Interpretation and the Court of Justice: A Basis for Comparative Reflection

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I. Introduction

Perhaps now more than ever, interpretation is the focal point through which the "judicial conversation" between the Court of Justice of the European Communities (the "Court of Justice" or the "Court") and the U.S. Supreme Court (the "Supreme Court") may prove to be most vibrant. This is because the sacred task, indeed the core function, of the judge in both the EU and the United States is the interpretation of law. That is to say, as squarely put by Chief Justice Marshall in *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is."[1] Thus, interpretation lies at the heart of the sound duty of the Court of Justice and the Supreme Court to uphold the rule of law and to ensure the fundamental objectives of their respective legal orders.[2]

As a starting point, it may be striking to note that although the term interpretation is not mentioned in Article III of the U.S. Constitution concerning the federal judicial branch, several provisions of the EC and EU Treaties have explicitly defined the term.[3]

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1. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

2. *See* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 247 (2002) (underscoring that the general objectives of the U.S. Constitution include: "(1) democratic self-government; (2) dispersion of power (avoiding concentration of too much power in too few hands); (3) individual dignity (through protection of individual liberties); (4) equality before the law (through equal protection of the law); and (5) the rule of law itself."). Compare the objectives of the EU legal order as set forth in the Treaties. *See, e.g.* Treaty on European Union art. 6(1), Dec. 29, 2006, 2006 O.J. (C 321 E) 5 [hereinafter EU Treaty] (providing that "[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."). *See also* Treaty Establishing the European Community art. 2-4, Dec. 29, 2006, 2006 O.J. (C 321 E) 37 [hereinafter EC Treaty] (describing the Community's objectives and activities); EU Treaty art. 2 (describing the Union's objectives); EC Treaty art. 5, 7 and EU Treaty art. 2 (concerning the conferral of powers on the Community and the European institutions).

3. It should be noted at the outset that references to the European Union (EU) and the European Community (EC) are not synonymous. At present, the EU comprises three pillars: (1) the three European Communities, which includes the EC, the European Atomic Energy Community (EAEC), and the now-expired

First and foremost, Article 220 of the EC Treaty states: "The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the *interpretation* and application of this Treaty the law is observed."[4] As seen below, this provision commands a preeminent place in the Court of Justice's interpretation of Community law and emanates throughout this discussion.

The word interpretation also appears in other provisions of the Treaties, namely those concerning the Court of Justice's preliminary ruling jurisdiction. Under the preliminary ruling procedure set down in Article 234 of the EC Treaty, the Court delivers preliminary rulings on the interpretation of Community law, as well as on the validity of Community acts, in response to requests made by the national courts.[5] An important distinction underlies this procedure between interpretation and application. Generally speaking, the interpretation of Community law lies with the Court of Justice, whereas the application of the Court's interpretation to the underlying national dispute lies with the national courts and includes interpreting national law and assessing the facts involved in the case.

Notably, this distinction beckons comparative reflection with the American case or controversy requirement enshrined in Article III of the U.S. Constitution. Both can be seen as falling within the rubric of jurisdictional matters since they serve to place limits on the jurisdiction of the Court of Justice and the American federal courts, including the Supreme Court. For example, similar to the Supreme Court's refusal to deliver advisory opinions and its elaboration of ripeness and mootness doctrines,[6] the Court of Justice has declared that it cannot deliver preliminary rulings where, *inter alia*: (1) the interpretation of Community law bears no relation to the actual facts of the national proceedings; (2) the problem is hypothetical; or (3) the Court has not been given the sufficient legal or factual materials so as to provide a useful answer to the national court.[7]

European Coal and Steel Community (ECSC); (2) the Common Foreign and Security Policy (CFSP); and (3) the Police and Judicial Cooperation in Criminal Matters (PJCCM). With the entry into force of the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 17, 2007, 2007 O.J. (C 306) 1 [hereinafter Lisbon Treaty], the pillar structure would disappear. This was also the case in relation to the Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) 1 [hereinafter Constitutional Treaty]. *See* KOEN LENAERTS & PIET VAN NUFFEL, CONSTITUTIONAL LAW OF THE EUROPEAN UNION § 4-007, at 71 (Robert Bray ed., 2d ed. 2005).

4. EC Treaty art. 220 (emphasis added). While the focus of this discussion is placed on the Court of Justice, for detailed discussion of the institution of the Court of Justice, which encompasses the Court of Justice, the Court of First Instance, and the newly created EU Civil Service Tribunal, *see generally* KOEN LENAERTS, DIRK ARTS & IGNACE MASELIS, PROCEDURAL LAW OF THE EUROPEAN UNION §§ 1-003 to -59, at 4-32 (Robert Bray ed., 2d ed. 2006).

5. Apart from Article 234 of the EC Treaty, however, there are specific provisions limiting the Court's preliminary ruling jurisdiction in the field of Title IV of the EC Treaty concerning visas, asylum, immigration, and other policies related to the free movement of persons under Article 68 of the EC Treaty and the third pillar of PJCCM under Article 35 of the EU Treaty, which would be eliminated with the entry into force of the Lisbon Treaty. *See* Lisbon Treaty, points 51, 67 (2007 O.J. (C 306) 1, at 37, 62); *see also* Annex to the Lisbon Treaty: Table of Equivalences Referred to in Article 5 of the Treaty of Lisbon, 2007 O.J. (C 306) 200, at 203, 209. In fact, there is already a proposal along these lines in relation to Article 68 of the EC Treaty. *See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the Court of Justice of the European Communities: Adaptation of the Provisions of Title IV of the Treaty Establishing the European Community Relating to the Jurisdiction of the Court of Justice with a View to Ensuring More Effective Judicial Protection*, COM (2006) 346 final (June 28, 2006).

6. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3-7, at 311-24 (3d ed. 2000).

7. *See* LENAERTS, ARTS & MASELIS, *supra* note 4, §§ 2-029 to -040, at 60-69.

Consequently, in the EU, the fundamental idea underlying the preliminary ruling procedure is that the Court of Justice delivers rulings on the interpretation of Community law that will be of use to the national courts. Framed another way, the Court's interpretation of Community law constitutes the means to achieve judgment and can thus be seen as the primary product in the outcome of the preliminary ruling procedure. In the United States, the limits underlying the case or controversy requirement are, in large part, related to the proper role of the judge in the American adversarial process, meaning that "[i]n part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."[8] Here, in contrast to the European context, interpretation is not so much a goal in itself but a means of equipping judges with what they need to decide the cases before them.

Part and parcel of its importance, however, interpretation lies at the heart of the most controversial aspects of the judicial function, whether it be: (1) "drawing lines"[9] both *horizontally* between the institutions at the Federal or Community level and *vertically* between the Federal or Community level and the constituent (Member) States, such as demonstrated by case law concerning pre-emption or the clear statement rule; (2) carrying out the task of judicial review, which injects tensions in extricating the judicial office from the political process;[10] or (3) delineating the relationship between constitutional interpretation and the use of foreign and international sources of law. As such, interpretation serves as the common ground on which the Court of Justice and the Supreme Court continue to grapple with similarly challenging issues.

In light of these remarks, this discussion is divided into four parts. First, a short overview of the principles and the methods of interpretation used by the Court of Justice will be provided. Second, the role of comparative, foreign, and international law in relation to interpretation will be explored from the European and American perspectives. Third, the reciprocal influence of European and American case law in the respective jurisprudence of the Supreme Court and the Court of Justice will be considered. Finally, the interplay between judicial interpretation and judicial lawmaking will be highlighted through the examination of European federal common law and its American counterpart. The discussion will incorporate several key examples taken from the recent case law of the Court of Justice, which will be used to illustrate the interpretative methods of the Court in greater detail and to illuminate many provocative issues for both the European and American audiences.

8. Flast v. Cohen, 392 U.S. 83, 95 (1968) (underscoring the dual limitation underlying this requirement that also embodies separation of powers concerns, such that "in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government").

9. This phrase is taken from Louis Henkin, *The Supreme Court, 1967 Term, Foreword: On Drawing Lines*, 82 HARV. L. REV. 63 (1968).

10. *See, e.g.*, MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, & JUDICIALIZATION 142 (2002) ("Constitutional judicial review has always been viewed as the most politically controversial power held by judges, precisely because its exercise obliterates boundaries that allegedly separate things 'political' from things 'judicial.'").

II. Principles and Methods of Interpretation of the Court of Justice

A. The Interpretative Background of the EU and the U.S. Compared

It is important to recognize from the outset that the EU and the United States approach interpretation differently. In the American setting, interpretative analysis very much depends upon the type of norm being interpreted. As is well-known, there are distinct modes of interpretation dedicated to U.S. constitutional interpretation, which, as a general matter, focus on the text, structure, history, ethos, and doctrine.[11] An equally long-established jurisprudence exists with regard to the Supreme Court's methodology for federal statutory interpretation, which encompasses a broad array of canons of statutory construction.[12]

This is not to say, however, that constitutional and statutory interpretation are unrelated given the notable interplay between the two in the American case law and legal literature.[13] In fact, the difference between constitutional interpretation and the canons of statutory interpretation does not appear to be as great as often thought in the United States, as well as in the EU, when one considers that all interpretation depends on the clarity of the text to be interpreted. Regardless of its rank, if the text is clear, then courts need not proceed further. Otherwise, further inquiry into the context and the purpose of the text is warranted, in which case the purpose must somehow be revealed by the text itself, not just by what has been said on the floor of Congress or amidst the debate by the Community legislator during the decision-making process.[14]

The interplay between statutory interpretation and rules of international law may be of special note, even if the hierarchy of norms is not the same in the EU as compared to the United States. In the American context where treaties and federal statutes are accorded equal rank, Supreme Court case law sets forth that "*[w]here fairly possible*, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."[15] In the European context, where rules ensuing from international agreements binding on the European Community rank higher than acts of the Community institutions, the Court of Justice has made clear that the provisions

11. *See generally* Tribe, *supra* note 6, §§1-11 to -17, at 30-89.

12. For a recent summary, *see* George Costello, *Statutory Interpretation: General Principles and Recent Trends*, Congressional Research Service Rep. 97-589 (updated March 30, 2006) (and citations therein).

13. For discussion of varying opinion on the relationship between theories of constitutional and statutory interpretation, *see* Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. Colo. L. Rev. 1 (2004). *Compare infra* note 36.

14. For example, in the European context, Article 253 of the EC Treaty requires, in relevant part, that Community regulations, directives, and decisions state the reasons on which they are based. *See* Lenaerts & Van Nuffel, *supra* note 3, § 17-109, at 759-60.

15. Restatement (Third) of Foreign Relations § 114 (1987) (emphasis added). For the principles guiding the interpretation of treaties and rules of international law more generally, *see id.* §§ 111-15. *But see* Sandra Day O'Connor, Keynote Address at the Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law, 96 Am. Soc'y Int'l L. Proc. 348, 350 (2002) ("The court on which I sit has held, for more than two hundred years, that acts of Congress should be construed to be consistent with international law, absent clear expression to the contrary. Somewhat surprisingly, however, this doctrine is rarely utilized in our court's contemporary jurisprudence.").

of such Community acts must, *so far as is possible*, be interpreted consistently with such agreements.[16]

In view of the foregoing aspects of the American framework, interpretative analysis has a different starting point in the EU. For one thing, there are no distinct approaches for the interpretation of primary Community law, such as the Treaties, as opposed to that of secondary Community law, such as directives, regulations, and other types of acts adopted by the European institutions.[17] Hence, the Court of Justice's principles and methods of interpretation apply generally to the interpretation of all forms of Community and Union law. Furthermore, as recognized in the *CILFIT* judgment, the Court's role to maintain the uniform application of Community law assumes center stage in the face of particular problems of interpretation endemic to the Community legal order, relating to: (1) the multi-lingual nature of Community law; (2) the use of peculiar terminology in Community law, which does not always coincide with similar terms found in the laws of the Member States; and (3) the assessment of provisions of Community law in light of the objectives of Community law as a whole and the state of its evolution at the time that the provision concerned is applied.[18]

An important distinction in the European context, however, lies between the overarching interpretative principle guiding the Court of Justice's approach, on the one hand, and the various methods, techniques, and sources used pursuant thereto, on the other.[19] This distinction is detailed further below.

B. THE COURT OF JUSTICE'S MANDATE UNDER ARTICLE 220 OF THE EC TREATY

The overarching principle guiding the Court of Justice's interpretative approach is found in Article 220 of the EC Treaty. As stated above, Article 220 provides that the institution of the Court of Justice "shall ensure that in the interpretation and application of this Treaty *the law* is observed".[20] It has been called "the most important provision of the Treaty"[21] because it constitutes the Court's overriding "*general mission statement*" in

16. *See* LENAERTS & VAN NUFFEL, *supra* note 3, § 17-092, at 740-41 (referring to Case C-61/94, Comm'n v. Germany, 1996 ECR. I-3989, ¶ 52; Case C-284/95, Safety Hi-Tech Srl. v. S. & T. Srl, 1998 ECR. I-4301, ¶ 22; Case C-341/95, Bettati v. Safety Hi-Tech Srl, 1998 ECR. I-4355, ¶ 20; Case T-256/97, BEUC v. Comm'n, 2000 ECR. II-101, ¶ ¶ 65-73). Since international agreements concluded by the Community are binding on the Member States, their provisions take precedence over national law, and thus, the Member States are required to "apply national rules *as far as possible* in the light of the wording and the purpose of such agreements"; in practice, however, it is quite rare for the Court of Justice to find that either a Community act or a national measure is incompatible with such an international agreement. *Id.* at 741 (and citations therein).

17. At present, no identical European counterpart to the federal statute in the United States exists, as secondary Community law can constitute either legislative (basic) acts or administrative (executive or implementing) acts. The Lisbon Treaty would, however, exact significant changes in this regard. *See* Lisbon Treaty, points 233-36 (2007 (C 306) 1, at 112-13).

18. Case 283/81, SrL CILFIT & Lanificio di Gavardo SpA v. Ministry of Health, 1982 ECR. 3415, ¶¶ 17-20.

19. Nial Fennelly, *Legal Interpretation at the European Court of Justice*, 20 FORDHAM INT'L L.J. 656, 662 (1997).

20. EC Treaty art. 220 (emphasis added). This provision has been retained in almost identical terms in Article 9F(1) of the Lisbon Treaty.

21. Takis Tridimas, *The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?*, *in* EUROPEAN UNION LAW FOR THE TWENTY-FIRST CENTURY: RETHINKING THE NEW LEGAL ORDER 113, 116 (Takis Tridimas & Paolisa Nebbia eds., 2004).

the interpretation of Community law so as to uphold the rule of law in all instances.[22] One should never lose sight that the Court's mandate under Article 220 to uphold the law radiates through all the methods of interpretation at its disposal.

C. THE COURT OF JUSTICE'S METHODS OF INTERPRETATION

The Court of Justice utilizes three primary methods of interpretation. First, literal interpretation looks to the text and wording of the law. Second, systematic interpretation denotes reference to the context of the law, for example, to its historical background and to its place in the system of the Treaties. Third, teleological interpretation, also called functional or purposive interpretation, constitutes the method by which the Court engages in the process of interpreting provisions of Community law by choosing "the interpretation which best serves the purpose for which the provision was made".[23]

In essence, the Court's methods of interpretation focus on text, context, and purpose. Indeed, it is well-settled that the interpretation of a provision of Community law predicates that its wording, context, and objectives must all be taken into account.[24] The Court of Justice made this clear very early on in the 1963 landmark judgment of *Van Gend & Loos* in which the Court of Justice looked to "the spirit, the general scheme and the wording" of the Treaty provision concerned in the course of establishing the principle of direct effect of Community law.[25] It should not be too surprising given this approach accords with Article 31(1) of the Vienna Convention on the Law of Treaties, which provides: "A treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of its *object* and *purpose*."[26]

However, in relation to Article 32 of the Vienna Convention, which allows recourse to the preparatory work (*travaux préparatoires*) of a treaty as a supplementary means of interpretation,[27] such preparatory work is not really used as an interpretative aid in cases concerning the interpretation of the Treaties, as opposed to cases concerning the

22. Koen Lenaerts & Kathleen Gutman, *"Federal Common Law" in the European Union: A Comparative Perspective from the United States*, 54 AM. J. COMP. L. 1, 14 (2006) (at the same time underscoring the limits of Article 220 of the EC Treaty that preclude overreaching by the Court of Justice).

23. HENRY G. SCHERMERS & DENIS F. WAELBROECK, JUDICIAL PROTECTION IN THE EUROPEAN UNION § 40, at 20-21 (6th ed. 2001). For general discussion of these methods of interpretation and their categorization, *see id.* §§ 20-52, at 10-27; ANTHONY ARNULL, THE EUROPEAN UNION AND ITS COURT OF JUSTICE 607-621 (2d ed. 2006); K.P.E. LASOK ET AL., JUDICIAL CONTROL IN THE EU: PROCEDURES AND PRINCIPLES 375-417 (2004). For comparative reflection on the methods of constitutional interpretation of the Supreme Court and the Court of Justice with particular regard to the teleological approach, *see* Michel Rosenfeld, *Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court*, 4 INT'L J. CONST. L. 618, 644-50 (2006).

24. *See, e.g.*, Case C-280/04, Jyske Finans A/S v. Skatteministeriet, 2005 ECR. I-10683, ¶ 34 (and citations therein). Importantly, this holds true for the extension of the interpretation of a provision of the Treaty to similarly or identically worded provisions of international agreements concluded by the Community. *See, e.g.*, Case 270/80, Polydor Ltd. v. Harlequin Records Shops Ltd., 1982 ECR. 329, ¶ 8; Case T-115/94, Opel Austria GmbH v. Council, 1997 ECR. II-39, ¶ 106.

25. Case 26/62, Van Gend & Loos v. Neth. Inland Revenue Admin., 1963 ECR. 1, at 12.

26. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (emphasis added).

27. *Id.* art. 32 ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a)

interpretation of secondary Community law in the EU.[28] Recent examples such as *easyCar*,[29] where the Court looked, albeit unsuccessfully, to the *travaux préparatoires* for the interpretation of a provision of Directive 97/7/EC on the protection of consumers in respect of distance contracts, illustrate the latter situation.[30]

D. The Court of Justice's Teleological Approach and "Constitutional" Interpretation

The teleological approach commands a prominent place in the Court of Justice's interpretative methods. It is particularly suited to the Community legal order for several reasons. To begin with, the structure of the Treaty itself is said to be "imbued by teleology,"[31] meaning the Treaty is designed along functional lines. It is structured with a view to the Community's achievement of the various objectives set forth in the Treaty, whether by way of the Preamble, the introductory provisions devoted to the Community's objectives and activities, or the articles concerning the various Community policies elaborated in Part III.

Moreover, the nature of the EC Treaty as a "*traité cadre*" means that the Treaty was drafted in general terms and designed to be incomplete and imprecise, leaving open various lacunae for the Court of Justice and the other European institutions to fill.[32] It should not escape notice that the U.S. Constitution has led to somewhat similar remarks particularly in light of the general phrasing of many of its provisions.[33] Chief Justice Marshall's seminal opinion in *McCulloch v. Maryland* is often invoked in this regard:

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution is not only to be inferred from the nature of the

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leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.")

28. *See* Lasok et al., *supra* note 23, §§ 670-72, at 388-90; Schermers & Waelbroeck, *supra* note 23, § 31, at 16. *Cf.* Arnull, *supra* note 23, at 614-15 (noting that this approach could be modified in the future, particularly in light of the documentation from the Convention on the Future of Europe in connection with the drafting of the Constitutional Treaty, which may inevitably be used by the Court as an aid in the interpretation of the Treaty). Given the identity of a whole range of provisions between the Lisbon Treaty and the Constitutional Treaty, this argument may still be relevant today.

29. Case C-336/03, easyCar (UK) Ltd. v. Office of Fair Trading, 2005 ECR. I-1947, ¶ 20.

30. Directive 97/7, 1997 O.J. (L 144) 19 (EC).

31. Takis Tridimas, *The Court of Justice and Judicial Activism*, 21 Eur. L. Rev. 199, 205 (1996). *See also* Arnull, *supra* note 23, at 612 (considering the teleological method as an "essential component of 'the European way'").

32. *See* Lenaerts & Gutman, *supra* note 22, at 11 (and citations therein).

33. *See, e.g.*, Martin Shapiro, *The European Court of Justice*, *in* The Evolution of EU Law 321, 332 (Paul Craig & Gráinne de Búrca eds., 1999) (explaining that "constitutions (or treaties) are usually vaguely and generally worded").

> instrument, but from the language. . . . In considering this question, then, we must never forget that it is a *constitution* we are expounding.[34]

Indeed, the final phrase of the above quotation has assumed an important position in the context of U.S. constitutional interpretation and the use of foreign and international law, particularly in relation to the Eighth Amendment. This was exemplified by Justice Scalia's dissenting opinion in *Thompson v. Oklahoma*:

> We must never forget that it is a Constitution for the United States of America that we are expounding. . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.[35]

In this way, Chief Justice Marshall's celebrated words serve to highlight the special nature of a constitution[36] and the fact that the Treaty can essentially be considered the constitution of the European Community in a substantive, functional sense.[37] Like the U.S. Constitution, the Treaty constitutes a compact among the Member States.[38] In fact, the functional equivalence between the Treaty and a constitution was recognized more than twenty years ago in *Les Verts*, in which the Court of Justice proclaimed the Treaty "the basic constitutional charter" of the European (then Economic) Community.[39] These famous words would be repeated in subsequent judgments through the present day.[40] As a

34. McCulloch v. Maryland, 17 U.S. 316, 407 (1819).

35. Thompson v. Oklahoma, 487 U.S. 815, 868-869 n.4 (1988) (Scalia, J., dissenting) (emphasis added). This was reiterated in *Atkins v. Virginia*, 536 U.S. 304, 347-48 (2002) (Scalia, J., dissenting). In *Thompson v. Oklahoma*, a plurality of the Supreme Court held that the Eighth and Fourteenth Amendments prohibited the imposition of the death penalty on persons under sixteen years of age at the time of their commission of a capital crime. In *Atkins*, the Supreme Court held that the Eighth Amendment prohibited the execution of mentally retarded criminals. The Eighth Amendment is certainly not the only context in which the expounding of a national constitution has been emphasized; obscenity law is another salient area in which this matter has arisen. *See* Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 158-61 (2005).

36. These words have had special reverberation in relation to the interpretation of the U.S. Constitution. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 732-33 (2005) (Stevens, J., dissenting) ("We serve our constitutional mandate by expounding the meaning of constitutional provisions with one eye toward our Nation's history and the other fixed on its democratic aspirations."). This is so, particularly with regard to highlighting the distinction between constitutional and statutory interpretation. *See, e.g.*, Oliver v. United States, 466 U.S. 170, 186-87 (1984) (Marshall, J., dissenting) ("We do not construe constitutional provisions of this sort the way we do statutes . . . Rather, we strive, when interpreting these seminal constitutional provisions, to effectuate their purposes – to lend them meanings that ensure that the liberties the Framers sought to protect are not undermined by the changing activities of government officials."); Verlinden v. Cent. Bank of Nig., 461 U.S. 480, 495 (1983) ("*It is a statute, not a Constitution, we are expounding.*") (citing Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 379 (1959)). *But see supra* notes 13 & 14 and accompanying text.

37. This point should be seen apart from the ongoing debate about the formal constitutionalization of the EU, a debate now provisionally closed with the signing of the Lisbon Treaty.

38. The academic scholarship is also indicative of such functional equivalence. *See, e.g.*, GEORGE A. BERMANN ET AL., TWO HUNDRED YEARS OF U.S. CONSTITUTION AND THIRTY YEARS OF EEC TREATY: OUTLOOK FOR A COMPARISON (Koen Lenaerts ed., 1988).

39. Case 294/83, Parti écologiste "Les Verts" v. Parliament, 1986 ECR. 1339, ¶ 23.

40. *See, e.g.*, Case T-306/01, Yusuf & Al Barakaat Int'l Found. v. Council & Comm'n, 2005 ECR. II-3533, ¶ 260; Case T-315/01, Kadi v. Council & Comm'n, 2005 ECR. II-3649, ¶ 289; Case C-15/00, Comm'n v. European Inv. Bank, 2003 ECR. I-7281, ¶ 75; T-236/00, Stauner v. Parliament & Comm'n, Order of Jan. 17,

result, it should not be surprising that it is within the context of the Court's teleological method that its explicit engagement in the "constitutional" interpretation of the Treaty has been illuminated.[41] With this overview in mind, further aspects concerning interpretation, as mentioned above, can now be explored.

III. Interpretation and the Role of Comparative, Foreign, and International Law

A. The American Context

As has been well-documented, the use of foreign and international law in the context of U.S. constitutional interpretation has become an increasingly controversial issue in American case law and legal scholarship.[42] At first glance, this issue is often portrayed as a stark dichotomy between recourse to and rejection of foreign and international legal materials. Upon closer examination, however, one may wonder whether these two positions are really so far apart once a clear distinction is made between the use of outside sources. On the one hand, judges may rely on outside sources of law for the interpretation of internal legal norms, which can be considered to exceed the bounds of judicial legitimacy, and, on the other, judges may look to such outside sources merely in an informative sense as a way of keeping the judge better informed, which can only lead to greater judicial cognizance of the interpretative practices used in the various judicial systems. Nonetheless, the issue has beckoned legislative responses in the form of the proposed Constitutional Restoration Act[43] and American Justice for American Citizens Act,[44] both of which seek to prevent American federal courts from looking to foreign and international law when interpreting

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2002, 2002 ECR. II-135, ¶ 50; Joined Case T-222/99, T-327/99 & T-329/99, Martinez v.Parliament, 2001 ECR. II-2823, ¶ 48; Case C-314/91, Weber v. Parliament, 1993 ECR. I-1093, ¶ 8; Case 2/88 Imm., J.J. Zwartveld, Order of July 13, 1990, 1990 ECR. I-3365, ¶ 16. *See also* Opinion 1/91, *Draft Agreement Relating to the Creation of the European Economic Area*, 1991 ECR. I-6079, ¶ 21.

41. *See* Schermers & Waelbroeck, *supra* note 23, § 40, at 21 (noting, amidst discussion of the teleological method, that:

> [T]he expression 'constitutional interpretation' may be used in order to stress that the Treaties, the Constitution of the Communities, are the basis for this interpretation. A legal order is developing out of the Constitution, and in its constitutional interpretation, the Court interprets that legal order as it has evolved and in such a way that it may fulfil its function most efficiently. The spirit and the purpose of the Constitution form the core of this interpretation.).

42. For a recent selection of publications (including further citations to the relevant legal literature and case law, as well as to extra-judicial writings and speeches by members of the U.S. Supreme Court), *see* Comment, *The Supreme Court – 2004 Term: The Debate Over Foreign Law in* Roper v. Simmons, 119 Harv. L. Rev. 103 (2005) [hereinafter 2004 Term]; Lori Fisler Damrosch & Bernard H. Oxman, Editors' Introduction, *Agora: The United States Constitution and International Law*, 98 Am. J. Int'l L. 42 (2004); Rex D. Glensy, *Which Countries Count?:* Lawrence v. Texas *and the Selection of Foreign Persuasive Authority*, 45 Va. Int'l L. 357 (2005); Mark Tushnet, *Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars*, 35 U. Balt. L. Rev. 299 (2006); Mark Tushnet, *When Is Knowing Less Better Than Knowing More? Unpacking the Controversy Over Supreme Court Reference to Non-U.S. Law*, 90 Minn. L. Rev. 1275 (2006).

43. Constitutional Restoration Act, S. 520, 109th Congress (2005); H.R. 1070, 109th Congress (2005). The 2005 House and Senate bills, which are identical to bills previously submitted in 2004, provide:

> In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency,

the U.S. Constitution. At present, however, these proposals have not been enacted into law and are languishing in committee.[45]

Importantly, as certain members of the Supreme Court have pointed out, this subject should be distinguished from the various contexts in which domestic legal questions directly implicate reference to foreign or international law, as in the interpretation of treaties at issue in the particular case and through references made in federal statutes or via domestic choice of law rules in the private international law sense.[46] With that said, this topic is perhaps uniquely suited for this discussion because it merits different perspectives from the European and American legal orders.

As a starting point, a note of clarification about terminology should be made. In the United States, reference to the use of comparative law is often considered synonymous with reference to the use of international and foreign law.[47] In this context, foreign law usually refers to the law of a foreign country, whereas international law denotes the law of international organizations and supranational bodies, such as the United Nations or the European Court of Human Rights,[48] which is charged with the interpretation of the Eu-

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other than English constitutional and common law up to the time of the adoption of the Constitution of the United States.

Constitutional Restoration Act §201. *See* Michael C. Dorf, *The Use of Foreign Law in American Constitutional Interpretation: A Revealing Colloquy Between Justices Scalia and Breyer*, *in* LITIGATION 2005, at 167, 170 (PLI Litig. & Admin. Practice, Course Handbook Series No. 736, 2005) *available at* http://writ.findlaw.com/dorf/20050119.html (discussing the purported unconstitutionality of the Act on separation-of-powers grounds).

44. American Justice for American Citizens Act, H.R. 1658, 109th Congress (2005). This bill provides:

> Neither the Supreme Court of the United States nor any lower Federal court shall, in the purported exercise of judicial power to interpret and apply the Constitution of the United States, employ the constitution, laws, administrative rules, executive orders, directives, policies, or judicial decisions of any international organization or foreign state, except for the English constitutional and common law or other sources of law relied upon by the Framers of the Constitution of the United States.

There have also been several legislative resolutions on the subject. *See* Glensy, *supra* note 42, at 358 n.3; 2004 Term, *supra* note 42, at 104 n.11.

45. The Library of Congress: THOMAS, http://thomas.loc.gov/home/bills_res.html (follow "Search Bill Summary, Status" hyperlink; then follow "109" hyperlink; then scroll to "Bill Number" under "Enter Search"; then Search "S.520") (last visited September 3, 2007); The Library of Congress: THOMAS, http://thomas.loc.gov/home/bills_res.html (follow "Search Bill Summary, Status" hyperlink; then follow "109" hyperlink; then scroll to "Bill Number" under "Enter Search"; then Search "H.R. 1070") (last visited September 3, 2007).

46. *See* Stephen Breyer, Keynote Address at the Proceedings of the Ninety-Seventh Annual Meeting of the American Society of International Law, *in* 97 AM. SOC'Y INT'L L. PROC. 265, 265 (2003); Antonin Scalia, Keynote Address at the Proceedings of the Ninety-Eighth Annual Meeting of the American Society of International Law: Foreign Legal Authority in the Federal Courts, *in* 98 AM. SOC'Y INT'L L. PROC. 305, 305-06 (2004). *See also* Young, *supra* note 35, at 149-50.

47. *See, e.g.*, Joan L. Larsen, *Importing Constitutional Norms From a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L. J. 1283, 1287 (2004). *But see* Breyer, *supra* note 46, at 267 (noting a blurring between what may be considered comparative law and public international law).

48. The Court of Justice, which is located in Luxembourg, should not be confused with the European Court of Human Rights, which is located in Strasbourg. *See* LENAERTS & VAN NUFFEL, *supra* note 3, § 2-004, at 25-26.

ropean Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on November 4, 1950.[49]

B. The Comparative Law Method in the EU

In the EU, reference to comparative law must be seen in a different light, namely as denoting reference to the laws of the Member States, which play a significant role in the Court's interpretation of Community law.[50] As a side note, it is worth mentioning that in certain cases, American law has found a place in the comparative method most often conducted by the Advocates General. For example, in the Opinion of Advocate General Jacobs in *Albany International*, given the novelty of the questions presented to the Court of Justice concerning the relationship between the Community competition (or antitrust) rules and collective bargaining agreements, the Advocate General found it helpful to engage in comparative review of the antitrust laws of the Member States *and* of the United States to see how they dealt with the problem.[51]

In fact, certain provisions of the Treaties explicitly call for recourse to the principles, rules, and laws common to the Member States.[52] The second paragraph of Article 288 of the EC Treaty provides that the Community's non-contractual liability shall be based on "*the general principles common to the laws of the Member States*".[53] Likewise, Article 6(2) of the EU Treaty provides that the Union "shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . and as they result from *the constitutional traditions common to the Member States*, as general principles of Community law."[54] Notably, this latter provision is itself the result of the Court's case law that looked to the common constitutional traditions of the Member States, as well as to the ECHR and other European and international conventions, in recognition of fundamental rights in the Union legal order, which first appeared by way of Article F of the 1992 Maastricht Treaty[55] and is now Article 6(2) of the EU Treaty.

The *Hauer* case serves as a quintessential example, as the Court surveyed the constitutional rules and practices of the then nine Member States in the course of its elaboration of the right to property in the EU.[56] There, the Court also stressed that relevant provisions of the ECHR reflected the Member States' common constitutional traditions con-

49. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

50. *See* Koen Lenaerts, *Interlocking Legal Orders in the European Union and Comparative Law*, 52 Int'l & Comp. L. Q. 873, 873 (2003).

51. Opinion of Advocate General Jacobs in Case C-67/96, Albany Int'l BV v. Stichting Bedrijfspensioenfonds Textielindustrie, 1999 ECR. I-5751; Joined Cases C-115/97, C-116/97 & C-117/97, Brentjens' Handelsonderneming BV v. Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen, 1999 ECR. I-6025; Case C-219/97, Maatschappij Drijvende Bokken BV v. Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven, 1999 ECR. I-6121, ¶¶ 79-111.

52. For discussion of these provisions and their role in relation to the comparative method of the Court, *see* Lenaerts, *supra* note 50, at 877-78, 887-93. For their significance in relation to European federal common law, *see* Lenaerts & Gutman, *supra* note 22, at 14-19, 78-96.

53. EC Treaty art. 288, para. 2. (emphasis added).

54. EU Treaty art. 6(2) (emphasis added).

55. *See* Treaty on European Union art. F(2), July 29, 1992, 1992 O.J. (C 191) 1.

56. Case 44/79, Hauer v. Land Rheinland-Pfalz, 1979 ECR. 3727, ¶ ¶ 17-22.

cerning the right to property.[57] Indeed, the full import and impact of Article 6(2) of the EU Treaty, together with Article 46 of the EU Treaty,[58] means that the Court of Justice looks to the ECHR in its entirety, not just picking and choosing among its provisions but instead taking account of the whole, including all of the European Court of Human Rights case law interpreting its provisions. The recent *Family Reunification* case proves a remarkable example in this regard.[59]

C. The Family Reunification Case

In *European Parliament v. Council*, also known as the *Family Reunification* case,[60] the European Parliament brought an action against the Council to annul three provisions of Council Directive 2003/86/EC on the right to family reunification.[61] This directive provides that any third-country national lawfully residing in the Community is entitled to have the host Member State where such national is residing approve the subsequent entry and residence of his or her family members, namely the spouse and children, by way of family reunification.[62] The three provisions contested by the European Parliament allow the Member States to derogate from the directive, thereby restricting family reunification in certain cases where the children concerned are over twelve years old[63] or over fifteen years old[64] and imposing certain waiting periods before the family members are able to join the third-country national.[65]

The European Parliament argued that these provisions did not respect fundamental rights, namely the fundamental right to respect for family life and the right to non-discrimination as guaranteed by Articles 8 and 14 of the ECHR and the common constitutional traditions of the Member States.[66] In doing so, the Parliament drew attention to the comparable provisions of the Charter of Fundamental Rights of the European Union (the "Charter") even though it does not yet have binding legal effect.[67] In fact, the direc-

57. *Id.* ¶ 17.

58. Under Article 46(d) of the EU Treaty, the Court is to ensure that Article 6(2) of the EU Treaty is applied "with regard to action of the institutions, in so far as [it] has jurisdiction" under the EC and EU Treaties (as well as under the EAEC and now-expired ECSC Treaties).

59. Case C-540/03, Parliament v. Council ("Family Reunification"), 2006 ECR. I-5769.

60. *Id.* For detailed discussion of the case, *see, e.g.*, Anthony Arnull, *Family Reunification and Fundamental Rights*, 31 Eur. L. Rev. 611 (2006).

61. Council Directive 2003/86 on the right to family reunification, 2003 O.J. (L 251) 12 (EC).

62. Opinion of Advocate General Kokott in Case C-540/03, Family Reunification, 2006 ECR. I-5769, ¶ 2. Despite its title, the directive does not concern family reunification as a general matter, but only in relation to the rights of families none of whose members is a European Union citizen. *Id.* ¶ 1.

63. *See* Council Directive 2003/86, *supra* note 61, art. 4(1), final subpara.

64. *See id.* art. 4(6).

65. *See id.* art. 8.

66. Case C-540/03, Family Reunification, ¶ ¶ 30-32.

67. *See id.* ¶ ¶ 31-32 (referring to the Charter of Fundamental Rights of the European Union, proclaimed in Nice on Dec. 7, 2000, 2000 O.J. (C 364) 1). The Charter would become binding with the entry into force of the Lisbon Treaty. *See* Lisbon Treaty art. 6(1); Declaration (No. 1) concerning the Charter of Fundamental Rights of the European Union annexed to the Final Act, Dec. 17, 2007, 2007 O.J. (C 306) 229, at 247. Under the Lisbon Treaty, the text of the Charter has not been included in the Treaties, but has been published separately, with the explanatory notes, in the Official Journal: *see* Dec. 14, 2007, 2007 O.J. (C 303) 1.

tive explicitly referred to the Charter in its preamble.[68] The Parliament also referred to relevant provisions of several international conventions concluded under the auspices of the United Nations, including the International Covenant on Civil and Political Rights and the International Convention on the Rights of the Child.[69]

In response, the Court of Justice rejected the Parliament's arguments and held that the provisions of the directive did not violate either the fundamental right to respect for family life or the principle of non-discrimination.[70] The Court began by underscoring the role of the comparative method and international law in ensuring respect for fundamental rights as general principles of law and against which the directive's legality would be reviewed: "the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories."[71] The Court underlined the "special significance"[72] of the ECHR in this respect, and it also paid heed to the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child as international instruments of which the Court takes account in applying the general principles of Community law.[73]

Moreover, for the first time, the Court highlighted the importance of the Charter, emphasizing that although it was not binding, its principal aim was:

> to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court . . . and of the European Court of Human Rights.'[74]

The Court then proceeded to assess the compatibility of the contested provisions of the directive by looking to several judgments of the European Court of Human Rights concerning the right to respect for family life as set out in Article 8 of the ECHR.[75] As a

68. The directive explicitly stated that it sought to ensure respect for fundamental rights and observe the principles recognized particularly in Article 8 of the ECHR and in the Charter of Fundamental Rights of the European Union. *See* Council Directive 2003/86, *supra* note 61, second recital.

69. *See* Case C-540/03, Family Reunification, ¶ 33. For further discussion of these and related international and European conventions in the field, *see* Opinion of Advocate General Kokott in Case C-540/03, Family Reunification, ¶ ¶ 18-30.

70. Case C-540/03, Family Reunification, ¶ ¶ 76, 90, 103, 109.

71. *Id.* ¶ 35.

72. *Id.*

73. *Id.* ¶ 37.

74. *Id.* ¶ 38 (citing the Preamble of the Charter). The significance of the Court's reference to the Charter in this judgment has not been missed and has in fact prompted further discussion about the function of the Charter in the Court's interpretation and recognition of fundamental rights. *See* Opinion of Advocate General Poiares Maduro in Case C-305/05, Ordre des barreaux francophones et germanophone v. Council, judgment of June 26, 2007, not yet reported, *available at* http://www.curia.europa.eu/en/transitpage.htm (follow "Case-law: search form" hyperlink; then search "Case number" for "C-305/05"), ¶ 48; Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-303/05, Advocaten voor de Wereld VZW v. Leden van de Ministerraad, judgment of May 3, 2007, not yet reported, *available at* http://www.curia.europa.eu/en/transitpage.htm (follow "Case-law: search form" hyperlink; then search "case number" for " C-303/05"), ¶ ¶ 78-79. The provisions of the Charter concerning its scope and interpretation are instructive in this regard. *See* Article 52 of the Charter.

75. *See* Case C-540/03, Family Reunification, ¶¶ 54-56, 65.

result, this case stands as an important example of the Court's interpretation of provisions of a Community measure in conformity with international law and the case law of the European Court of Human Rights.[76]

IV. Reciprocal Influence of European and American Case Law

A. The Influence of European Case Law in the Jurisprudence of the U.S. Supreme Court

Related to the foregoing remarks concerning the interplay between interpretation and comparative, foreign, and international law is the specific examination of the role played by the case law of the Court of Justice and the Supreme Court in each other's respective jurisprudence. In extra-judicial statements, certain members of the Supreme Court, such as Justice Breyer and now-retired Justice O'Connor, have expressed their willingness to refer to case law of the Court of Justice.[77] Nevertheless, explicit reference to case law of the Court of Justice in the Supreme Court opinions remains extremely rare.

In fact, only one such reference has occurred to date, and it involved a judgment of the Court of First Instance (CFI), not the Court of Justice. This reference occurred in the Supreme Court's 2004 ruling in *Intel Corp. v. Advanced Micro Devices, Inc.*[78] The case concerned the scope of a federal district court's powers under a federal statute[79] permitting domestic discovery for use in foreign legal proceedings. Briefly, Advanced Micro Devices Inc. (AMD) lodged a competition complaint with the European Commission against a competitor, Intel Corporation (Intel). Then, based on this complaint, AMD applied to a U.S. district court for an order requiring Intel to produce certain documents pursuant to this federal statute.[80] Accordingly, the issue presented by this case was whether the federal statute permitted such discovery.

The Supreme Court held that the federal statute did permit such discovery.[81] Among other things, it ruled that the European Commission was a "foreign or international tribunal" for the purposes of the statute when it acted as a "first-instance decisionmaker."[82] In

76. To be clear, at present, neither the Union nor the Community, as such, is party to the ECHR and hence is not directly subject to the review mechanism of the European Court of Human Rights; yet, the Court of Justice still "pays the greatest heed" to the case law of the European Court of Human Rights: Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-466/00, Kaba v. Sec'y of State for the Home Dep't, 2003 ECR. I-2219, ¶ 89 (and further citations therein). This would change with the entry into force of the Lisbon Treaty. *See* Lisbon Treaty art. 6(2).

77. *See* Anne-Marie Slaughter, *Judicial Globalization*, 40 Va. J. Int'l L. 1103, 1119 (2000) ("Following a day-long exchange of views with ECJ members and the opportunity to attend a hearing, both Justice O'Connor and Justice Breyer noted their willingness to consult ECJ decisions 'and perhaps use them and cite them in future decisions.'") (citing Elizabeth Greathouse, *Justices See Joint Issues with the EU*, Wash. Post, July 9, 1998, at A24); Glensy, *supra* note 42, at 398 (noting that Justice O'Connor stated that "she was in favor of the U.S. Supreme Court citing decisions of the European Court of Justice").

78. Intel Corp v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).

79. 28 U.S.C. § 1782(a) (2005).

80. *Intel Corp.*, 542 U.S. at 246.

81. *Id.* at 241.

82. *Id.* at 257-58. *Cf. id.* at 270-72 (Breyer, J., dissenting). Of further note, the Court set forth certain factors to guide the district courts in assessing whether the discovery sought in individual cases would be appropriate. *See id.* at 264-67. In a recent application of these factors in *In re Microsoft Corp.*, amidst discussion of the fourth factor, the district court explicitly cited a judgment of the CFI, Case T-210/01, Gen. Elec.

the course of its examination of the Commission's enforcement of the Community competition rules, the Court referred to the CFI's 2000 ruling in *Stork Amsterdam BV v. Commission*, which confirmed that the Commission's formal written decision of either declining to pursue a competition complaint against an undertaking or finding that there was an infringement of the Community competition rules was subject to judicial review by the CFI and, ultimately, by way of appeal to the Court of Justice.[83]

Beyond this case, it may be surprising that in the well-known Supreme Court case law concerning the use of international and foreign law in relation to the interpretation of the U.S. Constitution, especially in those cases involving federalism, homosexual relations, and the death penalty, there has been no citations to any judgments of the Court of Justice, despite various references to European law and practice, as seen below.

1. *"Comparative Federalism" Cases: Printz and Morrison*

Justice Breyer's dissenting opinion in *Printz v. United* States contains perhaps one of the most well-known references to the EU.[84] Justice Breyer opened his dissent by directing his attention to other legal systems, particularly that of the EU, which he noted could serve to "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."[85] In this context, Justice Breyer explicitly referred to several scholarly articles, two of which were written by present and former Judges of the Court of Justice, but not to any of the Court's case law.[86]

Likewise, another case that is often mentioned in this regard is *United States v. Morrison*[87]. In another dissenting opinion, Justice Breyer cited Article 5 of the EC Treaty[88] and the publications of two scholars in connection with the application of the principle of subsidiarity in the American context.[89] Justice Breyer did not, however, cite any case law of the Court of Justice therein.

Co. v. Comm'n, 2005 ECR. II-5575, ¶ 650. *See In re Microsoft Corp.*, 428 F. Supp. 2d 188, 196 (S.D.N.Y. 2006).

83. *Intel Corp.*, 542 U.S. at 254-55 (citing Case T-241/97, Stork Amsterdam BV v. Comm'n, 2000 ECR. II-309).

84. Printz v. United States, 521 U.S. 898 (1997). In this case, the Court struck down interim provisions of the Brady Handgun Violence Prevention Act, requiring state law enforcement officers to conduct background checks on prospective gun purchasers and to accept completed handgun-applicant statements from firearms dealers, as imposing unconstitutional obligations on state officers to execute federal laws in violation of the Tenth Amendment.

85. *Id.* at 977 (Breyer, J., dissenting). For the Court's response, *see id.* at 921 n. 11 (majority opinion).

86. *See id.* at 976-77 (Breyer, J., dissenting) (citing Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205 (1990) and Lord Mackenzie-Stuart, *Foreword* to COMPARATIVE CONSTITUTIONAL FEDERALISM: EUROPE AND AMERICA, at ix (Mark Tushnet ed., 1990)).

87. United States v. Morrison, 529 U.S. 598 (2000). In this case, the Court struck down the civil remedy provisions of the Violence Against Women Act (VAWA) as outside Congress's powers under the Interstate Commerce Clause and the enforcement clause of the Fourteenth Amendment.

88. The principle of subsidiarity is enshrined in the second paragraph of Article 5 of the EC Treaty.

89. *See Morrison*, 529 U.S. at 663 (Breyer, J., dissenting).

2. Lawrence v. Texas *and the Death Penalty Cases*

Supreme Court opinions dealing with the death penalty in relation to the Eighth Amendment and homosexual relations in relation to the Due Process Clause of the Fourteenth Amendment have contained ample discussion of the amicus curiae briefs submitted by the EU and the case law of the European Court of Human Rights, but again, no case law of the Court of Justice was mentioned.

In *Lawrence v. Texas*,[90] specifically in the context of overruling *Bowers v. Hardwick*,[91] the Supreme Court referred to several decisions of the European Court of Human Rights, which were used to disprove the claim that *Bowers* accorded with the views of "Western civilization."[92] In particular, the Supreme Court cited certain pages of the *amicus curiae* brief submitted by several human rights organizations, which referred to case law of the European Court of Human Rights concerning Article 8 of the ECHR and decisions of the U.N. Human Rights Committee interpreting Article 17 of the International Covenant on Civil and Political Rights.[93] This amicus brief also paid specific attention to the EU, both in connection with Article 13 of the EC Treaty (and Community legislation adopted thereunder) and the Charter of Fundamental Rights of the European Union, although these pages were not mentioned in the Supreme Court's opinion.[94]

Furthermore, in a string of death penalty cases concerning the interpretation of the Eighth Amendment of the U.S. Constitution,[95] *amicus curiae* briefs submitted by the EU have played an important, albeit somewhat controversial, role.[96] For example, in his concurring opinion in *Kansas v. Marsh*,[97] Justice Scalia noted that, "[t]he European Union advocates against the death-penalty even *in America*; there is a separate death-penalty page on the website of the Delegation of the European Commission to the U.S.A." and "[t]he views of the European Union have been relied upon by Justices of this Court (including all four dissenters today[98]) in narrowing the power of the American people to impose capital

90. 539 U.S. 558 (2003). In this case, the Court overruled its previous decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and held that a Texas statute making it a crime for persons of the same sex to engage in certain intimate sexual conduct was unconstitutional, as applied to two adult males who had engaged in homosexual sodomy in the privacy of the home, because it impinged upon the exercise of liberty interests protected by the Due Process Clause of the Fourteenth Amendment.

91. 478 U.S. at 186.

92. *See Lawrence*, 539 U.S. at 571-77.

93. *See id.* at 576-77 (citing Brief for Mary Robinson et al. as Amici Curiae, at 11-12). As an interesting side note, the Court of Justice also examined these two provisions in the *Family Reunification* case. *See* Case C-540/03, Family Reunification, pt. III.C.

94. *See* Brief of Mary Robinson et al. as Amici Curiae in Support of Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 164151, at *24, *24 n.43, *29 n.63.

95. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

96. This should not be taken to mean that the death penalty cases constitute the only area in which the European Union has filed amicus briefs as part of the Supreme Court proceedings. Indeed, another issue prompting the submission of such briefs concerns state business and tax laws. *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 382-83 (2000); Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298, 327 n.29 (1994); Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 203 n.4 (1983) (Powell, J., dissenting).

97. 548 U.S. 163 (2006). In this case, the Supreme Court held that the Kansas death penalty statute did not violate the Eighth Amendment.

98. Justices Stevens, Souter, Ginsburg, and Breyer dissented.

punishment," thereby referring to the Supreme Court's opinion in *Atkins v. Virginia*, which cited, "for the views of 'the world community,' the Brief for the European Union as *Amicus Curiae*."[99]

In addition, in *Roper v. Simmons*,[100] the Court cited the *amicus curiae* brief submitted by the EU, among others, in its recognition that Article 37 of the U.N. Convention on the Rights of the Child—which has been ratified by the vast majority of countries, including all Member States of the EU, but not the United States—contained an express prohibition against imposing the death penalty on persons under eighteen.[101] To date, however, explicit reference to case law of the Court of Justice remains exceptional in the Supreme Court's jurisprudence.

B. The Influence of U.S. Supreme Court Case Law in the Jurisprudence of the Court of Justice

Similarly, the jurisprudence of the Court of Justice, including that of the CFI, rarely references American case law, and when it does, its usage is primarily confined to the parties' arguments in a particular case[102] (or as in one case, in the national court's considerations leading it to submit a preliminary ruling request to the Court of Justice)[103] as opposed to comprising part of the legal reasoning or findings of the Court. By way of comparison, the extent to which the opinions of the Advocates General refer to Supreme Court and lower U.S. federal court case law on a wide variety of matters is striking. Recent examples can be drawn from the following areas concerning: the partial annulment of a Community measure;[104] Article 95 of the EC Treaty and public health objectives;[105] the Fifth Amendment of the U.S. Constitution;[106] lawyer-client confidentiality;[107] sex-dis-

99. *Marsh*, 126 S. Ct. at 2532 n.3 (Scalia, J., concurring) (citing Atkins v. Virginia 536 U.S. 304, 317 n.21 (2002)). For further discussion of the *Atkins* case, *see supra* note 35.

100. Roper v. Simmons, 543 U.S. 551 (2005). In this case, the Supreme Court held that the Eighth and Fourteenth Amendments prohibited the imposition of the death penalty on offenders who were under the age of eighteen at the time they committed their crime, abrogating *Stanford v. Kentucky*, 492 U.S. 361 (1989), which allowed the execution of offenders older than fifteen but younger than eighteen at the time of their commission of a capital crime.

101. *Roper*, 543 U.S. at 576 (referring to other international conventions in this regard).

102. *See, e.g.*, Case C-321/95 P, Stichting Greenpeace Council (Greenpeace Int'l) v. Comm'n, 1998 ECR. I-1651, ¶ 50.

103. *See* Case C-453/99, Courage Ltd. v. Crehan, 2001 ECR. I-6297, ¶ 13.

104. *See, e.g.*, Opinion of Advocate General Fennelly in Case C-376/98, Germany v. Parliament & Council ("Tobacco Advertising"), 2000 ECR. I-8419, & Case C-74/99, Queen v. Sec'y of State for Health, ex parte: Imperial Tobacco Ltd., 2000 ECR. I-8599, ¶ 126.

105. *See, e.g.*, Opinion of Advocate General Geelhoed in Case C-491/01, Queen v. Sec'y of State for Health, ex parte: British Am. Tobacco Invs. Ltd. ("BAT"), 2002 ECR. I-11453, ¶ 108.

106. *See, e.g.*, Opinion of Advocate General Sharpston in Case C-467/04, Criminal Proceedings Against Gasparini, 2006 ECR. I-9199, ¶ 72.

107. *See, e.g.*, Opinion of Advocate General Poiares Maduro in Case C-305/05, Ordre des barreaux francophones et germanophone v. Council, judgment of June 26, 2007, not yet reported, *available at* http://www.curia.europa.eu/en/transitpage.htm (follow "Case-law: search form" hyperlink; then search "Case number" for "C-305/05"), ¶ 71 n. 54.

crimination;[108] other constitutional-related issues;[109] the Brussels Convention;[110] intellectual property law;[111] and competition law.[112]

In light of the function of the Advocate General in the EU, it may not be surprising that Supreme Court case law generally appears more often in the opinions of the Advocates General than in the Court of Justice's judgments themselves. Under the Treaty,[113] Advocate Generals have a duty to bring to the Court's attention all aspects of the case in order for the Court to deliver its judgment, which includes providing a comprehensive overview and evaluation of the relevant issues and arguments and making a submission as to how the case should be resolved.[114] As such, the opinion of the Advocate General has been considered somewhat akin to serving the function of dissenting or concurring opinions as found in the United States, albeit with certain differences stemming from the particular role of the Advocate General in the Community legal order.[115] The Advocate General's opinion is all the more important because unlike the Supreme Court, the Court of Justice often does not have any lower court record to work with, except for cases involving appeals from the CFI, and it has a much larger docket without any *certiorari* procedure.[116] In any event, the Court of Justice and the Supreme Court do share the occasion of grappling with similar issues related to European and American federal common law, which leads to the final topic of this discussion.[117]

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108. *See, e.g.*, Opinion of Advocate General Jacobs in Case C-227/04 P, Lindorfer v. Council, judgment of Sept. 11, 2007, not yet reported, *available at* http://www.curia.europa.eu/en/transitpage.htm (follow "Case-law: search form" hyperlink; then search "Case number" for "C-227/04 P"), ¶¶ 57-58. To avoid confusion, it should be noted that this Opinion was delivered on Oct. 27, 2005. Advocate General Sharpston delivered a second opinion on Nov. 30, 2006.

109. *See, e.g.*, Opinion of Advocate General Poiares Maduro in Case C-41/02, Comm'n v. Neth., 2004 ECR. I-11375, ¶ 34 n.54.

110. *See, e.g.*, Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-159/02, Turner v. Grovit, 2004 ECR. I-3565, ¶ 34 n.13; for reference to an opinion of a lower federal court, *see id.* ¶ 33.

111. *See, e.g.*, Opinion of Advocate General Léger in Case C-104/01, Libertel Groep BV v. Benelux-Merkenbureau, 2003 ECR. I-03793, ¶ 94.

112. *See, e.g.*, Opinion of Advocate General Poiares Maduro in Joined Cases C-94/04, Cipolla v. Fazari (née Portolese) & Case C-202/04, Macrino & Capodarte v. Meloni, 2006 ECR. I-11421, ¶ 36; Opinion of Advocate General Jacobs in Case C-53/03, Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) v. GlaxoSmithKline plc, 2005 ECR. I-4609, ¶ 68; *see also supra* text accompanying note 51.

113. Article 222 of the EC Treaty states: "It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice, require his involvement."

114. For detailed discussion of the Advocate General's function in the European Union, *see* Cyril Ritter, *A New Look at the Role and Impact of Advocates-General—Collectively and Individually*, 12 COLUM. J. EUR. L. 751 (2006) (and further citations therein).

115. *See* Rosenfeld, *supra* note 23, at 634-44.

116. By virtue of the judicial reforms introduced by the Nice Treaty, however, the Court of Justice has been able to streamline the preliminary rulings that have the greatest bearing for the unity of European law to the Grand Chamber comprised of thirteen judges, while relegating others to the Chambers of either five or three judges. *See* Koen Lenaerts, *The Unity of European Law and the Overload of the ECJ—The System of Preliminary Rulings Revisited*, *in* 1 THE GLOBAL COMMUNITY - YEARBOOK OF INTERNATIONAL LAW & JURISPRUDENCE-2005 173 (2006).

117. *See generally* Lenaerts & Gutman, *supra* note 22.

V. European Federal Common Law

European federal common law brings to light the fine line between judicial interpretation and judicial lawmaking and is, therefore, a subject that continues to command sensitivity in the European Union very much like its American counterpart.[118] Regrettably, it is not possible to delve into all the aspects concerning the emergence and the development of European federal common law without exceeding the ambit of this discussion. Indeed, the definition and the analysis of European federal common law are greatly indebted to the tremendous American jurisprudence and scholarly literature on the subject.[119] And there are certainly a great many cases of European federal common law that could be mentioned, such as those concerning the Community's non-contractual (or tort) liability or those establishing the principle of State liability,[120] which has recently been augmented in relation to the liability of the highest courts of the Member States.[121] Be that as it may, for the purposes of this discussion, the focus centers on the following key issues, which may prove most illuminating for the American perspective: (1) the definition of European federal common law and its "hard core"; (2) key examples taken from the case law of the Court of Justice in the family and property law fields; and (3) the fundamental tensions underlying European and American federal common law.

A. The Definition of European Federal Common Law and its "Hard Core"

At the outset, European federal common law can be defined as "*Union and Community concepts, principles and rules of decision formulated by the Court of Justice that are not clearly suggested from the face of a provision of primary or secondary Community law.*"[122] Three important points follow from this definition.

First, this definition is a functional one.[123] It "essentially envisions European 'federal common law' as gap-filling *sensu lato*," meaning that "it transcends the mere filling-in of missing terms and concepts in a provision of Union or Community legislation, and in fact embodies the notion of filling all gaps that may be considered to preclude the achievement of the objectives of the Union legal order."[124]

Second, the distinction between judicial interpretation and judicial lawmaking is just as difficult to discern in the EU as in the United States, perhaps even more so for the following reasons. For one thing, until recently, the Court of Justice's federal common lawmaking had been essentially submerged within the analysis of its methods of interpretation, particularly its teleological approach discussed above.[125] Additionally, the Court's lawmaking often takes place within the context of its preliminary ruling jurisdiction.[126] This serves to demonstrate that judicial interpretation and judicial lawmaking are very much

118. *Id.* at 8-9, 33-35.
119. *Id.* at 8, 119.
120. *See id.* pt.V.B.1, at 78-96.
121. *See* Case C-173/03, Traghetti del Mediterraneo SpA v. Italy, 2006 ECR. I-5177.
122. Lenaerts & Gutman, *supra* note 22, at 7.
123. *Id.*
124. *Id.*
125. *Id.* at 8.
126. *Id.* at 9.

interrelated in the EU, since it is often through the Court's interpretation of a provision of Community law that the need for judicial lawmaking arises.[127]

Third, this definition brings to light what can be called the "hard core" of European federal common law.[128] This denotes the fact that European federal common law includes judge-made rules fashioned by the Court of Justice for which the Community *has not* yet received legislative competence, either expressly or implicitly, under the principle of conferred powers laid down in the first paragraph of Article 5 of the EC Treaty.[129] Yet, in order to make the objectives and choices provided under the relevant provision of the Treaty or the duly-adopted piece of Community legislation work for the fields in which the Community legislator *has* been given competence to act, the Court is faced with the prospect of making European federal common law.[130] Many cogent examples of this "hard core" of European federal common law can be found in the fields of family and property law.

B. The Field of Family Law

In the field of family law, the Court of Justice has been confronted with elaborating Community definitions of spouse and marriage through the course of its interpretation of Community law in several cases.[131] For example, in *D & Sweden v. Council*,[132] the Court ruled, when confronted with fashioning a Community definition of marriage for the purposes of interpreting the Staff Regulations governing Community employees, that "*according to the definition generally accepted by the Member States, the term marriage means a union between two persons of the opposite sex.*"[133] In doing so, the Court acknowledged that an increasing number of Member States had introduced legislative arrangements granting legal recognition to various forms of partnership between same-sex couples but that these were considered distinct from marriage.[134] Moreover, the Court placed emphasis on the Community legislator's intention *not* to effect any changes to the Staff Regulations so as to assimilate same-sex relationships with marriage, despite Sweden's proposal to do so.[135] Comparative reflection between the EU and the United States can surely be drawn in this area in view of the Supreme Court's case law and the adoption of the Defense of Marriage Act (DOMA),[136] in which the U.S. Congress provided explicit definitions of marriage and spouse for all federal statutes and regulations.[137]

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127. *Id.*

128. *Id.* at 7.

129. *Id.*

130. *Id.* at 7-8.

131. *See id.* pt. IV.A.1, at 50-55.

132. Joined Cases C-122/99 P & C-125/99 P, D & Sweden v. Council, 2001 ECR. I-4319.

133. *Id.* ¶ 34 (emphasis added).

134. *Id.* ¶¶ 35-36. With an increasing number of Member States recognizing same-sex marriage (Belgium, The Netherlands, and Spain), attention has fallen on the Court of Justice to revise its judge-made definition of marriage as well as on the Community legislator in this regard. *See* Lenaerts & Gutman, *supra* note 22, at 54-55.

135. *D & Sweden*, ¶ ¶ 32, 37-38. *See also* Opinion of Advocate General Mischo in Joined Cases C-122/99 P & C-125/99 P, D & Sweden v. Council, 2001 ECR. I-4319, ¶ ¶ 51-53.

136. 1 U.S.C.A. § 7 (West 2007); 28 U.S.C.A. § 1738C (West 2007).

137. *See* Lenaerts & Gutman, *supra* note 22, pt. IV.A.2, at 55-56.

C. The Field of Real Property Law

The field of real property law provides further examples of the "hard core" of European federal common law through the Court's interpretation of the Community legislation on the Value Added Tax (VAT) regime establishing a uniform system of taxation.[138] Specifically, Article 13 of the Sixth VAT Directive sets forth a common list of exemptions, one of which concerns "the leasing or letting of immovable property."[139] Here, the intent of the Community legislator was that the letting of movable property was to be subject to taxation, whereas the letting of immovable property was to be exempt from such taxation.[140] Yet, this term was not defined in the directive, and there was no reference made to the laws of the Member States.[141] As a result, the matter was left to the Court of Justice to fashion a Community judge-made concept of "leasing or letting of immovable property"—including the very meaning of "immovable property" itself—through the course of its case law.[142] This jurisprudence can be compared with that of the Supreme Court when faced with similar issues in relation to its federal common lawmaking in the property law field.[143]

In short, like the family law example, the property law field provides viable instances of the "hard core" of European federal common law. This is because the Court is fashioning key Community concepts in an area in which the Community legislator has *not* been given explicit competence, but it is doing so in order to ensure the effectiveness of the Community VAT legislation, which the Community legislator's competence to enact was not in dispute.[144]

D. Fundamental Tensions Underlying European and American Federal Common Law

Both the family and property law examples are equally illustrative of the fundamental tensions underlying European, as well as American, federal common law concerning the *vertical* division of powers between the Community or Federal level and the constituent (Member) States, *i.e.*, federalism in American parlance, and the *horizontal* division of powers between the Court of Justice and the Supreme Court, on the one hand, and the other institutions or branches at the Community or Federal level, on the other, *i.e.*, "institutional balance" in the EU and "separation of powers" in the United States.[145]

In regard to the latter point, it bears emphasis that despite the possibility of legislative override in both legal orders, tensions remain because it is much more difficult to amend the Treaties[146] or the U.S. Constitution[147] than it is to amend Community or American

138. *See id.* pt. IV.B.2, at 58-62.
139. Sixth Council Directive 77/388 on the Harmonization of the Laws of the Member States Relating to Turnover Taxes – Common System of Value Added Tax: Uniform Basis of Assessment, art. 13B(b), 1977 O.J. (L 145) 1 (EC).
140. Lenaerts & Gutman, *supra* note 22, at 59.
141. *Id.*
142. *Id.* at 59-61.
143. *See id.* pt. IV.B.2, at 62-66.
144. *Id.* at 65-66.
145. *See id.* pt. IV, at 45-74.
146. *See* EU Treaty art. 48.

legislation by way of the relevant decision-making procedures.[148] In theory, the political process may be able to overturn the outcome of a judicial decision issued by the Court of Justice or the Supreme Court. For this to occur, however, the rules governing the political process must be such that this can be achieved in practice.[149] For example, the U.S. Congress could conceivably overturn a Supreme Court ruling concerning the dormant Commerce Clause. Yet, problems occur when the Court of Justice interprets provisions of the Treaty because unanimous agreement by all Member States would be required to overturn such a ruling, thereby resulting in a situation in which the European judiciary *de facto* goes unchecked.[150]

Nevertheless, in light of these fundamental tensions, it could be said that the paths of European and American federal common law are proceeding in somewhat different directions, with the European context presenting increased opportunities for judicial lawmaking and the American landscape marking a decline in its use.[151] This may be explained by the fact that in the EU, a two-part framework governs the creation of European federal common law, which provides parameters for the lawmaking power of the Court of Justice and reveals its content to be nourished to the greatest extent from the laws, principles, and traditions shared by the Member States.[152] This may also explain why the discussion of European federal common law has been much quieter than that of its American counterpart.[153] By contrast, without the same outlet for the American states to nurture the formulation of federal common law, the strong presumption for state law in the formulation of American federal common law comes into play, along with the reasons why the fundamental tensions surrounding American federal common law have been most acute in the case law and literature.[154]

VI. Conclusion

It is perhaps here where the discussion of interpretation in the EU comes full circle. This is because, whether by way of federal common lawmaking or interpreting provisions of Community law, the Court of Justice is always guided by its mandate under Article 220 of the EC Treaty to uphold the rule of law in all instances and by the other provisions of the Treaty that ensure that it looks to the laws, rules, and principles shared by the Member States. In this sense, the Court's reliance on international law in its protection of fundamental rights, as gleaned through the common constitutional traditions of the Member States as well as through the ECHR, the case law of the European Court of Human Rights, and other European and international conventions, is essentially "built in" to the interpretation of the Treaties.

147. *See* U.S. CONST. art. V.
148. *See* Lenaerts & Gutman, *supra* note 22, at 48-49.
149. *See id.*
150. *See id.*
151. *Id.* at 119.
152. *Id.* at 119-20.
153. *Id.* at 120.
154. *Id.* at 119-20. This should not be taken to mean that American federal common law has diminished in its importance. *See id.* at 120-21; Martha A. Field, *Federal Common Law*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 321 (Kermit L. Hall, James W. Ely, Jr. & Joel B. Grossman eds., 2d ed. 2005).