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The Costs and Consequences of Incorrect Citations: European Law in the U.S. Supreme Court

Andrea Pin

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THE COSTS AND CONSEQUENCES OF INCORRECT CITATIONS: EUROPEAN LAW IN THE U.S. SUPREME COURT

Andrea Pin*

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INTRODUCTION

What would the U.S. Supreme Court have learned from Europe had it embarked on a comparative law inquiry for the sake of deciding *Obergefell v. Hodges*, the historical case that affirmed the constitutional protection of same-sex marriage in the United States?¹ Experience suggests that, had the court looked at European sources for inspiration, it could have misread them.

A lot of ink has been spilled² on the U.S. Supreme Court's practice of quoting foreign sources and using foreign materials.³ This debate goes beyond the legal terrain and reaches the realm of politics, deepening the divide between U.S. liberals, who support resorting to foreign law while adjudicating, and conservatives, who oppose this practice.⁴ But, the recent controversy over the constitutionality of same-sex marriage has given the debate over the recourse to foreign law the chance to free itself from partisanship.

The U.S. Supreme Court in *Obergefell* famously affirmed the constitutionality of same-sex marriage but did not quote foreign law in its reasoning, despite relying on *Lawrence v. Texas*, which

1. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

2. See David S. Law, *Judicial Comparativism and Judicial Diplomacy*, 163 U. PA. L. REV. 927, 935 (2015).

3. See STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* (2015).

4. See Eugene Volokh, *Foreign Law in American Courts*, 66 OKLA. L. REV. 219, 219 (2014).

famously did cite to law from outside the United States.⁵ *Obergefell* resolved a circuit split⁶ created by the Court of Appeals for the Sixth Circuit in *DeBoer v. Snyder*, which drew from foreign sources in ruling that the U.S. Constitution did not protect the right to same-sex marriage.⁷ Judge Jeffrey Sutton, who penned the decision in *DeBoer v. Snyder*, reasoned:⁸

[T]he European Court of Human Rights ruled only a few years ago that European human rights laws do not guarantee a right to same-sex marriage. *Schalk & Kopf v. Austria*, 2010. . . . “The area in question,” it explained . . . remains “one of evolving rights with no established consensus,” which means that States must “enjoy [discretion] in the timing of the introduction of legislative changes.” . . . It reiterated this conclusion . . . declaring that “the margin of appreciation to be afforded” to States “must still be a wide one.” *Hämäläinen v. Finland*, [2014].⁹

The opinion of the Sixth Circuit also added:

Our Supreme Court relied on the European Court’s gay-rights decisions in *Lawrence*. . . . What neutral principle of constitutional interpretation allows us to ignore the European Court’s same-sex marriage decisions when deciding this case? If the point is relevant in the one setting, it is relevant in the other.¹⁰

Judge Sutton took inspiration from the European Court of Human Rights (ECtHR) to conclude that the same-sex marriage issue had to be decided by the states. At the same time, Judge Sutton called for consistency by the U.S. Supreme Court in citing the practices of other countries and made this conservative argument, in part, on the basis of foreign law.

While the majority in *Obergefell* did not rely on foreign sources in its decision, admittedly, some of the judges of the U.S. Supreme Court who dissented made foreign law-based arguments in favor of the preservation of heterosexual marriage. But, such

5. *Lawrence v. Texas*, 539 U.S. 558 (2003); see also Han-Ru Zhou, *A Contextual Defense of “Comparative Constitutional Common Law,”* 12 INT’L J. CONST. L. 1034 (2014).

6. Lyle Denniston, *Sixth Circuit: Now, A Split on Same-Sex Marriage*, SCOTUSBLOG (Nov. 6, 2014, 4:50 PM), <http://www.scotusblog.com/2014/11/sixth-circuit-the-split-on-same-sex-marriage/>.

7. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).

8. *Id.*

9. *Id.* at 417.

10. *Id.*

references were extremely vague. For example, Chief Justice John Roberts spoke about a world in turmoil, with "countries overseas democratically accepting profound social change, or declining to do so."¹¹ Justice Samuel Alito lamented that the U.S. Supreme Court's ruling was at odds with "a great variety of countries and cultures all around the globe."¹² Such phrasings lack the precision that Judge Sutton offered when he wrote the opinion for the Sixth Circuit. Overall, however, the justices of the U.S. Supreme Court avoided using comparative law in analyzing *Obergefell*.

This has not always been the case. In the recent past, the U.S. Supreme Court looked abroad for inspiration and useful comparison on generally divisive issues such as the death penalty,¹³ homosexual relationships,¹⁴ and federalism.¹⁵ But, as this article will demonstrate, the court's explorations in foreign law prompted scattered skepticism and even led to strong political confrontations. Thus, the court in *Obergefell* may have decided not to look in order to avoid adding criticism to such a hotly debated topic as same-sex marriage through the utilization of contentious arguments drawn from foreign countries. This article will explore the presuppositions and implications involved when judges look to foreign law to make their decisions. It will maintain that learning from other courts is not only legitimate but also prudent, so long as this practice finds its proper place: namely, as long as it provides U.S. judges with fresh perspectives and crafted arguments instead of merely backing their own opinions. Looking at foreign law should be a disciplined practice that examines the details of foreign legal wisdom to discern its underpinnings and structure. This understanding can renew the genuine practice of using comparative law in adjudication while removing it from political partisanship.¹⁶

11. *Obergefell v. Hodges*, 135 S. Ct. 2625 (2015) (Roberts, C.J., dissenting).

12. *Id.* at 2642 (Alito, J., dissenting).

13. *Coker v. Georgia*, 433 U.S. 584 (1977); *Enmund v. Florida*, 458 U.S. 782 (1982); *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005).

14. *Lawrence v. Texas*, 539 U.S. 558 (2003).

15. *Printz v. United States*, 521 U.S. 898 (1997).

16. See Basil Markesinis, *National Self-Sufficiency or Intellectual Arrogance? The Current Attitude of American Courts Towards Foreign Law*, 65 CAMBRIDGE L.J. 301, 323 (2006) (discussing the political salience of using foreign law).

The focus of this article is largely descriptive since it starts from the U.S. use of foreign citations and draws a picture of how U.S. Supreme Court justices understand the legal orders from which they draw. It concentrates on concrete examples of legal borrowing to explore the conditions under which the use of foreign ideas is accurate and whether their use is appropriate. It aims to demonstrate that inquiries into comparative law can be a valid part of drafting a judicial opinion when those who cite locate foreign bodies of law within their legal contexts and try to understand both the original context and application to U.S. courts. Thus, this article will address an area of law not yet adequately considered by legal scholarship. It will provide a detailed analysis of certain foreign sources utilized by the U.S. Supreme Court and will contrast their actual meaning against the court's interpretation at the time of the decisions.

Part I will briefly describe the controversy of U.S. courts' citations to foreign decisions. It will discuss the main reasons why the use of foreign sources remains highly contested among U.S. judges and scholars and will weigh them against the reasons advocated by those who favor the practice of drawing from foreign jurisdictions. Finally, it will place the prevailing opinions about foreign citation usage in the United States within the global discourse on the utilization of foreign sources.

Part II will analyze the contentious U.S. Supreme Court decisions containing foreign citations that fueled debate on the utilization of foreign law within U.S. legal scholarship. It determines that much of the criticism of the court's use of such sources is well-founded, not because of the citations themselves but because such citations either misunderstand the foreign decisions or legislative provisions they quote or make inappropriate use of them. Part II continues by providing a detailed explanation of each of these mistakes and singles out those occasions in which the use of foreign materials proved to be appropriate or at least respectful of the quoted sources.

Part III will summarize how the U.S. Supreme Court interprets foreign legal orders and will contrast the court's opinion with the reality of such legal orders. It will show that, in the past, when the court sought to use foreign law, it overlooked the important features and structural differences of foreign legal cultures. Ultimately, had the court considered these aspects in the past, its appreciation of foreign law would have been more nuanced and probably more useful. Foreign sources could have

thus provided more information to the court without affecting its autonomous and objective judgement.

Part IV will explore the practice of citing to foreign jurisdictions as an instructive praxis that can help judges. It maintains that foreign laws are permissible sources for the court to reflect on, but not rely on, when the justices make decisions. Comparative law should be used by the U.S. Supreme Court simply to enhance justices' ability to see aspects of a controversy that they would otherwise overlook. To achieve this goal, the contexts from which foreign sources are drawn must also be explored. Such explorations include the institutional scenarios in which they developed as well as their legal status.

Part V will draw conclusions from this analysis, explaining that engaging in comparative law is not necessarily a partisan practice, so long as justices do not choose foreign legal concepts to simply back the decision the court will make. Rather, comparative law analysis should be used because it sheds light on the case and the legal issues at stake. Comparative law inquiries can deepen legal reasoning but cannot substitute it.

In exploring these matters, this article will focus on U.S. Supreme Court citations that involve the European Union and the so-called European Convention of Human Rights (ECHR),¹⁷ which are among the most common foreign sources that U.S. courts have relied upon. This article neither challenges the outcome of the U.S. Supreme Court decisions that have utilized such sources nor criticizes the case law that they have helped to build. It only focuses on the role that foreign jurisprudence played in the drafting of these opinions and, most importantly, how the U.S. Supreme Court interpreted the foreign jurisprudence it quoted.

I. THE U.S. CONTROVERSY OVER FOREIGN CITATIONS: AN OVERVIEW

Decisions of the U.S. Supreme Court that cite foreign statutes and provide readings of foreign decisions are quite few,¹⁸ especially when compared with other common law jurisdictions, such as South Africa, Canada, or Australia.¹⁹ Although commentators

17. Convention for the Protection of Human Rights and Fundamental Freedoms art. 19, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

18. Law, *supra* note 2, at 934.

19. Zhou, *supra* note 5.

prophesized that the U.S. Supreme Court's use of foreign law would increase over time,²⁰ in reality, the number of citations is decreasing.²¹ Academic, legal, and political forces are all at work in the decrease of the use of foreign sources in U.S. decisions.

A. The Reputation of Comparative Law in the United States

Law schools in the United States have classically deprioritized comparative law,²² and, as a result, comparative law studies have developed²³ more slowly than other disciplines.²⁴ Thus, foreign sources are often overlooked and misunderstood. These factors also raise doubts regarding the relevancy of foreign sources to and compatibility with domestic legal reasoning.²⁵

Additionally, legal critiques raise strong doubts about the legitimacy, appropriateness, and the genuine, unbiased purpose of foreign citations in U.S. jurisprudence; and the outcomes of these analyses do not persuade scholars such as Professor Mary Ann Glendon, who writes that "the benefits outnumber the drawbacks."²⁶ Inquiries from foreign law would not be just time-consuming or valueless; they would even be inappropriate and counterproductive to the adjudication of legal disputes.

As for the issue of legitimacy, because the U.S. Supreme Court must expound the U.S. Constitution,²⁷ critics maintain that foreign law should not be weighed when interpreting it. More broadly, they believe that foreign law should not affect the U.S.

20. Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 893 (2005).

21. Han-Ru Zhou provides some statistics in this regard. The U.S. Supreme Court quoted foreign sources in 7.2% of its cases from 1984–1990, 5.6% from 1990–1999, and 3.5% from 2000–2008. Zhou, *supra* note 5.

22. David S. Law, *Constitutional Convergence and Comparative Competency: A Reply to Professors Jackson and Krotoszynski*, 66 ALA. L. REV. 145, 150 (2014).

23. For some comforting developments in this area, see Mary Ann Glendon, *Comparative Law in the Age of Globalization*, 52 DUQ. L. REV. 1, 1–2 (2014) ("Over a hundred law schools have become sustaining members of the American Association for the Comparative Study of Law (now the American Society of Comparative Law).").

24. Ugo Mattei, *An Opportunity Not to Be Missed: The Future of Comparative Law in the United States*, 46 AM. J. COMP. L. 709, 716 (1998).

25. Law, *supra* note 2, at 1020.

26. Glendon, *supra* note 23, at 2.

27. *McCulloch v. Maryland*, 17 U.S. 316, 408 (1819).

Supreme Court's reasoning, let alone be relied upon. On the contrary, foreign citations would subject U.S. law to the oversight of foreign institutions,²⁸ thereby depriving the U.S. people of their own sovereignty and hijacking the U.S. constitutional structure.²⁹ In this respect, so the argument goes, the use of foreign sources would be, as U.S. constitutionalism understands it, intrinsically a betrayal of democracy and the rule of law.³⁰

Appropriateness issues stem from the problems of taking a decision out of its context.³¹ In other words, taking rules out of the legal regimes in which they originally appeared could create misunderstandings and prompt misuse by the U.S. Supreme Court.³² Different constitutional environments and legal regimes may lead to different decisions,³³ although the institutional framework may suggest that they act the same way on the surface.³⁴ For example, a civil law system balances statutes with court decisions differently than a common law system.³⁵ Consequently, the U.S. Supreme Court can sometimes learn more from a French statute than from a French judicial statement.³⁶

Legal critics also stress that the court would not be in the position to conduct any genuine inquiry into comparative law be-

28. See *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (criticizing the use of foreign law in U.S. Supreme Court decisions).

29. *Id.*

30. David J. Seipp portrays these sorts of criticisms against the practice of citing foreign law. See David J. Seipp, *Our Law, Their Law, History, and the Citation of Foreign Law*, 86 B.U. L. REV. 1417, 1446 (2006).

31. Vicki C. Jackson, *Comparative Constitutionalism, Legal Education, and Civic Attitudes: Reflections in Response to Professors Krotosynski and Law*, 66 ALA. L. REV. 155, 157 (2014).

32. *Id.*

33. Ran Hirschl, *In Search of an Identity: Voluntary Foreign Citations in Discordant Constitutional Settings*, 62 AM. J. COMP. L. 547, 552 (2014).

34. Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 AM. J. COMP. L. 1, 26 (1991).

35. *Id.*

36. This is hardly understood by the phenomenon of judicial globalization, which shows "deference not to foreign law or foreign national interests, but specifically to foreign courts." Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1112 (2000).

cause it could not avoid selectiveness. Stated differently, personal preferences among judges,³⁷ language skills,³⁸ and the unavailability of information would lead judges to focus³⁹ only on the sources that support their decision. Drawing from foreign law would be a quintessentially selective practice: judges would pick the foreign materials that they prefer, and their choice would still be limited by the language barrier.

Finally, the understanding of foreign citations as an illegitimate intrusion into the U.S. constitutional order has prompted scattered political criticisms, which often state that the use of foreign law undermines the U.S. Supreme Court's legitimacy.⁴⁰ Federal judges quoting foreign sources have faced calls for impeachment.⁴¹ Candidates for judicial appointments routinely are asked during U.S. Senate hearings whether they would look at and cite foreign sources in their decision-making processes.⁴² Further, popular state initiatives have tried to pull foreign law out of courts by banning judges from using it.⁴³ As Professor Roger Alford has shown, the lower courts' response to the U.S. Supreme Court's merely limited interest in foreign law has been almost unanimously negative.⁴⁴

37. This concept is also called "cherry-picking." Martin Gelter & Mathias M. Siems, *Citations to Foreign Courts—Illegitimate and Superfluous, or Unavoidable? Evidence from Europe*, 62 AM. J. COMP. L. 35, 40 (2014).

38. Hirschl, *supra* note 33, at 551.

39. Keep in mind that, "[a]ccording to recent polls, . . . 82 percent of Americans believe that the Justices decide cases based on their personal views." Eric Berger, *The Rhetoric of Constitutional Absolutism*, 56 WM. & MARY L. REV. 667, 733 (2015).

40. Law, *supra* note 2, at 939–40.

41. Seipp, *supra* note 30, at 1418, 1422.

42. Gelter & Siems, *supra* note 37, at 36; Ronald J. Krotoszynski, Jr., *The Heisenberg Uncertainty Principle and the Challenge of Resisting – or Engaging – Transnational Constitutional Law*, 66 ALA. L. REV. 105, 110–11 (2014); Mark C. Rahdert, *Comparative Constitutional Advocacy*, 56 AM. U. L. REV. 553, 557–58 (2007); Roger P. Alford, *Lower Courts and Constitutional Comparativism*, 77 FORDHAM L. REV. 647, 649 (2008).

43. See, e.g., OKLA. CONST. art. VII, § 1. *But see* *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012) (affirming an injunction against the Oklahoma ban). More states are trying to limit or ban the use of foreign law in state courts. See RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 146 (2014).

44. Alford, *supra* note 42, at 655–56.

B. The Normative Project and U.S. Resistance to It

The three-layered criticism by academic, legal, and political authorities underpins the deep concern that foreign citations have more to do with specific political agendas⁴⁵ than with enlightened judgment. Rather than being objective, informed judgments based on U.S. law, comparative law inquiries are viewed as a selective practice targeting U.S. laws and practices that do not necessarily align with the judges' own views.⁴⁶

Admittedly, the contemporary hope that the U.S. Supreme Court may one day welcome foreign citations as a token of a broader consideration of comparative law seems to be part of a normative project,⁴⁷ which actually makes the use of foreign law in adjudication even more controversial and problematic. The proponents of such recourse to foreign law conceive the highest courts of the world as positively involved in not only transnational dialogue for informative purposes but also as participants in a normative enterprise.⁴⁸ This initiative extends worldwide,⁴⁹ blends international law with national law in the name of progress,⁵⁰ focuses its efforts on developing a body of "generic constitutional law,"⁵¹ and finds its driving force in judicial activism.⁵² This is quite a revolutionary landscape in light of the fact that, only twenty-five years ago, U.S. judges had the reputation of being "less inclined than the scholar or legislator to examine

45. Christopher McCrudden, *Transnational Culture Wars*, 13 INT'L J. CONST. L. 434, 456 (2015).

46. Comparative law supporters seem to have a mainly liberal agenda. This agenda, however, may change over time. As Roger Alford pointed out, the infamous case, *Dred Scott v. Sandford*, 60 U.S. 393, 407, 475 (1856), went in the opposite direction, using generic references to the law of other nations to deny African Americans full rights. See Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 69 n.94 (2004); see also Calabresi & Zimdahl, *supra* note 20, at 802.

47. But see Veronika Fikfak, *English Courts and the 'Internalisation' of the European Convention of Human Rights? – Between Theory and Practice* 23 (Univ. of Cambridge, Legal Studies Research Paper Series, Paper No. 37/2015, 2015).

48. Mattei, *supra* note 24, at 709.

49. Alford, *supra* note 46, at 57.

50. For an overview of the evolutionary reading of international law, see Jochen von Bernstorff, *International Legal Scholarship as a Cooling Medium in International Law and Politics*, 25 EUR. J. INT'L L. 977, 979 (2014).

51. David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 662, 725 (2005).

52. Zhou, *supra* note 5.

the production of other countries.”⁵³ Therefore, it is no surprise that U.S. legal scholars and the U.S. people at large are particularly concerned that such a “rise of world constitutionalism”⁵⁴ would result in a deprivation of the democratic character and the sovereignty of the people of the United States. Skepticism of the United States with respect to drawing from foreign influence, however, is not simply derived from originalism⁵⁵ or any other inward-looking type of constitutional interpretation. The rejection of foreign law is a combination of at least three structural factors in the U.S. legal tradition: namely, the rule of *stare decisis*, the fact that the United States has not developed from a preceding supranational legal order, and the foundational character of U.S. constitutionalism.

First, although the role of *stare decisis* in domestic adjudication is debated, it is beyond doubt that U.S. academics and judges are equally concerned that judicial decisions are made in accordance with precedent.⁵⁶ Legal regimes that care about precedents do not take them lightly.⁵⁷ As a result, the more authoritative the role that foreign precedents have in their domestic decisions, the less likely it is that U.S. judges will feel at ease with quoting and incorporating them in their reasoning.

Second, many countries that indulge in foreign citations understand themselves as legally or traditionally part of a broader legal order.⁵⁸ This is true for Commonwealth countries,⁵⁹ which, for centuries, traded their own judicial precedents when they

53. Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, 39 AM. J. COMP. L. 343, 395 (1991).

54. To use the expression coined by Bruce Ackerman. Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 772 (1997).

55. On the breadth and nuance of this theory of constitutional interpretation, see STEVEN G. CALABRESI, *ORIGINALISM: A QUARTER-CENTURY OF DEBATE* (Steven G. Calabresi ed., 2007).

56. Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 412–13 (2010).

57. *Id.* at 413.

58. Wayne Sandholtz, *How Domestic Courts Use International Law*, 38 FORDHAM INT'L L.J. 595, 595 (2015).

59. See generally Stephen Garbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001) (discussing the commonalities among state members of the Commonwealth and the recent development of a shared understanding of constitutionalism among them).

were subject to British rule⁶⁰ and still share and draw information from each other.⁶¹ This is equally true for European countries, which, after World War II, committed to sharing legal projects through the European Union and the Council of Europe.⁶² On the contrary, vast portions of U.S. academia⁶³ categorize international law—which, as a discipline, focuses on international organizations and human rights—and comparative law—which traditionally compares different state systems—under the same label, although their views are not uniform in how they look at the two categories.⁶⁴ For example, many academics treat both international and comparative law with equal suspicion,⁶⁵ while others intertwine interest in international law with curiosity (and even engagement) in comparative law.⁶⁶ If a country understands itself as being part of a broader legal order that connects people through international law, this will probably position it to borrow from other countries' legal orders. Conversely, tenuous U.S. relations with international law⁶⁷ cause skeptical attitudes toward comparative law as a useful tool of adjudication.

60. HIRSCHL, *supra* note 43, at 35.

61. VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 96 (2010).

62. The Council of Europe is a supranational organization that covers forty-seven European states and aims to promote human rights, democracy, and the rule of law throughout its territories and globally. See COUNCIL OF EUR., <http://www.coe.int/en/web/portal/home> (last visited Nov. 10, 2016). The nature and the goal of the European Union and of the Council of Europe's institutions will be discussed below. See *infra* Part II.B.

63. JACKSON, *supra* note 61, at 169–70 (sketching out the differences between international law and comparative law).

64. Interestingly, Steven G. Calabresi and Stephanie Dotson Zimdahl began their more-than-two-centuries-long parade of U.S. Supreme Court citations of foreign law with the classical work *The Law of Nations*. Calabresi & Zimdahl, *supra* note 20, at 757; see also JEREMY WALDRON, "PARTLY LAWS COMMON TO ALL MANKIND": FOREIGN LAWS IN AMERICAN COURTS 8 (2012).

65. Glendon, *supra* note 23, at 24.

66. For a discussion on the intellectual pressure that international law scholars exerted on comparative law studies in order to form a cosmopolitan project of global law, see David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT'L L. 9, 11, 31 (1999).

67. The U.S. Supreme Court's attitude toward international law, however, is more nuanced than is commonly portrayed. See Gráinne de Búrca, *International Law Before the Courts: the EU and the US Compared*, 55 VA. J. INT'L L. 685, 723–26 (2015).

The third factor is linked to the second and relates to the very foundation of U.S. constitutionalism. As Professor David Fontana points out, the U.S. Constitution did not only establish the legal order; rather, it established the whole U.S. identity.⁶⁸ Constitutional foundations were concurrently political and social.⁶⁹ This fact makes the constitutional culture largely centripetal: the whole political community identifies with its attachment to the U.S. text.⁷⁰ Unless foreign law illuminates the U.S. Constitution, any foreign interference with constitutional interpretation amounts to an interference with the very foundations of U.S. society. Such preoccupations are absent, for instance, in European countries, where statehood long predated constitutional texts, or in Canada, where political loyalties characterized its development and where English, French, and U.S. law are incorporated into Canadian law.⁷¹

The worldwide normative project⁷² that the U.S. legal culture largely opposes is occasionally rooted in the so-called “Condorcet Theorem,”⁷³ named after the great French philosopher of the revolutionary era, the Marquis de Condorcet, whose “vision of law and politics was distinctly ‘universalist,’ imagining all people everywhere seeking the correct answer to questions of law and policy.”⁷⁴ While multiple versions of the Condorcet Theorem exist, the applicable version for the purposes of this article “suggests that the decision of a majority in a group of similar and independent decision-makers is more likely to be correct than the decision of any one member of that group.”⁷⁵ In other words, the version of the Condorcet Theorem that the supporters of this

68. David Fontana, *Response: Comparative Originalism*, 88 TEX. L. REV. *See Also* 189, 190 (2010), http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1409&context=faculty_publications.

69. HIRSCHL, *supra* note 43, at 145.

70. Fontana, *supra* note 68, at 196.

71. H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 289 (1987).

72. Carl Baudenbacher, *Judicial Globalization: New Developments or Old Wine in New Bottles?*, 38 TEX. INT'L L.J. 505, 505 (2015).

73. Paul H. Edelman, *On Legal Interpretations of the Condorcet Jury Theorem*, 31 J. LEGAL STUD. 327, 328 (2002).

74. Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to the Law of Other States*, 59 STAN. L. REV. 1281, 1283 (2007).

75. Shai Dothan, *Why Granting States a Margin of Appreciation Supports the Formation of a Genuine European Consensus* 4, 5 (iCourts Working Paper Series, Working Paper No. 22, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2597949.

normative project seem to entertain proposes that a significant exploration of the different legal trends that inhabit modern democracies can point domestic judges in the right direction.⁷⁶

The worldwide trading in legal ideas composes a “global community of law”⁷⁷—a concept that depicts a new legal order extending worldwide and stems from a globalized environment in which persons and goods move from one legal environment to another rather easily.⁷⁸ This scenario creates legal chaos,⁷⁹ which in turn calls for strong judicial interventionism. Given that the national level has become inadequate to regulate human activities that take place transnationally, if not worldwide, only strong interactions between supranational courts and state courts can put supranational social and economic phenomena in check.⁸⁰ The making of this global law takes place through both periodic meetings among domestic and supranational judges from different parts of the world⁸¹ and the domestic implementation of global trends through national court decisions.⁸²

The idea of a global law era suffers from weak or nonexistent democratic legitimation. Flowing spontaneously is the transnational dialogue among judiciaries and the practice of borrowing concepts and solutions.⁸³ They do not stem from state-like demos and are not the product of the democratic will of any people.⁸⁴

76. Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 136 (2006).

77. Slaughter, *supra* note 36, at 1104.

78. *Id.* at 1103 (where the author states that “[t]he compression of distance and the dissolution of borders that drives globalization has proved far more efficient at producing global markets than global justice.”).

79. See *On Reading Proust: Stephen Breyer, Interviewed by Ioanna Kohler*, N.Y. REV. BOOKS (Nov. 7, 2013), <http://www.nybooks.com/articles/2013/11/07/reading-proust/> [hereinafter *Stephen Breyer Interview*].

80. Baudenbacher, *supra* note 72, at 512.

81. *Id.* at 505.

82. MARTA CARTABIA & SABINO CASSESE, EUR. UNIV. INST., HOW JUDGES THINK IN A GLOBALISED WORLD? EUROPEAN AND AMERICAN PERSPECTIVES, ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES 2 (2013), http://cadmus.eui.eu/bitstream/handle/1814/30057/2013_07-Policy%20Brief_RSCAS_GGP-WEB.pdf?sequence=1&isAllowed=y.

83. Baudenbacher, *supra* note 72, at 505.

84. *Stephen Breyer Interview*, *supra* note 79; Sabino Cassese, *Global Administrative Law: The State of the Art*, 13 INT'L J. CONST. L. 465, 467 (2015).

With few exceptions, the resort to foreign sources is not legitimized directly by most countries' constitutions.⁸⁵ Further, even when such allowances exist, courts are not given any instructions about where to look for solutions. They can still be selective in which sources they use to base their decisions. This flexibility, and the danger of selectiveness that flows from it, is greater for countries that are not directly involved in supranational projects, such as EU countries or the states of the Commonwealth, which have both a justification as well as logical boundaries in judicial inquiries in foreign law.⁸⁶

Courts can be selective in both the legal regimes they decide to draw from as well as when they decide to draw. The inconsistency in the practice of quoting foreign sources is probably the aspect that raises most doubt. For example, if a court cites foreign law almost daily—like Canadian⁸⁷ or South African courts⁸⁸—then one can conclude that this is a standard component of the adjudication process. But, the U.S. Supreme Court engages in comparative inquiries only randomly and, more often than not, with regard to ethically and politically divisive cases,⁸⁹ such as death penalty issues or homosexual relations.⁹⁰ The fact that its practice is so rare and only deployed in hotly contested matters confirms the impression that comparative jurisprudence of the U.S. Supreme Court is driven merely by some political agenda, regardless of what it may be. After all, the Sixth Circuit's decision in *DeBoer* on same-sex marriage, which prompted the U.S. Supreme Court's decision to grant certiorari, touched upon this point when it mentioned the necessity of looking to foreign law consistently instead of occasionally.⁹¹ And by

85. South Africa, however, is a notable exception to this general rule. See S. AFR. CONST., 1996, ch. 2, § 39 (“When interpreting the Bill of Rights, a court, tribunal or forum . . . may consider foreign law.”).

86. As for the Commonwealth, see CALABRESI, *supra* note 55; as for the European Union, see *infra* Part II.B.

87. Zhou, *supra* note 5.

88. Since 1994, “foreign law has been cited or referenced in more than half of that country’s Constitutional Court rulings.” Hirschl, *supra* note 33, at 549.

89. This actually seems to be a trademark of the global practice of borrowing ideas. See Gelter & Siems, *supra* note 37, at 71.

90. As will be discussed in *infra* Part II.

91. *DeBoer v. Snyder*, 772 F.3d 388, 417 (6th Cir. 2014) (“What neutral principle of constitutional interpretation allows us to ignore the European Court’s same-sex marriage decisions when deciding this case? If the point is relevant in the one setting, it is relevant in the other.”).

quoting sources that merely back its decision, the impression is further corroborated that the U.S. Supreme Court simply looks for confirmation instead of additional wisdom in these sources. Judges find a place for themselves in the world community of courts not by simply quoting those foreign judgments that specifically support their reasoning but also through contrasting their own decisions with those of other jurisdictions that took different paths. For example, some years ago, the Czech Constitutional Court gave a strong endorsement to the Europeanization process in the Lisbon Treaty, openly stigmatizing the German Constitutional Court, which had taken the opposite position.⁹²

Selectiveness, misuse, and lack of democratic accountability are formidable criticisms of the U.S. Supreme Court's resort to foreign law. As a result, it is no surprise that, notwithstanding the paucity of the court's resort to foreign sources, this seldom-used practice has prompted strong reactions. Using foreign law in domestic adjudication gets to the core of democratic values, activates the impression that there is a "juristocratic"⁹³ threat, and prompts questions about whether the judiciary is trying to change the country's mores through the judges' own morals.⁹⁴

Regardless of whether the use of comparative law in a decision is substantial or limited, what we should monitor is the transformation of foreign law into domestic law.⁹⁵ If a foreign source is treated as normative, to some extent, it becomes part of the law of the land.⁹⁶ In other words, the U.S. Supreme Court may incorporate normative foreign law into U.S. law.⁹⁷ The specific weight of each citation may vary; but, citations, according to the

92. Mattias Wendel, *Comparative Reasoning and the Making of a Common Constitutional Law: EU-Related Decisions of National Constitutional Courts in a Transnational Perspective*, 11 INT'L J. CONST. L. 981, 988 (2013).

93. See RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

94. For a discussion on the tensions between mores and morals, see Michel Rosenfeld, *A Comparativist Critique of U.S. Judicial Review of Fundamental Rights Cases: Exceptionalisms, Paradoxes and Contradictions* 27 (Cardozo Law Sch. Legal Studies Research Paper Series, Working Paper No. 446, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2562717##.

95. For an explanation of international law's internalization, see Fikfak, *supra* note 47, at 2.

96. *Id.* at 11.

97. Glendon, *supra* note 23, at 9.

global law paradigm, make the law of other nations part of U.S. law.

C. The Urgent Need for an Alternative Understanding of Foreign Law's Contribution to Domestic Adjudication

The perils of indulging in comparative law derive from the intellectual project behind this current practice of drawing inspiration from foreign countries while deciding cases, not in the practice in itself. Such perils cannot be avoided simply by forbidding foreign citations because the issue of the use of foreign influences upon domestic judgments is not simply a matter of citation.⁹⁸ While the opposition to the use of foreign law may discourage foreign citations, it does not necessarily discourage their influence. After all, if the criticisms mainly target the U.S. Supreme Court's explicit citation of foreign sources, an easy shortcut for judges who seek to use foreign ideas in their opinions is to draw from them without displaying the source.⁹⁹ Using foreign law without quoting it is not transparent, but it avoids criticism. The mere fact that U.S. quotations of foreign law are rare may not say too much about the court's actual practice.¹⁰⁰ As a result, the case may be that judges do not disregard foreign sources but appear to do so because they want the U.S. audience to think that they do not look at them. Using foreign sources without acknowledging them ultimately affects a court's transparency. Moreover, the lack of transparency has a paradoxical result: although the strength and the reputation of a court largely rests on the quality of its reasoning, in actuality, part of its reasoning remains in the shadows precisely to reinvigorate the court's reputation.¹⁰¹

Judicial borrowings are not just a matter of citations.¹⁰² Citations testify that some resort to foreign materials was made; but, the influence of other countries' legal traditions on U.S. law does

98. See Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931 (2008).

99. Gelter & Siems, *supra* note 37, at 39.

100. Krotoszynski, Jr., *supra* note 42, at 137.

101. See Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 488 (2015) (highlighting that judges in the past preferred to omit giving reasons for their decisions in order to avoid annulment).

102. Law, *supra* note 2, at 946.

not end with citations.¹⁰³ It can even inspire indigenous U.S. developments that go much further than the initial references to foreign law. For example, the longstanding legacy of the distinct U.S. right to privacy, which was first affirmed in *Griswold v. Connecticut*,¹⁰⁴ finds its ancient roots in Warren and Brandeis' article *The Right to Privacy*,¹⁰⁵ which *Griswold* correctly quoted.¹⁰⁶ In their legal article, Warren and Brandeis strove to find an equivalent in (or to introduce into) U.S. law the protection of dignity afforded under French law.¹⁰⁷ In its opinion, however, *Griswold* carried no evidence of the French lineage to the U.S. intellectual endeavor that led to a right to privacy.

Many legal ideas, such as privacy, have a transnational story that encompasses both domestic and foreign legal experiences. Why should a judge quote the domestic strands of legal thought while remaining silent on the foreign ones in the same vein when the latter strands can provide valuable insight about the entire picture? After all, an insulated court is fictional, given the continuous flow of legal information across the globe.¹⁰⁸ Stated another way, "[i]n a modern, globalized society, knowledge is viral, and once caught, cannot be easily shed. One cannot undo awareness of same-sex marriage in Canada, state-sanctioned euthanasia in the Netherlands, or the decriminalization of many recreational drugs in Mexico."¹⁰⁹ As a result, judges cannot avoid being informed about what happens outside the United States because these events may give them issues to reflect upon while judging.

Parties and amici curiae normally draw from other jurisdictions when litigating before the U.S. Supreme Court under the assumption that foreign arguments could play some role in how judges will decide the case.¹¹⁰ It is not a matter of what parties and amici think about the validity of this process; rather, it is a matter of how they think the court will make a decision. Conservative groups in the United States,¹¹¹ which hardly approve

103. *Id.* at 948.

104. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

105. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

106. *Griswold*, 381 U.S. at 511 n.1.

107. Warren & Brandeis, *supra* note 105, at 214.

108. JACKSON, *supra* note 61, at 5.

109. Krotoszynski, Jr., *supra* note 42, at 108.

110. McCrudden, *supra* note 45, at 434.

111. *Id.* at 449.

of the practice of borrowing ideas from other countries,¹¹² have developed strategies that even support litigation abroad with the expectation that foreign decisions will have an impact on domestic ones.¹¹³ For instance, if such groups understand that the ECtHR decisions can play some part in the U.S. Supreme Court's reasoning on a similar issue relevant to their group, they will participate in the ECtHR's litigation, hoping that this may affect how the U.S. Supreme Court will behave in the future.¹¹⁴ This was particularly true in *Lawrence v. Texas*,¹¹⁵ the U.S. Supreme Court decision that struck down the Texas ban on sodomy. Since the majority in *Lawrence*'s relied on ECtHR case law, U.S. groups and individuals of different ideological orientations have subsequently started to target the ECtHR with the hope of influencing the U.S. Supreme Court in the future with respect to their interests.¹¹⁶

While the U.S. Supreme Court seems to be reluctant to embark on comparative law efforts while deciding, parties and amici do not behave with that understanding. Resort to foreign sources is "increasingly occurring in *both* sides of contested issues."¹¹⁷ All parties treat the U.S. Supreme Court as if it accepts comparative law arguments, despite the court's dearth of foreign law quotations indicating otherwise.¹¹⁸ It is therefore safe to say that, although sporadic, the U.S. Supreme Court's utilization of foreign sources in the past legitimizes parties' resort to them in their briefs and heightens the expectations that the court will, to some extent, value them.¹¹⁹

In a sense, the U.S. Supreme Court seems to be in a catch-22: quotations from foreign countries are criticized; yet, parties before it behave like the court uses foreign sources in making its decisions. Further, the court's reluctance in quoting foreign sources is suspicious because its silence does not necessarily mean that the court is immune from the influence of foreign law. In 2005, Professors Steven Calabresi and Stephanie Dotson Zimdahl wrote the following in the context of Eighth Amendment

112. *Id.* at 450, 456.

113. *Id.* at 442.

114. *Id.* at 445.

115. *Lawrence v. Texas*, 539 U.S. 558 (2003).

116. McCrudden, *supra* note 45, at 451.

117. *Id.* at 459.

118. *Id.*

119. See Schauer, *supra* note 98, at 1959.

cases: "With so many of the nine justices committed to looking at foreign law, . . . the question is no longer whether but how the Court will rely upon foreign law . . . in the future."¹²⁰ The answer seems to be: quietly.

Moreover, many scholars suggest that the U.S. Supreme Court's authoritativeness is declining worldwide, precisely because it does not participate in this global dialogue of courts.¹²¹ Its reluctance to quote foreign jurisdictions is counterproductive to the exportation of its own values.¹²² Case law of the United States can only encounter foreign jurisdictions interested in U.S. law if it utilizes foreign laws itself. If we consider the possibility that the U.S. Supreme Court indulges in considering foreign jurisprudence but omits the acknowledgement of it formally, we have the paradoxical result that the U.S. Supreme Court imports more legal ideas, concepts, and influences than what it exports because it merely does not want to concede to what it is importing. The alternative option of ignoring foreign legal wisdom is, of course, equally troubling. Open participation in a global dialogue with normative effects must first respond to the aforementioned criticisms: selectiveness, appropriateness, democratic deficit, and politically driven results. All of the doubts that have been raised so far make improbable the U.S. Supreme Court's explicit entrance into this dialogue. These improbabilities, however, do not stem simply from the U.S. Supreme Court's reluctance to engage. They also derive from the very presuppositions of the transnational judicial dialogue.

D. The Scope of this Article

The normative project behind global law is selective. It accepts only the constitutional theories that fit within its normative scheme. It is no surprise that originalism and the combination of a constitutional text with *stare decisis*¹²³ tend not to be circulated easily outside the United States.¹²⁴ This is because legal theories (good or bad) that address how to read constitutions in a way that is consistent through time, and which carry the highest respect for history and local traditions, are largely confined

120. Calabresi & Zimdahl, *supra* note 20, at 893.

121. Baudenbacher, *supra* note 72, at 526.

122. Slaughter, *supra* note 36, at 1119.

123. Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 9 (2011).

124. CARTABIA & CASSESE, *supra* note 82, at 2.

to U.S. legal discourse.¹²⁵ They hardly fit within the global trafficking of legal ideas and the circulation of arguments that promote legal change by using domestic and supranational judges as proxies.

As this article will show, foreign law must be understood as a valuable resource of crafted, articulated legal concepts that need to be evaluated autonomously by the court that is willing to draw from them¹²⁶ rather than as a mere repository of ideas floating independently from the legal systems in which they were shaped. That said, foreign laws should not control domestic decisions. They can only provide arguments that the U.S. Supreme Court will find useful to understand and evaluate a case. To appreciate how this can be done, this article will explore the U.S. Supreme Court's practice of excerpting foreign experiences, largely focusing on the U.S. Supreme Court's references to the ECtHR and to the European Court of Justice (ECJ) (later the Court of Justice of the European Union (CJEU)), which are both active in the global law community.

The ECtHR is "regarded as the poster child of international human rights law."¹²⁷ The ECtHR provides the forum by which individuals can complain that their state violated the rights enshrined to them under the ECHR.¹²⁸ Its approach is "extremely close to that of national constitutional courts," and, in its judgments, it occasionally defines itself as a "constitutional instrument of European public order."¹²⁹ By policing the ECHR, an international human rights treaty with forty-seven European members, it exerts its power over almost nine hundred million

125. *Id.*

126. Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 502–03 (2000).

127. Kai Möller, *From Constitutional to Human Rights: On the Moral Structure of International Human Rights*, 3 GLOBAL CONSTITUTIONALISM 373, 398 (2014).

128. The relevant portion of the ECHR articulates: "To ensure the observance [of] the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights." ECHR, *supra* note 17.

129. *Loizidou v. Turkey* (Preliminary Objections), 310 Eur. Ct. H.R. (ser. A) ¶ 75 (1995); see Robin C.A. White & Iris Boussiakou, *Separate Opinions in the European Court of Human Rights*, 9 HUM. RTS. L. REV. 37, 38 (2009); Wojciech Sadurski, *Is There Public Reason in Strasbourg?* 35 (Sydney Law Sch. Research Paper, Paper No. 15/46, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2603473.

people.¹³⁰ In an age in which “constitutionalism spilled over from its traditional nation-state setting to find new horizons within transnational and even to some extent global arenas,”¹³¹ the ECtHR is of paramount importance because it provides an example of when human rights protection, constitutionalism, and the rule of law are assimilated.

Moreover, the ECtHR understands itself as more than merely a regional player. It looks worldwide to gather legal ideas and incorporates them into its case law.¹³² Quoting the ECtHR, therefore, can mean more than drawing from the shared understanding of human rights that permeates the states that comprise it. It can also mean responding to the ECHR’s universal vocation¹³³ and the principle that the liberties it enshrines are morally just on a global scale.¹³⁴

On the other hand, speaking strictly quantitatively, the possibilities of quoting the CJEU’s decisions are technically fewer since it covers “only” twenty-eight countries and, for a large part of its history, has not focused on human rights.¹³⁵ Rather, it has mainly dealt with technical issues, such as limitations on the free movement of goods¹³⁶ or the liberalization of economic activities.¹³⁷ As a result, its solutions are harder to export. Still, the CJEU is an important global player: it draws from the laws of the EU Member States, and occasionally from other legal regimes as well, and its judgments are part of the law of the land in EU countries. Moreover, its scope recently expanded to cover

130. Cohen, *supra* note 101, at 565.

131. Michel Rosenfeld, *Is Global Constitutionalism Meaningful or Desirable?*, 25 EUR. J. INT'L L. 177, 178 (2014).

132. See Kanstantsin Dzehtsiarou, *Comparative Law in the Reasoning of the European Court of Human Rights*, 10 U. C. DUBLIN L. REV. 109, 109 (2010).

133. Gelter & Siems, *supra* note 37, at 38.

134. For a discussion on the relationship between morality, universality, and transnationalism, see Eric Blumenson, *Four Challenges Confronting a Moral Conception of Universal Human Rights*, 47 GEO. WASH. INT'L L. REV. 327, 336 (2015).

135. Joseph H. H. Weiler, *Human Rights, Constitutionalism and Integration: Iconography and Fetishism*, 3 INT'L L.F. D. INT'L 227, 229 (2001).

136. Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649 (so-called “Cassis de Dijon case”).

137. Case 6/64, Flaminio Costa v. ENEL, 1964 E.C.R. 585.

human rights.¹³⁸ In this respect, the recent accession of the European Union to the ECHR legitimized the European Union through human rights discourse.¹³⁹

Under the EU umbrella, European domestic courts have started sharing their own decisions with their peers systematically,¹⁴⁰ essentially making them available to the broadest public audience worldwide. This exchange implies that dozens of European states share the same principles regarding the rule of law, democracy, and human rights and spread them throughout the world. To some extent, they seem to make materials available for the enforcement of the Condorcet Theorem, which states that the practice of a significant group of states indicates where the majority¹⁴¹ is heading. European domestic courts, the CJEU and the ECtHR talk to each other systematically, impacting each other's case law on a rather ordinary basis.

II. MISTAKEN CITATIONS

The picture of a European continent in the process of legal unification is appealing to those who wish to draw inspiration from it. But, there may be hidden aspects of the process that must be considered before drawing from European legal sources. An outsider to Europe should also account for the constitutional infrastructure through which this process takes place, its principal drivers, and its theoretical underpinnings before borrowing from it. Part II will provide examples of when one of the U.S. Supreme Court's members overlooked some of these components and will highlight the consequences that derived from them.

A. *Lawrence v. Texas*

The U.S. Supreme Court case *Lawrence v. Texas* was probably the most famous occasion where the court drew from European law in formulating its decision.¹⁴² *Lawrence* was significant because it overturned *Bowers v. Hardwick*, a U.S. Supreme Court

138. Machteld Inge van Dooren, *The European Union and Human Rights: Past, Present, Future*, 26 MERKOURIOS-UTRECHT J. INT'L & EUR. L. 47, 52 (2009).

139. Jed Odermatt, *The EU's Accession to the European Convention on Human Rights: An International Law Perspective*, 47 N.Y.U. J. INT'L L. & POL. 59, 71 (2014).

140. See *The Network*, NETWORK PRESIDENTS SUPREME JUD. CTS. EUR. UNION, <http://network-presidents.eu/> (last visited Dec. 28, 2016).

141. Alford, *supra* note 46, at 59.

142. *Lawrence v. Texas*, 539 U.S. 558 (2003).

decision that upheld a Georgia law that sanctioned sodomy.¹⁴³ In *Bowers*, the court found that the prohibition on sodomy, which sanctioned the behavior regardless of gender, could survive constitutional scrutiny, as it did not conflict with the due process clause of the Fourteenth Amendment. In *Lawrence*, however, two male adults were charged under a Texas penal law that proscribed intimate acts among homosexuals. Unlike the Georgia law in *Bowers*, the law scrutinized in *Lawrence* targeted sodomy only among homosexuals.¹⁴⁴ Thus, the U.S. Supreme Court in *Lawrence* held that a prohibition on sodomy could not stand and overruled *Bowers* on the grounds of the due process clause.¹⁴⁵

Realistically, the factual differences between *Lawrence* and *Bowers* would have allowed the court to distinguish the two cases to avoid overruling *Bowers* and strike down the Texas law on the basis that it criminalized sodomy only between homosexuals as opposed to all individuals.¹⁴⁶ Distinguishing the two cases would have meant striking down laws that specifically targeted homosexuals while leaving the penal prohibition on sodomy untouched. Instead, the court in *Lawrence* overruled *Bowers* and created a precedent that would later be utilized to affirm the existence of a constitutional right to same-sex marriage.

What is relatively unknown, however, is that *Lawrence* impacted the use of comparative law in both litigation and U.S. jurisprudence.¹⁴⁷ Before this decision, explorations in foreign law aimed at determining "[w]hat the consequences of particular legal rules had been when they were employed by a foreign legal culture. In contrast, the *Lawrence* Court looked at foreign sources of law for moral guidance as to what the content of American law ought to be."¹⁴⁸ Case law of the the ECtHR played a significant role in the *Lawrence* decision. In the majority opinion, Justice Kennedy stated:

[A]lmost five years before *Bowers* was decided the European Court of Human Rights considered a case. . . . An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. . . .

143. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

144. *Lawrence*, 539 U.S. at 582 (O'Connor, J., dissenting).

145. *Id.* at 579.

146. *Id.* at 584.

147. McCrudden, *supra* note 45, at 449.

148. Calabresi & Zimdahl, *supra* note 20, at 868.

The court held that the laws proscribing the conduct were invalid under the ECHR. *Dudgeon v. United Kingdom*, [1981]. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization. . . .

. . . To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*. See *P. G. & J. H. v. United Kingdom*, [2001]; *Modinos v. Cyprus*, [1993]; *Norris v. Ireland*, [1988]. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.¹⁴⁹

The U.S. Supreme Court made some important reflections here that are worthy of extensive consideration. First, it considered that *Bowers* directly contradicted (or was “at odds with”) *Dudgeon*.¹⁵⁰ Moreover, in Kennedy’s words, *Bowers* did not rely on the “values [that U.S. citizens] share with a wider civilization.”¹⁵¹ In fact, the ECtHR did not follow *Bowers* “but its own decision in *Dudgeon*.”¹⁵² Second, the court stated that *Dudgeon* set a line of reasoning¹⁵³ that the ECtHR later confirmed in *P. G. & J. H. v. United Kingdom*, *Modinos v. Cyprus*, and *Norris v. Ireland*. Finally, *Lawrence* found *Dudgeon* particularly important because this ECtHR decision was “[a]uthoritative in all countries that are members of the Council of Europe.”¹⁵⁴

Each of these considerations requires adequate scrutiny. Although the quoted material in *Lawrence* drew significant political and scholarly attention, there seems to be relatively less familiarity among scholars with respect to the ECtHR case law that *Lawrence* quoted for the purposes of assessing the quality of the U.S. Supreme Court’s comparative law inquiry.¹⁵⁵

149. *Lawrence v. Texas*, 539 U.S. 558, 573, 576 (2003).

150. *Id.* at 574. Literally, *Dudgeon* “is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.”

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 573.

155. Those who have devoted special attention to these aspects are Roger P. Alford and Mary Ann Glendon. See Alford, *supra* note 46; Glendon, *supra* note 23, at 19.

It is no surprise that *Dudgeon* was overlooked in U.S. academia. Those favoring and those criticizing the comparative inquiries made by the U.S. Supreme Court have a theoretical rift.¹⁵⁶ While the average critic¹⁵⁷ denounces all citations¹⁵⁸ of foreign jurisprudence,¹⁵⁹ those who defend its use state that learning from other countries is a legitimate, and even opportune, part of the court's work.¹⁶⁰ Instead, it would be beneficial to analyze the ECtHR's case law directly to see if there is legal substance that the U.S. Supreme Court could engage with and whether it respected the ECtHR's approach.

1. Did *Dudgeon* Contradict *Bowers*? Contrasting the ECtHR's *Dudgeon* Decision with the U.S. Supreme Court's Picture of It

The majority in *Lawrence* clearly sought judicial dialogue. It used *Dudgeon* to rebut *Bowers*' affirmation that antisodomy laws are consistent with a sound legal civilization.¹⁶¹ The court's affirmation that "[t]he [ECtHR] has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*"¹⁶² seemed to imply that, had *Bowers* been a just decision, the ECtHR would have made a U-turn after *Dudgeon* and followed *Bowers* instead.

Is this U.S. depiction of *Bowers* accurate? Was *Dudgeon* as much of an implicit rejection of *Bowers* as *Lawrence* was? The majority in *Lawrence* was aware of the powerful shift it was making in the field of antisodomy laws. In its opinion, it stressed its awareness and importance of previous case law but explained why overruling *Bowers* was required:

The doctrine of stare decisis is essential. . . . [W]hen a Court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of

156. *But see* Glendon, *supra* note 23, at 1.

157. For example, "[c]ritics argue that such references to foreign law are an illegitimate, antidemocratic judicial usurpation of authority, or an effort to obscure the absence of solid grounding in U.S. law for a result." Vicki Jackson, *Yes Please, I'd Love to Talk with You*, LEGAL AFF., http://www.legalaffairs.org/issues/July-August-2004/feature_jackson_julaug04.msp (last visited Dec. 23, 2015).

158. *Id.*

159. For a depiction of the debate, see Rosenkranz, *supra* note 74, at 1281–83.

160. *See* *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) ("Wise parents do not hesitate to learn from their children.").

161. BREYER, *supra* note 3, at 238–39.

162. *Lawrence v. Texas*, 539 U.S. 558, 576 (2003).

that liberty cautions with particular strength against reversing course. . . . The holding in *Bowers*, however, has not induced detrimental reliance comparable to some instances where recognized individual rights are involved. . . . *Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding.¹⁶³

In a nutshell, the court opined that the doctrine of *stare decisis* did not prevent, nor did it warn against, overruling the previous decision on penal sanctions on sodomy. The societal reliance on precedents required, instead of discouraged, overruling *Bowers*, as *Bowers* itself created uncertainty.

Let us briefly consider *Dudgeon*. In 1976, Mr. Dudgeon, a homosexual man who lived in Northern Ireland, filed a claim with the ECtHR stating that the existence of state laws targeting homosexual conduct violated his right to private life.¹⁶⁴ At that time, the Offences Against the Person Act of 1861 and the Criminal Law Amendment Act of 1885 prohibited “buggery”¹⁶⁵ and “gross indecency”¹⁶⁶ among males in both Northern Ireland and Scotland¹⁶⁷ respectively (in England and Wales, however, the laws were not in force anymore).¹⁶⁸ In 1981, after the application was filed but prior to the ECtHR issuing a decision, Scotland passed a law reform that, like the English and Welsh regimes, decriminalized buggery and gross indecency.¹⁶⁹ Therefore, at the time the ECtHR delivered its judgment, the only British territory in which such provisions were in place was Northern Ireland. Some attempts in the late 1970s to remove homosexual conduct among consenting adults from Northern Irish penal laws were made¹⁷⁰ but ultimately failed,¹⁷¹ as vast portions of the Northern Irish society were of the opinion that sodomy had

163. *Id.* at 577.

164. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 13 (1981).

165. Offences Against the Person Act 1861, 24 & 25 Vict. c. 100, §§ 61, 62 (UK) (repealed).

166. Criminal Law Amendment Act 1885, 48 & 49 Vict. c. 69, § 11 (UK) (repealed).

167. *Dudgeon*, 45 Eur. Ct. H.R.

168. *Id.* at 5.

169. *Id.* at 6.

170. *Id.* at 7–10.

171. *Id.* at 8.

to be prosecuted¹⁷² (despite the fact that no prosecution for homosexual offenses by private persons actually took place between 1972 and 1981).¹⁷³

Mr. Dudgeon was initially investigated for drug offenses, not homosexual conduct.¹⁷⁴ While investigators searched his house, they found papers and documents describing homosexual activities.¹⁷⁵ The Director of Prosecution of Northern Ireland, however, decided not to prosecute him for the offense of gross indecency between males.¹⁷⁶ Mr. Dudgeon applied before the ECtHR, claiming that the mere existence of criminal laws against homosexual conduct—and the subsequent police investigation—constituted a breach of Article 8 of the ECHR for unjustified interference with his right to private life.¹⁷⁷ Article 8 of the ECHR states that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.” It permits public authorities to interfere with the enjoyment of such right only “in accordance with the law” and so long as such interference is “necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”¹⁷⁸

Explaining Mr. Dudgeon’s complaint in the ECtHR, the court noted that the applicant complained that the then-existing laws prohibiting homosexual conduct in Northern Ireland caused him fear, suffering, and psychological distress.¹⁷⁹ For instance, “following the search of his house, . . . he was questioned by the police about certain homosexual activities and that personal papers belonging to him were seized. In his view, he had “suffered, and continued to suffer, an unjustified interference with his right to respect for his private life.”¹⁸⁰

172. *Id.*

173. *Id.* at 10.

174. *Id.* at 11.

175. *Id.*

176. *Id.*

177. Mr. Dudgeon also complained that he suffered discrimination on grounds of sex, sexuality, and residence within the meaning of Article 14 of the ECHR; however, because the ECtHR found that Mr. Dudgeon’s rights were violated under Article 8, it did not consider his complaints under Article 14. *Id.*

178. ECHR, *supra* note 17, art. 8.

179. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 13 (1981).

180. *Id.*

The ECtHR endorsed Mr. Dudgeon's claim, pointing out that the very existence of legal provisions against homosexual conduct "constitute[d] a continuing interference with the applicant's right to respect for his private life." Although those rules had not been concretely enforced, they were still capable of triggering prosecutions, as the police investigation against *Dudgeon* demonstrated.¹⁸¹ Then, the ECtHR explored the justification for such a penal sanction more in depth and adopted the following line of reasoning:

[S]ome degree of regulation of male homosexual conduct, as indeed of other forms of sexual conduct, by means of the criminal law can be justified as "necessary in a democratic society." . . . Furthermore, this necessity . . . may even extend to consensual acts committed in private, notably where there is call . . . "to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence." In practice there is legislation on the matter in all the member States of the Council of Europe, but what distinguishes the law in Northern Ireland . . . is that it prohibits generally gross indecency between males and buggery whatever the circumstances. . . . [T]he question in the present case is whether the contested provisions . . . remain within the bounds of what, in a democratic society, may be regarded as necessary.¹⁸²

According to the ECtHR's reasoning, states are left with some margin of appreciation to balance interests and find a normative solution.¹⁸³ Yet, this degree of latitude for states also varied in light of the particularities of each country:

The fact that similar measures are not considered necessary in other parts of the United Kingdom . . . does not mean that they cannot be necessary in Northern Ireland. . . . [T]he moral climate in Northern Ireland in sexual matters . . . is one of the matters which the national authorities may legitimately take into account in exercising their discretion. There is . . . a strong body of opposition stemming from a genuine and sincere conviction shared by a large number of responsible members of the Northern Irish community that a change in the law would be

181. *Id.* at 14.

182. *Id.* at 16 (internal citations omitted).

183. *Id.* at 17 (internal citation omitted).

seriously damaging to the moral fabric of society. . . . [T]his point of view . . . among an important sector of Northern Irish society is certainly relevant.¹⁸⁴

It was up to the ECtHR, however, to evaluate “whether the interference [with private life] complained of was proportionate to the social need claimed for it.”¹⁸⁵ In the end, the ECtHR found that Mr. Dudgeon’s right to private life was violated because “the restriction imposed on [him], by reason of its breadth and absolute character, [wa]s . . . disproportionate to the aims sought to be achieved.”¹⁸⁶ It must be added that the ECtHR found this measure to be disproportionate because of the social and cultural changes that were affecting European life: “[T]he Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States In Northern Ireland itself, the authorities have refrained in recent years from enforcing the law in respect of private homosexual acts.”¹⁸⁷

Surely, both *Dudgeon* and *Lawrence* targeted laws that criminalized homosexual conduct and found them to be violations of the right to privacy. Nevertheless, we can observe differences in the reasoning between the two cases. *Dudgeon* treated laws targeting sodomy as part and parcel of a package of measures that legitimately aimed “to provide sufficient safeguards against exploitation and corruption of others.”¹⁸⁸ According to *Dudgeon*, limitations on homosexual conduct for moral reasons were legitimate,¹⁸⁹ however, they could not involve penal sanctions,¹⁹⁰ which the court found to be “disproportionate.”¹⁹¹ The legal stigma attached to being homosexual could be justified in court’s eyes, so long as penal sanctions were not involved.

Conversely, the U.S. Supreme Court in *Lawrence* found a clear violation of the right to privacy in the Texas law¹⁹² and overruled *Bowers* because “[i]ts continuance as precedent demean[ed] the

184. *Id.* at 18 (internal citations omitted).

185. *Id.* at 19.

186. *Id.* at 20.

187. *Id.* at 19.

188. *Id.* at 37.

189. Sadurski, *supra* note 129, at 31.

190. See Glendon, *supra* note 23, at 10.

191. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 20 (1981).

192. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (“The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”).

lives of homosexual persons,” and imposed a “stigma” on them.¹⁹³ There are striking differences between *Dudgeon* and *Lawrence*. But, in *Lawrence*, the U.S. Supreme Court focused on the outcome of *Dudgeon* and overlooked the legal reasoning behind it. In doing so, it did not fully realize the differences between the ECtHR’s approach to antihomosexuality laws and its own.

2. The ECtHR’s Case Law After *Dudgeon*

One of Justice Kennedy’s crucial points in *Lawrence* was that *Bowers* was “not correct when it was decided”¹⁹⁴ and caused “uncertainty.”¹⁹⁵ The unjustness of *Bowers* prevailed over the doctrine of *stare decisis* and prompted its overruling. *Lawrence* saw *Dudgeon* through a common law lens, as if it established a good precedent that the ECtHR followed consistently thereafter in line with a sort of *stare decisis* doctrine.¹⁹⁶ In *Lawrence*’s wording, “[t]he [ECtHR] has followed not *Bowers* but its own decision in *Dudgeon*. . . . See P. G. & J. H. [2001]; Modinos [1993]; Norris [1988].”¹⁹⁷

The issue, however, is more nuanced. *Dudgeon* was not uncontroversial. After all, it narrowed down the state’s discretion on a topic that had been regarded as culturally sensitive.¹⁹⁸ In fact, the decision itself was not unanimous. Out of the seventeen judges that compose the Great Chamber of the ECtHR, six judges dissented and four dissenting opinions¹⁹⁹ and one partial dissent were filed.²⁰⁰

Several dissenters found that penal laws incriminating homosexual conduct did not violate the ECHR generally.²⁰¹ Others found that there was no violation of Article 8 of the ECHR specifically because the applicant was not convicted or prosecuted

193. *Id.* at 575.

194. *Id.* at 578.

195. *Id.* at 577.

196. *Id.* at 576.

197. *Id.* at 576.

198. See Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MODERN L. REV. 1, 10 (1974).

199. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 21–41 (1981) (Zekia, J., dissenting) (Evrigenis & Garcia de Enterría, J.J., dissenting) (Matscher, J., dissenting) (Pinheiro Farinha, J., dissenting).

200. *Id.* at 34 (Walsh, J., partially dissenting).

201. *Id.* at 24, 34, 33 (Zekia, J., dissenting) (Walsh, J., dissenting) (Pinheiro Farina, J., dissenting).

under any of the relevant criminal laws; rather, he simply complained that their very existence threatened his lifestyle and subjected him to police investigation.²⁰² Overall, four members of the panel dissented on the grounds that there had been no breach of Article 8 of the ECHR. A divided ECtHR judgment is not necessarily a solid foundation that subsequent case law can use to base its decisions. This is linked to two different factors: namely, the special status of the ECtHR and the ECtHR's self-understanding.

The ECtHR's backdrop is international law, which "knows no *stare decisis*."²⁰³ Theoretically, its decisions do not need to be consistent over time.²⁰⁴ Stable precedents and explicit overrulings are, however, crucial for global adjudicators at the highest level of their respective domestic courts.²⁰⁵ Supreme Court precedents orient lower courts and ground the societal expectation that the whole judiciary will follow suit.²⁰⁶ But, the ECtHR is formally neither a supreme nor a higher national court: it is a supranational court and its whole effectiveness stands on the shoulders of the compliance of state members.²⁰⁷

In the conceptual framework in which the ECtHR operates, precedents are subject to change.²⁰⁸ Actually, they are not expected to stay too long, as they capture only a transitional stage in the development of the ECHR's case-law. It is not rare to find in the ECtHR's jurisprudence the affirmation that a topic of the ECHR can "*still* be regarded as one of evolving rights with no

202. *Id.* at 28, 33 (Matscher, J., dissenting) (Pinheiro Farina, J., dissenting).

203. Ingo Venzke, *The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation*, 34 LOY. L.A. INT'L & COMP. L. REV. 99, 123 (2011); see also Armin von Bogdandy, *Common Principles for a Plurality of Orders: A Study on Public Authority in the European Legal Area*, 12 INT'L J. CONST. L. 980, 987 (2014).

204. Venzke, *supra* note 203, at 123.

205. See L. A. Powe, Jr., *Intragenerational Constitutional Overruling*, 89 NOTRE DAME L. REV. 2093, 2099 (2014).

206. RUPERT CROSS & J. W. HARRIS, *PRECEDENT IN ENGLISH LAW* 7 (4th ed. 1991).

207. Janneke Gerards, *The European Court of Human Rights and the National Courts: Giving Shape to the Notion of 'Shared Responsibility,'* in IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND OF THE JUDGMENTS OF THE ECtHR IN NATIONAL CASE-LAW 22 (Janneke Gerards & Joseph Fleuren eds., 2014).

208. Dyson Heydon, *Are Bills of Rights Necessary in Common Law Systems?*, 130 LAW Q. REV. 392, 404 (2014).

established consensus.”²⁰⁹ A precedent is thus only temporary in the ECtHR.

This is because the ECtHR maintains an evolutionary interpretation of the ECHR.²¹⁰ It openly affirms that “[a] failure by the Court to maintain a dynamic and evoluti[onary] approach would risk rendering [the ECHR] a bar to reform or improvement.”²¹¹ In other words, the ECtHR understands the ECHR as a “living instrument,”²¹² in a nonoriginalist and nontextualist intellectual framework,²¹³ according to which the interpretation of the text changes along with the people whose rights it is called to protect. This idea of a “living instrument” is considered the true “genius” of the ECHR,²¹⁴ as the ECHR is continuously adjusted to fit within the contemporary context.²¹⁵ Therefore, for the U.S. Supreme Court, basing an argument on the mere fact that the ECtHR issued a given decision is suspect because the ECtHR’s holding is seemingly temporary.²¹⁶ Additionally, judgments written with numerous dissents warrant even more caution because it is less likely that later decisions will follow such judgments.

A further distinction must be made at this point. The U.S. Supreme Court noted that *Bowers* “was not correct when it was decided”²¹⁷ and therefore overruled it. This understanding of overruling as a means to correct previous erroneous judgments is,

209. *Schalk & Kopf v. Austria*, 2010-IV Eur. Ct. H.R. 409, 438 (emphasis added).

210. Alastair Mowbray, *An Examination of the European Court of Human Rights’ Approach to Overruling Its Previous Case Law*, 9 HUM. RTS. L. REV. 179, 198 (2009).

211. *Scoppola v. Italy* (No. 2), App. No. 10249/03, Eur. Ct. H.R. 28, ¶ 104, HUDOC (Sept. 17, 2009), [http://hudoc.echr.coe.int/eng#{“itemid”:\[“001-94135”\]}](http://hudoc.echr.coe.int/eng#{“itemid”:[“001-94135”]}).

212. *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) at 12 (1978).

213. George Letsas, *The ECHR as a Living Instrument: Its Meaning and Legitimacy*, in CONSTITUTING EUROPE: THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN AND GLOBAL CONTEXT (Andreas Follesdal, Birgit Peters, & Geir Ulfstein eds., 2013).

214. Luzius Wildhaber, *The European Court of Human Rights in Action*, 21 RITSUMEIKAN L. REV. 83, 84 (2004), <http://www.asianlii.org/jp/journals/RitsLRev/2004/4.pdf>.

215. Mowbray, *supra* note 210, at 198.

216. Paolo G. 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 L. REV. 1217, 1220 (1998).

217. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

after all, a feature of the *stare decisis* doctrine,²¹⁸ as enshrined in *Planned Parenthood v. Casey*,²¹⁹ which *Lawrence* correctly quoted. But, this is not the type of approach that the ECtHR would take. An incremental, evolutionary framework does not care too much if overruled judgments were mistaken when they were decided. Rather, it wonders whether they are correct today.

Another aspect that deserves close attention is the importance that the U.S. Supreme Court attached to ECtHR case law decided after *Dudgeon*. Justice Kennedy stressed the fact that *Dudgeon* was not a solitary decision in the vast context of ECtHR case law. Rather, the U.S. Supreme Court painted a picture in which *Dudgeon* inaugurated a trend that *P. G. & J. H., Modinos*, and *Norris* followed.²²⁰ The reality, however, is rather distant from Justice Kennedy's account. *Lawrence* grouped together cases that do not fit within its picture. For example, in relying on *P.G. & J.H. v. United Kingdom*,²²¹ the U.S. Supreme Court was correct in assessing that this judgment found a breach of Article 8 of the ECHR. But, the context of *P.G. & J.H.* was totally different. The applicants in *P.G. & J.H.* were convicted of conspiracy to commit armed robbery.²²² In their complaint, they argued that the means used to collect information against them violated their rights under the ECHR.²²³ Specifically, the complaint alleged that the police had recorded their conversations, used the record in evidence at their trial, and had the judge hear it absent the defense. The applicants "relied on Articles 6 [which gives the right to a fair trial], 8 and 13 [which gives the right to an effective remedy] of the Convention."²²⁴ Besides the invocation of Article 8, the facts of *P.G. & J.H.* do not seem to suggest a connection with *Dudgeon*.

The only connection with *Dudgeon* was found in dicta of the decision, in which the ECtHR articulated the scope and meaning of "private life" under Article 8. Drawing from its prior case law, the ECtHR stated:

218. CROSS & HARRIS, *supra* note 206, at 131.

219. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

220. *Lawrence*, 539 U.S. at 576.

221. *P. G. & J. H. v. United Kingdom*, 2001-IX Eur. Ct. H.R. 195.

222. *Id.* at 203.

223. *Id.*

224. *Id.* at 203, ¶ 3.

Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8 (see, for example, *B. v. France* . . . *Burghartz v. Switzerland* . . . *Dudgeon v. the United Kingdom* . . . and *Laskey, Jaggard and Brown v. the United Kingdom*. . . . Article 8 also protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. . . .²²⁵

There are so many quotations in this excerpt of *P.G. & J.H.*, and the cited cases' facts and holdings are so distinguishable from *Dudgeon* that one has to look closely to find the reference to *Dudgeon* to single it out from the rest of the cases.

On the other hand, *Modinos v. Cyprus*²²⁶ and *Norris v. Ireland*²²⁷ are quoted quite properly since they have many more facts in common with *Dudgeon* (despite the fact that *Norris* was decided five years before *Modinos*, so the line of ECtHR precedent in the field is actually different from what one may believe from reading *Lawrence*). The cases involved Cypriot²²⁸ and Irish²²⁹ penal laws against homosexual relations respectively. In *Modinos*, the relevant provision prohibited "carnal knowledge of any person against the order of nature," as well as sanctioned those who permitted "a male person to have carnal knowledge of him against the order of nature."²³⁰ In *Norris*, the relevant pieces of legislation targeting homosexual conduct were the same that originated the *Dudgeon* controversy, which were still in force in Ireland at the time of the case.²³¹

In both cases, the ECtHR found that there had been a breach of Article 8 of the ECHR. Yet, neither of the applicants in the cases were prosecuted or even investigated for their homosexual

225. *Id.* at 217, ¶ 56.

226. *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) (1993).

227. *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988).

228. For sections 171, 172, and 173 of the Criminal Code of Cyprus, see *Modinos*, 259 Eur. Ct. H.R. at 3, ¶ 8.

229. For more information regarding Irish laws against homosexuality, specifically sections 61 and 62 of the Offences Against the Person Act 1861 and section 11 of the Criminal Law Amendment Act 1885, see *Norris*, 142 Eur. Ct. H.R. at 4–5, ¶ 12.

230. See *Modinos*, 259 Eur. Ct. H.R. at 3, ¶ 8.

231. *Id.*

conduct.²³² Instead, like in *Dudgeon*, the complainants in both *Modinos* and *Norris* argued that the *very existence* of such laws amounted to an interference with their private lives.²³³

Modinos was resolved quite succinctly and was delivered by a Section of the Court, which, drew from both *Dudgeon* and *Norris*, enabling the court to avoid going into greater detail with respect to the case at hand.²³⁴ *Norris*, on the other hand, was heavily critiqued in a plenary session of the ECtHR, with large quotations taken from *Dudgeon*.²³⁵ *Norris* deserves greater attention—as it did when it was decided—because it emphasized that the very fact that Ireland made “such acts criminal offences”²³⁶ was a disproportionate measure. It turned the ECtHR’s attention from the threat of actual prosecutions to the very existence of antihomosexuality laws, which provided sufficient grounds for a complaint.

This expansion of *Dudgeon* to encompass complaints about the very existence of laws targeting sodomy did not go unnoticed. More precisely, out of fourteen judges, six filed a joint dissenting opinion, remarking that *Norris* bore

great similarities to the *Dudgeon* case. . . . However, an appreciable and . . . decisive difference between the two cases [lay] in the fact that, in the *Dudgeon* case, the applicant had been subjected by the police to certain intrusions into his private life whilst, in this case, no action was taken against the applicant by the authorities.²³⁷

The dissent clearly perceived that *Norris* was expanding the protection accorded to homosexuals’ private life and not simply confirming it.

After this examination of the ECtHR cases cited in *Lawrence*, it seems reasonable to conclude that Justice Kennedy did not line up a series of cases that were unquestionably related to each other. On the contrary, he gathered a series of cases that were significantly different from each other and which prompted considerable dissent. Interestingly enough, Justice Kennedy did not

232. See *id.* at 7, ¶ 17; *Norris*, 142 Eur. Ct. H.R. at 4, ¶ 10(iii).

233. *Modinos*, 259 Eur. Ct. H.R. at 6–7, ¶ 16; *Norris*, 142 Eur. Ct. H.R. at 3, ¶ 9.

234. *Modinos*, 259 Eur. Ct. H.R. at 8, ¶¶ 23–24.

235. See *Norris*, 142 Eur. Ct. H.R. at 15–16, ¶ 46.

236. *Id.*

237. *Id.* at 20 (Valticos, J., joined by Gölcüklü, Matscher, Walsh, Bernhardt, & Carrillo Salcedo, J.J., dissenting).

give an adequate picture of *Dudgeon* and the cases that came afterward. Had he done so, he could have used those cases in a more focused and less controversial way. *Lawrence*'s majority stressed that penal sanctions for homosexual conduct stigmatized homosexuals.²³⁸ It was in the context of that reasoning that the U.S. Supreme Court could have referred to *Dudgeon*, and more importantly to *Norris*, to underline precisely that the mere existence of laws targeting homosexual conduct placed a stigma upon them. But, *Lawrence*'s quotation of *Dudgeon* missed the point. It exploited *Dudgeon*, in general terms, as an exemplar of the global attitude toward antisodomy laws without any further explanation. It failed to notice, however, that *Dudgeon* confirmed *Lawrence*'s idea that antisodomy laws imposed a stigma on homosexuals.

3. The Authoritativeness of the ECtHR's Case Law

The most problematic aspect of the U.S. Supreme Court's reliance on ECtHR case law of *P.G. & J.H.*, *Modinos*, and *Norris* was the authoritativeness given to these quotations by the court. Justice Kennedy said that *Dudgeon* was "[a]uthoritative in all countries that are members of the Council of Europe."²³⁹ This affirmation requires adequate consideration.

There is no doubt that the ECtHR's decisions create an obligation upon the Member State that is found in violation of an Article of the ECHR. Article 46 of the ECHR states that Member States "undertake to abide by the final judgment of the Court in any case to which they are parties."²⁴⁰ Accordingly, under Article 46, ECtHR decisions only bind the parties involved in that controversy.²⁴¹ The ECtHR does not prevail over domestic legislation or case law throughout all the Member States, meaning, "[i]f a state refuses to accept a judgment handed down in a case to which it was not a party, there are no means to force the state to accept it."²⁴²

Think about *Dudgeon* and *Norris*. *Norris*, which was decided several years after *Dudgeon*, dealt with the very same provisions that the *Dudgeon* court found to violate Article 8 of the ECHR.

238. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

239. *Id.* at 573.

240. ECHR, *supra* note 17, art. 46.

241. *Gerards*, *supra* note 207, at 21.

242. *Id.* at 22.

Had *Dudgeon* been binding, that piece of legislation would have never been brought to the attention of the ECtHR again. After all, it is no surprise that *Norris* reaffirmed *Dudgeon*—as Kennedy rightly points out—because both cases involved the *very same provisions*.

Interestingly enough, the U.K. constitutional system differentiates between the jurisprudence of the CJEU, which is “binding,”²⁴³ and the ECtHR, which merely is “influential.”²⁴⁴ This distinction can shed light on how “authoritative” ECtHR decisions should have been for the U.S. Supreme Court. “Authoritative” does not mean “binding.” It is certainly true that “important areas of [domestic] law . . . have changed as a result of the influence of the ECHR and the case law of the [ECtHR]. National courts frequently refer to the ECtHR’s case law.”²⁴⁵ But, changes in domestic laws do not stem directly from the ECtHR’s decisions. On the contrary, they are a function of several variables that have more to do with the constitutional structure of the Member States of the ECHR than with the force that ECtHR decisions carry.²⁴⁶

Several states already ensure that new legislation must comply with the ECHR and now align their own interpretation of the ECHR with ECtHR decisions.²⁴⁷ For example, according to the Italian Constitutional Court, the Italian Constitution “requires the exercise of the legislative power of the state and the regions to comply with international law obligations, which undoubtedly include the European Convention on Human Rights.”²⁴⁸ Meaning, the ECtHR’s case law that targets other countries can bind a state legislature and be utilized in the domestic judicial review

243. Lady Hale, *Who Guards the Guards?*, Closing Address to the London Public Law Project Conference 2013 (Oct. 14, 2013), http://www.publiclawproject.org.uk/data/resources/144/PLP_conference_Lady_Hale_address.pdf.

244. *Id.*

245. Janneke Gerards & Joseph Fleuren, *Introduction*, in *IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND OF THE JUDGMENTS OF THE ECtHR IN NATIONAL CASE-LAW 1* (Janneke Gerards & Joseph Fleuren eds., 2014).

246. COURTNEY HILLEBRECHT, *DOMESTIC POLITICS AND INTERNATIONAL HUMAN RIGHTS TRIBUNALS: THE PROBLEM OF COMPLIANCE* 3 (2014).

247. *Id.* at 151.

248. Corte Costituzionale [Corte Cost.] [Constitutional Court], 24 ottobre 2007, n. 348, *Giur. it.* 2008, ¶ 4.2 (It.), http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S348_2007_Eng.pdf.

of legislation.²⁴⁹ Even in such circumstances, however, the ECtHR has no means to enforce its judgments in those states.²⁵⁰ Notwithstanding its constitutional framework, Italy is said to simply refuse “to comply with the vast majority of rulings handed down by the Court.”²⁵¹

State compliance with ECtHR rulings is therefore largely voluntary. In and of itself, ECtHR case law is not directly enforceable in any state party to the ECHR unless a state commits itself to obeying the jurisprudence. And while many states fully comply with the ECtHR’s rulings, some do not. What is most interesting is that the United Kingdom, which shares the most commonalities with the United States jurisprudentially, has not provided the domestic judiciary with the capacity to amend U.K. legislation to incorporate ECtHR case law. Enacting the Human Rights Act in 1998 with the aim of ensuring compliance with ECtHR rulings, the British Parliament²⁵² followed its strong tradition of granting parliamentary sovereignty²⁵³ and prevented British judges from setting aside domestic law in order to enforce ECtHR rulings. Moreover, further limiting ECtHR rulings is the fact that the decisions only bind the state found in violation of the contours of the court’s holding. Meaning, the state is expected to remedy only the violation and is not required to embrace the ECtHR’s reasoning.²⁵⁴ All things considered, the ECtHR’s authoritativeness is distinct from its binding force. That said, many of the forty-seven domestic jurisdictions that have adhered to the ECHR have increasingly incorporated its rulings into their legal interpretation.²⁵⁵ But, incorporating ECtHR law into the interpretation of domestic law is, above all, a matter of political practicality.²⁵⁶ For example,

249. *Id.*

250. See HILLEBRECHT, *supra* note 246, at 36–37.

251. *Id.* at 121.

252. Human Rights Act 1998, c. 42, § 3 (UK).

253. Law, *supra* note 51, at 664.

254. Gerards, *supra* note 207, at 24, 25.

255. To large extent, even British courts are required to interpret the domestic law in a manner that is compatible with the ECtHR’s jurisprudence. Roger Masterman, *The United Kingdom, in IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND OF THE JUDGMENTS OF THE ECtHR IN NATIONAL CASE-LAW 307* (Janneke Gerards & Joseph Fleuren eds., 2014).

256. Krotoszynski, Jr., *supra* note 42, at 128.

[t]he national courts [of the states that are party to the ECHR] are asked to adopt the Court's autonomous and evolutionary definitions of Convention rights and apply them in their own case law. If they do not do so, or lack the competence to set aside national legislation, the state may be held accountable for a violation of the ECHR.²⁵⁷

As a result, an ECHR violation does not bear domestic legal effects by itself unless a state decides differently.

In 2010, the states formalized this progressive incorporation of ECtHR case law at the High Level Conference on the Future of the European Court of Human Rights,²⁵⁸ where they committed themselves to "take into account" the holdings of the ECtHR in the cases to which they are not a party "with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State."²⁵⁹ The necessity of "taking into account" ECtHR case law regardless of which states were involved in the litigation is the outcome of two different factors: namely, the *res interpretata* expectation and the non-binding nature of ECtHR case law itself.

Although the ECtHR does not utilize *stare decisis*,²⁶⁰ it is commonly understood that the ECtHR's judgments have the force of *res interpretata*.²⁶¹ Each time the ECtHR is confronted with a new case, it does not start from scratch in examining the ECHR. On the contrary, it builds on preexisting decisions.²⁶² This gives the ECtHR's decisions some level of predictability and incentivizes the states to comply with ECtHR case law.

The states' duty to "take into account" the ECtHR's trends simply confirms that its decisions are nonbinding. If the ECtHR had a binding effect on state law, each state could not merely "take into account" what the ECtHR decides but rather would need to comply with its rulings. In reality, each state exercises

257. Gerards, *supra* note 207, at 71.

258. The document was later called the "Interlaken Declaration." See *Interlaken Declaration*, COUNCIL EUR. (Feb. 2, 2010), <https://wcd.coe.int/ViewDoc.jsp?id=1591969>.

259. *Id.* § B(4)(c) (noting that states are called to take "into account the Court's developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system.").

260. Venzke, *supra* note 203, at 123.

261. Gerards & Fleuren, *supra* note 245, at 2.

262. Gerards, *supra* note 207, at 23.

full sovereignty, at least in the way it draws from and implements the ECtHR's judgments.²⁶³ Again, the authoritativeness of the ECtHR's rulings has very few similarities with "binding force" here. The very nature of the ECHR, its authority, and the level of state compliance make it hard to maintain that "[t]o follow the ECtHR is to follow the practice of not just one or two countries, but forty-seven countries."²⁶⁴

In a few words, the ECtHR's decisions can be considered authoritative only through a combination of the predictability of the ECtHR's case law over time—which pushes states parties to conform to it—and the constitutional structure of each party to the ECHR, since some states accord ECtHR rulings with binding force while others do not. How such factors combine depends on the state, on the decision, and on how well each decision fits within the line of cases. Hence, the ECtHR's authoritativeness is a consequence of the reasonableness of its case law, the attitude of each state towards the ECtHR's case law itself, and the compatibility of its case law with each state's laws.²⁶⁵

Lawrence seems to have given only a superficial look at the ECtHR's case law and status and extracted the generic ideas that it opposes antihomosexual conduct and that this opposition applies to all the members of the Council of Europe. This account is too generic and even misleading. A closer look at the cases *Lawrence* quoted and the ECtHR's status and case law as a whole would have still had value for the decision but in a much more nuanced way. It could have fed the U.S. Supreme Court's consideration that penal laws targeting sodomy may impose a social stigma—but, Justice Kennedy's opinion does not establish any explicit connection between the issue of social stigma and the ECtHR's citations. *Lawrence*'s depiction of ECtHR case law on the subject was incomplete and probably misleading. Consequently, had the U.S. Supreme Court looked more thoroughly into the details of the relevant cases, it could have found the case law within its reasoning.

263. *Id.* at 19.

264. *Law*, *supra* note 2, at 1026 (internal citations omitted).

265. HILLEBRECHT, *supra* note 246, at 3.

B. Printz v. United States

*Printz v. United States*²⁶⁶ is another interesting example of how foreign sources can be utilized. *Printz* struck down a piece of federal legislation that commanded state officials to conduct background checks before authorizing the sale of guns.²⁶⁷ According to the court, the federal control of local authorities infringed upon the “dual sovereignty”²⁶⁸ system envisioned by the U.S. Constitution, which prohibits the federal government from acting through the states.

The distinction in *Printz* is that foreign sources were quoted only in a dissenting opinion. This case is particularly relevant because it shows the importance of understanding the functioning of the foreign system where the source is drawn and heeds a word of caution to judges to understand the foreign source’s implications and presuppositions before using it. In other words, the U.S. Supreme Court should reflect on whether the structure and the dynamics of a foreign legal system are compatible with the structure of the U.S. legal system. Learning how a foreign country works, however, does not necessarily entail importing its system into the legal system of another country, including the United States.

Justice Breyer filed a powerful dissent in which he lamented that federalism does not prevent the federal government from requesting the performance of certain duties from state authorities. According to Justice Breyer:

[T]he United States is not the only nation that seeks to reconcile the practical need for a central authority with the democratic virtues of more local control. At least some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution. The federal systems of Switzerland, Germany, and the European Union . . . all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws . . . enacted by the central “federal” body. . . .

266. *Printz v. United States*, 521 U.S. 898 (1997).

267. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

268. *Printz*, 521 U.S. at 918.

Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. . . . But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem—in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity. . . .

As comparative experience suggests, there is no need to interpret the Constitution as containing an absolute principle—forbidding the assignment of virtually any federal duty to any state official.²⁶⁹

The crucial passage states that “[t]he federal system[] of . . . the [European Union] provide[s] that constituent states, not federal bureaucracies, will themselves implement many of the laws . . . enacted by the central ‘federal’ body.”²⁷⁰ Justice Breyer was aware that he was not expected to interpret the constitutions of other nations.²⁷¹ But, he highlighted that “their experience may nonetheless cast an empirical light” on the relationship between the federation and the states.²⁷² Among the examples he mentioned, the EU model may be the most misleading, unless Justice Breyer is willing to make the bold affirmation that the U.S. conception of federalism should align itself to the EU model or that it would be possible to draw from one feature of EU constitutionalism while leaving out the rest.

The debate around the quasi-national, federal, or international nature of the European Union is still ongoing.²⁷³ Further, at the time *Printz* was penned, it was even more debated.²⁷⁴ After all, the Lisbon Treaty, which gave a firmer and more coherent structure to the European Union,²⁷⁵ had not yet been imple-

269. *Id.* at 976–77.

270. *Id.* at 976.

271. *Id.* at 977.

272. *Id.*

273. See generally PAUL CRAIG & GRAINNE DE BURCA, *EU LAW* (2011).

274. For more information on the debate, see *SOVEREIGNTY IN TRANSITION* (Neil Walker ed., 2003).

275. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) [hereinafter Treaty of Lisbon].

mented, and the EU constitutional structure was relatively undeveloped and in need of maintenance.²⁷⁶ But, the real problem with Justice Breyer's reasoning lies in the dynamics of the EU model itself.

Professor Joseph Weiler, one of the most important commentators in the field, stresses that the EU constitutional identity is marked by a *Sonderweg*, meaning a "special way" in German.²⁷⁷ As Weiler depicted it, the EU model is "a constitution without some of the classic conditions of constitutionalism. . . . Indeed, European federalism is constructed with a top-to-bottom hierarchy of norms, but with a bottom-to-top hierarchy of authority and real power."²⁷⁸

Among the tools that most characterize this combination of a law looking downward and institutions looking upward are the preliminary ruling procedure and the doctrine of "direct effect."²⁷⁹ These long-standing tools have marked the implementation of EU law since the inception of the European Communities and have channeled the Europeanization of states through a judicially driven process.²⁸⁰

The preliminary ruling procedure²⁸¹ states that, if a domestic judge finds what seems to be a conflict between EU law (and the European Communities law before the European Union came into existence) and domestic law, he or she must refer the issue to the CJEU to solve the dilemma through an interpretation of EU law.²⁸² The preliminary ruling procedure introduced the "direct effect" doctrine through the 1963 case *Algemene Transporten Expeditie Onderneming Van Gend & Loos v Nederlandse*

276. See *State of the Union 2015*, EUR. COMMISSION, http://ec.europa.eu/priorities/soteu/docs/state_of_the_union_2015_en.pdf (last visited Dec. 31, 2016).

277. Joseph H. H. Weiler, *In Defence of the Status Quo: Europe's Constitutional Sonderweg*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* 10 (Joseph H. H. Weiler & Marlene Wind eds., 2003).

278. *Id.* at 9.

279. ELINA PAUNIO, *LEGAL CERTAINTY IN MULTILINGUAL EU LAW: LANGUAGE, DISCOURSE AND REASONING AT THE EUROPEAN COURT OF JUSTICE* 59 (2013).

280. Joseph H. H. Weiler & Van Gend en Loos, *The Individual as Subject and Object and the Dilemma of European Legitimacy*, 12 INT'L J. CONST. L. 94, 104 (2014).

281. Treaty Establishing the European Economic Community art. 177, Mar. 25, 1957, 298 U.N.T.S. 11 (now TFEU art. 208) [hereinafter EEC Treaty].

282. *Id.*

Administratie der Belastingen.²⁸³ In that case, a national judge asked the then-ECJ (later CJEU) to interpret the effects of the provisions of the European Economic Community Treaty. The European Economic Community Treaty, which would later grow and expand together with other treaties into the European Union, was established in the 1950s to promote a common market and the “harmonious development of economic activities” among its state members.²⁸⁴ The court had to decide whether the treaty provisions had “direct application in national law in the sense that nationals of member States may on the basis of [such Articles] claim to rights which the national Court must protect.”²⁸⁵

The judge not only ruled in the affirmative but also boldly affirmed that European Economic Community law—and later EU law—was good law in each state and must be enforced by domestic tribunals. In the judge’s words, the community constituted “a new legal order of international law” that not only imposed “obligations on individuals but was “also intended to confer upon them rights which become part of their legal heritage.”²⁸⁶ As a result, “the implementation of [the Article of the treaty under consideration did] not require any legislative intervention on the part of the states,”²⁸⁷ and “according to the spirit, the general scheme and the wording of the treaty, [the Article of the treaty had to] be interpreted as producing direct effects and creating individual rights” that national courts could enforce immediately.²⁸⁸ The preliminary ruling procedure²⁸⁹ and direct effect doctrine have paved the way for the theory of the legal supremacy of the European Economic Community and the European Union.²⁹⁰ These doctrines have “internalized”²⁹¹ state compliance with EU law. The practical result is that domestic courts *act as* EU courts when they have to deal with EU law, thus set-

283. Case 26/62, *N.V. Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, 1963 E.C.R. 1.

284. CRAIG & BURCA, *supra* note 273, at 6.

285. Case 26/62, 1963 E.C.R. at 11.

286. *Id.* at 12.

287. *Id.* at 13.

288. *Id.*

289. JOSEPH H. H. WEILER, *DECIPHERING THE POLITICAL AND LEGAL DNA OF EUROPEAN INTEGRATION: AN EXPLORATORY ESSAY, PHILOSOPHICAL FOUNDATIONS OF EU LAW* 150, 154 (Julie Dickson & Pavlos Eleftheriadis eds., 2012).

290. Weiler & Loos, *supra* note 280, at 102.

291. WEILER, *supra* note 289, at 154.

ting precedent through legal opinion because all state institutions are required to respect, enforce, and comply with EU law as part of their law.²⁹²

When it comes to EU law, the practical wisdom Justice Breyer probably sought in his dissent in *Printz* was part and parcel of a legal order that *internalized* the federal model at the state level in a way that sees domestic courts and institutions operating under EU control. Justice Scalia, who penned the majority opinion for the court, famously criticized Justice Breyer's reference to foreign legal expertise in rather drastic terms, writing:

Justice Breyer's dissent would have us consider . . . other countries, and the [European Union]. We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one. . . . The fact is that our federalism is not Europe's.²⁹³

Justice Scalia could have gone another way, highlighting that EU and U.S. federalism rest on largely different grounds, and, therefore, the EU paradigm Justice Breyer was proposing did not fit well in explaining how the U.S. Supreme Court should have ruled. He could have brought Justice Breyer's pragmatic²⁹⁴ justification of the piece of legislation to its logical end through the EU example: if the law under the court's scrutiny was compatible with EU dynamics, this very fact was, in and of itself, a reason to doubt that the law was compatible with the U.S. Constitution. Justice Breyer's lesson about the European Union was correct; and, since it was correct, it should have prompted him to explain how the EU's functioning could go along with the structure of U.S. federalism.

C. The Death Penalty Cases

The issue of quoting or finding inspiration from foreign sources also has marked the long-lasting debate about the permissibility of the death penalty under the Eighth Amendment of the U.S. Constitution, which forbids "cruel and unusual punishments."²⁹⁵

292. Julie Dickson, *Towards a Theory of European Union Legal Systems*, in PHILOSOPHICAL FOUNDATIONS OF EUROPEAN LAW 43–44 (2012).

293. *Printz v. United States*, 521 U.S. 898, 921 (1997).

294. Berger, *supra* note 39, at 707; *see also* Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 272 (2001).

295. U.S. CONST. amend. XIII.

Interestingly, a significant line of U.S. Supreme Court's decisions have made some references to European legal regimes in support of their opinions.

As this section will show, the U.S. Supreme Court seems to have taken isolated fragments of the European legal attitude toward the death penalty, as it focused on the fact that this type of punishment has virtually vanished in Europe while overlooking how this phenomenon has unfolded. Had the U.S. Supreme Court looked into its details, it could have learned much more. As a result, the very same mistake that the U.S. Supreme Court made in *Lawrence* is even more apparent with respect to death penalty cases.

The practice of looking abroad in the context of the Eighth Amendment of the U.S. Constitution started with *Trop v. Dulles*,²⁹⁶ which struck down the penal sanctions for army desertion on the basis of the Eighth Amendment. This judgment paid special attention to foreign perspectives about the prohibition of "cruel and unusual punishments."²⁹⁷ Although *Trop* was not a death penalty case, the case law that followed on the matter relied on *Trop* and consequently considered the global attitude toward capital punishment in its reasoning. *Trop* also has the record of being "the first instance . . . in which the Court turned to foreign sources of law in the course of a decision that struck down, rather than upheld, an existing statute."²⁹⁸

Roughly two decades after *Trop*, the U.S. Supreme Court started looking into foreign approaches to the death penalty. In *Coker v. Georgia*,²⁹⁹ the court addressed the issue of whether the death penalty should be administered to a convicted rapist. In its opinion, the court stated that "*Trop v. Dulles* . . . took pains

296. *Trop v. Dulles*, 356 U.S. 86, 103–04, 125–27 (1958).

297. *Id.* at 103–04 ("The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. It is true that several countries prescribe expatriation in the event that their nationals engage in conduct in derogation of native allegiance. Even statutes of this sort are generally applicable primarily to naturalized citizens. But use of denationalization as punishment for crime is an entirely different matter. The United Nations' survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion. In this country, the Eighth Amendment forbids this to be done." (internal citations omitted)); U.S. CONST. amend. XIII.

298. Calabresi & Zimdahl, *supra* note 20, at 892.

299. *Coker v. Georgia*, 433 U.S. 584 (1977).

to note the climate of international opinion" it was "not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape."³⁰⁰ Since then, the court has repeatedly pondered if its precedents on the legitimacy of capital punishment also resist the changing "international opinion."

The first time in which the court made explicit reference to the European pattern in the context of death penalty cases was *Enmund v. Florida*.³⁰¹ In *Enmund*, the petitioner was convicted of first-degree murder and robbery and sentenced to death, despite neither taking part in the killings nor intending that they take place at the time the robbery was conceived.³⁰² The court opined that the punishment was disproportionate,³⁰³ as it sanctioned with death the mere participation in a robbery.³⁰⁴ In a footnote, the opinion also considered international trends: "[The] climate of international opinion . . . is an additional consideration which is 'not irrelevant.' . . . It is thus . . . worth noting that the doctrine of felony murder has been abolished in England and . . . is unknown in continental Europe."³⁰⁵ In the eyes of the U.S. Supreme Court, punishing this type of crime with a death sentence made the United States an outlier within the Western world, which, in turn, went against the preservation of the penalty itself.

Building upon prior case law that looked to international sources when writing its opinions, the U.S. Supreme Court in *Thompson v. Oklahoma*³⁰⁶ addressed whether the death penalty should be administered to juveniles under the age of sixteen. The court noted the following in its decision:

The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed . . . by the leading members of the Western European community. . . . Although the death penalty has not been entirely abolished in the United Kingdom, . . . [t]he death

300. *Id.* at 597.

301. *Enmund v. Florida*, 458 U.S. 782 (1982).

302. *Id.* at 789.

303. *Id.* at 798–96.

304. *Id.* at 801.

305. *Id.* at 797.

306. *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in . . . Italy, Spain, and Switzerland. Juvenile executions are also prohibited in the Soviet Union.³⁰⁷

The expression “Western European community,” seems to mean the countries that, after World War II, developed special connections with the United States and, therefore, could be said to entertain political and cultural dialogues with it (however, the court did not overlook the Soviet Union, i.e., the biggest and most powerful Eastern European country). Overall, the U.S. Supreme Court kept looking toward Europe for inspiration and as a useful comparison on whether the death penalty should still have been considered a permissible punishment within the U.S. Constitution. Fourteen years later in *Atkins v. Virginia*,³⁰⁸ the court concluded that the Eighth Amendment forbids the execution of criminals with cognitive disabilities.³⁰⁹ The court also made minor references to international trends regarding capital punishment,³¹⁰ including an interesting quotation in a footnote from an abolitionist brief that had been filed before the European Union in a previous case: “[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”³¹¹

In the text of its opinion, the majority drew from this brief, blending it with statistics about the national sentiments and state initiatives against the death penalty to conclude that “a national consensus [had] developed against it.”³¹² Albeit confined to few words, the footnote reference to foreign sources was not insubstantial, as it affected the overall consideration that the practice had become “truly unusual.”³¹³

The line of reasoning of the U.S. Supreme Court in *Atkins* found opposition among the dissenters. Chief Justice Rehnquist highlighted that “the viewpoints of other countries simply are

307. *Id.* at 830–31.

308. *Atkins v. Virginia*, 536 U.S. 304 (2002).

309. *Id.* at 316 n.21 (citing “Brief for the European Union as Amicus Curiae in *McCarver v. North Carolina*, O. T. 2001, No. 00–8727, p. 4.”).

310. *Id.* at 316–17.

311. *Id.*

312. *Id.* at 317.

313. *Id.*

not relevant.”³¹⁴ Similarly, Justice Scalia wrote: “[I]rrelevant are the practices of the ‘world community.’”³¹⁵

Adding even more controversy with respect to the use of foreign sources in U.S. Supreme Court decisions³¹⁶ was *Roper v. Simmons*.³¹⁷ The issue under scrutiny in *Roper* was whether applying the death penalty to offenders under eighteen years old was constitutional³¹⁸ in light of *Thompson*, which outlawed the death penalty for juveniles under the age of sixteen.³¹⁹ The court answered in the negative, finding confirmation in a broad consideration of foreign sources.³²⁰ It considered “the stark reality [that] the United States [was] the only country in the world that continue[d] to give official sanction to the juvenile death penalty.”³²¹ Although “[t]his reality [did] not become controlling . . . from the time of the Court’s decision in *Trop*, the Court [has found that] the laws of other countries and . . . international authorities [were] instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments.’”³²² Then it made explicit reference to an amici brief filed by the European Union that provided evidence to the court that “Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under [the age of] 18.”³²³

Justice Scalia opposed the utilization of foreign sources in vivid terms. In his words, the resort to alien law was both erro-

314. *Id.* at 325 (Rehnquist, J., dissenting).

315. *Id.* at 347–48 (Scalia, J., dissenting).

316. Between the *Atkins* and *Roper* decisions was *Foster v. Florida*, 537 U.S. 990 (2002), which denied certiorari to a petitioner requesting not to be executed after decades of proceedings. Writing in dissent, Justice Breyer quoted several foreign decisions, among which was the ECtHR’s *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989). See *Foster*, 537 U.S. at 993. Here, *Foster* is not considered, as it does not deal with the issue of capital punishment itself but rather the death penalty in the context of lengthy proceedings.

317. *Roper v. Simmons*, 543 U.S. 551 (2005).

318. *Id.* at 564.

319. *Thompson v. Oklahoma*, 487 U.S. 815, 839 (1988).

320. *Roper*, 543 U.S. at 575.

321. *Id.*

322. *Id.*

323. *Id.* at 576.

neous, insofar as it subjected the interpretation of the U.S. Constitution to foreign influence,³²⁴ and was biased by selectiveness, as the U.S. Supreme Court decided not to rely on foreign sources on other occasions when it could have taken inspiration from abroad.³²⁵ In Justice Scalia's view, "the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. In fact the Court itself [did] not believe it. In many significant respects the laws of most other countries differ from [U.S.] law" including "many interpretations of the Constitution prescribed by [the] Court itself."³²⁶

Justice Scalia elaborated further, enumerating a series of cases in which the court was perfectly aware that it was taking a rather solitary path.³²⁷ The core of Justice Scalia's response, however, lay in defense of an originalist interpretation of the constitution,³²⁸ which interprets the text according to its meaning at the time it was enacted. In his words, the court, which had "long rejected a purely originalist approach to [the] Eighth Amendment,"³²⁹ was at a crossroads. It could either "profess its willingness to reconsider [the topics covered by the Eighth Amendment] in light of the views of foreigners, or . . . cease putting forth foreigners' views as part of the *reasoned basis* of its decisions."³³⁰ Justice Scalia advocated for the return to the plain meaning of the constitutional text as opposed to the meaning that the court was ascribing to it in light of foreign law and legal opinions.

It is no surprise that the U.S. Supreme Court found support for its move away³³¹ from the death penalty through the European legal landscape. It is indisputable that "Europeans have

324. *Id.* at 622–23.

325. *Id.* at 623.

326. *Id.* at 624.

327. *Id.* at 625–26.

328. *Id.* at 625.

329. *Id.* at 627.

330. *Id.*

331. More recent decisions concerning the death penalty have also drawn from foreign and international law, although they fail to quote European law sources. See *Graham v. Florida*, 560 U.S. 48 (2010); *McDonald v. Chicago*, 561 U.S. 742 (2010).

taken issue with the notion that death can ever be an appropriate sentence,”³³² and that “the European human rights machinery and the [European Union] have indicated their disagreement and disenchantment with the United States over the issue of the death penalty.”³³³ In the aftermath of World War II, many European countries started developing an abolitionist trend that consolidated between the 1950s and the 1970s³³⁴ and finally took over the whole of Europe at the turn of the century.³³⁵

The abolition of the death penalty took place slowly and piecemeal, however. It was not a topic on which European states agreed in the immediate aftermath of World War II. The ECHR did not prohibit the death penalty in 1953, when it entered into force.³³⁶ It was only later on that its Protocols developed an abolitionist trend. For example, the Sixth Protocol,³³⁷ which passed in 1983, stated that “[t]he death penalty shall be abolished.”³³⁸ Nonetheless, the Sixth Protocol carved out a minor exception for times of war, during which states could make provisions “for the death penalty in respect of acts committed in time of war or of imminent threat of war.”³³⁹

Unlike the Sixth Protocol, the Thirteenth Protocol,³⁴⁰ which passed in 2002, spoke the final word on this matter, restating

332. Nora V. Demleitner, *The Death Penalty in the United States: Following the European Lead*, 81 OR. L. REV. 131, 131 (2002).

333. *Id.* at 132.

334. *Id.* at 134.

335. *Id.* The only exception was Latvia, which abolished the death penalty for ordinary crimes in 1999 but retained it for military crimes until 2012. See *Abolitionist and Retentionist Countries*, DEATH PENALTY INFO. CENT., <http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries> (last visited Nov. 11, 2016).

336. ECHR, *supra* note 17.

337. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 28, 1983, E.T.S. No. 114.

338. *Id.* art. 1.

339. *Id.* art. 2.

340. Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in All Circumstances, May 4, 2002, E.T.S. No. 187.

that “[t]he death penalty shall be abolished”³⁴¹ without exception.³⁴² Among the states that are party to the ECHR, only Armenia, Azerbaijan, and Russia did not ratify the Thirteenth Protocol.³⁴³ It is safe to say then that the overwhelming majority of the Council of Europe’s members now understand the death penalty as an impermissible means of punishment.

The European Union is not absent from this abolitionist scenario. It arose from the ashes of World War II with a vision of a pacified Europe but not necessarily with a particular focus on the death penalty. Later on, the European Union started developing a language of and an interest in human rights as a tool to self-legitimize³⁴⁴ and expand its reach.³⁴⁵ This development bolstered³⁴⁶ the drafting of the EU Charter of Fundamental Rights (“EU Charter”),³⁴⁷ which is now part of EU law as a result of its incorporation in the Lisbon Treaty.³⁴⁸ Article 2 of the EU Charter clearly states that “[n]o one shall be condemned to the death penalty.”³⁴⁹ Article 2 thus provides that a state cannot be considered for EU membership unless it abolishes capital punishment.

But, EU involvement in this scenario extends beyond the internal enforcement of rules against capital punishment. In fact,

341. *Id.* art. 1.

342. *Id.* art. 2 (“No derogation from the provisions of this Protocol shall be made.”).

343. For a complete list of signature and ratifications, see *Chart of Signatures and Ratifications of Treaty 187*, COUNCIL EUR., https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187/signatures?p_auth=K1MdscYM (last visited Jan. 14, 2017).

344. This also includes the EU’s accession to the ECHR. See Jan Klabbbers, *On Myths and Miracles: The EU and Its Possible Accession to the ECHR*, 2013 HUNGARIAN Y.B. INT’L & EUR. L. 45, 58.

345. WEILER, *supra* note 289, at 157–58.

346. Filippo Fontanelli, *The Implementation of European Union Law by Member States Under Article 51(1) of the Charter of Fundamental Rights*, 20 COLUM. J. EUR. L. 193, 200 (2014).

347. Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. 391 (C 326) [hereinafter Charter of Rights].

348. The Treaty of Lisbon came into force on December 1, 2009. See Treaty of Lisbon.

349. Charter of Rights, *supra* note 347, art. 2.

the European Union has become a proud player in the abolitionist movement.³⁵⁰ The European Union's activism includes filing briefs before U.S. courts,³⁵¹ diplomatic pressure, and global dissemination of information about death penalty enforcement.³⁵²

At first glance, it is apparent that the U.S. Supreme Court utilized foreign citations in an effort to evolve its jurisprudence on the death penalty. Citations have grown in size and importance and on pace with the progressive abolition of the death penalty, moving from footnotes to central aspects of the text.³⁵³ Of course, these parallel trends of death penalty abolition and growing foreign source quotations may legitimately prompt skepticism among the dissenters because foreign sources seem to back the court's predetermined abolitionist orientation.

Another striking feature of U.S. case law on the death penalty is the multilayered recourse to foreign citations from European law. Despite being incomplete, the U.S. Supreme Court's citations follow the changes in European legal culture on the death penalty quite closely, and yet miss some crucial aspects of the European developments in the field. *Coker*³⁵⁴ made a generic reference to "major nations."³⁵⁵ *Enmund*³⁵⁶ mentioned the disappearance of the death penalty in "continental Europe."³⁵⁷ *Thompson*³⁵⁸ enlarged the scope of its analysis to encompass the "Western European community"³⁵⁹ and paralleled the broadening horizon of abolitionist countries, but it failed to quote the

350. Council Common Guidelines on Death Penalty (EU) No. 8416/13 Annex of 12 Apr. 2013, https://eeas.europa.eu/sites/eeas/files/guidelines_death_penalty_st08416_en.pdf.

351. See, e.g., Brief for the European Union Amici Curiae Supporting Petitioner, *McCarver v. North Carolina*, 533 U.S. 975 (2001) (No. 00-8727) [hereinafter Brief for the EU].

352. Demleitner, *supra* note 332, at 140.

353. Mary Ann Glendon notes that *Roper* gave "foreign material a controlling role in the decision of an American constitutional question." Glendon, *supra* note 23, at 7; see also Adam Lamparello & Charles E. MacLean, *The Separate but Unequal Constitution*, 64 DEPAUL L. REV. 113, 159 (2014) (describing this growth in usage).

354. *Coker v. Georgia*, 433 U.S. 584, 597 (1977).

355. *Id.*

356. *Enmund v. Florida*, 458 U.S. 782 (1982).

357. *Id.* at 797. The disappearance of the death penalty in Europe was broadening; but, the U.S. Supreme Court could not have quoted the Sixth Protocol of the ECHR, which was not in existence at the time.

358. *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

359. *Id.* at 830–31.

Sixth Protocol that was already in place. *Atkins*³⁶⁰ and *Roper*³⁶¹ quoted EU Briefs after the European Union symbolically outlawed the death penalty in the EU Charter.

This progressive quoting of European law hides the most problematic issue: if the U.S. Supreme Court wants to tackle the issue of the death penalty as it has been addressed in Europe, down the road, the court will need to reflect on the legitimacy of the death penalty altogether. In fact, EU law, the ECHR, and the law of the vast majority of European states say—with one voice—that the death penalty can never be a just punishment. The U.S. Supreme Court’s judgments simply abolished the death penalty provisions that were presented before them, but, ultimately, the European legal culture would like to convince the United States to abolish capital punishment altogether. In the recent U.S. Supreme Court decision, *Glossip v. Gross*,³⁶² Justice Breyer’s dissent envisioned this moment, stating: “I believe it highly likely that the death penalty violates the Eighth Amendment. At the very least, the Court should call for full briefing on the basic question.”³⁶³ Ultimately, the European cultural pressure is unlikely to stop until the U.S. Supreme Court makes a final decision on whether the death penalty can ever be legitimate.

This European pressure gets lost in the U.S. Supreme Court’s reasoning because each decision leaves the reasons for European abolitionism of the death penalty unexplored. This turns arguments opposing capital punishment generally into arguments against specific death penalty laws in special circumstances³⁶⁴ or as applied to specific categories of people.³⁶⁵ The European attitude against capital punishment is generic enough to be played out in different contexts but leaves the big question on the legitimacy of the death penalty in the dark. Readers of the U.S. Supreme Court’s decisions are left with the impression that the court understands that the U.S. tradition of the death penalty

360. *Atkins v. Virginia*, 536 U.S. 304, 324 (2002).

361. *Roper v. Simmons*, 543 U.S. 551, 576 (2005).

362. *Glossip v. Gross*, 135 S. Ct. 2726, 2776–77 (2015) (Breyer, J., dissenting).

363. *Id.*

364. *See Coker v. Georgia*, 433 U.S. 584, 599 (1977).

365. *See Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Roper*, 543 U.S. at 568.

has become an anomaly,³⁶⁶ but they have not offered any description of the rift that now divides the United States from Europe in this field.³⁶⁷

What the court also fails to consider explicitly are the drivers of abolitionism in Europe. The relevant ECHR Protocols, as well as Article 2 of the EU Charter, came after state abolitionism. The rising wave that has outlawed the death penalty started from within each state. It was only later, when the states already set aside death penalty one by one, that the states brought the issue to the supranational courts.

Moreover, in several states, *de facto* abolitionist trends started first after domestic courts stopped enforcing the death penalty,³⁶⁸ while *de jure* abolition followed thereafter.³⁶⁹ On the contrary, the U.S. Supreme Court is still concretely confronted with state courts condemning an individual to death. There is a sensible difference between abolishing the death penalty because it is not being enforced and abolishing it so it cannot be enforced anymore.

Finally, when European states abolished the death penalty, they did so as states. This decision was largely deferred to the legislature, the constitution, or constitutional amendment. Many European states' constitutions have provisions banning the death penalty, including Italy,³⁷⁰ Germany,³⁷¹ Sweden,³⁷² Portugal,³⁷³ and Spain.³⁷⁴ Countries such as France,³⁷⁵ Greece,³⁷⁶ and Ireland,³⁷⁷ however, outlawed capital punishment through

366. Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97, 130 (2002).

367. Demleitner, *supra* note 332, at 159.

368. *Id.* at 133.

369. *Id.*

370. Art. 27 Costituzione [Cost.] (It.).

371. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], Dec. 23, 2014, art. 102 (Ger.), *translation at* http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0569.

372. REGERINGSFORMEN [RF] [CONSTITUTION] 2:4 (Swed.).

373. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [CONSTITUTION], Apr. 2, 1976, art. 24, para 2. (Port.).

374. CONSTITUCIÓN ESPAÑOLA [C.E.], Dec. 29, 1978, art. 15 (Spain).

375. 1958 LA CONSTITUTION [CONST.] art. 66-1 (Fr.).

376. Through its Criminal Code in 1983. See Stefano Manacorda, *Restraints on Death Penalty in Europe: A Circular Process*, 1 J. INT'L CRIM. JUST. 263, 270 (2003).

377. First in its 1990 Criminal Code, then in a 2001 Constitutional amendment. *Id.*

parliamentary legislation. Since 1993, applicant states to the Council of Europe must undertake to sign and ratify the ECHR and its Protocols, so all post-Thirteenth Protocol candidates have no choice but to abolish the death penalty.³⁷⁸ In fact, central and eastern European countries have joined the abolitionist regimes under the pressure of the Council of Europe,³⁷⁹ mainly through amending their penal laws or constitutions.³⁸⁰ Only a handful of countries have become abolitionist through a Constitutional Court decision (Albania, Hungary, and Lithuania).³⁸¹ Overall, the judicial outlawing of the death penalty is more the exception than the norm in this increasingly abolitionist wave.³⁸²

The ECtHR, which deliberately embraces the “living instrument” doctrine³⁸³ and draws from states’ cultures in its reasoning, treats the death penalty as an issue that is left to political branches.³⁸⁴ When Turkey condemned to death the leader of the PKK Kurdish party, “Ocalan,”³⁸⁵ the ECtHR noted: “By opening for signature Protocol No. 13 . . . the Contracting States have chosen the traditional method of amendment of the text of the Convention in pursuit of their policy of abolition.”³⁸⁶

All things considered, the aspects that the U.S. Supreme Court seemed to have overlooked with respect to utilizing foreign sources are 1) that this is a particularly ethically sensitive territory, and states have retained much leeway in when and how to abolish the death penalty; 2) that many states have seen the death penalty fall into desuetude before outlawing it; and 3) that setting aside this type of punishment has been a hallmark of parliaments, not courts.

The scattered quotations to European legal culture have not helped the U.S. Supreme Court spot these aspects. The European experience could have shed light on how delicate this issue is and suggested some way to deal with it. This does not mean that the U.S. Supreme Court should have followed the European

378. Roger Hood, *Introduction – The Importance of Abolishing the Death Penalty*, in *THE DEATH PENALTY: BEYOND ABOLITION* 16 (2004).

379. Agata Fijalkowski, *The Abolition of the Death Penalty in Central and Eastern Europe*, 9 *TILBURG FOREIGN L. REV.* 62, 78 (2001).

380. *Id.* at 63.

381. *Id.* at 75.

382. Hood, *supra* note 378, at 20–22.

383. Wildhaber, *supra* note 214, at 84.

384. See *Ocalan v. Turkey*, 2005-IV Eur. Ct. H.R. 47, 186, ¶ 164.

385. *Id.*

386. *Id.* at 186, ¶ 164.

path; rather, it at least could have considered the European approach as an interesting pattern.

Analogously, Justice Scalia, who dissented in *Roper* on the grounds that the court was entertaining foreign law,³⁸⁷ could have been boosted by a deeper consideration of the European legacy: that abolitionism does not happen at the expense of state sovereignty or popular sensitivities. A deeper look at the European experience with the death penalty could have suggested that, in Europe, the death penalty also was, first and foremost, a political and state affair.

Of course, the U.S. Supreme Court could have been misled by the European Union's intervention. The European Union advocated the death penalty's abolition before U.S. courts through amicus briefs.³⁸⁸ This could be interpreted as an indicium that in Europe the courts have played the biggest part in outlawing such punishment. This, however, is untrue. The European Union may have put pressure on the U.S. Supreme Court because it is more efficient to have death penalty provisions struck down by the U.S. Supreme Court than it is to work and wait for each state to make this decision. It is also no surprise that the European Union advocated the ban of the death penalty before the U.S. Supreme Court. The EU legal environment is familiar with judicial activism,³⁸⁹ as we have already noted that the combination of the CJEU and domestic courts was the main driver for European integration.³⁹⁰ Both factors, however, cannot hide the fact that the European legal culture has virtually wiped the death penalty out of the continent state-by-state, mainly through changes in legislation or in their respective constitutions. The U.S. Supreme Court excerpted fragments of foreign law and trends that testified the abolitionist wave in Europe; it failed to address, however, some features of it that could have shed light on some controversial aspects it was called upon to judge.

387. *Roper v. Simmons*, 543 U.S. 551, 627 (2005).

388. See, e.g., Brief for the EU, *supra* note 351.

389. PAUNIO, *supra* note 279, at 58; see also Slaughter, *supra* note 36, at 1105.

390. Mark Dawson, *The Political Face of Judicial Activism: Europe's Law-Politics Imbalance*, in JUDICIAL ACTIVISM AT THE EUROPEAN COURT OF JUSTICE 19 (Mark Dawson et al. eds., 2013) (internal quotations omitted).

III. DRAWING CONCLUSIONS: THE U.S. UNDERSTANDING OF EUROPEAN CONSTITUTIONALISM

The parade of cases in which the U.S. Supreme Court utilized European jurisprudence casts doubt on the feasibility of citing European sources. The problem, however, does not lie in the practice itself but rather in the methodology and the expectations that are normally attached to this practice.

The average debate about the legitimate importation of foreign law into the U.S. Supreme Court's adjudication normally sees two conflicting opinions. In the liberal camp are the concerns of staying on track with the development of transnational legal, economic, and popular movements that fluctuate among jurisdictions,³⁹¹ learning from other experiences, and ultimately looking for the best legal solution to a legal problem.³⁹² These concerns should prompt U.S. Supreme Court justices to engage in comparative law.³⁹³

In the conservative camp are the concerns of selectiveness,³⁹⁴ decontextualization,³⁹⁵ and the lack of a democratic foundation.³⁹⁶ After all, foreign quotations would disconnect fragments of foreign law from their sources and attach them to an alien constitutional structure. This operation would downplay the importance of the opinions of the U.S. people because they blend with others from jurisdictions that are foreign to the United States.

It is safe to say that the U.S. Supreme Court's practice in this field confirms some reservations of using foreign law. *Lawrence*³⁹⁷ clearly misunderstood *Dudgeon*³⁹⁸ and cobbled together a heterogeneous line of cases under the misleading assumption that ECtHR case law is "authoritative."³⁹⁹ Justice Breyer's dissent in *Printz*⁴⁰⁰ looked at the European Union as an interesting example of how states' autonomy and the need for supranational

391. *Stephen Breyer Interview*, *supra* note 79.

392. Mathias M. Siems, *Bringing in Foreign Ideas: The Quest for 'Better Law' in Implicit Comparative Law*, 9 J. COMP. L. 119, 119 (2014).

393. BREYER, *supra* note 3, at 426.

394. Gelter & Siems, *supra* note 37, at 40.

395. Kahn-Freund, *supra* note 198.

396. Jackson, *supra* note 157.

397. *Lawrence v. Texas*, 539 U.S. 558 (2003).

398. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981).

399. *Lawrence*, 539 U.S. at 573.

400. *Printz v. United States*, 521 U.S. 898 (1997).

coordination can be reconciled; yet, he failed to mention that this type of constitutional structure is precisely the European "special way."⁴⁰¹ Further, the line of cases about capital punishment drew from the unequivocal European abolitionist attitude; but, the U.S. Supreme Court forgot to add that 1) *de facto* abolition came first, which made it easier for states to outlaw the death penalty; 2) the abolitionist wave took hold state-by-state through a bottom-up process; and 3) the abolitionist movement spread through legislatures rather than constitutional or supreme court rulings that outlawed this kind of punishment.

In each of these scenarios, the U.S. Supreme Court missed crucial points in its analysis that could have better shed light on both the case at stake and the teachings that European legal culture could impart. The U.S. Supreme Court's flaws in interpreting European law, however, did not necessarily run against the court considering European law in and of itself. Understanding how European systems work and whether they are instructive for U.S. legal reasoning is not, by itself, selective or biased. Nor does it necessarily take U.S. law out of U.S. hands. Once the court understands what the European law says on a particular issue, it is totally up to the court to decide what to do with it.

Conversely, if sources are used to back decisions, there is no way to avoid the selectiveness conundrum, even if one decides to confine the legal exploration to the European environment. European law is multilayered with state and supranational regimes blending hard law, soft law, and political pressure in a way that makes it highly unlikely that Europe speaks with one single voice, at one time, and for all.

European Union law is valid law in all European states thanks to the supremacy and the "direct effect" doctrines that make them "binding."⁴⁰² The ECHR's status in each European state varies with its constitutional infrastructure.⁴⁰³ Therefore, ECtHR case law is "influential"⁴⁰⁴ but not necessarily the law of the land in every European state. The European legal culture varies in multiple respects, as the region encompasses both civil and

401. Weiler, *supra* note 277, at 10.

402. See *supra* Part II.B.

403. Gerards, *supra* note 207, at 22.

404. Hale, *supra* note 243.

common law countries and states that lack judicial review of legislation and those that have it.⁴⁰⁵ Also, domestic courts have very different attitudes, with common law courts unwilling to take an activist approach,⁴⁰⁶ while the constitutional courts of central and eastern Europe being more inclined to legislate from the bench.⁴⁰⁷ The ECtHR and EU law are ultimately the umbrellas for different traditions: the exploration of European law can start from them but definitely does not end with a mere quotation from the CJEU or the ECtHR.

Except for Justice Breyer's dissent in *Printz*, which made some observations about the EU legal system, both *Lawrence* and the death penalty judgments drew from European sources but did not investigate further. Since "judges are expected to be model reason-givers,"⁴⁰⁸ underdeveloped lines of reasoning cast doubt on their legitimacy. Quoting European law was not an issue by itself. The problem occurs when the court quotes without understanding, or understands without explaining, why those foreign materials mattered for the case at stake.

Proper contextualization and an adequate understanding of the foreign concepts examined are particularly important. Their importance is not limited to a country avoiding the importation of concepts that do not fit within its structure. They are, first and foremost, crucial because a lack of contextualization and understanding lend themselves to misunderstanding the same concepts that a court finds inspiring. Being respectful of the nuances of an entire legal system is necessary for the very comprehension of every aspect the court seeks to rely.

Overlooking the deep meaning of European law sources can do much more than affect a single decision with a wrong depiction of European law. It can have more profound and long-lasting implications on several legal regimes. For example, let us consider *Lawrence* and its impact on family law on a global scale. It

405. Armin von Bogdandy, Christoph Grabenwarter, & Peter M. Huber, *Il Diritto Costituzionale Nel Diritto Pubblico Europeo. L'esempio Della Rete Istituzionalizzata Della Giustizia Costituzionale* [Constitutional Law in European Public Law. The Example of Institutionalized Network of Constitutional Justice], RIVISTA AIC [MAG. AIC], Nov. 6, 2015, at 4 (It.).

406. ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON 158 (2012).

407. *Id.*

408. Cohen, *supra* note 101, at 486.

(mis)quoted *Dudgeon* and other ECtHR judgments that came after it, blending them with other arguments rooted in U.S. constitutional law: the ultimate result consisted in the U.S. Supreme Court decision to strike down antisodomy laws. The court in *United States v. Windsor*⁴⁰⁹ then quoted *Lawrence* twice to strike down the Defense of Marriage Act.⁴¹⁰ Similarly, *Obergefell v. Hodges*,⁴¹¹ which affirmed the constitutional right to same-sex marriage, quoted *Lawrence* twelve times.⁴¹² Since the court domesticated *Dudgeon* in *Lawrence*, *Windsor* and *Obergefell* simply quoted *Lawrence* as their precedent without needing to look abroad. As *Dudgeon*'s impact on U.S. law lies beneath the surface of *Lawrence*, its impact cannot be measured. But, of course, *Dudgeon* flows within U.S. jurisprudence from *Lawrence* up through *Obergefell*.

As a result, misreadings of foreign laws can bounce back and affect the legal system from which they were taken. In *Oliari & Others v. Italy*,⁴¹³ the ECtHR sanctioned Italy for not providing same-sex couples with any type of civil union. In its usual cursory comparative law analysis,⁴¹⁴ the ECtHR dedicated special attention to the United States—the only country that the judges analyzed that is not party to the ECHR.⁴¹⁵ The relevant paragraph of the decision is more than four hundred words long.⁴¹⁶

In few words, the ECtHR noticed and considered the U.S. Supreme Court's recent decision on same-sex marriage, which was built on ECtHR case law. Again, it is not possible to estimate the impact of *Obergefell* on *Oliari*. Going backward, it is therefore infeasible to trace back the relevance of *Lawrence* and, even further, *Dudgeon* on *Oliari*. It must be noted, however, that the ECtHR gave much more attention to *Obergefell* than what it gave to its own *Dudgeon* decision, which is barely quoted in *Oliari*.⁴¹⁷

409. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

410. *Id.* at 19, 23.

411. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

412. *Id.* at 2588–90, 2596, 2598–2600, 2602, 2604, 2606, 2620, 2623.

413. *Oliari & Others v. Italy*, App. Nos. 18766/11 & 36060/11, Eur. Ct. H.R., HUDOC (Oct. 21, 2015), [http://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-156265\"\]}](http://hudoc.echr.coe.int/eng#{\).

414. *Id.* at 15–18, ¶¶ 53–65.

415. *Id.* at 15, ¶¶ 53–55 (about individual state members), 15–17, ¶¶ 56–61 (the Council of Europe law), 17–18, ¶¶ 62–64 (EU law).

416. *Id.* at 13–14, ¶ 65.

417. *Id.* at 23, ¶ 95.

This example illustrates that the Condorcet Theorem, which undoubtedly is one of the theories that underpin the global judicial dialogue among U.S. supporters of these transnational judicial interactions,⁴¹⁸ does not apply to this legal phenomenon of quotations, borrowings, and transplants across Europe and the United States. The Condorcet Theorem “suggests that the decision of a majority in a group of similar and independent decision-makers is more likely to be correct than the decision of any one member of that group.”⁴¹⁹ The crucial idea here⁴²⁰ is decision-maker independence.⁴²¹ Perhaps the U.S. Supreme Court acted as an independent decision-maker when it decided to draw from *Dudgeon* because it accepted inspiration from the ECtHR with the understanding that the ECtHR has jurisprudence that assimilates the human rights culture of dozens of European states. In a sense, the U.S. Supreme Court treated the ECtHR as a synthesis of independent states’ decisions. But, the *Oliari* decision, which quotes *Obergefell*, lacks the same degree of independence. Since *Lawrence*, the U.S. Supreme Court’s case law has incorporated the ECtHR’s jurisprudence. As a result, when *Oliari* quotes *Obergefell*, to some extent, it is quoting itself.

Independence, however, is also hard to find within the ECtHR’s context. This is where the criticism about the Condorcet Theorem becomes more radical. The Condorcet Theorem does not consider the political and diplomatic pressure that is exerted within Europe through the Council of Europe’s institutions.

It is routine to expect that countries willing to join the European Union will comply with the human rights standards that the ECHR protects,⁴²² as they are interpreted by the ECtHR itself and propagated through the European Commission for Democracy Through Law (“Venice Commission”).⁴²³ This organ of the Council of Europe elaborates criteria and standards of democratization for states that apply to join the Council of Europe

418. Posner & Sunstein, *supra* note 76, at 131.

419. Dothan, *supra* note 75, at 5.

420. See Rosenkranz, *supra* note 74, at 1284.

421. Posner & Sunstein, *supra* note 76, at 131.

422. See Tony Joris & Jan Vandenbergh, *The Council of Europe and the European Union: Natural Partners or Uneasy Bedfellows?*, 15 COLUM. J. EUR. L. 1, 22–24 (2008–2009); see also EUROPEAN UNION’S SHAPING OF THE INTERNATIONAL ORDER 123 (Dimitry Kochenov & Fabian Amtenbrink eds., 2013).

423. Wolfgang Hoffmann-Riem, *The Venice Commission of the Council of Europe – Standards and Impact*, 25 EUR. J. INT’L L. 579, 585 (2014).

and advises countries that are trying to reinforce or establish the rule of law and human rights.⁴²⁴ Obviously, once they have entered the European Union, states are expected to keep track of both EU law and ECtHR case law. Therefore, a sort of triangulation exists between 1) the EU Commission, which monitors states' accession to the European Union and their compliance with EU law; 2) the ECtHR, which implements an expanding interpretation of the ECHR; and 3) the Venice Commission, which oversees the democratic effectiveness of political regimes.⁴²⁵ Especially for countries willing to enter the European Union, losing contact with one of these institutions could be detrimental for their relationship with the others.

The "independent decision-makers"⁴²⁶ that the Condorcet Theorem envisions simply do not exist because of the political pressure that is put on European states that join—or even try to adhere to—the European Union or the Council of Europe. Of course, EU law is followed by twenty-eight European states, and the ECtHR is "authoritative" (whatever this means) in forty-seven countries. This does not mean, however, that these countries, acting as "independent decision-makers," have embraced wholeheartedly all the rules stemming from ECtHR case law. The attractive power of the European Union and the ECtHR is likely to prevail over states' independent decision-making on single issues.

It is therefore thanks to neither its popularity nor the number of states that follow it that a European legal rule becomes relevant for the U.S. Supreme Court's reasoning. The Condorcet Theory is not a good reason for considering the ECtHR's decisions or EU law. Rather, the value behind the practice of drawing from supranational European legal culture lies in its reasoned judgment and capacity to shed light on the case at hand in U.S. courts.

424. See *Venice Commission of the Council of Europe*, COUNCIL EUR., http://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN (last visited Dec. 23, 2016).

425. Hoffmann-Riem, *supra* note 423, at 597.

426. Dothan, *supra* note 75, at 5.

IV. A GOOD IDEA IS A GOOD IDEA, AS LONG AS IT IS
UNDERSTOOD CORRECTLY: A FRESH U.S. READING OF
EUROPEAN SOURCES

The following Part will provide some examples of this alternative approach for the U.S. utilization of foreign sources. As already noted, in each context, European sources could have been deployed more accurately and fruitfully as thought-provoking ideas for the U.S. Supreme Court. *Lawrence*⁴²⁷ drew the conclusion that laws criminalizing homosexual conduct are not part of civilized societies from *Dudgeon*.⁴²⁸ Given the number of dissents in *Dudgeon* and *Norris*,⁴²⁹ this conclusion was not uncontroversial, and European states were not quick to follow it, given that Ireland kept the very legal provisions that *Dudgeon* sanctioned with reference to Northern Ireland in *Norris*.

The ECtHR's case law on this subject, however, points to one crucial fact. *Norris* found that laws concerning homosexual conduct in and of themselves victimized this group, as they put a social stigma on them.⁴³⁰ This is a powerful thought that the U.S. Supreme Court could have elaborated on further in *Lawrence* in connection with its own judgment that the mere existence of such laws violated the U.S. Constitution,⁴³¹ regardless of their actual enforcement. There was something that *Lawrence* could have learned from the ECtHR: namely, the impact of laws banning certain intimate conduct on human dignity. But, it was found outside the part from where the court actually drew: within the ECtHR's legal reasoning rather than the outcome of its decisions.

Justice Breyer's dissent in *Printz*⁴³² is instructive in understanding how a comparative law inquiry should be conducted. Justice Breyer got it right when he noted that normally, EU law is enforced by states, and that EU institutions operate through state organs. Ultimately, the European Union has secured a

427. *Lawrence v. Texas*, 539 U.S. 558 (2003).

428. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981).

429. *See Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988).

430. *Id.* at 15–16, ¶ 46.

431. As stated specifically in the *Lawrence* majority opinion: "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Lawrence*, 539 U.S. at 575.

432. *Printz v. United States*, 521 U.S. 898 (1997).

high level of compliance without burdening the European landscape with bureaucratic duplications of EU organs in each state.⁴³³

Justice Breyer's depiction of the EU model is accurate. But, does this model fit with the U.S. constitutional infrastructure? According to Justice Breyer, "comparative experience suggests" that "there is no need to interpret" the U.S. Constitution as "forbidding the assignment of virtually any federal duty to any state official."⁴³⁴ The European Union, however, can hardly suggest any specific interpretation of the U.S. Constitution in actuality. The EU structure stems from the European *Sonderweg*,⁴³⁵ and EU law scholars understand it to be uniquely European.⁴³⁶ If Justice Breyer wanted to import it into U.S. constitutional law, then he had the burden of proving that the "special way" fit within the U.S. constitutional infrastructure.

Misunderstandings of European law abound also in the field of death penalty. The U.S. Supreme Court thread of cases on this issue have poorly utilized European sources. On the one hand, the cases overlooked how abolitionism took over in Europe. To reiterate, the abolition of the death penalty first took place in Europe *de facto* when courts stopped enforcing it, then *de jure*.⁴³⁷ Moreover, the abolitionist trend took hold first state-by-state, then at the supranational level.⁴³⁸ Finally, rather than through judicial decisions, the death penalty was abolished mainly through legislatures, either at the statutory or constitutional level.⁴³⁹ All of these arguments could have suggested that the U.S. Supreme Court proceed cautiously to avoid issuing judicial rulings against capital punishment that would bind the states. On the other hand, that does not consider the whole picture. The European pressure will not cease until the death penalty is completely eradicated from the United States. The piecemeal decisions rendered by the U.S. Supreme Court have carved out exceptions from the main rule, which still allows for the death penalty. The belief of European legal culture with respect to capital punishment states that the death penalty is not only wrong for

433. Dickson, *supra* note 292.

434. *Printz*, 521 U.S. at 977.

435. Weiler, *supra* note 277, at 10.

436. *See supra* Part II.C.

437. *Id.*

438. *Id.*

439. *Id.*

juveniles or people with cognitive disabilities but also wrong in and of itself. Thus, drawing from European sources means drawing from this belief. Nevertheless, the U.S. Supreme Court has taken inspiration from the European attitude toward capital punishment, narrowed it down to specific circumstances, and avoided considering the justifications for and the scope of this attitude.

To summarize, the overall impression is that many European citations were deployed mostly—if not exclusively—in order to support U.S. Supreme Court decisions. They functioned as a sort of “persuasive authority”⁴⁴⁰ for the reader rather than for the court itself. Regardless of whether a foreign decision or law is cited appropriately or not, the sources, nonetheless, lack any binding authority.⁴⁴¹ Decisions or laws promulgated abroad are not authoritative. What is authoritative is what they highlight. So long as the foreign sources are precise, they can broaden the vision of the court that considers them and reveal facets of the issues at stake.

If the status of foreign law is informative rather than normative, then the interest in the foreign legal experience broadens to encompass, for instance, dissenting opinions or bills that never passed into law. Each legal opinion can have useful insights that the U.S. Supreme Court may consider interesting or even relevant. Ultimately, foreign legal concepts do not set binding legal precedent because they are only controlling in those jurisdictions where they are decided. Yet, they are significant because they contribute intellectually to U.S. adjudication. As scholarly works, their authoritativeness lies in their persuasiveness.⁴⁴² In order to be persuasive, they must be fully detailed and properly articulated. In other words, considerations of foreign law cannot be generic or confined to mere quotations. Persuasive authority thus requires the exclusion of both high levels of generality and superficial citations or references.

As a consequence, citations to foreign decisions lack normative power. They simply point to a source of knowledge for the court. They merely say where a concept was taken from, urge the author of the opinion to be accurate (since an inadequate depiction

440. McCrudden, *supra* note 126, at 502–03. H. Patrick Glenn elaborated on the idea of “persuasive authority.” See Glenn, *supra* note 71, at 263–64.

441. See Schauer, *supra* note 98, at 1935–36.

442. Sacco, *supra* note 53, at 349.

of foreign law will attract criticism), and provide a platform to debate the benefits and drawbacks attached to them.

V. THE CORRECT EUROPEAN LESSONS FOR THE UNITED STATES

This short review of cases and legal ideas that the U.S. Supreme Court could have taken from the European legal culture shows that quotations to foreign law are not selective in where they draw materials from but rather in how they use them. More precisely, citations overlook facets that could greatly contribute to a better understanding of the case before the court.⁴⁴³ The remainder of this Part will condense what is missing in the picture the court has painted of European law and which approach could have helped the court complete the picture. Some details in the European Union and the ECHR institutions' structures, goals, and mechanisms make them unique. This does not mean that their achievements cannot be imported or even understood; it only means that such achievements become understandable only if the political and legal processes through which they come to life are taken into account. The issue of same-sex marriage will be considered as a useful example.

A. *Understanding the European Legal Tradition*

Overall, the U.S. Supreme Court has used foreign quotations from Europe to evolve its own laws,⁴⁴⁴ with the exception of Justice Breyer's dissent in *Printz*, which is more nuanced. As a result, U.S. case law is currently in a state of fluctuation, swinging back and forth between post-New Deal jurisprudence and New Federalism.⁴⁴⁵ There is no doubt that *Lawrence's* overruling of *Bowers* changed the constitutional interpretation on the subject. The same observation applies to the death penalty line of cases, as the U.S. Supreme Court seems to be following European and international abolitionist trends more broadly. From a European perspective, the U.S. use of European sources to spur an evolution in U.S. law is not an absurd concept. Actually, it respects the spirit of European constitutionalism (more precisely, that of

443. Stefano Bertea & Claudio Sarra, *Foreign Precedents in Judicial Argument: A Theoretical Account*, 7 EUR. J. LEGAL STUD. 140 (2014).

444. Rosenkranz, *supra* note 74, at 1303–04.

445. On the nuances of the so-called New Federalism, see Robert A. Schapiro, *From Dualist Federalism to Interactive Federalism*, 56 EMORY L.J. 1, 18 (2006).

the European Union and the Council of Europe). European Union law started as a political vision, but its mandate has come together only piecemeal and through a process of trial and error.⁴⁴⁶ In a few words, its constitutional spirit lies in its process,⁴⁴⁷ with the CJEU pursuing the best solution in light of the EU project rather than the EU structure.⁴⁴⁸

Robert Schuman, the foreign minister of France who inspired the formation of the European Communities, prophesized that “Europe will not be built in a day, nor to an overall design.”⁴⁴⁹ A few years later, envisioning an integrative process and not simply a stable partnership with a long-lasting structure, the founding European Economic Community Treaty determined “to lay the foundations of an ever-closer union among the peoples of Europe.”⁴⁵⁰ This spirit sees European integration as a chain reaction,⁴⁵¹ with states deferring some of their powers to continental institutions with the expectation that this will trigger more devolution of state powers to the European Union.⁴⁵²

The evolutionary approach is even more apparent in the context of ECtHR case law. As we noticed earlier, the “living instrument” approach sees the ECtHR’s meaning and scope adapt with the changing needs of the society it serves. The ECtHR understands its jurisprudence as incremental, as it envisions a progressive⁴⁵³ “triumph of constitutionalism, rights and the rule of

446. Koen Lenaerts, *Interpretation and the Court of Justice: A Basis for Comparative Reflection*, 41 INT’L LAW. 1011, 1017 (2007).

447. Fikfak, *supra* note 47, at 7.

448. Koen Lenaerts & Jose A. Gutierrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, 20 COLUM. J. EUR. L. 3, 51 (2014).

449. *The Schuman Declaration – 9 May 1950*, EUROPA, http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm (last visited Dec. 29, 2016).

450. EEC Treaty.

451. Luigi Guiso, Paola Sapienza, & Luigi Zingales, *Monnet’s Error?*, Fall 2014 Brookings Panel on Economic Activity (Sept. 11–12, 2014), http://www.brookings.edu/~media/projects/bpea/fall-2014/fall2014bpea_guiso_sapienza_zingales.pdf.

452. *Id.*

453. Alastair Mowbray, *The Creativity of the European Court of Human Rights*, 5 HUM. RTS. L. REV. 57, 70 (2005).

law.”⁴⁵⁴ It sees international law and constitutionalism as a “continuing, but not linear, process of the gradual emergence and deliberate creation of constitutionalism elements in the international legal order,”⁴⁵⁵ which adds new human rights alongside older ones. Here, the dynamic is much more important than the structure.⁴⁵⁶

The U.S. legal culture does not need to accept these European views as a precondition to being inspired by European law. We already noticed that some distinct European patterns—like the idea that penal laws may put a social stigma on same-sex relations,⁴⁵⁷ the pan-European abolition of death penalty,⁴⁵⁸ or the mechanizations of the European Union at the state level⁴⁵⁹—can provide insight, or at least an interesting thought or idea, for the U.S. Supreme Court (despite the fact that U.S. and European constitutionalism stand on very different foundations). Ultimately, some ideas can be decontextualized and used in a foreign environment, but the importer must bear in mind their origin. As Professor Paolo Carozza puts it: “We cannot really compare two legal systems, or norms within them, without being conscious in the first instance of their differences.”⁴⁶⁰ If that notion is correct, it becomes even more demanding to draw inspiration from a different legal system in interpreting one’s own.

Overlooking important features in comparative law inquiries does not simply mean misusing comparative law and potentially altering the legal reasoning of a decision. It also enlists comparative law in ideological controversies about constitutional interpretation, creating a divide between progressively oriented scholars and judges, who will look to comparative law with the goal of changing their own law, and conservative judges, who will avoid considering foreign law due to its alleged irrelevancy and counterproductivity. This ideological connotation is not a

454. Jeffrey L. Dunoff et al., *Editorial: Hard Times: Progressive Narratives, Historical Contingency and the Fate of Global Constitutionalism*, 4 J. GLOBAL CONSTITUTIONALISM 11, 11–12 (2015).

455. *Id.*

456. For a discussion on the superiority of the process over the structure of change, see Riccardo Prandini, *The Future of Societal Constitutionalism in the Age of Acceleration*, 20 IND. J. GLOBAL LEGAL STUD. 731, 736 (2013).

457. See *supra* Part II.A.

458. See *supra* Part II.B.

459. See *supra* Part II.C.

460. Carozza, *supra* note 216, at 1233.

necessary implication of using foreign law.⁴⁶¹ *Norris's* idea of legal stigma upon homosexuals could have been more emphasized in *Lawrence*. In *Printz*, Justice Scalia could have rebutted Justice Breyer precisely by saying that the EU model of integration between national and supranational institutions is unique and lies on completely different foundations than the U.S. federalist system. Further, the European fight against the death penalty could have been used by both legions. Conservatives could have maintained that, even in Europe, the drivers of the death penalty's abolition were state legislatures. Progressive judges, on the other hand, could have stated up front that Europe challenges the very idea that capital punishment is permissible and directly tackled this issue. All these arguments are genuine interpretations of European legal culture; none of them is apocryphal.

B. Obergefell and the ECtHR's Case Law

Obergefell did not rely on foreign law, at least as far as one can detect from the wording of the decision. But, the Sixth Circuit decision in *DeBoer*,⁴⁶² which created the split that the U.S. Supreme Court resolved under *Obergefell*, drew from the ECtHR.⁴⁶³ The Sixth Circuit's ruling is instructive, as it shows that comparative law can be a genuine enterprise but requires elaboration in order to be helpful. On one hand, *DeBoer* pointed to the fact that the U.S. Supreme Court could not simply ignore the ECtHR's attitude toward same-sex marriage after it had given it some weight under other circumstances. On the other hand, the judgment did not clarify how the ECtHR's conclusion that the issue fell within the states' margin of appreciation⁴⁶⁴ resonated with the rest of the Sixth Circuit decision. In other words, Judge Sutton did not clarify whether the ECtHR's attitude toward same-sex marriage suggested that the issue should be left to the political branches of the states—which is the approach underpinning the decision he penned⁴⁶⁵—or that same-sex marriage was unquestionably not protected under the ECHR. The

461. Calabresi & Zimdahl, *supra* note 20, at 751.

462. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).

463. See *supra* Introduction.

464. *Id.*

465. Specifically, Judge Sutton stated: "Better in this instance, we think, to allow change through the customary political processes, in which the people, gay and straight alike, become the heroes of their own stories by meeting each

Sixth Circuit failed to draw conclusions from the depiction of the European approach, although it portrayed the approach quite accurately.

Overall, the Sixth Circuit opined that “foreign practice only reinforce[d] the impropriety of tinkering with the democratic process in this setting.”⁴⁶⁶ Certainly, the circuit court’s phrasing here may refer to a broader legal environment than that of the ECtHR. But, if this is also the court’s reading of ECtHR case law on the subject, then it is misplaced because the ECtHR does not counterbalance the democratic process of any European state, as it is not the ultimate form of legal redress in Europe.⁴⁶⁷ The ECtHR’s deferral to each country with respect to the issue of same-sex marriage did not necessarily place the decision in the hands of national parliaments. Different states balance their legislative and judicial powers differently.

The ECtHR’s line of decisions could have led the circuit court to think that the Europeans have different takes on same-sex marriage. But, then the circuit court should have also addressed the ECtHR’s specification that the states’ margin of appreciation in the field was “still . . . a wide [one]”⁴⁶⁸ and that states enjoyed discretion “in the timing of . . . legislative changes,”⁴⁶⁹ as the Sixth Circuit reported in its judgment. Such expressions lend themselves to the idea that the evolutionary approach of the ECtHR will, sooner rather than later, identify same-sex marriage as a right in the ECHR. This point, however, is missing in the Sixth Circuit decision. What the Sixth Circuit left in the penumbra must be brought to light in order to address this article’s initial question: “If the U.S. Supreme Court explored European legal culture in order to decide *Obergefell*,⁴⁷⁰ what would it have learned?”

other not as adversaries in a court system but as fellow citizens seeking to resolve a new social issue in a fair-minded way.” *DeBoer*, 772 F.3d at 421.

466. *Id.* at 417.

467. Gerards, *supra* note 207, at 22.

468. *Schalk & Kopf v. Austria*, 2010-IV Eur. Ct. H.R. 409, 436.

469. *Id.* at 438 (emphasis added).

470. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

At the time *Obergefell* was decided, the controlling ECtHR case law on same-sex relationships was *Schalk und Kopf v. Austria*.⁴⁷¹ In that decision, a section of the ECtHR decided that Austria's failure to provide protection for same-sex couples did not violate Article 12 of the ECHR, which states: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."⁴⁷²

The ECtHR acknowledged that the institution of marriage had undergone "major social changes since the adoption of the [ECHR]."⁴⁷³ But, there was "no European consensus regarding same-sex marriage" because "no more than six out of forty-seven Convention States"⁴⁷⁴ provided such protections at the time *Schalk und Kopf* was penned. The ECtHR acknowledged the necessity of being particularly prudent in developing its case law further, since "marriage has deep-rooted social and cultural connotations which may differ largely from one society to another."⁴⁷⁵ The ECtHR itself concluded that it could "not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society."⁴⁷⁶

The ECtHR also analyzed the applicability to the case of Article 8 of the ECHR, also in conjunction with Article 14, which forbids discrimination in the fields that are protected by the ECHR,⁴⁷⁷ and concluded that the ECtHR did not protect same-sex marriage, at least for the time being.⁴⁷⁸ It clarified that its case law protected same-sex relationships under the label of "private life," but it never acknowledged that they constituted

471. *Schalk & Kopf*, 2010-IV Eur. Ct. H.R. at 409. The judgment dealt with the issue of the legal recognition of same-sex partnerships, either as marriage or through alternative means.

472. ECHR, *supra* note 17, art. 12.

473. *Schalk & Kopf*, 2010-IV Eur. Ct. H.R. at 428.

474. *Id.*

475. *Id.* at 429.

476. *Id.*

477. "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." ECHR, *supra* note 17, art. 14.

478. *Schalk & Kopf*, 2010-IV Eur. Ct. H.R. at 436–37.

“family life.”⁴⁷⁹ Nevertheless, it noted a “rapid evolution of social attitudes towards same-sex couples” and pointed out that “a considerable number of member States” afforded some sort of legal recognition to homosexual couples.⁴⁸⁰ This provided a basis for the ECtHR to expand the scope of the protection of family life afforded by the ECHR to same-sex couples.⁴⁸¹

The acknowledgment that the “family life” umbrella also protected same-sex couples, however, did not provide direct legal entitlements, such as their legal recognition.⁴⁸² While the European community attempted to establish a consensus with respect to providing same-sex partnerships with some form of protection,⁴⁸³ the ECtHR stated:

[T]here is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes.⁴⁸⁴

Overall, *Schalk und Kopf* held that Austria did not violate the ECHR, but, more significantly, it did not, in any sense, narrow the states’ margin of discretion in dealing with these issues. That said, the decision marks a significant step in the recognition of same-sex families, despite the fact that, for the time being, the ECtHR found it more prudent to defer the process of recognition of same-sex relationships to the states.

After the *Schalk und Kopf* decision, the 2014 ECtHR case, *Hämäläinen v. Finland*, focused on whether marriage ends if one of the spouses changes his or her gender.⁴⁸⁵ In *Hämäläinen*, the ECtHR reinforced the idea that the European Union lacked a “consensus on allowing same-sex marriages,”⁴⁸⁶ and “reiterate[d]” that there was no obligation on Contracting States to grant same-sex couples access to marriage.”⁴⁸⁷

479. *Id.* at 435.

480. *Id.* at 436.

481. *Id.*

482. *Id.* at 438.

483. *Id.*

484. *Id.*

485. *Hämäläinen v. Finland*, 2014 Eur. Ct. H.R. 1, 5.

486. *Id.* at 19, ¶ 74.

487. *Id.* at 18–19, ¶ 71.

As a result of *Schalk und Kopf* and *Hämäläinen*, by the end of 2014, three conclusions could have been drawn by the U.S. Supreme Court with respect to the ECtHR's position on same-sex relationships. First, the ECHR protected same-sex relationships. Second, same-sex marriage, though protected, was not yet an ECHR right. Third, given the "social and cultural connotations"⁴⁸⁸ of marriage, states had a wide margin in deciding which kinds of protections they wanted to grant to such relationships and when to do it. At the time *Schalk und Kopf* and *Hämäläinen* were decided, it was the responsibility of the ECtHR to ensure adequate protections for same-sex couples, but it was up to the state to decide how and when to make it happen—either through the extension of the institution of marriage (or through using alternative solutions), the democratic process, or judicial review (*Schalk und Kopf* speaks about "national authorities,"⁴⁸⁹ not "legislatures"). These aspects could have informed the U.S. Supreme Court by shedding light on the status of family law in Europe and the concerns that surrounded it.

Of course, the U.S. Supreme Court could have gone beyond *Schalk und Kopf* and *Hämäläinen* by attempting to anticipate how the ECtHR would interpret the issue of same-sex relationships beyond 2014. The U.S. Supreme Court could have wondered if the growing European consensus that was still developing between 2010 and 2014, when *Schalk und Kopf* and *Hämäläinen* were decided, finally had become worthy of protection under the ECHR by the time *Obergefell* was written in 2015. But, the U.S. Supreme Court's guess of what the ECtHR would say on the topic beyond 2014 probably would have been exaggerated. The most consolidated jurisprudence of the ECtHR said that Europe was moving toward the legal recognition of same-sex relationships. But the pace, the breadth, and the means through which this would take place were largely in the hands of each state.

CONCLUSION

This article demonstrated that U.S. constitutionalism and comparative law can be reconciled. But, this cannot be done simply by pulling the U.S. Supreme Court into the global discourse through scattered citations that take foreign law out of

488. *Id.* at 16, ¶ 62.

489. *Id.*

context and that largely lack explanation for choosing one solution and leaving the others aside. The use of foreign sources cannot simply lend itself to selectiveness and be characterized by a normative attitude: these features are precisely the main criticisms against the utilization of foreign law by the hands of the court.

If engagement with comparative law is drawn out of this normative project, then it becomes a useful epistemological tool⁴⁹⁰—namely, as a means to better understand the case at hand. A better understanding of the facets of a controversy does not entail normative implications and is not characterized by selectiveness. It does not aim to look for a “better law”⁴⁹¹ but rather seeks a better understanding of the issues the court is called to judge. Since the U.S. Supreme Court’s purview cannot extend to the whole world, this effort surely will be plagued by incompleteness but not by selectiveness.

If the normative side of the global law project is abandoned, the U.S. Supreme Court will be free to simply ponder foreign legal reasoning and keep them in mind while adjudicating cases. The consideration of foreign legal thought will extend well beyond pure citations to explore the rationales behind the sources to which a court pays attention. Justice Breyer makes an interesting point in this regard, saying that the “[w]illingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from its birth has given a ‘decent respect to the opinions of mankind.’”⁴⁹²

But the mere citation of a decision, with no explanation of the reasoning that would support the U.S. Supreme Court’s arguments, does not really “respect” anyone’s “opinion.” The approach this article proposed, while decreasing the authority of foreign law, broadens the possibilities of inquiry. Since well-crafted and thoroughly understood concepts are what count, foreign decisions do not need to be cited for their holdings but for their reasoning. Dissenting opinions can be more persuasive than majorities; good observations can be found in contradictory foreign results.⁴⁹³ Foreign concepts do not become relevant because they are quoted or because some jurisdiction espoused them. They become persuasive only if they are well understood;

490. Hirschl, *supra* note 33, at 548.

491. *But see* Siems, *supra* note 392, at 119.

492. *Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting).

493. *See* Schauer, *supra* note 98, at 1944, 1947.

and it is only within the context in which they are deployed that they become meaningful. For the importing court, it is necessary to understand the context in which the citations were shaped in order to understand the concepts themselves. Then it takes an additional effort for the importing court to understand if they fit in the case at hand.

After all, if comparative law is a genuine, rational inquiry, then there is no reason to leave meaningful foreign concepts and concerns unexplored while judging.⁴⁹⁴ Rather, there is great reason to understand them for what they mean and entail.

494. Glendon, *supra* note 23.