PRIVATE AND FAMILY LIFE THROUGH THE LENS OF HUMAN RIGHTS: A COMPARATIVE ANALYSIS OF THE UNITED STATES SUPREME COURT AND THE EUROPEAN COURT OF HUMAN RIGHTS CASE-LAWS

Geoffrey WILLEMS

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Private and Family life through the Lens of Human Rights: A Comparative Analysis of the United States Supreme Court and the European Court of Human Rights Case-Laws

Geoffrey WILLEMS
Professor at Université catholique de Louvain (UCL)
Fulbright visiting scholar at Washington College of Law – American University

Abstract

Human rights guaranteed by national constitutions and international treaties now have a direct and profound impact on the legal regulation of private life and family relationships. Furthermore, judges in charge of applying bills or conventions protecting individual rights are more and more inclined to engage in different types of dialogue with their counterparts throughout the world. In this context, we take the view that there is huge interest in comparing the case-laws of the Supreme Court of the United States (SCOTUS) and the European Court of Human Rights (ECtHR) regarding private and family life. Obviously, the role of the SCOTUS and the ECtHR differ in many aspects (institutional position, textual basis of their power, composition of the seat, treatment of cases and elaboration of decisions). However, it is now widely accepted that the US Supreme Court and the European Court perform a fairly similar function which is to express the meaning of abstract liberties as applied to concrete situations and contexts with the power to censor democratic majorities. To accomplish this mission, they both face a range of difficult questions: What are the background elements that may legitimately nourish the legal discussion? How to define the scope of guaranteed rights? How to balance them against conflicting interests? How to avoid the temptation of judicial legislation? This paper explores the way the SCOTUS and the ECtHR answered these difficult questions in their case-law related to abortion, assisted suicide and same-sex marriage. It emphasises that each step of the complex process of judging human rights gives rise to a dialectical tension between a progressive, flexible, right-based and/or activist approach of decision making and a conservative, rigid, state-friendly and/or restrained conception of human rights. It concludes that each court should try to find the right balance between these two competing visions and that, in this search for a middle way, some elements of inspiration (as well as additional legitimacy) may be found in the other court's case-law.

Table

Introduction 5
I. Structural differences 6
A. National/international court 6
B. Texts 7
C. Judges 8
D. Cases 9
E. Decisions 10
II. Functional similarities 11
A. Setting the stage for human rights adjudication 11
B. Defining the scope of protected fundamental rights 12
C. Weighing rights and State interests 13
D. Enforcing rights while respecting sovereignty 14
E. Seeking coherence: law as an integrity 15
III. Abortion 17
A. Roe v. Wade (1973) 17
1) Of "relatively recent vintage" 17
2) From the right to "privacy" to the right to "define one's own concept of existence" 18
3) From the "trimester framework" to the "undue burden" standard 19
4) An "engine of controversy" 21
B. A., B. and C. v. Ireland (2010) 22
1) An Ongoing Public Reflection Process 23
2) Within the Scope of the Right to Respect for Private Life 23
3) Profound Moral Values Concerning the Nature of Life 24
4) A Real and Dangerous New Departure 26
C. Comparison 27
IV. Assisted suicide 28
A. Washington v. Glucksberg (1997) 29
1) A 700 years long Anglo-American tradition 29
2) An established method: tradition and careful description 30
3) Rational basis review 31
4) "As it should in a democratic society" 32
B. Pretty v. the United Kingdom (2002) 32
1) No Comparative Analysis 33
2) There Might be an Interference with the Right to Respect for Private Life 33
3) The Vulnerability of the Class Provides the Rationale 34
4) It is Primarily for States to Assess the Risk 35
C. Comparison 36
V. Same-sex marriage 38
A. Obergefell v. Hodges (2015) 38
1) Continuity and change: States are now divided 38
2) The Past Should Not Rule the Present: Due Process Unchained 39
3) Bypassing Balancing: Marriage Equality Wins 41
4) A community in Disagreement: Who is Afraid of Backlash 42
B. Schalk and Kopf v. Austria (2010) 43
1) International and comparative law: the European Union 43
2) The right to marry is not inapplicable 43
3) Bypassing Balancing: Marriage Conservatism Wins 44
4) A question Left to Regulation by National Legislatures 45
C. Comparison 46
Conclusion 48

Introduction

Human rights promote the idea that law should primarily create the conditions of a society where people can freely and equally pursue their own aspirations and defend the ideal that some rights should be recognised to all members of the human family. Accordingly, they provide not only a basis for the continuous reevaluation and reconstruction of law (towards more/true freedom and equality) but also a *lingua franca* for increased dialogue and understanding between legal systems, cultures and societies (the common horizon or the common reference of rights). In this sense, human rights are a "lens" through which a renewed and global conception of law is progressively developed. Such a process of "constitutionalization"[1] and of "globalization"[2] affects all areas of contemporary law and the legal regulation of private life and family relationships is no exception, quite the contrary.

Human rights guaranteed by national constitutions and international treaties now have a direct and profound impact on the legal regulation of private life and family relationships as freedom and equality are increasingly considered as the ultimate foundations for legislative action as well as for governmental policies and judicial decisions in this area of law. In the United States and in Europe, this trend is clearly illustrated by the case law of the Supreme Court of the United States (hereafter the "Supreme Court" or the "SCOTUS") and the European Court of Human Rights (hereafter the "European Court" or the "ECtHR") both of which have been rethinking and reconstructing the legal regulation of private life and family relationships in the light of civil liberties for the last decades. Historical examples of their striking influence are the condemnation of the ban on interracial marriage by the SCOTUS in *Loving v. Texas* (1967)[3] and the condemnation of the difference between legitimate and illegitimate children by the ECtHR in *Marckx v. Belgium* (1979)[4].

Simultaneously, judges in charge of applying bills or conventions protecting individual rights are more and more inclined to engage in multipolar dialogue with their counterparts throughout the world because national and international legal systems are no longer considered as parts of a pyramidal structure with rigid separations and hierarchies but rather as an intricate web of crossed influences and mutual inspiration[5]. Exchanges between human rights courts can take a number of forms from cross-references to each other's case law to actual meetings and discussions between justices. Both types of exchanges have already been carried out – although to a limited extent – between the SCOTUS and the ECtHR. It is widely known, for instance, that the Supreme Court relied on the European Court decision in *Dudgeon v. The United Kingdom*[6] to rule against the criminalization of sexual intimacy by same-sex couples[7] and, the other way round, the European Court referred to *Obergefell v. Hodges*[8] in its decision affirming the right for homosexual couples to have their relationships legally recognized and protected[9]. A first official meeting between the SCOTUS and the ECtHR was held in March 2012 in

[1] Barron J.A., *The Constitutionalization of American Family Law: The Case of the Right to Marry*, *in* CROSS CURRENTS: FAMILY LAW AND POLICY IN THE US AND ENGLAND (S.N. Katz, J. Eekelaar and M MacLean eds., 2000).
[2] Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000).
[3] Loving v. Virginia, 388 U.S. 1 (1967)
[4] ECtHR, Marckx v Belgium, 13 June 1979.
[5] See Carla M. Zoethout, *The Dilemma of Constitutional Comparativism*, 71 HEIDELBERG JOURNAL OF INTERNATIONAL LAW 787 (2011).
[6] ECtHR, Dudgeon v. United Kingdom, 22 October 1981.
[7] Lawrence v. Texas 539 U.S. 558 (2003) (overruling Bowers v. Hardwick, 478 U. S. 186 (1986)).
[8] Obergefell v. Hodges 576 U.S. ____ (2015).
[9] ECtHR, Oliari and others v. Italy, 21 July 2015, § 65.

Washington and American as European justices emphasized the need for enhanced cooperation between their courts[10].

In such context, this contribution takes the view that there is huge interest in comparing the case-laws of the Supreme Court and the European Court regarding private and family life matters. Indeed, while there are clearly structural differences between the two courts (**I**), there are also functional similarities between them (**II**) and this particular mix of similarity and dissimilarity precisely allows for a relevant legal comparative work. In the following pages, we systematically compare the case-law of the SCOTUS and the ECtHR regarding abortion (**III**), assisted suicide (**IV**) and same-sex marriage (**V**) before proposing general conclusions related to human rights adjudication as applied to private and family life.

I. Structural differences

There are obvious and crucial differences between the Supreme Court and the European Court and while hundreds of pages would be necessary for an in-depth comparison, it is worth pinpointing here the more salient contrasts. These differences and contrasts relate to the institutional position of the courts (**A**), the textual basis of their power (**B**), the composition of their seat (**C**), the treatment of cases (**D**) and the elaborations of decisions (**E**). While they should not be overlooked or downplayed, most of them may arguably be – somehow – discussed, nuanced or relativized.

A. National/international court

Let's start with the more obvious: the SCOTUS is a national court whereas the ECtHR is an international court. The Supreme Court is the fundamental basis of the federal judiciary of the US as article III of the 1787 Constitution provides that "the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish"[11] and – as such – it has been involved – for better and/or worse – in the early days and subsequent development of the US as a union of states ("out of many, one")[12]. At least since *Marbury v. Madison*, it has authority to invalidate legislation or executive action at federal or state level when it conflicts with the American Constitution[13]. Accordingly, its decisions potentially have a direct impact on the law in the 50 American States and on the life of 325 millions of Americans. The European Court, for its part, is an international jurisdictional body established in 1959 under article 19 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms which provides that "to ensure the observance of the engagements undertaken by the High Contracting Parties […], there shall be set up a European Court of Human Rights […] [that] shall function on a permanent basis". Adhesion to the Convention is mandatory for all Member States of the Council of Europe, but the ECtHR has no power to invalidate legislative or executive measures and may only declare

[10] Similar enthusiasm about the dialogue between the USSC and the ECtHR was also expressed by the Legal Adviser of the Department of State Harold Koh and by the, then, Secretary of State Hillary Clinton. The seminar, entitled Judicial Process & Protection of Rights, was organised by GW Law School and gathered four Washington justices and seven members of the ECtHR.
[11] US Const., Article III, Section 1.
[12] Translation of the Latin motto ("E pluribus unum") appearing on the Great Seal of the United States.
[13] Marbury v. Madison, 5 U.S. 137, 164 (1803).

that there has been a violation of guaranteed human rights. However, its decisions have a binding effect and condemned States have a duty under article 46 of the Convention to take measures in view of complying with their international obligations whereas other member States should take preventive measures to avoid condemnation on the same grounds[14]. In this sense, the ECtHR arguably has the power to strongly influence the law in the 48 countries under its jurisdictions and – correlatively – the life of 820 millions of Europeans. Despite their differences, the SCOTUS and the ECtHR thus have the – direct or indirect – power to re-shape law across vast and complex political ensembles and to influence dramatically the life of hundreds of millions of citizen. Accordingly, it is not surprising that, in the U.S. as well as in Europe the question arises of whether the SCOTUS[15] or the ECtHR[16] can be considered as a "constitutional court".

B. Texts

Another important difference worth mentioning here is that the texts which the SCOTUS and the ECtHR have to apply are distinct in nature. In addition to its Preamble and seven articles, the US Constitution includes amendments I to X (known as the "Bill of rights") and seventeen more amendments (XI to XXVII). The Fourteenth Amendment[17] forms the basis of most private and family life landmark decisions of the SCOTUS. It was adopted in the immediate aftermath of the American civil war with a couple of other "Reconstruction Amendments"[18] and includes a "Due Process Clause"[19] as well as an "Equal Protection Clause"[20]. Neither the right to privacy[21] nor the right to marry[22] is expressly provided by the articles and amendments of the Constitution. Instead, they were derived by the Court from the Fourteenth Amendment respectively in *Griswold v Connecticut*[23] and *Loving v Virginia*[24]. The ECtHR, in turn, is

[14] Andrea Caligiuri and Nicola Napoletano, *The application of the ECHR in the domestic systems*, ITALIAN Y.B. OF INT'L L. 145 et seq. (2010).
[15] See Jamal Greene, *The Supreme Court as a Constitutional Court*, 128 Harv. L. Rev. 142 (2014). According to Greene, "The U.S. Supreme Court is a constitutional court insofar as it resolves public law issues and has a self-conscious law-declaring function".
[16] See Luzius Wildhaber, *The European Court of Human Rights: The Past, The Present, The Future*, 22(4) Am. U. Int'l L. Rev. 527 (2007). According to Wildhaber, "functionally speaking, the European Court of Human Rights is becoming a European quasi-Constitutional Court". See also Geir Ulfstein, *The European Court of Human Rights as a Constitutional Court?*, PluriCourts Research Paper, n° 14-08 ; Alec Stone Sweet, *On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court*, Faculty Scholarship Series. 71. (2009).
[17] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".
[18] Paul Gormley, *The Reconstruction Amendments' Debates: The Legislative History and Contemporary Debates in Congress on the 13th, 14th, and 15th Amendments*, 17 DEPAUL L. REV. 621 (1968).
[19] According to which States shall not "deprive any person of life, liberty, or property, without due process of law". See Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010).
[20] According to which States shall not "deny to any person within its jurisdiction the equal protection of the laws". See K. Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 781 (2011).
[21] See Jamal Greene, *The So-Called Right to Privacy*, 43 UNIVERSITY OF CALIFORNIA DAVIS 720 (2010).
[22] See Cass Sunstein, *The right to marry*, 26 CARDOZO L. REV. 2081 (2004-2005).
[23] Griswold v. Connecticut, 381 U.S. 479, 485 (1965). The Court held that "the present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship" (381 U.S. 479, 485 (1965)). See also Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) and Roe v. Wade, 410 U.S. 113, 152 (1973).
[24] Loving v. Virginia, 388 U.S. 1 (1967). The Court held that "marriage is one of the "basic civil rights of man," fundamental to our very existence and survival […]. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law" (388 U. S. 1, 12 (1967)). See also Zablocki v. Redhail, 434 U.S. 374, 384 (1978) and Turner v. Safley, 482 U.S. 78, 95 (1987).

responsible for the implementation of a 1950 international treaty which presents itself – from the very beginning – as a catalogue of fundamental rights recognised to all individuals. In the framework of the European human right system, the most relevant provisions as regards the topic of this contribution are article 8 which guarantees the right to private and family life[25] and article 12 which enshrines the right to marry and to found a family[26] as well as article 14 which protects individuals from discriminations[27]. Private and family rights were thus immediately and expressly available in the European Convention and the ECtHR case-law only had to define their scope of application[28]. Despite such different textual starting point, it is striking – however – that the SCOTUS and the ECtHR have developed quite similar interpretative methods and achieved significantly comparable results in the field of private and family life.

C. Judges

A third structural difference between the US Supreme Court and the European Court of Human Rights is that their composition is extremely different. The SCOTUS is composed of nine[29] life appointed[30] justices and this make them easily recognizable public figures. Justices are nominated by the President and confirmed by the Senate[31] in a highly politicized process subject to intense media coverage[32]. The same nine justices decide together all the cases for which the court has granted *certiorari*. Accordingly, there can be quite reliable guesses as to how the justices (individually) and the Court (collectively) will react when faced with certain issues. There are even specific terms – as "swing justice" or "pivotal justice" – to designate "the Justice who is crucial to the outcome of a case and, thus, to the establishment of public policy"[33]. This system – however – has been criticized as some argue that "the American constitutional rule granting life tenure to Supreme Court Justices is fundamentally flawed, resulting now in Justices remaining on the Court for longer periods and to a later age than ever before in American history"[34] and there have been attempts to increase the number of justices[35]. In contrast, the ECtHR "consist of a number of judges equal to that of the High Contracting

[25] "Everyone has the right to respect for his private and family life, his home and his correspondence […]".
[26] "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".
[27] "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".
[28] The Court constantly expands the concepts of private life and family life. In *Niemietz*, it held that "it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings" (ECtHR, Niemietz v. Germany, 16 December 1992, § 29). In *Marckx*, it held that "the members of the 'illegitimate' family enjoy [the right to family life] on an equal footing with the members of the traditional family" (ECtHR, Marckx v. Belgium, 13 June 1979, § 40). The Court also extends the right to marry to new beneficiaries and, in *Goodwin*, it held that "Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as per se removing their right to enjoy the first limb of this provision" (ECtHR, Goodwin v. the United Kingdom, 11 July 2002, § 98).
[29] Judiciary Act of 1869 (16 Stat. 44).
[30] US Const., Article 3, Section 1 ("Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour").
[31] U.S. Const., Article II, Section 2, Clause 2 ("[the President] […] […] by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court […]).
[32] David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491 (1992).
[33] Andrew D. Martin, *The Median Justice on the United States Supreme Court*, 83 N.C. L. Rev. 1275 (2004).
[34] Steven G. Calabresi and James Lindgren, *Terms Limits for the Supreme Court: Life Tenure Reconsidered*, 29(3) HARV. J.L. & PUB. POL'Y 771 (2006).
[35] Barry Cushman, *The Court-Packing Plan as Symptom, Casualty, and Cause of Gridlock*, 88(5) NOTRE DAME L. REV. 2090 (2013).

Parties"[36]. As the Council of Europe has forty-seven Member States, this means that there is no less than forty-seven judges at the Strasbourg Court. Judges are elected by the Parliamentary Assembly among three candidates nominated by the State party[37] and they are appointed for a term of nine years which cannot be extended or renewed[38]. The Court is divided in five sections composed of nine to ten justices and most decisions are adopted by chambers composed of seven judges[39] whereas the most sensitive or important cases can be deferred to a grand chamber composed of seventeen judges[40]. In such system, no single judge can be said to have a decisive weight on the decision and, at the same time, it might be more difficult to guess what the Court would decide on any specific issue as the decision may depend heavily on the chamber that decide the case. Hence, as regards their composition, the SCOTUS and the ECtHR could not be any more different. However, it may be argued that, in some sense, both systems have the potential to lead to a degree of inconsistency. On the one hand, majority shifts among the nine Supreme Court justices might lead to decisions pointing in opposite decisions or to spectacular overrulings[41] and, on the other hand, the European Court may have difficulty in elaborating a consistent case law with so much different judges and formations involved[42].

D. Cases

A fourth fundamental difference is the nature and number of cases dealt with by the SCOTUS and the ECtHR. Since the Judiciary Act of 1891[43], the Supreme Court justices are free to decide in a discretionary manner the cases that will be heard[44]. According to a customary rule, four justices must accept the case to have it heard and decided by the Supreme Court[45]. The Court receives about 7.000-8.000 new cases each term and "plenary review, with oral arguments by attorneys, is currently granted in about 80 of those cases" while "the Court typically disposes of about 100 or more cases without plenary review"[46]. The question of the number of cases granted review tends to be a debated question as the Court's docket is said to be "shrinking"[47]. According to Ryan J. OWENS and David A. SIMON, "these questions are important for a host of reasons, not least of which is that the Supreme Court's impact on the law is a function of the type and number of cases it hears"[48]. The European Court, in turn, is obliged to deal with all individual applications[49] even if a certain amount of applications can be considered inadmissible by a single judge[50] or examined by a committee of three judges[51]. In 2016, more than 53.000 applications were allocated to a judicial formation. 36.579 applications were

[36] ECHR, Article 20.
[37] ECHR, Article 22.
[38] ECHR, Article 23.
[39] ECHR, Article 29.
[40] ECHR, Article 29.
[41] See Jonathan Turley, *The fate of health care shouldn't come down to 9 justices. Try 19.*, THE WASHINGTON POST, June 22, 2012, https://www.washingtonpost.com.
[42] See Yonatan Lupu and Erik Voeten, *The Role of Precedent at the European Court of Human Rights: A Network Analysis of Case Citations*, 12 SOUTHERN ILLINOIS UNIVERSITY CARBONDALE OPENSIUC 3 (2010).
[43] Judiciary Act of 1891 (26 Stat. 826).
[44] According to Rule 10 of the Rules of the Court, "Review on a writ of certiorari is not a matter of right, but of judicial discretion". See Margaret Meriwether Cordray and Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L. Q. 389 (2004).
[45] Linda Greenhouse, THE US SUPREME COURT. A VERY SHORT INTRODUCTION, Oxford University Press 54 (2012).
[46] See https://www.supremecourt.gov/about/justicecaseload.aspx
[47] Ryan J. Owens and David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219 (2012).
[48] *Id.* at 1223.
[49] ECHR, article 34. See Janneke H. Gerards and Lize R. Glas, *Access to justice in the European Convention on Human Rights system*, 35(1) NETHERLANDS QUARTERLY OF HUMAN RIGHTS 11 (2017).
[50] ECHR, article 27.
[51] ECHR, article 28.

declared inadmissible and 993 judgements were delivered in in respect of 1.926 applications. In the context of recent reforms and because the Court is overburdened by its caseload the proposition has been made to allow the Court to decide which cases it would hear[52]. However, the choice was made not to go this far and – instead – the admissibility conditions were strengthened allowing the Court to dismiss an application if "the applicant has not suffered a significant disadvantage"[53]. Thus, this far, there remain a very stark contrast between the US and European way of "selecting" cases[54] with the SCOTUS and the ECtHR respectively facing the inconvenience of an insufficient or excessive case-load[55].

E. Decisions

A fifth important difference between the American and European courts is that their decisions are taken and their judgements are written in quite different ways. The US Supreme Court's decisions usually take the form of a "majority opinion" written by one of the nine justices[56] belonging to the majority. If the majority agrees on the solution to the case but not on the underlying reasoning, the decision then takes the form of a "plurality opinion"[57]. In some rare cases, either for "routine matters" or for "complicated and divisive issue[s]"[58], the opinion is not delivered by one/some identified justice(s) but by the Court as an institution: these are "*per curiam* opinions"[59]. In any event, individual justices have the right to elaborate their own "concurring opinion" or "dissenting opinion". A European Court's judgement on the merits, in contrast, is – never[60] – the work of a single judge but the collective work of the judges composing the committee, chamber or grand chamber who decides the case. In the ECtHR's practice, a draft opinion is prepared by a "judge rapporteur"[61] who may be but is not necessarily the national judge of the defending Member State[62]. The draft is then presented to, discussed with and commented by the other judges of the section and a preliminary vote follows. Thereafter, the section registrar has the opportunity to revise the draft taking into consideration questions raised during the deliberation. The revised draft is then presented again to the members of the section and, after the final vote, the judgement is signed by the president and the registrar (but the names of the other judges constituting the chamber or the committee are mentioned). As in the American system, individual judges have the right to elaborate their own

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[52] Lucius Caflisch, *The Reform of the European Court of Human Rights: Protocol No. 14 and beyond*', 6 HUMAN RIGHTS LAW REVIEW 403 (2006).
[53] ECHR, article 35. See Nikos Vogiatzis, *Admissibility Criterion under Article 353b ECHR: a 'Significant Disadvantage' to Human Rights Protection*, 65(1) INTERNATIONAL & COMPARATIVE LAW QUARTERLY 185 (2016).
[54] See Alexander H. E. Morawa, *Certiorari and the Political Judge Discretionary Case Selection by the United States Supreme Court and the European Court of Human Rights* Compared, 33 (2) UNIVERSITY OF TASMANIA L. REV. 222-254 (2014).
[55] See also Geir Ulfstein and Andreas Zimmermann, *Certiorari through the Back Door? The Judgment by the European Court of Human Rights in Burmych and Others v. Ukraine in Perspective*, 17(2) LAW & PRAC. OF INT'L CTS. & TRIBUNALS 289 (2018).
[56] The author of the majority opinion is designated by the Chief justice if he is part of the majority or by the senior justice if he is not. See Elliot E. Slotnick, *Who Speaks for the Court? Majority Opinion Assignment from Taft to Burger*, 23(1) AMERICAN JOURNAL OF POLITICAL SCIENCE 60-77 (1979), pp. 60-77.
[57] See Adam S. Hochschild, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 WASH. U. J. L. & POL'Y 261 (2000).
[58] See Laura Ray, *The Road to Bush v. Gore: The History of the Supreme Court's Use of the Per Curiam Opinion*, 79 NEBRASKA LAW REVIEW 518 (2000).
[59] See Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TULANE LAW REVIEW 1197 (2012).
[60] Single judge may only take admissibility decisions (ECHR, article 27). See, however, Helena De Vylder, *Stensholt v. Norway: Why single judge decisions undermine the Court's legitimacy*, STRASBOURG OBSERVERS, May 28, 2014, www.strasbourgobservers.com.
[61] Nina-Louisa Arold, THE LEGAL CULTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS, Leiden/Boston, Martinus Nijhoff at 61-65 (2007).
[62] *Id.*

"concurring opinion" or "dissenting opinion"[63]. It is easy to understand that such differences in the "fabrication process" of the decisions of the SCOTUS and the ECtHR may lead to significant contrasts in the formulation of decisions. Whereas SCOTUS opinions usually are individual works clearly reflecting its author's own legal reasoning and style, ECtHR decisions are collective works in which the drafter's input is blurred by subsequent discussion and revision[64].

II. Functional similarities

Beyond differences and contrasts, it cannot be denied that the Supreme Court and the European Court perform a fairly similar function as, in their respective legal systems, they have to express the meaning of abstract liberties as applied to concrete situations and contexts with the power to censor democratic majorities. To accomplish such herculean and controversial mission, they necessarily have to identify the background elements that may legitimately nourish the legal discussion (**A**), define the scope of guaranteed rights (**B**) and balance them against conflicting interests (**C**) without succumbing to the temptation of judicial legislation (**D**) and pursuing the fundamental ideal of judicial coherence (**E**). This similarity in function or mission is now quite widely accepted by judges[65] and scholars[66] who expressly affirm the relevance of the SCOTUS/ECtHR comparison.

A. Setting the stage for human rights adjudication

Conflicts between individual liberties and conflicting interests do not arise in limbos: they occur in a certain geographical, historical, social and legal context. It follows that, beyond the obvious necessity of describing the factual situation at issue and the disputed regulations and measures, human rights judges have to define which contextual elements deserve consideration in the exercise of their power of judicial review. In this respect, a common feature of the case-laws of the SCOTUS and of the ECtHR is that they both give careful consideration to the state of law in their respective legal systems. In this respect, it is worth noticing that, in Washington as in

[63] Rule 74 of the Rules of Court. See Robin C.A. White and Iris Boussiakou, *Separate opinions in the European Court of Human Rights*, 9(1) HUMAN RIGHTS LAW REVIEW 37-60 (2009).
[64] Thore Neumann and Bruno Simma, *Transparency in International Adjudication*, in TRANSPARENCY IN INTERNATIONAL LAW (ed. A. Bianchi and A. Peeters), Cambridge University Press 459 (2013).
[65] As notoriously emphasised by Justice Breyer, "as judges throughout the world undertake to fulfill their responsibilities of reviewing their countries' law and regulation for constitutional validity, they have all found themselves facing similar problems". And, "if someone with a job roughly like my own, facing a legal problem roughly like the one confronting me, interpreting a document that resembles the one that I look to, has written a legal opinion about a similar matter, why not read what that judges has said? I might learn from it, whether or not I end up agreeing with it" (Stephen Breyer, THE COURT AND THE WORLD. AMERICAN LAW AND THE NEW GLOBAL REALITIES, New York, Vintage, at 239-240 (2015)).
[66] As specifically regards comparison between the SCOTUS and the ECtHR, Dzehtsiarou and O'Mahony, note that "the growing body of literature in which the European Court of Human Rights (ECtHR) and the U.S. Supreme Court are compared suggests that it makes sense to draw parallels and analyze the differences between these two courts". See Ioana Cismas and Stacy Cammarano, *Who's Rights and Whose Right? The US Supreme Court vs. the European Court of Human Rights on Corporate Exercise of Religion*, 34(1) BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 3 (2016) ("the parallel between the two jurisdictions provides a full account of how the interpretations on corporate religious freedom differ and offers avenues for alternative interpretation").

Strasbourg, the existence or absence of a "national"[67] or "European"[68] consensus on the issue at stake may have a significant impact on the outcome of the case[69]. Beyond this common practice of reviewing the existing law respectively in American and European states, however, the SCOTUS and the ECtHR obviously tend to value different sources of inspiration. In the Supreme Court's decisions, considerable attention is usually devoted to historical considerations[70]. In the European Court's case law, the emphasis is normally rather placed on relevant international law instruments[71]. Conversely, international law has a much disputed status in American constitutional law doctrine[72] whereas the ECtHR normally does not engage in substantial historical research to elaborate its reasoning. Finally, it should be mentioned that, in the case-law of the ECtHR, these background informations are grouped together at the beginning of judgments according to a well-defined pattern whereas, in the case-law of the SCOTUS, they may be presented in a somewhat disordered or mixed way depending on the individual style and approach of the author of the court's opinion[73].

B. Defining the scope of protected fundamental rights

The US Constitution and the European Convention provide for very abstract individual rights and liberties and one major aspect of the mission of the SCOTUS and the ECtHR is accordingly to define their scope of application by deciding whether given individual claims may be considered as involving a protected fundamental freedom. In the US, the principle and method of deriving substantive rights from the Due Process Clause have been and still are much debated between "originalists"[74] and "living constitutionalists"[75]. It is common ground, however, that "due process has not been reduced to any formula" and that its scope should be defined through "judgement and restraint"[76]. Accordingly, the Supreme Court tends to adopt a "middle ground" approach between "the position that the Constitution protects no unenumerated rights" and "unfettered discretion to conjure unenumerated rights"[77]. Navigating between these two extremes, the Court may adopt a more or less "open-ended" approach[78] depending – mainly – on the ideological balance among the justices[79]. On the basis of such "middle-ground" and more or less "open-ended" approach, the Cour affirmed a wide range of individual rights related to

[67] Kevin White, *The Constitutional Limits of the "National Consensus" Doctrine in Eighth Amendment Jurisprudence*, 2012 BYU L. REV. 1367 (2012); Wayne Myers, *Roper v. Simmons: The Collision of National Consensus and Proportionality Review*, 96 J. CRIM. L. & CRIMINOLOGY 947 (2005-2006).
[68] Kanstantsin Dzehtsiariou, *European Consensus: New Horizons*, in BUILDING CONSENSUS ON EUROPEAN CONSENSUS, JUDICIAL INTERPRETATION OF HUMAN RIGHTS IN EUROPE AND BEYOND (ed. Panos Kapotas and Vassilis P. Tzevelekos), Cambridge 29 (2019).
[69] See Panos Kapotas and Vassilis P. Tzevelekos, *How (Difficult Is It) To Build Consensus on (European) Consensus?*, in BUILDING CONSENSUS ON EUROPEAN CONSENSUS, JUDICIAL INTERPRETATION OF HUMAN RIGHTS IN EUROPE AND BEYOND (ed. Panos Kapotas and Vassilis P. Tzevelekos), Cambridge 1 (2019).
[70] See Charles A. Miller, THE SUPREME COURT AND THE USES OF HISTORY, Cambridge, Massachusetts: The Belkap Press (1969). See also Erwin Chemerinsky, *History, Tradition, the Supreme Court and the First Amendment*, 44 HASTINGS LAW JOURNAL 902 (1993).
[71] Magdalena Forowicz, THE RECEPTION OF INTERNATIONAL LAW IN THE EUROPEAN COURT OF HUMAN RIGHTS, Oxford University Press (2010).
[72] Carla M. Zoethout, *The Dilemma of Constitutional Comparativism*, 71 HEIDELBERG JOURNAL OF INTERNATIONAL LAW 787 (2011).
[73] See above I.E.
[74] Mitchell N. Berman, *Originalism is bunk*, 84(1) N.Y.U. L. REV. 1 (2009).
[75] David A. Strauss, *Do We Have a Living Constitution?*, 59 DRAKE L. REV. 973 (2011).
[76] Harlan J (dissenting) Poe v Ullman, 366 U.S. 497 542-543 (1961).
[77] Yoshino K., *A New Birth of Freedom? Obergefell v. Hodges*, 129 HARV. L. REV. 148-149 (2015).
[78] *Id.*
[79] E. Thomas Sullivan and Toni M. Massaro, THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW, Oxford at 147 (2013).

personal life and family relationships[80]. Similar debates may have existed in Europe about how "new" individual rights could or should be recognised in the framework of the right to private and family life. However "originalism" or "textualism" has not received much support and a "moral reading" of the ECHR is globally preferred[81] according to which the Convention is "a 'living instrument' which must be interpreted according to present-day conditions"[82]. The ECtHR accordingly developed the idea of an "evolutive" or "constructive" interpretation of the Convention[83] and such "evolutive" or "constructive" interpretation has been particularly dynamic as regards the right to private[84] and family life[85]. According to the Court, it is not "possible or necessary to attempt an exhaustive definition of the notion of "private life"[86] whereas "the existence or non-existence of "family life" is essentially a question of fact depending upon the real existence in practice of close personal ties"[87]. As a consequence, virtually any claim related to personal integrity or autonomy or to interpersonal relationships may be considered as involving the rights guaranteed by article 8. This indefinite extension of the concept of private and family life raises, however, criticisms as – for example – a Strasbourg judge once affirmed that "the jaws of Article 8 [had] already been opened wide enough"[88]. It thus appears that the SCOTUS and the ECtHR both use judgement and interpretation to apply a "living" human rights declaration to changing realities of contemporary societies and that – in Washington and in Strasbourg – judges face the challenge of finding the right path between an overly extensive or overly restrictive approach of the judicial affirmation of new rights resorting to private and family life.

C. Weighing rights and State interests

The determination that an action or omission by authorities infringed a fundamental liberty does not automatically imply that there has been a violation of the US Constitution or the European Convention: such infringement may be justified by the purpose of protecting a conflicting legitimate public or private interest. Accordingly, it is a third common feature of the decision-making process of the SCOTUS and the ECtHR that individual rights have to be somehow weighed or balanced against the countervailing interests put forwards by governments and legislatures. Such operation of weighing or balancing is not expressly provided for by the US Constitution, but the Supreme Court held – in *Hudson County Water Co. v. McCarter* – that

[80] See Loving v. Virginia, 388 U.S. 1 (1967) (right to marry); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) (right to have children); Meyer v. Nebraska, 262 U.S. 390 (1923) and Pierce v. Society of Sisters, 268 U.S. 510 (1925) (right to direct the education and upbringing of one's children); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to marital privacy); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right to use contraception); Rochin v. California, 342 U.S. 165 (1952) (right to bodily integrity); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (right to abortion); Cruzan v. Director of the Missouri Department of Health, 497 U.S. 261 (1990) (right to refuse unwanted lifesaving medical treatment).

[81] George Letsas, *Strasbourg's Interpretative Ethics: Lessons for the International Lawyer*, 21(3) THE EUROPEAN JOURNAL OF INTERNATIONAL LAW 509 (2010).

[82] *Id.* at 527.

[83] Alastair Mowbray, *Between the will of the Contracting Parties and the needs of today: Extending the scope of Convention rights and freedoms beyond what could have been foreseen by the drafters of the ECHR*, SHAPING RIGHTS IN THE ECHR: THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN DETERMINING THE SCOPE OF HUMAN RIGHTS (dir. E. Brems), Cambridge 2013, p. 17.

[84] See ECtHR (pl.), Dudgeon v. the United Kingdom, 22 October 1981, § 41 (same-sex intimacy); ECtHR, Laskey, Jaggard and Brown v. the United Kingdom, 19 February 1997, § 36 (sadomasochism); ECtHR, Tysiąc v. Poland, 20 March 2007, § 107 (access to legal abortion); ECtHR (gr. ch.), Evans v. the United Kingdom, 10 avril 2007, § 71 (decision to become parent or not to become parent).

[85] See ECtHR (pl.), Marckx v. Belgium, 13 June 1979, § 41 (rights of children born out of wedlock); ECtHR (gd ch.), E.B. v France, 22 January 2008, § 92 (adoption by a homosexual woman); ECtHR, Kozak v Poland, 2 march 2010, § 98 (tenancy rights of homosexual couples).

[86] ECtHR, Niemietz v Germany, 16 December 1992, § 29.

[87] ECtHR, K. and T. v Finland, 12 July 2001, § 150.

[88] ECtHR, Genovese v Malta, 11 October 2011, separate opinion of juge Valenzia.

rights "are limited by the neighborhood of principles of policy" which at some point "become strong enough to hold their own"[89]. Accordingly, it is considered that the "balancing methodology" is part of "a general conception of constitutional interpretation that [see] rights as standards rather than as categorical and absolute restrictions on governmental action"[90]. As a consequence, the Fourteenth Amendment and other constitutional provisions may give rise to a "weighing or balancing of the various interests which overlap or come in conflict and a rational reconciling or adjustment"[91]. Several ECHR provisions, including article 8, expressly mention the possibility of restrictions to guaranteed rights provided that these restrictions are "necessary in a democratic society" to protect a legitimate aim such as – among others – national security, economic well-being or public health. In *Dudgeon*, the Court affirmed that limitations cannot be regarded as "necessary in a democratic society" if they are not "proportionate" to the legitimate aim pursued". As a consequence, the Court's task is to determine whether the reasons adduced by authorities may be considered as "relevant and sufficient" to justify the disputed restriction[92]. While "balancing has never attained the status of an established doctrine in U.S. constitutional law in the same way that proportionality has in European constitutional law"[93], it cannot be denied that "the two tests […] resemble each other in important aspects" as they "seem to be analytically similar and to perform similar functions"[94]. It thus seems that American balancing and European proportionality may today be considered as "two legal principles that began very differently but came to a point where […] it seems natural to discuss the two together" [95].

D. Enforcing rights while respecting sovereignty

Legislatures and governments should normally be able to strike a proper balance between fundamental rights and conflicting interests and judicial review by unelected judges should only act as a subsidiary mechanism censoring grave errors of assessment. Accordingly, both the SCOTUS and the ECtHR accept that the task of reconciling or adjusting individual rights and state aims lays primarily on local democratic institutions and that they should correlatively think twice before imposing from above their own views on the adequate articulation of liberties and limitations. In US constitutional law, it is widely accepted that authorities should enjoy "a certain degree of latitude in the infringement of rights"[96] and a debate opposes supporters of

[89] Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908).
[90] Moshe Cohen Eliya and Iddo Porat, *American balancing and German proportionality: The historical origins*, 8(2) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 281 (2010).
[91] Roscoe Pound, *A Survey of Social Interests*, 57 Harv. L. Rev. 1, 4 (1943). See also H. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943 (1987) ; *Richard Fallon, Strict Judicial Scrutiny, 54 UCLA. L.Rev. 1267* at 1306–1308, 1328 ; Ian Ayres and Sydney Foster, Don't Tell, Don't Ask: Narrow Tailoring After *Grutter and Gratz*, 85 Tex. L.Rev. 517 (2007).
[92] ECtHR (pl.), Dudgeon v the United Kingdom, 22 October 1981, §§ 53-54. See Marc-André Eissen, The Principle of Proportionality in the Case-Law of the European Court of Human Rights, *in The European System for the Protection of Human Rights* (ed. McDonald, Matscher and Petzold), Dordrecht, Martinus Nijhof, at 146 (1993); Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality*, Antwerp, Intersentia, at 193 (2002).
[93] Moshe Cohen Eliya and Iddo Porat, above n. 90 at 265.
[94] According to Cohen Eliya and Porat, « it is fair to ask why the treatment of proportionality is so different in Europe and in the United States. How is it that proportionality raises very little opposition in Europe, while balancing raises so much opposition and resistance in the United States? European proponents of proportionality are perplexed by this American resistance. After all, they argue, some form of a two-stage proportionality analysis is both unavoidable and commonsensical. Why not make use of the fact that balancing is a familiar concept in American jurisprudence and increase its centrality to constitutional discourse, instead of marginalizing it and stressing the differences between American and European constitutional law" (Moshe Cohen Eliya and Iddo Porat, above n. 90 at 265).
[95] Moshe Cohen Eliya and Iddo Porat, above n. 90 at 264.
[96] Moshe Cohen Eliya and Iddo Porat, above n. 90 at 281.

"judicial activism"[97] and advocates of "judicial restraint"[98] as regards the extent of such latitude[99]. In this respect, it has been written that "subsidiarity concerns have long animated the U.S. Supreme Court even without the label "subsidiarity""[100]. In European human rights law, member states are similarly granted a certain "power of appreciation"[101] or "margin of appreciation"[102] in defining the right balance between individual rights and competing interests and the level of discretion that should be recognized to domestic authorities is the subject of a constant debate in which the terms "activism" and "restraint"[103] (or even "passivism"[104]) are occasionally used. In 2013, against a background of growing animosity between the Strasbourg Court and some member states, an explicit reference to the margin of appreciation has been introduced in the preamble of the European Convention[105]. Accordingly, it has been considered that subsidiarity "has gained increasingly high profile"[106] in the ECHR system and – even – that we would have entered an "age of subsidiarity"[107]. Hence, it appears that "the economics of federalism […] has implications for the incorporation of the Bill of Rights in the U.S. and for the margin of appreciation doctrine of the European Court of Human Rights"[108] and that both "courts must balance the need to protect fundamental human rights with the fact that tastes, cultural preferences, and real world conditions may differ at the state level in the U.S. […] or among the countries that are signatories to the European Convention on Human Rights"[109].

E. Seeking coherence: law as an integrity

Together with the exorbitant power of censoring legislatures and governments, comes the obvious responsibility to elaborate a consistent and coherent understanding of guaranteed rights and freedoms: doctrinal integrity might be the ultimate yardstick against which the legitimity of human rights judges may be measured. This directly echoes Ronald DWORKIN's ideal of judges deciding cases "in a way which makes the law coherent and integrated in the way it might be if a single author had decided all cases ever brought before the Courts"[110]. From this point of view, one last and crucial common feature of the SCOTUS and the ECtHR is that they both struggle to develop strong and enduring principles of interpretation allowing them to judge similarly in similar cases and to offer – over the time – a consistent and coherent reading of the provisions placed under their protection. It seems widely admitted that the decision-making

[97] Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism"*, 92 CALIF. L. REV. 1441 (2004).
[98] Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100(3) CALIF. L. REV. 519 (2012); John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747 (2017).
[99] Archibald Cox, *The Role of the Supreme Court: Judicial Activism or Self-Restraint?*, 47 MD. L. REV. 118 (1987).
[100] Calabresi, Steven G. and Bickford, Lucy D., "Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law" (2011). Faculty Working Papers. Paper 215. The *Lochner* decision is seen as the paradigmatic case of judicial activism, and is one of the most reviled cases in constitutional law. [*In Obergefell*], Chief Justice ROBERTS's dissent invoked *Lochner* no fewer than sixteen times" (Yoshino K., *A New Birth of Freedom? Obergefell v. Hodges*, 129 HARV. L. REV. 170, 171 (2015)).
[101] ECtHR, De Wilde, Ooms and Versyp v Belgium, 18 June 1971, § 93.
[102] ECtHR, Handyside v the United Kingdom, 7 December 1976, § 48.
[103] Dragoljub Popovic, *Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights*, 42 Creighton Law Review 361 (2009).
[104] Pierre Thielbörger, *Judicial Passivism at the European Court of Human Rights*, 19 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 3 (2012).
[105] Martin Kopa, *The Algorithm of the Margin of Appreciation Doctrine in Light of the Protocol No. 15 Amending the European Convention on Human Rights*, 14(1) INTERNATIONAL AND COMPARATIVE LAW REVIEW 37 (2014).
[106] Alastair Mowbray, *Subsidiarity and the European Convention on Human Rights*, 15(2) HUMAN RIGHTS LAW REVIEW 313 (2015).
[107] Robert Spano, *Universality or Diversity of Human Rights, Strasbourg in the Age of Subsidiarity*, 14 HUMAN RIGHTS LAW REVIEW 487 (2014).
[108] Calabresi, Steven G. and Bickford, Lucy D., *Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law*, FACULTY WORKING PAPERS, Paper 215, at 20 (2011)
[109] *Id.*
[110] http://faculty.ycp.edu/~dweiss/phl347_philosophy_of_law/dworkin%20readings.pdf

process and the case-law of the Supreme Court should be consistent and coherent[111]. It may be relatively easy for a
Court where the same nine justices deal with all accepted cases to advance a "coherent vision of the law" especially when there happens to be "ideological cohesion" among them[112]. However, it may be argued that the fact that Supreme Court's opinions are written by a single judge rather than by the Court as a whole somehow favors a degree of "fragmentation" of the Court's legal discourse[113]. Moreover, from a long-term perspective, the appointment system implies that dramatic changes in the Court's composition can occur in a very short time with the obvious risk of seeing a new court unravel the vision or the discourse of the former(s)[114]. This risk is nevertheless mitigated by the rule of *stare decisis* which requires respect "not for the narrow holding of earlier cases" but for "the principles that justify those decisions"[115] so that "while the Supreme Court may legally overrule its own precedents, it does so infrequently"[116]. Consistency and coherency are also desirable in the European system of protection of human rights[117]. Obviously, it might be difficult for forty seven judges organised in multiple formations to speak with one, consistent and coherent voice. This is – however – made easier by the collective writing process characterising ECtHR decisions as judges naturally tend to agree on well-tried patterns of reasoning and time-tested formulas. Moreover, when a case may lead to a decision inconsistent with the previous case-law of the Court, a chamber may – according to article 30 of the Convention – relinquish jurisdiction in favor of a grand chamber composed of seventeen judges that will decide the case keeping in mind the necessity of consistency. Finally, the Court is assisted by a jurisconsult whose task – according to article 18B of the rules of Court – is precisely to ensure the quality and consistency of the case-law[118]. As regards consistency in the long run, the ECtHR is less exposed to fluctuations related to the turnover of judges as the individual impact of each judge is diluted by the number of judges and the collective nature of their office. Moreover, the Court considers that "while [it] is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases"[119]. Hence, while the issue of coherence may take different forms at the Supreme Court and at the European Court, due to some of their distinctive features, it remains that human rights judges – in Washington as in Strasbourg – share the same

[111] See e.g. Patrick Weil, *Freedom of Conscience, but Which One? In Search of Coherence in the U.S. Supreme Court's Religion Jurisprudence*, 20(2) JOURNAL OF CONSTITUTIONAL LAW 313 (2017); Nicholas Kahn-Fogel, *An Examination of the Coherence of Fourth Amendment Jurisprudence*, 26(2) CORNELL JOURNAL OF LAW AND PUBLIC POLICY 275 (2016); Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AMERICAN CRIMINAL LAW REVIEW 1151 (2003).

[112] Neal Devins, *Ideological Cohesion and Precedent (or Why the Court Only Cares about Precedent When Most Justices Agree With Each Other)*, 86 NORTH CAROLINA LAW REVIEW 1399 (2018).

[113] See Ryan J. Owens and Justin P. Wedeking, *Justices and Legal Clarity: Analyzing the Complexity of U.S. Supreme Court Opinions*, 45(4) LAW & SOCIETY REVIEW 1027-1061, (2011); Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979).

[114] Neal Devins, above n. 112 at 1399.

[115] Ronald Dworkin, *The Supreme Court Phalanx*, THE NEW YORK REVIEW OF BOOKS, September 27, 2007 (http://www.nybooks.com).

[116] Stefanie A. Lindquist and Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 NYU LAW REV' 1161 (2005).

[117] Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 Cornell International Law Journal 133 (1993); Colin Warbrick, *Coherence and the European Court of Human Rights: The Adjudicative Background to the Soering Case*, 11 MICH. J. INT'L L. 1073 (1990); Tom Booms and Carrie van der Kroon, *Inconsistent Deliberations or Deliberate Inconsistencies? The Consistency of the ECtHR's Assessment of Convictions based on International Norms*, 7(3) UTRECHT LAW REVIEW 156 (2011).

[118] Erik Fribergh and Roderick Liddell, *The Interlaken process and the Jurisconsult*, in COHÉRENCE ET IMPACT DE LA JURISPRUDENCE DE LA COUR EUROPÉENNE DES DROITS DE L'HOMME : LIBER AMICORUM VINCENT BERGER, Wolf Legal Publishers, 2013, p. 177.

[119] ECtHR [GC], *Goodwin v. United Kingdom*, 11 July 2002, § 74.

concern to achieve to the greater possible extent the challenge of delivering a consistent and coherent interpretation of their respective reference instruments.

III. Abortion

Whereas the SCOTUS recognized, already in 1973, a constitutional right to abortion under the 14th Amendment of the American Constitution (A), the ECtHR holds, to this day, that no such right is guaranteed under the European Convention (B).

A. Roe v. Wade (1973)

The landmark case of *Roe v Wade*[120] remains (one of) the most important and most controversial decisions of the US Supreme Court and abortion remains one of the most divisive debate in American public life. At the time of the facts, it was a crime under the Texas Penal Code to procure an abortion except by medical advice and for the purpose of saving the life of the mother[121]. Jane Roe was an unmarried pregnant woman living in Dallas. She wished to terminate her pregnancy but she would not get a lawful abortion in Texas and could not afford to travel to another jurisdiction. As a consequence, she instituted a federal action against the District Attorney seeking a declaration that the abortion statutes were unconstitutional[122]. The Texan district court declared the statutes void on their face due to unconstitutional vagueness and infringement of the plaintiff's Ninth and Fourteenth Amendments' rights[123]. However, the District Court dismissed the application for injunctive relief and Roe's lawyer appealed to the Supreme Court from that part of the decision pursuant to § 1253 of the US Code[124]. The Supreme Court affirmed the District Court decision by a 7-2 vote. Justice BLACKMUN delivered the historical majority opinion and justices WHITE and REHNQUIST dissented.

1) Of "relatively recent vintage"

BLACKMUN started by emphasising that "it perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage"[125] relying on an historical account of abortion from Ancient Greece and Rome to contemporary America. Abortion had been "resorted without scruple" during Greek and Roman eras[126]. It was not an indictable offence under common law when at least when it was performed before "quickening"[127]. However, the "quickening" distinction had gradually disappeared in American states during the middle and late 19th century and by the end of the 1950's most jurisdictions had banned abortion except in case of threat for the life of the mother[128]. BLACKMUN concluded that "at common law, at the time of the adoption of our Constitution,

[120] Roe v. Wade, 410 U.S. 113 (1973). See also Doe v. Bolton 410 U. S. 179 (1973).
[121] Roe v. Wade, 410 U.S. 117-119.
[122] Roe v. Wade, 410 U.S. 120.
[123] Roe v. Wade, 410 U.S. 122. See also 314 F. Supp. 1217, 1225 (ND Tex. 1970).
[124] Roe v. Wade, 410 U.S. 122. See also 28 U.S.C. 1253.
[125] Roe v. Wade, 410 U.S. 113, 129 (1973).
[126] Roe v. Wade, 410 U.S. 113, 130-131 (1973).
[127] Roe v. Wade, 410 U.S. 113, 132-136. Blackmun explained that "quickening" meant "the first recognizable movement of the fetus in utero, appearing usually from the 16th to the 18th week of pregnancy".
[128] Roe v. Wade, 410 U.S. 113, 139-140 (1973).

and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect"[129].

2) From the right to "privacy" to the right to "define one's own concept of existence"

The first question to answer was obviously whether there was such thing as a right to choose to terminate the pregnancy under the American Constitution. The majority of the Court considered that such a right was included in "the right to privacy" which the Court had previously found to be rooted in several provisions of the Constitution[130]. In the Court's view, the right to privacy was to be found in the concept of "personal liberty" referred to in the Fourteenth Amendment and was "broad enough" to encompass a woman's decision whether or not to terminate her pregnancy taking into account the "detriment" upon pregnant women and the "distress" associated for all concerned by the unwanted child[131]. The Court did not follow any particular method to reach that conclusion. It did not define privacy or explain why privacy was involved. Instead, it "simply announced" that the right to privacy was broad enough to encompass the right to terminate pregnancy[132]. There were many abortion cases after *Roe v. Wade*[133] and in the overwhelming majority of the cases the very fact that there existed a right to terminate pregnancy was not put into question. However, *Planned Parenthood v Casey*[134] reinitiated the debate on the very existence of the right to abortion, against the background of a conservative shift at the Supreme Court[135]. The case concerned Pennsylvanian statutory provisions regulating abortion including an "informed consent" requirement and a "spousal notice" requirement as well as a "parental consent" requirement[136]. Four justices wanted to overrule *Roe* claiming that "in terming this right fundamental, the Court in Roe read the earlier opinions upon which it based its decision much too broadly"[137]. However, five justices reaffirmed the "essential holding"[138] of *Roe* offering a much more convincing account of how and why the right to terminate pregnancy was protected by the Fourteenth Amendment's. They emphasised that adjudication of substantive due process claims calls for "reasoned judgment" and cannot be expressed as "a simple rule"[139]. In the words used by John Marshall Harlan in his *Poe v. Ullman* dissent, "due process has not been reduced to any formula" and "no formula could serve as a substitute, in this area, for judgment and restraint"[140]. Against such background, the Court recalled that its case-law "affords constitutional protection personal to decisions relating to

[129] Roe v. Wade, 410 U.S. 113, 140 (1973).
[130] Roe v. Wade, 410 U.S. 113, 152-153 (1973).
[131] Roe v. Wade, 410 U.S. 113, 153 (1973).
[132] In his dissent, Rehnquist disagreed that the right to privacy was involved in the case as the practice of abortion was not "private" in the ordinary sense of that word and as it had nothing to do with "the freedom from searches and seizures" protected by the Fourth Amendment (410 U.S. 113, 172). In his dissent, White declared he did "find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers" (410 U.S. 113, 221). See also John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 The Yale Law Journal 931-932 (1973).
[133] In Doe v. Bolton 410 U.S. 179 (1973); Planned Parenthood of Missouri v Danforth 428 U.S. 52 (1976); Bellotti v. Baird 443 U.S. 622 (1979); Maher v. Roe 432 U.S. 464 (1977); Harris v. McRae 448 U.S. 297 (1980); Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) (Akron I); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986); Webster v. Reproductive Health Services, 492 U.S. 490, 532 (1989); Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 520 (1990) (Akron II).
[134] Planned Parenthood v. Casey, 505 U.S. 833 (1992).
[135] David Souter replaced William Brennan in 1990 and Clarence Thomas replaced Thurgood Marshall in 1991. Eight of the nine justices were Republican appointees.
[136]
[137] Planned Parenthood v. Casey, 505 U.S. 833, 944, 951-952 (1992).
[138] Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992).
[139] Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992).
[140] Planned Parenthood v. Casey, 505 U.S. 833, 849-850 (1992); Poe v. Ullman, 367 U.S. 542 (1961) (Harlan J dissenting).

marriage, procreation, contraception, family relationships, child rearing, and education" and that "these matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment"[141]. It then underlined that "in some critical respects the abortion decision is of the same character as the decision to use contraception" but that when abortion is being considered "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law"[142]. Accordingly, *Roe* was "an extension" of precedents and must be reaffirmed as the arguments on behalf of the State were outweighed by "the explication of individual liberty" provided by the Court and "the force of stare decisis"[143]. One last thing worth noting is that this whole reasoning does not refer to the right to privacy. Instead, the Court affirmed that "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"[144].

3) From the "trimester framework" to the "undue burden" standard

As a new right had just been affirmed, the Court must define the standard of review which would be used to balance the right to terminate pregnancy against State legitimate interests. The Court refused as well the Roe's claim that the right to abortion would be "absolute" or "unqualified" and deny States all possibility of imposing restrictions to abortion[145] as the District Attorney's claim that the foetus would be a "person" in the Constitutional sense whose right to life would always outweigh the right to abortion[146]. Instead, the Court affirmed that the right to terminate pregnancy was a "fundamental right" which could be limited by statutory regulation on the basis of "compelling reasons"[147]. Applying such "strict scrutiny" standard of review, the Court accepted that States had important interests in "safeguarding health", "maintaining medical standards" and "protecting potential life" and that, at some point during the pregnancy, these interest became sufficiently compelling to justify restrictions to the right to abortion[148]. There has been some criticism that the Cour did not really explain why such higher standard of review must be applied instead of the regular "rational basis" standard of review[149]. But even more criticism focused on the very formal fashion in which the Blackmun's opinion tried to encapsulate the balancing of the right to abortion and the State interests in a "sliding scale" known as the "trimester framework". The Court's approach was based on two "compelling points" being the end of first trimester[150] and the end of the second trimester[151] of pregnancy. During the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's physician. During the second trimester, the State might regulate the abortion procedure in ways that were reasonably related to maternal health. During the third trimester, the State might regulate and even proscribe abortion to protect the potentiality of human life except in case of risk for the life or health of woman. Not only has this "sort of guidebook" been seen as greatly exceeding the boundaries of constitutional adjudication but also it revealed that, at least during the first trimester, the right to abortion was

[141] Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)
[142] Planned Parenthood v. Casey, 505 U.S. 833,852 (1992)
[143] Planned Parenthood v. Casey, 505 U.S. 833, 505 U.S. 833, 853 (1992).
[144] Planned Parenthood v. Casey, 505 U.S. 833, 505 U.S. 833, 851 (1992). On this see Jamal Greene, *The So-Called Right to Privacy*, 43 UNIVERSITY OF CALIFORNIA DAVIS 724 (2010).
[145] Roe v. Wade, 410 U.S. 113, 153, 154 (1973).
[146] Roe v. Wade, 410 U.S. 113, 157, 162 (1973).
[147] Roe v. Wade, 410 U.S. 113, 155 (1973).
[148] Roe v. Wade, 410 U.S. 113, 154 (1973).
[149] John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 The Yale Law Journal 943 (1973).
[150] Until this compelling point abortion may be less than mortality in normal childbirth.
[151] From this compelling point the fetus presumably has the capability of meaningful life outside the womb.

indeed an absolute right as there was no room at all for State restrictions[152]. In the subsequent case-law, most decisions were based on rules derived from the trimester framework[153]. However, in *Casey*, the Court, while reaffirming the "core" of *Roe*, decided that the "strict scrutiny" standard of review (as subsequently applied, for example, in *Akron I*[154]) as well as the "trimester framework" (described as an "elaborate but rigid construct") contradicted the affirmation in *Roe* itself that states have legitimate interest in the health of the woman and in the potential life of the foetus[155]. Departing from *Roe's* approach, *Casey* opted for "intermediate scrutiny"[156] and promoted the "undue burden" standard as the appropriate means to reconcile the State legitimate interest and women's constitutional right[157]. Whereas according to *Roe*, almost no regulation was permitted during the first trimester[158], *Casey* affirmed that, even at a very early stage of pregnancy, a State may enact rules and regulations which make the right to abortion more difficult to exercise so far it does not impose an "undue burden" on the pregnant woman's ability to make the decision[159]. According to the new "undue burden" approach, States may adopt measures designed to ensure that the woman's choice is informed as well as to protect the health or safety of women as long as they do not have "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion"[160] Despite the Court's stated ambition to provide a clear explanation of what was meant by an undue burden[161], there has been some criticism that the new test was unclear and inconsistent[162]. Some consider that *Casey* "added uncertainty" and that "over the years, Casey's undue burden standard devolved into something even less defined"[163]. As such uncertainty led Courts of Appeal to "apply the test in ways that poorly safeguard women's reproductive choice"[164], the Court tried to re-explain the undue burden standard in *Whole Woman's Health v. Hellerstedt*, a case about new requirements imposed by Texas law on physicians performing abortion (the "admitting privileges requirement" and the "surgical-center requirement"). The majority's opinion – written by justice Breyer – reversed the Fifth Circuit Court of Appeal's decision according to which both requirements were constitutional. In the Court of Appeal's approach of the "undue burden" test, state regulation of abortion was constitutional as soon as "it [did] not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" and "it [was] reasonably related to (or designed to further) a legitimate state interest". The Court found that the first part of such test gave the false impression that the existence or absence of medical benefits was not relevant to assess the constitutionality of the challenged requirements and that its second part erroneously referred to the "rational basis" standard of review instead of applying the higher standard to be applied to a "constitutionally

[152] John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 The Yale Law Journal 922 (1973).
[153] Planned Parenthood v. Casey, 505 U.S. 833, 872 (1992). See especially Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) and Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 520 (1990) (Akron II).
[154] Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 427 (1983) (Akron I).
[155] Planned Parenthood v. Casey 505 U.S. 833, 871-872 (1992).
[156] Emma Freeman, *Giving Casey Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis*, 48 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW 279, 281 (2013). See also Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting "Casey" in Constitutional Jurisprudence*, 94(6) COLUMBIA LAW REVIEW 2025, 2032 (1994).
[157] Planned Parenthood v. Casey 505 U.S. 833, 876 (1992).
[158] Planned Parenthood v. Casey 505 U.S. 833, 872 (1992).
[159] Planned Parenthood v. Casey 505 U.S. 833, 872-874 (1992).
[160] Planned Parenthood v. Casey 505 U.S. 833, 877 (1992).
[161] Planned Parenthood v. Casey 505 U.S. 833, 878-879 (1992).
[162] Emma Freeman, *Giving Casey Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis*, 48 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW 279, 280 (2013). See also Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting "Casey" in Constitutional Jurisprudence*, 94(6) COLUMBIA LAW REVIEW 2025, 2075 (1994).
[163] 130 Harvard Law Review 397 (2016). See Gonzales v. Carhart 550 U.S. 124 (2007).
[164] Emma Freeman, *Giving Casey Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis*, 48 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW 279, 280 (2013).

protected personal liberty"[165]. Instead, Breyer emphasized, *Casey* required courts to "consider the burdens a law imposes on abortion access together with the benefits those laws confer"[166]. Breyer's opinion marks "the end of a decades-long movement-countermovement conflict about the meaning of an unconstitutional undue burden"[167] and makes it clear that while the "strict scrutiny" standard of review is too high, the "rational basis" standard of review is too low. *Whole Woman* accordingly frames the "undue burden" test as an intermediate "balancing test" similar to a "cost and benefits analysis" or to a "proportionality review"[168]. It does not seem, however, that the decision provides the ultimate guidance as to the kind of adequate balance that should be reached between the right to terminate pregnancy and the State legitimate interests[169]. Moreover, elaborating on Thomas' dissent[170], some denounce the arbitrary nature of the Court's choice to consider some rights as "fundamentals" and others as "non-fundamental" and to apply different standards[171] while others think that the new standard.

4) An "engine of controversy"[172]

Under such evolving standard of review, the Supreme Court ruled that the Texas ban on abortion (*Roe*), the Pennsylvanian spousal consent requirement (*Casey*) and the Texan admitting privileges and surgical-center requirements (*Whole Woman*) were unconstitutional. Whereas, according to *Roe*, any obstacle to pre-viability abortions was to be considered unconstitutional, the subsequent case law softened the Court's approach of abortion. *Casey* allow States to adopt "consent-related" regulations as far as they seek to "persuade" and not to "prevent"[173]. *Whole Woman*, in turn, does not exclude "health-related" regulations if they truly provide health benefits to be balanced against the right to abortion. In any case, the Court's abortion case-law remains extremely controversial. In his dissent to *Roe*, Rehnquist argued that the Court's decision "partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment" and "withdraw from the States the power to legislate with respect to this matter"[174]. Later, even Ginsburg has publicly taken the view that *Roe* "ventured too far in the change it ordered" and that "the sweep and detail of the opinion stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures"[175]. Criticisms of *Roe v. Wade* thus came from the liberal side as well as from the conservative side even if the underlying reasons were – obviously – very different. Blackmun had tried, however, to establish the Court's legitimacy by emphasizing – at the very

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[165] Whole Woman's Health v. Hellerstedt 579 U.S. ___ 19-20 (2016).
[166] Whole Woman's Health v. Hellerstedt 579 U.S. ___ 19 (2016).
[167] Ziegler, *Liberty and the Politics of Balance: The Undue-Burden Test after Casey/Hellerstedt*, 52 Harv. C.R.-C.L. L. Rev. 421, 468 (2017).
[168] 130 Harvard Law Review 397 (2016). See Noah Feldman, *A Cost-Benefit Test Defeats Texas Abortion Restrictions*, BLOOMBERG VIEW (June 27, 2016, 12:25 PM), http://www.bloomberg.com/ and Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2015).
[169] On the remaining uncertainties of the "full scope of the undue burden test" see Ziegler, *Liberty and the Politics of Balance: The Undue-Burden Test after Casey/Hellerstedt*, 52 Harv. C.R.-C.L. L. Rev. 462, 463 (2017). In support of "developing a rational basis with bite Balancing test", see Meghan Harper, *Making Sense of Whole Women's Health v. Hellerstedt: The Development of a New Approach to the Undue Burden* Standard, 65 U. Kan. L. Rev. 757 (2016-2017).
[170] Whole Woman's Health v. Hellerstedt 579 U.S. ___ 11 (2016) (Thomas J, dissenting).
[171] Joel S. Nolette, *Whole Woman's Health v. Hellerstedt: Judicial Review When the Court Wants to*, 14 Geo. J.L. & Pub. Pol'y 633 (2016).
[172] Jack M. Balkin, *Roe v Wade: An Engine of Controversy*, in What Roe v. Wade Should Have Said – The Nation's Top Legal Experts Rewrite America's Most Controversial Decision (ed. Jack M. Balkin), NYU Press, at 3 (2005).
[173] According to the Court, the definition of "medical emergency", the "informed consent requirement", the "one-parent consent requirement and judicial bypass procedure" and "the recordkeeping and reporting requirement" were constitutional.
[174] Roe v. Wade, 410 U.S. 113, 174-175 (1973). See also D.J. Zampa, *Supreme Court's Abortion Jurisprudence: Will the Supreme Court Pass the Albatross Back to the States*, 65 NOTRE DAME L. REV. 733,735 (1990).
[175] Ruth B. Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375, 381 (1985).

beginning of the opinion – the "relatively recent" character of restrictive criminal abortion laws[176] and by insisting – in its Due Process analysis – that federal and state courts that had recently considered abortion had concluded that the right to privacy included some non-absolute right to abortion[177]. According to the dissenters, Rehnquist and White, however, consideration should have been given to "the fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century"[178] and the decision was "an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court"[179]. The discussion about the Court's legitimacy continued in the subsequent case-law. The plurality in *Casey* and Breyer in *Whole Woman* reaffirmed that it was the Court's duty to provide States with guidance as to the regulation of abortion[180] but this was strongly and bitterly disputed by dissenting justices. In *Casey*, Scalia, wrote that "the permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting"[181]. In *Whole Woman*, Thomas noted that "before today, this Court had 'given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty'" but that "today, however, the majority refuses to leave disputed medical science to the legislature" [182]. In his view, "the majority reappoints this Court as "the country's ex officio medical board with powers to disapprove medical and operative practices and standards throughout the United States"[183]. Forty-five after *Roe*, the legitimacy of the Court's abortion case law remains – obviously – a fiercely debated topic.

B. A., B. and C. v. Ireland (2010)

After the *A., B. and C. v. Ireland*[184] case hit the ECtHR's docket in 2005 there has been some expectation that the Court might issue a European version of *Roe v. Wade*[185]. Instead, the European Court affirmed that the ban on abortion for health or well-being reasons was not in breach of the European Convention[186]. At the time of the facts, Article 40.3 of the Irish Constitution banned abortion in all cases except in case of risk to the mother's life. The applicants were two Irish women claiming that the Irish ban on abortion violated their right to respect for private life guaranteed by article 8 of the ECHR. The first applicant already had four children which were all in foster care. She had a history of depression during pregnancies and was trying to stop drinking. She planned to regain custody of her children with the help of social workers. However she feared that a further child could jeopardize her health and the successful reunification of her family because of the risk of depression and to her sobriety[187]. The second applicant got pregnant unintentionally despite the fact she had taken the "morning-after pill". She did not feel able to care for a child at that time of her life and was told by two doctors that she was at substantial risk of an ectopic pregnancy[188]. As the Constitution expressly provided

[176] Roe v. Wade, 410 U.S. 113, 129 (1973).
[177] Roe v. Wade, 410 U.S. 113, 154 (1973).
[178] Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist J, dissenting).
[179] Roe v. Wade, 410 U.S. 113, 222 (1973) (White J, dissenting).
[180] Planned Parenthood v. Casey 505 U.S. 833, 845 (1992) ;
[181] Planned Parenthood v. Casey 505 U.S. 833, 979 (1992) (Scalia J, dissenting).
[182] Whole Woman's Health v. Hellerstedt 579 U.S. ___ 8 (2016) (Thomas J, dissenting).
[183] Whole Woman's Health v. Hellerstedt 579 U.S. ___ 10 (2016) (Thomas J, dissenting).
[184] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010.
[185] Shannon K. Calt, *A., B. & C. V. Ireland: Europe's Roe v. Wade?*, 14(3) LEWIS & CARK LAW REVIEW 1189 (2010).
[186] Paolo Ronchi, *A., B. and C. v. Ireland: Europe's Roe v. Wade still has to wait*, 127(3) LAW QUARTERLY REVIEW, 365, 369 (2011).
[187] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, §§ 13-14.
[188] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, §§ 18-19.

that the abortion ban did not limit freedom to travel between the State and another state, both applicants had made the choice to travel to the U.K. to have their pregnancy terminated[189].

1) An Ongoing Public Reflection Process

Before embarking on the human rights analysis, the European Court discussed at lengths the Irish context before pinpointing more briefly relevant European and international material as well as comparative law data regarding domestic regulations in the Council of Europe. The protection of the life of the unborn had been introduced in the Irish Constitution in 1983 following a referendum as there had been some concern that the Irish Supreme Court would follow the approach adopted by English courts in *R. v. Bourne*[190] or by the American Supreme Court in *Roe v. Wade*[191]. In the early 1990s, constitutional amendments had been adopted to clarify that the ban on abortion did not prevent women to travel abroad in view of having an abortion and to be given information on available care in other states[192]. Since then there had been an ongoing domestic public reflection process on the matter of abortion involving several working groups and reports[193] as well as the creation of a Crisis Pregnancy Agency (CPA)[194]. The Irish government had obtained a guarantee that neither the Maastricht Treaty on the European Union (1992) nor the Lisbon treaty attributing legal status to the charter of fundamental rights of the European Union (2007) could be interpreted as affecting the Constitutional restrictions to abortion in Ireland[195]. However, in 2008, the Parliamentary Assembly of the Council of Europe (PACE) had issued a non-binding resolution according to which "abortion should not be banned within reasonable gestational limits" as "the lawfulness of abortion does not have an effect on a woman's need for an abortion, but only on her access to a safe abortion"[196]. Moreover, the UN Committee on the Elimination of Discrimination Against Women's (CEDAW)[197] as well the Human Rights Committee's (HRC)[198] had expressed concern about the very restrictive abortion laws in Ireland. Only three other member States prohibited abortion "in all circumstances" (Andorra, Malta and San Marino). Abortion "on request" was available in thirty member states whereas abortion "on health grounds" was authorized in 40 contracting states[199].

2) Within the Scope of the Right to Respect for Private Life

For the European Court – just as for the Supreme Court almost forty years earlier – the first legal question was whether there was a right to abortion guaranteed under the ECHR. The Court recalled that the notion of "private life" contemplated by article 8 is "a broad concept" which encompasses – as emphasized in *Pretty v. the United Kingdom*[200] – the right to "personal autonomy" and "personal development"[201]. In previous cases relating to legal abortion[202] or

[189] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, §§ 15-17 and 20-21.
[190] R. v. Bourne ([1939] 1 KB 687).
[191] Roe v. Wade, 410 U.S. 113 (1973).
[192] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, §§ 27-55.
[193] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, §§ 62-76.
[194] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, §§ 77-88.
[195] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, §§ 100-103.
[196] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, §§ 107-108. See Resolution 1607 (2008) Access to safe and legal abortion in Europe.
[197] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, § 110. See Report of the CEDAW of July 2005 (A/60/38(SUPP)).
[198] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, § 111. See Third periodic Report of Ireland on observance of the UN Covenant on Civil and Political Rights (CCPR/C/IRL/CO/3 dated 30 July 2008).
[199] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, § 112.
[200] ECtHR, Pretty v. the United Kingdom, 29 April 2002 (see below).
[201] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, § 212.
[202] ECtHR, Tysiąc v. Poland, 20 March 2007, § 106.

involuntary abortion[203], the Court – relying on an old decision from the former Human Right Commission[204] – had already affirmed that the regulation of abortion "touches upon" the private life of the pregnant woman but that "her private life becomes closely connected with the developing foetus". As a consequence, "the woman's right to respect for her private life must be weighed against other competing rights and freedoms invoked including those of the unborn child"[205]. In the Court's view, "article 8 cannot, accordingly, be interpreted as conferring a right to abortion" but "the prohibition […] of abortion where sought for reasons of health and/or well-being […] [comes] within the scope of their right to respect for their private lives and accordingly Article 8"[206]. The Court's approach is ambiguous as it affirmed at the same time that there is no right to abortion and that the abortion decision comes within the scope or article 8. The ECtHR does not want to go so far as expressly acknowledging that there is a right to abortion under the Convention but nor does want to leave the abortion decision entirely outside the scope of the protection provided by the ECHR. The kind of formulation used in *A., B. and C.* leaves the Court much room to balance women's right with States' legitimate interests. The Court's approach is also strange, some have written, because the Court includes the competing interests in the definition of the woman's right instead of simply affirming – consistently with the usual methodology – that a woman's right to privacy includes the question of abortion and that this right might be limited by other considerations[207].

3) Profound Moral Values Concerning the Nature of Life

The Court found that the case concerned "negative obligations" as the ban on abortion for reasons of health and/or well-being constituted an interference in their right to private life[208]. Accordingly, the Court must examine whether such restriction was justified under § 2 of article 8 by being, "in accordance with the law" and "necessary in a democratic society" for one of the "legitimate aims" mentioned by the Convention[209]. The Court found that the disputed prohibition was based on "profound moral values concerning the nature of life" as they appeared from the 1983 referendum held in Ireland on the right to abortion[210]. Moreover, as it was "neither desirable nor possible" to answer the question of the unborn right to life under article 2 of the Convention, it was "equally legitimate for a State to choose to consider the unborn to be […] a person and to aim to protect that life"[211]. There was no common European conception of morals and no common European answer to the question of when life begins, the Court said, and States were, in principle, in a better position to "give an opinion on the exact content of the requirements of morals"[212]. As Ireland's ban on abortion for health and/or well-being reasons pursued a legitimate aim, the Court had to supervise whether domestic authorities had struck a fair balance between the competing interests at stake[213]. To answer this question, the Court gave special consideration to the fact that the Irish Constitution authorised pregnant women to travel abroad to have their pregnancy terminated[214]. The Court acknowledged that

[203] ECtHR (gd ch.), Vo v France, 8 July 2004, § 76.
[204] European Commission of Human Right, Bruggemann and Scheuten v. Germany, 19 May 1976 (decision on admissibility).
[205] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, § 213.
[206] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, § 214.
[207] Elizabeth Wicks, *A, B, C v Ireland: Abortion Law under the European Convention on Human Rights*, 11(3) HUMAN RIGHTS LAW REVIEW 559-560 (2011).
[208] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, § 216.
[209] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, § 218.
[210] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, § 222.
[211] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, § 222.
[212] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, § 222.
[213] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, § 238.
[214] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, § 239.

travelling abroad to abort had been "psychologically and physically arduous" for the applicants and had a "serious impact" even if their suffering was not, in its view, severe enough to trigger the protection of article 3 against inhuman or degrading treatments[215]. However, "having regard to the right to lawfully travel abroad for an abortion with access to appropriate information and medical care in Ireland, the Court [did] not consider that the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of the Irish people as to the nature of life […] [exceeded] the margin of appreciation"[216]. The dissenting judges strongly disagreed with the majority's approach as, in their view, "the values protected – the rights of the foetus and the rights of a living person – are, by their nature, unequal". The rights of the applicants were the rights of "person(s) already participating, in an active manner, in social interaction". The rights of the foetus, in turn, were the rights of a subject "whose life has not been definitively determined […] and whose participation in social interaction has not even started". Convention rights, they said, were "mainly designed to protect individuals against State acts or omissions while the former participate actively in the normal everyday life of a democratic society"[217]. Moreover, some authors have criticised the "extreme predominance allowed to morality" and the correlative absence of a real "balancing approach" in *A., B. and C. v. Ireland*[218]. Generally speaking, the legitimate aim of protecting morals set forth in article 8, § 2, ECHR is controversial and disputed and some think that State should not be authorized anymore to rely on moral to justify restriction to human rights[219]. More specifically, it can be reasonably argued that the Irish protection of morals is tainted with "hypocrisy" or even "non-sense" as it expressly allows women to travel abroad to have their pregnancy terminated really[220]. As regards the suffering of women travelling abroad to seek abortion services, the Court's affirmation that it does not reach the threshold necessary to trigger the protection of article 3 might be inconsistent with its subsequent case-law. Indeed, in *R.R. v. Poland*[221] and *P. and S. v. Poland*[222], the level of suffering endured by pregnant women prevented from terminating their pregnancy although they were entitled to it under Polish law was considered high enough to call for the application of article 3. As underlined by Cosentino, if the prohibition of inhumane and degrading treatment depends on the grounds for abortion accepted by the State, then the protection of human rights is very weak[223]. One cannot help but have the feeling that the Court's proportionality analysis was biased as it overvalued the state interest in protecting morals and undervalued the rights of women to respect for their private life and correlatively renounced to perform a real balancing exercise. Even some justices who voted with the majority considered that the Court's approach was too abstract and emphasized that "it [could not] be excluded that in other cases, in which there are grave dangers to the health or the

[215] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, § 239.
[216] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, § 241.
[217] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, joint partly dissenting opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi, § 2.
[218] Chiara Cosentino, *Safe and Legal Abortion: An Emerging Human Right? The Long-lasting Dispute with State Sovereignty in ECHR Jurisprudence*, HUMAN RIGHTS LAW REVIEW 13 (2015).
[219] Chiara Cosentino, *Safe and Legal Abortion: An Emerging Human Right? The Long-lasting Dispute with State Sovereignty in ECHR Jurisprudence*, HUMAN RIGHTS LAW REVIEW 13 (2015). See also Christopher Nowlin, *The Protection of Morals Under the European Convention of Human Rights and Fundamental Freedoms*, 24(1) HUMAN RIGHTS QUARTERLY 285 (2002); Geoffrey Willems, *Private and family life vs. morals and traditions in the case-law of the ECHR*, in FAMILY LAW AND CULTURE IN EUROPE: DEVELOPMENTS, CHALLENGES AND OPPORTUNITIES (dir. K. Boele-Woelki et N. Dethloff), European Family Law Series, vol. 35, Cambridge, Anvers, Portland, Intersentia, 305-322 (2014).
[220] Chiara Cosentino, *Safe and Legal Abortion: An Emerging Human Right? The Long-lasting Dispute with State Sovereignty in ECHR Jurisprudence*, HUMAN RIGHTS LAW REVIEW 13 (2015). See also Elizabeth Wicks, *A, B, C v Ireland: Abortion Law under the European Convention on Human Rights*, 11(3) HUMAN RIGHTS LAW REVIEW, 563 (2011).
[221] ECtHR, R.R. v Poland, 26 May 2011, § 161.
[222] ECtHR, P. and S. v Poland, 30 October 2012, § 168.
[223] Chiara Cosentino, *Safe and Legal Abortion: An Emerging Human Right? The Long-lasting Dispute with State Sovereignty in ECHR Jurisprudence*, HUMAN RIGHTS LAW REVIEW 20 (2015).

well-being of the woman wishing to have an abortion, the State's prohibition of abortion could be considered disproportionate"[224].

4) A Real and Dangerous New Departure

The Court expressly noted that "the breadth of the margin of appreciation to be accorded to the State [was] crucial to its conclusion as to whether the impugned prohibition struck that fair balance"[225]. The Court recalled that the margin is narrower when the issue at stake involves "a particularly important facet of an individual's existence or identity" but that, at the same time, it is normally broader when the issue raises "sensitive moral or ethical issue"[226]. Turning to the facts of the case, the Court insisted that there was "no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake"[227]. As a consequence, Ireland was normally entitled to a broad margin of appreciation in striking a fair balance between the competing rights and interests at stake in the case[228]. However, the margin also depends on the existence or absence of a European consensus on the matter at issue. There was an indisputable European consensus on abortion for health reasons (allowed in 40 member states) and abortion for well-being reasons (allowed in 35 members states) and this normally should have reduced the discretion afforded to domestic authorities[229]. Instead, the Court affirmed that it "[did] not consider that this consensus decisively [narrowed] the broad margin of appreciation of the State"[230]. Indeed, the majority wrote, there was no European consensus on the definition of the beginning of life and it was accordingly up to the States to answer the question of when the right to life begins. As the rights of the mother and the rights of the unborn were "inextricably interconnected", the margin of appreciation for the protection of the rights of the unborn "necessarily" translated into a margin of appreciation as regards the balancing of these rights with the competing rights of the mother"[231]. According to the dissenting judges the majority "[shifted] the focus of this case away from the core issue" by insisting on the diverging views on the definition of the beginning of life rather than on the strong European consensus on abortion for health or well-being reasons. In doing so, the Court allowed the "profound moral views" of the Irish people to impact and override an existing European consensus. This was "a real and dangerous new departure in the Court's case-law" which until then did not distinguish "between moral and other beliefs when determining the margin of appreciation"[232]. Many authors share the view that the Court's approach was too deferential and gave excessive weight to Irish particularism neglecting its harmonizing role and the universal dimension of human rights[233].

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[224] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, concurring opinion of Judge López Guerra, joined by Judge Casadevall, §§ 4-5.
[225] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, § 231.
[226] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, § 232.
[227] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, § 233.
[228] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, § 233.
[229] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, §§ 234-235.
[230] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, §§ 236.
[231] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, §§ 237. See also ECtHR (gd ch.), Vo v. France, 8 July 2004, § 80.
[232] ECtHR (gd ch.), A., B. and C. v. Ireland, 16 December 2010, joint partly dissenting opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi, § 7.
[233] See e.g. Chiara Cosentino, *Safe and Legal Abortion: An Emerging Human Right? The Long-lasting Dispute with State Sovereignty in ECHR Jurisprudence*, HUMAN RIGHTS LAW REVIEW 7-14 (2015); Christine Ryan, *The Margin of Appreciation in A, B and C v Ireland: A Disproportionate Response to the Violation of Women's Reproductive Freedom*, 3 UCL JOURNAL OF LAW AND JURISPRUDENCE 245-248 (2014); Elizabeth Wicks, *A, B, C v Ireland: Abortion Law under the European Convention on Human Rights*, 11(3) HUMAN RIGHTS LAW REVIEW, 561-563 (2011).

C. Comparison

As regards the *background of the decisions*, the SCOTUS and the ECtHR both referred to the state of the law in the states under their jurisdiction. Moreover, in accordance with their respective practices, the Supreme Court paid significant attention to history whereas the European judges mentioned several international law instruments. The interesting thing here is that it could be considered that, in their abortion decisions, both courts presented background informations in a certain way, somehow paving the way for the very decision that would ultimately be taken. One the one hand, both courts paid only limited or even superficial attention to the national consensus existing among states (either against or in favor of abortion) which may be considered as heralding the subsequent dismissal of such national/European consensus as a critical factor in the final decision (respectively in favor of and against abortion). On the other hand, the historical record of the SCOTUS just as the international overview by the ECtHR also seem to be, to a certain extent, guided or altered by the underlying intention to provide the right context for the decision to come. Indeed, the Supreme Court presented an historical account emphasising the prior toleration of abortion instead of the relatively longstanding prohibition of abortion by American States which could be considered as announcing a decision in favor of women's choice. Similarly, the European Court mentioned (briefly) international instruments affirming the right to abortion while at the same time insisting (much more) on the national debate that led to the Irish prohibition of abortion which could be understood as announcing a decision in favor of restrictive regulations. Thus, comparing the American and European decisions on abortion, one cannot help but have the feeling that "setting the stage" for the human rights reasoning by providing contextual informations is far from being a "neutral operation" as the way such informations are presented may well be an important "strategic step" in the justification of the decision.

As regards the *very question of the existence or absence of a right* to abortion, the SCOTUS and the ECtHR struggled to decide whether such right could be included respectively in the scope of the US Constitution or in the scope of the ECHR. In this respect, whereas the Supreme Court and the European Court used very similar concepts and reasonings to conclude that the issue of abortion fell within the scope of the relevant constitutional or international provisions, it must be acknowledged that they subsequently affirmed the right of women to make choices regarding their pregnancy in very different ways. On the one hand, it is striking that both courts expressly associated the concepts of "privacy" (SCOTUS) or "private life" (ECtHR) with those of "personal liberty" (SCOTUS), "personal autonomy" and "personal development" (ECtHR) and that both of them expressly relied on the "breadth" of privacy/private life to justify – without further elaboration – that abortion regulations may impact women's protected rights. On the other hand, it is equally striking that whereas the SCOTUS explicitly and frankly affirmed "the woman's right […] to terminate her pregnancy" underlining not only the "detriment" for the woman herself but also the "distress" for all concerned, the ECtHR ambiguously and shyly declared that that the prohibition of abortion came within the scope of the right to private life but that there was no right to abortion as such as the woman's private life was "closely connected" to the developing foetus. Hence, comparing *Roe* and *A., B. and C.* emphasises that "defining the scope" of protected liberties is far from being a "mechanical process" producing "standardized new rights" and may be better understood as an occasionally "elliptic and/or performative operation" giving birth to "*sui generis* rights" whose strength or weight may vary greatly.

As regards the next step of *balancing women's rights and state interests*, the SCOTUS and the ECtHR had to examine whether the arguments adduced in favor of abortion policies were sufficient to justify a restriction to the right to privacy/to private life. In this respect, it is worth noticing that whereas the Supreme Court and the European Court took very different views on the "nature" and "weight" of legitimate state aims, they both tried to put forward some (more or less convincing) ways of reconciling them with women's right to personal liberty, autonomy or development. On the one hand, the SCOTUS refused the idea that Texas could successfully invoke its own "theory of life" to outweigh women's constitutional right but accepted to consider other interests through the prism of "strict scrutiny", while the ECtHR accepted – for its part –the idea that Irish "profound moral values concerning the nature of life" could prevail over the right to private life and insisted that the State is in a "better position" to assess the requirements of morals. On the other hand, however, the SCOTUS proposed a "chronological compromise" according to which the balance between women's rights and conflicting interests would evolve through the duration of pregnancy and, similarly, the ECtHR offered a "geographical compromise" according to which the ban on abortion in Ireland was somehow compensated by its availability abroad. Hence, comparing the American and European decisions on abortion shows that "balancing" may involve "sorting" arguments (i.e. by refusing or admitting abstract references to a certain "theory of life" or to the "nature of life") and "setting the scale" in a certain way (i.e. by offering "extra weight" to individual rights or states interests). The comparison also shows that a "fair balance" may (occasionally) be achieved through compromises, even if *Roe*'s "chronological compromise" as well as *A., B. and C.*'s "geographical compromise" have both given rise to strong criticism.

As regards the final issue of *enforcing women's rights while respecting sovereignty*, the SCOTUS and the ECtHR arguably tried to balance the universality of rights with the diversity of preferences and conditions among American and European States. Arguably, however, neither the Supreme Court nor the European Court did manage to find a "middle way" between judicial activism and judicial restraint. *Roe* was an extremely bold decision as it affirmed a right to terminate pregnancy despite the strong American consensus on the ban on abortion for health or well-being reasons and it was largely considered as a spectacular manifestation of excessive activism which may ultimately have ill-served the struggle for women's reproductive rights by galvanizing the right-to-life movement and undermined the legitimacy of the Supreme Court by giving the impression that it was somehow abusing its powers. *A., B. and C.*, in turn, was an overly cautious judgement as it refused to affirm a right to abortion despite the consolidated European consensus in favor of access to termination of pregnancy and it was accordingly criticized as an unfortunate example of excessive restraint which obviously undervalued women's reproductive autonomy and also questioned the very role of the European Court by giving the impression that it was to a certain extent neglecting its duty to harmonize the level of protection of human rights across Europe. Regarding this last common feature of the adjudication process, the comparison between the American and European abortion decisions thus puts forward the great difficulty of finding the "right pace" when it comes to affirming new rights as a "premature evolution" as well as a "belated response" may have (indirect) harmful effects.

IV. Assisted suicide

Respectively in 1997 and 2002, the SCOTUS and the ECtHR faced the issue of assisted suicide. The Supreme Court as well as the European Court refused to affirm a fundamental right to die and – unanimously – upheld legislations making it a crime to assist suicide.

A. Washington v. Glucksberg (1997)

In *Washington v. Glucksberg*[234], the US Supreme Court decided that the prohibition against causing or aiding a suicide did not violate the Due Process Clause[235]. In the State of Washington, assisted suicide had always been considered as a crime. In 1994, doctors, gravely ill patients and a non-profit organisation sued the State before the District Court and obtained a declaration that the Washington's ban on assisted suicide was unconstitutional. The Court of Appeals of the Ninth Circuit affirmed the decision and confirmed that the due process clause included a constitutional right to die. The State and its Attorney General brought the case before the Supreme Court which ruled unanimously in their favor. Chief Justice Rehnquist delivered the opinion of the Court. Four justices – Stevens, Souter, Ginsburg and Breyer – filled opinions concurring only in the judgement and not in the opinion.

1) A 700 years long Anglo-American tradition

Rehnquist began with an examination of US history, legal traditions and practices emphasizing that this was what the Court did in all due process cases[236]. In "almost every State" as in "almost every western democracy", he wrote, it was a crime to assist suicide. Such bans on assisted suicide, he continued, were "no innovations" but "longstanding expressions" of the States' commitment to protecting human life[237]. In fact, a 700 years long Anglo-American tradition disapproved suicide and assisting suicide[238]. If common law's "harsh sanctions" against the suicide's family were abandoned, colonial then early state legislatures maintained the prohibition of assisted suicide[239]. When the Fourteenth Amendment was adopted in 1868, most states expressly condemned assisted suicide and, in the XXth century context, the American Law Institute reaffirmed the prohibition of assisted suicide on the basis of the "sanctity of life"[240]. It was true, however, that "because of advances in medicine and technology, […] public concern and democratic action [were] […] sharply focused on how best to protect dignity and independence at the end of life". As a consequence, many states allowed living wills, surrogate decisionmaking or refusal of life-sustaining treatments, but the ban on assisted suicide was generally reaffirmed[241]. As a conclusion, the opinion noted that Oregon was the only state to have legalized physician-assisted suicide for competent and terminally ill adults whereas the "overwhelming majority of states" explicitly prohibited assisted suicide[242]. Interestingly, the Court mentioned – in a footnote to its discussion of American law – that "similar debates" took place in other countries such as Canada, New-Zealand, Australia and Colombia. Among these four jurisdictions, only Colombia did legalized assisted suicide[243]. Moreover, at a later stage of the decision, the Supreme Court expressly mentioned the Dutch experience of euthanasia.

[234] Washington v. Glucksberg, 521 U.S. 702 (1997).
[235] Cruzan v. Director of the Missouri Department of Health 497 U.S. 261 (1990).
[236] Washington v. Glucksberg, 521 U.S. 702, 710 (1997).
[237] Washington v. Glucksberg, 521 U.S. 702, 710 (1997).
[238] Washington v. Glucksberg, 521 U.S. 702, 711 (1997).
[239] Washington v. Glucksberg, 521 U.S. 702, 711-715 (1997).
[240] Washington v. Glucksberg, 521 U.S. 702, 715-716 (1997).
[241] Washington v. Glucksberg, 521 U.S. 702, 716 (1997).
[242] Washington v. Glucksberg, 521 U.S. 702, 716-719 (1997).
[243] Washington v. Glucksberg, 521 U.S. 702, 716 (1997).

2) An established method: tradition and careful description

Against this background, the opinion turned to the Due Process Clause and reaffirmed the range of rights it encompasses. However, Rehnquist wrote, "guideposts for responsible decision-making in this unchartered area are scarce and open-ended" and there was consequently a risk that "the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court"[244]. Accordingly, even if such liberty was "never fully clarified" and was "perhaps not capable of being fully clarified", the Court must rein in the subjective element inherent to judicial review by following its established method for substantive due process analysis[245]. This method, Rehnquist explained, had two main features. First, protected rights and liberties must be "objectively deeply rooted in the Nation's history and traditions" or "implicit in the concept of ordered liberty". Second, the Court must provide "a careful description of the asserted fundamental liberty interest"[246]. A few years earlier, in *Cruzan*[247], the Cour had affirmed a right to refuse unwanted lifesaving medical treatment. In Rehnquist's view, such right could be deduced from a long legal tradition protecting people against unwanted treatments[248]. The same could not be said of the right claimed in *Glucksberg* as assisted suicide had been and still was outlawed in most American States. Considering the necessity to describe carefully (and thus to identify and to distinguish finely) alleged constitutional rights, the solution affirmed in *Cruzan* could not be extrapolated to the issue at stake in *Glucksberg* based on the idea that both claims would express a "general tradition of 'self-sovereignty'"[249] or "abstracts concepts of personal autonomy"[250]. As a consequence, "the asserted "right" to assistance in committing suicide [was] not a fundamental liberty interest protected by the Due Process Clause"[251]. Obviously, the *Glucksberg* "tradition" and "specificity" requirements were stricter than *Casey'*s approach and "placed severe constraints on substantive due process jurisprudence"[252]. There was some criticism that they did not describe accurately the Court's actual practice[253] and role[254] and neglected "the essential question [of] whether the right to assisted death is comparable in its importance in a person's life to other aspects of liberty already protected"[255]. At least some of the concurring justices offered a different approach of the due process analysis and reached the conclusion that there was/might be a constitutionally protected interest to make decisions about one's death[256].

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[244] Washington v. Glucksberg, 521 U.S. 702, 720 (1997).
[245] Washington v. Glucksberg, 521 U.S. 702, 720-722 (1997).
[246] Washington v. Glucksberg, 521 U.S. 702, 720-721 (1997).
[247] Cruzan v. Director of the Missouri Department of Health, 497 U.S. 261 (1990).
[248] Washington v. Glucksberg, 521 U.S. 702, 723-726 (1997).
[249] Washington v. Glucksberg, 521 U.S. 702, 724 (1997).
[250] Washington v. Glucksberg, 521 U.S. 702, 725 (1997).
[251] Washington v. Glucksberg, 521 U.S. 702, 728 (1997).
[252] K. Yoshino, *A New Birth of Freedom? Obergefell v. Hodges*, 129 HARV. L. REV. 162 (2015).
[253] According to Chemerinsky, "he is just wrong in saying that due process is limited to protecting those rights that are "objectively, 'deeply rooted in this Nation's history and tradition'. Although this formulation is familiar and often uttered, it does not reflect the non-textual rights protected by the Court, especially under the rubric of privacy rights" (E. Chemerinsky, *Washington v. Glucksberg Was Tragically Wrong*, 106 Mich. L. Rev. 1505 (2008).
[254] According to Chemerinsky, "normatively, the fact that laws have long existed does not answer the question as to whether the interest the laws regulate is so integral to personhood as to be worthy of being deemed a fundamental right" (E. Chemerinsky, *Washington v. Glucksberg Was Tragically Wrong*, 106 Mich. L. Rev. 1505 (2008).
[255] Erwin Chemerinsky, *Washington v. Glucksberg Was Tragically Wrong*, 106 Mich. L. Rev. 1507 (2008).
[256] In his concurring opinion, Stevens considered that "Cruzan did give recognition, not just to vague, unbridled notions of autonomy, but to the more specific interest in making decisions about how to confront an imminent death" and that "the liberty interest at stake in a case like this differs from, and is stronger than, both the common-law right to refuse medical treatment and the unbridled interest in deciding whether to live or die". Accordingly, "some individuals who no longer have the option of deciding whether to live or to die because they are already on the threshold of death have a constitutionally protected interest that may outweigh the State's interest in preserving life at all costs" (Washington v. Glucksberg, 521 U.S. 702, 723-726 (1997)

3) Rational basis review

As the "right" to assisted suicide was not to be considered as a fundamental liberty interest, Washington's ban on assisted suicide must only meet the "rational basis" standard of review[257]. Rational basis is the "normal", "lower" or "minimum" level of scrutiny[258] in US constitutional law and only requires infringements on liberties to be "rationally related to legitimate government purposes"[259]. It usually applies to "economic interests and property rights" but, in *Glucksberg*, due to Rehnquist's restrictive approach of Due Process, it was (controversially) applied to the issue of the unavailability of assisted suicide[260]. Anyway, it was clear, in Rehnquist's view, that the prohibition of assisted suicide met such minimum standard of review as it was rationally related to at least four different important and legitimate state interests. First of all, the State had a "symbolical, aspirational and practical" interest in the "preservation of human life" irrespective of the health situation and wishes of the concerned individuals as "the States "may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy""[261]. Secondly, the State also had an interest in the "protection of the integrity and the ethics of the medical profession" as the American Medical Association (AMA) and many other medical and physicians' groups had concluded that assisted suicide was totally incompatible with "the physician's role as a healer" and created great "societal risks"[262]. Thirdly, the ban on assisted suicide aimed at the "protection of vulnerable groups" from "abuse, neglect and mistakes" as there was a risk of "subtle coercion" and of "undue influence" as well as a risk that "many might resort to [assisted suicide] to spare their families the substantial financial burden of end of life health-care costs"[263]. Finally, assisted suicide could pave the way towards "voluntary and perhaps even involuntary euthanasia" as was supported by the Court of Appeals "expansive reasoning" and by "evidence about the practice of euthanasia in the Netherlands"[264]. According to Rehnquist, there was no need to "weigh exactingly the relative strengths of these various interests" as "they [were] unquestionably important and legitimate, and Washington's ban on assisted suicide is at least reasonably related to their promotion and protection"[265]. At least some of the concurring justices while agreeing on the different legitimate interests pinpointed by the Court's opinion expressly affirmed that the balancing exercise might well lead – in a different case and at a different time – to a different decision[266].

(Stevens J, concurring in judgements)). In his concurring opinion, Souter affirmed that respondents" claim a right to assistance not on the basis of some broad principle" but "base their claim on the traditional right to medical care and counsel". Accordingly, "the importance of the individual interest here, as within that class of "certain interests" demanding careful scrutiny" (Washington v. Glucksberg, 521 U.S. 702, 781 (1997) (Souter J, concurring in judgements)). See also Washington v. Glucksberg, 521 U.S. 702, 790-791 (1997) (Breyer J, concurring in judgements).

[257] Washington v. Glucksberg, 521 U.S. 702, 728 (1997).

[258] Erwin Chemerinsky, The Rational Basis Test is Constitutional (and Desirable), 14 Geo. J.L. & Pub. Pol'y 401 (2016).

[259] Denise E. Choquette, Reno v. Flores and the Supreme Court's Continuing Trend Toward Narrowing Due Process Rights, 15 B.C. Third World L.J. 115 (1995).

[260] Erwin Chemerinsky, The Rational Basis Test is Constitutional (and Desirable), 14 Geo. J.L. & Pub. Pol'y 406 (2016).

[261] Washington v. Glucksberg, 521 U.S. 702, 728-731 (1997).

[262] Washington v. Glucksberg, 521 U.S. 702, 731 (1997).

[263] Washington v. Glucksberg, 521 U.S. 702, 731-732 (1997).

[264] Washington v. Glucksberg, 521 U.S. 702, 732-735 (1997).

[265] Washington v. Glucksberg, 521 U.S. 702, 735 (1997).

[266] In his concurrence, Stevens held that the "state interests supporting a general rule banning the practice of physician-assisted suicide do not have the same force in all cases" and that he did not "foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge" (Washington v. Glucksberg, 521 U.S. 702, 745-746 and 750 (1997) (Stevens J, concurring in judgements)). In his concurrence, Souter affirmed that he was "satisfied that the State's interests described in the following section are sufficiently serious to defeat the present claim that its law is arbitrary or purposeless" and that he did "not decide for all time that respondents' claim should not be recognized, I acknowledge the legislative institutional competence as the better one to deal with that claim at this time"

4) "As it should in a democratic society"

Chief Justice Rehnquist expressly took the view that balancing the competing interests at stake should be left to the states. In his opinion, he paid much attention to the fact that many States had legislated to allow living wills and that in many States bills had been introduced to allow assisted suicide but that "voters and legislators continue for the most part to reaffirm [the ban]"[267]. The Court should be very careful, he wrote, when considering to extend the scope of constitutionally protected liberty interests as this "to a great extent, [places] the matter outside the arena of public debate and legislative action". Accordingly, as "throughout the Nation, Americans [were] engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide", the Court must "[permit] this debate to continue, as it should in a democratic society"[268]. Whereas most concurring justices expressly shared this perspective, they also mentioned – as we just noted – the possibility of deciding otherwise in the future[269]. In their view, at some point and under certain circumstances, it could be necessary for the Court to take a more proactive position as regards death with dignity. In *Roe* and *Casey*, the Court "was willing to forge ahead to create a just outcome without regard to the usual decisional restraints"[270]. In *Glucksberg*, the Court chose a "restrained methodology" meant to leave the question of assisted suicide in the hands of the states[271]. There has been criticism that *Glucksberg* was "tragically wrong" as its excessively deferential approach of due process failed to affirm a fundamental right to die and left "countless individuals and their families" suffering whereas, according to polls, the majority of Americans would favor legalizing assisted suicide[272]. Others describe *Glucksberg* as "a pyrrhic victory" emphasizing the concurrences and the fact that "there were probably five votes for a somewhat narrower formulation of some right to die, under some circumstances"[273]. Once again, a landmark decision by the Supreme Court gave rise to criticism from both liberals and conservative.

B. Pretty v. the United Kingdom (2002)

In *Pretty v. United Kingdom*, the European Court decided that the prohibition of assisted suicide in English law did not amount to a violation of the ECHR[274]. The applicant, Mrs Pretty, suffered from motor neurone disease or "MND", a degenerative and incurable illness, in an advanced stage. She was almost entirely paralyzed and her life expectancy was very limited. However, her mental capacity was not impaired[275]. Assisted suicide was forbidden in the United Kingdom but she wanted the Director of Public Prosecutions to allow her husband to help her to die without being

(Washington v. Glucksberg, 521 U.S. 702, 782, 789 (1997) (Souter J, concurring in judgements)). See also Washington v. Glucksberg, 521 U.S. 702, 792 (1997) (Breyer J, concurring in judgements).

[267] Washington v. Glucksberg, 521 U.S. 702, 716-717 (1997).

[268] Washington v. Glucksberg, 521 U.S. 702, 735 (1997).

[269] Concurring in the opinion, Justice O'Connor heavily emphasized that "the […] challenging task of crafting appropriate procedures for safeguarding […] liberty interests is entrusted to the 'laboratory' of the States […] in the first instance". Referring to the Court's description of the "extensive and serious" debate taking place at state level on physician-assisted suicide, she considered that there was no reason to believe that the democratic process was not able to strike the appropriate balance between the interests of individuals and the interests of States Washington v. Glucksberg, 521 U.S. 702, 737 (1997).

[270] Washington v. Glucksberg, 521 U.S. 702, 735 (1997). See also Jennifer C. Popick, *A Time to Die?: Deciding the Legality of Physician-Assisted Suicide*, 24 Pepperdine Law Review 1344 (1997).

[271] Stephen L. Mikochik, *Self Restraint and Substantive Due Process*, 27 QUINNIPIAC LAW REVIEW 821 (2009).

[272] Erwin Chemerinsky, *Washington v. Glucksberg Was Tragically Wrong*, 106 MICH. L. REV. 1515-1516 (2008).

[273] Christopher Wolfe, *Washington v. Glucksberg and Physician-Assisted Suicide: A Pyrrhic Victory?*, Life and learning XXVI : proceedings of the twenty-sixth University Faculty for Life Conference at Marquette University, Milwaukee, Wisconsin 53 (2016).

[274] ECtHR, Pretty v. the United Kingdom, 29 April 2002.

[275] ECtHR, Pretty v. the United Kingdom, 29 April 2002, §§ 7-8.

prosecuted[276]. She challenged his refusal first before the Divisional Court and then before the House of Lords[277]. Lord Bingham of Cornhill gave the House of Lord's leading judgment. Engaging in a thorough analysis of the case under several provisions of the ECHR, he concluded that Mrs Pretty's rights had not been violated by the Director's decision[278]. The European Court agreed, in a unanimous decision issued on 29 April 2002.

1) No Comparative Analysis

Prior to its own analysis, the Court paid special attention to the domestic debate on assisted suicide and mentioned a relevant European instrument but neglected to provide an overview of the situation in member states. It first offered a very detailed account of the decision issued by the House of Lords in the case of Mrs Pretty by reproducing in full the very sophisticated reasoning of Lord Bingham which was largely based on the relevant provisions of the ECHR[279]. It then noted that the ban on assisted suicide was provided for by the Suicide Act 1961 emphasising that it had been reviewed, in the 1980's, by the Criminal Law Revision Committee and, in the 1990's, by the House of Lords Select Committee on Medical Ethics and that, in both cases, it had been decided to maintain the prohibition[280]. It finally referred to a Recommendation of the Parliamentary Assembly of the Council of Europe (PACE) encouraging the member States "to respect and protect the dignity of terminally ill or dying persons in all respects [...] by upholding the prohibition against intentionally taking the life of terminally ill or dying persons"[281]. The lack of comparative information provided by the Court may be explained and/or compensated by the fact that the reported decision of the House of Lords mentioned the European consensus against assisted suicide and specifically affirmed that "assisted suicide and consensual killing are unlawful in all Convention countries except the Netherlands"[282]. The absence of comparative law report by the Court itself remains, however, unusual, even more considering the attention paid, at a later stage of the decision, to a decision – *Rodriguez v. the Attorney General of Canada* – issued by a non-European national supreme court[283].

2) There Might be an Interference with the Right to Respect for Private Life

As already outlined above, *Pretty v. Kingdom* is a landmark case regarding the scope of the private life which protected under the ECHR. Refusing the arguments that a right to die might be derived from the right to life guaranteed by article 2[284] or from the interdiction of inhuman or degrading treatment provided by article 3[285], the Court affirmed that article 8's right to private life could be considered broad enough to apply to end-of-life decisions. It recalled the principle – affirmed in *Niemietz v. Germany* – that it is not "possible or necessary to attempt an exhaustive definition of the notion of "private life"" and affirmed that the right to private life included a right to "personal

[276] ECtHR, Pretty v. the United Kingdom, 29 April 2002, §§ 9-11.
[277] ECtHR, Pretty v. the United Kingdom, 29 April 2002, §§ 11-14.
[278] ECtHR, Pretty v. the United Kingdom, 29 April 2002, §§ 14-15.
[279] ECtHR, Pretty v. the United Kingdom, 29 April 2002, §§ 14-15.
[280] ECtHR, Pretty v. the United Kingdom, 29 April 2002, §§ 16-23.
[281] ECtHR, Pretty v. the United Kingdom, 29 April 2002, § 24. See Recommendation 1418(1999) Protection of the human rights and dignity of the terminally ill and the dying.
[282] ECtHR, Pretty v. the United Kingdom, 29 April 2002, § 15. Comparative information is also to be found in the two third parties interventions by the Voluntary Euthanasia Society (underlining the restrictiveness and inflexibleness of the disputed legislation) (§ 26) and and of the Catholic Bishops' Conference of England and Wales (focusing on the inability of Dutch law to protect the vulnerable) (§ 31).
[283] See below.
[284] ECtHR, Pretty v. the United Kingdom, 29 April 2002, § 40.
[285] ECtHR, Pretty v. the United Kingdom, 29 April 2002, §§ 54-55.

development" and to "personal autonomy" [286]. Contrary to the government's claim, the Court observed, the protection of private life also included "the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned"[287]. For example, the English case law itself admitted that "a person may claim to exercise a choice to die by declining to consent to treatment which might have the effect of prolonging his life"[288]. According to the Court, the way Mrs Pretty wanted to pass the last moments of her life was "part of the act of living", and she consequently had "a right to ask that this too must be respected"[289]. The Court then affirmed that "the very essence of the Convention is respect for human dignity and human freedom" and that "without in any way negating the principle of sanctity of life protected under the Convention, [it] [considered] that it is under Article 8 that notions of the quality of life take on significance"[290]. Against this background it noticed that "in an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity"[291]. Accordingly, the Court, finding inspiration in the Canadian Supreme Court decision in *Rodriguez*[292], declared that it was "not prepared to exclude" that the fact that Mrs Pretty was prevented from exercising her choice relating to the end of her life could be considered as an interference with her right to private life[293]. The Court thus referred to a wide range of abstract concepts – autonomy, development and dignity – and embraced a complex understanding of life – as choosing one's death might be part of the act of living and as life involves "sanctity" as well as "quality"[294] – to affirm the existence of a right to make end-of-life decisions. According to some, the Court's search for guidance as to the question of whether there had been an interference with Mrs Pretty's right to privacy was "somewhat random"[295]. A sure thing is that, just as in *A., B. and C. v. Ireland*, this right is affirmed in a very cautious way which eventually allows States to provide for an absolute ban on assisted suicide.

3) The Vulnerability of the Class Provides the Rationale

As the ban on assisted suicide could be considered as an interference in Mrs Pretty's right to private life, the Court must examine whether it was necessary in a democratic society to protect a legitimate aim. The applicant and the defending state agreed that the ban pursued the legitimate aim of "safeguarding life and thereby protecting the rights of others" but they disagreed as to the proportionality of the measure[296]. The applicant insisted that as she was mentally competent, fully informed and free from pressure she could not be considered as vulnerable. Accordingly, the "blanket nature" or the "inflexibility" of the ban illegitimately compelled her to "endure the consequences of her incurable and distressing illness, at a very high personal cost"[297]. The Court was ready to accept that Mrs Pretty was not herself a vulnerable person[298]. However, it underlined that the disputed law was designed to "safeguard life by protecting the weak and vulnerable and

[286] ECtHR, Pretty v. the United Kingdom, 29 April 2002, § 61. See also ECtHR, Niemietz v Germany, 16 December 1992, § 29.
[287] ECtHR, Pretty v. the United Kingdom, 29 April 2002, § 62.
[288] ECtHR, Pretty v. the United Kingdom, 29 April 2002, § 63.
[289] ECtHR, Pretty v. the United Kingdom, 29 April 2002, § 64.
[290] ECtHR, Pretty v. the United Kingdom, 29 April 2002, § 65.
[291] ECtHR, Pretty v. the United Kingdom, 29 April 2002, § 65.
[292] ECtHR, Pretty v. the United Kingdom, 29 April 2002, § 66.
[293] ECtHR, Pretty v. the United Kingdom, 29 April 2002, § 67.
[294] G. Willems, *The ECHR "end of life" case law in the light of the concept of "intrinsic value of life" theorized by Ronald Dworkin*, HUMAN RIGHTS AS A BASIS FOR REEVALUATING AND RECONSTRUCTING THE LAW (A. Hoc, S. WATTIER et G. WILLEMS), Proceedings of the 4th ACCA Conference, Bruxelles, Bruylant, 2016, pp. 313-333.
[295] J.S. Nugent, *Walking into the Sea of Legal Fiction: An Examination of the European Court of Human Rights, Pretty v. United Kingdom and the Universal Right to Die*, 13 J. Transnat'l L. & Pol'y 193 (2003).
[296] ECtHR, Pretty v. the United Kingdom, 29 April 2002, §§ 68-72.
[297] ECtHR, Pretty v. the United Kingdom, 29 April 2002, § 72.
[298] ECtHR, Pretty v. the United Kingdom, 29 April 2002, § 73.

especially those who are not in a condition to take informed decisions". So, even if "the condition of terminally ill individuals will vary", the fact remained that "many will be vulnerable and it is the vulnerability of the class which provides the rationale for the law"[299]. Referring to *Rodriguez*, the Court emphasized that State are entitled to regulate "activities which are detrimental to the life and safety of other individuals" and that "the more serious the harm involved the more heavily will weigh in the balance considerations of public health and safety against the countervailing principle of personal autonomy"[300]. In the light of these considerations and taking into consideration the fact that there was some flexibility in the application of the ban as most cases of "mercy killing" resulted in probation or suspended sentences, it concluded that there had been no breach of article 8[301]. On the basis of a similar reasoning, the Court also rejected Mrs Pretty's article 14 claim that the law was discriminatory as it did not distinguish persons who were physically able to commit suicide and those who – like her – were not. According to the ECtHR, just as there were sound reasons for not distinguishing between vulnerable and not vulnerable individuals, there were also good reasons for not distinguishing between those who are and those who are not physically able to suicide themselves[302]. Indeed, "the borderline between the two categories will often be a very fine one and to seek to build into the law an exemption for those judged to be incapable of committing suicide would seriously undermine the protection of life" [303]. It has been argued that there was some flaws in the Court's proportionality reasoning as the Court's acceptance of an absolute interdiction is somehow contradictory with the subsequent affirmation that its flexible application contributes to the finding that there has been no violation of the Convention[304].

4) It is Primarily for States to Assess the Risk

Whereas the House of Lords had pinpointed "a very broad international consensus" as "assisted suicide and consensual killing [were] unlawful in all Convention countries except the Netherlands"[305], the European Court did not refer to the existence or absence of a European consensus on the matter of assisted suicide to assess the width of the margin of appreciation to be allowed to member states. Instead, the Court focused on the fact that "the margin of appreciation has been found to be narrow as regards interferences in the intimate area of an individual's sexual life" but that – unlike the applicant – it "[did] not find that the matter under consideration in this case can be regarded as of the same nature, or as attracting the same reasoning"[306]. Further on in the decision, the Court, having emphasised the weight to be recognised to the state interest in protecting vulnerable people, simply affirmed that "it [was] primarily for States to assess the risk and the likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created"[307]. The correlation between the nature of the individual rights and state interests at stake and the desirability of a "restrained" or "deferential" approach is far from clear as, on the one hand, one may think that choices regarding end of life are even more intimate than sexual life and accordingly call for an even narrower margin of appreciation whereas, on the other hand, the affirmation that it is primarily for the State to assess the risks is not elaborated or explained in the decision. In any case, some authors consider that the Court must "avoid stepping on the toes of its numerous

[299] ECtHR, Pretty v. the United Kingdom, 29 April 2002, § 74.
[300] ECtHR, Pretty v. the United Kingdom, 29 April 2002, § 74.
[301] ECtHR, Pretty v. the United Kingdom, 29 April 2002, § 76.
[302] ECtHR, Pretty v. the United Kingdom, 29 April 2002, § 88.
[303] ECtHR, Pretty v. the United Kingdom, 29 April 2002, § 88.
[304] Olivier de Schutter, *L'aide au suicide devant la Cour européenne des droits de l'homme (A propos de l'arrêt Pretty c. le Royaume-Uni du 29 avril 2002)*, 53 REV. TRIM. DR. H. 98-99 (2003).
[305] ECtHR, Pretty v. the United Kingdom, 29 April 2002, § 14.
[306] ECtHR, Pretty v. the United Kingdom, 29 April 2002, § 70.
[307] ECtHR, Pretty v. the United Kingdom, 29 April 2002, § 74.

and diverse members" and that "Pretty is a good example of when the ECHR should show Member States a wide margin of appreciation"[308].

C. Comparison

As regards the *background of the decisions*, the SCOTUS thoroughly described the state of the debate in American states while the ECtHR mentioned only indirectly the European consensus against assisted suicide. Predictably, the Supreme Court contextualised its decision by insisting on the historical roots of the ban on assisted suicide and the European Court rather relied on international instruments supporting such prohibition. However, the most notable element arising from the comparative analysis as regards the background or context of the assisted suicide decisions rather is that both the SCOTUS and the ECtHR somehow felt the need to broaden their usual perspective or to enlarge their usual horizon by paying quite substantial attention to solutions forged in foreign legal systems. In this respect, the fact that both courts mentioned the *Rodriguez* decision issued in 1992 by the Canadian Supreme Court and deciding that the blanket prohibition on assisted suicide did not violate the Canadian Charter of Rights and Freedoms is a striking example of dialogue between human rights judges. Whereas the reference to *Rodriguez* is more subtle in *Glucksberg* than in *Pretty* and whereas *Pretty* did not mention *Glucksberg*, the fact remains that the American and European leading cases regarding assisted suicide – respectively issued in 1997 and 2002 – seem to have been decided with a similar view to taking the legal discussion to the global level and have accordingly been described as illustrations of "human rights cosmopolitanism"[309].

As regards the *very question of the existence or absence of a right* to assisted suicide, the SCOTUS and the ECtHR tried to determine whether such right could be considered respectively as an aspect of substantial due process or a manifestation of the right to private life. In this respect, the comparison shows a spectacular similarity between concepts and reasonings used by the Supreme Court and the European Court even if, in this case, such concepts and reasonings led to different conclusions. Both courts considered that it was perhaps not possible (*Glucksberg*) or even not necessary (*Pretty*) to clarify or define the concept of liberty or private life and discussed the asserted right to assisted suicide by comparing it with the already affirmed right to refuse life-saving medical treatment. Using a somehow "rigid" methodology (in stark contrast with *Roe*'s unsubstantiated affirmations[310]), the Supreme Court refused to derive a right to assisted suicide from the right to refuse treatment. Adopting a more "relaxed" approach (still more elaborated than *A., B. and C.*'s unexplained assertions[311]), the decision in *Pretty* – in turn – accepted to consider that refusal of treatment and assisted suicide could be considered as particular expressions of a more general principle of personal autonomy and affirmed (extremely cautiously) that it was "not prepared to exclude" that preventing someone from exercising end-of life choices constitutes an interference with the right to private life. Accordingly, it has been affirmed that – in *Pretty* – the ECtHR accepted to conduct the

[308] J.S. Nugent, *Walking into the Sea of Legal Fiction: An Examination of the European Court of Human Rights, Pretty v. United Kingdom and the Universal Right to Die*, 13 J. Transnat'l L. & Pol'y 210 (2003).
[309] B. Tripkovic, *The Metaethics of Constitutional Adjudication*, Oxford Constitutional Theory, OUP, 2017, p. 102; S. Millns, Death, Dignity and Discrimination: The Case of Pretty v. United Kingdom, 3 German Law Journal (2002); A. Stone Sweet and C. Ryan, A Cosmopolitan Legal Order: Kant, Constitutional Justice, and the European Convention on Human Rights, OUP, 2018; P.S. Berman, *Judges as Cosmopolitan Transnational Actors*, 12 TULSA J. COMP. & INT'L L. 109 (2005).
[310] See above 4.3.
[311] See above 4.3.

"transmutation" of the traditional right to refuse medical treatment into a new right to assisted suicide that the SCOTUS refused to perform in *Glucksberg*[312].

As regards the next step of *balancing the right of the terminally-ill and state interests*, both courts discussed the issue of whether the reasons adduced by the government were sufficient to justify the absolute ban on assisted suicide. Despite the fact that the SCOTUS (expressly) refused to affirm a constitutional right to assisted suicide, whereas the ECtHR (ambiguously) affirmed such right, both courts engaged in some balancing exercise. Applying the "rational basis" test, the Supreme Court accepted that the ban on assisted suicide was rationally related to four legitimate state aims and considered that it was not necessary to "weigh exactingly" their relative strength. The European Court, for its part, focused on the legitimate aim of "safeguarding life and thereby protecting the rights of others" and considered that the risk of serious harm "weighed heavily" in the balance. The ECtHR tried to "mitigate" its conclusion that there had been no violation of the applicant's right by emphasising the "flexible" application of sentences in case of "mercy killing" which somehow allowed "compromises" between personal autonomy and protection of the vulnerable but, basically, it validated – just as the SCOTUS – the absolute ban on assisted suicide. The main observation resulting from the comparative analysis in this respect is thus that (due to the fact that a "simple liberty" deserves minimal constitutional balancing in the American system whereas "recognised rights" may be given very limited weight in the European system) having no fundamental right under the US Constitution and having a protected right under the ECHR may surprisingly lead to relatively similar balancing exercises and exactly equal legal solutions.

As regards the final issue of *enforcing individual rights while respecting sovereignty*, the SCOTUS and the ECtHR tried to assess their own legitimacy to impose – from above – their views regarding assisted suicide to the states under their jurisdictions. Arguably, *Glucksberg* and *Pretty* were much more in line with the state of the law in the US and in Europe than *Roe* and *A., B. and C.*[313], however, it is worth noticing that only the Supreme Court based its "deferent" approach on the democratic debate taking place at states level whereas the European Court based its own "restrained" approach on the nature of the disputed issue. In *Glucksberg*, Rehnquist emphasised the consensus against assisted suicide in US states and insisted that the Supreme Court should not place the matter outside the "arena of public debate and legislative action" and should allow the continuation of an "earnest and profound debate" over assisted suicide. In *Pretty*, the ECtHR hardly mentioned the consensus among European States and rather insisted that end of life issues were not of the same "nature" as sexual life issues and did not call for the same narrow margin of appreciation before simply affirming that it is "primarily" for States to assess the risks associated with relaxing the general prohibition of assisted suicide. The comparison of the two decisions recalls[314] that the legitimacy of judicial interferences in the traditional democratic process may depend on the intensity and richness of debates at local level and/or on the nature of the interests at stake. One cannot but think, however, that in *Pretty*, the ECtHR could and should have relied on the evident consensus among European States rather than on nebulous considerations related to the comparison of sexual life and end of life issues to justify its deferent or restrained approach of the case.

[312] Olivier de Schutter, *L'aide au suicide devant la Cour européenne des droits de l'homme (A propos de l'arrêt Pretty c. le Royaume-Uni du 29 avril 2002)*, 53 REV. TRIM. DR. H. 88 (2003).
[313] See above 4.3.
[314] See above 4.1.4. and 4.2.4.

V. Same-sex marriage

In 2015, the SCOTUS affirmed a constitutional right to same-sex marriage which until now the ECtHR refuses to guarantee under the ECHR.

A. Obergefell v. Hodges (2015)

In 2015, the SCOTUS ruled in a 5-4 decision that the due process clause of the Fourteenth Amendment of the US Constitution featured a right to same-sex marriage. Petitioners were fourteen homosexual couples and two men whose same-sex partners were dead. They complained – on the basis of the Fourteenth Amendment – that they were denied the right to marry or have a marriage lawfully performed in another State given full recognition. District courts in Michigan, Kentucky, Ohio and Tennessee ruled in their favor but these judgements were reversed by the Court of appeals of the 6th Circuit[315]. A divided Supreme Court reversed the Court of Appeals decision affirming that the petitioners had the right "not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions"[316]. Justice Kennedy was the swing vote and delivered the majority opinion. Chief Justice Roberts as well as Justices Scalia, Thomas and Alito dissented.

1) Continuity and change: States are now divided

Kennedy classically emphasized that it was "appropriate to note the history of the subject"[317]. He affirmed that "the annals of human history [revealed] the transcendent importance of marriage" which "since the dawn of history, transformed strangers into relatives, binding families and societies together"[318]. It was "fair" as well as "necessary", he continued, to admit that all historical references to "the beauty of marriage" in religion, philosophy, arts and literature were based on an "understanding" of marriage as being a union between a man and a woman[319]. However, after brief considerations on the universal history of marriage, Kennedy rapidly turned to the individual stories of some of the petitioners. James Obergefell and John Arthur married in Maryland just before the latter's death but their marriage was not recognised in their State of Ohio. April DeBoer and Jayne Rowse raised together two children with special need but could not adopt them jointly and lived in the constant fear of what could happen in case of emergency or tragedy. Ijpe DeKoe and Thomas Kostura married in New-York and their marriage was stripped down when they settled in Tennessee where De Koe works full-time for the Army reserve since he came back from Afghanistan[320]. According to Kennedy, these stories illustrated the fact that the petitioners "[sought] not to denigrate marriage but rather to live their lives, or honor their spouses' memory, joined by its bond"[321]. At the same time, "the history of marriage [was] one of both continuity and change" and the institution had already gone through "deep transformations" as, for example, the conception of marriage as an "arrangement by the couple's parents" and the conception of marriage as "single, male-dominated legal entity" were abandoned[322]. These important changes had strengthened rather than weakened the institution of marriage and now the same "dynamic [could] be seen in the Nation's experiences with the

[315] Obergefell v. Hodges, 576 U. S. ____ 2 (2015).
[316] Obergefell v. Hodges, 576 U. S. ____ 28 (2015).
[317] Obergefell v. Hodges, 576 U. S. ____ 3 (2015).
[318] Obergefell v. Hodges, 576 U. S. ____ 3 (2015).
[319] Obergefell v. Hodges, 576 U. S. ____ 3-4 (2015).
[320] Obergefell v. Hodges, 576 U. S. ____ 4-6 (2015).
[321] Obergefell v. Hodges, 576 U. S. ____ 6 (2015).
[322] Obergefell v. Hodges, 576 U. S. ____ 6-7 (2015).

rights of gays and lesbians". Since the end of the 20th century, the cultural and political perception of homosexuality had changed rapidly and, as homosexual couples started to live more openly and to establish families, gay rights had reached the courts. In *Romer v. Evans*, the Court had struck down Colorado's constitutional amendment preventing public authorities from adopting anti-discrimination regulations protecting homosexuals[323]. In *Lawrence v. Texas*, the Court had overruled *Bowers*[324] and declared unconstitutional the criminalization of homosexual intimacy[325]. Against this background, a "new and widespread discussion" on same-sex marriage arose at state level with some states reaffirming the heterosexuality of marriage and others granting marriage to same-sex couples through judicial or legislative process[326]. In *Windsor*, the Supreme Court had invalidated the Defense of Marriage Act according to which marriage must be understood as a union between a man and a woman for the interpretation of all federal regulations[327]. There was an "ongoing dialogue" between Courts of appeals and District Courts (interpreting the US Constitution) and States high courts (interpreting their own State Constitution) on the subject of same-sex marriage. In conclusion, "after years of litigation, legislation, referenda, and the discussions that attended these public acts, the States [were] now divided on the issue of same-sex marriage"[328].

2) The Past Should Not Rule the Present: Due Process Unchained

The majority affirmed that the "definition" and "protection" of additional rights under the Fourteenth Amendment is a duty of the Court which cannot be reduced to a "formula" and requires the justice to use "reasoned judgement"[329]. This process should be based on history and tradition but the past should not be allowed to rule the present[330]. Indeed, Kennedy explained, "the nature of injustice is that we may not always see it in our own times". Those who wrote and ratified the Bill of rights "did not presume to know the extent of freedom in all of its dimensions". This is the reason why "they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning"[331]. Using "reasoned judgement", the Court had previously identified and protected the right to marry most notably in *Loving*[332], *Zablocki*[333] and *Turner*[334]. It was true that these cases identifying and protecting the right to marry presumed a different sex relationship[335], but they had nevertheless expressed "principles of broader reach" demonstrating that "marriage is fundamental under the Constitution" and applying "with equal force" to same-sex couples[336]. First of all, the right to marry was "inherent in the concept of individual autonomy" as "decisions regarding marriage "[were] among the most intimate that an individual can make" and "[shaped] the individual's destiny". There was "dignity", the Court said, in "the bond between two men or to women who seek to marry and in their autonomy to make such profound choices"[337]. Secondly, the right to

[323] Romer v. Evans, 517 U.S. 620 (1996).
[324] Bowers v. Hardwick, 478 U.S. 186 (1986).
[325] Lawrence v. Texas, 539 U.S. 558 (2003).
[326] Obergefell v. Hodges, 576 U. S. ____ 8-9 (2015).
[327] United States v. Windsor, 570 U.S. ___ (2013).
[328] Obergefell v. Hodges, 576 U. S. ____ 10 (2015).
[329] Obergefell v. Hodges, 576 U. S. ____ 10 (2015).
[330] Obergefell v. Hodges, 576 U. S. ____ 10-11 (2015).
[331] Obergefell v. Hodges, 576 U. S. ____ 11 (2015).
[332] Loving v. Virginia, 388 U.S. 1 (1967).
[333] Zablocki v. Redhail, 434 U.S. 374 (1978).
[334] Turner v. Safley, 482 U.S. 78 (1987).
[335] See Baker v. Nelson, 409 U. S. 810 (1972).
[336] Obergefell v. Hodges, 576 U. S. ____ 11-12 (2015).
[337] Obergefell v. Hodges, 576 U. S. ____ 12-13 (2015).

marry "[supported] a two-person union unlike any other"[338] and the freedom to engage in intimate relationships – affirmed in *Lawrence* – did not realize "the full promise of liberty"[339]. Thirdly, the right to marry "[safeguarded] children and families" by conferring "material" protection as well as "more profound" benefits to parents and children so that – as already considered in *Windsor* – "without the recognition, stability, and predictability marriage offers, […] children [suffered] the stigma of knowing their families are somehow lesser"[340]. Finally, the right to marry was a keystone of the American social order, as recognized by Alexis de Tocqueville – almost two hundred years earlier – and confirmed by the Court in *Maynard*[341] as soon as 1888. Marriage was "the foundation of family" as well as "a great public institution" and had been offered throughout history "symbolic recognition" and an expanding range of "rights, benefits and responsibilities"[342]. Kennedy concluded that "the limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry [was] now manifest"[343]. Finally, he noted, the "careful description" requirement was not appropriate as regards marriage. *Loving* did not consider a "right to interracial marriage" instead it inquired about the right to marry and asked whether there was "sufficient justification for excluding the relevant class from the right". The same reasoning must be applied to the petitioner's claim that the right to marry applied equally to same-sex couples[344]. The Court's decision in *Obergefell* thus departs from the *Glucksberg*'s methodology – already weakened by *Lawrence* – not only by emphasizing that history and tradition "guide and discipline the inquiry" but do not "set its outer boundaries"[345] but also by affirming that the "careful description" requirement was "inconsistent" with the approach previously used by the Court in discussing some fundamental rights[346]. Chief Justice Roberts himself, in his dissent, described the decision as "deeply disheartening" for "those who believe in a government of laws, not of men" as the majority adopted an "unprincipled approach" neglecting the "core meaning of marriage" and wrongly relying on precedents such as *Loving*, *Zablocki* or *Turner*[347]. Unsurprisingly, the decision has been praised by some as offering a "fully realized vision of how liberty analysis should proceed"[348] and decisively displacing the "cramped methodology" used in *Glucksberg*[349] and denounced by others as "[subverting] and [invalidating] laws due to matters of personal opinion"[350].

Obergefell did not rely only on the due process clause but also on the equal protection clause in the same provision and established a strong link between liberty and equality. In *Loving*, the Court decided that refusing the right to marry on "so unsupportable a basis" and "classifications so directly subversive of the principle of equality" as racial categories surely amounted to "deprive all the State's citizens of liberty without due process of law". In *Zablocki*, the Court found – the other way around – that the "fundamental importance" and the "essential nature" of the right to marry implied that the marriage ban on fathers late in paying child support was

[338] See Griswold v. Connecticut, 381 U.S. 479 (1965); United States v. Windsor, 570 U.S. ___ (2013); Turner v. Safley, 482 U.S. 78 (1987).
[339] Obergefell v. Hodges, 576 U. S. ____ 13-14 (2015).
[340] Obergefell v. Hodges, 576 U. S. ____ 14-16 (2015).
[341] Maynard v. Hill, 125 U. S. 190 (1888).
[342] Obergefell v. Hodges, 576 U. S. ____ 16-17 (2015).
[343] Obergefell v. Hodges, 576 U. S. ____ 18 (2015).
[344] Obergefell v. Hodges, 576 U. S. ____ 18 (2015).
[345] Obergefell v. Hodges, 576 U. S. ____ 11 (2015).
[346] Obergefell v. Hodges, 576 U. S. ____ 18 (2015).
[347] Obergefell v. Hodges, 576 U. S. ____ 15-16 (2015) (Roberts CJ, dissenting).
[348] Yoshino K., *A New Birth of Freedom? Obergefell v. Hodges*, 129 HARV. L. REV. 170 (2015).
[349] Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015).
[350] Augusto Zimmerman, *Judicial Activism and Arbitrary Control: A Critical Analysis of Obergefell v. Hodges, 576 U. S. (2015) – The US Supreme Court Same-Sex Marriage Case*, 17 UNDALR 79 (2015).

"incompatibility with requirements of equality"[351]. In both *Loving* and *Zablocki* the concepts of liberty and equality were used in synergy and provided a stronger understanding of each other. According to the Court, the same dynamic applied to the ban on same-sex marriage as "against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry [worked] a grave and continuing harm"[352]. On this point too, Chief Justice Roberts powerfully dissented by claiming that "the majority fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position"[353]. Some take the view that tis connection with the equal protection clause may explain the difference between *Obergefell* and *Glucksberg* and even reconcile the two approaches. In their view, *Glucksberg* principles should prevail where there are no equality considerations involved whereas *Obergefell* standards should be applied to cases combining liberty and equality dimensions[354]. In any case, combining the liberty and equality approaches ensures that States cannot decide to "level down" and refuse marriage license to anyone (respecting equality but not liberty) instead of "levelling up" and allow same-sex couples to marry (meeting the requirements of both the due process and equal protection clause)[355].

3) Bypassing Balancing: Marriage Equality Wins

The Court then concluded that State bans on same-sex marriage were unconstitutional under both the due process and equal protection clause of the Fourteenth Amendment without performing any actual balancing of the constitutional right to marry and State legitimate interests[356]. Under both clauses, however, the Court should normally have applied the strict scrutiny standard of review to the reasons adduced by the States in support of the ban on same-sex marriage[357]. Instead the Court simply affirmed – overruling *Baker*[358] – that "same-sex couples may exercise the fundamental right to marry" and that "no longer may this liberty be denied to them"[359]. Nevertheless, Kennedy, having already decided that "State laws challenged by Petitioners in these cases [were] now held invalid"[360], finally decided to give some consideration to two arguments offered by the respondents in favor of the States' choice not to allow same-sex marriages. Firstly, the argument that same-sex marriage "[would] harm marriage as an institution by leading to fewer opposite-sex marriages" could not be accepted as the choice marry was based on "personal, romantic, and practical considerations" and it was "unrealistic" to consider that different-sex couples would choose not to marry just because same-sex couple could do so[361]. Secondly, same-sex marriage would not prevent religious people "to advocate […] that same-sex marriage should not be condoned" as "religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered"[362]. Finally, Kennedy also rejected the compromise of allowing a "case-by-case determination of the required availability of specific

[351] Obergefell v. Hodges, 576 U. S. ____ 20 (2015).
[352] Obergefell v. Hodges, 576 U. S. ____ 22 (2015).
[353] Obergefell v. Hodges, 576 U. S. ____ 23-24 (2015) (Roberts CJ, dissenting).
[354] K. Watson, *When Substantive Due Process Meets Equal Protection: Reconciling Obergefell and Glucksberg*, 21 LEWIS & CLARK L. REV. 245 (2017).
[355] K. Yoshino, *A New Birth of Freedom? Obergefell v. Hodges*, 129 HARV. L. REV. 173 (2015).
[356] Obergefell v. Hodges, 576 U. S. ____ 22-23 (2015).
[357] Megan M. WALLS, "Obergefell v. Hodges: Right Idea, Wrong Analysis", 52(1) GONZAGA LAW REVIEW 138-142 (2017).
[358] Baker v. Nelson, 409 U.S. 810 (1972).
[359] Obergefell v. Hodges, 576 U. S. ____ 23 (2015).
[360] Obergefell v. Hodges, 576 U. S. ____ 23 (2015).
[361] Obergefell v. Hodges, 576 U. S. ____ 26-27 (2015).
[362] Obergefell v. Hodges, 576 U. S. ____ 27 (2015).

public benefits to same-sex couples" because "it still would deny gays and lesbians many rights and responsibilities intertwined with marriage"[363]. The Court's decision seems to mean that the right to marry is so fundamental and that the ban on same-sex marriage is so harmful to same-sex couple that no state interest could possibly be considered legitimate and weighty enough to allow states to maintain the traditional definition of marriage. The Court also takes the view that the allocation of "specific public benefits" normally associated with marriage to same-sex couple is not sufficient to meet the requirements of the US Constitution and that, in some sense, same-sex couples deserve "the real thing". Some complained that the Court did not expressly affirmed that sexual orientation is a "suspect class" under the equal protection clause calling for the application of the "strict scrutiny" standard of review and, by doing so, "bypassed the opportunity to deter future attempts to deprive the community of fundamental rights"[364].

4) A community in Disagreement: Who is Afraid of Backlash

Before concluding that State bans on same-sex marriage were unconstitutional, Kennedy had acknowledged that there might have been "an initial inclination […] to proceed with caution – to await further legislation, litigation and debate"[365]. Under the Constitution, he wrote, "democracy is the appropriate process for change so long as that process does not abridge fundamental rights"[366]. However, he continued, individuals could invoke the protection of their constitutional rights "even if the broader public disagrees and even if the legislature refuses to act" because the aim of the Constitution was "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials"[367]. In *Bowers*, an excessively cautious Supreme Court had upheld a law criminalizing same-sex intimacy and caused harm to same-sex couples which had not been erased by the recognition that it was wrong[368]. As Federal Court of Appeals disagreed on whether the Constitution encompasses a right to same-sex marriage, it was the Supreme Court's duty to put an end to an "impermissible geographic variation in the meaning of federal law"[369]. Accomplishing this duty, the Court could not make the same mistake as it did in *Bowers* by deciding against same-sex couples[370]. The dissenters strongly disagreed. According to Roberts, the majority had closed the debate by imposing its own vision of marriage and had stolen the issue from the people. This, he argued, "will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept"[371]. According to Scalia, "this practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves"[372]. While they do not necessarily agree with Roberts and Scalia, many authors take the view that – to some extent – the *Obergefell* decision might have some backlash effect. It has been noted that some public officials claimed to have a right not to issue marriage license to same-sex couples based on individual religious beliefs and that some service providers –

[363] Obergefell v. Hodges, 576 U. S. ____ 27 (2015).
[364] Megan M. WALLS, *Obergefell v. Hodges: Right Idea, Wrong Analysis*, 52(1) GONZAGA LAW REVIEW 141 (2017). See also Peter Nicolas, *Obergefell's Squandered Potential* 6 CALIFORNIA LAW REVIEW CIRCUIT 136 (2015). See *contra* David H. Schraub, *The Siren Song of Strict Scrutiny*, 84 UNIVERSITY OF MISSOURI-KANSAS CITY LAW REVIEW 859 (2016).
[365] Obergefell v. Hodges, 576 U. S. ____ 23 (2015).
[366] Obergefell v. Hodges, 576 U. S. ____ 24 (2015).
[367] Obergefell v. Hodges, 576 U. S. ____ 24 (2015).
[368] Obergefell v. Hodges, 576 U. S. ____ 25 (2015).
[369] Obergefell v. Hodges, 576 U. S. ____ 26 (2015).
[370] Obergefell v. Hodges, 576 U. S. ____ 25 (2015).
[371] Obergefell v. Hodges, 576 U. S. ____ 23-24 (2015) (Roberts CJ, dissenting).
[372] Obergefell v. Hodges, 576 U. S. ____ 23-24 (2015) (Scalia J, dissenting).

including cake bakers[373] – refused to serve gay couples[374]. Some parallels have been drawn between *Obergefell* and *Roe v. Wade* and *Brown v. Board of Education* as to the divisive potential of the Court's decisions[375]. Interestingly, some consider that conflicts arising from courts' decision on sensitive issues and strategies developed to limit their impact foster the "constitutional culture" by forging a sense of "community in disagreement"[376].

B. Schalk and Kopf v. Austria (2010)

In *Schalk and Kopf v. Austria*[377], the European Court had for the first time the opportunity to deal directly with the question of whether homosexual couples have a right to marry under the Convention. The case was brought before the Court by Horst Michael Schalk and Johan Franz Kopf who were same sex partners living in Vienna. They asked the Vienna civil registrar to proceed with the formalities to enable them to marry. However, same-sex marriage was not allowed in Austria and their request was accordingly rejected[378]. They went all the way to the Austrian Constitutional Court which provided its own interpretation of the ECHR and decided that it could not be considered as including a right for same-sex couples to marry[379]. Turning to the ECtHR, the applicants challenged that view arguing mainly that article 12 of the Convention should be interpreted as obliging member States to allow homosexual couples to marry[380].

1) International and comparative law: the European Union

Before starting its analysis of the applicant's claim, the Court briefly addressed the Austrian context. It mentioned that, from 1 January 2010 onwards, Austrian Law provided homosexual couples with a registered partnership and pinpointed the similarities and differences between this new status reserved for homosexuals and marriage. However, far less attention was paid to the national public debate than in *A., B. and C.* or *Pretty*[381]. Instead the Court focused on relevant European and comparative law. On the one hand, the Court emphasised that article 9 of the Charter of Fundamental Rights of the European Union which had recently entered into force took into account "the modern trends and developments in domestic laws in a number of countries toward greater openness" and guaranteed the right to marry without referring to "men and women" to reflect the diversity of European conceptions of marriage but did not require that domestic laws should facilitate same-sex marriages[382]. On the other hand, only six countries of the Council of Europe out of forty-seven admitted same-sex marriage while thirteen other states provided a registered partnership with varying legal consequences[383].

2) The right to marry is not inapplicable

The European Court offered a fairly progressive approach of the right to marry and considered that article 12 of the ECHR was not inapplicable to the applicant's claim. No right to same-sex

[373] Masterpiece Cakeshop v. Colorado Civil Rights Commission.
[374] Nancy Levit, *After Obergefell: The Next Generation of LGBT Rights Litigation*, 84 UMKC L. REV. 607 (2016).
[375] Adam Deming, *Backlash Blunders: Obergefell and the Efficacy of Litigation to Achieve Social Change*, 19(1) JOURNAL OF CONSTITUTIONAL LAW 272 (2016).
[376] Reva Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA LAW REVIEW 32 (2017).
[377] ECtHR, Schalk and Kopf v. Austria, 24 June 2010.
[378] ECtHR, Schalk and Kopf v. Austria, 24 June 2010, §§ 7-9.
[379] ECtHR, Schalk and Kopf v. Austria, 24 June 2010, §§ 11-14.
[380] ECtHR, Schalk and Kopf v. Austria, 24 June 2010, § 57.
[381] ECtHR, Schalk and Kopf v. Austria, 24 June 2010, §§ 16-23.
[382] ECtHR, Schalk and Kopf v. Austria, 24 June 2010, §§ 24-26.
[383] ECtHR, Schalk and Kopf v. Austria, 24 June 2010, §§ 27-34.

marriage could, in the Court's view, be derived from a textual interpretation of article 12 of the Convention which guarantees to "men and women" the right "to marry and to found a family"[384]. The choice of the word "men and women" must be considered as voluntary even if the connection between the right to marry and the right to found a family did not mean *per se* that one must be able to "parent or conceive a child" to enjoy the right to marry. However, the applicants asked the Court to engage in an evolutive interpretation of the Convention based on the "living instrument" doctrine according to which the ECHR is to be interpreted "in the light of present-day conditions"[385]. The Court gave much weight to the fact that article 9 of the Charter of Fundamental Rights of the EU promoted a more open approach of the right to marry without obliging States to allow same-sex marriage[386]. In the light of this provision, it expressly affirmed 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" and that "consequently, it [could not] be said that Article 12 [was] inapplicable to the applicants' complaint"[387]. Even if this progressive approach[388] is undoubtedly "highly significant"[389], one cannot but note the prudent formulation used by the Court. The right for same-sex couple to marry is not clearly and positively asserted. Instead, the ECtHR use a prudent double negation to acknowledge that it can't be said that the right to marry does not apply to homosexuals. The Court's extremely cautious formulation of the right of homosexuals to marry was *per se* a significant clue that such right was extremely unlikely to have more weight in the proportionality balance than the reasons adduced by the domestic authorities to maintain the heterosexual nature of marriage. In any case, it must be stressed that the *Schalk and Kopf* interpretation of article 12 remains to this day the most meaningful manifestation of the Court's favor for marriage equality. Indeed, in the subsequent case-law, the ECtHR seemed to re-endorse an even more prudent and conservative conception of marriage[390].

3) Bypassing Balancing: Marriage Conservatism Wins

By affirming that the right to marry applied to same-sex couples, the Court seemed to be "opening up discussion about the scope of States' obligations under it"[391]. Usually, when considering a limit imposed on the right to marry the Court asks itself whether, taking into account the reasons adduced by domestic authorities, this limit impairs the very essence of the right to marry[392]. However, the *Schalk and Kopf* decision can hardly be regarded as featuring any actual balancing of the right to marry as applied to homosexuals against the State interest in maintaining the heterosexual nature of marriage. Having affirmed that the right to marriage could apply to same-sex couples, the Court immediately insisted that there was – however – no obligation for states to allow same-sex marriage before merely stating that "marriage [had] deep-rooted social and cultural connotations which may differ largely from one society to another"[393]. One can only assume that these "deep rooted social and cultural connotation" were

[384] ECtHR, Schalk and Kopf v. Austria, 24 June 2010, §§ 54-56.
[385] ECtHR, Schalk and Kopf v. Austria, 24 June 2010, § 57.
[386] ECtHR, Schalk and Kopf v. Austria, 24 June 2010, § 60.
[387] ECtHR, Schalk and Kopf v. Austria, 24 June 2010, § 61.
[388] Compare with Parry or R. and F.
[389] Loveday Hodson, *A Marriage by Any Other Name? Schalk and Kopf v Austria*, 11(1) HUMAN RIGHTS LAW REVIEW 173 (2011).
[390] See ECtHR (gd. ch.), Fernandez Martinez v. Spain, 12 June 2014; ECtHR (gd. ch.), Hamalainen v. Finland, 16 July 2014. See also Damian A. Gonzalez Salzberg, *Confirming (the Illusion of) Heterosexual Marriage: Hamalainen v Finland*, 2 J. INT'L & COMP. L. 183 (2015)).
[391] Loveday Hodson, above n. 389 at 172.
[392] See e.g. ECtHR, B. and L. v. the united Kingdom, 13 September 2005, §§ 36-40.
[393] ECtHR, Schalk and Kopf v. Austria, 24 June 2010, § 62.

sufficient, in the Court's view, to justify the ban on homosexual marriage without need for further explanation of why they should prevail on the applicants' right. This absence of reasoning is also the basis for rejecting the applicant's alternative claim based on the non-discrimination principle enshrined in article 14 of the ECHR. Indeed, the Court recalled that "the Convention must be read as a whole" and "its articles should therefore be construed in harmony with one another". If there was no right to homosexual marriage under article 12, such right could not be derived from article 8 read in conjunction with article 14[394]. The lack of reasoning in *Schalk and Kopf* has been rightly criticized as "if marriage is not inevitably an institution for opposite-sex couples, as the Court […] acknowledged, then the exclusion of a particular group from it [required] explanation"[395]. Obviously, the Court erred in neglecting to provide such an explanation as nothing is said about how necessary access to mariage is for the applicant to fully enjoy the rights guaranteed by the Convention[396] and as the defending State was not asked to offer good reasons for excluding them from the marriage institution[397]. This is particularly frustrating from the equality perspective since, as a rule, differences based on sexual orientation should trigger strict scrutiny of governmental justifications[398]. Interestingly, a few years later, in *X. and Others v. Austria*[399], facing the fairly similar matter of the adoption of a child by his mother's same-sex partners, the Court refused to consider that the defending government could justify the difference in treatment between heterosexual and homosexual couples simply by relying on the legitimate aim of protecting the traditional family. According to the Court, "the 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" and "the State […] must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice when it comes to leading one's family or private life"[400]. Applying a strict scrutiny standard of review[401], the Court concluded, as the government was unable to prove that the protection of the child's interests required the exclusion of same-sex couples[402], that there had been a breach of article 14 of the Convention. There are no obvious reasons why such an approach was not adopted in *Schalk and Kopf*.

4) A question Left to Regulation by National Legislatures

The explanation for the lack of reasoning in *Schalk and Kopf* is obviously that the Court simply preferred to leave it up to the Member States to decide themselves on the matter of homosexual marriage. The Court distinguished the case from *Goodwin v. United Kingdom* where the absence of European consensus on the marriage of transsexuals was compensated by "convergence of standards" on the matter. As to the question of same-sex marriage, the Court explained, there was no European consensus and neither was there such "convergence of standards"[403]. Moreover, article 9 of the Charter of Fundamental rights, which provided the basis for the Court's progressive interpretation of the right to marry included an express reference to domestic legislations and thus did not involve any requirement that domestic laws

[394] ECtHR, Schalk and Kopf v. Austria, 24 June 2010, § 101.
[395] Loveday Hodson, above n. 389 at 173
[396] Loveday Hodson, above n. 389 at 174.
[397] Loveday Hodson, above n. 389 at 173.
[398] Bribosia E., Rorive I. and Van den Eynde L., *Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience*, 32 BERKELEY J. INT'L LAW. 17 (2014).
[399] ECtHR (gd. ch.), X. and others v. Austria, 19 February 2013.
[400] ECtHR (gd. ch.), X. and others v. Austria, 19 February 2013, § 139.
[401] ECtHR (gd. ch.), X. and others v. Austria, 19 February 2013, § 139.
[402] ECtHR (gd. ch.), X. and others v. Austria, 19 February 2013, § 140.
[403] ECtHR, Schalk and Kopf v. Austria, 24 June 2010, § 59.

should facilitate homosexual marriages[404]. In such context, the Court decided that "the question whether or not to allow same-sex marriage [was] left to regulation by the national law of the Contracting State"[405]. Indeed the "deep-rooted social and cultural connotations" of marriage "[might] differ largely from one society to another" and the Court "must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society"[406]. There has been criticism of the fact that the Court, having recognised that the right to marry could apply to homosexual couples, ultimately decided to leave the matter entirely at the discretion of Member States. As Hodson writes, "it is questionable whether one can talk coherently and meaningfully about a fundamental right in such conditional terms" and "for a regional human rights tribunal of the Court's stature to look for State consensus when faced with a situation of acknowledged discrimination is unsatisfactory, to say the least"[407]. Accordingly, other authors affirmed that recognition of the right to marry by the ECtHR 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"[408]. However, at this stage, the Court rather choose to confirm that the question of same-sex marriage belongs to the States while at the same-time taking steps to oblige them to offer alternative status[409] and similar rights[410] to same-sex couples. In its previous case law, the Court has sometimes – e.g. on the matter of transsexuality[411] – adopted a very progressive approach calling, first of all, for "reasonable accommodations" placing disadvantaged categories in a situation fairly similar to the status they claimed for before, as a second step, affirming their rights to access the status as such. It cannot be ruled out that such an approach could be applied to the issue of same-sex marriage.

C. Comparison

As regards the *contextualisation of the case*, the SCOTUS and the ECtHR described the state of the law in their respective jurisdiction and provided additional background by referring respectively to the history of the legal regulation of marriage and to relevant international instruments. In this respect, the most striking observation arising from the comparison of *Obergefell* and *Schalk and Kopf* is that the Supreme Court and the European Court use history and international in an arguably similar way to emphasize the dynamic nature of the (legal) regulation of marriage. In the American decision, Kennedy insisted that the history of marriage was a history of both "continuity and change" and that its progressive transformation had strengthened rather than weakened the institution. In the European judgement, the Court put forward that the formulation of article 9 of the Charter of Fundamental Rights of the European Union "broadens the scope" of the right to marry to reflect the "modern trends and developments" in domestic laws and the resulting "diversity" of domestic regulations but

[404] ECtHR, Schalk and Kopf v. Austria, 24 June 2010, § 60.
[405] ECtHR, Schalk and Kopf v. Austria, 24 June 2010, § 61.
[406] ECtHR, Schalk and Kopf v. Austria, 24 June 2010, § 62.
[407] Loveday Hodson, A Marriage by Any Other Name? Schalk and Kopf v Austria, Human Rights Law Review, Volume 11, Issue 1, p. 173.
[408] Bribosia E., Rorive I. and Van den Eynde L., *Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience*, 32 BERKELEY J. INT'L LAW. 1 (2014)); Frances Hamilton, *Why the Margin of Appreciation is Not the Answer to the Gay Marriage Debate*, 1 EUR. HUM. RTS. L. REV. 47 (2013); H. LAU, *Rewriting Schalk and Kopf: Shifting the Locus of Deference*, in DIVERSITY AND EUROPEAN HUMAN RIGHTS – REWRITING JUDGMENTS OF THE ECHR (dir. E. Brems), Cambridge, CUP, 2013, p. 243.
[409] ECtHR, Oliari and others v. Italy, 21 July 2015.
[410] ECtHR, Aldeguer Tomás v. Spain, 14 June 2016.
[411] See ECtHR, Christine Goodwin v. the United Kingdom, 11 July 2002.

without "explicit requirement" to allow same sex marriage. Each in its own characteristic way, through the prism of history or international law, the SCOTUS and the ECtHR both affirmed the living nature of marriage as an institution whose understanding and regulation are – at the same time – rooted in tradition and subject to modernization. Acknowledging this tension – instead of (artificially) insisting on one of the two dimensions[412] – may seem to offer a more accurate account of the complexity of human rights adjudication and a richer background for human rights decisions.

As regards the issue of *whether there existed a fundamental or human right* to same-sex marriage, the SCOTUS and the ECtHR respectively discussed the scope of the right to marry discovered in the Fourteenth Amendment and enshrined in article 12 of the ECHR. Once again, the similarity in concepts and reasoning is striking even if they produced quite different outcomes. Both courts, indeed, clearly affirmed that human rights charters call for "evolutive interpretation" as they are "living instruments" (*Schalk and Kopf*) and as "the past should not rule the present" (*Obergefell*). In its decision, the Supreme Court proposed an "attenuated version" of *Glucksberg*'s tradition and careful description requirements and accepted that a right to same-sex marriage could be "derived" from "broad principles" set forth in the case-law relating to different-sex marriage. For its part, the European Court adopted a *Pretty*-like, somewhat unprincipled, approach focused on the perspective arising from article 9 of the EU Charter and affirmed (extremely cautiously) that it did not longer consider that the right to marriage was "in all circumstances" limited to persons of the opposite-sex. Accordingly, it can be affirmed that *Obergefell* and *Schalk and Kopf* have in common that they accepted to deliver a "fresh" or "renewed" interpretation of the right to marry, extending its scope to include homosexual couples.

As regards the third stage of *balancing couples' rights and state interests*, both courts examined whether the interests invoked by the States could justify the disputed ban on same-sex marriage. Despite the fact that the SCOTUS (expressly) and the ECtHR (ambiguously) affirmed that the right to marriage applied to same-sex couples, it is interesting to note that neither the Supreme Court nor the European Court did engage in a real balancing analysis. Neglecting to indicate any defined standard of review, *Obergefell* started by considering that state bans on marriage were in breach of the Constitution and only paid limited *ex-post* consideration to the arguments adduced in support of such bans. *Schalk and Kopf*, conversely, started by announcing that same-sex marriage could not be imposed to contracting states and simply mentioned as an *ex-post* justification that "marriage [had] deep-rooted social and cultural connotations". It's worth mentioning, finally, that *Obergefell* expressly refused to consider that case-by-case access of homosexual couples to public benefits usually associated with marriage could be considered as a satisfying compromise, whereas *Schalk and Kopf* also affirmed that there was – at the time – no obligation for states to organise registered partnerships as alternatives to marriage. From a comparative perspective, the main conclusion here is that – in both systems – the balancing step may somehow be evaded or eluded when the disputed right is so strong that no state justification could possibly challenge it or so weak that any state aim is sufficient to outweigh it.

As regards the final issue of *enforcing couples' rights while respecting sovereignty*, the SCOTUS and the ECtHR dedicated significant attention to the question of their legitimacy to impose – top down – a certain conception of marriage to all the States under their jurisdiction. The interesting thing to note, here, is that both courts referred to previous cases in order to

[412] See above 4.3.

assess whether or not it was appropriate to affirm a right to marriage despite the lack of consensus at state/domestic level. Recognizing that "democracy is the appropriate process for change", Kennedy invoked *Bowers* as an example of an overly cautious decision that was highly and durably harmful for individual couples. In his view, a more dynamic approach must be adopted in *Obergefell* to avoid making the same mistake. Invoking the express reference to domestic legislation in article 9 of the EU Charter, the ECtHR invoked *Goodwin* as an example of a legitimately dynamic decision that was based on some international "convergence of standards" on the transsexual marriage. In it view, a more cautious approach must be taken in *Schalk and Kopf* as such "convergence of standards" was lacking in the case of same-sex marriage. Both choices, however, seem to involve a similar risk of undermining the legitimacy of human rights judge: *Obergefell* seems likely to have a strong "backlash effect" whereas – conversely – *Schalk and Kopf* is considered as "unsatisfactory to say the least" by European human rights advocates.

Conclusion

In this contribution, we described how the Supreme Court and the ECtHR dealt with three difficult issues related to private and family life: abortion, assisted suicide and same-sex marriage. The comparison focused on four different aspects of the decisional process: the contextualization of the case, the definition of the scope of protected human rights, the balance between individual rights and State aims and the assessment of the courts legitimacy.

As regards the *contextualization* of cases, the comparison puts forward a variety of approaches that can be used to present the case under a particular light and pave the way for the decision to be taken. The state of the law at state/domestic level is normally an important background element under both systems but it is sometimes somehow "neglected" which may be seen as heralding the court's intention to distance itself from views prevailing at local level (*Roe* and *A., B. and C.*). History – favored by the SCOTUS – is a flexible resource which may be presented in different ways with emphasis either on the prior (*Roe*) or current (*Glucksberg*) situation or – as in *Obergefell* – on the dynamic nature of conceptions relating to private life and family relationships. Similarly, international law – favored by the ECtHR – is a malleable material which can be used diversely either by ignoring or mentioning progressive (*A., B. and C.*) or conservative (*Pretty*) instruments or – as in *Schalk and Kopf* – by focusing on an international convention emphasising the tension between tradition and modernity. Beyond these habitual elements of context/background provided by the SCOTUS and the ECtHR, it has also been noted that both courts may pay some unusual attention either to the intensity and quality of the reflection led by domestic authorities (*A., B. and C.* and *Pretty*) or to the cruelty and difficulty of the situation of the persons involved (*Obergefell*) which may respectively "calibrate" the case in favor of governments or individuals. Finally, *Glucksberg* and *Pretty* emphasise the occasional choice made by the courts to broaden the perspective or enlarge the horizon by considering decisions issued by human rights judges outside their jurisdiction.

With respect to the *definition of the scope of protected human* rights, the comparison puts forward a variety of approaches that can be used to accept or refuse to affirm the existence of a new fundamental right. Under both systems, there is a strong connection between the very notion of privacy or private life and the idea of personal liberty (*Roe* and *A., B. and C.*). These

notions and ideas – however – do not lend themselves to exhaustive "definitions" (*Pretty*) or full "clarification" (*Glucksberg*). Accordingly, judges cannot rely on any pre-defined "formula" (*Obergefell*) to provide an "evolutive interpretation" (*Schalk and Kopf*) of protected liberties and have to use "reasoned judgement". The reviewed decisions of the Supreme Court put forwards three different ways of dealing with the issue: the unsubstantiated affirmation that the right to privacy is "broad enough" (*Roe*), the rigid "tradition" and "careful description" requirements (*Glucksberg*) and the intermediate "derivational" approach adopted in *Obergefell*. The reviewed decisions of the European Court reveal – in our view – a more "hazy" methodology: whereas *A., B. and C.* simply relies (as *Roe*) on the breadth of private life, *Pretty* and *Schalk and Kopf* engage in somewhat more elaborated but still largely unprincipled reasonings based on the "extension" of already protected rights closer to *Obergefell*'s intermediate approach. A last important consideration relates to the way rights are affirmed: whereas, in the three reviewed cases, the US Supreme Court clearly accepted or refused to guarantee a right, the ECtHR, in *A., B. and C.* as well as in *Pretty* and *Schalk and Kopf* used highly ambiguous expressions and confusing double negations to include the claimed rights in the scope of the provisions of the ECHR raising serious doubts about the actual strength of such evanescent rights.

As to the *balance between individual rights and State aims*, the comparison highlights different ways of defining the relative weights of conflicting interests in the sphere of private and family life. Under both systems, there may be a hesitation concerning the nature of arguments that can be legitimately adduced in support of limitations to liberties. In this respect, the Supreme Court seems reluctant to consider that abstract "theories" (*Roe*) or "beliefs" regarding the nature of life and family (*Obergefell*) should be regarded as valid arguments in favor of the State whereas the European Court expressly accepts that "profound moral values" (*A., B. and C.*) or "deep-rooted social and cultural connotations" (*Schalk and Kopf*) may be successfully invoked by domestic authorities. As regards balancing or weighing as such, the US case law shows the difficulty of "calibrating the scale" by distinguishing mere "liberties" and protected "rights" and respectively applying them the requirements of the "rational basis" (*Glucksberg*) or "strict scrutiny" (*Roe*) standards of review. In a certain sense, the "intermediate scrutiny" approach taken in *Casey* or the "undefined" approach taken in *Obergefell* seem closer to the "proportionality test" conducted by the European Court. Beyond this issue of "identifying", "naming" or "defining" the standards/tests to be applied, it is clear from the reviewed decisions that, in some cases, a true weighing and counterweighing of arguments occurs (*Casey* and *Pretty*) whereas, in other cases, there seems to be no actual balancing as individual rights (*Roe* and *Obergefell*) or domestic interests (*A., B. and C.* and *Schalk and Kopf*) are given so much weight that no real debate can arise. Finally, an interesting feature of both systems is the occasional attempt to strike a "fair balance" between individual rights and state interests through "conciliation" rather than "hierarchisation". Such "compromises" may involve sliding scales (*Roe*), circumvention shopping (*A., B. and C.*), flexible law enforcement (*Pretty*) or alternative status (*Obergefell* and *Schalk and Kopf*).

As regards *the issue of legitimacy*, the comparison puts forward several ways of deciding on the acceptability and/or desirability of judicially imposed solutions escaping the regular democratic process. Both courts emphasise that "democracy is the appropriate process for change" (*Obergefell*) and that domestic authorities are in a "better position" (*A., B. and C.*) and have "primary responsibility" (*Pretty*) to balance rights and conflicting interests. Accordingly, Courts should "exercise the utmost care" (*Glucksberg*) and not "rush to [impose] [their] own judgment" (*Schalk and Kopf*). The European system features a quite developed "margin of

appreciation" doctrine according to which the balance between "dynamism" and "deference" depends mainly on the nature of the rights and interests at stake (*A., B. and C.*) and on the existence or absence of a consensus among the member states (*Schalk and Kopf*). The American doctrine of "judicial restraint" is less clear as regards the impact of these elements on the level of discretion to be left to state legislatures. In any case, both Courts have to navigate swiftly between effective enforcement of human rights and due respect for sovereignty, democracy and pluralism. Avoiding excessive "activism" (*Roe*) as well as excessive "restraint" (*A., B. and C.*), they must find the right path and the right pace, paying respectful consideration to strengthened consensus (*Glucksberg* and *Pretty*) while at the same time considering to support and accelerate emerging trends (*Obergefell* and *Schalk and Kopf*).

Hence, when facing sensitive issues relating to private and family life both courts face *similar hesitations* regarding the contextual elements that should be taken into consideration, the reasoning to be followed to affirm the existence of a new right, the right way of balancing individual rights and state interests and the right way of assessing their own legitimacy. Such hesitations are inherent to human right decision-making and reflect the *fundamental dialectical tensions* characterising this peculiar decisional process. Courts may indeed opt for a more or less progressive or conservative contextualization of cases, a more or less flexible or rigid interpretation of guaranteed rights, a more or less marked preference for rights or state aims, a more or less active or restrained conception of judicial review.