Lawrence, *Roper*, and *Graham*

Comparative law's orthodoxy has long been committed to an understanding of the legal that can fairly be termed "positivist-analytical" or "positivist" *tout court*. Positivism's insistence on bindingness had traditionally meant that for positivists, law — whether national, regional, or international — was to be stringently equated with the law in force *within a given jurisdiction*.[1] And since its institutional emergence in the first part of the nineteenth century, it is one of comparative law's convulsive epistemic initiatives to have extended the range of positivist pertinence so as to include within the legitimate province of law as a focus of study *foreign* positivisms, mostly manifesting themselves at the national level, despite the obvious fact that foreign law does not enjoy any binding character locally. It is precisely this approach that accounts, say, for the U.S. Supreme Court taking an interest in European law and indeed valorizing European law as a (nebulous) source of relevant normative information within U.S. legal adjudication in decisions like *Lawrence* v. *Texas* (2003), *Roper* v. *Simmons* (2005), or *Graham* v. *Florida* (2010).

Consider *Lawrence*. Quite apart from the issues involved as regards the rights of sexual minorities, the opinion of the Court provoked intense controversy to the extent that it appeared to want to derive "normative purchase" from foreign law. Generating an extraordinary torrent of editorials, articles, and heated classroom and Internet discussion, Justice Anthony Kennedy referred to the European Court of Human Rights's decision in *Dudgeon* v. *United Kingdom*: "[T]he reasoning and holding in *Bowers* [the earlier judgment that the U.S. Supreme Court proceeded to overturn] 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*, App. No. 00044787/98, ¶ 56 (Eur. Ct. H. R., Sept. 25, 2001); *Modinos* v. *Cyprus*, 259 Eur. Ct. H. R. (1993); *Norris* v. *Ireland*, 142 Eur. Ct. H. R. (1988)".[2] In a vigorous dissent, Justice Antonin Scalia argued that not only was the reference to foreign judicial decisions such as *Dudgeon* "meaningless dicta" but (somewhat contradictorily) that it was "[d]angerous dicta" also.[3] Interestingly, it is said that "*Lawrence*

[1] "[T]he core of legal positivism is the view that the validity of any law can be traced to an objectively verifiable source': Raymond Wacks, *Philosophy of Law*, 2d ed. (Oxford, 2014), p. 25. Etymologically, the Latin term "*positivus*" refers to what is imposed. See James B. Murphy, *The Philosophy of Positive Law* (Yale, 2005), p. 18.
[2] *Lawrence* v. *Texas*, 539 U.S. 558 (2003), p. 576 (Kennedy J., for the Court) [hereinafter *Lawrence*]. The reference to the European Court of Human Rights's leading decision is *Dudgeon* v. *United Kingdom*, [1981] E.C.H.R. 5. A measure (although, clearly, not the most interesting measure) of the ensuing furore has to do with the fact that on 13 May 2004 the Constitution Sub-committee in the U.S. House of Representatives adopted a resolution "[t]hat it is the sense of the House of Representatives that judicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements are incorporated into the legislative history of laws passed by the elected legislative branches of the United States or otherwise inform an understanding of the original meaning of the laws of the United States": H.R. Res. 568, 108th Cong., 2d Sess. (2004).
[3] *Lawrence*, p. 598 (Scalia J., dissenting).

represents the first time the Supreme Court has cited foreign case law in the process of overruling an American constitutional precedent".[4]

I argue that a critique of the Court's brand of comparatism in *Lawrence* — which Laurence Tribe, himself the lawyer of record on behalf of the homosexual petitioner in *Bowers* v. *Hardwick*, labelled 'crude'[5] — is legitimate; that it is required; that it can take place in full awareness of the hurdles that the "foreign-minded" wing of the Court faced as it elected to mention European decisions; and that it can happen without corroding or disabling the Court's "foreign initiatives" of the future. In particular, to claim that the U.S. Supreme Court failed to do good comparative work in *Lawrence* cannot be equated to joining sides with Justice Scalia, whose disposedness towards foreign law is such that he would have had no reference to it at all.[6] As far as I can tell, Justice Scalia stands, at least when it comes to judicial decision-making, for something like the *degré zéro* of comparatism and possibly for outright anti-comparatism (which is interesting coming from an individual who used to teach comparative law at the University of Virginia).[7] Again (and no doubt allowing for some exaggeration on my part), Justice Scalia acts as if there was nowhere else and no one else on the planet that the U.S. Supreme Court could legitimately deem worthy of interest or reflection and, *a fortiori*, that could provide it with worthwhile normative inspiration. From a comparative standpoint, Justice Scalia's views connote closure (to the foreign) and erasure (of the foreign). They stand for something along the lines of judicial autarky. Indeed, he himself makes his point emphatically clear when he says that "foreign legal materials can *never* be relevant to an interpretation of — to the *meaning* of — the U.S. Constitution".[8] No

[4] William N. Eskridge, "*Lawrence* v. *Texas* and the Imperative of Comparative Constitutionalism", 2 Int'l J. Constitutional L. 555 (2004), p. 555. It has also been asserted that "[f]or the first time in history, a majority of the Supreme Court has relied on an international tribunal decision to interpret individual liberties embodied in the U.S. Constitution": Roger P. Alford, "Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on *Lawrence v. Texas*", 44 Virginia J. Int'l L. 913 (2004), p. 915. *Adde*: "Justice Kennedy's opinion in Lawrence, for the first time in a Supreme Court majority opinion, cited with approval an authority from European law" : Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law*, 15th ed. (New York: Foundation, 2004), p. 613.

[5] Laurence H. Tribe, "*Lawrence v. Texas*: The 'Fundamental Right' That Dare Not Speak Its Name", 117 Harvard L.R. 1894 (2004), p. 1931. In the same way as the deficient use of history in U.S. constitutional discourse can be captured by the notion of 'history lite' (Martin S. Flaherty, "History 'Lite' in Modern American Constitutionalism", [1995] 95 *Columbia L.R.* 523), one could resort to the idea of "comparison lite" to point to the inadequacies of comparative analysis in U.S. judicial discourse.

[6] *E.g.*: *Thompson* v. *Oklahoma*, 487 U.S. 815 (1987), p. 868, not. 4 (Justice Scalia, dissenting); *Stanford* v. *Kentucky*, 492 U.S. 361 (1988), p. 369, not. 1 (Justice Scalia, for the Court); *Printz* v. *United States*, 521 U.S. 898 (1997), p. 921, not. 11 (Justice Scalia, for the Court); *Atkins* v. *Virginia*, 536 U.S. 304 (2002), pp. 347-48 (Justice Scalia, dissenting); *Roper* v. *Simmons*, 543 U.S. 551 (2005), p. 628.

[7] As a law teacher at the University of Virginia from 1967 to 1974, Antonin Scalia taught comparative law. Indeed, the law school's electronic archive refers to comparative law as one of Scalia's two 'primary interests': https://libguides.law.virginia.edu/faculty/scalia [on file].

[8] Antonin Scalia, "Foreign Authority in the Federal Courts", 98 Am. Society Int'l L. Proc. 305 (2004), p. 307 [emphasis original]. *Contra*: Ruth B. Ginsburg & Deborah J. Merritt, "Affirmative Action: An International Human Rights Dialogue", 21 Cardozo L.R. 253 (1999), p. 282: "[C]omparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights". Observe that, although the invocation of comparative materials has been shown to tally with political preferences (Lee Epstein & Jack Knight, "Constitutional Borrowing and Nonborrowing", 1 Int'l J. Con. L. 196 [2003], pp. 206-09), the reluctance to refer to foreign data can cut across "conservative"/"liberal" lines. For an illustration of "liberal" reticence, see Bruce

comparativist-at-law can subscribe to an agenda that "offers us […] the kind of self-satisfied strutting that gives chauvinism a bad name" and that leads, in the end, to a world of colliding soliloquy.[9]

A fascinating parallel can, in fact, be drawn between Justice Scalia's treatment of foreign law in *Lawrence* and his consideration of homosexual individuals in that case. In his dissent, Justice Scalia makes it clear that the Texas statute criminalizing sexual practices such as sodomy should not be held unconstitutional. He rebuffs the majority of the Court for "ha[ving] largely signed on to the so-called homosexual agenda" and for causing "a massive disruption

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Ackerman, *We the People*, vol. I: *Foundations* (Harvard, 1991), p. 3: "America is a world power, but does it have the strength to understand itself? Is it content, even now, to remain an intellectual colony, borrowing European categories to decode the meaning of its national identity? […] To discover the Constitution, we must approach it without the assistance of guides imported from another time and place. Neither Aristotle nor Cicero, Montesquieu nor Locke, Harrington nor Hume, Kant nor Weber will provide the key. Americans have borrowed much from such thinkers, but they have also built a genuinely distinctive pattern of constitutional thought and practice". See also *id*., pp. 3-4: "The Constitution presupposes a citizenry with a sound grasp of the distinctive ideals that inspire its political practice. As we lose sight of these ideals, the organizing patterns of our political life unravel. If 'sophisticated' constitutionalists blind themselves to the distinctively American aspects of the American Constitution, this must be a cause for more general concern". This writer further criticizes those who "have been unable to escape the predictable consequences of the Europeanization of constitutional theory": *id*., p. 4. For his part, Cass Sunstein, another foremost liberal constitutional lawyer, writes that "it is not worthwhile, all things considered, [for American constitutional law] to consult foreign practices" given that it boasts "a large stock of precedents on which to draw" and that "its traditions are both developed and distinctive": Cass R. Sunstein, *A Constitution of Many Minds* (Princeton, 2009), p. 209. Meanwhile, Steven Calabresi, although a prominent conservative figure in the United States, has argued that "looking to other sovereign nation states' courts to see how they have resolved the difficult questions that have arisen in [the U.S.] legal system […] may enable American courts to reach better outcomes": Steven G. Calabresi & Bradley G. Silverman, "Hayek and the Citation of Foreign Law: A Response to Professor Jeremy Waldron", [2015] Michigan State L.R. 1, p. 18. Such cross-referencing would operate "only in the same way judges currently cite books and law review articles — for their persuasive value — and not as binding sources of authority": *Id*., p. 180. Specifically, "[j]udges should look to the decisions of foreign courts only when American law is so open-ended that it seems to invite, if not require, the citation of some source of understanding other than the text of the statute or constitutional provision in question": *Id*., p. 157. Calabresi's stance, as he expresses it in this article, is reconcilable with the warnings that he sounds elsewhere. See Steven G. Calabresi, "'A Shining City on a Hill': American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law", 86 Boston U. L.R. 1335 (2006), p. 1337. Eugene Volokh — who writes "I'm a conservative. I support free markets. I support gun rights. I vote Republican. And I'm skeptical of some of the internationalist impulses that often come from the left" (Eugene Volokh, "Foreign Law in American Courts", 66 Oklahoma L.R. 219 [2014], p. 219) appears, like Calabresi, to be taking a more sanguine view of the matter under discussion than liberals such as Ackerman and Sunstein. While he argues that "it's not sound to define the meaning of American constitutional rights with reference to foreign views of such rights" (*Id*., p. 227), he acknowledges how "there is a longstanding tradition of relying on foreign law in determining the scope of American constitutional law" (*Id*., p. 223). In the end, Volokh opines that "[Americans] shouldn't embrace every attempt to introduce foreign law into the American legal system, but neither should [they] rush to reject foreign law generally" (*Id*., p. 220). Observe that the Supreme Court was established in 1790, and there is evidence of reference to foreign law as early as 1823: *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) [Native Americans]. A sample of later decisions, accounting for the wide range of topics with respect to which the Court has found it opportune to refer to foreign law, includes *Pennoyer* v. *Neff*, (1877) 95 U.S. 714 [personal jurisdiction]; *Jacobson* v. *Massachussets*, 197 U.S. 11 (1905) [mandatory vaccination]; *Wickard* v. *Filburn*, 317 U.S. 111 (1942) [regulation of wheat markets]; *Miranda* v. *Arizona*, 384 U.S. 436 (1966) [rights upon arrest]; *Roe* v. *Wade*, 410 U.S. 113 (1973) [abortion]; *Washington* v. *Glucksberg*, 521 U.S. 702 (1997) [end-of-life treatment]. See generally Steven G. Calabresi & Stephanie D. Zimdahl, "The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision", 47 William & Mary L.R. 743 (2005).

[9] J.M. Balkin & Sanford Levinson, "The Canons of Constitutional Law", 111 Harvard L.R. 964 (1998), p. 1005, not. 134.

of the current social order".[10] In the process, Justice Scalia is assertively denying recognition to sexual otherness. The U.S. Supreme Court ought not to acknowledge the sexual other, the one who is sexually different — the homosexual, for instance. Indeed, the Court should sanction the repression of sexual otherness by allowing the criminalization of certain sexual conduct. As one reads Justice Scalia inveighing against the majority of the Court, one is prompted to observe that his denial or erasure of otherness in matters sexual matches his denial or erasure of otherness in matters adjudicative. The sexual other has nothing to teach U.S. society, has no contribution to make (indeed, "[m]any Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home").[11] The legal other has nothing to teach U.S. society either, has no contribution to make either.

In the manner in which the recognition of sexual minorities' rights is regarded as an emancipatory, empowering project, the recognition of foreign law can be approached as an emancipatory, empowering project, too. Consider this analogy: just as the queerness (*i.e.*, the foreignness/strangeness/uncanniness) of sexuality must matter to the U.S. Supreme Court, the queerness (*i.e.*, the foreignness/strangeness/uncaniness) of law must matter to the Court also. As queer bodies must count, "queer" laws must count also. As the proponents of sexual minorities' rights have been arguing in favour of the "queerification" of U.S. constitutional law, I argue for the "queerification" of the U.S. Supreme Court's reservoir of references on the basic understanding that comparative law offers "an important contribution to the rigour of the deliberative process".[12]

Now, the Court's succinct mention of foreign decisions is confusing inasmuch as it does not announce what it proposes to claim out of them exactly. In this sense, this feature of the opinion arguably suffers from the lack of clarity that has been said to characterize the holding generally. One aspect of the matter appears transparent enough, though, and it is that the reference to foreign law was meant to establish the erroneous character of Chief Justice Burger's concurring statements in *Bowers* v. *Hardwick* to the effect that "[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization" and that "[c]ondemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards".[13] Although *Lawrence* could presumably have chosen to overlook Chief Justice Burger's concurrence, Justice Kennedy was somehow keen to show that the "Western civilization" claim was "at the very least […] overstated",[14] which he did by pointing to the European decision in *Dudgeon* and to the three

[10] *Lawrence*, pp. 602 & 591.
[11] *Lawrence*, p. 602 (Justice Scalia, dissenting).
[12] Sandra Fredman, 'Foreign Fads or Fashions: The Role of Comparativism in Human Rights Law', (2015) 64 Int'l & Comp. L.Q. 631, p. 641.
[13] *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), p. 196 (Chief Justice Burger, concurring).
[14] *Lawrence*, p. 571 (Justice Kennedy, for the Court). See also *Id.*, p. 573: "[T]he [European Court of Human Rights decision in *Dudgeon*] is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization" (Justice Kennedy, for the Court).

other European decisions that later applied it. But is it the case that "Justice Kennedy's cit[ations] to European authorities *simply* show that the legal norms of 'a wider civilization' have not for some time been as [Chief] Justice [Warren] Burger imagined"?[15]

I argue that the foreign decisions in *Lawrence* are meant to do more work than simply cast a polite aspersion on *Bowers*. Even apprehending them in a strictly fustian key, the European cases effectively act not simply to disable *Bowers* but also, affirmatively, to enable *Lawrence*.[16] Indeed, "Justice Kennedy […] cited foreign legal precedent […] in support of the Court's ultimate holding", a normative impulse that the notion of "persuasive authority" appears optimally to capture.[17] Another commentator has noted that the reference to foreign data in *Lawrence* purported "to infuse the [U.S.] Constitution with substantive meaning".[18] Even though, in *Roper* v. *Simmons*, a later decision explicitly raising the issue of obligatoriness, Justice Kennedy emphasized that foreign cases are "not controlling our outcome"— which, evidently, they are not — it remains that their very presence in a U.S. Supreme Court opinion injects a measure of normativity within the adjudicative process.[19] In *Roper*, Justice Kennedy held that foreign law offers the U.S. Supreme Court's conclusions "respected and significant *confirmation* for our own conclusions".[20] Indeed, in *Lawrence*, the Court also appeared to have derived such confirmatory value from foreign law, even as it refrained from expressly mobilizing this idea. Immediately after registering its references to *Dudgeon* and to the three European cases that applied it, the Court wrote as follows: "The right the petitioners seek in [*Lawrence*] has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent".[21] What the Court did in a case like *Lawrence*, it seems to me, was precisely to seek to derive a measure of "normative purchase" of a confirmatory character from the European decisions inasmuch as it perceived these cases to be supporting its goal, which was to point to the *truth-in-the-law* of its constitutional reasoning.[22] The opponents to reference being made to foreign decisions are therefore

[15] Mary Anne Case, "Of 'This' and 'That' in Lawrence v Texas", [2003] Supreme Court R. 75, p. 122, not. 204 [my emphasis].
[16] *Cf*. Rex Glensy, "Which Countries Count?: *Lawrence v. Texas* and the Selection of Foreign Persuasive Authority", 45 Virginia J. Int'l L. 357 (2004), p. 443: "In other words, the *Lawrence* majority's use of foreign materials served both a narrow and a broad purpose".
[17] Donald E. Childress, "Using Comparative Constitutional Law to Resolve Domestic Federal Questions", 53 Duke L.J. 193 (2003), pp. 193-94 & 194.
[18] 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 (2004), p. 1326.
[19] *Roper* v. *Simmons*, 543 U.S. 551 (2005), p. 554 (Justice Kennedy, for the Court).
[20] *Ibid*. [my emphasis].
[21] *Lawrence*, p. 577 (Justice Kennedy, for the Court).
[22] I have in mind Sujit Choudhry, "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation, 74 Indiana L.J. 819 (1999), p. 890, where the author, referring to the universalist claim and to the argument from transcendence that underwrites it, notes how "transcendence represents more than just an empirical claim that legal principles tend to be shared by many legal systems. Rather, it turns this empirical observation [made, I would add, in advance of any demonstration or based on the most superficial of demonstrations] into the premise of an argument for a normative conclusion: that the presence of a legal principle

understandably worried (I mean, of course, 'understandably' from their oppositional perspective). One well appreciates why Justice Scalia — operating from his defiant vantage point — would regard the reference to foreign cases as "dangerous".[23] Who wants to be fighting an evidentiary-based truth-claim?

But the fact that the U.S. Supreme Court's decision adopts the truth-as-correctness model in *Lawrence* is worrisome even for comparativists who defend judicial references to foreign law.[24] Consider Justice Kennedy's words: "Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress".[25] The express focus on "truth" in the context of a "beyond-blindness" or "enlightenment" narrative alluding to the transition from a condition of obscurity to one of *voyance* suggests the existence of "something" that one once did not see and that one now sees, of "something" that has existed all along irrespective of one's inability to see it up until now, of 'something' that is there, in effect, beyond anyone's ability to see or not to see it. Like Konrad Zweigert and Hein Kötz, who refer to "a unitary idea of justice",[26] Justice Kennedy is ultimately locating "truth-in-the-law" in a transcendental realm.[27] From the moment that one is situating oneself in a "beyond-any-law", it follows that "the search for the right answer cannot be prejudiced by limiting the sources from which that answer is obtained to domestic sources alone".[28] It also ensues, as I aim to demonstrate presently, that differences across laws and legal cultures are to be "externalize[d]", the idea being that "[cultural] differences are manageable [only] when they can remain internal matters, below the waterline of sovereignty".[29]

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in many legal systems is evidence of its truth or correctness. Empirical convergence, in other words, is proof of moral truth".

[23] *Supra*, text at note 3.

[24] *Cf.* Ruti Teitel, 'Comparative Constitutional Law in a Global Age', 117 Harvard L.R. 2570 (2004), p. 2590, who notes that "[i]n both rhetoric and opinions, the current [U.S. Supreme] Court increasingly relies upon the functionalist rationale for its growing comparative constitutional jurisprudence". The Court thus "posits a return to the reigning postwar comparative method": *Id*., p. 2575. The intimate connection between truth and functionalism in the influential work of Konrad Zweigert and Hein Kötz is notorious. See Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law*, 3d rev. ed. transl. from the German by Tony Weir (Oxford, 1998), pp. 15 & 33.

[25] *Lawrence*, pp. 578-79.

[26] Zweigert & Kötz, *supra*, note 24, p. 3 ["*eine(m) einheitlichen Gerechtigkeitsgedanke(n)*"].

[27] *Cf.* Case, *supra*, note 15, p. 115, who takes the view that "truths" here means "eternal verities, not contingent, variable, or socially constructed". See also Richard A. Posner, 'A Political Court', 119 Harvard L.R. 32 (2005), p. 85, who observes that *Lawrence* "marks Justice Kennedy […] as a natural lawyer", "[t]he basic idea of natural law [being] that there are universal principles of law that inform — and constrain — positive law. If they are universal, they should be visible in foreign legal systems and so it is "natural" to look to the decisions of foreign courts for evidence of universality".

[28] Glensy, *supra*, note 16, p. 387. See also Charles Fried, 'Scholars and Judges: Reason and Power', 23 Harvard J. L. & Public Policy 807 (2000), p. 821, not. 50.

[29] David Kennedy, 'New Approaches to Comparative Law: Comparativism and International Governance', [1997] Utah L.R. 545, pp. 568 & 571.

Lawrence's reference to *Dudgeon* summons the comparativist-at-law to take a closer look at the European decision. In *Dudgeon*, the issue was whether legislation in Northern Ireland criminalizing sodomy was "necessary in a democratic society for the protection of morals". The matter turned on the interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which, at article 8, reads as follows:

> 1.Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2.There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being 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.

In *Dudgeon*, the European Court of Human Rights observed that "'necessary' in this context does not have the flexibility of such expressions as 'useful', 'reasonable', or 'desirable'".[30] Rather, said the Court, it "implies the existence of a "pressing social need" for the interference in question".[31] The Court noted that "in assessing the requirements of the protection of morals in Northern Ireland, the contested measures must be seen in the context of Northern Irish society. The fact that such measures are not considered necessary in other parts of the United Kingdom or in other member States of the Council of Europe does not mean that they cannot be necessary in Northern Ireland".[32] In the end, though, the Court found that there was no "pressing social need" to make such acts as were contemplated by the local statute criminal offences. In the later case of *Norris*, which Justice Kennedy also mentions in *Lawrence*, the European Court of Human Rights held that the relevant issue was whether contested measures "both answered a pressing social need and complied with the principle of proportionality".[33] The Court felt that there was no pressing social need and no proportionality (that is, that the local justifications for the statute were outweighted by the detrimental effect that the law could have on the life of an individual).

Now, it is important to appreciate that 'proportionality' is more demanding on the state than mere "reasonableness". In other words, regardless of whether or not a local statute is reasonable, the European Court of Human Rights's view is that there must be proportionality between legislative goals and legislative means — while all one need establish in the United

[30] *Dudgeon* v. *United Kingdom*, *supra*, note 2, §51, p. 16.
[31] *Ibid*.
[32] *Id*., §56, p. 18.
[33] *Norris* v. *Ireland*, [1988] E.C.H.R., <http://hudoc.echr.coe.int/eng?i=001-57547>, §44, p. 15 [on file].

States is that a law is reasonable to further governmental interest.[34] This understanding means that in Europe, the standard set for a law to survive the test is higher than in the United States. Accordingly, the laws of European member states will be quashed more often than in the United States, where state laws can survive more easily. Given this discrepancy, it may be thought odd that Justice Kennedy used the European cases in *Lawrence* in order to make a point about U.S. law. Why does the U.S. Supreme Court feel that *Dudgeon* and *Norris* are offering it "normative insight"?[35] After all, "U.S. constitutional law does not ordinarily and explicitly resort to the idea of proportionality as a measure of constitutionality — even in the Eighth Amendment area, where the constitutional text seems to call for application of the idea of proportionality".[36]

When used,[37] most conspicuously in a case of distribution of federal powers (and not, therefore, in a decision relating to individual rights), the "proportionality" standard has been said to "provid[e] little if any principled guidance as to where the line will be drawn in any particular case".[38] Other U.S. commentators have been even blunter: "There is no nonarbitrary way to arrive at the proper legal rules, no way to get to sensible bottom lines by something that looks and feels like legal analysis. Whether proportionality review is lodged in appellate or trial courts, the only way to do it is to do it […]. There is no metric for determining right answers, no set of analytic tools […]. […] All this amounts not just to open-ended judicial regulation — constitutional law has a lot of that, and courts do not seem terribly bothered by it — but also to *arbitrary* judicial regulation, regulation that produces outcomes untethered to any definable legal principle".[39] In any event, it has been remarked that "[b]orrowing the term 'proportionality' yields no guarantee, or even likelihood, that the concept will mean the same thing to [U.S.] courts that it does to its originators, or that the results reached in the

[34] This distinction is clearly highlighted in Michael D. Ramsey, "International Materials and Domestic Rights: Reflections on *Atkins* and *Lawrence*", 98 Am. J. Int'l L. 69 (2004), p. 74.
[35] Gerald L. Neuman, "The Uses of International Law in Constitutional Interpretation", 98 Am. J. Int'l L. 82 (2004), p. 87.
[36] Vicki C. Jackson, "Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on 'Proportionality', Rights and Federalism", 1 U. Pennsylvania J. Constitutional L. 583 (1999) , p. 619. *E.g.*: *Harmelin* v. *Michigan*, 501 U.S. 957 (1991), p. 965: "We conclude […] [that] the Eighth Amendment contains no proportionality guarantee" (Justice Scalia, for a plurality of the Court). Recall that the Eighth Amendment reads as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". For a critique of the U.S. objections to proportionality, see Jamal Greene, "Rights As Trumps?", 132 Harvard L.R. 28 (2018), pp. 85-96.
[37] *E.g.*: *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). This decision was followed, *e.g.*, in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), p. 520 (Justice Stevens, for the Court); *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), p. 365 (Chief Justice Rehnquist, for the Court); *Kimel* v. *Florida Board of Regents*, 528 U.S. 62 (2000), pp. 81-82 (Justice O'Connor, for the Court); *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 527 U.S. 627 (1999), p. 637 (Chief Justice Rehnquist, for the Court).
[38] David Cole, "The Value of Seeing Things Differently: Boerne v Flores and Congressional Enforcement of the Bill of Rights", [1997] Supreme Court R. 31, p. 47. For a later (and strong) critique of proportionality, see David Cole, "When Rights Went Right", *The New York Review of Books*, 21 April 2022, pp. 56-58. See generally E. Thomas Sullivan & Richard S. Frase, *Proportionality Principles in American Law* (Oxford, 2009).
[39] William J. Stuntz, "The Uneasy Relationship Between Criminal Procedure and Criminal Justice", 107 Yale L.J. 1 (1997), p. 73. For a review of the problems arising from the adoption of a proportionality test in the United States, see Vicki C. Jackson, "Constitutional Law in an Age of Proportionality", 124 Yale L.J. 3094 (2015), pp. 3159-66.

American context will mirror the results the doctrine yields in its home arena, even if [U.S. judges] were certain that those results were to be emulated".[40] For example, it has been argued that the distinctive features of U.S. constitutional law call for "a judicial policy of highly deferential review of exercises of federal power".[41] The contrast with the European position, where it is understood that "[t]he most striking point about the doctrine of proportionality is that it leaves a great deal to the judgment of the Court",[42] could hardly be starker. Within European Union law, "[p]roportionality embodies a basic concept of fairness which has strengthened the protection of individual rights at both the national and supranational level".[43] It follows, as has been aptly underlined, that it is "a misleading simplification" to assume that "the [United States] could introduce proportionality while leaving the other features and characteristics of its constitutional rights jurisprudence intact".[44] Indeed, "proportionality is not just an isolated standard of review but part and parcel of a conception of rights that must be adopted or rejected as a whole".[45]

As regards sodomy laws, as is indeed the case with any other law, "[e]very legal concept, every dogmatic construction, every line of legal argument operates in pre-determined traditional contexts".[46] Referring to the U.S. Supreme Court and to the European Court of Human Rights, "[i]t is too simplistic to say that both are doing constitutional law, and so doing the same thing".[47] Why, then, the approbative reference to "proportionality" by the U.S. Supreme Court? Why this assimilation in a situation where, although "[t]he grooves in the American legal mind lead one toward identifying the rights of the individual and the opposing interests of the state or community", European constitutional dynamics does not classically

[40] Seth F. Kreimer, "Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing", 1 U. Pennsylvania J. Constitutional L. 640 (1999), p. 647.
[41] Jackson, *supra*, note 36, pp. 631-62.
[42] Trevor C. Hartley, *The Foundations of European Union Law*, 8th ed. (Oxford, 2014), p. 168. See also Taavi Annus, "Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments", 14 Duke J. Comp. & Int'l L. 301 (2004), p. 313: "[A]dopting proportionality analysis actually requires the adoption of a normative position carrying a certain empirical assumption. This adoption normatively assumes that it is 'right' to balance different values in constitutional adjudication. Further, proportionality analysis carries an empirical assumption that courts are the suitable venue for balancing conflicting values, that is, that certain positive consequences result from the fact that courts engage in this balancing. […] Proportionality analysis is not a technical process". Annus expressly connects the adoption of "extensive proportionality analysis" by the courts with the "'judicialization of politics'": *Id*., p. 313, not. 55.
[43] Nicholas Emiliou, *The Principle of Proportionality in European Law* (Kluwer, 1996), p. 1. See also, *e.g*., Evelyn Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Hart, 1999). Still, note that even within the European Union, proportionality means differently in different member states. See Afroditi Marketou, *Local Meanings of Proportionality* (Cambridge, 2021).
[44] Kai Möller, "U.S. Constitutional Law, Proportionality, and the Global Model", in Vicki C. Jackson & Mark Tushnet (eds), *Proportionality* (Cambridge, 2017), pp. 130-31.
[45] *Id*., p. 131.
[46] Christian Joerges, "The Europeanization of Private Law as a Rationalization Process and as a Contest of Disciplines — An Analysis of the Directive on Unfair Terms in Consumer Contracts', (1995) 3 Euro. R. Private L. 175, p. 183. In this sense, the word "dogmatic" bears a characteristically German imprint. It roughly means "doctrinal".
[47] Ramsey, *supra*, note 34, p. 74. It has been noted, for instance, that "the role of the European Court under an international convention is not the same as that of the United States Supreme Court under [the U.S.] federal Constitution": Mary Ann Glendon, *Rights Talk* (Free Press, 1991), p. 153.

conceptualize State interventions as encroaching on the rights of citizens?[48] Thus, Mary Ann Glendon: "Current American practices of judicial review, it is well to remember, have evolved under very specific historical circumstances. Much judicial activism in recent years, as well as the approval it has received from academics, and such popular acceptance as it has found, was attributable to a lack of confidence in our state legislatures. This American attitude, grounded to some extent in our troubled history of race relations, has no real counterpart in most other liberal democracies".[49] Even a commentator saluting the "actual convergence of decisions on certain issues", the "constitutional cross-fertilization", and what would be an "emerging global jurisprudence",[50] applauding the fact that "judges worldwide [are] engaged in a common enterprise of protecting human rights",[51] welcoming the practice pursuant to which "courts are referring to each other's decisions",[52] talking the language of "common fundamental values",[53] "larger patterns and principles",[54] "global norms",[55] "universal norms",[56] "global constitutional jurisprudence",[57] a "global legal system",[58] a "common judicial enterprise",[59] and a "global community of human rights law",[60] even someone subscribing to "a deeper common identity" set against "the pluralism of multiple legal systems",[61] even such an observer, then, stresses the singularity of *Dudgeon* and maintains that the European case, in which the European Court of Human Rights "ha[s] relied on uniquely European legal developments to expand the scope of Convention rights",[62] offers "a peculiarly European interpretation of human rights standards' and 'a specialized view of human rights".[63]

Is one not dealing, in effect, with different discursive fields, with different political rationalities, with different explanatory logics? Is one not dealing with two different epistemological clusters? Why, then, the U.S. Supreme Court's appropriation of a European

[48] George P. Fletcher, "Constitutional Identity", 14 Cardozo L.R. 737 (1993), p. 742.
[49] Glendon, *supra*, note 47, pp. 161-62.
[50] Anne-Marie Slaughter, *A New World Order* (Princeton, 2004), p. 78.
[51] *Id*., p. 81.
[52] *Id*., p. 66.
[53] *Id*., p. 69.
[54] *Ibid*.
[55] *Id*., p. 99.
[56] *Id*., p. 102.
[57] *Id*., p. 66.
[58] *Id*., p. 67.
[59] *Id*., p. 68.
[60] *Id*., p. 69.
[61] *Id*., p. 103.
[62] Laurence R. Helfer & Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication", 107 Yale L.J. 273 (1997), p. 384.
[63] *Id*., p. 384, not. 496. Mary Anne Case also insists on Europe-U.S. differences, with specific reference to the regulation of sexual minorities: Case, *supra*, note 15, p. 127. Incidentally, this observation shows how the idea that one can draw an analogy between the consideration of laws across States within the United States with that of foreign laws is unsustainable and fails to account for the singularity of foreignness. Yet, this parallel is endorsed in Shirley S. Abrahamson & Michael J. Fischer, "All the World's a Courtroom: Judging in the New Millennium", 26 Hofstra L.R. 273 (1997), pp. 285-86.

discourse already-in-being to a U.S. discourse already-in-being (which, *concessio non dato*, I am willing to assume is meant to be hospitable)?

I argue that the answer lies with the truth-as-correctness model, which does not care for local knowledge and roundly aims for transcendentalization. One is witnessing the transcendental imperative in action, so to speak. In effect, Justice Kennedy is "looking only at the precept element in legal systems".[64] For him, what matters is the fact that *Dudgeon* addresses a law criminalizing certain sexual conduct. Justice Kennedy is acting as if *Dudgeon* was somehow "culture neutral", as if laws were not intimately embedded within the world from which they emerge and in which they find themselves. As such, there is no recognition on Justice Kennedy's part that "the prelegal instantiations of terms like 'political' and 'free speech' will vary dramatically from culture to culture".[65] All distinctions are abolished, the non-synthesizable dimensions pertaining to *Dudgeon* and *Lawrence* are suppressed, leaving a general, undifferentiated textuality. In the mind of Justice Kennedy, there is identity of precept, which translates into formal identity, without any realization, for example, that U.S. law is being marshalled as "a framework for structuring initial inquiry" into foreign law.[66] Indeed, in *Lawrence*, the European Court of Human Rights decisions are cited, for all intents and purposes, exactly as if they were U.S. cases.[67] In the belief (untested by either theoretical reflection or empirical practice) that one can interpret law across boundaries in such a way as to achieve a uniquely correct interpretation of local law locally, foreign material is delocalized and, on the basis of this act of exclusion, transported to a beyond-any-local-law, where it becomes right, correct, true — without any consideration being given to the structures of understanding that make it possible for *Dudgeon*, a European case that exists as a meaningfully structured (and structuring) situation, to be relevant to the U.S. case of *Lawrence*, also a meaningfully structured (and structuring) situation.

Not only is *Dudgeon* asserted to be right, correct, and true, but it is maintained to be right, correct, and true *like U.S. law*. As I have indicated, "the U.S. Constitution [becomes] [...] a prescriptive norm for constitutional design".[68] The point of departure is U.S. law — let us say, the unalloyed good or the right, correct, true re-presentation of the ideal — and this law is then extended to other laws: the process is one of universalization through the projection of U.S. law. In other words, the process is one of universalization via the advancement of particular values (as is indeed the case with any so-called "natural-law" or quasi-Platonic doctrines). *Mirabile visu*, there emerges a European "law" that is delocalized, that is rendered independent from its European horizon, that is de-Europeanized. There is, if you will, a

[64] Roscoe Pound, "Comparative Law in Space and Time", 4 Am. J. Comp. L. 70 (1955) , p. 75. Roscoe Pound was expressly critical of this approach: "[A] fruitful comparative law […] has to do much more than set side by side sections of codes or of general legislation' (or, one could no doubt add, citations to judicial decisions): *Ibid*.
[65] F. Schauer, "Free Speech and the Cultural Contingency of Constitutional Categories", 14 Cardozo L.R. 865 (1993), p. 879.
[66] Alford, supra, note 4, p. 956.
[67] *Supra*, text at note 2.
[68] Balkin & Levinson, *supra*, note 9, p. 1006.

European law without any European dimension. *Mirabile dictu*, this deracinated law is found to be enunciating the U.S. doctrine. One recognizes here the underlying claim to transcendence, universality, and, ultimately, unity. Indeed, it is maintained that "the judgments that have been written by courts around the world point very strongly to the existence of universal principles of law".[69] From there, the convergence of constitutional opinions is readily apprehended as the onset of greater rationality, that is, as a progress towards greater truth-in-the-law. One is back to the Enlightenment *Weltanschauung* that Kant has made familiar and that, more recently, Jürgen Habermas and his argument to the effect that truth-claims are claims to intercultural and universal validity has invigorated.[70] The process of de-differentiation in which the U.S. Supreme Court is engaging appears to operate as follows.

The Court's synthesis, which is meant to be a conjunctive synthesis (*Lawrence* + *Dudgeon*) is, in effect, a distorting synthesis overlooking (silenced) singularities, at least in its form A = B: it goes beyond any lived or liveable experience; it exists only in thought. Paradoxically, perhaps, this distortion has creative power in that it disturbs the economy (or *oikos*) of the world of U.S. law. The identity of *Dudgeon* is dissolved. *Dudgeon* is no longer defined in its selfness, but through a process of becoming. It vanishes in a purportedly objective zone of indistinction

[69] David Beatty, "Law and Politics", 44 Am. J. Comp. L. 131 (1996), p. 141. For other arguments in favour of universality, see, *e.g*., Lorraine E. Weinrib, "Constitutional Conceptions and Constitutional Comparativism", in Vicki C. Jackson & Mark Tushnet (eds), *Defining the Field of Comparative Constitutional Law* (Praeger 2002), pp. 3-34; Vicki C. Jackson, "Constitutional Comparisons: Convergence, Resistance, Engagement", 119 Harvard L.R. 109 (2005), p. 118.

[70] Indeed, the principle of universalizability is one of the cornerstones of Habermas's discourse ethics. Even though he purports to reject idealistic and transcendental accounts of reason and focus on everyday contextual requirements of conversation, Habermas continues to appeal to the Enlightenment tradition to the extent at least that he argues that a decentering of the self can happen in a relatively unproblematic fashion. In his *Wahrheit und Rechtfertigung* (Suhrkamp, 2004), for instance, Habermas develops his theory of truth-as-consensus pursuant to which a validity claim is justified if it can be redeemed discursively, that is, if everyone following principles of rational (*i.e*., unconstrained and undistorted) communication would agree with the relevant statement assuming participation in a discourse about it. The truth of statements thus depends on the possibility of a consensus (not, it must be emphasized, on actual consensus) and cannot adopt a monological form (*i.e*., a process of "debate" occurring in an individual mind). Irrespective of society's plurality, epistemic justification for Habermas requires consensus. The tension between immanence and transcendence is nowhere more apparent than when Habermas, in his later writings, purports to combine a situated reason with a transcendent reason through the notion of "transcendence from within": Jürgen Habermas, *Faktizität und Geltung* (Suhrkamp, 1998), pp. 32-45 ["*Transzendenz von innen*"]. See also Jürgen Habermas, "Transcendence from Within, Transcendence in this World" in Don S. Browning & Francis S. Fiorenza (eds), *Habermas, Modernity, and Public Theology* (Crossroad, 1992), pp. 226-50. In sum, "Habermas' institutional conception finds its limits in the empirical conditions of plurality": David Roth-Isigkeit, *The Plurality Trilemma* (Palgrave Macmillan, 2018), p. 90. For a critique of the universalist aspirations of Habermas's discourse ethics, see Joseph Heath, *Communicative Action and Rational Choice* (M.I.T., 2001), pp. 175-311. *Adde*: Stathis Kouvélakis, *La Critique défaite* (Editions Amsterdam, 2019), pp. 413-43. Kouvélakis entitles his critical chapter "A very German 'universalism'" ("*Un 'universalisme' très allemand*"). There is a brief survey of Habermas's theory of truth with reference to comparative law in Jens C. Dammann, "The Role of Comparative Law in Statutory and Constitutional Interpretation", 14 St Thomas L.R. 513 (2002), pp. 541-51. For a broader critique of rationalism, see Stephen Toulmin, *Cosmopolis* (Chicago, 1990). Toulmin writes as follows: "For reasons of ethnographic fact, as much as of analytical argument, neither proposal for a rational philosophy — starting from either shared concepts or shared sensations — still holds water today. […] The belief that, by cutting ourselves off from the inherited ideas of our cultures, we can 'clean the slate' and make a fresh start, is as illusory as the hope for a comprehensive system of theory that is capable of giving us timeless certainty and coherence": *Id*., p. 178.

or indiscernibility: *Dudgeon* becomes *Lawrence*, *Dudgeon* enters an area where it can no longer distinguish itself from *Lawrence*. It is not just in *Lawrence* (which it emphatically is), but it is *of Lawrence*: indeed, it *is Lawrence* so that "even though the persuasive authority might come from a geographically 'foreign' place, in reality, the overlapping normative convergence makes it so that the authority referenced is not 'foreign' at all".[71] Along the way, *Lawrence*, too, becomes something else: it loses its texture as a typical U.S. decision. As it domesticates *Dudgeon* (as it assumes power over it through its hallucinating — etymologically, "wandering" — gaze), *Lawrence* marginalizes itself within U.S. judicial discourse by retaining a new formation of sovereignty that explicitly purports to derive 'normative purchase' from foreign law. So, as *Dudgeon*-as-becoming (the case's transmutation into U.S. law) is made to enter into a becoming (the Supreme Court's decision to move into other-than-straightforward-U.S.-law), there is a process of deterritorialization taking place. More precisely, the U.S. court assimilates or appropriates, in effect colonizes, *Dudgeon*, as it is looking for a supplementary territoriality to support or sustain its process of reterritorialization (that is, to bolster the way in which it is repositioning itself within U.S. law). In the end, there is premature totalization, that is, a glossing over a myriad differences, for the sake of attaining a single, transcendental, disincarnated form (which, again, is re-formulated via the U.S. Supreme Court's own apprehension: in the way one encountered Zweigert and Kötz's brand of transcendentalism, one here meets the U.S. Supreme Court's). Justice Kennedy "tells us nothing interesting about the European case".[72]

In sum, what the U.S. Supreme Court does, to quote Zweigert and Kötz, is to sever European law from its local moorings,[73] from its 'systematic conceptual context' and from its 'dogmatic incrustrations'.[74] To paraphrase James Gordley, another partisan of the idea of "transcendentalism" within comparative law, "[t]here [is] nothing distinctively [European] about the [*Dudgeon*] decisio[n] [itself]".[75] Once there takes place a re-statement across laws 'in terms of precise and narrow rules' (Rudolf Schlesinger's formula),[76] it becomes clear, as Basil Markesinis enunciates the matter in language that Zweigert, Kötz, and Gordley would all welcome, that "foreign law is not very different from [U.S. law] but only appears to be so".[77] Zweigert and Kötz thus find themselves vindicated: "Different legal orders come, as regards the same questions of life, often down to details, to the same or at least perplexingly similar

[71] Glensy, *supra*, note 16, p. 423.
[72] Sanford Levinson, "Looking Abroad When Interpreting the U.S. Constitution: Some Reflections", 39 Texas Int'l L.J. 353 (2004), p. 363.
[73] Specifically, they use the verbs 'to free' and 'to unfasten': Zweigert & Kötz, *supra*, note 24, p. 43 ["*befreien*"/"*lösen*"].
[74] *Ibid*. ["*systematischen Begriffen*"/"*dogmatischen Verkrustungen*"]. Again, "dogmatic" can be inadequately understood as "doctrinal".
[75] James Gordley, "Comparative Legal Research: Its Function in the Development of Harmonized Law", 43 Am. J. Comp. L. 555 (1995), p. 563. I adopt and adapt Gordley's words.
[76] Rudolf B. Schlesinger, "Introduction", in Rudolf B. Schlesinger (ed.), *Formation of Contracts: A Study of the Common Core of Legal Systems*, vol. I (Oceana, 1968), p. 9.
[77] Basil S. Markesinis, "The Destructive and Constructive Role of the Comparative Lawyer", [1993] *Rabels Zeitschrift* 438, p. 443.

solutions".[78] And Unidroit, too, is seen to be justified in promoting "a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied".[79]

What one does not see, though, is even basic acknowledgement that any law operates in connection with other matters, that it connects with surfaces, networks, and circuits around which it flows, that it is the result of the affects and passions that it mobilizes*. What one does not see, though*, is even basic acknowledgment of the institutional or epistemological — of the cultural — conditions necessary for the production and circulation of law. *What one does not see, though,* is even basic acknowledgment that laws are articulated in line with some understanding of the spaces, persons, problems, and entities to be governed. *What one does not see, though,* is even basic acknowledgment that law is a species of political rationality, and that "[p]olitical rationalities are discursive fields characterized by a shared vocabulary within which disputes can be organized, by ethical principles that can communicate with one another, by mutually intelligible explanatory logics, by commonly accepted facts, by significant agreement on key political problems".[80] *What one does not see, though,* is even basic acknowledgment that different political rationalities are infused with various elements that can be traced to local meanings, which are linked within local thematics and which lead to the derivation of local conclusions as to what should be done, by whom, and how. *What one does not see, though,* is even basic acknowledgment that articulation of values, validity, and authority are concomitant aspects of localism.

What one does not see, though, is even basic acknowledgment that even such a fundamental notion as "free speech", for example, is un-universalizable (no matter "the universalising impetus of [its] form").[81] In fact, there cannot be an ahistorical entity called "free speech" since there is no ahistoricist universalist transcendentalism other than in the minds of its

[78] Zweigert & Kötz, *supra*, note 24, p. 38 ["*Verschiedene Rechtsordnungen kommen (...) in den gleichen Lebensfragen oft bis in Einzelheiten hinein zu gleichen oder doch verblüffend ähnlichen Lösungen*"].
[79] Governing Council of Unidroit, "Introduction", in Unidroit, *Principles of International Commercial Contracts* (International Institute for the Unification of Private Law, 1994), p. viii, repr. 4th ed. (2016), p. xxix.
[80] N. Rose, *Powers of Freedom* (Cambridge, 1999), p. 28.
[81] Costas Douzinas, *The End of Human Rights* (Hart, 2000), p. 139. Compare *American Booksellers Ass'n* v. *Hudnut*, 771 F.2d 323 (7th Cir. 1985), where a federal court of appeals declared unconstitutional a municipal ordinance that prohibited the "production, sale, exhibition, or distribution" of the material that it defined as pornographic on account of its violation of the First Amendment's guarantee of free speech, with the Canadian decision in *R*. v. *Butler*, [1992] 1 S.C.R. 452, where the Supreme Court of Canada upheld a federal obscenity law interpreted as banning the sale and distribution of pornography. For another comparison as regards hate speech, which is allowed in the United States but banned in Canada, see the United States and Canadian supreme courts' decisions in *R.A.V*. v. *City of St. Paul, Minnesota*, 505 U.S. 377 (1992) and in *R*. v. *Keegstra*, [1990] 3 S.C.R. 697. I am deliberately choosing U.S. and Canadian examples in order to show that even two countries so close geographically and historically differ even as regards something as fundamental as free speech. For a wider claim, see Michel Rosenfeld, "Constitutional Migration and the Bounds of Comparative Analysis", 58 New York U. Annual Survey Am. L. 67 (2001), pp. 71-72: "[A] cursory review of various freedom of speech provisions drawn from numerous constitutions throughout the world reveals a striking similarity in the formulation of that right. Examination of how freedom of speech is construed in various countries, however, reveals huge discrepancies ranging from virtually unconstrained liberty to extensive speech regulation".

proponents. Nor can the various "free speeches" all over the world be taken somehow to designate "a fragmented organism"; rather, they are but "an emission of pre-individual and pre-personal singularities, a pure dispersed and anarchic multiplicity, without unity or totality, and whose elements are welded, pasted together by the real distinction or the very absence of a link".[82] In effect, this claim applies to any notion of "due process" or "fundamental right" or "privacy". This contention concerns any "right". *What one does not see, though,* is that in a case like *Lawrence* there is but "a particularism gone global" — which is to say that the purported "universal" is haunted by the "particular" (no matter how unstable these categories find themselves to be), meaning that if the universal cannot escape the spectral presence of the particular, the particular must escape universalization.[83] The "universal" becomes an "empty signifier", a signifier without signified, a signifier perenially in quest of a referent,[84] a claim that one can readily substantiate by pointing to the fact that nowadays "to accept universality does not [even] mean that each culture has to understand a right in precisely the same way or accept the whole range of rights".[85] *What one does not see, though*, is that in the end (and quite contrary to the superficial claims made by the partisans of legal universals) there is no dialogue materializing at all in *Lawrence*, for European law is not even allowed to express itself as the law that it is. Indeed, it is arguable that standardization (of the kind pursued by the U.S. Supreme Court and advocated by the defenders of one-world-law-that-happens-to-look-remarkably-like-U.S.-law), as it cancels pluralism, endangers constitutional conversation and, ultimately, thwarts democracy.[86]

(There is, of course, another dimension to which the promoters of one-constitutional-law-for-the-world conveniently close their eyes that concerns the manner in which comparative constitutional law acts as "an agent of economic globalization",[87] the basic argument being that a marginalization of legal pluralism entails a downgrading of economic pluralism — something which, ultimately, signifies the triumph of imperial neo-liberalism, that is, of "limited government and the subordination of politics to economics".[88] Arguably, once all is said and done, "[c]onstitutional law […] aspires to generate one large free trade zone".[89] I

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[82] Gilles Deleuze & Félix Guattari, *L'Anti-Œdipe*, 2d ed. (Editions de Minuit, 1973), pp. 386-87 ["*un organisme morcelé*"/"*une émission de singularités pré-individuelles et pré-personnelles, une pure multiplicité dispersée et anarchique, sans unité ni totalité, et dont les éléments sont soudés, collés par la distinction réelle ou l'absence même de lien*"].

[83] See David Schneiderman, "Comparative Constitutional Law in an Age of Economic Globalization", in Vicki C. Jackson & Mark Tushnet (eds), *Defining the Field of Comparative Constitutional Law* (Praeger, 2002), p. 244.

[84] Ernesto Laclau, *Emancipation(s)* (Verso, 1996), pp. 36-46.

[85] Yash Ghai, "Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims", 21 Cardozo L.R. 1095 (2000), p. 1102.

[86] For a cogent expression of this point, see Maimon Schwarzschild, "Pluralism, Conversation, and Judicial Restraint", 95 Northwestern U. L.R. 961 (2001), p. 974: "[T]he quest for a unified system of values and for consistent Right Answers about how we should live" can hardly be reconciled with a commitment to "pluralism".

[87] Schneiderman, *supra*, note 83, p. 244. In this author's words, "recent work in comparative constitutional law […] maintains a comfortable distance from questions of political and economic power": *Id*., p. 239.

[88] *Id*., p. 238. *Cf*. G.C. Spivak, *In Other Worlds* (Routledge, 2006 [1987]), p. 232: "A 'culturalism' that disavows the economic in its global operations cannot get a grip on the concomitant production of barbarism".

[89] Schneiderman, *supra*, note 83, p. 240. See also David Schneiderman, "Investment Rules and the New Constitutionalism", 25 Law & Social Inquiry 757 (2000), pp. 757-59. Indeed, even Anne-Marie Slaughter —

readily accept that this observation may not prove as striking in a context where the issue concerns the emancipation of sexual minorities and where U.S. institutions claim to be deriving assistance from Europe. But when Upendra Baxi refers to the manner in which the Second Amendment is globalized "in ways that convert the American people's right to bear arms into the universal right of the American industrial-military complex to sell arms worldwide",[90] he is effectively arguing the very objection that one can make to *Lawrence*: the marshalling of European standards in order to stabilize the U.S. standard neither makes the U.S. standard universal nor does it turn it into a *telos* to which every society should be aspiring. It merely globalizes — or, more accurately, *glocalizes* — what remains a standard deriving much of its operative sense culturally although purporting to serve as a cross-cultural criterion for making legal — and, no doubt, moral — judgements about sexual rights.)

It is foolish to assume that one can simply move away from the constraints of local meaning, and it is mistaken to maintain that one ought to be doing so. Doxastic truth-claims must be questioned in the interest of a more enlightened understanding, of a primordial understanding, of an understanding of the law's authenticity — something that can be done without excessive particularization (since, of course, there is a degree of singularity at which every set of constitutional arrangements becomes unique),[91] something that must be done by the comparativist-at-law *bearing witness*. Given the shortcomings of the truth-as-correctness model — an unthought axiomatics that fails to allow for the culture-singular frameworks necessarily playing a crucial role in establishing the conditions of possibility (and of *im*possibility) for legal thought and legal experience, that ignores the embeddedness of law, that engages in a massive (and massively implausible) catachresis, a task is prescribed.[92]

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whose "discourse harkens back to earlier comparativist scientizing" (Teitel, *supra*, note 24, p. 2586, not. 74) — admits that the "presumption of an integrated system" must "res[t] on a conception of a single global economy": Slaughter, *supra*, note 50, p. 86.

[90] U. Baxi, "Constitutionalism as a Site of State Formative Practices", 21 Cardozo L.R. 1141 (2000), p. 1195. It is not only U.S. norms that have undergone the transformation process that Upendra Baxi emphasizes. *Cf*. David Kennedy, *The Dark Sides of Virtue* (Princeton, 2004), p. 289: "[T]here is no question that international legal norms have been metabolized into the routines of the U.S. Navy".

[91] Such unhelpful particularization would materialize, for instance, if the act of localization was itself localized, and if this localization was itself localized, and so forth. *Cf*. Jennifer Widner, "Comparative Politics and Comparative Law", 46 Am. J. Comp. L. 739 (1998), p. 745, who, writing about comparative analysis in politics, notes that "[t]here are tradeoffs between accuracy, generality, and parsimony". In this sense, I join with Jacques Derrida who, through his notion of "iterability", claims that dependence on locale must ultimately be limited. In his words, "a written sign contains a power of severance": J. Derrida, *Marges* (Editions de Minuit, 1972), p. 377 ["*un signe écrit comporte une force de rupture*"].

[92] I use the idea of "catachresis" to signify "the lack of an 'adequate historical referent' in the cultures of the Other": U. Baxi, *The Future of Human Rights* (Oxford, 2002), p. 102, referring to G.C. Spivak, "Constitutions and Culture Studies", in Jerry D. Leonard (ed.), *Legal Studies as Cultural Studies* (S.U.N.Y., 1995), p. 166. *Contra*: David Fontana, "Refined Comparativism in International Law", 49 UCLA L.R. 539 (2001), p. 541, not. 4: "[T]he refined comparativist judge should stick to the examination of formal texts". David Fontana means, of course, "formal *legal* texts", which he defines as "judicial opinions, constitutional text": *Id*., p. 553, not. 67. For greater clarity, Fontana observes that if U.S. judges are interested in "law in action" in foreign jurisdictions, they should try to "glean insights about how the law has actually worked from those [formal legal texts]": *Ibid*. This practice, it is said, "would be less objectionable […] than it would be […] to use an article on comparative legal sociology, for example": *Ibid*. It seems clear that Fontana's notion of "refinement", as he applies it to comparative law, involves refinement-as-reductionism rather than refinement-as-sophistication. Yet, even that writer feels

The serious comparativist-at-law is compelled to fashion an alternative framework acknowledging the 'take-home' point that, unlike the metric system, Greenwich Mean Time, and 'dot.com',[93] no conception of law can be said to be genuinely transnational, for no conception of law can be shorn of world — which is another way to say that every conception of law is inscribed within an experiential world, within someone's encultured experiential world, that every conception of law is worldly.[94] This matter is far from being simply an academic contention. Beyond the seemingly esoteric questions pertaining to comparative law, broader issues of a political sort can be seen to surface. One of these circumstances concerns the political communication and interaction appropriate to glocalization.

Recall that in *Roper*, while Justice Kennedy appeared willing to grant a measure of normative purchase to foreign law, therefore going beyond mere paraffles, the extent of the persuasiveness of this allegedly persuasive authority remains unspecified. The Kennedy opinion refers to a "significant confirmation", which means that the foreign input would be meaningful, that it would bring to bear an important measure of legitimation to the U.S. Supreme Court's decision. But why is there a need for the Supreme Court to have its opinions validated at all? Is the Supreme Court not, well, supreme? And, in point of constitutional theory, how can foreign law, issuing from a normative source located beyond national borders and not institutionally rooted in the national constitutional order, contribute to the ascertainment of the command of the U.S. sovereign and thus supply a ratification making the U.S. judicial decision normatively weightier? Later, in *Graham* v. *Florida*,[95] Justice Kennedy wrote about foreign law offering the U.S. Supreme Court "respected reasoning to support it[s] [rationale]".[96] In his dissent, Justice Clarence Thomas reacted in the following terms to the suggestion that foreign law matters: "I confine to a footnote the Court's discussion of foreign laws and sentencing practices because past opinions explain at length why such factors are irrelevant to the meaning of our Constitution".[97] I suggest that the ideas of "confirmation" (as in *Roper*) and "support" (as in *Graham*) must be distinguished, a fact

bound to acknowledge (somewhat paradoxically, given his formalistic commitment) that "the skilled comparativist must be able to analyze comparative constitutional law within the context of general institutional practices": *Id*., p. 620. To return to *Lawrence*, it must be observed that "technically", so to speak, the U.S. Supreme Court is not confined to a reductionist approach. The relevant rules of civil procedure make it plain that "[t]he court, in determining foreign law, may consider any relevant material or source, including a testimony, whether or not submitted by a party": Fed. R. Civ. P. §44.1. For example, the relevant rules of evidence allow the court to appoint an expert on its own motion in order to get assistance on a question of foreign law: Fed. R. Evid. §706.

[93] For these analogies, see H.H. Koh, "The Globalization of Freedom", 26 Yale J. Int'l L. 305 (2001), p. 306. Surely, though, law cannot be demoted to units of measurement or digital systems.

[94] A parallel can be drawn with philosophical conceptions. See, *e.g*., J. Derrida, *Donner le temps*, vol. I: *La Fausse monnaie* (Editions Galilée, 1991), p. 76: "[I]s it not impossible to bring out a concept of essence […] that would transcend idiomatic difference?" ["*(N)'est-il pas impossible de dégager un concept de l'essence (...) qui transcende la différence idiomatique?*"]. Derrida adds: "[T]he essential link of thought to language, or in any event to the trace, will never dispense with idioms": *Ibid*. ["*(L)e lien essentiel de la pensée (...) au langage, ou en tout cas à la trace, ne fera jamais l'économie des idiomes*"].

[95] 560 U.S. 48 (2010).

[96] *Id*., p. 82.

[97] *Id*., p. 114, not. 12.

further confusing the institutional dynamics between U.S. judicial decision-making and foreign law.