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### Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law

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# STORM IN A TEACUP: THE U.S. SUPREME COURT'S USE OF FOREIGN LAW

Austen L. Parrish\*

*In this article, Professor Parrish explores the legitimacy of the U.S. Supreme Court's use of foreign law in constitutional adjudication. In recent years, the U.S. Supreme Court has used foreign law as persuasive authority in a number of highly contentious cases. The backlash has been spirited, with calls for foreign law to be categorically barred from constitutional adjudication, and even for justices to be impeached if they cite to foreign sources. The condemnation of comparative constitutionalism recently reached its high watermark, as a barrage of scholarship decried the practice as illegitimate and a threat to our national sovereignty. The result has been a change to the debate's tenor. Instead of exploring how to use foreign materials in a sophisticated and refined manner, the debate has been reduced to an overly simplistic all-or-nothing proposition.*

*This article addresses the recent condemnation of the U.S. Supreme Court's use of foreign law as persuasive authority. After explaining how the debate has unfolded, the article critiques the recent arguments that opponents of the use of foreign law make. The article reveals how those arguments are misplaced, at times extreme, and inconsistent with a long history of American jurisprudence. In particular, the article explains how comparative constitutionalism is a hallmark of our state court system. The article then explores how the use of foreign law is not only sensible, but compatible with American constitutionalism and the proper role of the judiciary. Professor Parrish concludes that the judiciary's use of foreign law as persuasive authority is largely commendable, not illegitimate. The recent attacks*

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*against the use of foreign law are spurred on by rhetoric, not substance: a storm in a teacup.*<sup>1</sup>

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[Other] countries are our “constitutional offspring” and how they have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues. Wise parents do not hesitate to learn from their children.

—Judge Guido Calabresi, *United States v. Then*<sup>2</sup>

## INTRODUCTION

Few topics have captured the legal community’s imagination and invoked such passion as the recent debate over the use of foreign law in U.S. Supreme Court decisions. The Supreme Court justices have publicly debated the topic.<sup>3</sup> Congress has attempted to enact sweeping laws

1. An idiom: a large fuss about an insignificant matter; making a small problem seem far greater than it is. A “storm in a teacup” is the British or Australian equivalent of a “tempest in a teapot,” a phrase that scholars have used to describe the controversy over the citation of foreign law. See, e.g., Mark Tushnet, *Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars*, 35 U. BALT. L. REV. 299 (2006) (describing the “disjuncture between the perception on one side that something important and troubling has happened, or . . . may be about to happen—and the perception on the other that there is nothing to be concerned about”).

2. 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring).

3. See, e.g., Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. CONST. L. 519, 531–34 (2005); Justice Stephen Breyer, Keynote Address Before the Ninety-Seventh Annual Meeting of the American Society of International Law (Apr. 4, 2003), in 97 AM. SOC’Y INT’L L. PROC. 265 (2003) [hereinafter Breyer, Keynote Address]; Justice Stephen Breyer, Remarks at the Summit of World Bar Leaders (Nov. 10, 2001), available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_11-10-01.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_11-10-01.html) [hereinafter Breyer, Remarks]; Justice Sandra Day O’Connor, Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 16, 2002), in 96 AM. SOC’Y INT’L L. PROC. 348 (2002) [hereinafter O’Connor, Keynote Address]; Justice

barring judges from using foreign sources,<sup>4</sup> while some senators have suggested that citation to a foreign source should be an impeachable offense.<sup>5</sup> Mere mention of foreign law in an opinion triggers vitriolic responses from Justice Scalia<sup>6</sup> and, sometimes, Justice Thomas.<sup>7</sup> Even circuit court judges have weighed in on the debate.<sup>8</sup> Legal scholars are not above the fray. A spate of recent scholarly commentary has condemned the use of foreign law.<sup>9</sup> One professor has gone so far as to belittle jus-

Sandra Day O'Connor, Justice Antonin Scalia & Justice Stephen Breyer, Remarks at the National Constitutional Center et al., Constitutional Conversation (Apr. 21, 2005), in FED. NEWS SERV.; Justice Sandra Day O'Connor, Remarks to the Southern Center for International Studies (Oct. 28, 2003), available at [http://www.southerncenter.org/OConnor\\_transcript.pdf](http://www.southerncenter.org/OConnor_transcript.pdf) [hereinafter O'Connor, Remarks]; Justice Antonin Scalia, Keynote Address Before the Ninety-Eighth Annual Meeting of the American Society of International Law: Foreign Legal Authority in the Federal Courts (Apr. 2, 2004), in 98 AM. SOC'Y INT'L L. PROC. 305 (2004).

4. See, e.g., S. Res. 92, 109th Cong. (2005) ("Resolved, That it is the sense of the Senate that judicial interpretations regarding the meaning of the Constitution of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States."); see also David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 656-57 nn.16 & 17 (2005) (listing multiple resolutions and legislation from 2004 and 2005 attempting to prevent justices from citing to foreign law sources).

5. Carl Hulse & David D. Kirkpatrick, *DeLay Says Federal Judiciary Has 'Run Amok,' Adding Congress is Partly to Blame*, N.Y. TIMES, Apr. 8, 2005, at A21 (describing how Senator Coburn's chief of staff, Michael Schwartz, has called for "mass impeachment" of federal judges); Adam Liptak & Robin Toner, *Court In Transition: The Overview; Roberts Parries Queries on Roe and End of Life*, N.Y. TIMES, Sept. 15, 2005, at A1 (describing Justice Roberts' response to Senator Coburn's suggestion that Supreme Court Justices who cite to foreign judicial precedents should be subject to impeachment). House Representative Tom Feeney (R-Fla.) also proposed a bill, known as the Feeney Amendment, that would expose judges to impeachment for referring to foreign law in their opinions. *Foreign Law Bill Irks Ginsburg*, CONN. L. TRIB., Oct. 3, 2005, at 11 (discussing Justice Ginsburg's remarks regarding proposed impeachment bill). See generally Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER, Sept. 12, 2005, at 42, 43 (noting that Justice Kennedy's reliance on foreign sources has prompted a vicious backlash both on and off the Court).

6. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (characterizing the use of foreign views as "meaningless" and "[d]angerous dicta"); *Atkins v. Virginia*, 536 U.S. 304, 347-48 (2002) (Scalia, J., dissenting) (describing as "irrelevant . . . the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people"); *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (Scalia, J.) (stating that "such comparative analysis [is] inappropriate to the task of interpreting a constitution").

7. See, e.g., *Foster v. Florida*, 537 U.S. 990, 990 n.\* (2002) (Thomas, J., concurring in denial of certiorari) (belittling foreign death penalty values and noting that "this Court's Eighth Amendment jurisprudence should not impose foreign moods, fads or fashions on Americans"); see also *Knight v. Florida*, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of certiorari) (criticizing petitioners for reliance on foreign law from India, Zimbabwe, and the European Court of Human Rights to argue that twenty or more years on death row violated the Eighth Amendment's prohibition on cruel and unusual punishment).

8. See, e.g., Diarmuid F. O'Scannlain, *What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?*, 80 NOTRE DAME L. REV. 1893, 1900 (2005) (speech by Ninth Circuit judge exploring issue of citing to foreign sources and cautioning against its use); Patricia M. Wald, *The Use of International Law in the American Adjudicative Process*, 27 HARV. J.L. & PUB. POL'Y 431, 441-42 (2004) (comments by D.C. Circuit judge supporting use of foreign materials); J. Harvie Wilkinson III, *The Use of International Law in Judicial Decisions*, 27 HARV. J.L. & PUB. POL'Y 423, 429 (2004) (comments of Fourth Circuit judge criticizing use of foreign materials).

9. See, e.g., MARK R. LEVIN, *MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA* 18-22 (2005) (criticizing the Court's use of non-U.S. law); Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005) [hereinafter Alford, *In Search*

tices who dare cite to foreign opinions, remarkably suggesting that its use is evidence of intellectual inferiority.<sup>10</sup>

Bereft of nuance, this debate has become one of stark absolutes. Those who condemn the practice of citing to foreign law argue that its use should be banned *in toto*.<sup>11</sup> They variously assert that citation to foreign law undermines (1) the Court's legitimacy by impermissibly expanding judicial discretion and (2) our national and democratic sovereignty.<sup>12</sup> On the other hand, despite numerous writings extolling the virtues of comparative constitutionalism,<sup>13</sup> the amount of recent scholarship that strongly advocates the use of foreign sources, while also providing a theory justifying that use, is meager.<sup>14</sup> Justice Breyer and Justice Kennedy—often seen as the leading proponents for citing foreign sources—respond

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*of a Theory*] (arguing that no rigorous theory of constitutional interpretation justifies constitutional comparativism); Robert P. Alford, *Roper v. Simmons and Our Constitution in International Equipoise*, 53 UCLA L. REV. 1, 26 (2005) (arguing that comparative constitutionalism is dangerous); Kenneth Anderson, *Foreign Law and the U.S. Constitution*, POL'Y REV., June–July 2005, at 33, 33 (criticizing the use of foreign law in constitutional adjudication); Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL'Y 291 (2005) (arguing against the use of foreign and international law and supporting deviation among constitutional systems); Ken I. Kersch, *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 WASH. U. GLOBAL STUD. L. REV. 345, 346 (2005) (arguing that comparative constitutionalism is elitist and antidemocratic); John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 308 (2006) (arguing that “foreign and international law should not generally be used as legal authority in constitutional interpretation”); Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 84–90 (2005) (arguing that use of foreign law leads to “naked political judgment[s]”); Ernesto J. Sanchez, *A Case Against Judicial Internationalism*, 38 CONN. L. REV. 185 (2005) (arguing against the use of comparative constitutionalism); see also ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 15–25, 137 (2003) (criticizing the citation of foreign law materials); Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004) [hereinafter Alford, *Misusing International Sources*] (arguing that international law should have a very limited role in constitutional interpretation); Michael Wells, *International Norms in Constitutional Law*, 32 GA. J. INT'L & COMP. L. 429, 436 (2004) (suggesting that “it seems at best pointless, and at worst destructive, to give weight to decisions reached by international tribunals that, by their very nature, cannot give due regard to differences among cultures”).

10. See, e.g., Anderson, *supra* note 9, at 37 (arguing that “Justice Kennedy is not Justice Scalia’s intellectual peer, and it is hard to extract much of a guiding theory—in the sense of knowing when such legal materials may be used and when they may not—from Justice Kennedy’s unedifying admixture of piety, vacuity, earnestness, idealism, and platitude”).

11. Gary Jeffrey Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763, 1765 (2004) (describing Scalia’s “categorical rejection of all sources outside of the tradition” and noting that “his attachment to local tradition and history involves more than just a preference for a particular approach to substantive due process; it bespeaks as well hostility towards any judicial reliance on transnational norms of constitutional understanding”); see also Anderson, *supra* note 9.

12. See *infra* Part II.B and notes 74–90.

13. See, e.g., Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997); Patrick McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4 (1995) (describing the embarrassing absence of foreign law in cases involving other nations’ interests); Eric Stein, *Uses, Misuses—and Nonuses of Comparative Law*, 72 NW. U. L. REV. 198 (1977) (describing the need for lawmakers to study foreign legal opinions); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1232–33 (1999). See generally VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999).

14. Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 129–30 (2005) (describing the need for a legal theory explaining why courts are permitted to cite to non-American sources, and the failure for academics to provide it).

defensively, if not with bewilderment, as to why the debate ensues.<sup>15</sup> Rarely do they or other proponents affirmatively articulate why the arguments opposing the use of foreign law are unfounded on their own terms. And often the scholarship fails to explain how the use of foreign law should be commended as being consistent with American constitutionalism.<sup>16</sup>

Yet it is consistent. Stripped of its rhetoric, the hostility towards citing foreign decisions in any context seems misplaced. Those who oppose the use of foreign law confuse the question of validity with the question of what weight to afford that law. The critics also ignore a history of practice in which foreign legal materials have been used in constitutional analysis.<sup>17</sup> Indeed, the practice is one our state courts have long embraced when interpreting their own, unique state constitutions, a point that until now has been downplayed. Lurking under the surface of arguments made by those who oppose the use of foreign sources appears to be the hubris of American exceptionalism. More fundamentally, the arguments often reflect particular modes of constitutional interpretation—textualism and originalism—that, despite recent attempts to resuscitate, the legal mainstream long ago rejected or discounted, at least in their extreme forms.<sup>18</sup> A need therefore remains to explain not only why the use of foreign law is not offensive, but why its use is consistent with American constitutionalism and the proper role of the judiciary. This article attempts to do exactly that.

This is not an academic exercise: explaining why the U.S. Supreme Court's use of foreign law is legitimate, while debunking arguments that categorically reject its use, is important. The spirited backlash against the judiciary for citing to foreign materials as persuasive authority threatens to have a chilling effect.<sup>19</sup> Instead of exploring how to utilize foreign materials in a refined way, the debate has been debased to an all-

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15. Anderson, *supra* note 9, at 34, 39.

16. Alford, *In Search of a Theory*, *supra* note 9, at 639 (explaining that proponents of the practice of citing to foreign or international materials “rarely offer a firm theoretical justification for the practice”); Taavi Annus, *Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments*, 14 DUKE J. COMP. & INT’L L. 301, 309 (2004) (noting that “[w]hile most authors focus on classifications of comparative law, few actually address its legitimacy”); Waldron, *supra* note 14, at 129 (noting that “no one on the Court [has] bothered to articulate a general theory of the citation and authority of foreign law”).

17. See *infra* Part II.D.

18. See *infra* Part II.C. Almost all agree that the text and the intent of the Framers is the starting point of any constitutional analysis. The issue is what to do when the text and intent are not easily discernable.

19. The last time Justice Scalia vigorously attacked a citation practice—the use of legislative history in statutory interpretation—he had a significant impact in reducing the practice. See Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369 (1999) (concluding that Justice Scalia's acerbic criticism of the reliance on legislative history led to an overall decline in the use of that interpretive tool). For an explanation of why the Court might start using foreign materials silently, even when the use is legitimate, see Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1125–27 (1995) (arguing that an “appearance factor” influences decision making).

or-nothing proposition, with extreme and fringe positions obtaining a degree of superficial credibility. The result is problematic, and its impact real. Lessons that could be learned from other countries are missed. Moreover, the Court's failure to engage more meaningfully with foreign law divorces the Court from an ongoing transnational dialogue that is developing and shaping international norms—norms that, one day, may exert some control domestically.

This article proceeds in three parts. Part I describes the current debate and how it has unfolded in the last few years. Part II explores the validity of arguments championed by those who oppose citation to foreign law sources and explains why those arguments are misplaced. Contrary to the positions staked in the flood of critical articles published in 2005, the use of foreign law is hardly an offensive practice. Part III explains why citation to foreign law is consistent with American constitutionalism and explores some pragmatic reasons for why the U.S. Supreme Court's use of foreign law is sensible. The article concludes by suggesting that the U.S. Supreme Court should continue cautiously to use foreign law as persuasive authority. Engaging in transnational constitutional dialogue is a commendable goal, not an illegitimate one.

## I. BACKGROUND

The citation to foreign law in U.S. Supreme Court decisions is not a new phenomenon, but the debate over its use has only recently become bitter. The debate has proceeded on two fronts. One front is in the political arena, where elected officials and pundits have attacked vigorously the judiciary's use of foreign law.<sup>20</sup> The other front is in the nation's law schools. Last year, a slew of academic scholarship condemned the Court's use of foreign law as persuasive authority.<sup>21</sup>

### A. *Use of Foreign Law: A Recent History*

The debate reached a highpoint after the U.S. Supreme Court cited to foreign law in four well-publicized, controversial decisions in "hotly contested areas of constitutional law" involving capital punishment, gay rights, and affirmative action.<sup>22</sup> First, in *Atkins v. Virginia*, the Court held that executing mentally disabled persons violates the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>23</sup> In so

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20. See, e.g., Hulse & Kirkpatrick, *supra* note 5; *Legal Matters: The Insidious Wiles of Foreign Influence*, *ECONOMIST*, June 11, 2005, at 25.

21. See, e.g., Anderson, *supra* note 9; Delahunty & Yoo, *supra* note 9.

22. Law, *supra* note 4, at 653.

23. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002). This is not to say that the Supreme Court had not cited to foreign law many times in the past. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 734 (1997) (referring to the Dutch experience with physician-assisted suicide to determine whether recognizing a right to physician-assisted suicide would encourage other forms of euthanasia). See generally Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of*

doing, Justice Stevens, writing for the Court, referred to the “world community” and its “overwhelming[]” disapproval of imposing the death penalty on mentally disabled offenders.<sup>24</sup>

Second, on the heels of *Atkins*, came *Grutter v. Bollinger*.<sup>25</sup> In *Grutter*, the Court found foreign law relevant when it upheld the use of affirmative action in university admissions. During the oral argument for *Gratz v. Bollinger*, decided the same day as *Grutter*, Justice Ginsburg asked the solicitor general:

We’re part of a world, and this problem is a global problem. Other countries operating under the same equality norm have confronted it. Our neighbor to the north, Canada, has; the European Union, South Africa, and they have all approved this kind of, they call it positive discrimination . . . . [T]hey have rejected what you recited as the ills that follow from this. Should we shut that from our view at all or should we consider what judges in other places have said on this subject?<sup>26</sup>

In her concurrence in the *Grutter* case, Justice Ginsburg—joined by Justice Breyer—explained that “[t]he Court’s observation that race-conscious programs ‘must have a logical end point,’ accords with the international understanding of the office of affirmative action,” and cited to the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>27</sup>

Third was *Lawrence v. Texas*.<sup>28</sup> In June 2003, the Court struck down Texas legislation that criminalized sodomy, reversing its decision in *Bowers v. Hardwick*.<sup>29</sup> In reaching this result, Justice Kennedy relied not only on a 1957 British Report, but also decisions by the European Court of Human Rights.<sup>30</sup> As Justice Kennedy noted: “[A]lmost five years before *Bowers* was decided, the European Court of Human Rights considered a case with parallels to *Bowers* and to today’s case . . . . The [European] court held that the laws prescribing conduct were invalid under the European Convention on Human Rights.”<sup>31</sup>

Lastly, and most recently, came *Roper v. Simmons*.<sup>32</sup> In *Roper*, Justice Kennedy, again writing for the Court, struck down state laws that

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*Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005) (discussing the Supreme Court’s long practice of citing to transnational law in constitutional cases). The debate, however, did not become particularly heated until after *Atkins*.

24. *Atkins*, 536 U.S. at 316 n.21.

25. 539 U.S. 306 (2003). For a thoughtful first amendment analysis of *Grutter*, see Paul Horwitz, *Grutter’s First Amendment*, 46 B.C. L. REV. 461 (2005).

26. Transcript of Oral Argument at 23, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516).

27. *Grutter*, 539 U.S. at 342–44 (Ginsburg, J., concurring).

28. 539 U.S. 558 (2003).

29. *Id.* at 578.

30. *Id.* at 573 (discussing the European Court of Human Rights decision in *Dudgeon v. U.K.*, 4 Eur. H.R. Rep. 149, 164–65 (1981)).

31. *Id.*

32. *Roper v. Simmons*, 543 U.S. 551 (2005).



permitted the execution of juvenile offenders.<sup>33</sup> In so holding, the Court acknowledged that other countries and international conventions have banned the execution of juvenile murderers.<sup>34</sup> Justice Kennedy cited to the United Nations Convention on the Rights of the Child and the International Convention on Civil and Political Rights.<sup>35</sup> In her dissent, Justice O'Connor similarly acknowledged that foreign sources of law were relevant to the issues before the Court.<sup>36</sup> Commentators concluded that *Roper's* reliance on foreign sources "portend[ed] a sea change in the Court's doctrine."<sup>37</sup>

Not only have many justices used foreign law in their opinions, they also have been keen to keep the issue alive and at the "forefront of scholarly debate."<sup>38</sup> In January 2005, Justices Scalia and Breyer met at American University to publicly debate "The Relevance of Foreign Law for Constitutional Adjudication."<sup>39</sup> A year before, at the 2004 American Society of International Law's annual meeting, Justice Scalia spoke out against using foreign authorities, except for old English authorities shedding light on the Framers' intent.<sup>40</sup> He spoke out again in February 2006.<sup>41</sup> Other justices, in contrast, have written scholarship championing the practice of citing to foreign sources<sup>42</sup> or have advocated its use in

33. *Id.* at 578.

34. *Id.* at 575–76. A significant number of amicus briefs from human rights organizations and U.S. diplomats argued that executing juveniles contradicted international legal norms. *Id.* at 576 (citing Brief for Respondent 48; Brief for European Union et al. as Amici Curiae 12–13; Brief for President James Earl Carter, Jr., et al. as Amici Curiae 9; Brief for Former U.S. Diplomats Morton Abramowitz et al. as Amici Curiae 7; Brief for Human Rights Committee of the Bar of England and Wales et al. as Amici Curiae 13–14); see, e.g., Brief of Amici Curiae former U.S. Diplomats Morton Abramowitz et al. in Support of Respondent, *Roper* ("Amici believe that persisting in [the] aberrant practice of executing juveniles will further the diplomatic isolation of the United States and inevitably harm foreign policy objectives.").

35. *Roper*, 543 U.S. at 576.

36. *Id.* at 604–05 (O'Connor, J., dissenting).

37. See generally Calabresi & Zimdahl, *supra* note 23, at 748–51; Comment, *The Debate over Foreign Law in Roper v. Simmons*, 119 HARV. L. REV. 103, 103–04 (2005) (explaining that "the *Roper* decision has prompted a national debate over the propriety of citing foreign and international law in domestic constitutional cases"); cf. Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1283 (2004) ("It would be an understatement in the extreme to call the Supreme Court's decision in *Lawrence v. Texas* revolutionary. . . . Its holding aside, *Lawrence* may have added a spark to a quieter revolution—a revolution in constitutional interpretation that has been stirring, largely unnoticed, for years. The revolution of which I speak . . . is the Court's recent, and unexplained, embrace of comparative and international law norms as aids to domestic constitutional interpretation.").

38. Melissa A. Waters, *Justice Scalia on the Use of Foreign Law in Constitutional Interpretation: Unidirectional Monologue or Co-Constitutive Dialogue*, 12 TULSA J. COMP. & INT'L L. 149, 151 (2004). In fact, "[a]ll nine Justices have addressed the matter in recent years." Alford, *In Search of a Theory*, *supra* note 9, at 640.

39. See Dorsen, *supra* note 3.

40. See Scalia, *supra* note 3, at 305–06.

41. Justice Antonin Scalia, Remarks to the American Enterprise Institute, Subject: Outsourcing American Law (Feb. 21, 2006), in FED. NEWS SERV. (arguing that "foreign materials can never be relevant to constitutional adjudication").

42. See, e.g., Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999) (explaining the relevance of interna-

speeches.<sup>43</sup> In a 2004 speech at Georgetown Law School, Justice O'Connor made clear her support for citing to foreign law sources.<sup>44</sup> So too did the late Chief Justice William Rehnquist—over fifteen years ago:

For nearly a century and a half, courts in the United States exercising the power of judicial review had no precedents to look to save their own, because our courts alone exercised this sort of authority. . . . But now that the constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.<sup>45</sup>

The justices' remarks have met with fierce criticism, and even death threats.<sup>46</sup>

Congress's response to the Court's use of foreign law has been unabashedly hostile. In March 2004, House Republicans introduced a resolution prohibiting the use of foreign authorities except in special circumstances where the foreign law "informs an understanding of the original meaning of the laws of the United States."<sup>47</sup> In 2005, the Senate introduced a similar measure.<sup>48</sup> Although neither resolution passed, individual members of Congress made spirited attacks against the practice.<sup>49</sup> In

tional law to constitutional interpretation of affirmative action); Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1–10 (2003) (explaining the relevance of studying international law); Sandra Day O'Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, INT'L JUD. OBSERVOR, June 1997, at 2 (predicting increased reference to foreign constitutional courts that have struggled with similar constitutional questions).

43. See, e.g., Breyer, Keynote Address, *supra* note 3; Breyer, Remarks, *supra* note 3; Justice Ruth Bader Ginsburg, A Decent Respect to the Opinions of Human Kind: The Value of a Comparative Perspective to Constitutional Adjudication, Address Before the Constitutional Court of South Africa (Feb. 7, 2006), available at [http://www.supremecourt.us.gov/publicinfo/speeches/sp\\_02-07b-06.html](http://www.supremecourt.us.gov/publicinfo/speeches/sp_02-07b-06.html); O'Connor, Keynote Address, *supra* note 3; O'Connor, Scalia & Breyer, *supra* note 3; O'Connor, Remarks, *supra* note 3.

44. Justice Sandra Day O'Connor, Remarks at the American Law Institute 2002 Annual Meeting (May 15, 2002) (opining that "while ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here").

45. William H. Rehnquist, *Constitutional Courts—Comparative Remarks* (1989), in GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM 412 (Paul Kirchhof & Donald P. Kommers eds., 1993); see also William H. Rehnquist, *Foreword* to DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW, at viii (Vicki C. Jackson & Mark Tushnet eds., 2002) ("I am simply repeating now what I've said previously: it's time the U.S. courts began looking to the decisions of other constitutional courts to aid in their own deliberative process."); cf. *Washington v. Glucksberg*, 521 U.S. 702, 732, 734 (1997) (Rehnquist in a majority opinion quoting to "the practice of euthanasia in the Netherlands").

46. Ginsburg, *supra* note 43; see also *In Brief: Ginsburg, O'Connor Subjects of Death Threat*, NAT'L L.J., Mar. 20, 2006, at 3; Tony Mauro, *Ginsburg Discloses Threats on Her Life: In Speeches, Justice Says She and Sandra Day O'Connor Were Targeted Because of Use of Foreign Law in Cases*, LEGAL TIMES, Mar. 20, 2006, at 8.

47. Reaffirmation of American Independence Resolution, H.R. Res. 568, 108th Cong. (2004).

48. S. Res. 92, 109th Cong. (2005).

49. See, e.g., *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H. Res. 568 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 1 (2004) (statement of Rep. Steve Chabot, Chairman, H. Comm. on the Judiciary's Subcomm. on the Constitution) (criticizing the "alarming new trend" of "judges reaching beyond even

Chief Justice Roberts's confirmation hearings, one Senator suggested that citation to foreign sources should constitute an impeachable offense.<sup>50</sup> Senators reaffirmed this sentiment in Justice Alito's hearings.<sup>51</sup> The national media has actively chronicled the debate, with newspapers routinely discussing the practice, and politicians and pundits weighing in with their opinions.<sup>52</sup> At times, the criticism has had a xenophobic tone to it, playing on "exaggerated fears: fear of foreign domination, fear of judicial activism, fear of the unknown."<sup>53</sup>

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their own imagination to the decisions of foreign institutions to justify their decisions"); 151 Cong. Rec. H 3N5 (daily ed., May 10, 2005) (statement of Rep. Ted Poe) ("[Patriots] spilled their blood . . . to sever ties with England forever. . . . Now, justices in this land of America . . . use British court decisions . . . in interpreting our Constitution. What the British could not accomplish by force, our Supreme Court has surrendered to them voluntarily."); F. James Sensenbrenner, Jr., *Remarks Before the U.S. Judicial Conference Regarding Congressional Oversight Responsibility of the Judiciary*, 87 JUDICATURE 202, 260 (2004) (arguing that "America's sovereignty may be imperiled by a jurisprudence predicated upon laws and judicial decisions unfound in our Constitution and unincorporated by the Congress").

50. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 199-200 (2005) (Sen. John Kyl's questioning of John Roberts), available at <http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/browse.html>; see also Liptak & Toner, *supra* note 5 (describing Justice Roberts' response to Senator Coburn's suggestion that Supreme Court Justices who cite to foreign judicial precedents should be subject to impeachment). House Representative Tom Feeney (R-Fla.) also proposed a bill, known as the Feeney Amendment, that would expose judges to impeachment for referring to foreign law in their opinions. See *Foreign Law Bill Irks Ginsburg*, *supra* note 5 (discussing Justice Ginsburg's remarks regarding the proposed impeachment bill).

51. *Alito Fails to Convince Democrats on Abortion*, IRISH TIMES, Jan. 12, 2006, at 13 (noting that Justice Alito opposed citing to foreign law, but did not endorse a suggestion that justices should be impeached for doing so); see also Felix G. Rohatyn, *Dead to the World*, N.Y. TIMES, Jan. 26, 2006, at A23 (describing Justice Alito's views on the use of foreign law as "narrow and parochial"); David Stout, *Nominee Would Ignore Foreign Laws*, INT'L HERALD TRIB., Jan. 12, 2006, at 5, available at 2006 WLNR 638855 (noting that Justice Alito said in response to questions from Senator Coburn that "I don't think it's appropriate or useful to look to foreign law in interpreting the provisions of our Constitution. . . . I think the Framers would be stunned by the idea that the Bill of Rights is to be interpreted by taking a poll of the countries of the world").

52. See, e.g., Ann Althouse, Op. Ed., *The View over the Fence: The U.S. Supreme Court*, INT'L HERALD TRIBUNE, Sept. 20, 2005, at 6 (describing the debate over citing to foreign law sources); James G. Lakely, *Roberts Criticizes Foreign Law Used as Precedent: Says Practice Circumvents Judges' Accountability to the People*, WASH. TIMES (D.C.), Sept. 14, 2005, at A11 (quoting Ed Whelan, President of the Ethics and Public Policy Center, as saying, "There is no legitimate basis for the Supreme Court to rely on contemporary foreign laws or decisions in determining the meaning of provisions of the Constitution"); Abdon M. Pallasch, *Justices Shouldn't Cite Foreign Laws*, U.S. ATTORNEY GENERAL TELLS STUDENTS, CHI. SUN-TIMES, Nov. 10, 2005, at 24 (noting that Alberto Gonzalez warned members of the U.S. Supreme Court Wednesday not to cite foreign law in their opinions, and doing so was "meddling in U.S. foreign relations"); Kathleen Sullivan, *Battle for Courts: What's at Stake*, SAN JOSE MERCURY NEWS, May 29, 2005, at 1 (describing the recent attack on the judiciary and noting that "conservative lawyer and commentator Phyllis Schlafly called for a 'law declaring it an impeachable offense for justices to rely on foreign law in rendering constitutional decisions'"); Hope Yen, *Justices Debate Foreign Law*, BRADENTON HERALD, Apr. 22, 2005, at A4 (describing panel discussion and views of Justices O'Connor, Breyer, and Scalia on the use of foreign law materials); see also Steve Grady, Letter to the Editor, *Judicial Rulings That Cite Foreign Law Alienate U.S. Citizens*, USA TODAY, June 23, 2005, at 12A; *The Insidious Wiles of Foreign Influence*, ECONOMIST, June 11, 2005, at 25-26; Charles Lane, *The Court is Open for Discussion: AU Students Get Rare Look at Justices' Legal Sparring*, WASH. POST, Jan. 14, 2005, at A1.

53. Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 82 (2004) (discussing the related issue of whether international law is relevant to constitu-

Academics have not shied away from the controversy. In the late 1990s, several well-regarded scholars promoted the benefits of comparative constitutionalism and the need for a transnational judicial dialogue.<sup>54</sup> A significant amount of scholarship followed both the *Lawrence* and *Roper* decisions:<sup>55</sup> “international lawyers and comparativists hailed the move [towards discussing foreign materials] as a major victory in their ongoing battle to convince the Court to pay more attention to decisions of foreign courts.”<sup>56</sup> More recently, however, a backlash has ensued.<sup>57</sup> Some commentators have begun to decry aggressively the use of foreign materials,<sup>58</sup> and several colloquiums and symposiums have been held on the topic.<sup>59</sup> In the blogosphere, the debate is heated, if not mean spirited.<sup>60</sup> Citation to foreign law sources has become synonymous with judicial activism, sometimes eliciting shrill claims of an out-of-control Court.

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tional interpretation in the United States). At times, the criticism has reached the level of absurdity. See, e.g., Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, Apr. 9, 2005, at A3 (quoting author Edwin Vieira as calling for Justice Kennedy’s impeachment because his citation to foreign law “upholds Marxist, Leninist, satanic principles” and Michael P. Farris, Chairman of the Home School Legal Defense Association, who “said Kennedy ‘should be the poster boy for impeachment’ for citing international norms in his opinions”); see also William N. Eskridge, Jr., *United States: Lawrence v. Texas and the Imperative of Comparative Constitutionalism*, 2 INT’L J. CONST. L. 555, 558 (2004) (describing the “whiff of xenophobia” in Justice Scalia’s dissent in *Lawrence*).

54. See *supra* note 13. See generally Melissa Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 491–92 (2005) (describing recent literature).

55. Vicki Jackson, *Constitutional Comparison: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005) (listing scholarship); see also Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 LOY. L.A. L. REV. 239, 241 (2003) (noting that prior to *Lawrence* “no recent Supreme Court decision relied on non-U.S. constitutional or para-constitutional law to support a proposition that was material to the majority’s analysis”).

56. Waters, *supra* note 54, at 491.

57. Toobin, *supra* note 5, at 43–44, 50–51 (describing the backlash against the Court and the citation to foreign law).

58. See *supra* note 9; see also Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT’L L. 69 (2004) (criticizing the use of foreign materials); Carlos F. Rosenkrantz, *Against Constitutional Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT’L J. CONST. L. 269, 294 (2003) (focusing on the Argentinean constitutional experience and arguing that “borrowing and dialogic uses of foreign constitutional norms by courts are problematic”); Donald E. Childress III, Note, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 DUKE L.J. 193 (2003) (urging restraint in using comparative constitutional analysis); Robert H. Bork, *Whose Constitution Is It, Anyway?*, NAT’L REV., Dec. 8, 2003, at 37 (characterizing the citation to foreign sources as an “absurd turn in our jurisprudence” reflecting judicial arrogance); Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFF., July–Aug. 2004, at 3.

59. In September 2003, the *Texas International Law Journal* sponsored a symposium on “Globalization and the Judiciary.” In February 2004, the *Texas Law Review* held a symposium on “Comparative Avenues in Constitutional Law.” Other schools have done the same. See, e.g., Symposium, *International Law and the 2003–04 Supreme Court Term: Building Bridges or Constructing Barriers Between National, Foreign, and International Law*, 12 TULSA J. COMP. & INT’L L. (2004); Symposium, “Outsourcing Authority?” *Citation to Foreign Court Precedent in Domestic Jurisprudence*, 69 ALB. L. REV. 645 (2006); Symposium, *The Third Symposium on Globalization and the Judiciary*, 40 TEX. INT’L L.J. 197 (2005).

60. See, e.g., Posting of Michael Kelly to ACS Blog, <http://www.acsblog.org/international-affairs-1396-kelly-responds-to-kerr-on-international-law-in-us-courts.html> (May 27, 2005, 12:54 PM); Posting of Orin Kerr to the Volokh Conspiracy, [http://volokh.com/archives/archive\\_2005\\_04\\_10-2005\\_04\\_16.shtml#1113424503](http://volokh.com/archives/archive_2005_04_10-2005_04_16.shtml#1113424503) (Apr. 13, 2005, 4:35 PM).

The debate's strident nature has puzzled foreign scholars in other countries. Other nations' courts often cite to foreign materials.<sup>61</sup> The Supreme Court of Canada, for example, cited to at least one British case in about 45% of their decisions between 1984 and 1995, and had at least one citation to a U.S. case in nearly 30% of their decisions.<sup>62</sup> Even as a "uniquely Canadian body of law" has grown, the Canadian Supreme Court's use of foreign law has "increased in frequency and diversity."<sup>63</sup> Similarly, the South African Constitutional Court frequently cites to foreign materials.<sup>64</sup> In fact, the "South African Constitution explicitly requires that international law be taken into account when interpreting constitutional rights and specifically authorizes its courts to consider foreign law . . . ."<sup>65</sup>

South Africa and Canada are not unique. In virtually all foreign nations, courts "borrow[] from, respond[] to, or otherwise interact[] substantially with external sources of law, including foreign sources that do not fit directly into the home system's formal hierarchy of positive norms."<sup>66</sup> Comparative constitutionalism has become prominent world-

61. See *infra* notes 62–66 and accompanying text.

62. C.L. Ostberg et al., *Attitudes, Precedents and Cultural Change: Explaining the Citations of Foreign Precedents by the Supreme Court of Canada*, 34 CANADIAN J. POL. SCI. 377, 386–87 (2001). See generally Gérard V. La Forest, *The Use of American Precedents in Canadian Courts*, 46 ME. L. REV. 211, 212 (1994); Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT'L L.J. 353, 353–54 (2004) (describing the use of foreign materials in Canadian courts); Peter McCormick, *The Supreme Court of Canada and American Citations 1945–1994: A Statistical Overview*, 8 SUP. CT. L. REV. 527, 533 (1997).

63. Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 411–17 (2003) (comparing approaches taken by the U.S. Supreme Court and the Canadian Supreme Court to citing to foreign sources and noting that Canadian courts cite to American, Australian, European Community, New Zealand, and South African law).

64. Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 820 (1999); see also D. M. Davis, *Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience*, 1 INT'L J. CONST. L. 181, 191–95 (2003) (describing the extent to which South African constitutional law is shaped by comparative precedent); Levinson, *supra* note 62, at 354 (noting the South African practice of looking at "decisions of courts around the world for the insight that they cast on the solution of common problems").

65. Jackson, *supra* note 55, at 113.

66. Paulo G. Carozza, "My Friend is a Stranger": *The Death Penalty and the Global Ius Commune of Human Rights*, 81 TEX. L. REV. 1031, 1045 (2003); see also Guido Alpa, *Foreign Law in International Legal Practice: An Italian Perspective*, 36 TEX. INT'L L.J. 495, 496 (2001) (describing how "the use of foreign law in Italy is the subject of a very rich history"); Bruce Carolan, *The Search for Coherence in the Use of Foreign Court Judgments by the Supreme Court of Ireland*, 12 TULSA J. COMP. & INT'L L. 123, 124 (2004) (describing the Irish Supreme Court's willingness to employ decisions of foreign courts in interpreting the Irish Constitution); Yasuo Hasebe, *Constitutional Borrowing and Political Theory*, 1 INT'L J. CONST. L. 224, 226 (2003) (describing the use of comparative materials in post-war Japan); Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 505–06 (2000) (noting the increase in citation to foreign law in British courts and the use of comparative materials in Israel, Australia, South Africa, Canada, India, New Zealand, Zimbabwe, and Ireland); Wiktor Osiatynski, *Paradoxes of Constitutional Borrowing*, 1 INT'L J. CONST. L. 244, 244–45 (2003) (describing use of comparative precedent in Eastern and Central Europe, and Poland in particular); Matthew S. Raalf, *A Sheep in Wolf's Clothing: Why the Debate Surrounding Comparative Constitutional Law is Spectacularly Ordi-*

wide.<sup>67</sup> Compared to other western democracies, the American practice has become increasingly isolated as an extreme version of provincialism.<sup>68</sup>

### B. The Scholarly Debate

With this background, it is useful to understand how the scholarly debate has unfolded. First, what is the debate *not* about? No one argues that foreign institutions should control constitutional meaning. Jurists and scholars do not suggest—indeed would be foolish to suggest—that

- foreign rulings are legally binding on American courts;<sup>69</sup> or
- courts may impose foreign perspectives upon Americans through constitutional interpretation.<sup>70</sup>

Nor is this particular debate about whether international law and norms can become authoritative in U.S. constitutional adjudication.<sup>71</sup> Rather,

nary, 73 *FORDHAM L. REV.* 1239, 1242–43 (2004) (describing the extensive use of comparative materials in foreign courts).

67. See *Developments in Law—International Criminal Law: VI. The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 *HARV. L. REV.* 2049, 2059–63 (2001) [hereinafter *International Judicial Dialogue*] (noting that many countries engage without reservation in comparative constitutional analysis and that “the courts seem to find it not only appropriate, but even natural, to examine (and perhaps ultimately to rely on) the interpretations that their foreign and supranational counterparts have given to similar constitutional provisions); see also Ackerman, *supra* note 13, at 772–73 (describing the global transformation towards constitutionalism); Jacobsohn, *supra* note 11, at 1767–68 (describing how courts in Israel, India, and Ireland use foreign materials in constitutional adjudication); Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 *INT’L J. CONST. L.* 296, 304–08 (2003) (describing the influence of the U.S. Constitution abroad).

68. Ackerman, *supra* note 13, at 772–73.

69. Levinson, *supra* note 62, at 353 (“One obviously need not believe that there is an obligation to be bound by that foreign experience—indeed, I know of no one who makes such a foolish argument . . .”); Wells, *supra* note 9, at 429 (“Since nobody asserts that these rules are legally binding on American courts . . .”); Breyer, Keynote Address, *supra* note 3, at 266 (“But comparative use of foreign constitutional decisions will not lead us blindly to follow the foreign court. As I have said before—‘we are interpreting our own Constitution, not those of other nations . . .’”). This is not entirely true for international norms, which some scholars occasionally argue should be presumptively controlling in certain circumstances. See, e.g., Joan F. Hartman, “Unusual” Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 *U. CIN. L. REV.* 655, 689 (1983) (arguing that international norms should be used as a rule of decision).

70. Levinson, *supra* note 62, at 353; see also *International Judicial Dialogue*, *supra* note 67, at 2059 (noting that foreign courts who engage in comparative constitutionalism are not “willing to adopt an outside legal norm unless it accord[s] with domestic legal and political traditions. . . . [T]he interpretive process of these courts indicates that they do not view domestic law as subordinate to international law”).

71. Whether international law should be cited to or relied upon is a related, but different debate. See, e.g., Jack L. Goldsmith & Curtis Bradley, *Customary International Law and Federal Common Law: A Critique of the Modern Position*, 110 *HARV. L. REV.* 815 (1997) (arguing against the incorporation of international law into the U.S. legal system); Jack Goldsmith, *Should International Human Rights Law Trump U.S. Domestic Law?*, 1 *CHI. J. INT’L L.* 327, 335 (2000) (arguing against deference to international norms); Harold Hongju Koh, *Is International Law Really State Law?*, 111 *HARV. L. REV.* 1824, 1835 (1998) (asserting that federal courts retain the power to incorporate customary international law into federal common law); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 *FORDHAM L. REV.* 371, 376

the debate is whether the U.S. Supreme Court must categorically ignore foreign law—the opinions of courts in foreign nations—in all constitutional cases.<sup>72</sup> Are these authorities, as some imply, “affirmatively barred from U.S. constitutional adjudication?”<sup>73</sup>

Opponents of the use of foreign law sources answer yes, and base their opposition on two principal arguments. First, some scholars argue that citing to foreign law undermines judicial legitimacy by impermissibly expanding judicial discretion.<sup>74</sup> Justice Scalia, for example, asserts that using foreign sources threatens the Court’s legitimacy by implicating personal value judgments as to which foreign law to cite.<sup>75</sup> His argument is an extension of originalism: the judiciary is an undemocratic institution within a political system whose legitimacy is derived from the consent of the governed.<sup>76</sup> To overcome a threat of illegitimacy, the argument goes, the Court must adhere closely to the text and the original intent of those upon whose authority the legitimacy of the text rests.<sup>77</sup> “A court that moves beyond the formalism of the text and the boundaries of original history has exited the objective domain of law and has entered the subjective enterprise of politics.”<sup>78</sup>

Others have made the same point in slightly different ways. Kenneth Anderson argues that citing to foreign law invites “judges to ‘troll deeply . . . in the world’s *corpus juris*’ to reach a politically preferred outcome,”<sup>79</sup> a practice which “swings wide the door for the exercise of judges’ purely private sensibilities as public justices . . . [which is] unconstrained and unconstrainable.”<sup>80</sup> In his recent confirmation hearings,

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(1997) (arguing that customary international law is “presumptively incorporated into the U.S. domestic legal system and given effect as rules of federal law”).

72. Uniformly, all agree that foreign and international law is relevant in the “interpretation of statutes, conventions, international agreements, and so on.” Anderson, *supra* note 9, at 34 n.2. Scholars disagree about the use of foreign law in constitutional cases.

73. *Id.* at 34.

74. *Id.* at 45–46.

75. Dorsen, *supra* note 3, at 531 (describing the use of foreign law as lending itself to manipulation); see also Scalia, *supra* note 41 (arguing that use of foreign materials “vastly increases the scope of [judicial] discretion”).

76. See generally Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002) (discussing the countermajoritarian difficulty); Law, *supra* note 4, at 681 (explaining that “[t]he countermajoritarian dilemma is considered a dilemma because whenever constitutional courts dare to do more than validate existing consensus they are subject to a supposedly withering retort: ‘we did not elect you, so why should we listen to you.’”).

77. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1154 (1993).

78. *Id.*

79. Anderson, *supra* note 9, at 44–46 (quoting Judge Posner).

80. *Id.* at 42. As Anderson argues:

It is a confirmation of Justice Scalia’s view that the leading opinions featuring comparative constitutionalism—those of Justice Breyer and Justice Kennedy—are animated by exactly the judicial philosophies which, with respect to the rhetoric of judging, are the least constrained. Either the citation of foreign and international legal materials will come to nothing—it will mean nothing—or else, far more likely, it will open up whole new areas of rhetorical possibility. How can it be otherwise? There is nothing internal here, whether in principle or in practice, that acts to constrain.

Chief Justice Roberts suggested that relying on foreign precedent allows a judge "to incorporate his or her own personal preferences, [and] cloak them with the authority of precedent."<sup>81</sup> He explained it this way:

[R]elying on foreign precedent doesn't confine judges. It doesn't limit their discretion the way relying on domestic precedent does. . . . Foreign law, you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia, or wherever. As somebody said in another context, looking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them. They're there.<sup>82</sup>

Judge Richard Posner, in the 2005 *Harvard Law Review* Forward, summed up the concern, suggesting that using foreign law "opens up" "promiscuous opportunities."<sup>83</sup>

Second, some argue that citing foreign law is somehow inconsistent with sovereignty.<sup>84</sup> Sovereignists<sup>85</sup> bristle at the idea that U.S. sovereignty may be impinged upon, and they therefore attempt to firmly locate the U.S. Constitution in peculiarly American realities and dismiss the idea that decisions from other courts in other countries may be illuminating.<sup>86</sup> Sujit Choudhry has described this view as legal particularism in its mild form and legal hegemony in its extreme version.<sup>87</sup> Others have called it exceptionalism, the idea that "the United States Constitution is unique and that the experience surrounding it is unique."<sup>88</sup> For example, Jed Rubenfeld has argued that Americans and Europeans have funda-

*Id.* at 46–47.

81. *Court in Transition: From the Hearings*, N.Y. TIMES, Sept. 14, 2005, at A26 [hereinafter *Court in Transition*] (excerpts from Senate Judiciary Committee's Hearing on the nomination of Judge John G. Roberts, Jr., to be Chief Justice); Edwin Meese III, *Commentary: Supreme Choice . . . with Encore*, WASH. TIMES, Sept. 23, 2005, at A21.

82. *Court in Transition*, *supra* note 81 (Sen. Kyl questioning John Roberts); *see also* Jim Wooten, *Roberts Right on Court Role, Foreign Law*, ATLANTA J.-CONST., Sept. 20, 2005, at A15. Admittedly, Chief Justice Roberts did not entirely foreclose the use of foreign law as nonbinding, persuasive authority. Rather, he indicated that he would not rely on foreign law as precedent.

83. Posner, *supra* note 9, at 85.

84. *See, e.g.*, Anderson, *supra* note 9, at 47–49.

85. I use the term here only as a means of contrasting those who oppose the citation of foreign sources with those who do not oppose its citation.

86. Anderson, *supra* note 9, at 47–48. *See generally* Tushnet, *supra* note 55, at 257, 261–62 (describing the concern that making non-U.S. law a rule of decision "somehow could impair U.S. sovereignty and the democratic self-governance of the people of the United States").

87. Choudhry, *supra* note 64, at 830–32.

88. Louis J. Blum, *Mixed Signals: The Limited Role of Comparative Analysis in Constitutional Adjudication*, 39 SAN DIEGO L. REV. 157, 163 (2002); *see also* Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 TEX. INT'L L.J. 527, 529 (2003) ("[B]ecause supranational lawmaking operates outside those systems of checks and balances and accountability, it risks undermining our Constitution's institutional strategy."). Robert Post makes a similar point in the context of human rights law as applied by the International Court of Justice. Robert Post, *The Challenge of Globalization to American Public Law Scholarship*, 2 THEORETICAL INQUIRIES L. 323, 329 (2001) ("[W]ho makes this law? Whose identity does it represent? Who sets its goals? . . . Stripped of the historically-specific institutional procedures and legal traditions of particular nation-states, what authority does naked law hold?").



mentally different constitutional conceptions.<sup>89</sup> Ernest Young, in a similar vein, has said that when comparing Western Europe to the United States, “we see divergence rather than convergence on many aspects of values and political culture.”<sup>90</sup>

In many ways, both arguments are cut from the same cloth. Roger Alford has referred to it as the “international countermajoritarian difficulty”:<sup>91</sup> the notion that “federal judges will impose a particular elite’s view of good law on a public that might disagree if it understood what was at stake.”<sup>92</sup> Ken Kersch, a political scientist from Princeton, has employed harsher words, arguing that use of foreign materials “is part of an elite-driven, politically-motivated worldwide trend toward judicial governance, which is antithetical to democratic self-rule, if not to the rule of law itself.”<sup>93</sup> For others, the crux is more banal: unless judges confine themselves to original constitutional understandings, they act illegitimately and undemocratically.<sup>94</sup>

## II. CRITIQUING THE SOVEREIGNTISTS

The recent barrage of scholarship attacking the use of foreign law was shrill. But was there substance to the arguments? Should courts stop cautiously using foreign law and instead categorically bar its use? When closely examined, the positions taken by those who oppose ever citing to foreign law in constitutional adjudication seem particularly dubious.

### A. *Confusing Weight and Validity*

As an initial matter, scholars who believe that citation to foreign sources is never appropriate often confuse the issues of weight and valid-

89. Jed Rubenfeld, Commentary, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1995–99 (2004).

90. Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 161 (2005); see also McGinnis, *supra* note 9, at 312 (“[A]ny judicial opinion from another culture is the culmination of a complex institutional structure of producing norms. The low cost of accessing the mere words of a foreign judicial opinion can blind us to the fact that we are only seeing the surface of a far deeper social structure that may be incompatible with American institutions.”); Young, *supra* note 88, at 529.

91. Alford, *Misusing International Sources*, *supra* note 9, at 59. Of course, the “countermajoritarian difficulty” was a term first coined by Alexander Bickel in his famous 1962 defense of judicial review. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (Vail-Ballou Press 2d ed. 1986) (1962).

92. Tushnet, *supra* note 55, at 257.

93. Kersch, *supra* note 9, at 346.

94. See, e.g., *Reaffirmation of American Independence Resolution*, H. Res. 97, 109th Cong. (2005) (“Resolved, That it is the sense of the House of Representatives that judicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements . . . inform an understanding of the original meaning of the laws of the United States.”); cf. Dorsen, *supra* note 3 (Scalia arguing from originalist principles and suggesting that use of foreign law is problematic even for nonoriginalists).

ity. In any particular decision, reasons may exist for why certain authority is entitled to little or no weight. Foreign law may particularly lack persuasive value, for example, if that law is from a country with a significantly different cultural, social, or legal context.<sup>95</sup> In these circumstances, it may be true that the differences are so great that little can be gleaned from other countries' precedents interpreting similar constitutional provisions.

Not surprising then, scholars who have championed comparative constitutionalism—like Mark Tushnet,<sup>96</sup> Vicki Jackson,<sup>97</sup> Frank Michelman,<sup>98</sup> or Harold Hongju Koh<sup>99</sup>—recognize that foreign sources must be used with care.<sup>100</sup> Justices should use foreign sources in a refined manner<sup>101</sup> and be wary of cultural context:<sup>102</sup>

A common basis of democracy is, however, a necessary but insufficient condition for comparative analysis. [Judges] must also examine whether there is anything in the historical development and so-

95. That law is embedded in the culture and history of a nation and its peoples is beyond debate. See, e.g., ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 46 (Phillips Bradley ed., 1946) (1835) (explaining that social condition is the source of laws).

96. Tushnet, *supra* note 13; Tushnet, *supra* note 55; see also Mark Tushnet, *How (and How Not) to Use Comparative Constitutional Law in Basic Constitutional Law Courses*, 49 ST. LOUIS U. L.J. 671 (2005); Mark Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes with Reference to Affirmative Action*, 36 CONN. L. REV. 649 (2004).

97. Jackson, *supra* note 55, at 126 (advocating a "slow and incremental approach to considering foreign law"); see also Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse*, 2 INT'L J. CONST. L. 91 (2004); Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15 (2004); Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223 (2001) [hereinafter Jackson, *Narratives of Federalism*].

98. Frank I. Michelman, *Reflection*, 82 TEX. L. REV. 1737, 1758–59 (2004) (arguing that by "comparative encounter" our courts "can clarify our picture of ourselves," without advocating for constitutional borrowing).

99. Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 44 (2004) [hereinafter Koh, *International Law*]; Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003) [hereinafter Koh, *On American Exceptionalism*]; Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085 (2002) [hereinafter Koh, *Paying "Decent Respect"*].

100. See also Ackerman, *supra* note 13, at 771, 774 (encouraging academia to think about world constitutionalism without "kill[ing] the field by overenthusiastic embrace"); Jacobsohn, *supra* note 11, at 1767 ("taking seriously" concerns of cultural particularism but arguing that it "should not preclude courts from seeking constitutional convergence of legal systems in the incremental and proximate fulfillment of transcendent norms of constitutionalism").

101. David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 620 (2001).

102. See, e.g., William P. Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 WASH. L. REV. 945, 947 (1986) (explaining that "we need to approach foreign subjects with an even greater tentativeness of theoretical construct and with an even greater self-consciousness than we would subjects closer to home" and calling for a "careful, contextualized consideration"); Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 26 (1998) (arguing that judges "must ensure that foreign reasoning is not imported without sufficient consideration of the context in which it is being applied" because "solutions developed in one jurisdiction may be inappropriate elsewhere"); Frederick Schauer, *Free Speech and the Cultural Contingency of Constitutional Categories*, 14 CARDOZO L. REV. 865, 880 (1993) (describing how "constitutional constraints rest on culturally contingent social categories" and how constitutional interpretation must vary according to cultural history and national differences).

cial conditions that makes the local and the foreign system different enough to render interpretative inspiration impracticable.<sup>103</sup>

Certainly, the “persuasive value of a foreign source will depend on a combination of its reasoning, the comparability of contexts, and its institutional origin.”<sup>104</sup> At times, foreign law may play a very minor, supplementary role, or no role at all. But recognizing that foreign sources may be entitled to less weight than other sources is a far cry from barring foreign sources from constitutional adjudication.

Kenneth Anderson falls prey to this mistake in his recent article *Foreign Law and the U.S. Constitution*.<sup>105</sup> In an attempt to denigrate the practice, Anderson attacks Justice Kennedy’s use of foreign law in *Roper*.<sup>106</sup> In particular, Anderson criticizes Justice Kennedy’s reliance on the United Nations Convention on the Rights of the Child and the International Convention on Civil and Political Rights on a number of fronts, including:

- that the Rights of the Child Convention has not been ratified by the United States;<sup>107</sup>
- that the Court ignores “how widely the [Rights of the Child] Convention features sweeping reservations by individual countries”;<sup>108</sup>
- that the Convention is “essentially hortatory and honored in the breach by the nations of the world”;<sup>109</sup>
- that the United States ratified the International Convention on Civil and Political Rights with an express reservation.<sup>110</sup>

Later in his article, Professor Anderson bemoans that foreign law lacks the embeddedness of our judicial system or the “foreign judicial system from which it came.”<sup>111</sup> Anderson’s criticisms of *Roper*’s reasoning may, or may not, be sound.<sup>112</sup> But *all* of Anderson’s arguments concern the weight of foreign authority and do not support absolutely banning its use. At bottom, the critique becomes little more than an argument that the Court simply got the law wrong—an unexceptional point. Indeed, if the

103. Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 113 (2002).

104. Jackson, *supra* note 55, at 125.

105. Anderson, *supra* note 9, at 33, 35. In a paper for the Pacific Legal Foundation, Ernesto J. Sanchez puts forth similar arguments to Anderson as to why he believes *Roper* was incorrectly decided. Sanchez, *supra* note 9, at 200.

106. Anderson, *supra* note 9, at 34.

107. *Id.*

108. *Id.* at 35.

109. *Id.*

110. *Id.* at 36.

111. *Id.* at 45–46.

112. This article does not attempt to advocate for, or to justify, any outcome reached by the Court in any particular case.

debate is “not whether it is good to look abroad or not, but rather whether, in a particular case, it is done well or done poorly,” then there is really no debate.<sup>113</sup>

To be fair, Anderson seems aware of this criticism because he later suggests that the weight of any given foreign authority is too difficult to assess.<sup>114</sup> Which is entitled to greater weight, he rhetorically poses, “the German constitutional court [or] the high court of India?”<sup>115</sup> Because of that difficulty, Anderson suggests “a judge can use *any* of this material how he or she will.”<sup>116</sup> The worry of cherry picking is a legitimate concern. Yet Anderson does not explain, and frankly cannot explain, how this is different in kind from citation to a whole host of other sources that the Supreme Court uses regularly, tendentiously or not, without comment.<sup>117</sup>

Constitutional interpretation already permits judges wide leeway, requiring selection of arguments from “text, intent, precedent, history, structure, value, and pragmatic consequences.”<sup>118</sup> Judges also commonly cite to secondary authorities, such as “scholarly treatises, legal encyclopedias, ‘restatements’ of the case law, legislative committee reports, law review articles, legal dictionaries, and even, on occasion, books and articles that are completely outside ‘the law.’”<sup>119</sup> The Court has been known to star-stud its opinions with citation to sources ranging from *M\*A\*S\*H\** and *Sesame Street*, to books like *How to Buy and Care for Tires* and *Muscle-town USA: Bob Hoffman and the Manly Culture of York Barbell*,

113. Kersch, *supra* note 9, at 369; *see also* Toobin, *supra* note 5, at 44.

114. Anderson, *supra* note 9, at 46.

115. *Id.*

116. *Id.* Richard Posner has made the same point. Posner, *supra* note 9, at 86.

117. One study, analyzing the Court’s use of authority in statutory interpretation in the 1980s, found that the Court had cited to 109 different sources of authority. This authority included not only “conventional and formal sources,” such as statutory text, congressional reports, administrative regulations, and judicial decisions, but also unconventional and informal sources, including law review articles, famous jurists, the views of private groups, and diplomatic notes. Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1092 (1992); *see also* Wes Daniels, “Far Beyond the Law Reports”: *Secondary Source Citations in United States Supreme Court Opinions October Terms 1900, 1940, and 1978*, 76 LAW LIBR. J. 1 (1983) (describing Supreme Court’s use of legal periodicals, legal treatises, restatements, legal encyclopedias, nonlegal periodicals, nonlegal treatises, nonlegal reference sources, and statistical publications).

118. Jackson, *supra* note 55, at 122 (citing Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987)).

119. Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citations*, 33 STAN. L. REV. 773, 793–94 (1981); *see also* Daniels, *supra* note 117, at 7 (explaining that while only one case in 1900 cited to a law review article, by 1978, nearly 60% of Supreme Court cases cited to law reviews); Michael D. McClintock, *The Declining Use of Legal Scholarship by the Courts: An Empirical Study*, 51 OKLA. L. REV. 659, 665–67 (1998) (discussing history of the Supreme Court’s citation to legal scholarship and finding it to have declined in recent years); Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495 (2000) (describing how access to nonlegal material, such as newspaper reports and general interest books, has increased the citation to this material).

to popular music and poetry,<sup>120</sup> and to works of Plato, Aristotle, Shakespeare, Montesquieu, and others.<sup>121</sup> Even extralegal sources, such as the “views of private groups or individuals,” are sometimes cited to support a decision.<sup>122</sup> Judges can use this material in any manner they wish. And like foreign materials, this authority often is used only persuasively to support an opinion the Court had arrived at independently.<sup>123</sup>

Not only are the sources of authority vast for the modern court, so too is the substance. As law becomes increasingly interdisciplinary, “courts must inevitably dabble in a wide range of disciplines in which they may lack training or expertise—for example, economics in antitrust cases, science and engineering in patent cases, psychology in criminal cases.”<sup>124</sup> Yet in none of these circumstances, do courts entirely ignore the complicated interdisciplinary material, even if its weight is indeterminate.<sup>125</sup> In fact, many respected commentators have explained how unconstrained and unconstrainable the use of history is in originalist constitutional interpretation.<sup>126</sup> But this difficulty does not bar the court from engaging with, and relying on, the historical information.<sup>127</sup>

120. *County of Sacramento v. Lewis*, 523 U.S. 833, 861 (1998) (Scalia, J., concurring) (citing to a Cole Porter song); *Texas v. Johnson*, 491 U.S. 397, 424 (1989) (Rehnquist, C.J., dissenting) (quoting the poet John Greenleaf Whittier).

121. Schauer & Wise, *supra* note 119, at 502–03 (citing Fritz Snyder, *The Great Authors and the Influence of the Supreme Court*, 7 LEGAL REFERENCE SERVICES Q. 285, 286 (1987)).

122. Daniels, *supra* note 117, at 18–20; Zeppos, *supra* note 117, at 1095.

123. See, e.g., Chester A. Newland, *The Supreme Court and Legal Writing: Learned Journals as Vehicles of an Anti-Antitrust Lobby?*, 48 GEO. L.J. 105, 142 (1959) (concluding that Supreme Court Justices cited law reviews in antitrust cases “to support a view which [the Justices] had arrived at more or less independently of the reasoning in the source referred to”).

124. Young, *supra* note 90, at 166; see also James R. Acker, *A Different Agenda: The Supreme Court, Empirical Research Evidence, and Capital Punishment Decisions, 1986–1989*, 27 LAW & SOC’Y REV. 65, 66–67, 69–78 (1993) (examining the Supreme Court’s use of social science research evidence in twenty-eight capital punishment cases); cf. David M. O’Brien, *The Seduction of the Judiciary: Social Science and the Courts*, 64 JUDICATURE 8 (1980) (criticizing the Court’s use of social science in its decisions); Peter W. Sperlich, *Social Science Evidence and the Courts: Reaching Beyond the Adversary Process*, 63 JUDICATURE 280 (1980) (criticizing the Supreme Court’s use of social science findings).

125. Schauer & Wise, *supra* note 119, at 501–03 (noting the increase in citation to “textbooks and academic journals in economics, political science, sociology, psychology, medicine, criminology, pharmacology, and so on . . .”).

126. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 208–09, 221–22 (1980); see also Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 525 (1995) (noting that “constitutional discourse is replete with historical assertions that are at best deeply problematic and at worst, howlers”); Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387, 389 (2003) (discussing how scholars looking at the same historical materials can come to disparate conclusions); Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909, 914, 917–18 (1996) (critiquing the use of history in legal argument and asserting that historical materials are often used to support a preconceived legal conclusion); Paul Horwitz, *The Past, Tense: The History of Crisis—and the Crisis of History—in Constitutional Theory*, 61 ALB. L. REV. 459 (1997) (describing the varied uses of history in constitutional interpretation) (book review); cf. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 902–24 (1985) (arguing that the Framers did not support or envision use of originalist methodology).

127. Brest, *supra* note 126, at 228–29. The most notable example of a court using social science evidence is Dr. Kenneth Clark’s doll studies in *Brown v. Board of Education*, as famously referred to in footnote 11 of the opinion. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954). Dr. Clark’s study

Anderson is not alone in confusing weight with validity. Ernest Young, for example, verges on a similar error, although in a more subtle way. In his recent *Harvard Law Review* piece, Young describes what he refers to as the “denominator problem.”<sup>128</sup> In his view, by relying on foreign law the Court is able “to bolster claims of ‘consensus’ against (or in favor of) a particular practice.”<sup>129</sup> Young criticizes Justice Kennedy’s analysis in *Roper* because his use of “foreign law is all about [counting] noses, not reasons.”<sup>130</sup> He explains that the Court cites to “the practice of foreign jurisdictions without examining the whys and wherefores underlying those practices.”<sup>131</sup> Young is certainly correct in his conclusion that uncritical use is undesirable. But the proper conclusion is not, as Young implies, that foreign law should never be cited. Instead, his argument suggests that foreign law should be used in a more developed way. In fact, the nose-counting problem suggests that foreign law should be discussed in greater depth and with more sophistication, not less. The problem is not that foreign law is used, but rather that it is used inadequately or superficially.

A related Sovereigntist concern is that foreign law is too difficult to determine.<sup>132</sup> This concern similarly suffers from a weight versus validity problem. At most, concluding that foreign law is difficult to ascertain suggests that judges should use caution. No per se rule of exclusion from judicial deliberations is warranted, however, simply because something may be difficult to ascertain.<sup>133</sup> For instance, discerning legislative intent is classically difficult, but something courts attempt all the time.<sup>134</sup>

The concern that foreign law is difficult to ascertain is, in any case, exaggerated.<sup>135</sup> The legal community is better positioned now than it has

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was originally published in 1950 as part of a White House conference on the welfare of children. William J. Rich, *Betrayal of the Children of the Dolls: The Broken Promise of Constitutional Protection for Victims of Race Discrimination*, 90 CORNELL L. REV. 419, 419–20 n.2 (2005) (citing KENNETH B. CLARK, THE EFFECT OF PREJUDICE AND DISCRIMINATION ON PERSONALITY DEVELOPMENT, WHITE HOUSE MIDCENTURY CONFERENCE ON CHILDREN AND YOUTH (1950)). For further discussion on doll tests, see Gordon J. Beggs, *Novel Expert Evidence in Federal Civil Rights Litigation*, 45 AM. U. L. REV. 1, 9–16 (1995).

128. Young, *supra* note 90, at 148.

129. *Id.*

130. *Id.* at 152, 153–56.

131. *Id.* at 153.

132. Justice Souter has expressed this concern and suggested skepticism of the Court’s ability to ascertain accurately what foreign law is. *Washington v. Glucksberg*, 521 U.S. 702, 787 (1997) (Souter, J., concurring in judgment) (“The principle enquiry at the moment is into the Dutch experience, and I question whether an independent front-line investigation into the facts of a foreign country’s legal administration can be soundly undertaken through American courtroom litigation.”).

133. See Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 397–98 (1989) (exploring difficulties of reliability in ascertaining legislative intent).

134. See, e.g., *id.*

135. Anderson, *supra* note 9; Sanchez, *supra* note 9, at 40 (arguing the problem is with an “unelected judge whose true area of expertise is U.S. law and who lacks access to adequate resources for research on foreign law and culture”); Young, *supra* note 90, at 165–66 (arguing that the decision costs and end costs make the use of foreign materials unattractive).

ever been to identify and understand the laws of other nations. "In the last fifty years, the discipline has generated a veritable panoply of books, articles, and reports about foreign law."<sup>136</sup> Significant literature has been written about comparative law<sup>137</sup> and other countries' legal systems,<sup>138</sup> much "of it now go[ing] well beyond black letter rules and often pertain[ing] to the foreign system's historical genesis and underlying values, legal education and actors, institutions and procedures, sources and interpretative practices, and sometimes even cultural habits and (hidden) working styles."<sup>139</sup> Attorneys are now exposed to comparative and international law early in their careers. The "fastest growing area in the United States law school curriculum is in the international and comparative area."<sup>140</sup> To be sure, "[c]ourse offerings in international and comparative law abound; student and faculty exchanges are proliferating; transnational recruitment of faculty and students is expanding; international student initiatives such as mootings, journals, and internships are multiplying rapidly; [and] visitors' programs and transnational collaborative research projects are ubiquitous."<sup>141</sup>

Comparative analysis is also not the challenge it once was because today's attorneys are well equipped to engage in comparative analysis. Modern technology and the availability of experts in foreign law have

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136. Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 675 (2002).

137. Comparative legal analysis has long been a mainstay of American law schools. See, e.g., Arthur T. Von Mehren, *An Academic Tradition for Comparative Law?*, 19 AM. J. COMP. L. 624 (1971). For more recent discussions, see generally Nora V. Demleitner, *Challenge, Opportunity and Risk: An Era of Change in Comparative Law*, 46 AM. J. COMP. L. 647 (1998); James Gordley, *Is Comparative Law a Distinct Discipline?*, 46 AM. J. COMP. L. 607 (1998); John Henry Merryman, *Comparative Law Scholarship*, 21 HASTINGS INT'L & COMP. L. REV. 771 (1998).

138. Posner, *supra* note 9, at 80 (noting "the growing literature on constitutional courts in other countries—a literature that is growing in part because the number and activity of such courts are growing").

139. Reimann, *supra* note 136, at 675 (citations omitted).

140. Vivian Grosswald Curran, *The Role of Foreign Languages in Educating Lawyers for Transnational Challenges*, 23 PENN ST. INT'L L. REV. 779, 783 (2005); see also Jeffery Atik & Anton Soubbot, *International Legal Education*, 36 INT'L LAW 715, 715 (2002) (explaining that "[t]he effects of globalization and, in particular, the events of September 11 have led to redoubled efforts by U.S. law schools to expand and deepen the study of international law" and that "[t]here are signs that the marginalization of international legal study in U.S. law schools (evidenced by its traditional place in upper-division, elective courses) is giving way to a new recognition of its centrality"); Anne-Marie Slaughter, *The International Dimension of Law School Curriculum*, 22 PENN. ST. INT'L L. REV. 417, 417–18 (2004). International and comparative law courses have long topped the list of new curricular offerings at law schools. See, e.g., Deborah Jones Merritt & Jennifer Cihon, *New Course Offerings in the Upper-Level Curriculum: Report of an AALS Survey*, 47 J. LEGAL EDUC. 524, 538–40 (1997). For a particular example, see John E. Sexton, *The Global Law School Program at New York University*, 46 J. LEGAL EDUC. 329–31, 334 (1996).

141. Catherine Valcke, *Global Law Teaching*, 54 J. LEGAL EDUC. 160, 160 (2004); see also Alberto Bernabe-Riefkohl, *Tomorrow's Law Schools: Globalization and Legal Education*, 32 SAN DIEGO L. REV. 137 (1995); John F. Murphy & Jeffery Atik, *International Legal Education*, 37 INT'L LAW. 623, 623 (2003) (discussing whether it is desirable for all law students to have some exposure to international or transnational law and describing current developments in legal education).

made foreign decisions more accessible.<sup>142</sup> David Fontana has made the point well:

With the assistance of an expert (preferably one schooled in the language, culture, and law of the foreign country), or even without one, this process of comparison and analogical reasoning is nothing new to the judge. The judge of the future, and the lawyer of today, has practiced law or taught law in the era of globalization, when a lawyer must be familiar with some aspects of foreign law.<sup>143</sup>

Even without experts, courts can draw from an ever-increasing number of amicus briefs to gauge the soundness of arguments,<sup>144</sup> even those based on foreign law.<sup>145</sup> In short, as Justice Ruth Bader Ginsburg has noted: “[t]oday, tools are readily at hand to pursue international and comparative law inquiries.”<sup>146</sup>

Perhaps an obvious retort is to ask exactly what weight to afford foreign law in any particular case. Many scholars have grappled with this worthwhile question. In a seminal article,<sup>147</sup> Sujit Choudhry described different ways that foreign law can be used in constitutional adjudication.<sup>148</sup> Likewise, David Fontana has crafted a typology of uses.<sup>149</sup> He concludes that foreign sources may be used appropriately in “hard cases”<sup>150</sup> when there are no helpful American judicial precedents, when the American sources are unclear, and when the foreign sources aid to craft a rule or standard.<sup>151</sup> In similar fashion, Joan Larsen has attempted to describe the different uses of foreign law—expository, empirical, and moral fact finding—and then normatively evaluate those uses.<sup>152</sup> Others, such as Melissa Waters and Vicki Jackson, have suggested different approaches ranging from nonparticipation or resistance, to convergence, to engagement,<sup>153</sup> while constitutional scholars, like Mark Tushnet, have of-

142. See Shirley S. Abrahamson & Michael J. Fischer, *All the World's a Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273, 291 (1997) (describing how advances in technology have lead to the growing internationalization of the judiciary); Ginsburg, *supra* note 42, at 3 (“The Internet affords access to foreign judicial decisions, law journals contain all manner of commentary, course materials are well packaged.”); *International Judicial Dialogue*, *supra* note 67, at 2055; L’Heureux-Dubé, *supra* note 102, at 25 (describing how the Internet and other advances in communication technology allow judges to more easily access decisions from foreign jurisdictions).

143. Fontana, *supra* note 101, at 620.

144. Joseph D. Kearny & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 744–45 (2000) (describing the use and increased number of amicus briefs before the Supreme Court).

145. See Jason Morgan Foster, *Transnational Judicial Discourse and Felon Disenfranchisement: Reexamining Richardson v. Ramirez*, 13 TULSA J. COMP. & INT’L L. 279, 293–95 (2006).

146. Ginsburg, *supra* note 42, at 3.

147. Levinson, *supra* note 62, at 354 (describing Choudhry’s work as “splendid, indeed seminal”).

148. Choudhry, *supra* note 64, at 825–26.

149. Fontana, *supra* note 101, at 550–56.

150. *Id.* at 558.

151. *Id.* at 553–54.

152. Larsen, *supra* note 37.

153. Jackson, *supra* note 55, at 112–15 (describing convergence, resistance, and engagement models of constitutional comparativism); Waters, *supra* note 54, at 555–72 (describing different uses of comparative materials and foreign law).



ferred different theoretical justifications for the use of foreign law.<sup>154</sup> Many others have attempted the same.<sup>155</sup>

Although the approaches are varied, generally at least three factors are recognized as determining the weight and applicability of foreign law.<sup>156</sup> First, a court must consider the historical connection between the two countries—whether “for a considerable time the two systems had the same sources from which they derived their legal doctrines, principles, procedures, methods, and ideas.”<sup>157</sup> Second, a court should evaluate the similarity between the legal systems.<sup>158</sup> Third, the court must decide whether the constitutional institutions are analogous.<sup>159</sup> Strikingly, however, the recent literature denouncing the use of foreign law largely ignores this scholarship. Justice Scalia and “his supporters from the sidelines” would ignore this nuance in preference for an absolute rule.<sup>160</sup>

### B. *An Attack on Sovereignty?*

A second criticism that Sovereignists commonly proffer is that use of foreign law “surrenders U.S. sovereignty to non-U.S. decision-makers” who are not accountable to the people of the United States.<sup>161</sup>

154. Tushnet, *supra* note 13, at 1228–29 (describing functionalism, expressivism, and bricolage as three justifications for constitutional borrowing).

155. See, e.g., Annus, *supra* note 16, at 311–42 (distinguishing between different uses of comparative law); Brun-Otto Bryde, *The Constitutional Judge and the International Constitutionalist Dialogue*, 80 TUL. L. REV. 203, 213–19 (setting forth the uses of foreign law and the legitimacy of those uses); Eskridge, *supra* note 53, at 558–60 (describing some of the appropriate uses for comparative constitutionalism); Rex D. Glensy, *Which Countries Count? Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357, 401–40 (2005) (creating a framework for selection of foreign authorities based on differentiating between nations); McCrudden, *supra* note 66, at 517–27 (arguing that the persuasiveness of foreign authority is dictated by the nature of the political regime in which the foreign court is situated, the pedagogical impulse, and the existence of common alliances, among other factors); Waldron, *supra* note 14, at 139–43 (describing how to use foreign law as *ius gentium*); see also H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 265–88 (1987) (explaining how the concept of persuasive authority justifies the extensive use of foreign, nonbinding sources of law); cf. Bruce Carolan, *The Search for Coherence in the Use of Foreign Court Judgments by the Supreme Court of Ireland*, 12 TULSA J. COMP. & INT'L L. 123 (2004) (attempting to offer insight into when foreign sources should be used by demonstrating how the Supreme Court of Ireland has used foreign sources in several well-known Irish cases).

156. Pradyumna K. Tripathi, *Foreign Precedents and Constitutional Law*, 57 COLUM. L. REV. 319, 322 (1957).

157. *Id.* at 342.

158. *Id.* at 322.

159. *Id.*

160. Jacobsohn, *supra* note 11, at 1767.

161. Tushnet, *supra* note 55, at 261; see, e.g., Alford, *Misusing International Sources*, *supra* note 9, at 58 (arguing that “[u]sing global opinions as a means of constitutional interpretation dramatically undermines sovereignty”); Laurence E. Rothenberg, *International Law, U.S. Sovereignty, and the Death Penalty*, 35 GEO. J. INT'L L. 547, 548 (2004) (arguing that the U.S. criminal justice system’s sovereignty is threatened by the “insinuation” of foreign law into death penalty decisions); see also *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H.R. Res. 568 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong., 49 (2004) (statement of Jeremy Rabkin, Professor of Government, Cornell University) (arguing that the European Union “is really set on . . . undermining American sovereignty” by “infiltrat[ing] into our judicial system this idea that our judges need to listen to what their judges say”).

The point, at least superficially, seems an obvious one: “[t]o the extent that a state is subject to law made elsewhere, it has lost its sovereignty, and, perhaps, in some deep way, its right to call itself a ‘state.’”<sup>162</sup> True, perhaps; but as a reason for categorically barring the use of foreign law, nonsense.

As an initial matter, the argument fundamentally misconceives the nature of sovereignty. Sovereignty is the right to independence, “that is the right to exercise, within a portion of the globe and to the exclusion of other States, the functions of a State.”<sup>163</sup> Sovereignty embodies the right “to be left alone, to exclude, to be free from any external meddling or interference.”<sup>164</sup> Sovereignty is, therefore, what a nation makes of it. It cannot be “violated if a nation, through one of its branches, executive, legislative, or judicial, makes an autonomous decision to align its laws with other nations. This choice, exercised independently of other nations, constitutes an exercise of, and not a violation of, a state’s right to self-determination.”<sup>165</sup> To “acknowledge the propriety of comparative analysis hardly entails a surrender of sovereignty.”<sup>166</sup>

Similarly, the idea that somehow the Court is bowing to the whims of foreigners and thereby endangering sovereignty is simply untrue.<sup>167</sup> That suggestion confuses the use of foreign law as an interpretative aid with presuming that foreign law is controlling. The suspicion that the Court is using foreign sources for something more than persuasive authority is sheer speculation.<sup>168</sup> The Court “may be seeking information, guidance, stimulation, clarification, or even enlightenment,” but there is no evidence that it turns to foreign law for binding authority.<sup>169</sup> The

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162. T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989, 1993 (2004).

163. DAVID HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 379 (2d ed. 2002); see also IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 287 (6th ed. 2003) (describing principles of equality and nonintervention among sovereign nations); MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 330–50 (2d ed. 1993) (explaining the nature of sovereignty).

164. Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT’L L. 283, 284 (2004).

165. Po-Jen Yap, *Transnational Constitutionalism in the United States: Toward A Worldwide Use of Interpretive Modes of Comparative Reasoning*, 39 U.S.F. L. REV. 999, 1006 (2005); see also Aleinikoff, *supra* note 162, at 2000 (“Because transnational norms can only be made binding in the United States as permitted by domestic law, their application domestically results from an exercise of sovereignty—and therefore cannot constitute an abridgment of sovereignty.”); Tushnet, *supra* note 55, at 262 (“[T]he language of sovereignty obscures the fact that it is always a domestic decision-maker who concludes that a non-U.S. rule should be a rule of decision within the United States.”) (emphasis omitted).

166. Law, *supra* note 4, at 657.

167. See generally Tushnet, *supra* note 1 (describing the references to non-U.S. law in U.S. Supreme Court majority opinions); Mark Tushnet, *When Is Knowing Less Better than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275, 1286 (2006).

168. Law, *supra* note 4, at 657 (“If the point is instead to emphasize that Americans must remain masters of their own destiny, no one on the Court has suggested otherwise.”).

169. Laurie W. H. Ackermann, *Constitutional Comparativism In South Africa: A Response to Sir Basil Markesinis and Jörg Fedtke*, 80 TUL. L. REV. 169, 183 (2005) (arguing that sovereignty concerns

Court's use of foreign law is a recognition only that "no [nation] is so unique that it has neither anything to say to, or learn from, other [nations]." <sup>170</sup>

Alexander Aleinikoff has made a more cutting, if not fundamental, point. As Aleinikoff explains, the Sovereigntist objection to using foreign law because of sovereignty loss, "starts with an unrealistic view of states as hermetically sealed polities exercising sole jurisdiction over their territory and people."<sup>171</sup> This version of sovereignty "does not exist and perhaps has never existed."<sup>172</sup> Constitutional law is "not free from outside influences; nor has it ever been."<sup>173</sup> Perhaps more telling, states are often subject to laws, directly or indirectly, to which the state did not expressly consent. This can be either in the form of customary international norms<sup>174</sup> or through other states extraterritorially applying their laws.<sup>175</sup>

That so many politicians appear concerned about the possibility that courts could be influenced by law made elsewhere is ironic: the United States attempts to impose its law abroad all the time.<sup>176</sup> The United States routinely discounts or disregards the sovereignty of other nations.<sup>177</sup> Setting aside recent military operations, the disregard is evident in how the law permits broad jurisdictional assertions over foreigners on suspect bases,<sup>178</sup> and our increased willingness to apply our laws extraterritorially.<sup>179</sup> Even the U.S. judiciary all-too-often tends to ignore the impact its decisions have on other countries and legal systems.<sup>180</sup>

A final point—perhaps the most crucial one—is worth emphasizing. Paradoxically, the Sovereigntists may have it backwards (or, at least, are

are "red herrings"); see also Jackson, *supra* note 55, at 128 ("[F]oreign law requires issue-by-issue analysis and does not necessarily mean adoption, but thoughtful, well-informed consideration.").

170. Kahn, *supra* note 77, at 1162; see also *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) ("Wise parents do not hesitate to learn from their children.").

171. Aleinikoff, *supra* note 162, at 1994.

172. *Id.* (citing STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 20–25 (1999)).

173. Law, *supra* note 4, at 658.

174. Aleinikoff, *supra* note 162, at 1994.

175. Austen L. Parrish, *Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. REV. 363, 395 (2005) (discussing the extraterritorial application of law).

176. INT'L CHAMBER OF COMMERCE, *THE EXTRATERRITORIAL APPLICATION OF NATIONAL LAW* 36–37 (Dieten Lange & Gary Born eds., 1987).

177. See Roger D. Scott, *Territorially Intrusive Intelligence Collection and International Law*, 46 A.F.L. REV. 217, 224–26 (1999).

178. Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident, Alien Defendants*, 41 WAKE FOREST L. REV. 1, 51–53 (2006).

179. Parrish, *supra* note 175, at 393–99; see also Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501 (2005) (discussing the changing nature of territorial sovereignty and the expansion of the extraterritorial application of law). For an overview on the extraterritorial application of law, see generally William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85 (1998) and William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101 (1998).

180. Paul B. Stephan, *A Becoming Modesty—U.S. Litigation in the Mirror of International Law*, 52 DEPAUL L. REV. 627, 639 (2002); see, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (recognizing that forcible abduction of Mexican national from Mexico did not preclude U.S. criminal trial).

too late). Globalization of the judiciary and constitutional decision making is here and will surely continue.<sup>181</sup> To the extent that the lines between the domestic and the foreign have blurred, it has occurred already.<sup>182</sup> Transnational and global litigation is part of our court system,<sup>183</sup> and the United States is becoming “more vulnerable to the imposition of international norms.”<sup>184</sup> “As community boundaries diverge from national ones, law making may migrate from national institutions toward global ones.”<sup>185</sup> Having domestic courts engage with foreign or transnational materials, then, may be a way for us to shape that law as we see fit. But ignoring it will not make it go away. In this context, engaging with foreign law and using it in constitutional decision making may ultimately help shore up U.S. sovereignty, rather than erode it.

### C. *Old Wine, New Bottles: Originalism and the Countermajoritarian Difficulty*

If the Sovereignists are not lamenting the loss of national sovereignty, then their indictment often mirrors longstanding debates over certain kinds of constitutional interpretation.<sup>186</sup> Sovereignists believe that citation to foreign sources permits judges to engage in inappropriate policymaking.<sup>187</sup> Largely, then, the rejection of the use of foreign materials rests on the argument that judges must confine themselves to considering the original intention of the Framers when deciding constitutional cases, something foreign law has little to say about. Naturally, “[o]riginalism and textualism are particularly incompatible with comparative analysis”<sup>188</sup> because comparativism is not bound by history or text. But why should these theories stop the U.S. Supreme Court from continuing to use foreign sources?

As a preliminary matter, originalism—in its extreme form—has been “widely critiqued as unrealistic and unworkable” for a variety of

181. Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1113–15 (2000) (describing legal globalization); see also John B. Attanasio, *Rapporteur's Overview and Conclusions: Of Sovereignty, Globalization, and Courts*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 373, 383 (Thomas M. Franck & Gregory H. Fox eds., 1996) (describing how international human rights decisions are increasingly being quoted by national courts and accepted by them).

182. See generally Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 727–30 (2002) (describing how globalization has restructured how nation-states exercise their powers, has left the “United States more vulnerable to the imposition of international norms,” and how “no country—not even the supposed sole superpower—can resist or insulate itself from global forces”).

183. Parrish, *supra* note 178, at 43.

184. Spiro, *supra* note 182, at 730.

185. *Id.*; cf. Frederick Schauer, *On the Migration of Constitutional Ideas*, 37 CONN. L. REV. 907, 914–19 (2005) (discussing transnational harmonization of constitutional ideas and arguing that even the most enduring constitutions are not entirely indigenous).

186. See Jackson, *supra* note 55, at 111.

187. See *id.* at 122.

188. Blum, *supra* note 88, at 162.

reasons.<sup>189</sup> First, in practice the Court itself does not fully embrace strict originalist methodology, and never has.<sup>190</sup> Second, accurately determining what the Framers' views were as to most constitutional provisions is near impossible.<sup>191</sup> Historians have questioned whether, at the time of ratification, constitutional language like "equality" and "liberty" even had a fixed meaning from which to derive original understanding.<sup>192</sup> Third, that originalism will restrain judges more than other interpretative methodologies is unlikely, and at least, controverted. For many, "original understanding [is] no more than an artifice for imposing [the judge's] own political vision . . ."<sup>193</sup> At the very least, the countermajoritarian difficulty that lies at the heart of originalist thinking may be overblown.<sup>194</sup> Some scholars go further, suggesting that the "countermajoritarian issue [is] an 'obsession' of law professors cloistered in their ivory towers, incongruent with (or even irrelevant to) popular conceptions of the Court and judicial review."<sup>195</sup> Social science has repeatedly shown that the Court enjoys widespread and broad legitimacy—much more so than the other branches of government.<sup>196</sup> And despite fears of judicial activism, the justices "accept the conventional law-constrained conception of

189. Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOK. L. REV. 1109, 1117 (2006); see also Brest, *supra* note 126, at 204–05 (critiquing the problems with originalism); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1087–99 (1989); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877–78 (1996) (explaining that the text and original understandings play a small role in understanding what the Constitution requires). Textualism has received similar critiques. See Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 2 (2006) ("Textualism has outlived its utility as an intellectual movement.").

190. Zeppos, *supra* note 117, at 1099–120 (concluding, after analyzing citation patterns, that originalist methodology is absent from the Court and that "the Court's approach is eclectic, relying not only on text and originalist sources, but on practical considerations and other dynamic sources as well").

191. See Brest, *supra* note 126, at 13–17; see also RONALD DWORKIN, *A MATTER OF PRINCIPLE* 39 (1985).

192. See Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 59–65 (1955).

193. Anthony E. Cook, *The Temptation and Fall of Original Understanding*, 1990 DUKE L.J. 1163, 1164; see also Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1209–17 (1987) (arguing that "there simply is no value-neutral way to choose among possible specifications of the framers' abstract intent").

194. Friedman, *supra* note 76, at 159. Not long ago, the concern of constitutional theory was not a countermajoritarian difficulty, but a majoritarian one. Kahn, *supra* note 77, at 1158 ("The question that academics and judges pondered then was not the courts' own legitimacy in a democratic order, but the legitimacy of rule by a majority that, unregulated, threatened little more than mob action.").

195. Adam Burton, *Pay No Attention to the Men Behind the Curtain: The Supreme Court, Popular Culture, and the Countermajoritarian Problem*, 73 UMKC L. REV. 53, 53 (2004).

196. JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICANS' BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK* 99 (2002) (recounting focus-group studies and research regarding public opinions about the Supreme Court); see also Rosalee A. Clawson et al., *The Legitimacy-Confering Authority of the U.S. Supreme Court: An Experimental Design*, 29 AM. POL. RES. 566, 568–69 (2001) (describing public support for the Supreme Court as compared to other branches of government); Louis Michael Seidman, *What's So Bad About Bush v. Gore? An Essay on Our Unsettled Election*, 47 WAYNE L. REV. 953, 960–62 & nn.15–18 (2001) (citing polling data on the Supreme Court after *Bush v. Gore* and finding that public approval of the Court remained high).

judges and believe they conform to it."<sup>197</sup> This is not pure conjecture. "[E]mpirical studies of voting patterns of Supreme Court Justices never find that ideology explains anywhere near 100% of the Justices' votes."<sup>198</sup>

A particularly apt critique of originalism also exists in circumstances when the history and text are ambiguous. "Methodologically, the doctrine is backwards: as the subjects of debate become more difficult, the need to be open to the widest possible sources increases."<sup>199</sup> Constitutional provisions often do "not have a single, definite meaning in any community prior to the process of interpretation."<sup>200</sup> The constitutional meaning is therefore

not a thing waiting to be discovered by a judge. It only has an identifiable shape after the judge articulates the conclusion of an interpretative inquiry. . . . [I]t is not possible for a judge—or anyone else—to consider the meaning of [constitutional language] without drawing on a wealth of experiences, arguments, and values that range across local, national, and *even international communities*.<sup>201</sup>

Stated differently, foreign materials should not be used when the constitutional text and history speak clearly;<sup>202</sup> but they may be used when the conventional legal materials do not exist, and the justices, "deprived of these crutches," have to make discretionary calls.<sup>203</sup>

A more provocative point can be made. Adhering solely to strict originalism in interpreting the Constitution "means accepting the judgments of people who lived centuries ago in a society that was very different from ours."<sup>204</sup> As a society, however, we have far more in common—demographically, culturally, morally, and in our historical experiences—with foreigners in the twenty-first century than we do with Americans of the 1780s or 1860s.<sup>205</sup> Richard Posner, although more recently appearing

197. Posner, *supra* note 9, at 52.

198. *Id.* at 49.

199. Kahn, *supra* note 77, at 1160.

200. *Id.* at 1161.

201. *Id.* (emphasis added).

202. Virtually all Constitutional scholars agree that the specific intentions of the Framers count for something and that sometimes the text can be decisive. Brest, *supra* note 126, at 236 ("[N]onoriginalist adjudication . . . accord[s] presumptive weight to the text and original history."); see also Fallon, *supra* note 193, at 1244; Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1242 n.66 (1995).

203. Posner, *supra* note 9, at 40.

204. Strauss, *supra* note 189, at 880; see also Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 381 (1997) (describing and critiquing the "dead-hand problem of constitutionalism: Why should today's generation be ruled from the grave?"); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) (describing the dead-hand problem).

205. Tushnet, *supra* note 204, at 880; see also Jennifer Friesen, *State Courts as Sources of Constitutional Law: How to Become Independently Wealthy*, 72 NOTRE DAME L. REV. 1065, 1082 (1997) ("[P]opulations change, and change profoundly over time. Immigrants arrive, old ways die out, new priorities arise. People governed by today's decisions do not bear much necessary relation to those who yielded their sovereign power to a state government originally."); cf. Michael Kirby, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?*, 24 MELB. U. L. REV. 1 (2000).

to repudiate his prior position,<sup>206</sup> has explained how evidence of foreign practices may thus be more relevant than evidence of original intent:

If a law could be said to be contrary to world public opinion I would consider this a reason, not compelling but not negligible either, for regarding a state law as unconstitutional even if the Constitution's text had to be stretched a bit to cover it. The study of other laws, or of world opinion as crystallized in foreign law and practices, is a more profitable inquiry than trying to find some bit of eighteenth-century evidence [of the Framers' intent].<sup>207</sup>

Indeed, "[w]hy should we care more about the intent of the Founders—who are long-dead as well as culturally removed from us—than about the understandings of contemporary judges struggling with the same problems . . . ?"<sup>208</sup>

But even if one were to accept originalism as the only legitimate method of constitutional interpretation, originalism struggles to explain why citation to foreign sources must be banned in constitutional decision making. The Framers' reliance on international sources should lead "a justice devoted to originalism to look, like the framers themselves, toward—not away from—international opinion."<sup>209</sup> As a historical matter, the use of foreign materials has a "venerable history in constitutional interpretation."<sup>210</sup> The suggestion that citation to foreign law is new and unprecedented<sup>211</sup> is empirically wrong.<sup>212</sup> Comparative analysis, for its

206. Posner, *supra* note 9, at 84–90; see also Posner, *supra* note 58, at 40–42.

207. Richard Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 13–14 (1996).

208. Paul W. Kahn, *Comparative Constitutionalism in a New Key*, 101 MICH. L. REV. 2677, 2678 (2003).

209. Koh, *International Law*, *supra* note 99, at 47; see also Ginsburg, *supra* note 42, at 2–3 (explaining how the Framers intended that the new nation would be bound by international law and would respect world opinion); Koh, *Paying "Decent Respect," supra* note 99, at 1087–90 (explaining how the Framers understood the term "Law of Nations").

210. Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT'L & COMP. L. 421, 423–24 (2004) (arguing that "the use of international law in constitutional interpretation has a long history, and reflects the Framers' own interest in and concern about international law"); see also JACKSON & TUSHNET, *supra* note 13, at v ("Centuries ago scholars and political activists ranging from Aristotle to James Madison compared and analyzed systems of government to determine how best to constitute polities."); Koh, *International Law*, *supra* note 99, at 56 ("When phrases like 'due process of law,' 'equal protection,' and 'cruel and unusual punishments' are illuminated by parallel rules, empirical evidence, or community standards found in other mature legal systems, that evidence should not simply be ignored. Wise American judges did not do so at the beginning of the Republic, and there is no warrant for them to start now."); cf. *The Paquette Habana*, 175 U.S. 677, 700 (1900) (explaining that judges were to look "to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat").

211. Anderson, *supra* note 9, at 33 (noting that before *Roper* "the appearance of foreign law in constitutional decisions [was possibly] nothing more than a minor hobbyhorse for Justice Stephen Breyer or Justice Kennedy").

212. For an extensive detailing of the use of foreign law in U.S. decisions, see generally Calabresi & Zimdahl, *supra* note 23. See also Alain A. Levasseur, *The Use of Comparative Law by Courts*, in *THE USE OF COMPARATIVE LAW BY COURTS* 315, 325–31 (1997) (describing the uses of comparative law by the U.S. Supreme Court from 1907 through 1995). For cases that have cited to comparative materials, see, for example, *Washington v. Glucksberg*, 521 U.S. 702, 718 n.16 (1997) (noting that Canada, Great Britain, New Zealand, and Australia are embroiled in debates over physician-assisted sui-

part, has long been used in U.S. Supreme Court decisions.<sup>213</sup> International law—as distinguished perhaps from all foreign materials—cannot be irrelevant to constitutional interpretation because the U.S. Constitution itself openly refers to international law.<sup>214</sup> The Court itself has recognized its relevance: “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”<sup>215</sup> Indeed, ignoring the practices of other countries—according to Professor Harold Hongju Koh—would “constitute a stunning reversal of history.”<sup>216</sup> Vicki Jackson has recently made much the same point.<sup>217</sup>

Aside from the use of foreign law to decide cases, early American legal scholars were well versed in foreign materials:

Early opinions of the Court and leading treatises of the nineteenth century took international and comparative law far more seriously than courts and scholars in the twentieth century. James Madison studied the constitutions of the world in preparing to write the American document. Early U.S. jurists were schooled on the leading international treatises, the *lex mercatoria*, the law of prizes, Roman citizenship law, and British constitutionalism.<sup>218</sup>

Some commentators have argued that given our constitutional connections with international human rights, the reference to foreign law is par-

cide) and *New York v. United States*, 326 U.S. 572, 583 n.5 (1946) (discussing laws in Canada, Australia, and Brazil to support decision). See also M. H. Hoeflich, *Translation & the Reception of Foreign Law in the Antebellum United States*, 50 AM. J. COMP. L. 753, 753 (2002) (describing how, early in the nation's history, the courts turned “to Europe and European legal systems for its legal development”).

213. Fontana, *supra* note 101, at 545–49, 591 (noting the “long career” of comparative reasoning in Constitutional cases). Admittedly, the opposition to citing to foreign sources also has a long history. Young, *supra* note 90, at 149 n.11 (“In the early Republic, for example, several states enacted statutes forbidding their courts even to cite to English common law decisions.”).

214. See, e.g., U.S. CONST. art. I, § 8, cl. 10 (giving Congress the power “[t]o define and punish . . . Offenses against the Law of Nations”); see also Neuman, *supra* note 53, at 82 (explaining how the U.S. Constitution “assume[s] an international law background, which does not provide an exclusive source for the meaning of the constitutional text but does provide an essential resource for construing it”).

215. *The Paquete Habana*, 175 U.S. at 700; see also *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) (explaining how international law “is part of our law, and must be ascertained and administered by the courts of justice”); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (cautioning that congressional acts should “never . . . be construed to violate the law of nations, if any other possible construction remains”); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793) (noting the ability to rely on the “laws of nations”).

216. Koh, *International Law*, *supra* note 99, at 45; see also Aleinikoff, *supra* note 162, at 1989 (noting that “[t]here is nothing terribly new” in looking “at foreign sources of law as aids in constitutional interpretation”).

217. Jackson, *supra* note 55, at 109–11 (explaining that reference to foreign and international law is a “traditional method[] of analysis” and that “references to foreign law go way back in U.S. constitutional history”).

218. Aleinikoff, *supra* note 162, at 1989; see also Levasseur, *supra* note 212, at 316–24 (explaining how U.S. courts historically referred to foreign law sources); Childress, *supra* note 58, at 200 (explaining that “before the American Civil War, courts regularly referred to Roman law, civil law (that is, the law of continental Europe), and English common law”).



ticularly appropriate when the Court is addressing an issue related to human rights.<sup>219</sup>

But whether originalism supports citing to foreign law may be the juridical equivalent of debating how many angels can stand on the head of a pin. If the point is solely that originalism is preferred to other methods of interpretation—the point Justice Scalia seems to make<sup>220</sup>—then the debate is very ordinary indeed.<sup>221</sup> Deciding whether the use of foreign law is appropriate cannot require resolving the difficult and, perhaps, unsolvable question of what method of judicial interpretation is best. The wide-ranging debate over what constitutional interpretation requires has been ongoing for years with no end in sight. Nor is it realistic to believe that judges will universally apply one interpretative approach to all cases.<sup>222</sup> If a judge wishes to embrace a certain interpretative methodology, she should do so on its own terms. But the use of foreign law itself is not a reason for adopting or rejecting a particular interpretative methodology.

#### D. *The Sovereignist Position: How Extreme?*

Before turning to an affirmative explanation for why using foreign sources may well be sensible, one might ask whether the suggestion to ban the use of foreign materials—not to mention, as some senators suggest, to render its use an impeachable offense—is a radical one. Quite radical.

Underscoring the extremity of the Sovereignist position is not difficult. First, as explained above, the U.S. Supreme Court has used foreign law sources in constitutional analysis since the early days of the Union.<sup>223</sup>

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219. See, e.g., Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3, 6 (1983) (“[M]ost United State courts, both state and federal, show less inclination now than at the beginning of the Republic to use sources of foreign, international, and customary law to aid interpretation, especially in constitutional cases.”); Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 825 (1989) (arguing that the Framers intended to resort to “international human rights standards”); cf. Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1890–99 (2003) (describing how national constitutional systems can incorporate and accommodate international human rights).

220. *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (Scalia, J.) (stating that “such comparative analysis [to international law] is inappropriate to the task of interpreting a constitution”).

221. Cf. Tushnet, *supra* note 167, at 1277 (arguing that some criticisms of references to non-U.S. law are “entirely parasitic on some other argument—which is merely asserted, not defended” and “deployed in a wide range of contexts, not just this one”).

222. Cf. Cass R. Sunstein, Foreword, *Leaving Things Undecided*, 110 HARV. L. REV. 4, 13 (1996) (noting that the Supreme Court has never made an “official choice” among competing theories of interpretation). See generally Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535 (1999) (describing and evaluating various theories of interpretation).

223. See *supra* Part II.C; see also David Fontana, *The Next Generation of Transnational/Domestic Constitutional Law Scholarship: A Reply to Professor Tushnet*, 38 LOY. L.A. L. REV. 445, 457 (2004) (“[I]t would be more accurate to say we have had a Court that has paid at least some attention to transnational law for a long time, and many people are just now noticing.”); Glensy, *supra* note 155, at

It is the new Sovereigntist view that the “practices of other countries are irrelevant to understanding” American constitutional concepts that is “anomalous.”<sup>224</sup> Second, the Framers contemplated that courts would use foreign materials and engage in comparative analysis.<sup>225</sup> Third, other modern constitutional courts frequently use comparative constitutional analysis.<sup>226</sup> Numerous scholars have explained these points.<sup>227</sup> Less known, however, and one of the contributions this article hopes to make to the debate, is how our state court system routinely engages in comparative constitutionalism. The categorical rejection of foreign materials contradicts a practice deeply embedded in our legal system.

Comparative constitutionalism is a hallmark of our state court system. Each of the fifty states—with their own separate judicial systems and constitutional law—extensively cite to one another when interpreting their state constitutions without any hue and cry.<sup>228</sup> The practice has been continuous since the 1800s.<sup>229</sup> State supreme courts not only routinely cite to “foreign” decisions, but actively encourage lawyers appearing before them to rely on those decisions.<sup>230</sup> “The prevailing practice has been for the courts in one state to consider, and often cite in support

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361–62 (“United States courts have, from the founding of the nation to the present day, referenced foreign legal sources in a variety of different contexts.”); Jackson, *supra* note 55, at 110–11 n.7 (citing a laundry list of cases showing that references to foreign and international sources “occur episodically in constitutional decisions throughout the Court’s history”).

224. Jackson, *supra* note 55, at 110.

225. See discussion *supra* Part II.C.

226. See *supra* notes 62–67 and accompanying text.

227. See *id.*

228. Harding, *supra* note 63, at 422; see also James A. Gardner, *Whose Constitution Is It? Why Federalism and Constitutional Positivism Don’t Mix*, 46 WM. & MARY L. REV. 1245, 1263–64 (2005) (noting that “American courts have a long tradition of consulting related rulings from other jurisdictions when analyzing issues arising under the law of their own jurisdictions. . . . [And even] in constitutional law despite the fact that the answers to constitutional questions are in principle to be found exclusively within the four corners of the relevant constitution.”).

229. Friedman et al., *supra* note 119, at 797–98, 801–03 (studying 5900 cases from forty-eight states and finding that “out-of-state citations account[ed] for roughly 40% of all case citation in the 1870–1970 period” and that “out-of-state cases are cited often—24,956 times, to be precise (out of a total of over 60,000 cites in the 5,900 cases)”); see also James N. G. Cauthen, *Horizontal Federalism in the New Judicial Federalism: A Preliminary Look at Citations*, 66 ALB. L. REV. 783, 788, 790–94 (2003) (study of thirteen state supreme courts’ citation to other state supreme court decisions when interpreting state constitutional rights); cf. Patrick Baude, *Interstate Dialogue in State Constitutional Law*, 28 RUTGERS L.J. 835, 838, 847–64 (1997) (collecting a “comprehensive list of the occasions on which a state’s highest court referred to the constitution of another state”). Federal courts on occasion also look to state court decisions for guidance. Edmund B. Spaeth, Jr., *Toward a New Partnership: The Future Relationship of Federal and State Constitutional Law*, 49 U. PITT. L. REV. 729, 742 (1988) (“Just as the opinions of the state courts have been enriched by analysis of and response to the federal cases, so may the opinions of the federal courts be enriched by analysis of and response to the state cases.”).

230. See, e.g., *State v. Geisler*, 610 A.2d 1225, 1232 (Conn. 1992) (listing “sister state decisions” as a “tool[] of analysis” for interpreting the Connecticut constitution); *State v. Wheaton*, 825 P.2d 501, 504–05 (Idaho 1992) (Bistline, J., concurring) (indicating the court’s receptiveness to relying on sister state decisions in interpreting the Idaho constitution); *Davenport v. Garcia*, 834 S.W.2d 4, 20 (Tex. 1992) (encouraging citation to sister state constitutional decisions); *State v. Zaccaro*, 574 A.2d 1256, 1259 (Vt. 1990) (explaining that when interpreting the Vermont state constitution, the Court “may look for guidance to persuasive holdings . . . from sister-state jurisdictions”); *State v. Jewett*, 500 A.2d 233, 237 (Vt. 1985) (urging attorneys to argue other state precedent).

of their own decisions, the developing jurisprudence in other states. This sort of cross-fertilization has been a distinctive feature of the state constitutional law movement.<sup>231</sup> Judges uniformly find decisions of other state supreme courts—even on constitutional matters—“relevant and appropriate for consideration.”<sup>232</sup> One recent study of thirteen state courts of last resort found that over one-third of the decisions involving interpretation of state constitutional provisions included citation to out-of-state authority.<sup>233</sup> In more than three-quarters of those decisions, the courts cited to more than one out-of-state decision.<sup>234</sup> They even, on occasion, cite to other nations’ decisions and international law.<sup>235</sup>

Of course, when state courts cite to similar decisions from other jurisdictions, they do so only as persuasive authority.<sup>236</sup> Universal agreement exists that “state supreme courts have the unquestioned, final authority to interpret their state constitutions.”<sup>237</sup> State “courts seem to consult rulings from other jurisdictions more to educate themselves than to inquire into any authoritative constraints on how they themselves may rule.”<sup>238</sup> “[J]udges seek only to gain the benefit of relevant human experience for the purpose of sharpening their own decision making; the consulted ruling carries no more intrinsic weight than would, say, a work of history or a law review article.”<sup>239</sup> State courts thus do not consult “foreign” authority with any “belief that judicial rulings from other jurisdictions are in any sense binding within the consulting jurisdiction.”<sup>240</sup>

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231. Peter R. Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 13, 23 (1988); see also David Blumberg, *Influence of the Massachusetts Supreme Judicial Court on State High Court Decisionmaking 1982–1997: A Study in Horizontal Federalism*, 61 ALB. L. REV. 1583 (1998) (detailing the extensive citation to and reliance on decisions of the Supreme Judicial Court of Massachusetts by other state courts in deciding constitutional questions); Mary Anne Bobinski, *Citation Sources and the New York Court of Appeals*, 34 BUFF. L. REV. 965, 1002 (1985) (noting the prevalence of citations to the decisions of other jurisdictions in the opinions of the New York Court of Appeals); James Leonard, *An Analysis of Citations to Authority in Ohio Appellate Decisions Published in 1990*, LAW LIBR. J. 129, 152 (1994) (“[W]hen faced with more difficult issues, the Ohio Supreme Court is more likely to cite . . . nonbinding foreign sources . . .”); Fritz Snyder, *The Citation Practices of the Montana Supreme Court*, 57 MONT. L. REV. 453, 462–66 (1996) (describing how Montana courts have traditionally cited to out-of-state decisions from throughout the country).

232. Gregory A. Caldeira, *Legal Precedent: Structures of Communication Between State Supreme Courts*, 10 SOC. NETWORKS 29, 30 n.2 (1988).

233. Caution, *supra* note 229, at 790.

234. *Id.*

235. See *Sterling v. Cupp*, 625 P.2d 123, 131 & n.21 (Or. 1981). In that case, the Oregon Supreme Court examined “not only traditional sources of persuasive authority such as decisions of sister state courts, but also Eighteenth Century treatises on penology and the Universal Declaration of Human Rights.” Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 224 (1998).

236. CHRISTINA L. KUNZ ET AL., *THE PROCESS OF LEGAL RESEARCH* 6 (4th ed. 1996).

237. Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 100 (2000); see also *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983) (affirming state court authority to interpret its own law and rejecting federal court authority to revisit that interpretation).

238. Gardner, *supra* note 228, at 1265.

239. *Id.*

240. *Id.*

The same tradition exists when the state courts have interpreted provisions similar to federal constitutional provisions. In those circumstances, not only do state courts turn to the U.S. Supreme Court decisions for guidance, but the federal interpretation is presumed (rightly or wrongly) correct.<sup>241</sup> “[C]ongruence with federal decisional law is assumed to be the norm, and deviation is for all intents and purposes impossible.”<sup>242</sup> Even if this conclusion overgeneralizes,<sup>243</sup> it is widely believed that when interpreting state constitutional provisions, the state court should refer to U.S. Supreme Court and other state court opinions as “important guides on the subjects which they squarely address.”<sup>244</sup> Of course, as with state-to-state citation, although citation to the U.S. Supreme Court is common, all recognize that the state courts constitute an “independent appellate judiciary, and do not exist, when it comes to interpreting the Constitution and the laws of the state, solely to mimic decisions of the Supreme Court of the United States.”<sup>245</sup>

If the Sovereigntists are correct—that citation to foreign law undermines court legitimacy—then state courts should never cite to sister

241. Friesen, *supra* note 205, at 1067–69 (condemning the “uncritical adoption, when giving meaning to state constitutional rights, of verbal formulas that the United States Supreme Court uses to measure federal constitutional rights or powers” and calling for the creation of “a truly independent set of constitutional rules at the state level”); Robert F. Williams, *In the Supreme Court’s Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 356 (1984).

242. Friedman, *supra* note 237, at 103 (citing Thomas Morawetz, *Deviation and Autonomy: The Jurisprudence of Interpretation in State Constitutional Law*, 26 CONN. L. REV. 635, 638 (1994)); see also James A. Gardner, *The “States-as-Laboratories” Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475, 488–89 (1996). States have, however, over time interpreted their own constitutional provisions more broadly than federal provisions. JAMES A. KUSHNER, GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION § 1:07 (2006) (noting that while “the Burger Court pursued a pattern of retrenchment, stopping the advance of the Warren Court’s expansion of equal protection, state courts, particularly those of the most urbanized jurisdictions, commenced a pattern of expanding rights through interpretation of the state constitutional equivalents to the federal equal protection clause”).

243. State constitutionalism, and the idea that state constitutions could provide greater protections than the federal constitution, did not emerge until the mid-1970s. Justice Brennan’s famous 1977 *Harvard Law Review* article is often seen as the fountainhead of the state constitutionalism movement. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502–04 (1977); see also James D. Heiple & Craig James Powell, *Presumed Innocent: The Legitimacy of Independent State Constitutional Interpretation*, 61 ALB. L. REV. 1507, 1509 (1998) (observing that since Justice Brennan’s *Harvard Law Review* article appeared, “[s]tate courts have now rendered hundreds of decisions which grant greater protection to individual rights . . . than the Supreme Court has been willing to afford under the Federal Constitution”); Stewart G. Pollack, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983) (characterizing Justice Brennan’s *Harvard Law Review* article as the “Magna Carta of state constitutional law”); David Schuman, *The Right to “Equal Privileges and Immunities”: A State’s Version of “Equal Protection,”* 13 VT. L. REV. 221 (1988) (describing the hundreds of cases where state supreme courts found that their state constitutions provide greater protections than those under the federal Constitution); *Symposium: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959 (1985) (discussing the emergence of state constitutionalism).

244. *State v. Hunt*, 450 A.2d 952, 964 (N.J. 1982) (Handler, J., concurring).

245. Friedman, *supra* note 237, at 108 (quoting *Brown v. State*, 657 S.W.2d 797, 810 (Tex. Crim. App. 1983) (Teague J., dissenting)); see also Friesen, *supra* note 205, at 1073 (“State supreme courts have the power to interpret state law, including constitutional law, in any way they deem sound.” (citing *Alderman v. United States*, 394 U.S. 165, 175 (1969))).

states or the U.S. Supreme Court when interpreting their own constitutions. That they do, and have done so extensively since the 1800s, without any apparent loss in legitimacy, undermines the force of the Sovereignists' argument. Ironically, unlike on the international level, the debate with state court decision making is not whether state courts can or should refer to other state decisions. The debate is only whether state courts in consulting those foreign sources may uncritically adopt other state or federal interpretations of similar constitutional provisions.<sup>246</sup>

There is a natural response to this comparison: states share a common history as part of a federalist system, and therefore interstate citation, or even borrowing, does not raise the same problem as the U.S. Supreme Court citing to foreign law. Admittedly, state constitutional provisions are born and developed in a context that the national experience and the experience of sister states influences. But this is a difference of degree, not kind. On the one hand, states are not as similar as one might think. State constitutions are distinctive "in their origins," "their legal premises," and "their history."<sup>247</sup> Likewise, "framers of the state constitution[s] were different persons from the founding fathers, writing under different circumstances."<sup>248</sup> As political scientist Alan Tarr has detailed, "each state is a distinct polity, with its own fundamental law . . . ."<sup>249</sup> Accordingly, Alaska's constitutional history and tradition,<sup>250</sup> for instance, is remarkably different than Connecticut's constitutional

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246. See Friedman, *supra* note 237, at 95 (describing three approaches to construing state constitutional provisions; all of which permissibly look to federal and other state law for guidance). Compare Friesen, *supra* note 205, at 1068–70 (arguing for state court to assert greater independence from the federal judiciary when interpreting their own constitutions), and Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421 (1996) (supporting independent constructions of state constitutional provisions), with James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992) (arguing for greater deference to national constitutionalism), and Earl M. Maltz, *The Political Dynamic of the "New Judicial Federalism,"* 2 EMERGING ISSUES ST. CONST. L. 233, 235–38 (1989) (same), with Kahn, *supra* note 77, at 1159–60 (advocating a middle-ground position that rejects the doctrine of unique state sources while freeing the state courts "from the constitutionalism of the contemporary federal courts").

247. G. Alan Tarr, *State Constitutional Interpretation*, 8 TEX. REV. L. & POL. 357, 357–59 (2004); see also THE FEDERALIST NO. 46, at 365 (James Madison) (John C. Hamilton ed., 1864) (explaining that "[t]he federal and state governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes").

248. Thomas Morawetz, *Deviation and Autonomy: The Jurisprudence of Interpretation in State Constitutional Law*, 26 CONN. L. REV. 635, 641 (1994).

249. Tarr, *supra* note 247, at 364; see also Friesen, *supra* note 205, at 1074 (noting that "[s]tate declarations of individual rights have histories and qualities that differ, to a greater or lesser degree, from each other and from the first ten amendments to the Federal Constitution").

250. Ronald L. Nelson, *Welcome to the "Last Frontier," Professor Gardner: Alaska's Independent Approach to State Constitutional Interpretation*, 12 ALASKA L. REV. 1, 5–9 (1995) (describing Alaska's unique constitutional background, how Alaska is "very different from the other forty-nine states," and how the "Alaska constitution was purposefully 'customized' for the Alaskan experience"); see also Thomas V. Van Flein, *The Baker Doctrine and the New Federalism: Developing Independent Constitutional Principles Under the Alaska Constitution*, 21 ALASKA L. REV. 227, 228 (2004) (discussing the sovereignty of the individual states and the ability of Alaskan courts to interpret Alaska's constitutional provisions differently from similar ones in the U.S. Constitution).

history,<sup>251</sup> which is different than Oregon's,<sup>252</sup> which is different from Louisiana's.<sup>253</sup> If, as suggested in the debate over citing to foreign law, a constitution is so peculiar to each locality, then surely state courts would have nothing to learn from their sister states—but that has long been found untrue.

On the other hand, the distinctions between the United States and other countries are often overplayed.

The United States has never been a hermetically sealed legal system. It shares a common legal heritage, tradition, and history with many foreign constitutional systems. For that reason, constitutional concepts like "liberty," "equal protection," "due process of law," and privacy have never been exclusive U.S. property, but have long carried global meaning.<sup>254</sup>

Moreover, some countries, like Canada, "share a common law heritage in private law in liberal democratic and federal structures of government" and other historical, societal, and legal similarities that make their laws particularly well suited to comparison.<sup>255</sup> Other countries have long borrowed from the U.S. system, and American constitutional precedents have been emulated or adopted abroad, which is another reason why foreign law is often not all that different.<sup>256</sup>

In short, that state courts have a rich tradition of comparative constitutionalism reveals that the debate over citing to foreign law is a question only of what weight to afford that law—the very debate that correctly ensues among the states.<sup>257</sup> The real issue is not whether seeking guidance from abroad is ever inappropriate, but whether in any particular case the foreign law is persuasive.

251. Michael F. J. Picuch, *State Constitutional Law in the Land of Steady Habits: Chief Justice Ellen A. Peters and the Connecticut Supreme Court*, 60 ALB. L. REV. 1757, 1177–79 (1997) (describing the development of the Connecticut Constitution and noting the court's willingness to engage in independent interpretation); see also *Moore v. Ganim*, 660 A.2d 742, 771–76 (Conn. 1995) (Peters, C.J., concurring) (discussing the early constitutional history of Connecticut).

252. Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); see also Louis H. Pollak, *Judge-Professor Linde*, 70 OR. L. REV. 679, 682 (1991) (describing Judge Hans Linde's leadership in the state constitutional law movement as "one of the century's most important judicial contributions").

253. Robert F. Williams, *Shedding Tiers "Above and Beyond" the Federal Floor: Loving State Constitutional Equality Rights to Death in Louisiana*, 63 LA. L. REV. 917, 918–20 (2003) (noting "the rich and varied equality provisions contained in" the different state constitutions and discussing Louisiana's equality provision that was added in 1974 and distinctly different from the federal equal protection clause).

254. Koh, *International Law*, *supra* note 99, at 47; see also Schauer, *supra* note 185, at 911–19 (explaining how even very old constitutions are not "entirely indigenous").

255. Harding, *supra* note 63, at 411 (explaining that "[a]s followers of the common law tradition, [Canada and the U.S.] adhere to similar interpretations of the rule of law, follow similar procedural and evidentiary rules, and believe strongly in the concept of stare decisis"); La Forest, *supra* note 62, at 212–13 (noting that Canada and the U.S. share a "common law heritage in private law and in liberal democratic and federal structures of government" that are "peculiar to North American legal and societal development").

256. Tripathi, *supra* note 156, at 329–42.

257. See *supra* note 246 and accompanying text.

### III. JUSTIFYING THE USE OF FOREIGN LAW

For all of the deficiencies in the Sovereigntist position, it is still incumbent to explain why use of foreign law as persuasive authority is consistent with American constitutionalism and the proper role of the judiciary. As shown below, one need not flirt with the idea of a universal, natural law that so many find objectionable. One also need not suggest that foreign law should be outcome-determinative, or not take seriously “the particularist perspective on constitutional arrangements as manifestations of key attributes of national identity.”<sup>258</sup> Foreign law is persuasive authority: nothing more, nothing less.<sup>259</sup>

#### A. *Transparency and Judicial Dialogue*

The U.S. Supreme Court should cautiously continue to cite to foreign law because an essential part of judging is citing to authority that the justices use to arrive at their decisions. Our legal system is imbued with the tradition that judges must justify their holdings.<sup>260</sup> In doing so, they must be candid and honest in revealing the sources, and stating the reasons, for their decisions.<sup>261</sup> Transparency is important.<sup>262</sup> The public is entitled to know why the Court ruled a particular way and to be provided the opportunity to subject the reasoning to scrutiny.<sup>263</sup> A decision that accurately reveals the sources upon which it relies also furnishes greater

258. Jacobsohn, *supra* note 11, at 1767.

259. There are, admittedly, other uses for foreign law. For example, the U.S. Supreme Court should be able to use, and has used, foreign law to explain the effects of a particular interpretation. Larsen, *supra* note 37, at 1288–91, 1299 (describing a topology of foreign law uses including “expository” and “empirical” approaches). In this situation, the Court is not using the foreign source to aid in interpretation of a domestic constitutional provision. Certainly no objection can exist to using foreign law to describe how the U.S. system is different, and therefore why a contrary result is warranted. *Id.* at 1299.

260. Choudhry, *supra* note 64, at 824 (explaining that the Court is “under an obligation to engage in a process of public justification for their own decisions”); Nancy A. Wanderer, *Writing Better Opinions: Communicating with Candor, Clarity, and Style*, 54 ME. L. REV. 47, 48 (2002) (explaining the “judiciary’s responsibility to communicate clearly with its various audiences as the essential ingredient in achieving the goals of our judicial system”); cf. Friedman et al., *supra* note 119, at 793–94 (describing reasons for citation and their legitimizing function).

261. Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721, 735–41 (1979) (arguing for intellectual honesty and the need for judges to articulate the reasons for their decisions); see also Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 297 (1990) (arguing that judges should be candid, but not introspective); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737–50 (1987) (arguing that honesty and candor in judicial decisions are essential attributes of the judicial process).

262. Dorsen, *supra* note 3, at 540 (quoting Justice Breyer as saying “[i]f the foreign materials have had a significant impact on my thinking, they may belong in the opinion because an opinion should be transparent. It should reflect my actual thinking.”); see also Shapiro, *supra* note 261, at 736–38 (arguing that transparency and candor is important in judicial opinions, so that the Court’s analysis may be subjected to rational scrutiny).

263. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365–72, 388 (1978) (noting “[b]y and large” that “fairness and effectiveness of adjudication are promoted by reasoned opinions” and arguing that reasoned response to reasoned argument is an essential component of the judicial process).

guidance for those who seek to discover from the decision what the next case will likely hold.<sup>264</sup> That judges must provide a candid and reasoned explanation of the court's holding is a foundation of American jurisprudence and distinguishes our approach from that taken in countries like France, "where judges typically employ an opinion form that is terse and syllogistic."<sup>265</sup> As Justice Breyer explains: "[a justice's] opinion is meant to reflect [the justice's] actual method of reaching a legal conclusion; and references to those legal materials that had significance and will help the reader understand."<sup>266</sup> Accordingly, if a justice used certain authority to arrive at her decision, then the public has a right to know about it.

With this backdrop, citation to foreign law sources is inescapable. Justices frequently read and use foreign law.<sup>267</sup> Judges may even use foreign law unconsciously.<sup>268</sup> Judges from different nations commonly interact on a personal level and at international judges' conferences.<sup>269</sup> "Courts are talking to one another all over the world,"<sup>270</sup> and international and foreign sources inevitably inform decisions.<sup>271</sup> The only issue is whether "judge[s] should disclose—and be ready to debate" their views.<sup>272</sup> And of course they should. If a judge has used foreign law, the public has the right to know about it and question whether, given the comparability of contexts and the judge's reasoning, the outcome is sound. In short, judges must be willing to defend their decisions.

Remarkably, Justice Scalia and others suggest that judges should read foreign legal materials as much as they want, but just not put the ci-

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264. Leflar, *supra* note 261, at 737; see also Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651 (1995) (exploring, and ultimately criticizing, the "prediction model" whereby lower courts would rule based on a prediction as to how the highest court would likely rule).

265. Wanderer, *supra* note 260, at 49 (citing Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT'L L. 81, 82 (1994)).

266. Dorsen, *supra* note 3, at 541.

267. Jackson, *supra* note 55, at 119 ("It is almost impossible to be a well-informed judge or lawyer now without having impressions of law and governance in countries other than one's own.").

268. Tushnet, *supra* note 13, at 1238.

269. L'Heureux-Dubé, *supra* note 102, at 26 (describing the increased personal contact among judges and noting that "[j]udges often discuss common problems at international judges' conferences, by email, and over the telephone"); Slaughter, *supra* note 181, at 1120–23 (describing how judges from constitutional courts from different nations began attending conference with one another and exchanging views about what their nations' constitutions said and meant).

270. Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 100–18 (1994); see also MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 158 (1991) (describing a "brisk international traffic in ideas about rights" carried on by judges); Abrahamson & Fischer, *supra* note 142, at 287; Reem Bahdi, *Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts*, 34 GEO. WASH. INT'L L. REV. 555, 557–58 (2002); Slaughter, *supra* note 181, at 1103.

271. Jackson, *supra* note 55, at 119; see also Law, *supra* note 4, at 661 (describing how courts develop generic constitutional theory, analysis, and doctrine in response to similar stimuli). For an example of this interaction between the judiciaries of different nations, see JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION 1–7 (Robert Badinter & Stephen Breyer eds., 2004).

272. Jackson, *supra* note 55, at 119 n.52 (quoting Michael Kirby, Justice, High Court of Austl., Grotius Lecture at the Annual Meeting of the American Society of International Law: International Law—The Impact on National Constitutions 40 (Mar. 29, 2005)).



tations in the opinions.<sup>273</sup> This position—which appears to come close to advocating deception in decision making—is undesirable.<sup>274</sup> Promoting opaque decisions is unattractive, not only as antithetical to our legal tradition, but because it encourages judges to be arbitrary and manipulative.<sup>275</sup> Indeed, the very concern that Sovereignists rail against—pragmatic, policy-based decisions—are likely to be increased if judges use foreign materials silently.<sup>276</sup> Omitting key sources that inform a judge's decision from the opinion insulates the basis of the decision from debate and attack: vital means to constrain the judiciary's exercise of power.<sup>277</sup>

The citation to foreign law is not only sensible for transparency reasons, it also can serve to legitimize the Court as an institution, both within the United States and around the world. Legitimacy “emanate[s] from the persuasiveness of the arguments and the enhancement of communal knowledge.”<sup>278</sup> In some contexts, “foreign and international law are actually necessary to legitimate decision-making.”<sup>279</sup> Early on in our nation's history, Americans “self-consciously” appealed to the views of other nations “to win global legitimacy for their fledgling republic.”<sup>280</sup> In others, foreign law legitimizes why our courts are doing something dif-

273. Dorsen, *supra* note 3, at 534 (quoting Justice Scalia as saying, “I mean, go ahead and indulge your curiosity! Just don’t put it in your opinions!”).

274. Cf. Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 24–25 (1964) (criticizing deception when judges claim they are deciding a case for certain reasons, when in fact other reasons are decisive).

275. Altman, *supra* note 261, at 318–27 (arguing how introspection and hidden reasoning reduces the law's constraints); see also Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887, 904 (1987) (explaining that requiring judges to give reasons for their decisions provides a “profound constraint on judicial discretion”).

276. Shapiro, *supra* note 261, at 737 (noting that “candor is the sine qua non of all other restraints on abuse of judicial power, for the limitations imposed by constitutions, statutes, and precedents count for little if judges feel free to believe one thing about them and to say another[.]”); see also Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 667 (1983) (“Candor and sincerity are part of the distinctive process that legitimates judicial power—a process of decisionmaking and discourse whose requirements include writing opinions and giving reasoned justifications. These constraints help to promote the public accountability of judges and to stimulate judicial reflection and self-control. Without a requirement of candor, the constraints would be meaningless.”).

277. See JOHN RAWLS, *A THEORY OF JUSTICE* 133 (1971) (arguing that “publicity”—full disclosure of governing principles—is one of the essential formal constraints on the concept of right); see also Shapiro, *supra* note 261, at 737 (“In the absence of an obligation of candor, this constraint [on the judiciary's use of power] would be greatly diluted, since judges who regard themselves as free to distort or misstate the reasons for their actions can avoid the sanctions of criticism and condemnation that honest disclosure of their motivation may entail.”).

278. Harding, *supra* note 63, at 459; see also Jens C. Dammann, *The Role of Comparative Law in Statutory and Constitutional Interpretation*, 14 ST. THOMAS L. REV. 513, 540–54 (2002) (arguing that use of foreign law is legitimate using Habermas' theory of general discourse).

279. Harding, *supra* note 63, at 459 (citing Jackson, *Narratives of Federalism*, *supra* note 97, at 262; McCrudden, *supra* note 66, at 523–25); see also Bryde, *supra* note 155, at 207 (“As already mentioned, compared to this hidden background influence, open references to foreign law are rare. When they appear, they usually serve to provide additional legitimacy.”).

280. Koh, *International Law*, *supra* note 99, at 47.

ferent.<sup>281</sup> As Frank Michelman has described it, by comparative encounters, we “clarify our picture of ourselves.”<sup>282</sup>

Lastly, apart from issues of transparency and legitimacy in judicial reasoning, the use of foreign materials is particularly appropriate if one considers dialogical (as distinguished from particularist or universal) methods of constitutional interpretation. Tellingly, despite a fair amount of literature on the topic, those who condemn the use of foreign sources generally ignore the dialogic models.<sup>283</sup>

In recent years, theories of constitutional dialogue have emerged “as one of the principal contenders in the quest for a satisfactory theory” that legitimizes judicial review.<sup>284</sup> Dialogical theories are based on “the notion that judicial review is part of a ‘dialogue’ between the judges and the legislatures.”<sup>285</sup> Rather than focusing on interpretative criteria, dialogic models of interpretation focus on the “institutional process through which decisions about constitutional meaning are made.”<sup>286</sup>

Dialogical models are particularly well suited to justify the use of foreign law, a point generally well accepted. Indeed, the failure of the U.S. Supreme Court to engage more vigorously in international dialogue leaves the U.S. judiciary out-of-step and behind the times.<sup>287</sup> A significant amount of scholarship has emphasized the essential nature of this dialogue and its benefits.<sup>288</sup> “[C]ourts should be talking with each other . . . and even with academics. All are engaged in a search for the meaning of common concepts. The unique authority of each does not speak at

281. *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) (stating that other nations’ “experience[s] may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem”); Jackson, *supra* note 55, at 117 (explaining how comparisons can shed light on the “distinctive functioning of one’s own system” and that engagement with foreign law “need not lead to its adoption”); L’Heureux-Dubé, *supra* note 102, at 26–27 (arguing that “[c]ross-pollination helps not only when we *accept* the solutions and reasoning of others, but when we *depart* from them, since even then, understanding and articulating the reasons a different solution is appropriate for a particular country helps make a better decision.”).

282. Michelman, *supra* note 98, at 1758–59 (describing how comparative constitutionalism allows us to understand our own unique culture and legal traditions better); *see also* Kahn, *supra* note 208, at 2679 (advocating a cultural approach to comparative constitutionalism that “can illuminate the different constitutionalisms that already exist . . . [and m]ost importantly . . . help us to understand who we are”).

283. Alford, *In Search of A Theory*, *supra* note 9, at 639.

284. Bateup, *supra* note 189, at 1118.

285. Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures: (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)*, 35 OSGOODE HALL L.J. 75, 79 (1997).

286. Bateup, *supra* note 189, at 1118.

287. L’Heureux-Dubé, *supra* note 102, at 37–40.

288. *See, e.g.*, Choudhry, *supra* note 64, at 820 (discussing methods by which foreign courts use comparative constitutional law); Harding, *supra* note 63, at 424–27 (describing foreign law and the transnational dialogue); Michelman, *supra* note 98, at 1758–61 (describing a dialogical approach to constitutional comparison); Waters, *supra* note 54, at 554–74; *see also* Carozza, *supra* note 66, at 1077–89 (describing the global discourse over human rights law); Matthew S. Raalf, *supra* note 66, 1242–44.

all to the common substance of their interpretative effort.”<sup>289</sup> Melissa Waters has captured the problem in a nutshell:

[T]his is not simply a debate over the relevance of foreign legal materials in the work of the U.S. courts. In a larger sense, it is a debate over what role U.S. courts will play in the emerging transnational judicial dialogue among the world’s courts. Moreover, the outcome of this debate will . . . have a tremendous impact on the ability of the Supreme Court and other U.S. courts to influence the emerging transnational judicial dialogue, and through that dialogue, the development of international legal norms on a wide range of legal issues.<sup>290</sup>

### B. *Pragmatic Considerations*

This article has attempted to show that the recent criticism of the use of foreign law is much ado about nothing. It would be remiss, however, not to conclude by briefly describing how the use of foreign law sources as persuasive authority is also sensible in several pragmatic respects. First, an “enormous value [exists] in any discipline of trying to learn from the similar experience of others.”<sup>291</sup> Practical benefits exist to having judges learn from “the technical competence of their fellow professionals operating in an increasingly interconnected world system.”<sup>292</sup> Foreign law can be a “source of good ideas” and provide “empirical evidence about how a prospective legal rule operates in practice.”<sup>293</sup> Indeed, “considering and comparing judgments from various jurisdictions makes for stronger, more considered decisions, even if the result is the same.”<sup>294</sup>

This does not mean that the law of foreign nations should ever control our Constitution, but rather that foreign law informs and aids our Court in its interpretation of our Constitution.<sup>295</sup> “No [nation’s] experiences are so different as to reject the norms of equality, liberty, and due process” developed in other nations.<sup>296</sup> The approach is pragmatic:

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289. Kahn, *supra* note 77, at 1163.

290. Waters, *supra* note 38, at 160.

291. Breyer, Keynote Address, *supra* note 3, at 266; Jacobsohn, *supra* note 11, at 1766 (describing the “natural desire to learn from others in order to improve one’s own circumstances” and the “logic of self-improvement”).

292. Kersch, *supra* note 9, at 354.

293. Bodansky, *supra* note 210, at 424–25.

294. L’Heureux-Dubé, *supra* note 102, at 39; *see also* Abrahamson & Fisher, *supra* note 142, at 292 (“[E]ven when [the study of foreign experiences] does not immediately move us into a new stage of thinking, it nearly always affords us a deeper understanding of, and a more balanced perspective on, our own law.” (quoting Professor Mary Ann Glendon)).

295. Vicki Jackson has appropriately described this as the Engagement Model. Jackson, *supra* note 55, at 112.

296. Kahn, *supra* note 77, at 1162; *see also* Wald, *supra* note 8, at 441–42 (“[C]itizens of most countries have common aspirations, a sense of dignity and worth, and intuitions and feelings about justice. Why then would we consciously shut the door to American judges on looking at the law of these countries as it affects the basic human needs and dilemmas of their people?”).

[C]onstitutional law can be understood as a site of engagement between domestic law and international or foreign legal sources and practices. On this view, the constitution's interpreters do not treat foreign or international material as binding, or as presumptively to be followed. But neither do they put on blinders that exclude foreign legal sources and experience.<sup>297</sup>

Or put simply by Justice Ginsburg, "[w]e are the losers if we do not both share our experience with, and learn from others."<sup>298</sup>

The use of foreign law furthers a second worthy goal. The use of foreign law serves as a means for diplomatic harmonization on important human rights issues. Judges "are beginning to articulate their responsibility to 'help the world's legal systems work together, in harmony, rather than at cross purposes.'"<sup>299</sup> As Professor Koh describes it:

[D]omestic courts must play a key role in coordinating U.S. domestic constitutional values with rules of foreign and international law, not simply to promote American aims, but to advance the broader development of a well-functioning international judicial system. . . . U.S. courts must look beyond narrow U.S. interests to the 'mutual interest of all nations in a smoothly functioning international legal regime' and, whenever possible, should 'consider if there is a course that furthers, rather than impedes, the development of an ordered international system.'<sup>300</sup>

Isolationism and parochialism undermine U.S. influence over the global development of human rights.<sup>301</sup>

The "U.S. Supreme Court's failure to engage in the international judicial dialogue may [also] cause other nations to be less willing to rely on its rulings . . . [and] reduce[s] its ability to shape the conversation about legal norms."<sup>302</sup> Traditionally, the United States has had an unusual amount of influence on emerging democracies whose constitutional courts would rely on U.S. Supreme Court precedent.<sup>303</sup> But that influence is waning.<sup>304</sup> Those courts are "increasingly looking to judicial decisions from Europe, Australia, Africa, and Canada."<sup>305</sup> To the extent the

297. Jackson, *supra* note 55, at 114.

298. Ginsburg, *supra* note 42, at 1.

299. Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367, 392 (1998) (quoting *Howe v. Goldcorp Invs. Ltd.*, 946 F.2d 944, 950 (1st Cir. 1991)); see also Kersch, *supra* note 9, at 354-55.

300. Koh, *International Law*, *supra* note 99, at 53-54 (citing *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 555, 567 (1985) (Blackmun J., concurring in part)).

301. *Id.* at 56.

302. *International Judicial Dialogue*, *supra* note 67, at 2072; L'Heureux-Dubé, *supra* note 102, at 27, 29-31, 38 (arguing that the Rehnquist Court is "less influential internationally than its predecessors" in particular on human rights issues, in part because of its failure to engage with other nations' courts and their laws).

303. See generally CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD (Louis Henkin & Albert J. Rosenthal eds., 1990).

304. Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 561 (1988); see also L'Heureux-Dubé, *supra* note 102, at 37; Waters, *supra* note 54, at 493 n.26.

305. Waters, *supra* note 54, at 493.

U.S. Supreme Court “refuses to consider the relevance of decisions from other legal systems, this will eventually lead courts in other legal systems . . . to view U.S. Supreme Court jurisprudence as irrelevant and isolated.”<sup>306</sup> Justice Michael Kirby of the High Court of Australia goes a step beyond. He has colorfully “gone so far as to warn that the United States is in danger ‘of becoming something of a legal backwater’ if its courts continue to disregard foreign precedent.”<sup>307</sup>

### CONCLUSION

After several years of promising progression towards a meaningful discourse on how to engage appropriately in comparative constitutionalism,<sup>308</sup> recent years have been marred by a steady stream of academic criticism and, at times, crass political condemnation of the Supreme Court’s use of foreign law. Let’s hope that this criticism has seen its end, because a continued backlash will undoubtedly have a chilling effect. The arguments proffered to categorically bar the use of foreign law in all circumstances are misplaced, at times have the whiff of xenophobia about them, and are inconsistent with a long history of practice. The use of foreign law as persuasive authority is deeply embedded in our legal traditions, particularly in state court constitutionalism. Moreover, the mere citation to foreign laws neither undermines our national sovereignty nor provides judges the means to render unprincipled, nakedly political decisions. When properly viewed, the condemnation of the Court’s use of foreign law is much ado about nothing: a storm in a teacup.

Contrary to the thrust behind recent attacks on the judiciary, the U.S. Supreme Court is sensible to cite cautiously to foreign law when it informs the Court’s decision. The United States is not so exceptional that it has neither anything to say to, nor learn from, other nations. More importantly, citing to persuasive authority—be it domestic or foreign—when that authority informs the Court’s decision is an integral part of what it means to be a justice when writing transparent, candid, and reasoned opinions. One can only hope that we quickly move beyond the parochial, and overly simplified, belief that foreign law should be categorically barred from constitutional adjudication. Instead of condemning the Court for citing to foreign law, academic scholarship would be more productively directed at educating the justices on how best to use and engage with it. For, in the final analysis, the Supreme Court’s use of foreign law is commendable, not illegitimate.

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306. Harding, *supra* note 63, at 415; see also Barak, *supra* note 103, at 27 (suggesting that the influence of American law may be declining).

307. O’Scannlain, *supra* note 8, at 1897 (quoting Michael Kirby, *Think Globally*, 4 GREEN BAG 2d 287, 291 (2001)).

308. Koh, *International Law*, *supra* note 99, at 48 (noting in January 2004 that “promising signs have emerged that the American ostrich is finally starting to take its head out of the sand”).