
Walking Back Human Rights in Europe?

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Abstract

Judges and scholars have long debated whether the European Court of Human Rights (the ECtHR or the Court) can only expand, never diminish, human rights protections in Europe. Recent studies have found that political backlashes and national-level restrictions have influenced ECtHR case law. However, analysing whether the ECtHR is shifting in a regressive direction faces an empirical challenge: How can we observe whether the Court is limiting rights over time if it has never expressly overturned a prior judgment in a way that favours the government? We gain traction on this question by analysing all separate and minority opinions of the ECtHR Grand Chamber between 1998 and 2018. We focus on opinions asserting that the Grand Chamber has tacitly overturned prior rulings or settled doctrine in a way that favours the respondent state, which we label as ‘walking back dissents’. We find that walking back dissents have become significantly more common in the last decade, revealing that some members of the ECtHR themselves believe that the Grand Chamber is increasingly overturning prior judgments in a regressive direction.

1 Introduction

Human rights in Europe are a perpetual work in progress. The individual liberties protected by the European Convention on Human Rights are fixed neither by the treaty’s text nor by the intent of its drafters. Instead, the Convention is periodically reinterpreted by the 47 judges of the European Court of Human Rights (the ECtHR or the Court). Applying a famously dynamic and evolutive interpretive approach, the Court has found domestic laws and practices that once raised no human rights concerns to

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contravene the Convention when later re-evaluated in light of progressive regional trends in law, policy and public opinion. Perhaps most strikingly, the ECtHR has not hesitated to explicitly overrule its prior judgments to expand protected rights.

But what if European trends move in the other direction? If states narrow the protection of certain individual liberties – in response to concerns about terrorism or migration, for example – should the ECtHR revisit its prior case law and restrict human rights in Europe? As explained in Section 3, scholars have long debated whether the Court can only expand, never diminish, human rights. For many years, these disagreements were never tested in practice; national-level human rights protections – and the Court’s case law reflecting them – moved in only one direction.

Beginning in the mid-2000s, however, executive officials, legislators, and judges in several countries began to criticize the ECtHR for pushing human rights protections too far. Across a range of high-profile and politically sensitive topics – including the rights of criminal defendants, suspected terrorists, asylum seekers, and non-traditional families – the Court expansively interpreted the European Convention on Human Rights (ECHR or the Convention)¹ and limited governments’ legal and policy discretion. Discontent with the ECtHR soon spilled over from public complaints to concrete action:

- In the 2012 Brighton Declaration² and in later declarations and amendments to the Convention, states collectively signalled that the ECtHR should give them greater deference.³
- Several states rolled back domestic legal protections, especially in the area of immigration.⁴
- Some consolidated democracies, the ECtHR’s traditional backbone of support, refused to implement judgments⁵ or openly challenged judgments.⁶
- Some politicians and political parties adopted sceptical positions towards international human rights and even expressed interest in leaving the ECHR altogether.⁷

When states collectively shift in a progressive direction, the ECtHR has relied on those trends to explicitly overturn its prior rulings and issue decisions that ‘pull up’ lagging

¹ European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, 213 UNTS 221, as amended.

² High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration (20 April 2012).

³ See, e.g., Council of Europe Steering Commission For Human Rights, *The Longer-Term Future of the System of the European Convention on Human Rights* (2015).

⁴ See, e.g., Kennedy, A ‘European Race to the Bottom’: Human Rights Defenders Criticise Denmark’s new immigration bill, *Euronews*, 22 February 2019, available at <https://bit.ly/3iXRK0I>.

⁵ See, e.g., Bates, ‘The Continued Failure to Implement *Hirst v UK*’, *EJIL: Talk!*, 15 December 2015, available at <https://bit.ly/3hZ1tmf>.

⁶ See, e.g., McGoldrick, ‘Religion in the European Public Square and in European Public Life—Crucifixes in the Classroom?’, 11 *Human Rights Law Review* (*Hum. Rts. L. Rev.*) (2011) 451.

⁷ Ciacchi, ‘Political Parties’ Programmes: Examples of Governance Against Human Rights?’, 4 *European Journal of Comparative Law and Governance* (2017) 105.

countries, leading them to adopt reforms more quickly – a pattern we have documented for LGBT rights.⁸ But what about when countries are, on average, moving in a regressive direction, and governments publicly oppose broadening the Convention's reach? If ECtHR sticks to its expansionist approach, it risks triggering a backlash that could reduce the Court's influence. Alternatively, the ECtHR could adjust its case law to track rights-restrictive national trends.⁹ But this approach, too, has risks. It may both alienate the Court's compliance constituencies and limit rights protections for those disfavoured individuals and groups whom the Court has identified as especially in need of its assistance.

Any analysis of whether ECtHR case law is shifting in a rights-restrictive direction faces an empirical challenge: How can we observe whether the Court is limiting rights over time if the ECtHR – unlike many national supreme or constitutional courts – has never expressly overturned a prior judgment in a way that favours the government? We gain traction on this question by systematically analysing minority (separate) opinions of the ECtHR Grand Chamber, the 17-member plenary body that addresses the most significant human rights issues and resolves inconsistencies in prior case law.¹⁰ We identify minority opinions asserting that the Grand Chamber has overturned prior rulings or settled doctrine in a way that favours the respondent government. We label such minority opinions as 'walking back dissents'. The large majority of these minority opinions (85%) are denominated as dissents; the remainder are concurring opinions that agree with the outcome of the case but nonetheless charge the majority with overturning prior case law or doctrine. For convenience, we label all minority opinions containing such assertions as 'walking back dissents'.

We recognize that ECtHR judges can reasonably disagree about how to interpret prior decisions and legal doctrines. What the minority perceives as a tacit overturning of a rights-protective precedent, the majority may view as clarifying the Court's case law or adjusting it to different facts or circumstances. We also acknowledge that the jurists who write dissenting opinions may have a range of normative and strategic reasons for charging the ECtHR with overturning a judgment. They may, for example, do so to sharpen the rhetorical bite of their critique, heighten its political implications, or invite new cases from future litigants.

⁸ Helfer & Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe', 68 *International Organization (Int'l Org.)* (2014) 77, at 95–96 (finding that, on average, an ECtHR judgment is responsible for an additional five countries adopting pro-LGBT rights policies in the five years immediately following the ruling and an additional eight countries doing so over a decade).

⁹ See, e.g., Madsen, Cebulak and Wiebusch, 'Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts', 14 *International Journal of Law in Context* (2018) 5.

¹⁰ Mowbray, 'An Examination of the Work of the Grand Chamber of the European Court of Human Rights', 3 *Public Law* (2007) 507, at 510. Chambers of the ECtHR are 'formally prohibited from reversing precedent'. See William A. Schabas, *The European Convention on Human Rights: A Commentary* (2015), at 711. They must relinquish jurisdiction in favor of the Grand Chamber 'where the resolution of a question . . . might have a result inconsistent with a judgment previously delivered by the Court'. See ECHR, *supra* note 1, Art. 30.

Yet, for a court on which expressly abrogating a prior judgment in a rights-restrictive direction is foreclosed, the majority will *always* justify a decision that achieves that result, in fact if not in name, by reference to the different circumstances of a later case. In addition, even if dissenting judges have different motivations for charging the majority with tacit overruling, an aggregate increase in walking back dissents over time provides suggestive evidence from an especially well-informed group of actors that the ECtHR is, in fact, walking back human rights in Europe, even if the Court is not doing so overtly.

Our dataset comprises all of the nearly 400 Grand Chamber judgments from 1999 (following the entry into force of Protocol No. 11) through 2018. During this 20-year period, 83% of the judgments included at least one (and often more than one) separate opinion, usually a dissent or a concurrence in whole or in part. With the help of two research assistants, we coded all of these opinions, asking three questions: (i) whether the opinion was more or less favourable to the government than the majority judgment; (ii) whether the opinion claimed that the majority had explicitly or tacitly overturned a prior ECtHR judgment or misconstrued or ignored prior case law; and (iii) whether the opinion asserted that the majority inconsistently applied key legal principles, such as the margin of appreciation, living instrument or European consensus doctrines.

We find that walking back dissents are on the rise, both absolutely and proportionally. For example, between 2012 and 2018, 56 Grand Chamber judgments (40%) were accompanied by one or multiple walking back dissents. In contrast, in the 1999–2005 period, this was true for just 24% of Grand Chamber judgments. We offer a range of qualitative examples to illustrate the arguments in these minority opinions, including claims that tacit overruling reflects a broader abandonment of the ECtHR's historical role.

We also provide information about the judges, countries and substantive legal issues most often associated with walking back dissents. We consider the possibility that Grand Chamber cases have become more difficult or contested over time and thus are more likely to generate walking back dissents. We find evidence, even after controlling for these case characteristics, that walking back dissents have become significantly more likely in the post-Brighton period.

The remainder of this article proceeds as follows. Section 2 describes the ECtHR's dynamic treaty interpretation methods and the views of judges and scholars as to whether the Court can use these methods to contract rights as well as expand them. Section 2 also surveys existing empirical studies on how the ECtHR is responding to state pushback and the literature on judicial dissents. Section 3 explains our research design, data collection, theoretical expectations and coding procedures. Section 4 sets forth our analysis and findings. Section 5 concludes and considers broader theoretical and normative implications.

2 The Expansion (and Contraction?) of Human Rights in Europe

A The Living Instrument Doctrine and the Expansion of Rights

The European Convention on Human Rights was adopted in 1950, but it was not until the late 1970s that the ECtHR first confronted a practice – judicial corporal

punishment of juveniles – that was once widely viewed as unexceptional but had gradually been abandoned. In finding such punishment to be degrading, the Court famously stated that ‘the Convention is a living instrument which . . . must be interpreted in the light of present-day conditions’.¹¹

Over the next four decades, the living instrument doctrine ‘spread throughout the Strasbourg case-law’, enabling the Court ‘to adapt, over time, the text of the Convention to legal, social, ethical or scientific developments’.¹² When the ECtHR identifies a European consensus – or at least a significant convergence – in the national laws and practices of the member states towards more expansive protection of a particular right or freedom, the Court is more likely to conclude that a state which has not kept pace with these trends has violated the Convention.¹³

The ECtHR applies this progressive approach even when doing so requires overturning prior judgments. Although recognizing that ‘legal certainty, foreseeability and equality before the law’ weigh against ‘depart[ing], without good reason, from precedents laid down in previous cases’, the Court has also held that failing ‘to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement’.¹⁴

Examples of the ECtHR explicitly overruling its own prior decisions and those of the European Commission on Human Rights are numerous and varied.¹⁵ They include judgments recognizing the rights of conscientious objectors to refuse military service,¹⁶ of trade unions to bargain collectively with employers,¹⁷ of gay men to challenge laws criminalizing private homosexual activity¹⁸ and of transgendered persons to marry and obtain appropriate identity documents.¹⁹ The Court has also overturned rulings involving procedural issues, reversing judgments declining to extend the right

¹¹ ECtHR, *Tyrer v. United Kingdom*, Appl. No. 5856/72, Judgment of 25 April 1978, para. 31. All ECtHR decisions are available at <http://hudoc.echr.coe.int/>.

¹² ECtHR, *Magyar Helsinki Bizottság v. Hungary*, Appl. No. 18030/11, Grand Chamber Judgment of 11 August 2016, para. 3 (Sicilianos and Raimondi JJ., concurring).

¹³ See, e.g., K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (2015); Helfer, ‘Consensus, Coherence and the European Convention on Human Rights’, 26 *Cornell International Law Journal* (1993) 133.

¹⁴ ECtHR, *Vilho Eskelinen v. Finland*, Appl. No. 63235/00, Grand Chamber Judgment of 19 April 2007, para. 56.

¹⁵ Mowbray, ‘An Examination of the European Court of Human Rights’ Approach to Overruling its Previous Case Law’, 9 *Hum. Rts. L. Rev.* (2009) 179. Prior to Protocol No. 11, the European Commission reviewed applications and issued nonbinding decisions as to whether the respondent state had violated the Convention. The Commission or the respondent state (but not the applicant) could appeal these decisions to the ECtHR.

¹⁶ ECtHR, *Bayatyan v. Armenia*, Appl. No. 23459/03, Grand Chamber Judgment of 7 July 2011 (overruling European Commission case law from the 1970s and 1980s).

¹⁷ ECtHR, *Demir and Baykara v. Turkey*, Appl. No. 34503/97, Grand Chamber Judgment of 11 December 2008 (overturning an ECtHR judgment from the mid-1970s).

¹⁸ ECtHR, *Dudgeon v. United Kingdom*, Appl. No. 7525/76, Judgment of 22 October 1981 (overturning European Commission case law from the 1950s and 1960s).

¹⁹ ECtHR, *Goodwin v. United Kingdom*, Appl. No. 28957/95, Grand Chamber Judgment of 11 July 2002 (overturning multiple ECtHR judgments from the 1970s through the 1990s).

to a fair hearing to injunction proceedings,²⁰ refusing to consider violations of the right to an effective domestic remedy if the state violated other Convention provisions²¹ and concluding that interim measures are not legally binding.²² Even when the ECtHR declines to find a Convention violation, it often signals that it is open to revisiting the issue in the future.²³

B *Can the ECtHR Walk Back Rights?*

The ECtHR has not hesitated to explicitly overrule prior cases to *expand* rights and freedoms, often explicitly referencing legislative, judicial and social developments in Europe. But what if these trends move in a more rights-restrictive direction?

There is ample correlational evidence that national high courts respond to shifts in public opinion and ‘policy moods’. Studies of the US Supreme Court, for example, reveal that when public opinion and policies – including those relating to civil liberties and the rights of criminal defendants – become more liberal (or conservative), the Court’s rulings also tend to become more liberal (or conservative).²⁴ Various mechanisms may explain this correlation. Politicians may appoint more liberal (or more conservative) judges in line with ambient policy preferences. Judges may be concerned that the Court will lose legitimacy if its decisions are out of sync with public opinion. Or the events that shape public moods, such as terrorist attacks or other threats, may also affect the views and interpretive choices of judges.²⁵

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.²⁶ Similarly, observations

²⁰ ECtHR, *Micallef v. Malta*, Appl. no. 17056/06, Grand Chamber Judgment of 15 October 2009, paras. 75, 81 (overturning numerous ECtHR judgments from the late 1990s and 2000s).

²¹ ECtHR, *Kudła v. Poland*, App. No 30210/96, Grand Chamber Judgment of 26 October 2000, paras. 147–149 (overturning judgments from the early 1990s through 2000 regarding the right to effective national remedy).

²² ECtHR, *Mamatkulov and Askarov v. Turkey*, App. Nos. 46827/99 and 46951/99, Grand Chamber Judgment of 4 February 2005 (overturning ECHR judgments from the early 1990s and early 2000s).

²³ See, e.g., ECtHR, *S.H. and Others v. Austria*, Appl. no. 57813/00, Grand Chamber Judgment of 3 November 2011, para. 118 (stating that restrictions on medically assisted procreation is an area ‘in which the law appears to be continuously evolving and which is subject to a particularly dynamic development in science and law [and which therefore] needs to be kept under review’); ECtHR, *Nait-Liman v. Switzerland*, Appl. no. 51357/07, Grand Chamber Judgment of 15 March 2018, para. 220 (emphasizing ‘the dynamic nature’ of universal jurisdiction over human rights violations in civil cases, asserting that ‘the Court does not rule out the possibility of developments in the future’ and inviting states ‘to take account in their legal orders of any [relevant] developments’).

²⁴ See, e.g., Mishler and Sheehan, ‘The Supreme Court as a Counter-majoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions’, 87 *American Political Science Review* (*Am. Pol. Sci. Rev.*) (1993) 87; B. Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (2009).

²⁵ See Epstein and Martin, ‘Does Public Opinion Influence the Supreme Court? Possibly Yes (But We’re Not Sure Why)’, 13 *University of Pennsylvania Journal of Constitutional Law* (2010) 263.

²⁶ Carrubba, Gabel and Hankla, ‘Judicial Behavior under Political Constraints: Evidence from the European Court of Justice’, 102 *Am. Pol. Sci. Rev.* (2008) 435; Larsson and Naurin, ‘Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU’, 70 *Int’l Org.* (2016) 377.

by third-party states correlate strongly with the direction and content of rulings by World Trade Organization dispute settlement bodies.²⁷ There are no equivalent studies of the ECtHR, where submissions by other member states are less common.²⁸ Yet, there is evidence that more Euro-sceptical governments tend to nominate candidates who favour judicial self-restraint as compared to the nominees of less Euro-sceptical governments.²⁹

While it is quite common for courts to be responsive to their political and social environments, we are unaware of another legal system in which strong normative arguments constrain the direction of a court's response. The rise of transnational terrorism first sparked a debate over whether the ECtHR can or should consider regressive trends in national law and policy. As Jeffrey Brauch has noted:

As the world grows smaller and technology advances, terrorism poses a greater and more imminent threat. Nations are responding more forcefully and aggressively to that threat. As they do, tomorrow's 'consensus' on what is needed to counter international terrorism may embrace stronger measures and more infringements on individual privacy – perhaps those measures and infringements we consider to be human rights violations today. But under a consensus standard they may not be violations tomorrow.³⁰

The Convention's expansion to Eastern Europe in the 1990s raised similar concerns. The diverse legal, social and political traditions of these countries led scholars such as Paolo Carozza to argue that 'we should not just expect in practice but actually agree in principle that the dilution of consensus occasioned by the integration of an ever-broader circle of member states should result in a lowering of already established standards'.³¹ Proponents of a bidirectional application of the living instrument and European consensus doctrines make a more general normative claim – that 'there is no compelling reason why the protection of human rights will not diminish if consensus is the primary determiner of whether a right exists'.³²

Other scholars disagree. For Alec Stone Sweet, the logic of 'majoritarian activism' operates only in one direction: 'Once national regulatory autonomy has been lost in a given field, states have never regained it. To date, no ECtHR ruling has ever been overridden.'³³ According to George Letsas, evolutive interpretation 'denotes a process

²⁷ Busch and Reinhardt, 'Three's a Crowd: Third Parties and WTO Dispute Settlement', 58 *World Politics* (2006) 446.

²⁸ N. Bürli, *Third-Party Interventions Before the European Court of Human Rights* (2017), at 9.

²⁹ Voeten, 'The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights', 61 *Int'l Org.* (2007) 669.

³⁰ Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law', 11 *Columbia Journal of European Law* (2005) 113, at 146.

³¹ Carozza, 'Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights', 73 *Notre Dame Law Review* (1998) 1217, at 1231.

³² Brauch, *supra* note 30, at 146; see also Dzehtsiarou and O'Mahony, 'Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the U.S. Supreme Court', 44 *Columbia Human Rights Law Review* (2013) 309, at 339 (stating that 'there is nothing in principle to prevent the ECtHR from rowing back on previous decisions and restricting the accepted scope of a particular guarantee').

³³ Stone Sweet and Brunell, 'Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the ECHR, the EU, and the WTO', 1 *Journal of Law and Courts (J. L. & Courts)* (2013) 61, at 81.

of moral discovery’ that requires ‘ignoring consensus and blocking majoritarian preferences from having an effect on fundamental interests of individuals’.³⁴ Rights-restricting trends are irrelevant to this ‘moral reading’ of the Convention, precluding the Court from regressive interpretations of rights.³⁵

Judges on the ECtHR are similarly divided. The ‘one-way ratchet’ view was most forcefully defended by Judge Casadevall in a dissenting opinion in *Gorou v. Greece*:

[O]nce [the Court] has decided to extend individuals’ rights . . . it should not . . . reverse its decision. Acquired rights in the cause of human rights are at least as precious as acquired rights in other branches of the law and therefore the principle of non-regression must prevail.³⁶

Former ECtHR President, Swiss judge Luzius Wildhaber, disagrees. Critiquing Judge Casadevall’s opinion, he writes:

The idea that a ‘ratchet’ should be attached to the interpretative process . . . has neither a treaty nor a customary law basis, nor a reasoned justification in the Court’s jurisprudence or the States’ practice and reactions to this jurisprudence. Democratic societies may and sometimes must change their values and laws, especially when they are confronted with a widespread and vicious life-endangering terrorism.³⁷

The debate among judges and scholars has not (yet) been reflected in the Court’s case law. In particular, our review of all Grand Chamber judgments reveals that the ECtHR has never *expressly* overturned a prior ruling in a rights-restrictive direction. Nor are we aware of any majority judgment that cites the living instrument, European consensus or other legal doctrine to justify narrowing a right that the Court had previously expanded. What we have observed are recent judgments in which the judges authoring minority opinions assert that the Grand Chamber has tacitly overturned prior case law or doctrine.

An apt example is *Animal Defenders International v. United Kingdom*, a 2013 case concerning a blanket ban on paid political advertising.³⁸ Although a Chamber had upheld a challenge to a nearly identical Swiss ban more than a decade earlier,³⁹ the Grand Chamber, by a vote of nine to eight, concluded that the UK restrictions did not violate the right to freedom of expression. The dissenting judges rejected the attempt to distinguish the two cases, accusing the majority of ‘overruling, at least in substance’, the earlier judgment.⁴⁰ Also illustrative is *Khlaifia v. Italy*,⁴¹ a 2016 case interpreting the

³⁴ Letsas, ‘The ECHR as a Living Instrument: Its Meaning and Legitimacy’, in A. Føllesdal et al. (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (2013) 106, at 124.

³⁵ *Ibid.*, at 132.

³⁶ ECtHR, *Gorou v. Greece* (no. 2), Appl. no. 12686/03, Grand Chamber Judgment of 20 March 2009.

³⁷ Wildhaber, ‘The Old Court, the New Court, and Paul Mahoney’, 36 *Human Rights Law Journal* (2016) 292, at 296.

³⁸ ECtHR, *Animal Defenders International v. United Kingdom*, Appl. no. 48876/08, Grand Chamber Judgment of 22 April 2013.

³⁹ ECtHR, *VgT Verein gegen Tierfabriken v. Switzerland*, Appl. no. 24699/94, Judgment of 28 June 2001.

⁴⁰ ECtHR, *Animal Defenders International*, *supra* note 38, at paras. 1, 9 (Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano JJ., dissenting); see also *ibid.* at para. 12 (Tulkens with Spielmann and Laffranque JJ., dissenting) (characterizing the majority judgment as ‘incompatible with . . . previous case-law’).

⁴¹ ECtHR, *Khlaifia and Others v. Italy*, Appl. no. 16483/12, Grand Chamber Judgment of 15 December 2016.

prohibition on collective expulsion of aliens. In an earlier case against Italy, the Grand Chamber construed the ban expansively as ‘prevent[ing] States from being able to remove a certain number of aliens without examining their personal circumstances . . .’.⁴² In the later judgment, however, the Grand Chamber held that the ban ‘does not guarantee the right to an individual interview in all circumstances’,⁴³ a conclusion that a dissenting judge rebuked as ‘a serious and unjustified backward step in human rights protection in the field of expulsion’.⁴⁴

These separate opinions suggest that the Court, at least in the eyes of some judges, may have begun to walk back human rights in Europe. Before investigating the frequency of walking back dissents and whether they are increasing, we first review studies on whether ECtHR case law has changed in recent years and then discuss the role of separate opinions in general and walking back dissents in particular.

C Existing Scholarship on Changes in ECtHR Jurisprudence

Scholars are beginning to investigate ECtHR decisions before and after the events described in the introduction to this article, using quantitative and qualitative approaches. Mikael Madsen compares all ECtHR judgments between 2009 and 2015 and finds ‘a statistically significant increase in the percentage of cases that refer to either the margin of appreciation or subsidiarity over the entire period’.⁴⁵ From this, Madsen concludes that the ECtHR ‘provide[s] more subsidiarity overall following the Brighton Declaration’.⁴⁶ Janneke Gerards provides a qualitative comparison of the context in which these two doctrines appear in cases decided in 2012–2013 and in 2016–2017. She concludes, contrary to Madsen, that the Court invokes the margin of appreciation primarily as an ‘empty rhetorical device’ that does not ‘determine the strictness and standards of review’.⁴⁷

Başak Çali argues that the Court is increasingly applying a variable geometry approach that gives greater deference to states that apply ECtHR case law in good faith while developing a ‘bad faith jurisprudence’ for states that flout established human rights standards.⁴⁸ Oddný Arnardóttir identifies a different trend. She asserts that the post-Brighton Court is giving a wider margin of appreciation to national courts and parliaments that follow certain decision-making procedures.⁴⁹ However, similarly

⁴² ECtHR, *Hirsi Jamaa and Others v. Italy*, Appl. no. 27765/09, Grand Chamber Judgment of 23 February 2012, para. 177.

⁴³ ECtHR, *Khlaifia and Others*, *supra* note 41, para. 248.

⁴⁴ *Ibid.* paras. 12, 16 (Serghides J., partly dissenting).

⁴⁵ Madsen, ‘Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?’, 9 *Journal of International Dispute Settlement (J. Int’l Dispute Settlement)* (2018) 199, at 210.

⁴⁶ *Ibid.* at 221.

⁴⁷ Gerards, ‘Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights’, 18 *Hum. Rts. L. Rev.* (2018) 495, at 497, 506.

⁴⁸ Çali, ‘Coping with Crisis: Towards a Variable Geometry in the Jurisprudence the European Court of Human Rights?’, *Wisconsin Journal of International Law* (2018) 237, at 242.

⁴⁹ Arnardóttir, ‘The Brighton Aftermath and the Changing Role of the European Court of Human Rights’, 9 *J. Int’l Dispute Settlement* (2018) 223, at 223.

to Çali, Arnardóttir concludes that the current Court has redefined its relationship with the national authorities by giving more deference ‘under the principle of proportionality to those national authorities that exhibit due Convention diligence by applying the Court’s jurisprudence and analytic methodologies at home’.⁵⁰ Consistent with these claims, Øyvind Stiansen and Erik Voeten, analysing all ECtHR judgments through mid-2016, find that the Court has recently found fewer violations by established democracies, while violation rates against non-democracies and newer democracies have remained steady.⁵¹

The foregoing studies suggest that case outcomes have changed in recent years. Yet, this does not tell us whether the ECtHR is, in fact, walking back human rights. Even if, on average, violation rates have declined over time, that trend could simply reflect the Court’s maturation. Perhaps the types of cases that the Grand Chamber now hears are more complex, or applicants are pushing the ECtHR to be even more progressive, leading to a lower rate of violation findings. A Court that is less likely to endorse pleas for more expansive interpretations of human rights is not the same as a Court that is narrowing prior interpretations.

D *The Role of Separate Opinions*

The rules governing separate opinions vary widely across international and national high courts, ranging from a total prohibition at one extreme to courts whose judgments regularly include multiple separate opinions at the other.⁵² Differences in institutional design, judicial culture and the professional backgrounds of judges also influence the frequency of minority opinions on courts that permit judges to publish individual views.⁵³ Research on separate opinions in national courts is far more extensive than similar studies of international tribunals, but scholars have identified a common set of advantages and disadvantages associated with the practice.

The benefits of separate opinions include improving the quality of a court’s reasoning; enhancing judicial independence, transparency and accountability; demonstrating judicial deliberation, including by revealing to the parties that their arguments have been carefully considered; and providing information to other judges, future litigants, compliance constituencies and the public about the errors of the majority’s approach, alternative future trajectories of the law or the need for legislation or treaty revisions.⁵⁴ The disadvantages of minority opinions include: reducing legal certainty and predictability; eroding collegiality; damaging a court’s authority and legitimacy by ‘undermining the credibility of the argument that the decision reached is based

⁵⁰ *Ibid.*

⁵¹ Stiansen and Voeten, ‘Backlash and Judicial Restraint: Evidence from the European Court of Human Rights’, *International Studies Quarterly (Int’l Stud. Q.)* (forthcoming 2021) (on file with authors).

⁵² Dunoff and Pollack, ‘The Judicial Trilemma’, 111 *American Journal of International Law (AJIL)* (2017) 344; K. Kelemen, *Judicial Dissent in European Constitutional Courts* (2018).

⁵³ Bentsen, ‘Court Leadership, Agenda Transformation, and Judicial Dissent: A European Case of a “Mysterious Demise of Consensual Norms”’, 6 *J. L. & Courts* (2018) 189.

⁵⁴ Vitale, ‘The Value of Dissent in Constitutional Adjudication: A Context-Specific Analysis’, 19 *Review of Constitutional Studies* (2014) 83.

only on sound legal principles'; and (especially for international courts) increasing the risk of noncompliance.⁵⁵

The ECtHR has allowed judges to file separate opinions since its inception. Concurrences and dissents are common and have remained relatively stable over time.⁵⁶ Between 1960 and 1997 – just prior to Protocol No. 11's entry into force – 42% of Chamber judgments and 78% of Grand Chamber judgments included one or more separate opinions.⁵⁷ The data we collected for the next 20 years show only a modest increase in Grand Chamber judgments with minority opinions (83%). A 2009 study provides additional information to assess the jurisprudential division between ECtHR judges:

[A]pproximately 25 percent of Strasbourg judgments on the merits are unanimous, 15 percent contain at least one dissenting opinion, and 60 percent contain at least one separate concurring opinion. This means that eighty-five cases out of every hundred are unanimous as to the outcome even if the reasoning for that outcome is not the same in the minds of all the judges.⁵⁸

These relatively high rates of concurrences and dissents on the ECtHR are unsurprising. Studies of national constitutional and high courts find that separate opinions are more common on courts that hear complex and politically salient cases and on courts whose dockets focus on individual rights and freedoms.⁵⁹ Other studies find that 'the likelihood of disagreement grows with the size of the panel'.⁶⁰ The 17-member Grand Chamber combines all three of these features.

Most analyses of ECtHR separate opinions focus on judicial voting patterns, such as whether national judges dissent more often than their colleagues when the Court rules against the state that nominated or appointed them.⁶¹ A few studies investigate correlations between rates of individual opinions and a judge's professional background, with some evidence suggesting that former academics write separate opinions at higher rates than judges who previously served on national courts and that former diplomats tend to be more likely to dissent in favour of the respondent government.⁶²

⁵⁵ Naurin and Stiansen, 'The Dilemma of Dissent: Split Judicial Decisions and Compliance with Judgments from the International Human Rights Judiciary', 53 *Comparative Political Studies* (2020) 959, at 964; see also Vitale, *supra* note 54, at 92 (discussing the relationship between dissenting opinions and noncompliance).

⁵⁶ See, e.g., White and Boussiakou, 'Separate Opinions in the European Court of Human Rights', 9 *Hum. Rts. L. Rev.* (2009) 37, at 50 (finding that non-unanimous judgments ranged between 69.5% and 84.5% between 1999 and 2004, inclusive).

⁵⁷ Wildhaber, 'Opinions dissidentes et concordantes de juges individuels à la Cour Européenne des droits de l'homme', in R.-J. Dupuy (ed.), *Droit et justice: Mélanges en l'honneur de Nicolas Valticos* (1999) 529, at 530–531.

⁵⁸ White and Boussiakou, *supra* note 56, at 53.

⁵⁹ See, e.g., Bentsen, *supra* note 53, at 194; White and Boussiakou, *supra* note 56, at 50–51.

⁶⁰ L. Epstein, W. Landes and R. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (2013), at 267.

⁶¹ See, e.g., Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights', 102 *Am. Pol. Sci. Rev.* (2008) 417; Kuijer, 'Voting Behavior and National Bias in the European Court of Human Rights and the International Court of Justice', 10 *Leiden Journal of International Law* (1997) 49.

⁶² See Bruinsma, 'The Room at the Top: Separate Opinions in the Grand Chamber of the ECHR (1998–2006)', (2008) *Ancilla Juris* 32, at 36–37; White and Boussiakou, *supra* note 56, at 571.

Outside of these topics, scholars have paid little attention to the role of separate opinions on the ECtHR.

Application of the living instrument and European consensus doctrines often generates divisions among ECtHR judges over how far and how fast the Convention should evolve, including whether to overrule prior case law in a progressive direction. Yet, it is common ground among the members of the Court that human rights can, and do, expand over time; the disagreement is over whether to recognize such an expansion in a particular case. In contrast, walking back dissents accuse the Grand Chamber of overruling case law in a rights-restrictive direction – a jurisprudential move that the ECtHR has never endorsed and that remains highly contested. Walking back dissents also call out the majority – sometimes, as we show later, in forceful, even passionate language – for diminishing rights via stealth or subterfuge.

We thus expect that judges will not lightly write or join such dissents because doing so risks undermining the ECtHR's collegiality and diminishing its authority and legitimacy. We recognize, however, that the frequency and content of separate opinions, as well as the inferences that can be drawn from them, depend in part on a court's culture of dissent, which itself may change over time.⁶³ The next section considers changes to the Court's political and institutional environment that may affect the incidence of Grand Chamber minority opinions.

3 Expectations and Data

A Expectations

We have theoretically and historically informed conjectures about when and why ECtHR judges publish walking back dissents. We divide Grand Chamber judgments into three periods – 1999 to 2005, 2006 to 2011 and 2012 to 2018 – that correspond to how member states, both individually and collectively, have responded to controversial judgments and to the broader trajectory of ECtHR case law.⁶⁴

1 Period One: 1999 through 2005

The first period begins after the entry into force of Protocol No. 11 in late 1998. The Protocol transformed the ECtHR into a permanent, full-time supranational judicial body that included a Grand Chamber to resolve the most important cases. The

⁶³ See, e.g., Greenhouse, 'Divided They Stand; The High Court and The Triumph of Discord', *N.Y. Times*, 15 July 2001, available at <https://nyti.ms/33Stw1L> ('While the culture of dissent that now prevails is not a Rehnquist Court invention, it is a surprisingly recent development that illuminates not only this court's approach to its work but also the modern Supreme Court's changing relationship to the country and to the concept of law itself').

⁶⁴ Other scholars have identified these periods as marking different eras in the ECtHR's evolution. See Christoffersen and Madsen, 'Postscript: Understanding the Past, Present, and Future of the European Court of Human Rights', in J. Christoffersen and M. R. Madsen (eds.), *The European Court of Human Rights between Law and Politics* (2013) 230, at 237–240; Çali, *supra* note 48, at 247–250; Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash', 79 *Law and Contemporary Problems* (2016) 141, at 167–175.

Protocol became operational after a momentous decade for the regional human rights system. Following the end of the Cold War, the number of member states increased as countries in Central and Eastern Europe joined the Convention; the ECtHR's docket began to swell with new cases; and a growing number of countries incorporated the Convention into national legislation. Responding to a 'general geopolitical zeitgeist [that] favored human rights and neoconstitutionalism',⁶⁵ the Grand Chamber audaciously labelled the Convention as a 'constitutional instrument of European public order' and embraced a capacious view of its authority as a regional constitutional court.⁶⁶

The ECtHR continued on this course through the mid-2000s. The number of judgments issued by Chambers and the Grand Chamber increased sharply, from 177 in 1999 to 1,105 in 2005.⁶⁷ Many cases tackled high-profile human rights controversies, including a ban on gays in the military, restrictions on freedom of expression and flaws in domestic criminal, civil and immigration proceedings. We expect relatively few allegations during this period that the majority was tacitly reversing its case law in a more pro-government direction.

2 Period Two: 2006 through 2011

The ECtHR's political and institutional landscape began to shift in the mid-2000s. Events in the United Kingdom and Russia spearheaded a growing discontent with the Court. In the United Kingdom, the government responded to a major terrorist attack in 2005 by adopting a policy of deporting foreigners who posed a national security risk. ECtHR case law stymied this effort, blocking expulsions to countries where the individuals faced a foreseeable risk of torture, mistreatment or unfair trials.⁶⁸ In the same year, the Court delivered its controversial *Hirst No. 2* judgment, finding fault with a ban on prisoner voting.⁶⁹ The decision triggered a vociferous backlash by all three branches of the UK government, which publicly lambasted the ECtHR as 'unduly expanding the scope of interpretation of the Convention rights at the expense of the well qualified domestic national authorities'.⁷⁰

Around the same time, the Court delivered several high-profile judgments against Russia, including cases involving extrajudicial killings in Chechnya, the extradition of Chechen rebels and unrest in the Russian-backed separatist region of Moldova.⁷¹ 'Almost immediately thereafter, problems with Russian compliance and political

⁶⁵ Madsen, 'Challenging Authority', *supra* note 64, at 166.

⁶⁶ Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', 19 *European Journal of International Law (EJIL)* (2008) 125, at 138 (quoting *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) (1995), at 27).

⁶⁷ Madsen, 'Challenging Authority', *supra* note 64, at 160 fig. 3.

⁶⁸ ECtHR, *Othman (Abu Qatada) v. United Kingdom*, Appl. no. 8139/09, Judgment of 17 January 2012; see also Gearty, '11 September 2001, Counter-Terrorism, and the Human Rights Act', 32 *Journal of Law and Society* (2005) 18, at 29.

⁶⁹ ECtHR, *Hirst v. United Kingdom (No. 2)*, Appl. no. 74025/01, Grand Chamber Judgment of 6 October 2005.

⁷⁰ Çali, *supra* note 48, at 249.

⁷¹ Madsen, 'Challenging Authority', *supra* note 64, at 167; Helfer, 'Redesigning the ECtHR', *supra* note 66, at 157.

discontent arose.⁷² The government responded by blocking the entry into force of Protocol No. 14, which sought to reduce the backlog of pending cases. Russia held the Protocol hostage until 2010, depriving the Court of valuable tools to address its docket crisis.

In response to these developments, we expect to observe the ECtHR becoming more circumspect in interpreting protected rights and freedoms between 2006 and 2011. In comparison to the previous period, this trend should be reflected in an increase in Grand Chamber judgments accompanied by separate opinions asserting that the majority implicitly overturned precedents or misapplied doctrine in ways that favoured national governments.

3 *Period Three: 2012 through 2018*

The Council of Europe has adopted numerous reforms of the regional human rights system since its founding in 1950. All of these reforms either expanded protected rights and freedoms or introduced procedural or technical changes to expand the ECtHR's jurisdiction and its capacity to review complaints. That unbroken pattern ended in 2012 with the High Level Conference on the future of the convention hosted by the UK in Brighton. A leaked draft declaration provided a blueprint for weakening the Court's review powers.⁷³ The final declaration was more measured, but still critical of the ECtHR's trajectory. Member states not only criticized the quality of the Court's judges and judgments, but also agreed to add a paragraph to the Convention's preamble emphasizing subsidiarity and the margin of appreciation doctrine.⁷⁴ Scholars have identified the Brighton Declaration as the start of a new phase in the ECtHR's evolution, one marked by 'a diffusion of critical discourse across Europe' that includes the political branches of government as well as national judges. Notably, the criticisms came from established democracies that were previously considered to be the Court's core supporters.⁷⁵

The third period also marked a shift in the institutional support available to judges to draft minority opinions. Previously, ECtHR judges had little if any assistance from Registry lawyers to write separately. In 2012, however, Yale Law School (and, later, other university law faculties) began to send recent graduates to serve as clerks to several individual members of the Court.⁷⁶ These young lawyers enhanced the capacity of these judges to draft separate opinions.

Consistent with these developments, we expect to observe, beginning in 2012 as compared to the two prior periods, an increase in the number and percentage of Grand

⁷² Madsen, 'Challenging Authority', *supra* note 64, at 167–168.

⁷³ Helfer, 'The Burdens and Benefits of Brighton', 1 *European Society of International Law (ESIL) Reflections* (2012), available at <https://bit.ly/3mHtGS2>.

⁷⁴ Çali, *supra* note 48, at 250.

⁷⁵ Madsen, *supra* note 64 at 174; see also Christoffersen and Madsen, *supra* note 64, at 238.

⁷⁶ Schell Center for International Human Rights, *Robina Foundation Human Rights Fellows*, available at <https://bit.ly/3i5XGUo> (listing recent Yale Law School graduates who clerked at the ECtHR beginning in 2012).

Chamber judgments accompanied by one more or dissenting opinions criticizing the majority for tacitly overruling progressive precedents or diverging from doctrines that favour individual rights.

B Data

We examined all 397 non-interstate, non-duplicative Grand Chamber judgments between the creation of the new Court in 1998 and the end of 2018.⁷⁷ We focus on the Grand Chamber for both practical and substantive reasons. It is not feasible to systematically code the more than 10,000 judgments issued by ECtHR Chambers. Moreover, the Grand Chamber's function is to hear the most important cases and to reconcile inconsistencies in prior rulings. Grand Chamber judgments are also authoritative statements of Strasbourg jurisprudence law and are frequently cited by Chambers.⁷⁸

Of the 397 Grand Chamber judgments, 331 judgments had at least one (but often multiple) concurring, dissenting and/or separate opinions. These 331 judgments yielded a total of 791 judicial opinions – 509 dissenting opinions, 263 concurring opinions and 19 separate opinions. We collected the text of these opinions and the identities of the judges who wrote or signed on to them from the HUDOC website.

We asked two research assistants (RAs) to answer three questions.⁷⁹ First, was the separate opinion more sympathetic to the applicant or the respondent government as compared to the majority opinion? For example, we instructed the RAs to code the opinion as more favourable to the applicant if the majority did not find a violation or did not declare the application admissible, but a dissent argued that the majority should have found a violation or that the application should have been declared admissible. We directed the RAs to code in the same way concurring or separate opinions that agreed with the Court on the outcome of a case but nonetheless viewed the complaint more favourably to the applicant than the majority.

Second, we asked the RAs whether the separate opinion asserts that the majority overturns prior case law in one of three ways: (i) by *explicitly overturning* prior judgments (either in a progressive or conservative direction); (ii) by *implicitly or tacitly overturning* prior case law; or (iii) by *construing* prior case law too narrowly or too broadly, *ignoring* prior case law or *failing to apply* it.⁸⁰

Third, we directed the RAs to code whether a separate opinion (i) disagrees with the majority over the application of one or more key legal doctrines *and, in addition,*

⁷⁷ We eliminated two interstate cases (between Turkey and Cyprus) which do not map onto our conceptual framework. We also eliminated 15 judgments against Italy, Turkey and the United Kingdom that were duplicates and had identical separate opinions (other than the name of the applicant). In later years, the Registry grouped such duplicate cases as a single judgment. Collapsing these rulings into a single judgment ensures consistency over time.

⁷⁸ Lupu and Voeten, 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights', 42 *British Journal of Political Science* (2012) 413.

⁷⁹ We initially asked two RAs to code a random sample of 33 judgments containing 88 separate opinions, which we evaluated and used to adjust the codebook and to train the RAs. One RA then coded all the opinions whereas the other RA coded a random subsample of two thirds of the opinions.

⁸⁰ The intercoder reliability on whether the opinion favoured the government or the applicant was excellent: the coders assigned the same score on 97% of opinions. The coders also agreed 90% of the time on

(ii) asserts that the doctrine had been applied more broadly or narrowly in prior case law. These key legal doctrines included the *margin of appreciation*, the ‘*living instrument*’ doctrine, ‘*European consensus*’ analysis, the ‘*effectiveness*’ doctrine and the ‘*in dubio pro persona*’ or ‘*pro homine*’ principle.

Table 1 summarizes our coding. We identified 249 separate opinions alleging that the majority had acted inconsistently with prior precedent. Only eight of these charged that the majority explicitly overturned prior case law, but 46 alleged that the Court did so implicitly. Much more often (195 opinions), the minority asserts that the majority has misconstrued case law in a way that unduly favours either the government or the applicant.

In addition, we identified 57 opinions asserting that the majority had applied key interpretive principles, such as the living instrument and margin of appreciation doctrines, inconsistently with prior applications.⁸¹ However, only 17 of these 57 minority opinions were *not* also accompanied by an assertion that the Court majority had implicitly overturned or misconstrued prior case law. To avoid double-counting, Table 1 reports instances where the minority only asserted a wrong interpretation of doctrine. Finally, 25 of the 791 opinions asserted that prior case law itself was wrongly decided. Since such opinions do not, as such, indicate that the Court is walking back rights, we do not include these as ‘walking back dissents’.

In all, 381 separate opinions were more favourable to the applicant, 313 were more favourable to the government and in 97 cases it was unclear which side the separate opinion favoured. While 23% of concurring opinions could not be labelled as favouring either party, this was true of only six percent of dissenting opinions.⁸² Moreover, we were able to code all but three allegations of overturning by whether the separate opinion favoured the government or the applicant.

whether an opinion argued that it relied on wrongly decided past case law or wrongly applied past legal doctrine. We found more incongruities in whether a separate opinion charged that the majority overturned past case law (77% consistency). Almost all of the disagreement came from our third category – instances where the majority construes prior case law too narrowly or too broadly, ignores prior case law or fails to apply it. For all categories, we checked and recoded all instances where the coders disagreed.

⁸¹ Our rules for coding the misapplication of doctrine required that a separate opinion explicitly argue that the Court deviated from prior applications of a doctrine, rather than simply asserting, for example, that the margin of appreciation was applied too broadly or too narrowly in the case to which the minority opinion was appended.

⁸² This category includes cases where the Court must balance two competing rights. When the ECtHR ‘is called upon to adjudicate on a conflict between two rights which enjoy equal protection under the ECHR, the Court must weigh up the competing interests’. See *Kaboğlu and Oran v. Turkey*, App. Nos. 1759/08, 50766/10 and 50782/10, Judgment of 30 October 2018, para. 69. A common example concerns individuals whose activities are reported on in the news media, which raises the question of whether a fair balance has been struck between the individual’s right to privacy and the newspaper’s right to freedom of expression. The outcome of such cases may ‘vary depending on whether it was lodged under Article 8 by the person who was the subject of the impugned press article or under Article 10 by the author of the same article’. *Id.*

Table 1: Coding of separate opinions alleging that the majority overturned precedent by whether the opinion favoured the government or the applicant

	Separate opinion: Pro-government or pro-applicant?			Total
	Pro-applicant	Pro-government	Not clear	
No overturning	224	182	94	500
Explicit overturn	3	5	0	8
Implicit overturn	22	24	0	46
Overturning by misconstruing prior case law	110	84	1	195
Inconsistent interpretation of doctrine ^a	8	9	0	17
Prior case law wrong	14	9	2	25
Total	381	313	97	791

^a Separate opinions may fit multiple categories; to avoid double counting, we report only the category that most clearly indicates overturning.

4 Analysis and Findings

As explained in the introduction, we label as ‘walking back dissents’ those minority opinions which assert that the Grand Chamber has overturned or misconstrued prior case law in a way that favours the government. The data also contain ‘walking forward dissents’, which assert that the Court has overturned or misconstrued past case law in a way that favours *the applicant*. As noted earlier, the ECtHR regularly overturns its prior judgments to expand rights. In contrast, walking back dissents assert that the Court is engaging in a practice that it has never endorsed and does not formally acknowledge – tacitly overturning or misinterpreting interpretations to narrow protected rights and freedoms.

This section first examines overall trends in violation findings and in walking back dissents. We then analyse more nuanced patterns in the data, including the judges who author these separate opinions and the kind of arguments they raise, as well as the countries and legal issues that are the most frequent in the three time periods.

A Overall Trends

Existing empirical studies have focused primarily on the outcomes of ECtHR judgments, i.e. whether the Court rules for the applicant (by finding in her favour on at least one allegation) or the respondent (by finding no violation of human rights). [Figure 1](#) documents an increase in both the absolute and relative numbers of Grand Chamber judgments that do not find any violation of the Convention.⁸³ Between 1999

⁸³ One case declared an application admissible without reaching a judgment on the merits. We include this with the pro-applicant rulings. We exclude 36 judgments that involved only pecuniary damages or struck out cases because the parties reached a friendly settlement. Only 11 cases focused solely on admissibility issues (a matter usually handled by Chamber decisions). The basic trend is robust to including or excluding admissibility decisions.

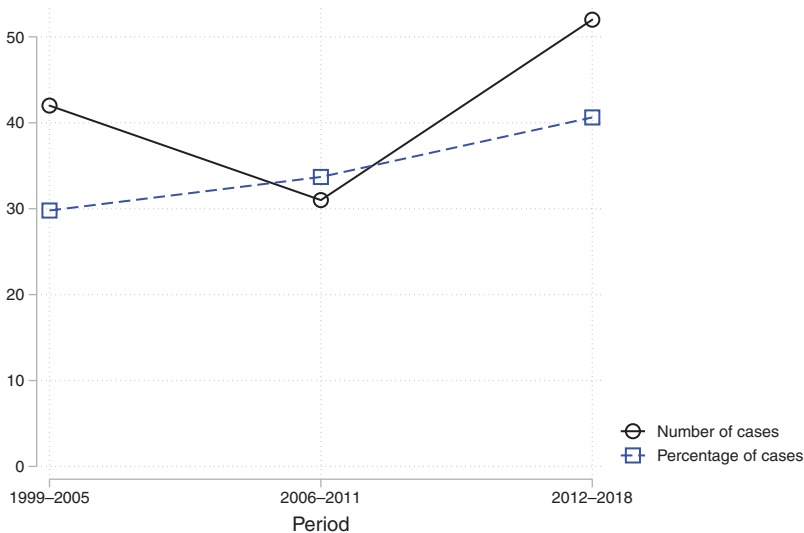


Figure 1: *Grand Chamber judgments with non-violation findings*

and 2005, the government prevailed in 29% of Grand Chamber judgments. This increased to 33% between 2006 and 2011 and to 41% in the post-Brighton period. (The dip in the number of cases in 2006–2011 reflects a lower number of Grand Chamber judgments in that period.)⁸⁴

Figure 1 reinforces the findings of previous studies that the ECtHR has become more likely to rule for governments. Yet, this does not necessarily tell us whether the Court is walking back rights. The data in Figure 1 are also consistent with a Court that is less likely to push the boundaries of its past decision but does not actually backtrack on established precedent. The pattern in Figure 1 could also reflect the maturation of the ECtHR. For example, the Grand Chamber may have previously developed case law on the most egregious violations, leaving less severe cases that are more likely to result in rulings for the government. On the other hand, the data could understate the pro-government trend. A violation finding does not necessarily imply a victory for the applicant. For example, the Court could find a breach on a minor issue but rule for the state on the most important claims, or it could rule for the applicant but award inadequate remedies.

Figure 2 provides direct aggregate evidence that walking back dissents are increasing over time. The figure plots both the percentage and number of Grand Chamber judgments with any type of separate opinion asserting that the majority overturned prior case law in a way that favours the government. Figure 2 clearly shows that such separate opinions are on the rise in both relative and absolute terms. Before 2006, 24% of Grand Chamber judgments were accompanied by a walking back dissent. This rose to 30% between 2006 and 2011, and to 40% in the post-2011 period.⁸⁵

⁸⁴ There are similar patterns in Chamber rulings, where the government is typically less likely to prevail because many cases involve repetitive violations. The percentage of violation rulings decreased from 89% in the 2006–2011 period to 80% in the post-Brighton period.

⁸⁵ These increases are statistically significant at the 95% level based on a t-test.

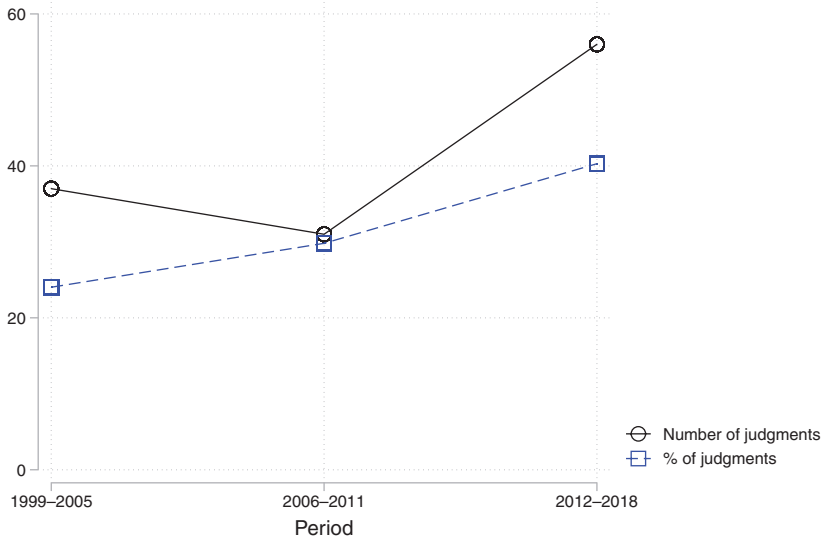


Figure 2: *Judgments with separate opinions claiming the Grand Chamber overturned prior case law in favour of the government*

These increases are consequential. If judges had written walking back dissents at the same rate in the post-Brighton era as they did prior to 2005, then only 33 (rather than 56) Grand Chamber judgments would have been accompanied by such a dissent. Unsurprisingly, some judges have always complained that the Grand Chamber is more restrained than prior case law suggests it should be. Yet, such concerns are far more frequent in the post-Brighton era.

More detailed evidence from the post-Brighton era helps to contextualize this trend. The 56 walking back dissents during that period were not the product of ‘lone wolf’ judges. Only 19 opinions were written by a single judge, and 13 were signed by five or more judges. On average, three to four judges joined these minority opinions.⁸⁶ A discrete group of judges is responsible for many walking back dissents; Judges Tulkens, Rozakis, Sajó, Spielmann and Pinto de Albuquerque all wrote or joined at least 15 such separate opinions. Yet, the pattern shown in Figure One holds even if we exclude separate opinions that were written solely by these serial dissenters.

Interestingly, judges sometimes write walking back dissents even when the majority rules for the applicant. In the post-Brighton era, 36% of Grand Chamber judgments that find at least one Convention violation are accompanied by such a dissent (compared to 18% in both earlier periods). Typically, in these instances, the minority opinion argues that the Court should have found an additional violation or should have awarded more expansive remedies, such as financial compensation or the reopening of judicial proceedings. This finding suggests that Figure 1 understates the recent retrogressive trend in the case law: there are cases where the ECtHR finds a violation but is nevertheless more restrictive than it was in the past, at least in the view of some judges.

⁸⁶ The mean is 3.5 in the post-2012 periods and 3.3 and 3.1, respectively, in the earlier periods.

For a more complete picture of the Court's evolution, we also examined 'walking forward dissents' – separate opinions charging that the majority overturned prior case law in a way that *favours the applicant*. These opinions are appended almost exclusively to judgments that found one or more violations of the Convention. Between 1999 and 2005, 32% of violation findings were accompanied by such a separate opinion. This increased to 38% in the 2006–2011 period and to 53% in the 2012–2018 period. In addition, there is some evidence that separate opinions are becoming more common on the Court as a whole. In the Grand Chamber, 78%, 73% and 90% of judgments in each of the three periods, respectively, were accompanied by at least one separate opinion. The corresponding figures are 37%, 27% and 47% for the most important Chamber judgments,⁸⁷ and 11%, 9% and 22% for all Chamber judgments in each period.

The increase in walking forward dissents and in the incidence of all separate opinions is consistent with an alternative conjecture: that the ECtHR is becoming more ideologically polarized over time, with pro-applicant and pro-government judges staking out competing positions in minority opinions. A more detailed analysis, however, suggests caution in reaching that conclusion. In nearly 40% of Grand Chamber cases (41 of 105 judgments), *only* the national judge of the respondent state signed the separate opinion charging that the majority overturned case law in favour of the applicant.⁸⁸ Like all ECtHR judges, national judges are independent and do not represent their respective governments. Yet, as previously noted, studies have found that national judges dissent much more frequently in cases finding a violation of the Convention than do non-national judges. It is, thus, plausible that a separate opinion signed *only* by a national judge should be viewed as weak evidence that the Court has departed from its previous case law.

If we exclude 'national judge only' separate opinions, walking forward dissents were filed in 14%, 16% and 24% of all judgments across the three periods, respectively, and in 20%, 27% and 42% of violation rulings. Thus, in those judgments where the Grand Chamber finds a violation, there is a growing trend of separate opinions charging that the Court has overruled its prior case law in a progressive direction, revealing that – at least for some judges – the ECtHR is still too pro-applicant on some legal issues. Judges Costa (13), Villiger (10), Wildhaber (nine), Turmen (eight) and Mahoney (eight) joined or wrote the largest number of opinions charging that the ECtHR has deviated from prior case law in a progressive direction.

⁸⁷ The ECtHR divides decisions into four categories, the highest level of importance being Case Reports or Key Cases – decisions selected for publication in the Court's official reporter – followed by Levels 1, 2 and 3. See European Court of Human Rights, *HUDOC FAQ: Frequently asked questions*, available at <https://bit.ly/3hVfxIN>. The percentages quoted in the text are for Case Reports and Level 1 decisions.

⁸⁸ This includes 15 judgments where Turkey was the respondent state and five where Russia was the respondent state. No other respondent government appeared more than twice on this list. Unsurprisingly, there were no judgments where only the national judge argued that the majority unduly favoured the respondent state. However, national judges sometimes joined and even wrote such opinions on behalf of multiple judges. See, e.g., ECtHR, *Moreira Ferreira v. Portugal* (No. 2), Appl. no. 19867/12, Grand Chamber Judgment of 11 July 2017 (Pinto de Albuquerque, Sajó, Tsotsoria, Vehabović and Kuris, JJ., dissenting), discussed below.

B Examples of Walking Back Dissents

We have thus far lumped together the different types of walking back dissents. However, our coding allows us to extract more fine-grained information and trends about the type of assertions made in those minority opinions and to illustrate them with concrete examples.

Separate opinions asserting that the majority implicitly or explicitly overturned past case law *in favour of the government* have increased significantly, from two in the 1999–2005 period, to eight in the 2006–2011 period, to 15 in the 2012–2018 period. These opinions are often quite forceful. *Beuze v. Belgium*, for example, considered a criminal suspect's right to access a lawyer while in police custody. Although the Grand Chamber found a violation on the facts presented, four judges devoted an entire section of a joint concurring opinion to charging the majority with 'overruling' not only a prior judgment but the entire line of jurisprudence it generated:

The *Salduz* judgment led to a revolution for fair-trial rights, stating firmly that any restriction on the right of access to a lawyer must be *exceptional* and *capable of justification*: 'Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police' and that, as further clarified in *Ibrahim and Others*, 'restrictions on access to legal advice are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case'. The *Beuze* judgment in this respect represents a regrettable counter-revolution: it has overruled the '*as a rule*' requirement – already repeated in more than one hundred judgments widely known as the '*Salduz* jurisprudence' – and has dramatically relativised it to the detriment of procedural safeguards.⁸⁹

Some separate opinions argue that the Court's tacit overturning in a specific case signifies a broader retreat from its historical role, as exemplified in the opinion written by Judges Ziemele, De Gaetano, Laffranque and Keller in *Janowiec and Others v. Russia*:

With this judgment, the Court has missed an opportunity to . . . uphold the 'Convention values' clause in the Šilih principles.⁹⁰ In doing so, it has deprived that clause of its humanitarian effect in the case at hand and potentially weakened its effect in the event of its future application. This approach is untenable if the Convention system is to fulfil the role for which it was intended: to provide a Court that would act as a 'conscience' for Europe.⁹¹

Another interesting example is *Moreira Ferreira v. Portugal (No. 2)*, which concerns the rejection by the Portuguese Supreme Court of a request to reopen criminal proceedings following a Chamber judgment that found a violation of Article 6 (the right to a fair hearing). The Grand Chamber held, by a vote of nine to eight, that the Supreme

⁸⁹ ECtHR, *Beuze v. Belgium*, Appl. no. 71409/10, Grand Chamber Judgment of 9 November 2018, para. 25 (Yudkivska, Vučinić, Turković and Hüseyinov, JJ., concurring).

⁹⁰ The Šilih principles define the temporal scope of a state's duty to investigate violations of the right to life that occurred in the distant past. See Moynihan, 'Regulating the Past: The European Court of Human Rights' Approach to the Investigation of Historical Deaths under Article 2 ECHR', 86 *British Yearbook of International Law* (2016) 68.

⁹¹ ECtHR, *Janowiec and Others v. Russia*, App. Nos. 55508/07 and 29520/09, Grand Chamber Judgment of 21 October 2013, para. 34 (Ziemele, De Gaetano, Laffranque and Keller, JJ., partly dissenting).

Court decision did not constitute an additional violation of Article 6. In a passionate dissent, Judges Pinto de Albuquerque, Sajó, Tsotsoria, Vehabović and Kuris argued that the Court is retreating from its role as the authoritative interpreter of human rights standards in Europe:

[T]he majority are envisaging the [ECtHR] as a mere advisory body to the Supreme Court which is ultimately free to interpret [ECtHR] judgments as the Supreme Court pleases as long as the latter sets out some grounds, any grounds for its interpretation, regardless of the content of those grounds. Applying to the [ECtHR] its own case-law . . . one would have to conclude that, according to the majority, the [ECtHR] is not a judicial body, because it does not even have competence to order an individual measure to redress a Convention violation.⁹²

Notably, this judgment also contains a minority opinion by six judges that charges the majority with the exact opposite: ‘overturning by stealth the well-established existing case-law’ that would have required declaring the application inadmissible.⁹³

In contrast, the number of judgments where the minority asserts that the majority has explicitly or implicitly overturned past case law *in favour of the applicant* has stayed mostly flat: from six in the 1999–2005 period, to 13 in the 2006–2011 period and to 10 in the 2012–2018 period. Some of these separate opinions assert that the ECtHR continues to be overly expansive. Consider *Del Rio Prada v. Spain*, which concerned sentencing guidelines for convicted ETA terrorists. The dissent charges the Court with subterfuge by issuing a judgment that deviates from prior case law in reality but does ‘not purport to overrule or depart from that well-settled case-law’.⁹⁴

While implicit and explicit overturning offer the clearest examples, separate opinions that allege tacit overruling by inconsistent application of prior case law also charge the majority with moving in a new and problematic direction. These assertions are often quite forceful. For example, as Judges Tulkens, Spielmann and Garlicky argued in *Austin and Others v. United Kingdom*: ‘the majority’s position can be interpreted as implying that, if it is necessary to impose a coercive and restrictive measure for a legitimate public-interest purpose, the measure does not amount to a deprivation of liberty. This is a new proposition which is eminently questionable and objectionable . . .’⁹⁵

In *Regner v. Czech Republic*, an applicant who worked for the ministry of defence complained that administrative proceedings to revoke his security clearance unfairly denied him access to classified information. Judge Sajó’s dissenting opinion contains lengthy sections discussing the inconsistencies with prior case law, as does Judge Serghides’s opinion, quoted below:

⁹² ECtHR, *Moreira Ferreira v. Portugal* (No. 2), Appl. No. 19867/12, Grand Chamber Judgment of 11 July 2017, para. 56 (Pinto de Albuquerque, Sajó, Tsotsoria, Vehabović and Kuris, JJ. dissenting).

⁹³ *Ibid.* para. 25 (Raimondi, Nulberger, Gaetano, Keller, Mahoney, Kjølbros and Leary, JJ., dissenting). See also ECtHR, *Magyar Helsinki Bizottság v. Hungary*, Appl. no. 18030/11, Grand Chamber Judgment of 8 November 2016, para. 30 (Spano and Kjølbros, JJ., dissenting) (asserting that it is ‘impossible to accept that the majority are merely engaged in “clarification” of the Leander principles. On the contrary, let it be clear, today the Court’s settled . . . case-law . . . has, in fact, been overruled’).

⁹⁴ ECtHR, *Del Rio Prada v. Spain*, Appl. No. 42750/09, VI Eur. Ct. H.R. 1, 58 Grand Chamber Judgment of 21 October 2013 (Mahoney and Vehabovic, JJ., dissenting).

⁹⁵ ECtHR, *Austin and Others v. United Kingdom*, Appl. Nos. 39692/09, 40713/09 and 41008/09, Grand Chamber Judgment of 15 March 2012, para. 3 (Tulkens, Spielmann, and Garlicky, JJ., dissenting).

I humbly propose that the case-law should not have changed direction in the present case, thus giving too much legal status to an absolute restriction at the expense of the effective protection of the right to fair hearing. . . . Until now we have known that the Convention makes provision for some absolute rights, but not for absolute restrictions. An absolute restriction leads to the death of a right or to no right at all.⁹⁶

These sentiments are not limited to judgments that find no violations. For example, the Court in *Al-Dulimi and Montana Management Inc. v. Switzerland* finds that the government violated Article 6 of the Convention when it confiscated the applicant's assets to implement a UN Security Council Sanctions Committee decision. Two concurring opinions allege that the majority judgment is inconsistent with prior rulings that address potential conflicts between the Convention and obligations to implement Security Council resolutions.⁹⁷

To be clear, our contention is not that these minority opinions correctly identify faults with the majority opinion. Nor are we saying that the Grand Chamber never expansively construes rights and freedoms in the post-Brighton era. We do observe, however, a marked increase in assertions by judges that the ECtHR is receding from its traditional role as a progressive interpreter of European human rights law.

C Variable Geometry?

As previously discussed, some studies have found that the ECtHR has increasingly applied more lenient standards to established democracies⁹⁸ than to other types of governments.⁹⁹ Some members of the Court have also levelled the same critique in dissenting opinions. For example, Judge Pinto de Albuquerque stated in *Hutchinson v. United Kingdom* that the Grand Chamber's 'backtracking' from prior case was 'not an isolated event', but instead the product of a biased application of the margin of appreciation according to which:

[T]he margin should be wider for those States which are supposed 'to set an example for others' and narrower for those States which are supposed to learn from the example. This evidently leaves the door wide open for certain governments to satisfy their electoral base and protect their favourite vested interests. In my humble view, this is not what the Convention is all about.¹⁰⁰

Our data provide some evidence to support these assertions. In the 1999–2005 period, Turkey was the respondent state with most Grand Chamber judgments accompanied by walking back dissents, suggesting that Turkey was not held to sufficiently high human rights standards. For example, in *Sürek v. Turkey (No. 1)*, Judges Tulkens,

⁹⁶ ECtHR, *Regner v. Czech Republic*, Appl. No. 35289/11 Grand Chamber Judgment of 19 September 2017, para. 71 (Serghides, J., partly dissenting).

⁹⁷ ECtHR, *Al-Dulimi and Montana Management Inc. v. Switzerland*, Appl. no. 5809/08, Grand Chamber Judgment of 21 June 2016 (Hajiyev, Albuquerque, Pejchal and Dedov, JJ. concurring; Keller, J., concurring).

⁹⁸ Defined as a country that has consistently held a Polity score of seven or higher since 1988.

⁹⁹ Çali, *supra* note 48, at 242.

¹⁰⁰ ECtHR, *Hutchinson v. United Kingdom*, Appl. No. 57592/08, Grand Chamber Judgment of 17 January 2017, para. 40 (Pinto de Albuquerque, J., dissenting).

Casadevall and Greve argued that the Court departed from its past decisions – which interpreted Article 10 ECHR (freedom of expression) expansively – when reviewing cases involving ‘political statements and sometimes virulent and acerbic criticism of the Turkish authorities’ actions’.¹⁰¹

By contrast, in the 2006–2011 period, the most frequent respondent states in judgments with walking back dissents were the United Kingdom (seven) and France (five). In the post-Brighton era, the United Kingdom (seven) and Italy (five) were the most common respondents in such cases (and there was only one such judgment on Turkey). In contrast, in the 1999–2005 period, just 21% of judgments involving an established democracy were accompanied by a walking back dissent, as compared to 39% in the 2006–2011 period and 45% in the 2012–2018 period. There was no similar trend among other types of governments. In short, much of the increase in separate opinions charging that the Court is backtracking from prior case law and legal doctrines comes from judgments involving longstanding democracies.

D *Substantive Issues*

The countries that have been most outspoken in their criticisms of the ECtHR are motivated by a set of specific substantive concerns, particularly case law on the treatment of detainees, immigrants and suspected terrorists. These cases often involve alleged violations of physical integrity rights (covered by Articles 2, 3 and 5 ECHR), or privacy and family rights (protected by Article 8 ECHR).

Judgments raising these legal issues are responsible for much of the increase in walking back dissents. In the post-Brighton period, 18 of the 56 Grand Chamber judgments accused of walking back rights involved Article 8, as compared to eight of 37 and seven of 31 judgments, respectively, in the earlier two periods. This does not simply reflect an increase in the total number of Article 8 judgments. Out of all Article 8 Grand Chamber judgments, 42% were accompanied by a walking back dissent in the post-Brighton era (as compared to 28% in the first period). The figures for physical integrity rights are similar: 19 walking back dissents concerned Articles 2, 3 or 5 in the post-Brighton period, while 41% of all Article 2, 3 and 5 Grand Chamber judgments were accompanied by a walking back dissent in that period as compared to 35% and 28% in the preceding periods. Aggregated together, the percentage of Article 2, 3, 5 and 8 judgments accompanied by a walking back dissent has increased from 25% to 53% between the first and last periods.

We find no similar trends for other substantive issues. For example, the number of Grand Chamber judgments on Article 10 (free expression) attracting walking back dissents has remained relatively constant (seven, three and eight in the three periods). The number of P1-1 (property rights) cases that attract such opinions has also not increased (six, six and seven). Overall, the percentage of judgments accompanied by walking back dissents in cases that do not invoke Articles 2, 3, 5 and 8 has

¹⁰¹ ECtHR, *Sürek v. Turkey* (No. 1), Appl. No. 26682/95, Grand Chamber Judgment of 7 July 1999, para. 2 (Tulkens, Casadevall and Greve, JJ., partly dissenting).

remained constant (35%) between the first and last period of analysis. In sum, much of the increase in judgments that attract allegations of walking back rights involve issues that have become increasingly politically contentious over the past two decades in consolidated democracies: physical integrity, privacy and family rights.

E Regression Analysis

One potential objection to our findings is that they are driven by changes in the observable characteristics of cases. We estimated a series of regression models to analyse this possibility. The units of analysis are Grand Chamber judgments. The dependent variable measures whether a Grand Chamber judgment is accompanied by a walking back dissent. The principal Model 1 (see Table 2) includes indicators for whether the articles of the Convention discussed above were invoked, as well as an indicator for whether the judgment found at least one violation. As previously discussed, judgments that find a violation are (logically) much less likely to be accompanied by a walking back dissent, although we found some of these separate opinions.

To further assess the robustness of the results, Model 2 includes a measure for whether the respondent state is a consolidated democracy. We defined this as a country that had received a Polity score of seven or higher for at least 20 years in 1998.¹⁰² Model 3 also includes an indicator for the importance level of the case assigned by the Registry. Most judgments (78%) are ‘key cases’ or ‘case reports’.¹⁰³ This is the baseline category in Model 3. The coefficients on Level 1, 2 and 3 cases thus measure the extent to which those decisions are less likely to attract walking back dissents. Finally, Model 3 incorporates information on whether the applicant is detained (a prisoner) or a refugee. This variable was coded based on the appearance of certain terms (e.g. ‘detained’ or ‘asylum’) in the description of applicants.¹⁰⁴ However, this information is only available for cases prior to 2017.

Table 2 presents the results from a linear regression analysis. (All results also hold in a logit regression, available from the authors.) The table’s most important finding is that the likelihood of a walking back dissent has increased by 13 to 15 percentage points (depending on the model) in the post-Brighton period as compared to the 1999–2005 period.¹⁰⁵ Thus, even after controlling for case characteristics, the probability of a walking back dissent has increased significantly. This suggests that our core descriptive finding is not due to changing observable characteristics in the types of cases that come before the Court. Even so, this does not mean that we can claim to find a causal effect: there could still be unobservable changes in case characteristics that we cannot control for in a statistical analysis.

¹⁰² This follows the approach adopted in Moravcsik, ‘The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe’, 54 *Int’l Org.* (2000) 217. The consolidated democracies are: Andorra, Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland and the United Kingdom.

¹⁰³ See *supra* note 87.

¹⁰⁴ See Stiansen and Voeten, *supra* note 51.

¹⁰⁵ The difference compared to the 2006–2011 period is 13 percentage points.

Table 2 also reveals that, as we expected, violation judgments are much more likely to be accompanied by a walking back dissent. However, none of the other case characteristics meaningfully correlate with such dissents. Our earlier descriptive analysis demonstrated that judgments involving Articles 2, 3, 5 and 8 ECHR were more likely to attract walking back dissents in the 2012 to 2018 period but not in the other periods. In a regression model on the full period of analysis, the regression coefficients on these articles are positive but not statistically significant.¹⁰⁶ The only exceptions are ‘Case Reports’ or ‘Key Cases’, which are more likely to be accompanied by walking back dissents than judgments designated as less important by the Court’s Registry. This result is consistent with our claim that walking back dissents are associated with decisions marking significant shifts in ECtHR jurisprudence.

Table 2: Linear regression analysis on the occurrence of walking back dissents

Variables	Model 1	Model 2	Model 3
(1999–2005)	(Reference Category)		
2006–2011	0.06 (0.06)	0.07 (0.06)	0.05 (0.06)
2012–2018	0.13** (0.06)	0.15** (0.06)	0.15** (0.06)
Violation	–0.18*** (0.05)	–0.18*** (0.05)	–0.20*** (0.05)
Article 2 ECHR	0.03 (0.09)	0.05 (0.09)	0.03 (0.09)
Article 3 ECHR	0.07 (0.07)	0.06 (0.07)	0.05 (0.08)
Article 5 ECHR	0.06 (0.07)	0.07 (0.07)	0.03 (0.08)
Article 6 ECHR	–0.02 (0.05)	–0.01 (0.05)	–0.00 (0.05)
Article 8 ECHR	0.07 (0.06)	0.06 (0.06)	0.09 (0.06)
Article 10 ECHR	0.04 (0.07)	0.05 (0.07)	0.00 (0.07)
P1, Article 1	–0.02 (0.06)	–0.01 (0.06)	0.02 (0.07)
Democracy		0.06 (0.05)	0.05 (0.05)
Prisoner			0.06 (0.05)
Refugee			–0.08 (0.07)
Case Report or Key Case	Reference Category		
Importance Level 1			–0.14** (0.06)
Importance Level 2			–0.42** (0.17)
Importance Level 3			–0.39** (0.15)
Constant	0.33*** (0.06)	0.28*** (0.08)	0.33*** (0.08)
Observations	397	397	366
R-squared	0.06	0.07	0.11

Standard errors in parentheses.

*** p<0.01, ** p<0.05, * p<0.1.

¹⁰⁶ One could include interaction effects between the periods and the articles to identify changing correlations over time. However, this type of analysis is very demanding on the data and would yield very imprecise estimates.

5 Conclusion and Implications

This article has analysed overarching trends in ECtHR case law based on a review and coding of all separate opinions of the Grand Chamber between 1999 and 2018. The first years of these two decades saw the ECtHR continue its longstanding practice of interpreting the Convention as a living instrument that responds to rights-enhancing trends in national laws – including by overturning judgments that were out of step with these developments. Beginning in the mid-2000s, however, the member states, especially the established democracies that have long been the ECtHR’s staunch supporters, began to impose new restrictions on disfavoured groups, especially immigrants, criminal defendants and suspected terrorists. They also publicly criticized the Court for expanding rights and freedoms too far and for giving insufficient deference to governments. First hesitantly and then more frequently after 2012, the Grand Chamber started to narrow its interpretation of the Convention, especially in cases against consolidated democracies.

What the ECtHR has not done – at least not explicitly – is overturn its prior case law in a rights-restrictive direction. Such a move would represent a sharp and controversial break from the living instrument, European consensus and other rights-expanding doctrines that the Court has long endorsed. Instead, the Grand Chamber may be achieving the same result indirectly by purporting to reconcile earlier rights-protective rulings with later decisions that are more favourable to respondent states. For many ECtHR judges, however, these efforts are unconvincing. To protest the Court’s jurisprudential wrong turn, these judges are writing separate opinions that accuse the Court majority – sometimes quite forcefully and vociferously – of tacitly overturning prior case law or settled doctrine in favour of national governments.

The rise of what we label as ‘walking back dissents’ reveals that some members of the ECtHR themselves believe that the Grand Chamber is overturning prior judgments in a regressive direction. It also suggests that the Court is, in fact, constricting human rights in Europe. We show that walking back dissents have increased in both absolute and percentage terms over the last two decades, with the sharpest uptick following the 2012 Brighton Declaration. We also find that such dissents are especially common in cases against established democracies, and in cases – often brought by prisoners, immigrants and suspected terrorists – whose Convention protections have provoked significant backlash against the Court.

There are two plausible explanations for these findings. First, the Grand Chamber may be responding to political signals from the member states that Strasbourg judges have been too aggressive in expansively interpreting the Convention, especially in cases involving longstanding democracies. Second, the ECtHR may be tacitly taking account of the growing number of member states that have restricted the rights of certain disfavoured individuals and minority groups, in effect applying the living instrument and European consensus doctrines in reverse.

We suspect that both trends are driving the increase in the number of Grand Chamber judgments accompanied by walking back dissents. However, our data do not allow us to untangle these two potential causes or to assess their respective influence.

Nor do they exclude other explanatory factors, such as the appointment of judges who favour more restrained interpretations of human rights. Disentangling these factors would require, at a minimum, gathering national-level data on progressive and regressive legal trends in different issue areas, including those for which the ECtHR has been criticized by governments and those for which it has not. For example, scholars could identify changes in domestic asylum procedures and examine whether these predate or follow shifts in the ECtHR's case law.

What are the broader theoretical and normative implications of the rise of walking back dissents? It is quite common for national constitutional and high courts to oscillate between periods of progressive and restrictive interpretation, with some rights expanding in one era and contracting in another. It may, therefore, seem unremarkable for the Grand Chamber to walk back human rights in Europe, especially given the significant recent changes to the legal and political climate that the ECtHR faces.

Yet, unlike most national courts, the ECtHR has a longstanding commitment to broadening the scope and reach of human rights and endorsing the legitimacy of such judge-made expansions. This commitment is partly an outgrowth of the Court's jurisdiction and access rules. Because individuals are the source of nearly all complaints,¹⁰⁷ the ECtHR has developed legal doctrines that 'target individual claimants' and expansively interpret rights to encourage the filing of additional cases.¹⁰⁸ The ECtHR also operates alongside another ambitious supranational project (the EU) with its own famously purposive court (the CJEU) and supporters who espouse a 'bicycle theory' of integration, according to which the EU must continuously expand to avoid disintegration.¹⁰⁹ Perhaps most importantly, the ECtHR's view of the Convention as a living instrument has been validated (at least until recently) by decades of progressive legal, political and social trends at the national level and by the sustained commitment to the regional human rights system by a growing number of member states. Indeed, prior to the 2012 Brighton Declaration, all of the many Protocols to the Convention either expanded the ECtHR's authority or augmented the rights and freedoms that it protects.¹¹⁰

These perspectives underscore why Grand Chamber judgments that walk back human rights, even tacitly, are normatively and jurisprudentially fraught. Most obviously, such rulings have immediate adverse effects for the thousands of vulnerable individuals who seek legal redress from the Court. But the rulings also have consequences beyond the litigants. When the ECtHR expounds the meaning of a particular right or freedom, its interpretation has ripple effects across the 47 member states, all of which have incorporated the Convention into domestic law, and across national

¹⁰⁷ Complaints from groups, associations and business entities, as well as interstate cases, are far less common.

¹⁰⁸ Helfer & Slaughter, 'Toward a Theory of Effective Supranational Adjudication', 107 *Yale Law Journal* (1997) 273, 309–312.

¹⁰⁹ See, e.g., Moravcsik, 'Federalism in the European Union: Rhetoric and Reality', in K. Nicolaidis and R. Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (2001) 161, at 162.

¹¹⁰ Helfer, 'The Burdens and Benefits of Brighton', *supra* note 73.

judiciaries, many of whose members give significant weight to ECtHR rulings when interpreting rights or freedoms in their respective constitutions. Pro-government rulings that disappoint these actors risk undermining the Court's influence and its legitimacy.

At the same time, the ECtHR depends upon the political, institutional and financial backing of the member states, especially established democracies. When that support wanes, it is difficult enough for the Court to hold states to commitments that they expressly consented to when joining the Convention. It is that much more perilous for the ECtHR to 'double down' on a strategy of expanding rights and freedoms.¹¹¹ Given the paucity of formal mechanisms through which member states can signal their collective support for or opposition to the ECtHR's jurisprudential trajectory (other than occasional reform conferences), it is not unreasonable for Strasbourg judges to consider the criticisms expressed by governments and to take account of regressive trends in national laws and policies.

Balancing these competing considerations is a complex endeavour for any international court or review body. It is still more challenging for a human rights tribunal that has been lauded as 'the crown jewel of the world's most advanced international system for protecting civil and political liberties'.¹¹² These issues may explain why the Grand Chamber has opted for tacit rather than explicit overturning of previous rulings (at least in the view of some of its members) as the 'least worst' approach to navigating a fraught political environment.

On the one hand, tacit overturning has real costs. It undermines the consistency and predictability of ECtHR case law and risks inconsistent treatment of similarly situated litigants. It also generates separate opinions that expose normative fractures among the judges over foundational principles. Some recent research suggests that ECtHR judgments finding a Convention violation that are accompanied by a dissent are less likely to be implemented by the respondent state than judgments without such a dissent. The logic here is that dissenting opinions 'enable recalcitrant parties to argue that the court's decision was "politicized" or otherwise unworthy of respect'.¹¹³

It is unclear whether walking back dissents have similar effects for the Court's supporters and compliance constituencies, diminishing their view of the legitimacy of pro-government rulings that include such separate opinions.¹¹⁴ Future research

¹¹¹ Cf. Uruena, 'Double or Nothing? The Inter-American Court of Human Rights in an Increasingly Adverse Context', 35 *Wisconsin International Law Journal* (2018) 398, at 408.

¹¹² Helfer, 'Redesigning the ECtHR', *supra* note 66, at 159.

¹¹³ Naurin and Stiansen, *supra* note 55, at 84–85.

¹¹⁴ It is perhaps noteworthy that the Strasbourg Observers blog's list of the five 'worst ECtHR judgments of 2018' includes two Grand Chamber judgments, both of which feature walking back dissents. See 'Poll: Best and Worst ECtHR Judgment of 2018', *Strasbourg Observers*, 29 January 2019, available at <https://bit.ly/3kHOjf8> (citing ECtHR, *Beuze v. Belgium*, Appl. No. 71409/10, Grand Chamber Judgment of 9 November 2018; ECtHR, *Murtazaliyeva v. Russia*, Appl. No. 36658/05, Grand Chamber Judgment of 18 December 2018). The blog previously published analyses of both Grand Chamber judgments that criticized the majority's reasoning and praised separate opinions that highlighted inconsistencies with prior ECtHR case law.

on retrogression in the European human rights system might investigate whether walking back dissents influence the litigation strategies of civil society groups that are repeat players before the ECtHR, as well as efforts by those groups to lobby governments to appoint progressive judges to the Court. Scholars could also examine if tacit overturning encourages governments other than the respondent state to lower national rights protections, just as expansive rulings have *erga omnes* effects in a progressive direction.¹¹⁵

Yet tacit overturning may also have advantages. Studies of national and international courts have found that judges issue vague or ambiguous rulings when faced with political uncertainty.¹¹⁶ Vagueness can ‘provide state officials with a measure of discretion, allowing them freedom to use local knowledge . . . to reach outcomes that judges desire but would struggle to produce absent better information’.¹¹⁷ Ambiguous decisions also may ‘attenuate the potential costs judges perceive to be associated with noncompliance’ by ‘making it difficult to argue that an order has actually been defied’.¹¹⁸

In the ECtHR context, ambiguity may reduce compliance pressures on all member states. For example, a Grand Chamber judgment accompanied by a separate opinion that accuses the majority of implicitly overruling an earlier judgment arguably weakens the *erga omnes* effects of both rulings, creating doubt as to whether and how they apply to other countries and different circumstances.¹¹⁹ The benefits of vagueness may also help to explain why we observe an increase in separate opinions charging the Grand Chamber with tacitly overturning prior judgments or doctrines in a *pro-applicant* direction: ECtHR judges in the majority in such cases may have become more circumspect in justifying progressive rulings as a way to shield themselves from criticism by states that oppose a more expansionist Court.

A final implication of our findings concerns recent nationalist-populist opposition to the post-World War II liberal multilateral system, including international human rights courts and review bodies.¹²⁰ The international institutions that comprise this system have tended to enlarge their competences over time.¹²¹ The precise

¹¹⁵ Helfer & Voeten, *supra* note 8.

¹¹⁶ Staton and Vanberg, ‘The Value of Vagueness: Delegation, Defiance, and Judicial Opinions’, 52 *American Journal of Political Science* (2008) 504.

¹¹⁷ Staton and Romero, ‘Rational Remedies: The Role of Opinion Clarity in the Inter-American Human Rights System’, 63 *Int’l Stud. Q.* (2019) 477, at 477.

¹¹⁸ *Ibid.* at 478.

¹¹⁹ The *Animal Defenders* case, discussed above, which upheld the UK’s blanket ban on paid political advertising notwithstanding an earlier ruling striking down a nearly identical Swiss ban, provides an apt example. See *Animal Defenders International v. United Kingdom*, Appl. No. 48876/08, Grand Chamber Judgment of 22 April 2013.

¹²⁰ See, e.g., Helfer, ‘Populism and International Human Rights Institutions: A Survival Guide’, in G. Neuman (ed.), *Human Rights in a Time of Populism: Challenges and Responses* (2020) 218; Voeten, ‘Populism and Backlashes against International Courts’, 18 *Perspectives on Politics* (2020) 407.

¹²¹ See, e.g., Helfer, ‘The ILO at 100: Institutional Innovation in an Era of Populism’, 113 *AJIL Unbound* (2019) 396; M. Barnett and M. Finnemore, *Rules for the World: International Organizations in Global Politics* (2004).

mechanisms of these expansions vary,¹²² but a common thread connecting these diverse examples is that expansions of authority have been far more common than contractions. International institutions may lack the flexibility and feedback mechanisms needed to execute course corrections that shrink their legal and policy footprint in response to shifts in political support and public opinion.

The post-Brighton ECtHR is a plausible example of this phenomenon. The tacit overturning that the Grand Chamber appears to be using to walk back human rights in Europe after decades of dynamic rights-enhancing rulings – and the controversies that this approach has engendered – suggest a need to reconsider whether international institutions have the appropriate tools to reduce – as well as expand – their authority over time.

¹²² See, e.g., C. Bradley and J. Kelley, 'The Concept of International Delegation', 71 *L. & Contemp. Probs.* (2008) 1.