
Dissenting Opinions and Rights Protection in the European Court: A Reply to Laurence Helfer and Erik Voeten

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Abstract

In their article ‘Walking Back Human Rights in Europe?’, Helfer and Voeten (hereinafter ‘H-V’) argue that a series of High Level Conferences (2012–2018), specifically Brighton (2012), dramatically altered the style of the European Court of Human Rights’ (ECtHR) decision-making. The Grand Chamber began to adopt judgments which, in turn, provoked an unprecedented wave of ‘Walking-Back Dissents’. Such dissents are separate opinions that, in effect, accuse the majority of a Grand Chamber of ‘tacitly overturn[ing] prior rulings or settled doctrine in favour of national governments’ (H-V, p. 823). In an expansive conclusion, H-V suggest that the ECtHR has also generated a rising number of ‘Walking-Back Judgments’, which lower standards of rights protection. We reject H-V’s major claims on the empirical evidence. The outcomes of Brighton and subsequent conferences did not pose a credible threat to the Court, and could not have induced it to ‘walk back’ rights protection. We also closely examined two sets of Walking-Back Dissents identified by H-V, focusing on judgments that would be ‘most likely to fit’ H-V’s ‘expectations’. We found that fewer than one in four judgments analysed actually contained a Walking-Back Dissent. And we identified only one plausible Walking-Back Judgment. We are confident that H-V’s results are inaccurate and cannot be reproduced by external analysts. We conclude by noting factors that H-V do not consider, but that are crucial to understanding the ECtHR’s decision-making. In appendices, posted online, we summarize and give reasons for our coding decisions.

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1 Introduction

In ‘Walking Back Human Rights in Europe?’, Helfer and Voeten (hereinafter ‘H-V’) argue that a series of High Level Conferences (2012–2018), specifically Brighton (2012), dramatically altered the style of the European Court of Human Rights’ (hereinafter ECtHR or ‘the Court’) decision-making.¹ The cause: with Brighton, the ‘established democracies’ had shown themselves to be ‘critical of the Court’s trajectory’, including entertaining projects designed to curtail the ECtHR’s powers.² The result: the Grand Chamber began to adopt judgments that, in turn, provoked an unprecedented wave of ‘Walking-Back Dissents’ (hereinafter ‘WB-Dissents’). WB-Dissents are separate opinions written by judges that accuse the Court of ‘tacitly overturn[ing] prior rulings or settled doctrine in favour of national governments’.³ In an expansive conclusion, H-V suggest – and gradually treat as an established fact – that the ECtHR has also generated a rising number of ‘Walking-Back Judgments’ (hereinafter ‘WB-Judgments’), thereby lowering standards of rights protection.

We reject H-V’s major claims on the empirical evidence. Section 2 examines the results of the High Level Conferences, in particular the two most important: Brighton (2012) and Copenhagen (2018). We demonstrate that the outcomes of these Conferences did not pose a credible threat to the Court, and thus could not have induced it to ‘walk back’ rights protection. Section 3 reports the findings of our analysis of WB-Dissents identified by H-V. Focusing on the judgments most likely to fit H-V’s ‘expectations’, we found that fewer than one in four actually contained a WB-Dissent. And we identified only one plausible WB-Judgment. We are confident that H-V’s results are inaccurate and cannot be reproduced by external analysts. Section 4 notes factors that H-V do not consider, but that are crucial to understanding the Court’s decision-making. Four appendices, posted online, summarize and give reasons for our coding decisions.⁴

2 The High Level Conferences: Outcomes

Did the Brighton and Copenhagen Declarations register a credible threat to curb the ECtHR’s authority, as H-V suggest? No. In fact, Brighton and Copenhagen registered high levels of *collective* state support for the Court’s existing approach to adjudicating the European Convention on Human Rights (hereinafter ECHR or ‘the Convention’).⁵ Indeed, the big losers of the High Level Conferences were the Court’s critics, including states, academic think tanks and elements of the media.

¹ Helfer and Voeten, ‘Walking Back Human Rights in Europe?’, 31 *European Journal of International Law* (EJIL) (2020) 797.

² *Ibid.*, at 808–810. The other factor H-V identify, in the ‘Expectations’ section of their article (*ibid.*, at 808–811), is the impact of a new programme to accept Yale Law School students as junior ‘clerks’ at the European Court of Human Rights (ECtHR). While several of Stone Sweet’s students at Yale were amongst the first wave of such clerks, none would take credit for an increase in WB-Dissents.

³ *Ibid.*, at 823.

⁴ The four appendices are available at [Supplementary Appendices](#).

⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221, as amended (hereinafter ECHR).

The Brighton Declaration proclaims that the Court has made ‘an extraordinary contribution to the protection of human rights in Europe for over fifty years’.⁶ It (i) emphasizes that ‘the Court authoritatively interprets the Convention’;⁷ (ii) recognizes the binding nature of the Court’s precedents;⁸ (iii) approves the strengthening and expansion of new remedies;⁹ and (iv) emphasizes that domestic officials ‘must abide by the final judgment of the Court’.¹⁰ These statements are reinforced by reference to states’ responsibilities to ensure ‘effective’ compliance with the Court’s judgments, under enhanced supervision of the Committee of Ministers.¹¹

The bulk of the Brighton Declaration concerns the problem of docket overload, not the Court’s methods or politics. Brighton places the blame for this crisis squarely on the failure of national institutions. The Brighton Declaration does not directly criticize the Court’s approach to interpreting the ECHR. Nonetheless, it includes statements that imply some measure of discontentment:¹²

The authority and credibility of the Court depend in large part on the quality of its judges and the judgments of they deliver.¹³

The Conference therefore welcomes the development by the Court in its case law of principles such as subsidiarity and the margin of appreciation, and encourages the Court to give great prominence to and apply consistently these principles in its judgments.¹⁴

The same recital reiterates the basics of the ECtHR’s relevant case law:

The margin of appreciation goes hand in hand with supervision. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State’s margin of appreciation.

These statements, which ‘invite’ the Court ‘to ensure’ that its case law ‘continues to afford States Parties an appropriate margin of appreciation’,¹⁵ comprise the strongest evidence in support of the view that Brighton 2012 expresses criticism of the Court’s approach to rights protection. This latter view starkly contrasts with the overall content and tenor of the document.

While Brighton 2012 disappointed those hoping to rein in the Court, Copenhagen 2018 destroyed that project altogether. The Copenhagen Declaration stresses that the ‘ultimate goal’ of the ECtHR is to enhance ‘the effective protection of human rights in Europe’.¹⁶ It affirms that the Court ‘authoritatively interprets the Convention . . .

⁶ High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration (20 April 2012), para. 13 (hereinafter ‘Brighton 2012’).

⁷ *Ibid.*, para. 10; see also *ibid.* para. 26.

⁸ *Ibid.*, paras. 9(c), 35(c).

⁹ *Ibid.*, para. 9(c); see also *ibid.* paras. 7, 20(c), 20(d).

¹⁰ *Ibid.*, para. 3; see also *ibid.* para. 26.

¹¹ *Ibid.*, para. 20(c).

¹² *Ibid.*, para. 11.

¹³ *Ibid.*

¹⁴ *Ibid.*, para. 12(a).

¹⁵ *Ibid.*, para. 25(c).

¹⁶ High Level Conference meeting in Copenhagen, Copenhagen Declaration (13 April 2018), para. 6 (hereinafter ‘Copenhagen 2018’). Copenhagen 2018, comprised of 67 paragraphs, evokes ‘effectiveness’ 30 times.

giving appropriate consideration to present-day considerations',¹⁷ a reference to the dynamic, precedent-based construction of the treaty as a 'living instrument'.¹⁸ It strongly rejects any intimation that the principles of subsidiarity and margin of appreciation should be reshaped as formal deference doctrines. Indeed, Copenhagen 2018 'reiterates' that 'strengthening the principle of subsidiarity is not intended to limit or weaken human rights protection, but to underline the responsibility of national authorities to guarantee the rights and freedoms' in the ECtHR.¹⁹ While 'the margin of appreciation goes hand in hand with supervision under the Convention system', the Copenhagen Declaration insists that 'the decision as to whether there has been a violation of the Convention ultimately rests with the Court'.²⁰

Copenhagen 2018 targets the failings of the member states, not those of the Court. It is the 'ineffective national implementation of the Convention that remains the principal challenge confronting the . . . system'.²¹ Thus, state officials must continue to: strengthen 'the implementation of the Convention at the national level', create 'effective domestic remedies' and ensure that 'policies . . . comply fully with the Convention, including by checking, in a systematic manner and at an early stage of the process, the compatibility of draft legislation and administrative practice in the light of the Court's jurisprudence'.²²

Deliberations ultimately resulted in two amendments to the ECHR. Protocol No. 15, which entered into force on 1 August 2021, adds a reference to subsidiarity and margin of appreciation in the Preamble:

Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights . . .²³

The official explanatory report declares that this reform 'is intended . . . to be consistent with the doctrine of the margin of appreciation *as developed by the Court in its case law*'.²⁴ The second, now Protocol No. 16,²⁵ conferred upon the ECtHR powers to issue advisory opinions upon referral from national apex courts. Protocol No. 16 does

¹⁷ *Ibid.*, para. 26.

¹⁸ *Ibid.*, para. 27.

¹⁹ Copenhagen 2018, *supra* note 16, para. 10.

²⁰ *Ibid.*, para. 28(d).

²¹ *Ibid.*, para. 12.

²² *Ibid.*, para. 16.

²³ Protocol No. 15 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning criteria of admissibility, relinquishment of a case to the Grand Chamber and the appointment of judges, 24 June 2013, CETS No. 213.

²⁴ Explanatory Report to Protocol 15 to the ECHR, CETS no. 213, www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf (last visited 28 June 2021) (emphasis added). The Parliamentary Assembly of the Council of Europe stressed that the 'reference to the principle of subsidiarity and the doctrine of the margin of appreciation' strictly means 'as developed in the Court's case law'. Parliamentary Assembly of the Council of Europe, Opinion 283 (2013), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19723&lang=en>.

²⁵ Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning requests for advisory opinions, 2 October 2013, CETS No. 214, entered into force in 2018.

not diminish the Court's role as the regime's constitutional court; it enhances it, while bolstering the Court's view on the importance of inter-judicial dialogue to the subsidiarity principle. For these and other reasons, most states still refuse ratification.

The High Conferences produced a suite of at least 29 proposals. Most of these comprised procedural changes meant to reduce the docket, many proposed earlier by the Court itself. As Glas has documented, the ECtHR either rejected or ignored the vast majority of additional proposals, on its own authority.²⁶ Protocol No. 15, Glas predicts, will be 'of mainly symbolic importance', for good reasons: 'First, the Court opposed the amendment, and only the Court can ensure that [it] is more than just symbolic. Second, reference to the Court's case law . . . means [that it] can be interpreted as instructing the Court not to change anything at all.'²⁷

In sum, the stakes of the High Level Conferences were high. Certain states (the United Kingdom, Denmark, joined by Hungary and Poland, at times) sought actively to rein in the Court. But they failed,²⁸ spectacularly. Contrary to H-V's theoretical 'expectations', the Conferences did not generate a credible threat to the Court's powers and authority, and thus could not have cowed the Court into a more deferential posture. As H-V admit, the Court has not 'walked back rights' in any transparent or honest way.²⁹

3 Doctrinal Analysis of Dissents and Judgments

H-V advance one strong empirical claim: WB-Dissents 'are on the rise, both absolutely and proportionally', especially since 2012.³⁰ They then go on to assert that their findings on WB-Dissents amount to 'suggestive evidence from an especially well-informed group of actors that the [Court] is, in fact, walking back human rights in Europe'.³¹ In the conclusion, they put the point more firmly, claiming that, after 2012, 'the Grand Chamber began to narrow its interpretation of the Convention'.³² Indeed, through the

²⁶ Glas, 'From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights?', 20 *Human Rights Law Review* (2020) 121, at 147.

²⁷ *Ibid.*

²⁸ See also Ulfstein and Føllesdal, 'Copenhagen – Much Ado about Little?', *EJIL: Talk!*, 14 April 2018, available at www.ejiltalk.org/copenhagen-much-ado-about-little/ (last visited 28 June 2021).

²⁹ Helfer and Voeten, *supra* note 1, at 799–800. H-V (*ibid.*, at 802) bolster their theoretical claims as follows: 'For international courts, there is strong evidence that the Court of Justice of the European Union (CJEU) is responsive to the signals sent by the member states that express a preference for more or less European integration', citing Carrubba et al., 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice', 102 *American Political Science Review* (*Am. Pol. Sci. Rev.*) (2008) 435. Carrubba et al., however, provide no such evidence; and they do not demonstrate that the CJEU has deferred to the member states in even one ruling. Indeed, Carrubba et al. have been comprehensively refuted on the basis of their own data and methods: see Stone Sweet and Brunell, 'The European Court of Justice, State Non-Compliance, and the Politics of Override', 106 *Am. Pol. Sci. Rev.* (2012) 204.

³⁰ Helfer and Voeten, *supra* note 1, at 800.

³¹ *Ibid.*

³² *Ibid.*, at 823.

‘tacit overturning’ of its precedents, it ‘appears to be . . . walk[ing] back human rights in Europe’.³³

Neither claim is viable unless H-V’s student research assistants, who did the coding, have correctly identified WB-Dissents. To replicate the classifications H-V relied upon, we carried out a doctrinal analysis of a set of 23 judgments H-V identified as containing WB-Dissents. These 23 cases contain separate opinions that would, in principle, be most likely to support their thesis: we analysed every judgment in the data set involving evolutive interpretation, margin of appreciation considerations and explicit consensus analysis. We coded these cases independently, each of us classifying every separate opinion. We focused on whether its author accused the majority of breaching precedent in a rights-restrictive way (‘Yes’) or clearly did not (‘No’). In addition, we included two middle categories for ‘close calls’, in which the analyst leaned towards ‘Yes’ or ‘No’, but thought that a plausible case could be made for the opposite. We labelled these latter categories ‘Yes – tossup’ and ‘No – tossup’.

Our findings do not replicate the classification reported by H-V. Even in the most generous reading (where a single ‘Yes’ or a single ‘Yes – tossup’ vote would qualify a separate opinion as a WB-Dissent), only seven of 23 cases could be designated as including a WB-Dissent. If we require two ‘Yes’ (or ‘Yes – tossup’) votes to count as a WB-Dissent, we must reject H-V’s coding in all but five of the 23 judgments under analysis. We also failed to confirm H-V’s results with respect to the 17 (of this set of 23) judgments decided in ‘Period 3’ (2012–2018), which covers the years during which, in H-V’s account, the pushback from disgruntled states had its greatest effect on the Court. The timing, the subject matter (qualified rights, as enumerated in Articles 8, 9, 10, 11 ECHR and ECHR Protocol 1) and the methods of analysis (balancing, margin of appreciation, consensus) in these 17 cases directly correspond to the criticisms raised by a vocal minority of states before and during the High Level Conferences. Of these 17 cases, only three included a clear WB-Dissent³⁴ and 12 clearly did not.³⁵ An additional case (*S.A.S. v. France*³⁶) received two ‘Yes’ and one ‘No’ votes; and one (*Van der Heijden v. The Netherlands*³⁷) received one ‘Yes – tossup’, one ‘No – tossup’ and one ‘No’. In short, only four of the 17 ‘Period 3’ judgments (24%) that are ‘most likely to fit H-V’s predictions’ received at least two ‘Yes’ votes.

Moreover, Andenas analysed every judgment that H-V discuss in the text of their paper as an example of a WB-Dissent. Out of nine such cases, Andenas found only one WB-Dissent, and no WB-Judgments.³⁸

³³ *Ibid.*, at 827.

³⁴ That is, all three of us labelled these three cases as either ‘Yes’ (*Scoppola v. Italy* (No. 3), Appl. No. 126/05, Grand Chamber Judgment of 22 May 2012; *Animal Defenders v. the United Kingdom*, Appl. No. 48876/08, Grand Chamber Judgment of 22 April 2013), or as ‘Yes’ or ‘Yes – tossup’ (*Pentikäinen v. Finland*, Appl. No. 11882/10, Grand Chamber Judgment of 20 October 2015).

³⁵ All three of us classified 10 cases as ‘No’. Two additional cases (*Delfi AS v. Estonia*, Appl. No. 64569/09, Grand Chamber Judgment of 16 June 2015, and *Dubská v. Czech Republic*, Appl. No. 28859/11, Grand Chamber Judgment of 15 November 2016) received two ‘No’ votes and one ‘No – tossup’.

³⁶ *S.A.S. v. France*, Appl. No. 43835/11, Grand Chamber Judgment of 1 July 2014.

³⁷ *Van der Heijden v. The Netherlands*, Appl. No. 42857/05, Grand Chamber Judgment of 3 April 2012.

³⁸ For the Andenas codings, see Appendix A, Table A.2; Appendix D. Andenas’s coding for *Animal Defenders v. UK*, *supra* note 34, is reported in Appendices B and C.

In most cases, dissenters either (i) did not specify the precedents alleged to have been overruled, or (ii) failed to indicate how the ruling would reduce standards of rights protection, or (iii) did not show that the judgment would expand the regulatory autonomy of states, relative to the situation prior to the judgment. Instead, in most cases, dissenters criticize the Court for either (i) refusing to move forward fast enough, or (ii) not giving enough weight, in the balancing exercise, to factors that dissenters believed should have led them to raise standards. Neither reason meets H-V's criteria for identifying a separate opinion as a WB-Dissent.³⁹

How and to what extent has the Grand Chamber sought to mollify critical states by reeling in rights protections established in its extant case law? H-V state that the Court has never explicitly overturned precedent, or admitted to walking back protections. But they also argue, circumspectly at first but more openly in the conclusion, that the Court surreptitiously reverses rights protections – by ignoring or misapplying precedent, or by deploying the margin of appreciation or consensus analysis in ways that expand state regulatory autonomy. Thus, WB-Dissents become evidence that counts for the proposition that the Court is, in fact, ‘constricting human rights in Europe’,⁴⁰ through ‘tacit overturning’ of precedent.⁴¹ Our analysis contradicts these claims.

Doctrinal analysis of the judgments themselves would provide more direct evidence regarding the allegation that the ECtHR is ‘walking back rights’. All three of us evaluated the majority opinions in the set of 23 judgments discussed above. Only one case, *S.A.S. v. France*,⁴² was identified as a WB-Judgment. In some of the 23 judgments, the Court declined to expand established rights. In others, the Court found that domestic apex courts had conducted proportionality analysis in line with its announced standards and principles, in which case, the ECtHR would normally *not* second-guess outcomes.⁴³ We found no post-Brighton 2012 trend of ‘walking back rights’.

We give reasons for our coding decisions in the Appendices posted online.⁴⁴ While we recognize that these decisions can be fiercely complex, many of the errors made by H-V's coders are simple and easy to identify. In *A, B and C v. Ireland*, for instance, the Court refused to declare Ireland's draconian restrictions on access to abortion to be in violation of Article 8 ECHR, thwarting the normal presumptions of consensus analysis.⁴⁵ However, the ECtHR did not ‘walk back rights protection’; instead, it declined to move forward. At the same time, the Grand Chamber ordered Ireland to revise its law, in order to enhance procedural protections of women in their pregnancy, and to render effective the meagre entitlements that did exist. *A, B and C* is a classic example

³⁹ See the coding notes to Appendices B and C.

⁴⁰ Helfer and Voeten, *supra* note 1, at 823.

⁴¹ *Ibid.*, at 827.

⁴² *S.A.S. v. France*, *supra* note 36.

⁴³ See Section 4 below.

⁴⁴ See *supra* note 4.

⁴⁵ *A, B and C v. Ireland*, Appl. No. 25579/05, Grand Chamber Judgment of 16 December 2010. Levels of state consensus concerning the scope of a qualified right, and how it may be limited, are a factor that the Court takes into account when determining the proportionality (necessity) of a state measure under review. While consensus analysis is often, in fact, determinative, the Court is not bound, in any legal sense, by the results of state consensus.

of ‘proceduralisation’,⁴⁶ which is a strategy the Court sometimes deploys in what Gerards calls ‘dilemma cases’,⁴⁷ including those that ‘involve complex moral questions [such as] abortion, euthanasia, and religion’.⁴⁸ In any event, all three of us coded the judgment as (i) not containing a WB-Dissent and (ii) not comprising a WB-Judgment.

As noted, we identified only one WB-Judgment – *S.A.S. v. France* – albeit by split decision.⁴⁹ In *S.A.S.*, the Court upheld a French law prohibiting the wearing of full-face coverings (*burqas*) in public spaces. Although the Court rejected every other rationale proffered by France for the ban, it accepted a novel justification: ‘respect for the minimum requirements of life in society’, that is, to render ‘living together’ meaningful.⁵⁰ Two of us coded this ruling as a WB-Dissent, given that the Grand Chamber had, in essence, added a reason for limiting a qualified right in breach of precedent to the effect that the headings listed in limitation clauses were presumptively exhaustive. These two coders discounted the pains the majority took to connect the new justification to limitation clauses authorizing states to take measures necessary to protect ‘the rights and freedoms’ of others. One of us disagreed, emphasizing that the ruling had not rolled-back existing rights protection and that the dissent had not accused the majority of having done so. After all, the Grand Chamber had never recognized a woman’s right to wear religious-based face coverings, while upholding state authority to prohibit Islamic headscarves in a prior case.⁵¹

4 Conclusion

In the end, what H-V offer is an exploration of the evolving law and politics of dissent in the ECtHR. Separate opinions have become sharper and more common in recent periods, and their paper sheds light on aspects of these changes. But H-V have not demonstrated, at least in the cases we have analysed, either that dissenters increasingly accuse the Court of reversing protections, or that the Court has ‘tacitly overturned’ its precedents so as to lower standards of rights protection, or to expand state regulatory autonomy.

It is important to emphasize that our differences with H-V are not primarily theoretical-conceptual or methodological. We agree with H-V on basic points: (i) that the ECtHR is a strategic actor; (ii) that it is important to consider the institutional and policy preferences of the member states, as they evolve, when assessing the Court’s decision-making; and (iii) that intra-Court politics are routinely expressed through separate opinions, which deserve analytic attention. We also agree that identifying

⁴⁶ A. Stone Sweet and C. Ryan, *A Cosmopolitan Legal Order: Kant, Constitutional Justice, and the European Convention on Human Rights* (2018), at 190–196.

⁴⁷ J. Gerards, ‘Procedural Review by the European Court of Human Rights: A Typology’, in J. Gerards and E. Brems (eds.), *Procedural Review in European Fundamental Rights Cases* (2017) 127, at 153.

⁴⁸ Stone Sweet and Ryan, *supra* note 46, at 196.

⁴⁹ *S.A.S. v. France*, *supra* note 36.

⁵⁰ *Ibid.*, para. 77, 121–22.

⁵¹ *Leyla Şahin v. Turkey*, Appl. No. 44774/98, Grand Chamber Judgment of 10 November 2005.

WB-Dissents and WB-Judgments can tell us much of significance about the development of law and politics in the regime.

At the same time, H-V's perspective is excessively narrow, leading them to ignore crucial factors that bear directly on the Court's decision-making. We have mentioned two of them. A first is proceduralization. Even while balking at expanding the substantive scope of a given right, the ECtHR can and does strengthen rights protections, through commanding states to guarantee the effectiveness of procedures applicable to the enjoyment of existing rights. A second concerns the Court's strategy of relying on inter-judicial 'dialogue' with the apex courts of Europe, as a preferred means of respecting the subsidiarity principle. It would be wrong to equate the Court's deference to its domestic counterparts, when the latter balance in accordance with the relevant principles established by the Court's case law, with abdication. We also found that the Court does not hesitate to engage in dialogues with the courts of states that are *not* classified by H-V as 'established', 'consolidated' democracies. In the cases we analysed, dissenters complained that too much deference was given to domestic officials, including the courts, in Estonia, the Czech Republic, Romania and Russia. A third factor relates to the interpretive dynamics of adjudicating through a jurisprudence of general principles, namely, the tendency, over time, for the case law to 'thicken' through use, such that any given principle (or guiding precedent) is increasingly defined by exceptions to its scope. We will expand upon these themes in our continuing research on the present topic: why efforts to rein in the European Court, in 2012 and afterwards, failed.

