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## Peek-A-Boo, It's a Case Law System! Comparing the European Court of Justice and the United States Supreme Court from a Network Perspective

By Mattias Derlén & Johan Lindholm\*

### A. Introduction

#### 1. CJEU and Case Law – Throwing Darts in the Dark?

From the moment of its inception the European Union (EU) has included a court that was entrusted to give coherence and integrity to the interpretation and application of the Union's primary and secondary law.<sup>1</sup> That the Court of Justice of the European Union (CJEU) was to play an important role in settling disputes was clear. But few anticipated how instrumental the Court would become in the development of EU law.<sup>2</sup>

No one can dispute that the CJEU's judgments constitute an important source of European Union law. When the Court renders a judgment it settles the case at hand but also sets a precedent for how subsequent cases are to be resolved.<sup>3</sup> Collectively this precedent constitutes case law, sometimes even "settled" or "established" case law, which can serve

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<sup>1</sup> Article 31 of the Treaty establishing the European Coal and Steel Community ("La Cour assure le respect du droit dans l'interprétation et l'application du présent Traité et des règlements d'exécution."), now Article 19 of the Treaty on European Union (TEU).

<sup>2</sup> See, e.g., Karen J. Alter, *Who are the 'Masters of the Treaty'?: European Governments and the European Court of Justice*, 52 INT'L ORG. 121 (1998); Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991); PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW* 63–66 (5th ed. 2011).

<sup>3</sup> John J. Barceló, *Precedent in European Community Law*, in INTERPRETING PRECEDENT 407, 417(D. Neil McCormick et al. eds., 1997). Barceló notes that the Court never explicitly refers to its previous judgments as "precedents". *Id.* However, the Court has acknowledged that the General Court's judgments can "constitute a precedent for future cases". Case C-197/09 RX-II, *M v EMEA*, EU:C:2009:804, para. 62; Case C-334/12 RX-II, *Jaramillo et al. v EIB*, EU:C:2013:134, para. 50.

as a legal basis for deciding subsequent cases, occasionally extensively or even exclusively.<sup>4</sup> For example, this is true concerning the principle of state liability, for which the Court now openly refers to its judgment in *Francovich* as the source of law.<sup>5</sup> The importance of such settled case law is demonstrated by how simply arguments going against such case law are rejected by the Court, sometimes by the well-known put-down “suffice it to say”.<sup>6</sup>

It is clear that the CJEU’s case law constitutes one of the primary sources of European Union law. But that is where the certainty ends. There are many questions about CJEU case law that legal scholars have not yet answered – or about which scholars have not found common ground. This article addresses the fundamental questions of how the CJEU<sup>7</sup> establishes and uses precedent.<sup>8</sup>

The CJEU has frequently been criticized for lacking a clear method for establishing and using precedent. At least five specific (and interrelated) criticisms have been levelled at the Court: First, the Court normally only cites previous judgments in support of its arguments. Judgments pointing in other directions are typically ignored.<sup>9</sup> This approach is still described as a step forward as compared to the traditional approach of the Court, where passages from previous cases were repeated without giving any source.<sup>10</sup> Second, the Court does not

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<sup>4</sup> See, e.g., Case C-409/06, *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim*, EU:C:2010:503, paras. 36, 39, 53, 33 and 58.

<sup>5</sup> See, e.g., Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT et al.*, EU:C:2014:2, para. 50 (“a party injured as a result of domestic law not being in conformity with European Union law can none the less rely on the judgment in *Joined Cases C-6/90 and C-9/90 Francovich and Others* [1991] ECR I-5357”).

<sup>6</sup> See the overview in MITCHEL LASSER, *JUDICIAL DELIBERATIONS* 107–12 (2004).

<sup>7</sup> The judicial system of the European Union consists of a two-part structure, with the CJEU at the top and the General Court below it. In this article, we only discuss the CJEU, as it is the most important court of the Union. EU legal development by way of case law primarily takes place in the CJEU. This court decides on average 600–700 cases per year. See *Annual Report of the Court of Justice of the European Union, Luxembourg 2015*, 93. Arnall has published a useful general introduction to the Court of Justice. See ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* (2nd ed. 2006). The judicial structure previously also included a Civil Service Tribunal, ruling on disputes between the European Union and its staff, but this organ was dissolved in 2016 and its jurisdiction was transferred to the General Court. For further discussion see, e.g., Alberto Alemanno & Laurent Pech, *Thinking Justice outside the Docket: A Critical Assessment of the Reform of the EU’s Court System*, 54 *COMMON MKT. L. REV.* 129 (2017).

<sup>8</sup> In an earlier article, we explore under what circumstances CJEU case law is an important source of law. See Mattias Derlén & Johan Lindholm, *Characteristics of Precedent: European Court of Justice Case Law in Three Dimensions*, 16 *GERMAN L.J.* 1073 (2015).

<sup>9</sup> See, e.g., Anthony Arnall, *Owning Up to Fallibility: Precedent and the Court of Justice*, 30 *COMMON MKT. L. REV.* 247, 252–53 (1993); L. NEVILLE BROWN & TOM KENNEDY, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* 369–70 (5th ed. 2000); ANTHONY ARNULL *ET AL.*, *WYATT & DASHWOOD’S EUROPEAN UNION LAW* 409 (5th ed., 2006).

<sup>10</sup> See, e.g., Arnall, *supra* note 9, at 252.

explain why a particular judgment is cited, rather than another. As noted by Barceló, the CJEU “does not discuss the facts of the prior case or the *ratio decidendi* to demonstrate that the holding is truly in point”.<sup>11</sup> In fact, the common approach of the Court in this regard is described as “selective and superficial”.<sup>12</sup> Third, it is claimed that the Court practices “faux infallibility” by rarely openly departing from previous judgments.<sup>13</sup> Express overruling has happened only in a few, well-known cases,<sup>14</sup> and for example not a single time in the 52 Grand Chamber judgments from 2010 studied by Jacob.<sup>15</sup> Fourth, and similar to the issue of overruling, it is argued that the Court rarely distinguishes related cases, making the precedential value of old judgments uncertain.<sup>16</sup> Even scholars who argue that the Court does engage in distinguishing make it clear that the practice of the Court is problematic. The approach of the CJEU to distinguishing includes manipulating judgments to avoid following previous case law.<sup>17</sup> Finally, and most problematically, the Court is accused of simply ignoring the meaning of previous judgments in order to be able to reach a desired conclusion. This can happen as an implicit overruling, deviating from a previous judgment without even discussing it,<sup>18</sup> or as a form of pretend continuity, where a previous judgment is used as an authority for a particular conclusion, despite that obviously not being the case.<sup>19</sup>

These criticisms target practically all aspects of the Court’s interaction with previous judgments, giving an overall impression of a bumbling Court, uncomfortable and inexperienced in working with case law, a pale shadow of courts in common law countries. Our conclusion contradicts these assessments. The CJEU is a court with civil law roots but a case law future. Taking the constitutional nature of the CJEU into account, and moving away

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<sup>11</sup> John J. Barceló, *Precedent in European Community Law*, in INTERPRETING PRECEDENTS – A COMPARATIVE STUDY 407, 416 (Neil D. MacCormick & Robert S. Summers eds., 1997).

<sup>12</sup> Takis Tridimas, *Precedent and the Court of Justice*, in PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 307, 314 (Julie Dickson & Pavlos Eleftheriadis eds., 2012).

<sup>13</sup> MARC JACOB, PRECEDENTS AND CASE-BASED REASONING IN THE EUROPEAN COURT OF JUSTICE – UNFINISHED BUSINESS 159 (2014).

<sup>14</sup> Tridimas, *supra* note 12, at 316–20; BROWN & KENNEDY, *supra* note 9, at 370.

<sup>15</sup> JACOB, *supra* note 13, at 160.

<sup>16</sup> See, e.g., Tridimas, *supra* note 12, at 313–16; BROWN & KENNEDY, *supra* note 9, at 369–75; Ulrich Everling, *Zur Begründung der Urteile des Gerichtshofs der Europäischen Gemeinschaften*, 1994 EUROPARECHT 127, 136–39 (1994).

<sup>17</sup> JACOB, *supra* note 13, at 130–45.

<sup>18</sup> See, e.g., Barceló, *supra* note 11, at 416; Stefano Civitarese, *A European Convergence Towards a Stare Decisis Model?*, REVISTA DIGITAL DE DERECHO ADMINISTRATIVO, No. 14, Julio - Diciembre de 2015, 173, 182.

<sup>19</sup> See, e.g., Tridimas, *supra* note 12, at 315; Arnall, *supra* note 9, at 253.

from the more traditional understanding of precedent, we view the CJEU's approach as an acceptable exercise of judicial authority in a case law system.

*II. The Claim – CJEU is a Constitutional, Precedent-Driven Court*

We agree that there are grounds for criticizing the CJEU's approach *vis-à-vis* its own case law. For example, the reasoning of many judgments lacks transparency and consistency and the language is often cryptic and overly succinct.<sup>20</sup> But the Court's method is not as deficient as some commentators argue.

Our claim, which this article will support, is that the CJEU is a precedent-driven<sup>21</sup> constitutional court comparable to the Supreme Court of the United States (SCOTUS) and with a comparable approach to precedent. We further argue that this case law approach is acceptable given the nature of the CJEU. Thus, we use the SCOTUS as a yardstick for measuring whether the CJEU takes case law seriously.<sup>22</sup>

From this we conclude that the existing debate regarding how the CJEU establishes and relates to precedent would benefit from a broader (internal and external) comparative perspective. On one hand, criticisms against the CJEU's approach are normally based on a limited number of CJEU decisions.<sup>23</sup> On the other hand, criticisms of the CJEU's approach to case law seldom reflect on the way precedent is deployed in other legal systems. Regarding the former of these points, it is problematic to evaluate a sprawling, extensive, and continuously expanding system of case law—comprising thousands of individual decisions—on the basis of a limited number of well-known judgments.<sup>24</sup> This shortcoming in typical evaluations of the CJEU's practice is not surprising given the limitations of traditional legal

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<sup>20</sup> See also Mattias Derlén, *Multilingual Interpretation of CJEU Case Law: Rule and Reality*, 39 EUR. L. REV. 295, 296–99 (2014).

<sup>21</sup> The concept of precedent is discussed *infra* Part B.

<sup>22</sup> This choice for comparison is explained and defended immediately *infra*.

<sup>23</sup> This does not prevent scholars from making general claims. See, e.g., TREVOR C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 72 (6th ed. 2007) (claiming that the frequency of citations in CJEU judgments has increased).

<sup>24</sup> See Atieh Mirshahvalad *et al.*, *Significant Communities in Large Sparse Networks*, 7 PLOS ONE (2012); Mattias Derlén *et al.*, *Coherence Out of Chaos: Mapping European Union Law by Running Randomly Through the Maze of CJEU Case Law*, 2013 EUROPARÄTTSLIG TIDSKRIFT 517; Mattias Derlén & Johan Lindholm, *Goodbye van Gend en Loos, Hello Bosman?: Using Network Analysis to Measure the Importance of Individual CJEU Judgments*, 20 EUR. L.J. 667 (2014).

methods.<sup>25</sup> We echo Posner's and Fallon's battle cry, calling for empirical analysis of precedent in the US context.<sup>26</sup> Only by combining quantitative and qualitative methods can we fruitfully discuss and understand the use of case law as a source of European Union law.

For these reasons, this comparison of the CJEU's and USSC's attitudes to precedent takes an empirical approach relying on network analysis.<sup>27</sup> Fowler has pioneered this approach in the American context in two landmark articles.<sup>28</sup> We draw inspiration for our study of the CJEU from existing studies of SCOTUS case law that use network analysis, including Fowler's. We replicate those studies and apply them to a network consisting of the CJEU's judgments,<sup>29</sup> and enrich our analysis by contrasting and comparing our results from those achieved with respect to the SCOTUS.

The discussion below reveals that there are fundamental similarities between how the SCOTUS and the CJEU establish and use precedent. This, in turn, suggests that the latter court in many ways approaches its precedent in the same way as the former and should be judged accordingly. Three main arguments supporting this claim are presented below. The first argument, advanced in Part D, is that similarities in the basic features of the networks of CJEU and SCOTUS judgments negate claims that the CJEU establishes and uses precedent without any form of method. The second argument, presented in Part E, is that previous judgments are an indispensable source of law for both the CJEU and the SCOTUS and that this constitutes clear evidence of a system of precedent.<sup>30</sup> The third and final argument, defended in Part F, is that the CJEU's citation approach has four main components – (i) stages of development, (ii) issue shifting, (iii) a general approach to existing case law and a different approach to important cases, and (iv) overruling and avoiding precedent – and that its approach stands up quite well in a comparison with the SCOTUS's.

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<sup>25</sup> All studies mentioned in Part A.I are examples of such qualitative studies, encompassing a limited number of judgments from the Court of Justice. Even Jacob, who conduct a quantitative study, only discuss 52 judgments. See JACOB, *supra* note 13, at 87.

<sup>26</sup> Richard A. Posner, *An Economic Analysis of the Use of Citations in the Law*, 2 AM. L. & ECON. REV. 381, 402 and n. 30 (2000); Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1115 (2008).

<sup>27</sup> The use of network analysis is described in more detail *infra* Part C.II.

<sup>28</sup> James H. Fowler *et al.*, *Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court*, 15 POL. ANALYSIS 324 (2007); James H. Fowler & Sangick Jeon, *The Authority of Supreme Court Precedent*, 30 SOC. NETWORKS 16 (2008).

<sup>29</sup> The dataset used in this study, described further *infra*, was compiled by us as part of a larger research project and previously described and analyzed in sources cited *supra* note 24.

<sup>30</sup> See also Derlén & Lindholm, *supra* note 8.

The CJEU is still influenced by its civil law roots. But this article empirically demonstrates that it exhibits key features of a case law based legal system. The CJEU has a systematic approach for deciding when to cite case law and determining which case law to cite. The CJEU regards case law as an indispensable source of law. And, as measured by a number of key metrics, the CJEU uses approaches to case law and precedent that are similar to those used by the SCOTUS. Consequently, while the CJEU deserves much of the criticism it receives, our findings suggest that its approach to precedent is not as poor as some would claim.

### **B. Setting the Scene – Moving Beyond the Traditional View of Precedent**

The importance of precedent<sup>31</sup> is continuously emphasized, including descriptions of precedent as the “life blood of legal systems.”<sup>32</sup> Yet, despite all the spilled ink, the discussion of the nature and meaning of precedent has remained surprisingly stagnant. It is traditionally claimed that the common law and civil law traditions approach the doctrine of precedent in fundamentally different ways. This claim is primarily based on differences in the binding effect of previous judgments and, in particular, the absence of *stare decisis* in the civil law tradition.<sup>33</sup> Differing from the common law tradition, where court judgments are seen as a way to develop the law from below,<sup>34</sup> the civil law tradition does not regard earlier decisions as absolutely binding. Instead, previous judgements merely serve as interpretations of statutory law.<sup>35</sup> The binding/non-binding dichotomy is too simplified to capture the attitude towards case law in the civil law and common law traditions. Indeed, the discussion about whether precedent constitutes a binding source of law in civil law has overshadowed the practical importance of case law.<sup>36</sup> Even if judgments are not formally binding, the authority

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<sup>31</sup> As will be demonstrated by the discussion below, we here use precedent in a wide sense, encompassing all use of previous judgments, not limited to binding precedent.

<sup>32</sup> C.K. ALLEN, *LAW IN THE MAKING* 243 (7th ed. 1964).

<sup>33</sup> As famously summarized by David & Brierly: “The place given to judicial decisions as a source of law distinguishes the laws of the Romano-Germanic family from the Common law.” RENÉ DAVID & JOHN E.C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 133 (3rd ed. 1985).

<sup>34</sup> MATHIAS SIEMS, *COMPARATIVE LAW* 46 (2014).

<sup>35</sup> Eric Tjong Tijn Tai & Karlijn Teuben, *European Precedent Law*, 16 *EUR. REV. PRIV. L.* 827, 832 (2008). An alternative theory explains the difference between civil law and common law as the distinction between *jurisprudence constante* and *stare decisis*, emphasizing that civil law courts are expected to have regard to previous decisions when there is a high level of consistency in case law (settled case law or *jurisprudence constante*). See Vincy Fon & Francesco Parisi, *Judicial precedents in civil law systems: A dynamic analysis*, 26 *INT’L REV. L. ECON.* 519 (2006). However, we remain unconvinced by this argument. The existence of a line of cases, rather than a single decision, matters in common law as well as civil law. See, e.g., William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 *J. L. ECON.* 249, 250 (1976).

<sup>36</sup> Stefan Vogenauer, *Sources of Law and Legal Method*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 869, 894–95 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

of decisions of higher courts can be a *de facto* very strong influence on decisions of lower courts.<sup>37</sup> This is sometimes described as “precedent in the broad sense” or “persuasive precedent,” as opposed to precedent in the strict sense.<sup>38</sup> The differences between the common law and civil law traditions are more formal than practical.<sup>39</sup>

Concentrating on the issue of binding sources of law is not productive. To move on we have to acknowledge that there are different kinds of precedent, even within the common law paradigm. Two related aspects are of particular importance: constitutional precedent and self-precedent. As to the former a distinction is made between constitutional, statutory, and common law precedent. Out of the three, statutory precedent enjoys a “super-strong presumption of correctness,” common law precedent occupies a middle position, and constitutional precedent is given a weaker presumption of correctness.<sup>40</sup> The idea behind the weaker protection for constitutional precedent is the difficulty the legislator faces if it wants to intervene to object to case law. There are only very limited, external checks on the judicial interpretation of the constitution. In this situation a strong form of precedent would create an undesirable lock-in effect. Consequently, the SCOTUS needs to be able to correct the path of the law.<sup>41</sup> This has been confirmed by the SCOTUS itself.<sup>42</sup>

Self-precedent is distinguished from vertical precedent (prior decisions of a higher court) and horizontal precedent (prior decisions issued by a peer court). Self-precedent is a prior decision issued by the same judge or the same court.<sup>43</sup> The distinction is illuminating because the view of precedent changes as these relationships change. Gascón observes that, while

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<sup>37</sup> Tai & Teuben, *supra* note 35, at 833.

<sup>38</sup> See, e.g., Richard Brunaugh, *Persuasive Precedent*, in PRECEDENT IN LAW 217, 217 (Laurence Goldstein ed., 1987); Tai & Teuben, *supra* note 35, at 828.

<sup>39</sup> Vogenauer, *supra* note 36, at 894–95.

<sup>40</sup> William N. Eskridge, *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 388 (1988).

<sup>41</sup> Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 656 (2001). See RUPERT CROSS & J. W. HARRIS, PRECEDENT IN ENGLISH LAW 20 (4th ed. 1991) (finding it unsurprising that the USSC has taken a less rigorous attitude towards precedent given the difficulties in changing the US constitution).

<sup>42</sup> See, e.g., *Burnet v. Coronado Oil & Gas Co.* 285 U.S. 393, 407 (1932); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

<sup>43</sup> Marina Gascón, *Rationality and (Self) Precedent: Brief Considerations Concerning the Grounding and Implications of the Rule of Self Precedent*, in ON THE PHILOSOPHY OF PRECEDENT 35, 36 (Thomas Bustamante & Carlos Barnal Pulido eds., 2012). The more traditional approach is to only employ two categories: vertical and horizontal stare decisis. See, e.g., Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1712–13 (2013); Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 385 (2007). Yet, following Gascón, we find it valuable to distinguish between different courts on the same hierarchical level and the same court, as only the latter is concerned by this study.



important differences exist between the common law and civil law traditions as regards vertical precedent, the same does not hold true for self-precedent.<sup>44</sup> Self-precedent does not require the court to always follow its previous judgments. It only requires the judge to justify departures from his or her previous rulings.<sup>45</sup> The underlying idea of self-precedent is not legal certainty or stability but rationality and the absence of arbitrariness.<sup>46</sup>

Komárek has developed the fundamental plurality of precedent into his theory of reasoning with previous decisions, identifying the legislative model as distinct from the traditional case-bound model.<sup>47</sup> In the legislative model judgments are drafted and interpreted as if they were legislative texts and the authority of the court is derived from its position in the judicial hierarchy. Thus, the wording of the judgment is closely scrutinized in search of a rule-like pronouncement by a higher court.<sup>48</sup>

The use of the legislative model of reasoning with previous decisions is not limited to the civil law tradition. Both the SCOTUS and the CJEU occupy positions that enable the use of the legislative model. The former court selects the cases to decide, delivers a small number of judgments each year, and is widely regarded as a political institution.<sup>49</sup> The latter court was clearly envisioned as a superior authority on the interpretation of EU law. Neither the SCOTUS nor the CJEU are specialized constitutional courts like the ones found in many legal orders that have centralized judicial review,<sup>50</sup> like for example the German *Bundesverfassungsgericht*, but both are constitutional courts in the sense that they by merit of their elevated positions in their respect systems perform constitutional functions in a way and to an extent that distinguish them from lower courts of their respective legal systems.<sup>51</sup>

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<sup>44</sup> Gascón, *supra* note 43, at 37.

<sup>45</sup> *Id.* at 43.

<sup>46</sup> *Id.* at 37–38.

<sup>47</sup> Jan Komárek, *Reasoning with Previous Decisions: Beyond the Doctrine of Precedent*, 61 AM. J. COMP. L. 149 (2013).

<sup>48</sup> *Id.* at 162–63.

<sup>49</sup> *Id.* at 165. See Earl M. Maltz, *The Function of Supreme Court Opinions*, 37 HOUSTON L. REV. 1395, 1420 (2000) (underscoring that “[b]y virtue of its position, the [SCOTUS] necessarily provides general legal rules that bind other actors in the system”).

<sup>50</sup> See, e.g., Alec Stone Sweet, *Constitutional Courts*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 816, 817–18 (Michel Rosenfeld & András Sajó eds., 2013).

<sup>51</sup> Komárek, *supra* note 47, at 165–66. But see David A. O. Edward, *Richterrecht in community law*, in RICHTERRECHT UND RECHTSFORTBILDUNG IN DER EUROPÄISCHEN RECHTSGEMEINSCHAFT 75, 80 (Reiner Schulze & Ulrike Seif eds., 2003) (concluding that a CJEU judgment “is not legislation, is not intended to be legislation and it should not be interpreted as if it were”).

In conclusion, we have to adjust our expectations when discussing how the CJEU establishes and uses precedent. We cannot expect the Luxembourg court to treat its own case law in the same way as a lower common law court would treat case law from a higher court. The CJEU is a constitutional court and it has a particular assignment in the legal system. It is reasonable that these courts will build upon their own previous cases, but the format is constitutional self-precedent.

### C. Methodological Questions

#### *1. Finding a Yardstick – The SCOTUS as an Object of Comparison*

This article examines how the CJEU establishes and uses precedent. Our study draws inspiration from a comparison with the SCOTUS. This is a comparative study, with the comparison serving as an instrument to gain a better understanding of the CJEU.

In any comparison both similarities and differences are examined in order to gain the most fruitful results.<sup>52</sup> The differences between the two courts are obvious and include basic structural differences as well as differences in argumentation and style. One noticeable distinction is that the SCOTUS has the power to grant or deny *certiorari*, while the CJEU has no similar docket control mechanism. The CJEU court can expedite the process for questions already answered.<sup>53</sup> But it cannot close areas of case law to further discussion and rely on the existing decisions, as the SCOTUS can.<sup>54</sup> There are also clear differences in style between the argumentative reasoning of the SCOTUS and the official, authoritative voice of the CJEU. Though, as pointed out by Lasser, the latter aspect is mitigated by the voice of the Advocate General.<sup>55</sup>

Still, the two courts also have significant similarities, making a comparison viable. It is always problematic to compare the CJEU with any other court, given the peculiarities of the Luxembourg court. While it is unhelpful to fall back on the *sui generis* description,<sup>56</sup> the CJEU certainly occupies an unusual position, being neither a national court nor a traditional, international court. The Luxembourg court has, on its own initiative and using the basic treaties of the Union, taken on the role of a constitutional court, developing EU law into an

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<sup>52</sup> Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 383 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

<sup>53</sup> See generally MORTEN BROBERG & NILS FENGER, PRELIMINARY REFERENCES TO THE EUROPEAN COURT OF JUSTICE 400–03 (2010).

<sup>54</sup> MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 45 (2008).

<sup>55</sup> LASSER, *supra* note 6, at 236–38.

<sup>56</sup> ROBERT SCHÜTZE, EUROPEAN CONSTITUTIONAL LAW 67–68 (2012).

effective legal system. Thus, it is reasonable to treat the CJEU as a constitutional court,<sup>57</sup> making a comparison with another constitutional court such as the SCOTUS both practical and fruitful. In the words of Tridimas, the SCOTUS is an interesting comparison, as it “exercises constitutional jurisdiction in a pluralist judicial system applying an abstract founding law”.<sup>58</sup>

Finally, we have chosen the SCOTUS for comparison with the CJEU because of the established position of precedent in the American legal system in general and in the SCOTUS in particular. *Stare decisis*, the binding force of precedent, has been said to be “the defining feature of American courts,”<sup>59</sup> including the SCOTUS. The justices regard the principle as “the heart of the rule of law.”<sup>60</sup> Naturally, it could be claimed that the SCOTUS has lost its way and deviated from its common law roots. For example, it is frequently pointed out that the SCOTUS takes a less rigorous attitude towards precedent as compared to English courts.<sup>61</sup> But it is difficult to claim that precedent is not an important part of the American legal system.

## *II. The Broader Perspective – A Short Introduction to Network Analysis*

This study compares the approaches to precedent in the CJEU and the SCOTUS from a network perspective. The main network analysis concepts employed in the article are *nodes*, *links*, *centrality*, and *authority*.<sup>62</sup> The first step when performing network analysis is to

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<sup>57</sup> Takis Tridimas, *The Court of Justice and Judicial Activism*, 21 EUR. L. REV. 199 (1996).

<sup>58</sup> Tridimas, *supra* note 12, at 324. We also believe that a comparison between the two courts is interesting as both are arguably driven by ideas. While this concept cannot be fully explored here, the essential idea is the following: The CJEU is not linked to any country but rather to an abstract idea of Europe, *see e.g.*, Ditlev Tamm, *The History of the Court of Justice of the European Union Since its Origin*, in *THE COURT OF JUSTICE AND THE CONSTRUCTION OF EUROPE: ANALYSES AND PERSPECTIVES ON SIXTY YEARS OF CASE-LAW* 9 (2013). This very characteristic trait of being linked to an idea rather than the history of an individual nation is absent in most other constitutional courts, but arguably not in the SCOTUS. The American nation is itself built on ideas, as evidenced in the Declaration of Independence and the Constitution, and these ideas still affect the US legal system, *see e.g.*, KONRAD ZWIGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 239 (3rd ed. 1998).

<sup>59</sup> Timothy R. Johnson *et al.*, *The Origin and Development of Stare Decisis at the U.S. Supreme Court*, in *NEW DIRECTIONS IN JUDICIAL POLITICS* 167, 167 (Kevin T. McGuire ed., 2012).

<sup>60</sup> HAROLD J. SPAETH & JEFFREY A. SEGAL, *MAJORITY RULE OR MINORITY WILL* 6 (1999).

<sup>61</sup> *See, e.g.*, CROSS & HARRIS, *supra* note 41, at 19–20; NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* 123 (2008); SAUL BRENNER & HAROLD SPAETH, *STARE DECISIS* 1 (1995); Richard P. Caldarone, *Precedent in Operation: a comparison of the judicial House of Lords and the US Supreme Court*, 2004 PUB. L. 759, 787. The idea is captured elegantly by Moore & Oglebay: “[*Stare decisis*] does not command unquestioning obedience to the past. It is a friendly and frequently persuasive link with what has gone before.” *See* James Wm. Moore & Robert Stephen Oglebay, *The Supreme Court, Stare Decisis and the Law of the Case*, 21 TEX. L. REV. 514, 552 (1943).

<sup>62</sup> *See also* Mirshahvalad *et al.*, *supra* note 24; Derlén *et al.*, *supra* note 24.

arrange the judgments into a network, the raw network. The raw network consists of judgments (*nodes*) and citations between judgments (*links*).<sup>63</sup> As citations can only go backwards in time the network is *directed*, making every link both an out-link (a link from a node) and an in-link (a link to a node).<sup>64</sup> The network is constructed solely from actual citations – the links. This enables us to claim that the network and the resulting patterns are natural, in the sense that they correlate with the perception of the judges of the respective court.

The relative importance of a node (i.e. a judgment) is referred to as its *centrality* in the network. There are several ways of calculating centrality, the most obvious being simply counting the number of links to a node, in this context that would involve determining the number of citations a particular decision generates. The number of links to and from a node is also referred to as the node's *degree*. Thus, when speaking of a node's in-degree centrality we are referring to the number of citations *to* a particular judgment.<sup>65</sup>

In-degree centrality is a straightforward centrality measurement, but it can be misleading when applied to case law. Counting the number of times a decision has been cited is not necessarily the best way of measuring its importance. All citations are not equal; being cited by a case, which is in itself important, should count for more than a citation from an unimportant case. Similarly, the fact that a decision is rarely cited does not conclusively prove that it is relatively unimportant, as a decision can be the basis of other cases and be at the core of an important area.

At the same time, it would be unacceptable to conclude that only old, foundational cases are important and that more recent cases are irrelevant. A balance between the two extremes must be struck. In this regard, measuring cases' importance by using in-degree centrality will invariably favor older cases over newer cases, simply due to the fact that the former has had more time than the latter to accumulate citations.

A better approach is therefore to use a *non-local centrality measurement*,<sup>66</sup> also known as a feedback centrality measurement, thus called because rather than assuming that every

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<sup>63</sup> See generally Ulrik Brandes & Thomas Erlebach, *Fundamentals*, in NETWORK ANALYSIS – METHODOLOGICAL FOUNDATIONS 7 (Ulrik Brandes & Thomas Erlebach eds., 2005).

<sup>64</sup> The existence of directed links gives added value to the network. See Elizabeth A. Leicht & Mark E. J. Newman, *Community Structure in Directed Networks*, 100 PHYS. REV. LETTERS 118703 (2008). It is noteworthy that while citations only can go backwards in time, ideas flow through the network in the opposite direction, from older to newer cases.

<sup>65</sup> See Jon M. Kleinberg, *Authoritative Sources in a Hyperlinked Environment*, 64 J. OF THE ACM 604 (1998). Regarding its application in a legal context, see, e.g., Daniel M. Katz & Derek K. Stafford, *Hustle and Flow: A Social Network Analysis of the American Federal Judiciary*, 71 OHIO ST. L.J. 457, esp. 491–44 (2010).

<sup>66</sup> Other examples of such measurements, besides the ones discussed below, are Eigenvector and Katz centrality.

citation is equally valuable, a decision's centrality is based on the characteristics of cases that refer to it.<sup>67</sup> Using such measurements, an important node is one that is linked to other important nodes.<sup>68</sup> In the context of a case law network, this conforms to the legally intuitive view that an important decision is a decision cited by other important decisions.

In order to facilitate comparisons we follow Fowler in using *authority score*.<sup>69</sup> Authority is one aspect of the HITS algorithm that was developed by Jon Kleinberg.<sup>70</sup> This algorithm provides two centrality measurements for each node: *hub score* and *authority score*.<sup>71</sup> Authority score is a measurement of the amount of knowledge held by a node and, in a case law network, authority score therefore becomes a measurement of a decision's importance in a traditional sense, calculated by citations from the hubs of the network, discussed below. In case law networks, nodes with a high authority score (*authorities*) are decisions that are important because they say something vital about the content or development of the law. In other words, they are influential cases.<sup>72</sup>

Hubs (nodes with high hub score) are nodes that know how to find information on a given topic in the network. In case law networks, hubs are decisions that cite important decisions. In other words, they are well-grounded decisions.<sup>73</sup> According to Kleinberg, authorities and

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<sup>67</sup> See Dirk Koschützki *et al.*, *Centrality Indices*, in NETWORK ANALYSIS – METHODOLOGICAL FOUNDATIONS 16, 53 (Ulrik Brandes & Thomas Erlebach eds., 2005).

<sup>68</sup> See Renaud Lambiotte & Martin Rosvall, *Ranking and clustering of nodes in networks with smart teleportation*, 1 (2012), available at <http://arxiv.org/pdf/1112.5252.pdf> (May 12, 2017); Koschützki *et al.*, *supra* note 67, at 53.

<sup>69</sup> See Fowler & Jeon, *supra* note 28. We generally favor using the PageRank algorithm that serves as the basis for how Google ranks webpages. See, e.g., Mattias Derlén & Johan Lindholm, *The Court of Justice and the Ankara Agreement: Exploring the Empirical Approach*, 2012 EUROPARÄTSLIG TIDSKRIFT 462 (2012); Derlén & Lindholm, *supra* note 24. Very simplified, PageRank allows a "Random Walker" to explore the structure of the network by randomly following citations and occasionally teleporting to a random link in the network. PageRank, which is expressed as a percentage value, represents the relative probability that the Random Walker will find itself in a certain place and represents, as applied to a case law network, a decision's popularity. See Sergey Brin & Lawrence Page, *The anatomy of a large-scale hypertextual Web search engine*, 30 COMPUTER NETWORKS & ISDN SYSTEMS 107 (1998); Lawrence Page *et al.*, *The PageRank Citation Ranking: Bringing Order to the Web* (January 29, 1998), available at <http://ilpubs.stanford.edu:8090/422/1/1999-66.pdf> (March 15, 2015).

<sup>70</sup> Kleinberg, *supra* note 65. HITS stands for Hyperlink-Induced Topic Search. As indicated by the title of his article, Kleinberg developed the algorithm for use on the World Wide Web, but it has been used in the context of case law networks. See Fowler *et al.*, *supra* note 28, at 330–32.

<sup>71</sup> The initial step of using the HITS algorithm is to construct a focused subgraph of the network, for which the algorithm is employed. See Kleinberg, *supra* note 65, at 608–10. This is necessary in the context of the World Wide Web and other large networks in order to limit computational cost, but not with a network as small as ours. Consequently, we operate the HITS algorithm on the entire CJEU case law network.

<sup>72</sup> Fowler *et al.*, *supra* note 28, at 331.

<sup>73</sup> *Id.*

nodes are mutually reinforcing: a good *authority* is a node pointed to by many good hubs, and a good *hub* is a node that points to many good authorities.<sup>74</sup> This definition is circular, which is why the algorithm must be iterative and take into account the entire network and assume that the sum of the authority-weight and the sum of the hub-weight are equal.<sup>75</sup>

#### D. First Argument – Basic Features of a Network

##### *I. Introduction – A Non-Random Approach*

In order to constitute a case law network, we can reasonably expect judgments to be connected through citations and that those citations are made on the basis of the issues discussed in each case. At least, in case X concerning issue A we expect the court to cite its previous decision in case Y concerning the same issue and we expect it not to cite case Z concerning issue B. When we extrapolate this reasoning to a whole network of case law, we expect certain patterns to emerge.<sup>76</sup>

First, we expect decisions to be connected to each other by citation to a relatively high degree, here referred to as the *connectedness* of the network. If the judgments are very loosely connected to each other, then this suggests that the court is not citing relevant cases, potentially because there are no relevant cases.<sup>77</sup> Second, we expect that citations among cases are not distributed equally or, to use network analysis terminology, the network's *degree distribution* does not follow a flat or normal distribution. Instead, certain precedents where particularly important points of law were established should receive most of the citations and the great majority of judgments should receive relatively few citations.<sup>78</sup>

As explained below, the CJEU's case law network is quite similar to the SCOTUS's in both these regards and distinctly different from a random network. Thus, the first argument in support of our claim is that similarities in these basic features of the CJEU and SCOTUS case law networks negate claims that the CJEU establishes and uses precedent randomly. While

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<sup>74</sup> Kleinberg, *supra* note 65, at 611.

<sup>75</sup> Kleinberg gives the following example, where *p* denotes page, *x* authority weight and *y* hub weight: "If *p* points to many pages with large *x*-values, then it should receive a large *y*-value; and if *p* is pointed to by many pages with large *y*-values, then it should receive a large *x*-value." Kleinberg, *supra* note 65, at 611 (italics omitted). In other words, if a judgment cites many influential cases, it should be considered a well-founded case, and if a judgment is cited by many well-founded cases it should be considered an influential case.

<sup>76</sup> Naturally, this is only a minimum requirement. In reality a court will often interact with judgments that are similar, for example in order to distinguish them.

<sup>77</sup> See *infra* Part D.II.

<sup>78</sup> See *infra* part D.III.

this hopefully surprises no one, it is a necessary first step, considering the extent of the above-described criticism of the CJEU and its approach towards case law.

## *II. Connectedness*

In network analysis, the degree of connectedness between nodes is referred to as the *density* of the network. A network's density is calculated by comparing the actual number of links to the potential number of links in a complete network, i.e. one where every node (i.e. case) is connected to every other. By dividing the former with the latter one derives a measure between 0 and 1 where 1 is the density of a complete network.<sup>79</sup>

While both the CJEU and SCOTUS networks are fairly sparse, they differ significantly from each other. The density of the CJEU's citation network is 0.00096.<sup>80</sup> The density of the SCOTUS network studied by Fowler & Jeon is, by comparison, only 0.00048.<sup>81</sup> Thus, the SCOTUS network's density is only half that of the CJEU's. This may at first appear surprising considering that, on average, a recent SCOTUS judgment contains roughly twice as many citations as a CJEU judgment.<sup>82</sup> The explanation is very simple: network size.

The CJEU case law network analyzed here consists of all 8,879 judgments issued by the Court since its first case in 1954 until the middle of May 2011. The CJEU network is significantly smaller than the 30,288 judgments included in the SCOTUS network studied by Fowler & Jeon, including all majority opinions between 1754 and 2002.<sup>83</sup> The fact that the CJEU's case law network is much smaller than the SCOTUS's is in no way surprising. The latter institution is more than four times older than the former.<sup>84</sup> Still, this fact affect density. If the average number of references remains the same, then density will decrease almost exponentially as the size of the network increases.<sup>85</sup> Although the average number of references has

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<sup>79</sup> JOHN SCOTT, *SOCIAL NETWORK ANALYSIS* 81 (4th ed. 2017).

<sup>80</sup> It should be noted that density is quite different than simply measuring average number of citations.

<sup>81</sup> Calculated on the basis of Fowler & Jeon, *supra* note 28, at 18 (220,500 citations between 30,288 cases).

<sup>82</sup> Compare Figures 5 and 6 *infra*.

<sup>83</sup> Fowler & Jeon, *supra* note 28, at 17. The study by Fowler & Jeon includes all judgments in the U.S. Supreme Court Reporter. The latter includes judgments decided by the Supreme Court of Pennsylvania, before the establishment of the SCOTUS. See *id.* at 17, footnote 1. It should be noted that Fowler et al., *supra* note 28, studies a slightly different data set consisting of all decisions between 1791 and 2005. *Id.* at 326.

<sup>84</sup> In fact, the CJEU network is growing about five times as fast as the USSC network and will surpass it in size around the year 2085 if the current trend continues.

<sup>85</sup> SCOTT, *supra* note 79, at 85–87. See also *infra* Figure 1.

historically increased in both networks,<sup>86</sup> there is a very real, practical limit to how many citations can be included in a single judgment.

Considering this, it is necessary to use an alternative measurement for network connectedness. One such alternative is *inclusiveness*, which “is the total number of points minus the number of isolated points.”<sup>87</sup> In this context, an “isolated point” is a case that neither cites nor is cited by at least one other case. Networks can be usefully compared by measuring “the number of connected points expressed as a proportion of the total number of points.”<sup>88</sup>

When we use inclusiveness instead of density a very different picture emerges. In the CJEU case law network 89% of all CJEU decisions are connected by citation, inward or outward, to at least one other case. That is, 11% of all cases are unconnected, i.e. do not cite any other case and are not cited by any other case. This finding alone suggests that the CJEU has a method when it cites case law, for if citations were actually distributed randomly the network’s inclusiveness would be much higher, nearly complete.

The inclusiveness among CJEU decisions is quite similar to that of SCOTUS judgments: the SCOTUS network has an only slightly lower inclusiveness of 84%.<sup>89</sup> Thus, we see that the CJEU not only has a method but that the CJEU’s method and the SCOTUS’s method produce networks with very similar degrees of inclusiveness. This does not necessarily mean that they are the same or even similar methods, but it indicates that the CJEU approaches previous judgments in a consistent matter.

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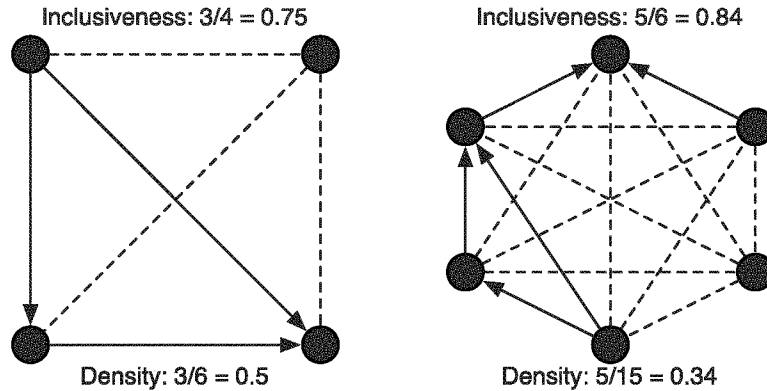
<sup>86</sup> See *infra* Part E.III.

<sup>87</sup> SCOTT, *supra* note 79, at 81.

<sup>88</sup> *Id.*

<sup>89</sup> Yonatan Lupu & Erik Voeten, *Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights*, 42 BRITISH J. POL. SCI. 413, 424 n. 54 (2012).





**Figure 1. Density & Inclusiveness**

### III. Degree Distribution

Another way of proving that the CJEU approaches previous judgments in a consistent way is to consider the *degree distribution* of the CJEU case law network. Degree distribution is the variation in total number of inward and outward citations, or more generally, the number of links per node.<sup>90</sup> In a random network, where links are placed randomly between nodes, most nodes will have the same number of links.<sup>91</sup> But, as pointed out by Albert & Barabasi, most complex networks are not random and links are not distributed randomly. Instead, complex networks in general and citation networks in particular tend to follow a *power law distribution* where most nodes will have few links and a small group of nodes will have a great number of links.<sup>92</sup>

Translated to the case law networks studied here, most judgments can be expected to have few inward and outward citations, and citations will instead gather in a small group of judgments with a great number of inward and outward citations. Fowler *et al.* demonstrate that the network of SCOTUS judgments follows a power law distribution, both regarding inward and outward citations (see figure 3 *infra*).<sup>93</sup> Similarly, we find that the CJEU case law network is a power-law network. Figure 3 below demonstrates that this holds true both

<sup>90</sup> Fowler *et al.*, *supra* note 28, at 332; Réka Albert & Albert-László Barabási, *Statistical Mechanics of Complex Networks*, 74 REV. MOD. PHYS. 47, 49 (2002).

<sup>91</sup> Albert & Barabasi, *supra* note 90, at 49.

<sup>92</sup> Mark E.J. Newman, *Random graphs as models of networks*, 99 PNAS 2566 (2002).

<sup>93</sup> Fowler *et al.*, *supra* note 28, at 332; Fowler & Jeon, *supra* note 28, at 18. See also Lupu & Voeten, *supra* note 89, at 425–26 (concluding that the same is true for the European Court of Human Rights in Strasbourg).

regarding inward and outward citations. This demonstrates, first, that the CJEU case law network is not random but follows established patterns and, second, that there is no significant difference between the CJEU and the SCOTUS networks in their basic degree distribution.

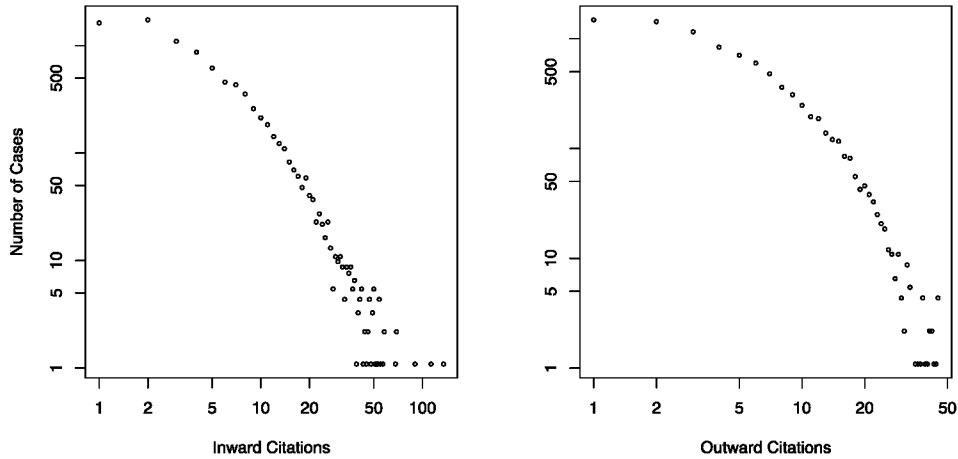
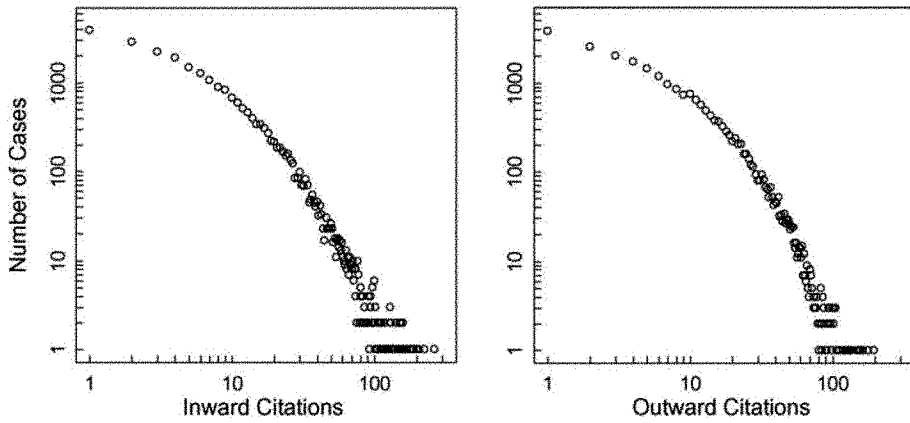


Figure 2. CJEU, Degree Distribution



Source: Fowler & Jeon (2008)

Figure 3. SCOTUS, Degree Distribution

#### *IV. Interim Conclusions*

The CJEU's case law is connected largely in the same way as the constitutional, precedent-driven American court: relatively sparse (i.e. few links as compared to other types of networks) but few cases are entirely disconnected. Furthermore, in both networks, citations clearly follow a power law distribution.

This constitutes a first argument in favor of a conscious approach *vis-à-vis* case law at the CJEU. The CJEU network is not random, but it also displays patterns that indicate some form of method.

These similarities between the two courts are only a first step. Next we turn our attention to empirical measurement of the development of the networks over time.

### **E. Second Argument – Case Law as an Indispensable Source of Law**

#### *I. Introduction – Humble Beginnings*

No legal system can start out with a strong, established system of precedent and this includes the systems studied here. The explanation is partly practical: a minimum core of judgments is needed before a court can develop a systematic citation practice. There are also cultural explanations why neither court started out with a strong, established system of precedent. For the CJEU the cultural explanation can be found in its civil law heritage. The Luxembourg court was created by six continental civil law nations,<sup>94</sup> and modeled mainly on the French system.<sup>95</sup> In such a context, with heavy emphasis on legislation and a relatively limited role for the judiciary, there are clear cultural limits on the Court's capacity to act as a lawmaker. The absence of a system of precedent is hardly surprising. The SCOTUS, by comparison, also lacked a strong system of precedent early on; it hesitated to refer to and build upon its previous decisions prior to the nineteenth century.<sup>96</sup> In this regard it essentially followed the pattern of English courts, where the strengthening of precedent, culminating in the 1898 *London Tramways* case,<sup>97</sup> started during the nineteenth century.<sup>98</sup>

Thus, time is a relevant factor when considering how the SCOTUS and the CJEU established and use precedent. In this section, we present existing research on how the SCOTUS's use of

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<sup>94</sup> Belgium, France, Germany, Italy, Luxembourg, and the Netherlands.

<sup>95</sup> Tamm, *supra* note 58, at 9.

<sup>96</sup> Fowler & Jeon, *supra* note 28, at 18.

<sup>97</sup> *London Tramways v. London County Council* [1898] AC 375.

<sup>98</sup> DUXBURY, *supra* note 61, at 125–26.

precedent developed over time and replicate these studies for the CJEU. In so doing we find that there are fundamental similarities between the SCOTUS and the CJEU in their gradual development towards a position where case law is now an indispensable source of law. The similarities in the development and current state of their approach constitute clear evidence of the CJEU having a system of precedent where new judgments are well embedded in existing case law.

## *II. The SCOTUS – Development Towards Binding Precedent*

There are primarily two network analysis studies of how the SCOTUS's use of precedent has developed over time. The first study, conducted by Fowler & Jeon, investigated how the SCOTUS's citation practice has changed over time using primarily two measurements. The first measurement is average number of citations, i.e. *average out-degree*. The second measurement, which is a slight modification of the first, is the *percentage* of SCOTUS decisions each year that contain at least one outward citation.<sup>99</sup> Both measurements illustrate a clear development, with average out-degree and percentage of cases citing at least one previous case increasing during the nineteenth century and continuing to expand during the twentieth century.

The second study, carried out by Johnson *et al.*, came to the same conclusion after finding a steady increase in average out-degree. Out-degree increased from an average of 1.1 citations during the Court's first fifty years to 18.7 citations in the last fifty years. The authors regard this increase as observable evidence of the institutionalization of the norm of precedent at the SCOTUS.<sup>100</sup>

Fowler & Jeon furthermore sought to empirically verify the claim made in legal literature that the principle of *stare decisis* was firmly established in the SCOTUS by the year 1900. There is significant agreement on the correlation between increasing references to precedent and the establishment of the principle of *stare decisis*,<sup>101</sup> but different perspectives prevail as to when *stare decisis* was established in the SCOTUS. Fowler & Jeon primarily confirm the 1900 claim on the ground that the increase in the percentage of cases citing at least one previous case levels-off after 1900 at about 90%.<sup>102</sup> Fowler & Jeon do not conclude that 90% of cases citing older decisions is a clear threshold for a system of precedent, only that it was true that 90% of SCOTUS cases cited older cases at the time when

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<sup>99</sup> Fowler & Jeon, *supra* note 28, at 19. They also discuss average in-degree, but we will return to that measurement below.

<sup>100</sup> Johnson *et al.*, *supra* note 59, at 172–73.

<sup>101</sup> Frank B. Cross *et al.*, *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 528–29 (2010).

<sup>102</sup> Fowler & Jeon, *supra* note 28, at 19.

traditional legal doctrine claims that *stare decisis* had been firmly established. Thus, 90% should not be regarded as a requirement for *stare decisis*, only an indication, and a lower percentage does not rule out the existence of a system of precedent.

Johnson *et al.* arrive at a seemingly quite different conclusion, claiming that the SCOTUS began to base its decisions on its own precedents by the early 1800s and that the norm of *stare decisis* was firmly entrenched by 1815.<sup>103</sup> The quite significant difference between the two studies is explained by a difference of perspective. Fowler & Jeon take an absolute perspective, concentrating on outward citations to previous SCOTUS judgments. Johnson *et al.* take a relative perspective, concentrating on the SCOTUS's transition from using English common law to its own precedent. This development is very clear, with references to English common law decreasing from 75.8% of all citations in 1791–1800 to only 10.9% during 1806–1815.<sup>104</sup>

Fowler & Jeon observe a variation in the outward citation pattern by the SCOTUS. The trend is clearly increasing, sharply during the nineteenth century and more modestly during the twentieth century. A clear dip in this trend can be observed—regarding average out-degree (average number of citations in a case to a previous case) and the percentage of cases citing at least one previous judgment—during the so-called Warren Court (1953–1969).<sup>105</sup> According to Fowler & Jeon this quantitatively confirms legal theory, in the sense that the famously activist Warren Court had less need for precedent due to their focus on creating new law.<sup>106</sup> This makes some intuitive sense. The Warren Court is famous for revolutionizing many aspects of US constitutional law,<sup>107</sup> including cases such as *Brown v. Board* and *Miranda v. Arizona*.<sup>108</sup> If the importance of precedent is connected to evolution, its relevance in a revolutionary context is limited.<sup>109</sup>

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<sup>103</sup> Johnson *et al.*, *supra* note 59, at 169.

<sup>104</sup> *Id.* at 169–72.

<sup>105</sup> Fowler & Jeon, *supra* note 28, at 19; *infra* Figure 5.

<sup>106</sup> *Id.*

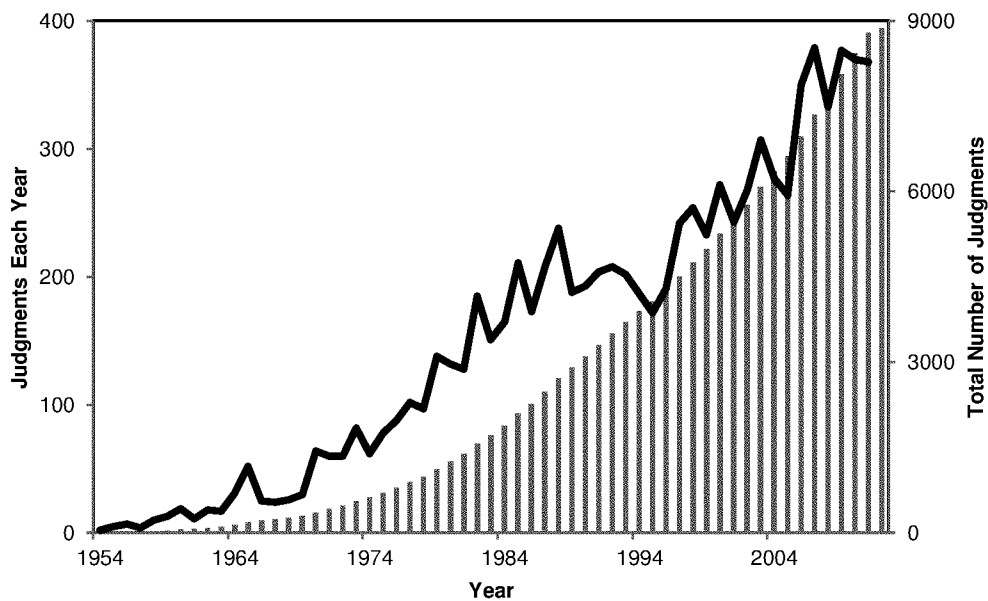
<sup>107</sup> Kurland has written an overview of the history and importance of the Warren Court. See P B KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT (1970).

<sup>108</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954); *Miranda v. State of Arizona*, 384 U.S. 436 (1966); SPAETH & SEGAL, *supra* note 60, at 163.

<sup>109</sup> Yet, as discussed further below, this is a complicated issue. See SPAETH & SEGAL, *supra* note 60, at 207 (arguing that the Warren court does not deviate significantly from the view of precedent as compared to other courts, claiming that “the Warren Court neither invented nor perfected preferential decision making.”).

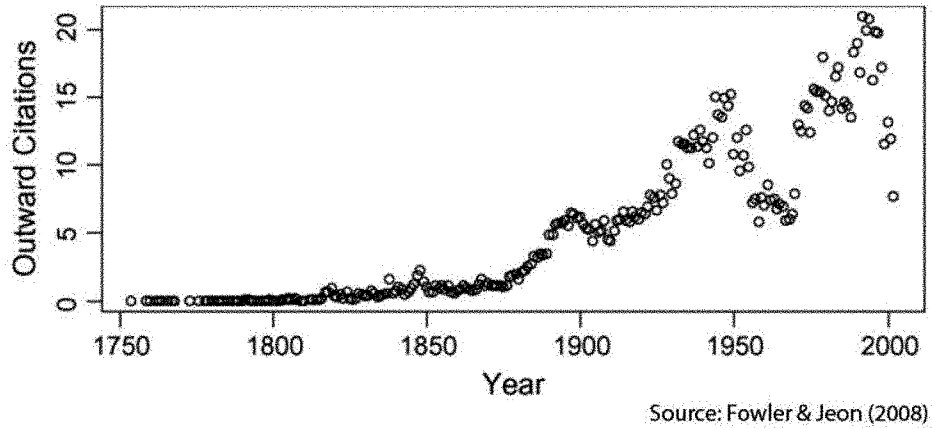
### III. The CJEU – From Zero to a Hundred in Thirty-Five Years

The CJEU's use of previous decisions has developed over time. First and most obviously, the total body of CJEU case law has increased steadily over the years. This is of course unavoidable as new decisions are constantly added. But the CJEU's body of case law is growing much faster as it steadily increases the number of cases it settles each year.<sup>110</sup> It is not only the number of CJEU judgments that has increased over time; the same is true for its citation practice. The CJEU has steadily increased the average number of citations it makes to its own case law: from less than 0.5 until 1977 to 8.4 in 2011 (see figure 4 *infra*).

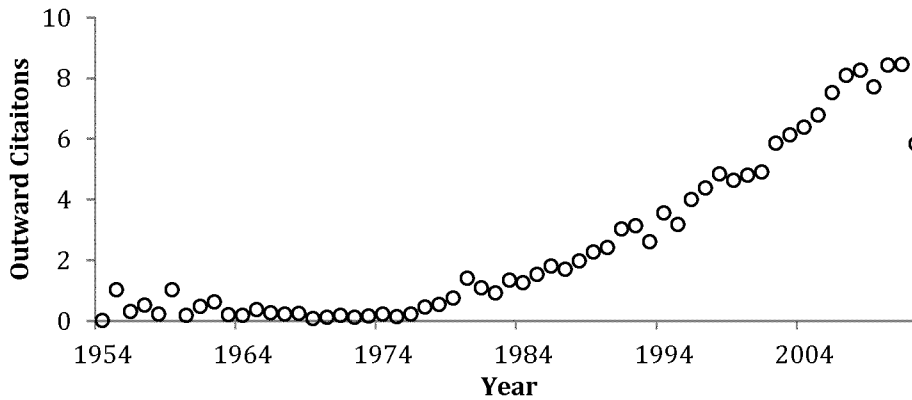


**Figure 4. CJEU, Number of Cases**

<sup>110</sup> See figure 4 *infra*.



*Figure 5. SCOTUS, Avg. Out-degree over Time*



*Figure 6. CJEU, Avg. Out-degree over Time*

It may appear as if average out-degree follows the number of judgments decided each year. But there is an important difference. The increase in out-degree roughly corresponds with the increase in decisions after 1977. Still, it does not explain why it took the CJEU twenty-three years to properly start citing its own case law. The obvious fact that citations require something to cite cannot explain this discrepancy. In 1977 the CJEU had 788 judgments to choose from but only made 44 citations. By comparison, in 1980, the number of previous decisions had increased to 1,125 (a 42% increase) but the number of citations even more to 184 (a 318% increase). Thus, claims made by other scholars that the CJEU initially avoided

citing its own cases appear to be supported by our data.<sup>111</sup> This cannot be (entirely) attributed to the CJEU being bound by its French heritage or inexperience with case law. After all, it took the SCOTUS almost a century to properly start citing its own case law. The comparison suggests that case law-based systems must reach a “critical mass” before courts will start to cite their own case law.

Average out-degree is a straightforward and intuitive measurement for how the CJEU’s use of precedent has developed, but it is rather blunt. For example, a high average out-degree might be explained by more cases being available to cite<sup>112</sup> and a few judgments with many citations can have a disproportionately large effect on the yearly average. The latter is particularly true for the early years, when the CJEU decided a very limited number of judgments per year.<sup>113</sup>

Given the limitations of average out-degree we follow Fowler & Jeon in considering what percentage of all judgments decided each year involve citations to at least one previous decision. This is, in our opinion, a good measurement of the importance of case law as a source of law: if the CJEU decides few cases without citing precedent, then that suggests that it is in practice an indispensable source of law. Using this measurement, we find a trend similar to that seen by using average out-degree, as the relative portion of judgments citing at least one precedent has increased from (i) around 10% in the early 1970s, to (ii) around 60% in the 1980s, to (iii) around 90% in the last two decades.<sup>114</sup> The trend of three distinct periods of development at the CJEU follows the pattern identified by Fowler & Jeon in the SCOTUS’s case law: lack, growth, and finally establishment of case-law use.<sup>115</sup>

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<sup>111</sup> Arnall, *supra* note 9, at 252; Tridimas, *supra* note 12, at 309.

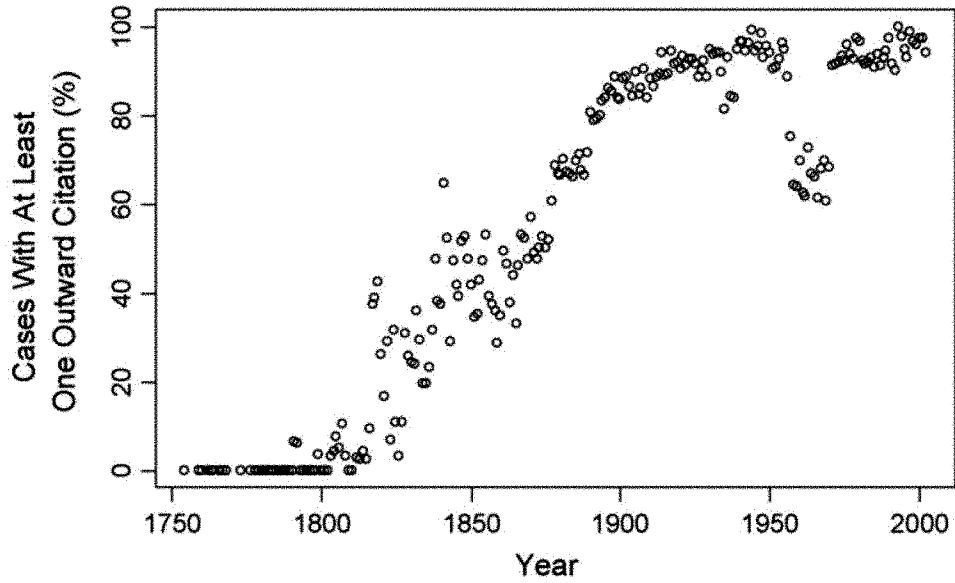
<sup>112</sup> Fowler & Jeon, *supra* note 28, at 19.

<sup>113</sup> This might explain the relatively high average out-degree in 1955 and 1959.

<sup>114</sup> See *infra* Figure 8. See also Tridimas, *supra* note 12, at 309 (describing the development in a similar way).

<sup>115</sup> Fowler & Jeon, *supra* note 28, at 19; *infra* Figure 7.





Source: Fowler & Jeon (2008)

Figure 7. SCOTUS, Cases With At Least One Outward Citation

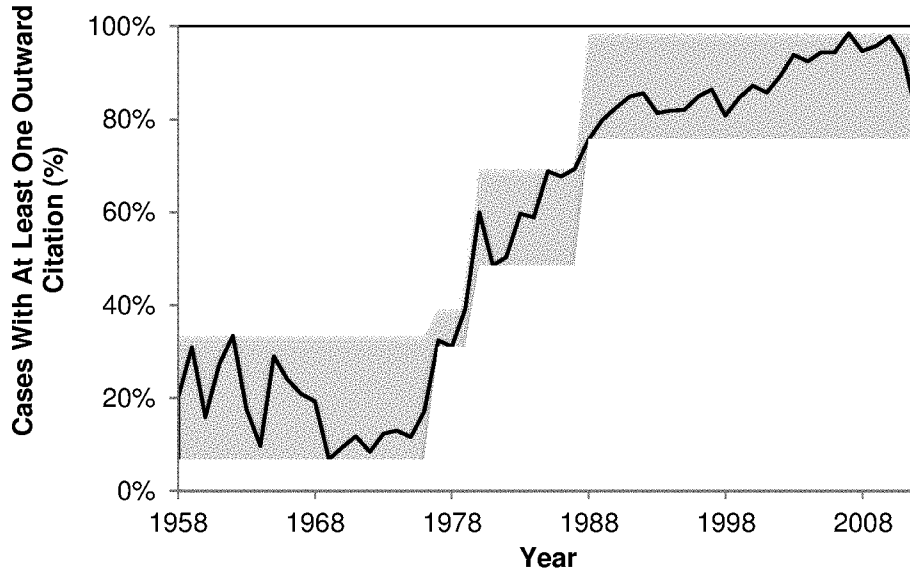


Figure 8. CJEU, Cases With At Least One Outward Citation

#### IV. Interim Conclusions

The discussion in the sections above leads us to a number of conclusions. First, it is significant that the CJEU follows the same development as the SCOTUS, with a steady increase in the use of previous decisions. Along with Fowler & Jeon and Johnson *et al.*,<sup>116</sup> we argue that a steady increase in average out-degree and the number of cases citing at least one precedent is a good indicator of case law's increasingly important role as a source of law in the EU framework. Fowler & Jeon come to the conclusion that a high tendency to cite case law suggests the establishment of a norm of *stare decisis*.<sup>117</sup> We are a little more cautious. Rather than being formally required as a norm of *stare decisis*, a high frequency could be explained by the court's interest in the legitimacy of its rulings and belief that embedding a decision in previous case law gives it the desired legitimacy.

This is supported by our second conclusion, which concerns judicial activism. An interesting difference between the SCOTUS and the CJEU is that the CJEU's trend towards increased reliance on existing case law has largely been continuous and without any significant deviation. If judicial activism leads to a more relaxed attitude *vis-à-vis* precedent, as suggested by Fowler & Jeon, then the CJEU should demonstrate similar deviations during some "revolutionary" periods identified by other scholars.<sup>118</sup> The consistent development towards ever more extensive use of case law indicates that judicial activism at the CJEU does *not* exclude reliance on precedent. This is vividly demonstrated by the *Francovich* decision in which the CJEU established the principle of state liability.<sup>119</sup> Although the case is arguably one of the Luxembourg court's most far-reaching and innovative judgments – or, in Hartley's words, a "confusion of 'ought' and 'is' that no ordinary lawyer would make"<sup>120</sup> – it is one of the CJEU network's foremost hubs. This indicates that it contains references to many important CJEU judgments.<sup>121</sup> Thus, despite being entirely novel, *Francovich* is firmly connected to previous judgments.

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<sup>116</sup> Fowler & Jeon, *supra* note 28, at 19; Johnson *et al.*, *supra* note 59, at 172–73.

<sup>117</sup> Fowler & Jeon, *supra* note 28, at 19.

<sup>118</sup> Regarding judicial activism in the CJEU, see, e.g., TREVOR HARTLEY, CONSTITUTIONAL PROBLEMS OF THE EUROPEAN UNION (1999); Hjalte Rasmussen, *Between Self-Restraint and Activism: A Judicial Policy for the European Court*, 1988 EUR. L. REV. 28; Takis Tridimas, *The Court of Justice and Judicial Activism*, 1996 EUR. L. REV. 199.

<sup>119</sup> Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italy*, EU:C:1991:428.

<sup>120</sup> HARTLEY, *supra* note 118, at 60.

<sup>121</sup> Derlén & Lindholm, *supra* note 24, at 685. *Francovich* is the sixth best hub of the network, only surpassed by *Bosman*, *Preussen Elektra*, *Gebhard*, *Schumacker*, and *Becker*.

This follows the basic idea that the use and rhetoric of precedent is a response from the courts to their natural and unavoidable discretion. Unfettered discretion would ultimately threaten the position of the courts, which is why they have voluntarily limited their discretion by following past cases.<sup>122</sup> Following this logic, the greater the novelty of the holdings, then the greater the need to entrench the decision in previous case law in order to achieve legitimacy. This arguably explains the use of previous case law in *Francovich*. The Court attempts to demonstrate that the legal principle established in the case, while novel, is fundamentally related to other principles and thereby to previous judgments.

Third, development at the CJEU is taking place with remarkable speed compared to the SCOTUS. While the latter court took more than a century to reach a point where case law was firmly established as a source of law, the CJEU achieved the same in about thirty-five years. We argue that by 1989 the CJEU had reached a clear habit of connecting decisions to previous judgments. By 1989 the average out-degree had reached 2.25, exceeding 2 for the first time and only increasing thereafter. Even more importantly, the yearly percentage of cases citing at least one previous case reached 80% by 1989 and never dipped below that threshold again for the time included in the study, but rather increasing to close to 100% in recent years.

Finally, the reasons for the development should be discussed. As noted above the CJEU began referring to its previous decisions in the late 1970s and early 1980s, starting from a very low level. Why did we see this development? Some have speculated that the CJEU's increased tendency to cite its previous judgments can at least partly be explained by the accession of Ireland and Great Britain in 1973. The idea is that this represented an influx from the common law tradition.<sup>123</sup> Although the "common law thesis" may appear plausible, it is not obvious from our data. On the one hand, almost a decade passed between these countries' accession and the increased trend in citations, and once started, that trend has remained largely unbroken for thirty years, during which fifteen "civil law countries" were admitted as Member States. On the other hand, if viewed from a longer perspective, it cannot be ruled out that the 1973 accession started a process that eventually led to a new view of precedent in the CJEU, in particular given the very low levels of citation before 1973.

However, while the accession of the common law countries might be a factor, the development must be viewed from a broader perspective, where the move to precedent is part of an effort to legitimize the law-making efforts of the CJEU. This hypothesis is

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<sup>122</sup> Alec Stone Sweet & Margaret McCown, *Discretion and Precedent in European Law*, in *JUDICIAL DISCRETION IN EUROPEAN PERSPECTIVE* 84, 96–97 (Ola Wiklund ed. 2003).

<sup>123</sup> For different views of the accession of the common law countries as an explanation for the change in attitude at the CJEU vis-à-vis case law, compare HENRY G. SCHERMERS & DENIS F. WAELEBROECK, *JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES* para. 171 (4th ed. 1987) and Thijmen Koopmans, *Stare decisis in European Law*, in *ESSAYS IN EUROPEAN LAW AND INTEGRATION* 11, 17 (David O. O'Keefe & Henry G. Schermers eds., 1982).

supported by the fact that the SCOTUS, which has undisputedly been part of the common law tradition since its very inception, follows largely the same development as the CJEU.<sup>124</sup>

## **F. Third Argument – The Anatomy of a Method**

### *I. Introduction*

We have argued that the CJEU has a conscious approach to case law (Part D) and that it treats case law as an indispensable source of law (Part E). In this final part, we will discuss the substance of that approach.

We do not claim that the CJEU's approach to its own case law is beyond reproach, but as elaborated below we believe that it can to a large extent be described as the combined result of four components: (i) stages of development, (ii) issue shifting, (iii) a general approach to existing case law, including a specific approach to important cases, and (iv) overruling and avoiding precedent. This not only shows that the CJEU's approach has substance. A comparison with the SCOTUS's approach and how it has developed over time suggests that the CJEU's approach represents a credible exercise of judicial authority in a case law system.

### *II. Stages of Development*

One way of capturing how the CJEU establishes and uses precedent is to consider how its approach to case law has developed over time. This issue lies at the heart of the Court's supposedly poor and inexperienced approach to case law.<sup>125</sup> A first way of measuring this is to consider how citations to case law, i.e. in-degree centrality, are distributed over time by looking at average yearly inward citations. This provides us with a rough map of when CJEU precedents were established (*see figure 9 infra*) and permits several observations.

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<sup>124</sup> Fowler & Jeon, *supra* note 28, at 19, fig. 3.

<sup>125</sup> *See supra* Part A.I.

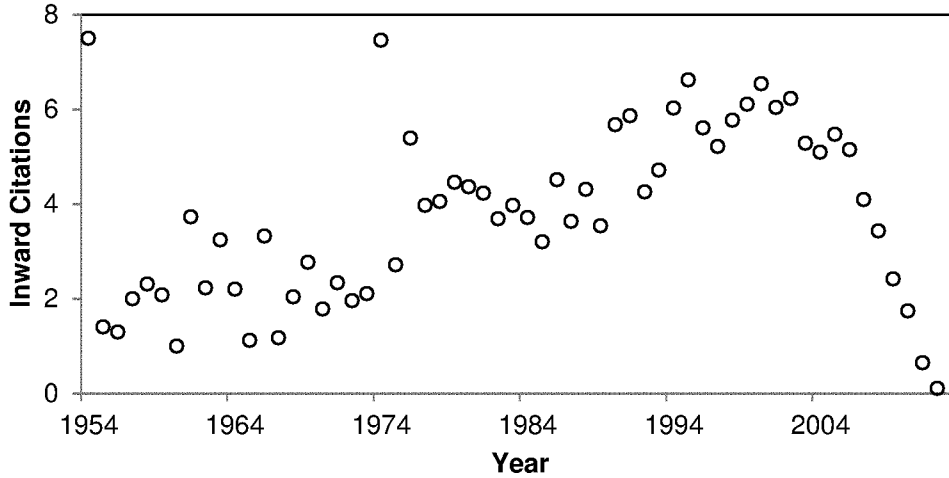
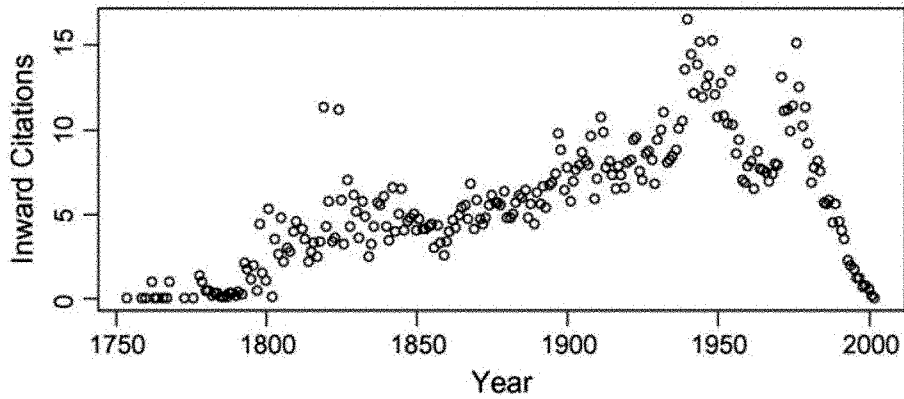


Figure 9. CJEU, Avg. In-degree over Time



Source: Fowler & Jeon (2008)

Figure 10. SCOTUS, Avg. Indegree over Time

First, we see that inward citations are not distributed evenly over time, but that, generally speaking, they are increasing over time and then decreasing for the most recent years. In both these regards, the CJEU's citation practice mirrors that of the SCOTUS and makes theoretical sense. The fact that the average number of inward citations increases over time is natural given that (i) the number of decisions made increases every year,<sup>126</sup> (ii) the average

<sup>126</sup> See *supra* Figure 4.

number of outward citations increases every year,<sup>127</sup> and (iii) when it comes to citing non-leading cases, the CJEU has a tendency to cite fairly recent cases.<sup>128</sup> Thus, the observed tendency is the product, and confirmation, of various aspects of the CJEU's approach. That recent decisions have been cited fewer times is unavoidable because they simply have not had the same chances to be cited.<sup>129</sup>

Second, although the overall development is an increase in inward citations over time, this development is not as steady and constant as the development in outward citations and while early variations can be attributed to a small sample size, the same is not true for later years. In fact, the CJEU data clearly illustrates that the mid- to late-1970s was a golden era of case law.<sup>130</sup>

The same can also be said about the SCOTUS and is consistent with the thesis of the CJEU as a constitutional, precedent-driven court. For a court that takes developing case law seriously there should be an overall increase in average inward citations that illustrates the continuous development of law, but unless the court has a mechanical approach there will also be outliers. Since citations tend to concentrate in a few, central decisions,<sup>131</sup> average inward citations will increase considerably in years when those central decisions are decided. For example, the high average number of inward citations in 1974 is largely attributable to the CJEU's decision in *Dassonville*,<sup>132</sup> the second most cited decision ever.<sup>133</sup>

Third, related to the discussion above, deviations from the observed trends during more extended periods can indicate a historically anomalous period of case law development.<sup>134</sup> Fowler & Jeon identify a sharp drop in mean inward citations during the judicially-active Warren Court (1953–1969)<sup>135</sup> that mirrors the below-average outward citations during the

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<sup>127</sup> See *supra* Figure 6.

<sup>128</sup> See *infra* Part F.IV.

<sup>129</sup> The length of the "tail" suggests that it on average takes seven years for a case to reach its peak citation potential. However, we return to this issue in Part F.IV *infra*.

<sup>130</sup> See figure 9 *supra*.

<sup>131</sup> See *supra* Part D.III and figure 2.

<sup>132</sup> Case 8/74, *Procureur du Roi v. Benoît and Gustave Dassonville*, EU:C:1974:82.

<sup>133</sup> Derlén & Lindholm, *supra* note 24, at 673. *Dassonville* has been cited 112 times in our dataset. Other frequently cited judgments rendered in 1974 include Case 2/74, *Reyners v. Belgium*, EU:C:1974:68 (35 citations) and Case 41/74, *van Duyn v. Home Office*, EU:C:1974:133 (23 citations). The impact of these cases on the average increases as the court only decided 62 cases that year.

<sup>134</sup> See *supra* Part E.II.

<sup>135</sup> Fowler & Jeon, *supra* note 28, at 19.

same period.<sup>136</sup> Fowler & Jeon present two possible explanations for this trend: either that the Warren Court's judgments had a weak legal basis and were therefore of less interest to subsequent compositions of the court, or that the court subsequently shifted to a more conservative policy.<sup>137</sup> The absence of any similar periods regarding CJEU case law indicates a more stable, homogenous court, continuing to build on the achievements of previous compositions.

### *III. Issue Shifting*

We expect that a constitutional, precedent-driven court will not continuously deliver decisions on the same legal issue but to shift focus over time, first developing law in one area and when it is "done" moving on to another. Mature constitutional courts tend to engage in this type of strategic issue shifting. For example, in their study of the SCOTUS, Fowler & Jeon demonstrated that the Court shifted focus from commercial issues to civil rights in the 1960s by tracing the authority score of key cases over time (*see* Figure 11 *infra*). Because of how an authority score is calculated,<sup>138</sup> a rise in authority score over time occurs because new, well-grounded cases (hubs) citing that case are added to the network. Similarly, a decline in authority score means that the new cases added to the area do not cite the case. This, in turn, could indicate that the court has turned its attention to other issues.<sup>139</sup>

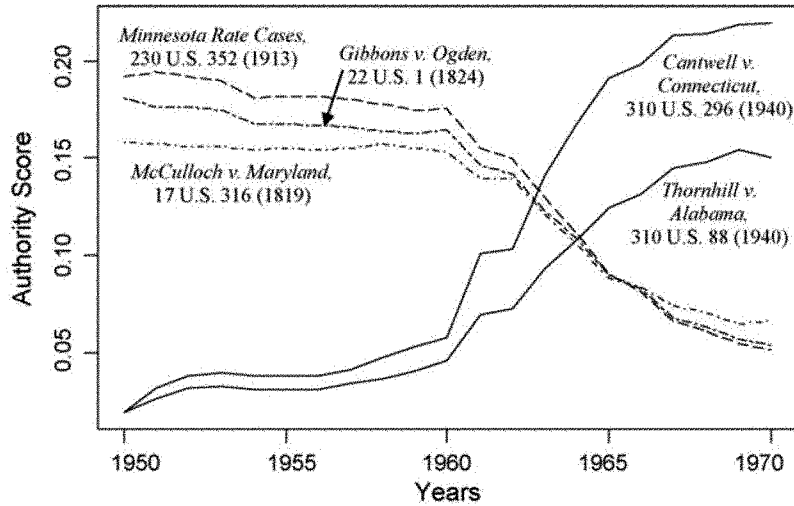
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<sup>136</sup> *See supra* Part E.II.

<sup>137</sup> Fowler & Jeon, *supra* note 28, at 19–20.

<sup>138</sup> *See supra* Part C.II.

<sup>139</sup> If we are studying a single case an alternative explanation is that the case has been overruled and is no longer good law. *See further infra* Part F.V. A third, possible explanation is that the Court instead cites another case in support of the same point of law.



Source: Fowler & Jeon (2008)

**Figure 11. SCOTUS, Issue Shifting**

To study issue shifting in the CJEU we use the same approach as Fowler & Jeon but with some modifications. First, rather than studying individual cases, we have tracked the mean authority score of key decisions in the areas of free movement of goods,<sup>140</sup> competition law,<sup>141</sup> and constitutional law.<sup>142</sup> To ensure a fair comparison, the decisions studied are all from the 1960s and 1970s represent still-binding law, and the tracking begins more than eight years after the most recent decisions were decided.<sup>143</sup> Second, it is difficult to compare how much attention the CJEU pays to a particular group of cases using their total absolute authority score since the numbers differ greatly. Instead, we track the group's authority score relative to its own peak score over time.<sup>144</sup> Third, instead of using a yearly average, we calculate each group's authority score after each new citation is added to the network (see Figure 12 *infra*).

<sup>140</sup> Case 8/74, Dassonville, EU:C:1974:82; Case 120/78, Cassis de Dijon, EU:C:1979:42.

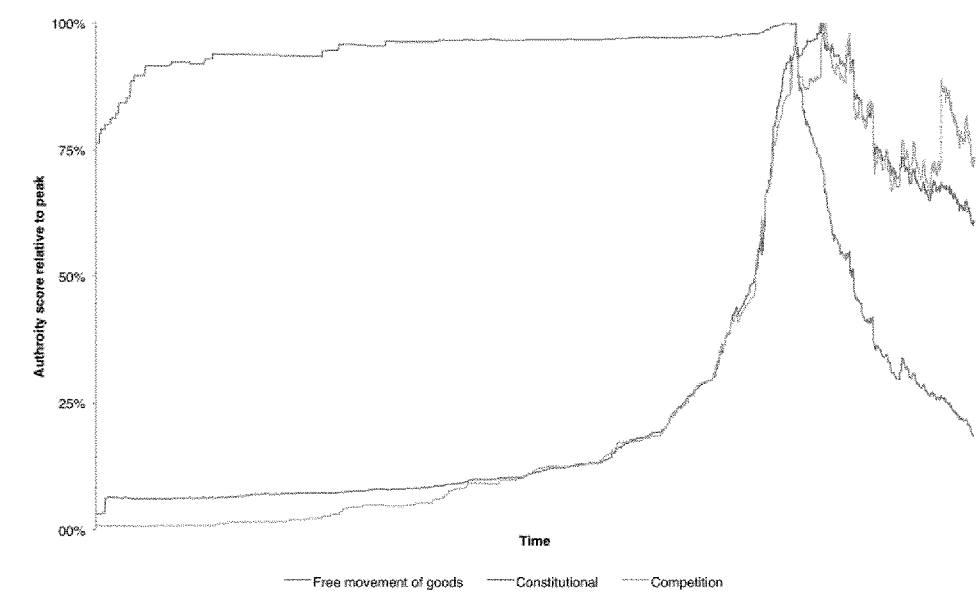
<sup>141</sup> Case 85/76, Hoffmann-La Roche, EU:C:1979:36; Case 27/76, United Brands, EU:C:1978:22.

<sup>142</sup> Case 26/62, Van Gend en Loos, EU:C:1963:1; Case 6/64, Costa v. ENEL, EU:C:1964:66; Case 29/69, Stauder, EU:C:1969:57; Case 41/74, Van Duyn, EU:C:1974:133; Case 43/75, Defrenne II, EU:C:1976:56; Case 106/77, Simmenthal II, EU:C:1978:49.

<sup>143</sup> This ensures that all studied decisions have had an opportunity to be cited. See *further infra* Part F.IV.

<sup>144</sup> Compare *infra* Part F.IV.





**Figure 12. CJEU, Issue Shifting**

This reveals that the amount of attention the CJEU has paid to free movement of goods, competition law, and constitutional law has shifted a lot over time. Early, and for a long time, the CJEU paid much attention to the free movement of goods. During this era, key cases in that area were the best authorities in the network. Over time the court shifted focus to other issues, such as constitutional law and competition law. This is evident in the gradual increase in authority scores of key cases in these areas, many of which had been around for a longer time than the key decisions regarding free movement of goods. Towards the end of the period studied the decisions on free movement of goods had lost more than 75% of their peak authority scores.

This illustrates how the CJEU's relative attention to various areas has shifted over time. The observed trends are also consistent with the Court spreading its attention between more areas of law as the breadth of EU law gradually expanded beyond its historical focus on the free movement of goods. This would explain, for example, why the development of decisions in constitutional law and competition law for a long time closely mirrored each other and why they more recently declined. The Court is again shifting its attention to new areas. In this regard one of the more interesting phenomena is the more recent increase in authority score for competition law cases. If our explanation for the overall trends is correct, then this

suggests that the CJEU has returned to the issue of competition law despite other, newer areas demanding its attention.

Given the fact that the CJEU has only been active for about sixty years—compared to the SCOTUS's more than two hundred and fifty years—the relative lack of evidence of more significant shifts in issue priorities is understandable. Furthermore, given the relatively limited amount of data not all priority shifts can be easily detected empirically.

#### *IV. The Half-Life of Important and Non-Important Cases*

It was discussed above that citations follow an unequal distribution, where a small group of important cases receive the large majority of all citations and most cases are very rarely cited.<sup>145</sup> Along similar lines, we expect the CJEU to treat important and non-important cases differently in other respects as well. We would expect the average judgment's usefulness as a precedent to initially and gradually increase, as it is cited for the information it holds on a particular issue, up to a peak, and then decline as newer cases on the same issue are decided or the issue becomes settled.<sup>146</sup> In comparison, it is axiomatically true that important cases will age better than unimportant cases.

Fowler & Jeon's study shows that the SCOTUS behaves in this manner. They observe that the average time to peak authority score is somewhat shorter for important SCOTUS judgments than for unimportant judgments.<sup>147</sup> Also, unimportant cases' authority scores decline more quickly than important cases'.<sup>148</sup>

When examining how the CJEU's judgments' authority scores develop over time (*see* Figure 13 *infra*), we find interesting similarities and differences when compared to the SCOTUS. The CJEU's judgments' authority scores generally follow the same development as the SCOTUS's, building gradually to a peak and then steadily declining in importance. We will refer to this as the "Banana index," in the sense that judgments go through three phases: green (still developing), yellow (peak), and brown (declining).

The most obvious difference between the two courts in this regard is that it takes a CJEU decision significantly less time to reach peak authority. CJEU judgments reach peak authority score after an average of eight years, compared to circa twenty-seven years for SCOTUS

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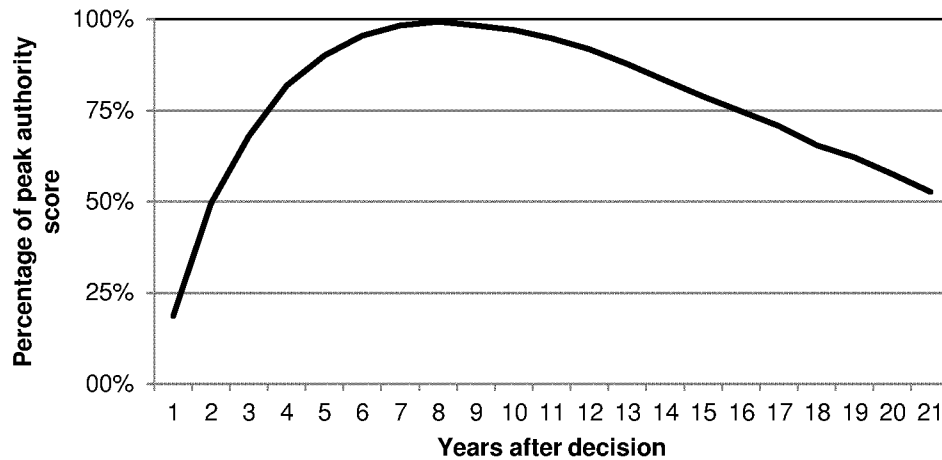
<sup>145</sup> *See supra* Part D.III.

<sup>146</sup> Fowler & Jeon, *supra* note 28, at 25.

<sup>147</sup> *Id.* (25.5 years compared to 27.2 years).

<sup>148</sup> *Id.* (as expected, important cases reaches a higher average authority at peak as compared to other cases).

judgments.<sup>149</sup> Interestingly, there is no similar difference in decline rate. An average SCOTUS case will have lost 25% of its authority about five years after peak and 50% after about seventeen years;<sup>150</sup> the comparable time for an average CJEU case is eight years and thirteen years. Thus, the CJEU is quick to cite new cases and they become settled after a short time. The judgments also stay relevant for a surprisingly long time, as compared to time to peak and in comparison with the SCOTUS.



**Figure 13. CJEU, Authority Score Development (1991–2001)**

Much like Fowler & Jeon, we observe that important CJEU decisions<sup>151</sup> follow a different development as compared to average decisions (see Figure 14 *infra*). First, important CJEU decisions seem to take less time to peak than the average decision, within four to six years. The almost instant impact of cases like *Keck* and *PreussenElektra* is obvious from the almost vertical rise in authority. Some cases have a more staggered development. The *Marleasing* decision, for example, eventually reached a high authority score than *Francovich* or *Keck*, but it took twice as long to get there. This suggests that the CJEU only gradually warmed to the use of *Marleasing* in later cases. *Factortame* is even more controversial, initially rising fast but then the development breaks and the case continues a troubled up-and-down existence at a lower level of authority.<sup>152</sup>

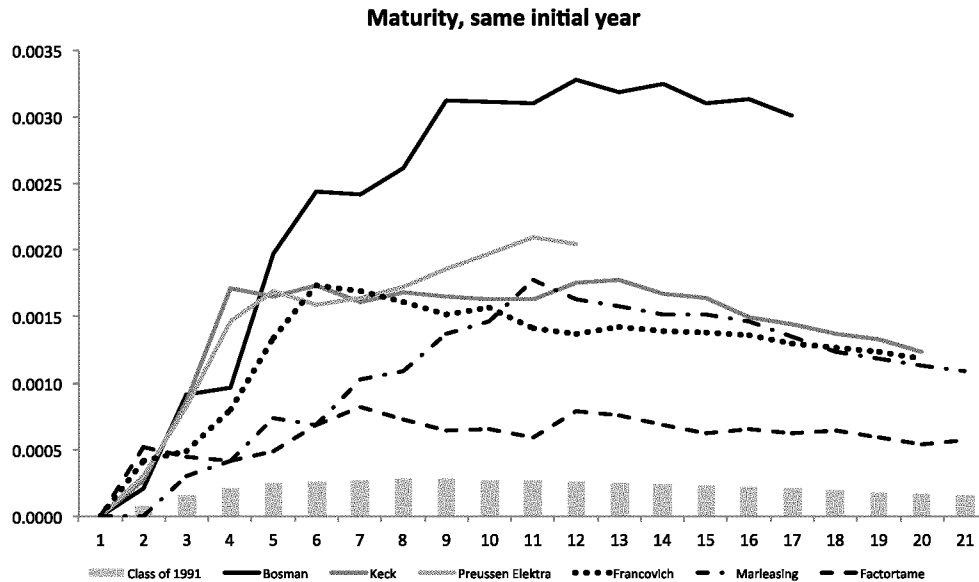
<sup>149</sup> This is also supported by the length of the inward citation “tail”, see *supra* Part F.II.

<sup>150</sup> Fowler & Jeon, *supra* note 28, at 25.

<sup>151</sup> See Derlén & Lindholm, *supra* note 24 (regarding what constitutes an important case).

<sup>152</sup> The interesting development of *Torfaen* is discussed further *infra* Part F.V.

Second, some important decisions, for example *Bosman* and *PreussenElektra*, experience a second wind, continuing their upward climb after the initial peak. The development of the *Bosman* case is explosive, even when compared to other important decisions.



**Figure 14. CJEU, Authority Score Development of Important Decisions**

#### V. Overruling and Avoiding Precedent

In any legal system where judgments constitute an important source of law, overruling and otherwise avoiding previous cases becomes relevant, the most obvious form being formal overruling, traditionally the prerogative of a court higher up in the judicial hierarchy.<sup>153</sup> With an express overruling the authority of the previous decision is wiped clean, replaced by the new judgment.<sup>154</sup> But there are less dramatic ways of avoiding a troublesome judgment. Overruling can be implied when the later court regards the previous judgments as wrongly decided. Furthermore, a previous ruling can be undermined if a later court concludes that a

<sup>153</sup> CROSS & HARRIS, *supra* note 41, at 127.

<sup>154</sup> *Id.* at 127–28.

previous court misunderstood the law.<sup>155</sup> The rise and fall of judgments as they are overturned or otherwise avoided can be traced in the networks of the courts' precedent.

The academic opinion on overturning precedent in the SCOTUS is split. It is sometimes claimed that the tendency to overturn previous decisions is the main difference between the English and American doctrine of precedent.<sup>156</sup> On the other hand, Gerhardt claims that overruling constitutional precedents "constitutes a tiny fraction of what the [SCOTUS] does."<sup>157</sup> Fowler & Jeon concur, classifying overruling at the SCOTUS as "extremely rare," with only 252 overturned judgments.<sup>158</sup> The network analysis demonstrates that overruled cases have higher than average authority, indicating that the SCOTUS is more likely to overturn judgments that could influence later decisions.<sup>159</sup> Naturally, once a judgment has been overruled its importance will gradually decrease, while the importance of the overruling judgment will increase. Thus, the development of the judgments will intersect, with the overruling judgment surpassing the overruled decision after about ten years. The overruling judgment will then continue to increase in importance for almost thirty additional years.<sup>160</sup>

Similarly, it is reasonable to assume that the overruling cases are grounded in previous case law to a degree above average. This is confirmed for the SCOTUS network, with overruling cases having about five times higher hub scores than other cases. More specifically, the hub score of an overruling case appears to be closely connected to the authority score of the overruled case. In other words, the more important the overruled case is, the more well-grounded the overruling case will be.<sup>161</sup> This makes intuitive sense. When overruling a well-established old case the court has an interest in "anchoring" the new judgment in other cases, thus demonstrating that the overruling is not arbitrary or political.

The CJEU is frequently accused of not being explicit about overturning precedent.<sup>162</sup> Examples of the CJEU changing its case law radically without acknowledging the fact can be

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<sup>155</sup> *Id.* at 129–30.

<sup>156</sup> Cross & Harris claim that "[t]here are many instances, some American lawyers would say too many, in which the Supreme Court has overruled a previous decision." *Id.* at 19. No source is given as to who these "American lawyers" are.

<sup>157</sup> GERHARDT, *supra* note 54, at 34.

<sup>158</sup> Fowler & Jeon, *supra* note 28, at 25.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 25–26.

<sup>161</sup> *Id.* at 26.

<sup>162</sup> *See, e.g.,* Tridimas, *supra* note 12, at 316.

found, including the famous *Stauder* case in which the CJEU made a complete turnabout concerning the protection of fundamental rights in EU law.<sup>163</sup> But it is hardly surprising that the CJEU was not explicit about its overruling in *Stauder*, given that the open use of previous decisions had not been established at that point in time.

Furthermore, we have no classification of CJEU overruling with which to compute average authority scores for overruling cases as compared to other cases. If we want to understand overruling in the CJEU we should choose examples from the 1990–2011 period, when the Luxembourg court routinely made use of previous decisions.<sup>164</sup> Conveniently, the most famous<sup>165</sup> example of explicit overruling at the CJEU occurred at this time with the Court's *Keck* decision.<sup>166</sup> The CJEU was unusually clear in *Keck* about the change made to case law, concluding that it was "necessary to re-examine and clarify its case law."<sup>167</sup> The problem is that the CJEU does not specify which old cases are overturned and which remain good law.<sup>168</sup> Still, following the method of Fowler & Jeon, we can study the rise and fall of decisions' authority score following *Keck*. *Torfaen* is an obvious example of bad law following *Keck*, as the CJEU treated selling arrangements as *prima facie* violations of what is now Article 34 TFEU.<sup>169</sup> Comparing how the two decisions' authority scores have developed demonstrates that *Torfaen* is no longer good law following *Keck* (see Figure 15 *infra*). *Torfaen* was initially regarded as an important authority in the area, but its prominence immediately fell with the arrival of *Keck*, whose authority score increased explosively, remaining a top authority until the start of its decline more than a decade later.

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<sup>163</sup> Case 29/69, *Stauder v. Ulm*, EU:C:1969:57.

<sup>164</sup> See *supra* Part E.III.

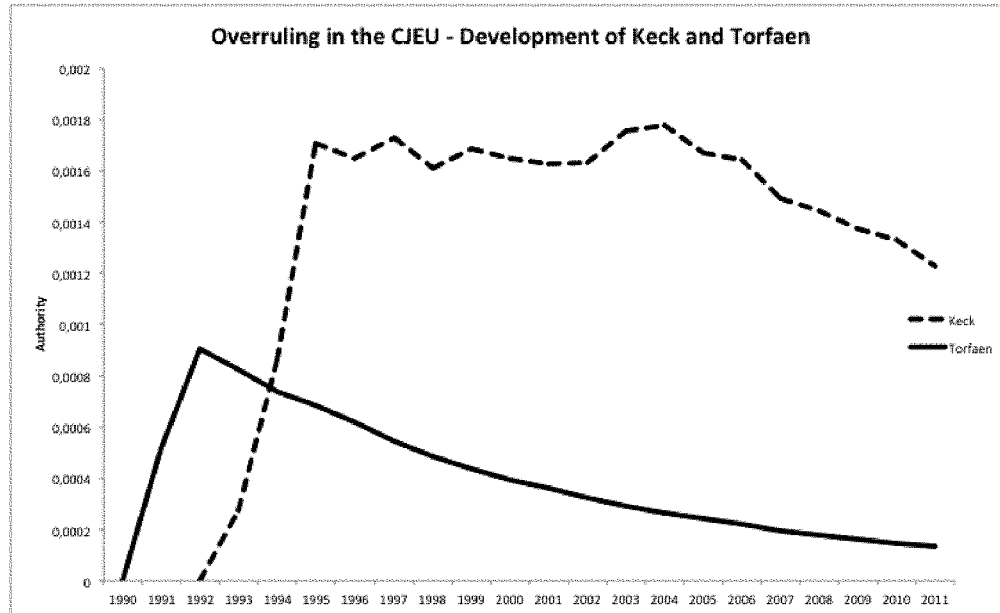
<sup>165</sup> Tridimas, *supra* note 12, at 317 (according to whom *Keck* constitutes "the most spectacular departure from precedent in the Court's history").

<sup>166</sup> Joined Cases C-267/91 and C-268/91, *Criminal Proceedings against Keck and Mithouard*, EU:C:1993:905.

<sup>167</sup> *Id.* at para. 14.

<sup>168</sup> The case law of the Court of Justice regarding so-called selling arrangements (rules regarding when, where and how goods are sold) before the *Keck* judgment was complex and contradictory, with the Court taking different approaches to the issue. See also Mattias Derlén & Johan Lindholm, *Article 28 E.C. and Rules on Use: A Step Towards a Workable Doctrine on Measures Having Equivalent Effect to Quantitative Restrictions*, 16 *Col. J. Eur. L.* 191 (2010).

<sup>169</sup> Case C-145/88, *Torfaen Borough Council v B & Q plc*, EU:C:1989:593.



**Figure 15. Overruling in the CJEU – Development of Keck and Torfaen.**

In line with the American findings that cases overturning important authorities are important hubs, *Keck* is one of the foremost hubs of the entire network of CJEU cases.<sup>170</sup>

Finally, the fact that the CJEU appears to have been somewhat reluctant to expressly overrule previous decisions is not wholly surprising. Similar patterns can be identified with regard to the SCOTUS. The positive treatment of precedent, i.e. citing cases in support, developed faster than negative treatment of precedent, i.e. citing a case in order to limit its future status wholly or partly.<sup>171</sup> This discrepancy can be explained by the core idea of precedent. Since the main emphasis is on following relevant previous decisions the routine of citing cases in order to do the opposite (i.e. to distinguish potentially discordant precedents) may take longer to develop.<sup>172</sup> If we apply this reasoning to the CJEU it appears reasonable that a firm routine of express overruling is still in development, given that the positive treatment of precedent was established as late the early 1990s.

<sup>170</sup> *Keck* is tied for seventh place as the best hubs of the CJEU network. See Derlén & Lindholm, *supra* note 24, at 685.

<sup>171</sup> Johnson et al., *supra* note 59, at 172–75.

<sup>172</sup> *Id.* at 175.

## VI. *Interim Conclusions*

This part has described four key components of the CJEU's approach to case law: how its development of case law follows certain stages, how the Court over time has shifted focus between different issues, that it has one approach for citing average decisions and a different approach to important cases, and that it engages in overruling.

Our findings show that the CJEU has developed an approach to its own case law that is not only fairly predictable, and therefore *prima facie* credible as an exercise of judicial authority in a case law system, but in many regards its methods are similar to the SCOTUS's approach. While the style and manner of the CJEU is quite different from the SCOTUS, the two courts' overall approaches to case law with regard to the studied key components are not as different as might be expected. We find important differences between the two courts. But overall the empirically-observable elements of the CJEU's approach are consistent with that of a constitutional, precedent-driven court such as the SCOTUS.

## G. Conclusions – Re-evaluating the CJEU's Approach to Precedent

The CJEU is a court with civil law roots but a case law future. Created in the model of continental European courts, the CJEU was naturally hesitant to develop a strong model of precedent.<sup>173</sup> But, seeing the need for judicial legitimacy, the Court began developing a system where previous judgments play a central role.

This is demonstrated in our three-part examination. The judgments of the CJEU constitute a traditional citation network. They are not chaotic or random. Furthermore, after a period of development, the Luxembourg court has clearly learned how to cite. It has established a clear system of relying on previous cases. Finally, the CJEU has a method for handling cases in all phases of their development.

The phrase “case law future” makes an important point. Above all, it is high-time that we separate the concepts case law and common law.<sup>174</sup> The CJEU is, for all intents and purposes, a constitutional court<sup>175</sup> that produces case law for the guidance of national courts against the background of EU primary and secondary law. This is far removed from the traditional picture of common law, where the legislator has remained silent and precedent is the sole source of law.<sup>176</sup> Constitutional precedent, as used by the SCOTUS and the CJEU, takes a less strict approach to precedent. There is good reason for this. While case law is an important

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<sup>173</sup> Arnall, *supra* note 9, at 265.

<sup>174</sup> See *supra* Part B.

<sup>175</sup> Tridimas, *supra* note 118.

<sup>176</sup> GERHARDT, *supra* note 54, at 97.



source of law, we should not expect a development towards strict adherence to previous judgments in the EU system. Just as the external, political check on the SCOTUS is limited,<sup>177</sup> the Member States have de facto limited possibilities to correct a line of CJEU case law,<sup>178</sup> and the Luxembourg court must therefore retain enough flexibility to be able to change a line of case law gone awry.<sup>179</sup> Thus, there is indeed a case law system hiding below the surface of EU law, but the idea of case law has developed beyond its strictest traditional common law roots.

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<sup>177</sup> Hathaway, *supra* note 41, at 656.

<sup>178</sup> HARTLEY, *supra* note 118, at 57.

<sup>179</sup> Tridimas, *supra* note 12, at 323–24.