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The Irish Abortion Debate: Substantive Rights and Affecting Commerce Jurisprudential Models

Anne M. Hilbert

NOTES

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ABSTRACT

This Note examines the balance of power between the European Community and its Member States through the window of the Irish abortion debate. The framework for that debate has been shaped largely by two judicial bodies: the Irish judiciary and the European Court of Justice (ECJ), the judicial arm of the European Community. The Irish judiciary has approached the abortion question through an analysis of the content of substantive individual rights protected by the Irish Constitution. The ECJ, on the other hand, has addressed abortion from the standpoint of the European Community's goal of uninhibited commerce between Member States. These two approaches have produced different sets of protected rights related to abortion. The need to choose one set or the other drove Ireland to referendum in 1992, and the Irish people chose the package of rights protected by the ECJ's "affecting commerce" jurisprudential model. This Note analyzes and compares the affecting commerce model and the Irish judiciary's "substantive rights" model as applied to abortion. The Author concludes that the adoption by Ireland of the abortion rights protected under the affecting commerce model, although it may end some confusion, may be indicative of a shift in the power to define the scope of important personal liberties from Member States to the central

authority of the European Community. This centralization may be beyond the original contemplation of the states that joined to form the Community.

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I. INTRODUCTION

In the last thirty years the judicial arm of the United States has demonstrated two ways in which a judiciary may expand the protections afforded to the personal rights of citizens. First, the judiciary may extend the Constitution's coverage of personal rights by discovering unenumerated, implicitly protected substantive rights.[1] Second, a court may indirectly extend the Constitution's reach under the "affecting commerce" model by treating personal rights as constitutionally protected commercial relationships.[2]

The European Court of Justice (ECJ), the judicial branch of the European Community,[3] and the domestic courts of the European Community Member States also have employed the sub-

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1. In the mid-1960s, the United States Supreme Court embarked on a re-exploration of the Bill of Rights' substantive content, discovering additional, unenumerated, but constitutionally protected, personal liberties. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that zone of privacy created by unenumerated constitutional guarantees prohibits state from criminalizing use of contraceptives by married persons); Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending right of privacy to the decision whether to bear or beget a child); Roe v. Wade, 410 U.S. 113 (1973) (extending right of privacy to a woman's decision whether or not to terminate her pregnancy); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10 (2d ed. 1988); LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 93-94 (1990).

2. In NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), the United States Supreme Court first employed the affecting commerce rationale to justify regulating activities on the basis of their practical effect on interstate commerce. GERALD GUNTHER, CONSTITUTIONAL LAW 128 (12th ed. 1991). The language "affecting commerce" was drawn from the National Labor Relations Act of 1935, the statute challenged in the case. *Jones & Laughlin Steel*, 301 U.S. at 6-7. Section 2(7) of the National Labor Relations Act defined "affecting commerce" as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a . . . dispute burdening or obstructing commerce or the free flow of commerce." *Id.*

At the same time the United States Supreme Court began exploring the extent of unenumerated substantive rights relating to privacy and procreation, it also sought to ensure other personal liberties under the Commerce Clause by striking down prejudicial practices which interfered with interstate commerce. Congress' power to regulate via the Commerce Clause provided the constitutional foundation for the passage of the Civil Rights Act of 1964. GUNTHER, *supra*, at 145-51; TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 1, § 5-6. The Supreme Court upheld the constitutionality of the Civil Rights Act as a proper exercise of Congress' Commerce Clause power under a test that inquired, first, whether the regulated activity affected interstate commerce and, second, whether the activity had a substantial relation to the national interest. Katzenbach v. McClung, 379 U.S. 294, 301-05 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241, 255-262 (1964).

3. GEORGE A. BERMANN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 69 (1993).

stantive rights and affecting commerce models as means of protecting individual rights. As an entity created primarily for economic reasons, the European Community does not purport to offer personal freedoms to its citizens and places the main responsibility for guaranteeing protection of individual rights on the separate Member States.[4] The freedoms protected by the European Community relate almost exclusively to its goal of economic integration,[5] and the ECJ has relied upon the affecting commerce model to further that goal.

Although the courts of Member States have allowed the ECJ to remove economic roadblocks between states, these courts have not abdicated their role as interpreters of their own constitutions. Domestic courts of Member States continue to define the content of their respective constitutions by examining the substantive guarantees that they contain.[6] Despite the ECJ's use of the affecting commerce model, domestic courts have preserved the vitality of the substantive rights jurisprudential model.[7]

The European Community's jurisdictional mandate[8] and the continuing role played by the domestic courts of Member States allow the possibility that the ECJ and a Member State's court could adjudicate the same issue using two different jurisprudential models. The recent abortion debate in Ireland provides an example of the simultaneous application of the substantive rights and affecting commerce models to the same issue. In considering the Irish government's ability to limit access to abortions, Irish courts engaged in a painstaking analysis of the nature of individual substantive rights guaranteed by their constitution.[9] By contrast, the ECJ characterized the Irish abortion debate as implicating economic rights relating to unencumbered transborder access to goods and services.[10] The application of the two models has provided two distinct jurisprudential frameworks for considering the related issues of whether to allow

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4. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]. The EEC Treaty contains no equivalent to the United States Constitution's Bill of Rights. Diarmuid Rossa Phelan, *Right to Life of the Unborn v. Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union*, 55 MOD. L. REV. 670, 676-77 (1992).

5. JOSEPHINE STEINER, TEXTBOOK ON EEC LAW 6-7 (3d ed. 1992).

6. *See generally* HENRY G. SCHERMERS & DENIS F. WAELBROECK, JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES 386-90 (5th ed. 1992).

7. *Id.* at 116. This preservation has been accomplished implicitly by means of the continued resort to the domestic legal order by the national judiciaries of the Member States. *Id.*

8. *See infra* part V.A.

9. *See infra* part IV.

10. *See infra* part V.B.

abortions in Ireland and whether to allow women to travel abroad to receive abortions.[11] In turn, these models have shaped the nature of the Irish political debate on abortion.

This Note examines the substantive rights and affecting commerce models as applied to the issue of the availability of abortion both inside and outside Ireland. It explores the evolution of the two approaches and compares their implications for the protection of individual rights. Part II considers the Irish Constitution's substantive guarantees and the scope of Irish judicial review. Next, Part III presents the evolution of the Irish judiciary's inquiry into the constitutional protection of unenumerated substantive rights, and Part IV discusses the Irish judiciary's use of the substantive rights approach in the context of abortion. In Part V, the Note turns to the commercial rights and freedoms guaranteed under the EEC Treaty and the ECJ's application of the affecting commerce model to European Community legal questions raised by Irish abortion regulations. Part VI weighs the relative merits of the Irish and European models and their place in the larger scheme of a unified Europe. The results of the November 1992 referendum, through which Irish voters presented with the competing visions of these models chose to elevate to constitutional status the package of rights protected under the affecting commerce approach, are also examined in Part VI. The Note concludes that, while the affecting commerce referendum result ironically may have provided the Irish judiciary with new guidance as to the abortion-related substantive protections available under the constitution, the larger implications of the affecting commerce model are potentially troublesome for the future balance of power between the European Community central government and Member States.

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11. The number of Irish women travelling to the United Kingdom each year to obtain abortions has grown significantly in recent years. Official statistics for the number of abortions performed on Irish women in the United Kingdom for the years 1968 through 1991 are as follows: 1968-64; 1969-122; 1970-261; 1971-577; 1972-974; 1973-1192; 1974-1406; 1975-1572; 1976-1802; 1977-2183; 1978-2533; 1979-2767; 1980-3380; 1981-3598; 1982-3650; 1983-3677; 1984-3946; 1985-3887; 1986-3918; 1987-3673; 1988-3839; 1989-3721; 1991-4152. These figures actually may underrepresent the true numbers because many abortions may not be reported. Peter Charleton, *Judicial Discretion in Abortion: The Irish Perspective*, 6 INT'L J. L. & FAM. 349, 365-66 (1992) (compiling statistics of the United Kingdom Office of Censuses and Surveys).

II. THE IRISH CONSTITUTION AND JUDICIAL REVIEW

A. *The Irish Constitution: History and Content*

The text of the current Irish Constitution prominently reflects Ireland's peculiar history and social makeup. First conquered by the English in 1171,[12] Ireland existed uneasily for centuries as a colony under the rule of the British Crown.[13] Independence for the Republic of Ireland was achieved in 1937 when the populace ratified a constitution that created a state with no legal relationship to the United Kingdom.[14]

The Constitution of 1937, still in force today, reflects two unique aspects of Ireland's political evolution.[15] The Catholic nationalism that marked the Irish drive to independence[16] and the British-derived concept that the state's ability to infringe upon the citizens' rights should be limited both flavor this document.[17] The elevation of the Catholic religion is evident in the rhetoric of the constitution's Preamble and in the spirit of several of the Articles on Fundamental Rights, specifically the provisions addressing education and the family.[18] In fact, prior

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12. D. GEORGE BOYCE, NATIONALISM IN IRELAND 29 (2d ed. 1991). "Conquered" is perhaps too strong a term, for many of the Irish ruling class actually welcomed the English. *Id.*

13. For a historical overview of British rule in Ireland, see *id.*

14. DAVID GWYNN MORGAN, CONSTITUTIONAL LAW OF IRELAND 23-24 (2d ed. 1990). Serious agitation for independent home rule began during the 19th century. Jay A. Sigler, *Constitutional Chronology to 1982*, *in* 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (IRELAND) 1, 5 (Albert P. Blaustein & Gilbert H. Flanz eds., 1988). After years of British parliamentary intransigence over various Home Rule Bills, and in the wake of growing Irish militancy, an independent *Dáil Éireann* (Assembly of Ireland) was formed in 1918. MORGAN, *supra*, at 21. The following year, this body proclaimed the Irish Free State and promulgated the first Irish Constitution. *Id.* at 21-22. However, even with the establishment of a legislature and the publication of a constitution, Ireland technically remained bound to the United Kingdom until passage of The Republic of Ireland Act in 1948. *Id.* at 23-24.

15. BASIL CHUBB, THE POLITICS OF THE IRISH CONSTITUTION 4-13, 33-44 (1991).

16. Gerard Hogan, *Constitutional Analysis*, *in* 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (IRELAND), *supra* note 14, at 15, 17. Religious differences severely hindered attempts to integrate Ireland into the British state, and after several years Catholicism became hopelessly intertwined with Irish national self-identity. For an in-depth analysis of the interlocking nature of religious and national identity in Ireland, see SEAN CRONIN, IRISH NATIONALISM (1981); JOHN FULTON, THE TRAGEDY OF BELIEF (1991).

17. CHUBB, *supra* note 15, at 26. Personal rights derived from the British liberal tradition and incorporated into the Irish Constitution include freedom of religion, freedom of association, habeas corpus, and privacy in the home. *Id.*

18. Paul W. Butler & David L. Gregory, *A Not So Distant Mirror: Federalism and the Role of Natural Law in the United States, the Republic of Ireland, and the European Community*, 25 VAND. J. TRANSNAT'L L. 429, 446 (1992). The authors

to its repeal in 1972, Article 44.1.2 explicitly recognized the special position of the Catholic Church in Ireland's social fabric.[19] The Irish Constitution also evinces British liberalism and its concern with individual liberty.[20] For example, Article 40.3 provides that the state shall respect and, as far as possible, defend the personal and property rights of its citizens.[21] Moreover, the Irish Constitution's Articles on Fundamental Rights guarantee personal rights such as freedom of speech,[22] freedom of religion,[23] inviolability of the home,[24] and habeas corpus.[25]

B. *Judicial Review in the Irish Judicial System*

The Irish Constitution also enunciates the role to be played by the judicial branch in the overall governmental structure. Article 34 provides that justice shall be administered in courts established by the Irish Parliament.[26] This Article also specifies that the High Court[27] and the Irish Supreme Court shall have

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note, "The structure and language of the Constitution reveal a comparatively well-defined collective conscience seeking justice through the prism of Catholic morality." *Id.*

19. IR. CONST. art. 44.1.2 (repealed 1972), *quoted in* Butler & Gregory, *supra* note 18, at 450.

20. *See supra* note 17 and accompanying text.

21. Prior to the passage of the Eighth Amendment in 1983, Article 40.3 read:

> 1. The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
>
> 2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.

IR. CONST. art. 40.3.1-2, *reprinted in* 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (IRELAND), *supra* note 14, at 66.

22. *Id.* art. 40.6.1, at 66-67.

23. *Id.* art. 44.2, at 71-72.

24. *Id.* art. 40.5, at 67.

25. *Id.* art. 40.4, at 67.

26. *Id.* art. 34, at 60-62.

27. The Irish High Court is equivalent in many respects to the United States Circuit Courts of Appeals. The Irish High Court is endowed by the constitution with original jurisdiction to determine all matters civil or criminal, including constitutional questions. *Id.* art. 34.3.1-2, at 60-61. The High Court is at the judicial level immediately below the Supreme Court, which enjoys appellate jurisdiction over all decisions of the High Court. *Id.* art. 34.4.3, at 61. High Court judges are appointed for life tenure by the executive branch. *Id.* art. 35.1-4, at 63. *Cf.* U.S. CONST. art. III.

jurisdiction over the constitutionality of any law,[28] bestowing upon these courts the power of judicial review.[29] The constitution's guarantee of judicial independence buttresses this power.[30] By providing for independent judicial review, the Irish Constitution entrusts the ultimate function of interpretation of its content to the courts.[31] The Irish courts have grown more confident and active in the exercise of judicial review during the last quarter century.[32]

III. THE IRISH SUBSTANTIVE RIGHTS MODEL: CONTENT AND DEVELOPMENT

In exercising judicial review, the Irish judiciary often has been forced to grapple with and attempt to harmonize the differing interests of the Catholic bias and the desire to protect individual liberty manifest in the Irish Constitution.[33] When reconciliation has proven impossible, the Irish judiciary has been forced to choose between the two influences.[34] In modern times, the concern for protecting individual liberty has come to dominate Irish jurisprudence, but religious values nevertheless remain an important part of courts' considerations.[35] The evolution of Irish jurisprudence regarding fundamental rights protected by Articles 40 through 44 reflects the clash of competing values and an activist approach by the judiciary in

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28. IR. CONST. art. 34, *reprinted in* 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (IRELAND), *supra* note 14, at 60-62.

29. Under the doctrine of judicial review developed by the Irish courts, "[i]t is emphatically the province and duty of the judicial department to [s]ay what the law is." This language, taken from Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), is particularly appropriate in light of the similarities between the exercise of judicial review by the Irish courts and the United States Supreme Court. PAUL C. BARTHOLOMEW, THE IRISH JUDICIARY 18 (1971).

30. Article 35.2 of the Irish Constitution provides that "[a]ll judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law." IR. CONST. art. 35.2, *reprinted in* 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (IRELAND), *supra* note 14, at 63.

31. Creating a political system and environment in which judicial review could flourish is considered one of the Irish Constitution's great achievements. Hogan, *supra* note 16, at 18.

32. Francis William O'Brien, *Judicial Review in Ireland*, 9 ST. LOUIS U. PUB. L. REV. 587, 588-89 (1990).

33. *See* Butler & Gregory, *supra* note 18, at 432.

34. *Id.* at 452.

35. *Id.* at 455-58.

defining the scope of constitutional guarantees.[36] Beginning in 1963 with *Ryan v. Attorney General*,[37] the High and Supreme Courts embarked on an examination of the unenumerated rights protected under the constitution. In *Ryan* and its progeny, the Irish judiciary laid the foundations for the reasoning that later marked its decisions relating to abortion, reasoning focused on the substantive content of the protections of the Irish Constitution.

A. Ryan v. Attorney General

The Irish judiciary's activist approach to protecting individual liberties originated in a challenge of a fluoridation law by a plaintiff claiming that the addition of fluoride to the public water supply infringed on her constitutionally guaranteed personal rights.[38] The resolution of the matter hinged on whether Article 40.3's guarantee of state protection of the "personal rights of the

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36. IR. CONST. arts. 40-44, *reprinted in* 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (IRELAND), *supra* note 14, at 65-72. Briefly summarized, the provisions of Articles 40-44 provide:

1. Article 40: "All citizens shall, as human persons, be held equal before the law." This Article goes on to delineate personal freedoms on which the State may not encroach, including free expression, free association, and privacy in the home.
2. Article 41: This Article recognizes a special role for the family and extends protection to the family unit.
3. Article 42: This Article recognizes freedoms associated with education.
4. Article 43: "The State acknowledges that man, in virtue of his natural being, has the natural right, antecedent to positive law, to the private ownership of goods." This Article accordingly furnishes protection to property rights.
5. Article 44: This Article guarantees freedom of religion and separation between church and state.

Id.

37. 1965 I.R. 294, *available in* LEXIS, Ireland Library (All Irish materials cited throughout this Note are available in LEXIS, Ireland Library).

38. *Id.* at 308. The plaintiff challenged the Health (Fluoridation of Water) Act of 1960 on two constitutional grounds. Her central argument rested on the claim that the Act violated Article 40.3's guarantee to respect, defend, and vindicate the citizens' personal rights. *Id.* at 308. This argument was the focus for both the High Court's and the Supreme Court's opinions. The plaintiff also claimed that the Act violated the inalienable and imprescriptible rights guaranteed to the family by Article 41 of the constitution. *Id.* This second argument is not discussed in this Note. For the Supreme Court's discussion of this claim, see *id.* at 349-50.

citizen"[39] extended to rights not specified in the constitution.[40] First, the High Court held that it had a duty to determine which personal rights are protected by the constitution.[41] Further, the High Court found, and the Supreme Court affirmed, that Article 40.3's general guarantee extended to unenumerated personal rights.[42] Writing for the High Court, Justice Kenny defined the contours of these unenumerated rights by reasoning that they followed both from the Christian nature of the state and from Catholic doctrine.[43] *Ryan*'s more lasting significance, however, rests in the judiciary's interpretive expansion of the substantive protections afforded by the constitution to include rights not specifically enumerated.[44]

B. McGee v. Attorney General

The *Ryan* decision provoked an explosion of litigation concerning the Articles on Fundamental Rights,[45] including the case of *McGee v. Attorney General*,[46] decided in 1974, which centered on issues of privacy and personal integrity. In *McGee*, a woman with four children warned by her doctor of life-threatening risks presented by any subsequent pregnancy decided to use contraception.[47] When she attempted to import contraceptive jelly into Ireland, customs agents seized the jelly, deeming its importation prohibited by Irish law.[48] The woman sued, arguing that the relevant law violated the constitution.[49]

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39. IR. CONST. art. 40.3, *reprinted in* 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (IRELAND), *supra* note 14, at 66.

40. *Ryan*, 1965 I.R. at 313.

41. *Id.*

42. *Id.* Justice Kenny's opinion for the High Court deemed the right to bodily integrity to be one of the unenumerated personal rights protected by Article 40.3. *Id.* at 313. The Supreme Court, however, considered this question unnecessary to the resolution of the case. *Id.* at 345.

43. *Id.* at 313-14. Justice Kenny drew support for the proposition that a right to bodily integrity exists from a 1962 Encyclical Letter of Pope John XXIII. *Id.*

44. CHUBB, *supra* note 15, at 65.

45. 3 MODERN LEGAL SYSTEMS CYCLOPEDIA 3.150.19, § 1.2(D)(1) (Kenneth R. Redden ed., 1990).

46. 1974 I.R. 284.

47. *Id.* at 289.

48. *Id.* at 290. The contraceptive jelly was seized pursuant to Section 17 of the Criminal Law Amendment Act of 1935, which provided in relevant part:

> (1) It shall not be lawful for any person to sell, or expose, offer, advertise, or keep for sale or to import or attempt to import into Saorstát Éireann [Ireland] for sale, any contraceptive.
>
> (2) Any person who acts in contravention of the foregoing subsection of this section shall be guilty of an offence [sic] under this

In finding for the plaintiff, the Supreme Court continued to explore the scope of unenumerated substantive personal rights protected by the Irish Constitution.[50] By a four to one majority, the Supreme Court held that the constitution protected an unenumerated right to marital privacy.[51] The court struck down the restriction preventing the import of contraceptives as inconsistent with this constitutionally guaranteed right.[52]

The decision in *McGee* continued the Irish judicial activist trend in defining the scope of the unenumerated rights protected by the constitution and striking down laws that the courts deemed to violate those rights.[53] In *McGee*, Justice Walsh explicitly instructed that judges have the duty to interpret the constitution and to determine the scope of unenumerated rights.[54] According to this influential vision of judicial activism,

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> section and shall be liable on summary conviction thereof to a fine not exceeding fifty pounds or, at the discretion of the court, to imprisonment for any term not exceeding six months or to both such fine and such imprisonment and, in any case to forfeiture of any contraceptive in respect of which such offence [sic] was committed.

Quoted in McGee, 1974 I.R. at 285-86.

49. The plaintiff argued that Section 17 of the Criminal Law Amendment Act violated Articles 40 (protection of personal rights), 41 (protection of the family), 42 (protection of parental rights), 44 (freedom of religion), 45 (protection of the social order), and 50 (validity of preconstitutional laws) of the Irish Constitution. *Id.* at 286-88.

50. *See* CHUBB, *supra* note 15, at 52-53.

51. *McGee*, 1974 I.R. at 284-85.

52. *Id.* The Irish Supreme Court found that the Act violated Articles 40.1 and 40.3 of the constitution. *Id.* See *supra* note 21 for the text of Article 40.3. Article 40.1 reads: "All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function." IR. CONST. art. 40.1, *reprinted in* 8 CONSTITUTION OF THE COUNTRIES OF THE WORLD (IRELAND), *supra* note 14, at 65.

53. MORGAN, *supra* note 14, at 18-20. Morgan criticizes this judicial activism as blurring the constitutional lines separating the different branches of the Irish government. He notes that courts lack the information available to the legislative branch. *Id.*

54. Justice Walsh wrote:

> In this country it falls finally upon the judges to interpret the Constitution and in doing so to determine, where necessary, the rights which are superior or antecedent to positive law or which are imprescriptible or inalienable. In the performance of this difficult duty there are certain guidelines laid down in the Constitution for the judge. The very structure and content of the Articles dealing with fundamental rights clearly indicate that justice is not subordinate to the law. . . . The judges must, therefore, as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity. It is but natural that from time to time the prevailing ideas of these virtues may

the constitutional status of unenumerated rights was to be determined by a substantive textual inquiry, sensitive to the prevailing concepts of the times.[55]

The judicial activist philosophy expressed in *McGee* may have been inspired in part by the inertia of the Irish Parliament.[56] The conservative nature of Irish politics often has translated into parliamentary hesitancy to change laws to meet the needs of contemporary society.[57] Junior members of Parliament attempted to introduce bills relaxing contraceptive regulation, but the party leadership and the Catholic Church quashed these proposals.[58] Judicial activism in the face of legislative footdragging remains characteristic of current Irish lawmaking.[59]

The numerous citations in *McGee* to United States Supreme Court precedents exploring substantive rights affirmed the Irish Supreme Court's shift to a substantive, content-based approach to evaluating unenumerated rights.[60] Three of the Irish justices found the United States Supreme Court's conclusion that the United States Constitution's substantive content included an unspecified right to privacy highly relevant to the *McGee* case.[61] The references by the Irish court to United States cases highlighted the parallel nature of the evolution of the Irish and United States substantive rights approaches to protecting personal privacy and autonomy, particularly in the area of procreation.[62]

McGee also marked a turning point in the Irish Supreme Court's consideration of the religious values informing the consti-

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> be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts.

McGee, 1974 I.R. at 318-19.

55. *Id.*

56. MORGAN, *supra* note 14, at 20.

57. *Id.*

58. CHUBB, *supra* note 15, at 52. The perceived liberal slant in the evolution of Irish jurisprudence regarding fundamental rights alarmed the Irish Catholic Church. *Id.*

59. *See infra* part IV.C.2.a.

60. *See generally* John A. Quinlan, Note, *The Right to Life of the Unborn—An Assessment of the Eighth Amendment to the Irish Constitution*, B.Y.U. L. REV. 371, 379-81 (1984) (examining the reaction in Ireland to *McGee*, the agitation for some form of constitutional protection for fetuses, and the eventual passage of the Eighth Amendment).

61. Justices Walsh, Henchey, and Griffin all cited to United States Supreme Court opinions regarding the existence of unenumerated fundamental privacy rights, specifically: Poe v. Ullman, 367 U.S. 497 (1961); Griswold v. Connecticut, 381 U.S. 479 (1965); and Eisenstadt v. Baird, 405 U.S. 438 (1972). *McGee*, 1974 I.R. at 319, 327-28, 334-35.

62. *See generally* Butler & Gregory, *supra* note 18, at 452-63.

tution's unenumerated protections. Justice Walsh in *McGee* expressed a preference for generic Christian values over more specific Catholic teachings,[63] a view consistent with the recent repeal of the constitutional provision recognizing the special position of the Catholic Church.[64] Justice Walsh noted that the constitution, while labeling Ireland a religious state, nevertheless acknowledged the pluralistic nature of Irish society.[65] Equating the natural law that undergirded the constitution's unenumerated rights with the law of God, Justice Walsh in his concurrence instructed that the Christian principles of prudence, justice, and charity should inform the judiciary's efforts to define the scope of unenumerated rights.[66] The generically Christian values evinced in *McGee* thus contrasted with the more overtly Catholic references in *Ryan*.[67]

C. *The 1983 Amendment: Reaction to* McGee

The potential implications of an expansive application of the substantive rights jurisprudential model and the Irish Supreme Court's attention to the evolution of United States constitutional doctrine[68] intimated to many that the Irish Supreme Court might extend the guarantee of constitutional privacy to abortion.[69] In 1981, to preempt any efforts to legalize abortion in Ireland, conservatives launched a campaign for a constitutional amendment to safeguard the interests of fetuses.[70] After protracted debate over the wording, Irish voters in 1983 approved an amendment extending protection to the right to life of the unborn.[71] The resultant Eighth Amendment (Article 40.3.3) reads, "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother,

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63. *McGee*, 1974 I.R. at 317-18.

64. *See supra* note 19 and accompanying text.

65. *McGee*, 1974 I.R. at 317.

66. *Id.* at 317-19. *See also supra* note 54 and accompanying text.

67. *See* Ryan v. Attorney General, 1965 I.R. 294, at 313-14. *See also supra* note 43 and accompanying text.

68. In State (Quinn) v. Ryan, 1965 I.R. 70, Justice Walsh noted:

> In this state one would have expected that if the approach of any Court of final appeal of another State was to have been held up as an example for this Court to follow it would more appropriately have been the Supreme Court of the United States rather than the [British] House of Lords.

Id. at 126.

69. Quinlan, *supra* note 60, at 378-80.

70. *Id.* at 383-84.

71. *Id.* at 387-390. The Eighth Amendment was passed by a vote of 841,233 to 416,136. Sigler, *supra* note 14, at 11.

guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."[72]

With its emphasis on the personal rights guaranteed to both the fetus and the woman, Article 40.3.3 carried forward the Irish Supreme Court's substantive rights approach to privacy issues.[73] In seeking to delineate whose rights and which rights the constitution protects, the amendment echoed the court's content-focused jurisprudential model.[74] In passing the Eighth Amendment, the Irish public responded along the substantive rights lines laid down by the Irish Courts and provided the judiciary with additional guidelines as to which protections the constitution should include.[75]

IV. THE IRISH SUBSTANTIVE RIGHTS MODEL AND ABORTION

Article 40.3.3 provided the Irish judiciary with specific constitutional instructions regarding the substantive rights of the woman and the fetus. The Amendment declared that the right to life of the mother and fetus were equal, but failed to provide any indication of how to balance these competing interests.[76] Moreover, the Irish Parliament subsequently provided no legislative guidance regarding how the state planned to safeguard these rights.[77] Although abortion on demand would continue to be illegal in Ireland,[78] the issues of women travelling to the United

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72. IR. CONST. art. 40.3.3, *reprinted in* 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (IRELAND), *supra* note 14, at 66.

73. MORGAN, *supra* note 14, at 15-16; CHUBB, *supra* note 15, at 52-55.

74. Quinlan, *supra* note 60, at 396.

75. *See generally id.* at 378-91. These guidelines have been criticized as overly vague. *Id.* at 396-97.

76. *Id.*

77. *See* Attorney General v. Open Door Counselling, 1988 I.R. 593.

78. At least Chief Justice O'Higgins held this view in 1983, shortly after passage of the Eighth Amendment.

> A right to privacy or, as it has been put, a right "to be let alone" can never be absolute. There are many acts done in private which the State is entitled to condemn, whether such be done by an individual on his own or with another. The law has always condemned abortion, incest, suicide attempts, suicide pacts, euthanasia or mercy killing. These are prohibited simply because they are morally wrong . . . .

Norris v. Attorney General, 1984 I.R. 36, 64.

Others, such as Irish Attorney General Peter D. Sutherland, were not as certain as to the extent of the protections afforded by the amendment:

> [The] wording [of the Amendment] is ambiguous and unsatisfactory. It will lead inevitably to confusion and uncertainty, not merely amongst the medical profession . . . but also amongst lawyers and more specifically the

Kingdom to have abortions and the availability of abortion in cases of medical emergency remained unresolved by the Amendment. Frustrated by the lack of parliamentary instruction[79] and propelled by a now established tradition of activism, the Irish judiciary took upon itself to determine how the issues of travelling abroad and medical emergency were affected by the constitutional guarantees.[80]

Two salient characteristics marked the judiciary's consideration of these issues. First, for several years the Irish courts avoided directly balancing the right to life interests of the woman against those of the fetus.[81] The judiciary retreated somewhat from its earlier activism by choosing to characterize the issues before them narrowly.[82] Second, the courts began to acknowledge that the issue of women wishing to travel abroad for an abortion implicated European Community law.[83] This acknowledgment laid the foundation for the subsequent consideration of these issues by the ECJ and its development of the affecting commerce model in the context of abortion.[84]

A. Attorney General v. Open Door Counselling

Attorney General v. Open Door Counselling[85] presented the first major opportunity for the Irish judiciary to address Article 40.3.3's effect on the substantive rights protected by the Irish Constitution.[86] In this case the Irish courts examined whether

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> judges who will have to interpret it. Far from providing the protection and certainty which is sought by many of those who have advocated its adoption, it will have a contrary effect.

Statement of Attorney General Peter D. Sutherland, SEN. DEB. 520 (daily ed. May 4, 1983), *quoted in* IR. TIMES, Feb. 16, 1983.

79. *See infra* notes 145-46 and accompanying text.

80. *See infra* parts IV.A. & C.

81. *See infra* parts IV.A.-B.

82. For instance, both the High Court and Supreme Court in Attorney General v. Open Door Counselling, 1988 I.R. 593, refused to address the broader question of how to balance the competing rights of women and fetuses, though the facts of the case might have allowed them to do so. *See infra* part IV.A.

83. *See infra* parts IV.A.-B.

84. *See infra* parts IV.B.

85. This case was heard before the High Court in 1986, 1988 I.R. 593, and the Supreme Court in 1988, 1988 I.R. 619.

86. The plaintiff in the case sued for an injunction to prohibit several counselling centers from providing information to women about the availability of abortion services outside of Ireland. 1988 I.R. 593, at *11. Originally the plaintiff in the case, an anti-abortion group known as the Society for the Protection of the Unborn Child (SPUC), attempted to assert Article 40.3.3 against two private pregnancy advice clinics in Dublin. *Id.* at *11.

the activities of several counselling centers, which had advised and aided Irish women in obtaining abortions abroad, contravened the fetus' right to life as explicitly protected by Article 40.3.3.[87] The High Court and, in turn, the Supreme Court found that the counselling activities violated Article 40.3.3.[88] Both courts focused narrowly on how the woman's right of access to information weighed against the fetus' interests and refused to address the broader issue of how to balance their competing rights to life.[89]

1. The High Court's Opinion

In *Open Door Counselling*, the plaintiffs argued that the counselling activities violated both the statutory criminal law, as codified in the 1861 Offences [sic] Against the Persons Act (1861 Act), and Article 40.3.3 of the constitution.[90] The defendant counselling services asserted, however, that their assistance to women seeking abortions was legal because the extraterritorial activities of the pregnant women did not constitute crimes in the jurisdictions where the abortions occurred.[91] They maintained that to find their activities unlawful under the 1861 Act would extend Ireland's criminal law to actions occurring in jurisdictions where such acts were legal.[92] Defendants contended that only the legislature, not the courts, could effect this jurisdictional extension.[93] The counselling services argued additionally that the constitutional rights to privacy, to freedom of expression and communication, and to freedom of access to information protected their activities.[94]

The High Court rejected all of the defendants' arguments.[95] It deemed the constitutional guarantees asserted by the defendants to be qualified rights that did not override the "fundamental right to life of the unborn."[96] By this reasoning,

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87. *Open Door Counselling*, 1988 I.R. 593, 1988 I.R. 619.

88. *Open Door Counselling*, 1988 I.R. 593, at *25-26; 1988 I.R. 619, at *8.

89. *Open Door Counselling*, 1988 I.R. 593, at *25; 1988 I.R. 619, at *4.

90. *Open Door Counselling*, 1988 I.R. 593, at *1. Article 58 of the 1861 Act made it criminal to give or receive an abortion. Article 59, directed at aiding and abetting, criminalized the knowing supply or procurement of materials used to cause abortion. Offences [sic] Against the Person Act, 1861, 24 & 25 Vict., ch. 100 §§ 58-59. Although this Act was passed by the English Parliament, its coverage extended specifically to Ireland. *Id.* pmbl.; M.J. Findlay, *Criminal Liability for Complicity in Abortions Committed Outside Ireland*, 1980 IR. JURIST 88, 88.

91. *Open Door Counselling*, 1988 I.R. 593, at *19.

92. *Id.*

93. *Id.*

94. *Id.* at *14.

95. *Id.* at *1-2.

96. *Id.* at *23.

the substantive protections afforded to the fetus ranked superior to the mother's right of access to information.[97] Moreover, the High Court held that, while the judiciary ordinarily should not extend the territorial reach of the criminal law, the court might have a constitutional obligation to do so when a breach of a fundamental right occurred in order to defend and vindicate that right.[98] The High Court reasoned that, even if the abortion were legal in the jurisdiction where performed, the counselling services nevertheless could be prosecuted criminally for corrupting public morals.[99] The High Court left unresolved the question of the jurisdictional reach of and the type of activities forbidden by Article 40.3.3.

The counselling services also contended that an injunction would violate the right of access to services secured under the EEC Treaty and subsequent European Community directives.[100] The High Court rejected this argument, holding that the injunction issued was directed at assisting a woman to have an abortion and therefore did not prevent a pregnant woman from becoming aware of the availability of abortion services located outside Ireland.[101] Although the European Community law claim failed in this case, this argument would be put forth successfully in future cases.[102]

2. The Supreme Court's Opinion

On appeal, the Irish Supreme Court upheld the ruling of the High Court.[103] Like the High Court, the Supreme Court focused on the narrow inquiry of whether the activities of the counselling services impinged upon the fetus' substantive right to life.[104] The

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97. *See id.*

98. *Id.* at *19.

99. *Id.* at *22. The High Court ruled that a jury should decide the question of intent to corrupt public morals. *Id.* at *21. By reasoning that the defendants could be prosecuted for corrupting public morals instead of conspiracy, the High Court avoided having to hear the prosecution of the defendants for the inchoate offense of conspiracy to help a woman obtain an abortion when the substantive "crime," abortion, was not a criminal act in the jurisdiction where the activity took place. *See* Findlay, *supra* note 90, at 96-97.

100. *Open Door Counselling*, 1988 I.R. 593, at *27.

101. *Id.*

102. *See infra* part IV.B.

103. *Open Door Counselling*, 1988 I.R. 619.

104. The Supreme Court framed the question as follows:

> The essential issue in this case, having regard to the nature of the guarantees contained in Article 40.3.3 . . . of the Constitution is the issue as to whether the defendants' admitted activities were assisting pregnant women within that jurisdiction to travel outside that jurisdiction in order

Supreme Court noted that the defendants had not argued that their services were directed at preserving the right to life of the woman, and thus this right did not have to be balanced against the fetus' competing interests.[105] The Supreme Court therefore deemed the simple question to be answered; the defendants' activities resulted in the destruction of the life of the fetus.[106] The court found that the unenumerated right to information rated lower in the hierarchy of constitutional protections than the right to life of the fetus.[107] The Supreme Court did not address Article 40.3.3's territorial reach or the availability of criminal sanctions as an enforcement vehicle. It looked only to the defendants' infringement upon the fetus' interests, not to how the laws of other states might circumscribe the reach of the Irish Constitution.[108]

The Supreme Court agreed with the High Court that *Open Door Counselling* did not implicate the EEC Treaty's provisions on freedom of access to services.[109] The Supreme Court characterized the access issue in terms of the defendants' ability to provide information about services, a right unprotected by European Community law, not the ability to obtain information about services, a right protected by European Community law.[110] Although the court denied that European Community law applied to *Open Door Counselling*, it nevertheless opened the way for future European Community challenges by women wishing to obtain information about abortion services outside of Ireland.

> to have an abortion. To put the matter in another way, the issue and the question of fact to be determined is: were they thus assisting in the destruction of the life of the unborn?

Id. at *6.

105. *See id.* The court thus was able to delay addressing this crucial question.

106. *Id.*

107. *Id.* at *7. The Supreme Court was confident that no right to information could arise to defeat the constitutional right to life of the child, particularly when the purpose of the information was to defeat the right to life. *Id.* In making such a broad statement, the court neglected to consider whether there could be a right to information in cases in which the information was necessary to preserve the constitutionally protected right to life of the woman.

108. *See Open Door Counselling*, 1988 I.R. 619.

109. *Id.* at *7-8. Articles 59 and 60 of the EEC Treaty address access to services. EEC Treaty, *supra* note 4, arts. 59-60. Article 59 guarantees equality of access to services located in different Member States; Article 60 defines "services," as "normally supplied for remuneration" and provides that "[s]ervices shall include in particular: . . . [a]ctivities of the . . . . professions." *Id.*

110. *Open Door Counselling*, 1988 I.R. 619, at *7-8. Under Article 29.4.3 of the Irish Constitution, laws enacted by the Community or laws enacted by the state pursuant to European Community obligations may not be invalidated by the constitution. IR. CONST., art. 29.4.3, *reprinted in* 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (IRELAND), *supra* note 14, at 56.

Because injunctions in Ireland apply beyond the actual parties to anyone having notice of the order, the decision in *Open Door Counselling* had the effect of preventing virtually anyone from providing information to women seeking abortions outside Ireland.[111] A future challenge, therefore, was likely.[112]

B. SPUC v. Grogan: *Access to Services*

Several Irish student organizations made this challenge in the following year, thereby forcing the Irish judiciary to frame the issue of travelling outside Ireland for an abortion as an economic right to services.[113] In defending a suit brought by the Society for the Protection of Unborn Children (SPUC) to enforce Article 40.3.3, several student unions who had published information about abortion services available in the United Kingdom argued that Articles 59 and 60 of the EEC Treaty protected their right to provide information about access to overseas abortion procedures.[114] Although Articles 59 and 60 nominally protect only the right of freedom to receive information regarding services, the High Court held that a corresponding protection for the right to provide such information also must exist.[115] By characterizing the right to give abortion information as a service implicating the guarantees of European Community law, the High Court was able to request an ECJ ruling on whether *Open Door Counselling*'s prohibitions violated the European Community principle of nondiscriminatory transborder access to goods and services.[116]

The Supreme Court upheld the High Court's reference to the ECJ even though it recognized the potential difficulties posed by a decision that European Community law applied to the activities of the student unions.[117] Writing in concurrence, Justice Walsh

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111. *See* Charleton, *supra* note 11, at 367.

112. *See id.*

113. SPUC v. Grogan, 1 C.M.L.R. 689; 1989 I.R. 760.

114. *Grogan*, 1 C.M.L.R. 689, at *30-31. See *supra* note 109 for a summary of the protections afforded by Articles 59 and 60.

115. *Grogan*, 1 C.M.L.R. 689, at *3. The High Court distinguished *Grogan* from *Open Door Counselling* on the grounds that the latter case addressed the question of the right to obtain information, whereas *Grogan* addressed the right to give information. *Id.* at *3. The Supreme Court, however, rejected any distinction between the activities at issue in *Open Door Counselling* and *Grogan*. *Grogan*, 1989 I.R. 760, at *6-7.

116. *Grogan*, 1 C.M.L.R. 689. The Irish court referred the matter to the ECJ under Article 177 of the EEC Treaty, which provides for ECJ preliminary rulings on interpretation of Treaty provisions. EEC Treaty, *supra* note 4, art. 177.

117. *Grogan*, 1989 I.R. 760, at *7. Although the Supreme Court upheld the reference, it disagreed with the High Court regarding the availability of an

asserted that the European Community method of protecting access to goods and services, in essence the affecting commerce model, was circumscribed within Ireland by Article 40.3.3, because the right to life of the fetus trumped the rights of the woman to travel and to enjoy access to information.[118] He deemed it the Supreme Court's duty in the aftermath of an ECJ decision to determine how to reconcile European Community economic rights with the Irish Constitution's substantive guarantees.[119]

C. Attorney General v. X: *Balancing Directly Competing Interests*

In early 1992, the case of *Attorney General v. X*[120] forced the Irish judiciary to return to a consideration of what substantive rights the constitution protects and under which circumstances. The case, involving a fourteen year-old girl desiring an abortion, at last necessitated a judicial balancing of the competing rights to life of the woman and the fetus. The girl was raped by the father of a close school friend and became pregnant.[121] After consulting with her parents about various alternatives, the girl decided to go to the United Kingdom to obtain an abortion.[122] Before the procedure could be performed, however, the Irish High Court granted an interlocutory injunction forbidding the abortion from taking place.[123] Upon the girl's return to Ireland, an experienced clinical psychologist examined her and determined that carrying the fetus would result in considerable mental damage to the girl and might even cause her to commit suicide.[124] In reconsidering

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interlocutory injunction during the pendency of the action. *Id.* The High Court had deferred deciding on SPUC's application for an interlocutory injunction until the ECJ ruled on the case. *Grogan*, 1 C.M.L.R. 689, at *4. The Supreme Court, however, granted the injunction, rejecting the contention that considering an appeal involving the availability of an interlocutory injunction was in effect a review of the High Court's reference of the matter to the ECJ. *Grogan*, 1989 I.R. 760, at *7.

118. *Grogan*, 1989 I.R. 760 at *9 (Walsh, J., concurring).

119. *Id.* at *10.

120. 1992 I.R. 1.

121. *Id.*

122. *Id.* at *3. The girl and her parents traveled to the United Kingdom together and made the necessary arrangements. *Id.*

123. *Id.* at *3-4. Ironically, the girl and her parents themselves first brought the case to the attention of the authorities. Hoping to have the rapist prosecuted, they inquired of the *Garda Siochana* (police) whether it would be possible to use fetal tissue samples to confirm the identity of the biological father. *Id.* at *3. The police then informed the Office of the Director of Public Prosecutions, who in turn informed the Attorney General. *Id.* The Attorney General then filed with the High Court for an injunction to prevent the girl from obtaining an abortion. *Id.*

124. *Id.* at *13-14.

the injunction, therefore, both the High Court and the Supreme Court found themselves faced with two lives at stake: that of the girl and that of the fetus.

1. The High Court's Reasoning

Having boldly affirmed the judiciary's ability to adjudicate the case in the absence of parlimentary guidance,[125] the High Court turned to the substantive issues in question. The court held the right to life of the fetus to be paramount under the particular facts of the case.[126] It distinguished *X* from situations of medical emergency for the woman on the grounds that *X* involved a more uncertain, self-inflicted risk.[127] Contending that the risk of suicide was much less than the certainty of termination of the life of the fetus by an abortion, the High Court ruled that the fetus' interests had to be protected.[128]

An assertion that preventing the girl from travelling amounted to an unconstitutional infringement of her liberty interests also failed to sway the High Court from upholding the injunction.[129] The High Court reasoned that when a constitutional right such as travel was abused to further a wrong, as it deemed an abortion, then the court could restrain the wrongful act even though doing so involved curtailing the exercise of a constitutional right.[130]

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125. Attorney General v. X, 1992 I.L.R.M. 401, at *5. The High Court asserted its right to adjudicate the matter in strong language.

> The Constitution acknowledges many rights which the courts are required to protect and vindicate. There have been hundreds of cases in which they have carried out this constitutional duty, even though no law has been enacted by the Oireachtas [Parliament] regulating the manner in which it is to be done. The right acknowledged in the Eighth Amendment is clear and unambiguous and the court's duty to protect it is imperative.

Id.

126. *Id.* at *6.

127. *Id.* The High Court recognized that there was a risk to the girl's life, but reasoned that her parents' love and support would help the girl to cope with the difficulty of her situation. *Id.*

128. *Id.* The High Court failed to consider, however, that the girl's threatened suicide also posed a real and imminent danger to the fetus's life.

129. *See id.* at *6.

130. *Id.* at *6. In earlier cases, the Irish Supreme Court had held it to that it violated Article 40.4 to deprive a person of his liberty on the belief that the person would commit offenses if left free. Ryan v. Director of Public Prosecutions, 1989 I.L.R.M. 333; People v. O'Callaghan, 1966 I.R. 501. It was argued that a court order prohibiting the girl to exercise her right to personal liberty by travelling to the United Kingdom for an abortion would constitute the sort of action condemned in *Ryan* and *O'Callaghan*. *X*, 1992 I.L.R.M. 401, at *6. The High Court found that

The High Court rejected a similar argument based on the girl's right to travel under the EEC Treaty.[131] Although acknowledging the ECJ's characterization of abortion services as within the ambit of Articles 59 and 60,[132] the High Court refused to apply European Community law.[133] Deeming the passage of Article 40.3.3 an "expression of public policy," the court exercised the power, granted to Member States by a European Community Council Directive, of derogation, which allows a Member State to refuse to enforce European Community law "on grounds of public policy, public security or public health."[134] The High Court found derogation to be especially appropriate because of the strong moral convictions surrounding the issue.[135] This reasoning insulated the issues of abortion in Ireland and women leaving the state to obtain abortions from the application of European Community law.[136]

2. The Supreme Court's Reasoning

Even though it used the same content-based approach for examining the girl's and the fetus's competing rights, the Irish Supreme Court reached a conclusion opposite of that reached by the High Court.[137] The Supreme Court found that the risk to the girl's life outweighed the interests of the fetus and allowed the abortion to proceed.[138] In so doing, the court expanded on the High Court's reasoning and confirmed the primacy of the substantive rights model in considering abortion issues.[139] Its decision, while revoluntionary in allowing abortion to occur

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Ryan and *O'Callaghan* were distinguishable on the grounds that these cases were decided in criminal proceedings in which the accuseds were imprisoned awaiting trial and that these cases did not support the broader proposition that a court could not restrain a party from committing an unlawful act by limiting her constitutional right to liberty. *Id.*

131. *X*, 1992 I.L.R.M. 401, at *7-8.

132. *Id.* at *7. The High Court was referring to the recent ECJ decision in SPUC v. Grogan, 3 C.M.L.R. 849 (1991), discussed *infra* part V.B.

133. *X*, 1992 I.L.R.M. 401, at *9.

134. *Id.* at *8; Council Directive 73/148 EEC O.J. (L172) 14.

135. *X*, 1992 I.L.R.M. 401, at *8. The High Court noted that the Eighth Amendment was an unequivocal expression of public will and public policy regarding a moral issue. *Id.*

136. Chief Justice Finlay implicitly recognized this result in his opinion for the Supreme Court in *X*. *See id.* at *18.

137. *Id.* at *14.

138. *Id.*

139. *Id.* at *10-14.

legally in Ireland, was merely evolutionary in the application of Irish content-based jurisprudence.[140]

a. The Power of the Judiciary

The absence of legislation did not constrain the Supreme Court's adjudication of the *X* case. In their pleadings, the girl and her parents challenged the judiciary's power to implement Article 40.3.3 without appropriate legislation to guide the courts regarding how to weigh the competing interests of women and fetuses.[141] The Supreme Court firmly rejected this argument. Writing for the court, Chief Justice Finlay noted that the constitution obligated each branch of the Irish government, including the judiciary, to guarantee, defend, and vindicate the personal rights of the citizen.[142] To accomplish these ends, Justice Finlay wrote, the judiciary's powers "are as ample as the defence [sic] of the Constitution requires."[143] The rest of the court shared this willingness to exercise judicial review to protect personal rights.[144] The court's readiness to find itself capable of adjudicating the *X* case without legislative guidance was tempered, however, by Justice McCarthy's clear demand for parliamentary action.[145] In his concurrence, he labeled the failure to enact appropriate legislation in the eight years since the passage of Article 40.3.3 "inexcusable".[146]

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140. *See id.* Chief Justice Finlay's extensive quotations from McGee v. Attorney General, 1974 I.R. 284, and other precedents similarly addressed to unenumerated constitutional rights supports this conclusion. *See X*, 1992 I.L.R.M. 401, at *11-12.

141. *X*, 1992 I.L.R.M. 401, at *4. They argued that the use of the term "laws" in the Eighth Amendment, meant exclusively laws enacted by Parliament. *Id.* at *8. As no laws regarding the enforcement of the Amendment had been passed, it was asserted that the Irish Supreme Court had no jurisdiction to intervene. *Id.*

142. *Id.* at *10.

143. *Id.* (quoting The State (Quinn) v. Ryan, 1965 I.R. 70, 122).

144. *Id.* Justices McCarthy, O'Flaherty, and Egan were explicit in their views that the Court could not be prevented from adjudicating the case because of a want of legislative guidance. *Id.* at *34, 38, 42. This same view also was implicit in the opinion of Justice Hederman, for he willingly decided the case on the merits. *See id.* at *19-20.

145. *Id.* at *35.

146. *Id.* Justice McCarthy wrote:

> In the context of the eight years that have passed since the amendment was adopted and the two years since *Grogan*'s case, the failure by the legislature to enact the appropriate legislation is no longer just unfortunate; it is inexcusable. What are pregnant women to do? What are the medical profession to do? They have no guidelines save what may be gleaned from the judgments in this case. What additional considerations are there? Is the victim of rape, statutory or otherwise, or the victim of

b. Balancing the Competing Interests

Having confirmed its power to adjudicate matters falling under Article 40.3.3, the Supreme Court next attempted to balance the substantive rights guaranteed by this constitutional provision. This consideration, necessitated by the girl's threatened suicide, made the *X* case one of first impression for the Supreme Court. Since the 1983 Amendment, the court had never been forced to choose directly between the life of the woman and the life of the fetus.[147] Like the High Court, the Supreme Court deemed the two rights to be in counterbalancing tension with one another.[148]

Writing for the Supreme Court, Chief Justice Finlay hearkened back to *McGee* for instruction regarding how to strike the proper balance between the woman's and the fetus's competing rights.[149] The court ruled that the concepts of "prudence, justice and charity," interpreted in accordance with the prevailing ideas of the time, should inform the court's examination of the substantive content of the constitution.[150] The court held that applying these concepts in the modern era necessitated that the court, in balancing the lives of the two parties, give great weight to a living woman's place within her family and society.[151] To that end, the court gave primacy to the woman's right to life.[152]

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incest, finding herself pregnant, to be assessed in a manner different from others? The amendment, born of public disquiet, historically divisive of our people, guaranteeing in its laws to respect and by its laws, to defend the right to life of the unborn, remains bare of legislative direction.

Id.

147. *X*, 1992 I.R. 1.

148. *See id.* at *12-13.

149. *Id.* at *11-12. Chief Justice Finlay clearly tied his reasoning in this regard to the teachings of McGee v. Attorney General, 1974 I.R. 284:

> Such a harmonious interpretation of the constitution carried out in accordance with concepts of prudence, justice and charity, as they have been explained in the judgment of Walsh, J. in *McGee v. The Attorney General* leads me to the conclusion that in vindicating and defending as far as practicable the right of the unborn to life but at the same time giving due regard to the right of the mother to life, that the Court must, amongst the matters to be so regarded, concern itself with the position of the mother within a family group, with persons on whom she is dependent, within other instances, persons who are dependent upon her and her interaction with other citizens and members of the society in the areas in which her activities occur.

X, 1992 I.R. 1, at *12.

150. *Id.* (quoting The State (Healy) v. Donoghue, 1976 I.A. 325, 347).

151. *Id.*; *see supra* note 149 and accompanying text.

152. *See X*, 1992 I.R. 1, at *12.

It deemed the proper balancing test to be:

> [I]f 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, that such termination is permissible, having regard to the true interpretation of Article 40.3.3 of the Constitution.[153]

Applying this test, the court concluded that the girl's threatened suicide constituted a "real and substantial risk" to her life which only terminating the pregnancy could prevent.[154]

Three of the remaining four justices endorsed Chief Justice Finlay's "real and substantial risk" formulation and its application.[155] Justice Egan noted additionally that it did not matter whether the risk to the woman was one of self-destruction rather than some other life-threatening danger.[156] In his concurrence, Justice McCarthy made explicit the implicit holding of *X*: the court's finding that the girl could terminate her pregnancy led to the inevitable conclusion that Article 40.3.3 contemplated lawful abortions taking place in Ireland.[157] The court's opinion, however, limited legal abortions to those situations of a "real and substantial risk" to the life of the woman.[158] On-demand procedures motivated by other reasons remained unlawful.[159] Nevertheless, legal abortion was now possible in Ireland.

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153. *Id.* at *13.

154. *Id.* at *14. The court placed heavy weight on the report of a psychologist who had concluded that the risk of the girl's committing suicide was very great. *Id.* at *13-14. The Chief Justice reasoned that such a risk would be exceedingly difficult both to monitor and to prevent. *Id.* at *14.

155. Justices McCarthy, Egan, and O'Flaherty agreed with both the test formulated by Chief Justice Finlay and the result he reached. *Id.* at *33, 39, 43. Justice Hederman approved of the "real and substantial risk" standard but dissented from the ruling that the girl might obtain an abortion. *Id.* at *29-30. He held that the mother's right of self-determination should not be given priority over the protection of the right to life of the fetus. *Id.*

156. *Id.* at *43.

157. *Id.* at *34.

158. *Id.* at *14.

159. Though the Irish Supreme Court never explicitly stated that on demand abortion remained unlawful, it is clear from an application of the "real and substantial risk" standard that a woman's mere desire to have an abortion not motivated by serious health concerns would not be sufficient to overcome the interests of the fetus.

c. Extraterritoriality and the Right to Travel

Although it recognized an unenumerated constitutional right to travel,[160] the court held that this right was inferior to that of the fetus's right to life.[161] In concluding that the woman's right to travel could be qualified to protect the life of the fetus, the court limited a woman's ability to leave Ireland legally to obtain an abortion.[162] The Supreme Court held that it was valid to restrain a woman from travelling from the jurisdiction when the exercise of the right to travel conflicted with the interests of the fetus.[163] It found arguments that orders restricting travel would be impossible to supervise or enforce unpersuasive, reasoning that such expectations did not relieve the judiciary of its obligation to defend and vindicate personal rights.[164]

Two justices, McCarthy and O'Flaherty, dissented from the majority on the issue of travel and held that a woman's right to travel could not be curtailed.[165] Their view more consistently reflected Irish judicial precedent. In *Open Door Counselling*, the Supreme Court had found that giving pregnant women information about abortion services outside Ireland violated Article 40.3.3, but had not addressed limiting a woman's right to travel.[166] Justices McCarthy and O'Flaherty refused to extend the information ban of *Open Door Counselling* to travel.[167] By contrast, the majority's restriction of the right to travel essentially

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160. Writing for the High Court in 1979, then Justice Finlay recognized an unenumerated right to travel protected by Article 40 of the constitution in The State (M) v. The Attorney General, 1979 I.R. 73, 80-81. Writing for the Irish Supreme Court in *X*, now Chief Justice Finlay again held that Article 40 embraced an unenumerated right to travel. *X*, 1992 I.R. 1, at *15.

161. *X*, 1992 I.R. 1, at *16.

162. *Id.*

163. *Id.* Although recognizing that whenever possible the judiciary should seek to harmonize interrelated constitutional rights, Chief Justice Finlay noted that, when such harmonization proved impossible, the judiciary necessarily was forced to prioritize rights. *Id.* at *15.

164. *Id.* at *17.

165. *Id.* at *37, 40. According to Justice McCarthy, the right to life of the fetus and woman's right to travel were neither interrelated nor to be balanced against one another. *Id.* at *37. He held that a woman's right to travel could not be curtailed on the basis of any sort of an intent on the part of the woman. *Id.* Tracking Professor Findlay's argument, *see* Findlay, *supra* note 90, at 92-95, Justice McCarthy reasoned that a "conspiracy" to travel to another state to commit a lawful act in that state could not permit a restraining order. *X*, 1992 I.R. 1, at *11. Going a step beyond Findlay, McCarthy postulated that even if a woman intended to travel to another state to commit an act unlawful in Ireland, such as exploding a bomb, she could not lawfully be prevented from exercising her right to travel. *Id.*

166. Attorney General v. Open Door Counselling, 1988 I.R. 619.

167. *X*, 1992 I.R. 1, at *37, 40.

broadened the scope of conduct prohibited by Article 40.3.3 to include abortions performed outside Ireland, for the only way a woman could obtain an abortion abroad was by exercising her right to travel.

d. Applicability of European Community Law

The Supreme Court in *X* grounded its reasoning exclusively in Irish constitutional law, placing no reliance upon European Community legal principles.[168] Chief Justice Finlay reasoned conclusorily that because no Community legal issue had been raised, neither an application of European Community law nor a reference to the ECJ was necessary.[169] This conclusion was questionable because the court itself characterized the issues raised on appeal.[170] It as easily could have found that *X* implicated Articles 59 and 60 of the EEC Treaty and then referred the case to the ECJ.[171] The court's characterization of the issues as concerning only Irish constitutional doctrine indicated little about the relevancy of European Community law, instead revealing the Irish judiciary's overriding concern with defining domestic constitutional rights.

V. THE ECJ AND THE AFFECTING COMMERCE MODEL

Although the Irish Supreme Court denied the relevance of European Community law to the *X* case, the applicability of European Community law in the context of abortion services already had been considered by the ECJ. In 1991 the ECJ applied European Community law to the issue of a woman's access to abortion services in *SPUC v. Grogan*,[172] the case referred to it by the Irish High Court. Although the *Grogan* opinion had little immediate impact on the Irish abortion

168. *Id.* at *18-19.

169. *Id.* at *19. Chief Justice Finlay also took the practical position that, by the time a reference reached the ECJ, the matter would be moot. *Id.* He was the only member of the court to discuss European Community law as it applied to the *X* case. *Id.*

170. *Id.*

171. This is especially true when examined in light of the ruling in Case C-159/90, SPUC v. Grogan, 3 C.M.L.R. 849 (1991), discussed *infra* part V.B., in which the ECJ deemed abortion a "service" for European Community law purposes.

172. 3 C.M.L.R. 849 (1991).

issue,[173] the ECJ's reasoning shaped future debate on the issue. In *Grogan*, the ECJ labelled abortion a protected economic right,[174] and thereby laid the foundations for an affecting commerce jurisprudential model to be available for use later.

A. *The ECJ and Protecting Services Jurisprudence*

As the judicial branch of the European Community, the ECJ has the power to interpret and apply European Community law.[175] Composed of thirteen judges[176] and aided in the interpretation of the EEC Treaty by six advocates general,[177] the ECJ may review European Community acts and acts of Member States.[178] Under Article 177, Member States' domestic courts may refer questions regarding the interpretation of European Community law to the ECJ.[179] The Article 177 process, therefore, is marked by shared jurisdiction between the ECJ and domestic courts and relies on their cooperation.[180] Domestic courts of Member States have disagreed whether ECJ preliminary rulings constitute binding precedent.[181]

The ECJ has taken an active role in promoting the European Community's overarching goals of free competition and economic

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173. The ECJ's judgment in *Grogan* upheld the injunction granted by the Irish High Court in Attorney General v. Open Door Counselling, 1988 I.R. 593, *aff'd in part* 1988 I.R. 619, which prevented parties from distributing information to Irish women about abortion clinics located in other Member States. *See supra* part IV.A.

174. *See Grogan*, 3 C.M.L.R. 849, at *32.

175. The ECJ is granted the general task of interpreting and applying the EEC Treaty under Article 164. EEC Treaty, *supra* note 4, art. 164. Article 177 empowers the ECJ to give preliminary rulings concerning the interpretation of the EEC Treaty, the validity of acts of Community institutions, and the interpretation of statutes of bodies established by acts of the Council. *Id.* art. 177.

176. SCHERMERS & WAELBROECK, *supra* note 6, at 447. Although not required under the EEC Treaty, each Member State is represented in the ECJ. *Id.* at 448. This tradition recognizes that, although the ECJ performs a supranational role, national interests of the Member States are also implicated. *Id.* at 449.

177. *Id.* at 453. The advocates general enjoy standing equal to that of the judges. *Id.* In each case heard by the ECJ, at the closing of the oral procedure, an advocate general renders an opinion which often serves as a starting point for the Court's analysis. *Id.* at 454. Even when the ECJ disagrees, the advocate general's opinion remains in the record, much like a dissenting opinion, as a potentially potent tool for subsequent legal arguments. *Id.*

178. STEINER, *supra* note 5, at 287-93. The Treaty empowers the ECJ to rule only on matters of Community law and the ECJ does not have jurisdiction to interpret Member States' domestic laws or to adjudicate the compatibility of their laws with European Community laws. *Id.*

179. *Id.* EEC Treaty, *supra* note 4, art. 177. In fact, Article 177 references constitute 40% to 50% of the ECJ's docket. STEINER, *supra* note 5, at 285.

180. STEINER, *supra* note 5, at 286.

181. SCHERMERS & WAELBROECK, *supra* note 6, at 440.

integration.[182] It has filled perceived gaps in the EEC Treaty and interpreted provisions of the Treaty to maximize the realization of these goals.[183] The ECJ's expansive approach in interpreting Articles 59 and 60, which guarantee European Community citizens the right to provide services, is a good example of the Court's activism.[184]

The text of Articles 59 and 60 guarantees only the freedom to provide services, but the ECJ extended the reach of these articles in *Luisi v. Ministero del Tesoro*[185] to protect the freedom both to receive services and to travel to another Member State to receive services. In so doing, the ECJ did not focus on whether the activity at issue, medical treatment, was itself a substantive guarantee under the EEC Treaty, but on whether this activity could be characterized as a "service" for purposes of Articles 59 and 60.[186] It found that medical treatment constituted a service under the Article 60 definition of an activity normally provided for remuneration,[187] and then extended the protections of Article 59 to ensure access to this service.[188] In addition, the ECJ recognized that, as a necessary corollary to guaranteeing the freedom to provide services, Articles 59 and 60 likewise protect the right to receive services and to travel to other Member States to obtain services.[189]

The 1984 *Luisi* decision established three important propositions regarding the ECJ's approach to protecting services. First, the ECJ indicated a willingness to examine challenged activities to determine if they fit the concept of "service" under Articles 59 and 60 and, if so, to extend the status of protected

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182. Brian Wilkinson, *Abortion, The Irish Constitution and the EEC*, PUB. L. 20, 25 (Spring 1992); STEINER, *supra* note 5, at 289.

183. STEINER, *supra* note 5, at 18.

184. See *supra* note 109 and accompanying text for the relevant portions of Articles 59 and 60.

185. Joined Cases 286/82 & 26/83, 1984 E.C.R. 377. These two joined cases involved challenges to an Italian law capping the amount of foreign currency that could be exported from the state. *Id.*

186. *Id.* at 401-03.

187 *Id.*

188. *Id.* at 403.

189. The ECJ held in *Luisi*:

> [T]he freedom to provide services includes the freedom, for the recipient of services, to go to another Member State in order to receive a service there, without being obstructed by restrictions, even in relation to payments and that tourists, persons receiving medical treatment and persons travelling for the purpose of education or business are to be regarded as recipients of services.

Id.

economic rights to such activities.[190] Second, the ECJ deemed medical treatment a service for purposes of Articles 59 and 60.[191] Third, by reading the Article 59 and 60 protections liberally, the ECJ showed a readiness to protect a broad range of activities associated with the providing of services.[192] All three of these propositions resurfaced in the ECJ's *SPUC v. Grogan*[193] opinion in the context of the issue of access to abortion.

B. *The* SPUC v. Grogan *Decision*

Although the Irish High Court initially approved a reference to the ECJ of the European Community issues implicated by *Grogan* in 1989,[194] the High Court did not provide the ECJ with the relevant questions to be answered until early 1990.[195] The three questions presented all related to abortion as a service and the degree to which access to such a service in another Member State might be limited. The first and most important query for the ECJ's review was whether the medical termination of a pregnancy constituted a "service" protected under Article 60 of the EEC Treaty.[196] The second inquired whether a Member State could prohibit the distribution of information about abortion clinics in other Member States.[197] The last question asked if European Community law created the right for an individual in a Member State that constitutionally prohibits abortion to distribute information about abortion clinics in Member States where such procedures are lawful.[198]

Relying upon *Luisi*, both the ECJ and the Advocate General concluded that the provision of abortions constituted a "service" for purposes of Article 60.[199] In answering the first question in the affirmative, the ECJ rejected SPUC's argument that the

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190. *See* Catherine Barnard, *An Irish Solution*, 142 NEW L. J. 532, 533 (1992).
191. *Luisi*, 1984 E.C.R. at 401.
192. Barnard, *supra* note 190, at 533.
193. 3 C.M.L.R. 849.
194. *See supra* part IV.B.
195. *Grogan*, 3 C.M.L.R. 849, at *7.
196. *Id.* at *7.
197. The second question read:

> In the absence of any measures providing for the approximation of the laws of member-States concerning the organised [sic] 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?

Id.
198. *Id.*
199. *Id.* at *11, 32.

immorality of abortion negated the claim that it was a service.[200] The ECJ noted that it was inappropriate for it to adjudicate the morality of an activity; rather, that was the role of the domestic legislature of each Member State.[201] The ECJ focused on determining whether abortion was an economic right without inquiring into substantive rights issues raised by the activity.[202]

Although it defined abortion as a service under the EEC Treaty, the ECJ nevertheless declined to extend the protections of Article 59 to the informational activities of the student unions.[203] In keeping with the European Community's focus on economic freedom, the ECJ implicitly viewed Article 59 as prohibiting restrictions on the economic right to supply services such as abortion.[204] The ECJ found, however, that the link between the student unions' activities and abortions carried out in clinics located in other Member States was too tenuous to constitute an economic relationship to which economic rights attached.[205] Because no economic tie bound the student unions to the abortion clinics, their distribution of information did not constitute the exercise of an economic right, but a manifestation of the freedom of expression.[206] Article 59 protects only economic rights, not the substantive right of freedom of expression.[207] The ECJ held, therefore, that Article 59 did not apply to the student unions' activities and that the restrictions placed on the exercise of these activities did not contravene European Community law.[208]

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200. *Id.* at *32.

201. *Id.*

202. *See id.* at *32-34. The ECJ did not engage in any sort of substantive rights analysis or balancing of the competing rights of the mother and the fetus. *Id.*

203. *Id.* at *33-34.

204. *Id.*

205. *Id.* at *33. On the ground of a lack of economic linkage, the ECJ distinguished *Grogan* from Case 362/88, GB-Inno-BM v. Confédération du Commerce Luxembourgeois, 1990 E.C.R. 667, in which the Court found an advertising prohibition capable of constituting a barrier to the free movement of goods and services. *Grogan*, 3 C.M.L.R. 849, at *33.

206. The ECJ deemed this freedom of expression to be independent of the economic activities of the abortion clinics. *Grogan*, 3 C.M.L.R. 849,. at *33.

207. *See supra* note 109 and accompanying text.

208. *Grogan*, 3 C.M.L.R. 849, at *33. In conjunction with its consideration of the applicability of Article 59, the ECJ also examined the Irish injunction in light of Article 62, which holds that unless provided for in the Treaty, a Member State may not introduce new restrictions on the freedom to provide services. EEC Treaty, *supra* note 4, art. 62. The ECJ found the relevancy of Article 62 to depend on whether Article 59 applied to the case. Because Article 59 did not, neither did Article 62. *Grogan*, 3 C.M.L.R. 849, at *33.

The Advocate General disagreed with the ECJ's analysis of the applicability of Article 59 to this case and reasoned that European Community law indeed could govern the ability of Member States to prohibit access to abortion services.[209] In contrast to the ECJ's narrow focus on the relationship between the student unions and the abortion clinics, the Advocate General believed that the proper inquiry was whether the prohibition on information distribution adversely affected intra-Community trade in services.[210] He opined that allowing measures detrimental to intra-Community trade in services to fall beyond the reach of Article 59 "would detract substantially from the effectiveness of the principle of the free movement of services."[211] The Advocate General wanted to extend Article 59's scope to include protecting the right to distribute information, whether or not for remuneration.[212]

The Advocate General then proceeded to analyze the extent to which Article 59 could be invoked to safeguard access to information in light of the doctrine of derogation.[213] Article 56 of the EEC Treaty, made applicable to Articles 59 and 60 by Article 66, provides that Member States may derogate from the articles relating to the supply of goods and services on grounds of "public order, public safety and public health."[214] The Advocate General recognized that Ireland's ban on information regarding abortion services involved a moral and philosophical policy choice that entitled Ireland to the Article 56 exclusion.[215] To derogate from the operation of Articles 59 and 60, however, a national law also must comply with the principle of proportionality; that is, it must

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209. *Grogan*, 3 C.M.L.R. 849, at *10-11.

210. *Id.* at *10. In contrast to the ECJ's focus on the relationship between the clinics and the student organizations, the Advocate General, Walter van Gerven, focused on the opposite side of the commercial equation, on the recipients of the services and how restrictions limited their access to services. Dena T. Sacco & Alexia Brown, Recent Development, 33 HARV. INT'L L.J. 291, 298 (1992).

211. *Grogan*, 3 C.M.L.R. 849, at *16. The Advocate General's view of Article 59's scope paralleled the view expressed previously by the ECJ in Case 186/87, Cowan v. Tresor Public, 1989 E.C.R. 195.

212. *Grogan*, 3 C.M.L.R. 849, at *16.

213. *Id.* at *16-20.

214. Article 56 reads in relevant part: "The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of . . . provisions which lay down special treatment for foreign nationals and which are justified by reasons of public order, public safety and public health." EEC Treaty, *supra* note 4, art. 56.

Article 66 reads: "The provisions of Articles 55 to 58 inclusive shall apply to the matters governed by this Chapter [which includes Articles 59 and 60]." *Id.* art. 66.

215. *Grogan*, 3 C.M.L.R. 849, at *19. The Advocate General argued that the fundamental rights enshrined in a Member State's constitution fell within a sphere of autonomy with which Community law should not interfere. *Id.* at *20.

be useful, indispensable, and the least restrictive means of realizing the Member State's public policy goal.[216] The Advocate General determined that Ireland's information ban met this proportionality test and that the prohibition should therefore be upheld.[217] Significantly, he hypothesized that a ban on the right of a pregnant woman to travel to another Member State would fail such a balancing test and so would not be a justifiable derogation from the protections of Article 59.[218]

VI. ANALYSIS: THE AFFECTING COMMERCE AND SUBSTANTIVE RIGHTS MODELS COMPARED

The affecting commerce model posited by the ECJ and the Irish judiciary's substantive rights model, with its focus on the content of the rights guaranteed by the Irish Constitution,

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216. *Id.* The Advocate General enunciated a two-prong test for determining whether a law complies with the principle of proportionality. First, the national law must be objectively necessary. Second, even if useful and indispensable, the law must not have a disproportionate impact on European Community trade. *Id.*

217. *Id.*

218. *Id.* at *20-21. In addition to examining how the Irish restrictions implicated Articles 59 and 60, the Advocate General analyzed the impact of the restrictions under Article 10 of the European Convention on Human Rights (the Convention), which guarantees freedom of expression. *Id.* at *21-26 (citing European Convention on Human Rights, art. 10). He found that the right to life of the fetus outweighed the right to free expression. *Id.* at *27-28. Even if the Advocate General or the ECJ had reached the opposite conclusion, however, this would have meant little to Ireland because although Ireland is a signatory to the Convention, the Irish Parliament has never given domestic effect to the Convention; therefore, in accordance with Article 29.6 of the Irish Constitution, Ireland is not bound by the Convention's provisions. Wilkinson, *supra* note 182, at 24 n.23; Butler & Gregory, *supra* note 18, at 441-42.

The implications of the Advocate General's reasoning, however, were worrisome because the primary goals of and protections afforded by the Community and the EEC Treaty are economic in nature, but the Convention focuses on human rights. Were the ECJ to follow the lead suggested by the Advocate General and use the Convention to provide content to general Community principles, it essentially would be introducing fundamental noneconomic personal rights considerations into Community jurisprudence. This would increase the ECJ's mandate drastically and concomitantly decrease the scope of Member State laws not susceptible to ECJ review. *See generally* Phelan, *supra* note 4, at 681-89. Because Ireland has given effect to the EEC Treaty, any incorporation of the Convention into European Community law would bind Ireland.

In 1992 the European Court of Human Rights held that the injunction granted by the Irish judiciary in Attorney General v. Open Door Counselling, 1988 I.R. 593, *aff'd* in part, 1988 I.R. 619, violated Article 10 of the Convention. *Freedom to Receive and Impart Information Violated by Ireland*, THE TIMES (London), Nov. 5, 1992 (Features), at 42.

present two contrasting jurisprudential visions of how to examine the Irish abortion issue. Each model seeks to protect a different package of rights associated with the process of obtaining an abortion, and each model has different limits on the extent of the freedoms it affords. Application of the affecting commerce and substantive rights analytical approaches, therefore, translates into vastly divergent paths for the evolution of abortion rights in Ireland. In 1992, these two jurisprudential models, each with its different package of protected rights, formed the framework for the Irish public debate on abortion. The role of jurisprudential thinking in shaping public discussion was extremely clear.

A. *Implications of the ECJ's Affecting Commerce Model*

Derided by some as an unnecessarily narrow decision,[219] the ECJ's ruling in *Grogan* nevertheless yielded results. The ECJ transformed cross-border access to abortion into an economic right protected by the EEC Treaty. In the wake of *Grogan*, the abortion issue could no longer be characterized purely as a matter of substantive individual rights under Irish law; now abortion had been cast as a "service" within the web of European Community commercial relations.[220] The ECJ's concern was that access to abortion in other Member States not be impeded. Although the ECJ declined to address the issues in *Grogan*, its holding in *Luisi* suggested that it would interpret Article 59 to protect a woman's right to travel to another Member State to receive an abortion and her right to receive information about the availability of abortions.[221] The Court indicated that it would not inquire into the moral, ethical, and philosophical content of the substantive right to an abortion.[222] Instead, the ECJ's inquiry would be whether a restriction impinged on transborder access to abortion services: whether a law affected commerce.[223] The ECJ's affecting commerce jurisprudence thus holds out a potential guarantee of Community protection to a package of rights relating to abortion access. This package includes the rights to obtain information about abortion services in Member States where abortions are legal and to travel to these states for such procedures.[224] Any restrictions upon these rights may be examined by the ECJ for a determination of whether the law in question violates European Community law.

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219. Barnard, *supra* note 190, at 533.
220. SPUC v. Grogan, 3 C.M.L.R. 849, at *32.
221. Barnard, *supra* note 190, at 533.
222. *Grogan*, 3 C.M.L.R. 849, at *32.
223. *See generally* Phelan, *supra* note 4, at 673-75.
224. *See generally id.* at 676.

Limits exist, however, upon the ECJ's ability to guarantee access to services. As the Advocate General pointed out in his accompanying opinion to *Grogan*, Article 56 allows Member States to derogate from the commands of Articles 59 and 60 "on grounds of public policy, public security or public health."[225] The import of this exception is that the domestic law of a Member State may trump European Community law if it meets the requisite proportionality test.[226] Certain domestic regulations therefore may be beyond the reach of ECJ action, even when they affect transborder access to services, as long as the Member State successfully can assert "public policy" grounds as the reason for the regulations.[227] This ability to derogate leaves Member States with potentially a great deal of autonomy, which in turn limits the ability of the ECJ to attack laws that affect commerce.

In that manner, domestic public policy could circumscribe the rights protected by Articles 59 and 60. The ECJ and the Advocate General having made Irish abortion restrictions vulnerable to challenges that such rules affected commerce, the Irish government reacted swiftly to the *Grogan* ruling. The Prime Minister negotiated a special EEC Treaty protocol, known as "Protocol 17," with the other European Community Member States confirming that the Maastricht Treaty would not affect Article 40.3.3 of the Irish Constitution.[228] This Protocol created in essence a form of automatic derogation whereby European Community law would not apply to Irish abortion issues, for by its instructions the ECJ could no longer supersede Irish law on matters relating to abortion.[229]

While a Member State may argue that its regulation represents a proper derogation from European Community law, the ECJ retains discretion to decide whether such a claim is valid.[230] The ECJ thus maintains significant power over how much deviation from European Community law Member States will be allowed in pursuing their public policies. Recognizing the threat to equality of access presented by derogation, the ECJ has construed the concept of "public policy" grounds strictly,

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225. *Grogan*, 3 C.M.L.R. 849, at *17 (quoting EEC Treaty, *supra* note 4, art. 56).

226. *Id.* at *17.

227. *Id.*

228 Walter Ellis, *Yes or No to the Irish Question?*, THE TIMES (London), June 16, 1992 (Features).

229. *Id.*

230. SCHERMERS & WAELBROECK, *supra* note 6, at 93-94.

requiring a showing of a "genuine and sufficiently serious threat affecting one of the fundamental interests of society."[231]

In the context of the Irish abortion debate, the principle of derogation allows Ireland to claim an exemption from Articles 59 and 60 for laws limiting access to abortion procedures.[232] However, the ECJ ultimately will determine whether derogation is justified and whether the restrictions are proportional.[233] Under the affecting commerce model and the *Grogan* ruling, any time a domestic law relating to abortion implicates access to European Community services in any manner, the ECJ can be called upon to review the validity of the law.[234] Given the Advocate General's approval of derogation in the context of Irish abortion regulations, Protocol 17, the explicit guarantees of Article 40.3.3, the popular referendum method by which this amendment was adopted, and the overwhelming Catholic population of Ireland, it is arguable, but not certain, that Ireland might be allowed to derogate on public policy grounds from the requirements of Articles 59 and 60.[235] The ECJ might, however, hesitate to find that invalidating restrictions on the rights to travel and to give or receive information about abortion constitutes a threat to Ireland's policy against abortion, for to do so would place such Irish laws beyond the ECJ's grasp.[236] *Luisi* indicates that, if the ECJ denied Article 56 exemptions to Ireland, the ECJ likely would strike down restrictions on activities, such as travelling and giving or receiving information about abortion clinics, that relate to the termination of a pregnancy and have European Community economic effects.[237] Through ECJ review then, the European Community enjoys ultimate authority to pass on many of the means Ireland

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231. Case 30/77, Regina v. Pierre Bouchereau, 1977 E.C.R. 1999, 2014; 2 C.M.L.R. 800, 825 (1977).

232. *See generally* Phelan, *supra* note 4, at 676.

233. *See* Advocate General's Opinion in SPUC v. Grogan, 3 C.M.L.R. 849, at *17-20 ("justified" test), 20-21 (proportionality test).

234. *See* Phelan, *supra* note 4, at 681-86.

235. By deciding that the student unions essentially lacked standing to assert the protections of Articles 59 and 60, the ECJ avoided the question of whether Article 40.3.3 of the Irish Constitution could be considered a valid derogation on a public policy ground. *See Grogan*, 3 C.M.L.R. 849, at *33.

The Advocate General in his accompanying opinion, in which the issue of derogation was squarely addressed, noted that the public policy grounds that in previous cases had been found to allow derogation included those grounds reflecting political and economic choices connected with national socio-cultural characteristics. *Id.* at *18.

236. The Advocate General certainly would hesitate to make that finding as indicated by his recognition of Article 40.3.3 as valid public policy grounds for derogation from the coverage of Articles 59 and 60. *Grogan*, 3 C.M.L.R. 849, at *19-20.

237. *See supra* part V.A.

chooses to further the protections afforded to the rights of the unborn under Article 40.3.3 of its constitution.[238]

As noted previously, while ECJ decisions are extremely influential, they are only advisory opinions; enforcement remains with the domestic courts and legislatures of Member States.[239] The Irish judiciary therefore at least could lessen the impact of ECJ decisions to harmonize better with its vision of the Irish Constitution.[240] In his opinion in *Grogan*, Chief Justice Finlay indicated that if the ECJ ruled that European Community law protected the activities of the student unions, the consequences of that decision as it affected constitutional rights would fall to consideration by the Irish judiciary.[241] Justice Walsh, in his concurrence, noted the filtering role to be played by the Irish judiciary when faced with an ECJ decision implicating the Irish Constitution.[242] He indicated that, in the end, only the Irish Supreme Court could decide what effects European Community law would have on Article 40.3.3.[243] Justice Walsh also expressed the view that the economic objectives of the Community should not subsume national laws dealing with moral issues.[244] This dicta calls into question just how vigorously the Irish judiciary would apply ECJ rulings it found in conflict with Article 40.3.3.

Leaving the moral questions raised by abortion aside, the fact of the ECJ's sitting in judgment on how a state chooses to protect fundamental rights seems at odds with the notion of the European Community as a primarily economic entity composed of autonomous Member States. The European Community has

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238. *See generally* Phelan, *supra* note 4, at 670.

239. SCHERMERS & WAELBROECK, *supra* note 6, at 311-12.

240. *See* SPUC v. Grogan, 1989 I.R. 760, at *10 (Walsh, J., concurring).

241. *Id.* at *7.

242. *See id.* at *10. Justice Walsh retired from the Irish Supreme Court shortly after penning his concurrence in this case. Charleton, *supra* note 11, at 371.

243. *Grogan*, 1989 I.R. 760, at *10-11.

244. Justice Walsh wrote:

> The fact that particular activities even grossly immoral ones [specifically abortion], may be permitted to a greater or lesser extent in some member states does not mean that they are considered to be within the objectives of the treaties of the European Communities, particularly the Treaty of Rome, which is the Treaty of the European Economic Community. A fortiori it cannot be one of the objectives of the European Communities that a member state should be obliged to permit activities which are clearly designed to set at nought the constitutional guarantees for the protection within the State of a fundamental human right.

Id. at *11.

no Bill of Rights,[245] yet the end result of deeming abortion a service is roughly analogous to the result of United States Supreme Court's decision in *Roe v. Wade*[246] finding the right to terminate a pregnancy protected by the Constitution; the ECJ, in effect, can guarantee to some extent the right of an Irish woman to privacy by protecting her right to receive an abortion in a Member State where abortions are legal.[247]

The implicit limit on the privacy right thus afforded by the EEC Treaty is that this right can be exercised only outside Ireland by those who can afford to travel to another Member State.[248] The ECJ cannot reach the core fundamental rights to life of the woman and the fetus protected by Article 40.3.3 as long as these rights remain domestic and services in another Member State are not implicated.[249] Nonetheless, under the affecting commerce model, the ECJ can guarantee a "fundamental" right of access to abortion that directly conflicts with Irish constitutional guarantees.[250] One must inquire if this power is consistent with the overarching vision of the European Community.[251] Is the European Community central authority meant to be so extensive and the ECJ so powerful a guarantor of Community "fundamental" rights?[252]

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245. Phelan, *supra* note 4, at 676.

246. 410 U.S. 113 (1973).

247. As of the ECJ's decision in SPUC v. Grogan, 3 C.M.L.R. 849, Ireland was the only Member State not to allow legal abortions under circumstances other than a threat to the life of the woman. Charleton, *supra* note 11, at 366. In the wake of the referendum, Ireland remains the sole Member State to forbid abortions. *Id. See infra* part VI.C.

248. Professor Brilmayer has noted that prior to *Roe v. Wade*, when the legality of abortions varied from state to state, women with knowledge of states that allowed abortion and with money for travel could obtain abortions, but those with less information or money could not, leaving them no recourse but the back alley. Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873, 878-79 (1993); *see also* Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992).

249. However, even the purely domestic fundamental rights protected by Article 40.3.3 theoretically are vulnerable to ECJ review. *See* Wilkinson, *supra* note 182, at 27.

250. *See* Phelan, *supra* note 4, at 684-86.

251. *See generally id.* at 688-89. Professor Phelan perceives the logical end of the rationale employed by the ECJ in *Grogan* ultimately to be the shaping of national fundamental rights according to the role of Member States within the EC economic structure. *Id.*

252. Professor Phelan is critical of such a development and has proposed a counterbalancing jurisdictional rule for the ECJ, giving greater weight to the principle of derogation, and effectively creating a form of reverse preemption. *Id.* at 687-88. The rule reads:

> The special type of rights embedded in national constitutions which are considered by the national courts (a) to express basic principles

B. *Implications of the Irish Substantive Rights Model*

The implications of the Irish substantive rights model in many ways mirror the issues presented by the affecting commerce model. The Irish judiciary's substantive rights inquiry examines the protection of unenumerated rights based on a reading of the constitution in light of the demands of modern times.[253] In *X*, the Irish Supreme Court employed this approach to arrive at a result that for the first time allowed abortion to take place in Ireland legally.[254] In striking a balance between the competing rights to life of the woman and the fetus under Article 40.3.3, the court made clear, however, that abortions were available only in cases in which the woman faced a "real and substantial risk" avoidable only by termination of the pregnancy.[255] Reasoning that only the right to life of the woman could supplant the right to life of the fetus, the court also noted that the woman's right to travel could be restricted to protect the life of the fetus.[256] Earlier, in *Open Door Counselling*, the Supreme Court granted an injunction preventing the provision of information regarding abortion.[257] The package of rights guaranteed under the Irish substantive rights model was, therefore, completely at odds with that guaranteed by the ECJ's affecting commerce model. The Irish judiciary allowed some abortions within Ireland, but limited access to these procedures abroad by restricting the right to travel,[258] the right to provide information, and, implicitly, the right to receive information.[259]

Given the amorphous nature of the analysis under the substantive rights model and the lack of legislative guidance on the subject, the rights to travel and to provide and receive information were not afforded any permanent guarantees. Since

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concerning life, liberty, religion and the family; (b) to have as their interpretive teleology a national vision of personhood and morality; and (c) to be fundamental to the legitimacy of the national legal system and the preservation of its concept of law; take precedence over European Community law within their field of application.

Id. at 688.

253. *See supra* part IV.

254. *See supra* part IV.C.

255. Attorney General v. X, 1992 I.R. 1, at *13.

256. *Id.* at *16; *see supra* part IV.C.2c.

257. Attorney General v. Open Door Counseling, 1988 I.R. 619; *see supra* part IV.A.2.

258. As Professor Brilmayer points out, the state is not denying its citizens the right to travel, but demanding that citizens follow its laws even when absent from the state. Brilmayer, *supra* note 248, at 883.

259. *See supra* part IV.A.

the passage of Article 40.3.3 in 1983, the Irish Parliament has failed to furnish any guidance on how to enforce the Amendment's protections; perforce the courts have fashioned their own vision of the scope of Article 40.3.3. As has been noted in the context of United States Supreme Court jurisprudence regarding unenumerated rights, a lack of textual guidance frees the judiciary from the moorings of the constitution and allows it to substitute to a greater degree its own subjective appraisal of what rights should or should not be protected.[260] The text of Article 40.3.3 provides no indication of how and to what extent the competing rights of the woman and fetus should be protected.[261] Moreover, until 1993, no other parliamentary guidance in the form of laws or regulations existed to aid the judiciary in channelling its consideration of abortion.[262] The missing directions from the constitution and the laws combined with the Irish courts' tradition of activist review give the judiciary tremendous latitude in considering abortion issues.[263] This virtually unfettered discretion meant greater judicial subjectivity, which in turn hampered the consistency of the judiciary's approach to abortion.[264]

Beyond the problem of a lack of standards to follow in examining abortion issues, the fundamental separation of powers question, whether creating a right to obtain an abortion is a proper exercise of judicial authority, remained. After all, Article 40.3.3 was passed partially in response to fears that the Irish judiciary might take the bit in its mouth and run with the abortion issue.[265] The Irish Constitution endowed Parliament,

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260. Justice Black, objecting to the notion of Supreme Court Justices as Platonic Guardians, noted in his dissent in *Griswold v. Connecticut*:

> [If] these formulas based on "natural justice" . . . are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body. . . . [I] do not believe that we are granted power . . . to measure constitutionality by our belief that the legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our notions of "civilized standards of conduct."

381 U.S. 479, 511-13 (1965) (Black, J., dissenting).

261. Charleton, *supra* note 11, at 357.

262. The lack of legislative guidance is in stark contrast with the wealth of laws passed to protect other personal rights. *Id.* at 351.

263. *Id.* at 352.

264. For instance, consider the directly opposite results of Chief Justice Finlay's and Justice Hederman's applications of the "real and substantial risk" standard in *X*, with Finlay finding the risk to the mother to be paramount and Hederman finding that the interests of the fetus trumped those of the mother. Attorney General v. X, 1992 I.R. 1, at *14, 27-28.

265. *See* Quinlan, *supra* note 60, at 379-82.

not the judiciary, with the power to make laws.[266] Some commentators have argued that in interpreting Article 40.3.3, the Supreme Court was supplanting the legislative process.[267]

The problems with the substantive rights model as applied to the abortion issue extended beyond the Irish domestic scene. In holding the fetus's right to life paramount to the woman's right to travel or to obtain information, the Irish judiciary in essence set prohibitions on precisely those rights the ECJ sought to protect. Moreover, as the Supreme Court never recognized that the protections afforded to the fetus by the constitution ended at the Irish border, it could be accused of exporting the effects of these prohibitions to other Member States. By an amendment passed in 1972, Ireland had agreed that European Community law preempted even the Irish Constitution.[268] The ECJ ruling in *Grogan,* interpreting the European Community law regarding access to services, therefore, should have been taken by the Supreme Court as instruction that European Community law preempted Member State restrictions on the right to travel or to obtain information. Instead, the Irish Supreme Court in *X* endorsed travel restrictions and, in a separate action, refused to lift the injunction on providing information.[269] The Irish judiciary and the ECJ thus appeared to be on a jurisprudential collision course over rights relating to abortion. This collision, as it turned out, would occur in the forum of public vote rather than in the context of an actual case.

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266. IR. CONST. art. 15.2, *reprinted in* 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (IRELAND), *supra* note 14, at 34.

267. Charleton, *supra* note 11, at 375.

268. IR. CONST. art. 29.4.3, *reprinted in* 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (IRELAND), *supra* note 14, at 56. This Article reads in relevant part: "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." *Id.*

269. Despite the 1992 referendum result, *see infra* part VI.C., the injunction prohibiting the distribution of information regarding abortion services outside Ireland remained in place. The High Court issued a fresh ban in August 1992, even though this ruling contradicted the referendum's results. The High Court reasoned that all matters relating to the Maastricht Treaty, of which it considered the right to information about services to be one, would take effect only once the Treaty came into effect. Alan Murdoch, *Fresh Ban on Abortion Information in Ireland*, INDEPENDENT (London), Aug. 8, 1992, at 3.

The Supreme Court subsequently rejected an application to overturn the order on grounds that it lacked jurisdiction to hear the matter. Christine Newman, *Supreme Court Retains Ban on Travel and Information*, IR. TIMES, July 21, 1993, at 2.

C. *The Referendum: Choosing a Model*

In early 1992, events conspired to make a resolution of the questions surrounding abortion imperative for Ireland. Part of the momentum for a solution could be traced directly to the *X* case. The compelling facts of the case and the Supreme Court's ruling focused national attention on abortion as well as on the glaring lack of legislation to address the issue.[270] Justice McCarthy's call for legislative action in *X* did not fall on deaf ears.[271] The debate sparked by *X* also spilled over into the question of European unity.[272] In the wake of *Grogan* observers recognized that the Maastricht Treaty, representing the next stage in the process of European Community unification, had potential ramifications for the ability of Irish women to travel and to obtain information.[273] After bitter public debate in which abortion figured prominently, the Irish public resoundingly voted in favor of the Maastricht Treaty in the summer of 1992.[274] This vote indicated that the Irish public valued European unity more highly than preventing access to abortions outside of Ireland.[275] The Maastricht vote, however, did not provide any legislative guidance as to how to deal with abortion. Recognizing that a legislative hole, which European unity provided even greater impetus to fill, still existed, the Irish prime minister decided to hold a referendum for the public to voice its preferences on abortion.[276] These preferences then would be incorporated into the constitution to provide the Irish judiciary at last with textual guidelines for considering abortion issues.

The referendum held in late 1992 presented Irish voters with the three central questions previously before the Supreme Court and the ECJ:

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270 *Ireland; Mercy Strain'd*, ECONOMIST, Oct. 24, 1992, at 59.

271. *See supra* note 146 and accompanying text.

272. Ray Moseley, *Irish Mix: Abortion, Euro-unity*, CHI. TRIB., May 31, 1992, § 1, at 17.

273. David Gardner, *Danes' Maastricht Vote 'Will Jolt Irish': Prime Minister Seeks to Rally Liberals to Yes-Vote by Re-establishing Link with Freer Access to Abortion*, FIN. TIMES, June 6, 1992, at 2.

274. James F. Clarity, *Irish Vote Backs European Treaty, Giving New Life to Plan for Unity*, N.Y. TIMES, June 20, 1992, at 1.

275. *See* Clarity, *supra* note 274.

276. The Irish Constitution provides for amendment by popular referendum under Article 27. IR. CONST. art. 27, *reprinted in* 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (IRELAND), *supra* note 14, at 50-52.

1. Should a right to an abortion exist when there is a "real and substantial risk" to the life of the woman?
2. Should a woman have the right to travel to another country to terminate a pregnancy?
3. Should there be a right to distribute or receive information on the availability of legal abortions abroad?[277]

Irish voters rejected the first amendment but approved the latter two addressing the rights to travel and to information.[278]

VII. CONCLUSION

The Irish public thus embraced the package of rights protected under the ECJ's affecting commerce model with its emphasis on equality of transborder access to services. Given the pro-Maastricht vote earlier in the year, with its clear mandate in favor of continuing the process of European unity, this result was not surprising. The referendum result achieved a new certainty regarding the rights to travel and to information and made Irish law consistent with the European Community goals of economic integration. The amendments also put Irish women on a more equal plane with women from other Member States as far as the access rights now guaranteed to them.

One must ask, of course, at what price these accomplishments were purchased. While the European Community could not and did not command Ireland to change its laws, it nevertheless exerted pressure on Ireland to conform to the practices fol-

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277. Abbie Jones, *Dramatic Vote: Ireland to Consider Liberalizing Abortion*, CHI. TRIB., NOV. 22, 1992, § 6 at 1.

278. Geraldine Kennedy, *Abortion Issue is Heavily Defeated*, IR. TIMES, Nov. 30, 1992 (Home News), at 6. The vote percentages were as follows:

	For	Against
1. Right to abortion	34.6	65.4
2. Right to travel	62.3	37.7
3. Right to information	59.9	40.1

Id.

In the wake of the Supreme Court's ruling in *X*, the Irish government also sought to soften the effects of Protocol 17 by adding interpretive language indicating that the protocol would not limit the right to travel nor the right to obtain information in Ireland about services lawfully available in other Member States. This declaration was approved by the 12 foreign ministers of the Member States in May 1992. *EC: The Twelve Approve the Solemn Declaration Interpreting the Irish Protocol on Abortion*, AGENCE EUR., May 5, 1992.

lowed by other Member States individually and by the Community as a whole. In seeking to protect economic rights relating to access to services, the ECJ essentially instructed Ireland on the extent to which Ireland could protect fundamental substantive rights guaranteed under its constitution. While perfectly within the ECJ's mandate to condemn Member State restrictions that affect commerce, the exercise of this power is troubling when it impinges on laws promulgated by Member States to protect values enshrined as fundamental in their constitutions. By characterizing rights as economic and limits on these rights as affecting commerce, the ECJ may review domestic restrictions addressed to protecting fundamental rights, as long as these laws affect the European Community economy to some degree. This happened to Ireland in *Grogan*. A more expansive exercise of ECJ review, therefore, is likely to translate into greater homogeneity of rights among Member States, which perhaps tracks the even more closely united Community envisioned in the Maastricht Treaty. The affecting commerce model, therefore, is a potentially powerful jurisprudential tool to accomplish the ends of European Community unity.

The result of the application of the affecting commerce model necessarily is much greater control exercised by the central European Community authority over the laws passed by Member States. This same development has marked the relationship of the United States federal government and state governments in the past thirty years, as the United States judiciary has used the affecting commerce jurisprudential model to strike down state laws that implicated federally guaranteed rights.[279] Criticism has been levelled at the use of this model in the United States as having put too many state laws within the review and grasp of the federal judiciary.[280] The affecting commerce approach has been argued to enchance federal power at the price of state autonomy.[281] The European Community is organized along looser lines than the United States, with a supposedly lesser degree of control to be exercised by the central authorities over the Member States.

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279. TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 1, § 5-5; Butler & Gregory, *supra* note 18, at 431.

280. "The growth of the federal police power based on the commerce clause disrupts the delicately balanced federal system. As federal power expands, state governments are displaced from their traditional role as the primary authority over individuals." Alan N. Greenspan, Note, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 VAND. L. REV. 1019, 1021 (1988).

281. The effect of federal encroachment on state autonomy has been that "[i]ndividuals increasingly are governed by a large federal bureaucracy that is not as accountable, democratic, or responsive as state and local governments and which cannot provide for local diversity." *Id.*

If the affecting commerce model does aggregate power in the central authorities at the expense of member autonomy, this jurisprudential tool is also a potential danger to the original vision of the European Community.

And what about the substantive rights model employed by the Irish judiciary? Is there still a place for this approach in the wake of the referendum's elevation of the affecting commerce model? The answer is yes, but clearer textual boundaries will exist now to guide and to limit the judiciary in its inquiries into the extent of the substantive rights protected by the constitution.[282] This guidance probably is a welcome development for the Irish judiciary, which clearly has been aware of the problems of having to work in a legal vacuum. Of course with the benefit of greater certainty comes the detriment of less flexibility. The Irish judiciary will not enjoy the same degree of latitude in interpreting the substantive content of its constitution as the United States Supreme Court has possessed in the aftermath of *Roe v. Wade*. Instead, the Irish judiciary has been instructed that the ban on the availability of abortion procedures in Ireland is absolute. The substantive content of Article 40.3.3, as it regards the protections afforded the right to life of the fetus, has been enunciated clearly for the court. If faced today with the facts of the *X* case, the Irish Supreme Court, working under the guidelines of the new amendments, would be hard pressed to fashion a line of reasoning to allow the termination of a pregnancy in Ireland in medical emergencies. The need for flexibility in approaching abortion issues, however, largely has been ameliorated by these same amendments, as a woman now may freely leave Ireland to obtain an abortion elsewhere. In a very real sense, the Irish judiciary may not be faced with deciding many abortion issues in the coming years.

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282. The 13th and 14th Amendments to the Irish Constitution, codifying the popular referendum result, have been incorporated into Article 40.3.3 to read:

> The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, so far, as practicable, by its laws to defend and vindicate that right.
>
> This subsection shall not limit freedom to travel between the State and another State.
>
> 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.

IR. CONST. art. 40.33, *reprinted in* Maurice Collins, *Legal Fall-Out From Eighth Amendment Sure to Go On*, IR. TIMES, July 23, 1993 (Sound & Vision), at 13.

Although the substantive rights model now seemingly will have less value than the affecting commerce model in considering how issues relating to abortion will be examined in the coming years by the Irish judiciary and the ECJ, it is clear that both jurisprudential approaches have been extremely influential in shaping the tenor of the Irish abortion debate. The two models have provided the intellectual molds into which the courts, the debate participants, and commentators might pour the ingredients of their thoughts and feelings about abortion into shapes that conform to constitutional doctrine and theory. The resulting models have incorporated different constitutional values and different views of how European Community laws ought to weigh into the balance. The affecting commerce model currently holds sway, but the elevation of one approach by no means destroys the other. Both the substantive rights and affecting commerce models will continue to be influential in shaping debates over how to protect individual rights.

Anne M. Hilbert