Vanderbilt Journal of Transnational Law

Volume 25
Issue 3 *Issue 3 - October 1992*

Article 2

10-1992

A Not So Distant Mirror: Federalism and the Role of Natural Law in the United States, the Republic of Ireland, and the European Community

Paul W. Butler

David L. Gregory

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vjtl

Part of the Natural Law Commons

Recommended Citation
Paul W. Butler and David L. Gregory, A Not So Distant Mirror: Federalism and the Role of Natural Law in the United States, the Republic of Ireland, and the European Community, 25 *Vanderbilt Law Review* 429 (2021)
Available at: https://scholarship.law.vanderbilt.edu/vjtl/vol25/iss3/2

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

A Not So Distant Mirror: Federalism and the Role of Natural Law in the United States, the Republic of Ireland, and the European Community

*Paul W. Butler**
*David L. Gregory***

ABSTRACT

In this Article, Mr. Butler and Professor Gregory discuss the themes of federalism and natural law by examining United States, Republic of Ireland, and European Community cases regarding reproductive freedom, sexual preference, and divorce. The authors find a parallel between Ireland's difficulty in reconciling its Catholic values with the more secular human rights views of the European Community and the religious and social tension caused by federalism in the United States. While courts in both Ireland and the United States have used natural law to justify the level of substantive due process they accord privacy rights, the authors note that Irish courts predicate natural law upon Catholic teachings while United States courts take a more neutral approach based on constitutional interpretation. Despite this difference, the authors believe that the renaissance of natural law jurisprudence in the United States mirrors the established natural law dominant in Ireland.

TABLE OF CONTENTS

I. INTRODUCTION 430
II. NATURAL LAW IN THE UNITED STATES 433
III. FEDERALISM IN THE EUROPEAN COMMUNITY 438

* Associate Attorney, Cahill Gordon & Reindel, New York City. B.A., 1983, State University of New York at Albany; M.A., 1984, State University of New York at Albany; J.D., 1988, St. John's University.

** Professor of Law, St. John's University. B.A., 1973, The Catholic University of America; M.B.A., 1977, Wayne State University; J.D., 1980, University of Detroit; LL.M., 1982, Yale University; J.S.D., 1987 Yale University.

The authors especially thank Floyd Abrams, Robert J. Rubinson, Karen L. Severy, and Martin J. Waters for their many generous and astute comments on an earlier draft of this Article. The authors are solely responsible for any errors.

A. *The European Economic Community* 438
B. *The European Convention on Human Rights* .. 440
IV. NATURAL LAW IN THE REPUBLIC OF IRELAND 445
A. *The Constitutional History of Ireland* 448
B. *Church and State in the Irish Constitution* 450
V. NATURAL LAW, PRIVACY, AND PERSONAL AUTONOMY—A COMPARATIVE ASSESSEMENT 452
A. *Personal Autonomy and Contraception* 452
B. *Abortion* 458
C. *Homosexuality* 463
D. *Marriage and Divorce* 466
VI. CONCLUSION 469

I. INTRODUCTION

In February and March 1992 a tragic case captured the world's attention. A fourteen-year-old schoolgirl in the Republic of Ireland became pregnant, allegedly as the result of being raped in December 1991 by the father of her friend.[1] On February 26, 1992, the Supreme Court of the

1. On January 27, 1992, the girl told her parents that she had been raped in December 1991 in a middle-class suburb of Dublin by the father of her best friend. She was confirmed as pregnant three days later. On February 5, her family informed the police of their intention to obtain a lawful abortion for the girl in London, where they were staying. Anna Quindlen, *The Abortion Orphans*, N.Y. TIMES, Feb. 19, 1992, at A21. The police questioned the alleged rapist, who denied the accusations; no criminal charges were filed until July 26, 1992. *Dublin Charges Man in Contested Abortion Case*, N.Y. TIMES, July 26, 1992. The parents wanted to ensure that the abortion would not destroy any evidence necessary to prosecute the rapist, and wanted to preserve amniotic fluid samples as evidence. The Attorney General of Ireland then intervened and obtained an injunction, affirmed by a High Court judge, ordering the girl not to travel outside Ireland for nine months. The girl and her parents had already returned from London without having obtained the abortion, and she repeatedly threatened to commit suicide if she could not return to England to obtain the abortion. A lower court judge opined that the risk of her threatened suicide " 'is much less and of a different order of magnitude than the certainty that the life of the unborn will be terminated.' " Quindlen, *supra*, at A21. On February 26, 1992, the Supreme Court set aside the lower court injunction. In a terse, one-sentence opinion, Chief Justice Thomas Finlay of the Supreme Court said that " 'the court is satisfied that this appeal should be allowed and that the High Court decision should be set aside.' " Subsequently, the Supreme Court provided a fifty-four page explanation of its one-sentence decision, and the girl obtained a lawful abortion in England. James F. Clarity, *Irish Court Says Girl Can Leave to Obtain Abortion in Britain*, N.Y. TIMES, Feb. 27, 1992, at A1, A7 [hereinafter Clarity, *Irish Court Says Girl Can Leave*]; *see also* James F. Clarity, *Irish High Court Explains Decision*, N.Y. TIMES, Mar. 6, 1992, at A8 [hereinafter Clarity, *Irish High Court*]; James F. Clarity, *Irish Leader Will Try To Ease Abortion Law*, N.Y. TIMES, Mar. 15, 1992 at A15 [hereinaf-

Republic of Ireland set aside a lower court injunction of her right to travel from the Republic, where abortion is constitutionally banned except when necessary to save the life of the mother.[2] In its lengthy explanation of the February 26 order setting aside the injunction,[3] the Supreme Court significantly expanded the constitutional meaning of what may constitute a "real and substantial risk" to the life of the mother[4] and thereby substantially broadened the grounds for obtaining lawful abortion in Ireland.[5] Indeed, a leading anti-abortion activist said that the Supreme Court had now " 'introduced legalized abortion in Ireland.' "[6]

This recent case exemplifies the dilemma caused by competing fundamental rights in federal systems. Like the controversial United States Supreme Court decisions of the past two decades regarding abortion, this recent Irish case highlights the complex jurisprudential issues surrounding intimate personal rights and the role of natural law in federal systems.

These tensions between the sovereign prerogative of the Republic of Ireland and the role of federalism in the European Community are broadly analogous to themes of federalism in the United States. Privacy, personal individual dignity, and the most intimate and fundamental human rights lie at the heart of decisions in the courts of the United States, the Republic of Ireland, and the European Community.

Historically, activist jurists have employed the device of substantive due process to achieve their political preferences. The democratic principles of majoritarian government are especially susceptible to judicial manipulations through natural law, creating what the late Professor Alexander Bickel identified as the famous paradox of the "countermajoritarian difficulty."[7]

---

ter Clarity, *Irish Leader*]; William E. Schmidt, *Girl, 14, Raped and Pregnant, Is Caught in Web of Irish Law*, N.Y. TIMES, Feb. 18, 1992, at A1. Alisa Solomon, *Barrier Method*, VILLAGE VOICE, Mar. 10, 1992, at 22. *See infra* subpart V(B).

2. *See* Clarity, *Irish High Court, supra* note 1, at A8.
3. *See* Clarity, *Irish Court Says Girl Can Leave, supra* note 1, at A7.
4. *See* Clarity, *Irish High Court, supra* note 1, at A8.
5. *Id.*
6. *Id.*
7. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962). Bickel's famous phrase refers to the paradox of unelected, life-tenured federal judges who, in order to protect minority interests, declare unconstitutional statutes passed by majorities of popularly-elected legislatures. The difficulty for democratic purposes is that the judge "thwarts the will of the representatives of the actual people here and now." *Id.* at 17. The Framers of the United States Constitution anticipated this dilemma, and they endorsed the concept of judicial review despite the absence of a specific provision in Article III of the Constitution. *See* THE FEDERALIST NOS. 78, 81 (Alexander Hamilton); *see*

Should natural law inform the response to the "countermajoritarian" difficulty? Does judicial reliance upon natural law violate or vindicate principles of federalism and democracy? These questions permeate the United States Supreme Court's struggles with the activist judicial political device of substantive due process, especially in the delicate areas of privacy and personal autonomy. As the European Community moves beyond economic and toward political union, however, it too must confront these deep dilemmas of social and legal policy.

Just as in the European Community today, the United States Supreme Court's consideration of natural law rights began with its efforts to cement the political union of the American colonies through expansive use of the Commerce Clause and the doctrine of economic due process. The socio-economic issues of civil and human rights, which first emerged in the Civil War amendments and dominated the New Deal era, drew the Court into the more unfamiliar terrain of privacy and natural law. Likewise, the European Court must now confront these issues of fundamental human rights in the progression towards federal economic union.

The Republic of Ireland has an overwhelmingly Catholic population and a tradition of synergy, rather than separation, between church and state. Because of these cultural influences, Ireland's case law epitomizes a judiciary's difficulty in harmonizing democratic principles of majoritarian rule with respect for the fundamental rights of minorities.[8] This Article compares Irish case law on the rights of privacy and personal autonomy and its review before the European courts with the recent decisions of the United States Supreme Court. Part II presents a brief overview of the intersection of natural law and judicial review in the United States. Part III highlights the key features of federalism in the European Community. Part IV examines the pervasive influence of natural law in the legal system of the Republic of Ireland. Part V describes the means by which the courts in the United States, the Republic of Ireland, and the European Community employ principles of federal-

---

also JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980). In any event, since Chief Justice John Marshall's landmark opinion in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the concept of judicial review has been so engrained in United States constitutional law that arguments against its validity have been reduced to mere pedantry, although some have questioned the extent of its use. *Compare* ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 1-24 (1987) (strongly endorsing the constitutional validity of judicial review) *with* RADU BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 283-88 (1977) (accepting judicial review somewhat begrudgingly and arguing for narrow use).

8. *See infra* Part IV.

ism and natural law to deal with questions of contraception, abortion, sexual preference, and divorce.

This Article offers no firm solutions, but its discussion of these topics may further elucidate critical, unresolved issues and help dispel some misunderstandings. As Professor Mary Ann Glendon noted in her book *Abortion and Divorce in Western Law,* the value of a comparative approach is not that comparisons give us ready-made solutions to our legal controversies, but rather that the comparisons will reveal a "deepened understanding of the problem, and, if [we] are lucky, a source of inspiration."[9] Accordingly, this Article's comparative approach should help excise the rhetoric that pervades debates over legal issues (such as abortion) that implicate the important relationship between natural law and federalism. The isolation of this relationship might contribute to a clearer understanding of inherently emotional issues. This Article is offered to that end.

II. Natural Law in the United States

As the debate over the source of legitimacy in judicial review continues, the role of natural law remains highly controversial. In the United States, a fragile consensus has centered upon a process-oriented approach to constitutional theory.[10] According to this school, the judiciary should apply value-neutral principles[11] so that minority interests may assume

9. Mary Ann Glendon, Abortion and Divorce in Western Law (1987). *See also* Floyd Abrams, Speech to the Graduating Class of the University of Michigan Law School (May 13, 1990) (on file with author) (comparing foreign courts' use of First Amendment principles).

10. The definitive exposition of the process-oriented approach to judicial review is John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980). The main thesis of Ely's influential work is that the use of judicial review should be circumscribed by principles of democracy. Courts should only strike down laws that prevent minority representation from asserting itself in the democratic process. Ely argues that this would take the oxymoron out of "substantive due process" by returning it to its procedural origins. *See also* Lawrence H. Tribe, American Constitutional Law § 8-7, at 583-84 (1988); Michael J. Perry, The Constitution, The Courts, and Human Rights (1982).

11. *See* Herbert Wechsler, *Toward Neutral Principles of Constituional Law,* 73 Harv. L. Rev. 1 (1945). *See also* Robert H. Bork, *Neutral Principles and Some First Amendment Problems,* 47 Ind. L.J. 1 (1971). Despite the increasing influence of conservative judicial philosophy, Judge Bork's article endorsing a strict interpretivist approach can hardly be classified as mainstream; his advocacy of neutral principles in the application of the Constitution lies substantially to the right of the center of even the current Rehnquist Court. Bork insists the application of neutral principles requires a strict adherence to original intent and therefore does not allow for enforcement of rights

their proper role in the complex matrices of factions that account for political majorities in the United States republican system.[12] Justice Stone's famous footnote in *United States v. Carolene Products* warns that when this positivist methodology fails to protect the chronically disenfranchised, courts must step in to protect the fundamental rights of "discrete and insular minorities."[13]

The definition of fundamental rights under this process-oriented approach to judicial review[14] has been distinctly secular. In the late twentieth century, democratic pluralism and the Establishment Clause of the First Amendment have mandated a rational secular morality derived from the text of the Constitution and the role and status of the individual under principles of limited government adopted by the Framers.[15] The

---

beyond those found in the text and the structure of the constitution as seen by the Framers. *See also* ROBERT H. BORK, THE TEMPTING OF AMERICA (1990). It should be noted that Ely does not endorse this concept of "neutral principles." He contends that judicial review is inherently value-laden:

> [F]ew come right out and argue for the judge's own values as a source of constitutional judgment. Instead the search purports to be objective and value neutral. The reference is to something "out there" waiting to be discovered, whether it be natural law or some supposed value consensus of historical America, today's America, or the America that is yet to be.

ELY, *supra* note 10, at 48. If there is a major criticism of Ely's work, it is that he does not choose among his aforementioned options nor definitively answer this ultimate question. *See* LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 280 (1988).

12. For the salient classic discussion of political factions and their role in the writing and interpretation of the Constitution, see THE FEDERALIST No. 10 (James Madison).

13. United States v. Carolene Products, 304 U.S. 144, 152 n.4. (1938). *Compare* Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (arguing that protection of only the classic "discrete and insular" racial minorities no longer provides adequate protection for many of the disadvantaged who today are neither discrete nor insular, but, with the increasingly pervasive feminization of poverty, are disproportionately women and children of all races).

14. Legal positivism and the process-oriented approach to judicial review have been linked by Ely, the latter's leading exponent. Discussing the debate between interpretivism (those arguing for strict adherence to original intent) and non-interpretivism (those arguing for a broader use of judicial review), Ely states: "The interpretivism-noninterpretivism dichotomy stirs a long-standing debate that pervades all of law, that between 'positivism' and 'natural law.' Interpretivism *is* about the same thing as positivism, and natural law approaches are surely one form of noninterpretivism." ELY, *supra* note 10, at 1. *See also* Phillip Soper, *Making Sense of Modern Jurisprudence: The Paradox of Positivism and the Challenge for Natural Law*, 22 CREIGHTON L. REV. 67 (1988).

15. These principles have been expounded by utilitarians such as John Stuart Mill. *See* JOHN STUART MILL, ON LIBERTY (Gertrude Himmelfarb ed., Penguin Books 1971) (1859). Mill's philosophy objected to state intervention in private morality. Legislation in this area is permissible only when necessary to the function of government. The

lessons of the *Lochner* era[16] ostensibly require that all citizens enjoy these universal and immutable liberties and that the protection of these liberties must be free of individual religious values that would lead to the application of an overt natural law/substantive due process philosophy grounded in theological considerations. Hence, United States natural law jurisprudence in the post-*Lochner* era is essentially deontological.[17]

"sole end to which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection." *Id.* at 68. Mill's philosophy drew heavily upon the works of David Hume, Jeremy Bentham, and Mill's father, James Mill, in developing a coherent and eloquent attack on state intervention in areas of private morality. *See, e.g.*, JEREMY BENTHAM, *Article on Utilitarianism, in* THE COLLECTED WORKS OF JEREMY BENTHAM 289 (A. Goldnorth ed., 1983).

16. References to the *Lochner* era refer to the Supreme Court's notorious decision in Lochner v. New York, 198 U.S. 45 (1905), in which the Court held unconstitutional a New York statute regulating the maximum number of work hours of bakers on the grounds that it interfered with the natural law right to contract embodied in art. I, § 10 and in the Due Process Clause of the Fourteenth Amendment. The *Lochner* decision has come to symbolize the zenith of the Court's highly politicized and grossly activist use of substantive due process, which led soon thereafter to the wholesale judicial invalidation of critical New Deal legislation in the first term of the Roosevelt administration and which culminated in Roosevelt's Court-packing threat and the crisis of 1937. *See, e.g.*, Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding the National Industrial Recovery Act of 1933 unconstitutional under commerce clause); United States v. Butler, 297 U.S. 1 (holding the Agricultural Adjustment Act of 1933 unconstitutional under spending clause). For a discussion of the mid-thirties crisis period, see WILLIAM H. REHNQUIST, THE SUPREME COURT 215-34 (1987). The Court's dramatic jurisprudential shift in 1937, exemplified by West Coast Hotel v. Parrish, 300 U.S. 379 (1937), (and major accompanying changes in the Court's personnel) supposedly invalidated *Lochner* and the use of substantive due process as legitimate constitutional theory. Consequently, "*Lochner*izing" today connotes the judiciary's use of subjective personal values as a basis for deciding cases. *See* TRIBE, *supra* note 10, §§ 8-4 to 8-7; Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

17. LLOYD L. WEINREB, NATURAL LAW AND JUSTICE (1987). Weinreb argues that modern constitutional law has abandoned the original understanding and purpose of natural law as ontological, i.e., as providing an understanding of humankind's place in nature and incorporating it into legal theory. He contends that the rise of social contract theory and the shift toward Kantian ethics, and other similar consequentialist theory, has transformed natural law into an evaluation of humankind's relationship to the state, thus making United States natural law deontological. *Id.* at 67. For a discussion of Immanuel Kant's philosophy as it pertains to natural law, see FREDERICK C. COPLESTON, A HISTORY OF PHILOSPHY 308-48 (1960); David A.J. Richards, *Kantian Ethics and the Harm Principle: A Reply to John Finnis,* 87 COLUM. L. REV. 457 (1987).

The authors subscribe to Weinreb's position and point to the Supreme Court's institutional reluctance to recognize unequivocally the Ninth Amendment, the quintessential natural law provision, as the fully legitimate repository of substantive rights. *But cf.* Steven J. Burton, *"Ontological" Natural Law?*, 82 NW. U. L. REV. 843 (1988) (reviewing LLOYD L. WEINREB, NATURAL LAW AND JUSTICE (1987)). Of course, the Sen-

The United States has recently experienced a resurgence of conservative values that may have its most profound impact in these areas of private morality.[18] Proponents of this conservative resurgence purport to subscribe to the doctrine of judicial restraint. These judges and scholars oppose the judiciary's use of sources outside the text of the Constitution to find in the Constitution the right to privacy and other rights grounded in natural law.[19] This interpretivist or originalist school argues that the Constitution itself embodies the legitimate expression of society's conscience or that the directly-elected representatives of the people manifest that expression. Accordingly, any attempt by the courts to enforce rights not derived from these sources will necessarily elevate the judiciary into "Platonic guardians"[20] whose subjective excesses violate the popular will.

Some judicial conservatives, however, have abandoned judicial restraint and now advocate the express reincorporation of religion and religious value systems into public life in the United States.[21] From across the philosophical spectrum, but primarily among conservatives and libertarians within religious traditions, natural law has reemerged in the United States. The Senate Judiciary Committee nomination hearings for Judge (now Justice) Clarence Thomas revealed to the public this renaissance of natural law. In several speeches before his 1990 appointment to the Unites States Court of Appeals for the District of Columbia, Judge Thomas endorsed many of the timeless qualities of natural law elucidated in the classic jurisprudential thinking of Cicero, St. Augustine, and St. Thomas Aquinas, pointing out the Reverend Dr. Martin Luther King Jr.'s forceful reiteration of this thinking.[22] Justice Thomas, in alli-

---

ate's rejection of the nomination of Judge Robert Bork to the Supreme Court in 1987 functioned as a national referendum on the now-established fundamental natural law rights of privacy and personal autonomy located squarely within the Ninth Amendment.

18. *See, e.g.,* Michael Horowitz, *The Conservative Struggle for Legal Change: Alternatives to the "Fifth Vote,"* 11 HARV. J.L. & PUB. POL'Y 75 (1988); James G. Wilson, *Justice Diffused: A Comparison of Edmund Burke's Conservatism with the Views of Five Conservative, Academic Judges,* 40 U. MIAMI L. REV. 913 (1986).

19. *See* BERGER, *supra* note 7; BORK, THE TEMPTING OF AMERICA, *supra* note 11.

20. LEARNED HAND, THE BILL OF RIGHTS 73 (1958).

21. FREDRICK MARK GEDICKS & ROGER HENDRIX, CHOOSING THE DREAM: THE FUTURE OF RELGION IN AMERICAN PUBLIC LIFE (1991). *See* David L. Gregory, *The Religious, the Ethical, the Communal, and the Future,* 54 CATH. U. L. REV. (forthcoming 1992).

22. *See* 137 CONG. REC. S10,350-53 (daily ed. July 18, 1991). Senator Danforth of Missouri entered into the Congressional Record the entire speech that then-Equal Employment Opportunity Commission Chairman Clarence Thomas delivered to the Heritage Foundation in 1987:

Now that even *Time* magazine has decided to turn ethics into a cover story, there

ance with Justice Scalia, most likely will employ one political vision of natural law themes to infuse the Supreme Court's newly activist jurisprudence well into the twenty-first century. This activist judicial use of natural law by conservative justices seems to contradict their self-same professions of restraint and originalist adherence to the text and to the intent of the Framers.

The conflict between judicial restraint and a more activist application of natural law resurfaced in *Planned Parenthood of Pennsylvania v. Casey,*[23] in which the Supreme Court preserved the basic right to abortion but allowed the states to regulate it extensively. Ironically, just as in Ireland, the extent of the permissible state regulations will likely make the right to obtain a lawful abortion in the United States contingent on the individual woman's economic resources: a woman seeking an abortion may have to travel from a restrictive home state to one without those restrictions. Thus, the United States continues to wrestle with yet-unresolved themes of federalism, rights, autonomy, judicial review, and the contemporary role of natural law.

---

is at least some recognition that a connection exists between natural law standards and constitutional government. . . . The need to reexamine the natural law is as current as last month's issue of *Time* on ethics. Yet it is more venerable than St. Thomas Aquinas. It both transcends and underlies time and place, race and custom. And until recently, it has been an integral part of the American political tradition. Martin Luther King was the last prominent American political figure to appeal to it. But Heritage Foundation Trustee Lewis Lehrman's recent essay in *The American Spectator* on the Declaration of Independence and the meaning of the right to life is a splendid example of applying natural law.

Briefly put, the thesis of natural law is that human nature provides the key to how men ought to live their lives. As John Quincy Adams put it: 'Our political way of life is by the laws of nature of nature's God, and of course presupposes the existence of God, the moral rules of the universe, and a rule of right and wrong, of just and unjust, binding upon man, preceding all institutions of human society and of government.'

Without such a notion of natural law, the entire American political tradition, from Washington to Lincoln, from Jefferson to Martin Luther King, would be unintelligible. According to our higher law tradition, men must acknowledge each other's freedom, and govern only by the consent of others. All our political institutions presuppose this truth. Natural law of this form is indispensable to decent politics. . . .

This approach allows us to reassert the primacy of the individual, and establishes our inherent equality as a God-given right. This inherent equality is the basis for aggressive enforcement of civil rights laws and equal employment opportunity laws designed to protect individual rights.

Id.

23. 112 S. Ct. 279 (1992). *See supra* notes 140-155 and accompanying text.

III. Federalism in the European Community

A. *The European Economic Community*

What is colloquially known as the "European Community" is, in fact, an amalgam of four different treaties which form the foundation for a united Europe. The European Economic Community originated from a Marshall Plan-inspired proposal in 1950 by the French government to postwar Germany to pool resources and create a "common market" in the coal and steel industries. The result was the signing in April 1951 of a treaty forming the European Coal and Steel Community (ECSC), an organization open to all European states and joined by Italy and the Benelux states.

Building on the success of the ECSC, the original six states[24] continued negotiations toward further economic integration. The negotiations culminated in the Treaty of Rome in 1957, which formed the European Atomic Energy Community and the European Economic Community (EEC). The signing of the Treaty of Rome was a watershed event in European history. It created, for the first time, a supra-national organization in which Member States agreed to cede large degrees of national sovereignty to an international organization. The ratification by all Member States of the Single European Act of 1986, which mandates a single European market devoid of all physical, technical, and fiscal barriers to internal trade by December 31, 1992, furthered the drive toward economic and political union.

The political apparatus of the European Community employs traditional concepts of democratic government and distinct elements of the civil-law system. Four institutions comprise the European Community: (1) the Commission of the European Communities (the Commission),[25] which functions primarily as an executive branch in enforcing Community law, although it does participate to some extent in the legislative process; (2) the Council of the European Communities (the Council),[26]

---

24. The original Member States in the ECSC were Belgium, Germany, France, Italy, Luxembourg, and the Netherlands. For the text of the treaty forming the ECSC, see 1 Treaties Establishing the European Communities 23-130 (1987).

25. The Commission is made up of fourteen representatives appointed by the Member States, no more than two of which can be from the same country. Upon appointment, Commissioners are to act independently of their Member States and can be removed from office for failure to do so.

26. The Council consists of one representative from each of the Member States who meet to discuss Community policy and initiatives submitted by the Commission. These are usually the respective state's foreign minister, although other officials may attend depending on the subject matter of the issue at hand. Voting is usually by majority rule,

which is the primary legislative body setting policy for the EEC; (3) the European Parliament,[27] which acts not so much as a legislative body but rather as advisor to the Council and Commission, and (4) the Court of Justice of the European Communities (the European Court of Justice),[28] which adjudicates Community law both among the governmental branches of the Community and between the Community and its Member States. Article 177, which permits references from national courts to the Court of Justice for preliminary rulings on the application of Community law, is foremost among the treaty's federalism provisions concerning the Court.[29] This article has spawned much controversial litigation.

Aside from the some 250 articles of the EEC treaty, which serve as constitutional guideposts, the Commission or the Council promulgate community law through a hierarchy of legislation. "Regulations" are Community laws of general application that are directly binding on all Member States. "Directives" are likewise pronouncements of Community law, but they permit each Member State to pass implementing legislation. "Decisions" are binding only on the parties concerned. Lastly, "recommendations and opinions" merely offer guidance on issues of Community law and are not binding.

Given the primary goal of European economic integration, few of these laws directly address natural law rights. As article 215(2) of the Treaty makes clear, however, "general principles common to the laws of Member States" are implicit in the Treaty itself and should be used by the Court as a source of Community law. Moreover, in 1989 the European Parliament passed the Declaration of Fundamental Rights and Freedoms in an attempt to ensure the protection of individual rights

---

but votes are weighted by state pursuant to the Treaty.

27. The Parliament currently consists of 518 directly-elected representatives with seats apportioned to Member States by factors such as population and economic power.

28. The European Court of Justice is composed of eleven judges appointed by the Member States for six-year terms and is assisted by five advocates general who function as assistants or special masters and who issue reports that are incorporated in the Court's opinions. Additionally, the Single European Act created a Court of First Instance which now functions as a lower court of limited jurisdiction to assist the Court of Justice with its increasing case load. For further discussion of the Court, see Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning The Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities*, 61 WASH. L. REV. 1103 (1986).

29. The jurisdiction of the Court of Justice is set forth in Articles 169-79 and includes suits by Member States against other Member States, suits by the Commission against Member States and suits by individuals against Member States for violations of Community law.

within the Community system.

Nevertheless, discerning the "general principles common to the laws of Member States" is a herculean task. The consistently expanding ranks of the Community compound the problem.[30] Finding a common theme among these remarkably diverse legal systems sufficient to give meaningful protection to implied natural law rights may strain the interpretive powers of law and create doubt as to the legitimacy of the process. As a consequence, the European Court of Justice has looked to the coordinate treaty of the European Convention of Human Rights as a source of enforceable Community law.

B. *The European Convention on Human Rights*[31]

In the aftermath of the atrocities of World War II, the newly liberated countries of Europe met at the Hague to form an organization capable of protecting fundamental human rights. In 1949, the Council of Europe was created with a mandate to author a charter for the protection of fundamental rights and freedoms and to implement and enforce the nascent United Nations Universal Declaration of Human Rights. The European Convention on Human Rights (the Convention) was thus signed the following year and entered into force on September 3, 1953. Twenty-two nations of Europe, including all members of the EEC, are currently signatories.[32]

The first twelve articles and several ensuing protocols to the Convention set forth many rights grounded in natural law jurisprudence including the right to life (article 2),[33] the right to respect for private and

---

30. The Community has expanded with the addition of the United Kingdom, Ireland, and Denmark in 1973, Greece in 1979, and Spain and Portugal in 1986. It is currently considering applications by Austria, Sweden, Switzerland, and Turkey, and the admissions of the liberated countries of Eastern Europe is clearly on the agenda. Norway's application to the Community was accepted in 1973 but a national referendum for admission was defeated and its application withdrawn.

31. For a further discussion of the Convention, see P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2d ed. 1990).

32. These are Austria, Belgium, Cyprus, Denmark, the Federal Republic of Germany, France, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, and the United Kingdom.

33. Article 2 states:

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this

family life, home, and correspondence (article 8),[34] the right to freedom of thought, conscience, and religion (article 9),[35] and the right to marry and found a family (article 12).[36] These broadly defined and intensely personal rights inevitably conflicted with the national policies of some Member States, but the extent of the Convention's intrusion on national sovereignty in these sensitive areas of social policy has become more problematic.

The Convention is not a self-executing document. States that adhere to the dualistic approach to international law must enact legislation to give Convention provisions a direct and binding effect in national courts. Otherwise, injured persons or Member States must seek redress before the European Commission of Human Rights (the Commission). The Commission is then charged to seek a friendly settlement between the parties and, if none is achieved, to determine whether an application is admissible.[37] If deemed admissible, the matter may be prosecuted by a

---

Article when it results from the use of force which is no more than absolutely necessary:

(a) in defense of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

See VAN DIJK & VAN HOOF, *supra* note 31, at 216.

34. Article 8 provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except as in accordance with the law and as necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Id. at 368.

35. Article 9 states:

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

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

Id. at 397.

36. Article 12 provides: "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." *Id.* at 440.

37. Pursuant to articles 26 and 27 of the Convention, to be admissible an application

Member State or the Commission, on behalf of an injured person, before the European Court of Human Rights.[38]

The Convention, therefore, resembles the United States Bill of Rights before its incorporation to the states.[39] The Convention purports to express the shared values that the contracting parties agree to protect at the expense of national sovereignty. Although the decisions of the European Court of Human Rights are theoretically binding and the twenty-two signatories to the Convention have agreed to abide by the decisions of the

---

must: (1) not be anonymous, (2) not constitute an abuse of the right of complaint, (3) not be substantially the same as a matter which has already been examined by the commission or has already been submitted to another procedure of international investigation or settlement unless it contains relevant new information, (4) not be incompatible with the provisions of the Convention, (5) have exhausted all domestic remedies, and (6) have been submitted within six months of the final national decision.

38. Under article 33, if an application is not brought before the Court within three months of the Commission's finding of admissibility, the matter is referred to the Committee of Ministers, which is the policy-making and executive organ of the Council of Europe, for a decision as to whether a violation of the Convention has occurred. If a violation is found, the accused Member State is given time to conform its conduct to the Committee's findings.

39. Russell M. Dallen, Jr., *An Overview of European Community Protection of Human Rights, With Some Special References to the U.K.*, 1990 COMMON MKT. L. REV. 761, 773-74. As the author explains:

> Incorporation is the term given to the process by which the U.S. Supreme Court extended the protection of the Bill of Rights to the actions of the state governments. Prior to incorporation, there existed two standards—that of the Federal Government, and that of the State Government. The Federal Government was not allowed to take any action that would violate those norms. In 1868, however, the Fourteenth Amendment came into force. It was a Constitutional amendment which was designed to ensure that no State could violate the freedom of the former slaves; thus applying Federal guarantees to the States. The Supreme Court was able to use its wording to ensure that Federal guarantees of individual rights were extended and protected in the States. . . . In 1897, the U.S. Supreme Court first used that Amendment to prevent a State from taking property for public use without just compensation. In the 1920s the Supreme Court made some major headway in the process of incorporation and completed most of the remainder of incorporation during the judicially (and socially) activist 1960s. The practical effect of incorporation was the creation of a single standard of State and Federal rights in the United States.

Id.

For further discussion of European constitutionalism, see J.A. Andrews, *The European Jurisprudence of Human Rights*, 43 MD. L. REV. 463 (1984); John T. Lang, *The Development of European Community Constitutional Law*, 25 INT'L LAW. 455 (1991); Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 58 AM. J. COMP. L. 205 (1990); Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403 (1991).

Court, the Court lacks any enforcement powers beyond moral suasion. The European Court of Human Rights cannot compel countries formally to comply with its rulings, although a country not in compliance can be expelled from the Convention. The EEC's Court of Justice can assert more forcefully the underlying principles of the Convention, "which the Court accepts as forming part of the Community legal order."[40]

On October 4, 1991, the European Court of Justice rendered a deeply problematic and significant decision in *Society for the Protection of Unborn Children Ireland Ltd. v. Grogan*.[41] The Court had to reconcile federalist principles of individual state autonomy and legitimate European Community majoritarian policies. The extent to which the European Court of Justice will vindicate minority rights within a majoritarian model presents one of the most compelling challenges for effective European integration. The issue evokes comparative assessment based on the federalism debates in the United States.

As previously mentioned, the Republic of Ireland, foremost among the EC states, lacks any tradition of separation of church and state.[42] Abortion has always been unlawful in Ireland, originally by the common law, and by statute since 1803.[43] The Eighth Amendment to the Irish Constitution, approved by referendum in 1983, provides: "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."[44] In 1986 and again in 1988, the Irish courts held that it was unlawful to assist women traveling abroad to obtain abortions. The Irish courts enjoined the defendants from making travel arrangements abroad for pregnant women to obtain abortions and from disseminating information about abortion clinics to pregnant women. Following these decisions by the Irish courts, the European Commission of Human Rights declared admissible the defendants' applications against Ireland for breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms articles 8 (right to respect for private and family life), 10 (freedom of expression and information), and 14 (prohibition of sex discrimination).

40. Society for the Protection of Unborn Children Ireland Ltd. v. Grogan, 3 C.M.L.R. 849 (1991).

41. *Id.*

42. *See infra* subpart IV(B).

43. *See infra* subpart V(B).

44. I.R. CONST. art. VIII.

In *Grogan*, the European Court of Justice concluded that "medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of article 60 of the [EEC] Treaty."[45] Thus, if this were all that the Court decided, Ireland's strict ban on assistance and information regarding procurement of abortions lawful outside of Ireland clearly would violate the EEC Treaty. The European Court of Justice, however, then complicated matters with a second holding exporting Irish law in *Grogan*, finding "it is not contrary to [European] Community law for a member-State in which medical termination of pregnancy is forbidden to prohibit students' associations from distributing information about the identity and location of clinics in another member-State where voluntary termination of pregnancy is lawfully carried out and the means of communicating with those clinics, where the clinics in question have no involvement in the distribution of the said information."[46]

The Treaty on European Unity, signed in December 1991 in the Dutch city of Maastricht, further refined the ground rules for the unified European Community. It reinforced the *Grogan* decision and weakened and skewed European federalism even more in favor of deference to the particular law of the individual Member State. A protocol of the treaty appears to permit the Republic of Ireland to prevent women from traveling abroad to obtain abortions that are banned in Ireland; the protocol says that nothing in the Treaty would infringe on Irish abortion law. Ireland approved the Maastricht Treaty on European Unity in June 1992. The Irish government strongly supported approval of the Treaty because the European Community annually provides hundreds of millions of dollars in subsidies to Ireland's devastated economy.[47]

Fortuitously, the decision rendered by the Supreme Court of the Republic of Ireland in March 1992 appears to have reduced the effect of the *Grogan* decision substantially and to have ameliorated tensions between Irish and European Community laws.[48] The Supreme Court's broader interpretation of the Irish Constitution will make it somewhat less difficult to obtain a lawful abortion within the Republic of Ireland.[49]

Indeed, the new Irish government has expressed a wish to return the issue of passing abortion legislation more liberal and more consonant with EC human rights law to the Irish populace. Irish constitutional

45. *Grogan*, 3 C.M.L.R. at 849.
46. *Id.*
47. *See* Clarity, *Irish Court Says Girl Can Leave*, *supra* note 1, at A1.
48. *Id.*
49. *See* Clarity, *Irish Leader*, *supra* note 1, at A15.

history, however, indicates that proposed liberalization conflicting with Catholic doctrine usually gets defeated. Moreover, the results of this legal and political confrontation between Catholic Ireland and the European Community will inevitably have a profound impact on the applications for EC membership of other theologically homogeneous states, such as Catholic Poland and Islamic Turkey. The confrontation also invokes comparisons to regional religious and cultural differences among states within the United States. A deeper understanding of the source of Irish law and its relationship to the EC is therefore instructive to both the growth of the Community and the direction of federalism in Europe and the United States.

IV. Natural Law in the Republic of Ireland

Oh Ireland, my first and only love, where Christ and Caesar are hand in glove.[50]

The Republic of Ireland has a written constitution and common-law heritage. Ireland's essentially homogenous Roman Catholic population[51] and largely institutionalized Catholic Church have shaped the social and political history of the country.[52] Notwithstanding the repeal in 1972 of an express provision recognizing the special position of the Roman Catholic Church in Irish society,[53] the Irish Constitution's Preamble[54] and

---

50. James Joyce, Gas From a Burner, *in* The Portable James Joyce 660 (Harry Levin ed., Viking Books 1966).

51. *See* G.W. Hogan, *Law and Religion: Church-State Relations in Ireland From Independence to the Present Day,* 35 Am. J. Comp. L. 47, 50 (1987).

52. For discussion of the international role of the Catholic church in the furtherance of international human rights, see John A. Onorato, Note, *Saving Grace or Saving Face: The Roman Catholic Church and Human Rights,* 8 Dick. J. Int'l L. 81 (1989).

53. *See infra* subpart IV(B).

54. The Preamble to the Irish Constitution states:

> In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred.
>
> We the People of Eire,
>
> Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial.
>
> Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation.
>
> And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,
>
> Do hereby adopt, enact, and give to ourselves this Constitution.

I.R. Const. pmbl.

Articles on Fundamental Rights[55] amplify the importance of God and incorporate the basic tenets of Catholic social teaching. Thus, the structure and language of the Constitution reveal a comparatively well-defined collective conscience seeking justice through the prism of Catholic morality. This near-theological conception of the state as a mechanism of higher law has its roots in the jurisprudence of St. Thomas Aquinas.[56]

In response to this political manifestation, the Irish judiciary has frequently adopted an ontological approach to natural law rights in accordance with Thomistic jurisprudence.[57] Under Thomism, a judge should apply judicial reason to derive political truths from the eternal law of God. Natural law is the link between the eternal law and the positive moral law. The function of the state, including the courts, is to move society closer to God's eternal law through the definition of justice. The Irish Constitution, as the premier embodiment of this heightened political consciousness, represents one of the few instances of divine law in

---

For a discussion of the role of Catholic social teaching and natural law philosophy in the Irish Constitution, see J.M. KELLY, THE IRISH CONSTITUTION (2d ed. 1984); Hogan, *supra* note 48; Brian Doolan, CONSTITUTIONAL LAW AND CONSTITUTIONAL RIGHTS IN IRELAND (1984); Peter D. Sutherland, *The Influence of United States Constitutional Law on the Interpretation of the Irish Constitution*, 28 ST. LOUIS U. L.J. 41 (1984).

55. I.R. CONST. arts. 40-44.

56. ST. THOMAS AQUINAS, SUMMA THEOLOGICA (Blackfriars ed., 1975) (Prima Secundae, Questions 90-97).

57. The philosophy of St. Thomas Aquinas is most cogently set forth in the SUMMA THEOLOGICA, the definitive treatise on Catholic natural law. The focus of the SUMMA was to translate ontological principles of Platonic and Aristotelian philosophy into medieval Catholic thought, and reconcile this with the Augustinian concept of free will. *See* FREDERICK C. COPLESTON, A HISTORY OF PHILOSPHY 302-435 (6th ed. 1962). As restated by Professor Rommen, the resultant jurisprudence is "based on the presupposition that the universe, the world, is an 'order' of being; from this order of being, from the *ontological* order follows then the *moral* order. This ontological order leads to God as the Creator of being and of its order, and thus to God as the legislator of the moral order." HEINRICH A. ROMMEN, THE STATE IN CATHOLIC THOUGHT 173 (1945). *See also* LLOYD L. WEINREB, NATURAL LAW AND JUSTICE 53-64 (1987); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 281-89 (1980).

Aquinas thus found four types of law in the universe: (1) the eternal law representing the will of God and the timeless order of the universe, (2) the natural law that must reconcile the eternal law with justice because free will has directed the individual from the "ought," i.e., the natural tendency to follow the eternal law, (3) the human law that represents the positive law of society in its attempt to implement the natural law, and (4) the divine law embodied in the Scriptures which gives man guidance in his formulation of the human law and interpretation of the natural law. *See* WEINREB, *supra* note 17, at 57-61; DAVID GRANFIELD, THE INNER EXPERIENCE OF LAW: A JURISPRUDENCE OF SUBJECTIVITY (1988).

which the eternal law is revealed to the masses.[58] Consequently, positive law which conflicts with the natural law is void ab initio, and manifestly unconstitutional.[59]

This ontological approach to judicial review solves many of the epistemological and heuristic difficulties which have plagued the noninterpretivist school in the United States.[60] Secular state enforcement of Catholic orthodoxy, however, has political implications that transcend the debates over constitutional theory currently taking place in the United States.[61]

---

58. Professor Ackerman presents an interesting derivation of this theme. He distinguishes two levels of United States constitutional law. First, there is a more elevated, higher track constitutional law that rarely reflects critically important periods of heightened political consciousness in society as a whole. Ackerman believes that the United States experienced this full political awareness during the enactment of the Constitution, the Civil War amendments, and the New Deal legislation. Second, there is a normative period in which general awareness and participation in the political process is limited and therefore may not entirely reflect the "will" of the people. BRUCE A. ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution,* 93 YALE L.J. 1013 (1984). This division may perhaps be incorporated into the blend of Thomistic jurisprudence practiced by the Irish courts. The heightened phase of political and theological awareness reflected in the Irish Constitution analogously marks a stage between the human and natural law and therefore requires special deference in interpretation.

59. As Professor Doolan has stated:

> It is generally accepted that the [Irish] Constitution is based on natural law teachings. The natural law is based on value judgments which cite as their authority some absolute source such as, for example, God's revealed word. These absolute value judgments claim to reflect the essential character of the universe and purport to be immutable and eternally valid. They can be grasped and understood by the proper employment of human reason. When perceived, they must overrule all positive, or man-made, law.

DOOLAN, *supra* note 53, at 4-5 (1984).

60. The "epistemological" and "heuristic" difficulties mentioned in the text express the heart of the conservatives' attack on noninterpretivist thinking. The true conundrum in judicial activism is the source and method of gaining the knowledge necessary to infuse with discernible meaning ambiguous and value-laden terms such as "due process," "equal protection," and the entirety of the First and Ninth Amendments without "*Lochner*izing." *See* LEVY, *supra* note 11, at 350-87. For better or worse, Irish courts fail to confront this problem, or only confront it to a lesser degree, because their epistomological source is Catholicism and their heuristic process is guided by Thomistic jurisprudence. The wisdom of applying this reasoning in United States natural law theory (in a more ecumenical Christian and less Catholic sense) represents a major theme of the present Article.

61. First, because Protestants encompass the discrete and insular minorities of the Republic of Ireland in both a religious and political sense and form a peculiar symbiosis with the Protestant majority to the north, judicial implementation of Catholic social legislation retards attempts at unification by resurrecting the ubiquitous Protestant fear that

Economic necessity has made Ireland a party to the various treaties forming the European Economic Community and has already led to several confrontations between Ireland's Catholic social agenda and EEC law.[62] These socioeconomic factors and the pervasive influence of the Roman Catholic Church energize the peculiar synergy of the Irish Constitution, an understanding of which requires a brief foray into Irish history.

A. *The Constitutional History of Ireland*[63]

Since the invasion of Ireland by the Earl of Strongbow under the direction of England's Henry II, the fate of Irish society has been inextricably intertwined with Anglo-Irish relations and the resultant Protestant/Catholic dichotomy.[64] The expulsion of the Earls of Ulster under James I sounded the death knell for the ancient Gaelic tradition and resulted in Catholic disenfranchisement in the immediate post-Jacobite

---

"Home Rule means Rome Rule." This political consideration enormously complicates the already complex duty of the judiciary to reconcile Catholic doctrine with the traditional role of the court as guardian of human rights in the liberal democratic state. For an interesting exchange over legitimacy and judicial review, compare Stephan L. Carter, *The Right Questions in the Creation of Constitutional Meaning*, 66 B.U. L. REV. 71 (1986), with Erwin Chermerinsky, *Wrong Questions Get Wrong Answers: An Analysis of Professor Carter's Approach to Judicial Review*, 66 B.U. L. REV. 47 (1986).

62. The major conflicts have actually arisen more often from application of the European Convention on Human Rights. See the discussion of Johnston v. Ireland, 112 Eur. Ct. H.R. (ser. A) at 8 (1986), *infra* subpart IV(D). Unlike European Community law, however, the Convention has been deemed an international treaty which is not self-executing under Article 29 of the Irish Constitution. *In re* O'Laighleis, 1960 I.R. 93. Consequently, the decisions of the European Court of Human Rights are not directly enforceable in the courts of Ireland.

63. An exhaustive bibliography for the following brief, and certainly incomplete, history of Ireland is obviously beyond the scope of this Article. Unless specifically noted elsewhere, background sources include JAMES CASEY, CONSTITUTIONAL LAW IN IRELAND (1987); R.F. FOSTER, MODERN IRELAND: 1600-1972 (1989); ROBERT KEE, THE GREEN FLAG: A HISTORY OF IRISH NATIONALISM (1972); KELLY, *supra* note 54; DAVID G. MORGAN, CONSTITUTIONAL LAW OF IRELAND (1985); THE COURSE OF IRISH HISTORY (T.W. Moody & F.X. Martin eds., 2d ed. 1984); SEUMAS MACMANUS, THE STORY OF THE IRISH RACE (4th ed. 1944). For an interesting political history of Ireland in the context of a discussion on the "Diplock" courts, see William E. Hellerstein, Robert B. McCay & Peter R. Schlam, *Criminal Justice and Human Rights in Northern Ireland*, 43 REC. ASSOC. NEW YORK CITY BAR 110 (1988). For a general bibliography on Irish law, see PAUL O'HIGGINS, A BIBLIOGRPAHY OF PERIODICAL LITERATURE RELATING TO IRISH LAW (1966 & Supp. 1983).

64. MICHAEL RICHTER, MEDIEVAL IRELAND: THE ENDURING TRADITION (Brian Store & Adrian Kogle trans., 1987).

era. The unsuccessful uprisings of 1798 engineered by Irish patriot Theobald Wolfe Tone reversed constitutional reforms implemented in 1782 and led to the dissolution of the Irish Parliament through the Act of Union of 1800.[65]

The leadership of Daniel O'Connell and the grant of Catholic emancipation appeared to signal a trend toward liberalization at the close of the Napoleonic Wars.[66] The rise of Fenianism[67] under the leadership of Charles Stewart Parnell saw an Irish Home Rule Bill pass the British House of Commons with the reluctant support of Prime Minister Gladstone. But the fall of Parnell for his adulterous affair with Kitty O'Shea and the public condemnation of Parnell for his breach of Catholic morality stymied the cause of Irish independence for yet another generation.[68]

The frustrated attempts at Home Rule exploded in an outpouring of nationalistic sympathy surrounding executions following the Easter Rebellion of 1916.[69] During this period, the nascent Irish Republican Army developed close ties with leaders of the Catholic Church. By the time of the War of Independence and the establishment of the Irish Free State under the Anglo-Irish Treaty of 1921, the Catholic Church had become the dominant moral force in the new nation.[70]

Dissatisfaction over the exclusion of the six counties of Northern Ireland from the sovereign territory of the Republic of Ireland led Eamon de Valera and the Sinn Fein party to boycott the provisional government in the formation of the Constitution of 1922.[71] Sinn Fein expressly rejected the position of the Anglo-Irish Treaty as beyond the amending power of the Constitution; an unsuccessful civil war ensued, ending in 1923.[72] These unstable political conditions weakened the force of the Constitution of 1922 by extending the transitional period within which it could be amended by ordinary legislation, thereby circumventing effec-

---

65. For an interesting depiction of the 1798 uprising in the form of historical fiction, see THOMAS FLANAGAN, THE YEAR OF THE FRENCH (1979).

66. *See* LAWRENCE J. MCCAFFREY, DANIEL O'CONNELL AND THE REPEAL YEAR (1966); ANGUS MACINTYRE, THE LIBERATOR (1965).

67. For an entertaining depiction of the Fenian movement in the context of a historical novel, see THOMAS FLANAGAN, THE TENANTS OF TIME (1988)

68. *See* GEORGE DANGERFIELD, THE DAMNABLE QUESTION (1976); F.S.L. LYONS, CHARLES STEWART PARNELL (1977).

69. LYONS, *supra* note 68. For further reading on the Easter Rebellion of 1916, see LEADERS AND MEN OF THE EASTER RISING (F.X. MARTIN ed., 1967).

70. PATRICK J. CORISH, A HISTORY OF IRISH CATHOLICISM (1972).

71. *See* JOHN BOWMAN, DE VALERA AND THE ULSTER QUESTION 1917-1973 (1982); GEORGE O'BRIEN, FOUR GREEN FIELDS (1936).

72. JOSEPH M. CURRAN, THE BIRTH OF THE IRISH FREE STATE 1921-1923 (1980).

tive judicial review.[73]

The eventual incorporation of Sinn Fein into the mainstream polity culminated in the election of de Valera as Prime Minister in 1932. The new government soon purged all vestiges of British sovereignty from the Irish Constitution by repealing the oath of allegiance to the British Crown, appeals to the Privy Council, and the special place of the Anglo-Irish Treaty. In 1936, de Valera convened the Irish Parliament, or Oireachtas to rewrite the Constitution of 1922. The new Constitution of 1937 retained the basic system of republican parliamentary democracy but provided for stronger judicial review[74] and a more comprehensive Bill of Rights, codified in Articles 40-44. These articles on fundamental rights remain the most controversial aspect of the Irish Constitution. Despite Article 44's proclamation in support of religious pluralism, Catholic social teaching has had its most profound influence through these articles.

B. *Church and State in the Irish Constitution*

Article 44.1.2, the provision of the Irish Constitution most diametrically opposed to principles of United States constitutional law, was repealed by the Fifth Amendment to the Irish Constitution pursuant to a referendum passed in 1972. The repealed article recognized "the special position of the Holy Catholic Apostolic and Roman Church as guardian of the Faith professed by the great majority of the citizens."[75] In 1945, the distinguished Irish jurist George Gavan Duffy articulated the basis for Article 44.1.2, while using it to extend the priest/penitent privilege to a cause of action for seduction, a privilege unknown to English common law.[76] Hence, according to Duffy, Article 44.1.2 merely reflected

---

73. Ryan v. Lennon, 1935 I.R. 170.

74. Unlike the United States Constitution, the Irish Constitution provides directly for judicial review within Article 34.

75. I.R. CONST. art. 44.1.2 (repealed 1972).

76. Justice Gavan Duffy, speaking for the court in Cook v. Carroll, 1945 I.R. 515, observed:

> In a State where nine out of every ten citizens today are Catholic and on a matter closely touching the religious outlook of the people, it would be intolerable that the common law, as expounded after the Reformation in a Protestant land [Great Britain], should be taken to bind a nation which persistently repudiated the Reformation as heresy. When, as a measure of necessary convenience, we allowed the common law generally to continue in force, we meant to include the common law in harmony with the natural spirit; we never contemplated the maintenance of any construction of the common law affected by the sectarian background.

Id. at 520.

the incontrovertible fact that since the overwhelming majority of Irish society ascribed to the teachings of the Roman Catholic Church, the Church's statements on social issues would define the judiciary's use of natural law.[77]

The lack of harmony between Article 44.1.2 and the mandate of Article 44.2.3 that "[t]he State shall not impose any disabilities or make any discrimination on the ground of religious profession belief or status," and the simultaneous resurrection of the drive for reunification, led to the repeal of Article 44.1.2 in 1972. The judiciary reacted with a slightly more pluralistic approach to free exercise problems and a cautious move toward disestablishment. In fact, the Irish court considered First Amendment precedents in the constitutional law of the United States to strike down an order exempting Jewish butchers from Saturday closing laws[78] and section 12 of the Adoption Act of 1952 requiring adoptive parents to be of the same religion as both the child and natural parents.[79]

Although these cases arguably did not touch upon core issues of Catholic doctrine, the repeal of Article 44.1.2 nonetheless caused a fundamental structural change in the Church's role in Irish society. Certainly no high and impregnable wall of separation exists between church and state in Ireland. Nor have Irish courts undertaken to "disentangle" religion from the secular state as the United States Supreme Court has attempted.[80] But the evolution of disestablishment theory in Ireland has

---

77. *See* G.M. GOLDING, GEORGE GAVAN DUFFY (1982); *see also In re* Tilson, Infants, 1951 I.R. 1, for a discussion of Article 44.1.2 in the context of a Catholic mother's suit to regain custody of her child placed in a Protestant school by her father. The case was decided pursuant to an antenuptial agreement but addresses Article 44.1.2.

78. Quinn's Supermarket v. The Attorney General, 1972 I.R. 1, 27 (1971). The court cited the United States Supreme Court's decisions in Abington School Dist. v. Schempp, 374 U.S. 203 (1963), McGowan v. Maryland, 366 U.S. 420 (1961), and Braunfield v. Brown, 366 U.S. 599 (1961).

79. M. v. An Bord Uchtala 1975 I.R. 81. *Cf.* Palmore v. Sidoti, 466 U.S. 429 (1984) (reversing judgment of state court divesting natural mother of custody of her child because of the effects on the child due to the mother's remarriage to man of different race); Loving v. Virginia, 388 U.S. 1 (1967) (invalidating Virginia statute outlawing miscegenation).

80. Many argue that the emergence of the nonpreferentialists, those who believe that the First Amendment's Establishment Clause only prevents Congress from establishing a national church and not from aiding religion, has threatened the intent of the framers to depoliticize religion. *See, e.g.*, LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986); William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on* Lynch v. Donnelly, 1984 DUKE L.J. 770. However, the Supreme Court's adherence to the *Lemon* test, i.e., that challenged activity must have a secular purpose, a primary effect that neither advances nor inhibits religion, and that the activity must not create an excessive entangle-

done much to alter the institutional relationship between politics and religion. Instead, like the Due Process Clause in the United States, the battleground between church and state has shifted to the judiciary's definition of fundamental rights under Articles 40-44 of the Irish Constitution, and especially the formation of the right to privacy.

V. NATURAL LAW, PRIVACY, AND PERSONAL AUTONOMY—A COMPARATIVE ASSESSMENT

A. *Personal Autonomy and Contraception*

Defining and safeguarding the rights to privacy and personal autonomy have been among the most vexatious tasks in modern constitutional law.[81] Liberal democratic theory denounces the use of the coercive powers of the state to enforce private morality. Article 40 of the Irish Constitution thus imposes a duty on the state to "vindicate the personal rights of the citizen."[82] This natural rights provision, which echoes the themes of the Ninth Amendment to the United States Constitution,[83] leads to grave difficulties when individual rights conflict with legislation implementing the morality of the majority. The history and periodic acceleration of this confrontation in the United States and Ireland has resulted in

---

ment between church and state, Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), has continued to maintain the wall of separation, albeit subject to increasing criticism from within the Court. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985) (invalidating Alabama statute permitting moment of silence for prayer); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (invalidating statute giving church veto over issuance of liquor licenses within 500 foot radius); Stone v. Graham, 449 U.S. 39 (1980) (invalidating Kentucky law requiring posting of Ten Commandments in public classrooms). *But see* Lynch v. Donnelly, 465 U.S. 668 (1984) (allowing display of creche on city grounds); Marsh v. Chambers, 463 U.S. 783 (1983) (upholding Nebraska legislature commencing sessions with prayer); Mueller v. Allen, 463 U.S. 388 (1983) (upholding tax deduction for educational expenses regardless of school type); Board of Education v. Mergens, 496 U.S. 226 (1990) (allowing public school students to conduct group prayers on school grounds during school day). *See* David L. Gregory & Charles J. Russo, *Let Us Pray (But Not "Them"!): The Troubled Jurisprudence of School Prayer*, 65 ST. JOHN'S L. REV. 273 (1991); David L. Gregory & Charles J. Russo, *The Return of School Prayer: Reflections on the Libertarian-Conservative Dilemma*, 20 J. L. & EDUC. 167 (1991).

81. TRIBE, *supra* note 10, at 1302.

82. I.R. CONST. art. 40.3.1.

83. The Ninth Amendment to the United States Constitution reads: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. For discussions of the Ninth Amendment, see LEVY, *supra* note 11, at 267-63; B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955); EDWARD S. CORWIN, THE HIGHER LAW BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 72-89 (1955).

some of the major constitutional law decisions of the twentieth century.

In the 1964 decision *Ryan v. Attorney General*,[84] the Irish High Court[85] faced a challenge to a public health act that required universal fluoridation of the water supply.[86] The plaintiff, fearing the possible health hazards that chemical ingestion might have upon her children, challenged the act under several provisions of the Constitution, including Article 40.3.1 and Article 41.1.1, which recognizes the "inalienable and imprescriptible rights" of the family as "antecedent and superior to all positive law."[87] While rejecting plaintiff's substantive claim, Judge Kenny's opinion for the High Court acknowledged that the list of rights contained in Article 40 were not exclusive, but rather include "many personal rights of the citizen which follow from the *Christian and democratic* nature of the State."[88] Judge Kenny turned to the 1962 Encyclical Letter of Pope John XXIII, entitled "Peace on Earth," to hold that Article 40 encompassed a general right to bodily integrity, even though the plaintiff had failed to prove a violation of that right.[89]

The *Ryan* decision clearly is a landmark case in Irish constitutional law.[90] It not only presaged a more activist approach to judicial review, but its broad reading of Article 40 explicitly delineated the judiciary's natural law jurisprudence and firmly rooted it in the Christian and democratic nature of the state. The tension between Judge Kenny's criteria

---

84. 1965 I.R. 294.

85. The High Court is the pivotal court in the Irish legal system. Although the Circuit and District Courts are the trial courts for the majority of legal matters, the High Court is the sole court of original jurisdiction on cases challenging legislation. There are fourteen judges of the High Court, who sit one at a time. Appeals from the High Court are to the Irish Supreme Court, which is composed of five justices who sit en banc in constitutional cases. For further discussion of judicial review in Ireland, see Francis W. O'Brien, *Judicial Review in Ireland*, 9 ST. LOUIS U. PUB. L. REV. 587 (1990).
There are two aspects of the Irish legal system unfamiliar to the United States judicial process. First, under Article 26 of the Irish Constitution, the President may submit proposed legislation to the Irish Supreme Court for an advisory opinion as to its constitutionality. Second, under articles 169-79 of the Treaty of Rome (the founding document the European Economic Community), the European Court of Justice has jurisdiction on all matters of EEC law and can invalidate member state legislation. These decisions are binding on the courts of member states. *See* KELLY, *supra* note 53, at 145, 187-89.

86. *Ryan*, 1965 I.R. at 294.

87. Article 41.1.1 states: "The State recognizes the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptable rights, antecedent and superior to all positive law." I.R. CONST. art. 41.1.1.

88. 1965 I.R. at 313 (emphasis added).

89. *Id.* at 314, 316.

90. *See* Hogan, *supra* note 48, at 64-65.

of Christianity and democracy in a Catholic country was a harbinger of the conflict between judicial activism and the Catholic Church that would linger dormant for nearly a decade before reaching its denouement in 1974 over the issue of contraception.

Only one year after *Ryan*, the United States Supreme Court applied a more secular version of this natural law philosophy by holding that a law banning the use of contraceptives violated the rights of married individuals. Justice Douglas's majority opinion in *Griswold v. Connecticut*[91] culled the right to privacy from the text and structure of the United States Constitution. Unable to point to a particular provision establishing this "sacred"[92] right of married persons to use contraceptives, he found that the Bill of Rights created "penumbras, formed by emanations from those guarantees that helped give them life and substance."[93] The reach of these penumbras was not entirely paraconstitutional, but was a function of the pluralistic and democratic nature of the social compact.[94] Justice Douglas looked directly to the natural law tradition in acknowledging that "[w]e deal with a right to privacy older than the Bill of Rights. . . ."[95] His invocation of the language of theology—of the "sacred" rights of marriage—was an even more obvious resort to a natural law motif.

Justice Goldberg's concurrence in *Griswold* expounded on this natural law approach by relying directly on the "language and history" of the Ninth Amendment to define the right to privacy.[96] Justice Goldberg believed that the framers of the Bill of Rights, many of whom were wary of the attempt to protect against powers never ceded to the government by the Constitution,[97] subscribed to natural law in providing for a mech-

91. 381 U.S. 479 (1965). Justice Douglas relied substantially upon early privacy cases such as Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding that the right to send children to private school is protected by the right to privacy) and Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that the right to privacy includes the right to study German in private school). *Id.* at 482.

92. *Griswold*, 381 U.S. at 484, 485.

93. *Id.* at 484.

94. *Id.* at 485-86.

95. *Id.* at 486.

96. *Id.* at 487 (Goldberg, J., concurring).

97. The Federalists believed that an attempt to enumerate rights not listed in the body of the Constitution was unnecessary and dangerous because an enumeration might prove exhaustive but inadequate. *See* THE FEDERALIST No. 84 (Alexander Hamilton). Calls from the Massachusetts and Virginia ratification conventions, however, ensured passage. The Ninth Amendment was therefore seen by Justice Goldberg as a catch-all provision intended to incorporate those liberties not specified in the Constitution. *Griswold*, 381 U.S. at 488-90 (Goldberg, J. concurring).

anism through which fundamental rights not enumerated could be protected. Justice Goldberg rejected the fear that resting this ultimate definitional question in the judicial branch would open a Pandora's box by providing the judge an unconstrained vehicle to implement her own political agenda or personal moral code. Judges were bound to look to "the traditions and [collective] conscience of [the American] people" to determine whether a principle was "so rooted [there] . . . as to be ranked as fundamental."[98] This is, once again, an argument grounded in Lockean social contract and natural rights theory.

Justice Harlan added a separate concurrence based on the due process argument, which he had set forth in his previous dissent in *Poe v. Ullman.*[99] Reflecting Judge Kenny's analysis in *Ryan*, Justice Harlan believed that the Due Process Clause of the Fourteenth Amendment was not limited to the liberties enumerated in the Bill of Rights, but indeed "stood on its own bottom"[100] in incorporating all fundamental rights belonging to citizens of a free democracy. Justice Harlan advocated a Millsian balancing test in which the "values implicit in the concept of ordered liberty"[101] were to be weighed against the demands of organized society. Although these demands encompassed the right to legislate in the field of social morality to protect compelling state interests, Connecticut's proffered legislative intent to deter extramarital affairs failed to warrant the excessive intrusion into the marital relationship that a complete ban on the use of contraceptives required.[102] The basis for this conclusion rested on the exalted position of the family in United States society.[103] Therefore, Justice Harlan reserved judgment on the legitimacy of state intervention in an extramarital context.

The latent paradox intrinsic in the Christian and democratic nature of the Irish state came to the fore in 1974 in the case of *McGee v. Attorney General.*[104] In *McGee*, plaintiff, a married mother of four whose health would be endangered by another pregnancy, challenged a pre-Constitution statute criminalizing the import or sale of contraceptives in the Republic. Here, liberal Christian theology and Catholic social teaching

98. *Griswold,* 381 U.S. at 493 (Goldberg, J., concurring) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

99. *Griswold,* 381 U.S. at 499 (Harlan, J., concurring). In Poe v. Ullman, 367 U.S. 497 (1961), the Supreme Court rejected an attack on a contraception law on justiciability and standing grounds.

100. *Griswold,* 381 U.S. at 500 (Harlan J., concurring).

101. *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1936)).

102. *Griswold,* 381 U.S. at 498 (Goldberg, J., concurring).

103. *See Poe,* 367 U.S. at 551-54 (Harlan, J., dissenting).

104. 1974 I.R. 284.

clashed, for contraception remained beyond the approbation of the Catholic but not the Protestant Church. In a surprising display of secular judicial activism, the *McGee* court turned to the "inalienable and imprescriptible" rights expressed in Article 41 to find a right to marital privacy in the Irish Constitution.[105] Since the ban on the import or sale of contraceptives effectively denied plaintiff the exercise of this right, the Irish Supreme Court held that the provision of the 1935 statute had not survived the enactment of the 1937 Constitution.[106]

Writing for the court, Justice Walsh's opinion began with the astounding proposition that the text and structure of the Irish Constitution "acknowledge[d] God as the source of all authority."[107] Rejecting "legal positivism as a jurisprudential guide,"[108] the court refused to look upon natural law jurisprudence as a mere nonbinding deontology for courts to follow in their interpretation of the common law. Instead, Justice Walsh stated, divinely inspired natural law "is the ultimate governor of all the laws of men."[109]

But Justice Walsh refused to adopt the Catholic natural law stance on procreation. Rather, contrary to the faith of the clear majority of the "framers" of the Irish Constitution, the court defined the "inalienable and imprescriptible" rights in Article 41 ecumenically, noting that different religious denominations held differing views on matters involving procreation.[110] Referring directly to the Ninth Amendment and due process arguments in *Griswold* and *Poe*, Justice Walsh instead vested this ontological task in the judiciary. In a paragraph representing the zenith of the Irish disestablishment movement, Justice Walsh set forth the court's reasoning:

---

105. *Id.* at 313.
106. *Id.* at 314.
107. *Id.* at 317.
108. *Id.* at 319.
109. *Id.* at 317-18. Justice Walsh further reasoned:

> In view of the acknowledgement of Christianity in the preamble and in view of the reference to God in Article 6 of the Constitution, it must be accepted that the Constitution intended the natural human rights I have mentioned as being in the latter category rather than simply an acknowledgement of the ethical content of law in its ideal of justice.

Id.

110. *Id.* The court stated:

> In a pluralist society such as ours, the Courts cannot as a matter of constitutional law be asked to choose between differing views, where they exist, of experts on the interpretation by the different religious denominations of either the nature or extent of these natural rights as they are to be found in the natural law.

Id. at 318.

> In this country it falls finally upon the judges to interpret the Constitution and in doing so to determine, where necessary, the rights which are superior or antecedent to positive law or which are imprescriptible or inalienable. In the performance of this difficult duty there are certain guidelines laid down in the Constitution for the judge. The very structure and content of the Articles dealing with fundamental rights clearly indicate that justice is not subordinate to the law. In particular, the terms of s. 3 of Article 40 expressly subordinate the law to justice. Both Aristotle and the Christian philosophers have regarded justice as the highest human virtue. . . . The judges must, therefore, as best they can from their training and their experience interpret these rights in accordance with their ideas of *prudence, justice* and *charity*.[111]

The *McGee* decision embodied the conservative interpretivists' nightmare. This was the first time that the Catholic hierarchy had lost in the Irish courts on a sensitive issue of faith and morals. Although the *Ryan* decision turned to a Papal Encyclical to infer a right to bodily integrity from the Christian and democratic nature of the state, Justice Walsh's opinion in *McGee* disregarded Catholic doctrine, embodied in the 1968 Papal Encyclical *Humanae Vitae*, in holding that the marital right to privacy included the right to use contraceptives. Moreover, the power of the judiciary to define extra-constitutional rights in terms of a more "Christian" and less "Catholic" natural law philosophy appeared unfettered. Justice Walsh's opinion for the court combined the broad Ninth Amendment/substantive due process analysis with the hermeneutics of "structural" exegesis reminiscent of Justice Douglas' opinion in *Griswold*.[112] Finally, *McGee* appeared to signal a more conciliatory approach on the social front to the political conditions of the Protestant minority, especially in the wake of the repeal of Article 44.1.2.

The political reaction to the *McGee* decision belies the conclusion that the courts were leading a liberalization movement within Irish society. Despite the extension in the United States of the right to privacy to nonmarital relationships,[113] legislation in Ireland geared toward expanding the *McGee* holding to nonmarried persons failed to win approval in the Oireachtas and remained dormant until eventual passage in 1979. In the interim, the Irish Supreme Court declared unconstitutional

---

111. *Id.* at 318-29 (emphasis added).

112. For a discussion of the role of textual interpretation in constitutional theory, see LEVY, *supra* note 11, at 10-11 (1988); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV.885 (1985); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984).

113. *See* Eisenstaidt v. Baird, 405 U.S. 438 (1972) (invalidating law criminalizing distribution of contraceptives to unmarried persons).

a decision of Ireland's Censorship Board banning a booklet on family planning.[114] But the United States Supreme Court's decision in *Roe v. Wade*,[115] extending the right to privacy to the area of abortion, sent a paroxysm through the Irish body politic, resulting in a constitutional referendum in 1983 expressly protecting fetal rights and banning abortion in all cases except when necessary to save the life of the mother.

B. *Abortion*

Fearful that the progression from *Griswold* to *Roe* would lead the Irish courts to overturn section 42 of the Offenses Against the Person Act of 1861 criminalizing abortion in Ireland, pro-life factions successfully pushed for a constitutional referendum to protect the rights of the unborn. The Eighth Amendment Bill to the Irish Constitution, codified as Article 40.3.3,[116] passed by a 2 to 1 margin in 1982, despite formal opposition by the government and Protestant clergy. Unlike the *McGee* and *Roe* rationales, the constitutional amendment took its guidance directly from Catholic dogma in fixing the point at which life begins at conception, rather than at birth or upon viability outside the womb.

Given the established position of the Catholic Church and the context in which the amendment was passed, it initially appeared that the statute required saving the fetal life at all costs. Cases ranged from *Attorney General v. Cadden*,[117] which in 1957 upheld the use of abortion as the basis for felony-murder charge upon death of the mother, to *Attorney General ex rel. Society for the Protection of the Unborn v. Open Door Counseling Ltd.*,[118] affirming in 1988 an injunction against Irish health centers referring pregnant women to English abortion clinics. The potential political fallout from such a blatantly sectarian attitude seemed enormous. The bitter debate over abortion resulted in an abandonment of the Irish commitment to unity by consent.[119] In recent years an estimated 4,000 Irish women annually have traveled quietly to obtain abortions in

114. Irish Family Planning Association v. Ryan, 1979 I.R. 295.

115. 410 U.S. 113 (1973).

116. Article 40.3.3 reads: "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, so far as practicable, by its laws to defend and vindicate that right."

117. 9 I.L.T.R. 97 (Ir. C.C.A. 1957).

118. 2 C.M.L.R. 443 (Ir. Ct. 1988). The decision is being challenged in the European Court of Human Rights by two Dublin-based clinics as a violation of free speech, privacy, and equal protection under the European Convention on Human Rights. Open Door Counselling Ltd. v. Ireland, 64/1991/316/387-388. *See also Americans Aid Irish Lawyers In Abortion Case*, NAT'L L.J., Mar. 30, 1992, at 5.

119. Hogan, *supra* note 48, at 83.

England, where an estimated 180,000 abortions to the twenty-fourth week of pregnancy are performed lawfully each year.[120]

In February 1992 the world's attention focused on a pregnant fourteen-year-old Irish schoolgirl's struggle to join this wave of Irish women leaving the country to obtain an abortion. This recent case gained notoriety because the Attorney General intervened in the Irish courts to enjoin the girl from leaving the country. The involvement of the legal regime galvanized international interest. Ultimately, on February 26, 1992, the Irish Supreme Court set aside the lower court injunction.[121]

On March 5, 1992, the Supreme Court provided a fifty-four page explanation of its earlier one-sentence decision of February 26.[122] Chief Justice Finlay stated that the "test proposed on behalf of the Attorney General that the life of the unborn could only be terminated if it were established that an inevitable or immediate risk to the life of the mother existed, for the avoidance of which a termination of the pregnancy was necessary, insufficiently vindicates the mother's right to life."[123] The court then focused on the High Court's factual findings regarding the girl's repeated threats to commit suicide if she was unable to obtain an abortion. The court realized the impossibility of preventing self-destruction in a young girl in this situation.[124] The court thus significantly broadened the Constitution's sense of what constituted a threat to the life of the mother. Chief Justice Finlay concluded that if, as a matter of probability, a real and substantial risk to the life of the mother exists, and the termination of the mother's pregnancy presents the only means of avoiding the mother's death, Article 40.3.3 of the Irish Constitution permits the termination of pregnancy.[125]

The debate over abortion in the United States is no less contentious, despite the lack of a shared national religion supporting fetal rights.[126] Almost each term the Supreme Court appears to confront a case in which interpretivists, various political interests, the Catholic hierarchy,

---

120. *See* Schmidt, *supra* note 1; Abortion Act of 1967, ch. 87, § 1. For further discussion of the right to obtain an abortion in Great Britain, see INTERNATIONAL HANDBOOK ON ABORTION (Paul Sachdev ed., 1988).

121. *See* Clarity, *Irish Court Says Girl Can Leave, supra* note 1.

122. *See* Clarity, *Irish High Court, supra* note 1.

123. *Id.*

124. *Id.*

125. *Id.*

126. The abortion issue has deeply divided Catholics in the United States. In several of the major post-*Roe* abortion cases reaching the Supreme Court, amicus curiae briefs are filed by the Catholic Bishops of America, seeking to ban abortion, and by Catholics for Free Choice, calling for the Court to uphold *Roe.*

and fundamentalist Christian groups urge the Court to overrule *Roe* and return regulation of abortion to state legislatures. Simultaneous political opposition to abortion on demand has led to the extraordinary judicial application of the federal Racketeer-Influenced and Corrupt Organizations Act (RICO) to pro-life groups engaging in acts of civil disobedience.[127] The abortion issue perhaps remains the clearest example of the inability of constitutional theory alone to resolve fundamental social problems. The calculus of constitutional theory fails to function optimally where right-to-life and the right-to-privacy, both paradigms of natural law, are in the balance.[128]

The political and jurisprudential tensions continue to accelerate in each post-*Roe* case to reach the Supreme Court, and the role of natural law in judicial decision-making grows more overt and more controversial. In *Thornburgh v. American College of Obstetricians and Gynecologists*,[129] the Court held unconstitutional a number of "informed consent" state law constraints upon the scope of the rights guaranteed by *Roe*. Justice Stevens' concurrence and Justice White's dissent provided a remarkably candid debate of the natural law and theological considerations implicated in these cases. Justice Stevens expressly stated that a powerful theological argument can be made for the position that life begins with conception, but he concluded that the Court's jurisdiction was "limited to the evaluation of secular state interests."[130] Justice White, in dissent, reiterated his view that "the time has come to recognize that *Roe v. Wade* departs from a proper understanding of the Constitution and to overrule it."[131] He rejected Justice Stevens' view that this was a theological position, and stated that a legislative or judicial finding that life begins at conception was not an "impermissible 'religious' decision merely because it coincides with the belief of one or more religions."[132] Unequivocally, Justice White stated that "[a]bortion is a hotly contested

127. Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342 (3d Cir. 1989), *cert. denied*, 493 U.S. 901 (1989). *See* Adam D. Gale, Note, *The Use of Civil RICO Against Antiabortion Protesters and the Economic Motive Requirement*, 90 COLUM. L. REV. 1341 (1990).

128. Some scholars suggest that the law of international human rights is the best focus for resolution of this particular problem. *See* Berta E. Hernandez, *To Bear or Not to Bear: Reproductive Freedom as an International Human Right*, 17 BROOK. J. INT'L L. 309 (1991); Barbara Stark, *International Human Rights and Family Planning: A Modest Proposal*, 18 DEN. J. INT'L L. & POL'Y 59 (1989).

129. 476 U.S. 747 (1986).

130. *Id.* at 778.

131. *Id.* at 788.

132. *Id.* at 795 n.4.

moral and political issue,"[133] but one "to be resolved by the will of the people, either as expressed through legislation or through the general principles they have already incorporated into the Constitution they have adopted."[134]

In *Webster v. Reproductive Health Services*,[135] the Court upheld Missouri's fetal viability testing requirement and other constraints.[136] Although the Court did not pass upon the constitutionality of the state legislature's finding that "the life of each human being begins at conception,"[137] Justice Stevens stated in his concurrence in part that the dissent was "persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble [of the statute of issue] invalid under the Establishment Clause of the First Amendment of the Federal Constitution."[138] He then proceeded to a lengthy discussion of the views of St. Thomas Aquinas as to when ensoulment occurs in order to buttress his strict separationist antipathy to the operation of natural law to inform the state legislature in this case.[139]

Most recently, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[140] the Court attempted to resolve the abortion debate in what Justice Scalia described as an "epic tone."[141] In a plurality opinion authored by Justices Souter, O'Connor, and Kennedy, the Court reaffirmed the basic principle of *Roe* that a woman has a right to abort a fetus prior to the point of viability, while simultaneously upholding, under the plurality's new "undue burden" test,[142] all but one of the restrictions in a Pennsylvania statute as consistent with the state's interest in protecting fetal life.[143]

---

133. *Id.* at 796.
134. *Id.*
135. 492 U.S. 490 (1989).
136. *Id.*
137. *Id.* at 504.
138. *Id.* at 566 (Stevens, J., concurring in part).
139. *Id.* at 567 (Stevens, J., concurring in part).
140. 112 S. Ct. 2791 (plurality opinion).
141. *Id.* at 2885 (Scalia, J., concurring in part and dissenting in part).
142. The plurality explained that the "undue burden" test "is shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking abortion of a nonviable fetus." *Id.* at 2820.
143. The Court upheld the statute's informed consent requirements, twenty-four hour waiting period, parental consent with judicial bypass provision, and various reporting and record keeping requirements. *Id.* at 2830. The Court also upheld as sufficiently broad the statute's definition of a "medical emergency," which exempts a woman and her doctor from complying with the statute. Lastly, the Court struck down the spousal notifi-

The plurality opinion rooted this right squarely in the jurisprudence of substantive due process, noting that "[c]onstitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment."[144] The plurality further rejected the notion that the liberties enumerated in the Bill of Rights limits the boundaries of substantive due process.[145] Rather, the Court observed that "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[146] The plurality viewed the basic right to abortion, along with other basic decisions regarding family, childrearing, and bodily integrity, as settled.[147] Although these rights are not defined anywhere in the Constitution, the plurality argued that they are "implicit in the meaning of liberty"[148] that must survive even if the meaning is unclear. In a passage totally antithetical to Ireland's theosophical stance on abortion, the plurality further stated that the Court should "define the liberty of all, not to mandate [its] own moral code. . . . 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."[149]

In their concurrences, Justices Stevens and Blackmun reiterated this principle of noninterference by the state in matters touching upon personal and theological considerations. Justice Stevens noted that the First Amendment barred the state from promoting a theological or sectarian interest.[150] Justice Blackmun further stated that the state's interest in protected fetal life is not grounded in the Constitution and, agreeing with Justice Stevens, could not be supported by a sectarian interest.[151] But despite the resolve of the majority of Justices in *Casey* to protect the right to abortion, the extent of permissable regulations, as well as the longevity of the majority, may in practice make the abortion right as illusory as that offered by the Irish Court.[152]

---

cation provision as an undue burden on the woman's right to choose to have an abortion. *Id.* at 2826-33.

144. *Id.* at 2804.

145. *Id.* at 2805.

146. *Id.*

147. *Id.* at 2806 (citations omitted).

148. *Id.* at 2816.

149. *Id.* at 2806-07.

150. *Id.* at 2839 (Stevens, J., concurring).

151. *Id.* at 2849 (Blackmun, J., concurring).

152. In a stirring passage Justice Blackmun, the author of *Roe*, noted that he was eighty-three and that he had the deciding vote in affirming the right to abortion. He cautioned that the selection of the next Justice might prove the true test of *Roe*'s viability.

In their separate dissents, both Chief Justice Rehnquist and Justice Scalia, joined by Justices White and Thomas, called for the Court to overrule *Roe* as a product of the "Imperial Judiciary."[153] The dissents looked to the *Lochner* line of cases to exemplify the dangers inherent in employing an undefinable substantive due process rationale to create rights not set forth in the Constitution.[154] The Chief Justice noted that no historical right to abortion exists because laws criminalizing abortion existed both in colonial times and during the passage of the Fourteenth Amendment.[155] The dissenting Justices vehemently objected to the Court's use of implied fundamental rights and considered their use a grave threat to the legitimacy of the Supreme Court.[156]

C. *Homosexuality*

The judicial polemic in the privacy area has also crossed national boundaries in the respective challenges to criminal sodomy laws in Ireland and the United States. Both courts split by one vote on opposite sides of the amorphous line that separates individual liberties from valid state intervention under Millsian utilitarian principles. Once again, the Irish Supreme Court grounded its decision on theosophical grounds while the United States Supreme Court looked to the history and structure of the nation. But this time the majority of the Supreme Court drew on the United States shared religious principles, holding that the right to privacy did not encompass homosexual acts. The dissents in both cases attacked what they saw as excessive reliance on historical prejudices and rebuked the governmental instrusion into life's most intimate details.

In *Bowers v. Hardwick*,[157] the plaintiff alleged that the Due Process Clause of the Fourteenth Amendment protected his decision to engage in consensual male homosexual acts. Justice White's majority opinion rejected this contention, noting that substantive due process jurisprudence limited judges' interpretive powers to those liberties that are "deeply rooted in [United States] history and tradition."[158] The prior line of cases demonstrated that the right to privacy was inextricably linked to accepted concepts of family, marriage, and procreation. The traditional

---

Id. at 2854-55 (Blackmun, J., concurring).

153. *Id.* at 2882 (Scalia, J., concurring in part and dissenting in part).

154. *Id.* at 2862-64 (Rehnquist, C.J., concurring in part and dissenting in part).

155. *Id.* at 2859 (Rehnquist, C.J., concurring in part and dissenting in part).

156. *Id* (Rehnquist, C.J., concurring in part and dissenting in part).

157. 478 U.S. 186 (1986).

158. *Id.* at 192 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

social taboos on male homosexuality constrained the Court's discretion in this area. To exceed these restraints unilaterally by construing a right to engage in homosexual acts having "no cognizable roots in the language or design of the Constitution"[159] would be a grossly illegitimate exercise of judicial power tantamount to that which threatened the Court's legitimacy during the *Lochner* era.

In his concurrence, Chief Justice Burger invoked the "Judeao-Christian moral and ethical standards"[160] of the common law that were incorporated by the American colonies. Chief Justice Burger quoted Blackstone in holding that Anglo-American law considered homosexuality a moral abomination remaining beyond the purview of constitutional sanction.[161] Thus, the implicit ethical considerations in the traditionalism of Justice White and Chief Justice Burger defined the right to privacy in terms of the "Judeao-Christian" and democratic nature of the state, honing United States pluralism to its supposed natural law core.

Justice Blackmun's dissent in *Bowers*[162] took a distinctly secular humanistic stance in criticizing the unwarranted injection of Christian values and traditions into the definition of the right to privacy. Noting that the privacy cases had indeed focused on the family unit, Blackmun argued that the Due Process Clause "protect[s] the family because it contributes so powerfully to the happiness of the individual [and] not because of the preference for stereotypical households."[163] Blackmun reasoned that the right to privacy conferred upon the individuals the "right to be let alone" in determining the "nature of . . . intimate associations with others."[164] This liberty is restricted only by the state's power to act on behalf of the general welfare and does not include incorporation of the dictates of Christian morality.[165]

---

159. *Id.* at 194.
160. *Id.* at 196 (Burger, C.J., concurring).
161. *Id.* at 197 (Burger, C.J., concurring). *See infra* note 160.
162. *Id.* at 199 (Blackmun, J., dissenting).
163. *Id.* at 205 (Blackmun, J., dissenting).
164. *Id.* at 206 (Blackmun, J., dissenting).
165. *Id.* at 211 (Blackmun, J., dissenting). It is interesting to note that Justice Blackmun cited a Georgia Supreme Court case describing sodomy as an "abominable crime not fit to be named among Christians." *Id.* (quoting Herring v. State, 119 Ga. 709, 721, 46 S.E. 876, 882 (1904)). As Chief Justice Burger pointed out in his concurrence, the origin of the statement appears to be Blackstone's opinion that sodomy is " 'a crime not fit to be named.' " *Bowers*, 478 U.S. at 197 (Burger, C.J., concurring) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES * 215). The statement also appears in the poem "Two Loves" by Lord Alfred Douglas, an intimate of Irish author Oscar Wilde, who himself was tried for the offense of buggery. In his poem, Lord Alfred confesses that "I am the Love that dare not speak its name." LORD ALFRED DOUGLAS, COMPLETE

In 1984, two years prior to *Bowers*, the Irish Supreme Court in *Norris v. Attorney General*[166] addressed the homosexuality issue in Ireland on facts similar to those in *Bowers*. David Norris, professor of literature at Trinity College and self-professed congenital homosexual, sought a ruling akin to *McGee* declaring that sections 61 and 62 of the Offenses Against the Person Act of 1861, which criminalized acts of sodomy, buggery, and other indecent male behavior, had not survived enactment of Article 40.3 of the Constitution—the provision in which the *McGee* court had grounded the right to privacy.[167] Chief Justice O'Higgins's opinion for a sharply-divided court denied plaintiff's privacy claim. While endorsing the duty of the state to protect the moral well-being of society from the detrimental effects which even consensual homosexual activity may visit upon more conventional relationships, the main focus of the court's opinion took a more conservative, interpretivist approach, similar to Justice White's gloss on the Due Process Clause in *Bowers*, although much more religious in tone.[168]

The dissenting justices in *Norris* objected to this historical and literal approach to Article 40 and instead accentuated the constitutional objectives that seek to protect the freedom and dignity of the individual. In these choices, Catholic social teaching was inapposite. Justice Henchy reasoned that homosexuality, like many immoral acts, should not be classified as criminal because this classification would upset "the necessary balance which the Constitution posits between the common good and the

---

POEMS 82 (1928). For an entertaining account of the controversy surrounding Wilde and Lord Douglas, see THE THREE TRIALS OF OSCAR WILDE (H. Montgomery Hyde ed., 1956).

166. 1984 I.R. 36.

167. *See supra* text accompanying note 111.

168. Chief Justice O'Higgins opined:

> The Preamble to the Constitution proudly asserts the existence of God in the Most Holy Trinity and recites that the people of Ireland humbly acknowledge their obligation to "our Divine Jesus Christ." It cannot be doubted that the people, so asserting and acknowledging their obligations to our Divine Lord Jesus Christ, were proclaiming a deep religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and faith and with Christian beliefs. Yet it is suggested that, in the very act of so doing, the people rendered inoperative laws which had existed for hundreds of years prohibiting unnatural sexual conduct. . . . It would require very clear and express provisions in the Constitution itself to convince me that such took place. When one considers that the conduct in question had been condemned consistently in the name of Christ for almost two thousand years . . . the suggestion becomes more incomprehensible and difficult of acceptance.

1984 I.R. at 64.

dignity and freedom of the individual."[169]

Subsequently, in *Norris v. Ireland*, the European Court of Human Rights found that Ireland's criminal law proscribing consensual adult homosexual sexual conduct violated the article 8 right to privacy of the European Convention.[170]

D. *Marriage and Divorce*

Another case brought against Ireland in the European Court of Human Rights injected the religious sectarianism affecting civil rights in Irish society with a degree of pluralism. Article 41.3.1 of the Irish Constitution prohibits the enactment of any law "providing for the grant or dissolution of marriage."[171] The ban on divorce divided Catholic and Protestant clergy on both theological and secular grounds. Irish courts consistently had taken a strict interpretivist approach to this ban, limiting marital dissolution to the narrow decrees of nullity and refusing to take legal cognizance of cohabitation outside of marriage. In response, the Oireachtas submitted the Tenth Amendment Bill to the people through referendum on June 26, 1986 in an attempt to replace Article 41.3.2 with a statute allowing future divorce-with-cause legislation. The referendum originally appeared to be a panacea for the growing incidence of marital breakdown and the increased tensions between Catholics and Protestants. But a strong antidivorce lobby and timely opposition by the Catholic hierarchy defeated the referendum by an unexpectedly large margin.[172]

In the midst of the referendum process, the European Court of Human Rights accepted the petitioner's claim in *Johnston v. Ireland*.[173] In *Johnston*, an Irishman, separated from his wife, was living with an

169. *Id.* at 78 (Henchy, J., dissenting).

170. Norris v. Ireland, 142 Eur. Ct. H.R. (ser. A) at 6 (1988). For further discussion of the international law dimensions of the rights of persons to engage in consensual adult homosexual sexual activity, see Lawrence R. Helfer, *Finding a Consensus On Equality: The Homosexual Age Of Consent and The European Convention on Human Rights*, 65 N.Y.U. L. REV. 1044 (1990); Daniel J. Kane, *Homosexuality and the European Convention on Human Rights: What Rights?*, 11 HASTINGS INT'L & COMP. L. REV. 447 (1988); Markus Dirk Dubber, Note, *Homosexual Privacy Rights Before The United States Supreme Court and the European Court of Human Rights: A Comparison of Methodologies*, 27 STAN. J. INT'L L. 189 (1990).

171. Article 41.3.2. reads in full: "No law shall be enacted providing for the grant of a dissolution of marriage." I.R. CONST. art. 41.3.2.

172. The final vote on the referendum was 538,279 for repeal of Article 41.3.2, and 935,844 against. *See* Hogan, *supra* note 51, at 88 n.116.

173. Johnston v. Ireland, 112 Eur. Ct. H.R. (ser.A) at 8 (1986).

English woman in Ireland and had a child from the relationship. The complaint alleged that Ireland's ban on divorce was inconsistent with article 8[174] of the European Convention, obligating the contracting parties to respect the rights of the family, and with article 12,[175] guaranteeing the right to marry. The Court dismissed the couple's claim under article 12, holding that its protections extended only to the formation, and not to the dissolution, of marriage.[176] Ireland's ban on divorce did not prohibit the parties from marrying generally, but merely disallowed their marriage to each other. The Court likewise found that, although the applicants' fifteen year union created a family under article 8, this did not impose a positive obligation on Ireland to permit divorce and remarriage.[177] The Court found the provisions in Irish law allowing legal separations under limited circumstances sufficient to comply with article 8.

The Court, however, found Ireland to be in violation of article 8 for placing the legal burdens of illegitimacy on the couple's child.[178] Under the Irish law, Mr. Johnston was denied all parental rights and could not adopt nor be appointed legal guardian to the child. In addition, the child was denied inheritance rights under intestacy and could not be legitimated even by her parents' subsequent marriage.[179] The Court opined that natural family ties between the couple and their child required that the child have the same legal and social position as a legitimate child.[180]

The divorce issue may be the most explosive of all those analyzed in this Article. The moderate Fianna Fail government of Garret Fitzgerald, elected on a platform of constitutional reform, fell soon after the defeat on the divorce referendum and was replaced by the more conservative

174. Article 8 reads:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

175. Article 12 reads: "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."

176. *Johnston*, 112 Eur. Ct. H.R. at 24.

177. *Id.* at 25-26.

178. *Id.* at 30-31.

179. The European court took note of interim legislation in Ireland, but nevertheless retained jurisdiction. *Id.* at 21.

180. *Id.* at 30-31.

Fine Gael Party with Charles Haughey as Prime Minister. This change in government significantly affected the reunification issue because alienated Northern Protestants fear the imposition of the full range of Catholic social teaching. But Ireland's entrance into the community of European nations is certain to infuse its domestic law with an enhanced sense of cultural relativism, perhaps resulting in a more moderate view on issues nearer the fringe of Catholic social teaching. Indeed, the Haughey government has in turn been replaced by the more moderate government under Prime Minister Albert Reynolds. This wave of moderation may or may not affect the criminalization of homosexual conduct and the sensitive area of abortion. The arguments for retention of the ban on divorce, however, appear less compelling.[181] The fabric of Irish society continues to suffer through an increase in illicit relationships and the commensurate burgeoning of illegitimates in the population. These illegitimate children are the true victims of the defeat of the divorce referendum, and curative legislation is under consideration. The barrier to North/South unification and to harmonious Protestant/Catholic relations and the right to live legally outside the institution of marriage nonetheless remains moribund because Ireland appears impervious to "Europeanization" and staunchly unwilling to follow the United States line of cases extending family rights to unconventional family units.[182]

VI. CONCLUSION

The source of legitimacy in the definition and safeguarding of inherent fundamental rights under a written constitution remains at the heart of the countermajoritarian difficulty. Mainstream constitutional theory in the United States instructs the judge to apply neutral principles to refine the process, so that the positive law expressed through legislative majorities may truly reflect the society's consensus on liberty and justice. As the privacy cases reveal, however, the inherent constitutional safeguards

---

181. For works discussing the evolving liberal movement within the Catholic Church, see EUGENE KENNEDY, TOMORROW'S CATHOLICS, YESTERDAY'S CHURCH (1988); CARLES E. CURRAN, TRANSITION AND TRADITION IN MORAL THEOLOGY (1979).

182. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (holding unconstitutional law banning marriage where groom had not paid child support); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (holding that extended family entitled to family rights); Department of Agric. v. Moreno, 413 U.S. 528 (1973) (allowing household consisting of unrelated persons to collect food stamps); Boddie v. Connecticut, 401 U.S. 371 (1971) (holding filing fee for indigents seeking dissolution of marriage unconstitutional as applied); Loving v. Virginia, 388 U.S. 1 (1967) (holding unconstitutional anti-miscegenation statute).

against the tyranny of the majority frequently require the judge to make much more fundamental value choices.[183]

The role that the natural law tradition has played in this judicial process promises to become even more overt and more controversial. Conservatives charge liberal noninterpretivists with imposing quixotic values of secular humanism on society under the rubric of pluralistic democracy. Liberals respond that the doctrine of original intent deifies the Framers and misconstrues their vision of the future, by imposing anachronistic eighteenth-century values in the name of republican democracy and federalism. As the direction of the privacy and personal autonomy cases under a politically conservative but activist Supreme Court remains somewhat uncertain, the role of Christian, and potentially Catholic, natural law takes on increased importance. Justice White has especially engaged the natural law tradition in the more recent abortion regulation and sexual preference cases. The Court's newest Justice, Clarence Thomas, repeatedly declared his appreciation of the classic principles of religiously-informed natural law before becoming a federal judge.[184] His judicial activism is already making his political agenda and his personal vision of natural law important elements of the Rehnquist Court's jurisprudence.[185]

This Article's comparative[186] assessment of case law developments in Ireland, a society rooted in the Catholic natural law tradition, amplifies the methods and applications of natural law in both Ireland and the United States. Although the religious traditions of Irish law lead to more explicit natural law theories, the natural law tradition imbues the judicial reasoning of courts in both countries. Moreover, given the growth of

183. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE (1985); RONALD DWORKIN, LAW'S EMPIRE (1986). *See also* LAWRENCE TRIBE, CONSTITUTIONAL CHOICES 3-8 (1985).

184. *Id.*

185. Linda Greenhouse, *Judicious Activism: Justice Thomas Hits The Ground Running*, N.Y. TIMES, March 1, 1992, at D4 ("Moving quickly for such an early point in his Supreme Court tenure, he has cast his lot with the brand of conservative activism exemplified by Justice Antonin Scalia and, to a lesser degree, by Chief Justice William H. Rehnquist.").

186. Comparative constitutional study is becoming even more important, and it is receiving the attention of scholars, jurists, and practitioners. *See* Symposium, *Comparative Constitutionalism*, 40 EMORY L.J. 723 (1991); Symposium, *Comparative Constitutionalism*, CARDOZO L. REV. (forthcoming 1992).

natural law theory in the United States, Ireland's natural law tradition may indeed prove to be a not so distant mirror.[187]

187. *Cf.* BARBARA W. TUCHMAN, A DISTANT MIRROR: THE CALAMITOUS 14TH CENTURY (1978). In her book, Tuchman examines the disintegration of Christian medieval society. She observes that "the interest of the period itself—a violent, tormented, bewildered, suffering and disintegrating age, a time, as many thought, of Satan triumphant—[is] compelling and . . . consoling in a period of similar disarray." *Id.* at xiii. Like the events of that period, the growing jurisprudence of fundamental rights in both the United States and Ireland arises out of collapsing assumptions in the face of changing standards of human behavior. *Cf. id.* at xii-xiv.