect by the end of June.\textsuperscript{64} Also, the court’s president openly hinted that he and his fellow justices would likely take further steps towards granting same-sex couples additional rights, such as requiring that same-sex partners be treated the same as married couples for income taxation.\textsuperscript{65} In response to the court’s ruling, Volker Krauder, the head of the CDU, demanded that his party change its stance on the rights of same-sex couples, restating the refrain that the Conservatives should be embarrassed that they must be forced, once again, by the court to grant equal rights to same-sex couples.\textsuperscript{66} Pressure for change continued to build as other prominent members of Merkel’s party, including her Finance Minister, pushed the CDU to change its stance on gay rights, but Merkel ultimately had to bow to pressure from the more conservative elements of her party and abandon the push to change the party platform.\textsuperscript{67} Thus, for the moment, further progress in Germany towards marriage equality must come from the Constitutional Court, not the legislature. However, the next round of elections in October 2013 may have changed the situation, if the new governmental coalition—which has not yet formed—were to include the SPD social-democratic party.\textsuperscript{68}

Finally, parts of Europe remain intransigently opposed to marriage equality. Most of Eastern Europe does not provide any official recognition of same-sex relationships and many Eastern European states also have constitutional bans on same-sex marriage. Of the South-East states, four do not recognize same-sex relationships (Albania, Bosnia & Herzegovina, Macedonia, Slovakia), six have constitutional bans on same-sex marriage (Bulgaria, Hungary, Montenegro, Poland, Serbia, Ukraine), one country recognizes limited rights for same-sex couples (Croatia recognizes unregistered cohabitation), and three countries recognize full partnerships (the Czech Republic, Hungary, Slovenia).\textsuperscript{69} Of the Far Eastern European states, six countries do not recognize

\begin{footnotes}
\item[62] Id.
\item[63] Id.
\item[65] Id.
\item[66] Id.
\item[69] See MARRIAGE EQUALITY USA, supra note 5 (for information on all of the foregoing, except Hungary’s constitutional same-sex marriage ban); PINK NEWS, supra note 6 (for information
\end{footnotes}
same-sex relationships (Armenia, Azerbaijan, Georgia, Kyrgyzstan, Russia, Tajikistan), one country has a constitutional ban (Belarus), and one country still outlaws same-sex sexual activity (Uzbekistan). Of the Baltic states, one does not recognize same-sex unions (Estonia) and two have constitutional bans on same-sex marriage (Latvia, Lithuania). Lastly, of the Romano-Hellenic and Southern states, seven provide no recognition (Cyprus, Greece, Italy, Monaco, Romania, Turkey, Vatican City) and one has a constitutional ban on same-sex marriage (Moldova). In sum, only four Eastern European nations provide any recognition to same-sex couples: Croatia, the Czech Republic, Hungary, and Slovenia.

B. Public Attitudes in Europe Towards Same-Sex Marriage

The recent advance in same-sex marriage rights in Europe appears to be driven by strong public support, such as in France and the UK. In France, public support for same-sex marriage grew from 48 percent in 1996 to 55 percent in 2003 to 65 percent in 2012. In the UK, 71 percent of Britons support their government’s recent efforts to extend civil marriage to same-sex couples.

In the European Union generally, the countries with the most public support of marriage equality have either legalized same-sex marriage or have provided official recognition of same-sex relationships in the form of registered partnerships. In the last Eurobarometer survey to address the issue in 2006, an average of 44 percent of EU citizens supported allowing same-sex marriage across the EU. On average, in EU countries that have legalized same-sex marriage, there was a rate of 61.5 percent public support as of 2006 for EU-wide same-sex marriage (82 percent in the Netherlands, 71 percent in Sweden, 69 percent in Hungary’s same-sex marriage ban).


71. Id.

72. Id.

73. Id.


percent in Denmark, 62 percent in Belgium, 56 percent in Spain, and 29 percent in Portugal).\(^77\) Portugal remains an interesting outlier in that it legalized same-sex marriage in spite of low public support. In countries that have registered partnership laws, there was an average rate of public support as of 2006 of 46.9 percent for EU-wide same-sex marriage (58 percent in Luxembourg, 52 percent in Germany, 52 percent in the Czech Republic, 49 percent in Austria, 48 percent in France, 46 percent in the UK, 45 percent in Finland, 41 percent in Ireland, and 31 percent in Slovenia).\(^78\) Slovenia is an intriguing outlier, having passed a domestic partnership law in spite of low public support for marriage equality. In countries that do not recognize same-sex relationships, there was an average rate of public support for same-sex marriage as of 2006 of 19.7 percent (31 percent in Italy, 21 percent in Estonia, 19 percent in Slovakia, 18 percent in Malta, 15 percent in Greece, and 14 percent in Cyprus).\(^79\) Lastly, in countries with constitutional bans on same-sex marriage, there was an average rate of public support as of 2006 of 16 percent for EU-wide same-sex marriage (18 percent in Hungary, 17 percent in Lithuania, 17 percent in Poland, and 12 percent in Latvia).

Like in the United States, millennials globally are far more supportive of same-sex marriage than their parents or grandparents. Eighty-three percent of millennials in the Netherlands, 81 percent in Spain, 81 percent in Sweden, 78 percent in Germany, 74 percent in Italy, 74 percent in the UK, 71 percent in France, 66 percent in Greece, and 54 percent in Poland support same-sex marriage.\(^80\) Compared to the Eurobarometer survey results,\(^81\) it appears that only in the Netherlands is millennial support for same-sex marriage roughly equivalent to the national average. Millennials in Spain and Germany are much more supportive than the national average, and millennials in Greece and Poland appear to be substantially more supportive than the national average.\(^82\)

What explains higher support for same-sex marriage among millennials? And why is this effect not seen in the Netherlands? Furthermore, why have Portugal and Slovenia passed marriage equality laws in spite of low public support on the issue? These questions will be addressed in Part IV.

\(^77\) Id.
\(^78\) Id.
\(^79\) Id.
\(^81\) Although the Eurobarometer was taken several years before the Millennial poll, the gaps in support between Millennials and the national averages are still quite substantial, even assuming the national averages grew at roughly 2 percent a year, as in the United States.
\(^82\) See Kurtz, *supra* note 80 (for millennial statistics); See also EUROBAROMETER, 2.4 Attitudes Towards Homosexuality (2006), *supra* note 76 (for national averages).
III.
THE ROLE OF THE COURTS IN CRAFTING SAME-SEX MARRIAGE POLICY

A. The United States

The legitimacy of prohibiting same-sex marriage has been under review by the highest courts in the United States and in Europe. In two recent decisions this June, the US Supreme Court held that the Defense of Marriage Act’s restrictive definition of marriage was unconstitutional and allowed the judicial striking down of California’s Proposition 8 to stand.83 In Europe, the European Court of Human Rights decided in 2012 that Austria could lawfully refuse to authorize same-sex marriage without violating the European Convention on Human Rights.84

The US Defense of Marriage Act (DOMA), passed in 1996, defines marriage as “only a legal union between one man and one woman” in regards to all federal regulations and legislation, which includes, inter alia, receiving federal benefits to which spouses are entitled (such as Social Security) and federal tax credits, exemptions, and deductions.85 In addition, DOMA provides that states that do not recognize same-sex marriage need not give full faith and credit to same-sex marriages attained in states where they are legal.86 In United States v. Windsor, the United States Supreme Court upheld the Second Circuit’s decision that DOMA’s restrictive definition of marriage violates equal protection under the Fifth Amendment.87 The Second Circuit held that homosexuals are a “quasi-suspect class,” and therefore, laws that single them out are subject to intermediate scrutiny. DOMA did not survive such scrutiny.88 The Supreme Court held that DOMA’s definition of marriage violated both due process and equal protection, but the Court did not apply intermediate scrutiny to laws singling out homosexuals and attempted to limit its holding by continuing to allow states (but not the federal government) to adopt their own definitions of marriage.89 Justice Scalia in his dissent noted that Justice Kennedy’s majority opinion in Windsor seems to punt the issue of the

83. Williams & McClam, supra note 38.
86. 28 U.S.C. § 1738C.
87. Windsor v. United States, 699 F.3d 169, 188 (2d Cir. 2012), cert. granted, 133 S. Ct. 786 (2012), and aff’d.
88. Id. at 185, 188.
89. United States v. Windsor, 133 S. Ct. 2675, 2693 (“[DOMA] violates basic due process and equal protection principles . . .”). Justice Kennedy, in fact, seems to apply a balancing test that defies classification on the scrutiny scale, stating that a legitimate government purpose must outweigh illegitimate purposes, such as those based on animus. Id. at 2698 (“The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure . . .”).
constitutionality of state defense of marriage provisions (under the Fourteenth Amendment) further on down the line, with Justice Scalia speculating that this issue might be decided during the Supreme Court’s next term. Windsor provides little guidance on how the Supreme Court might rule on the constitutionality of state DOMA provisions, since Justice Kennedy’s holding rests in part on finding a violation of federalism principles, leaving the question of whether Windsor’s holding would also apply to state DOMA provisions unanswered. Time will tell (perhaps soon) how this issue will be decided by the Court.

The 2013 California Proposition 8 Supreme Court case, Hollingsworth v. Perry, was decided on much narrower grounds. In 2008, the California Supreme Court held that marriage was a fundamental right under the state constitution and that denying this right on the basis of sexual orientation violated equal protection under the California Constitution. The California Supreme Court ruling legalized same-sex marriage in California. However, later that same year, California voters passed Proposition 8, which amended the state constitution to add the following language: “[o]nly marriage between a man and a woman is valid or recognized in California.” Thus, Proposition 8 effectively overruled the California Supreme Court’s decision by amending the state constitution to prohibit same-sex marriage. Same-sex marriage proponents challenged Proposition 8 in the United States District Court for the Northern District of California, which held in June 2010 that Proposition 8 was unconstitutional. After the district court’s decision, the State of California decided that it would no longer defend Proposition 8 and would not seek an appeal. However, supporters of Proposition 8, who had intervened in the original suit, appealed the district court’s decision to the Ninth Circuit. The Ninth Circuit held that the intervenors had standing to defend Proposition 8 and affirmed the district court’s holding on the merits. The Ninth Circuit then granted a stay of its holding until the Supreme Court had a chance to review the case; same-sex marriages could therefore not resume in California until the Supreme Court issued its holding. The Supreme Court held that the intervenors did not have standing to defend the

90. Id. at 2705 (Scalia, J., dissenting).
91. See id. at 2705-07 (stating that Kennedy’s holding borrows a bit from due process, a bit from equal protection, and a bit from federalism); Windsor v. United States, 133 S. Ct. 2675, 2696-97 (Roberts, J., dissenting) (clarifying that the majority opinion rests its holding on federalism grounds and is thus not applicable to state DOMA provisions).
95. Hollingsworth, 133 S. Ct. at 2660.
96. Id.
97. Id. at 4-5.
law in federal court, only the State of California could do so, and thus the intervenors should not have been allowed to appeal the district court’s holding to the Ninth Circuit. Thus, the district court’s holding—that Proposition 8 was unconstitutional—still stands. As a result, the Ninth Circuit’s stay expired and same-sex marriages, which were legal pre-Proposition 8, have resumed in California.

Although the Supreme Court declined to decide Hollingsworth v. Perry on the merits, the story in California is similar to that of Colorado in Romer v. Evans, in which a number of municipalities in Colorado passed ordinances banning discrimination based on sexual orientation in housing, employment, and education. Colorado voters responded by passing Amendment 2, amending the state constitution to preclude any legislation from protecting people on the basis of sexual orientation. The Supreme Court held in Romer that Amendment 2 was unconstitutional under the Fourteenth Amendment. Similarly, in its Proposition 8 holding, the Ninth Circuit noted that Romer forbids states from taking away a right that has already been granted to homosexuals, whether the right is granted through city ordinance or court decision. Given his dissent on the standing issue in Hollingsworth, Justice Kennedy appeared ready to decide Hollingsworth on the merits, so that if the Supreme Court were once again faced with the question in Hollingsworth—whether a state can take away a right that has already been granted to homosexuals—it seems likely that Justice Kennedy would vote to decide the case similarly to Romer. The days when ballot initiatives could reverse forward progress on same-sex marriage may be over.

B. Europe

In Europe, the European Court of Human Rights (ECtHR) ruled in Schalk and Kopf v. Austria that member states of the Council of Europe are not compelled to authorize same-sex marriages under the European Convention on Human Rights. In 2002, Mr. Schalk and Mr. Kopf requested a marriage permit in Austria, but state authorities refused on the grounds that same-sex

99. Hollingsworth, slip op. at 17.
100. Id.
102. Id.
104. The majority in Hollingsworth declined to reach the merits (of whether the Equal Protection Clause prohibits states from denying marriage equality to same-sex couples), holding instead that the petitioners (who were the proponents of Proposition 8) lacked standing to appeal the district court’s decision. See 133 S. Ct. at 2659. Justice Kennedy disagreed in his dissent, stating that when a state’s government officials refuse to defend a ballot initiative in court, the proponents of the initiative should be granted standing to defend the initiative. See id. at 2668 (Kennedy, J., dissenting). Therefore, Justice Kennedy would have decided the case on the merits. See id.
105. Schalk and Kopf v. Austria, supra note 84.
marriage was not permitted in Austria.\textsuperscript{106} Schalk and Kopf filed suit but lost in all of Austria’s courts, so they appealed to the European Court of Human Rights. The ECtHR stated that same-sex couples fell within Article 8 of the European Convention on Human Rights, which provides that, “Everyone has the right to respect for his private and family life.”\textsuperscript{107} The court held that “the relationship of the applicants, a cohabiting same-sex couple living in a stable \textit{de facto} partnership, falls within the notion of ‘family life,’ just as the relationship of a different-sex couple in the same situation would.”\textsuperscript{108} Because same-sex couples enjoy protection of their family life under Article 8, the court held that Article 14 (which enhances other recognized rights) applied to them as well.\textsuperscript{109} Article 14 states, “The enjoyment of the rights and freedoms set forth in this Convention [such as the right to respect for one’s family life] shall be secured without discrimination on any ground.”\textsuperscript{110} The ECtHR applies a similar standard under Article 14 as the US Supreme Court does when evaluating equal protection claims under the 14th Amendment, testing whether the state has a legitimate interest in treating one group differently from another and whether the means employed are sufficiently related to this goal:

The Court has established in its case-law that in order for an issue to arise under Article 14 there must be a difference in treatment of persons in relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment.\textsuperscript{111}

While the ECtHR appears to subject discrimination against homosexuals to what would be called in the United States “heightened scrutiny” (“like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification”), the effect of the “wide margin of appreciation” that it affords states in crafting “economic and social strategy” is to make the standard of review closer to the US “rational basis” test.\textsuperscript{112} The ECtHR ultimately held that the decisions of whether to recognize same-sex relationships and to what extent to recognize these relationships fall within each state’s “margin of appreciation.”\textsuperscript{113}

If the ECtHR had held that the Convention required all Council of Europe states to recognize the right to same-sex marriage, it would have applied to

\textsuperscript{106} Id. at 2.
\textsuperscript{107} Id. at 15.
\textsuperscript{108} Id. at 21.
\textsuperscript{109} Id. at 20.
\textsuperscript{110} Id. at 15.
\textsuperscript{111} Id.
\textsuperscript{112} See id.
\textsuperscript{113} Id. at 23.
several countries in which there is very strong opposition to same-sex marriage, such as Russia and Turkey. And it would have applied to countries that have constitutional bans on same-sex marriage, such as Poland, Lithuania, Latvia, and Ukraine. Some have speculated that the court may fear that some European countries may feel so strongly about same-sex marriage that they would have been willing to withdraw from the Council of Europe in order to avoid same-sex marriage being imposed upon them.

However, the court seems to be walking on a tight rope, balancing between the need to apply the European Convention on Human Rights’ equal treatment provisions to homosexuals with the need to avoid the political third rail of full same-sex marriage legalization. Under the Convention, the court has been granting more and more rights to gay people, particularly in the last decade. For example, in the July 2002 case of Goodwin v. United Kingdom, the court found that the United Kingdom violated Articles 8 (right to private and family life) and 12 (right to marry) of the Convention on Human Rights because the UK did not allow a transgender individual to get married. Ms. Goodwin was a post-operative male to female transgender individual who presented herself to society as a female, but for legal purposes continued to be recognized by the UK as male. In other cases, the court upheld the equal treatment of gay people such as in cases of the attribution of child custody and the right to adopt children. However, in Schalk and Kopf, it failed to recognize the right of same-sex couples to get married. We might say that the court has an “everything but marriage syndrome.”

How long the European Court of Human Rights can keep this increasingly contradictory dynamic—that of granting more and more rights to gay people under the Convention’s requirement of equal treatment, while stopping short of recognizing equal marriage rights—remains to be seen.

As a result of Schalk, same-sex marriage decisions in Europe must be decided at the national level. Likewise in the United States, given the Supreme Court’s holdings in Windsor and Perry, we should expect the legal effort to secure equality rights in marriage to proceed on a state-by-state basis.

114. This staunch opposition is not surprising, given that Turkey is the most religious country in Europe (see Part IV), and Turkey’s population is 99.8% Muslim. CIA World Factbook Turkey (2008 est.) (updated Mar. 26, 2013), https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html.


116. Id. at ¶¶ 12-13, 21-22.


119. Although litigation efforts at the federal level (based on the 14th Amendment) will continue to play a role in the fight for marriage equality, the Supreme Court has expressed an unwillingness in Windsor and Perry to legalize marriage in states that have never done so.
To determine what factors may speed or impede state-level efforts to effectuate marriage equality, we turn to the question of what causes different levels of support for same-sex marriage among different US and European states.

IV. POSSIBLE EXPLANATIONS FOR DIFFERENTIAL SUPPORT FOR SAME-SEX MARRIAGE IN EUROPE AND THE UNITED STATES

A. United States

1. Religion in General

We propose that religiosity may be a major driver of public opposition to recognizing same-sex relationships. In the twelve most religious US states (as measured by the Gallup poll) with between 46 and 58 percent of their populations categorized as “very religious”—support for same-sex marriage is extremely low (ranging from 23 to 35 percent). All twelve of the most religious states have constitutional bans on same-sex marriage. In Mississippi, the most religious state in the United States, the state’s same-sex marriage ban passed with 86 percent of the vote. Of the states where same-sex marriage bans passed with more than 75 percent of the vote—Mississippi (86 percent), Tennessee (81 percent), Alabama (81 percent), Louisiana (78 percent), South Carolina (78 percent), Texas (76 percent), Oklahoma (76 percent), Georgia (76 percent), and Arkansas (75 percent)—all are extremely religious (58 percent, 50 percent, 56 percent, 53 percent, 52 percent, 47 percent, 48 percent, 48 percent, and 52 percent of the population categorized as “very religious,” respectively). The South, in which same-sex marriage bans exist in every state, comprises the most religious region of the country.

120. These states and their populations, categorized by religiosity, are as follows: Mississippi (58 percent classified as “very religious”), Utah (56 percent), Alabama (56 percent), Louisiana (53 percent), Arkansas (52 percent), South Carolina (52 percent), Tennessee (50 percent), North Carolina (50 percent), Georgia (48 percent), Oklahoma (48 percent), Texas (47 percent), and South Dakota (46 percent).

121. Frank Newport, supra note 8; Jeffrey R. Lax & Justin H. Phillips, Gay Rights in the States: Public Opinion and Policy Responsiveness, 103 Am. Pol. Sci. Rev., 373, n.2 (Aug. 2009), available at http://www.columbia.edu/~jrl2124/Lax_Phillips_Gay_Policy_Responsiveness_2009.pdf. Low support for same-sex marriage in these states is as follows: Mississippi (23 percent support same-sex marriage), Utah (25 percent), Alabama (23 percent), Louisiana (30 percent), Arkansas (25 percent), South Carolina (26 percent), Tennessee (26 percent), North Carolina (31 percent), Georgia (30 percent), Oklahoma (25 percent), Texas (32 percent), and South Dakota (35 percent).


123. Newport, supra note 8; Dalton, supra note 122.

124. Newport, supra note 8 (“Southern states and Utah are the most religious areas in the..."
In contrast, the least religious region in the country is New England. Every state in New England has legalized same-sex marriage. Of the twelve states that have the highest support in polling data for same-sex marriage—Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Hampshire, California, Hawaii, Maine, Washington, New Jersey, and Colorado—their religiosity is low (ranging from 19 percent to 35 percent of their populations categorized as “very religious”).

According to an analysis performed by Frank Newport, the Editor-in-Chief of Gallup, these geographic differences in religiosity cannot be explained by demographic factors, such as age, education, or race, but rather reflect what Newport describes as “differences in regional cultural traditions.”

Thus, there is a very clear link between religiosity and support for same-sex marriage. The correlation should be clear from Figures 1 and 2, which plot support for same-sex marriage against religiosity for the fifty states, using two different Gallup polls for religiosity.

**Figure 1**

[Diagram showing the correlation between religiosity and support for same-sex marriage in the fifty US states.]
Same-sex marriage support is higher in states that have a higher share of religiously unaffiliated citizens (see Figure 3).


In general, same-sex couples choose to live in the least religious states and avoid living in the most religious states (see Figure 4).  

This trend is not surprising given that the more religious states are less supportive of same-sex relationships.  

In addition, Washington D.C. has the largest concentration of same-sex couples in the entire nation (with eighteen same-sex couples per thousand households, more than twice the concentration of the highest state—Vermont, which has eight same-sex couples per thousand households). It is difficult to determine whether the District of Columbia’s large concentration of same-sex couples is based on its low religiosity (only 30 percent of the population is “very religious”), its early adoption of domestic partnerships in 1992, the desirability of living in the nation’s capital, or mere random variance resulting from focusing on such a small geographic unit. Regardless, the District of Columbia remains a very favorable environment for same-sex couples, given its adoption of same-sex marriage.

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131. However, this trend does not hold for Black same-sex couples, who tend to live in the South, where there are the largest overall concentrations of Blacks generally. See Alain Dang & Somjen Frazer, Black Same-Sex Households in the United States, NAT’L GAY AND LESBIAN TASK FORCE POLICY INST., 22 (Dec. 2005), http://www.thetaskforce.org/downloads/reports/reports/2000BlackSameSexHouseholds.pdf. Thus, for Black same-sex couples, race seems to swamp the effect of religiosity in determining where to locate.  
133. Id.  
134. Newport, supra note 129.
Table 1 below displays religiosity, attitudes towards same-sex marriage, and state policies towards same-sex relationships in the fifty US states.

<table>
<thead>
<tr>
<th>State</th>
<th>People categorized as “very religious”</th>
<th>Support for same-sex marriage</th>
<th>Current state policy towards same-sex relationships</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vermont</td>
<td>19%</td>
<td>53%</td>
<td>Same-sex marriage</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>23%</td>
<td>51%</td>
<td>Same-sex marriage</td>
</tr>
<tr>
<td>Maine</td>
<td>24%</td>
<td>49%</td>
<td>Same-sex marriage</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>26%</td>
<td>56%</td>
<td>Same-sex marriage</td>
</tr>
<tr>
<td>Oregon</td>
<td>29%</td>
<td>45%</td>
<td>Domestic partnerships, Constitutional marriage ban</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>29%</td>
<td>53%</td>
<td>Same-sex marriage</td>
</tr>
<tr>
<td>Connecticut</td>
<td>30%</td>
<td>52%</td>
<td>Same-sex marriage</td>
</tr>
<tr>
<td>Washington</td>
<td>30%</td>
<td>49%</td>
<td>Same-sex marriage</td>
</tr>
<tr>
<td>Alaska</td>
<td>31%</td>
<td>42%</td>
<td>Constitutional marriage ban</td>
</tr>
<tr>
<td>Hawaii</td>
<td>31%</td>
<td>49%</td>
<td>Civil unions, Statutory marriage ban</td>
</tr>
<tr>
<td>Nevada</td>
<td>31%</td>
<td>46%</td>
<td>Domestic partnerships, Constitutional marriage ban</td>
</tr>
<tr>
<td>New York</td>
<td>31%</td>
<td>52%</td>
<td>Same-sex marriage</td>
</tr>
<tr>
<td>Wyoming</td>
<td>33%</td>
<td>36%</td>
<td>Statutory marriage ban</td>
</tr>
</tbody>
</table>

135. Newport, supra note 129.
136. Lax, supra note 121.
137. NCSL, State Laws Limiting Marriage to Opposite-Sex Couples, supra note 3; NCSL, Civil Unions & Domestic Partnership Statutes, supra note 2.
As this Article went to press, New Jersey legalized same-sex marriage.
Religiosity thus has a demonstrated correlation with same-sex marriage support. In addition, there are many other factors that appear to affect same-sex marriage support because they co-correlate with religiosity, such as age, religious sect, race, party affiliation, and political ideology.

2. Age & Religiosity

There are also significant generational differences in support for same-sex marriage. In general, support for same-sex marriage is stronger among younger Americans, who as a group are less religious than older generations. Millennials are four times more likely than their grandparents’ generation and two times more likely than their parents’ generation to be “religiously unaffiliated” (self-
describing their religion as “atheist,” “agnostic,” or “nothing in particular”).

Twenty-six percent of millennials, 20 percent of generation X, 13 percent of baby boomers, and 8 percent of the silent generation self-describe as either atheist, agnostic, or unaffiliated with any particular religion. Church attendance is also down among younger generations. Eighteen percent of millennials, 27 percent of generation X, 32 percent of baby boomers, and 44 percent of the silent generation attend church regularly. We suspect that because millennials are less religious, they have less rigid viewpoints on homosexuality. Seventy percent of the silent generation, 56 percent of baby boomers, 47 percent of generation X, and 43 percent of millennials say same-sex relationships are “always wrong.”

Correspondingly, millennials are 2.25 times more likely than their grandparents and 1.84 times more likely than their parents to support same-sex marriage. Thus, religiosity may explain a large part of the reason why millennials are much more supportive of same-sex marriage than older generations.

3. Religious Affiliation

Religious affiliation clearly correlates to support for same-sex marriage. In 2013, 74 percent of the religiously unaffiliated, 55 percent of white mainline Protestants, 54 percent of Catholics, and 23 percent of white evangelical Protestants supported same-sex marriage. In general, evangelical Protestants are much less supportive of homosexual rights than are mainline Protestants or Catholics. These denominational differences can explain much of the regional variation in same-sex marriage support in the United States. The South, which is most opposed to same-sex marriage, has the heaviest concentration of evangelicals “by a wide margin.” The Northeast has the largest concentration of Catholics, and it tends to be more supportive of same-sex marriage, perhaps because Catholics are one of the more supportive religious denominations (along

139. Religion Among the Millennials, PEW RESEARCH CTR. (Feb. 17, 2010), http://archive.is/OaK5m.
140. Id.
141. Id.
142. Id.
143. PEW RESEARCH CTR., supra note 28. In March 2013, 70 percent of millennials, 38 percent of baby boomers, and 31 percent of the silent generation supported same-sex marriage.
145. Darren E. Sherkat, Kylan Mattias de Vries & Stacia Creek, Race, Religion, and Opposition to Same-Sex Marriage, 91 SOC. SCI. Q. 80, 82 (2010).
with mainline Protestants). Lastly, the West, which tends to be quite supportive of same-sex marriage, has the highest concentration of atheists and agnostics.

As the most religious group, evangelical support for same-sex marriage is the lowest among Protestant denominations, perhaps save Mormonism (which may engender even lower support for same-sex marriage). Thus, as depicted below in Figure 5, the fewer evangelicals in a state, the higher the support for same-sex marriage.

**Figure 5**

Religious affiliation and same-sex marriage support in the continental US

Utah, however, is an outlier because of its large share of Mormons (58 percent of the state population). Mormons appear to have comparably low levels of support for same-sex marriage.

4. Race

In addition, while Blacks are generally less supportive of same-sex marriage than whites (38 percent of Blacks as compared to 50 percent of whites support same-sex marriage), Darren Sherkat et al. found that these racial differences in same-sex marriage support can be wholly explained by

148. Id.

149. Id.


152. Changing Attitudes on Gay Marriage, PEW RESEARCH CTR. (June 2013), http://archive.is/9QR60.
differences in denominational ties and religious participation. The support gap cannot be explained by differences in political values, educational attainment, income, or gender. These racial differences initially appeared to have been erased by President Obama’s announcement of his support for same-sex marriage. There was an immediate 18 percentage point jump in Black support for same-sex marriage following the President’s announcement. While at first this jump in support seemed to have eliminated the Black-white gap in support for same-sex marriage, recent Pew data shows that the gap still persists, and this jump in support was likely only temporary.

In the recent Proposition 8 vote in California, much blame was leveled at the Black community because exit polls showed that 70 percent of Black voters voted in favor of Proposition 8. However, Professor Russell Robinson pointed out that not only were exit polls wrong and only 58 percent of Blacks voted for Proposition 8, but also the differences in voting behavior between whites and Blacks could be wholly explained by differences in religiosity, not race. Professor Robinson, citing a study by Patrick Egan et al., stated that “once the authors controlled for religion, there were no significant racial differences. Thus, the biggest difference between the white vote and the Black vote is not race, but religion.” Not only did the Egan study find that religiosity fully explained the Black-white differential in Proposition 8 voting, but it also found that among all voters, those that attended religious services “weekly or more often” were 22 percentage points more likely to support Proposition 8 than voters who attended only monthly. Thus, the degree of religiosity not only affected Black voting patterns, but also had a large overall effect on Proposition 8 voting behavior.

To sum up, there has been a rapid shift in public opinion since 2003, which can partly be explained by decreased stigma and partly by a greater proportion

154. Id.
159. Id. at 17.
160. Id.
162. Id. at 7.
of the US population that personally knows someone who is gay, but this shift can also be partially explained by changes in religious attitudes.

5. Party Affiliation

Party affiliation has a strong correlation with same-sex marriage support. In 2013, 59 percent of Democrats and 57 percent of Independents, but only 29 percent of Republicans support same-sex marriage. Support has also grown more among Democrats and Independents. Since 2004, Republican support for same-sex marriage has grown by twelve percentage points (from 17 to 29 percent), whereas support among Democrats has grown 19 percentage points (from 40 to 59 percent) and support among Independents has grown 20 percentage points (from 37 to 57 percent).

163. Changing Attitudes on Gay Marriage, PEW RESEARCH CTR. (June 2013), http://archive.is/Sk3Ah.

164. Id.
6. Political Ideology

Self-identified ideology also has a strong correlation with same-sex marriage support. In 2013, 73 percent of liberals and 30 percent of conservatives supported same-sex marriage. The correlation between ideology and same-sex marriage support is demonstrated in Figure 6. “Conservative advantage,” as measured by Gallup, is the percent of self-identified conservatives in the state minus the percent of liberals.

**Figure 6**

![Graph showing the correlation between same-sex marriage support and conservative advantage in the fifty U.S. states](http://archive.is/pg04u)
While political ideology seems to be a relatively strong predictor of same-sex marriage support, the correlation for party identification and same-sex marriage support is not quite as strong, as illustrated in Figure 7.

**Figure 7**

Because of the South’s long history—now rapidly disappearing—of support for the Democratic Party, religiosity appears to be a better proxy for conservatism than does party affiliation. For example, Mississippi, the most religious state, whose marriage ban passed with the highest proportion of the vote of any state, is only the 12th most Republican state, but is the 4th most conservative. Thus, religiosity has an important role to play in predicting public support for same-sex marriage in the United States.

However, the above polls only capture self-reported religiosity, ideology, party affiliation, and same-sex marriage support among a state’s citizens. Since not all citizens vote, a state’s red or blue status, based on past voting behavior, may be a better predictor of actual state policies towards same-sex marriage. Of the dark red states (states where the Republican won the last four presidential elections), all twenty-two have bans on same-sex marriage, twenty by state constitution and two by statute. Of the light red states (Republican won three of last four presidential elections), both ban same-sex marriage, one by state constitution and two by statute.

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167. Lydia Saad, *In the U.S., Blue States Outnumber Red States, 20 to 12*, GALLUP (Jan. 30, 2013), http://www.gallup.com/poll/160175/blue-states-outnumber-red-states.aspx#2 (Democratic Advantage, as measured by Gallup, is the percent of Democrats in the state minus the percent of Republicans in the state); Lax, *supra* note 121.


169. Alaska, Arizona, Utah, Idaho, Montana, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas, Missouri, Arkansas, Louisiana, Mississippi, Alabama, Georgia, South Carolina, Tennessee, Kentucky (Constitutional bans), Wyoming, and West Virginia (statutory bans).
constitution (North Carolina) and one by statute (Indiana). For purple states (split two-two on presidential elections), all five ban same-sex marriage by state constitution, but two states provide rights to same-sex couples through domestic partnerships or civil unions (Nevada, Colorado). Of the three light blue states (Democrat won three of last four presidential elections), two allow same-sex marriage (New Hampshire and Iowa), and the other provides no recognition of same-sex relations but has no ban (New Mexico). Of the eighteen dark blue states, two states ban same-sex marriage and provide no other recognition to same-sex couples (Michigan – Constitutional ban, and Pennsylvania – statutory ban), two states ban same-sex marriage but provide civil unions or domestic partnerships (Oregon, Hawaii), three simply provide civil unions or domestic partnerships (Wisconsin, Illinois, New Jersey), and eleven allow same-sex marriage (Washington, Maryland, New York, Connecticut, Massachusetts, Vermont, Maine, Delaware, Rhode Island, Minnesota, California). Thus, in general, dark red states are more likely to ban same-sex marriage by constitution than by statute (which typically takes more legislative votes or a popular vote), all red states have bans on same-sex marriage and no additional recognition of the rights of same-sex couples (through either civil unions or domestic partnerships), purple states all have bans, but approximately half otherwise provide recognition of same-sex relationships, and blue states comprise the only states to allow same-sex marriage. Those blue states that ban same-sex marriage are more likely to do so by statute (which is more easily reversible), than by state constitution, and even if they ban same-sex marriage, they are still likely to provide recognition of same-sex relationships in the form of civil unions or domestic partnerships.

Thus, to the extent that low religiosity does not match state policies towards same-sex couples, it may be due to lower voter turnout among more liberal citizens. One study, for example, found that in 74 percent of elections, non-voters were disproportionately Democratic. The religiosity of the population captured in polls may thus not translate into actual votes. Therefore, while religiosity may be a good predictor of general support for same-sex marriage, it may not be quite as good at predicting elections outcomes (such as for ballot initiatives).

170. The other three are Ohio, Virginia, and Florida.

171. See Saad, supra note 167; NCSL, Same Sex Marriage Laws, supra note 1; NCSL, Civil Unions & Domestic Partnership Statutes, supra note 2; NCSL, State Laws Limiting Marriage to Opposite-Sex Couples, supra note 3.

The correlation between religiosity and support for same-sex marriage in Europe is not quite as remarkable as that in the United States, but a correlation does exist.

In the European Union, there is a general trend between increased religiosity (as measured by the 2010 Eurobarometer) and decreased support for same-sex marriage, as illustrated in Figure 8.

**Figure 8**

<table>
<thead>
<tr>
<th>Belief in God (%)</th>
<th>Support for same-sex marriage (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>20</td>
<td>20%</td>
</tr>
<tr>
<td>40</td>
<td>40%</td>
</tr>
<tr>
<td>60</td>
<td>60%</td>
</tr>
<tr>
<td>80</td>
<td>80%</td>
</tr>
<tr>
<td>100</td>
<td>100%</td>
</tr>
</tbody>
</table>

However, the trend is stronger for the most religious countries than the least religious. In Figure 8, the scatter diagram becomes more tightly arranged as religiosity increases. Thus, the correlation is not as strong for less religious countries. Likewise, in Figure 9, there are a number of countries that do not appear to fit the trend line. Moreover, the contrast is striking when this figure is compared with Figures 1 and 2, depicting the trend in the United States.

**Figure 9**

There are five clear outliers in the EU that don’t fit the trend line—Estonia, Latvia, Hungary, Bulgaria, Lithuania (countries that are not very religious but have low support for same-sex marriage). Given that most of Eastern Europe remains adamantly opposed to gay rights, we suspect that some other factor, associated with their shared history under communism, correlates with low support for same-sex marriage. There may be some co-correlate with both conservatisnit and religiosity that we have yet to identify, or it may be that Eastern Europeans are more likely to be atheists than similarly politically conservative Western Europeans because of the legacy impact of the communist suppression of organized religion.

Estonia and Latvia appear to be the largest outliers because of their unique ethnic composition. During Soviet rule, in order to promote the Sovietization of all aspects of life, the Soviets implemented a mass migration program into the

174. EUROBAROMETER, 2.4 Attitudes Towards Homosexuality (2006), supra note 76; European Value Survey, *European Values Study Longitudinal Data File 1981-2008*, GESIS DATA ARCHIVE (2011) (we downloaded the survey data and used a data analysis tool to extract the most recent survey data that was available for each country).
three Baltic states.\textsuperscript{175} While Lithuania does not retain much of its Russian population (only 5 percent of the current population is ethnic Russian),\textsuperscript{176} Estonia and Latvia have retained large ethnic Russian populations (26 percent and 28 percent of the populations, respectively).\textsuperscript{177} Ethnic Russians tend to be much less supportive of gay rights. In Estonia, for example, 51 percent of ethnic Estonians support registered partnerships, but only 35 percent of ethnic Russians do.\textsuperscript{178} This can be partially explained by religiosity because in Estonia, ethnic Russians tend to be “considerably more religious” than ethnic Estonians.\textsuperscript{179}

One might hypothesize that the link between religiosity and same-sex marriage opposition has been de-coupled in former Soviet states because if someone is forced to give up her religion, this is not evidence that the conservatism associated with religion has been eliminated, whereas if someone leaves her religion voluntarily, this is evidence of such. The Soviet Union did often engage in forced atheism campaigns in its satellites, often to the point of nationalizing and confiscating all church properties and outlawing religious practices.\textsuperscript{180} If people retained their conservatism but gave up their religion, this would explain why religiosity does not seem to correlate with same-sex marriage support in many Eastern European countries.

This hypothesis, however, does not explain why Estonia remains one of the least religious nations in the EU, but also one of the most strongly opposed to same-sex relationships. Estonia has never had a strong religious tradition, even before the Soviet occupation.\textsuperscript{181} Many Estonians viewed religion as an undesirable tradition performed by the Swedish and German ruling classes.\textsuperscript{182} However, if the hypothesis is modified it may still be valid: if a person leaves her religion, this is evidence of a transformation away from conservatism, but if a person was never religious or was forced to give up her religion, a lack of

\begin{thebibliography}{99}
\item \textsuperscript{178} Postimees, \textit{Uuring: eestlased pole samasoolistekooseluregistreerimisevastu} (Sept. 13, 2012), http://archive.is/58QRs (Est.).
\item \textsuperscript{179} Ringvee, \textit{Is Estonia really the least religious country in the world?} THE GUARDIAN (Sept. 16, 2011), http://archive.is/Yo0UC.
\item \textsuperscript{181} Ringvee, supra note 179.
\item \textsuperscript{182} Id.
\end{thebibliography}
Religiosity is not evidence of a lack of conservatism, at least as far as gay rights (and potentially other social issues) are concerned.

However, further research is still needed. The above hypothesis does not explain why the Czech Republic, with comparable religiosity to Estonia, displays more than double the support for same-sex marriage and has registered partnerships, while Estonia does not. Both countries consistently rank as the two least religious states in the EU, and both countries appear to be proud of their non-religiosity. Yet both have such different attitudes towards same-sex marriage (52 percent support in the Czech Republic, compared to 21 percent for Estonia). These differential levels of same-sex marriage support, but comparable levels of religiosity, would make for an interesting further study.

A regression analysis by Jurgen Gerhards provides one explanation for why religiosity is more explanatory of social attitudes towards homosexuality in Western Europe than Eastern Europe. Gerhards found that in the EU, the more modernized a country becomes, the more supportive its populace becomes of homosexuality (as measured by the question “can homosexuality ever be justified?”). Education level, as one measure of development, had an independent effect on social attitudes towards homosexuality. The lower support for same-sex relationships in Eastern Europe may be due to lower levels of economic, social, and political development.

In addition, Gerhards found that religious affiliation affected attitudes towards homosexuality. Among the denominations, “Orthodox Christians, Catholics and especially Muslims are much more ready to say that homosexuality is not justifiable than are Protestants.” In addition, Gerhards found that “religious integration” (as measured by church attendance) also correlated with a person’s views on homosexuality. The more frequently a person attended a religious institution, the less likely that person was to view homosexuality as being permissible. Lastly, Gerhards found that the effect of religious integration on social attitudes towards homosexuality was greater than the effect of religious denomination. This result means that as far as social attitudes towards homosexuality are concerned, it matters more how fervently someone adheres to her religion than to which religion she belongs.

183. Ringvee, supra note 179.
184. EUROBAROMETER, 24 Attitudes Towards Homosexuality (2006), supra note 76.
186. Id.
187. Id.
188. Id.
189. Id.
190. Id.
Table 2 below charts the relationship between non-religiosity and the level of recognition of same-sex relationships in Europe. Table 3 does the same for the European Union, while including attitude surveys towards same-sex marriage from the Eurobarometer.

**Table 2**

Non-religiousness and country policy towards same-sex relationships, for European countries included in the European Value Survey (2008-2010)

<table>
<thead>
<tr>
<th>Country</th>
<th>Percent of country that considers religion “not important” or “not at all important” ¹⁹¹</th>
<th>Country policy towards same-sex relationships ¹⁹²</th>
</tr>
</thead>
<tbody>
<tr>
<td>Czech Republic</td>
<td>80%</td>
<td>Registered partnerships</td>
</tr>
<tr>
<td>Sweden</td>
<td>77%</td>
<td>Same-sex marriage</td>
</tr>
<tr>
<td>Estonia</td>
<td>76%</td>
<td>No recognition</td>
</tr>
<tr>
<td>Germany</td>
<td>73%</td>
<td>Registered partnerships</td>
</tr>
<tr>
<td>Finland</td>
<td>71%</td>
<td>Registered partnerships</td>
</tr>
<tr>
<td>Denmark</td>
<td>70%</td>
<td>Same-sex marriage</td>
</tr>
<tr>
<td>Latvia</td>
<td>68%</td>
<td>Constitutional marriage ban</td>
</tr>
<tr>
<td>Norway</td>
<td>65%</td>
<td>Same-sex marriage</td>
</tr>
<tr>
<td>France</td>
<td>63%</td>
<td>Same-sex marriage</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>62%</td>
<td>Registered partnerships</td>
</tr>
<tr>
<td>Belgium</td>
<td>61%</td>
<td>Same-sex marriage</td>
</tr>
<tr>
<td>Spain</td>
<td>61%</td>
<td>Same-sex marriage</td>
</tr>
<tr>
<td>Hungary</td>
<td>60%</td>
<td>Registered partnerships</td>
</tr>
<tr>
<td>Slovenia</td>
<td>59%</td>
<td>Registered partnerships</td>
</tr>
<tr>
<td>Switzerland</td>
<td>57%</td>
<td>Registered partnerships</td>
</tr>
<tr>
<td>Netherlands</td>
<td>55%</td>
<td>Same-sex marriage</td>
</tr>
<tr>
<td>Lithuania</td>
<td>54%</td>
<td>Constitutional marriage ban</td>
</tr>
</tbody>
</table>


¹⁹² See MARRIAGE EQUALITY USA, supra note 5.
It is important to note that in comparison to Europe, the United States in the aggregate finds itself among the most religious countries, with only 28 percent
of Americans saying that religion was not very important or not at all important. This places the United States with comparable religiosity to Poland and Italy. Only the least religious US state (Vermont—only 19 percent consider themselves “very religious”) has remotely comparable religiosity to the least religious states in Europe, such as Belgium (only 12 percent consider religion “very important”), France (13 percent consider religion “very important”), Norway (13 percent consider religion “very important”), and Denmark (9 percent consider religion “very important”). Moreover, very few nations in Europe are as religious as the most religious US states. Mississippi, the most religious US state (58 percent consider themselves “very religious”), finds very few comparable countries in Europe. Only Georgia (67 percent consider religion “very important”), Greece (46 percent), Malta (65 percent), Romania (57 percent), Kosovo (48 percent), and Turkey (80 percent) have comparably high levels of religiosity. Looking only at Western Europe, the most traditionally religious countries, such as Northern Ireland (36 percent consider religion “very important”) or Portugal (24 percent), would—if they were a US state—find themselves among the ten least religious states in the United States. Thus, compared to Western Europe, the least religious US states tend to be more religious than the most religious Western European countries, and the most religious US states tend to be far more religious than the most religious Western European countries.

In the European Union, religiosity is tied closely to same-sex marriage support, with some notable exceptions. The Baltic states (Estonia, Latvia, Lithuania) appear to be outliers, in that their support should be higher based on their low religiosity. Spain and Portugal, at the other end of the spectrum, are outliers because it is surprising that they have same-sex marriage given their high levels of religiosity (see Table 3).

195. Id.
196. Id.
Table 3
Belief in God, support for same-sex marriage, and national policy in the European Union

<table>
<thead>
<tr>
<th>Country</th>
<th>Believes there is a God (Eurobarometer 2010)</th>
<th>Support for EU-wide same-sex marriage (Eurobarometer 2006)</th>
<th>Country policy towards same-sex relationships</th>
</tr>
</thead>
<tbody>
<tr>
<td>Czech Republic</td>
<td>16%</td>
<td>52%</td>
<td>Registered partnerships</td>
</tr>
<tr>
<td>Estonia</td>
<td>18%</td>
<td>21%</td>
<td>No recognition</td>
</tr>
<tr>
<td>Sweden</td>
<td>18%</td>
<td>71%</td>
<td>Same-sex marriage</td>
</tr>
<tr>
<td>France</td>
<td>27%</td>
<td>48%</td>
<td>Same-sex marriage</td>
</tr>
<tr>
<td>Denmark</td>
<td>28%</td>
<td>69%</td>
<td>Same-sex marriage</td>
</tr>
<tr>
<td>Netherlands</td>
<td>28%</td>
<td>82%</td>
<td>Same-sex marriage</td>
</tr>
<tr>
<td>Slovenia</td>
<td>32%</td>
<td>31%</td>
<td>Registered partnerships</td>
</tr>
<tr>
<td>Finland</td>
<td>33%</td>
<td>45%</td>
<td>Registered partnerships</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>36%</td>
<td>15%</td>
<td>Constitutional marriage ban</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>37%</td>
<td>46%</td>
<td>Same-sex marriage (England &amp; Wales) Registered partnerships (Scotland &amp; Northern Ireland)</td>
</tr>
</tbody>
</table>

197. EUROBAROMETER, Biotechnology, Special Eurobarometer 341/Wave 73.1, supra note 173.

198. EUROBAROMETER, 2.4 Attitudes Towards Homosexuality (2006), supra note 76. These statistics were confirmed in 2011 regarding France, Germany, the United Kingdom, Hungary, Italy, the Netherlands, Portugal and Poland (with 52% in France, 40% in Germany, 42% in United Kingdom, 70% in Hungary, 64% in Italy, 17% in the Netherlands, 62% in Portugal, and 88% in Poland answering that allowing gay marriage is not a good thing). Andreas Zick, Beate Kupper, & Andreas Hovermann, Intolerance, Prejudice and Discrimination - A European Report, THE FRIEDRICH-EBERT-STIFTUNG FOUNDATION, 64-65 (2011), available at http://library.fes.de/pdf-files/do/0790-20110311.pdf.

199. MARRIAGE EQUALITY USA, supra note 5.
### Table

<table>
<thead>
<tr>
<th>Country</th>
<th>Percentages</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>37%</td>
<td>62% Same-sex marriage</td>
</tr>
<tr>
<td>Latvia</td>
<td>38%</td>
<td>12% Constitutional marriage ban</td>
</tr>
<tr>
<td>Austria</td>
<td>44%</td>
<td>49% Registered partnerships</td>
</tr>
<tr>
<td>Germany</td>
<td>44%</td>
<td>52% Registered partnerships</td>
</tr>
<tr>
<td>Hungary</td>
<td>45%</td>
<td>18% Registered partnerships</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>46%</td>
<td>58% Registered partnerships</td>
</tr>
<tr>
<td>Lithuania</td>
<td>47%</td>
<td>17% Constitutional marriage ban</td>
</tr>
<tr>
<td>Spain</td>
<td>59%</td>
<td>56% Same-sex marriage</td>
</tr>
<tr>
<td>Slovakia</td>
<td>63%</td>
<td>19% No recognition</td>
</tr>
<tr>
<td>Ireland</td>
<td>70%</td>
<td>41% Registered partnerships</td>
</tr>
<tr>
<td>Portugal</td>
<td>70%</td>
<td>29% Same-sex marriage</td>
</tr>
<tr>
<td>Italy</td>
<td>74%</td>
<td>31% No recognition</td>
</tr>
<tr>
<td>Greece</td>
<td>79%</td>
<td>15% No recognition</td>
</tr>
<tr>
<td>Poland</td>
<td>79%</td>
<td>17% Constitutional marriage ban</td>
</tr>
<tr>
<td>Cyprus</td>
<td>88%</td>
<td>14% No recognition</td>
</tr>
<tr>
<td>Romania</td>
<td>92%</td>
<td>11% No recognition</td>
</tr>
<tr>
<td>Malta</td>
<td>94%</td>
<td>18% No recognition</td>
</tr>
</tbody>
</table>

Slovenia is an interesting case. When it passed its domestic partnership law in 2005, granting only limited property rights to same-sex couples, it had a center-right government in power. The Social Democrats and Liberals refused to take part in the vote for the law because it granted no social benefits to same-sex couples (such as Social Security), provided no health insurance benefits, did not allow same-sex couples to be next-of-kin, and contained an explicit statement that marriage was not permitted. In 2010, a left-leaning government proposed an amendment to the family code that would have legalized same-sex marriage, but Conservatives later removed this from the bill. The final bill, which would have merely equalized the rights of domestic partners and

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201. *See* Andy Humm, *News Brief*, 4 GAY CITY NEWS 25 (June 30–July 6, 2005), [http://archive.is/TL763](http://archive.is/TL763) (the final vote was 44-3 because the Social Democrats and Liberals had left the chamber and refused to participate).

heterosexual married couples, ultimately passed, but was later repealed by a popular referendum.\footnote{203} Thus, although a new left-of-center government has come into power in Slovenia,\footnote{204} it is unlikely to be able to make progress towards marriage equality given the high level of opposition to same-sex relationships (69 percent of the public oppose same-sex marriage, according to the 2006 Eurobarometer).

One important reason that national policies towards same-sex relationships often do not match religiosity or even same-sex marriage support among the public may be based on the political party currently in power. France, for example, is a very non-religious country (27 percent believe in God), but progress towards same-sex marriage has been stalled there until relatively recently. This is because France was led by Jacques Chirac, a Conservative,\footnote{205} (who formed the Union for a Popular Movement (UMP) in 2002), from 1995 until 2007 and was led by Nicolas Sarkozy (the head of the conservative UMP party) from 2007 until 2012. With the recent election of a Socialist majority in the National Assembly and Senate and François Hollande as President, France has placed the Socialist Party back in power and has thus quickly passed a same-sex marriage law.

Spain was way ahead of the curve in its legalization of same-sex marriage, in spite of being a very religious country. Spain’s legalization of same-sex marriage was due to the election of a Socialist government in 2004. Upon his election, Prime Minister Jose Luis Rodriguez Zapatero (of the Spanish Socialist Workers’ Party) pledged to legalize same sex marriage and did so approximately a year later.\footnote{206} The election of socialist governments appears to strongly spur European countries towards same-sex marriage legalization.

It is surprising, likewise, that Portugal legalized same-sex marriage in 2010, in spite of having a deeply religious population. However, in 2005, Portugal’s Socialist party, under the leadership of Prime Minister Jose Socrates, won an absolute majority for the first time in the nation’s history.\footnote{207} It was during Socrates’s second term that the Parliament passed same-sex marriage legislation, after he announced before the elections his intention to propose it.\footnote{208}

\begin{footnotes}
\item 203. J.C. von Krempach, \textit{supra} note 58.
\item 205. As that term is used in the United States.
\item 206. \textit{Spain’s new government to legalize gay marriage}, \textit{REUTERS} (Apr. 15, 2004), http://www.webcitation.org/5kV80Iu9U.
\item 208. His Socialist party lost its absolute majority in the 2009 election; but it is hard to blame this on his announced intention to pursue same-sex marriage, since the economic situation deteriorated following the 2008 economic crisis and the “Left Bloc,” a left wing party which gained additional seats in Parliament, was also favorable to same sex marriage.
\end{footnotes}
There was little public backlash to legalization, notably because Portugal’s history of oppressive dictators has left it a socially progressive country in terms of human rights. Moreover, it should be recalled that since 2001 Portuguese law provided for recognition of de facto couples, “whatever their sex” and since 2004 the Constitution explicitly prohibited discrimination based on sexual orientation. Lastly, the fact that neighbor Spain had already legalized same-sex marriage made it easier for Portugal to follow suit.

Additionally, the United Kingdom, under the leadership of David Cameron, has legalized same-sex marriage in spite of having a center-right government (a majority coalition led by the Conservative Party). However, Cameron is much more liberal (as that term is used in the United States) than a typical member of his party. He has thus been able to attract LGBT voters to the Conservative Party (with 30 percent of the gay community saying before the last election they would vote for the Conservative party, compared to 27 percent who would vote for Liberal Democrats and 38 percent who would vote for Labour).

In Germany, however, gay rights advocates have good cause to be skeptical of a center-right party’s willingness to grant marriage equality rights. While Chancellor Merkel’s party has made some noise about increasing the rights given to domestic partnerships, ultimately Merkel decided that her party would continue to oppose any additional granting of rights to same-sex couples.

Progressive socialist parties can be elected even in some very religious nations because religiosity does not necessarily determine people’s votes. While it is relevant to voting behavior in many countries, its influence is weakening. Kerman Calvo et al. explain, “Religiosity is surely lessening its political significance and has consequently much lower impact on voting. Party leaders, building strategically on the outcomes of secularisation and social change processes, as well as on increasing levels of education and information, have decided to maximise their electoral appeals by downplaying the conflictive ladders of religious divisions.” A regression performed by Calvo et al., for example, finds that religiosity has much less influence on voting behavior in Portugal than in Spain. This might serve to explain why Portugal’s

211. Marc Shoffman, Cameron in the pink: Tory leader sees increased support in the gay community, PINK NEWS (Apr. 17, 2006), http://archive.is/Idyz8.
212. Laura Stevens, Merkel Scraps Gay Rights Push, WALL ST. J., Mar. 5, 2013, at A10. Although this may change, depending on whether Merkel must compromise in order to form a coalition with the SPD.
214. Id. (“In sharp contrast [to Spain], a quick perusal at the results of Table 7 confirms that, in contemporary Portugal, religiosity continues to be a weak predictor of the vote.”).
government could pass same-sex marriage with little backlash, in spite of Portugal being a deeply religious country.

Thus, in Europe, religiosity is not as strong a predictor of state policy as in the United States because Europeans are less likely to resort to popular votes to determine whether to legalize same-sex marriage and because religiosity in Europe does not correlate as strongly to voting behavior. Thus, European legislatures, more than their American counterparts, are free to ignore public attitudes and either legalize same-sex marriage, in spite of low public support (such as in Portugal), or refuse to legalize in spite of strong public support (such as in Germany).

However, religiosity remains an important factor, particularly in Western Europe, and over time, Western Europe should be expected to influence Eastern Europe, at least for those countries in Eastern Europe that are members of the EU. Some people even argue that there is currently a movement in the EU towards total religious neutrality.\footnote{Andrew Higgins, A More Secular Europe, Divided by the Cross, N.Y. TIMES, June 17, 2013, at A-1.} For example, last year, when Slovakia attempted to print Christian symbols on Euro coins, it was blocked from doing so by the European Commission, before the latter finally gave in.\footnote{Id.} The charge against Slovakia’s attempt to print religious Euro coins was led by France, which “enforces a rigid division of church and state at home.”\footnote{Id.} As Western Europe continues to influence the Eastern European members of the EU towards secularization, and as the societies of these latter countries develop and modernize, one would expect religiosity to become less influential in those countries’ politics, opening room for change on issues involving the rights of same-sex couples.

CONCLUSION

We have found three main trends in the United States and Europe regarding the relationship between religiosity and support for same-sex marriage. First, in the United States, there is a remarkably close correlation between religiosity and the legal status of same-sex marriage. The states that have legalized same-sex marriage or openly recognize same-sex relationships tend to be the least religious, while the states that have constitutional bans on same-sex marriage tend to be the most religious. Second, in Western Europe, there is a close correlation between religiosity and the legal status of same-sex marriage. Where the correlation does not hold, at least in some cases (such as Spain and Germany), it is a product of which party is in control of the government. Center-right parties tend to slow reform in non-religious countries, whereas center-left parties tend to expedite reform in more religious countries. Third, Eastern
Europe is different from the United States and Western Europe in that low religiosity there does not translate into same-sex marriage legalization. We suspect the reason this correlation disappears in Eastern Europe is because of the legacy of communism, which often involved enforced atheism. Thus, part of Eastern Europe is very non-religious, but also politically and culturally conservative. The two big exceptions in Eastern Europe which have provided recognition to same-sex relationships, are the Czech Republic and Hungary both of which are the closest to the West both culturally and geographically and both of which had the biggest revolts against communism (in 1968 and 1956, respectively). Thus, religiosity is one explanatory factor that can be extremely useful in predicting same-sex marriage support in both the United States and Western Europe. And at least in the European Union, Western Europe should be expected to influence Eastern Europe over time.218

218. Although outside the EU, such as in former Soviet Bloc countries, the influence of Western Europe is quite limited.

Theresa Cheng

Recommended Citation
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I.
INTRODUCTION

The phenomenon of globalization has captured the world’s cultures, marketplaces, and state laws. Even national governments are not impervious to this growing trend, as states are quick to imitate the policies developed by other countries or advanced by international institutions. International models can strongly influence the development of a nation’s agenda, but little scholarship has been produced elucidating the narrative of connecting global norms with domestic politicking.

In her book The Democratic Foundations of Policy Diffusion, Katerina Linos posits a novel theory explaining international patterns of policy adoption by re-framing the political backdrop of an increasingly pervasive global occurrence. Linos proposes a policy diffusion model that embraces domestic democracy as the engine through which international norms spread, countering previous social policy scholarship that traditionally credits international elites and technocratic networks. While the dominant account of policy diffusion conflicts with the large body of literature attributing the formulation of domestic social policy to only domestic factors, Linos’s model asserts that electoral incentives drive a diffusion process in which international norms and domestic democracy are mutually reinforcing.

At the heart of her proposal is an acknowledgement that international norms do not necessarily conflict with the attitudes or policy positions of voters. She further posits that voters rely on their impressions of foreign models to develop judgments on domestic government competence and legislative

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action. National media profoundly shapes these benchmarks, so that the general populace is most familiar with large, rich, and culturally similar countries. Driven by electoral incentives to win the approval of voters, politicians in democratic states choose to imitate foreign models, leveraging the public’s disproportionate familiarity with relatable countries to reassure them that the designed policies are competent and broadly accepted. As a result, governments adopt the policy choices of countries heavily covered by national media.

Linos’s diffusion through democracy model offers more than just a novel account of a government’s strategic use of information from abroad. The theory proposes strong linkages between international law and domestic policymaking, and it clarifies the global and political circumstances from which this policy diffusion arises. She demonstrates the applicability of her model to two major areas of social policy—family policy and health policy—both of which have been traditionally understood to be shaped entirely by domestic forces. The diffusion through democracy account shatters the previous implications that policy diffusion and domestic democratic processes are antithetical by illustrating that democracy facilitates the spread of international values.

Linos’s book, and the theory it introduces, serves as a grand finale-thesis, a culmination of years of research as an international law fellow and lecturer at Harvard Law School and, more recently, as an assistant professor of law at the University of California, Berkeley School of Law. Her diverse research interests, ranging from European Union law to employment law, result in a sophisticated and convincing account of political science and legal scholarship. Linos’s exceptional research skills and interests are brought to bear in this compelling and insightful book combining legal analysis with original empirical research as she challenges present scholarship and familiar accounts of policy diffusion and social policy development.

II. SUMMARY

Leading international policy diffusion models often explore only broad, theoretical pathways through which foreign norms influence domestic policies.\textsuperscript{2} Competition, the first pathway, underscores a state’s desire for a greater share of resources or capital over a competitor.\textsuperscript{3} In competing with one another, governments may imitate another’s laws to attract businesses and labor. The second pathway is learning, in which a government adopts a policy after evaluation of the reform’s positive effects in a foreign state.\textsuperscript{4} According to the

\begin{itemize}
\item 2. \textit{Id.} at 14-15.
\item 4. Linos, \textit{supra} note 1, at 15 (citing Chang Kil Lee & David Strang, \textit{The International Diffusion of Public Sector Downsizing}, 60 INT’L ORG. 883 (2006)).
\end{itemize}
third pathway of emulation, policy replication occurs without regard to international outcomes. In hopes of following a global script, states decide to adopt foreign norms solely based on the identities of prior adopters. Abstracted away from the mechanisms of domestic policy adoption, these traditional pathways typically ignore the individual agency necessary for policy diffusion.

As Linos notes, more recent diffusion scholarship highlighting the role of the domestic actor attributes policy adoption only to technocracy, or to the networks of sophisticated elites, such as policy experts and politicians. These diffusion models promote a “top-down” framework of policy adoption in which bureaucratic technocrats and policy experts shape domestic law to imitate models from abroad, imposing international values upon domestic voters.\footnote{Linos, supra note 1, at 16 (citing ANNE MARIE SLAUGHTER, A NEW WORLD ORDER (2004); Michael Mintrom, Policy Entrepreneurs and the Diffusion of Innovation, 41 AM. J. POL. SCI. 738 (1997); Michael Mintrom & Phillipa Norman, Policy Entrepreneurship and Policy Change, 37 POL. STUD. J. 649 (2009); KURT WEYLAND, BOUNDED RATIONALITY AND POLICY DIFFUSION: SOCIAL SECTOR REFORM IN LATIN AMERICA (2007); Kenneth Anderson, Foreign Law and the US Constitution, 131 POL’Y REV. 33 (2005); American University News, Transcript of discussion between US Supreme Court Justices Antonin Scalia and Stephen Breyer, AU Washington College of Law (Jan. 13, 2005)).}

Unable to access these circles of technocracy, ordinary voters do not provide real input on proposed laws. In short, under these conventional theories, state reforms may be in direct opposition to the democratic populace.\footnote{Id. at 2.} These accounts fail to explain how technocrats, particularly elected politicians, are able to impose unpopular policy agendas onto the same electorate pool upon which they rely to win reelection.

In the same vein, present social policy literature singularly examines domestic factors in the national adoption of redistributive laws. In sharp contrast to the theories of technocratic diffusion of international policies, leading social policy scholars attribute the domestic acceptance of social reforms to democracy and the expression of popular demand, which is aligned with voters’ material interests.\footnote{Linos, supra note 1, at 17 (citing Douglas A. Hibbs Jr., Political Parties and Macroeconomic Policy, 71 AM. POL. SCI. REV. 1467 (1977))).}

Proposed economic bills earn the backing of powerful interest groups, such as strong labor unions or employer organizations, and are ushered slowly through the bureaucratic channels toward possible adoption.\footnote{Linos, supra note 1, at 18.} Societal acceptance of the adopted welfare reform eventually follows. Dominant accounts of social policy adoption exemplify this pathway, highlighting only domestic forces in national reform.\footnote{Id. at 17.}

Contrary to the dominant narratives, Linos’s model of policy diffusion reconciles the two conflicting bodies of literature with the explanation that international values and democracy can be mutually reinforcing and that “elections and other democratic processes are an engine, not an obstacle, for the
spread of policies across countries and can provide critical domestic legitimacy for these policies."\(^9\) Shifting away from the conventional narrative attributing the spread of similar policies around the world to networks of technocrats, Linos proposes a novel account of policy diffusion, one that credits voters and elected politicians with the agency and power to change domestic policy to reflect international norms. She asserts that reforms in democratic states occur not only because of the technocrats who are knowledgeable about international values, but also because of citizens who express their support through elections and other democratic processes.

Foundational to her proposed model of policy diffusion through democracy is the relationship between voters and elected officials.\(^1\) In democratic states, politicians seeking election strive to convince electorates of their competence and of their alignment with the voters’ values. Politicians, and the political platforms they promote, are constrained by voters and the public interest. Voters, on the other hand, view political candidates and their political platforms with skepticism, and it is upon this skepticism that Linos builds her theory of policy diffusion through democratic mechanisms.

In contrast to the sophisticated technocrats who have access to international decision-making processes, voters may have only a vague sense of the types of policies they support. Yet citizens continue to appraise hopeful politicians with limited and contextualized information passively accumulated through the continual bombardment of printed, televised, and digitized media. Through these streams of coverage, voters acquire knowledge of foreign developments, but do not learn of such international events equally, as the media disproportionately covers the developments of culturally proximate countries with large economies.\(^2\) As a result, state citizens develop only general, nebulous impressions about foreign regimes, international organizations, and policies abroad, with the most familiar countries—those that are large, rich, and proximate—resonating most favorably with voters. In the diffusion through democracy account, citizens welcome such information about foreign models and use this knowledge to benchmark government performance. Knowledge of identical foreign laws can shift citizens’ perspectives of domestic policy proposals, and Linos highlights three types of voters who are particularly swayed by international accounts: inexpert voters, skeptics, and voters who hold positive views of foreign governments and international organizations.\(^3\)

Despite being severely constrained by voters, politicians anticipate the public’s use of foreign models and benefit from introducing these international values into their domestic policies, especially during election campaigns and in

\(^9\) Id. at 2.
\(^1\) Id. at 18.
\(^2\) Id. at 20. Here, proximity is understood to be geographical, linguistic, and cultural similarities.
\(^3\) Id. at 28.
debates on proposed legislation. Politicians frame possible policies by borrowing foreign models, particularly the policies of countries most familiar to voters. They use such comparisons to show similarities between international models and their own proposals. This invocation of international norms serves two ends: first, it shows that the proposed law coheres with public values; and second, it signals that the politician governs competently. Details of the success or failure of a foreign model are not necessary; voters are most likely to respond to a model’s familiarity and adoption as foreign law.14 Perceiving that a foreign state has adopted particular legislation indicates that foreign leadership vetted the reform and ultimately found it worth the expense of implementation.15 Likewise, by comparing a proposal with foreign models, a politician signals to voters that his or her proposed policies are mainstream and are accepted by familiar countries. Even politicians who have personal misgivings about international models have the electoral incentive to embrace these models to appeal to swing voters—members of the populace who have doubts about a government’s competence and values.16 However, according to Linos’s theory, such references to foreign models are less likely from politicians who are unconstrained by electoral incentives, for example, those living in non-competitive electoral environments such as dictatorial or oligarchical regimes, or those not seeking re-election.17

To empirically substantiate the cornerstone of her theory, that voters respond positively to foreign models in the evaluation of policy proposals, Linos begins her analysis in the United States. The United States is a difficult test case because of its relative wealth as well as its geographically and culturally distinct character. To further exacerbate these distinctions from other states, US citizens have access to a wide variety of domestic resources for reliable policy opinions and research. Domestic sources of information, such as think tanks and universities, may lead voters to dismiss information from international sources. Americans are typically characterized as conflicted, even hostile, to information with foreign origins.18 With its late adoption of foreign models in health care and family policy, the American government reflects its citizens’ resistance to international norms.

Linos conducted public opinion experiments to corroborate her claim.19 She surveyed a representative sample of Americans to assess the level of support for social welfare reforms in the areas of health care and family policies and to determine whether the support level would change if the policy was described as

14. Id. at 23.
15. Id. at 23.
16. Id. at 25.
17. Id. at 29.
18. Id. at 38; Steven Calabresi, “A Shining City on a Hill”: American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law, 86 B.U. L. Rev. 1335 (2006).
19. Linos, supra note 1, at 41.
an accepted foreign model. Respondents were significantly more likely to support the policy if it was presented as an international recommendation, particularly one from the United Nations (UN). By delineating the positive responses to social policy information from abroad according to different groups of US citizens, she further supports her theory that inexpert and skeptical voters are more likely to rely upon foreign models in evaluating a policy than non-skeptics. Aggregate support for left-leaning ideology increased more significantly for those with little prior knowledge or who were more likely to oppose social welfare policy.

To investigate the other side of her theory, that politicians rely on foreign models to appeal to voters, Linos compares the debates leading up to the passage of the Family and Medical Leave Act of 1993 (FMLA), the Patient Protection and Affordable Care Act of 2010 (ACA), and the unsuccessful health reform proposal, the Health Security Act of 1993. She utilizes presidential campaign statements and the Congressional Record to contrast the references made by the supporting and opposing politicians to international templates. As predicted, proponents of these pieces of legislation frequently refer to foreign models to increase public support. In the family policy debates, for example, reform advocates made 290 references to foreign models, highlighting policies in Germany and Japan in particular. This focus on German and Japanese models seems incongruous, as neither state had particularly successful family policies. However, national US media featured these states prominently in the preceding decades, making them relevant to citizens. Opponents of these policies also acted according to the diffusion model, as exemplified by the arguments made against health care reform. Critics emphasized the diversity of international health models and challenged the international references directly, expounding on the negative effects of similar health care reforms in other countries.

A. Conditions Most Favorable and Unfavorable to Diffusion Through Democracy

While this proposed relationship between voters and politicians is central to Linos’s policy diffusion through democracy model, the strength of the diffusion—whether a country replicates a foreign model entirely or a variation of the model, and whether diffusion occurs at all—depends entirely upon the national and international circumstances, or, as Linos terms them, the “scope conditions.” One such national factor is the policy area under scrutiny. Linos theorizes that imitation of foreign models is more likely to occur within policy areas that are the most politically salient and in contention in the domestic

20. Id.
21. Id. at 45.
22. Id. at 39.
23. Id. at 57.
Politicians are unlikely to reference foreign models for proposed legislation that is of little interest or of little debate to voters. Similarly, competitive electoral environments should influence politicians to refer to broad international policy outlines to reassure voters about broad policy goals, and not the details of policy implementation.

Linos asserts that policy diffusion through democracy also depends on the characteristics of the country considering policy imitation. If foreign models are to lend credibility to policies in the face of a skeptical populace, then diffusion effects should be stronger in countries that give its citizens reason for skepticism. For example, international norms should be most well-received by voters in countries without reliable domestic sources of information, as may be found in corrupt or poor states. Countries undergoing transitions may also rely more on foreign policy comparisons because their citizens are likely to experience doubt in the reforms. Finally, countries that have geographically and culturally proximate neighbors and whose residents receive greater coverage of foreign affairs should have strong responses to international models.

Similarly, several characteristics of a foreign model influence the likelihood that it will be adopted. First, the decisions of competent foreign policymakers or international institutions, such as the UN or International Labour Organization (ILO), are more likely to resonate with domestic voters. Second, in the absence of high-quality information or when citizens are unable to gauge the reliability of a source, the number and identities of countries adopting a particular legislation also persuade voters. According to Linos, the diffusion through democracy model resembles emulation models and is strongest in situations where multiple foreign governments make and international organizations recommend the same policy choice, as was seen in the field of maternity leave in family policy. In contrast, policy areas offering a variety of possible prototypes send weaker signals to uncertain voters. For example, countries and international organizations promulgate diverse health structures, from universal health care to privatized insurance schemes, and this multiplicity of models weakens the likelihood that a state will adopt one structure over the others.

The final scope condition influencing the strength of diffusion effects is temporal and implicates the domestic politics of late and early adopters. Linos hypothesizes that late adopters of a particular legislation were able to introduce and implement the reforms under less favorable domestic conditions than pioneers. This hypothesis illustrates the significance of the connection Linos’s theory makes between international model diffusion and domestic policymaking. By definition, early adopters must advance their legislation

24. Id. at 30.
25. Id. at 31.
26. Id. at 32.
27. Id. at 34.
without the availability of international models to follow or reference, and reform will come only after favorable conditions are met. However, late developers are able to use internationally promulgated norms to strengthen and implement their domestic cause despite less favorable conditions.

By analyzing familiar international waves of policy reform, Linos develops her theory further by empirically testing the range of scope conditions leading to policy diffusion. She examines the applicability of her proposed diffusion model to two distinct social policy areas chosen for their disparate scope conditions: family policy and health policy. Family policy is typical of other social policy fields with strong international lobbying efforts. Health policy, on the other hand, represents a least-likely test case, a scenario with unfavorable scope conditions that would challenge the validity of the model most. Linos demonstrates the validity and wide applicability of her model by analyzing the diffusion patterns in well-known social policy reforms: the diffusion of family policy across Organisation for Economic Co-operation and Development (OECD) countries, the adoption of the National Health Service model across Europe, and the recent Patient Protection and Affordable Care Act reform in the United States. Each of these reforms represents policy diffusion through democracy under disparate scope conditions, and Linos utilizes these historical reforms to elucidate the international and domestic factors that facilitated policy diffusion the most. To further underscore the validity and strength of her proposal, Linos highlights least-likely cases of diffusion through democracy at the country-level, or domestic circumstances in history during which the scope conditions were least favorable to yield policy diffusion through democracy. Here, she focuses on rich democracies with strong domestic policymaking capacities that should reduce the need to reference foreign models.28

B. Family Policy Diffusion: Maternity Leave and Family Benefits

By investigating the spread of family policy across OECD countries, Linos concretely demonstrates to readers the application of her diffusion model to social policy fields. Family policy, particularly maternity leave, is representative of other social policy areas, such as antidiscrimination regulations and unemployment policy, in the types and structures of the international and domestic stakeholders involved in the politicking.29 As with other social policies, family policy debates typically divide domestic interest groups equally, pitting those most likely to support international social welfare values, such as unions, feminist groups, and left-wing parties, against groups opposing these norms, such as employers, religious groups, and right-wing parties.30 As seen in global family policy adoption patterns, domestic debates of many social policy

28. *Id.* at 6.
29. *Id.* at 128.
30. *Id.* at 129.
fields occur against a backdrop of strong international policy recommendations provided by powerful stakeholders like the ILO to member states.

To better survey the policy area, Linos explores two topics within family policy: maternity leave and family allowances. This comparison of family policy topics offers Linos the additional methodological advantage of within-field variation analysis, as she is able to contrast diffusion patterns that differ on degree of international organization activity alone. As early as 1919, international expert stakeholders, such as the ILO and European Union (EU), began developing extensive, detailed, and legally-binding recommendations on maternity leave, leading to one dominant international model with few opposition groups. No equivalent international advocate existed for family benefits until ILO developed relevant guidance in 1952, and even afterwards, the ILO was never forceful about its recommendation. Linos is thus able to use the field of family allowances as a benchmark to measure how a similar field develops with international influences.

Global adoption patterns of family benefits and maternity leave reforms support the diffusion through democracy model. Even though a present-day survey reveals that maternity leave is almost universal and more widespread than family allowances, closer examination of the forces promoting global policy adoption reveals that international norms contributed significantly to the promulgation of both family policy fields. In order to test the influence of foreign models over domestic reforms and to identify other diffusion factors, Linos uses statistical modeling to measure the “weights” of potential international and domestic determinants of a state’s reform.31 The results corroborate her claims that, in contrast to previous scholarship on policy diffusion and domestic social policy adoption, domestic policymaking is significantly driven by emulation of proximate and familiar countries, and that both international and domestic forces are equally influential in determining national reform. In fact, countries with the greatest ties to the international system were most likely to adopt longer maternity leaves.32

Global adoption patterns also confirm the temporal dimension of the diffusion through democracy account. By using industrialization as a proxy for the domestic political conditions necessary for maternity leave reform, Linos uncovers a significant negative relationship between the year a state adopted

31. Linos analyzed which diffusion theories played the greatest role: emulation (measured by media coverage of large, rich, proximate countries), competition (where a competitor was defined as states exporting similar products), or learning (where successful countries were defined by high female labor market participation). The international influences were temporal lag, citizen attentiveness to international organization messages (as measured by the number of international nongovernmental organization memberships), and ratification of relevant international agreements. Domestic factors explored and determined to be significant were union power (measured by the percentage of unionized workers in the labor force), political power of women (measured by the number of parliament seats held by women), percentage of women in the labor force, and percentage of unemployed women. See id. at 137-41.

32. Id. at 147.
maternity leave and the level of industrialization present at the time of adoption. The later a maternity or sick leave was introduced, the less industrialized the state was at that time. The statistical modeling Linos uses also supports her claim that late adopters can adopt a policy under less favorable domestic conditions than pioneers. In states that adopted maternity leave before 1919, the domestic forces accounted for much more of the policy development than in late-adopter states. Likewise, the role of country-to-country emulation in these pioneer countries was insignificant.

C. Health Care Policy: National Health Service Model

The application of the diffusion through democracy model also extends to least-likely test cases. Linos interrogates the global patterns of health policy diffusion to show that her theory is valid in unlikely circumstances as well. Similar to the family benefits field, health policy lacks the presence of strong, cohesive international lobbying groups promulgating a single specific model. In contrast to the ILO’s specific, legally-binding recommendations advancing maternity leave, the health care policies promoted by the World Health Organization (WHO) in the Alma-Ata Declaration were broad and non-binding outlines of key goals. Unlike the circumstances surrounding family allowances, however, health policy reform, and particularly the adoption of the left-wing National Health Service (NHS) model, faces an additional and significant obstacle: forceful domestic opposition from national interest groups. Medical associations of doctors, a key interest group, contest reforms that limit providers’ autonomy and compensation, while no concentrated interest groups exist to counterbalance these associations. The beneficiaries of medical reforms—patients and taxpayers—are typically unable to organize to form a collective interest group. This asymmetry is unique to health policy and is distinct from the more evenly-divided interest groups in family policy and other social policy fields.

The multiplicity of international health care models likewise distinguishes health policy from family policy. Rich, sophisticated countries, like those in the OECD, have adopted diverse health systems that generally fall into one of three broad categories: privatized systems, social insurance systems, and universal systems. These models differ in the source of health care financing, the scope of health insurance coverage, and the delivery of health care. First formulated in Britain in 1946, the NHS model is a form of universal, single-payer health system. While the NHS may have inspired the WHO to take up the cause for universal healthcare, the WHO failed to champion a single health model and instead described goals that were generally consistent with the NHS, but that

33. Id. at 136.
34. Id. at 68.
35. Id. at 70.
could also be achieved through other systems. This array of possible health models set the stage for greater variety in country-to-country diffusion.

Again, Linos uses empirical research techniques to examine global adoption patterns for support of her diffusion through democracy account. Analysis of the diverse types of health systems found in OECD countries shows geographical and temporal patterning in the national adoptions of NHS models and social insurance systems. Linos’s studies revealed that four of the test domestic variables helped to determine domestic choices: states were more likely to have adopted a NHS model if the country had a (1) left-wing administration, (2) few parties, (3) high prior health coverage, and (4) a federalist structure. The likelihood that a country will adopt a NHS system increases when other countries covered prominently in the national media have already adopted this reform. However, whether a country accepts NHS reform is also shaped by learning and competition diffusion theories.

Linos’s analysis of health policy diffusion illustrates that not all weakly-promoted international models are doomed to fail, as seen with the family benefits case study. Diffusion through democracy can influence major national policy even with strong opposing domestic interest groups. In examining the case studies of two NHS late-adopter countries, Greece and Spain, Linos demonstrates that diffusion through democracy explains how the electoral process drives domestic policymaking to imitate radical foreign models. To push their agenda forward, socialist politicians in Greece and Spain chose to reference NHS adoptions from rich, familiar countries, such as Britain, over geographically proximate countries with greater political and institutional similarities. The use of foreign models helped persuade skeptical politicians and medical professionals to adopt national reform.

III. 
DISCUSSION

The implications of the proposed diffusion through democracy framework are significant and far-reaching. According to Linos, because international norms do not run antithetical to, but rather reinforce, local politics, this insight can transform the priorities and strategic messaging used by international organizations and community advocates. Instead of trying to persuade technocratic elites or bind them to hard law instruments, stakeholders should reframe their communications, emphasizing the informational content of soft law, or even non-law, to influence the populace or domestic nongovernmental bodies. The diffusion through democracy model highlights that voters can be the key to introducing and implementing policy reform.

36. Id. at 71.
37. Id. at 91.
38. Id. at 97.
Among the strengths of Linos’s formulation is her methodological approach, which combines three types of empirical evidence to support disparate portions of her theory: (1) experimental public opinion data to show that foreign models resonate with voters, (2) qualitative case studies of multiple states to show that politicians incorporate foreign models into their campaigning and legislative debates, and (3) rigorous statistical analysis demonstrating that foreign models impact domestic policy adoption. Unlike other political scientists and legal scholars who are only able to frame theories amidst quantitative support, Linos effectively demonstrates the validity of her claims by qualitatively analyzing the adoption patterns of specific social policies in multiple distinct national contexts. Furthermore, Linos does not shy away from rigorous evaluation of the diffusion by democracy model. By testing the central assumptions of her theorem against the least-likely circumstances, she asserts the wide applicability of her model—that democratic governments facing unfavorable scope conditions were still able to transform national policy by referencing international norms.

Linos’s unique empirical approach, and in turn, her diffusion model, is further strengthened by her resourcefulness and candidness. While other researchers may be stalled by the lack of original records existing from the early time periods being examined, she creatively identifies appropriate proxies in the existing data in order to source the variables necessary to conduct the statistical analyses. She uses the limited available resources without constraining her research. Likewise, readers could perceive her work to be more credible because she readily recognizes and openly acknowledges the weaknesses not only of each statistical analysis, but also of her proposed model generally.

The book’s greatest strength may be its accessibility to a wide range of audiences. Linos acknowledges that the far-reaching implications of the diffusion through democracy model would attract a diverse range of readers, from international law scholars to community advocates. Despite the complexities of the diverse topics addressed and their inter-relationships, Linos makes no assumptions about the background of her audience and is thus conscientious about explaining contexts and analytical delineations, particularly for the construction of the statistical analyses she uses. The structure she has adopted for every chapter, and for the book in its entirety, previews and summarizes for readers each chapter’s critical takeaways. Linos’s articulate and engaging writing style further ensures accessibility to a diverse spectrum of stakeholders in the domestic policymaking process.

39. Id. at 9.
40. Despite the lack of information on the foreign countries predominantly covered in the news in 1975, Linos found an adequate substitute from the data that is available—foreign newspaper sales. In chapter four, she establishes the high correlation between foreign newspaper sales with domestic coverage of said countries and citizens’ familiarity with these countries. See id. at 79-85.
Because diffusion through democracy has significant real-world implications on the design of international advocacy platforms and the campaigns of domestic politicians, some readers may find that Linos’s book leaves some critical questions unanswered. For example, the direct relationship between voters and politicians is underexplored. While an unavoidable weakness that is recognized by Linos, the empirical research employed in the book fails to show the direct causal relationship between voters and politicians, the centerpiece of the diffusion model. Linos’s public opinion experiment, for example, only shows that voters’ opinions of a particular policy can shift, not that international law endorsement of certain models lead to a favorable domestic vote. Similarly, the experiment fails to show that voters and their impressions directly influence politicians’ stances on key political issues related to international policy models. Politicians may reference foreign models to sway citizens for their support, but are not necessarily constrained to propose policies that imitate only the foreign countries familiar to voters.

Linos’s account ushers in and highlights the role and implications of domestic media as an essential area of further research. According to her theory, voters are passive information-gatherers who learn about global happenings primarily through domestic media coverage. Constituents’ impressions of politicians and their policies hinge entirely upon the media, but Linos’s book is limited in its examination of this third actor. How does the media decide which countries are most culturally proximate? What else influences the media’s choice in coverage and the color of these portrayals? Such unexplored questions lead the reader to wonder if perhaps the energies of international advocacy efforts should not be focused on convincing citizens of the value of certain foreign models, but rather upon the local media, who might be able to bring knowledge of foreign models directly to domestic voters.

Finally, while Linos investigates the applicability of the diffusion through democracy model to multiple waves of social policy reform at both regional and country levels, she limits exploration of the relevant circumstances to rich OECD countries. While she explains early in her book that she selected relatively wealthy democracies because they are difficult test-cases because of their strong national policymaking capacities, her sole focus on rich Western countries leaves something to be desired. Even if lower-income democracies are more likely to experience diffusion through democracy in theory, international reform advocates may be even more interested in the applicability of the democratic diffusion model to lower-income countries at the precipice of reform initiatives. The conditions accompanying the evolving industrial status of a developing or a newly developed country could disrupt a number of the scope conditions, such as accuracy of the portrayal of foreign models in media. Likewise, Linos’s diffusion theory contributes to the larger understandings of the overlap between international law and domestic political processes. But by failing to explore the full relationship between her account and different types of
democratic states, the book misses an opportunity to inform transnational advocacy efforts.

These weaknesses, however, do not undermine the strength or validity of the diffusion through democracy theory, and only show the importance of further investigation of the model’s applicability and implications. By bridging international laws and local politics, *The Democratic Foundations of Policy Diffusion* proffers a timely account, which reconcile[s] previously antithetical political science scholarship by using a variety and depth of resources to explore global policy convergence from within national borders. The value in Linos’s novel theory lies not only in its unique contributions to international and domestic legal scholarship, but also in its testimony to the importance of mobilizing ordinary voters in generating social policy reform.
2014

Book Review, International Law in the U.S. Supreme Court: Continuity and Change by David L. Sloss, Michael D. Ramsey & William S. Dodge (eds.)

Riddhi Dasgupta

Recommended Citation
Review of *International Law in the U.S. Supreme Court: Continuity and Change* by David L. Sloss, Michael D. Ramsey, and William S. Dodge (eds.)

Riddhi Dasgupta*

I.

INTRODUCTION

The multi-essay book *International Law in the U.S. Supreme Court: Continuity and Change* by editors David L. Sloss, Michael D. Ramsey, and William S. Dodge is an evolutionary tale of the United States Supreme Court’s interaction, and sometimes tense confrontation, with international law. Depending on the time period, posture, and issue facing the Court’s jurisprudence, the Court has been both solicitous and hostile toward international law. Going forward, the common trends must be coalesced and analyzed for the benefit of the Court, practicing attorneys, and the public. This review highlights the well-organized historical odyssey of some aspects of public international law in the Supreme Court of the United States and in American jurisprudence generally.

The editors are well-suited to the task: Sloss is a Professor at Santa Clara University School of Law whose scholarly interest concerns the application of international law to domestic tribunals; Ramsey is the Hugh and Hazel Darling Foundation Professor at the University of San Diego School of Law where his work is at the cutting edge of constitutional law, foreign relations law, and international business law; and Dodge is a Professor at the University of California Hastings College of the Law specializing in international law, international transactions, and international dispute resolution as well as serving

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as Co-Reporter for the American Law Institute’s Restatement (Fourth) of Foreign Relations Law: Jurisdiction and Judgments. Each editor is a leader in his field and retains significant experience as a practitioner to temper the theoretical bent with constructive practical advice.

In Part I, this review will introduce the work and its various chapters and then proceed to consider the book’s many strengths. In Part II, the review addresses the book’s omissions and proposes areas for improvement, which the editors and others are invited to take up in future publications. Namely, this review suggests that the editors might have better integrated the two differing schools of constitutional thought into their discussion on international law: evolutionary and static, or “originalist” constitutional interpretation. The editors might have also included an expanded scope of the appearance of international law in the Supreme Court, and addressed private international law issues such as commercial and investment arbitration. Not only would this have been the more comprehensive course of action, it might also have pointed out how to reconcile the philosophical tension between constitutional and commercial conservatism and eventually converted conservative skeptics of international law into active stakeholders.

This review concludes with commendation for the editors and with a positive recommendation about this book to scholars as well as laypersons wishing to learn more about the historical and prospective role of international law in the US polity.

II. SUMMARY

A. Structure and Highlights of the Book

In consolidating academic contributions from twenty international law scholars, including themselves, the three editors have charted a highly organized chronological course. Part one of the book addresses public international law in the US Supreme Court from the Founding Era to 1860. Part two discusses public international law in the Court from the Civil War to 1900. Subsequently, part three frames the treaties, customary international law, the interpretive role of public international law, and doctrinal change relating to international law in the Supreme Court from 1900 to the Second World War. Part four discusses the same issues from the Second World War to the new millennium. Finally, part five discusses treaties, customary international law, and other international law issues after 2000.

Part one, “From the Founding to the Civil War,” discusses the origins of international law in the US Constitution and the US Supreme Court. The editors, in their co-authored article “International Law in the Supreme Court to 1860,” state that “[n]ational honour,” which “the Revolutionary generation took quite seriously,” as much as foreign and economic policy objectives induced the
founders to attend to the law of nations. Particularly strategic was the framer’s consideration that “[c]omplying with the law of nations was important for a small, weak country trying to avoid trouble.” In short, both “interest and duty” made plain this imperative. If the Constitution follows the flag, then the Supreme Court follows the Constitution.

The book illustrates this point through the lens of the following question: did the Constitution and the Judiciary Act of 1789, when omitting the law of nations as a decisional rule “mean to foreclose that practice or to assume its continued operation?” In that pursuit, the editors look to the law of nations in admiralty, criminal law, general common law, federal statutes, the President’s role in the constitutional design, and the Supreme Court’s emerging positivism. Then the editors shift their focus to the role of international law as a tool of construction in the hands of the Supreme Court, as the Court tried to preserve the nation’s hard-won independence and help build the new nation. In that role, the editors point out, the Court was a collaborative partner with the other branches and “generally strove to facilitate compliance with the nation’s international legal obligations or, at least, to avoid noncompliance.”

Part two, “From the Civil War to the Turn of the Century,” expounds on treaties, customary international law, and international law as an interpretive tool in the US Supreme Court from the Civil War to 1900. In that historically fascinating age, the Supreme Court showed little hesitation in applying most treaty provisions in domestic courts unless the Court found that there were “jurisdictional or political constraints to judicial review,” or that certain treaty provisions were “non-self-executing.” When construing treaties, good faith and liberal construction were the Supreme Court’s modus operandi. The Supreme Court’s treaty interpretation and general approach to customary international law had several hallmarks: greater acceptance that individual treaty rights were derivative in character; differential treatment of European versus non-European treaties; and the “deliberate blending” of positive and natural law principles affirmed by the Court during this era.

Part three, “From the Turn of the Century to World War II,” explains that “continuity, consolidation, and completion” characterize the development of the

3. Id.
4. Id.
5. Id. at 23.
6. Id. at 23-37.
7. Id. at 44-51.
8. Id. at 50.
law of treaties during this period. Even though the kinds and number of treaties rose dramatically in this early part of the twentieth century, the Supreme Court did not retreat from the core precepts of its treaty law jurisprudence, such as the judicial duty to apply treaties as governing law, the “last-in-time” rule, the principle of territorial acquisition, and the Executive’s privilege to determine the treaty signatories and partners of the United States. During this period, the Supreme Court also established what we today consider the building blocks of its international law jurisprudence: a “purposive approach” to construction that is designed to further “amicable relations” with the United States’ fellow signatories as well as a “presumption in favor of a liberal recognition of individual rights secured by treaties.”

Also in part three, Professors Michael P. Van Alstine and Edward A. Purcell, Jr. present their contrasting views about the precedential and doctrinal changes generated by the significant treaty power case concerning migratory birds and the police power of states, Missouri v. Holland (1920). Holland’s shaping of the national discourse on the treaty power and the ramifications of like debates are the important subjects of debate in this portion of the book.

Part four, “From World War II to the New Millennium,” explains the ways in which the Supreme Court’s jurisprudence replaced international law principles of territorial sovereignty with reasonableness, fairness, and equality considerations. This era witnessed the rise of federal power through the Commerce Clause and the Necessary and Proper Clause under the appointees of President Franklin D. Roosevelt and until the epoch of the Chief Justice William H. Rehnquist-led Supreme Court, from approximately 1937 to 1995. Moreover, the book points out that the decline in Austinian sovereignty was manifest in the Supreme Court’s attitude to diminishing federal power as well as rising deference to the Executive branch in customary international law cases. Nonetheless, another trend line was reflected by the Supreme Court’s greater willingness to consider international human rights treaties and norms to which the United States had obligated itself, not necessarily to expand rights under those treaties, but rather to interpret various provisions of the US Constitution


15. Id. at 376.
Dasgupta: Book Review, International Law in the U.S. Supreme Court: Continu

such as the Eighth Amendment’s Cruel and Unusual Punishment Clause and the Fourteenth Amendment’s Due Process Clause.  

Finally, part five, “International Law and Constitutional Interpretation after 2000,” finds the aforementioned trends to be of continuing relevance and draws attention to the “self-executing” treaty debate as well as the extraterritorial application of US laws. Some latent as well as expressly-stated fears have been about the future of the United States’ “national identity” once its judges become “active participants in the dialogue on human rights . . . .” Overall, the editors and authors cover adroitly what they have sought out to cover, which is not to say that their scope is perfect. This review addresses those significant omissions and the attending opportunity costs.

III. DISCUSSION

A. Contributions Made by the Book

The chronological structure does not come at the cost of thematic discussion. By structuring certain chapters, particularly in part five, as a “Main Essay” followed by several “Response Essays,” the editors have handled effectively and clearly what could have obfuscated the book’s complex messages. At the end of the discussion, the reader has no doubt of its central thesis: the Supreme Court has gradually become more and more reluctant to apply treaties to restrain government action, but has gone in the diametrically opposite direction in relation to deciphering the Constitution’s meaning in light of international law. Historically there has always been judicial conflict with the political branches over various preferences in international law usage, but never has this inter-branch conflict been greater than in relation to the previous decade’s war-on-terror cases—notably the iconic Hamdi/Rasul, Hamdan, and Boumediene trifecta.

The strategic decision by the editors to acknowledge the dramatic changes over the twentieth century and the projected changes to come over the next few decades is particularly farsighted and commendable. Nonetheless, there remains something of a befuddling element present here. The editors must be aware that the wave of the future in international law, as in international imperialism, is through foreign investments and mercantilism. That projected future deserves

16. U.S. CONST. amend. V.
more in-depth treatment than what is currently provided in the book. Not only are the consequences in this legal area great in purely monetary terms, they might also raise to irreconcilable heights the uneasy relationship between high commerce and legal conservatism in the United States à la international law. This point goes largely unaddressed.

Among the book’s merits, the editors pull no punches when characterizing the early Supreme Court’s practice of “look[ing] to international law” as “more scattered and opportunistic than with statutory interpretation.”21 Similarly, Professor Paul B. Stephan candidly acknowledges the socio-political and economic undercurrents that may have affected the Supreme Court’s perception and application of international law: “[I]n a world where the United States suddenly was a triumphant superpower, the views of other state parties about the meaning of their commitments might have meant little.”22 These muscular critiques of prevailing legal doctrine add vibrancy and robustness to dialogue for the sake of doctrinal clarity going forward.

It is also refreshing that with some frequency the scholar-essayists have admitted to the law’s trans-substantive ground-rules that render “unifying patterns” less than “self-evident.”23 Indeed, they openly assert that “[s]o complex are the [Supreme] Court’s machinations, one is tempted to admit defeat and say that the cases are simply too compartmentalized, deal with areas that do not consistently trigger predictable ideological passion, and are too idiosyncratic to hazard any grand theory.”24 The compartmentalization and the very fact-specific focused criticisms of the Supreme Court’s jurisprudence are sufficiently anodyne. But references to an “ideological passion” are a different matter altogether.25 Whether or not the reader agrees with the accuracy of the premise, most jurist-epistemologists would find “ideological passion” to be an illegitimate execution of the judicial power. How can an impartial arbiter pronouncing on “what the law is”26 indulge an “ideological passion” channeling her judgment? Did Alexander Hamilton, in The Federalist No. 78, not maintain that “[t]he judiciary . . . ha[s] neither FORCE nor WILL but merely judgment?”27 It is quite a powerful charge from which the book does not shy away. Finally, the book’s comprehensive and even-handed treatment of most substantive issues leaves it in good stead.

24. Id.
25. Id.
B. A Missed Chance: The Merger between Public International Law and US Constitutional Conservatism and Libertarianism

The book’s somewhat unimodal analysis leaves out the conservative—originalist and conservative purposivist—perspectives on the Constitution and their interplay with international law. The Declaration of Independence sets the stage by exhorting that the United States must be responsive to the “[o]pinions of [hu]mankind.”\(^2\) Its follow-up legal document, the Constitution explicitly recognizes international law when empowering Congress to “define and punish . . . Offences against the Law of Nations.”\(^2\) Chief Justice, John Jay, who tellingly was one of the authors of *The Federalist Papers*, wrote: “by taking a place among the nations of the earth,” the United States had “become amenable to the laws of nations.”\(^3\) The law of nations is but one component of international law, the other primary component being international treaties and agreements.\(^3\)

In fact, at the turn of the twentieth century in a landmark case, *The Paquete Habana* (1900), Justice Horace Gray famously asserted that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice . . . .” This, however, is not a freewheeling power of courts operating under the US Constitution.\(^3\) Rather, the default principle is that “resort must be had to the customs and usages of civilized nations” only “where there is no treaty, and no controlling executive or legislative act or judicial decision . . . .”\(^3\) This is in keeping with the pragmatic yet principled approach to construing official policies that the great Chief Justice John Marshall had laid down in 1804: “an act of Congress ought never to be construed to violate the law of nations,” nor the Constitution, if any other possible construction remains . . . .”\(^3\) The *raison d’être* is that, since the Judiciary has only so much precious capital to expend against its coordinate branches before the courts become irritants that are perceived to add little value, inter-branch constitutional conflict ought to be minimized.\(^3\)

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32. 175 U.S. 677.
33. Id. at 700.
34. Id.
35. Hooper v. California, 155 U.S. 648, 657 (1895) (“The elementary rule is that every reasonable construction must be resorted to in order to save a statute from unconstitutionality.”).
37. Ex parte Randolph, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11, 558) (stating that because no questions of “greater delicacy” than constitutional ones could arise, “if the case may be determined on other points, a just respect for the legislature requires, that the obligation of its laws should not be unnecessarily and wantonly assailed.”); Ashwander v. Tennessee Valley Auth., 297
This is just one version of American legal history’s interplay with international law. It is also the disproportionately predominant version covered in the book. By contrast, a conservative, strict constructionist view of the “law of nations” term contained in the Constitution might be credibly strained to include some limited jus cogens precepts, that is non-negotiable basic principles or “peremptory norms” of international law. To some conservative scholars, this imperfect solution would be a “legitimate compromise” which maintains “much of the [Offense] Clause’s original meaning while preventing it from being used to eliminate the boundary between state and federal authority.” In short, it is an acceptable triangulation: pragmatism and principle satisfied, equities balanced.

However, countenancing a dramatic expansion of the federal police power, particularly through the operation of criminal law, is beyond the pale. It would encroach on the states’ traditional sphere of regulating such behavior in protecting the health, safety, welfare, or morals. There might be a structural anomaly as well. A policy objective that might never win the assent of two-thirds of the Senate (required for treaties) but might win the assent of a simple majority and even the filibuster-proof majority of the Senate and win the assent of a simple majority of the House of Representatives (required for statutes) might obligate both States and private legal entities to certain international norms, thus rendering the Constitution’s Treaty Clause effectively superfluous.

In such a scenario, a constitutional crisis might be brought about by an overzealous and despotic Presidency — who may well be driving the synergy to

U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”).


40. Id., at 113, n. 20. Morley suggests merely that principle has an interstitial component of pragmatism, which is important to honor.

41. United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1252 (11th Cir. 2012) (“Private [17] criminal activity will rarely be considered a violation of customary international law because private conduct is unlikely to be a matter of mutual legal concern.”) (referring approvingly to Flores v. S. Peru Copper Corp., 414 F.3d 233 (2d Cir. 2003)).

42. U.S. CONST. art. II, § 2, cl. 2. The Treaty Clause was designed to relieve “[t]he Founder[s]’ . . . anxiety” and “to avoid treaty violations because such violations threatened to provoke wars and otherwise complicate relations with more powerful nations. The founders also wanted to establish a reputation for treaty compliance to induce other nations to conclude beneficial treaties with the new nation.” See Carlos Manuel Vázquez, Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties, 122 HARV. L. REV. 599, 617-18 (2008) (footnotes omitted).
Dasgupta: Book Review, International Law in the U.S. Supreme Court: Continu

When one House of the Congress is expelled from the operation, the process can no longer be called “congressional.” Instead, because the President is the first mover in such a scheme, the operation’s attributes are likely best characterized as “presidential.” Although Hamilton, writing in The Federalist No. 70, observed that “[e]nergy in the executive is a leading character in the definition of good government,” “energy” cannot be allowed to become a tyrannical force that usurps the prerogatives of other constitutional actors. Unfortunately, this entire chain of reasoning and consequences is absent from International Law in the U.S. Supreme Court.

C. How Economic Libertarianism and the Investment Arbitration Angle Might Have Enriched the Book

Economic libertarians too have a complaint to register. International Law in the U.S. Supreme Court does not really address the commercial dimensions of international law beyond the historical connections with nineteenth-century imperialism and “gunboat diplomacy.” The “unbundling of global production” since the 1990s has spurred international investments and their arbitration to an unprecedented volume. The editors to focus on this phenomenon, they would have found much ground to cover in the areas of private international law and the investment-arbitration sphere of public international law. In the editors’ defense, of course, the Supreme Court has not yet engaged with a significant volume of private international law. Still, the reader could be forgiven for being misled by the book’s ambitious title: International Law in the U.S. Supreme Court, rather than Public International Law in the U.S. Supreme Court. Moreover, this omission might be related to the editors’ proclivity for dissecting the public international law features of the governor-governed relationship.

Even as a public international law publication, though, the book has a significant deficiency. Economic libertarians have promoted international agreements that enable foreign investments and allow expeditious legal claims to be assessed by impartial tribunals under favorable procedural and substantive law. They have largely been successful, and this strategy has prompted some international investment tribunals to ambitiously head off into terra incognita by

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43. THE FEDERALIST NO. 70, p. 471 (A. Hamilton) (addressing the President’s national security powers) (Clinton Rossiter ed., 1961); see THE FEDERALIST NO. 34, at 175 (A. Hamilton) (“the circumstances which may affect the public safety are [not] reducible within certain determinate limits, . . . it must be admitted, as a necessary consequence that there can be no limitation of [Presidential] authority which is to provide for the defense and protection of the community in any matter essential to its efficiency.”).

44. SLOSS, ET AL., INTERNATIONAL LAW IN THE U.S. SUPREME COURT, supra, at 541-46.

mandating not just pecuniary relief for the victorious parties but also injunctive relief to enjoin enforcement of the state’s policies.\textsuperscript{46}

Since international investment arbitration, as a component of public international law, is the most prominent commercial area that the editors largely omitted, this review focuses on its potential. In 1929, the International Chamber of Commerce (ICC) and the League of Nations created the maiden proposal to protect investors: the Draft Convention on the Treatment of Foreigners.\textsuperscript{47} Although the Draft Convention was rejected, the emergence of investment arbitration had commenced, and it soon took on a life of its own.\textsuperscript{48} The flow of FDI into developing and transitional economies has been steadily growing, and in 2011 reached the peak of $776.562 billion.\textsuperscript{49} The same year, the global FDI inflow reached $1524.422 billion.\textsuperscript{50} To vindicate their legal rights reposed in the capital that has flowed into a host nation, investors may file a request for arbitration. Had the editors of International Law in the U.S. Supreme Court focused on the contemporary commercial aspects of public international law, they might have deduced that these public welfare effects—and what some have called “human rights backsliding”—might be ominous.\textsuperscript{51}

Fragmentation, both among domestic courts and among international tribunals, is far from the only similarity between the two systems. In at least nine

\textsuperscript{46} Micula v. Romania, ICSID Case No. ARB/05/20, Award (2008), at ¶ 167 (stating that a remedy must be expressly precluded in order to be available to the Tribunal: “the Tribunal finds no limitation to its powers to order restitution in the BIT, the instrument on which the consent of the parties is based. While Article 4 of the BIT dealing with expropriation only mentions compensation, it does not rule out restitution. Moreover, the rest of the BIT provisions do not preclude a tribunal from ordering restitution, if and when appropriate, for a violation of other substantive provisions.”).


\textsuperscript{48} Compare The Oscar Chinn Case (1934), Britain v. Belgium (1934), P.C.I.J. Series A/B, No. 63 (the Permanent Court of International Justice, the precursor to today’s International Court of Justice, held that investors and business owners have no substantial right of access to any market) with Case Concerning Jeno Hartman (1958), No. Hung.-717 (1958), United States Foreign Claims Settlement Commission (the Commission found that expropriation does occur when the government deprives the owner of access to use, enjoy or sell the property (regardless of who owns the title)).


\textsuperscript{50} Id. Deriving by subtraction, the amount of FDI in-flow for developed countries is $747.86 billion.

\textsuperscript{51} Katerina Linos & Andrew Guzman, Human Rights Backsliding, Cal. L. Rev. (forthcoming), at 37, available at www.law.berkeley.edu/files/Guzman-Linos_0930-2.pdf (explaining as part of their “theory of norm transmission” that human rights “backsliding can take place even though no state is obligated to reduce the level of human rights it provides.”); UPS v. Canada, UNCITRAL, Award on the Merits (rejecting similar claims by UPS by a 2-1 vote), May 24, 2007. International investment tribunals, it must be remembered, assemble their arbitrators differently than a domestic tribunal, and the substitution of one arbitrator for another may well have led to a victory for the corporation. And it may still be so for the health insurance provider who is one day challenging the public option.
fields of law—(i) Methods of Interpreting International Law Instruments; (ii) Exhaustion of Local Remedies; (iii) Continuous Nationality; (iv) Expropriation and Property Rights; (v) Fair and Equitable Treatment; (vi) Due Process; (vii) Non-Discrimination; (viii) International Minimum Standard; and (ix) Compensation—the exchange of ideas between the US legal system and the international law arena might prove mutually beneficial. The first three are efficiency-based, whereas the last six are substantive or equity-based on the merits. A common denominator among these fields concerns the cultural normativity that results from judge-made balancing, a circumstance reminiscent of the common-law tradition.

First, consider the US-international law convergences in the substantive jurisprudence. One similarity pertains to the varying degrees of deference owed by tribunals to the policy-making sovereign. The degree of deference depends, on both levels, on balancing the public interest asserted by the government with the abridgement of rights alleged by the claimant. Yet another factor is that the Supreme Court’s Takings Clause jurisprudence has a striking overlap with international law—implicating, inter alia, public purpose and use, legitimate expectations, degree of interference, government intent, the sole effects doctrine, deference, and compensation. Determining an efficient and equitable


53. Lemire v. Ukraine, ICSID Case No. ARB(AF)98/1, at ¶ 273, Decision on Liability (2010) (“balanc[ing] against the legitimate right of [the host State] to pass legislation and adopt measures for the protection of what as a sovereign it perceives to be its public interest.”).

54. Kelo v. City of New London, 545 U.S. 469 (2005) (if the area is blighted and the carefully considered development plan is designed to increase economic and social vitality, then it qualifies as constitutional “public use”); Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 241-42, 244 (1984) (although the State immediately transferred the taken property to private parties for redevelopment, the Court held that it “is only the taking’s purpose, and not its mechanics” with which the Court is concerned); Berman v. Parker, 348 U.S. 26, 35 (1954) (even though the property owner contended that his store was not itself blighted, the Court held that “community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.”).

55. See, e.g., Y. Fortier & S. L. Drymer, Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor, 19 ICSID REV. 293, 326 (2004); id. at 305 (“in order to be considered an expropriation, the effect of a regulatory measure on property rights—that is, the required level of interference with such rights—has been variously described as: (1) unreasonable; (2) an interference that renders rights so useless that they must be deemed to have been expropriated; (3) an interference that deprives the investor of fundamental rights of ownership; (4) an interference that makes rights practically useless; (5) an interference sufficiently restrictive to warrant a conclusion that the property has been ‘taken’; (6) an interference that deprives, in whole or in significant part, the use or reasonably-to-be-expected economic benefit of the property; (7) an interference that radically deprives the economical use and enjoyment of an investment, as if the rights related thereto had ceased to exist; (8) an interference that makes any form of exploitation of the property disappear (i.e., it destroys or neutralizes the economic value of the use, enjoyment or disposition of the assets or rights affected); and (9) an interference such that the property can no longer be put to reasonable use.”) (emphasis in original).
allocation of costs, considering who pays, why, and the public and private benefits the use of property will promote or hinder are also salient.

Second and on a related point, there are many logistical and procedural similarities between the international and US courts. They illustrate the importance of efficiency and economy interests of both litigants and tribunals. These similarities include the shared importance in facilitating the roles of special masters and amici curiae in improving the applications of vehicles such as the exhaustion of local remedies, class actions, mass claims, and counterclaims, and in developing a contractual process that more effectively balances the preference towards party autonomy in contract negotiations with making allowances for socioeconomic disparities among the parties. Whether or not these considerations deserve to be adopted is not the point; rather, they should be discussed comprehensively.

The editors had an opportunity to map out the future of international economic law and its impact on the US Supreme Court’s jurisprudence. In doing so, the editors could have attended to the discussion about the future of the intersection of commerce, libertarian and originalist conservatism, and the role of international law in the United States. The editors might have pointed out a potential battleground between corporatist conservative pragmatism and originalist theoretical conservatism: while the former may strategically prefer to transpose modern international law principles to the US constitutional universe (and with great efficacy), to the latter’s philosophical allegiances this

56.  Id. at 413 (stating one view that “joint experts agreed upon by the parties ten[d] to ‘work out far better’ than tribunal appointments of the experts, confidentiality advisors, and special masters. As evidence, many of them pointed to the “superb” performance of Professor John R. Crook as confidentiality advisor in the recent Softwood Lumber Dispute.”) (referring to United States v. Canada, LCIA, Case No. 111790, at ¶¶ 49-50 (2012)) (emphasis in original).

57.  For international tribunal procedures on this question, see R. Moloo, The Quest for Legitimacy in the United Nations: A Role for NGOs?, 16 UCLA J. INT’L L. & FOREIGN AFF. 1, 27-28 (2011); UPS v. Canada, Decision on Intervention as Amicus Curiae, at ¶¶ 35-43 (2001) (construing its UNCIRAL Article 15(1) power to grant it the authority “to investigate and determine the matter subject to arbitration in a just, efficient and expeditious manner”). For procedures of the US Supreme Court on this issue, see Paul M. Collins, Amici Curiae and Dissensus on the U.S. Supreme Court, 5 J. EMPIRICAL LEGAL STUD. 143 (2008).

58.  B. K. Gathright, A Step in the Wrong Direction: The Loewen Finality Requirement and the Local Remedies Rule in NAFTA Chapter Eleven, 54 EMORY L. J. 1093, 1121 (2005); Ambatielos Claim (Greece v. United Kingdom), 23 LL.R. 306, 335 (1956) (the International Court of Justice required that before bringing an international claim a claimant “should have exhausted the possibilities of appealing to a higher court against any adverse decision of a lower one.”). Other possible alternatives for adoption into investment agreements are waiting periods, “local-court-first” requirements, and “fork-in-road” (making a binding choice between tribunal paths at a later stage in the dispute) provisions.

59.  RIDDH I DASGUPTA, INTERNATIONAL INTERPLAY, at 214 (2013). Other possible improvements might be structurally improving the growing conflict-of-interest problem among adjudicators, managing continuous nationality (internationally), addressing corporate veil (US federal courts, particularly in diversity jurisdiction suits) problems, and making more widely available the anti-suit injunctions.
course is anathema. For instance, the broad vagaries of due process do not, at least from an originalist viewpoint, carry a substantive component or even a procedural component beyond the original understanding in 1791 (in cases where federal action is being scrutinized) or 1868 (same for state action).\(^{60}\) Conservatism will then face a difficult test of method-based fidelity, being forced to adjust to the evolutionary “law of nations” or to stay the course of a static constitutional regime. The consequences for internal, almost introspective, tension between these two iconic camps of conservative thought—Scylla and Charybdis—should be addressed in a sequel edition.

### IV. CONCLUSION

Overall, the editors, Professors Sloss, Ramsey, and Dodge, deliver cogently on their commission. Interested readers should find this book enormously enriching and should consider giving *International Law in the U.S. Supreme Court: Continuity and Change* their thoughtful attention. This is not to say that this multi-essay book does not suffer from its limitations, notably the failure to account for the interaction between private international law and US domestic law.

The international legal academia in the United States must take a broader view of conservative and libertarian arguments than it previously has. A parting word is that like US policy writ large, US jurisprudence is subject to the scrutiny of “a candid world.”\(^{61}\) Whatever the predominant inclination of the international law academia in the United States, the populace at large is much more philosophically diverse. The international law paradigm in the United States will benefit immensely from conservative, libertarian, and commercial voices. International law is not going anywhere, and constitutional conservatism (of whichever stripe) arguably asserts the prevailing narrative at the highest echelons of the Judiciary these days. The same might be said of the present Supreme Court’s insistence on resolving disputes in a pro-corporate direction suffused with a penchant for consumer welfare-maximization.\(^{62}\) It should not, therefore, come as a stunning surprise when most judicial conservatives in the United States embrace certain business-friendly attributes of international

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60. See, e.g., BMW v. Gore, 517 U.S. 559, 600 (1996) (Scalia, J., dissenting) (“At the time of adoption of the Fourteenth Amendment, it was well understood that punitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved.”).

61. Declaration of Independence (U.S. 1776).

economic law and interpret the Constitution in light of those principles. Nor is a directional pull necessarily illegitimate unless there has been an explicit presumption that such a pull is not influencing the analysis. The tension between the originalist method of constitutional interpretation keeping out the international ethos and the corporatist preferences will be fascinating to observe. It might even presage the new frontier of constitutional conservative thought.

In a future edition, the editors might be advised to add analyses discussing these new debates and directions. Consequently, the editors and their readers would be able to envision that those who had hitherto been international law’s critics, and virtually written off by progressive constitutionalists, might become international law’s “qualified” champions due to sincere concerns of sovereignty deficit. The editors and their readers might also appreciate more fully that the neat philosophical fault-lines do not always hold true. For intellectually sound reasons, sometimes progressive constitutionalists in America sweepingly distrust foreign judicial proceedings, and once in a while conservatives harmonize domestic decisions with foreign courts’ interpretations of the same treaty. A manageable truce remains possible and even probable.

Some jurists believe that international law has become über-American[ized], meaning that the US legal system’s values and processes are imported into international law through what is sometimes seen as a one-way pipeline. American conservatives and progressives might show the collective

63. Depending on how the Supreme Court resolves Bond v. United States, cert. granted, 133 S. Ct. 978 (2013), this term, it may become necessary to decide the same questions apropos of the treaties into which the United States has entered.

64. Compare Kal Rausila, Rethinking the Sovereignty Debate in International Economic Law, 6 J. INT’L ECON. L. 841 (2003) (arguing that typically nations that fear their sovereignty is being eroded by international organizations are already suffering from a corrupted domestic system while international organizations actually help them reclaim their sovereignty) with M. Sornarajah, Power and Justice: Third World Resistance in International Law, 10 SING. Y.B. INT’L L. 19, 32 (2006) (arguing that, generally speaking, international law systems are not worthwhile because of the domestic sovereignty that is abdicated).

65. SLOSS, ET AL., INTERNATIONAL LAW IN THE U.S. SUPREME COURT, supra note 1, at 549; see, e.g., Small v. U.S., 544 U.S. 385, 390 (2005) (Justice Breyer’s majority opinion observing that foreign or at least Japanese legal proceedings “somewhat less reliably identify] dangerous individuals for the purposes of U.S. law where foreign convictions, rather than domestic convictions, are at issue.”).

66. See, e.g., Olympic Airways v. Husain, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting) (“Today’s decision stands out for its failure to give any serious consideration to how the courts of our treaty partners have resolved the legal issues before us.”); Hartford Fire Ins. Co. v. California, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting in part) (“[E]ven where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law.”).

67. See, e.g., W. W. Park, Arbitrators and Accuracy, 1 J. INT’L DISP. SETTLEMENT 25 (2010) (“Evidentiary tools in [international] arbitration should balance sensitivity towards cost and delay against the parties’ interest in due process and correct decisions); id. at 27.

68. This is not to say that the international adjudicative process does not need transparent streamlining. Even the best-informed lawyers find it difficult to predict how a specific tribunal might
Dasgupta: Book Review, International Law in the U.S. Supreme Court: Continu
2014] INTERNATIONAL LAW IN THE U.S. SUPREME COURT 267

willingness to learn from international law as well. This fortress ensconcing the
“law of nations” might augment its legion of defenders and the consequent
intellectual sturdiness—or a host of reasons might counsel differently. In any
case, the “law of nations” and the conservative and libertarian legal traditions
will be mutually enriched.

respond to close jurisdictional (“ritual[istic]”) questions, rendering the international “legal syste[m]”
rather a “mystery . . . [that is] baffling to everyday citizens” and is “preside[d] over” by “priests”
(and comprehended exclusively by the cognoscenti in the field). BRUCE M. NASH, ALLAN ZULLO &
KATHRYN ZULLO, THE NEW LAWYER’S WIT AND WISDOM: QUOTATIONS ON THE LEGAL
2014

Book Review, The New Global Law by Rafael Domingo

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Recommended Citation
Available at: http://scholarship.law.berkeley.edu/bjil/vol32/iss1/9
Hajjaji: Book Review, The New Global Law by Rafael Domingo

Review of The New Global Law by Rafael Domingo

Shams Al Din Al Hajjaji*

I. INTRODUCTION

In his book The New Global Law, Rafael Domingo Osle, Professor and Former Dean of Navarra School of Law, makes a wide-ranging argument in favor of globalization.1 While this book is his latest publication, Domingo has previously written a variety of legal articles and books supporting globalization. This book is an expansion of his previous article, The Crisis of International Law, which was published in the Vanderbilt Journal of Transnational Law2 and is used as a chapter in the book. Domingo offers a theory and practice—global law—that he argues will replace the existing corrupt regimes. Even though it is clear that Domingo is a proponent of globalization the new utopia that he calls for appears difficult to accomplish.

Throughout the book Domingo calls for the utopia that is represented in globalization. He presents many ideas that are very hard to combine in one sentence, even though all are heading toward the same objective: the new global law. In the course of his argument, Domingo tackles the issue of globalization from different perspectives. He attempts to frame a social, philosophical, historical, and realistic theory about globalization, which would need more than one book to develop fully. He starts his argument with ancient history from before and during the Roman Empire, and proceeds to the modern legal system. He argues in favor of a new legal order that is being developed and believes in human dignity and global justice rather than in state sovereignty and valid norms. Supporting that argument, he maintains that globalization is inherent to

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** The writer would like to thank Rory Collins, Megan Niedermeyer, Elliot Shackelford, and Tara Capsuto for their helpful and constructive comments, and my wife for her continuous help and support.
human nature and civilization and he expresses great ambition about the future global justice system. The author’s optimism leads him to make arguments at various points in his book that are inconsistent with the current legal order.

II.
SUMMARY

The New Global Law is divided into two main parts: part one, which includes the first three chapters; and part two, which includes chapters four through seven. In part one of the book, titled “From the Ius Gentium to International Law,” Domingo provides the historical context of globalization, following the approach taken by John W. Meyer in his article Globalization Theory and Trends. 3 Both writers tackle the issue of globalization from the origin and nature of the concept. However, while Meyer starts from modern history, Domingo goes even further back. He begins with ius gentium, or the law of nations in the Roman Empire. In so doing he may be one of the only writers to trace the history of globalization to this depth. Domingo tries to prove that globalization has been embedded in human civilization since its inception. 4

Domingo adopts a historical approach to deal with the idea of justice and law, beginning in the first chapter with the Roman Empire and the way it drew on the Greek concept of justice to develop the ius gentium. 5 He explains the role of the Greek goddess, Dike, in developing the concept of justice and equality, ideas that the Roman Empire built upon. 6 In turn, the law of nations and philosophers like Cicero played a major role in advancing international law. Cicero’s most significant contribution was his description of the ius gentium. 7

In the second chapter, Domingo focuses on the Middle Ages and argues that the dominant legal system in Europe during that period was the European common law, which continues to be the dominant legal system in Europe today as well. 8 He states that “common law consolidated in the United States to become the most influential legal system in the world.” 9 He claims it is the most just system, as it develops through judicial practice away from the state authority. 10 As he notes, “[i]ndeed, this was a system of judicial authority upheld by the principle of stare decisis, which limited royal authority through the rule of law.” 11 He contends that the common law dominates not only at the national

4. DOMINGO, supra note 1, at xviii.
5. Id. at 5.
6. Id.
7. Id. at 7.
8. Id. at 14, 16.
9. Id. at 16.
10. Id. at 17.
11. Id.
level, but also at the international level. He argues that the law of nations prevailed during the Middle Ages, and by consequence, influenced the common law rule of Europe, which later affected Western legal traditions.

In his serious endeavor to prove the influence of the global law over the common law, Domingo turns to the Islamic Sharia’s provisions. He argues that the Islamic Sharia is a common law system with a law of nations represented in the Siyar. The Muslims came to know the Siyar when they first came in contact with non-Muslims. At that point they split the world into two divisions: the House of Islam (Dar el Islam) and the House of War (Dar el Harb). Domingo states that the rules governing the relationship between Muslims and non-Muslims started with the Hanafi Jurisprudence. Islam treats Muslims—the “people of the book”—and non-Muslims differently. It is unclear whether Muslims recognized any non-Muslim rights within their territory. The writer does not provide a concrete answer about the issue of the different treatment of Muslims and non-Muslims in the Dar El Islam and Dar El Harb; this was a significant difference because it affected the rules of war and peace.

In the third chapter, Domingo discusses the modern concept of international law from the fourteenth to the nineteenth century. During such period, the conflict between positivist law and natural law led to the formulation of a new concept: the international system of states. Domingo states that the ius gentium, or the law of nations, took on another dimension towards an international system of states by the fourteenth century. Spanish, English, and Italian scholars led these new tendencies toward the formulation of the law of nations. These scholars affirmed the view that the need for communication between nations is a universal necessity. Thus, scholars at that time set the foundation of modern public international law based on the concept of ius gentium.

12. Id.
13. Id. at 14.
14. Id. at 15.
15. Id. at 19.
16. Id.
17. Id. at 20.
18. Id.
19. People of the book in Islam are Christians and Jews, and may also include the followers of Abraham (called Sabian in Islam). Sabian believe in God, but they do not have a book like the Bible or Quran. The Quran states that “the Believers, and the Jews, and the Christians and the Sabian—whichever party from among these truly believes in Allah and the Last Day and does good deeds—shall have their reward with their Lord, and no fear shall come upon them, nor shall they grieve.” QURAN, Al Baqarah 63.
20. DOMINGO, supra note 1, at 22.
21. Id. at 26.
22. Id. at 23.
Domingo focuses on the role philosophers played in developing legal concepts and advocating for the idea of a world republic. These philosophers tried to face the reality that international law was founded on the principle of nationality. In regard to Germany, Domingo refers to Kant and his view that law “makes all people citizens of the planet and members of a world republic.”

Looking at France, Domingo focuses on the philosopher Jeremy Bentham, the father of modern international law and one of the most influential philosophers of the French Revolution. Bentham’s *Principles of International Law* was the first book to call the law of nations “international law.” At that time, the new science of law, which was international law, was founded on the principle of nationality. Hence, Bentham used the word “universal” to refer to all nations.

Domingo then considers other writers, seemingly not based on specific criteria. He discusses Philip C. Jessup’s *Transnational Law*, which as the title implies, discusses transnational law instead of international law, as well as C. Wilfred Jenks’s *The Common Law of Mankind*, which focuses on human prosperity and international peace. The author also discusses John Rawls’s *The Law of Peoples*. Rawls described another form of utopia in which people govern themselves by what he called the “law of peoples,” and through this they form a union accordingly. Finally, Domingo discusses the philosopher Alvaro d’Ors and his theory of national states and sovereign states.

Domingo argues that natural law is the most significant concept in legal history. He contends that natural law was the main reason for legal prosperity during the Roman era and the French Revolution. The rules of natural law were built on the Christian *ius naturale* and medieval canon law. Natural law obligations are recognized by many legal systems in the world that were based on Roman law. It is a binding feature on everyone’s conscience, even though natural law is not enforced in a court of justice. The writer argues that global law must, but does not yet, have the acceptance of natural law in order to build the new global law on the people’s dignity rather than the state’s sovereignty.

In the second part of the book, titled “Toward a Global Law,” Domingo moves on to the present situation: international law under the provision of the United Nations (UN) since the Second World War. Creating an “effective and

23. *Id.* at 29.
24. *Id.* at 30.
25. *Id.* at 31.
26. *Id.* at 37, 39.
28. DOMINGO, *supra* note 1, at 41.
29. *Id.* at 43.
30. *Id.* at 45.
31. *Id.* at 46.
32. *Id.* at 49.
33. *Id.*
powerful” UN was the highest legal aim of international law during that era. Even though this aim was the same as that of the pre-World War II era, he argues that the new international law must have a new aim, and he proposes the establishment of the new global law as this aim. In four chapters—The Crisis of International Law, A Challenge for Our Time, The Global Legal Order, and Legal Principles of Global Law—Domingo discusses the transformation from the old to new legal order, and from the old to the new system that he proposes in the book. He discusses that after introducing the historical context and background of the international relationships.

In chapter four, the author tackles globalization like a constitutionalist, concentrating on the UN, its charter, and its function. He follows the structure of the arguments laid out by Erika De Wet in her article *The International Constitutional Order* and Bardo Fassbender in his article *The United Nations Charter as Constitution of the International Community*. While De Wet proposes a new understanding of constitutional law as “building blocks of the international community,” Fassbender goes beyond that to declare that the UN Charter “is the constitution of the international community in its entirety.” Even though Domingo takes the same approach in proposing the necessity of an international constitution for the whole globe, he is against the existing systems, especially the UN. He calls for a new constitutional system to be developed, outside of the UN, which would be manifested in the emergence of a new global law.

Domingo discusses the modern crisis of international law, asserting that its rules are no longer able to achieve the needs behind its inception. He proposes a new global law as a solution. According to him, “if states are internationalized, society is globalized.” The new definition of international law, in the author’s view, must be broad enough to regulate the international community but must also focus on individuals.

In chapter five, the writer addresses the challenges of our time. He calls for a new global law that would be formulated away from the inefficient old standards. The new standards must build on the dignity of the global law, not the sovereignty of international law. The individual would be the main focus under his proposed law. There will not be one law for the sovereigns and

34. *Id.* at 54.
40. *Id.* at 56.
41. *Id.*
42. *Id.* at 98.
another for the individuals, but one law for all its subjects. Globalization has paved the way for the new law to prevail after the collapse of the old system.

The author further explains that there is a need for the formulation of a “global human community” that, like current international law, avoids homogeneity of some societies over others. The fate of the formulation of the new global community relies on the elimination of the sovereign state. The limitations of national rule have paved the way to search for a new international legal order. Due to national barriers in international law, states are equal, while individuals are not. People are not free to move between states due to nationalistic barriers. The idea of nationality is attached to the sovereign state.

Immigration is one of the most prominent problems related to the issue of nationality. Most states’ legislation on this issue violates international human rights standards, especially freedom of movement. States have to stop setting up barriers to their national immigration laws in order to fulfill international human rights standards. Domingo offers a solution for nationality and immigration in global law. Under global law, there will be no boundaries amongst people depending on language, place of birth, gender, or race; it would be one global human community.

In chapter six, Domingo sees individuals as the main concern in the new global order. He proposes that “persons are distinguished by their genuine dignity, their natural freedom, and their radical equality.” Domingo calls for a new institution that will replace the UN. This new institution must be established according to modern standards; it shall have a global parliament, law, and tribunal—this is the new legal pyramid that he proposes. The legal pyramid of the new global law as he states “is not normative, like Kelsen’s, but ultimately personal, social, and human.”

Finally, Domingo proposes that newly-established global law will shape the new global order and he lays out seven principles of global law. These principles are divided into two main areas. First, there are three principles common to international and global legal orders: the principles of justice, reasonableness, and coercion. Second, the principle of global order includes four other main sub-principles: the principles of universality, solidarity, subsidiary, and

43. Id. at 99
44. Id. at 119.
45. Id. at 102.
46. Id. at 105.
47. Id. at 106.
48. Id. at 107.
49. Id. at 131.
50. Id. at 145.
51. Id. at 149.
52. Id. at 157.
horizontality or democratization. He starts the book with the principle of justice, discusses it throughout the book, and finally he comes back to the concept at the end of his analysis. He tries to highlight the concept of justice in global law to show its applicability in the current legal context.

III. DISCUSSION

After reading The New Global Law, one appreciates the great effort that the writer put into this book. He tries to build a new utopia, similar to the one that was proposed in Plato’s Republic. In a world where the concepts of justice and equality are subject to political decisions, the author tries to offer a modern concept of justice and apply it to reality. Nonetheless, there are areas where Domingo and other scholars could improve. This piece provides five areas of critiques of the book, grouped by category.

A. Overlooking Key Legal Concepts

1. Justice in Roman Law

In the Roman law section, the author raises many questions in the reader’s mind without giving answers, such as: What is the limitation of justice? Is it for all humankind or it is just exclusive to the people of the same creed? Did Socrates really believe in equality between the Greeks and the Barbarians? And did the invention of the new Praetor Peregrinus really control the justice process between foreigners? Domingo leaves these questions unanswered, begging the reader to find answers on their own.

Domingo argues that “justice exists in all civilizations.” The Greek philosophers developed such a concept. Then, it was transferred to the Roman philosophers like Cicero. However, the question about what is just and what is unjust is an unsolved question generally, whether in international or national laws. The legal formality of the Roman law was actually a sign of injustice. Firstly, the concept of the new Praetor Peregrinus that the writer used was invented in the Roman era. It was fabricated for mere civil and commercial reasons. The role of Praetor Peregrinus was limited to foreigners’ disputes, as

53. Id. at 157-58.
54. Id. at 159.
55. DOMINGO, supra note 1, at 5.
56. Id. at 7.
jus civile prohibited foreigners from resorting to Roman trials as a means to achieve justice. 58

Secondly, Domingo maintains that the idea of justice is synonymous with equality. 59 However, the Roman population did not even enjoy such equality. From the perspective of gender equality, women in the Roman Empire were unable to take any part in government and society, 60 unlike in neighboring Egypt, where there were two women kings, Cleopatra (69-30 BC) and Hatshepsut (1508-1458 BC). Moreover, in the Roman Empire women were deprived of the right to control their property and if they did, they would be prosecuted for “unauthorized exercise of guardianship.” 61 Guardianship of a woman started with her father and was then transferred to her husband. 62 Hence, for the author to consider Roman law as a system of justice that should be replicated is a perhaps troubling and unrealistic proposal.

2. Common Law versus Civil Law

Domingo presents common law as the dominant law in the world’s justice system. He ignores the civil law countries within Europe and he reduces the European legal system to the common law system. 63 However, civil law is the dominant legal system in Europe, where all the countries except the United Kingdom are considered to be civil law countries. He tries to convince the reader of the domination of the common law system because the role of the judge in justice administration is higher in common law systems than in civil law systems. Thus, in the author’s concept of global law the importance of common law would serve the concept of justice rather than that of validity.

Moreover, Domingo does not justify the comparison between the common law and civil law in his argument, and shows his bias toward the common law system. There is no longer any national legal system that is purely common law, while other systems are purely civil law. Even the US legal system is now characterized as a mixed legal system, and is no longer claimed to be pure common law. 64 In short, legal systems are now integrated rather than distinct. The proposal that one legal system is superior to all others is no longer generally accepted. Furthermore, the idea of a supreme legal system contradicts the very

59. DOMINGO, supra note 1, at 5.
63. DOMINGO, supra note 1, at 4.
64. CHARLES F. ABERNATHY, LAW IN THE UNITED STATES 2 (2006).
idea of global law that he proposes, because it would mean one nationalistic legal system having priority over a system created for people.

Even assuming that common law is the dominant law of the world, Domingo is still not able to make a convincing argument that common law is the best system or that common law should be the foundation for the new global law. He does not spend much time articulating his argument against the civil law system. He simply presents the merits of the common law system, instead of integrating it into his proposed thesis. Of course, no one can assume that the civil law system is the best legal system either. It contains its own deficiencies, but this does not mean the common law is a faultless divine revelation.

B. Sharia Law and Global Law

In his endeavor to focus on and promote globalization, and to prove that it is embedded in all legal systems, Domingo touches on the Islamic legal system unnecessarily and unconvincingly. He argues that “Sharia is common law.”65 However, he mentions later in the same sentence that those states that apply Sharia (Egypt, Saudi Arabia, Iran, and Morocco) are civil law countries, not common law. Categorizing the structure of Sharia law is complicated because it combines concepts of natural law, socio-legal approaches, and legal positivism.66 Even though scholars intended Islamic law to be a global law, its struggle with plurality was meant to be within the context of the global Muslim presence.

Internally, there are issues within the system of Islamic Sharia law that make it an inappropriate system for Domingo to apply towards a new global law. The conflict between what is divine and what is earthly was much easier during the days of the Prophet’s life, while this conflict got more complicated after his death. During the Battle of Badr, the first Muslim war against non-Muslims, one of the Prophet’s companions, El Habab ebn Monzer, asked him a question regarding the position of the Muslim soldiers on the battlefield.67 El Habab said, “Is this place where we are, a place that Allah chose for us, or is it a place of your choice based on war tactics and intrigue?” The Prophet said, “No it is based on war and intrigue,” to which El Habab answered that the place is not a good place for war and he recommended they reach a place where they find enough water.68 In this Siyara, the Prophet and his companions set a clear rule between what is divine and what is earth. The significance of this differentiation is that any decision made by Allah (God) is undisputed, while a decision made by the Prophet based on his own knowledge is arguable and can be contested, as noted in the example of El Habab. Consequently, Domingo’s

65. DOMINGO, supra note 1, at 19.
66. WERNER F. MENSKI, COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEM OF ASIA AND AFRICA 279 (2d ed. 2006).
67. IBN HISHAM, 2 AL SIRA AL NABAWIYA 278.
68. Id. at 278.
argument about the Islamic Sharia is inapplicable to a new global legal order because it will always have to face what is earthly and what is divine, in a world that believes in a separation between them (this is known as the separation between the church and the state, in the American legal tradition).

C. Utopia and World Bias

Domingo tries to convince the reader that the call to globalize the world is as old as eternity. He builds his argument on philosophers’ ideas of utopia and how people should act within a utopia. This section raises many questions, such as: Is globalization the right solution to achieve this utopia? Were the Bill of Rights and the Declaration of Human Rights the first to admit such rights at the international level? Were the people who worked to achieve these declarations really devoted to the concepts? I believe the answer to this last question is no. States send their public figures or politicians to defend their own views, which sometimes reflect national wrongs like discrimination based on color or sex. I refer to these distorted views as “national-wrong bias.” A good example is Eleanor Roosevelt, the US delegate and chair of the UN Commission on Human Rights between 1946 and 1950. She also chaired the Commission’s working group that drafted the Universal Declaration of Human Rights (UDHR). She was a universally admired figure and, by all accounts, played a key role both in bringing the Declaration to fruition and in ensuring official US support for the outcome. People saw her in a positive light because she supported African Americans and fought for their rights and for social equality.69

On the other hand, she had an inclination and bias in favor of the international image of the United States over the genuine interests of the human rights cause. Two situations support such a finding. The first is when, as chair of the UN Commission on Human Rights, she opposed a complaint to the UN charging South Africa with racial discrimination and recurrent human rights violations. She took this stance because she saw that confronting discrimination by whites against blacks in South Africa would trigger a similar reaction around the world and would probably draw criticism of the US domestic policy toward African Americans. That was a risk and a blemish to the American image that she would not tolerate.70

Second, Ms. Roosevelt fought hard for the inclusion of a clause in the Declaration of the Human Rights that allowed federal system states, such as Georgia, to completely disregard the treaty.71 Such action led the US Supreme Court to struggle to enforce the Fourteenth Amendment and its Equal Protection Clause under strict scrutiny review in Loving v. Virginia.72 Politically and

69. HENRY SEINER, PHILIP ALSON & Ryan GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALES 135 (3d ed. 2008).
70. Id. at 137.
71. Id. at 138.
72. 388 U.S. 1 (1967).
socially, this struggle started with the Civil War. Judicially, however, it started with Justice Harlan's dissent in *Plessy v. Ferguson*: “Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.” While the Supreme Court tried to eliminate racial discrimination by holding it to heightened scrutiny, Eleanor Roosevelt was not completely convinced that such discrimination should be held to any international scrutiny. Domingo will need a different type of international leader to achieve his dream of a global law; real leaders, who seek justice rather than political arrangements and consideration, are still rare in human history.

**D. Global Law versus States**

Domingo knows that to convince the reader of his theory he has to diminish the importance of state and national elements. He confronts these state elements—like sovereignty, territoriality, and jurisdiction—in the international law arena. For sovereignty, he represents the argument against state sovereignty as if it were a conflict between positive law and natural law. The idea of the state, as Kelsen refers to it, is related to positive law jurisprudence, which is built on the ability of the state to enforce law. Domingo describes sovereignty as the person’s will. It is the person’s will that gives the state the power over its territory. England, the United States, the Ottoman Empire, the German Empire, the Holy Roman Empire, and many other states in history were built on the philosophy of sovereignty.

For territoriality, the writer offers the principle of suitability as an alternative to the principle of territoriality. The principle of territoriality depends on the territory element of the state, where states exercise exclusive jurisdiction over their nationals. Yet he does not offer a complete and comprehensive view of his new principle of suitability. He leaves the reader to guess the definition of the principle of suitability or opportunity. In his justification of the principle of suitability he states:

> If we want to perpetuate its mission, the principle of territoriality must be loosened in the civil law as well as in the common law, and perhaps more so in the latter because common law—especially US law—forcefully deployed the principle of territoriality for a variety of historical reasons. In the realm of jurisprudence, territoriality must be made a principle of suitability or opportunity, not the decisive criterion of justice, much less a demand of state sovereignty or an impulse that leads ultimately to secession.

73. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
74. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 383 (1945).
75. DOMINGO, supra note 1, at 65.
76. Id. at 66.
77. Id. at 76.
78. Id. at 76.
As for jurisdiction, he connects the idea of universal jurisdiction, where international criminals can be haled into court anywhere in the world for particularly egregious crimes. However, universal jurisdiction requires universal agreement. Courts cannot impose jurisdiction over a crime without having at least one standard of jurisdiction, such as territory, which Domingo opposes in the previous section of his book. Besides, Domingo assumes that there is a universal agreement on crimes against humanity. Why, then, did some states not ratify the ICC statute? The answer is simple. The convention would contradict their direct and indirect interests. Domingo’s attempt to equate universal jurisdiction with the idea of universal justice cannot be wholly substantiated, as there is no such universal agreement over many aspects of the international crimes.

E. The Danger of the Idea of a Unified World

Domingo tends to unify the world in one state, one power, and one law, which is The New Global Law. However, he has forgotten the diversity of the world. People are not the same. They differ within the same nation, let alone across the world. He categorizes the world into two poles, one in favor of the global law and the other against it, leading to a very dangerous “either you’re with us or you’re against” sentiment. The following articulates two examples from the facts that he uses.

The writer bases his analysis of global law in Islam on the writing of certain Muslim scholars who separated the world into two poles. The two poles are the House of Islam (Dar el Islam), and House of War (Dar el Harb). However, this separation is only half the truth. When Islamic scholars invented such concepts as the House of Islam (Dar el Islam) and House of War (Dar el Harb), they tried to develop other concepts, including the concepts of House of Safety (Dar al Amn), House of Invitation (Dar al Dawa), and House of Truce or Treaty (Dar al-'Ahd). This embrace of diversity was one of the reasons that the Islamic state endured for more than thirteen centuries from the Prophet state until the fall of the Ottoman Empire after World War I.

In the last decade, George W. Bush adopted the same rhetoric in dealing with the world during his war against Afghanistan. He stated in his speeches “either you’re with us, either you love freedom and [are] with nations which embrace freedom, or you’re with the enemy. There’s no in between.” In the second war with Iraq, both Germany and France, who were allies of the United States in the previous war, did not back the United States.

79. Id. at 81.
80. Id. at 20.
81. With Us or Against Us, YOUTUBE (Mar. 7, 2008), http://www.youtube.com/watch?v=-23kmhc3P8U.
Hajjaji: Book Review, The New Global Law by Rafael Domingo

French President (1995-2007), explained in an interview with CNN why he was opposing the war against Iraq, “if I see my friend or someone I dearly love going down the wrong path, then I owe it to him to tell him, to warn him, be careful. From my experience on the international political stage, I am telling my American friends be aware, be careful...[t]his is can be very dangerous.” If we apply the polarizing “with us or against us” rhetoric, then the question becomes whether France joined the enemy unjustifiably or whether the war was in fact an illegal act. Kofi Annan, the UN Secretary General (1997-2006), condemned the US-led invasion of Iraq as an illegal act. However, Domingo refuses to tackle the consequences of such a two-pole world.

On the other hand, Obama’s speech in Cairo was also a landmark in US foreign policy, particularly in contrast to previous rhetoric about a two-pole world. He spoke about the importance of understanding diversity and accepting it; this represented a major evolution of the idea of a two-pole world. Obama made it clear in his speech that “I’ve come here, to Cairo, to seek a new beginning between the United States and Muslims around the world. One based on mutual interest and mutual respect, and one based upon the truth that America and Islam are not exclusive and need not be in competition. Instead they overlap and share common principles. Principles of justice and progress, tolerance, and the dignity of all human beings.” While the US administration has learned from world history that it must have a new beginning and accept the other, Domingo—arguing in favor of The New Global Law as the righteous law—has not yet realized the necessity of accepting the other and creates divisions in his version of the new global law.

IV.
CONCLUSION

In The New Global Law, Domingo develops a unique argument about justice and the formation of a new global law. He tries to build a new utopia, like the one that was proposed in Plato’s Republic. In a world subject to political decisions, he tries to offer modern concepts of justice and equality that will succeed in reality. Even though he does not offer a complete view of many issues, he still deserves credit for his attempt to search for and impose new ideas on legal reform of existing international law.

83. Be Careful! Chirac to USA, YOUTUBE (Dec. 24, 2010), http://www.youtube.com/watch?v=wX2rS6p3akw (Jacques Chirac interview with CNN).
85. President Barack Obama Speech Cairo University, Egypt, YOUTUBE (June 5, 2009), http://www.youtube.com/watch?v=2TcyZUMUG2A.
86. Id.
Book Review, New Media, Old Regimes by Lyombe Eko

Lexi Rubow
Rubow: Book Review, New Media, Old Regimes by Lyombe Eko

Review of *New Media, Old Regimes* by
Lyombe Eko

Lexi Rubow*

I.
INTRODUCTION

The international nature of modern communication technologies, particularly the Internet, has turned previously domestic issues into global ones, challenging conceptions of jurisdiction and sovereignty “that were tailor-made for geographical spaces in the real world.” Comparative communication law provides a theoretical lens for interpreting the impact of modern technology in different political and cultural contexts. Although the value of comparative communication law has become more apparent as technology has placed different cultures into direct contact (and sometimes into conflict), Lyombe Eko notes that the field has not been thoroughly developed. In his book *New Media, Old Regimes*, Eko intends to fill a gap in comparative communication law by compiling his analyses of recent events into one volume, “mapping the terrain” for modern comparative and international legal analysis.

Eko succeeds in creating an interesting and informative catalogue of case studies, which are described below. These case studies use foundational communication law theories to attain a depth of comparative perspective rarely found in analyses of current events. However, Eko does not provide sufficient continuity between these case studies or synthesize his arguments into a cohesive thesis. The result is a slightly disjointed presentation of interesting analyses that Eko has previously published as individual journal articles.

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1. **LYOMBE EKO, NEW MEDIA, OLD REGIMES** 103 (2012).

2. Eko is Associate Professor and Associate Director for Graduate Studies at the University of Iowa School of Journalism and Mass Communication. He specializes in comparative media law and international communication. Eko has published a number of papers analyzing recent international events through the lens of communication law theory. Lyombe Eko, THE UNIVERSITY OF IOWA, SCHOOL OF JOURNALISM & MASS COMMUNICATION, http://clas.uiowa.edu/sjmc/people/lyombe-eko (last visited Oct. 24, 2013).

3. See Eko, supra note 1, at 3.

II. SUMMARY

The book begins with several chapters discussing the theoretical underpinnings of comparative and communication law. These chapters, while interesting, rely too heavily on quotes, which is confusing to the uninitiated. Eko discusses the same issues again in each of the case studies, so the introductory chapters are also redundant. The case studies that follow are essentially a repackaging of articles that Eko has separately published in various scholarly publications. The connection between these articles is tenuous at best, and to the extent that the author defines a thesis in the first few chapters, he does not connect the case studies back to any centralized theme. In examining the resulting variety of information, I have reorganized and refocused selected case studies in a way that will hopefully make the underlying themes more clear.

A. Instrumentalization of the Internet and Networked Social Media in the Arab Spring of 2011 in North Africa

Unlike past forms of technology, which totalitarian governments could utilize unilaterally to control citizens, the Internet places unprecedented opportunity and power in the hands of the citizens themselves. In this section, Eko explores the instrumentalization of social media and the Internet during the Tunisian, Egyptian, and Libyan revolutions of April 2011. Instrumentalization involves the transformation of neutral objects or infrastructures into tools to gain power over others. Eko posits that during the Arab Spring of April 2011, the crumbling regimes and citizens of Tunisia, Egypt, and Libya, as well as international corporate powers, instrumentalized social media and the Internet as offensive and defensive weapons in the struggle to gain or maintain power.

Prior to the Arab Spring, North African governments tightly restricted freedom of expression on the Internet, controlling the flow of data between their nations and the outside world and censoring content through ownership of national Internet Service Providers (ISPs).

A Tunisian man initiated the Arab Spring in December 2010 when he posted cell phone footage to Facebook showing his cousin self-immolating in protest against the Tunisian authoritarian government. The video went viral and Al Jazeera soon televised the footage. As anti-government demonstrations


5. EKO, supra note 1, at 129.
6. Id. at 78.
7. Id. at 139.
8. Id. at 133-38.
9. Id. at 130.
10. Id.
erupted in Tunisia, Egypt, and Libya, revolutionary citizens continued to use social media to mobilize and inspire protestors, posting footage of their respective governments’ violent attempts to suppress the uprising. The Tunisian government responded by blacking out a number of websites that were broadcasting information and attempting to hack the Facebook and Twitter accounts of dissidents. The Egyptian and Libyan governments completely severed their countries’ Internet connection to the rest of the world.

As the protests gained international publicity, various international and third-party organizations began instrumentalizing social media to assist the protesters. The “hacktivist” group Anonymous launched “denial of service” attacks on Tunisian government websites. Facebook increased security around Tunisian citizen accounts, allowing them to continue utilizing social media as a tool of resistance. Google developed a “speak-to-tweet” service, a phone number that would instantly tweet voicemails from Egyptian citizens, using the hashtag “#egypt.”

Eko uses the Arab Spring case study to demonstrate that the instrumentalization possibilities inherent in modern media are significantly different from older media forms. Although North African governments modeled their strict top-down regulation and Internet censorship on past media control strategies, the activists and hacktivists of the Arab Spring demonstrate that both sides of a power struggle can instrumentalize new media. Eko therefore posits that it is much more difficult to use the Internet as a tool for suppressing dissent than it was to use older media forms.

B. Propaganda and the Laws of War in the NATO/Yugoslav Conflict of 1999

The instrumentalization of modern media and its potentially momentous impact on power struggles raises important questions of international humanitarian law, as traditionally civilian institutions are now engaged in warfare. Eko uses the Yugoslav case study to discuss whether the NATO bombing of the state-run Radio Television Serbia building violated international humanitarian law. Despite the devastation caused by the state-run Serbian propaganda campaign, Eko concludes that all media producers were and continue to be civilians and should be protected.

11. Id. at 130-31.
12. Id. at 144.
13. Id. at 145.
14. Id. at 151.
15. Id. at 153.
16. Id. at 152.
17. Id. at 154.
18. Id.
19. Id. at 400.
In the 1990s, Serbian President Slobodan Milosevic attempted to maintain power in the crumbling Socialist Federal Republic of Yugoslavia through a campaign of ethnic cleansing and heavy propaganda. He eliminated the private press and used the state-run Radio Television Serbia to “fan[] the flames of nationalism and ethnocentrism.” In response, NATO embarked on its own “information war” with the goal of using NATO propaganda to counteract Milosevic’s attempted brainwashing. When the Serbian citizenry did not respond to NATO’s propaganda by rising up against Milosevic, NATO bombed the Radio Television Serbia building and most of the rest of Yugoslavia’s communications infrastructure. Eko sees this strategy as highly controversial because international law generally forbids attacks on civilians. Unfortunately, as Eko points out, international judicial bodies never satisfactorily determined whether such action runs afoul of international humanitarian law. Although the surviving relatives of Radio Television Serbia employees brought suit under the International Court of Justice and the European Court of Human Rights, both suits were dismissed on jurisdictional grounds. While Eko concedes that Milosevic did use the broadcasting facility to devastating military effect, he contends that NATO’s actions violated multiple international laws of war designed to protect civilians, journalists, and cultural institutions. Eko urges the international community “to review and update international humanitarian law” so that future military actions against media institutions do not avoid legal challenge on technicalities.

In seeking more protection for media outlets, state-controlled or otherwise, Eko fails to acknowledge that laws classifying creators of media as civilians may need to be revised to exclude the use of communication technology to facilitate atrocities such as ethnic cleansing. New communication technologies require a reassessment of values, balancing the importance of a healthy press in times of war with the value of lives lost if the media is instigating violence. Perhaps in this case the distinction lies in the fact that Radio Television Serbia was a government-owned broadcasting station. Whatever the answer, this ideological tension demands more discussion than is provided in this case study. In fact, Eko’s automatic and rigid application of older international humanitarian law regimes seems in conflict with one of the overarching theses of the volume: evolving technology requires a reassessment of old legal strategies.

20. Id. at 382.
21. Id. at 387-88.
22. Id. at 390.
23. Id. at 393.
24. Id. at 397.
25. Id. at 399-400.
26. Id. at 400.
27. Id. at 403-04.
C. The Mohammed Cartoons Affair and the Clash of Religious “Establish(mentalities)” in Denmark and France

A recurring theme throughout this volume is the idea that freedom of expression is a pluralistic concept and its understanding and application vary depending on political and cultural context. Eko uses the Mohammed cartoon controversy to explore how the national philosophies regarding the establishment of religion in Denmark, France, and the Islamic communities therein affected their interpretation of the conflict.28

In response to what it perceived as anti-secular demands for “universal respect and deference”29 from the Muslim community, a Danish newspaper, Jyllands-Posten, published controversial political cartoons of Mohammed.30 The cartoons angered Muslim communities and spurred pockets of violence around the world.31

Despite Danish criminal code provisions prohibiting blasphemy and hate speech, Danish public prosecutors decided not to prosecute the newspaper, referencing European Court of Human Rights precedent protecting substantive freedom of expression.32 However, the Director of Public Prosecutions did give the newspaper a slap on the wrist, stating that “the freedom to express opinions about religious subjects [is] not absolute in Denmark.”33 This course of action reflects Denmark’s desire to give deference the European Court of Human Rights while still expressing its political and cultural background in established Lutheranism.

In contrast, when a French newspaper republished the cartoons in solidarity with Jyllands-Posten, the French court used the opportunity to affirm its stance that blasphemy is not a criminal offense but a “sacred right,” and denied French Arab-Islamic groups any injunctive, civil, or criminal legal relief.34 Eko asserts that this response is representative of France’s revolutionary dogma of anti-establishmentarianism, rationalism, and secular republicanism.35

Although the outcomes of the defamation suits in Denmark and France were the same, Eko reminds us that this should not “be allowed to mask major divergence of substance between the different conceptualizations of the rule of law and the place of religion in society.”36 In Denmark, the prosecutor emphasized that the Danish Criminal Code places hard limits on the freedom of

28. Id. at 21.
29. Id. at 72.
30. Id. at 163.
31. Id. at 161.
32. Id. at 172.
33. Id. at 176.
34. Id. at 193.
35. Id. at 184.
36. Id. at 200.
speech. 37 On the other hand, the French court asserted its ideology that blasphemy is a “sacred right.” 38 Eko urges both nations to review their freedom of expression policies because both have internal inconsistencies. If Denmark does not wish to enforce its anti-blasphemy criminal laws, Eko contends, it should alter its criminal code to be in conformance with both its current application of the law and with the European Court of Human Rights. 39 France, on the other hand, needs to resolve the contradiction inherent in its protection of blasphemy but prohibition of hate speech. 40

While these recommendations are insightful, Eko fails to offer any strategies for resolving the conflicts of establishmentality between European secular or nominally religious nations and Islamic communities, which Eko describes as demanding that deference to Islam prevail over secular considerations of freedom of expression. 41 Harmonization of law in European nations might provide Arab-Islamic minorities in European countries more predictability. It may also serve to deepen the divide between the two groups. Since the conflict of Arab-Islamic and European establishmentalities, not minor variations of European law, was central to the controversy, a lengthier discussion of this conflict would have made for a more robust analysis.

D. Regulation of Child Pornography under International and American Jurisprudence

The pluralistic concept of freedom of expression becomes problematic when attempting to legislate the prohibition of child pornography, since the global nature of the Internet dictates that regulation of media distribution is only as strong as its weakest link. Eko contends that the United States is this weakest link, since its exceptionalist conception of freedom of expression and “zealous application of First Amendment standards” creates a loophole for producers of virtual child pornography. 42

The European conception of freedom of expression is based on a “moral philosophical worldview” in which human dignity trumps pure freedom of expression. 43 In contrast, in the United States, freedom of expression generally takes precedence over morality and human dignity. 44 Thus, in attempting to overcome constitutional hurdles, proponents of anti-child pornography legislation had to frame the issue as a public health issue, emphasizing the

37. Id. at 176.  
38. Id. at 199.  
39. Id. at 200.  
40. Id. at 202.  
41. Id. at 72.  
42. Id. at 325.  
43. Id. at 326.  
44. Id. at 339.
“protection of the physical and psychological well-being of minors.”45 This characterization has made legislative harmonization with Europe on the subject of child pornography regulation difficult.46 The schism between European and American worldviews became apparent when the United States failed to ratify the 1989 UN Convention on the Rights of the Child.47 Eko attributes this failure to the United States’ belief that its domestic regulations regarding child pornography were superior to international laws, distrust of the treaty’s reporting requirements, and rejection of a clause in the treaty which expresses concern with the “living conditions of children in every country, in particular in the developing countries.”48

Eko states that the advent of virtual (or animated) child pornography presents potentially the greatest challenge to harmonization of international child pornography regulations because it exposes the differences in scope between the European human dignity approach and the American public health approach. With advancement in technology, children can now be virtually represented in pornography, such that it is sometimes “impossible to determine whether or not real children or photographic models of real children” were used.49 Following from their belief that all forms of child pornography, real or virtual, are injurious to the human dignity of children, the European community has expanded its definition of child pornography to include depictions of a “person appearing to be a child.”50 However, in Ashcroft v. Free Speech Coalition, the United States Supreme Court held that virtual images were not “intrinsically related to the sexual abuse of children.”51 Since US child pornography laws are based on public health rhetoric, rather than the human dignity approach, the Court reasoned that if no children are actually used in production, there is no danger to public health. Thus, any laws banning virtual child pornography would fail the constitutional strict scrutiny standard required to overcome the First Amendment’s Free Speech Clause.52

Eko asserts that the American public health approach undermines global efforts to eradicate child pornography for the following reasons. First, technology has advanced to the point that it is difficult to tell when children are used in filming and when they are virtually represented.53 Second, Eko disagrees with the idea that participation in the production of pornography is the only aspect of child pornography that is damaging to the physical and psychological

45. Id.
46. Id. at 340.
47. Id.
48. Id.
49. Id. at 343.
50. Id.
51. Id. at 344 (quoting Ashcroft v. Free Speech Coalition, 535 U.S. 234, 254 (2002)).
52. Id.
53. Id. at 344-45.
health of children. For example, he argues that “pedophiles can use images of artificial children indulging in sexual acts with adults to entice real children to participate in sexual acts.” The limited scope of American regulation of virtual child pornography thus creates a space where virtual child pornography producers can distribute their product with impunity. For this reason, Eko asserts, it is imperative that the United States harmonize its policy with that of the European community and United Nations.

E. The Internet, Minitel, and Exceptionalist Technology Policy

Eko defines exceptionalism as the philosophy of nations that see themselves as “unique political dispensations” such that “they define themselves in opposition to other countries.” For Eko, the United States and France are two prime examples of exceptionalist nations. US exceptionalism is characterized by its free market economics and libertarian interpretation of freedom of speech. France, on the other hand, emphasizes and prioritizes protecting the unique French culture and language. Through his case study of the Internet and its French counterpart, the Minitel, Eko “explore[s] the impact of exceptionalism” on the development and relative success of the two technologies.

France’s rationale for developing the Minitel and its approach to implementation are grounded in its exceptionalist mindset. Historically, France’s approach to managing and maintaining its exceptionalist cultural landscape has been the undertaking of grand projets, which Eko defines as “major industrial or cultural projects.” In this vein, during the 1970s, French scientists Simon Nora and Alain Minc advised the government that it should develop its own telecommunication technology in order to “preserve the country’s political and cultural independence.” The resulting Minitel was a telephone-based communication system that allowed users to view static content stored on remote computers using a “dumb terminal” but did not allow users to create or publish information.

The Internet was developed in response to American exceptionalist ideology that the United States was “the epitome of science and technology” and

54. Id. at 345.
55. Id.
56. Id.
57. Id.
58. Id. at 20.
59. Id. at 213.
60. Id. at 212-13.
61. Id. at 210-11.
62. Id. at 219.
63. Id. at 215.
64. Id. at 214.
that Soviet technological advancements were “threats to America’s scientific and technological superiority.”\textsuperscript{65} The Department of Defense created the predecessor of the Internet in order to increase efficiency and technological innovation through resource sharing and to distribute the network, thereby protecting it from Soviet attack.\textsuperscript{66} In the wake of particularly strong cultural and political inclinations toward free market economics during the 1980s, the US government privatized the network.\textsuperscript{67} A decade later, Congress sought to encourage even more innovation on the Internet by passing the Communications Decency Act, which shields ISPs from liability for users’ objectionable material.\textsuperscript{68} Around this time, President Clinton lobbied world leaders for minimal regulation of the Internet.\textsuperscript{69}

Ultimately, the Internet developed more rapidly, both in terms of technology and economics, and ousted Minitel from the market, even in France.\textsuperscript{70} While the United States’ decision to privatize the Internet has led to other problems, such as the issue of net neutrality, Eko concludes that the Minitel’s demise was due to France “treating rapidly evolving, innovative information and communication technologies like static cultural artifacts.”\textsuperscript{71}

\textit{F. American and French Exceptionalism and Harmonization of Intellectual Property Law}

In the international context, national exceptionalism can create barriers to policy harmonization. In this case study, Eko further explores the exceptionalist ideologies of the United States and France in the intellectual property context, investigating the “legislative balancing acts” of each nation in harmonizing their domestic regimes with the international intellectual property regime.\textsuperscript{72}

Copyright law in the United States originated in the utilitarian Copyright Clause of the Constitution, which seeks “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”\textsuperscript{73} The French equivalent to copyright reflects France’s exceptionalist culture: the protection of authors’ rights is viewed as protection of “the integrity and cultural heritage of the nation.”\textsuperscript{74} The “[a]uthor’s right,” contains two components: the economic

\begin{flushleft}
\textsuperscript{65} Id. at 222.
\textsuperscript{66} Id. at 222-23.
\textsuperscript{67} Id. at 226.
\textsuperscript{68} Id. at 228.
\textsuperscript{69} Id. at 228-29.
\textsuperscript{70} Id. at 231-33.
\textsuperscript{71} Id. at 235.
\textsuperscript{72} Id. at 302.
\textsuperscript{73} Id. at 282; U.S. CONST. art. I, § 8, cl. 8.
\textsuperscript{74} Eko, supra note 1, at 287.
\end{flushleft}
right, and the moral right of the author to protect his works against alteration and mutilation.\textsuperscript{75}

The Berne Convention of 1886, an attempt to harmonize international intellectual property law, was heavily influenced by the French intellectual property regime. The United States refused to participate, finding the Convention’s moral rights framework to be at odds with its utilitarian copyright philosophy and commitment to freedom of contract.\textsuperscript{76} In 1989, almost one hundred years later, the United States recognized that it needed to protect its artistic works abroad and ratified the Convention, but only after it made numerous reservations.\textsuperscript{77} For example, the United States still does not recognize or follow the moral rights provisions of the Berne Convention.\textsuperscript{78}

However, the advent of the Internet and the proliferation of American media intensified France’s exceptionalist cultural protectionism.\textsuperscript{79} Whereas the Berne Convention, modeled after the French tradition, posed little threat to French exceptionalism, France’s transposition of the World Intellectual Property Organization (WIPO) treaties of 1996 into domestic law was “an acrimonious, time-consuming affair.”\textsuperscript{80} France was particularly opposed to the treaties’ authorization of iTunes’ Digital Rights Management (DRM) tools.\textsuperscript{81} Although DRM protected the economic rights of artists from peer-to-peer pirating networks, media purchased through the iTunes store could not be played with any other program and, as such, Apple came to dominate online media distribution.\textsuperscript{82} France viewed this domination as “a threat to international cultural diversity, French cultural independence, and the French exception.”\textsuperscript{83} Ultimately, the domestic French version of the WIPO treaties allowed DRM, but required that companies using DRM provide other manufacturers access to their DRM software.\textsuperscript{84}

Eko concludes the case study by noting that French and American responses to harmonization efforts are contextualized by their exceptionalist ideologies.\textsuperscript{85} He states that France and the United States should be forced to harmonize, so that their reticence does not “get in the way of technological innovations that lead to the betterment of mankind.”\textsuperscript{86} However, in concluding
on this note, Eko seems to miss the evolving power dynamics between France and the United States as dominant players in intellectual property. The Berne Convention was promulgated when France dominated the international cultural landscape. The WIPO treaties, on the other hand, were enacted during American cultural domination. If he had focused on this changing global context, rather than offering a mere blanket directive for harmonization, Eko could have explored harmonization frameworks that would avoid capitulation and cultural dilution at the hands of the current dominant technological and cultural superpower.

III.

DISCUSSION

On the whole, the strength of this volume is not in what it adds to the traditional international and comparative law frameworks, but rather in what these frameworks reveal about a variety of current events and the evolution of communication technology. Using these frameworks, Eko is able to analyze current events in their native political and cultural context and thereby gain perspective and understanding. This insight is most compelling where Eko is able to draw conclusions from his analysis that give direction to national and international leaders, such as his finding that the United States needs to expand its conceptualization of child pornography if international efforts are to gain any traction. The book tends to lose steam, however, where Eko focuses on aspects of an issue or event that mesh well with his desired framework but ignores the aspects that are most practically important. For example, his analysis of the Mohammed cartoon affair would have been more valuable if he had concentrated on the conflict between the Arab-Islamic communities and the European nations in which they are located, rather than the differences between Denmark and France.

The structure of the book also severely detracts from its effectiveness. As stated above, there is a disconnect between the first five chapters, where Eko describes in broad strokes the theory behind comparative communication law and its general importance in a changing technological landscape, and the case studies. While some case studies, such as the Arab Spring analysis, might, with further explanation, fit somewhat comfortably under this general theme, others, such as the Minitel/Internet case study, seem related only due to the presence of technology. If Eko had provided more explanation, tying each case study back to a cohesive thesis, it is possible he could have crafted a more targeted and meaningful work. However, as assembled in book form, the value of this compilation lies in the strength of its constituent parts, rather than the resulting synergy.