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Covert Consensus: Why the United States Supreme Court Won't Admit That It Uses Consensus to Interpret the Constitution

Joshua Pickar[1]

The European Court of Human Right's doctrine of emerging consensus is widely lauded as a mechanism for the ECHR to maintain legitimacy absent an enforcement mechanism by deferring to states' various interpretations of the European Convention on Human Rights. By contrast, the United States Supreme Court has no such explicit doctrine of deference to state implementation of constitutional provisions. And, were the Court to announce one prospectively, there would likely be vociferous resistance as the constitutional traditions of the US run contrary to the idea that the federal Constitution would change based on states' decision to enact or repeal laws. Yet, it appears that—at least in some instances—the Supreme Court does implicitly employ a form of emerging consensus in its jurisprudence, akin to that of the European Court. This paper explores why the Supreme Court is covert in its application of the emerging consensus approach while the ECHR explicitly employs the doctrine, focusing on the key differences between the European and American systems to explain these divergent approaches.

The European Court of Human Rights ("ECHR") famously employs the doctrine of emerging consensus to evaluate member states' compliance with the European Convention on Human Rights (the "Convention").[2] This analysis requires the ECHR to look at both the pure number of member states with a given law and also the speed at which laws are changing among the Council of Europe member states. This approach is applauded as a means for an international court interpreting a multilateral convention to retain legitimacy in the absence of an enforcement mechanism.[3]

By contrast, the US Supreme Court has no such doctrine, and would be loath to ever explicitly announce a principle whereby its interpretation of the federal Constitution relied on states'

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[2] Beginning in the 1950s, the ECHR began to employ the Margin of Appreciation (the "Margin") in the context of Article 15. The first such case involved an application by Greece against the United Kingdom for failure to conform to the convention in Cyprus. For the next two decades, a number of other cases invoked the Margin as well; however, it was not until the 1972 *Hadyside* case that the Court fully expounded upon the Doctrine. Accordingly, the Court looks to four factors in determining the breadth of the Margin, namely: (1) whether there exists a European consensus, (2) whether there is a moral issue at stake, (3) the nature of the right, and (4) whether the there is a conflict of Convention values. Most important, however, is European Consensus, and this factor forms the basis of the US-Europe comparison.
[3] *See, e.g.*, Oskar Holmer, *Decoding the Margin of Appreciation doctrine in its use by the European Court of Human Rights*, https://perma.cc/AQ8Y-GP7X.

decisions to enact or repeal a law. Yet in a number of the Court's most famous and influential opinions—often those involving rights not explicitly listed in the Constitution,[4] but of great public importance—the Court implicitly employs an emerging consensus approach. These cases include *Bowers v. Hardwick*,[5] *Lawrence v. Texas*,[6] *Pace v. Alabama*,[7] *Loving v. Virginia*,[8] *Plessy v. Ferguson*,[9] *Brown v. Board of Education*,[10] *Stanford v. Kentucky*,[11] *Roper v. Simmons*,[12] *Heller v. District of Columbia*,[13] *Griswold v. Connecticut*,[14] *Roe v. Wade*,[15] and *Obergefell v. Hodges.*[16]

As a brief example, let us consider the 2005 case *Roper v. Simmons.*[17] In Roper, the Court overruled its prior decision from 1989 in *Stanford v. Kentucky*,[18] holding that the imposition of capital punishment on minors was unconstitutional. At the time of *Stanford*, twenty-two states allowed the death penalty for sixteen-year-olds and twenty-five for seventeen-year-olds.[19] However, by the time

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[4] These have included including the rights to: privacy, marry, contraception, abortion and, (arguably) bear arms as an individual.
[5] 478 US 186 (1986) (finding state bans on criminal sodomy laws constitutional).
[6] 539 US 558 (2003) (finding state bans on criminal sodomy laws unconstitutional).
[7] 106 US 583 (1883) (finding states bans on miscegenation constitutional).
[8] 388 US 1 (1967) (finding states bans on miscegenation unconstitutional).
[9] 163 US 537 (1896) (finding "separate but equal" to be constitutional).
[10] 347 US 483 (1954) finding "separate but equal" to be unconstitutional).
[11] 492 US 361 (1989) (finding death penalty for minors constitutional).
[12] 543 US 551 (2005) (finding death penalty for minors unconstitutional).
[13] 553 US 570 (2008) (finding an individual right to bear arms in the Constitution).
[14] 381 US 479 (1965) (finding state prohibition on contraceptives unconstitutional as violating the right to privacy).
[15] 410 US 113 (1973) (finding right to abortion in the Constitution under the right to privacy).
[16] 135 S. Ct. 2584 (2015) (finding state bans on same-sex marriage unconstitutional).
[17] 543 US 551 (2005).
[18] 492 US 361 (1989).
[19] As the Court acknowledged, "In determining whether a punishment violates evolving standards of decency, this Court looks . . . to the conceptions of modern American society as reflected by objective evidence. The primary and most reliable evidence of national consensus-the pattern of federal and state laws-fails to meet petitioners' heavy burden of proving a settled consensus." 492 US at 362. The Court explicitly found that "[o]f the 37 States that permit capital punishment, 15 decline to impose it on 16-year-olds and 12 on 17-year-olds. This does not establish the degree of national agreement this Court has previously thought sufficient to label a punishment cruel and unusual." *Id.*

of *Roper*, only eighteen states allowed for the death penalty of sixteen-year-olds.[20] This change in the number of states might have implicitly helped the Supreme Court to overrule *Stanford*.

Data on state laws and petitions for certiorari denied by US Supreme Court suggest that the Court implicitly considers state consensus on contentious issues before "constitutionalizing" them. This approach is similar to that of the ECHR, despite the fact that the Court and the ECHR have different legislative mandates and interpret substantially different documents. The following argues that Supreme Court's covert use of an emerging consensus approach is likely based on two factors that distinguish it from the ECHR, including: (1) different legitimacy concerns, and (2) different theories of interpretation.

Part I of this essay outlines a number of cases in which the Supreme Court imposed a new constitutional mandate on the states using emerging consensus. Part II analyzes this data and questions why emerging consensus is not an explicit constitutional doctrine in the US. Finally, Part III offers some conclusions and insights for what this means more broadly for courts in federal systems, considering whether new courts should employ the doctrine of consensus overtly or covertly.

I. AMERICAN CONSENSUS

In many areas of the law, consensus is explicitly the means of change. Indeed, federal laws are passed with the majority of both the House and the Senate,[21] and amendments to the

[20] Twenty-three states remained allowing the death penalty for seventeen-year-olds. *See* DEATH PENALTY INFORMATION CENTER, *State-By-State*, (last accessed May 2, 2017), https://perma.cc/Z62D-6MBG. This is consistent with a change in public opinion. *Compare* GALLUP, Death Penalty (May 2002), https://perma.cc/34P9-Y29K (finding that sixty-one percent of Americans supported the death penalty for juvenile murderers), *with* ROPER CENTER, Death Penalty 45 (Oct./Nov. 1999), https://perma.cc/KW2D-8SEG (finding that sixty-one percent of Americans supported the death penalty for juvenile murderers).
[21] US CONST. art. 1, § 1 ("All Legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate a House of Representatives.").

Constitution are passed in a similar fashion.[22] But it is not particularly surprising that the legislative process relies on consensus: the purpose of creating a bicameral Congress was to ensure that there would be both proportional representation of populations in the House, and that each state would also have an equal voice to each of the other states in the Senate.[23]

Beyond the pure legislative process, the Restatements of Law and Federal Rules provide other examples of consensus in the law-making process. For example, the 2007 amendment to the Rule 56 in the Federal Rules of Civil Procedure explicitly took into account the reality of how district courts decide motions for summary judgment.[24] Similarly, in other Restatements of Law, the American Law Institute frequently looks to state law practice to determine the rules which, in turn, affects the development of the common law.[25]

But the Supreme Court's use of consensus is different. The Supreme Court appears to employ the consensus approach primarily in cases where: (1) there is no explicit constitutional provision supporting the decision, and (2) the issue is one of great public importance.[26] The

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[22] US CONST. art. 5 ("This Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution . . . . which . . . shall be valid to all Intents and Purposes, as Part of this Constitution when ratified by the Legislatures of three fourths of the several States.").

[23] For this reason, there are few suits brought against the federal government alleging that federal legislation harmfully targets minorities. This is because the federal judiciary is, in theory, the body of the federal government with roughly the same worldview as the decision makers in the political branches—and it is built to be that way. *See generally* Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 975 (2004) (arguing that the lack of successful race discrimination claims against the federal government "is not a function of a lack of federal discrimination," but rather "is a function of the shared norms between the federal judiciary and the political branches of the federal government"). This means that, for the most part, the minority groups that the courts believe to be worthy of protection are the ones that the political branches largely have not passed legislation to affect. *Id.* at 1021–22. However, sometimes there may be a time lag between the protection of the political branches and of the courts, and it is in those moments where the courts expand constitutional protections. *Id.*

[24] Fed. R. Civ. P. 56 committee notes on rules (2007) ("'Should' in amended Rule 56(c) recognizes that courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue as to any material fact.").

[25] *See generally* David B. Massey, *How the American Law Institute Influences Customary Law; The Reasonableness Requirement of the Restatement of Foreign Relations Law*, 22 YALE J. INT'L L. 419 (1997).

[26] It is difficult to define exactly what it means for an issue to be of great public importance. These cases are typically the "blockbuster" cases of a given year, and a couple of examples include cases concerning abortion, gay marriage, and the death penalty.

following explores a number of cases where the Supreme Court employed the consensus approach in answering constitutional questions.

A. Consensus in the Courts

In order to understand how the Supreme Court uses consensus, it is instructive to examine a number of key cases. These cases demonstrate how the Supreme Court employs the consensus approach explicitly in some contexts, while doing so implicitly in others. This section draws upon state laws, public opinion data, and failed petitions for certiorari to demonstrate the Supreme Court's use of consensus in rendering constitutional decisions.

Some areas of constitutional interpretation explicitly require an inquiry into the practice of states.[27] The Supreme Court occasionally treats state legislation as a source of "knowledge relevant to the solution of trying questions."[28] For example, in applying the Eighth Amendment, which states that, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,"[29] the Court explicitly looks to state practice. Justice Warren announced that "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,"[30] which requires an eye toward state practice. However, in other areas of the law, including the Fourteenth Amendment, the Court more casually and covertly

[27] For a survey of this practice, see generally *State Law as "Other Law": Our Fifty Sovereigns in the Federal Constitutional Cannon*, 120 HARV. L. REV. 1670, 1672 (2007) (explaining how the Court looks to state laws under the Fourteenth Amendment fundamental rights cases, Fourth Amendment search-and-seizure cases, Sixth Amendment jury cases, and Eighth Amendment capital punishment cases).
[28] Ruth B. Ginsburg, *A Decent Respect to the Opinions of [Human]kind" The Value of a Comparative Perspective in Constitutional Adjudication*, 1 FIU L. REV. 27, 32 (2006).
[29] US CONST. amend. VIII.
[30] *Trop v. Dulles*, 356 US 86 (1958). However, many scholars have criticized the idea of "evolving standards of decency." *See, e.g.*, John F. Stinneford, *The Original Meaning of 'Unusual': The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1746-47 (2009) ("[T]he word 'unusual' was a term of art that referred to government practices that deviate from 'long usage' . . . . Without a renewed recognition of the significance of the word 'unusual,' courts will be powerless when faced with the primary danger against which the Cruel and Unusual Punishments Clause was designed to protect: The tyranny of enflamed majority opinion.").

employs a consensus approach, often without any explanation for why.[31] Advocacy groups, such as the ACLU and Lambda, are aware of the fact that the Court employs consensus, and are careful about when to bring impact litigation claims.[32]

i. *Bowers v. Hardwick* and *Lawrence v. Texas*

One of the most striking instances of the Supreme Court's use of consensus is in the context of criminal restrictions on sodomy. In 1986 in *Bowers v. Hardwick*, [33] the Court held 5–4 that a Georgia law was constitutional. Less than twenty years later in *Lawrence v. Texas*,[34] the Court overruled *Bowers* 6–3, holding that anti-sodomy laws are unconstitutional under the Due Process Clause of the Fourteenth Amendment.[35] What changed during the twenty years between *Bowers* and *Lawrence*? Twelve less states had anti-sodomy laws.

Before the Supreme Court's decision in *Bowers*, every state criminalized sodomy, categorizing the act as felonious.[36] These prohibitions dated back at least as far as 1779, at which time Thomas Jefferson proposed a bill which would punish by castration men who engage in sodomy.[37] As the

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[31] For example, in a very recent case before the Court, *Esquivel-Quintana v. Sessions*, No. 16-54, Petitioner was ordered deported for sexual abuse of a minor under California law for sex with his girlfriend who was three years younger than him. However, had Mr. Esquivel-Quintana been living in forty-three other states, or the District of Columbia, his acts would not have been an "aggravated felony" as based on state law and, therefore, he could not be deported for his actions. The issue of consensus became important at oral argument, where the attorney for Esquivel-Quintana stated: "[A]ll you are dealing with this in this case is a few – there's actually seven outlier statutes that go further than Federal law, and that have backup provisions that are going to still allow the Federal government to seek automatic removal or some other immigration remedy." Transcript of Oral Argument at pages 23–24, *Esquivel-Quintana v. Sessions*, (2017) (No. 16-54), https://perma.cc/2ZK8-JK9H.

[32] *See, e.g.*, Erin Ryan, *The Public Trust Doctrine, Private Water Allocation, and Mono Lake: The Historic Saga of* National Audubon Society v. Superior Court, 45 ENVTL. L. 561, 630 (2015) ("Usually, the plaintiffs in strategic impact litigation make carefully tailored decisions about when and where to file, professionally counseled to aim for legal moments at which the chosen jurisdiction appears ready for the new interpretation the litigants are promoting.").

[33] 478 US 186 (1986).

[34] 539 US 558 (2003).

[35] US CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property without due process of law.").

[36] 478 US at 192–93 ("In fact, until 1961, all 50 states outlawed sodomy.").

[37] Thomas Jefferson, *A Bill for Proportioning Crimes and Punishments*, 1778 Papers 2: 492–504 ("Whosoever shall be guilty of Rape, Polygamy, or Sodomy with a man or woman shall be punished, if a man, by castration, if a

Court explained in *Bowers*, "Proscriptions again [sodomy] have ancient roots."[38] In 1962, the American Law Institute developed the Model Penal Code ("MPC") promote uniformity among state criminal laws. The MPC decriminalized consensual sodomy, opting instead to make it a crime to solicit for sodomy.[39] In 1962, Illinois adopted the recommendation of the American Law Institute, becoming the first state to remove criminal penalties for sodomy.[40] By 1986, the year the Court decided *Bowers*, twenty-six states had removed their criminal sodomy laws—the majority through legislative repeal—while a few state court decisions invalidated laws on the basis of either the federal or state Constitution.[41]

In *Bowers*,[42] a "practicing homosexual"[43] was convicted of consensual sodomy under a Georgia statute.[44] Petitioner challenged the law as a violation of the right to privacy under the Due Process Clauses of the Fifth and Fourteenth Amendments.[45] The Court framed the question

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woman, by cutting thro' the cartilage of her nose a hole of one half inch dimeter at the least."), https://perma.cc/7EP6-JXFE. This was actually a decriminalization of sodomy, as the prior punishment was death. *See* JEAN HALLEY & AMY ESHELMAN, SEEING STRAIGHT: AN INTRODUCTION TO GENDER AND SEXUAL PRIVILEGE 16 (2017).

[38] 478 US at 192 (citing Yao, *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 525 (1986)). As Yao explains, "The earliest legal argument for outlawing homosexuality can be found in Plato's *Laws*." 40 U. MIAMI L. REV. at 525.

[39] Model Penal Code § 213.2 (Proposed Official Draft 1962). Blackstone "later restated . . . sodomy legislation as prohibiting an 'infamous crime against nature.' Blackstone's characterization of sodomy, as a 'crime against nature,' would serve as the basis for most American sodomy laws." *Id.* (citing William Blackstone, 4 *Commentaries* *215).

[40] Criminal Code of 1961, §§ 11–2, 11–3, 1961 Ill. Laws, pp. 1985, 2006 (codified as amended at Ill. Rev. Stat., ch. 38 ¶¶ 11–2, 11–3 (1983) (repealed 1984)).

[41] The twenty-six state that repealed their laws were: Alaska (1980), California (1976), Colorado (1972), Connecticut (1971), Delaware (1973), Hawaii (1973), Illinois (1971), Indiana (1976), Iowa (1977), Maine (1976), Massachusetts (1974, Comm v. Balthazar), Nebraska (1977), New Hampshire (1975), New Jersey (1977), New Mexico (1975), New York (1980, NY v. Onofre),North Dakota (1973), Ohio (1974), Oregon (1972), Pennsylvania (1980, Comm. v. Bandio), South Dakota (1977), Vermont (1977), Washington (1976), West Virginia (1976), Wisconsin (1983), Wyoming (1977),

[42] 478 US 186 (1986)

[43] *Id.* at 188.

[44] Ga. Code Ann. § 16–6–2(a)–(b) (1984) provided, in pertinent part: "A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth of another . . . . the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years."

[45] *See* US CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law"); US CONST. amend. XIV (same).

presented as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."[46]

The Court in *Bowers* went out of its way to explain how widespread the criminalization of sodomy was, and how long back the practice dated. Noting that "[s]odomy was a criminal office at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights,"[47] the Court continued by outlining that "[i]n 1868 . . . all but 5 of the 37 states in the Union had criminal sodomy laws. In fact, until 1961, all 50 states outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults."[48] Based on the fact that there existed widespread approval and enforcement of anti-sodomy laws, Justice White, writing for the majority, explained that were the Court to diverge from the state consensus, the Court would lose legitimacy: "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[49] Accordingly, the Court held that the Constitution "does not confer a fundamental right upon homosexuals to engage in sodomy."[50]

An eye toward failed petitions for certiorari helps to demonstrate the Supreme Court's approach to consensus as well. In 1998 in *Thompson v. United States*,[51] an active duty member of the military was convicted of consensual sodomy with his wife under the Uniform Code of Military

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[46] 478 US at 190.
[47] *Id.* at 192.
[48] *Id.* at 192–94.
[49] *Id.* at 194.
[50] *Id.* at 186.
[51] No. ACM 31803, 1996 WL 493013 (A.F. Ct. Crim. App. Aug. 8, 1996).

Justice (UCMJ).[52] He petitioned the Supreme Court for certiorari,[53] arguing that Article 128 of the UCMJ was unconstitutional as a violation of the right to privacy.[54] At the time of this petition, four fewer states had anti-sodomy statutes on the books. However, the Court denied certiorari.[55]

In 2003, the Supreme Court granted certiorari in *Lawrence v. Texas*.[56] Like *Bowers*, *Lawrence* concerned a state prosecution for sodomy in Texas.[57] The Court's pointed to two reasons supporting its decision to overrule: (1) "the fact that a State's governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice," and (2) "individual decisions concerning the intimacies of physical relationships, even when not intended to produce offspring, are a form of 'liberty' protected by due process."[58] However, it also appears that the change in the number of states criminalizing and prosecuting sodomy laws prompted the Supreme Court's decision. The Court noted: "*Bowers'* deficiencies became even more apparent in the years following its announcement. The 26 States with laws prohibiting the conduct referenced in *Bowers* are reduced now to 14, or which 4 enforce their laws only against homosexual conduct."[59]

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[52] Art. 128, U.C.M.J., 10 USC. § 925(a) ("Any person subject to this chapter who engaged in unnatural carnal copulation with another person of the same or opposite sex by unlawful force or without the consent of the other person is guilty of forcible sodomy and shall be punished as a court-martial may direct.").
[53] No. 97-1504, 1997 WL 34103380 (1998),
[54] *See generally Griswold v. Connecticut*, 318 US 479 (1965).
[55] 523 US 1077 (1998).
[56] 539 US 558 (2003).
[57] Lawrence was prosecuted under Tex. Penal Code Ann. § 21.06(a)(2003), which provides: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." The statute defines "[d]eviate sexual intercourse" as: "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object." § 21.01(1).
[58] 539 US at 560.
[59] 539 US at 559. Justice O'Connor concurred, arguing that *Lawrence* was distinguishable from *Bowers* insofar as the law at issue in *Bowers* was generally applicable against both heterosexual and homosexual couples, while the law in *Lawrence* only proscribed same-sex contact. *See* 539 US at 581, 585 (O'Connor, J., concurring) ("The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction . . . . I therefore concur in the Court's judgment that Texas' sodomy law banning 'deviate sexual intercourse' between consenting adults of the same sex, but not between consenting adults of different sexes, is unconstitutional.").

A mere seventeen years after *Bowers*, the Court overruled in *Lawrence.* The text of the Constitution had not changed, nor had a new document indicating that the founders approved of sodomy emerged from the annals of history. The major change was the proportion of states criminalizing sodomy versus those who had repealed their anti-sodomy laws. During this period, public opinion changed as well. In 1977, forty-three percent of Americans thought that "homosexual relations between adults" should be legal, forty three percent thought that they should be illegal, and fourteen percent had no opinion.[60] During the 1980s, nearly sixty percent of Americans thought that homosexual relations between consenting adults should be illegal, while approximately thirty percent thought they should be legal.[61] By May 2003 nearly sixty percent thought the practice should be legal while only thirty-five percent opposed.[62] As demonstrated by the trajectory from *Bowers* to *Lawrence*, considering state laws and public opinion, the Supreme Court appears to consider consensus in interpreting ambiguous provisions of the Constitution when the case is of great public importance.

ii. *Pace v. Alabama* and *Loving v. Virginia*

As was the case in the progression from *Bowers* to *Lawrence*, the Supreme Court reversed trajectory in cases concerning anti-miscegenation laws as states began to repeal their laws. First, in *Pace v. Alabama*,[63] the Court upheld Alabama's anti-miscegenation statute when thirty-two states had similar prohibitions. Then, in *Loving v. Virginia*,[64] the Court found a Virginia anti-miscegenation statute unconstitutional, overruling only sixteen states.

60 Frank Newport, *Six in 10 Americans Agree that Gay Sex Should Be Legal*, GALLUP, June 27, 2003, https://perma.cc/A53R-63UU.
61 *Id.*
62 *Id.*
63 106 US 583 (1883).
64 388 US 1 (1967).

In *Pace*, the Court found that Alabama's prohibition on interracial marriage did not violate the Equal Protection Clause of the Fourteenth Amendment. First, the Court pointed to the fact that the Equal Protection Clause was meant "to prevent hostile and discriminating state legislation against any person or class or persons."[65] The Supreme Court concluded that, because the Alabama law "applie[d] the same punishment to both offenders, the white and the black," there was no violation of the Equal protection clause.[66] At the time the Court decided *Pace*, thirty-two states had anti-miscegenation laws.

Then, nearly eighty years later, the Court overruled *Pace* and found a Virginia anti-miscegenation statute unconstitutional in *Loving v. Virginia*.[67] The Court explicitly noted that "Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications,"[68] and rebuffed "the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious discrimination"[69] from *Pace*. Additionally, as was the case with *Bowers-Lawrence*, public opinion changed on the question of whether society "approve[d] or disapproved of marriage between blacks and whites," though not nearly as starkly.[70] In 1959, four percent approved, while by 1968 twenty percent approved.[71] But even twenty percent is nowhere near the sixty percent margin of approval at the time of *Lawrence*. As was the case in the *Bowers-Lawrence* trajectory, from

[65] 106 US at 584
[66] *Id.*
[67] 388 US 1 (1967).
[68] *Id.* at 6. The Virginia statute made it illegal for "any white person [to] intermarry with a colored person, or any colored [to] intermarry with a white person," punishing violators of a felony with no less than a five-year sentence. Va. Code 20–58.
[69] 388 US at 8.
[70] Frank Newport, *In US, 87% Approve of Black-White Marriage, vs. 4% in 1958*, GALLUP, July 25, 2013, https://perma.cc/33EU-ZKW7.
[71] *Id.*

the time of *Pace* to *Loving* the number of states with anti-miscegenation severely decreased and only when a minority remained did the Court impose a new constitutional rule.

iii. *District of Columbia v. Heller*

It is of note the Court's consensus approach does not apply only in the civil rights context. Indeed, in the context of the Second Amendment,[72] the Court found that there was an individual right to bear arms once a majority of states provided such a right in 2008 in *District of Columbia v. Heller*.[73] Before *Heller*, there were a number of cases that petitioned the Court for certiorari dating back to as early as 1996,[74] the last of which was filed in 2005. And in *Heller*, the Court itself acknowledged that the strict District of Columbia law was an outlier: "Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban."[75]

Commentators have heralded *Heller* on a number of grounds. Some consider *Heller* to be the most originalist opinion ever drafted.[76] Other scholars opine that the relevant historical texts do not support the conclusion that the Second Amendment supports an individual right to bear arms; instead, they view the *Heller* decision as "overrid[ing] democratic judgments in favor of a dubious understanding of the Constitution."[77] Still, there is a third group of scholars, who neither view *Heller* as the paragon of originalism nor as an anti-democratic abomination: instead, they view *Heller* as

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[72] US CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").
[73] 554 US 570 (2008).
[74] *Bach v. Pataski*, No. 05-786, 2005 WL 3486081 (Dec. 19, 2005); *Seegars v. Gonzales*, No. 05-365, 2005 WL 2295182 (Sept. 16, 2005); *Costerus v. Swift*, No. 02-427, 2002 WL 32134491 (June 27, 2002); *Silveira v. Lockyer*, No, 03-51, 2002 WL 32166832 (Oct. 2002); *Hickman v. City of Los Angeles*, No. 96-109, 1996 WL 33422748 (July 5, 1996).
[75] 554 US at 629.
[76] *See, e.g.*, Randy E. Barnett, *New Flash, the Constitution Means What It Says*, WALL ST. J., June 27, 2008, https://perma.cc/S8KC-R2WB ("Justice Scalia's opinion is the finest example of what is not called 'original public meaning' jurisprudence ever adopted by the Supreme Court.").
[77] *See* Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 Harv. L. Rev. 246 (2008) (citing SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA (2006); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 158 (2000)).

building upon the methodology of consensus as, despite the fact that "[t]he Court worked hard to support its decision by reference to the standard legal materials . . . [,] the national consensus probably provides the best explanation of what the Court did."[78] The third approach, that of consensus, is exactly the same as that which the Court uses in the civil rights context.

It is somewhat difficult to quantify state laws in this realm, as the laws can be so varied and precise that it would be inappropriate to haphazardly group them. Suffice it to say that a majority of states had laws that provided—at a minimum—an individual right to bear arms. Public opinion polls are quite clear, though: in 1990, seventy-eight percent of people thought that there should be more strict gun laws while in 2008 only forty-nine percent thought so.[79] *Heller* demonstrates that the Court's consensus approach is not only for progressive civil rights issues, but can inform a variety of constitutional provisions, and a change in consensus can lead to a direct change in the interpretation of the laws.

iv. *Roe v. Wade*

One case in which the Supreme Court deviated from its own pattern, imposing a constitutional ruling onto a majority of states, was *Roe v. Wade*.[80] In *Roe*, the Supreme Court considered the constitutionality of a Texas statute criminalizing abortion.[81] The Court found the restriction unconstitutional as a violation of the right to privacy enshrined "in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."[82] Most notable about *Roe*, however, is not that the Court imposed a new constitutional rule; instead, the Court imposed a

[78] Sunstein, *supra* note 77 at 247.
[79] GALLUP, Guns, https://perma.cc/K3DK-QWS7.
[80] 410 US 113 (1973).
[81] Tex. Penal Code § 1191 reads: "If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine . . . and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years."
[82] 410 US at 153.

new constitutional rule on a *majority* of states. Perhaps for this reason, *Roe* remains highly contentious and, as viewed by many, an illegitimate decision of the Court.[83]

The Supreme Court acknowledged that "[i]n the past several years . . . a trend toward liberalization of abortion statutes has resulted in adoption, by one-third of the States of less stringent laws."[84] Prior to *Roe*, twenty-nine states made abortion completely illegal.[85] Other states had different permutations of abortion regulations. For example, Mississippi made abortions illegal except in cases of rape, and the remaining twenty states either permitted abortion on request, when the pregnancy posed a danger to the woman's health, or when the fetus was likely to be damaged.[86] Twenty-nine is far more states that the Court overruled in *Roe* than in any other case discussed in this article. And twenty-nine only include those states that prohibited all forms of abortion no matter the circumstance; one could easily include those states with rules like Mississippi as being in the majority.

It should be noted that, despite the lack of state law consensus regarding the right to abortion, there was public opinion supporting the Court's decision. In 1975, nearly sixty percent of Americans thought that abortion should be legal "only under certain circumstances" and another twenty percent thought it should be "legal under any circumstances."[87] The figures have not changed too much into modern day; now fifty percent think abortion should be legal "only under certain circumstances," while about thirty percent think abortion should be legal "under any

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[83] *See* LACKLAND H. BLOOM, JR., DO GREAT CASES MAKE BAD LAW? 320 (2014) ("To some extent the very fact that the Court did revisit *Roe* in *Casey* is a testament to the fact that the critics of *Roe* both on and off the Court attacked the decision as not simply wrongly decided, but rather as a wholly illegitimate exercise of judicial power.").
[84] 310 US at 140.
[85] *See* NAT'L RIGHT TO LIFE, *Abortion History Timeline*, (last accessed May 2, 2017), https://perma.cc/3EZS-KMWC.
[86] *See Id.*
[87] GALLUP, Abortion, https://perma.cc/GXS2-3JTW. Perhaps this reflects the ultimate progress of the Supreme Court's abortion jurisprudence, culminating with the doctrine of "undue burden." *See Generally Planned Parenthood v. Casey*, 505 US 883 (1992).

circumstances."[88] The remaining twenty percent who think abortion should be "illegal in all circumstances" has remained relatively static.[89]

Perhaps in part because the Court in *Roe* overruled a majority of states, the decision is still viewed as highly illegitimate by a number of critics and by the Republican party as a whole. Legal academics on both the left and right hotly debate *Roe*'s legitimacy and the constitutionality of abortion restrictions to this day.[90] But these debates are not merely academic. Indeed, both President Trump and Democratic nominee Hillary Clinton announced that would-be Supreme Court justices' view on *Roe* would serve as a decisive factor in Supreme Court nominations.[91] Perhaps in the context of *Roe*, the Court was guided more by public opinion than by state laws. Nonetheless, there existed consensus that contributed to the Supreme Court's decision.

v. Other Cases

A number of other important decisions from the Supreme Court exemplify the consensus approach.[92] And this list is by no means exclusive, either. For example, the Court's recent decision in *Obergefell v. Hodges*,[93] as well as its decision in *Griswold v. Connecticut*,[94] conform with the above

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[88] GALLUP, Abortion, https://perma.cc/GXS2-3JTW.
[89] *Id.*
[90] *See supra* note 83. *See also* MARY ZIEGLER, AFTER ROE THE LOST HISTORY OF THE ABORTION DEBATE 56 (2015) ("According to the conventional historical account, a conviction that *Roe* was undemocratic and illegitimate defined the national antiabortion movement and motivated activists.").
[91] *See* Mark Berman, *Trump promised judges who would overturn* Roe v. Wade, WASH. POST (Mar. 21, 2017), https://perma.cc/4GRL-P3GF; Michelle Ruiz, *Hillary Clinton Awesomely Defended Abortion Rights at the Debate*, VOGUE (Oct. 19, 2016), https://perma.cc/9UT7-8P9T.
[92] *See, e.g.*, *Washington v. Glucksberg*, 521 US 702 (1997) (holding that there is no right to assisted suicide); *Reed v. Reed*, 404 US 71 (1971) (holding that administrators of estates cannot be chosen in a way that discriminates on the basis of sex); *Romer v. Evans*, 517 US 620 (1996) (holding that state constitutional amendment that prevented a protected status based on sexual orientation did not violate the equal protection clause); *Brown v. Bd. of Educ.*, 437 US 483 (1954) (holding that "separate but equal" is unconstitutional); *Plessy v. Ferguson*, 163 US 537 (1896) (holding that "separate but equal" is constitutional).
[93] 576 US __, 135 S. Ct. 2584 (2015) (holding that there is a right for homosexual couples to marry and overruling only fourteen states).
[94] 381 US 479 (1965). It is difficult to quantify exactly how many states had similar laws banning contraception. As economist Martha J. Bailey explains, "Although 47 of the 48 coterminous states enacted antiobscenity laws . . . idiosyncratic differences in language had an important impact on their relevance for contraceptive access decades later. For instance, only 31 states explicitly enumerated 'contraception' among

pattern.[95] In *Griswold*, one "conclusive" factor leading to the conclusion that the Connecticut statute was unconstitutional was "the utter novelty of [the state's] enactment. Although the federal Government and many States have at one time or other had on the book statutes forbidding or regulating the distribution of contraceptives, none . . .has made the *use* of contraceptives a crime."[96]

In sum, the Supreme Court's use of consensus is pervasive, and appears not only in the context of famous civil rights decisions, but in many areas of constitutional law. Yet, the Supreme Court's invocation of consensus is rarely overt despite its frequency. It therefore warrants further analysis as to why the Court is generally silent about its invocation.

II. THE SUPREME COURT'S COVERT CONSENSUS

The Supreme Court and the European Court of Human Rights each employ the doctrine of consensus differently, as the two courts have different institutional duties and concerns. A better understanding of the structure and goals of each of these two courts can better elucidate why the Supreme Court is covert about applying consensus, while the ECHR is overt. Two specific factors underlie this difference: (1) different legitimacy concerns and (2) different theories of interpretation. But beyond the reasons for why the Supreme Court is covert in its application, one should normatively consider the benefit of consensus in the American context. The following reviews these factors in turn.

A. Legitimacy

To be sure: both the Supreme Court and the ECHR have legitimacy concerns. But whereas the ECHR system is premised on state consent to be bound by ECHR judgments, one does not

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the regulated obscenities, and language in only 24 states additionally banned the 'sales' of contraceptive supplies." Martha J. Bailey, *"Momma's Got the Pill": How Anthony Comstock and* Griswold v. Connecticut *Shaped US Childbearing*, 100 AM. ECON. REV. 98, 101 (2010)

[95] RICHARD A. POSNER, SEX AND REASON 329 (1992); Bailey, *supra* note 94.

[96] *Poe v. Ullman*, 367 US 497, 554 (1961) (Harlan, J., dissenting), *incorporated by reference in Griswold v. Connecticut*, 381 US 479, 500 (1965) (Harlan, J., concurring in the judgment).

conceptualize the US federal system as being based on states' consent to be bound by the judgments of the Supreme Court. The two courts are quite different, effectuating different policy goals and serving different governmental functions. Accordingly, each court's use of consensus—be it overt or covert—is in large part based on the diverging legitimacy concerns of these two bodies.

The Supreme Court is primarily concerned that its decisions are grounded in solid constitutional analysis with a basis in either the text or the traditions of the Constitution. Given that the justices are unelected and serve for life "with no power except their institutional role and persuasion to convince the country to abide by their decisions . . . [the Court's] legitimacy rests not just on the principle of the rule of law, but on the idea that there is some distance between interpreting the law and making political decisions."[97] The Court is aware of this, and acts to protect its legitimacy consistent with these tenets.[98]

The debate concerning the basis of the Supreme Court's legitimacy is heated.[99] Some scholars have found that the citizens have a sense of good will toward the Court, so that when a

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[97] Emma Long, *The legitimacy of the US Supreme Court is at stake*, THE CONVERSATION (Mar. 21, 2017), https://perma.cc/9KPK-73UJ.

[98] *See generally* Tom S. Clark, The Limits of Judicial Independence (2011).

[99] The legitimacy concerns of the ECHR are pronounced as well. But unlike the US Supreme Court, the ECHR is a supranational court imposing rules onto member states with widely diverging preferences. As a means of maintaining legitimacy without acting as a supranational legislature to all Council of Europe member states, the doctrine of emerging consensus provides a way for the ECHR to render judgments consistent with the preferences of the various member states. *See generally* Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law*, 16 EUR. J. INT'L L. 907 (2005). However, when a judgement does not comply with the preferences of a given state, a struggle can arise between the ECHR and the state. This issue is coming to a head in Russia. Russia recently amended the law on the Constitutional Court of the Russian Federation, which came into effect on December 14, 2015. The law gave the Constitutional Court the power to declare judgement of the ECHR as "impossible to implement" on the grounds that the interpretation of the Convention is inconsistent with the Russian Constitution. *See* Natalia Chaeva, *The Russian Constitutional Court and its Actual Control over the ECtHR Judgment in Achugov and Gladkov*, EJIL: TALK!, Apr. 26, 2016, https://perma.cc/QDM5-979Z (citing https://perma.cc/2US7-K3RJ). In the Russian Constitutional Court case of *Achugov and Gladkov v. Russia*, the Russian Constitutional Court held that the ECHR's judgment that Russia's "blanket ban on convicted prisoners' voting rights was incompatible with the" Convention violated the Russian Constitution. *Id.* Article 32(3) of the Russian Constitution states, "Deprived of the right to elect and be elected shall be citizens recognized by court as legally unfit as well as citizens kept in places of confinement by a court sentence," and refused to implement the ECHR's judgment. St. 32(3) Konstitutsii Rossiiskoi Federatsii ot 12 dekabrya 1993 goda // Rossiskaya Gazieta 25 dekabrya 1993. The Russian

specific decision conflicts with an individual's policy values, they do not view the decision as illegitimate.[100] Others have found that the Court's legitimacy is based on the American people's satisfaction with individual decisions.[101] And others have taken a more middle-of-the-road view, concluding that "the Supreme Court need not make decisions pleasing to the majority all or even most of the time. But because the Court currently attracts legitimacy form the majority, its ability to rule against the people's preferences, even up to one-half or so of the time, is secure."[102] Given that the US Supreme Court's legitimacy concerns are based on writing opinions with strong analytical reasoning—whereas the ECHR's are based on having decisions fall within the mainstream—the Supreme Court is less likely to explicitly rely on consensus.

B. Methods of interpretation

The second reason for the Supreme Court's covert invocation of consensus is that the approach is at odds with textualism and originalism—two fundamental interpretive tools in American constitutional law.[103] Both of these methods involve judicial restraint: judges see their hands as being tied either by the text or the history of the Constitution. Textualism is a method where judges look to the plain text of a statute or constitutional provision to determine its meaning.[104] Originalism "regards the discoverable meaning of the Constitution at the time of its

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Constitutional Court also considered this question in the recent case of *Yukos v. Russian Federation*, where it refused to implement the judgement of the ECHR as being inconsistent with the Russian constitution. *See also Russia passes law to overrule European human rights court*, BBC (Dec. 4, 2015), https://perma.cc/BD5P-6NN6. However, in other contexts, countries have readily accepted that judgments of the ECHR trump their national constitutions. *See, e.g.*, *A, B, C v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. (2010) (holding that Ireland's Constitution violated Article 8 of the European Convention concerning abortion).

100 James L. Gibson et al., *Measuring Attitudes toward the United Sates Supreme Court*, 47 AM. J. POL. SCI. 354 (2003).

101 Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 197 (2013) ("Contrary to conventional wisdom, a potent ideological foundation underlies Supreme Court legitimacy vis-à-vis subjective ideological disagreement with the Court's policymaking.").

102 James L. Gibson & Michael J. Nelson, *Is the US Supreme Court's Legitimacy Grounded in Performance Satisfaction and Ideology?*, 59 AM. J. POL. SCI. 162, 173 (2015).

103 See Robert Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1 (1971).

104 "Textualism," 5 *Encyclopedia of the Supreme Court of the United States* 21–22 (Davis D. Tanenhaus ed., 2008).

initial adoption as authoritative for purposes of constitutional interpretation in the present."[105] Both of these methods of interpretation are at odds with the consensus approach. And given that the Constitution is explicit that states can regulate in certain areas, while the federal government can regulate others, it seems odd that state laws should affect constitutional interpretation[106]

In a system where the Constitution's meaning can change based on state law and public opinion, originalism and textualism lose their potency. Judges may still be guided by the constitutional text; but in a document that is often "vague or irreducibly ambiguous," the text can only do so much.[107] Originalism's utility fails even more in a consensus model: where the only inquiry is change in opinion—rather than the original public meaning—originalism as a means of constitutional interpretation becomes a nonstarter. The consensus approach, while beneficial for other reasons, is undoubtedly at odds with two keys methods of American constitutional interpretation and, for this reason, contributes to the fact that the Supreme Court is covert about consensus.

But the principle of consensus can provide a more nuanced and concrete approach to the living Constitution method of interpretation.[108] The living Constitution approach is "[b]ased on the

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[105] Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599 (2004).
[106] The Tenth Amendment provides: "The powers not delegated to the United States by Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." US CONST. amend. X. Some areas of law are explicitly limited to the federal government, and the states are "field pre-empted" from passing any laws in this area. *See, e.g.*, *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 US 88, 98 (1992) ("[N]onapproved state regulation of occupational safety and health issues for which a federal standard is in effect is impliedly pre-empted"); *Rice v. Santa Fe Elevator Corp.*, 331 US 218 (1947) ("It is clear that since warehouses engaged in the storage of grain for interstate or foreign commerce are in the federal domain, Congress may, if it chooses, take unto itself all regulatory control over them"). In all of the cases presented in this Article there are no issues of pre-emption.
[107] Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 467–68 (2013).
[108] This is akin to the "living instrument" approach that the ECHR employs in interpreting the European Convention. *See generally* George Letsas, *The ECHR as a Living Instrument: Its Meaning and Legitimacy*, *in* THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN AND GLOBAL CONTEXT (Geir Ulfstein, Andreas Follesdal & Birgit Schlütter eds., 2010). While this may pose different problems in the context of an international treaty—including the fact that progressive interpretation could be viewed as imposing new requirements on signatories in a system premised on sovereignty and consent—the different

idea that society changes and evolves" and "requires that constitutional controversies, in the words of Justice Oliver Wendell Holmes Jr., 'must be considered in light of our whole experience and not merely in that of what was said a hundred years ago.'"[109] The living Constitution approach may be appropriate because "the world has changed in incalculable ways" and "it is just not realistic to expect the cumbersome amendment process to keep up with these changes."[110] Accordingly, by applying this approach, the Court modernizes the law to keep up with the changing times.[111]

The consensus-living Constitution approach provides a constrained and more foreseeable way for judges to interpret the Constitution. By referring explicitly to state laws—perhaps as a proxy for public opinion—courts can ground a changing constitutional jurisprudence in considerations less nebulous than the "changing times." Through a more systematized living Constitution approach, those with fears of the judiciary becoming a supra-legislature can rest assured that the courts' decisions will be in line with that of the public. Of course, this raises the question of whether it should be the courts effectuating the public's preferences or the legislature, and whether such an approach would exacerbate the counter-majoritarian difficulty.[112] But this separation of powers issue

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approach to interpretation is an important underlying difference between the European and American systems, as the ECHR rarely employs a textualist or originalist method of interpretation.

[109] Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the 'Living Constitution'*, 76 N.Y.U. L. REV. 1456, 1463 (2001).

[110] DAVID A. STRAUSS, THE LIVING CONSTITUTION 1–2 (2010).

[111] Controversially, Judge Posner recently applied this approach to statutory interpretation in *Hively v. Ivy Tech Community College*, 853 F.3d 339, 357 (7th Cir. 2017) (en banc) (Posner, J., concurring), stating that courts fairly frequently impose new statutory interpretations on old statutes "that the Congress that enacted it would not have accepted . . . to avoid statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch."

[112] The countermajoritarian difficulty is the idea that "[j]udicial review conflicts with democracy because it permits unelected judges to invalidate actions taken by representative branches of government." Darren Lenard Hutchinson, *The* Majoritarian *Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1, 1 (2005); *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (2d ed. 1986); *Barry Friedman*, *The History of the Countermajoritarian Difficulty, Part One; The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 (1988) ("The 'countermajoritarian difficulty' has been the central obsessed of modern constitutional scholarship.").

is beyond the scope of this Article, and it has been heavily discussed by numerous scholars throughout the years.[113]

C. Normative

While it is important to understand the reasons for which the Supreme Court is covert in its use of consensus, it is also necessary to consider whether invocation of consensus is normatively preferable in the American judicial system. First, one must note that there is an alternative way to consider the consensus model in US constitutional law: consensus does not *bind* the Court, but rather provides the Court with constitutional authority to make a given decision.[114] Indeed, in the context of the Eighth Amendment, the Court has proclaimed that "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[115] But simply because there is evidence of contemporary values does not mean that the Supreme Court *must* heed those values; rather, it gives them the leeway to do so, consistent with state action.

Were the Supreme Court bound to explicitly base its decisions exclusively on the laws of the states, its decisions that lack an explicit textual basis could be seen as more legitimate, as there would be no concern the constitutional protections are "judge-made constitutional law."[116] Further, coordinate branches interpret the Constitution all the time, so deferring to their interpretation—as well as that of the states—is not so outlandish.[117] Regardless of whether consensus constrains or

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[113] *See, e.g.*, Dennis B. Wilson, *Electing Federal Judges and Justices: Should the Supra-Legislators Be Accountable to the Voters*, 39 CREIGHTON L. REV. 695 (2006); Randy E. Barnett, The Disdain Campaign, 126 HARV. L. REV. F. 1 (2012); Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 111 HARV. J.L. & PUB. POL'Y 5, 7 (1998).
[114] *See, e.g.*, Richard Primus, *Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207 (2010) ("[I]f we understand public consensus to be one potential source of authority within a larger process of constitutional decisionmaking, we may find a better way of understanding the relationship between constitutionalism and democracy."); Roderick M. Hills, Jr., *Counting States*, 32 HARV. J.L. & PUB. POL'Y 17 (2009).
[115] *Penry v. Lynaugh*, 492 US 302, 331 (1989); *accord Atkins v. Virginia*, 536 US 304, 314–16 (2002) (holding that execution of the mentally ill has "become truly unusual" and, accordingly, it was "fair to say that a national consensus has developed against it.").
[116] *See Bowers v. Hardwick*, 478 US 186, 194 (1986).
[117] The President has the duty to "take Care that the Laws be faithfully executed." US CONST. art. II, § 3. In order to fulfill this constitutional responsibility, the President must interpret the Constitution. In so

grants authority to the Court to make decisions, consensus appears to affect decision-making, and this alone warrants a normative analysis of the benefits and drawbacks of consensus in the US.

One reason that Constitution changing merely because a majority of states change their laws may be troubling is because this appears to be an amendment process that is inconsistent with the process explicitly prescribed by the Constitution. Article V of the Constitution sets forth the process for amendment: "The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, . . . which . . . shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourth of the several states."[118] Given the requirement that both two-thirds of Congress and three-fourths of the states' ratification is necessary to amend the Constitution, it would be peculiar for changes in states' laws to change the Constitution.[119]

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interpreting "a President may [constitutionally] refuse to execute a law on the ground that it is unconstitutional," and various presidents have done so. *See* ROAUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 306 (1974). *See* Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 469 (1860) ("Every law is to be carried out so far as it is consistent with the Constitution, and no further. The sound part of it must be executed and the vicious portion of it suffered to drop."). *See also* Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, US House of Representatives (Feb. 23, 2011), https://perma.cc/98Q6-DNXX (citing US CONST. amend. V); Michael Sant'Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351 (2014); Joseph Landau, *DOMA and Preisdential Discretion: Interpreting and Enforcing Federal Law*, 81 FORDHAM L. REV. 619 (2012). For example, the Obama administration refused to enforce the Defense of Marriage Act (DOMA), which defined marriage as "a legal union between one man and one woman," arguing that it violated the "equal protection component of the Fifth Amendment. 1 USC. § 7; 28 USC § 1783C. Additionally, the Executive has prosecutorial discretion and "the Take Clause has not traditionally been read to mandate executive prosecution of all violators of all federal laws." Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 NOTRE DAME L. REV. 1907, 1911 (2014) (citing *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (noting that the President, through the Attorney General who acts as the "hand of the President," retains "the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecution.")). Similarly, state legislatures must and indeed do often interpret the federal Constitution. When passing laws, legislatures have the ability and responsibility to pass laws that they, in good faith, believe to be constitutional. In order to pass laws, they must interpret the Constitution, apply the Supreme Court's precedent, and consider whether the law at issue would be constitutional. *See generally* Matthew Berns, *Trigger Laws*, 97 GEO. L.J. 1639, 1653 (2009)

[118] US CONST. art. V.

[119] These decisions do not technically amend the Constitution. But, particularly in decisions where the Supreme Court overruled past precedent—à la *Lawrence*, *Brown*, or *Roper*—there is a reasonable argument that the Court changed the Constitution. Many conceive of the Constitution as being a rigid, unchanging document, which has a "correct" application to any situation. *See* Christopher R. Green, *Originalism and the*

However, consensus may be beneficial as a means to implement the Condorcet Jury Theorem.[120] The Jury Theorem posits that "under certain conditions, a widespread belief, accepted by a number of independent actors, is highly likely to be correct."[121] Professors Posner and Sunstein applied this idea to the use of comparative law.[122] Posner and Sunstein argue that "if the majority of states believe that X is true, there is reason to believe that X is in fact true."[123] The same idea might be applicable to the domestic US context, or to the European context.[124]

If the US Supreme Court or the ECHR were able to effectively capitalize on the Jury Theorem then, in theory, the Court would always come to the best decisions.[125] Additionally, were this the case, then the Court's decisions would never overrule the decisions of a majority of states because, by definition, the Theorem only applies when the "majority of states believes that X is true."[126] Accordingly, the Court would face less legitimacy concerns under this approach.

While the application of the Jury Theorem is intriguing in the abstract, it faces serious difficulties in practice—both in the American and European contexts. The main problem arises insofar as there is no way to guarantee that decisions of the various states are truly independent—as is required by the Theorem. As Posner and Sunstein explain, "If the foreign law exists because the foreign state mimicked some other state, then the law would not count as an independent vote, as

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Sense-Reference Distinction, 50 ST. LOUIS U. L.J. 555, 556 (2006) ("Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, set[ ] out a vision of an unchanging Constitution.").

120 *See* CONDORCET: SELECTED WRITINGS (Keith Michael Baker ed., 1976).

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

122 *See generally id.*

123 *Id.* at 136.

124 *See, e.g.*, Shai Dothan, *The Optimal Use of Comparative Law*, 43 DENV. J. INT'L L. & POL'Y 21, 22 (2014)

125 This argument is akin to "marketplace of ideas" in the free speech context. *See generally* Stnaley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (1984). But the marketplace of ideas argument in the First Amendment context faces its critics, and many of those same problems apply here. *See generally* Gregory Brazeal, *How Much Does a Belief Cost?: Revisiting the Marketplace of Ideas*, 21 S. CAL. INTERDISC. L.J. 1 (2011) (collecting arguments against the marketplace of ideas).

126 *See* Posner & Sunstein, *supra* note 121 at 136.

required by the Jury Theorem. When this condition is violated, we say that foreign law reflects a cascade effect."[127]

It is highly likely that state-to-state cascade occurs in the United States. Both the Democratic and Republican Parties have strong national platforms and agendas which they push down to the most local levels. Nearly every election in the United States is won by either a self-proclaimed Democrat or Republican. The national government is formed by State representatives who put forth their constituents' preferences. Finally, states are bound by the decisions of the federal courts of appeals that encapsulate their states, creating uniformity among states within the vicinity of one another. For all of these reasons, the application of the Jury Theorem to the American federal context, while seemingly good, is incredibly troubling.

Implementation of the Jury Theorem in the European context seems more possible, though the likelihood of cascade remains high,[128] as there is still no way to know whether member states of the Council of Europe actually arrived at their decision independently. Intuitively to an American audience, it may feel like decisions are more likely to be independent in Europe than in the US However, like the US, Europe has become increasingly federal. European states face significant regulation from the European Union,[129] they are subject to the jurisdiction of two supra-national courts (the ECHR and the European Court of Justice),[130] as well as many international agreements that bind Europe as a whole.[131] And while Europe is not dominated by a two-party system like the

[127] Posner & Sunstein, *supra* note 121 at 144–45.
[128] *Cf.* Dothan, *supra* note 124, at 22 ("[The ECHR] aggregates the preferences of a wide range of states, each of which has already made an independent decision," the result allows for the "benefits of comparative law . . . without the risk of information cascades.
[129] *See, e.g.*, *Brexit is a golden chance to throw some EU regulations on a bonfire*, TELEGRAPH (Mar. 27, 2017), https://perma.cc/X897-PZKT.
[130] *See generally* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997).
[131] For example, in climate change negotiations, the European Union negotiates as a block rather than having individual states represent themselves. *See generally* Beatriz Pérez de las Heras, *The European Union, The United States, and China Dialogue on Climate Change: Respective Policies and Mutual Synergies for a World Climate Order*, 26

US, there is significant communication among states. Accordingly, as in the US, the Jury Theorem may not hold in the European context, despite it seeming to be a more fruitful location for its benefits to take hold.

There are undoubtedly benefits and drawbacks to the use of consensus in the American context. Given that the Supreme Court rarely admits that it uses consensus, though, it is hard to imagine how one could go about curbing invocation of the doctrine. Instead, it is fruitful for scholars to think about effective ways to capitalize on the use of consensus when bringing claims to argue for new constitutional protections that previously had not been recognized.

III. CONCLUSION

While scholars have previously pointed out the US Supreme Court's apparent consensus approach to constitutional jurisprudence, the link between the Supreme Court's approach and that of the European Court of Human Rights is novel and consequential. Even more important is understanding why the Supreme Court is covert about its implementation of consensus, whereas consensus is a key doctrine in European Jurisprudence. It appears that the two courts' differing legitimacy concerns and approaches to interpretation undergird the courts' openness in exploring their respective doctrines of consensus.

There is another key difference between the US and European approaches: the ECHR functions on a consensus model, while the US Supreme Court functions as a quasi-anti consensus model. That is to say: the US Supreme Court only imposes rules on outliers, whereas the ECHR self-consciously proclaims that states have latitude to make decisions up to and until there is a consensus, at which time the ECHR suppresses the outliers. Perhaps this distinction is only

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GEO. INT'L ENVTL. L. REV. 13 (2013). Similarly, the EU shares a currency—the Euro—which prevents individual countries from affecting their money supply and grants the power of regulating monetary policy to the European Central Bank. *See* Nahalel A. Nellis, *Deficiencies in European Monetary Union's Credible Commitment Against Monetary Expansion*, 33 CORNELL INT'L L.J. 263 (2000).

rhetorical; nevertheless, the two courts' conception of themselves is important in understanding the American and European approaches to consensus.

This connection underscores a broader point about courts in federal systems: legitimacy concerns force courts to remain within the "mainstream."[132] As policymakers and leaders in international organizations think about the creation of new international courts, they should consider the legitimacy concerns that courts in federal systems face in developing the protocols for these courts. Perhaps in some contexts, as with the ECHR, it makes more sense for the court to be explicit about its invocation of consensus. Or, in other contexts, it might make more sense for the court to be more opaque about its use of consensus in order to preserve legitimacy. The bottom line is this: courts in federal systems have legitimacy concerns, and the people who create courts need to be cognizant of how the court should balance the concerns of legitimacy and independence to create an effective court.

[132] The "mainstream," in this context was measured using state laws and public opinion surveys. There are a number of ways one could go about the mainstream. Additionally, this paper in no way asserts whether state laws or public opinion polls are more indicative of the "mainstream" that either the US Supreme Court of the European Court of Human Rights is more likely to follow. As explained above, both the US Supreme Court and the European Court of Human Rights explicitly count state laws in many opinions; but neither explicitly looks to public opinion polls. Nonetheless, it would be foolish to think that judges were not aware of public opinion.