Can the EC Kill the Irish Unborn?: An Investigation of the European Community's Ability to Impinge on the Moral Sovereignty of Member States

Donald A. MacLean
NOTE

CAN THE EC KILL THE IRISH UNBORN?:
AN INVESTIGATION OF THE EUROPEAN COMMUNITY’S ABILITY TO IMPINGE ON THE MORAL SOVEREIGNTY OF MEMBER STATES

I. INTRODUCTION

Ireland considers abortion to be morally wrong, and the Bunreacht na hÉireann, Ireland’s Constitution, specifically protects the right to life of the unborn. The European Community (“EC”), on the other hand, considers abortion to be a service, and restricts a Member State’s ability to hamper access to services. While Ireland has successfully included

1. See BUNREACHT NA HÉIREANN art. 40.3.3° (Ir.); see generally Jeffrey A. Weinstein, “An Irish Solution to an Irish Problem”: Ireland’s Struggle with Abortion Law, 10 ARIZ. J. INT’L & COMP. L. 165, 169-94 (1993) (providing a thorough history of the development of abortion law in Ireland, followed by an excellent survey of the relevant case law).

2. A distinction is drawn between the European Union (“EU”) and the European Community (“EC”), since the law of the European Court of Justice (“ECJ”) is based solely on the first “pillar” of the Treaty on European Union (“TEU”). See Hon. John P. Flaherty & Maureen E. Lally-Green, The European Union: Where is it Now?, 34 DUQ. L. REV. 923, 949 (1996); TREATY ON EUROPEAN UNION, 1997 O.J. (C 340) 145 (as amended by the Treaty of Amsterdam) [hereinafter TEU]. In this Note, all references are to the EC, unless the reference is intended to incorporate all three pillars, with the other two pillars consisting of the Common Foreign and Security Policy and the Cooperation in the fields of Justice and Home Affairs. The current EU started as a Community of six countries (France, the Federal Republic of Germany, Italy, Belgium, Luxembourg and the Netherlands). See Flaherty, supra at 932. The “Treaty of Rome,” which came into force in 1958, created the European Economic Community. See id. at 926 n.2. The TEU, or “Maastricht Treaty,” came into force in October 1993, establishing the EU and renaming the European Economic Community Treaty as the “Treaty Establishing the European Community” (“EC Treaty”). See id.; TREATY ESTABLISHING THE EUROPEAN COMMUNITY, 1997 O.J. (C 340) 173 (as amended by the Treaty of Amsterdam) [hereinafter EC TREATY]. The Maastricht Treaty altered the EC’s institutional structures, but “the basic treaties were not replaced with a new treaty.” Flaherty, supra, at 950 n.225. On May 1, 1999, the Treaty of Amsterdam came into effect and amended the TEU and EC Treaty. See TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, 1997 O.J. (C 340) 1 (1997) [hereinafter TREATY OF AMSTERDAM]. While the Treaty of Amsterdam strengthens provisions on human rights, it does not alter the provisions used historically in the analysis of the issues addressed in this Note. See TEU art. 7.

3. See EC TREATY arts. 39-55. This Note will use the numbering changes to the Articles

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itself in the economic benefits of the EC, it has avoided a direct confrontation between its constitutional provisions against abortion and the right to avail oneself of a service as protected by the new legal order. The avoidance of conflict has allowed Catholic morality to remain a dominant factor in State abortion law. While some may view this domination as religious fanaticism contrary to the philosophies of personal autonomy and equal rights for women, it is actually a unique example of a conflict being faced by all EC Member States who may be forced to relinquish control of domestic moral issues due to the conveyance of competences, or powers, to a supranational organization.\

This Note utilizes the Irish abortion issue to investigate the extent to which the EC may impinge on Member States’ sovereignty on moral issues unique to each State. This Note predicts what will happen to the Irish constitutional amendment to protect the right to life of the unborn once the Irish courts and the European Court of Justice (“ECJ”) come into direct conflict. By looking at the expansion of EC law through ECJ activism in Part II, the current powers and limits created by the “constitutionalization” of the EC Treaties will be made evident. Part III demonstrates that Ireland is bound by EC law, as long as any regulation, directive, or decision passed down by the institutions of the EC are within the competences granted by the EC Treaties. Thus, because Ireland is bound by EC law, there is a potential conflict between Irish sovereignty and EC law. Part IV investigates the avoidance of this conflict in both ECJ and Irish court decisions. Part V hypothesizes what the outcome will be should this conflict be referred to the ECJ by the Irish courts.

This Note argues that characteristics unique to each Member State justify giving discretion to the national authorities to maintain “order in society.” This discretion is the intent of Articles 46 and 55 of the EC Treaty, and will allow national determination of matters related to

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4. See generally Flaherty, supra note 2, at 949-75 (providing an excellent survey of EC history and law).
5. See infra Part II.A-B.
6. See infra text accompanying notes 69-72. This Note does not address the Kompetenz-Kompetenz argument. See infra note 242. Nor does it discuss the validity of a pro-choice directive issued by the EC in light of the principle of subsidiarity. See infra notes 42-46 and accompanying text. This Note also ignores the relevance or validity of Protocol 17 and its accompanying Solemn Declaration. See infra Part IV.B.
7. See infra Part V.
“services” which are imperative requirements of public interest. The ECJ should not disregard the moral, religious and cultural aspects of abortion, but should defer judgment to the national courts of the Member States. This Note concludes that the EC and the ECJ should be required to allow Article 40.3.3° of the Bunreacht na hÉireann to stand, given the powers and constraints contained in the EC Treaty. These powers and constraints are discussed next in Part II.

II. THE EC TREATY AND ITS COMPETENCES

Since 1957, there have been a series of treaties in the evolution of the EC, culminating in the Treaty on European Union (“TEU”), which carries Member States towards “a new stage in the process of creating an ever closer union among the peoples of Europe.” With the signing of the TEU, the Member States replaced the old concept of a “European Economic Community” (“EEC”) with the new concept of a “European Union” (“EU”). This “Union” is an entity created by the TEU’s “three pillars.” The first pillar, or the “EC Treaties,” is composed of three distinct legal entities with separate international legal personalities: the EC, the European Atomic Energy Community (“Euratom”), and the European Coal and Steel Community (“ECSC”). It is this first pillar that is the basis for the laws of the EC, and which will be the focus of this Note. This Part gives a brief history of the EC in relation to those powers vested in the EC Treaties and the ECJ by the signatory Member States.

A. The Treaties and Sources of EC Law

The law of the EC is founded on the EC Treaties, as amended by the TEU and the Treaty of Amsterdam, rather than by a single “constitution.” A treaty would not normally be thought of as

8. See infra Part II.E.
9. See BUNREACHT NA HÉIREANN art. 40.3.3°.
10. TEU art. 1.
11. See Flaherty, supra note 2, at 944.
12. The second and third pillars are the Common Foreign and Security Policy and the Cooperation in the fields of Justice and Home Affairs. See TEU arts. 11-45; Jo Shaw, LAW OF THE EUROPEAN UNION 6 (2d ed. 1996).
13. See Shaw, supra note 12, at 5.
14. See Flaherty, supra note 2, at 949.
15. See id. Other relevant treaties leading to the current EU include: (1) The Treaty of Paris, which came into force in July 1952, and which established the European Coal and Steel Community made up of the original six members, see TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, 261 U.N.T.S. 140; (2) The Euratom Treaty, which came into
"providing individuals with enforceable rights based on the obligations incurred by their signatory nations." Yet constitutional principles form the foundation for both institutional and substantive EC law. This "constitutionalization" is predominantly the result of ECJ activism.

EC law is a growing legal system based on its sources of law, its goals, and its principles. The remainder of this Part first looks at these sources, then turns to the principles and goals that guide the interpretation of EC law.

The EC Treaties as the primary sources of EC law express power to the institutions of the EC in various articles. Because these Treaties are international agreements, rather than a constitution, the acceptance of the Treaties needs to be ratified by the people of each signa-


17. See Shaw, supra note 12, at 62.

18. See infra Part II.B.

19. See infra Part II.B.

20. See id. at 950. Accession treaties to admit new Member States are also sources of primary law. See id. at 951. An accession treaty is entered into between a new state and each of the existing Member States, not the EC itself. See id. "[E]ach Member State must ratify the accession treaty in accordance with its own national procedures." Id. When States become Member States, they may not "question or substantially modify the institutional structure, scope, policies or rules" of the EC. Id. This principle of accquis communautaire was first recognized when Ireland became a Member State, see id., and was formalized as a stated Community objective in 1992. See TEU art. 2. A broader definition of accquis communautaire includes not only policies and rules, but also political objectives such as the second and third pillars of the TEU. See Roger J. Goebel, The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden, 18 Fordham Int'l L.J. 1092, 1096 (1995); TEU art. 3. This definition was accepted in the terms of the 1994 Act of Accession. See Goebel, supra at 1096.

Amendments to the Treaties, such as the basic treaties and the accession treaties, also became a primary source of law. See Flaherty, supra note 2, at 952. The process to effect an amendment is governed by the TEU. See TEU art. 48. The treaty requires that an intergovernmental conference be held, in which the Council, after consulting the Parliament and the Commission, can convene with the majority consent of its members. See id.; Flaherty, supra note 2, at 953. Amendments must then be ratified by the signatory states under their own constitutional procedures. See TEU art. 48; Flaherty, supra note 2, at 953.

21. See infra Part II.D.
tory State, using their own constitutional procedure for ratification. If a signatory's constitution forbids the transfer of competences provided under the Treaties, that country must make appropriate changes in its constitution.

Other sources of EC law, as granted by the Treaties, include legally binding acts such as regulations, directives, and decisions adopted or issued by the institutions of the EC, which includes the Commission, the Council, the Parliament, and the ECJ.

Article 249 empowers the

22. See Flaherty, supra note 2, at 951.
23. See id. The process required to amend the Irish Constitution is described in Articles 46 and 47. Article 46 states that:
   1. Any provision of this Constitution may be amended, whether by way of variation, addition, or repeal, in the manner provided by this Article.
   2. Every proposal for an amendment of this Constitution shall be initiated in Dáil Éireann [the equivalent of the U.S. House of Representatives] as a Bill, and shall upon having been passed or deemed to have been passed by both Houses of the Oireachtas [the equivalent of the bicameral U.S. Congress], be submitted by Referendum to the decision of the people in accordance with the law for the time being in force relating to the Referendum.

BUNREACHT NA HÉIREANN art. 46. Article 47 provides that:
   1. Every proposal for an amendment of this Constitution which is submitted by Referendum to the decision of the people shall, for the purpose of Article 46 of this Constitution, be held to have been approved by the people, if, upon having been so submitted, a majority of the votes cast at such Referendum shall have been cast in favour of its enactment into law.

Id. art. 47.1.

24. See Flaherty, supra note 2, at 953; EC TREATY, art. 7. There are four institutions of the EC: (1) the Commission; (2) the Council; (3) the Parliament; and (4) ECJ. The Commission "supervises implementation of [the Treaties], initiates and implements EU policy, transacts negotiations with [non-members], and manages EU funds." NEW YORK TIMES ALMANAC 504 (John W. Wright ed., 1999). It is currently composed of 20 commissioners who are appointed by member governments, each of which is mandated by the Treaties to represent the EU, independent of their Member State's interests. See id. The Council, the chief decision-making body, passes legislation on the most important issues affecting all Member States. See id. at 505. It is currently composed of 15 ministers, one from each of the Member States. See id. The Parliament oversees the budget and passes on Commission proposals to the Council. See id. Currently, each of the 626 deputies that make up the Parliament are elected directly by the citizens of the Member States. See id. The ECJ interprets the Treaties and legislation, and hears complaints concerning alleged violations by Member States. See id. The ECJ also resolves inconsistencies between EC law and national laws. See id. There are currently thirteen Justices, appointed by the Member States to sit for six-year terms. See id.

25. See EC TREATY art. 249. The EC Treaty states that:
institutions of the [EC] to approve legally binding instruments in order to implement the general principles contained in the [EC] Treaties. These general principles relate to economic integration and the foundation of the EC. They are stated in broad terms in Articles 2, 3, and 4 of the EC Treaty.

The institutions of the EC have assumed the role of interpreter of these powers and have developed some underlying principles to aid in this process. An important concept borrowed from German law and indoctrinated into EC law is the principle of proportionality. This principle requires that any regulation or directive of an EC institution can "be no more burdensome than is necessary to achieve its objective." Investigating proportionality involves determining that the aim is legitimate, finding a nexus between the necessity for the measure chosen and its aim, and concluding that the impact of the measure is not disproportionate or excessive on affected interests. This principle has become the standard test used to assess the legality of the regulations and

In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.

Id. 26. RAYMOND BYRNE & J. PAUL MCCUTCHEON, THE IRISH LEGAL SYSTEM 704 (3d ed. 1996). Regulations and directives are proposed by the Commission, but the Council's final approval is required. See id. at 704. Decisions include the holdings of the ECJ. Also included as a source of law are treaties with third countries to which the EC itself is a party. See Flaherty, supra note 2, at 953. For example, if the EU becomes a signatory of the European Convention of Human Rights ("ECHR"), the provisions of the Treaty would become law.

27. See Klaus Lackhoff, Restrictions on State Interference with Commerce in the U.S.A. and the EC, 2 COLUM. J. EUR. L. 313, 329 (1996). Article 2 of the EC TREATY states that:

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities ... and economic and social cohesion and solidarity among Member States.

EC TREATY, art. 2.

28. See SHAW, supra note 12, at 186.

29. Id.

30. Id.

31. See id.
directives of the EC.\textsuperscript{32} It has become "an essential tool in checking abuses of governmental power,"\textsuperscript{33} and in assessing derogations from EC law by Member States through national legislation.\textsuperscript{34}

Harmonization of laws among the Member States is also authorized by the TEU.\textsuperscript{35} The institutions may "issue directives for the approximation of . . . provisions of the Member States."\textsuperscript{36} Member States are required to achieve this harmonization by altering national laws.\textsuperscript{37} While harmonization originally required unanimous approval of the Council, the Single European Act ("SEA")\textsuperscript{38} introduced Qualified Majority Voting ("QMV") and the use of regulations, as well as directives, to achieve the objective of harmonization.\textsuperscript{39} QMV eliminated the veto power of a single Member State to block a harmonization measure and allowed the Commission to formulate regulations and directives that did not have unanimous support.\textsuperscript{40} The Member States still reserved unanimous voting for areas warranting continued protection of sovereignty.\textsuperscript{41}

The TEU added Article 5 to the EC Treaty, which specifies that "[i]n areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity."\textsuperscript{42} According to this principle, the EC should not act if the "objectives could effectively be served by action taken at or below the Member State level."\textsuperscript{43} In areas of concurrent competence, the EC may act only in limited situations.\textsuperscript{44} The principle of subsidiarity is not con-

\begin{footnotes}
\footnote{32}{See \textit{id.} at 187.}
\footnote{33}{Steven A. Bibas, \textit{The European Court of Justice and the U.S. Supreme Court: Parallels in Fundamental Rights Jurisprudence}, 15 \textit{HASTINGS INT'L & COMP. L. REV.} 253, 268 (1992).}
\footnote{34}{See \textit{SHAW, supra} note 12, at 187.}
\footnote{36}{EC TREATY art. 94.}
\footnote{37}{See \textit{SHAW, supra} note 12, at 96. There has been a shift in ideology regarding harmonization in that convergence of laws, not uniformity, is required by Member States. \textit{See id.}}
\footnote{38}{See \textit{generally SEA} arts. 6, 100A (amending current Articles 12 and 95 of the EC Treaty).}
\footnote{39}{See Bermann, \textit{supra} note 35, at 355 & 356 n.90; \textit{see also} EC TREATY art. 94 (stating that the "Council shall . . . issue directives for the approximation of such laws").}
\footnote{40}{See Bermann, \textit{supra} note 35, at 355-56 & 356 n.90.}
\footnote{41}{\textit{Id.} at 363.}
\footnote{42}{\textit{Id.} at 346.}
\footnote{43}{\textit{Id.} at 334.}
\footnote{44}{\textit{See EC TREATY} art. 5. The EC Treaty provides that: The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better
cerned with the extent or type of the Community's action. Instead, the principle of proportionality will be applied.

These principles are applied in interpreting the EC Treaty to further the goals of the EC. The primary goal of EC law is the creation of an internal market, which ensures the "four freedoms": the free movement of goods, persons, services and capital across Member State borders. These freedoms are strictly internal rights; they are reserved for citizens of the Member States and only when a cross-border transaction exists. The ECJ will examine all national legislation contrary to these four freedoms.

The powers of the EC appear limited by express provisions in the EC Treaty, and "must be exercised for the specific purpose of achieving a particular policy goal." This idea is embodied in Articles 5 and 7. However, the ECJ has applied a general doctrine of implied powers to facilitate the evolution of the Community's competence, both internally and externally. This doctrine permits the EC to make decisions where an obvious duty or task exists under the Treaty, but no specific power exists. The ECJ has employed this doctrine to attain "external compe-

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45. See Bermann, supra note 35, at 369.
46. See id. The TEU and the Council look upon subsidiarity and proportionality as distinct but related topics. See id. at 369 n.158. The Commission considers subsidiarity as a larger concept with two separate branches: the "need-for-action" test, as identified with the definition of subsidiarity, and the "proportionality" test. See id. at 377 n.200.
47. See Lackhoff, supra note 28, at 329.
48. See id. Article 3 of the EC Treaty states that:
   For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:
   (c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;
   (d) measures concerning the entry and movement of persons as provided for in Title IV . . . .
EC TREATY, art 3.
49. See Lackhoff, supra note 28, at 329.
50. See id. at 330. Only in a few instances will the EC law allow restrictions on the four freedoms by a Member State. See id.
51. Shaw, supra note 12, at 80.
52. See supra note 44 for a restatement of Article 5 of the EC TREATY. Article 7 of the EC Treaty states that "[e]ach institution shall act within the limits of the powers conferred upon it by this Treaty." EC TREATY, art 7.
53. See Shaw, supra note 12, at 81.
54. See id. An example of expansion of internal competences is the treatment of "Article 235
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tence, even exclusive external competence . . . in the absence of express powers in the Treaty." The position was summarized by the ECJ as follows:

Authority to enter into international commitments may not only arise from an express attribution by the Treaty, but may also flow implicitly from its provisions . . . . [I]n particular . . . whenever Community law created . . . powers within its internal system for the purpose of attaining a specific objective, the Community had authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision . . . . 56

Thus, the ECJ has expanded the competences of the EC through judicial decisions. The results of this judicial activism can also be seen in the “constitutionalization” of the EC Treaty and further expansion of competences by the ECJ, as discussed in the following section.

B. Powers of the European Court of Justice

With the exception of Articles 1057 and 22058 of the EC Treaty, “the principles of a unique supranational legal order have evolved . . . through judicial action.”59 The judicial expansion of the competences of the EC began with the ECJ interpreting the EC Treaties as a constitution, and explicitly stating such in 1986.60 This “constitutionalization” formed the “foundation of an international legal order that imposes substantive obligations on the Member States and confers corresponding rights” on citizens of the Member States.61 Through its decisions, the

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55. Id. (using fisheries conservation as an example).
57. See EC TREATY art. 10. This Article states:
   Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks.
   They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

Id.
58. See EC TREATY art. 220. This Article provides that: “[t]he Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed.” Id.
59. SHAW, supra note 12, at 251.
ECJ made it clear that the law created by the EC Treaty was unlike any other international agreement.62

Through "direct effect" and "supremacy," the ECJ began the constitutionalization of the EC Treaty as well as expanding the independence and competence of the EC.63 In the early 1960s the ECJ recognized that a transfer of sovereign powers from Member States to the EC had occurred.64 In Van Gend en Loos v. Nederlandse administratie der belastingen,65 the ECJ concluded that the EC Treaty has "direct effect," defining EC law as part of domestic law.66 When a national law is deemed incompatible with EC law, national authorities must not wait for its repeal by a constitutionally appropriate process but are immediately prohibited from enforcing the national law.67 A compelling justification for this conclusion is that "it enhances the effectiveness or 'effet utile' . . . of EC law."68

The ECJ also held that the EC Treaty created legal rights for individuals, as well as Member States, and, through interpretation of Article 234, these rights are enforceable in national courts.69 The justiciability of EC law in the national courts has maximized its effectiveness.70 Article 234 gives the ECJ the power to deliver binding preliminary rulings on questions concerning the interpretation of the EC Treaty and the validity of secondary EC acts that were referred to the ECJ by the national court of a Member State.71 "This route has permitted the human rights

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62. See BYRNE & MCCUTCHEON, supra note 26, at 672.
63. See SHAW, supra note 12, at 252.
64. See id. at 34-35.
66. See BYRNE & MCCUTCHEON, supra note 26, at 673.
68. SHAW, supra note 12, at 263.
69. See BYRNE & MCCUTCHEON, supra note 26, at 673.
70. See SHAW, supra note 12, at 252.
71. See EC TREATY art. 234. This Article states:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of this Treaty;
(b) the validity and interpretation of acts of the institutions of the Community . . .
(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.
issues to emerge because it circumvents the standing requirement which individuals otherwise face. In other actions, individuals must establish that the measure was addressed directly to them or was of direct and individual concern to them, a standard difficult to satisfy.  

In analyzing the provisions of the EC Treaty to determine whether direct effect exists, the ECJ held that "the general scheme and wording of [the EC Treaties'] provisions" should be considered in interpreting the law. Referring to the Preamble, the ECJ concluded that the powers vested in the institutions of the EC would affect the Member States and their citizens, because of the use of the words "peoples of Europe." Thus, private individuals may demand a national court to apply EC Treaty provisions if the national laws have been found to be contrary to EC law. Under direct effect, private individuals are protected by EC law, even in situations where the Member State has not implemented the legislation. Thus, ECJ case law asserts the superiority of EC law over the law of Member States, and has identified the significance of the relationship between EC law and the individual citizens of the Member States.

The ECJ further established the "supremacy" of EC law over the national law of the Member States in Costa v. Ente Nazionale per L'Energia Elettrica. The EC Treaty does not contain an express "supremacy" provision that "catapults" EC law above national law in those circumstances when EC law and national law are incompatible. Nevertheless, the ECJ stated that:

> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers

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72. Bibas, supra note 33, at 257 n.22. Other important Articles are: Article 242, which gives the power to order the suspension of a contested act; Article 243, which allows the ECJ to prescribe interim measures; and Article 244, which gives the ECJ the power to have its judgments enforced. See EC TREATY arts. 242-44.

73. Byrne & McCutcheon, supra note 26, at 673.

74. See EC TREATY preamble.

75. Byrne & McCutcheon, supra note 26, at 673 (quoting EC TREATY preamble).

76. See Ball, supra note 16, at 344.

77. See id. at 344 n.171.

78. See Shaw, supra note 12, at 35.

79. See Joined Cases 14 & 6/64, 1964 E.C.R. 585, [1964] C.M.L.R. 425 (1964); see also Byrne & McCutcheon, supra note 26, at 675 (stating that Costa and Van Gend en Loos are the main decisions concerning the supremacy of EC law over national law).

80. See Flaherty, supra note 2, at 969.
from the States to the Community, the Member States have limited their sovereign rights, *albeit within limited fields*, and have thus created a body of law which binds both their nationals and themselves.

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The precedence of Community law is confirmed by Article 189 [currently Article 249], whereby a regulation ‘shall be binding’ and ‘directly applicable in all Member States’. This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.

It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. 81

In Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 82 the ECJ, using the words of Costa, determined that the principle of “supremacy” applies even to the constitutional law of the Member States:

[T]he law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed ... [and ]therefore, the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.

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.... [A]n examination should be made as to whether or not any analogous guarantee ... inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community. It must therefore be

ascertained . . . whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the Community legal [system].

Thus, the ECJ made it clear that EC law was an independent source of law that is supreme to national law, including the constitutions of Member States.

C. The General Principles of Law and Human Rights

The "general principles of law," which the ECJ made reference to in Internationale Handelsgesellschaft, is an unwritten body of law derived by the ECJ in exercising its duty under Article 220. The ECJ established this principle from Article 220, in concert with Article 230, which "mentions ‘essential procedural requirement[s]’ and other ‘rule[s] of law’ but does not define them." The ECJ has determined that these are customary rules, derived from "the Member States’ ‘common legal heritage.’" Further, the ECJ has concluded that these rules evolved from "continental administrative law standards and certain fundamental rights," and that all EC institutions and Member States are required to honor them. The ECJ has adopted, and operates, under these "general principles of law."

The ECJ has consistently held that the "fundamental rights form an integral part of the general principles of law," and the ECJ must ensure these principles. The ECJ draws inspiration from the constitutional traditions common to Member States. The ECJ also draws inspiration from international treaties of which the Member States are signatories, particularly the European Convention of Human Rights ("ECHR"). These "fundamental rights" include "human rights," and are typically

84. See id. at 677.
85. See Flaherty, supra note 2, at 957; see also Shaw, supra note 12, at 180-81 (classifying “general rules of law” as a primary source of law).
86. Bibas, supra note 33, at 258; see EC Treaty arts. 220, 230.
87. Bibas, supra note 33, at 258.
88. See Flaherty, supra note 2, at 957.
89. See Bibas, supra note 33, at 257.
91. See id.
92. See id. The EC itself is not a member, but all Member States are.
more political and social, rather than economic, in nature. The ECJ expressly stated that the EC cannot accept measures which are incompatible with observance of the human rights recognized and guaranteed by the ECHR. Thus, the ECJ may interpret the Convention, but only in relation to questions within the scope of EC law.

D. The Four Freedoms

Specific articles within the EC Treaty detail the four freedoms: the free movement of goods, persons, services, and capital across Member States' borders. Articles 43 through 48 guarantee that citizens of Member States cannot be restricted on freedom of establishment, and Articles 49 through 55 guarantee the freedom to provide services. Specifically, Article 50 of the EC Treaty defines "services" as one of the four freedoms which are activities "normally provided for remuneration," including activities of the "professions." Article 49 requires the abolition of any restriction, which due to nationality or origin, has the aim or effect of treating a provider of services established in another Member State less favorably. These Articles have become the critical issues in the current debate.

Because the main purpose of the ECJ is to ensure the four freedoms, the ECJ will closely examine any Member State's regulations which discriminate against another Member State or its citizens. For example, the freedom to travel to another Member State to receive services lawfully attainable in that Member State was decided in Luisi and Carbone v. Ministero del Tesoro. The ECJ found that the right to receive services is a corollary to the explicit right to supply services. It

93. See Flaherty, supra note 2, at 957; see also Bibas, supra note 33, at 257 (drawing a connection between the "general principles of law" and the "human rights guarantee").
96. See EC TREATY arts. 23-31 & 39-69.
97. See Lackhoff, supra note 28, at 329.
98. See Flaherty, supra note 2, at 996.
100. See id. at I-4712, [1991] 3 C.M.L.R. at 865.
101. See infra Part IV.A.
102. See supra notes 47-50 and accompanying text.
103. See Lackhoff, supra note 28, at 330.
concluded that "the freedom to provide services includes the freedom, for the recipients of services, to go to another Member State in order to receive a service there, without being obstructed by restrictions, even in relation to . . . persons receiving medical treatment . . . ."\textsuperscript{105} The ECJ has further held that "[t]he freedom recognized by the [ECJ] of a recipient of services to go to another Member State . . . ensue[s] from fundamental rules of the Treaty to which the most extensive possible effectiveness must be given."\textsuperscript{106} Thus, if the ECJ finds the restriction discriminatory, it will protect the right of a citizen of one Member State to travel to another Member State to receive a medical service.

In 1979, the ECJ held that Member States may be limited in restricting services even if the restriction is non-discriminatory.\textsuperscript{107} In \textit{Süger v. Dennemeyer & Co.},\textsuperscript{108} the Court stated that:

\begin{quote}
Article 59 [currently Article 49] of the Treaty requires not only the elimination of all discrimination against a person providing services . . . but also the abolition of any restriction . . . when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.\textsuperscript{109}
\end{quote}

However, some general provisions allow derogations from fundamental economic freedoms based on "public policy" exceptions.

\textbf{E. Public Policy Exceptions}

Under Articles 46\textsuperscript{110} and Article 55\textsuperscript{111} of the EC Treaty, Member States may enact regulations that restrict the freedoms granted under Articles 49 and 50 on the "grounds of public policy, public security and

\begin{footnotesize}
\textsuperscript{105} \textit{Id.} at 403, [1985] 3 C.M.L.R. at 78.
\textsuperscript{109} \textit{Id.} at I-4243, [1993] 3 C.M.L.R. at 656.
\textsuperscript{110} EC TREATY art. 46 (providing that "[t]he provisions of this Chapter . . . shall not prejudice the applicability of provisions . . . providing for special treatment . . . on grounds of public policy, public security or public health").
\textsuperscript{111} EC TREATY art. 55 (stating that "[t]he provisions of Articles 45 to 48 shall apply to the matters covered by this Chapter").
\end{footnotesize}
The freedom to provide services can only be limited by rules which are justified by "overriding reasons relating to the public interest." These requirements must be "necessary" and must not exceed what is necessary to attain those objectives.

The ECJ has held that, for certain services, the requirements imposed on the provider cannot be deemed to be in direct conflict with the EC Treaty. However, the freedom to provide services is one of the fundamental rights granted by the EC Treaty. It may only be restricted by requirements which are justified by the "general good" and which are imposed equally on all providers operating in the Member State. In addition, regard must be given for the privileges already conferred by the Member State of the provider's establishment. The specific restrictions are to be regarded "as compatible with Articles 59 and 60 [currently Articles 49 and 50] of the Treaty only if, in the sphere of the activity in question, there appear to be grounds of public interest justifying the restrictions . . . and the same result cannot be achieved by less restrictive rules."

The ECJ has been imprecise in delimiting the "cluster of imperative requirements" in the sphere of freedom to receive services.

In instances where national legislation is contrary to free movement, a possibility still exists that the restrictions, whether or not they...
are discriminatory, may be found compatible with EC law, and thus allowable under Article 46.\textsuperscript{121} EC law has provisions which provide that discriminatory national laws must be justified by the imperative requirements of public interest.\textsuperscript{122} The ECJ appears to be prepared to accept grounds which "reflect certain political and economic choices" and are connected with "national or regional socio-cultural characteristics, [which], in the present state of Community law, is a matter for the Member States."\textsuperscript{123} The ECJ took this position in Société Générale Alsaciennede Banque v. Koestler,\textsuperscript{124} where the ECJ accepted local legislation based on the "social order"\textsuperscript{125} and Bond van Adverteerders v. Netherlands,\textsuperscript{126} where derogations may be justified on grounds of public policy.\textsuperscript{127} Therefore, in order to safeguard the interests which it endeavors to defend, Article 46 must be interpreted narrowly.\textsuperscript{128}

These derogations "must not be disproportionate to the intended objective."\textsuperscript{129} The ECJ utilizes the principle of proportionality to assess the interference by the Member States in the economic freedoms guaranteed under the EC Treaty.\textsuperscript{130} "As presented by the European Council, the principle of proportionality bars . . . [any] measure that imposes burdens disproportionate to the objective,"\textsuperscript{131} and requires that a measure must "be no more burdensome than is necessary to achieve its objective."\textsuperscript{132} The measure of proportionality is a three step analysis: (1) the national rule must serve a legitimate end; (2) the Member State must show that no equally effective, but less burdensome, method exists; and,
(3) the negative impact on the freedom must not be excessive compared to the gain.\textsuperscript{133}

The ECJ has applied the expanding fundamental rights of the "general principles of law" to the "actions of Member States taken within the realm of the derogations from [one of] the fundamental . . . freedoms guaranteed by the Treaty."\textsuperscript{134} As noted, Articles 39 through 55 protect the free movement of persons and services and the right of establishment in another Member State.\textsuperscript{135} "Rather than viewing these sections as merely maximizing economic efficiency," the ECJ has come to treat the freedoms as "expressions of fundamental rights."\textsuperscript{136} For example, in \textit{Rutili v. Minister of the Interior},\textsuperscript{137} France restricted an Italian citizen from living in certain areas.\textsuperscript{138} The ECJ held that the freedom of movement is a "fundamental freedom" and it would narrowly interpret public policy exceptions.\textsuperscript{139} The ECJ, in an effort to ensure that derogations of this right were proportionate to legitimate state aims, "treated the right as a strong, albeit rebuttable, presumption and invoked the proportionality test."\textsuperscript{140} Reviewing the various limitations upon national discretion, the ECJ concluded that "they were all specific manifestations of a more general principle, enshrined in a number of provisions of the ECHR, that 'no restrictions in interests of national security or public safety shall be placed'" on the freedom of movement other than those necessary for the protection of those interests.\textsuperscript{141}

In \textit{Elliniki Radiophonia Tileorassi v. Dimotiki Etairia Pliroforisis},\textsuperscript{142} the ECJ employed a similar principle but in broader terms:

[W]hen it was examining the acceptability [of] national public policy derogations (under Articles 56 and 66 [currently Articles 46 and 55] . . . ) from the principle of free movement of services (Article 59 [currently Article 49] . . . ), it was applying fundamental rights stan-
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ards to national measures falling ‘within the scope of Community law.’ 143

Greece had invoked Articles 46 and 55, claiming that it had prohibited all of the television broadcasts except those of the State in order to protect the interests of the State. 144 The ECJ held that the prohibition “had to be assessed in the light of general principles of law, notably fundamental rights.” 145 The freedom of expression of Article 10(1) of the ECHR “could be invoked before the national court which is called upon to assess the validity of the purported justification for the derogation from the principles of EC law.” 146 Thus, the ECJ has shown its willingness to expand its jurisdiction to protect human rights as determined by the ECHR.

However, “[t]he logical corollary . . . is that [EC] fundamental rights protection does not extend to areas which fall within the jurisdiction of the Member States . . .” 147 In Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena, 148 the ECJ upheld the ECHR principle of nondiscrimination, but noted that it serves only as a limitation on EC acts; legal relationships which are left within the powers of the national legislature must be understood to be subject to national, not EC, safeguards. 149 “Nonetheless, general principles of law, including human rights, bind the Member States when they implement Community obligations.” 150

It is important to note that harmonization measures 151 can preclude reliance on public policy exceptions. 152 If a harmonization directive deals with an issue, a Member State may enact stricter rules in regards to that issue, but “only within the boundaries of its own territory and only in accordance with the principles laid down by the Treaty.” 153

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144. See id. at 192-93; Elliniki, 1991 E.C.R. at I-2964.
145. Shaw, supra note 12, at 192-93.
146. Id. at 193.
147. Id.; see also Joined Cases 60 & 61/84, Cinéthèque v. Fédération nationale des cinémas français, 1985 E.C.R. 2605, 2627, [1986] 1 C.M.L.R. 365, 386 (1985) (providing that the ECJ “has no power to examine the compatibility with the European Convention of national legislation which concerns . . . an area which falls within the jurisdiction of the national legislator”).
150. Bibas, supra note 33, at 269-70.
151. See supra notes 35-41 and accompanying text.
153. Id. at I-1264, [1998] 2 C.M.L.R. at 674 (opinion of Advocate General Leger).
complete harmonization is sufficient to preclude the public policy exception.\textsuperscript{154} Thus, when Ireland joined the EC in 1972, the ECJ had established a well defined system of laws. These laws were accepted by the signatories of the Treaties, and since then, the competence and reach of EC law and the ECJ have expanded. If the laws were contrary to the constitutions of the new Member State, the amendment of the national law was required.\textsuperscript{155} Ireland was faced with these contradictions and, as described in Part III, has been successful in its integration of EC law.

III. IRISH INTEGRATION OF EC LAW

When Ireland began negotiations to enter the EC, it was evident that certain articles of the Irish Constitution were in direct conflict with EC law as established by ECJ decisions, including \textit{Costa}, \textit{Van Gend en Loos}, and \textit{Internationale Handelsgesellschaft}.\textsuperscript{156} This Part describes the steps taken by Ireland to enable it to ratify a Treaty of Accession and become a Member State.\textsuperscript{157} It was crucial for Ireland to amend its Constitution, and by doing so, EC law became binding in Ireland.\textsuperscript{158} After eight hundred years of fighting to free itself of English rule, Ireland voted to allow EC law to take priority over Irish law, including Ireland’s Constitution.\textsuperscript{159} Through an analysis of Ireland’s Constitution, the amendments necessary to conform with EC case law, and the challenges to those amendments, this Part will establish that EC law is now Irish law.

A. The Irish Constitution

“Bunreacht na hÉireann” may be translated from the native Irish as the “Basic Law of Ireland” and it has been referred to as both “law and manifesto.”\textsuperscript{160} It has the indelible stamp of its primary author, Eamon deValera, who included his nationalistic and religious aspirations in the
document. Because of the religious references, the Irish courts have faced the challenge on how to incorporate natural law, defined as Church law, into their constitutional interpretations. This definition of natural law has played a role in the outcome of abortion cases in Ireland, but its effects on the assimilation of EC law into Irish law have been less prevalent. The nationalistic stance of deValera created hurdles which had to be overcome in the acceptance of the EC law.

Article 5, which simply states that "Ireland is a sovereign, independent, democratic state," became an issue in one of the first challenges to the EC Treaty. Article 6 of the Irish Constitution makes it clear that no international organization can exercise the powers expressly granted to the main institutions of the State. Further conflicts include Article 15.2, which grants exclusive lawmaking power to the Oireachtas, and Article 34, which grants judicial powers only to those courts established under the Constitution, and which also establishes the Supreme Court as the final court of appeal. An interesting summation can be found in Byrne v. Ireland, where Judge Walsh said:

Article 6 of our Constitution, having designated the powers of government as being legislative, executive and judicial and having declared them to have been derived from the People, provided that these powers of government are exercisable only by or on the authority of the organs of [the] State established by the Constitution.

However, the exclusive lawmaking power of the Oireachtas is limited by the Constitution in that no law shall be enacted that is "repugnant" to

161. For example, Article 2 defines the national territory of Ireland to include the "whole island," in direct defiance of the sovereignty of Northern Ireland. See Bunreacht na Héireann art. 2. But always the diplomat, deValera suspended jurisdiction over the whole island until "re-integration." See Bunreacht na Héireann art. 3. The religious convictions of deValera are prevalent. The Preamble begins, "[i]n 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." Bunreacht na Héireann preamble. But again, showing political skill, deValera included Article 44, which acknowledged the other prominent religions in Ireland at the time and guaranteed religious freedom. See Bunreacht na Héireann art. 44 (repealed in part 1972).

162. See generally Byrne & McCutcheon, supra note 26, at 616 (discussing natural law).

163. See id.

164. See Bunreacht na Héireann art. 5; see also infra Part III.B (discussing the challenges to the amendments).

165. See Bunreacht na Héireann art. 6; Byrne & McCutcheon, supra note 26, at 678.

166. See Bunreacht na Héireann art. 15.2.

167. The Oireachtas is the Irish legislature. See id.

168. See Bunreacht na Héireann art. 34.

169. See Byrne & McCutcheon, supra note 26, at 678.


171. Id. at 262; see Byrne & McCutcheon, supra note 26, at 566.
the Constitution, and any law found to be repugnant shall be invalid to the extent of that "repugnancy." The power to determine the validity of such laws is expressly conferred on the High Court and the Supreme Court. The Constitution grants jurisdiction to the High Court on the validity of any law in regard to the provisions of the Constitution, and these issues can be raised in no other court besides the High Court and the Supreme Court. The Supreme Court is expressly given appellate jurisdiction over all decisions of the High Court and all other courts "prescribed by law." The Oireachtas cannot enact a law that exempts a constitutional issue from appellate review, and the decisions of the Supreme Court shall be final. In addition, Article 1 expressly and unequivocally proclaims Ireland's right of self-determination, both domestically and in relations with other nations. All of these constitutional provisions are contrary to the requirements and jurisdiction of the EC described in Part II.

Under Article 29.4.2, however, the Government may adopt procedures necessary for associations to further international cooperation.

172. See BUNREACHT NA HÉIREANN art. 15.4.1. This Article states: "The Oireachtas shall not enact any law which is in any respect repugnant to this Constitution or any provision thereof." Id.
173. See id. art. 15.4.2. This Article states: "Every law enacted by the Oireachtas which is in any respect repugnant to this Constitution or to any provision thereof, shall, but to the extent only of such repugnancy, be invalid." Id.
174. See id. art. 34.
175. See id. art. 34.3.2. This Article states: "Save as otherwise provided by this Article, the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution, and no such question shall be raised (whether by pleading, argument or otherwise) in any Court established under this or any other Article of this Constitution other than the High Court or the Supreme Court." Id.
176. See id. art. 34.4.3. This Article states that: "The Supreme Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law." Id.
177. See id. art. 34.4.4. This Article states that: "No law shall be enacted excepting from the appellate jurisdiction of the Supreme Court cases which involve questions as to the validity of any law having regard to the provisions of this Constitution." Id.
178. See id. art. 34.4.6. This Article provides that: "The decision of the Supreme Court shall in all cases be final and conclusive." Id.
179. See id. art. 1. This Article states: "The Irish nation hereby affirms its inalienable, indefeasible, and sovereign right to choose its own form of Government, to determine its relations with other nations, and to develop its life, political, economic and cultural, in accordance with its own genius and traditions." Id.
180. See generally supra Part II.
181. See BUNREACHT NA HÉIREANN art. 29.4.2; BYRNE & McCUTCHEON, supra note 26, at 678.
While the Government is expressly responsible for international affairs, it is also responsible for any effect of the agreement. 182 Article 29.3 states that the Government should conduct relations based on the principles of international law, which generally do not impose that the provisions of an agreement become part of domestic law automatically, contrary to the principle of direct effect found in Van Gend en Loos. 184 In fact, Article 29.6 expressly mandates the "dualist" approach, providing that "[n]o international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas." 186 Thus, only the Oireachtas can incorporate such agreements into Irish law. To overcome the conflict between the Constitution and the ECJ decisions, Article 29.4.3 was added by referendum in 1972. 187

The State may become a member of the [ECSC, EEC and the Euratom] . . . . No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State. 188

Thus, on January 1, 1972, Ireland became a Member State of the EC by will of the Irish people. 189 Subsequently, EC law became incorporated into Irish law. 190 While Ireland has clearly benefited as a Member State, it has relinquished some of its sovereignty. 191 This loss has not gone unchallenged in Ireland.

B. Challenges to the Amendments

In December 1986, the Oireachtas enacted the European Communities (Amendment) Act of 1986 to incorporate into Irish law the appropriate provisions of the Single European Act ("SEA"). 192 However, a private citizen was granted an interlocutory injunction on Christmas Eve 193

182. See Byrne & McCutcheon, supra note 26, at 678.
183. See Bunreacht na Héireann art. 29.3.
184. See Byrne & McCutcheon, supra note 26, at 678-79.
185. See generally supra Part II.
186. Bunreacht na Héireann art. 29.6; see also Byrne & McCutcheon, supra note 26, at 679 (discussing the Oireachtas' role as the only lawmaking body of Ireland).
187. See Byrne & McCutcheon, supra note 26, at 679.
188. See id. (quoting Bunreacht na Héireann art. 29.4.3°).
189. See id. at 655.
190. See id.
191. See id. at 657.
192. See id.
193. See id. at 680; European Communities (Amendment) Act, No. 24 (1992).
of 1986, preventing the Government from finalizing acceptance of the Treaty.\footnote{194} In 1987, a High Court upheld the 1986 Act, stating that the Act fell within the purview of Article 29.4.3\super{a}.\footnote{195} The Divisional High Court also ruled that the clause in question, Title III,\footnote{196} was outside the range of enforceable EC law; therefore, it was never incorporated into Irish law by the 1986 Act.\footnote{197} The Supreme Court, in Crotty v. An Taoiseach,\footnote{198} upheld the High Court’s decision with one critical exception. While the Supreme Court agreed that amendments to existing Treaties were authorized under Article 29.4.3\super{a} of the Constitution, and automatically incorporated into Irish law, any amendments that “alter the essential scope or objective of the Communities” required a referendum to amend the Constitution.\footnote{199} The rationale was that commitment to Title III of the SEA restricted the State’s freedom to formulate an independent foreign policy, inconsistent with Article 5 of the Constitution.\footnote{200} Therefore, ratification of the SEA required amendment to Article 29 through referendum.\footnote{201}

The case set precedent, as seen with the ratification of the TEU Treaty in 1992. The amendment, resulting from the TEU Act that created Article 29.4.5\super{a},\footnote{202} had two major effects:

1. nothing in the Constitution can prevent laws enacted, acts done or measures adopted by the European Union or by the Communities, or by institutions of the European Union or of the Communities, from having the force of law in the State; and

\begin{itemize}
  \item \footnote{194} See \textit{BYRNE \\& McCUTCHEON}, supra note 26, at 680. After hearing arguments from Crotty in his home on Christmas Eve, Judge Barrington granted the injunction preventing the deposit of the instrument of ratification with the Italian Government. \textit{See id.}
  \item \footnote{195} \textit{See id.}
  \item \footnote{196} \textit{See SEA tit. III.}
  \item \footnote{197} \textit{See \textit{BYRNE \\& McCUTCHEON}}, supra note 26, at 680.
  \item \footnote{198} \textit{[1987] I.L.R.M. 400 (Ir. S.C.).}
  \item \footnote{199} \textit{Id. at 444.}
  \item \footnote{200} \textit{Id. at 444-45. The Court concluded that the other amendments to the Treaties, including the introduction of a qualified voting majority in EC institutions, the establishment of a Court of First Instance attached to the ECI, and the extension of the aims of the EC to include protection of the environment, were authorized under Article 29.4.3\super{a}, and were thus valid and incorporated into Irish law. \textit{See id. at 446-47.}}
  \item \footnote{201} The amendment simply included the SEA to the treaties listed in Article 29.4.3\super{a}. \textit{See European Communities (Amendment) Act, 1986; \textit{BYRNE \\& McCUTCHEON}, supra note 26, at 681.}
  \item \footnote{202} \textit{See Eleventh Amendment of the Constitution Act, 1992.}
\end{itemize}
2. nothing in the Constitution can invalidate laws enacted, acts done or measures adopted by the State where these were necessitated by membership of the European Union or of the Communities.\(^\text{203}\)

EC law took priority over the Constitution, at least in those areas where the EC Treaties governing “the European Communities” have competence.\(^\text{204}\) With the amended Article 29.4.5,\(^\text{205}\) Ireland complied with Van Gend en Loos, Costa, and Internationale Handelsgesellschaft.\(^\text{205}\) Therefore, EC law is part of the domestic law of Ireland, and superior to the Constitution.\(^\text{206}\) This has been acknowledged by the Supreme Court in Doyle v. An Taoiseach,\(^\text{207}\) where it was stated that EC law “‘has the paramount force and effect of constitutional provisions.'”\(^\text{208}\)

It is interesting that Ireland has gone through great lengths to ensure compliance with EC law, its direct effect, and its supremacy. Any EC regulation or ECJ decision within the competences granted by the EC Treaty will automatically become Irish law.\(^\text{209}\) This would include any ECJ ruling which held that Article 40.3.3\(^\text{9}\) is incompatible with EC law.\(^\text{210}\) This question of incompatibility, in light of the powers granted as discussed in Part II, is addressed in Part V, following a brief history of

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203. Byrne & McCutcheon, supra note 26, at 682.

204. See European Communities Act, No. 27, (1972). Section 1 defines the treaties governing the EC. The definition is included in the European Communities (Amendment) Act, 1994, which is made up of the ECSC, the Euratom, the EC Treaty, the Accession Treaties, the SEA and the TEU. See Byrne & McCutcheon, supra note 26, at 683. This definition does not include the parts of the SEA and TEU that fall outside of the jurisdiction of the ECJ (i.e., the other “two pillars”). See id. Section 2 provides an explicit statement that the treaties and the acts of the EC institutions are binding and part of Ireland’s domestic law. See id. at 684. Section 2 of the 1972 Act states: “From the 1st day of January, 1973, the treaties governing the European Communities and the existing and future acts adopted by the institutions of those Communities shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in those treaties.” Id.

205. See id. at 682.

206. See id. at 683.


209. See Byrne & McCutcheon, supra note 26, at 684.

210. See id.
how the abortion issue has been avoided, both by the Irish courts and by
the ECJ.

IV. A HISTORY OF AVOIDING CONFLICT

"In 1861 the Irish legislature enacted the Offences Against the Person Act,"211 which made self-induced and aided abortions illegal for both the mother and any person who assists the mother.212 This Act remained in force213 and untouched through 1983, when the Eighth Amendment to the Constitution Act was passed.214 The Eighth Amendment inserted Article 40.3.3⁰, which states: "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."215 This Amendment was ratified in reaction to the fears raised by the liberal interpretations of individual rights by both Irish and American courts. These liberal decisions threatened, or presumably threatened, the Catholic objections to abortion that the Irish courts had previously interpreted as part of Irish law.216 The Amendment brought the abortion issue in Ireland to the forefront, resulting in political movements and a series of cases challenging the Amendment. This set up a possible collision between Irish

211. Weinstein, supra note 1, at 170.
212. See id. at 170 nn.37-38 (reproducing sections 58 and 59 of the Act).
213. See id. at 171 & n.44 (explaining the 1921 Constitution (Saorstát Éireann) and the 1937 Constitution maintained English law, unless repealed, amended, or inconsistent with the recognized Constitution).
214. See id. at 172-73.
215. BUNREACHT NA HÉIREANN art. 40.3.3°.
216. The Amendment was in reaction to fears raised by the more secular interpretation of the Constitution seen in McGee v. Attorney General, [1974] I.R. 284 (Ir. S.C.), as opposed to the natural law approach seen in Norris v. Attorney General, [1984] I.R. 36 (Ir. S.C.). See BYRNE & McCUTCHEON, supra note 26, at 644. The McGee case held that the Constitutional right to privacy prohibited the State from interfering with the right of married couples to use contraceptives. See id. This deviation from the natural law approach, and the extension of the right to privacy to oppose a ban on abortion in the United States, mobilized the Pro-Life Amendment Campaign. See Weinstein, supra note 1, at 172-73; see also Liam Hamilton, Matters of Life and Death, 65 FORDHAM L. REV. 543, 548 (1996) (discussing Griswold v. Connecticut, 381 U.S. 479 (1965)). In this article, Judge Hamilton stated that:

A majority of the United States Supreme Court, led by Justice Blackmun, held that the right to privacy identified in Griswold v. Connecticut extended to "a woman's decision whether or not to terminate her pregnancy." Once the Irish Supreme Court had found a right to marital privacy in McGee, it was feared by some commentators that the Court might one day extend this right to cover abortions, in the same manner as Roe v. Wade.

In truth, this seemed an unlikely prospect; abortion had been a statutory offence since 1861, and both popular and judicial opinion seemed to support this.

Id. (footnotes omitted).
moral sovereignty and the EC. This Part examines how, despite this heightened attention, the abortion confrontation has been avoided.

A. The Courts

Both the Irish courts and the ECJ have avoided the conflict surrounding abortion. This Part examines how each court has deferred any real decision despite the opportunities.

1. SPUC v. Open Door

The first case challenging the Eighth Amendment was Attorney General ex rel. The Society for the Protection of Unborn Children Ireland Ltd. v. Open Door Counselling Ltd.\(^{217}\) ("SPUC v. Open Door"). The High Court ruled that the counseling and assisting of pregnant women to travel abroad to obtain an abortion was illegal under Article 40.3.3°.\(^{218}\) The High Court, awarding injunctive relief, found that the defendants’ activities amounted to a restrainable activity.\(^{219}\) More interestingly, the High Court determined that EC law did not apply because the proceedings and the defendants’ activities were limited to activities within the State.\(^{220}\) The defendants’ contention that EC law entitled them to operate was rejected.\(^{221}\) The High Court ruling was upheld on appeal to the Supreme Court where Chief Justice Finlay dismissed all issues raised by the appellants.\(^{222}\)

With their standing assured, SPUC sought to prevent abortion information from being disseminated in student handbooks distributed on Irish college campuses.\(^{223}\) In Society for the Protection of Unborn Chil-

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218. See Weinstein, supra note 1, at 176 & n.87.
219. See id. at 176.
221. See id.
222. See Weinstein, supra note 1, at 177 (citing SPUC v. Open Door, [1988] I.R. at 619). SPUC appealed to the Supreme Court, which ultimately decided that SPUC had standing to sue. SPUC never pursued the remand in High Court. See id. at 180. This issue, whether SPUC had standing to bring this case before the Court, was raised again in SPUC v. Coogan, [1989] I.R. 734 (Ir. H. Ct.), where the High Court dismissed the case on a lack of standing. See id. at 179. Further, in SPUC v. Open Door, with the ECJ no longer available to the appellants, applications were filed with the European Commission of Human Rights ("ECHR Commission"). See id. at 178. The ECHR Commission found that the injunction was not authorized by law because it violated Article 10(1) of the ECHR. See id. The "non-directive" counseling practiced by the appellants was not included within the activities prohibited by Article 40.3.3° of the Irish Constitution, and the counseling was protected by Article 10(1) of the ECHR, guaranteeing freedom of expression. See id. The case was referred to the European Court of Human Rights for adjudication. See id.
dren (Ireland) Ltd. v. Grogan ("SPUC v. Grogan"), due to their publication of information on abortion clinics located in the United Kingdom, the defendants were accused of violating Article 40.3.3'. The High Court acknowledged that the right to travel to avail oneself of services in other Member States is correlative to the right to receive information about these services. However, the High Court questioned whether this right to receive information gave rise to the right to distribute the information. For this issue, the High Court exercised its referral option under Article 234 of the EC Treaty.

While the High Court awaited the response of the ECJ, SPUC appealed the action to the Irish Supreme Court. The Supreme Court granted an injunction based on the decision of SPUC v. Open Door, stating that "[i]t is clearly the fact that such information is conveyed to pregnant women, and not the method of communication which creates the unconstitutional illegality." As to the outcome of the ECJ referral, Chief Justice Finlay wrote that if "some aspect of European Community law affects the activities of the defendants impugned in this case, the consequence of that decision on these constitutionally guaranteed rights and their protection by the courts will then fall to be considered by these courts." In his concurring opinion, Justice Walsh said, "[i]n the last analysis only this Court can decide finally what are the effects of the interaction of the Eighth Amendment of the Constitution and the Third Amendment of the Constitution," a statement seemingly contrary to the principles of direct effect and supremacy.

2. ECJ Ruling on SPUC v. Grogan

What would have been the first direct conflict of EC law and Irish abortion law was effectively dodged by the ECJ. The High Court, in SPUC v. Grogan, referred three questions under Article 234:

224. Id.
225. See id. at 761; Weinstein, supra note 1, at 180.
226. See Weinstein, supra note 1, at 182 n.125.
227. See id. at 182.
228. See supra note 71 and accompanying text.
229. See Weinstein, supra note 1, at 182.
230. See id.
1. Does the organized activity or process of carrying out an abortion or the medical termination of pregnancy come within the definition of “services” provided for in Article 60 [currently Article 50] of the Treaty establishing the European Economic Community?

2. In the absence of any measures providing for the approximation of the laws of Member States concerning the organized activity or process of carrying out an abortion or the medical termination of pregnancy, can a Member State prohibit the distribution of specific information about the identity, location and means of communication with a specified clinic or clinics in another Member State where abortions are performed?

3. Is there a right at Community law in a person in Member State A to distribute specific information about the identity, location and means of communication with a specified clinic or clinics in Member State B where abortions are performed, where the provision of abortion is prohibited under both the Constitution and the criminal law of Member State A but is lawful under certain conditions in Member State B?

In his Opinion, the Advocate General stated that, as a result of the public policy questions related to abortion and the right to life of the unborn, the ECJ should consider the public policy justification. The Advocate General concluded that the restriction on information in the case passed the proportionality test. The central purpose of the ban on dissemination of information is to protect the right to life of the unborn, as safeguarded by the Constitution. Thus, Ireland’s “decision to concentrate the prohibition on practices . . . [as in] the distribution of information by way of assistance—which [the Irish] consider transgress most plainly that high priority value-judgment” ex-

235. Id. at I-4736-37, [1991] 3 C.M.L.R. at 888-89.
236. The judges in the ECJ are assisted by nine Advocate Generals. The Advocate Generals submit “opinions” containing detailed discussion of the background to the legal issues involved in a case, which may not be found in the judgments themselves, but frequently influence the outcome. See Shaw, supra note 12, at 134.
pressed in the Constitution, satisfies the test of proportionality.\footnote{240} However, the Advocate General’s Opinion was largely ignored.

On October 4, 1991, the ECJ delivered its decision.\footnote{241} The ECJ ruled that it had the competence to adjudicate on the issues of dissemination of information providing assistance to a pregnant woman, and the ability to travel to attain an abortion.\footnote{242} The ECJ concluded that a “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 [currently Article 50] of the Treaty.”\footnote{243} The ECJ relied on \textit{Luisi and Carbone}, where it was held that medical activities providing for remuneration are services under Article 50(d).\footnote{244} The ECJ refused SPUC’s contention that abortion cannot be regarded as being a service “on the grounds that it is grossly immoral and involves the destruction of the life of a human being, namely the unborn child.”\footnote{245} The ECJ would not “substitute its assessment [of a moral issue] for that of the legislature in those Member States where the activities in question are practised legally.”\footnote{246}

As for the second and third questions, the ECJ chose to opt out on a technicality. Instead of ruling on the right to disseminate the information, the ECJ found that the link between the activity of the student associations ... and medical terminations of pregnancies carried out in clinics in another Member State is too tenuous for the prohibition on the distribution of informa-

\footnote{240. Id. at I-4721, [1991] 3 C.M.L.R. at 875 (opinion of Advocate General Van Gerven).}
\footnote{241. See id. at I-4733, [1991] 3 C.M.L.R. at 887.}
\footnote{242. See id. at I-4738, [1991] 3 C.M.L.R. at 889. This Note will not address the argument that the ECJ cannot define its own competence; that it does not have Kompetenz-Kompetenz as found by the German Constitutional Court in the “Maastricht Decision.” See generally Theodor Schil- ling, \textit{The Autonomy of the Community Legal Order: An Analysis of Possible Foundations}, 37 \textit{HARV. INT’L L.J.} 389, 406 n.99 (1996) (defining Kompetenz-Kompetenz as “the jurisdiction to determine one’s own jurisdiction”); J.H.H. Weiler & Ulrich R. Halterm, \textit{The Autonomy of the Community Legal Order—Through the Looking Glass}, 37 \textit{HARV. INT’L L.J.} 411, 413 (1996) (denoting Kompetenz-Kompetenz as “the competence to declare or to determine the limits of the competences of the Community”).}
\footnote{246. Id.; see also Case C-249/96, Grant v. South-West Trains Ltd., 1998 E.C.R. I-621, I-628, [1998] 1 C.M.L.R. 993, 1000 (1998) (opinion of Advocate General Elmer) (referring to \textit{Grogan}, the Court stated that “[t]he Court has thus confirmed that the Treaty cannot be interpreted on the basis of the moral conceptions of a Member State”).}
tion to be capable of being regarded as a restriction within the meaning of Article 59 [currently Article 49] of the Treaty.\textsuperscript{247}

Because the student associations were not paid for the dissemination of the information by "an economic operator" (the clinics) in another Member State, Ireland’s prohibition “cannot be regarded as a restriction within the meaning of Article 59 [currently Article 49] of the Treaty.”\textsuperscript{248}

Since the prohibition cannot be regarded as a restriction under Article 49, old Article 62 (repealed by the Treaty of Amsterdam),\textsuperscript{249} which prohibits the enactment of new laws contrary to established EC law, cannot be invoked.\textsuperscript{250} The ECJ concluded that the "information constitutes a manifestation of freedom of expression and of the freedom to impart and receive information which is independent of the economic activity carried on by clinics established in another Member State;\textsuperscript{251} therefore, it is outside the jurisdiction of the ECJ.

The ECJ also addressed the invocation of ECHR protections. While the freedom to disseminate the information may be protected by ECHR Article 10(1), the ECJ reasoned that, despite its mandate to ensure compatibility of Member State legislation with the fundamental rights of ECHR,\textsuperscript{252} the national legislation lies “outside the scope of Community law,” and thus, outside the jurisdiction of the ECJ.\textsuperscript{253}

3. Attorney General v. X

On August 7, 1992, \textit{SPUC v. Grogan} again appeared before the Irish High Court.\textsuperscript{254} However, in the interim, Irish abortion law had changed forever with the decision of \textit{Attorney General v. X}.\textsuperscript{255} In February of 1992, the High Court granted the Attorney General an injunction prohibiting a fourteen-year old rape victim (who was suicidal because of the rape and resulting pregnancy) from leaving the State to obtain an

\textsuperscript{248} \textit{Id.}
\textsuperscript{249} \textit{See EC Treaty} art. 62, 1992 O.J. (C 224) at 23 (repealed by the Treaty of Amsterdam, 1997 O.J. (C 340) at 61), which states: “Save as otherwise provided in this Treaty, Member States shall not introduce any new restrictions on the freedom to provide services which have in fact been attained at the date of the entry into force of this Treaty.” \textit{Id.} The repeal had no effect on the outcome of this case, since it was not invoked.
\textsuperscript{251} \textit{Id.} at I-4740, [1991] 3 C.M.L.R. at 891.
\textsuperscript{255} \textit{See [1992]} 1 I.R. 1 (Ir. H. Ct.).
abortion in England. The High Court balanced the two rights protected in Article 40.3.30, the rights of the unborn child and the rights of the mother. Judge Costello, writing for the court, stated:

I am quite satisfied that there is a real and imminent danger to the life of the unborn and that if the court does not step in to protect it by means of the injunction sought its life will be terminated. The evidence also establishes that if the court grants the injunction sought there is a risk that the defendant may take her own life. But the risk that the defendant may take her own life if an order is made is much less and is of a different order of magnitude than the certainty that the life of the unborn will be terminated if the order is not made. I am strengthened in this view by the knowledge that the young girl has the benefit of the love and care and support of devoted parents who will help her through the difficult months ahead. It seems to me, therefore, that having had regard to the rights of the mother in this case, the court’s duty to protect the life of the unborn requires it to make the order sought.

Judge Costello adjudicated the case based on the Irish Constitution, and felt no compulsion to refer the case under Article 234 of the EC Treaty. The case was appealed, and the Supreme Court set aside the decision of the High Court. The rationale was based on “all the submissions from both sides on the constitutional issues arising, with the exception of questions which might have arisen under the provisions of [E]uropean law.” Through its holding, the Supreme Court avoided any issues concerning EC law.

While the Irish Supreme Court resolved what it considered to be the substantive issue of the case, it never truly considered the ECJ finding in Grogan protecting the right to travel abroad to avail one’s self of the service of abortion. Instead, the majority was of the opinion that the right to travel was not absolute and could not take precedence over

256. See Byrne & McCutcheon, supra note 26, at 646.
258. Id.
259. See id. at 13 (explaining that the court is “required to determine” Community law and “if that law conflicts with Irish law, including Irish constitutional law, then Community law will prevail”).
261. Id.
263. See Hamilton, supra note 216, at 555-56.
the right to life. Thus, Ireland was left with the following guidelines, as stated by Chief Justice Liam Hamilton in 1996:

(1) "if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible;"

(2) the dissemination of information with regard to abortion services available outside the State was unlawful; and

(3) travel abroad for the purpose of obtaining an abortion was unlawful and could be restrained.

Thus, while still avoiding a clash with EC law, the Supreme Court left Ireland with "the most ambiguous, confused and dangerous abortion law in Europe."

B. The Politicians

While the Irish courts and the ECJ were avoiding a clash, the politicians were at work trying to avoid the same conflict. In efforts to protect Article 40.3.3° as written, during the drafting of the TEU in the fall of 1991, Protocol 17 was added. This Protocol stated that nothing in the TEU shall affect the application of Article 40.3.3°. It was intended to immunize the "Eighth Amendment ... from any effects EC law might have on its application in Ireland." The fear was that ECJ case law could be used to override Article 40.3.3°, where the economic ties referred to in Grogan were present; the effect was to remove rights granted under EC law as a defense in abortion cases. While the political intent was to get anti-abortion backing for the TEU Referendum, after Attorney General v. X was decided, neither pro-choice nor anti-abortion groups wanted to maintain the status quo, so both groups campaigned against the TEU. The Member States refused to amend the Protocol for risk of more ratifications and re-ratification in some
States.\textsuperscript{272} Ireland's only resort was to sign a Solemn Declaration which stated "that the Protocol is not meant to '[l]imit freedom either to travel between Member States or, in accordance with EU law, by Irish legislation, to obtain information relating to services lawfully available in other Member States."\textsuperscript{273} Although the question remains whether this Solemn Declaration is legally binding, it was enough, along with the economic benefits\textsuperscript{274} and a promise of an abortion referendum,\textsuperscript{275} to secure ratification of the TEU by the Irish people on June 18, 1992.\textsuperscript{276}

C. The Voice of the People

The promised referendum\textsuperscript{277} was presented to the people of Ireland on November 25, 1992.\textsuperscript{278} The State once again avoided a direct clash with EC law, because with the passage of two of three Amendments Ireland fell in line with ECJ proclamations.\textsuperscript{279} In the rehearing of \textit{SPUC v. Grogan}, the Supreme Court still refused to lift the injunction on dissemination of information until the Oireachtas passed the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill of 1995.\textsuperscript{271} When the Bill was referred to the Supreme Court under Article 26 of the Irish Constitution,\textsuperscript{281} the Supreme Court spent consid-

\textsuperscript{272} See id. at 395.
\textsuperscript{273} Id.
\textsuperscript{274} See Weinstein, supra note 1, at 195 (explaining that Ireland had increased its level of prosperity since 1973 and the government predicted $10 billion net receipts from the EC over five years if the TEU was ratified).
\textsuperscript{275} See id. (commenting on Prime Minister Albert Reynolds' announcement that an abortion referendum for a Constitutional Amendment would be held in November 1992 to protect "the right of Irish women to travel to other European Community states and to be given information on abortion services outside of Ireland").
\textsuperscript{276} See Sterling, supra note 262, at 396. The legality and force of the Protocol and the Solemn Declaration are outside the scope of this Note.
\textsuperscript{277} See supra note 275 and accompanying text.
\textsuperscript{278} See Thirteenth Amendment of the Constitution Act, (1992) (adding the following language to Article 40.3.3: "This subsection shall not limit freedom to travel between the State and another state."); Fourteenth Amendment of the Constitution Act, (1992) (the following paragraph was inserted in Article 40.3.3: "This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.").
\textsuperscript{279} See Sterling, supra note 262, at 396.
\textsuperscript{280} See id. at 400.
\textsuperscript{281} See Bunreacht na hÉireann art. 26. This Article allows the President to refer a bill passed by both Houses of the Oireachtas to the Supreme Court which is required to pronounce on whether the bill, or any part of it is repugnant to the Constitution. See Byrne & McCutcheon, supra note 26, at 171. Interestingly, once the bill is found to not be repugnant, and the bill is signed into law by the President, the law is immune from any other constitutional challenge under Article 34.3.3. See id. at 173. This was the case for the Regulation of Information Bill of 1995.
erable time on the supremacy of constitutional law over natural law, but said nothing of EC law except that medical termination of pregnancy "constitutes a service within the meaning of Article 60 [currently Article 50] of the [EC] Treaty" and "[t]here can be no doubt but that the provisions of the [new Fourteenth Amendment relate, inter alia, to and include information relating to medical termination of pregnancy, performed in accordance with the law of the state in which it is carried out."

The Supreme Court maintained that while disseminating information was now lawful, abortion and assistance in obtaining an abortion are unlawful unless the test of "a real and substantial risk to the life, as distinct from the health, of the mother" has been met. The provisions of the Thirteenth or Fourteenth Amendment or those of the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill do not give a right to abortion or termination of pregnancy where none existed prior to their enactment. Thus, Ireland is still "within the realm of the derogations from the fundamental ... freedoms" guaranteed by Articles 49 and 50 of the EC Treaty, and, despite the evasive maneuvering and the constitutional amendments, the potential for conflict still exists between EC law and Article 40.3.3.

Part of the evasive maneuvering is based on the ECJ being unwilling to confront questions of morality head on. This unwillingness is seemingly due to the uncertainty of the ECJ's competence in the realm of Member States' moral issues. In light of the history of judicial activism discussed in Part II, if the issue is referred to the ECJ once again, they may not defer to a technical omission, but instead, the ECJ may take the question head on. Part V hypothesizes how the ECJ should answer an Article 234 referral to determine if Irish abortion law is incompatible with EC law.

V. IRISH LAW IN DIRECT CONFLICT WITH EC LAW

Since Ireland is still "within the realm of the derogations from the fundamental ... freedoms," it is not difficult to foresee a confrontation between Ireland and the ECJ on this issue. The fundamental freedoms conferred by Article 49 and 50 give individuals the right to chal-
challenging national law. Having classified abortion as a service, the ECJ could logically be faced with the question of whether Ireland's Article 40.3.3° represents restrictions on the freedom of movement or freedom to receive services that are incompatible with EC law. Should the ECJ rule that Article 40.3.3° is contrary to EC law, Ireland would be bound by the decision and would be required to change its Constitution.

Thus, the hypothetical questions which may be referred to the ECJ are:

(A) Is Ireland’s ban on abortion, as written in Article 40.3.3°, contrary or incompatible with EC law under Articles 49 and 50?

(B) Is Ireland’s current ban on traveling to another Member State to obtain an illegal termination of a pregnancy where such termination is legal under local law, without a threat to the life of the mother, incompatible with EC law?

(C) Is Ireland’s current ban on traveling to another Member State to allegedly obtain an illegal termination of a pregnancy where such termination is legal under local law, without a threat to the life of the mother, incompatible with EC law?

(D) Are the above restrictions necessary and not disproportionate to the aims of the national legislation?

Although the ECJ has left public morality questions to the Member State to determine on its own scale of values, it has never fully relinquished its competence over such issues. Member States have not retained exclusive jurisdiction over these matters, but have only been granted competence “in principle” by the ECJ. To avoid invocation of the public policy articles “at every turn,” which would effectively create multiple obstacles to the four freedoms, the ECJ has strictly interpreted the articles allowing derogation. The ECJ limits its role to determination of the incompatibility of national rules which claim protection un-

287. See supra notes 69-72 and accompanying text.
288. See supra Part III.
289. See Case C-1/96, The Queen v. Minister of Agriculture, Fisheries and Food, 1998 E.C.R. I-1251, I-1270, [1998] 2 C.M.L.R. 661, 678 (1998) (opinion of Advocate General Leger). This Note does not address the ramifications of Protocol 17. Protocol 17 would bring the public policy question outside the normal process for determining ECJ jurisdiction. This would defeat the purpose of this Note to test the extent to which the EC can override the moral doctrines of the Member States.
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under the guise of public policy that are not truly a matter of public morality.292

Thus, the ECJ maintains that it has the competence to carry out at least a minimal review of Article 40.3.30.293 The ECJ must consider: (1) if the national rule can rely on imperative requirements of public interest; (2) if the national rule is consistent or not incompatible with the aims laid down in the Treaty provisions; and (3) whether that rule passes the proportionality test.294

Although the ECJ has held that it has competence to assess concepts such as public policy, there is a "strictly national character" to the abortion question.295 The ECJ acknowledges that public morality varies from State to State, and that the ECJ has no part in judging the merits of each State's moral determinations.296 The ECJ has chosen to allow the States "sufficient discretion" in determining their own values.297 With the prohibition of discrimination being the common thread in strict interpretation of the articles allowing derogation, the ECJ has transplanted the law relating to goods to that relating to services.298 Therefore, it would be appropriate to employ the principle used in Article 30 cases which states "it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory."299 Furthermore, the Advocate General states, in The Queen v. Minister of Agriculture, Fisheries and Food,300 that "it is no part of the Court's task to judge values characterizing the public morality of a Member State and which are therefore quite specific to it."301 The ECJ has held that it is "necessary to allow national authorities sufficient discretion to determine the requirements which ensue from public morality, within the bounds imposed by the Treaty."302

293. See id.
297. Id.
301. Id. at I-1271, [1998] 2 C.M.L.R. at 680 (opinion of Advocate General Leger).
In light of the aforementioned precedent, it would be unlikely for
the ECJ to find that the right to life of the unborn is not an imperative
requirement of public interest. The incorporation of the ban into the
Irish Constitution validates the right to life of the unborn as a
"sufficiently serious threat to the requirements of public policy affect-
ing one of the fundamental interests of society."303 Ireland would be
entitled to invoke the ground of public policy for this genuine and suf-
ficiently serious threat affecting one of the fundamental interests of Irish
society.304 Thus, it can be concluded that the first requirement of the
ECJ's test can be met and the restriction on abortion and protection of
the right to life of the unborn is an imperative requirement of public in-
terest. This imperative requirement of public interest is common to
three of the hypothetical questions posed.305 What follows is the analysis
of the compatibility with EC law of each derogation presented by the
questions, and then the application of the principle of proportionality as
applied to each hypothetical. Each question is addressed in turn.

A. Is Ireland’s Ban on Abortion, as Written in
Article 40.3.3º, Contrary or Incompatible with
EC Law Under Articles 49 and 50?

The question of the ban on abortion is simple. "[S]trong grounds
can be put forward for holding that national rules which contain a gen-
eral prohibition of a specified activity and which are neither overtly nor
covertly discriminatory are not incompatible with Article 59 [currently
Article 49] of the Treaty."306 This precedent was set in Her Majesty's
Customs and Excise v. Schindler,307 in which the Court held that public
policy concerns justified legislation restricting the importation of lottery

303. Case C-159/90, Society for the Protection of Unborn Children Ireland Ltd. v. Grogan,
C.M.L.R. 800, 824 (1977)).
305. Also common to the three questions is that the ECJ has already ruled that abortion is a
C.M.L.R. at 890-91. The ECJ has also ruled that Article 40.3.3º "involves no discrimination on the
basis of nationality and must consequently be regarded as being applicable without distinction."
Schindler, 1994 E.C.R. at I-1094, [1995] 1 C.M.L.R. at 45. Also, there has been no harmonization
of abortion laws which would preclude reliance on the public policy exceptions of Articles 46 and
55 of the EC Treaty. See supra Part II.E.
Gulmann).
advertisements and tickets into England. Relying on Van Wesemael and Koestler, the ECJ concluded that the necessity for "order in society" justified the invocation of Article 56 (currently Article 46). The ECJ stated that it is not possible to disregard the moral, religious, or cultural aspects of the Member States in these situations. These considerations "are such as to justify restrictions, as regards Article 59 [currently Article 49] of the Treaty, which may go so far as to prohibit [the activity] in a Member State." The ECJ held that the specific facts in Schindler justified a "sufficient degree of latitude" be given to national authorities to maintain "order in society." Given this precedent which establishes the evils of foreign lotteries as a sufficient threat to "order in society," it would be difficult to justify that the freedoms granted by current Article 49 could invalidate Article 40.3.3°, which protects the right to life of the unborn.

B. Is Ireland's Current Ban on Traveling to Another Member State to Obtain an Illegal Termination of a Pregnancy Where Such Termination Is Legal Under Local Law, Without a Threat to the Life of the Mother, Incompatible with EC Law?

This question concerns an issue separate from a total ban within Ireland. Here, Article 40.3.3° is a derogation of the right to avail oneself of services and freedom of movement of persons conferred by Articles 49 and 50 and legal in another Member State, even though the Amendment specifically states that it will not interfere with an individual's freedom to travel to another State. The words of the Amendment would seem to protect only against the overbroad restriction on any pregnant woman from traveling, as mentioned by the Advocate General in SPUC v. Grogan. Thus, the ECJ needs to determine whether this restraint is incompatible with EC law.

309. See id. at 1-1096, [1995] 1 C.M.L.R. at 47.
310. See id.
311. Id.
312. See id. at 1-1097, [1995] 1 C.M.L.R. at 47.
313. Id.
Given that there is an imperative requirement of public interest as discussed above, the ECJ must balance the relevant rights. For the ECJ to balance the freedom of movement or the right to travel to avail oneself of services with a restriction on traveling abroad to unlawfully terminate a pregnancy, the ECJ must balance that right with the right to life of the unborn. The right to life of the unborn is clearly a fundamental right recognized and protected by the Irish Constitution.\(^6\) The right to an abortion is not. Furthermore, there are clearly no traditions common to the Member States with regards to the unborn, only a diverse array of abortion laws.\(^3\) With such diversity, and the absence of harmonization measures regarding abortion at the Community level,\(^3\) it has been established by the ECJ that such issues “must be left to the Member States, whose decisions will reflect choices that are largely determined by the social and cultural circumstances prevailing in those countries.”\(^3\)

The Irish court has determined this right to travel is not absolute.\(^3\) Also, the ECJ has held that the fundamental freedoms are strong, but rebuttable, presumptions.\(^3\) Considering that the right to travel to avail oneself of a service is not absolute, and the requirement to respect the Constitutions of Member States,\(^3\) the ECJ would be hard pressed not to find that the effects of the restriction are “not incompatible” with EC law. To find otherwise, the ECJ must conclude that the fetus has no right to life, or a right less than the mother’s right to travel for services or her right to freedom of movement. Without objective scientific evidence on the determination on when life begins, and when rights begin, the moral question should be left to the Irish.\(^3\)

316. The argument that the amendments are unconstitutional because of Article 62 of the EC Treaty is not addressed in this Note. The Article was repealed by the Treaty of Amsterdam.


320. See Hamilton, supra note 216, at 556; supra note 264 and accompanying text.

321. See Bibas, supra note 33, at 268; supra note 140 and accompanying text.


The argument that “other” human rights that the ECJ has incorporated into the “general principles of law” may be drawn upon in this case is untenable.\textsuperscript{324} In \textit{J. Nold v. Commission},\textsuperscript{325} the ECJ found that “fundamental rights form an integral part of the general principles of law which it enforces.”\textsuperscript{326} In safeguarding these rights, the ECJ is bound to draw inspiration from constitutional traditions common to the Member States.\textsuperscript{327} Abortion has no constitutional traditions common to the Member States,\textsuperscript{328} and it cannot be drawn on for protection here.

The ECJ has also incorporated rights granted by the ECHR.\textsuperscript{329} The ECHR has special significance and the ECJ has held that the EC cannot accept measures that are incompatible with the observance of human rights recognized by the ECHR.\textsuperscript{330} While the ECHR has ruled that the ban on non-directive counseling violated ECHR Article 10(1) and that such a ban was disproportionate to the aim of protecting the right to life of the unborn because the counseling was non-directive,\textsuperscript{331} they have never ruled as to when life, and rights of that life, begin.\textsuperscript{332} The ECHR declined to include the unborn fetus in the class protected under Article 2(1), specifically excluding the fetus from the Article’s grant of right to life.\textsuperscript{333} Instead, the European Commission of Human Rights upholds an English regulation based on the fact that the balance is struck between the right to life of the mother with the right to life of the fetus.\textsuperscript{334} Thus, while there is no specific ECHR ruling for the ECJ to incorporate into its general principles, it would seem that the Commission would support the balancing of rights expressed by Article 40.3.3.\textsuperscript{3} Furthermore, although the ECJ acknowledges that respect for the fundamental rights which form an integral part of those general principles of law is a condition of the legality of EC acts, those rights cannot in themselves have

\textsuperscript{324} See supra Part II.C.
\textsuperscript{326} Id. at 507, [1974] 2 C.M.L.R. at 354.
\textsuperscript{327} See id.
\textsuperscript{329} See supra Part II.C.
\textsuperscript{331} See Weinstein, supra note 1, at 189.
\textsuperscript{334} See id. at 252-53.
the effect of extending the scope of the EC Treaty provisions beyond the competences granted. The ECJ has left these determinations to the Member States.

C. Is Ireland’s Current Ban on Traveling to Another Member State to Allegedly Obtain an Illegal Termination of a Pregnancy Where Such Termination Is Legal Under Local Law, Without a Threat to the Life of the Mother, Incompatible with EC Law?

This question is an extension of the issue addressed above, and it can be reasoned that the ECJ still lacks the jurisdiction to balance the ethical issue unique to the Member State against the rights reserved under Articles 49 and 50. The Member State has the jurisdiction to protect itself from potential threats to public policy, as exemplified in Schindler. The ECJ held that the prohibition on materials intended to enable nationals of the Member State to participate in gambling in another Member State “cannot be regarded as a measure involving an unjustified interference with the freedom to provide services.” This upholds a preemptive restriction that “is a necessary part of the protection which that Member State seeks to secure in its territory in relation to [the evils].” Among the considerations that the ECJ concluded were valid are prevention of crime and “to avoid stimulating demand ... [for a service] which has damaging social consequences.” These considerations concern the “consumers” as well as the maintenance of order in society, and the ECJ has already held that these objectives “figure among those which can justify restrictions on freedom to provide services,” or its corollary, to receive services.

Thus, it can be reasoned that the preemptive restriction on a woman who allegedly will travel overseas to receive an illegal abortion
can be found compatible with EC law. Without a threat to the life of the mother, Article 40.3.3° makes the abortion illegal because Ireland is bound by its Constitution to protect the right to life of the unborn. For Ireland to restrict access to a service available in another Member State to prevent a criminal act against the unborn child seems justified under the reasoning in J. Nold v. Commission. The requirement of due process would be left to Ireland under the theory of subsidiarity, and Irish courts would be required to consider protections under EC law, including ECHR principles, and protections that already exist under the Irish Constitution. However, these considerations are unable to invalidate the restrictions on allowing a woman to travel to avail herself of an illegal act. As stated in Schindler, these “particular factors justify national authorities having a sufficient degree of latitude to determine what is required to protect [its citizens] and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society.”

D. Are the Above Restrictions Necessary and not Disproportionate to the Aims of the National Legislation?

The principle of proportionality must be employed to ensure that the restriction is necessary and the national rule does not have any effects beyond what is necessary. In Question A, the determination of “necessity” is straightforward. The ban itself is on the procedure of abortion, thus it is necessary to restrict this procedure. As to the restriction on a woman traveling abroad to avail herself of an abortion, this restriction is also necessary and proportional. In R v. Human Fertilisation and Embryology Authority, the English Court of Appeal concluded that “[o]ne justification which is recognised by the authorities . . . is that the Member State is going no further than is necessary to prevent persons from evading the application of national legislation.” Traveling to avail oneself of an abortion is an illegal activity that is a

342. See supra notes 257-58 and accompanying text.
344. See supra notes 42-44 and accompanying text.
346. See SHAiW, supra note 12, at 143.
threat to the right to life of the unborn; Article 40.3.3° seeks to protect that right. Since there is currently no technology available which would allow the insurance of the right to life of the unborn without attempting to restrict the mother’s ability to terminate the pregnancy, the restraint cannot be beyond what is necessary to protect this right.

The ECJ, therefore, should answer Questions A, B and C by replying that it is not possible to disregard the moral, religious and cultural aspects of abortion in the Member States. The answer to Question D should reflect that in all three of the above scenarios, the restrictions are necessary and not disproportionate to the aims of the national legislation. Characteristics unique to each Member State justify that a sufficient degree of latitude be given to the national authorities to maintain order in society. This latitude is the intent of Articles 46 and 55 of the EC Treaty, and will allow national determination of matters which are imperative requirements of public interest. Since the right of the mother to travel to avail herself of an abortion is diametrically opposed to the right to life of the unborn marked by Article 40.3.3°, the moral, religious, and cultural aspects of this balancing requires the ECJ to defer judgment to the national courts.

VI. CONCLUSION

In Attorney General v. X, the Supreme Court of Ireland grounded its reasoning exclusively in Irish constitutional law, placing no reliance upon EC legal principles. Chief Justice Finlay reasoned that because no EC legal issue had been raised, neither an application of EC law nor a reference to the ECJ was necessary. Some commentators believe that this case could have easily been referred to the ECJ under Articles 49 and 50, and the ECJ could have found Ireland’s law contrary or inconsistent with these Articles. However, the analysis presented above does not support the commentators’ finding.

Neither express jurisdiction nor general principles derived by the ECJ give the Court competence to value the right to life of the unborn as subordinate to the rights of the mother, be it the mother’s right to avail herself of services, her right to freedom of movement, or her right to life. Based on the precedent found in EC law, the ECJ simply does not have the competence to balance these rights. These moral judgments are

350. See id.
351. See Hilbert, supra note 112, at 1143.
better left to the sovereignty of the Member States, where the affects on socio-cultural norms can be properly factored into the equation.

Ireland is capable of deciding these issues. And it is Ireland's responsibility, not the EC's, to adapt their laws to the will of the Irish people on moral issues. This is a process that has already begun. Restrictions have already softened in response to the needs of Ireland's changing society. These needs will continue to be a factor in this debate, as will EC law. But it is for the Irish to decide, no one else.

Donald A. MacLean*

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