

## DISCUSSION

# JUDGES AS DIPLOMATS IN ADVANCING THE RULE OF LAW: A CONVERSATION WITH PRESIDENT KOEN LENAERTS AND JUSTICE STEPHEN BREYER

### INTRODUCTION

On both sides of the Atlantic, Western countries have taken a well-publicized and perhaps poorly understood turn toward leaders espousing extremist, xenophobic, and introspective politics that threaten the core tenets of liberal democracy. Electorates appear divided and confused as political leadership in Europe and the U.S. take measures that undermine the basic principles of the rule of law and human rights. Above all else, the designated defenders of the constitutional order, the supreme courts, have come under direct political attack in countries such as Hungary and Poland. Even in traditional bastions of Western democracy, like the United States and the United Kingdom, judicial appointments and decision making have come under intense public and political scrutiny.

Against this backdrop, the Supreme Court of the United States and the Court of Justice of the European Union have begun institutionalizing regular meetings, under the auspices of the Luxembourg Forum, to “facilitate dialogue and increase mutual understanding between the two judicial systems at a time of increased globalization.” Very little is known or understood about the existence and functioning of the Luxembourg Forum and what impact, if any, this form of judicial diplomacy actually has on fostering liberal democratic values through a common and comparative constitutional discourse. What inspired the courts to institutionalize their previously informal diplomacy, and what do they hope to achieve? What impact does the Forum have on the legal communities and the practice and teaching of law outside of the courtrooms of Luxembourg and

Washington, D.C.? To what extent might the courts improve judicial decision making and strengthen the rule of law and human rights through engagement with foreign law and practices of equivalent foreign courts within a politically recalcitrant environment?

In the aftermath of the second official Luxembourg Forum and the visit of a delegation of the Court of Justice of the European Union to the U.S. Supreme Court, American University convened a workshop with judges, legal scholars, social scientists, students, and practitioners to expand and increase among all workshop participants the value of this Forum: to enhance constitutional decision making and strengthen the rule of law and fundamental rights across the Atlantic.

The significance of this inter-court dialogue and the use of foreign law and practice in domestic courts is a hotly contested issue at a time when the reaffirmation of national sovereignty through the rise of extremist values and political and economic introspection are in the ascendency. Famously, just over a decade ago, Justices Stephen Breyer and Antonin Scalia debated the use of foreign law by the U.S. Supreme Court, with Scalia's more insular approach seemingly winning the day despite the opposing preferences of other Justices, such as Breyer, Ginsburg, and Kennedy. Since then, Justice Breyer has restated the case for the judge to also be a "diplomat" and to learn from foreign legal ideas, particularly the European constitutional concept of proportionality when adjudicating on the First Amendment. In a similar way, the members of the Court of Justice of the European Union have also struggled with the use of foreign legal norms given the more precarious nature of its jurisdiction vis-à-vis twenty-eight member states. In fact, no direct citation to the U.S. Supreme Court appears in the judgments of the Court of Justice of the European Union even though some opinions of its Advocates General occasionally cite to U.S. jurisprudence. This is in sharp contrast from the other regional European court, the European Court of Human Rights based in Strasbourg, which openly cites the U.S. Supreme Court in its decisions.

The lack of this overt kind of influence of the U.S. Supreme Court on the Court of Justice of the European Union and vice-versa does not necessarily mean that they do not employ similar ideas and modes of reasoning. Some scholars have attempted to trace some of these more invisible or cultural cross-influences through the lenses of transnational dialogue among courts, migration of constitutional ideas, and judicial comparativism as judicial diplomacy. Yet the current literature on comparative constitutional law remains silent on the deep cultural and ideological connections between the Court of Justice of the European Union and the U.S. Supreme Court. Our

questioning during the following conversation sought to evidence the concrete benefits and advantages of this judicial dialogue and to impart to the audience the value and normative significance of the courts' relationship at a time when judicial independence, and potentially the rule of law itself, are being subverted. We hope that judicial exchanges, like this one between Associate Justice Stephen Breyer and President Koen Lenaerts, can stem the tide of isolationism that has befallen the Western world.

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*The following transcript has been edited by the speakers for grammar and readability.*

PROFESSOR NICOLA: This is the conclusion of our second Luxembourg Forum. The judges have been talking to each other, the delegation of the Court of Justice of the European Union, with the Supreme Court of the United States. In talking, judges do seek a better understanding, a comparative understanding, of their own legal system but also the other legal system and, ultimately, to better understand their own identity, as President Lenaerts told us this morning—or as it was mentioned before, Justice Breyer also mentioned the idea of weaving a tapestry to better understand the fabric of the rule of law. Our question is really about the Breyer-Lenaerts connection, your personal connection that goes back to again, Harvard Law School in the '70s. You've been teacher and student, friends, colleagues in law, and to what extent did such a relationship play a role in opening your minds to the working and reasoning of each other's courts, but mostly can judicial dialogue occur in the absence of those close ties, personal ties between judges? Is there a hope for people that don't know each other as well as you do? We'll start with Justice Breyer.

JUSTICE BREYER: Of course there is, that's the short answer. I mean it's true, Lenaerts was my student. He wrote this brilliant thing on the Dormant Commerce Clause, and it was great. But despite being my student for many years, he's made a huge success of himself. So, certainly, it's a hard job. I'm delighted that the members of the Court are here. It's so great to have you come at this time particularly. I think it's a very important time for our Court to meet with the European Court of Justice and for you to be over here. It has been a very, very interesting week for us and I think helpful. I was interested, of course, could he really help put these twenty-eight—*twenty-eight*—judges together, in a workable way, after it grew from fifteen? The answer is yes, so I had confidence, and the others did, and of course he has helped and it does function. But the personal part is not primarily what you do as a judge. I mean, you have the same job, the same kind of a job, and we've had exchanges before Lenaerts, there will be exchanges after Lenaerts. He is very helpful and the other members of the Court are too. And the personal part, while pleasant, is, I would say, quite secondary.

PROFESSOR NICOLA: Great. President Lenaerts?

PRESIDENT LENAERTS: We have not coordinated our answers, but I fully subscribe to what my former professor has just said. It is true that the previous personal contacts make any discussion more agreeable because you know one another. However, I would also like to stress the fact that such contacts are not a prerequisite for having a very successful exchange between judges. The core point is that we all perform the same task: that is to find the proper legal solution to cases that are often highly sensitive. Judges never set their own agenda. They say what the law is when parties in cases ask them to do so. They are entrusted with finding the law and applying it to the particular case before them, which is a task that gives legitimacy to the judicial office and is the common business of all judges that operate in a democratic society. For example, some months ago, I was on an official visit to Brazil to discuss the rule of law. Although I didn't previously know any of the judges there, we had extremely fruitful exchanges that, just like those taking place this week, were enormously enriching. In that regard, I would like to take this opportunity to pay tribute and express, once again, my gratitude to American University for its contribution to the success of our visit here in Washington, D.C.

PROFESSOR DAVIES: Thank you. So, our second question, really, we're trying to establish what the value of the Luxembourg Forum is for both of your courts. Your courts have been meeting regularly since the late 1990s, and under the auspices of the Luxembourg Forum since 2014, and the potential of this dialogue is immense. Your jurisdictions encompass nearly a billion people, and a majority of the world's economic activity and trade, so what you learn about each other and from each other, today and in the future, has a truly global significance. But when you read the scholarship on judicial diplomacy and when they try to actually pin down the concrete benefits of a dialogue, the conclusions are quite mixed. I can read one conclusion here. "In sum, the various fora, networks, meetings, and databases are an important psychological and socializing element. Their practical utility for obtaining applicable comparative knowledge for solving a concrete case is, nonetheless, very, very limited."<sup>1</sup> Would you contradict this? And if so, could you perhaps share with the audience, with us, some of the specific examples of how the Luxembourg Forum, all the regular meetings that you've had, have affected your thinking or the jurisprudence of your courts.

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1. MICHAL BOBEK, *COMPARATIVE REASONING IN EUROPEAN SUPREME COURTS* 50 (2013).

PRESIDENT LENAERTS: The quote to which you refer implies, as I read it, that the *concrete* resolution of cases is conditioned, to a large extent, by the fact that each legal system is constrained by its own rules and also by the sociological environment in which those rules are to operate. That said, I disagree with that quote if it is taken as meaning that, for that reason, judicial dialogue is somewhat futile and not worth the effort. If my understanding of that quote is correct, that definitely is not true in so far as the Court of Justice of the European Union is concerned. And, as I have already explained in other fora throughout this past week, the Court of Justice now deals, like the U.S. Supreme Court, with all sorts of legal issues that fall outside the scope of the common market—the “European Commerce Clause,” to put it in U.S. terms—and that pertain to areas of law such as criminal law, family law, asylum and immigration law, tax law, environmental law, consumer protection, copyright law. You can find some examples illustrating that comparative law point in Stephen Breyer’s excellent book, *The Court and the World*. For instance, I could refer to a U.S. case relating to the Alien Tort Statute—*Kiobel v. Royal Dutch Petroleum*,<sup>2</sup> perhaps—and immediately draw a parallel with a European case brought before our Court: *Air Transport Association of America*.<sup>3</sup> So that’s what I mean. In the European Union, which, even after Brexit, will still have a population of more than 450 million people, spanning a whole continent—from the Atlantic Ocean to the Black Sea and from the Arctic Circle to the Mediterranean—the Court of Justice is now confronted, in all substantive fields of EU law, with legal issues that are similar to those faced by federal judges here in the United States, a jurisdiction that also comprises an extremely large land area with a population of well over 300 million people. That means that we are both dealing, in essence, with the challenges of establishing a single legal space for a huge and heavily-populated space. *E pluribus unum* (“out of many, one”), on this side of the Atlantic, *In varietate concordia* (“united in diversity”), on the other side. We and the U.S. Supreme Court are almost twin sisters, and that’s why comparisons between our respective case law remain worthwhile: in a cognitive manner—as one of my fellow colleagues, Judge Siniša Rodin, said in an earlier panel today—we should be aware of the frame of reference of the other court. That’s how I see the added value.

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2. 133 S.Ct. 1659 (2013).

3. Case C-366/10, *Air Transp. Ass’n of Am.*, EU:C:2011:864.

JUSTICE BREYER: Whoever wrote this quote, what is he looking for? What does he want? Of course, probably very few changes in doctrine, very few. It's a conversation. What is a conversation? I've known this for a while, a great quotation you can use, I stole it from Michael Oakeshott—a conversation is not a debate. There aren't winners; there aren't losers. The value of the conversation lies in the remnants that it leaves in the minds of the participants, and who knows what that will be. It will be something, somewhere, some time. Sometimes it might be as when I was in Canada. We went there, and I thought, "My God, they have a round table. What a good idea." And I suggested that to my colleagues and oh, another one of these. All right, so who knows.

If you want specific things, I have been affected by talking on different occasions to European judges about the use of proportionality as they use in Canada. And I think we do, too, we just don't say it. First Amendment, I think, is not going to be totally that, it's going to be some combination, but I think it helps in many, many cases. And I think they have learned from the Commerce Clause. I'm dying to find out if the courts can actually use subsidiarity, is it actually capable of being enforced. And then just yesterday or the day before, I remember reading a case out of the European Court of Human Rights, which I never fully understood, where a Muslim woman wants to wear a headscarf—not as a protest or anything, but just a headscarf—in her medical class. No, can't do it. Does that violate freedom of religion? Well, the European Court held no, and I just thought, "That's not how we would do it," you know, said with an English tone of voice, which means there is really no other way—my wife was English. Now, I heard them talking about a different case, and, suddenly, I begin to see this concept of margin of appreciation in a way that I didn't know before. I knew it on paper, but suddenly you see it. They really have to take into account different cultures of different states, Member States.

Is it helpful to know this? Of course it is. It's helpful to feel it emotionally, and you feel it more emotionally when you talk about different topics when you're meeting with a different person. Of course, that's how I learn things, and I think it's all how human beings learn things. They learn things emotionally and pretend that they've learned them out of a book. That is good, symbolically, to have these things. It is true that the world, you know—and it sounds like a Fourth of July speech, you know—it's true that we're more and more dependent on a rule of law that encompasses democracy, human rights and constitutions enforced by independent judiciaries, and, you know,

there are a lot of threats to those. And we're on the same beam, right there, boy we are.

PRESIDENT LENAERTS: Absolutely.

JUSTICE BREYER: And so are you, and so are you. And it isn't each other or you [the audience] that we have to convince about that, it's other people we all have to convince, and that's—we're not going to solve that problem, but you do what you can do. And so it's a little bit, it's a little bit, one drop in the bucket. But every time we do have—we have other jobs, we've got to do them. Our job isn't to go meet people—it's not Dale Carnegie, we're not professional greeters—but, to use some of our time, some of our time in this way, I think is valuable . . . and meaningful—symbolically, personally, learning things. And you never know where they'll turn up, but they will, quite a few.

PROFESSOR NICOLA: Thank you, Justice Breyer.

JUSTICE BREYER: Thank you.

PROFESSOR NICOLA: Our third question is really about the legacy of the 2005 Breyer/Scalia Debate that took place here, in this school. It was mentioned this morning, by President Lenaerts, and this debate spurred a body of significant academic literature. Professor Gábor Halmai wrote a book about it.<sup>4</sup> The central question touched upon different issues, let me quote: “What constitutes a foreign court decision? Should a foreign court decision have operative, persuasive, or rhetorical authority? Could convergence towards a common global rule of law framework be facilitated by the use of foreign law citation, even if they were not considered binding?” So, with these questions in mind, could you both give us a sense, and maybe we'll start with President Lenaerts, on how your personal understanding, and that of your Court, has developed since this 2005 debate?

PRESIDENT LENAERTS: The Scalia/Breyer Debate is a typically American debate, and I say that without in any way diminishing the significance or the importance of that debate. The reason why I say it's typically American is because the self-perception of the American legal system has for a long time been rather inward-looking—and, in

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4. *See generally* PERSPECTIVES ON GLOBAL CONSTITUTIONALISM: THE USE OF FOREIGN AND INTERNATIONAL LAW BY DOMESTIC COURTS (2014).

saying that, I'm quoting a first-rate source: that same book, *The Court and the World*—so that internationalization comes as a surprise to many. By contrast, being open to external influences is what the European Union is all about. As I said earlier today, the EU is building bridges, reaching outwards. It's an outreach to former enemies, to former adversaries. That was the genius of the Schuman Plan. It is about knowing the other and about doing together things which you couldn't meaningfully do separately. For European judges, that entails a comparative law approach. As far back as 1957, the year of signature of the Treaties of Rome, the predecessor of the Court of Justice—i.e., the Court of the European Coal and Steel Community—set the tone in the famous *Algera*<sup>5</sup> case. It was a staff case—that is to say, a case concerning the employment of a civil servant. That Court held that, even where concepts of Union law—Community law at that time—are not defined, it must uphold the rule of law by determining the true meaning of those concepts, because otherwise it would be committing a denial of justice. As a result, EU judges must, in such cases, draw on the comparative experience of the Member States' legal systems. So, in other words, looking outwards to what is happening in the Member States of the European Union is embedded in the DNA of our Court since, in finding the law of the EU, we—the EU Judges—must develop a sort of “federal common law” of Europe. I know that in the U.S. that is a very loaded term given the understanding of it in *Erie Railroad v. Tompkins*.<sup>6</sup> But in Europe the comparative law method is essential to the protection of fundamental rights because that protection draws inspiration from the constitutional traditions common to the Member States. It is also imperative that the Court of Justice should engage in federal common law making when giving a meaning to any term that has not been legislatively defined. For example, “who is a spouse?” is a question that pertains to family law and, thus, to the law of the Member States. Yet, where a case is brought before us involving a couple that moves from one Member State to another, that question arises in the context of the application of the free movement rules, which form part of EU law. An EU citizen and her or his family members, notably his or her spouse, enjoy the right to free movement. How do we define the term “spouse” in a cross-border situation? Because the EU legislative institutions have not provided a definition of that term for free movement purposes, we have to come up with a definition because that is essential for solving the case before us. In so doing, we must also

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5. Case 7/56, *Algera v. Common Assembly*, EU:C:1957:7.

6. 304 U.S. 64 (1938).

provide an interpretation of that term that facilitates the uniform application of Union law. That is why we have to rely on the comparative law method.

It often happens, in sensitive cases, that there are significant divergences among the laws of the Member States. The question is then to what extent diversity may be limited in order to ensure unity. Justice Breyer just referred to the headscarf cases. On the one hand, the EU is not one indivisible nation, it's a common governance structure, a common legal order within which the Member States keep their constitutional identities that the Union must respect. On the other hand, the Member States must not jeopardize the objectives pursued by the EU, that's what's known as "Union Loyalty." This means, in essence, that there is a need to strike the right balance between unity and diversity, that balance being achieved in practice through the medium of the comparative law method. As an EU judge, you have to examine how the different legal systems in the Member States approach sensitive issues and to gauge how Union law, the common law of Europe, can be carved out in a way that balances appropriately unity and diversity. And then, of course, it becomes very interesting to look at third countries' legal orders as well, such as that of the United States, where federal judges are equally confronted with unity and diversity issues, not as a normative proposition but as a cognitive one—that is, to see how U.S. Supreme Court Justices address these very same issues.

JUSTICE BREYER: We miss Nino, I miss him a lot. I really do, every day. I mean, he was a force, he was a life force, and we didn't always agree, but, my goodness, he made people think. And he's missed. But that debate here? Yeah, it got me to write this book, for better or for worse. What is it about? Is it really that big a difference? I'd say to him, "No." Look, these aren't our cases, the ones you're talking about. Our cases involve, for example, the Hague Convention. That's a treaty. What treaty? A treaty about whom the child belongs to and whom you can run away with if a marriage breaks up. And we have four cases involving that, *four*, and in two years. *What?* On this state matter? It's in the treaty. And you know who knows less about that than anybody? Our Court. Family judges are state judges. You want a really tough job, become a family judge. And I've known several, and they say to the couple, fighting, "Hey, you agree because whatever you agree on will be better than what I have to tell you, okay?" But we're deciding it. What, it's in a treaty and today, more and more because there are more and more international couples. You're not going to change

that. I said, “We’d better learn something about it.” Does Nino think we should read what other courts decide when they interpret that treaty? Of course, of course, well established, and he does. Does he believe that we should read what other courts are doing when we’re trying to decide the reach of our own law. I mean, go read the Australian securities case.<sup>7</sup> He quotes in the majority what the lawyers from Britain and France and the EU have been telling us, and so forth.<sup>8</sup> So, where is the difference? There is one but not that much.

Here is why I wrote the book—it is Nino, partly. I’m sitting with one of the congressmen, and we have a panel, you know one of these panels where you have three judges, and you have a few congressmen who are willing—I guess they had nothing to do that week—and there they are, and we’re talking. All of a sudden, he goes into this thing about, “This is an American constitution, what are you...” and a lot of criticism, and I said, “Well, I guess that’s aimed at me.” He said, “Yeah, actually, it is,” and I said, “Well let me tell you why.” And I said, “Look, we can refer to anything. We refer to Henry Friendly, we refer to law review articles, but they don’t bind us for the most part. But if it was a person with a job like mine, and he has a problem like mine, and he has a document at least somewhat like mine, why don’t I read what he says? I don’t have to follow it, I might learn something.” That’s a pretty good argument, right? So he said, “Read it, just don’t refer to it in your opinion.” I don’t know when to quit when I’m ahead, so then I say, “No, no, you don’t really see the whole story. If I’m honest about the whole story, there are countries that are new. They haven’t had civil liberties and protection of basic rights in some Eastern European countries for as long as we have, and those countries are trying to establish their independence. They refer to us, why don’t we refer to them? They can go to their legislature and say, ‘See, it’s a worldwide thing, and maybe you should pay us this month,’ and so forth. It helps, it helps.” And he said, “Fine, write them a letter.”

So, you see? I’m trying to convince him. And where does this come from in America, this exceptionalism, et cetera? Well, one place it comes from, read Madison. After Madison comes out of that convention, he says, “This document, our Constitution, unlike Europe,” he says, “it’s a document, it is a charter of power, granted by liberty. Europe, they may be in the same place but if they are, it’s still a charter of liberty granted by power.” And what he means is the condition of the man and woman in the United States: free, insofar

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7. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247 (2010).

8. *Id.* at 269–70.

and unless they bind themselves. The basis of power is the periphery, while in Europe it's the king. So, what does that mean practically? It means the average American doesn't know that, but the average American does have an instinct. Who are those people? Now that isn't chauvinism or jingoism or it shouldn't be. Maybe there is an element of this because they'll say the same thing about the Court—I mean, who are those nine people who are telling us what to do.

PRESIDENT LENAERTS: Exactly, that instinct comes out in respect of U.S. Justices, too.

JUSTICE BREYER: Yeah, yeah, who are they? We didn't elect them. But at least somebody can say, well you did elect the people who confirmed them, and you did elect the man or woman, perhaps, who appointed them. You did do that, didn't you? You have control. Who are those people in the ICJ? What power do we have over them? Who are they? Why should they tell us what to do? So, you're getting that instinct. Now, I'm not saying that should be a controlling instinct—it shouldn't—but it's there, and it's not completely illegitimate.

So, what now? It's a long windup, but the reason I write this book is I want to say to the Congressman, and I want to say to the people who are embodying this instinct, "Hey, I want to tell you about our job. I want to show you the cases that are actually there. I want to show you how, in these defense and security and civil rights cases, we're not going to really make much of an advance unless we know what's happening throughout the world because after all terrorism—as unfortunately we have very recently seen—is not just our problem. And we'd better find out what other countries are doing, too, because we're not the only democracy trying to deal with these problems. Or a case involving securities, or a case involving antitrust, or a case involving the Alien Tort Statute, or a case involving..." and you name it. And so what I am explaining isn't the ideal of globalization. It is instead a condition of the world. Just as it isn't an ideal of regionalism and localism, it is a condition, and our job is to figure out how to handle these conditions in today's world. So that's what I want to show them. I won't put it in those sort of highfalutin terms, but I want to show you, this is what we do. Now, you tell me how we do it, how we interpret these American laws without knowing what happens beyond our shores in this world today. You tell me. Because I'll tell you, if we pay no attention whatsoever—environment, health, safety, commerce, security—they're going to go operate elsewhere, and the world will go on without us. We can pay attention or not, and we're worse off not paying

attention. But I want them to reach that conclusion, not me to tell them. And I think they will reach that conclusion for themselves if they read what we do, and that is a result. And I think, I don't know how much I would have persuaded Nino, but I might a little, I might a little. And, of course, that is really my hope.

PROFESSOR DAVIES: Wonderful, thank you. We're going to—in our fourth question—we're going to push you a little bit towards a subject very close to my own heart, and that's namely the role of history for your courts. So obviously, we've talked about Madison, we've talked about the European Coal and Steel Community; your courts were born in strikingly different historical contexts, and your courts enjoy quite different and distinct institutional features. In Europe, we have an advocate general, we have the principles of proportionality, mutual recognition, and, of course, the need to constantly engage, in a positive way, with the Member State courts. In the U.S., we can think of dissenting opinions, which are missing in Europe, and the Court's difficult position in the tripartite constitutional agreement. At the same time, despite these differences, over time, your courts have faced similar questions as the highest courts in complex, federalized, market economies. We're thinking broadly here of issues of market integration—which my colleague, Michelle Egan's book is about—federal/state relations, the application of the federal Bill of Rights. So, we're wondering, is it possible to draw from the historical experience of each other's court, and, if it is, what lessons you take from that history?

PRESIDENT LENAERTS: The answer in my view is clearly yes. It's important to know the history, not only of your own court but also of other courts, because the case law can only be properly understood, be it your own case law or that of another court, when you can place it in its historical context. For instance, the whole debate in the United States about the counter-majoritarian rule of the judges, which has in fact been going on for 200 years here, is a very relevant debate in the European Union also, in spite of all the differences you pointed out—that is, the fact that there are no dissents in the Court of Justice and that we are assisted by Advocates General. By the way, it's not that the Court of Justice has itself chosen not to deliver dissenting opinions, it's in the EU Treaties themselves. Perhaps, that is because the legal order of the Union is less cohesive when compared to that of the U.S. and because the authors of the Treaties—including those of successive reform

Treaties, amending the original ones—have taken the view that it is still too soon to allow for dissenting opinions.

But then—I know you are a legal historian, Bill—I read this book about the life of John Marshall. I read—and I say this also for my own colleagues here in the room—that in the first formative decades of this country, the U.S. Supreme Court Justices were circuit riding. With limited means of transportation, they came to Washington only for a few weeks a year, during which they lived, all five—there were only five of them—together in a sort of boarding house. They literally shared their lives while their families stayed back in their respective home states. And perhaps this life experience coupled with the need to combine their efforts in order to strengthen a young nation meant that, although dissents were possible in theory, there were, in actual fact, almost none. So, in the thirty-five years of the chief justiceship of John Marshall, I think there were only one or two. It was extremely limited, and that's the stage at which we should understand the European Court of Justice as being at.

From a historical perspective, it is true that the EU is sixty years, or sixty-five years old, if you count from the launching of the Coal and Steel Community. But these sixty-five years are not comparable in terms of the subject matters that the European Union has been dealing with or in terms of what European integration stands for. Basically, each decade a new wave of cases arrives in our docket that relates to new areas of law over which the Member States have transferred powers to the EU. Those new areas constitute uncharted waters for us so that, as far as these new types of cases are concerned, the existing case law does not provide a safe haven. Thus, the subject matters entrusted to the European Union have, under the principle of conferred competence, evolved with each Treaty change. After we receive each incoming wave of cases on these new matters, our practice is to employ the same tools as in other cases: uniform interpretation, enforcement, constitutionality, and review of legislative texts. Think about the *Schrems*<sup>9</sup> case, which was discussed in the panel this morning, or the *Test-Achats*<sup>10</sup> case mentioned yesterday evening during the discussion, *et cetera*.

So, for us, the future of European integration is always a moving target, and it's important that you are aware of what happened in the formative decades in order to move forward. I sometimes say, from a historical perspective, that we were extremely fortunate that these

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9. Case 362/14, *Schrems v. Data Protection Commissioner*, EU:C:2015:650.

10. Case 236/09, *Test-Achats ASBL v. Conseil des Ministres*, EU:C:2011:100.

crucial structural principles like primacy—supremacy you would say here—of Union law over Member State law, direct effect, state liability for compensation of harm caused by breaches of Union law by the Member State authorities, that all these structural principles were developed at the time when the European Union was operating in a low-politics environment, that is the common market. Who would be against the common market whose main objective is simply to increase the welfare of all the peoples? Today, the full implications of those principles are becoming visible because we are dealing with criminal law, with asylum and immigration law, *et cetera*.

Consequently, we are now increasingly in the media spotlight, and we get as much criticism in Europe as the Supreme Court in the United States when people dislike our rulings. So, we really have been forced to move center stage, and then the historical perspective—where we are coming from and where we are going—becomes important. So now people are saying, “Ah, the Court of Justice seems to be more cautious in accommodating Member State diversity.” My answer is always the same: We remain true to all of our structural principles and to the basic tenets of Union law, but it is true that we are now called upon to get involved in the fine-tuning of fundamental rights, sometimes in situations where different rights are in conflict: the right of the businessman to conduct his or her business and the right of the employee to express his or her religion, for example. A balancing of rights is required. That would have been unthinkable only fifteen years ago, and that is why we are, in a sense, more cautious because historical change has meant that we are now dealing with subject matters that attract highly political-charged cases. But we still apply our old, established principles to this new political environment, and we seek to do so with all the subtleness that is required when balancing competing interests.

JUSTICE BREYER: That is very interesting because we’ve never discussed this, and I have absolutely the same reaction as your court. I mean in the olden days, when Rodriguez Iglesias was the president, we had Mancini and so forth, there was a direction, and the direction was the common market and everything cut in that way. I’m not saying it was easy, but I mean you saw the basic underlying purposes of these treaties. And now the treaties have changed, I mean the treaties put in some countervailing principles. They put in good connections with bills of rights, union rights, and this and that and the other thing and before you know it, you have fundamental documents.

PRESIDENT LENAERTS: Yes.

JUSTICE BREYER: I mean that existed before but you could deal with it. And now there are several, and there are clashes, and what are you going to do now? Alongside the fact that there are twenty-eight member states. I don't know. But you say, "Well, we have to be a little more cautious." I understand that, I can see it, yes. But I can look at that history, and I can listen to you, and I can find it very interesting. Then I think well what about ours? Very hard to learn from history, very hard. See, you are the historian. I read somewhere, somebody said anyone can make history, it takes a real genius to write it. But they're driving at something there. I mean, my chaotic mind thinks, you know, in any second of the day there are billions of things that happen. And after, other things happen. That's McMillan, he says it's just one thing after another then, eventually, some things seem to be important, and you decide what was important after you know what turned out to be important. Which lesson, which ones, do we draw? I'm not saying it's impossible, I mean I learned, for example, by reading *Dred Scott*,<sup>11</sup> the worst case ever written in the U.S. Reports, and I think what in heaven's name did they have in mind? Even then, read the dissent in that case. It's not that the law has changed. Looking at the law at that time, it made no sense. Why did he do that, Taney, who was a pretty good judge? He thought he was going to stop the Civil War.

PRESIDENT LENAERTS: Yes.

JUSTICE BREYER: If anything, he helped to cause it.

PRESIDENT LENAERTS: Exactly.

JUSTICE BREYER: Judges are terrible politicians and worse historians, and so we're into a subject about which I'm sort of nervous. I do think, and this does bear out, you are the person you are, and if you want to know what a Supreme Court justice is going to think about something, ask what his law professors taught him, who were they. Sometimes I think of myself, and maybe Ruth, as the last creations of the New Deal. You see why? And so that hesitancy means something to us but not just the New Deal. We don't have to so much face the problem that Frankfurter faced because we had the New Deal plus the

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11. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

Warren Court. And so our question is well, how do you reconcile those. But, you can take both those things into account. To get me out of those basic experiences, the Warren Court plus the New Deal, it's going to take a new generation, and we'll get a new generation, and we'll get a generation that is formed under different circumstances. I think the most frightening words of the Bible are that there grew up a generation that knew not Joseph. Yeah, that does happen. And so the Court will—no, it's not going to change the basic doctrines, it's not going to change all that, that's true—but things will change. And do you want to know is it helpful in those circumstances to know the past? Of course it is. And what exactly can I say more than that? Not much.

PROFESSOR NICOLA: Thank you. So our fifth question goes back to the role of judges as judicial diplomats as Justice Breyer called them in his book and in one of his chapters. We read from both of you about the importance of judicial diplomacy and the diplomatic role of judges. We just heard about the President of the Court of Justice that has a particular diplomatic role. We heard that President Lenaerts went to Brazil. So, judges can be judicial diplomats and, according to Justice Breyer, to advance the acceptance of the rule of law or, according to President Lenaerts, to construct a dialogue and prevent normative conflicts, especially if you have a pluralist legal order where you have different hierarchies among courts. But what do you believe are the most important purposes and results of judicial diplomacy?

JUSTICE BREYER: Well I think pretty much what we've said. You get a feeling for the people, you get a feeling for the job by getting a feeling for the people. It's going to be basically similar, but you have an understanding of where the differences lie and how they approach problems, and then every so often you will find that there is something, my goodness, quite specific that you did learn from that approach, and at least you learned how to approach. At lunch, we were talking about privacy, and so he's going to tell me, what is the main directive on this that I ought to read. There are a million things to read, and I don't necessarily read all of them. I do read yours, I read Berman's. Nonetheless, time is limited, more important is the process of saying to the world or saying to others, yes, we are part of the same enterprise. Say it to the judges themselves, say it to the lawyers who work with the judges, say it to the people who are not lawyers or judges. Somehow, this seeps through, and it isn't necessarily adopting each other's rules of law. I mean that could happen, but it's not, I think, basically about that.

PRESIDENT LENAERTS: For me, in my capacity as President of the Court of Justice of the European Union, it is certainly important. I have to say that the term “judicial diplomacy” is probably not ideal because we are, of course, not diplomats in the technical sense of the word, but it’s rather judicial communication, or conversation, that’s how I understand that term. That said, there are two aspects to it from our perspective. The main aspect is inside the European Union itself, and that has to do with the fact that the judicial structure of the European Union is multilayered; the main responsibility for applying Union law lies with the Member State courts. As we say in French, those courts are *les juges de droit commun de l’Union*, an expression that may be translated into English, more or less, as the common law judges of the European Union.

On their own initiative, Member State judges interact with the Court of Justice to obtain a definitive interpretation of European Union law. This means that the uniform interpretation of EU law goes hand in hand with judicial dialogue, a dialogue that is based on a relationship of mutual trust. We, the EU Judges, must trust that the Member State courts will do their best to submit to us an order for reference that, in describing the factual background and legal framework adequately, enables our Court to apprehend fully the reasons why the questions of EU law referred are decisive for the outcome of the case at hand. It is only with such an order that we can construe the law of the EU properly. We must also trust the Member State courts in that after our judgment is delivered, they will apply and enforce it loyally. At the same time, those courts must also trust us in that our interpretation of Union law—as the law of the land for all twenty-eight Member States, which is made available in all of the twenty-four official languages of the European Union—will be founded on a clear, transparent and convincing reasoning.

In my official capacity as President of the Court of Justice, judicial diplomacy means accompanying that process through informal contacts and channels. As a result, I’m traveling all the time to the Member State capitals for bilateral discussions with the Member State judiciaries—sometimes with other stakeholders, too. Those discussions focus on our case law. It’s one of the essential responsibilities of the President: first, to be a good communicator, especially when it comes to explaining our case law and to making transparent our internal functioning as those explanations constitute in themselves important means for enhancing trust; second, to be a good listener, notably when it comes to the concerns expressed by our

Member State counterparts; and, last but not least, to be a good conciliator in seeing what can be done about those concerns. It is vital that they know us and that we know them.

In addition to that, in relation to the second aspect of judicial diplomacy, there are the contacts with judiciaries outside the EU, I mentioned Brazil, for example. That's, of course, because there are historic bonds that unite Latin America with the European Union, especially since the accession of Spain and Portugal to the Union in 1986—in which our Court takes part. Those contacts are more similar to the type of contacts we are having here. But the first aspect is by far, quantitatively, the most important one, and, qualitatively, also the one that is most vital because it's part and parcel of the proper functioning of the EU judicial system.

PROFESSOR DAVIES: And for our final question, I'd like to bring us back to something that Dean Romzek mentioned in our opening talk; namely, that across Europe, across America, judges have been under political attack, and have been publicly attacked. They've been labeled enemies of the people in the UK press. They've been considered a block on the popular will, and judicial independence and separation of powers are under question in some countries that have been labeled illiberal democracies. What does the Luxembourg Forum, what is the judicial diplomacy and the relationship between your courts, what does that give you as tools, to combat that political and social unease with the judiciary?

JUSTICE BREYER: Us, as judges? Not much, not much. When I talk to Stanford, as I did, at the law school, I say, "I know what you're thinking, you think we're junior league politicians." And I'll tell you we're unanimous half the time, really unanimous. Is it five-four twenty percent? And you're thinking, "Oh, but those are the most important." And I'll say, "Well, it's not the five-four, and it's not the most important. They're the ones most in the press, maybe, but that isn't necessarily the same." They don't believe you. And so, so, how do we deal with them? You'll have to help on that because I say yes, yes, I am affected by the fact that I went to Lowell High School in San Francisco, grew up the way I did, and I am the way I am, on these big open questions. That isn't politics. That's sort of basic philosophy on open matters and everybody is, and it isn't so terrible in this country of 320 million people, all of whom think something different, if there are a few differences on the Supreme Court of the United States. The president of Ghana's court asked me, "Why do people do what you say?"

PRESIDENT LENAERTS: Yes, exactly.

JUSTICE BREYER: And I can't explain that without going back into history because it isn't words on paper. It's Jackson, who said "I won't" and sent all the Cherokees off their own land, into Oklahoma. It's a Civil War. It's new amendments. It's Little Rock, where Eisenhower sent troops—the 101st Airborne—to enforce . . . desegregation. And it's where the Freedom Riders and Martin Luther King and the others went when the troops really weren't sufficient to change the whole South. So I say, "Look, please, the judges already believe that, they already believe it, and so do the lawyers, but use them. And the people you have to convince are the people in the villages, and what you have to convince them of is they will accept a decision that they think is completely wrong without killing each other." When it's five-to-four somebody's wrong. What about *Bush v. Gore*?<sup>12</sup> Well, I'm in dissent. I think that was wrong, and I think half the people—and maybe a few more than half—agree. But, but you see, you see the point? And I get skepticism on that. I say, "Okay, before you decide that it might have been nice if there were a few riots and so forth, turn on your television set. Turn it on and see how people decide things in the world where they don't have a rule of law, and then say thank you to the 200 years of predecessors who have gradually brought this about." And when people want to fall apart, the person who said this the best on the Union—wish they'd used it on Brexit—Abraham Lincoln, he said most things the best. "The mystic cords of memory that run from every battlefield and patriot's grave, to every hearth and homeland, will sound the chorus of the Union, when they are plucked, as surely they will be, by the better angels of our nature."

Now, since I'm on this subject, I love to quote Camus in *The Plague*. And you want to know why we want a rule of law? Why people do what they don't like and what may even be wrong? He says, I'll tell you the story of Iran suffering from the plague, he means France suffering from the Nazi occupation. All right, I'll tell you their story. Why? I'll tell you their story because I want you to see how they suffered and how some were good and some weren't. I'll tell you their story because it's a story of a doctor, that's the story of the book, and a doctor is a person who just helps. He just helps without thinking about it or philosophizing. But really because the plague germ never, never, never dies. It just goes into remission. It goes into remission, and it stays there

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12. 531 U.S. 98 (2000).

lurking in the file cabinets, the closets, the hallways, the attics, one day to reemerge for the education or the misfortune of mankind, by sending its rats into a once happy city. I like that quote, I use it because I say that's what we who are in law are against. We are one of the world's weapons against the reemergence of that terrible part of human beings that he labels as the plague germ.

PRESIDENT LENAERTS: I fully agree with what Justice Breyer has just said. I must emphasize this because his message is so important. I think that the role of judges in democratic societies needs to be re-explained, and it's a shared responsibility of the legal community, of universities, of the press, of the public at large. In a way, understanding the fundamentals of that role is very, very simple. In any liberal democracy—how could there be an illiberal one?—there are ground rules, including the protection of fundamental rights, which enjoy a more fundamental democratic legitimacy than the will of the majority of the day. Democracy is not about being subject to the tyranny of the majority but about respecting a sphere of self-determination free from public interference. That's how I explain, in some of our Member States, the reason why they need an independent Constitutional Court and should also accept such a Constitutional Court as an expression of democracy. Democracy is not just fifty percent plus one, it also encompasses the protection of the minority against the majority. This is actually in *The Federalist No. 10*. So, no oppression by the majority of the inalienable rights of the minority. Judges are there, of course, to protect the minority because the majority can protect itself through the political process. In fact, as those inalienable rights are set out in a written constitution, they trump—it's a dangerous word these days—the choices made by the majority of the day. Such a constitution is based on the most deeply rooted democratic legitimacy, adopted by referendum in many countries or by a supermajority. It is the result of "constitutional moments," as [Professor Bruce] Ackerman would say. That constitutional moment is a supreme expression of democracy. In order to determine its exact meaning, it requires adjudication, if litigation arises, by a neutral umpire—by a judge, by a court, be it nine judges or, in our grand chamber, fifteen judges. From a democratic perspective, it is wrong to say that judges obstruct the wishes of the majority of the day composed of millions of people. It's the wrong comparator. It is a matter of hierarchy in the democratic legitimation of the basic rights as they have been understood by the people when they constituted themselves as a polity.

In the European Union, this means, from a functional perspective, that the EU Treaties and the EU Charter of Fundamental Rights, both of which have been democratically adopted by the Member States supported by their populations, enjoy constitutional status. So, they are at the apex of the hierarchy of EU norms. In order to uphold and enforce those basic texts, EU judges must be courageous and resist any external pressure. In so doing, they must first try to interpret all the laws of the majority of the day in a manner that is consistent with those higher rights, and if that is not possible, they must quash those laws. But with all of that said, judges do not have their own agenda. First of all, they can only become active in a sensitive matter when called upon to do so; that is, when a case is brought to the Court by a person or body who is entitled to do so—whether directly by a party before the Court of Justice or by a Member State court making a reference—because otherwise the case would be dismissed as inadmissible. And second, you need to reason your decision in law, which means that you must have a cogent and a coherent reasoning—informed legal reasoning—which supports the outcome, and which is, of course, subject to criticism, and that is positive, but it should be criticism of a strictly legal kind.

Whilst highly political-charged cases may come to the Court of Justice, the judicial process cannot be confused with the political push and pull of a debate that takes place in the very different “court” of public opinion or during a referendum or an election campaign. I often tell visitors’ groups, and they are very numerous in our Court, that the societal debate on the most delicate issues—take the refugee and asylum crisis or the Eurozone crisis, for example—inevitably land in our docket, sooner or later. That reminds me of an important lesson that I learned during one of the first constitutional law lectures given by Laurence Tribe that same year when Justice Breyer was my professor at Harvard. He said that any political issue of a certain importance eventually ends up in the docket of the Federal Judiciary. It’s maybe slightly overstated, but it’s pretty close to the truth. We now have the same situation in the European Union; hence, my point that you are now seeing EU law operating in a high politics environment, which makes these criticisms—“Enemies of the People,” for example—all the more likely to occur. But if you apprehend correctly the role of judges in a democratic society, then you realize that those criticisms are misguided. So, we must then de-emotionalize the societal debate by distilling it down to a legal argument, and it is the best legal argument that wins. In hard cases, it’s not always clear that there is a single correct outcome. We also have dissenters during our deliberations, and we try

to pull together as many viewpoints as possible so that the largest possible majority is onboard, but even so, there might still be dissent. So, it's not that there is one right decision, that's not what I am arguing. But, it is an outcome that is reached, in our case, by a majority—normally a relatively large majority—on very delicate issues, in the name of the law.

And then we read all the criticisms that miss the point because they disregard the dividing line between law and politics and misunderstand, sometimes willfully, the dynamics underpinning judicial dialogue and decision-making. Sometimes, Member State courts and the political institutions of the EU react to our judgments, either positively or negatively. Such reaction may bring about more litigation so that, in the next case, we do not seek to make amends, but we do take that opportunity to add a few further blocks to the edifice of our case law. This shows that we strictly adhere to the logic of the system, which Cass Sunstein wrote about,<sup>13</sup> of proceeding one case at a time. So, we are not legislators, we move forward case-by-case. We must convince people that, in democracies that respect the rule of law, that's the only way possible. And I often think of that book that I had to read—or which I was lucky enough to be obliged to read—by Alexander Bickel, a Yale Law professor, another famous law school, and the book dates back to the '60s, *The Least Dangerous Branch*, because the judiciary has neither the power of the sword nor that of the purse, fortunately enough. We have only the power of persuasion. Exercising that power can only be done by judges who have the courage to be vulnerable, in the hope that respect for the rule of law remains embedded in our civic culture.

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13. See generally ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (2001).