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Comparative Constitutional Advocacy

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Comparative Constitutional Advocacy

Abstract

When the Supreme Court handed down its decision in *Roper v. Simmons*, a longstanding debate about comparative analysis in constitutional cases came to national prominence. In *Roper* the Court relied in part on comparative precedent in ruling that the execution of juvenile offenders violates the Eighth Amendment's proscription against cruel and unusual punishment. This look beyond our borders earned the Supreme Court both accolades and scathing criticism. This article comprehensively evaluates the place of comparative analysis in our constitutional jurisprudence. It discusses and adds to the arguments in support of comparative constitutional advocacy offered by several leading scholars, and responds to arguments against the practice, including many that figured in the confirmation hearings for Chief Justice John Roberts and Associate Justice Samuel Alito.

The article identifies several catalysts that have driven comparative constitutionalism to the fore, including the exponential growth of foreign constitutional precedent, the similarity of constitutional issues worldwide, shared analytic methods among jurists, and increased availability of foreign materials. Also supporting the appropriateness of comparative analysis are increasing globalization, international judicial interaction, constitutional convergence, and the growing sophistication of foreign constitutional courts. Countering these factors are the U.S. Supreme Court's tradition of separateness, a longstanding view of our own constitutional uniqueness, America's head start in constitutionalism, and the persistence of insularity and exceptionalism in American legal education.

Comparative analysis is only worthwhile if it confers unique benefits not available from domestic law that justify the added challenges of identifying and contextualizing foreign constitutional law. On the benefits side of this formula are satisfaction of constitutional curiosity, shared institutional responsibility among jurists, and increased opportunities for constitutional dialogue. Further, by looking to decisions of foreign courts, U.S. jurists can identify rules that work elsewhere and consider their application here, as well as reject rules that have either proven detrimental elsewhere or clearly would do so here. Considering the opinions of foreign courts also exposes U.S. jurists to ideas uninfluenced by American political landscape, gives jurists the opportunity to return to first principles, and allows them opportunities for judicial cross-fertilization.

The article evaluates and rejects claims against comparative constitutional analysis that stem from conceptualization of the US Constitution as a social contract, reliance on original intention, or assertions that reliance on foreign precedent unconstitutionally delegates decision making and interferes with separation of powers. The article accepts some limits on use of foreign precedent based on American exceptionalism but argues that these concerns go to the weight of foreign precedent, not its admissibility. The main challenges inherent in comparative constitutional advocacy, however, stem primarily from U.S. lawyers' and judges' lack of expertise with foreign materials. Many advocates and jurists are not sufficiently familiar with foreign jurisdictions to ensure that materials selected are sufficiently similar and relevant to the case at hand. Adding to the challenge are obvious language and access barriers. Despite these challenges, comparative constitutional advocacy is worth the candle, although the article argues for several significant changes in legal education to give American lawyers more skill in using foreign materials. The exercise of looking beyond our borders for insight into constitutional issues should begin in law school and become a norm in constitutional advocacy.

Keywords

Comparative constitutionalism, Foreign precedent, Judicial interaction, Globalization, *Roper v. Simmons*, *Lawrence v. Texas*, Insularity, Exceptionalism, Original intention, Constitutional advocacy, Legal education, Judicial cross-fertilization, Constitutional convergence

COMPARATIVE CONSTITUTIONAL ADVOCACY

MARK C. RAHDERT*

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INTRODUCTION

In January 2005, Justices Stephen Breyer and Antonin Scalia of the U.S. Supreme Court engaged in a highly publicized "conversation" before an audience at American University's Washington College of Law about the use of other nations' constitutional law in evaluating and deciding U.S. constitutional questions.¹ Justice Breyer generally favored the use of such materials. He maintained that comparative constitutional law might sometimes be helpful, and the Court should be willing to at least look at what other nations have done on common questions² even though it should never be bound by foreign decisions.³ Justice Scalia opposed even limited use of foreign materials. Drawing on the postulates of American exceptionalism and originalism,⁴ he argued that foreign materials are at best

1. Antonin Scalia, Justice, U.S. S. Ct., & Stephen Breyer, Justice, U.S. S. Ct., Discussion at the American University Washington College of Law (Jan. 13, 2005), in 3 INT'L J. CONST. L. 519 (2005) [hereinafter AU Conversation].

2. Regarding a foreign court's consideration of a similar controversy before the U.S. Supreme Court, Justice Breyer stated: "So here you're trying to get a picture how other people have dealt with it. And am I influenced by that? I am at least interested in reading it." Antonin Scalia, Justice, U.S. S. Ct., & Stephen Breyer, Justice, U.S. S. Ct., Discussion at the American University Washington College of Law (Jan. 13, 2005) [hereinafter AU Conversation, *Transcript*] (transcript available through the Federal News Service).

3. AU Conversation, *supra* note 1, at 523 ("[D]ecisions of foreign courts do not bind American courts.").

4. *Id.* at 521 (noting that the United States does not have "the same moral and legal framework as the rest of the world, and never [has]").

irrelevant to American constitutional law, which requires interpretations of the language, structure, drafting and ratification of the U.S. Constitution, all of which are uniquely American legal questions.⁵

As the nation soon learned, Justices Breyer and Scalia's "AU conversation" was not a purely academic exchange. Behind the discussion (known to them though not yet to us) was the Supreme Court's pending decision in *Roper v. Simmons*.⁶ In an opinion by Justice Kennedy, the Court would rely in part on comparative precedent in ruling that the execution of juvenile offenders violates the Eighth Amendment's proscription against cruel and unusual punishment.⁷ *Roper* had been argued in October 2004, and the Court's decision was announced in early March 2005, barely six weeks after the Justices' conversation. The opinions in the case were almost certainly already being circulated among the Justices when the AU conversation occurred. In *Roper*, Justice Breyer joined Justice Kennedy's majority opinion. Justice Scalia's dissent castigated the Court for relying on international materials,⁸ advancing many of the same arguments he had put forward informally in the AU conversation.

Roper provoked considerable commentary both for and against the Court's decision. Many of *Roper*'s opponents took a cue from Scalia's dissent and charged the Court with misuse of foreign materials.⁹ Former House Majority Leader Tom DeLay singled out Justice Kennedy as an activist judge bent on re-writing the Constitution to suit his personal predilections regarding the death penalty.¹⁰ They

5. *Id.* ("If you told the framers of the Constitution that we're to be just like Europe, they would have been appalled.")

6. 543 U.S. 551 (2005).

7. *See id.* at 575-78 (devoting an entire section to the analysis of foreign law).

8. *See id.* at 624 (Scalia, J., dissenting) ("More fundamentally, however, the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.")

9. *E.g.*, Tony Blankley, *Black Robes and Betrayal*, WASH. TIMES, Mar. 2, 2005, at A17 ("The majority, still sensing its arguments to be rather feeble, went on to try to buttress their case further by citing a menagerie of international treaties and foreign laws."); John Hinderaker, *A Government of Men: Justice Kennedy changes his mind. Amazingly he found that the Constitution changed with him*, WKLY. STAND. (Wash., D.C.), Mar. 6, 2005 ("It is not unfair to say, however, that [Justice Kennedy's] attempted rationale consists of nothing but fine words, which contain no explanation of how, why, and when the opinions of non-Americans become relevant to our Constitutional jurisprudence."); Tom Parker, Editorial, *Alabama Justices Surrender to Judicial Activism*, BIRMINGHAM NEWS, Jan. 1, 2005, at 4B; Stuart Taylor Jr., *The Court, and Foreign Friends, as Constitutional Convention*, NAT'L. J., Mar. 5, 2005, Vol. 37, No. 10 (criticizing the Court for its reliance on international and foreign law).

10. *See, e.g.*, Mike Allen, *DeLay Takes Fight to Talk Radio*, WASH. POST, Apr. 20, 2005, at A04 (quoting Tom DeLay: "We've got Justice Kennedy writing decisions

cited Kennedy's reliance on foreign precedent as evidence of his activist sins. The event added steam to an effort already under way in Congress to enact legislation forbidding the Court from relying on foreign materials in its constitutional adjudication.¹¹

Had the *Roper* decision involved an isolated use of foreign constitutional law, its reliance on comparative materials might have passed relatively unnoticed. Use of comparative law is not unknown in the Court, particularly in Eighth Amendment cases, where longstanding legal principles call for the Court to engage in some level of comparative review.¹² But the case came on the heels of

based upon international law, not the Constitution of the United States. That's just outrageous."); *International Law*, INVESTOR'S BUS. DAILY, May 3, 2005, at A12 (emphasizing Tom DeLay's reaction to Supreme Court decisions based on international law); Tony Mauro, *U.S. Supreme Court vs. The World*, USA TODAY, June 20, 2005, at 15A (noting Tom DeLay's reaction to Justice Kennedy's opinion in *Roper*).

11. American Justice for American Citizens Act, H.R. 1658, 109th Cong. § 3 (2005) ("Neither the Supreme Court of the United States nor any lower Federal court shall . . . employ the constitution, laws, administrative rules, executive orders, directives, policies, or judicial decisions of any international organization or foreign state, except for the English constitutional and common law or other sources of law relied upon by the Framers of the Constitution of the United States."); Constitution Restoration Act of 2005, H.R. 1070, 109th Cong. § 201 (2005) ("In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution . . . or any other action of any foreign state or international organization or agency, other than English constitutional and common law up to the time of the adoption of the Constitution of the United States."); Constitution Restoration Act of 2005, S. 520, 109th Cong. § 201 (2005) (as referred to the S. Comm. on the Judiciary, Mar. 3, 2005) (providing identical text to H.R. 1079); S. Res. 92, 109th Cong. (2005) (as referred to the S. Comm. on the Judiciary, Mar. 20, 2005) ("Expressing the sense of the Senate that judicial determinations regarding the meaning of the Constitution of the United States should not be based 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."); H.R. Res. 97, 109th Cong. (2005) (stating identical language to S. Res. 92, 109th Cong. (2005)); American Justice for American Citizens Act, H.R. 4118, 108th Cong. (2004) (as referred to the Subcomm. on Cts., the Internet, and Intell. Prop., May 20, 2004); Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. (2004) (Subcomm. hearings held, Sept. 13, 2004); H. Res. 568, 108th Cong. (2004) (as forwarded by the Subcomm. on the Constitution of the H. Comm. on the Judiciary to the full H. Comm. on the Judiciary, May 13, 2004); H. Res. 468, 108th Cong. (2003) (as referred to the Subcomm. on Cts., the Internet, and Intellectual Prop., Dec. 10, 2003).

12. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002) (pointing to international disapproval of the imposition of the death penalty for mentally retarded offenders as a factor in supporting the Court's conclusion that consensus exists among those who have dealt with this issue); *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (plurality opinion) (observing the views of respected professional organizations, other nations that share an Anglo-American heritage and leading members of the Western European community, on the issue of the death penalty for juveniles); *Enmund v. Florida*, 458 U.S. 782, 796-97 n.22 (1982) (noting several countries, including England and India, that have abolished the doctrine of felony murder); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (plurality opinion) (expressing the relevance of a United Nations' survey pertaining to the death penalty in rape cases, where only three out of sixty nations surveyed in 1965, retained this

similar uses of comparative precedent in two earlier controversial decisions. In *Atkins v. Virginia*,¹³ another death penalty case, the Court relied in part on foreign materials to prohibit the execution of the mentally retarded.¹⁴ And, in *Lawrence v. Texas*,¹⁵ Justice Kennedy's majority opinion used comparative precedent to support its ruling that criminalization of consenting adult same-sex relations violates the Due Process Clause.¹⁶ This trio of recent, prominent, and controversial human-rights-oriented decisions involving comparative precedent convinced conservative Court critics that the use of such precedent was part of an activist judicial agenda to both "globalize" and "liberalize" the U.S. Constitution.¹⁷ Many of them are now determined to exterminate this perceived abuse of judicial power.

In addition to the prospect of congressional legislation on the subject, the role of comparative precedent was raised during the

sentence for the crime of rape); *Trop v. Dulles*, 356 U.S. 89, 102-03 (1958) (plurality opinion) (emphasizing the opinion of the international community in regards to denationalization as a form of punishment).

13. 536 U.S. 304 (2002).

14. *Id.* at 317 n.21 (discussing the international community's disapproval of imposing the death penalty on mentally retarded offenders).

15. 539 U.S. 558 (2003).

16. *Id.* at 576-77 (noting the decisions of the European Court of Human Rights against the criminalization of consenting adult same sex relations in the United Kingdom, Ireland, and Cyprus, and emphasizing that "[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct").

17. *E.g.*, Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69 (2004) (noting Scalia's condemnation of the Court's use of international materials to expand rights under the U.S. Constitution); Eugene Kontorovich, *Disrespecting the Opinions of Mankind: International Law in Constitutional Interpretation*, 8 GREEN BAG 2D 261 (Spring 2005) (discussing the Supreme Court's decision in *Roper* and the consequences of using foreign and international law when interpreting the U.S. Constitution); Richard A. Posner, *The Supreme Court, 2004 Term: Foreword: A Political Court*, 119 HARV. L. REV. 31, 84-90 (2005); Richard Posner, *No Thanks, We Already Have Our Own Laws: The court should never view a foreign legal decision as a precedent in any way*, LEGAL AFFAIRS, July/August 2004, available at <http://legalaffairs.org/issues/July-August-2004/featureposnerjulaug04.msp> (arguing against the use of foreign law as precedent: "To cite foreign law as authority is to flirt with the discredited . . . idea of a universal natural law; or to suppose fantastically that the world's judges constitute a single, elite community of wisdom and conscience."); Carl Huse & David D. Kirkpatrick, *DeLay Says Federal Judiciary has Run Amok, Adding Congress Partly to Blame*, N.Y. TIMES, Apr. 8, 2005, at A21 (discussing Tom Delay's criticism of the judiciary's disregard for Congressional intent and use of international standards and precedents in cases involving the right to abortion and prohibitions on school prayer); Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, THE NEW YORKER, Sept. 12, 2005, at 42 (commenting that Justice Kennedy has turned his passion for foreign cultures and ideas "into a principle of jurisprudence"); Emily Bazelon, *What Would Zimbabwe Do? "Comparativism"—Using Foreign Legal Rulings to Help Interpret the Constitution—Is Startlingly on the Rise in the U.S. Supreme Court*, ATL. MONTHLY, Nov. 1, 2005, at 48(3) (discussing the rise of comparativism in U.S. Supreme Court decisions).

recent Senate Supreme Court confirmation hearings.¹⁸ At the close of the October 2005 Term, Justice O'Connor announced her intention to retire from the Court. However, during deliberations on her successor, Chief Justice Rehnquist died leaving two vacancies on the Court to be filled by President George W. Bush. Bush's eventual nominees, Judges John Roberts and Samuel Alito, both faced close questioning from the Senate Judiciary Committee regarding their views on the Court's use of foreign constitutional precedent. Both nominees registered opposition to the use of such precedent, although they stopped short of saying that other members of the Court should be prevented from doing so. Both nominees probably needed to oppose the use of foreign precedent in order to win the support of some of the Judiciary Committee's more conservative members, including Senators John Cornyn and Jon Kyl.¹⁹

In his September 2005 confirmation hearings, Judge John Roberts offered two principal reasons for opposing the use of comparative constitutional law. First, he claimed that the democratic process is circumvented when judges base their decisions on precedent by foreign judges who were not appointed or confirmed by representatives accountable to the American people.²⁰ "If we're relying on a decision from a German judge about what our Constitution means, no president accountable to the people appointed that judge and no Senate accountable to the people confirmed that judge," Roberts said. "And yet he's playing a role in shaping the law that binds the people in this country."²¹ Second, Roberts raised concerns about unbridled judicial discretion. In Roberts's view, allowing judges to use foreign precedent could encourage cherry-picking of foreign decisions that were favorable to a particular judge's personal views.²² He expressed concern that

18. *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. (2005) [hereinafter *Roberts Hearing*]; *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) [hereinafter *Alito Hearing*].

19. During Roberts's confirmation hearing, Senator Cornyn asked: "On what legitimate basis can the Supreme Court uphold state laws on the death penalty in 1989, then strike them down in 2005, relying not on the written Constitution . . . but on foreign laws that no American has voted on, consented to, or may even be aware of?" *Roberts Hearing*, *supra* note 18, at 42 (statement of Sen. John Cornyn, S. Comm. on the Judiciary). Similarly, Senator Kyl flatly stated during the Alito hearings, "I do not support the use of foreign law as authority in United States court opinions." *Alito Hearing*, *supra* note 18, at 370 (statement of Sen. Jon Kyl, S. Comm. on the Judiciary).

20. *Roberts Hearing*, *supra* note 18, at 200-01.

21. *Id.* at 201.

22. *Id.* But see Sir Basil Markesinis, *Judicial Mentality: Mental Disposition or Outlook as a Factor Impeding Recourse to Foreign Law*, 80 TUL. L. REV. 1325, 1334 (2006)

without domestic boundaries as a restraint, judges would use foreign law to “cloak [the result they desire] with the authority of precedent.”²³ “Domestic precedent can confine and shape the discretion of judges. [But by using] foreign law, you can find anything you want” Roberts noted.²⁴ He compared looking to foreign law to finding one’s friends in a crowd. “You can find them. They’re there.”²⁵ Roberts declined, however, to pronounce use of foreign constitutional precedent as a violation of a judge’s oath of office, or to accept some Judiciary Committee members’ characterization of the practice as improper judicial behavior.²⁶

In January 2006, Supreme Court nominee Judge Samuel Alito echoed Roberts’s disapproval of comparative constitutional law.²⁷ Like Roberts, he opposed the practice in constitutional cases. Alito argued that America’s unique governmental structure and history render foreign precedent unhelpful.²⁸ He said, “I think we can do very well with our own Constitution and our own judicial precedents and our own traditions.”²⁹ He argued that “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.”³⁰ Alito asserted that there are no significant legal insights to be gained from foreign courts on American constitutional law questions, although their approaches may be “very interesting from a political science perspective.”³¹ Alito also identified several practical problems with using foreign precedent, such as the difficulty of determining which nations’ decisions to consider, how those courts are organized, and how much weight to give their opinions.³² Notwithstanding his general opposition to the use of comparative constitutional law, Alito did acknowledge that studying the organization of foreign constitutional courts might be useful.³³

(suggesting that when interpreting both national and foreign law, “[f]ew judges can entirely escape from these pressures [to reach conclusions based upon personal convictions] or lose habits and modes of thinking acquired from background and environment”).

23. *Roberts Hearing*, *supra* note 18, at 200-01.

24. *Id.*

25. *Id.*

26. *Id.* at 293.

27. *Alito Hearing*, *supra* note 18, at 410.

28. *Id.* at 370.

29. *Id.* at 410.

30. *Id.* at 471.

31. *Id.* at 410.

32. *Id.* at 471.

33. *Id.* at 604.

As a consequence of these developments, debate over the use of comparative constitutional precedent, which has been simmering on back burners of comparative constitutional scholarship, is heating up.³⁴ At the moment, the discussion has taken on a liberal *versus* conservative cast,³⁵ with result orientations concerning the recent death penalty and due process issues defining positions on the broader jurisprudential question of the role of comparative precedent. But the issue obviously transcends current events, and it is in need of a mature evaluation. This Article is an attempt to contribute to that process by adding to the arguments supporting the use of comparative constitutional advocacy, and responding to those who oppose the practice. My thesis is that looking beyond U.S. borders for insight into constitutional issues already considered

34. E.g., Roger P. Alford, *The United States Constitution and International Law: Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004) [hereinafter Alford, *Misusing International Sources*] (outlining the potential misuses arising from the application of international and foreign materials in interpreting the U.S. Constitution); Andrew R. Dennington, *We Are the World? Justifying the U.S. Supreme Court's Use of Contemporary Foreign Legal Practice in Atkins, Lawrence, and Roper*, 29 B.C. INT'L COMP. L. REV. 269 (2006) (arguing in favor of limiting the use of foreign law in domestic constitutional interpretation, to cases representing *jus cogens*, which could reduce concerns regarding "activist judges"); Harold Hongju Koh, *The United States Constitution and International Law: International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 56 (2004) [hereinafter Koh, *U.S. Constitution and International Law*] (emphasizing the historical use of international law in forming domestic U.S. law and pointing out that "phrases like 'due process of law,' 'equal protection,' and 'cruel and unusual punishment' 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."); Hon. Diarmuid F. O'Scannlain, *What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?*, Lecture at the Institute of Advanced Legal Studies of the University of London (Oct. 11, 2004), in 80 NOTRE DAME L. REV. 1893 (2005) (suggesting a cautious approach to comparative constitutionalism and remarking that "[d]espite the seemingly irresistible forces of globalization . . . our respective countries and legal systems remain distinct in several important aspects. Judges who disregard these differences run the risk not only of making bad law, but also of profoundly altering their legal system by incorporating foreign values."); Ramsey, *supra* note 17; Cheryl Saunders, *The Use and Misuse of Comparative Constitutional Law*, 13 IND. J. GLOBAL LEGAL STUD. 37 (2006) (examining the extent of comparative constitutional adjudication in common law countries other than the United States, focusing on Australia); 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 (2006) [hereinafter Tushnet, *When Is Knowing Less Better?*] (arguing that criticisms over the Supreme Court's reference to non-U.S. law are greatly overstated).

35. See SIR BASIL MARKESINIS & JÖRG FEDTKE, *JUDICIAL RECOURSE TO FOREIGN LAW* 220, 223 (2006) (noting increased use of foreign law by liberal-leaning judges); Mark Tushnet, *Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars*, 35 U. BALT. L. REV. 299, 309-12 (2006) (discussing the debate over comparative constitutionalism in terms of a "cultural war" within the courts, turning on competing views of constitutional interpretation and patriotism).

elsewhere is a valuable exercise on many levels. This exercise should begin in law school and become a norm in constitutional advocacy.

Part I of this Article examines several catalysts—including both external and internal factors—that have fueled the comparative constitutional debate in recent years, and provides an overview of the main positions currently discussed on both sides of the issue. Part II examines the United States' tradition of constitutional insularity, and identifies several explanations behind the tradition. Part III discusses various prospects for changing our isolationist view of constitutionalism, looking in particular at the effects of globalization, international judicial interaction, constitutional convergence, and what I view as a shift in the constitutional learning curve. In Part IV, I identify and analyze seven benefits of comparative constitutional analysis, and discuss several “factors counseling hesitation.”³⁶ Part IV concludes with the assertion that the benefits of comparative analysis outweigh the challenges, and highlights several “best uses” of comparative constitutionalism. Finally, Part V explores ways to implement comparative constitutional analysis, focusing on the importance of advocacy and the role of legal education.

I. CATALYSTS FOR THE COMPARATIVE CONSTITUTIONAL DEBATE

Beyond the accidental confluence of *Atkins*, *Lawrence*, and *Roper*, there are both external and internal reasons why the use of comparative constitutional precedent is of greater potential interest than ever before.

A. External Factors

Perhaps the main reason that this debate has surfaced at this particular juncture is that foreign sources on constitutional questions are available to a degree and in a quality never previously experienced. There are four principal causes. First, until recently, there was relatively little comparative constitutional material worthy of serious consideration by U.S. courts. Now there is, forcing U.S. judges for the first time to decide what to do about it. Second, the decisions of foreign constitutional courts increasingly grapple with the same (or very similar) constitutional issues as their U.S. counterparts. This is particularly true in human rights, where there has been an international convergence of constitutional human rights norms, making discussion of these issues in foreign courts more potentially relevant to U.S. jurisprudence. Third, many foreign

36. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 396 (1971).

constitutional courts possess sufficient expertise, professionalism, judicial independence, transparency of process, and caliber of reasoning to make their views worthy of mature consideration. Finally, while there is still a long way to go, improvements in information technology and availability make the decisions of foreign courts more accessible than they have ever been in the past.

1. Growth of foreign constitutional precedent

Most comparative constitutional material is of recent origin. The bulk has developed since World War II.³⁷ Prior to the War, liberal democracies outside the United States were rare,³⁸ and those with systems for authoritative legal interpretation and application of constitutional norms were even rarer.³⁹ English-speaking systems (most accessible because of a common tongue and common legal roots) were still part of the British common law system, which operated without a formal written constitution and without American-style judicial review.⁴⁰ Other major non-English legal systems were either relatively short-lived constitutional democracies (such as the German pre-war Weimar republic),⁴¹ functioned under civil law traditions that vested constitutional authority outside the courts (as was the case in pre-war France),⁴² or simply lacked the indicia of true democratic governance (as was true in most of Asia,

37. See Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 772 (1997) [hereinafter Ackerman, *World Constitutionalism*] (observing the rise of constitutionalism throughout the world over the last sixty years); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 707 (2001) (noting that comparative constitutional law owes its origins and substance to the rise of constitutionalism that has occurred over the last sixty years).

38. These nations "democratized" during what is generally considered the "first wave of democratization." See generally SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 16-17 (1991) (discussing the first wave of democratization in countries such as the United States, France, and Great Britain).

39. See Gardbaum, *supra* note 37, at 713-14 (discussing the dominance of the legislative supremacy model around the world prior to 1945 and noting that in the pre-war period, only a small number of European countries formed constitutional courts equipped with "the power to review the constitutionality of national legislation").

40. See Ackerman, *supra* note 37, at 771-72 (explaining the British constitutional model and its influence overseas, in places such as Canada, Australia, New Zealand and South Africa).

41. See generally DETLEV J. K. PEUKERT, *THE WEIMAR REPUBLIC: THE CRISIS OF CLASSICAL MODERNITY* (Richard Deveson trans., Hill and Wang 1992) (1987).

42. Article 6 of the Declaration of the Rights of Man, 1789, stated that statutory law is the expression of the general will. This was interpreted to mean that the legislature, and not the courts, was the supreme arbiter of constitutionality. JOHN BELL, *FRENCH CONSTITUTIONAL LAW* 25 (1992).

Central America, and most jurisdictions south of the Equator).⁴³ Consequently, there was practically no worthwhile constitutional precedent anywhere else in the world. English law played a significant though occasional role in American constitutional thinking,⁴⁴ but the constitutional law of other nations had virtually no role at all.

The past fifty years have changed all of that in remarkable ways, most notably through the enactment of new constitutions and the development of tribunals for authoritative constitutional interpretation and application in democratic systems around the world.⁴⁵ With direct U.S. encouragement, elements of American-style constitutionalism were transplanted into the new post-war constitutional structures adopted in Japan and West Germany.⁴⁶ Some leading Western European nations contemporaneously adopted new constitutional systems complete with formal constitutional courts.⁴⁷ English-speaking constitutional legal systems with judicial review powers emerged in several British

43. See, e.g., JOHN A. BOOTH & THOMAS W. WALKER, UNDERSTANDING CENTRAL AMERICA 19 (1989) ("Except for Costa Rica, Central American nations spent most of the period from 1838 until 1945 under either civilian or military dictatorships."); Lu Ya-Li, *Political Developments in the Republic of China*, in DEMOCRACY AND DEVELOPMENT IN EAST ASIA 44 (Thomas W. Robinson ed., 1991) [hereinafter DEMOCRACY AND DEVELOPMENT] (analyzing the potential for the development of democracy in Taiwan); Daryl M. Plunk, *Political Developments in the Republic of Korea*, in DEMOCRACY AND DEVELOPMENT, *supra*, at 118 ("While over the years some have called for the 'restoration' of democracy in Korea, the fact remains that Koreans have experienced precarious little democracy.");

44. See *infra* Part II.B (discussing the Supreme Court's reliance on English common law during its early days).

45. See RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 1 (2004) [hereinafter Hirschl, *Political Origins*] ("Around the globe, in more than eighty countries and in several supranational entities, constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries."); Louis J. Blum, *Mixed Signals: The Limited Role of Comparative Analysis in Constitutional Adjudication*, 39 SAN DIEGO L. REV. 157, 161 (2002) ("In recent years, the spread of constitutional democracies has catalyzed the reemergence of comparative analysis as a significant issue in constitutional interpretation."); Gardbaum, *supra* note 37, at 714-16 (discussing two concentrated bursts of "constitutionalization"); Ran Hirschl, *The Political Origins of the New Constitutionalism*, 11 IND. J. GLOBAL LEGAL STUD. 71, 71 (2004) [hereinafter Hirschl, *New Constitutionalism*] (observing a global trend towards judicial reform spanning two decades, as illustrated by a number of countries that adopted or revised their constitutions to include a bill of rights and established mechanisms for judicial review).

46. See Gardbaum, *supra* note 37, at 714-15 (elucidating how in the aftermath of World War II, numerous countries, including Japan and Germany, adopted the American model of constitutionalism, "to protect, and express their commitment to, fundamental human rights and liberties").

47. *Id.* See generally BELL, *supra* note 42, at 29-33 (providing an overview of the system of constitutional review in France); ALBERT P. BLAUSTEIN, CONSTITUTIONS OF THE WORLD 8 (1993) (discussing France's multiple constitutions).

Commonwealth nations including Canada, Australia, and New Zealand.⁴⁸ New supranational constitutional systems with authoritative judicial structures, most notably the European Court of Human Rights and the courts of the European Union, developed.⁴⁹ Constitutions and constitutional courts were installed in some of the nations that emerged from crumbling colonial empires in Africa, the Middle East, the Indian subcontinent, Southeast Asia, and the Pacific.⁵⁰ More recently, systems of constitutional law and adjudication in constitutional courts were adopted in several Eastern European republics that were organized (sometimes with U.S. technical assistance) after the disintegration of the Communist bloc and the Soviet Union.⁵¹ Indeed, if one were to create a list of the fifteen or twenty leading world constitutional systems today, the overwhelming majority either did not exist or were in their infancy fifty years ago.

2. *Similarity of issues*

Many of the world's leading constitutional systems have been in business long enough to develop significant and relatively mature law on constitutional questions that resonate with issues in the United States. There is, for example, a robust transnational jurisprudence on such issues as reproductive freedom,⁵² freedom of speech,⁵³

48. See Gardbaum, *supra* note 37, at 719-27 (analyzing the emergence of constitutional structures and procedures in Canada, New Zealand, and the United Kingdom that together form a "third model" of constitutionalism).

49. See generally J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 1-24 (1993); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 290-98 (1997); J. H. H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2410-31 (1991).

50. At least eighty countries liberated from colonial rule since World War II have established constitutions. See CIA: The World Factbook, <https://www.cia.gov/cia/publications/factbook/fields/2063> (listing each country's constitutions and when they were adopted); see also John Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 369 (1995) (noting that the dissolution of French and British colonial empires inspired a wave of constitution-making).

51. See generally Jean-Marie Henckaerts & Stefaan Van der Jeught, *Human Rights Protection Under the New Constitutions of Central Europe*, 20 LOY. L.A. INT'L & COMP. L. REV. 475 (1998) (examining the development of constitutional rights and the judicial enforcement of those rights in Poland, Hungary, the Czech Republic, and the Slovak Republic); Rett R. Ludwikowski, *Fundamental Constitutional Rights in the New Constitutions of Eastern and Central Europe*, 3 CARDOZO J. INT'L & COMP. L. 73 (1995) (analyzing the process of constitutional drafting in Eastern Europe that drew upon Western ideals and principles).

52. *E.g.*, *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (Can.); *Tremblay v. Daigle*, [1989] 2 S.C.R. 530 (Can.); Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (F.R.G.).

freedom of religion,⁵⁴ racial and ethnic equality,⁵⁵ language rights of minorities,⁵⁶ gender equality,⁵⁷ sexual orientation equality,⁵⁸ privacy,⁵⁹ constitutional limits on punishment,⁶⁰ the right to counsel for the indigent,⁶¹ and the rights of the accused.⁶² An international jurisprudence is also developing on such structural issues as separation of powers and the rulemaking authority of government agencies,⁶³ war and emergency executive powers,⁶⁴ and even (to a limited degree) federalism.⁶⁵

53. *E.g.*, *Lange v. Atkinson*, [1998] 3 N.Z.L.R. 424 (C.A.); *Irwin Toy Ltd. v. Att'y Gen. of Quebec*, [1989] 1 S.C.R. 927 (Can.); *Curtis v. Ministry of Safety & Security & Others* 1996 (5) BCLR 609 (CC) (S. Afr.); *Austl. Capital Television PTY. Ltd. v. Australia*, (1992) 108 A.L.R. 577; *Ceylan v. Turkey*, 30 Eur. Ct. H.R. 73 (2000).

54. *E.g.*, *Japan v. Yasuko Nakaya*, 42 MINSHÜ 5 (Sup. Ct., 1988), *available at* <http://courtdomino2.courts.go.jp/4925672a00027076.nsf/0/a8b3da37b77ca44649256739001ccb91?OpenDocument&Highlight=0,Gokoku>; *Emmanuel v. State of Kerala*, (1986) 3 S.C.R. 518 (India); *Kokkinakis v. Greece*, 17 Eur. Ct. H.R. 397 (1993); *Thlimmenos v. Greece*, 31 Eur. Ct. H.R. 15 (2001).

55. *E.g.*, *Mahe v. Alberta*, [1990] 1 S.C.R. 342 (Can.); *R. v. Van Der Peet*, [1996] 2 S.C.R. 507 (Can.); *Calder v. Att'y Gen. of British Columbia*, [1973] S.C.R. 313 (Can.).

56. *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, 6 Eur. Ct. H.R. 252 (1968); *Ahmedabad St. Xavier's College Society v. State of Gujarat*, (1974) 1 S.C.C. 717 (India).

57. *E.g.*, Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] 1992, 85 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 191 (F.R.G.); *President of the Republic of South Africa v. Hugo* 1997 (6) BCLR 708 (CC) (S. Afr.).

58. *E.g.*, *Egan v. Canada*, [1995] 2 S.C.R. 513 (Can.); *Smith & Grady v. United Kingdom*, 29 Eur. Ct. H.R. 493 (1999); *Lustig-Prean & Beckett v. United Kingdom*, 29 Eur. Ct. H.R. 548 (1999); *Salgueiro Da Silva Mouta v. Portugal*, 31 Eur. Ct. H.R. 47 (1999).

59. *E.g.*, *Kennedy v. Ireland*, [1987] I.R. 587 (Ir.); *Chapman v. United Kingdom*, 33 Eur. Ct. H.R. 18 (2001); Verfassungsgerichtshof [VfGH] [Constitutional Court] Mar. 14, 1991, 1991/12689, Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes [VfSlg] (Austria) (not available in English).

60. *E.g.*, HCJ 5100/94 Public Comm. Against Torture in Isr. v. Israel [1999] IsrSC 1; *Aydin v. Turkey*, 25 Eur. Ct. H.R. 251 (1997).

61. *E.g.*, *State v. Vermaas*, 1995 (7) BCLR 851 (CC) (S. Afr.); *Ogawa et al. v. Japan*, 33 KEISHÜ 5 (Sup. Ct., 1979), <http://courtdomino2.courts.go.jp/promjudg.nsf/766e4f1d46701bec49256b8700435d2e/d6d51d9487926baf49256fe200224cf3?OpenDocument>.

62. *E.g.*, *State v. Mbatha* 1996 (3) BCLR 293 (CC) (S. Afr.); *O'Leary v. Att'y Gen.*, [1990] I.R. 363 (Ir.).

63. *E.g.*, Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] 1984, 62 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (F.R.G.); Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] 1978, 49 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 89 (F.R.G.); CC decision no. 86-207DC, June 26, 1986, Rec. 61 (France).

64. *E.g.*, *Liversidge v. Anderson*, (1941) 2 Eng. Rep. 612 (A.C.); *United Communist Party of Turk. v. Turkey*, 26 Eur. Ct. H.R. 121 (1988); *S.R. Bommai v. Union of India*, (1994) 3 S.C.C. 1.

65. *E.g.*, Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] 1951, 1 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 14 (F.R.G.); Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] 1961, 12 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 205 (F.R.G.); *Re Quebec Objection to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793 (Can.).

Exploring the jurisprudence of other nations on these and other similar constitutional questions, one is struck by the similarity to U.S. constitutional law. This similarity has at least two sources: a commitment to common constitutional norms, and the need to apply them to comparable cultural, social, political, and economic developments.⁶⁶ While the various world constitutional systems reflect important differences in language, structure, and history, they are often committed to the same basic principles as the U.S. Constitution. This is especially true in the field of human rights⁶⁷ because the U.S. Constitution has served as a model for human rights guarantees around the world.⁶⁸ While more modern constitutions elsewhere have often expanded beyond the U.S. Constitution, including explicit guarantees that the U.S. Constitution lacks,⁶⁹ many have looked (often explicitly) to the U.S. Constitution for guidance when crafting their own Constitutions.⁷⁰ Because their constitutional

66. See Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in Democracy*, 116 HARV. L. REV. 16, 110-11 (2002) (observing the importance of comparative law: "In different legal systems, similar legal institutions often fulfill corresponding roles, and similar legal problems (like hate speech, privacy, and now the fight against terrorism) arise"); Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 535 (1992) ("Every country is grappling with a set of problems that are in a general way similar.").

67. See Rex D. Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357, 433 (2005) (noting that human rights cases are best suited for comparative analysis as "their essence transcends notions of boundaries and nationhood").

68. See generally MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 158 (1991); Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 541 (1988) ("Currently, there is a vigorous overseas trade in the Bill of Rights. . . . When life or liberty is at stake, the landmark judgments of the [U.S.] Supreme Court . . . are studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C."); Andrzej Rapaczynski, *Bibliographical Essay: The Influence of the U.S. Constitutionalism Abroad*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 405 (Louis Henkin & Albert J. Rosenthal eds., 1990).

69. Examples of nations with constitutionally enumerated human rights that go beyond those enumerated in the United States Constitution include Canada, Germany, and Japan. The Canadian Charter of Rights and Freedoms as Part 1 of the Constitution Act of 1982 provides for "Mobility Rights," in Article Six and "Equality Rights" in Article Fifteen, which protect against discrimination based on "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.) §§ 6 & 15 (emphasis added). The German Basic Law provides in Article One, Section One for "human dignity," in Article Six for the Rights of Family, and in Article Seven for Education rights. Grundgesetz für die Bundesrepublik Deutschland [GG] [Federal Constitution] May 23, 1949, arts. 6 & 7 (F.R.G.). The Constitution of Japan provides in Article Fourteen against discrimination "in political, economic or social relations because of race, creed, sex, social status or family origin," in Article Twenty-Six for education rights, and in Article Twenty-Seven for fair labor practices. KENPÖ [Constitution], arts. 14, 26 & 27 (emphasis added).

70. See Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's*

law embraces comparable basic human rights, it encounters similar constitutional questions. While reliance on the U.S. model for structural issues has been less direct, other democracies also share some common structural ground, particularly in the delineation of separate spheres for legislative, executive/administrative, and judicial functions.⁷¹ Like the U.S. Constitution, many foreign constitutions delineate legislative and executive powers and functions, and their legal systems face instances of potential horizontal and vertical conflict among internal governmental structures.⁷²

Not only do other systems share a commitment to similar constitutional norms, they also experience similar challenges in applying these principles to the realities of contemporary culture.⁷³

Leap of Faith, 46 AM. U. L. REV. 1483, 1491 (1997) (expounding upon Argentina's constitutional experience and how historically, the Argentine constitutional structure drew from the U.S. Constitution and constitutional practice); Rapaczynski, *supra* note 68, at 408-12 (reviewing the influence of the U.S. Constitution in a number of countries and regions).

71. William Safran, *The Influence of American Constitutionalism in Postwar Europe: The Bonn Republic Basic Law and the Constitution of the Fifth French Republic*, in AMERICAN CONSTITUTIONALISM ABROAD: SELECTED ESSAYS IN COMPARATIVE CONSTITUTIONAL HISTORY 95-98, 102 (George Athan Billias ed., 1990) (noting similarities among American, French, and German separation of powers).

72. See generally Bruce Ackerman, *New Separation of Powers*, 113 HARV. L. REV. 633 (2000) [hereinafter Ackerman, *New Separation of Powers*]; Hirschl, *Political Origins*, *supra* note 45. See also Council of Civil Service Unions v. Minister for the Civil Service, (1984) 3 Eng. Rep. 935 (H.L.); CC decision no. 86-207DC, June 26, 1986, Rec. 25 (France), available at <http://www.conseil-constitutionnel.fr/decision/1986/86207dc.htm>; Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] 1978, 49 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 89 (F.R.G.). Some notable examples of nations with federalist systems loosely similar to the United States are Australia, Germany, Canada, and Switzerland. See EDWARD SCHNEIER, CRAFTING CONSTITUTIONAL DEMOCRACIES: THE POLITICS OF INSTITUTIONAL DESIGN 184 (2006) (including a table depicting the structures of various federated democracies).

73. See Barak, *supra* note 66, at 110-11 (remarking on the similar issues that constitutional courts around the world face). Several judges from constitutional courts have made similar claims. See, e.g., Stephen Breyer, *Réflexions relatives au principe de fraternité*, Address to the 30th Congress of the Association of French-Speaking Constitutional Courts (June 20, 2003), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_06-20-03.html ("En un mot on trouve partout des juges faisant face aux memes especes de problemes et armes des memes especes d'instruments juridiques.") ("Judges everywhere face the same types of problems and use the same types of legal tools."); Canadian Nat'l Ry. Co. v. Norsk Pacific Steamship Co. Ltd., [1992] 91 D.L.R. (4th) 289, 320 (La Forest, J., dissenting) ("[T]he legal system of every society faces essentially the same problems and solves these problems by quite different means, though often with similar results."). Discussing comparative analysis, Justice Anthony Mason of the Australian Supreme Court asserts: "Legal problems, because they often reflect human problems, are not unique to any one system of law. And the appropriate answers must be moulded, at least in part, by reference to experience and, in large measure, experience is common to all peoples." Anthony Mason, *The Relationship Between International Law and National Law, and its Application in National Courts*, 18 COMMW. L. BULL. 750, 753 (1992).

In the twenty-first century, economic and technological developments, demographic changes, political, social, cultural, or religious issues, and world events often cross national boundaries, creating the same sorts of constitutional friction in more than one constitutional system. Thus, for example, nations committed to principles of equality have addressed the rights of various subgroups, including ethnic and linguistic minorities, women, indigenous groups, and non-citizens.⁷⁴ Nations committed to free expression have grappled with the effects of mass media, the Internet, distribution of sexually explicit materials, disclosure of government secrets, press invasions of privacy, hate speech, and saturated media coverage of high-profile criminal trials.⁷⁵ And nations committed to constitutional reproductive and medical privacy have defined the scope of those rights in the context of rapid advances in reproductive and medical technology.⁷⁶

3. *Analytic methods*

Constitutional decision makers often employ similar analytic processes. For example, concepts such as separation of powers, standards of review, means-ends analysis, balancing of interests, and proportionality⁷⁷ familiar to American constitutional law have counterparts in other constitutional systems. The principles do not have identical meanings or applications in different systems, and there are other analytic structures that lack direct U.S. cognates.⁷⁸

74. See *supra* notes 52-62 and corresponding text; see also *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 128 A.L.J. 353 (Australia).

75. See *supra* note 53.

76. See *supra* note 52.

77. E.g., Case 122/78, *Buitoni SA v. Fons D'Orientation et de Regularisation des Marches Agricoles*, 1977 E.C.R. 677; Case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3727; *R. v. Oakes*, [1986] S.C.R. 103 (Can.); see also K.G. Jan Pillai, *Incongruent Disproportionality*, 29 HASTINGS CONST. L.Q. 645, 646 (2002) (discussing the Supreme Court's mandate in *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end").

78. For example, the German Constitution contains concepts that do not inhere in the U.S. Constitution. Article 24 provides that the "Federation may, by legislation, transfer sovereign powers to international institutions." Grundgesetz für die Bundesrepublik Deutschland [GG] [Federal Constitution] May 23, 1949, art. 24. Article 32(3) grants the Laender the power to "conclude treaties with foreign states." Grundgesetz für die Bundesrepublik Deutschland [GG] [Federal Constitution] May 23, 1949, art. 23(3). Article 34 establishes the affirmative duty of Laender toward citizens, who can sue for violation of that duty. Grundgesetz für die Bundesrepublik Deutschland [GG] [Federal Constitution] May 23, 1949, art. 34. Article 115g grants the German Constitutional Court the power to re-write legislation in some circumstances. Grundgesetz für die Bundesrepublik Deutschland [GG] [Federal Constitution] May 23, 1949, art. 115g.

Nevertheless, there is a definite analytic common ground across constitutional systems.

Additionally, many foreign constitutional tribunals exhibit high levels of professionalism, use transparent and fair processes, maintain the impartiality and political independence of judges, engage in thorough legal reasoning, and display a strong commitment to the rule of law. All of this supports the potential utility of foreign courts' judgments on common questions of law.⁷⁹ One particularly notable feature of comparative constitutional adjudication is the frequency and analytic clarity of international courts' reference to and discussion of U.S. precedent on constitutional questions. In Canada,⁸⁰ Australia,⁸¹ Germany,⁸² the European Court of Human Rights,⁸³ Israel,⁸⁴ India,⁸⁵ South Africa,⁸⁶ Japan,⁸⁷ and elsewhere, judges

79. See Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. INT'L L.J. 331, 362 (1998) ("The transfer of legal concepts is facilitated when the host accepts the transplant... this acceptance is more likely to occur where the compared legal systems share socio-cultural, economic, or political factors."); Glensy, *supra* note 67, at 424 ("A useful comparison can exist only if the legal systems have a common ideological basis.").

80. *E.g.*, *Morgentaler v. R.*, [1988] S.C.R. 30 (Can.); *R. v. Keegstra*, [1990] S.C.R. 697 (Can.); *R. v. Malm-Levine*, [2003] S.C.R. 571 (Can.); *Chamberlain v. Surrey Sch. Dist. No. 36*, [2002] S.C.R. 710 (Can.); *Trinity Western Univ. v. British Columbia College of Teachers*, [2001] S.C.R. 772 (Can.); see also H. Patrick Glenn, *The Use of Comparative Law by Common Law Courts in Canada*, in *THE USE OF COMPARATIVE LAW BY COURTS* 59, 66 (Ulrich Drobnig & Sjef van Erp eds., 1997) (noting that the legal reasoning process of the Canadian common law courts is inherently comparative and these courts—particularly the maritime courts—frequently cite to foreign sources as part of their judicial reasoning).

81. *E.g.*, *Mabo v. Queensland II* (1992) 175 C.L.R. 1 (Austl.); *Dietrich v. R.* (1992) 177 C.L.R. 292 (Austl.).

82. *E.g.*, *Bundesverfassungsgericht [BverfGE] [Federal Constitutional Court] 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 1 (F.R.G.)*.

83. *E.g.*, *Ceylan v. Turkey*, 30 Eur. Ct. H.R. 73 (2000) (Bonello, J., concurring) (citing *Abrahams v. United States*, 250 U.S. 616, 630 (1919), *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), *Schenck v. United States*, 294 U.S. 47, 52 (1919), *Whitney v. California*, 274 U.S. 357, 376 (1927)); *Adami v. Malta*, No. 17209/02, slip op. (Eur. Ct. H.R. Jun. 20, 2006), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=adami%20%7C%20malta&sessionid=8882858&skin=hudoc-en> (referencing *Smith v. Texas*, 311 U.S. 128 (1941); *Theil v. Southern Pac. Co.*, 328 U.S. 217; and *Brown v. Allen*, 344 U.S. 433 (1953)); *Dickson v. United Kingdom*, No. 44362/04, slip op. Eur. Ct. H.R. (Apr. 18, 2006), <http://cmiskp.echr.coe.int/view.asp?item=1&portal=hbkm&action=html&highlight=Dickson%20%7C%20united%20%7C%20kingdom%20%7C%2044362/04&sessionid=8882839&skin=hudoc-pr-en>.

84. *E.g.*, CA 546/78, *Bank Kupat Haam v. Handeles* [1980] IsrCR 34(3) 57 (not available in English); CA 40/80, *Koenig v. Cohen* [1982] IsrSC 36(3) 701 (not available in English); CA 417/89, *Alrabia v. The Custodian of Absentee Property* [1991] IsrSC 45(4) 641 (not available in English).

85. *Singh v. Punjab*, A.I.R. 1983 S.C. 465 (India) (cited by *Knight v. Florida*, 120 S. Ct. 459, 463 (1999)) (Breyer, J., dissenting from denial of certiorari); see also Adam Smith, *Making Itself At Home: Understanding Foreign Law in Domestic Jurisprudence: The Indian Case*, 24 BERKELEY J. INT'L L. 218, 233 (2006) (discussing influence of American law on modern India's constitution and judicial processes).

frequently refer to and discuss U.S. constitutional law and precedent. Indeed, the depth of foreign courts' knowledge and discussion of U.S. constitutional precedent contrasts with the dearth of knowledge and discussion of comparative sources in most U.S. constitutional law. When skilled and thoughtful judges elsewhere deem U.S. constitutional law relevant to constitutional issues in their legal system, it supports the reciprocal inference that their decisions might be relevant to questions of U.S. constitutional law.

4. Availability

The final external factor favoring greater use of comparative constitutional precedent is its increasing availability.⁸⁸ Most foreign constitutional tribunals maintain detailed and accurate records of their proceedings, publish them in accessible formats, and sometimes even translate them into English.⁸⁹ These materials are internationally available and in many instances electronically accessible.⁹⁰ While some lag time still exists between decision and publication, it is growing progressively shorter, so that it is often possible to acquire detailed knowledge of foreign decisions shortly after they are rendered.

These developments combine to create the distinct impression that foreign constitutional courts might well have significant potential utility as a source for analysis of current U.S. constitutional questions.

86. *E.g.*, S. v. Makwanyane 1995 (3) SA 391 (CC) (S. Afr.); City Council of Pretoria v. Walker 1998 (2) SA 363 (CC) (S. Afr.); Prinsloo v. Van der Linde 1997 (3) SA 1012 (CC) (S. Afr.); Brink v. Kitshoff NO 1996 (4) SA 197 (CC) (S. Afr.); President of the Republic v. Hugo 1997 (4) SA 1 (CC) (S. Afr.).

87. *E.g.*, Case to Seek Habeas Corpus, 47 MINSHŪ 5099 (Sup. Ct., Oct. 19, 1993), <http://courtdomino2.courts.go.jp/promjudg.nsf/0/a3f856ed9deed3ee492570ff00377a15?OpenDocument>; Tsu City Shinto Groundbreaking Ceremony Case, 31 MINSHŪ 533 (Sup. Ct., July 13, 1977), <http://courtdomino2.courts.go.jp/promjudg.nsf/766e4f1d46701bec49256b8700435d2e/42?OpenDocument>; Nakamura v. Japan, 16 KEISHŪ 11, at 1593 (Sup. Ct., Nov. 28, 1962), <http://courtdomino2.courts.go.jp/promjudg.nsf/766e4f1d46701bec49256b8700435d2e/6b85d7ccc095bcb49256739000fa74c?OpenDocument> ("Except where there is an actual case or controversy, the United States Supreme Court has long held that it is not empowered to review the constitutionality of a statute.").

88. See generally Lyonette Louis-Jacques, *New Rights: Legal Information In A Changing World Wide Web*, 32 INT'L J. LEGAL INFO. 474 (2006) (discussing the increased accessibility of foreign legal materials on the Internet). This increased availability extends to law school libraries as well. For example, the University of Pittsburgh School of Law maintains a list of which law libraries collect legal resources from many countries throughout Europe, Asia, and Africa. University of Pittsburgh School of Law Library, <http://www.law.pitt.edu/library/international/foreigncollections.php> (last visited Oct. 16, 2006).

89. See generally Global Courts, <http://www.globalcourts.com/mini-oversikt.html> (providing access to Supreme Court decisions from 123 countries worldwide).

90. See Lyonette Louis-Jacques, *supra* note 88, at 482-83 (providing a host of websites where foreign decisions can be found on the Internet).

They set the foundation for internal U.S. debate over the legitimacy of comparative constitutional analysis.

B. Internal Factors

The dearth of comparative discussion in U.S. constitutional law extends back in time, though not to the beginning of the Republic. In the Supreme Court's earliest years, it often relied on international legal sources,⁹¹ particularly the English common law. However, the Supreme Court also occasionally referred to European civil law in both constitutional and non-constitutional decisions.⁹² The early Court was definitely an active participant in a wider community of courts,⁹³ and its judges made skilled use of international precedent on a significant range of issues.⁹⁴

Sometime near the middle of the nineteenth century, reliance on comparative materials subsided, becoming almost nonexistent in constitutional cases by the turn of the century.⁹⁵ The Court replaced

91. See, e.g., *Glensy*, *supra* note 67, at 365 (suggesting that the Supreme Court's "compliance with the laws of nations was an expression of governmental legitimacy to the rest of the world").

92. See, e.g., *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 81-82, 91-92 (1807) (citing English law); *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 270-71 (1808) (citing English law); *Brown v. United States*, 12 U.S. (8 Cranch) 110, 143-44 (1814) (citing English law); *M'Coul v. Lekamp's Administratrix*, 15 U.S. (2 Wheat.) 111, 117 n.1 (1817) (contrasting French civil law with English common law); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 163 n. h (1820) (relying on the law of nations to define the offense of 'piracy'); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 572-84 (1823) (referencing the laws of colonial European nations); *The Antelope*, 23 U.S. (10 Wheat.) 66, 116-18 (1825) (citing English law); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560-61 (1832) (relying on the doctrine of the law of nations).

93. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 introductory note (1987) ("From the beginning, the law of nations, later referred to as international law, was considered to be incorporated into the law of the United States without the need for any action by Congress or the President. . ."); see also Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1825 (1998) [hereinafter Koh, *Is International Law Really State Law?*] ("The early Supreme Court spent much of its time deciding cases under the law of nations.").

94. See, e.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (standing); *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133 (1795) (expatriation); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 216, 230-31 (1796) (confiscation of property); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798) (ex post facto laws); *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 452-53 (1806) (habeas corpus); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 121 (1810) (disposition of land by state legislature); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 155 (1820) (piracy); *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 17 (1821) (seizure of cargo in times of war); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 223 (1827) (contractual obligations); *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 162 (1833) (pardons).

95. See David S. Clark, *The Use of Comparative Law by American Courts*, in *THE USE OF COMPARATIVE LAW BY COURTS* 297 (Ulrich Drobnig & Sjef van Erp eds., 1997) (suggesting that the Civil War was a turning point in routine usage of comparative materials).

this practice with greater reliance on the Court's own precedent, the precedent of state and lower federal courts, discussions of American political history, and appeals to original intention.⁹⁶ Some commentators have tied these developments to a growing national insularity,⁹⁷ while others have suggested that the shift was influenced by "scientific" approaches to legal analysis associated with the development of Harvard's "Langdell" method in American legal education.⁹⁸ It may also have been a natural result of the growing maturity of American law.

For most of the last century, the Court has occasionally alluded to international developments (particularly in other common-law countries). Examples include the Court's examining whether a particular interest is "fundamental" to the concept of ordered liberty under the Due Process Clause,⁹⁹ or determining whether a punishment is "unusual" for purposes of the Eighth Amendment.¹⁰⁰

96. *E.g.*, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (devoting no attention to the then-current treatment of slavery by other nations, notably Great Britain, where the institution had been abolished); *Jackson v. The Magnolia*, 61 U.S. (20 How.) 296, 302 (1857) (arguing that it was not the framers' original intent to limit the jurisdiction of the admiralty courts to the eastern seaboard); *Ward v. State*, 79 U.S. (12 Wall.) 418, 431 (1870) (maintaining that it was the framers' original intent to forbid discrimination in state taxation); *Keokuk N. Line Packet Co. v. City of Keokuk*, 95 U.S. 80, 85-89 (1877) (relying on Supreme Court precedent); *Douglas v. Pike County*, 101 U.S. 677, 687 (1879) (same); *Ex parte Baine*, 121 U.S. 1, 12 (1887) (relying on framers' intent); *Lake County v. Rollins*, 130 U.S. 662, 670 (1889) (same); *Patton v. United States*, 281 U.S. 276, 297 (1930) (discussing American political history); *Shelley v. Kraemer*, 334 U.S. 1, 7-17 (1948) (relying on Supreme Court precedent). *But see Dred Scott*, 60 U.S. (19 How.) at 534 (McClean, J., dissenting) ("There is no nation in Europe which considers itself bound to return to his master a fugitive slave, under the civil law or the law of nations."). The majority in *Dred Scott* dismissed the notion that looking to changed views on slavery elsewhere in the world could be relevant to the Court's decision in the case. *Id.* at 426.

97. *See infra* Part III.A-C (discussing how America's distinct history, its well-developed sense of constitutional uniqueness, and its "head start" in the development of its constitutional law contributes to American constitutional insularity).

98. *See infra* Part III.D (attributing a portion of American constitutional insularity to the U.S. legal educational system's narrow focus on the particulars of American law).

99. *Miranda v. Arizona*, 384 U.S. 436, 486-89 (1966) (referring to the laws of countries such as England, Scotland and India (where curbs on interrogation methods had long been in place) to demonstrate that the adoption of similar curbs on interrogation methods in America would create no significant detrimental effect to U.S. law enforcement); *Duncan v. Louisiana*, 391 U.S. 145, 151-52 (1968) (noting the use of similar rules under the English legal system to bolster support for its determination that the Sixth Amendment guarantee of trial by jury in criminal cases was fundamental to the American system of justice).

100. *See supra* note 12 (examining respectively, the constitutionality of authorizing the expatriation of a citizen convicted of wartime desertion, the constitutionality of applying the death penalty in instances of rape, and the constitutionality of applying the death penalty in instances of felony murder where the defendant did not intend to kill the victim).

However, for most constitutional questions, the Court has treated American law as a closed system containing all the relevant resources for adjudication. On those occasions when the Court has considered comparative precedent, it has typically limited itself to general assertions regarding the state of the law elsewhere and avoided engaging in specific analyses of actual foreign rules or decisions. The Court has treated comparative precedent largely as “window-dressing”—supplemental support for decisions made for other reasons.¹⁰¹

Recent cases such as *Lawrence v. Texas*¹⁰² and *Roper v. Simmons*,¹⁰³ together with some extrajudicial writings and speeches by individual Supreme Court Justices,¹⁰⁴ suggest that these longstanding habits of

101. See Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005) (providing a comprehensive study of the Court's use of foreign materials from its creation to present day); see, e.g., *Lochner v. New York*, 198 U.S. 45, 71 (1905) (Harlan, J., dissenting) (mentioning that the number of hours a laborer should continuously work was a matter of serious concern among “civilized peoples” of other nations); *Muller v. Oregon*, 208 U.S. 412, 420 (1908) (characterizing foreign legislation and court opinions as “significant” yet noting that such legislation and opinions are not binding authority); *O'Malley v. Woodrough*, 307 U.S. 277, 281 n.8 (1939) (referencing a decision of the Supreme Court of South Africa construing a South African act that had adopted identical language as that found in Article III, Section 1, of the U.S. Constitution); *Arver v. U.S.*, 245 U.S. 366, 378-79 (1918) (citing an English conscription act to support the Court's finding that the U.S. military draft during World War I did not violate the Constitution).

102. 539 U.S. 558 (2002).

103. 543 U.S. 551 (2004).

104. Sandra Day O'Connor, Commentary, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, 45 FED. LAW. 20, 21 (1998) (noting that foreign law can increasingly be applied in U.S. courtrooms and particularly in choice-of-law disputes); Ruth Bader Ginsburg, Perspective, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329, 330 (2004) (arguing that the U.S. Supreme Court should look to the Supreme Court decisions of other nations for guidance, as foreign Supreme Courts have amassed a large body of constitutional jurisprudence during the post-World War II era); Stephen Breyer, Keynote Address at the American Society of International Law Proceedings (Apr. 2-5, 2003) in 97 AM. SOC'Y INT'L L. PROC. 265, 266 [hereinafter Breyer, ASIL Keynote] (suggesting that the “comparativist” view—that which embraces the consideration of foreign law—will ultimately prevail due to the fact that there is great value in learning from the common experiences of others); Ruth Bader Ginsburg, “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication, Address Before the Constitutional Court of South Africa (Feb. 7, 2006) available at http://www.supremecourtus.gov/publicinfo/speeches/sp_02-07b-06.html (citing the Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2004), where the Court acknowledged the “the overwhelming weight of international opinion against the juvenile death penalty,” as evidence that the “U.S. Supreme Court will continue to accord a ‘decent Respect to the Opinions of [Human]kind’”). *Contra* Antonin Scalia, Keynote Address at the American Society of International Law Proceedings (Mar. 31-Apr. 3, 2004), in 98 AM. SOC'Y INT'L L. PROC. 305 (espousing the view that “modern foreign legal materials can never be relevant to an interpretation of—to the meaning of—the U.S. Constitution”).

insularity are eroding. Many of the Justices have regular contacts and established professional relationships with their judicial counterparts in other nations.¹⁰⁵ Several Justices, including Justices O'Connor,¹⁰⁶ Ginsburg,¹⁰⁷ and Breyer,¹⁰⁸ have registered off-bench support for a greater resort to foreign precedent on a range of issues, including constitutional questions. Justice Kennedy often teaches summer courses in comparative constitutional law in Austria.¹⁰⁹ In addition to death penalty and sexual orientation issues, individual Justices have alluded to comparative sources in cases involving affirmative action,¹¹⁰ free speech,¹¹¹ freedom/establishment of religion,¹¹² abortion rights,¹¹³

105. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 96 (2004) [hereinafter SLAUGHTER, *NEW WORLD*] (discussing the involvement of Justices O'Connor, Breyer, Ginsburg, Kennedy and Rehnquist in international judicial summits and exchange programs); Stephen Breyer, *Dedication at the University of Puerto Rico* (2001) in 70 *REV. JUR. U.P.R.* 1015, 1017 (2001) [hereinafter Breyer, *Dedication*] (noting his participation in meetings with foreign judges).

106. See O'Connor, *supra* note 104, at 21 ("I have had the wonderful opportunity to participate in several legal exchanges—exchanges with judges and lawyers in Great Britain, in France, in India, in Canada, and in Australia, for example. We have compared approaches to criminal law, to administrative law, to court management, and to constitutional law.").

107. Ginsburg, *supra* note 104 ("My message tonight is simply this: We are the losers if we do not both share our experience with, and learn from others."); Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue, Fifty-first Cardozo Memorial Lecture* (Feb. 11, 1999), in 21 *CARDOZO L. REV.* 253, 282 (1999) (asserting that "comparative analysis . . . is relevant to the task of interpreting constitutions and enforcing human rights").

108. Breyer, *Dedication*, *supra* note 105, at 1017 ("The *global* revolution demands a more uniform law, say, of commercial transactions or intellectual property. It requires us better to understand other systems of law, as we try to universalize the protection of human, as well as commercial, rights."); Breyer, *ASIL Keynote*, *supra* note 104, at 266 (suggesting that comparative materials should not be limited strictly to formal decisions of foreign courts, but should also include relevant documents that can be readily found on the Internet).

109. Toobin, *supra* note 17, at 44.

110. See *Grutter v. Bollinger*, 539 U.S. 309, 344 (2003) (Ginsburg, J., concurring) ("The Court's observation that race-conscious programs 'must have a logical end point,' accords with the international understanding of the office of affirmative action.") (internal citation omitted) (citing the text of the International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994).

111. See, e.g., *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 566 n.10 (1976) (contrasting the differences between the English and American legal systems); *Burson v. Freeman*, 504 U.S. 191, 206 (1992) (noting the widespread use of secret ballot voting systems in all fifty states and in numerous Western democracies); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 381-82 (1995) (noting that England, Australia, and Canada are all examples of foreign democracies that prohibit anonymous campaigning).

112. See, e.g., *Locke v. Davey*, 540 U.S. 712, 734 (2004) (Scalia & Thomas, J. J., dissenting) (comparing the majority's decision to allow public universities to provide scholarships for secular instruction but not for religious instruction with a proposed French policy that would ban all religious attire in schools); *McCreary County v. ACLU*, 125 S. Ct. 2722, 2748 (2005) (Scalia & Thomas, J. J., dissenting) (contrasting the European model of separation of church and state, where religion is strictly excluded from the public forum, and the American model, where such strict

and other issues. The number and detail of references to international rules and precedent are growing.¹¹⁴

C. *The Terms of the Present Debate*

The judicial position in favor of using comparative constitutional resources generally follows the path outlined in Justice Breyer's remarks in the AU conversation. Justice Breyer supported the use of comparative sources based on the pragmatic perception that the systems share common constitutional guarantees, endorse common principles, face common questions regarding application of those principles, and possess sufficiently similar legal and social structure to make the experience of one nation potentially relevant to the other.¹¹⁵ He maintained that use of comparative precedent should be selective, based on its persuasive value, and never binding on the Court.¹¹⁶ He regarded it as a source for potential inspiration or instruction, not as a source of controlling law.¹¹⁷

separation was never the intention of the framers). As an example of the differences in the two models, Scalia notes that in the United States, Congress begins each legislative session with a prayer, whereas in Europe this would be forbidden. *Id.*

113. See *Roe v. Wade*, 410 U.S. 113, 135-38 (1973) (summarizing the history of English abortion law).

114. There is also evidence of growing interest in international precedent among lower court judges. For one example, see the arguments of Judge Guido Calabresi in *United States v. Then*, 56 F.3d 464, 466-469 (2d Cir. 1995) (Calabresi, J., concurring), suggesting that in deciding cases under rational basis review, American courts would be wise to take note of how foreign constitutional courts have dealt with similar situations—particularly situations where laws that were ostensibly rational when enacted, appear to become increasingly irrational over time. Additionally, the former Chief Justice of the D.C. Circuit, Hon. Patricia Wald, has spoken out in support of comparative analysis. See Patricia M. Wald, *The Use of International Law in the American Adjudicative Process*, Debate Before the Federalist Society National Lawyer's Conference (Nov. 15, 2003), in 27 HARV. J.L. & PUB. POL'Y 431, 441 (opining that while American judges should exercise caution and restraint in relying on foreign decisions, there should be no absolute bar to this practice). These sentiments are not shared by all other federal judges; for example, Judge Richard Posner of the Seventh Circuit recently contested the use of comparative precedent. See Posner, *supra* note 17 (maintaining that foreign decisions should not be considered persuasive authority in deciding U.S. constitutional issues); see also Hon. J. Harvie Wilkinson, 4th Cir., *The Use of International Law in Judicial Decisions*, Debate Before the Federalist Society National Lawyer's Conference (Nov. 15, 2003), in 27 HARV. J.L. & PUB. POL'Y 423 ("When judges rely on foreign sources, especially for difficult constitutional questions concerning domestic social issues, they move the bases for judicial decision-making even farther from the realm of both democratic accountability and popular acceptance."); O'Scannlain, *supra* note 34, at 1900-03 (suggesting that there are unique social, political, and economic realities in America that make reliance on foreign constitutional decisions ill-suited in the American jurisprudential system).

115. AU Conversation, *supra* note 1, at 527-34.

116. *Id.* at 533.

117. See *id.* at 524 ("The practice involves opening your eyes to what's going on elsewhere, taking what you can learn for what it is worth, and using it as a point of comparison where doing so will prove helpful.").

The Justices who support the use of comparative constitutional precedent draw strength for their position from a growing body of legal scholarship favoring comparative constitutionalism. Among the leading proponents have been Dean Harold Hongju Koh, Professor Vicki Jackson, Dean Anne-Marie Slaughter, and Professor Mark Tushnet. These scholars agree on the many benefits to be realized by the study of foreign and international law. At the core of their arguments, they share a belief in the inevitability of comparison among different legal systems resulting from globalization.¹¹⁸ In addition to globalization on an institutional level, they maintain that globalization affects judges on an individual level, as increased international exposure causes judges to internalize their broader understanding of the world, rendering it “impossible for them to recabin their intellectual and professional world.”¹¹⁹

Professor Jackson classifies the benefits of comparative thinking as “internal” or “external.”¹²⁰ A chief “internal” benefit is access to new perspectives and information by looking to judicial opinions abroad.¹²¹ Foreign perspectives can be particularly instructive with

118. Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on “Proportionality,”* *Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 600 (1999) [hereinafter Jackson, *Ambivalent Resistance*] (noting that in nearly all instances, people are influenced by what they think they know about other countries); Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 278-79 (2001) [hereinafter Jackson, *Narratives of Federalism*] (arguing that because people always make implicit comparisons, it is critical that decision makers have an accurate sense of what makes the U.S. unique or, on the other hand, what makes the U.S. similar to other “civilized nations”); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 119-20 (2005) [hereinafter Jackson, *Constitutional Comparisons*] (arguing that since judges necessarily have impressions about other countries, and these impressions may influence U.S. constitutionalism, it is critical for the sake of transparency, that these judges overtly state in their opinions what it is they believe to be true of other countries). Jackson maintains that such overt references create accountability and prevent court decisions based on erroneous misconceptions from remaining good law. *Id.* See generally ANNE-MARIE SLAUGHTER, *A Brave New Judicial World*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 297-98 (Michael Ignatieff ed., 2005) [hereinafter Slaughter, *Brave*] (noting that in a globalized world, where access to information is readily available and where travel to foreign countries is common, it is impossible to insulate judges from the universe of ideas stemming from other legal systems).

119. Slaughter, *Brave*, *supra* note 118, at 297.

120. Jackson, *Narratives of Federalism*, *supra* note 118, at 255-63 (explaining that “internal utility” refers to the “process by which a judge reasons about and decides a case for herself,” whereas “external legitimacy” refers to the practice of “invoking the decisions of other constitutional courts . . . to enhance the legitimacy of a court’s reasoning and result before particular audiences”).

121. Slaughter, *Brave*, *supra* note 118, at 293-94 (suggesting that studying foreign decisions is helpful in that they “may cast an issue in a different and more tractable light”).

respect to “common areas of human experience,”¹²² and basic concepts such as liberty, equal protection, and privacy.¹²³ Examination of other nations’ approaches should enable U.S. courts to produce better-reasoned and more sophisticated judicial opinions by adding depth and breadth to their analyses. Additionally, it gives domestic courts an opportunity to prepare for potential future cases that other courts have already addressed¹²⁴ or to gain insight into the consequences of different interpretations and rule adoptions.¹²⁵ Further, comparative analysis allows a more refined understanding of our own constitutional system by highlighting its differences from other systems.¹²⁶ Dean Slaughter argues that this deeper understanding of American law does not necessarily favor uniformity as the likely outcome of global dialogue; rather, “informed divergence” is just as likely an outcome.¹²⁷ Finally, comparative study allows courts to examine whether the assumptions of American jurisprudence are as essential as we believe them to be.¹²⁸

In addition, several scholars argue that comparative constitutional law promises additional benefits related to the global perception of the United States. They dispute the contention by opponents of comparative analysis that looking abroad will impair the legitimacy of U.S. courts, instead proposing that such analysis “could actually strengthen the Court’s legitimacy”¹²⁹ and “enrich” American law.¹³⁰

122. Jackson, *Narratives of Federalism*, *supra* note 118, at 254-61 (suggesting that comparing constitutional experiences can “provide[] a basis against which divergent judgments can be tested”).

123. Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 47 (2004) [hereinafter Koh, *International Law*] (arguing that the United States has always shared basic concepts of liberty, equal protection, and privacy with other systems).

124. Slaughter, *Brave*, *supra* note 118, at 293-94 (noting that the examination of foreign decisions is particularly useful when the foreign decisions come from countries with comparable legal standards).

125. See Jackson, *Narratives of Federalism*, *supra* note 118, at 255-61. (suggesting that “the experience of other nations can have significant internal utility for legal interpretation by demonstrating different approaches to similar ‘functional’ questions”).

126. *Id.*

127. See Slaughter, *Brave*, *supra* note 118, at 295 (defining informed divergence as “a deliberate decision to pursue an explicitly idiosyncratic path in the face of global trends in the other direction,” and noting that there are a host of uniquely American justifications available to judges to justify divergence from the prevailing trends in global constitutional jurisprudence).

128. See Vicki C. Jackson, *Holistic Interpretation, Comparative Constitutionalism, and Fiss-ian Freedoms*, 58 U. MIAMI L. REV. 265, 292 (2003) [hereinafter Jackson, *Holistic Interpretations*] (noting that comparative analysis suggests that U.S. courts’ interpretations of freedom of speech could be altered “without impairing a robust constitutional democracy”).

129. See Jackson, *Narratives of Federalism*, *supra* note 118, at 261 (describing the possibility of comparative analysis to “enhance the legitimacy of a court’s reasoning

Further, they believe that greater interaction with foreign authority will protect the Court's international stature "against charges of ignorance."¹³¹

The leading scholars favoring comparative constitutionalism offer unique perspectives on the study of comparative constitutional law. Dean Harold Hongju Koh is a leading advocate of legal globalization,¹³² who centers much of his work on transnational and international litigation.¹³³ He builds his argument in support of comparative constitutionalism on the premise that U.S. courts should look to "international law standards out of a decent respect for the opinions of mankind."¹³⁴ He urges the development of a "transnationalist jurisprudence," which includes "understanding and making reference to foreign constitutional precedents" as an aid to constitutional interpretation¹³⁵—not just as an aid to drafting.¹³⁶

and result before particular audiences"); Slaughter, *Brave*, *supra* note 118, at 292 (arguing that citing foreign decisions neither undermines the Court's legitimacy nor jeopardizes the Court's integrity).

130. Slaughter, *Brave*, *supra* note 118, at 299.

131. Jackson, *Narratives of Federalism*, *supra* note 118, at 263.

132. See Harold Hongju Koh, *The Globalization of Freedom*, 26 YALE J. INT'L L. 305 (2001) [hereinafter Koh, *Globalization of Freedom*] (characterizing "the globalization of human freedom" as the "most profound social revolution of our time," and citing the fact that the existence of democratic nations across the world has increased nearly five fold over the past three decades as evidence of this ongoing revolution).

133. E.g., Koh, *International Law*, *supra* note 123 (advocating the view that ignoring international law standards in U.S. constitutional interpretation would constitute a drastic reversal of American jurisprudential history); Harold Hongju Koh, How Are International Human Rights Enforced?, Addison C. Harris Lecture (Jan. 21, 1998), in 74 IND. L.J. 1397 (1999) [hereinafter Koh, Harris Lecture] (discussing the role of the *transnational legal process*—that is, the interaction, interpretation, and internalization of human rights laws into domestic legal systems—in the enforcement of human rights laws); Harold Hongju Koh, The 1998 Frankel Lecture: Bringing International Law Home (Apr. 8, 1998), in 35 HOUS. L. REV. 623 (1998) [hereinafter Koh, Frankel Lecture] (examining the possible reasons why nations obey international law); Koh, *International Law*, *supra* note 123 (arguing that international law should be treated as federal law); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) [hereinafter Koh, *Why Do Nations Obey International Law?*] (examining why nations obey international law); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991) [hereinafter Koh, *Transnational Public Law*] (discussing the role of U.S. courts in handling public litigation suits brought by foreign litigants challenging violations of international law); Harold Hongju Koh, *Judge Wilkey's Contributions to International Law and the Foreign Relations Law of the United States*, 1985 BYU L. REV. 647 (1985) (examining the opinions of Judge Malcolm Wilkey and chronicling the legacy of this famed globalist).

134. Koh, *International Law*, *supra* note 123, at 44; see also Koh, *Transnational Public Law*, *supra* note 133, at 2355-56 (noting Justice Marshall's repeated mandate that the United States adhere to the law of nations).

135. Koh, *International Law*, *supra* note 123, at 53.

136. *Id.* at 54 ("Construing U.S. constitutional law by referring to other nations' constitutional drafters, but not their constitutional interpreters, would be akin to operating a building examining the blueprints of others on which it was modeled,

Koh's scholarship highlights an emerging body of transnational law that is fundamentally public in character, "rooted in shared national norms and emerging international norms, that have similar or identical meaning in every national system."¹³⁷ This "transnational public law," Koh says, "encourag[es] dialogue between domestic and international law-declaring institutions [and] moves us closer to a unitary, 'monist' legal system, in which domestic and international law are integrated."¹³⁸ He identifies a "cycle of interaction, interpretation, and internalization" of international law in the transnational legal process and finds that "[j]udicial internalization occurs when litigation in domestic courts provokes judicial interpretation of international law norms into domestic law, statutes, or constitutional norms."¹³⁹ In response to the argument that comparative constitutionalism runs counter to democratic principles, Koh notes that U.S. courts have a long tradition of unelected judges applying law that was made in other jurisdictions.¹⁴⁰

Professor Vicki Jackson advocates what she has termed an "engagement model" of comparative constitutional law.¹⁴¹ This model approaches constitutional law as a "site of engagement" between domestic and foreign sources, and although foreign precedent is not viewed as binding—or even as necessarily persuasive—the model admits the utility of comparative analysis.¹⁴² When considering foreign precedent, courts should view it as "relational authority," because courts can use foreign decisions to distinguish one country's legal norms from another's,¹⁴³ an approach not adequately "foreshadowed by the term 'persuasive authority.'"¹⁴⁴

Jackson particularly supports comparative constitutional law for individual rights questions, but she acknowledges that issues centering on federalism might not have as much to gain from foreign

while ignoring all subsequent progress reports on how well those other buildings actually functioned over time.").

137. Koh, *Globalization of Freedom*, *supra* note 132, at 306.

138. Koh, *Transnational Public Law*, *supra* note 133, at 2397.

139. Koh, Harris Lecture, *supra* note 133, at 1411, 1413.

140. Koh, *International Law*, *supra* note 123, at 1852-53 ("Every court in the United States . . . applies law that was not made by its own polity whenever the court's own choice-of-law principles so direct.").

141. Jackson, *Constitutional Comparisons*, *supra* note 118, at 124.

142. *Id.* at 114, 124. Jackson contrasts her Engagement Model with the "Convergence Model," which views constitutions as "sites for implementation of international law or for development of transnational norms" and the "Resistance Model," which views constitutions as no place for foreign influence. *Id.* at 112-13.

143. Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 LOY. L.A. L. REV. 271, 280, 283 (2003) [hereinafter Jackson, *Transnational Discourse*].

144. *Id.* at 283.

precedent.¹⁴⁵ Other issues that can particularly benefit from comparative analysis are those that engender “deep controversy over internal norms,” and those that turn on matters “of particular concern to legal communities beyond the country of decision,” such as treatment of foreign nationals.¹⁴⁶ Finally, Jackson asserts that the legitimacy of comparative constitutional law varies with the issue, and courts must consider the quality of reasoning, degree of comparability, and institutional origin when determining the weight to give foreign precedent.¹⁴⁷

Dean Anne-Marie Slaughter views comparative constitutional analysis as part of a broader globalization or “disaggregation of the state.”¹⁴⁸ Chronicling the growing cross-border exchange among national courts with international or supranational tribunals, Slaughter characterizes these horizontal and vertical networks as a growing “community of courts.”¹⁴⁹ She identifies five types of judicial interaction that reflect a transactional judicial community: constitutional cross-fertilization, collaboration on global human rights law, judicial exchange, transnational litigation, and in-person meetings.¹⁵⁰ Slaughter explains further that international dialogue proceeds “through mutual citation, as well as through increasingly direct interactions, both face to face and electronic.”¹⁵¹ The outcome is an “emerging global jurisprudence.”¹⁵²

As comparative judicial dialogue materializes, Slaughter stresses the critical importance of actual citation and discussion of foreign

145. Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse*, 2 INT'L J. CONST. L. 91, 95-96 (2004) [hereinafter Jackson, *Comparative Constitutional Federalism*]; Jackson, *Narratives of Federalism*, *supra* note 118, at 272.

146. Jackson, *Transnational Discourse*, *supra* note 143, at 320-21.

147. Jackson, *Constitutional Comparisons*, *supra* note 118, at 125.

148. See generally Anne-Marie Slaughter, *Government Networks: the Heart of the Liberal Democratic Order*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 199 (Gregory H. Fox & Brad R. Roth eds., 2000) [hereinafter Slaughter, *Government Networks*] (describing the disaggregation of the state and the emergence of global government networks).

149. SLAUGHTER, NEW WORLD, *supra* note 105, at 67-68.

150. *Id.* at 68-69.

151. See Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 195 (2003) [hereinafter Slaughter, *Global Community*] (arguing that “these interactions both contribute to a nascent global jurisprudence on particular issues and improve the quality of particular national decisions, sometimes by importing ideas and sometimes by insisting on an idiosyncratic national approach for specific cultural, historical, or political reasons”). Slaughter goes on to argue that these judges are cognizant of the debate in which they are engaging—“the use[] and abuse[] of ‘persuasive authority’ from fellow courts within other national legal systems.” *Id.*

152. *Id.* at 193.

authority.¹⁵³ When courts look to foreign colleagues for inspiration, the only way to avoid deception is for judges to cite the materials they rely upon as persuasive.¹⁵⁴ Courts need to be judicious in their determination of which foreign authority is persuasive; the existence of a comparable governmental structure and a sense of common enterprise is likely needed to render a foreign opinion instructive.¹⁵⁵ Finally, to support the growing inclination of U.S. judges to look abroad, Slaughter argues that American lawyers must expand their analysis,¹⁵⁶ and legal education must adapt accordingly.¹⁵⁷

Professor Mark Tushnet has identified three approaches where the interpretation of the U.S. Constitution would gain from comparative constitutional analysis: functionalism, expressivism, and bricolage.¹⁵⁸ Functionalism treats constitutional provisions as creating “arrangements that serve particular functions in a system of governance.”¹⁵⁹ Functionalist comparative analysis reveals the ways different constitutional provisions accomplish the same purpose in various countries.¹⁶⁰ Expressivism views constitutions as a mirror to a country’s political identity.¹⁶¹ “[S]eeing how things are done in other constitutional systems may raise the question of the Constitution’s connection to American national character more dramatically than

153. See Slaughter, *Brave*, *supra* note 118, at 292 (stating that U.S. judges’ views will be forever changed by their exposure to foreign law, thus “it is far better to be able to trace the evolution of their views through citations than to guess at it”).

154. See *id.* at 297 (noting the importance of citation, Slaughter considers “[t]he worst of all worlds would be for judges to be deeply but secretly influenced by any set of sources”).

155. See Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 127 (1994) [hereinafter Slaughter, *Typology*] (noting that “[a]ctual citation of a foreign authority as persuasive authority . . . assumes that the audience for a particular decision will recognize the foreign court as sufficiently like the national court, or at least sufficiently embodying [its] aspirations . . . to give weight to its words”).

156. See Slaughter, *Government Networks*, *supra* note 148, at 207 (“As American lawyers find judges more receptive to foreign law, they will search out foreign decisions that support their arguments; judges will then have these citations ready to hand for inclusion in their opinions. It is the beginning of a virtuous circle that may finally open the US judiciary and legal profession to the rich wealth of learning and experience in other legal systems.”).

157. See Anne-Marie Slaughter, *The International Dimension of the Law School Curriculum*, 22 PENN. ST. INT’L L. REV. 417, 417 (2004) [hereinafter Slaughter, *International Dimension*] (arguing that as opposed to law schools requiring students take international law, it may be more effective for law schools to strongly recommend that students take it).

158. See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1228 (1999) [hereinafter Tushnet, *Possibilities*] (arguing it is a more systematic approach to learning comparative constitutional law).

159. *Id.* at 1228.

160. *Id.*

161. *Id.*

reflection on domestic constitutional issues could.”¹⁶² “Bricolage” is the notion that a constitution has been assembled, not by a well-structured design, but by borrowing materials that are at the “bricoleur’s” disposal.¹⁶³ As bricoleurs, constitution drafters and interpreters utilize the first concept that solves the current legal problem.¹⁶⁴ Tushnet argues that the U.S. Constitution “licenses reliance on experience elsewhere” through each of these approaches.¹⁶⁵ Although he offers some notes of caution for institutional and doctrinal reasons,¹⁶⁶ he concludes that these reservations do not dictate a rejection of comparative analysis.¹⁶⁷

Tushnet views the reaction against comparative constitutional law as unwarranted, because foreign precedent is neither binding on the United States, nor has it led the Supreme Court to different results than it would have reached analyzing domestic precedent alone.¹⁶⁸ Accordingly, the “unduly heightened rhetoric [against comparative constitutionalism] . . . seems strikingly out of proportion to what has actually happened on the ground.”¹⁶⁹ Comparative constitutionalism is not a threat to U.S. sovereignty because the United States is perfectly capable of deciding when its interests as a sovereign nation are advanced by looking beyond its borders for ideas.¹⁷⁰ Similarly, comparative constitutionalism does not threaten democratic integrity because democratically appointed judges decide to consult foreign law.¹⁷¹ Tushnet argues that comparative analysis is consistent with

162. *Id.* at 1285.

163. *Id.* at 1229.

164. *Id.* at 1286.

165. *Id.* at 1230.

166. See Mark Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes, With Reference to Affirmative Action*, 36 CONN. L. REV. 649, 650-61 (2004) [hereinafter Tushnet, *Interpreting*] (discussing the importance of the compatibility between a constitution’s substantive values and its institutional structure, as well as the need to consider doctrinal context when using comparative materials).

167. See *id.* at 650 (noting that concerns about the relevance of comparative law do not preclude such analysis entirely).

168. See generally Tushnet, *Possibilities*, *supra* note 158 (describing three approaches that would help contribute to the interpretation of the U.S. Constitution); Tushnet, *When Is Knowing Less Better?*, *supra* note 34 (discussing three main arguments against referencing non-U.S. law).

169. Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 LOY. L.A. L. REV. 239, 267 (2003) [hereinafter Tushnet, *Transnational/Domestic*]; see also MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 142-64 (2003) (“We have seen little effects of globalization on constitutional doctrine because, in the new constitutional order, large-scale developments generally have small-scale effects.”).

170. See Tushnet, *Transnational/Domestic*, *supra* note 169, at 261-62 (noting that nations, taking into account their interests, can limit their sovereignty through agreements with other nations).

171. See *id.* at 262 (noting that when U.S. decision makers apply international law, there is no threat to sovereignty); Tushnet, *When Is Knowing Less Better?*, *supra* note 34, at 1286 (noting that no Supreme Court decision has used foreign authority as

originalism where evidence indicates that the Framers intended courts to look abroad.¹⁷² The risk of “cherry-picking” is no more prevalent when the “cherries” are foreign precedents than when they are legislative history,¹⁷³ and in many respects use of foreign precedents is “indistinguishable” from citation to other nonbinding sources.¹⁷⁴

Finally, Tushnet argues that the role of the United States as an influence on the world community depends in part on the willingness of U.S. courts to engage with the courts of other countries.¹⁷⁵ Even if a “reciprocal pay-off about constitutional policy” fails to materialize, comparative study remains valuable as an exercise in training and intellectual interest.¹⁷⁶

Just as Justice Breyer’s AU conversation remarks capture the affirmative view of using comparative constitutional precedent, Justice Scalia’s response, and the confirmation testimony by Chief Justice Roberts and Justice Alito, equally encapsulate the opposing position. Justices Scalia, Roberts, and Alito argue that U.S. constitutional principles are inherently unique, deriving from the history of their creation and popular ratification as part of the United States Constitution.¹⁷⁷ This view renders foreign precedent simply irrelevant, even when it addresses similar concerns, because it is not rooted in the American constitutional experience and does not concern American legal institutions.¹⁷⁸ Justice Scalia’s commitment to

precedent to interpret the U.S. Constitution); *see also* Tushnet, *Interpreting*, *supra* note 166, at 649 (dismissing the “emerging conservative critique” that distrusts the ramifications of comparative analysis on democracy).

172. *See* Tushnet, *When Is Knowing Less Better?*, *supra* note 34, at 1279 (using as an example the Cruel and Unusual Punishments Clause of the Eighth Amendment, which the Supreme Court has held must be interpreted by the common standards of decency, which can be gleaned from positions held in other countries).

173. *Id.* at 1280-81 (referring to Judge Roberts’s comment arguing that judges will use those foreign sources that support their position while ignoring those that do not).

174. *Id.* at 1288 (using as an example a citation to a law review article).

175. *Id.* at 1292 (“Perhaps merely explaining ourselves might have been enough in 1776 or 1862. But today, others will not listen unless we display some reciprocity.”).

176. Mark Tushnet, *Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 325, 349 (1998) [hereinafter Tushnet, *Returning*]; *see also* Tushnet, *Interpreting*, *supra* note 166, at 663 (promoting comparative constitutionalism “because the subject has an intrinsic intellectual interest, and because knowing more rather than less is generally a good thing”).

177. AU Conversation, *supra* note 1, at 521 (“[W]e don’t have the same moral and legal framework as the rest of the world, and never have. If you told the Framers of the Constitution that we’re to be just like Europe, they would have been appalled.”) (Scalia response).

178. *Id.* at 526 (“[A judge should look to] the standards of decency of American society . . . not the standards of decency of countries that don’t have our background, that don’t have our culture, that don’t have our moral views.”). Scalia

a textualist interpretation of original intention as the *sine qua non* of U.S. constitutional interpretation reinforces his position against using comparative constitutional precedent.¹⁷⁹ Obviously, the search for original intention is not aided by consideration of modern comparative constitutional adjudication unless the creators of the American constitutional norm in question signified an intention to use such comparative materials as a guide.¹⁸⁰ Finding no such intention, Justice Scalia and other originalists reject the entire enterprise of comparative constitutional reasoning. Justice Scalia's advice to Justice Breyer in the AU conversation captures this position: "Look, I'm not preventing you from reading these [foreign] cases. . . . Just don't put [them] in your opinions!"¹⁸¹

Building on this negative argument, Chief Justice Roberts has added the observation that reliance on foreign precedent creates a danger of judicial unaccountability, since the judges in other systems are not accountable to the American people, and that reliance on comparative precedent cloaks result-oriented decisions, as judges selectively cite only that comparative law which supports their decisions. Justice Alito has added concerns about the difficulty of understanding foreign precedent, which necessarily arise from unfamiliar legal, political, and governmental terrains.

While there has been less academic scholarship registering clear opposition to the use of comparative precedent, the negative position finds support in testimony before Congress by Michael Ramsey, as well as recent articles by Professors Roger Alford, Eugene Kontorovich, and Steven Calabresi, and others.¹⁸² Along with the

also argued that looking to European law was inappropriate in *Lawrence v. Texas* because that law was established "not as a consequence of some democratic ballot but by decree of the European Court of Rights." *Id.* at 531.

179. *Id.* at 537 ("Now if you're following an originalist approach, you ask, what did the Framers believe constituted due process of law? . . . Whereas if you just say due process of law is an invitation for intelligent judges and lawyers and law students to imagine what they consider to be due process and consult foreign judges, then, indeed, you do not know what you're saying when you swear to uphold and defend the Constitution of the United States. It morphs. It changes.") (Scalia response).

180. But see 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, 1309-15 (2004) (arguing against the usage of foreign law, even in human rights cases and where one must apply natural law).

181. AU Conversation, *supra* note 1, at 534.

182. See generally *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 18-28 (2004) (testimony of Michael Ramsey) (arguing that use of foreign materials when making moral and social policy should be left to the legislature and exceeds prescribed judicial powers); Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005) [hereinafter

judicial and legislative developments mentioned in the Introduction, there has been a recent outpouring of commentary opposing the use of comparative constitutional materials. Professors Robert Delahunty and John Yoo recently declared that “[f]oreign and international law cannot be legitimately used in an outcome-determinative way to decide questions of constitutional interpretation.”¹⁸³ This statement reveals the persistent concern among commentators that reference to foreign law is the functional equivalent of deference to that law. Professor Ernest Young, for example, has argued that the Supreme Court’s *Roper* analysis “swell[ed] the denominator”¹⁸⁴ by including foreign jurisdictions to articulate a global consensus about the death penalty for juveniles when a domestic consensus proved elusive.¹⁸⁵ Others have contended that ascribing authoritative weight to foreign

Alford, *In Search of a Theory*] (discussing the propriety of constitutional interpretation under four theories—originalism, natural law, majoritarianism, and pragmatism); Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT’L L. 675 (2003) (proposing a method by which federal courts can decide how much deference to give to international decisions); Alford, *Misusing International Sources*, *supra* note 34 (arguing that using international sources in interpreting the Constitution violates the Supremacy Clause); Steven G. Calabresi, *Lawrence, The Fourteenth Amendment, and the Supreme Court’s Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097 (2004) (concluding that the use of foreign materials is “most relevant to good policy-making or to assessments of reasonableness and least relevant to questions of interpretation”); Donald E. Childress III, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 DUKE L.J. 193 (2003) (arguing that the correct political order can not be achieved through the judiciary alone); Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL’Y 291 (2005) (arguing that foreign materials cannot be used to determine constitutional questions unless the text of the Constitution itself refers to international law); Donald J. Kochan, *Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Judicial Invocations of Foreign and International Law*, 29 FORDHAM INT’L L.J. 507 (2006); Eugene Kontorovich, *supra* note 17; Larsen, *supra* note 180; John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303 (2006) (arguing that judges should not assume international law is “intrinsically good” and should therefore not utilize such sources, which are not formulated in the same democratic process); Ramsey, *supra* note 17; Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT’L J. CONST. L. 269 (2003) (arguing that borrowing foreign law should be limited for constitutional design and not used for constitutional interpretation); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005).

183. Delahunty & Yoo, *supra* note 182, at 296.

184. Young, *supra* note 182, at 153.

185. *Id.* at 151 (arguing that “including foreign jurisdictions in the denominator of noses that count accords *authoritative* weight to their choices”). “In this situation, those choices—for example, to adopt or reject the juvenile death penalty—have legal significance *without regard to the reasons for the choice.*” *Id.*

decisions¹⁸⁶ grants persuasive weight to the results of foreign law without any regard to the reasons behind those results.¹⁸⁷

Scholarship opposing the use of comparative materials in constitutional decision-making articulates several recurring themes: (1) comparative analysis represents a threat to democracy and sovereignty, (2) comparative materials have only been used haphazardly and opportunistically, and (3) the Supreme Court lacks the institutional capacity to properly interpret foreign and international law.

Critics of comparative constitutional analysis often perceive it as a threat to democracy.¹⁸⁸ Looking to judicial decisions and laws abroad effects a countermajoritarian allocation of decision-making power to foreign bodies when their views conflict with domestic values.¹⁸⁹ For example, Judge Richard Posner objects to the citation of foreign judicial decisions by pointing to the lack of democratic legitimacy of foreign judges in the United States.¹⁹⁰ Donald Childress sees comparative analysis as a symptom of excessive judicial power here, as “the Court sets itself up to usurp the law from its organic ground: the American people.”¹⁹¹ Related to the subversion of democracy through reference to foreign law is the argument that comparative analysis

186. See, e.g., Alford, *Misusing International Sources*, *supra* note 34, at 60 (stating that “*Atkins* thus reaffirms the international countermajoritarian difficulty: the global consensus does not provide content to the national consensus and the global consensus is of no relevance in the absence of a national consensus”).

187. See, e.g., Young, *supra* note 182, at 155 (contending that “[t]he Court is not persuaded by new rationales, but rather by the mere fact that foreign jurisdictions take a particular view. It has not ‘learned’ anything from looking abroad . . . [i]t is deferring to numbers, not reasons”); Larsen, *supra* note 180, at 1291-92, 1297 (observing that the Rehnquist Court resisted reason-borrowing and instead employed the more problematic method of moral fact-finding when examining foreign law; in *Lawrence*, for example, “it was the mere *fact* that other nations . . . had accepted the right the petitioners sought that the Court deemed important”). But see Calabresi, *supra* note 182, at 1105 (regarding determinations of reasonableness, “this nose-counting inquiry is entirely appropriate, although it may not always be dispositive”).

188. See, e.g., Rosenkrantz, *supra* note 182, at 285 (arguing that Argentina’s experience of borrowing from the U.S. Constitution is comprised of collective choices made by the United States); Kochan, *supra* note 182, at 507 (declaring citation of foreign law as “inappropriate, undemocratic, and dangerous”).

189. See Alford, *Misusing International Sources*, *supra* note 34, at 58 (defining the countermajoritarian misuse of comparative analysis as occurring “when the ‘global opinions of mankind’ are ascribed constitutional value to thwart the domestic opinions of Americans”).

190. Posner, *supra* note 17.

191. Childress, *supra* note 182, at 217; see also Delahunty, *supra* note 182, at 309-10 (arguing that “[b]y relying on foreign sources of law to interpret the Constitution, the Court undermines the very delegation of authority that gives it the power of judicial review”).

destroys American separation of powers¹⁹² and undermines national sovereignty.¹⁹³ As Donald Kochan has asserted, “[a] Nation should have the freedom to control the development of its own laws. The elected branches, which develop U.S. law, lose that control if judges are able to exhort extraterritorial and extra-constitutional sources for the determination of legally applicable standards.”¹⁹⁴

In addition, some criticize that use of comparative constitutional law is opportunistic and haphazard.¹⁹⁵ Professor Ramsey notes that “[i]f we are serious about the project of using international materials, we must ‘take the bitter with the sweet,’ and use international materials to contradict, not merely confirm, our own view of rights.”¹⁹⁶ Moreover, Ramsey argues that “[t]he most trenchant critique of this use of international materials is that it serves as mere cover for the expansion of selected rights favored by domestic advocacy groups, for reasons having nothing to do with anything international.”¹⁹⁷ According to this view, judges “cherry-pick” only those foreign authorities that suit their personal legal preferences.¹⁹⁸ Further, some commentators believe that the haphazard citation of foreign authority creates uncertainty about the law.¹⁹⁹ Several critics, including Ramsey, have sought to provide elaborate guidelines to ensure more systematic references to foreign law.²⁰⁰

192. See Kochan, *supra* note 182, at 539 (providing that “[i]f the United States is to have an independent but limited judiciary, the courts must feel constitutionally constrained from searching for, and then applying, extraterritorial sources for purported authority in reaching decisions”).

193. See, e.g., Delahunty, *supra* note 182, at 299 (stating that deference to foreign law “would subject American citizens to the judgments of foreign and international courts”).

194. Kochan, *supra* note 182, at 541-42.

195. See, e.g., Alford, *Misusing International Sources*, *supra* note 34, at 69 (arguing that “[i]f international and foreign sources are arrows in the quiver of constitutional interpretation, those arrows should pierce our constitutional jurisprudence to produce results that we celebrate and that we abhor. Put simply, . . . the results will by no means herald a capacious enhancement of civil liberties in this country”); Ramsey, *supra* note 17, at 76 (contending that comparative analysis must “not be used only in support of rights-enhancing outcomes”).

196. Ramsey, *supra* note 17, at 77.

197. *Id.* at 69.

198. Tushnet, *When Is Knowing Less Better?*, *supra* note 34, at 1280.

199. See Kochan, *supra* note 182, at 543 (stating that the effect of determining which international law should be used as authority is that the law loses predictability).

200. See, e.g., Ramsey, *supra* note 17, at 69-70 (articulating four guidelines for the use of international materials in defining domestic constitutional rights: (1) creating a neutral theory by which to select international sources and their relevance; (2) using sources that do not support the position as well as those that do; (3) utilizing empirical inquiry rather than broad generalizations; and (4) avoiding materials that rely on “unrepresentative proxies”).

A related indictment of the Supreme Court's reference to foreign authority asserts that the Court lacks the institutional competence to critique international law.²⁰¹ Judge Posner has pointed to language barriers and insufficient judicial understanding of the legal and political circumstances surrounding foreign law.²⁰² Additionally, Professor Young argues that both decision costs and error costs are likely to be high when courts use comparative materials due to lack of international legal training as well as language and cultural barriers.²⁰³

Nevertheless, many scholars cautioning against the use of comparative materials in constitutional law stop short of taking an absolute position; rather, they acknowledge limited instances when comparative analysis may properly aid courts.²⁰⁴ For example, Professor Larsen considers both expository and empirical uses of foreign law to be justifiable and views substantive reason-borrowing to be superior to moral fact-finding.²⁰⁵ In addition, several anti-comparative scholars admit the value of negative use of foreign materials, specifically by examining a foreign rule and expressly taking a different path.²⁰⁶

These arguments against comparative constitutionalism have been amplified by the public reaction in the wake of *Roper v. Simmons*.²⁰⁷ In introducing a proposed congressional resolution condemning the use of foreign precedent, Senator Cornyn effectively characterized much of the larger public negative view. The resolution itself asserts "that judicial interpretation regarding the meaning of the

201. See, e.g., McGinnis, *supra* note 182, at 320 (arguing that in order to use international law, judges would have to also do a comparative analysis of both the culture and legal systems); Alford, *Misusing International Sources*, *supra* note 34, at 64-65 (noting this weakness makes judges susceptible to an undue reliance on foreign legal advocacy).

202. See Posner, *supra* note 17 (suggesting that legal translations are particularly susceptible to misunderstandings).

203. Young, *supra* note 182, at 165-67.

204. See, e.g., *id.* at 151-52 (stating that the benefit of persuasive authority stems from "engagement with the reasons for a practice or decision"); Calabresi, *supra* note 182, at 1106 (maintaining that "foreign court decisions are relevant to policy making, but not to interpretation"); Childress, *supra* note 182, at 204 (noting that "even the most committed textualist encounters times where it is necessary to plug holes in the process of interpretation").

205. See Larsen, *supra* note 180, at 1295-96 (noting that such use is permissible because it looks "to the judgments and practices of foreign nations and international agreements to determine what the content of the domestic constitutional law should be").

206. See, e.g., Rosenkrantz, *supra* note 182, at 290 (stating that negative use of international materials is permissible because a judge's decision to do so is an autonomous one that confirms the differences between constitutional systems).

207. 543 U.S. 551 (2005).

Constitution of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States.”²⁰⁸ In advocating the resolution, Cornyn decried the trend toward judicial use of foreign precedent as eroding the control of the American people over “what our laws and our Constitution mean, and what our policies in America should be.”²⁰⁹ He equated the use of foreign precedent with delegation of American judicial power to foreign courts.²¹⁰ He also suggested that judges who look to foreign law may be violating their oath to discharge their constitutional duties.²¹¹ He asserted that such a step offends the democratic process because international law is not accountable to the American people.²¹² He also asserted that the use of foreign precedent was “selective, not principled,” and motivated by an ideological agenda that threatens to interfere with the powers of the President and Congress over the direction of foreign policy.²¹³

II. THE AMERICAN TRADITION OF CONSTITUTIONAL INSULARITY

Contemporary negative reactions to the use of comparative constitutional precedent tap into a longstanding tradition of exceptionalism and particularism in American attitudes toward foreign law. There are at least four reasons why the United States has been insular in the development of constitutional law for so much of its legal history: (1) a broader historic tradition of separateness that has characterized all American law, politics and foreign policy, (2) a well-developed sense of the United States’ own constitutional uniqueness, (3) its long “head start” in the development of its constitutional law and the resulting advanced state of U.S. constitutional jurisprudence, and (4) the habits and practices of American legal education.

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

209. Gebe Martinez, *Cornyn Suggests “Political Decisions” May Be a Factor in Recent Incidents at Courthouses*, HOUSTON CHRON., Apr. 5, 2005, at A7.

210. 151 CONG. REC. 3109, 3111 (2005).

211. *Id.* at 3110.

212. *Id.*

213. *Id.* These arguments prompted a stinging response from Justice Scalia, who made clear that he believes Congress is going too far in trying to tell judges how to adjudicate cases. See Charles Lane, *Scalia Tells Congress to Mind its Own Business*, WASH. POST, May 19, 2006, at A19 (stating “[t]he proposed legislation ‘is like telling us not to use certain principles of logic,’ . . . ‘Let us make our mistakes just as we let you make yours’”).

A. Tradition of Separateness

The United States, for much of its history, has chosen an insular path in the development of law and politics.²¹⁴ This insularity no doubt originally had much to do with U.S. geographic separation.²¹⁵ Recent technological advances have erased much of that sense of physical separation.²¹⁶ Nevertheless, physical separation has influenced the historical development of U.S. law.

Accompanying that physical isolation was the national sentiment of uniqueness. For example, American cultural tradition is closely associated with such icons as the pioneer spirit, manifest destiny, and the metaphor of the United States as a moral and political “beacon on a hill,” committed to the development of a transformed society fundamentally different in character from its European forebears.²¹⁷ In this view, the U.S. Constitution and Bill of Rights (along with the Declaration of Independence) are salient expressions of the unique character of American democracy. Thus, they are venerated to an extent rarely extended to similar legal documents in other political systems.²¹⁸ For example, the national bicentennial celebrations of the

214. See ALFRED H. KELLY ET AL., *THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT* 13-19 (6th ed. 1983) (illustrating the formation of local governments in the colonies).

215. See ELLEN CHURCHILL SEMPLE, *AMERICAN HISTORY AND ITS GEOGRAPHIC CONDITIONS* 1 (1903) (stating that America's location opposite Europe was an important geographical fact in its history and that its location opposite Asia would lend its future history).

216. See John King Gamble, *New Information Technologies and the Source of International Law: Convergence, Divergence, Obsolescence and/or Transformation*, 41 GERMAN Y.B. INT'L L. 170, 205 (1998) (stating that the technology evolution “will make state institutions less formidable and the barriers between states more porous”); Manfred Lachs, *Thoughts on Science, Technology and World Law*, 86 AM. J. INT'L L. 673, 679-80 (1992) (attributing a growing international interdependence in law to the development of technology).

217. See generally PETER CHARLES HOFFER, *LAW AND PEOPLE IN COLONIAL AMERICA* (rev. ed. 1998); LAWRENCE M. FRIEDMAN, *LAW IN AMERICA: A SHORT HISTORY* 75-80 (2002) (discussing how Puritanism influenced ideas of crime and punishment); Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1910-1922)*, 65 REV. JUR. U.P.R. 225, 284-99 (1996) (discussing the collective psychology underlying manifest destiny and its effect on American jurisprudence). Professor Tushnet argues that the view of the United States as a “shining city upon a hill” feeds courts’ reluctance to look beyond our borders for guidance. Mark Tushnet, “A Decent Respect to the Opinions of Mankind”: Referring to Foreign Law to Express American Nationhood, 69 ALBANY L. REV. 809, 811 (2006). The traditional viewpoint is that a nation thus situated is one to which other should look, but Tushnet argues that “[i]t is not unreasonable to think that in a post-imperialist world they will be more willing to emulate us when we demonstrate to them that we take them seriously.” *Id.* at 812.

218. This view of the Constitution began with the delegates to the Constitutional Convention, who felt the eyes of the world on them. CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA* 134 (1966). Indeed, “Europe for her part kept a watchful eye on the American States.” *Id.*; see also LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION* 2 (1988) (noting that Madison viewed the Constitution as a

Declaration of Independence in the 1970s and of the Constitution in the 1980s were unprecedented. The federal statute requiring U.S. law schools receiving federal funds to set aside Constitution Day in September for special Constitution-related legal instruction further demonstrates this reverence.²¹⁹

Flowing from these traditions of independence and separation has been a fairly consistent habit of insularity in foreign policy and attitudes toward foreign law.²²⁰ From the beginning there have been strong political currents resisting U.S. involvement in international affairs, especially in situations requiring substantial cooperation with other nations and incorporation of their views into American policy.²²¹ Since World War II, that attitude has changed significantly, as the United States has become a leader on the world political stage, but long habits of insularity and independence have left their marks on American law, including American constitutional doctrines.

The effect on law has been a prolonged resistance to foreign influence. Foreign laws and the “law of nations” have had a place in American law since the beginnings of the Republic,²²² but reliance on foreign judgments and legal principles has always proceeded with caution, subject to a variety of limiting doctrines affording American courts discretion to disregard foreign law in circumstances where they deem it to be inconsistent with American interests and policies.²²³ Even areas of shared doctrine with other common law nations, such as torts, property, and commercial law, have witnessed a

possible vehicle for promoting “the cause of Liberty throughout the world”). Professor Paul W. Kahn has noted that this viewpoint persists today. Paul W. Kahn, *American Hegemony and International Law Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT’L L. 1, 4 (2000) (stating “America’s relationship to the rest of the world still seems to us to be one of example: the ‘city on a hill’ that the rest of the world is to imitate”).

219. See 36 U.S.C. § 106 (2000).

220. See ANDREW MORAVCSIK, *The Paradox of U.S. Human Rights Policy*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 149, 191 n.136 (Michael Ignatieff ed., 2005) (noting that “many senators—most notably Senator Bricker—were deeply concerned about the tendency of state and federal courts in the late 1940s to cite international treaty commitments in support of domestic human rights claims”).

221. See Harlan Grant Cohen, *The American Challenge to International Law: A Tentative Framework for Debate*, 28 YALE J. INT’L L. 551, 556-60 (2003) (discussing generally American resistance to involvement in international affairs).

222. See *supra* notes 80-88 and accompanying text; see also Calabresi & Zimdahl, *supra* note 101, at 743 (quoting Justice O’Connor’s dissent in *Roper v. Simmons*, where she stated that notions of human dignity are not “wholly isolated from, nor inherently at odds with, the values prevailing in other countries”).

223. Vicki Jackson has suggested that foreign precedent be viewed as relational authority to advance the notion that courts are connected through their shared challenges, even though they are not bound by each other’s decisions. See Jackson, *Transnational Discourse*, *supra* note 143.

strong resistance to influence from foreign legal principles or precedent.²²⁴

B. Constitutional Uniqueness

Perhaps in part because Americans regard the United States as fundamentally different from all other nations, they also regard the Constitution as unique among world organs of government.²²⁵ The drafters and ratifiers of the U.S. Constitution initiated this view when they declared that the U.S. Constitution broke new ground in world political history.²²⁶ The delegates to the Constitutional Convention self-consciously treated their efforts as a fundamental departure from the predominant governmental practices of Europe. They frequently told each other that the entire world would be watching this extraordinary experiment in true popular self-government, which if successful would serve as a model for the rest of human kind.²²⁷

From this perspective one might infer that the constitutional law of other nations should be irrelevant to American constitutional principles.²²⁸ Because the Constitution was designed from the start to be different, the Court's jurisprudence interpreting it should also be unique. Borrowing principles or concepts from other nations could introduce a corrupting influence, drawing U.S. constitutional law

224. See, e.g., O'Scannlain, *supra* note 34, at 1903 (arguing that U.S. property law grew out of the colonies' unprecedented access to land, and is thus not appropriate for comparative analysis); Charles Hobson, *Atkins v. Virginia, Federalism, and Judicial Review*, 11 WIDENER L. REV. 23, 50 (2004) (arguing that foreign influence has no place in tort law, and speculating that "the *Atkins* Court's willingness to strike down punishments it personally deems excessive may lead to a similar expansion of the Court's interference with state tort law"); Jens C. Dammann, *The Role of Comparative Law in Statutory and Constitutional Interpretation*, 14 ST. THOMAS L. REV. 513, 526 n.55 (2002) (questioning the appropriateness of referencing foreign authorities in commercial law).

225. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 181-82, 188-93 (1999) (discussing how the United States Constitution is an expression of American character); see also Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 830-32 (1999) (defining "legal particularism" as a doctrine which emphasizes that "legal norms and institutions generally . . . emerge from and reflect particular national circumstances, most centrally a nation's history and political culture").

226. See Jackson, *Narratives of Federalism*, *supra* note 118, at 255-61 (describing American constitutional exceptionalism and the theory that the U.S. Constitution enabled a more progressive form of government than any other political system in the world).

227. *Id.*

228. For example, Justice Scalia made his feelings on comparative analysis clear in numerous opinions. In *Thompson v. Oklahoma*, Justice Scalia noted that that "[w]e must never forget that it is a Constitution for the United States of America that we are expounding." 487 U.S. 815, 868 n.4 (1988). Similarly, in *Printz v. United States*, Justice Scalia suggested that "comparative analysis [is] inappropriate to the task of interpreting a constitution." 521 U.S. 898, 921 n.11 (1997).

back into the swamp of outmoded forms and ideas its creators sought to escape.²²⁹ One detects some of this attitude in the negative arguments of Justice Scalia, Senator Cornyn and others described above, as well as in some of the conservative criticism Justice Kennedy received in the wake of the *Roper* and *Lawrence* decisions.²³⁰

In addition to this sense of conscious difference, the widely shared understanding of the Constitution as a social contract, adopted by and for the people of the United States,²³¹ stresses indigenous control over the meaning and application of the Constitution by individuals and institutions accountable (directly or indirectly) to popular control.²³² Regard to foreign constitutional interpretations, even when devoted to identical language or principles, arguably risks improper delegation of constitutional control to agents independent of such constitutional accountability. How could law from another society outside the American political and social contract add to the development of American constitutional law? Once again, this viewpoint appears in Chief Justice Roberts's²³³ and Senator Cornyn's remarks,²³⁴ as well as in some of the academic criticism of comparative constitutionalism.²³⁵ Presence of these views over a long period has

229. Justice Scalia made this very point in his discussion with Justice Breyer at American University. AU Conversation, *supra* note 1; *see also* quotations, *supra* notes 4, 177 (maintaining that "we don't have the same moral and legal framework as the rest of the world").

230. *See, e.g.,* Phyllis Schlafly, *Supreme Court 5 Runs Roughshod Over Will of the People*, Copley News Serv., Mar. 14, 2005 ("[M]ost other countries don't allow jury trials or other Bill of Rights guarantees, so who knows if the accused ever gets what we would call a fair trial? Over 90 percent of jury trials are in the United States, and we certainly don't want to conform to non-jury-trial countries."); Stuart Taylor Jr., *The Court, And Foreign Friends, as Constitutional Convention*, NAT'L J., Mar. 5, 2005.

And if international standards are to be our guide, what of the facts that—by decree of the Supreme Court—the United States alone broadly bars prosecutors from using illegally seized evidence; is one of only six countries to allow abortion on demand until the fetus is viable; and is quite exceptional in requiring strict separation of church and state?

231. U.S. CONST. pmbl.; *see* Paul L. Kahn, *American Exceptionalism, Popular Sovereignty, and the Rule of Law*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 198, 198 (Michael Ignatieff ed., 2005) (stating that the Constitution "produces the absolute bedrock of the American political myth: the rule of law is the rule of the people").

232. Chief Justice Roberts voiced this concern in his confirmation hearing, noting that "If we're relying on a decision from a German judge about what our Constitution means, no president accountable to the [U.S.] people appointed that judge and no Senate accountable to the people confirmed that judge." *Roberts Hearing*, *supra* note 18, at 201.

233. *Id.*

234. *See supra* note 19 (questioning how the Supreme Court can strike down state death penalty laws while relying on foreign laws).

235. *See, e.g.,* Rosenkrantz, *supra* note 182, at 285 (describing constitutional borrowing as a "deferral of the final word to others in constitutional matters"); Kochan, *supra* note 182, at 546-49 (pointing to democracy concerns arising from the

contributed significantly to the United States' sense of constitutional isolation.

Adding to this sense of isolation have been historically important political differences in the structure of American government, together with social and cultural differences that set many of the constitutional challenges facing the United States apart. With respect to political difference, probably the most salient factor was the division of American government between the national government and the states, with the accompanying doctrine of federalism that colors a wide range of American constitutional questions.²³⁶ Until very recently, no other government had such a system for vertically dividing sovereignty.²³⁷ Even in those foreign systems where significant political subdivisions did exist, none enjoyed the kinds of autonomy typically enjoyed by the American states.²³⁸ With respect to society and culture, factors such as American racial divisions, the presence and continual influx of immigrant populations, national expansion and settlement of new territory, upward (and downward) economic mobility, and religious diversity seemed to set American society apart, particularly from those European nations that might otherwise have seemed a potential source of constitutional thinking.²³⁹

use of foreign authority); Alford, *In Search of a Theory*, *supra* note 182, at 709-10 (viewing comparative theory as weak in its ability to support democratic, majoritarian goals).

236. See Keith Werhan, *Checking Congress and Balancing Federalism: A Lesson from Separation-of-Powers Jurisprudence*, 57 WASH. & LEE L. REV. 1213, 1218 (2000) ("Both of the Constitution's central structural principles—federalism and the separation of powers—reflect this aspiration of balance between the ideals of effective government and limited government."); Allison H. Eid, *Federalism and Formalism*, 11 WM. & MARY BILL RTS. J. 1191, 1198-08 (2003) (discussing the notion that the Supreme Court has taken federalism too far in some recent constitutional cases).

237. See JOHN W. KINGDON, *AMERICA THE UNUSUAL* 8 (1999) (pointing out the division between the national, state and local governments, and noting that each division reserves a certain set of powers).

238. See *id.* ("In contrast to the unitary system found in some other countries, in which regional governments are simply administrative units of the central government, the American federal system provides for states to have their own sovereign powers.").

239. *Id.*; see Richard Albert, *American Separationism and Liberal Democracy: The Establishment Clause in Historical and Comparative Perspective*, 88 MARQ. L. REV. 867, 868 (2005) (discussing the Establishment Clause as a reflection of America's unique approach to religious diversity); Daniel P. Franklin, *American Political Culture and Constitutionalism*, in *POLITICAL CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH* 43, 45 (Daniel P. Franklin & Michael J. Baun eds., 1995) (stating that the common immigrant experience unifies American society and culture).

C. A Constitutional Head Start

As matters played out, the United States had roughly a 150-year head start on other nations in the development of constitutional principles, especially those concerning human rights.²⁴⁰ This occurred because other nations (even democratic ones) simply did not have anything like the U.S. system of constitutional rules, principles, and judicial interpretation during the nineteenth century and the first half of the twentieth century.²⁴¹ For that long period, the U.S. Supreme Court largely had to rely on itself. The Court drew on its own thinking, plus historical American materials, because there was no other source.²⁴²

Thus, by the postwar period when other international constitutional courts first significantly arose, the U.S. Supreme Court had already built a substantial domestic body of precedent on a wide range of constitutional issues. So much American precedent had accumulated that there seemed to be little need to resort to the decisions of other nations' courts. American constitutional law ranged far ahead of other national systems in its development of detailed and nuanced constitutional doctrine, particularly concerning human rights.²⁴³ The Court's own prior decisions thus provided more relevant and instructive teaching than anything that could have been gleaned from other jurisdictions. On constitutional questions, U.S. law was considerably ahead of the rest of the world.²⁴⁴

In addition, partly as a result of its long period of relatively solitary constitutional adjudication, American courts developed modes of constitutional analysis that tied them even more tightly to domestic law. There are deep roots to this insular analytical approach. For

240. See Ackerman, *supra* note 37, at 780-87 (describing the problems faced by India, Hungary and Russia in devising a constitution while tackling difficult human rights issues).

241. See *supra* notes 37-44 and accompanying text.

242. See William H. Rehnquist, *Constitutional Courts—Comparative Remarks* (1989), in GERMANY AND ITS BASIC LAW: PAST, PRESENT, AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993) (stating that U.S. courts could not look to foreign courts for nearly a century and a half because foreign courts lacked the power of judicial review); Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 422-23 (2003) (noting that the U.S. Supreme Court has historically expanded the rights of American citizens without guidance from foreign precedent).

243. See Jed Rubenfeld, Commentary, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1989 (2004) (arguing that American lawmakers believed "[i]nternational human rights were American rights").

244. See, e.g., *id.* at 1987-90 (indicating that continental Europe looked to American law for guidance after World War II); Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 407-08 (1979) (stating that the development of international human rights relied heavily on American constitutionalism).

example, the treatment of the Constitution in *Marbury v. Madison*²⁴⁵ as a form of law that is in most respects comparable (though superior in a case of conflict) to statutes encouraged the use of interpretative techniques similar to those employed in statutory analysis. These techniques treat constitutional principles as artifacts of domestic law and the product of domestic legal and political processes.²⁴⁶ Under Chief Justice Marshall's leadership, the Court adopted a largely positivist interpretative approach which typically emphasized the particulars of constitutional text in political and historical contexts.²⁴⁷ Following the practices of common law legal method, the Court also treated its own prior judicial decisions interpreting the same provisions as law, in the form of controlling judicial precedent.²⁴⁸ In addition, the Court's emphasis on originalism (the idea that the views of the Framers should be consulted in determining the meaning of constitutional texts), historicism (the notion that constitutional principles should be understood in light of the events that gave rise to them and the specific legal issues to which they responded), and pragmatism (the notion that constitutional interpretation should be guided by considerations of practicality and workability in the context of actual governmental experience) all contributed to an inward-looking jurisprudence to which foreign precedent would have little if anything to contribute.²⁴⁹

245. 5 U.S. (1 Cranch) 137 (1803).

246. Robert J. Reinstein & Mark C. Rahdert, *Reconstructing Marbury*, 57 ARK. L. REV. 729, 767-69 (2005) (emphasizing Chief Justice Marshall's fundamental belief that the Constitution was not only a political document, but the paramount law of the United States).

247. Justice Story's Commentaries on the Constitution of the United States largely defined and later influenced the Court's standards for interpreting the Constitution. Regarding these standards, Justice Story quoted Thomas Jefferson:

On every question of construction [we should] carry ourselves back to the time, when the constitution was adopted; recollect the spirit manifested in the debates; and instead of trying, what meaning may be squeezed out of the text, or invented against, conform to the probable one, in which it was passed.

Joseph Story, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 390 (1833); see also HERBERT A. JOHNSON, THE CHIEF JUSTICESHIP OF JOHN MARSHALL, 1801-1835 61 (1997) (discussing Justice Marshall's belief that it was important to consider the Framers' intentions when interpreting the Constitution).

248. G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, 114-15 (1988); H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW 237 (2000).

249. See LEVY, *supra* note 218, at 322-87 (examining the constitutional jurisprudence of original intent); Mitchell Gordon, *Adjusting the Rear-View Mirror: Rethinking the Use of History in Supreme Court Jurisprudence*, 89 MARQ. L. REV. 475, 539 (2006) (suggesting that rather than using historicism to further isolate ourselves, jurists should engage in "deliberative" historical analysis in the comparative context); Catherine Wells Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541, 551 (1988).

D. Insularity and Exceptionalism in American Legal Education

Finally, a portion of American constitutional insularity is the result of American legal education. While the best-trained lawyers in the early republic read continental and Roman law as well as English common law,²⁵⁰ by the late nineteenth century, U.S. legal education was far more narrowly focused on the particulars of *American* law.²⁵¹ Whether through study of famous treatises like those authored by Kent, Story, and Cooley,²⁵² or through the later study of American decisional and statutory law under the guiding principles of the Langdell method,²⁵³ the emphasis in American legal education focused with increasing narrowness and specificity on indigenous American sources of law. As attention to American laws and precedents increased, attention to foreign legal sources subsided.²⁵⁴

("[P]ragmatism provides a theory of meaning that limits meaningful discourse to statements saying something about actual or potential experience.").

250. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 3 (1983) (discussing Litchfield Law School, the "most famous" of the law schools established after the Revolutionary War, and how it based its course of study on the work of Blackstone); 1 CHARLES WARREN, *HISTORY OF THE HARVARD LAW SCHOOL* 303, 339, 355, 436-37 (1970) (discussing how foreign law was part of the Harvard Law School curriculum during its early days); see also M. H. HOEFELICH, *ROMAN AND CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE IN THE NINETEENTH CENTURY* 142 (1997) (noting that some American lawyers and jurists studied Roman and civil law during the late eighteenth until early twentieth centuries).

251. See WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* 59-60, 111 (1994) (discussing how American lawyers increasingly shunned Roman and English law and focused on learning American law); Stevens, *supra* note 250, at 39, 48 nn.39 & 41 (discussing Harvard Law School's sporadic use of "international law" in its curriculum after 1899 and how most law schools emulated Harvard's curriculum).

252. Story, *supra* note 247; JAMES KENT, *COMMENTARIES ON AMERICAN LAW* (1873); THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* (1880).

253. See STEVENS, *supra* note 250, at 69 n.48 (noting Dean Langdell's belief that English and American law should be studied on its own, without interference from government, economics, international law, or Roman law); CHARLES W. ELIOT, *A LATE HARVEST: MISCELLANEOUS PAPERS WRITTEN BETWEEN EIGHTY AND NINETY* 54 (1924) (explaining Langdell's teaching method, which resembled "the laboratory method of teaching physical science, although he believed that the only laboratory the law school needed was a library of printed books"); Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 YALE L.J. 1059, 1074 (1999) (discussing Dean Langdell's notion that American law is a science rather than an art, marked by its logic, methodology and subject matter).

254. See Koh, *U.S. Constitution and International Law*, *supra* note 34, at 45 (pointing out the heavy reliance by early U.S. courts on international law, and subsequent abandonment of international law except for a narrow group of situations); Rehnquist, *supra* note 242, at 412 ("For nearly a century and a half, courts in the United States exercising the powers of judicial review had no precedents to look to save their own, because our courts alone exercised this sort of authority."); see also Jackson, *Narratives of Federalism*, *supra* note 118, at 251 (observing that as the U.S. Supreme Court built a large body of precedent dealing with constitutional questions, it relied less on the decisions of foreign constitutional courts); Jackson, *Ambivalent*

By the turn of the twentieth century, it was entirely possible for an American lawyer or jurist to be regarded as highly learned in the law, without knowing *anything at all* about law outside the United States, save for a few tidbits of English common law still relevant to the functioning of the American common law system.

The growth of legal realism during the twentieth century further undermined the importance of foreign law in American legal education. While some leading academic legal realists took inspiration from comparative sources,²⁵⁵ the legal realist view of human rights rejected concepts of natural law that had played a significant part in the formation of the U.S. Constitution, had animated some early American constitutional precedent, and supplied a platform for some comparative constitutional analysis. In the mid-twentieth century, realist Justices such as Hugo Black and William O. Douglas argued strenuously against reliance on principles of natural law in constitutional adjudication, claiming that they disturbed the separation of powers by inviting unrestrained judicial activism.²⁵⁶ The concept of general or shared transcendent constitutional principles of a kind that might acquire meaning from consideration of comparative sources was anathema to their politically positivist view of American constitutional analysis.²⁵⁷ As many commentators have noted, over the last fifty years or so legal realism has become the dominant viewpoint in American legal

Resistance, *supra* note 118, at 592-99 (questioning the Supreme Court's current ambivalence about looking to other constitutional courts for precedent); George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683, 690-95 (1998) (explaining why comparative law has little influence as an academic discipline). *Contra* Calabresi & Zimdahl, *supra* note 101, at 755 (finding "a steady escalation in citation of foreign law" in U.S. Supreme Court cases).

255. See LAURA KALMAN, *LEGAL REALISM AT YALE 1927-1960*, 72 (1986) (indicating that the Yale faculty incorporated comparative law into its curriculum); see also WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 107-09 (1973) (discussing Llewellyn's interest in German law and connection with German legal studies); DAVID WIGDOR, *ROSCOE POUND: PHILOSOPHER OF LAW* 179 (1974) (observing Pound's discontent with the refusal by American lawyers to consider comparative sources).

256. See, e.g., *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 326 (1945) (Black, J., dissenting) ("For application of this natural law concept, whether under the terms 'reasonableness,' 'justice,' or 'fair play,' makes judges the supreme arbiters of the country's laws and practices. This result, I believe, alters the form of government our Constitution provides."); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 350-51 (1969) (Black, J., dissenting) ("All of these so-called tests represent nothing more or less than an implicit adoption of a Natural Law concept which under our system leaves to judges alone the power to decide what the Natural Law means. These so-called standards do not bind judges within any boundaries that can be precisely marked or defined by words for holding laws unconstitutional.").

257. See Twining, *supra* note 255, at 70 (noting Llewellyn's "rejection of a general definition of 'law'").

education, and the foundation for much of the modern law school curriculum.²⁵⁸

As a result, the American bar, upon whom the American bench ultimately depends for information regarding sources of law, has been thoroughly trained *not* to look beyond American law in its search for advocacy materials.²⁵⁹ In modern legal education, this training begins in the first year where students learn how to conduct research on American statutory law and decisional precedent in American federal and state courts, but typically *receive no instruction whatsoever* on methods for research in other legal systems.²⁶⁰ Courses on legal methods typically omit any discussion regarding use of international sources or comparative analysis.²⁶¹ When students are taught to draft persuasive briefs and legal memoranda, in first-year legal writing courses, upper level appellate advocacy courses, or moot court programs, they are instructed in the persuasive characteristics and deployment of *American* precedent. Only with rare exceptions (such as the Philip C. Jessup International Law Moot Court Competition) do students have an opportunity for written or oral advocacy involving international or comparative resources.²⁶²

258. See, e.g., Gerald R. Ferrera, *Ethics in Legal Education: An Augmentation of Legal Realism*, 18 PEPP. L. REV. 893, 893-94 (1991) (arguing that incorporation of legal ethics into the law school curriculum is a natural extension of the legal realism movement); Jackson, *Ambivalent Resistance*, *supra* note 118, at 592 n.43 (discussing the relation between legal realism and international and comparative law within the law school curricula); Thomas Hayes, Comment, *A Good Judge is Hard to Find: An Essay on Legal Realism and Law School Casebooks*, 54 J. LEGAL EDUC. 216 (2004) (pointing out the role of legal realism in first-year contracts).

259. See Jackson, *Ambivalent Resistance*, *supra* note 118, at 592-95 (arguing that although rates of enrollment in international and comparative law classes are on the rise, lawyers still neglect comparative materials when presenting arguments to judges).

260. For example, students at Temple University Beasley School of Law, where I teach law, are assigned two primary textbooks for their first year courses in Legal Research & Writing: RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* (4th ed. 2001), and AMY Y. SLOAN, *BASIC LEGAL RESEARCH: TOOLS AND STRATEGIES* (2d ed. 2003). These books teach legal novices about the sources of law, the relative weight of authority, and how to begin a search for legal materials. In Neumann's text, a sub-chapter titled "How Courts React to Foreign Precedent," jointly discusses turning to out-of-state and out-of-country precedent, suggesting that "[c]ases from other jurisdictions are consulted only for guidance and only where a gap appears in local law." NEUMANN, *supra*, at 124-27. Sloan's text does not discuss foreign law at all.

261. See, e.g., JANE C. GINSBURG, *LEGAL METHODS: CASES AND MATERIALS* (2d ed. 2004) [hereinafter GINSBURG, *LEGAL METHODS*] (presenting no discussion of foreign law); RICHARD B. CAPPALLI, *THE AMERICAN COMMON LAW METHOD* (1997) (same).

262. See, e.g., FREDERICK BERNAYS WIENER, *EFFECTIVE APPELLATE ADVOCACY* (Christopher T. Lutz & William Pannill eds., rev. ed. 2004) (including no discussion of comparative materials); MARY BETH BEAZLEY, *A PRACTICAL GUIDE TO APPELLATE ADVOCACY* (2002) (same).

International and comparative law are, of course, included in the curriculum as elective courses in most law schools. But until recently, law schools encouraged students to think of these courses as a discipline apart from domestic law, using entirely different materials and for completely different purposes with more emphasis on international diplomacy or international politics than on the intersections and interactions with domestic law.²⁶³ Comparative law, in particular, has been treated as a subject of almost purely academic interest. As the globalization of law advances, these patterns are undergoing dynamic change.²⁶⁴ However, the vast majority of today's practicing lawyers were trained during times when the international and comparative courses in law school had little to do with the development of domestic American law, and nothing to do with advocacy.²⁶⁵

Law libraries and legal research tools reinforce the sense of division between international and domestic law. Practitioner-oriented bar and law firm libraries often omit international material entirely. Law school libraries frequently have limited international and comparative collections. Until recently most practitioners largely excluded international and comparative resources from their research tools. Indexing systems, compendia, major legal treatises, and other similar research tools concerned themselves exclusively with American law and precedent. Electronic legal databases, such as

263. For example, when I attended law school, Yale Law School had an entirely separate library for international materials, located in an entirely different part of the law school building from the main law library (this has since been changed). Many students (myself included) never made it there during their entire legal education. See Ugo Mattei, *Some Realism About Comparativism: Comparative Law Teaching in the Hegemonic Jurisdiction*, 50 AM. J. COMP. L. 87, 96-97 (2001) (finding a significant "degree of europhilia" among comparative law professors and in textbooks).

264. Koh, *Globalization of Freedom*, *supra* note 132, at 309-10 (discussing innovative ways in which American law schools have recently begun to acquaint students with foreign law); Michael P. Waxman, *Teaching Comparative Law in the 21st Century: Beyond the Civil/Common Law Dichotomy*, 51 J. LEGAL EDUC. 305, 306 (2001) (proposing an introductory course called "Law in Comparative Cultures," as an alternative to standard comparative law courses); Judith Welch Wegner, *The Curriculum: Patterns and Possibilities*, 51 J. LEGAL EDUC. 431, 433 (2001) (finding a growing number of law school courses offering comparative or foreign law in a wide array of substantive areas); M.C. Mirow, *Globalizing Property: Incorporating Comparative and International Law into First-Year Property Classes*, 54 J. LEGAL EDUC. 183, 186-88 (2004) (proposing that law schools incorporate aspects of comparative law into first-year property classes).

265. See Jackson, *Transnational Discourse*, *supra* note 143, at 343 (stating that most U.S. judges and lawyers today received little or no training in international law while in law school and in practice); Stephen Zamora, *The Cultural Context of International Legal Cooperation*, 51 J. LEGAL EDUC. 462, 464-65 (2001) (observing that most law students graduate from law school without a basic understanding of international law, despite the ample opportunities to take international law classes).

Westlaw and Lexis, that have become the means of choice for most practical and advocacy-oriented legal research initially followed suit. The available international materials tend to be highly specialized and relatively difficult for most practicing lawyers to obtain.²⁶⁶ Further, they do not typically include foreign constitutional law.²⁶⁷ A lawyer seeking comparative constitutional materials will encounter significant difficulty finding them.²⁶⁸

With such limited legal training and sources for legal research, it is little wonder that comparative precedent rarely appears in American legal decisions. For relevant legal materials, courts depend on the counsel before them,²⁶⁹ who seldom provide the court with any international materials.²⁷⁰ True of all legal issues, this is especially true of constitutional questions. If presented with a case involving an unsettled constitutional question, the typical American advocate: (1) would not think to ask whether comparative or international material might bear on the resolution of the question; (2) if she did ask, would not know how to go about looking for relevant comparative precedent; (3) if she did look, would encounter great difficulty in finding it; and (4) if she actually found it, would have little idea how to use it.²⁷¹ Consequently, when members of the bar fashion constitutional legal arguments, they systematically omit any relevant discussion of foreign law. Because courts depend on counsel to provide them with both the relevant legal materials for rendering

266. On both Lexis and Westlaw, foreign law searches are difficult to complete. To find available material, one must work through multiple links to reach a search prompt that grants access to the laws of only one nation at a time.

267. There is no decisional law from non-English speaking nations on either Lexis or Westlaw, and only a small amount of law available from English speaking countries. Searches for foreign constitutional law are restricted to (most) Commonwealth countries and the European Court of Human Rights.

268. See Andrew Grossman, *Towards Cooperation in Access to Foreign Primary Law*, 30 INT'L J. LEGAL INFO. 1, 1 (2002) ("In the United States particularly, acquisition of foreign materials has perceptibly declined since the early 1980s."). But see Mary Rumsey, *Foreign and International Law Librarianship* (2006), available at <http://www.aallnet.org/sis/fcilsis/rumseyFCILarticle.pdf> ("Increasingly, large law firms have a librarian who specializes in international and foreign legal research.").

269. See Lon L. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 30-32 (Harold Berman ed., 1961) (pointing out that the legal advocate must persuade the judge through careful selection of arguments and materials); GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 120 (1978) ("[The adversary system's] essential feature is that a decision is made by judge, or judge with jury, who finds the facts and determines the law from submissions made by partisan advocates on behalf of the parties.").

270. See Jackson, *Transnational Discourse*, *supra* note 143, at 343 (finding that because law schools do not train lawyers to use international materials, lawyers are reluctant to give these sources to judges in the course of litigation).

271. See Rumsey, *supra* note 268, at 5 ("The variety of sources used in international law can overwhelm researchers, and the field lacks a clear hierarchy of authority.").

decisions and persuasive arguments about how to use them,²⁷² the ignorance of the bar regarding comparative constitutional resources contributes to near-equal ignorance on the bench. Although courts are not precluded from seeking such materials themselves, in practice they are unlikely to do so.

III. PROSPECTS FOR CHANGE

The American tradition of legal and constitutional isolation is slowly breaking down and will continue to do so. There are several factors contributing to this development, including the increasing globalization of American law, the interaction and exchange among judicial officials of different nations, the international convergence of constitutional norms, and the increasing sophistication and progressivism of foreign constitutional courts.

A. Globalization and its Constitutional Implications

Globalization of the law is eroding American constitutional isolation.²⁷³ Globalization of American law has advanced along many fronts, most notably in areas related to trade and finance, but also in environmental law, intellectual property, and other important domains.²⁷⁴ Where globalization has occurred, it has introduced into the American judicial process a new need for attention to comparative legal analysis.²⁷⁵ While most of these developments do not have direct constitutional implications, they carry overtones that can indirectly introduce a comparative element into American constitutional discourse.

For example, the United States has agreed to abide by and enforce a variety of international legal principles that constrain domestic discretion both to adopt restrictive policies toward foreign trade and to provide preferential treatment for domestic competitors in global markets.²⁷⁶ Two prominent examples are U.S. participation in the

272. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 382-84 (1978).

273. Professor Annelise Riles has defined globalization, with respect to the law, as "a condition of interconnected, overlapping legal regimes, a proliferation of information technologies which mediates and engineers an awareness of this condition." Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L. J. 221, 222 (1999).

274. *Id.* at 222-23.

275. See Koh, *Globalization of Freedom*, *supra* note 132, at 310-12 (arguing that the spread of democracy requires comparative legal academics to speak up and inform policy makers and judges on ways to shape globalization).

276. See Robert E. Dalton, *National Treaty Law & Practice: United States*, in NATIONAL TREATY LAW AND PRACTICE 773-74 (Duncan B. Hollis, Merritt R. Blakeslee & L. Benjamin Ederington eds., 2005) (describing the Trade Act of 2002, where

World Trade Organization and the North American Free Trade Agreement. Such agreements introduce comparative elements into U.S. judicial decisionmaking. They create the possibility of conflict between their terms and domestic laws, contracts, or other legal arrangements. When that occurs, U.S. courts will be called upon to interpret the language of the multinational agreements, determine the extent (if any) of their legally cognizable conflict with domestic laws or regulations, and decide how the conflict will be resolved.²⁷⁷

Conflict between international trade arrangements and domestic law has constitutional overtones because, under Article VI's Supremacy Clause, such international free trade obligations become part of the "supreme law of the land" in the United States, binding upon government and private citizens alike.²⁷⁸ Under the constitutional doctrine of preemption, the international trade obligations adopted at the national level displace conflicting state and local law.²⁷⁹ They also become judicially binding in domestic as well as international commercial arrangements, for example by rendering certain contractual arrangements illegal or defeating claims based on domestic protective legislation that conflicts with international legal commands.

Globalization of this sort obliges greater consideration of transnational and comparative principles and materials in American courts. It not only promotes awareness of international and comparative precedents, but it also creates a pressure for conscious complementarity of decisionmaking between American and foreign tribunals, which in turn requires comparative analysis. In litigation over domestic application, American courts must interpret the international agreements in question.²⁸⁰ When they do so, they must

Congress established objectives with respect to seventeen areas of foreign trade, including improvement of the WTO and other multilateral trade agreements and reduction of border taxes).

277. See Koh, *Transnational Public Law*, *supra* note 133, at 2371 (suggesting that U.S. courts should not decide unilaterally how such conflicts will be resolved, but should instead engage in a "process of institutional dialogue among various domestic and international, judicial and political fora to achieve ultimate settlement"); Catherine Valcke, *Global Law Teaching*, 54 J. LEGAL EDUC. 160, 163 (2004) (referring to this process as the application of "transnational law").

278. See U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . ."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES' 111 cmt. d (1987) (discussing how international agreements have binding domestic legal force).

279. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 416 (2003) ("Valid executive agreements are fit to preempt state law, just as treaties are.").

280. See Dalton, *supra* note 276, at 765, 789-90 ("When an Act of Congress and an international agreement relate to the same subject, the Executive Branch and the

be aware that other foreign national tribunals will also interpret the same agreements, and that international tribunals may exist to provide final authoritative interpretation of disputed questions.²⁸¹

The U.S. courts thus may well have occasion to consider: (1) how other world tribunals have interpreted the provisions of the international agreement in question; (2) whether similar domestic law conflicts have been detected in other participating nations; and (3) if so, how other court systems have chosen to resolve those conflicts. At a minimum, U.S. courts probably would not want to give the international norms *more* restrictive effect in the United States than they received abroad. And while the U.S. courts might not be required to interpret the international agreements in the same way as foreign courts, divergent interpretation could trigger various forms of international conflict. This conflict may range from international litigation, to legal and diplomatic responses by other nations (or in some cases even by foreign corporations or citizens) whose interests are harmed by the U.S. interpretation, to economic or legal retaliation by foreign states whose interests are negatively affected by the U.S. decision.²⁸²

Given the prospect for such international consequences, it would behoove American courts to attend carefully to potential interpretative divergences from foreign tribunals.²⁸³ At a minimum, American courts need to know what foreign and international courts have said regarding the trade provisions in question before adopting a different interpretation. Where possible, the American courts should probably harmonize U.S. interpretation with the weight of

courts will endeavor to: (1) construe them so as to give effect to both; or (2) reconcile the international agreement and an Act of Congress, with the 'later in time' generally prevailing in domestic law.").

281. See, e.g., *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (looking to the positions of foreign governments in striking down a Massachusetts law that restricted the ability of Massachusetts and its agencies to purchase goods and services from companies that do business with Burma).

282. Naturally, these concerns run both ways, as illustrated by the Case Concerning *Elettronica Sicala, S.p.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. 15 (July 20), in which the United States sued Italy, alleging violations of the 1948 U.S.-Italy FCN Treaty. For a discussion of this case, see generally Wendy Huey, *International Litigation: United States and Italy FCN Treaty and I.C.J. Jurisdiction Over Disputes—United States v. Italy*, 1989 I.C.J. 15 (1989), 32 HARV. INT'L L.J. 236 (1991).

283. See Reem Bahdi, *Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts*, 34 GEO. WASH. INT'L L. REV. 555, 556-57 (2002) (outlining five reasons why judges pay attention to international law, including concern for the rule of law and to avoid negative consequences from the rest of the world).

interpretation elsewhere;²⁸⁴ alternatively, they should have good cause, solidly grounded in U.S. law and policy, for adopting any interpretation that is at odds with comparative precedent.²⁸⁵ In either event, they need to know what comparative law is on the interpretative issues in question in order to make an intelligent decision. They should not depart from comparative precedent lightly, let alone ignorantly or absent-mindedly.

Ultimately, of course, authoritative U.S. interpretation of disputed provisions in international trade agreements becomes the responsibility of the U.S. Supreme Court. The Court is most likely to take up this duty where the terms of the agreement are subject to competing plausible interpretations.²⁸⁶ That possibility could emerge (as with domestic statutory law) through a conflict in interpretation by lower federal courts, or between federal and state tribunals. In the case of international agreements, it could also arise because of a conflict in interpretation between a lower U.S. court and a foreign tribunal.

In such a case, the Supreme Court's interpretation will perform the important constitutional function of providing uniformity in federal law.²⁸⁷ But the Court's choice among competing interpretations of international agreements will carry additional constitutional significance. This occurs both because the choice will affect how the provision in question preempts other American laws, and because the choice will have implications for the exercise of national legislative and executive powers.²⁸⁸ Although the Court may not be technically

284. See Bahdi, *supra* note 283, at 590 (2002) (discussing how the desire to avoid being viewed negatively by other countries inspires comparative analysis); cf. AU Conversation, *supra* note 1, at 521 (quoting Justice Scalia as stating, "But I thought that the object of a treaty being to come up with a text that is the same for all the countries, we should defer to the views of other signatories, much as we defer to the views of agencies—that is to say if it's within the ballpark, if it's a reasonable interpretation, though not necessarily the very best").

285. *Id.*

286. See, e.g., *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (resolving a question of whether the Extradition Treaty between the United States and Mexico prohibits international abductions); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995) (examining the intersection of the Carriage of Goods by Sea Act and the Hague Rules, and "declin[ing] to interpret our version of the Hague Rules in a manner contrary to every other nation to have addressed this issue"); *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (settling a dispute over foreign detainees by interpreting Article 36(1)(b) of the Vienna Convention on Consular Relations).

287. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (holding that the Supreme Court had authority over state courts in matters of federal law in order to guarantee a uniform system of law).

288. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 386 (2000) (recognizing weighty foreign policy and separation of powers concerns involved in interpreting the Massachusetts Burma Law).

required to consider foreign interpretations of the disputed treaty language, there are powerful constitutional policy reasons for doing so. A decision at odds with international precedent, for example, could affect the President's ability to conduct foreign policy by triggering international litigation, inviting retaliatory measures by other states, or leading to sanctions against the United States in international tribunals.²⁸⁹

As globalization progresses, and as U.S. participation in international agreements proliferates, the circumstances in which both the Supreme Court and lower federal courts need to be aware of foreign precedents will increase. As they do, judicial demand for information about foreign law will grow, as will the need for both advocates and judges proficient in understanding and utilizing international and foreign precedent.²⁹⁰ Over time, the inevitable effect will be more extensive knowledge and use of foreign legal decisions in American courts.

Globalization also has an impact on the interpretation of domestic law. For example, when U.S. courts are called upon to apply domestic trade regulations, intellectual property rules, and commercial law principles in contexts that have international implications, they will need to do so in ways that harmonize with international trade agreement obligations and avoid potential violations of international norms.²⁹¹ Once again, awareness of comparative law interpretations of the trade provisions in question will become essential to informed judicial decisionmaking about related domestic questions. Although these interpretative questions

289.

[T]he EU and Japan have gone a step further in lodging formal complaints against the United States in the World Trade Organization (WTO), claiming that the state Act violates certain provisions of the Agreement on Government Procurement [citation omitted], and the consequence has been to embroil the National Government for some time now in international dispute proceedings under the auspices of the WTO. In their brief before this Court, EU officials point to the WTO dispute as threatening relations with the United States

Id. at 383.

290. See O'Connor, *supra* note 104, at 21 (predicting that judges will become increasingly interested in foreign law, and urging attorneys to embrace foreign law in their arguments); Slaughter, *Government Networks*, *supra* note 148, at 207 (discussing Justice O'Connor's and Justice Breyer's willingness to refer to European Court of Justice decisions).

291. See, e.g., Koh, *Is International Law Really State Law?*, *supra* note 93, at 1842 ("[W]hen customary international norms are well-defined, the executive branch has regularly urged the federal courts to determine such rules as matters of federal law."); Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733, 735 (2001) (recognizing the recent implementation of international norms in copyright law).

under U.S. international agreements do not directly involve constitutional norms, their proximity to important issues of constitutional authority will generate exposure to similar issues in other constitutional regimes. Thus, they will lead American courts into the domain of comparative constitutional thinking.

B. International Judicial Interaction

A concomitant of globalization has been increased interaction between American judges and their foreign counterparts. The interaction comes from several sources. Some American jurists have been tapped for service on international tribunals, and those who have often return to the United States actively committed to enhancing international judicial exchange.²⁹² In addition, international law organizations and societies,²⁹³ private non-governmental organizations, professional bar associations,²⁹⁴ law schools,²⁹⁵ and others sponsor international judicial exchange

292. See, e.g., Patricia M. Wald, *Women of the Courts Symposium, Six Not-So-Easy Pieces: One Woman Judge's Journey to the Bench and Beyond*, 36 U. TOL. L. REV. 979, 991-93 (2005) (describing her two-year appointment as a judge on the International Criminal Tribunal for the Former Yugoslavia after leaving the United States Court of Appeals for the District of Columbia); Patricia M. Wald, *Reflections on Judging: At Home and Abroad*, Lecture at the University of Pennsylvania Law School (Mar. 30, 2004), in 7 U. PA. J. CONST. L. 219 (2004) (comparing the role, power, and motivations of judges who serve in national courts and those who serve in international courts and concluding that international judges must be held accountable for their decisions and make a greater effort to engage in international judicial dialogue).

293. See, e.g., Ron Brown, *Legal Exchange With China*, 1995 HAW. BAR J. 22 (Dec 1995) (discussing the U.S.-Asia Law Institute's legal exchange program); *Feature, New Judicial Conference Committee Created*, 13 AM. BANKR. INST. J. 8 (Apr. 1994) ("Chief Justice Rehnquist established the committee to plan and administer the activities of federal judges in international exchange and educational programs.").

294. See ABA Central European and Eurasian Law Initiative, <http://www.abanet.org/ceeli/> (last visited Oct. 17, 2006) (creating liaisons with foreign judiciaries and a forum for discussion among international jurists).

295. For example, Temple University Law School has a dynamic international law program, which brings international students to the United States, and has legal semester abroad programs in Italy, Japan, and China. See International Law Programs, http://www.law.temple.edu/servlet/RetrievePage?site'TempleLaw&page'Degrees_International_Programs (last visited Oct. 26, 2006) (explaining that international law has permeated every aspect of the law and international programs will give students access to resources that will help them meet the needs of this new legal reality). Also, Yale Law School established a seminar for members of foreign constitutional courts for the purpose of promoting intellectual exchange among judges. *Yale Law School Establishes Seminar on Global Constitutional Issues*, 4 INT. JUD. OBSERVER, June 1997, at 2 (noting that the first semester hosted fourteen justices from around the world). In 1995, NYU Law School implemented the Global Law School Program aimed at internationalizing legal education by bringing important legal figures from other nations to teach law in the United States. See Norman Dorsen, *Achieving International Cooperation: NYU's Global Law School Program*, 51 J. LEGAL EDUC. 332, 332 (2001) (tracing the origins of the program to the realization that globalization would impact the legal field and increasingly make foreign law

programs designed to introduce American jurists to their foreign counterparts (and *vice versa*), and to increase mutual understanding and respect among jurists from different legal systems.²⁹⁶ Even the U.S. Department of State has participated in promoting international judicial exchange.²⁹⁷ As a result, the level of contact between American jurists and those of other nations has increased appreciably over the past two decades.

These contacts have increased American judicial familiarity with foreign law and judges. In this case, familiarity generally breeds respect. American jurists usually come away from the experience with heightened appreciation for the talents and professionalism of their foreign counterparts, as well as greater awareness of the degree to which judges worldwide encounter similar legal issues in their work.²⁹⁸ Over time, this familiarity translates into increased understanding, which translates into an increased willingness to learn from one another's work. The natural sciences, medicine, mathematics, art, and music have long been internationalized professions where colleagues share work and insight across national boundaries. Law is finally beginning to follow suit.

C. Constitutional Convergence

The opportunity for judges from different nations to use one another's work has been enhanced by a convergence in constitutional legal norms.²⁹⁹ World constitutional democracies are coming together in important ways. One significant feature of this development is the spread of judicial review, a doctrine with links to *Marbury v. Madison* that Robert Reinstein and I have discussed

relevant to U.S. jurisprudence); Hauser Global Law School Program, <http://www.nyulawglobal.org> (last visited Oct. 17, 2006) (describing the program, providing links to the various events and papers on international subjects, and introducing the diverse international faculty). Harvard Law School hosted part of the Anglo-American Exchange, where judges and lawyers from the United States and the United Kingdom met to discuss various judicial issues and developments. James G. Apple, *British, U.S. Judges and Lawyers Meet, Discuss Shared Judicial, Legal Concerns*, 2 INT'L JUD. OBSERVER, Jan. 1996, at 1.

296. MARKESINIS & FEDTKE, *supra* note 35, at 109-21.

297. *E.g.*, American Judges Eager to Set Up Exchange Programs With Ukraine: New Program Would Follow Model of U.S.-Russian Judicial Exchange, <http://usinfo.state.gov/eur/Archive/2005/Aug/04-428459.html> (last visited Sept. 8, 2005) (discussing future U.S. and Ukraine judicial exchange programs and noting U.S. judges have engaged in similar exchanges in over forty five countries).

298. *See supra* note 105 and corresponding text.

299. *See* Breyer, ASIL Keynote, *supra* note 104, at 266 (articulating that globalization has spread similar problems, rights, and concerns, such that courts across the world are dealing with similar legal issues).

elsewhere.³⁰⁰ Another feature has been integration, sometimes through deliberative international lawmaking and sometimes through conscious domestic adaptation of common constitutional norms into multiple national legal systems.

This process has been most advanced in Europe, but it is evident elsewhere as well. In Europe, members of the Council of Europe are obliged to incorporate specific organic principles and human rights guarantees into their domestic laws.³⁰¹ An even more aggressive convergence is apparent in the European Union. Although the adoption of the European Union Constitution has proven elusive,³⁰² promulgation of the European Convention on Human Rights and later protocols has been accomplished with enforcement at both the national and supranational levels.³⁰³ Constitutional convergence is also apparent in the conscious selection of common constitutional norms by newly organized constitutional democracies, such as South Africa and several former Communist Bloc and Soviet republics,³⁰⁴ and in the development of shared constitutional norms by former

300. Reinstein & Rahdert, *supra* note 246, at 828-33. *See generally* Gardbaum, *supra* note 37, at 712-16 (tracing the creation of constitutional courts and development of judicial review throughout Europe and North Africa after World War II).

301. *See generally* European Court of Human Rights, How the Execution of Judgments Works, <http://www.echr.coe.int/ECHR/EN/Header/The+Court/Execution/How+the+execution+of+judgments+works/> (last visited Oct. 26, 2006) (stating all member states have an obligation to follow the judgments of the European Court of Human Rights and to codify the rights and freedoms in Section 1 of the European Convention on Human Rights).

302. *See, e.g.*, Daniel Dombey et al., *Opposition Widens: European Constitution Facing Oblivion*, FIN. TIMES, June 4, 2005, at 6 (discussing the delays to ratifying the European constitution and negative votes by member states). *But see* Graham Bowley, *No Fanfare as Luxembourg Plans to Vote on European Constitution*, N.Y. TIMES, July 10, 2005, at 3 (re-enforcing the dedication and support of the people of Luxembourg for the passage of the European Constitution despite some anxiety about the no votes from France and Germany).

303. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, Europ. T.S. No. 005, 213 U.N.T.S. 221 (requiring, under Article 1, all member states to guarantee the rights enumerated in the Convention to all individuals within their nations).

304. The most successful areas of constitutional growth have been in Eastern Europe and former Commonwealth nations. Other world regions have gone a separate way. For example, most states with a predominately Muslim citizenry have authoritarian rather than liberal democratic forms of government. Additionally, although there has been some constitutional convergence in Africa and South America, durability and enforceability of constitutional norms has proven problematic. *See generally* Mirna E. Adjami, *African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?*, 24 MICH. J. INT'L L. 103, 113-18 (2002) (observing that judiciaries in Africa charged with securing and upholding constitutionally protected human rights face issues of cultural legitimacy and respect among their governments).

British Commonwealth nations such as Canada, India, and Australia.³⁰⁵

The constitutional drafting process in South Africa after the fall of apartheid is particularly instructive. The drafters charged with creating a new constitution systematically studied various world constitutions, international agreements and conventions, and other sources for constitutional norms. From these, they selected principles, and sometimes even the particular language, deemed to be most suitable for inclusion in the new South African system of government.³⁰⁶ The drafters also surveyed the interpretation of constitutional guarantees in other nations (including the United States), often drawing from those interpretations additional guarantees that they addressed explicitly in the South African Constitution.³⁰⁷ In recognition of this overt borrowing, the South African Constitution authorizes its constitutional courts to consider comparative and international law in interpreting South African constitutional guarantees.³⁰⁸

Just as modern building methods contributed to the development of a worldwide “international style” in architecture, the use of common organic principles and human rights guarantees contributes to a growing “international style” of constitutional governance that

305. See generally Brian R. Opeskin, *Constitutional Modeling: The Domestic Effect of International Law in Commonwealth Countries: Part 2*, 2001 PUB. L. NO. 97, 98-99 (2001) (noting that even as former colonies adopted constitutions, they retained the principles of the British Empire, such as vesting the Queen with the power to enter into treaties).

306. See 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, 186-88 (2003) (discovering that the South Africa Constitution contains numerous provisions and rights modeled after or copied from the constitutions of the United States, Canada, Germany, and Malaysia).

307. See *id.* at 188 (discussing the South African drafters' concern with the United States Constitution's differentiation between a deprivation of property and an expropriation, and their eventual adoption of a clause similar to the Malaysian Constitution, which added public purpose and prior payment requirements for expropriation).

308. S. AFR. CONST. 1996 § 233 (“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”); e.g., *Khumalo v. Holomisa* 2002 (5) S.A. 401 (CC), at ¶¶ 35-40 (S. Afr.) (exploring conflicts between defamation cases in Canada, Germany, Australia, and the United States to analyze whether an action for defamation requires a showing that the statement was false); *S. v. Makwanyane* 1995 (3) S.A. 391 (CC) (S. Afr.) (declaring the death penalty unconstitutional in South Africa and considering the laws of numerous nations in its rationale); *S. v. Williams* 1995 (3) S.A. 632 (CC) (S. Afr.) (finding that juvenile whipping has been characterized throughout the world as a degrading and violent form of punishment and therefore abolishing the practice to fall in line with international consensus).

fits governmental form to function.³⁰⁹ For example, although separation of *powers* is not uniformly required by world constitutions, the delineation of distinct legislative, executive/administrative, and adjudicative *functions* is a common and widely shared attribute of twenty-first century constitutional democracies.³¹⁰ While important technical and substantive differences between systems remain, the commonality of governmental processes and services has contributed substantial common ground to world constitutionalism.

D. Relative Sophistication: A Shift in the Constitutional Learning Curve

Globalization and the convergence of constitutional norms are necessary, but not sufficient, preconditions to comparative constitutional analysis. Even where constitutional guarantees are identical, comparative constitutional analysis would be of little use unless it offered the opportunity for new and helpful insights beyond what might be gleaned from domestic law. For much of the post-World War II period, the prospect of new insight seemed (in American eyes) not to exist³¹¹ because American constitutional law had advanced beyond the level of other nations.³¹² This U.S. “constitutional advantage” arguably existed along three dimensions: results, reasoning, and timing of new issues.³¹³ As to results, American constitutional law had progressed beyond comparative sources, in both its delineation of governmental powers and its interpretation of human rights.³¹⁴ In addition, U.S. courts could draw on decades of detailed precedent, much of it crafted by U.S. Supreme Court Justices who ranked among the world’s leading jurists. Because U.S. constitutional law was so much more developed, new questions and potential applications were likely to occur first in the United States. Thus, we were (by our own estimation) ahead of the curve.³¹⁵ The

309. KENNETH FRAMPTON, *MODERN ARCHITECTURE: A CRITICAL HISTORY* 248-61 (1992).

310. See generally Ackerman, *New Separation of Powers*, *supra* note 72 (analyzing the parliamentary, presidential, and constrained parliamentary frameworks for the separation of powers that represent numerous governments throughout the world).

311. See *supra* notes 37-44 and corresponding text.

312. Cf. Ken I. Kersch, *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 WASH. U. GLOBAL STUD. L. REV. 345, 351-52 (2005) (discussing how the American “court-led rights revolution” inspired other nations to empower their judiciaries and improve their human rights standards).

313. See *infra* notes 314-317 and accompanying text.

314. See *supra* notes 237-249 and accompanying text.

315. See *Alito Hearing*, *supra* note 18 (arguing that because the United States was the one of the first and foremost to develop individuals rights, judges should only look to U.S. precedent in interpreting the Bill of Rights).

rest of the world might well learn from the United States,³¹⁶ but we thought that we had little to learn from them. Some opponents of using comparative constitutional precedent, including Justice Alito, still maintain this American “constitutional advantage” as a reason not to look at constitutional precedent from beyond the our shores.³¹⁷

But the learning curve on constitutional questions is shifting. Other nations have begun to encounter important constitutional questions *before* they emerge in the United States, or at least contemporaneously with their emergence here, and in some areas their jurisprudence has equaled or even occasionally surpassed that of the United States in sophistication or new direction.³¹⁸ On shared novel questions of constitutional law, other courts have sometimes pressed substantively beyond the limits of U.S. constitutional law. Thus they have established constitutional principles that the United States has yet to discover, dealing with applications that have not yet arisen here, or developing constitutional principles that are less fully advanced in the United States. In other areas, foreign courts have established constitutional doctrines that may not surpass those of the United States in their development, but that arrive at substantively different conclusions from those reached in the United States with comparably well-developed reasoning.³¹⁹

This seems particularly true in the area of human rights where thirty years of relatively conservative U.S. rights jurisprudence arguably has put the United States out of step with some of its closest economic and social world constitutional counterparts.³²⁰ Areas of U.S. divergence include many hot-button social questions that have provoked a sharp U.S. conservative-liberal divide on comparative constitutional analysis. Some examples are: gay rights and other issues pertaining to sexual orientation, where Canada has affirmed

316. See BLAUSTEIN, *supra* note 47, at 11-13 (remarking that the U.S. Constitution, the world's first national constitution, was the model for the rest of the world).

317. *Alito Hearing*, *supra* note 18 (stating that because “the structure of our government is unique,” comparisons to other constitutions would not be helpful).

318. See *supra* notes 321-328 and accompanying text.

319. See, e.g., Jackson, *Holistic Interpretation*, *supra* note 128, at 291-92 (discussing how Germany and Canada interpret freedom of speech guarantees differently from the United States, denying protection for certain speech that threatens equality).

320. See Heinz Klug, *Model and Anti-Model: The United States Constitution and the “Rise of World Constitutionalism”* 2000 WIS. L. REV. 597, 607-12 (2000) (citing cases from South Africa, Germany, and Canada in which constitutional courts have explicitly rejected the interpretations and reasoning of the U.S. Supreme Court); Larry Cata Backer, *Disciplining Judicial Interpretation of Fundamental Rights: First Amendment Decadence in Southworth and Boy Scouts of America and European Alternatives*, 36 TULSA L.J. 117, 120-22 (2000) (lambasting the U.S. Supreme Court's interpretation of the rights of expression and association in comparison to several European courts).

rights of gay marriage,³²¹ and where the Court of Justice of the European Communities (“ECJ”) has prohibited discrimination against the transgendered;³²² the death penalty, which has been outlawed or deeply curtailed in France, Great Britain, the Netherlands, and elsewhere;³²³ rights of racial, ethnic, linguistic, and religious minorities, such as the rights of indigenous groups in Australia or French-speaking minorities in Canada;³²⁴ rights to education, now recognized as fundamental in many nations, but not in the United States;³²⁵ privacy rights, where European law puts more extensive limits on government civil access to and disclosure of private information;³²⁶ and gender discrimination, where U.S. law lags behind other nations in recognizing gender equality in military service. In these and other areas, constitutional courts around the world have recognized constitutional guarantees that have either gone unrecognized or have been affirmatively rejected by the U.S. Supreme Court.³²⁷ In other contexts, such as abortion and religious liberty, foreign courts have labored over many of the same issues as the United States, but have arrived at different conclusions that are often less protective of the rights in question.³²⁸ Often these courts

321. Civil Marriage Act, 2005 S.C., ch. 33, § 4 (Can.) (declaring that the fact the spouses are the same sex is not grounds for invalidating a marriage).

322. *E.g.*, Case C-13/94, *P. v. S.*, 1996 E.C.R. I-2143 (holding that termination of a transgender employee is a violation of the right not to be discriminated against on the basis of sex).

323. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1998) (“The death penalty has been abolished in West Germany, France, Portugal, the Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain, and Switzerland. Juvenile executions are also prohibited in the Soviet Union.”).

324. *See supra* note 56 and accompanying text.

325. *E.g.*, *nález Ústavního soudu j. 25/94/1995/ Sbírka nálezů a usnesení Ústavního soudu* (Czech Rep.) in *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* 1247, 1247-49 (Norman Dorsen et al. eds, 2003) (noting the fundamental right to free education, as provided in Art. 33, ¶ 2 of the Charter of Fundamental Rights and Basic Freedoms).

326. *See, e.g.*, *Tax Data Case*, Constitutional Tribunal (Poland), decision dated 24 April 1997 (K. 21/96) in *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS*, *supra* note 325, at 588 (holding that the publication of tax payments and tax arrears of individual taxpayers violates the right to privacy, which encompasses protection of personal information).

327. *See supra* note 69 and accompanying text.

328. *E.g.*, *Bundesverfassungsgerichts [BverfGE] [Federal Constitutional Court] 1993, 88 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 203* (F.R.G.) (sanctioning more limited access to abortions than is available in the United States); *Bundesverfassungsgerichts [BverfGE] [Federal Constitutional Court] 1975, 41 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 29* (F.R.G.) (holding that parents do not have the right to demand that Christian references be eliminated from public schools).

have explicitly considered, criticized, and rejected U.S. precedent, ultimately reaching different substantive conclusions.³²⁹

IV. THE MERITS OF COMPARATIVE CONSTITUTIONAL ANALYSIS

The preceding Part discussed a variety of factors that create favorable conditions for comparative constitutional analysis. Taken together, the factors afford a greater opportunity for comparative constitutional decisionmaking and increase the likelihood that it will occur. They do not, however, answer the ultimate question of whether comparative constitutional analysis is appropriate or desirable. In this Part, I will evaluate some of the arguments for and against the use of comparative analysis in the adjudication of U.S. constitutional law. Ultimately, this analysis supports the selective and open-textured comparative analysis advocated by Justice Breyer and other Supreme Court Justices, though not without acknowledging some legitimate “factors counseling hesitation”³³⁰ raised by comparative constitutionalism’s critics that circumscribe (but do not defeat) the role comparative constitutional analysis ought to play.

A. The Benefits of Comparative Constitutional Reasoning

Comparative constitutional decisionmaking is worthwhile only if its benefits outweigh its costs. In making this determination, one should focus on systemic advantages that contribute positively to the quality of domestic constitutional decisionmaking and that are unique to comparative constitutional law. Those benefits will accrue only if comparative constitutional material does more than merely duplicate insights available from domestic resources. Consequently, in this discussion I will concentrate on benefits of comparative constitutional analysis that are not equally achievable domestically. I find at least seven significant benefits: constitutional curiosity, shared institutional responsibility, opportunities for constitutional dialogue, rule rejection and rule alignment, de-politicization, ability to return to first principles, and judicial cross-fertilization.

1. Constitutional curiosity

The immediate trigger for looking at comparative constitutional precedent is simple curiosity. Judges in one nation’s constitutional courts may be naturally curious what counterparts in other nations

329. See *supra* note 320 and accompanying text.

330. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 396 (1971).

are doing on similar issues. For many scholars³³¹ and jurists,³³² such curiosity supplies ample motivation to engage in comparative analysis.

Like the curiosity of the proverbial cat, this curiosity reaps satisfaction. Because of constitutional convergence, American and foreign constitutional courts address similar constitutional issues requiring interpretation of shared constitutional norms in the context of comparable governmental systems.³³³ Where that sort of commonality exists, one court can learn from another's treatment of the issues their systems share. Simple human intellectual curiosity is thus the prime motive for comparative constitutional analysis, and for individual judges satisfaction of that curiosity is an immediate, perhaps sufficient reward.

2. *Shared institutional responsibility.*

The assertion that one nation's constitutional court can learn from the work of another depends upon two assumptions: (1) that the different courts are in fact dealing with similar issues, and (2) that looking at what other nations' courts are doing can tell a constitutional judge something new. The former assumption requires a sufficient similarity of systems, principles, norms, and questions to make comparative decisions relevant,³³⁴ and it requires some common points of legal reasoning.³³⁵ Some critics of comparative constitutionalism contest this assumption of common ground with arguments I address below.³³⁶ Here, I will assume the existence of common ground in order to examine the validity of the

331. See *supra* notes 118-176 (discussing the opinions of scholars who are proponents of comparative analysis).

332. See, e.g., *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) (citations omitted) (noting that, despite our differences, other countries' "experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem"); Barak, *supra* note 66, at 110 (observing that as a judge, "[t]he case law of the supreme courts of the United States, Australia, and Canada, of United Kingdom courts, and of the German Constitutional Court have helped [me] significantly in finding the right path to follow").

333. See *supra* notes 52-65 and accompanying text (citing foreign constitutional law).

334. Here, I generally mean that before engaging in comparative analysis, American courts should ask whether a potential donor country is a liberal democracy. Where it is, comparative analysis is permissible. Alternatively, where it is not, comparative analysis should be avoided.

335. See Glensy, *supra* note 67, at 407-08 (concluding that U.S. courts engage only in comparative analysis with other democracies); Slaughter, *Global Community*, *supra* note 149, at 194 ("The global community of courts does not . . . include all courts from all countries.").

336. Ramsey, *supra* note 17, at 73 ("[A]s a matter of legal interpretation, there is no obvious connection between the U.S. Constitution and foreign court opinions.").

second assumption, namely that comparative constitutional analysis can tell us something new.

The similarity of issues, principles, and systems alone is not enough to demonstrate that comparative constitutionalism is advantageous to jurists. If it was sufficient, one might well end up with the “look but don’t tell” position Justice Scalia rather playfully tossed at Justice Breyer in their AU conversation.³³⁷ Comparative constitutional precedent would have some interest, but little more relevance than, say, an editorial in a leading major periodical, a minister’s sermon, or a spirited dinnertime conversation on the constitutional question at hand. These sources all tell how others think about the constitutional question, yet none ranks as the sort of discussion that ought to receive systematic official attention or play a structural role in the court’s decisionmaking.³³⁸ What sets comparative precedent apart from these other “sources?”

Foremost, comparative precedent is *legal* discourse. It follows precepts of legal reasoning, engaging in the same kind of rigorous analytical process that U.S. courts are expected to follow.³³⁹ That may not be true of all foreign constitutional precedent, but because of the transparency, procedural regularity, impartiality, and professionalism in many systems, it is true in a growing number of foreign tribunals.³⁴⁰ Where it is true, the foreign precedent has a relevance to American

337. AU Conversation, *supra* note 1 (“I’m not preventing you from reading these cases. . . . Just don’t put it in your opinions!”). Dean Slaughter points out the danger of Justice Scalia’s suggestion and advocates citation to comparative materials as persuasive to promote transparency, noting that “[t]he worst of all worlds would be for judges to be deeply but secretly influenced by any set of sources.” Slaughter, *Brave*, *supra* note 118, at 297.

338. Cf. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189-90 (1987) (noting that the traditional sources of precedent in constitutional decisionmaking are constitutional text, history, structure, and theory).

339. See Breyer, ASIL Keynote, *supra* note 104, at 267 (“These growing institutional and substantive similarities are important because to a degree they reflect a common aspiration . . . for judicial institutions that, through guarantees of fair treatment, help to provide the security necessary for investment and, in turn, economic prosperity.”); Jackson, *Transnational Discourse*, *supra* note 143, at 344 (recognizing that foreign constitutional courts consider the same governmental and public implications and consequences as the U.S. Supreme Court when analyzing a constitutional issue and rendering a decision); Jackson, *Ambivalent Resistance*, *supra* note 118, at 636 (concluding that “foreign constitutional decisions might be worthy of consideration because they reflect reasoned judgments of other judges faced with similar problems”).

340. Cf. Rehnquist, *supra* note 242, at 412 (“[N]ow that 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.”); Leslie Friedman Goldstein, Review Essay, *From Democracy to Juristocracy*, 38 LAW & SOC’Y REV. 611, 612-13 (2004) (stating that over eighty countries have the power of judicial review and constitutional interpretation).

constitutional discourse that transcends the non-legal sources mentioned above. Comparative precedent more nearly resembles discussions of the issues in such legal sources as law review articles, scholarly treatises, commentaries, restatements of the law, or even published student notes or comments; all materials to which American courts frequently turn even though they carry no official legal significance or formal precedential weight.³⁴¹

If comparative material simply replicated what was available from these domestic sources, it might not be worth the effort required to extract and apply it. But comparative constitutional precedent has a distinct advantage over domestic sources: it represents the considered judgment of a tribunal shouldering the same (or very similar) burdens of governmental responsibility as the American courts.³⁴²

Like U.S. judges, foreign constitutional jurists face national accountability for their decisions.³⁴³ Within their own legal systems they possess the obligation of striking a balance among the dictates of constitutional theory, institutional and personal intellectual consistency, pragmatism and political reality, and commitment to the rule of law.³⁴⁴ They have a duty to make constitutional law work for their society, and they take responsibility for the legal, economic, and social results of their judgments.³⁴⁵ Like the Justices of the U.S. Supreme Court, foreign constitutional jurists sit on the constitutional “hot seat” of ultimate accountability to their government and their people.³⁴⁶

341. It is not uncommon to see citations to amicus briefs discussing foreign law in cases where the Court looks to foreign law for guidance. *E.g.*, *Lawrence v. Texas*, 539 U.S. 558, 567-68 (2003) (referring to academic writings and amicus briefs which criticize the Court’s decision in *Bowers v. Hardwick*); *Roper v. Simmons*, 543 U.S. 551, 576-77 (2005) (citing numerous briefs that support the prohibition of capital punishment for juveniles and note that the United States is one of only two members of the United Nations that had not abolished it).

342. See Jackson, *Constitutional Comparisons*, *supra* note 118, at 116 (noting that constitutional courts that “perform similar functions” have “similar concerns”); Slaughter, *Typology*, *supra* note 155, at 128-29 (emphasizing each constitutional court’s responsibility to interpreting and applying its own constitution).

343. For example, German constitutional judges are appointed by both houses of parliament and serve only for non-renewable, twelve-year terms. Sir Basil Markesinis & Jorg Fedtke, *The Judge as Comparatist*, 80 TUL. L. REV. 11, 134 (2005).

344. Barak, *supra* note 66, at 59, 126-27.

345. See *id.* at 28-36 (charging judges with the responsibility for evolving law and constitutional interpretation with the changing values of society, yet taking care to do so transparently and when the balance is strongly in favor of such a change).

346. See *id.* at 50-53 (noting that while judges are not accountable in the traditional sense like the legislature and politicians, they are accountable because the legislature has the ability to nullify their decisions, their legal reasoning may be appealable, and they are impeachable for judicial misconduct).

This responsibility gives the decisions of foreign constitutional courts an unique perspective. Unlike the parties or amici before the court, their views are not colored by the result orientations that derive from profit or ideological motives.³⁴⁷ Unlike scholars, they take responsibility for consequences and thus are unlikely to engage in flights of academic fancy or commit to rigid theoretical structures that will not work in actual practice.³⁴⁸ Unlike lower domestic courts, they are not relieved of the burden of *final* decisionmaking and cannot take comfort in the thought that their errors will be corrected further up the line.³⁴⁹ Foreign decisions thus supply an opportunity to learn how other tribunals that are charged with *final national constitutional decisionmaking responsibility* acquit that charge.³⁵⁰

This perspective yields a number of potentially illuminating inquiries, not only about the result the foreign court reached, but about the reasoning by which that result was achieved. How, the American court can ask, did the foreign constitutional court frame the issues? What facts did it deem to be particularly relevant? What weight did it assign to the parties' competing arguments, and why? What weight did it assign to its own precedent and past governmental practice? What social implications did it perceive? How did it thread its way through the competing policy puzzles that inhere in most constitutional principles? How did it reconcile principle with pragmatism? How broadly or narrowly did it rule? What political and juridical results attended its decision? The answers to such questions are likely to be both informative and persuasive, though rarely (if ever) authoritative. An American court need not follow the foreign tribunal, but it may use the tribunal's thinking as a catalyst for viewing American constitutional issues in a different light.

Asking such questions about a foreign court's decision can assist an American court in projecting the impact of different potential

347. See Jackson, *Transnational Discourse*, *supra* note 143, at 342-43 (noting that looking to foreign precedent allows a judge to step outside of her own country's tradition, open her eyes to new approaches, and makes her "more likely to respond by reasoning rather than by an instinctive assumption that one has the right answer").

348. See Fuller, *supra* note 272, at 366 (asserting that the judge assumes a "burden of rationality" unique to that position).

349. See Barak, *supra* note 66, at 102 (confirming that the final interpretation of statute and law lies with the highest court). But see *id.* at 134 (recognizing that legislatures can overcome the finality judicial decisions by enacting further legislation to specifically override the constitutional court).

350. *Id.*

resolutions for an American constitutional question.³⁵¹ A review of foreign materials might convince the American court that a decision in line with foreign law would be wise, or conversely that such a decision should be rejected because of undesirable legal or social consequences.³⁵² In between these poles, consideration of foreign precedent might persuade an American court to adjust its framing of the issues, to broaden or narrow its view of relevant facts, to take various policy factors elucidated by foreign precedent into account, to weigh them similarly or differently, or even to reject them as irrelevant.³⁵³ However the American court responds, because of shared institutional responsibility, it can learn lessons from a foreign decision that cannot be taken as directly from any domestic source.

In American domestic law, there is a loose counterpart that gives some idea of the potential value of considering the decisions of other constitutional courts: state constitutional law.³⁵⁴ In addressing novel questions of state constitutional interpretation, state supreme courts often evaluate the decisions of their counterparts in other states.³⁵⁵ They also often treat federal constitutional precedent as relevant to determination of state constitutional rights.³⁵⁶ As a purely formal

351. See Jackson, *Narratives of Federalism*, *supra* note 118, at 258 (“[T]he approaches of foreign nations can help identify the consequences of different reasonably justifiable interpretations plausibly open to the decisionmaker.”).

352. See Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models*, 1 INT’L J. CONST. L. 296 (2003) (arguing that constitutional comparison permits new countries to reflect upon existing constitutional designs, provisions, possibilities to which they would like to aspire and those to which they are averse); Jackson, *Narratives of Federalism*, *supra* note 118, at 258 (emphasizing that foreign case law can “illuminate” the consequences of different potential decisions).

353. See generally Jackson, *Narratives of Federalism*, *supra* note 118, at 260-61 (commenting that regardless of the actual decision, the consideration of foreign precedent will enhance the quality and depth of the argument and reasoning).

354. See J.M. Balkin & Stanford Levinson, Commentary, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1004 & n.131 (1998) (implying that the U.S. Constitution may be compared to state constitutions as they contain similar provisions and rights).

355. Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 19-20 (2004) [hereinafter Jackson, *Constitutional Dialogue*].

356. For example, when the United States Supreme Court refused to recognize the existence of a right to equal educational resources in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 54-55 (1973), some state courts found such a right in their state constitutions. *E.g.*, *MacDaniels v. Thomas*, 285 S.E.2d 156, 167 (Ga. 1981) (conceding the Georgia Supreme Court’s lack of expertise in understanding the financial foundations of the local school systems and therefore deferring to the Supreme Court’s analysis of the fundamental right to education in *San Antonio Independent School District v. Rodriguez*). *But see* *Cathe A. v. Doddridge County Bd. of Educ.*, 490 S.E.2d 340, 346 n.3 (W.Va. 1997) (explaining that the West Virginia Constitution guarantees a fundamental right to education, which must be provided for all children on an equal basis).

matter, a constitutional guarantee under one state's constitution need not correspond to a similar guarantee in another state, or even coincide exactly with the scope of a comparable federal guarantee.³⁵⁷ Nor is there any formal reason to treat precedent from another state's courts as relevant.³⁵⁸ Yet state courts routinely look across state boundaries, and to federal courts, for inspiration regarding the interpretation of shared constitutional norms.³⁵⁹

Of course, the analogy to comparative constitutional precedent is inexact because states share a common legal system, participate in a union committed to a unified vision of republican government, and partake of a common history rooted in principles emanating from the nation's founding and the Civil War. This makes regard for the decisions of sister states easy, familiar, and almost automatic.³⁶⁰ However, when one asks *why* Pennsylvania might look at New Jersey or Arkansas at California on a question of the forum state's law, the same reason emerges. The court in one state, though not required, consults the decisions of a court in another state because the other state court has faced a similar question and context *with the same level of institutional responsibility*. Its decision and the aftermath therefore helpfully illuminate the forum state's analysis.

3. Opportunities for constitutional dialogue

Another advantage of comparative constitutional analysis is the opportunity for constitutional dialogue that it affords.³⁶¹ This

357. *Compare* Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974) (holding that a restrictive definition of "family" for residential zoning purposes is not a violation of the U.S. Constitution; most states follow this precedent), *with* Charter Twp. of Delta v. Dinolfo, 351 N.W.2d 831 (Mich. 1984) (holding that the restrictive definition of "family" upheld under the U.S. Constitution in *Village of Belle Terre v. Boraas* violates Michigan's state constitution).

358. *See* CAPPALLI, *supra* note 261, at 177 (stating that judicial decisions from other state courts are persuasive and given weight "because of the wisdom they display").

359. Further, many state courts look to foreign law when "interpret[ing] and mak[ing] common law" and when interpreting statutes with "foreign roots." Mark Wendell DeLaquil, *Foreign Law and Opinion in State Courts*, 69 ALBANY L. REV. 697, 699-700 (2006).

360. *See* GINSBURG, *LEGAL METHODS*, *supra* note 261, at 6 (noting the "important influence of outstate decisions as persuasive authority in American law").

361. *See* Harding, *supra* note 242, at 424-27 (discussing the Supreme Court of Canada's discussion and analysis of American jurisprudence relative to its own constitutional issues); Choudhry, *supra* note 225, at 855-65 (explaining that through a comparative constitutional approach, courts develop a better perspective of the assumptions and norms from which they analyze and create jurisprudence); Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 503-10 (2000) (analyzing the enactment of the European Convention on Human Rights and the dialogue that courts of the individual members countries engage in with each other and the European Court for Human Rights); *see also* Anne-Marie Slaughter, *Judicial*

opportunity may not be as easily obtained from domestic sources. *Martin v. Hunter's Lessee*³⁶² established the principle of nationally uniform interpretation and application of federal law, including federal constitutional law.³⁶³ This means that once the Supreme Court has spoken, constitutional interpretation on that particular question is fixed, unless and until the Constitution is amended or the Court overrules its own precedent. Alternative contested interpretations of the particular constitutional issue can be entertained and applied by different lower courts before the Supreme Court's decision, but not after. This is the foundation of Justice Jackson's famous quip linking finality with "infallibility" in Supreme Court adjudication.³⁶⁴

While finality serves important uniformity interests, it has a downside: once the Supreme Court decides a question, further judicial discussion or experimentation with that question is cut off. The merits of the Court's decision remain subject to popular and academic criticism, and those critiques can be used in subsequent cases testing the further implications of the rule.³⁶⁵ However, until the Court changes course, all subsequent judicial discourse must assume that the Court's determination was correct on its own terms and within its own sphere. This is, in part, what the judges' oath³⁶⁶ to defend the Constitution has come to mean.³⁶⁷ It necessarily influences the direction of all future analysis because future courts must at some level accept the legitimacy of the decision, and must accord an equivalent level of merit to its essential reasoning.

Not so, however, with foreign constitutional courts. They may debate the merits of U.S. Supreme Court decisions on common

Globalization, 40 VA. J. INT'L L. 1103 (2000) (noting that courts all over the world are beginning to work in a global legal system, where they look to super-national courts, constitutional courts, and jurists from around the world for developing trends and interpretations).

362. 14 U.S. (1 Wheat.) 304 (1816).

363. *Id.* at 352-54.

364. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

365. See Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153, 156 (2002) ("At its best, persuasive legal scholarship displays a power to elucidate the logic of doctrinal practices in enlightening ways, to engage audiences, and to motivate legal and social change."); Larry Alexander, *What We Do, and Why We Do It*, 45 STAN. L. REV. 1885, 1886-88 (1993) (discussing five purposes for legal scholarship, including "normative scholarship" aimed at "prescrib[ing] doctrinal changes" in the law).

366. 28 U.S.C. § 453 (2000).

367. The scope of the judicial oath of office was discussed during the confirmation hearings of Chief Justice John Roberts. Then-Judge Roberts declined to denounce use of foreign precedent as a violation of a judge's pledge to uphold the Constitution. *Supra* note 18.

constitutional questions.³⁶⁸ They may reach different, even diametrically opposed, results.³⁶⁹ In the process, they may identify arguable flaws in the U.S. Supreme Court's analysis, whether errors of logic, incorrect assumptions, overvaluation of certain interests, neglect of others, or failure to perceive unfortunate consequences.³⁷⁰ When foreign constitutional courts do so, they enter into a judicial dialogue with the U.S. Supreme Court over the proper direction for shared constitutional principles.³⁷¹ Over time, this dialogue might convince the Supreme Court to alter its position on the disputed question as it realizes the flaws in its own reasoning and/or the merits of the alternative positions outlined by other constitutional courts. Conversely, it might impel the Court to summon additional support for its conclusions, answer the foreign court's objections, and reaffirm commitment to its original rule. In either event, the dialogue would produce a useful dialectic making positive contributions to the development of American law.

It may be partly for this reason that the Court's most prominent use of foreign precedent has occurred in decisions like *Roper* and *Lawrence* that actually overruled prior Supreme Court decisions.³⁷² Those earlier decisions had cut off further development of the law in the United States, but not abroad. When the Court considered the foreign developments and their trajectory, it concluded that its own

368. See, e.g., *Truth About Motorways Party Ltd. v. Macquarie Infrastructure Investment Mgmt. Ltd.* (2000) 200 C.L.R. 591 (Austl.) (looking to U.S. Supreme Court case law to resolve a question of standing under the Australian Constitution); *Australian Conservation Found. v. The Commonwealth* (1980) 146 C.L.R. 493 (Austl.) (discussing and analyzing major U.S. Supreme Court cases on standing); *Amalgamated Soc'y of Eng'rs v. Adelaide Steamship Co. Ltd.* (1920) 28 C.L.R. 129, 147-48 (Austl.) (noting that the differences between the foundations and history of Australia and the United States make reliance on U.S. federalism cases futile); *S. v. Makwanyane*, 1995 (3) SA 391 (CC) at 56 (S. Afr.) ("The United States jurisprudence has not resolved the dilemma arising from the fact that the constitution prohibits cruel and unusual punishments, but . . . contemplates that there will be capital punishment. . . . The difficulties that have been experienced in following this path . . . persuade me that we should not follow this route.").

369. E.g., *R. v. Keegstra*, [1990] 3 S.C.R. 697 (Can.) (holding that hate speech is not constitutionally protected speech, a decision in direct conflict with the United States Supreme Court's holding in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)).

370. See *id.* at 738-44 (surveying First Amendment jurisprudence and finding inconsistencies in its treatment of hate speech and propaganda).

371. See Rebecca Lefler, Note, *A Comparison of Comparison: Use of the Foreign Case Law as Persuasive Authority by the United States Supreme Court, the Supreme Court of Canada, and the High Court of Australia*, 11 S. CAL. INTERDISC. L.J. 165 (2001) (concluding that this dialogue is, more often than not, only one-way, with the U.S. Supreme Court declining to engage).

372. See Koh, *U.S. Constitution and International Law*, *supra* note 34, at 48-50 (suggesting that the Court's recent citations to foreign precedent in *Atkins* and *Lawrence* signal a trend towards constitutional dialogue); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 89-90 (2004).

prior decisions were incorrect, and that outcomes more nearly in line with comparative rulings were in fact more faithful to American constitutional principle.³⁷³ It also realized that those rulings did not produce the sorts of untoward effects for society that the Court had feared.³⁷⁴ Foreign constitutional precedent played an instrumental role in facilitating these corrections.

When the Court revises American constitutional principles based in part on inspiration from foreign sources, it is neither slavishly following foreign precedent nor surrendering responsibility for resolution of an American constitutional question to a foreign tribunal. Rather, it is using the foreign decision and analysis as an instrument for re-evaluation of the American constitutional norm. Decisional responsibility remains with the American court, and its analysis remains an analysis of *American* constitutional law. The Court's discussion in *Lawrence v. Texas* supplies a potent example. There, Justice Kennedy employed foreign precedent on the decriminalization of same-sex sexual relations as a device for exposing flaws in the reasoning of the majority and concurring opinions³⁷⁵ in *Bowers v. Hardwick*.³⁷⁶ The Court was able to isolate incorrect assumptions about the historical legal treatment of homosexual sodomy,³⁷⁷ and it was able to identify flaws in the *Bowers* Court's treatment of international and comparative norms regarding homosexual sodomy.³⁷⁸ These errors in the *Bowers* Court's analysis weakened its force as precedent under established American norms of stare decisis,³⁷⁹ and this in turn enabled the Court to conduct a

373. See *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing the European Union's disapproval of the death penalty for mentally retarded persons as support for finding the sentence unconstitutional in the United States); *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003) (noting that the Court's decision in *Bowers v. Hardwick* has been widely rejected by states and other nations alike and that the United States, like other nations, must also recognize the right of homosexual adults to engage in intimate conduct).

374. See, e.g., *Lawrence*, 539 U.S. at 577 (acknowledging that there has been no reliance on the holding in *Bowers v. Hardwick* that would make its reversal inequitable).

375. See *id.* at 573 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981)) (using the European Court of Human Rights' invalidation of laws prohibiting homosexual sodomy in all member-countries of the European Union as evidence that the *Bowers* court was mistaken in asserting that there existed a far-reaching tradition of condemning same-sex sexual relations).

376. See 478 U.S. 186 (1986) (holding that homosexual individuals did not have a fundamental right to engage in acts of consensual sodomy).

377. See *Lawrence*, 539 U.S. at 567-72 (correcting the *Bowers* Court's statement that the prohibition of sodomy has historical roots by acknowledging that such a history does not exist in American jurisprudence or law).

378. *Id.* at 572-73.

379. *Id.* at 577-78.

fresh examination of the issue.³⁸⁰ Foreign law was a catalyst for reconsideration, but it neither forced nor directed the Court to a new outcome.³⁸¹ That outcome was entirely a result of the Court's independent evaluation of American due process principles, even though it was significantly facilitated by analysis of comparative constitutional materials.³⁸²

Contrary to popular belief, constitutional dialogue with foreign constitutional courts has neither a liberal nor a conservative bias. While the most recent examples of comparative constitutional reasoning in the Supreme Court have pushed American law in politically liberal directions, the liberal impact is coincidental. There are many contexts in which leading foreign constitutional precedents strike relatively conservative positions, including such high-profile social issues as abortion rights, freedom of expression, and religious freedom.³⁸³ Indeed, if one were to forecast an inherent bias to foreign constitutional decisions, it would probably be in a jurisprudentially conservative (and politically neutral) direction, since most foreign constitutional courts are considerably less aggressive than the U.S. Supreme Court in exercising powers of judicial review and hence are more likely to uphold laws that are challenged under various constitutional norms.³⁸⁴

4. Rule rejection and rule alignment

The effects of comparative constitutionalism are most apparent in circumstances involving agreement with or adaptation of comparative precedents under U.S. law. But there is another important advantage that arises from conscious rejection or differentiation of constitutional rules adopted elsewhere. An American court, looking

380. *Id.* at 573-79.

381. It is possible to remove all mention of recent foreign law from the Court's opinion and arrive at the same result. In fact, only three paragraphs from the Court's seventeen-page decision engage in transnational constitutional dialogue.

382. See Mortimer N. S. Sellers, Comment, *The Doctrine of Precedent in the United States of America*, 54 AM. J. COMP. L. 67, 82 (2006) (concluding that the Court's decision in *Lawrence v. Hardwick* was based on changes in society's notion of liberty and the fact that there was no detrimental reliance on *Lawrence*).

383. See, e.g., Alford, *Misusing International Sources*, *supra* note 34, at 67 (noting that many countries reject the right to abortion, guaranteed in the United States by *Roe v. Wade*); Ramsey, *supra* note 17, at 77 ("World practice (even in Europe) often may be less protective of speech than the U.S. First Amendment" but "[i]f we are serious about the project of using international materials, we must 'take the bitter with the sweet,' and use international materials to contradict, not merely confirm, our own view of rights.").

384. See Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 80 (2005) [hereinafter Posner, *Foreword*] ("Not that foreign constitutional courts are unaggressive; but, as we shall see, it is aggression with a soft bite.").

at the work of a foreign counterpart, can treat it as an example of what *not* to rule.³⁸⁵

This is an option that typical uses of domestic precedent do not regularly afford. When American courts consider valid American precedent on a constitutional question, they generally take one of three positions regarding its application: (1) that it is directly controlling and should be followed, (2) that it is not controlling but is relevant and indirectly supports or harmonizes with the decision being taken, or (3) that it is not relevant and therefore should be distinguished. In all three instances, the court assumes that the precedent is, on its own terms, correct. Rarely does a court use existing valid domestic precedent negatively—that is, to show that the outcome is wrong, depends on flawed reasoning, or produces undesirable consequences.

However, negative use of precedent is not entirely missing from domestic law. Thus, instances of negative use contribute significantly to legal analysis. For example, negative uses of precedent occur when one lower court openly disagrees with another lower court on an issue the Supreme Court has yet to consider.³⁸⁶ Federal circuit court conflicts have this quality, and such open disagreement among respected jurists often plays an important part in the Supreme Court's resolution of the issue. Sometimes, negative uses of domestic precedent occur with respect to an *invalid* precedent. In these situations, a court adopts an interpretation in order to avoid a once-controlling but now-discredited ruling. For example, after *Nebbia v. New York*,³⁸⁷ many subsequent Supreme Court decisions warned against the dangers of returning to the economic due process reasoning of the now-discredited *Lochner* approach.³⁸⁸ Negative

385. Jackson, *Transnational Discourse*, *supra* note 143, at 283; *see also* David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 551 (2001) (suggesting that the Court does one of two things when it looks at foreign law: either positive comparative analysis when the Court looks to foreign precedent with approval, or negative analysis when the Court turns to foreign precedent as an example of what not to do). For examples of where the Court actually engaged in such analysis, *see id.* at 551 n.58 (citing Justice Breyer's dissent in *Printz v. United States*, 521 U.S. 898, 976-78 (1997), as an example of positive analysis), and at 551 n.59 (citing a law review article by Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998), as an explanation of negative analysis).

386. *See, e.g., In re NationsMart Corp. Sec. Litig.*, 130 F.3d 309, 315 (8th Cir. 1997) (refusing to follow the authority of the Third, Fifth, and Seventh Circuits as to the question of whether non-fraud securities claims must be pled with particularity pursuant to FED. R. CIV. P. 9(b)).

387. 291 U.S. 502 (1934).

388. *See Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (explaining that the Court has "returned to the original constitutional proposition" that courts do not substitute their will for the judgment of legislative bodies).

discussion also occasionally occurs when precedent is distinguished and a court uses doubt about a ruling as a reason for not extending it to new situations. And negative use of precedent occurs in those still-exceptional situations where the Supreme Court actually overrules a prior decision. Though fairly rare, these examples illustrate the potency of negative precedential reasoning.³⁸⁹

Foreign constitutional precedent can also be used in this explicitly negative way. American courts can use constitutional decisions from abroad as an example of what should *not* be done in the United States. The foreign decision may embrace constitutional principles that Americans do not share. For example, it may be based on a social order that is inconsistent with that of the United States, it may flow from what Americans deem to be an inadequate (or, more rarely, overzealous) commitment to liberty or democracy or rule of law, it may be inconsistent with countervailing American constitutional principles, or it may produce consequences that would be unacceptable in the United States. Foreign decisions may also rest on erroneous assumptions (ones that would be erroneous in the United States), may conflict with other constitutional norms that operate here but not abroad, or may utilize flawed reasoning. In these situations, “comparative” constitutional law transforms into “contrastive” or perhaps “corrective” constitutional law, illustrating not what we should do, but rather what we should avoid doing.

In some situations, negative and positive use of foreign constitutional precedent might combine to produce constitutional alignment. The American court can say, in effect, “our rule comports with nations A, B, and C, which share American constitutional values, but runs contrary to nations X, Y, and Z, which do not.” While this approach may involve identifying “friends in a crowd,” as Chief Justice Roberts put it,³⁹⁰ it follows a pattern of conscious alignment that is an embedded practice in the American common law tradition and that promises significant positive benefits. The court can clarify its reasoning by identifying the factors of similarity in the one group of nations and of difference in the others that justify its choice,

389. *Compare* *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (permitting the segregation of railway cars on the grounds that the cars were “separate, but equal”), with *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (overruling *Plessy* because segregated schools are “inherently unequal”).

390. Adam Liptak & Adam Nagourney, *Judge Alito the Witness Proves a Powerful Match For Senate Questioners*, N.Y. TIMES, Jan. 11, 2006, at A1 (quoting Justice Roberts during his testimony as saying that “[l]ooking at foreign law for support . . . is like looking out over a crowd and picking out your friends. You can find them. They’re there. And that actually expands the discretion of the judge”).

engaging in a selective process that illuminates the aims and values underlying the court's decision regarding the American constitutional position.³⁹¹

5. *De-politicization*

Sometimes, constitutional issues in the United States get drawn into partisan politics. When this happens, positions on the issues can be colored by partisan political affiliations.³⁹² Political candidates or parties appeal for voter support over a constitutional question, such as the status of flag-burning, abortion, the rights of the terminally ill, or the posting of the Ten Commandments, to cite a few recent examples.³⁹³ When this occurs, there is a risk that courts and judges, who are supposed to maintain independence from partisan matters,³⁹⁴ will get drawn into the political vortex and let political considerations dictate their judicial decisions. Indeed, as the processes of judicial appointment and confirmation become more openly politicized, the prospect for such politically dictated judicial decisionmaking may be increasing.³⁹⁵ Judges who have been nominated and confirmed because of their views on certain fundamental constitutional questions³⁹⁶ may feel some sense of obligation to deliver rulings that

391. Jackson, *Narratives of Federalism*, *supra* note 118, at 259-60 (asserting that Justice Scalia considered the experiences of foreign democracies in his analysis of the constitutionality under the First Amendment of a ban on anonymous pamphleteering).

392. See STEPHEN P. POWERS & STANLEY ROTHMAN, *THE LEAST DANGEROUS BRANCH?* 28 (2002) (arguing that the lower federal courts are a battleground between more liberal Carter and Clinton appointees versus the more conservative Reagan and Bush appointees); Moravcsik, *supra* note 220, at 183-86 (noting that congressional voting patterns on human rights issues are dictated by political party affiliation); William P. Marshall, *Constitutional Law as Political Spoils*, 26 CARDOZO L. REV. 525, 530 (2005) (highlighting the Reagan Justice Department's efforts to achieve conservative judicial rulings by appointing conservative judges to the federal bench).

393. See Carl Hulse, *Senate Emphasis on Ideology Has Some in G.O.P. Anxious*, N.Y. TIMES, June 7, 2006, at A1 (describing the skepticism of several rank-and-file Republicans over the "long-held belief among Republican leaders that highlighting issues like same-sex marriage, flag desecration and abortion speaks to the party's convictions and carries concrete political beliefs").

394. See ALEXANDER HAMILTON, JOHN JAY & JAMES MADISON, *THE FEDERALIST AND OTHER CONSTITUTIONAL PAPERS* 431 (Scott, E.H. ed., 1898) (describing in *FEDERALIST* NO. 79 how judicial lifetime tenure provides for judicial independence). In addition, the judge's oath requires judges to affirm that they will "faithfully and impartially discharge and perform all the duties incumbent upon [them]." 28 U.S.C. § 453 (2000).

395. See Charles Babington & Amy Goldstein, *Alito on Day 1: 'A Judge Can't Have Any Agenda'*, WASH. POST, Jan. 10, 2006, at A01 (noting that the questions posed to now-Justice Samuel A. Alito during his confirmation hearing split along party lines).

396. See Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1203-04 (1988) (explaining that the President's nominating decisions are entirely political); Gerald Walpin, *Take Obstructionism Out of the Judicial Nominations and Confirmations Process*, 8 TEX. REV. L. & POL. 89, 92 (2003) (noting, for

satisfy their political supporters' expectations and frustrate those of their opponents.³⁹⁷ Judges in lower courts seeking "promotion" to a higher court may be tempted to curry political favor by ruling in line with prevailing popular beliefs.³⁹⁸ Judges with long-established political affiliations may be tempted to decide particular questions with an eye toward their impact in the next round of elections.³⁹⁹ The American system is designed to guard against this sort of political influence,⁴⁰⁰ yet undoubtedly it sometimes occurs. In a highly politicized atmosphere, it may be difficult for judges to isolate and eliminate political overtones from their thinking, and even if they do, others are likely to attribute political motives to their most politically charged decisions.

While this political element may never be excised completely from judicial decisions on politically controversial constitutional questions, consideration of foreign precedent may supply a partial antidote to politicization of the American judiciary. Foreign judges naturally function outside U.S. politics.⁴⁰¹ Their decisions may be colored by

instance, that President Lincoln appointed Salmon Chase to the Supreme Court because Chase would "sustain what has been done in regard to emancipation"); *see also* *Republican Party of Minn. v. White*, 536 U.S. 765, 777-78 (2002) (discussing possible meanings of "impartiality" in the judicial context, the majority finding that the term could mean "lack of preconception in favor of or against a particular *legal view*").

397. Alexander Hamilton argued that Presidential appointees may perform their jobs with bias toward the President, and that the Senate confirmation process exists to prevent extreme patronage. *THE FEDERALIST* NO. 76, at 414 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Many commentators cited this passage when arguing that Harriet Miers, President Bush's second nominee to succeed Justice O'Connor, was a poor candidate to fill O'Connor's vacancy on the Supreme Court. *See* Randy E. Barnett, *Cronyism*, WALL ST. J., Oct. 4, 2005, at A26 (asserting that Harriet Miers' lack of judicial experience confirms that her nomination was politically motivated); *Welcome to The Hackocracy*, NEW REPUBLIC, Oct. 17, 2005, at 21; *see also* Laura E. Little, *Loyalty, Gratitude, and the Federal Judiciary*, 44 AM. U. L. REV. 699, 716 (1995) (explaining that a judge nominated to the federal bench incurs a "social obligation" to those who nominated him or her).

398. *See* Vincent Martin Bonventre, *Judicial Activism, Judges' Speech, and Merit Selection: Conventional Wisdom and Nonsense*, 68 ALB. L. REV. 557, 562 (2005) (warning that judges may make up their mind before considering the merits of a case).

399. *See* Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1980 (1988) (articulating a concern that the election of judges would foster a system with an appearance of impropriety because judges would be able to find out who contributed to their campaign).

400. *See* *THE FEDERALIST* NOS. 76, 79, at 417, 431 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing the Senate confirmation process in *THE FEDERALIST* No. 76 and 79 as a safeguard on judicial nominee patronage towards the nominating President and life tenure as a preserve of judicial independence).

401. It is certainly possible that a constitutional judge in another country may decide a case with an eye toward American reaction, especially given that liberal democracies like the United States sometimes place economic sanctions on those countries which deny their citizens basic human rights or which transgress important

the political issues of the day in their own countries, but they are unlikely to be influenced by the ebb and flow of politics in the United States, and are thus unlikely to be determined by the partisan political effects of a particular result in the United States.

As a consequence, foreign decisions may serve as a background check against domestic political pressures on the judiciary. American judges can test their reasoning and results against the decisions and rationales of foreign counterparts. Where there is common ground, the American courts can use foreign precedent to buttress their arguments and demonstrate the political impartiality of their decision. Where there are differences, the American judges may consider whether the difference is attributable to political concerns and, if so, whether according weight to such political factors requires correction. They may also be prompted to explain why their decision differs. Over time, this could help American courts to detect and correct for political influences in their thinking, and thus to preserve a greater measure of independence from partisan politics.⁴⁰²

6. Return to first principles

As I mentioned above, one of the traditional barriers to using foreign precedent has been the high level of development of American constitutional law. Typically, that development is an advantage, but not always. Sometimes, it bogs American courts down, miring them in the obligation to apply increasingly voluminous, detailed, sometimes conflicting, and overly formal or technical precedent,⁴⁰³ rather than focusing on the first principles that ought to govern decisionmaking in the area. The Constitution itself may not

transnational legal norms. However, this concern is likely outweighed by the judge's allegiance to (or fear of) his or her own nation's government. In any event, political reaction in the United States is unlikely to be a foreign constitutional judge's paramount concern. Cf. Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057, 1100 (2004) (outlining how, in essence, Chilean citizens were governed by British and Spanish judges when judges in Britain and Spain decided to enforce the Torture Convention against the former Chilean President, General Augusto Pinochet).

402. See Jackson, *Transnational Discourse*, *supra* note 143, at 320-21 ("The presence of deep controversy over internal norms . . . might be itself a particular reason to look outside—not for the purpose of adopting external norms, but rather to critically interrogate our own instincts or predispositions . . .") (internal quotation marks omitted).

403. The doctrine of stare decisis is a guiding principle in the American legal system. Although the Court is not absolutely bound to follow precedent, the Court requires that "a departure from precedent . . . be supported by some special justification." *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (quoting *United States v. Int'l Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996)) (internal quotation marks omitted).

take on the “prolixity of a legal code,”⁴⁰⁴ but the precedent applying it does. While meticulous application of precedent has the virtues of promoting predictability and narrowing the scope of future dispute,⁴⁰⁵ at times it can become stultifying,⁴⁰⁶ particularly in a system where constitutional amendment (which theoretically provides an escape from burdensome or misguided precedent) is especially difficult.⁴⁰⁷ Unduly prolix precedent is also subject to manipulation, particularly when the proliferation of precedent has produced conflicting sets of doctrinal rules that plausibly apply to the same questions.⁴⁰⁸

Occasionally, the Supreme Court cuts loose from burdensome precedent by declaring new rules,⁴⁰⁹ organizing principles,⁴¹⁰ forms of analysis, or other substantial departures from a restraining judicial mold. Such landmark departures are rare, and are often highly controversial in their own time. However, they are also important watershed moments in the development of American constitutional law. It is not easy for a court habituated to following its own most

404. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

405. See *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (acknowledging that *stare decisis* is essential to the stability of the law but rejecting the notion that this principle should always be invoked to justify judicial holdings); GINSBURG, *LEGAL METHODS*, *supra* note 261, at 94-95 (explaining that the principle of *stare decisis* dictates that a decision in one case should govern in subsequent cases with similar facts).

406. See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.”).

407. See Darren R. Latham, *The Historical Amendability of the American Constitution: Speculations on an Empirical Problematic*, 55 AM. U. L. REV. 145, 149 (2005) (comparing the number of constitutional amendments that have been formally proposed (eleven thousand) versus the relatively small number of amendments that have passed both houses of Congress with a two-thirds majority (thirty-three)); Jackson, *Narratives of Federalism*, *supra* note 118, at 277 (noting that amending the United States Constitution is immensely more difficult than amending the constitutions of other nations).

408. See *Lawrence v. Texas*, 539 U.S. 558, 587 (2003) (Scalia, J., dissenting) (“I do not myself believe in rigid adherence to *stare decisis* in constitutional cases; but I do believe that we should be consistent rather than manipulative in invoking the doctrine.”).

409. See *id.* at 578 (“*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent.”); *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (“The contrary teaching of *Whitney v. California* . . . cannot be supported, and that decision is therefore overruled”); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“[I]n the field of public education the doctrine of ‘separate but equal’ has no place.”).

410. See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562-63, 568 (1996) (establishing guideposts for determining whether punitive damage awards are sufficiently excessive to constitute a violation of Due Process); *Craig v. Boren*, 429 U.S. 190, 218 (1977) (establishing intermediate scrutiny as the test for gender classifications); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (establishing two different kinds of Due Process scrutiny depending upon the nature of the right in question).

immediately and specifically applicable precedent to step back from the trees for a new and different view of the forest. Yet in retrospect, these departure points are among the most productive and important developments in constitutional law.⁴¹¹

Foreign constitutional precedent can assist this process. Foreign courts, of course, have no obligation to apply U.S. precedent, so they run no risk of getting caught in the minutiae of domestic precedential applications that sometimes swamp the U.S. courts or warp their decisions. Additionally, in many foreign systems, the constitutional courts do not have the same obligation to follow their own prior decisions.⁴¹² Courts from civil law jurisdictions, for example, do not regard past decisions as binding law in the way that common law courts traditionally do.⁴¹³ Constitutional courts from other jurisdictions may also have fewer and more general precedents to apply.⁴¹⁴ As a consequence, foreign courts are less apt to decide a new constitutional question simply by consulting, applying, and manipulating precedent, and they are more apt to engage discussion of fundamental constitutional first principles as the foundation for their reasoning.⁴¹⁵

Given this tendency, the decisions of foreign constitutional courts become a useful mirror for gauging whether applicable U.S. precedent reflects fidelity to shared first principles. Where precedent comports with principle, foreign precedent can reinvigorate the connection. Where U.S. precedent has lost its compass or become mired in detail, foreign precedent can help identify the problem, measure the variance between existing precedent and controlling constitutional values, and model the means for restructuring American law.⁴¹⁶ Alternatively, foreign constitutional precedent can

411. See H. Jefferson Powell, *Grand Visions in an Age of Conflict*, 115 YALE L.J. 2067, 2081 (2006) (stating that the seminal civil rights case, *Brown v. Board of Education*, ushered in a new era of Equal Protection jurisprudence).

412. See GINSBURG, LEGAL METHODS, *supra* note 261, at 70 (indicating that there is no concept of stare decisis in many foreign courts).

413. See *id.* (positing that civil law jurists are willing to interpret the civil code “generously” in part because its articles are drafted in general and broad terms).

414. See *id.* (noting that French jurists look to previous cases “not for binding precedents with similar facts but rather for general principles of law and for specific interpretations of particular provisions of law”).

415. See *id.* at 69-70 (noting that a typical French case begins not with a detailed exposition of the facts, but instead builds upon a statement of applicable general principles of law). Additionally, jurists in civil law jurisdictions look more to “la doctrine,” i.e., legal scholarship, than to cases. *Id.* at 72.

416. See *id.* at 71-72 (analogizing the importance of learning a foreign language to the study of foreign law because both are increasingly important in an age of globalization and increased world travel).

serve as a departure point for setting a new U.S. constitutional direction when that becomes an appropriate step.

7. *Judicial cross-fertilization*

A final advantage of comparative constitutional precedent is what may be called “cross-fertilization,” of perspectives and ideas by individual jurists.⁴¹⁷ This is similar to the constitutional dialogue concept, but it occurs at an individual rather than institutional level.⁴¹⁸ When cross-fertilization occurs, a particular jurist in the United States learns something from a foreign court that alters the American jurist’s view of U.S. constitutional law.⁴¹⁹ The lesson can be as broad as a different perspective, methodology, or constitutional vocabulary, or it can be as narrow as a fine point of reasoning on a particular question. In any event, it stimulates the American judge to rethink principles or priorities in ways that alter the American jurist’s constitutional perspective.

The general advantages of cross-fertilization among jurists can be observed by looking at U.S. courts, particularly the U.S. Supreme Court. I have discussed elsewhere the importance of “personality” in judging. Indeed, the notion of cross-fertilization serves to bolster the theory that the personalities of judges are paramount because

417. See Jackson, *Constitutional Comparisons*, *supra* note 118, at 119 (noting that engaging with foreign sources can be a “partial intellectual substitute for conversation”); SLAUGHTER, *NEW WORLD*, *supra* note 105, at 71 (employing the phrase, “cross fertilization,” to describe the interplay of ideas between foreign and U.S. judges).

418. See Christine Bateup, *Assessing The Normative Potential of Theories of Constitutional Dialogue*, 71 BROOK. L. REV. 1109, 1164-65 (2006) (positing that individual Americans may become more involved in civic life if there were a way to incorporate their views into a constitutional dialogue similarly to the way that judges are having a constitutional dialogue).

419. Since 1971, nine Supreme Court Justices have attended sessions at the annual international judicial seminar at the Schloss Leopoldskron (“the Schloss”) in Salzburg, Austria. Toobin, *supra* note 17. Justice Kennedy frequents the Schloss to meet foreign counterparts from around the globe, such as a recent meeting with Richard Goldstone, a former justice of the South African Constitutional Court. *Id.* Indeed, Justice Breyer has said:

[I] have found discussions with foreign judges increasingly valuable with respect to institutional matters. In the past few months, several of us have met with members of the Supreme Court of India and discussed at some length the problem of overcrowded dockets I thought we might have something to learn from a mediation program I observed in Gujarat Judging from the lines outside the clinic, the twenty-four hours a day work schedule, and the settlement rate, the program seemed to work well. I could not help but wonder if we in the United States did not have something to learn from this cross-disciplinary, problem-based, approach.

Breyer, ASIL Keynote, *supra* note 104, at 266-67; see Jackson, *Ambivalent Resistance*, *supra* note 118, at 596 n.49 (explaining that U.S. judges are increasingly traveling abroad to visit with their counterparts around the world).

interactions with foreigners will likely influence, at least to some degree, judges' views of humanity and of the law.⁴²⁰

Although the role of judicial personality seems to be declining, the Supreme Court remains one place where it still has palpable significance, especially in the development of constitutional law.⁴²¹ Each new Justice brings to the Court new issues, modes of analysis,⁴²² ideas,⁴²³ and sometimes a new lexicon.⁴²⁴ Other Justices respond to their new colleagues and change as well.⁴²⁵ It is an important process of institutional renewal, and a significant, even if indirect, check on the direction of the Court. It is part of the reason we take events such as the recent appointments of Chief Justice Roberts and Justice Alito so seriously.⁴²⁶

That check is losing some of its force because of the increasing longevity of service by the Justices. Changes in Supreme Court personnel used to occur about once every two years. Over the last twenty-five or thirty years changes have slowed considerably and may slow even further in the future.⁴²⁷ Chief Justice Roberts's appointment to the Court, for example, was the first change in Court personnel in over a decade.⁴²⁸ With the slowing of change in Court

420. See Mark C. Rahdert, *A Jurisprudence of Hope: Justice Blackmun and the Freedom of Religion*, 22 HAMLINE L. REV. 1, 2 (1998) (lamenting the fact that law is taught and practiced as if the judges themselves are not a critical force in the development of the law).

421. See generally MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 104-29 (2005) [hereinafter TUSHNET, *A COURT DIVIDED*] (analyzing Justice Ginsburg's legal career and the way in which her personal experiences were brought to bear in shaping the Court's decision in *United States v. Virginia* (the "VMI case")).

422. *Id.* at 174-75 (citing Justice Kennedy's reliance on international law in *Lawrence* to overrule *Bowers*).

423. *Id.* (documenting how Justice Thomas brought his belief in "natural law jurisprudence" to the Court).

424. *Id.* at 149 (quoting Justice Scalia's concurrence in *County of Sacramento v. Lewis* where he does a riff on Cole Porter: "[T]oday's opinion resuscitates the *ne plus ultra*, the Napoleon Brandy, the Matatma Ghandi [*sic*], the Cellophane [*sic*] of subjectivity, th' ol' 'shocks-the-conscience' test").

425. See David M. Levitan, *The Effect of an Appointment of a Supreme Court Justice*, 28 U. TOL. L. REV. 37, 76 (1996) (positing that certain influential Justices impact the course of constitutional law far beyond their votes on a single case, in particular, Justice John Marshall who authored the opinion in 519 cases out of a total of 1,106 decided during his stay on the Court).

426. See *supra* notes 18-33 and accompanying text.

427. See Tony Mauro, *Coming to Terms With Supreme Court Tenure*, LEGAL TIMES, Jan. 3, 2005, available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1104154537063> (explaining that the average length of service on the current Court is 18.7 years, but that a new justice appointed at the age of 53 would be expected to serve 24 years).

428. There was no change on the Supreme Court from August 3, 1994, the day Justice Breyer took his seat on the Supreme Court, to September 29, 2005, the day John Roberts was sworn in as Chief Justice. That means the Court had no change in personnel for eleven years, one month and twenty-six days. See *Bush Nominates Roberts*

personnel comes a slowing of domestic judicial cross-fertilization at the Supreme Court level. Unless the Justices now sitting on the Court are able to find ways of renewing their own thinking, new perspectives and ideas will enter the Court at a slowed pace, which will get even slower as medical technology enhances the longevity of life appointment.

For these institutional reasons, the Supreme Court is in growing need of external sources that renew its own stock of constitutional ideas. One potentially valuable source of renewal is the work of foreign jurists, who are likely to approach common questions from a different perspective. Attention to those differences may well stimulate the Justices to view American constitutional issues in a different light. Unless one thinks Supreme Court Justices should stop learning when they join the Court, this opportunity for cross-fertilization should prove beneficial for the development of American constitutional law.

Whether, and how, American judges use these opportunities for cross-fertilization depends on the personality and intellectual position of the individual judge. A judge with firmly fixed positions at one end or another of the American jurisprudential spectrum is unlikely to seek (or find) much enlightenment from considering the different views of others. On the other hand, a judge with a more flexible jurisprudential stance and an open or unsettled mind is more likely to find value in jurisprudential exchange. An example of such a difference is clear from the perspectives of Justices Breyer and Scalia in their AU conversation. Breyer, a centrist and compromiser,⁴²⁹ sees many controversial American constitutional questions as close calls and engages in a more eclectic process of constitutional reasoning.⁴³⁰ Thus, he is more likely both to pursue and find benefit from comparative cross-fertilization of constitutional

to *Supreme Court*, CNN, July 20, 2005, <http://www.cnn.com/2005/POLITICS/07/19/scotus.main/index.html> (last visited Oct. 17, 2006) (noting the lengthy interval between nominations).

429. See Ken I. Kersch, *The Synthetic Progressivism of Justice Stephen Breyer*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 241, 249-50 (Earl M. Maltz ed., 2003) (discussing Justice Breyer's pragmatic judicial style and noting that Breyer, unlike Justice Thomas, does not adhere to "categorical jurisprudence"); Paul Gewirtz, *The Pragmatic Passion of Stephen Breyer*, 115 YALE L.J. 1675, 1678 (2006) (quoting Justice Breyer as saying that he is, by temperament, one who values "participating and cooperating" with others).

430. See generally STEPHEN BREYER, *ACTIVE LIBERTY* 121-22 (2005) (outlining his reasoning in several Establishment Clause cases and noting that he considers the long-term social consequences in his analysis of a particular case).

ideas.⁴³¹ On the other hand, Scalia regards few if any of those same questions as close, and develops his views by a more firmly fixed and formalized system of constitutional reasoning. This leaves less inclination and less jurisprudential room to look for influences from abroad. Thus the one Justice views comparative constitutionalism as beneficial while the other sees it as either pointless or pernicious.

*B. "Factors Counseling Hesitation"*⁴³²

There are some "factors counseling hesitation"⁴³³ in the use of comparative constitutional reasoning. Some derive from ways in which the U.S. Constitution is sufficiently different from its foreign counterparts to retard the effectiveness of constitutional comparison.⁴³⁴ Others concern ways in which foreign constitutional differences make direct comparison potentially misleading.⁴³⁵ Still others concern the challenges and complexities of obtaining and digesting comparative constitutional material.⁴³⁶ These concerns do not render comparative constitutional analysis either useless or improper, but they do suggest some limits on the ways in which comparative analysis might be employed.

1. Relevance

The main objection opponents to the use of foreign precedent make is that it is essentially irrelevant to American constitutional law. These objections come in two different intensities. One asserts complete across-the-board irrelevance.⁴³⁷ This seems to be the view of

431. See, e.g., Stephen Breyer, *Changing Relationships Among European Constitutional Courts*, 21 CARDOZO L. REV. 1045, 1060 (2000) ("[W]hile the more obvious comparative study of substantive constitutional law ('free speech' law, for example) is important, such substantive law is not the only kind worth serious examination. One must look as well at the comparative aspect of the structural, or governance-related, characteristics of constitutional courts.").

432. This phrase is drawn from *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 396 (1971).

433. *Id.*

434. See *supra* Part II.B.

435. See McGinnis, *supra* note 182, at 311 (arguing that citations to foreign law in Supreme Court decisions may unfairly suggest that the case is authoritative by virtue of its appearance in a Supreme Court decision); Alford, *In Search of a Theory*, *supra* note 182, at 697 ("[I]n searching for commonalities among and between constitutional courts, the Court patently risks ignoring the distinctions.").

436. See *supra* notes 182-187 and accompanying text.

437. Proponents of this view include Justice Scalia and Judge Richard Posner. See AU Conversation, *supra* note 1 (rejecting the use of foreign law in U.S. jurisprudence in large part because other nations may not have the same "moral and legal framework" as the United States); Scalia, Keynote Address, *supra* note 104, at 307 ("It is my view that modern foreign legal materials can *never* be relevant to an interpretation of—to the *meaning* of—the U.S. Constitution."); Posner, *Foreword*, *supra* note 384, at 81 (indicating that the use of foreign law would increase the

the various Justices and Senators who have publicly decried the use of comparative constitutional precedent.⁴³⁸ The other objection asserts partial irrelevance on some issues.⁴³⁹ In my view the former objection is misguided but the latter carries some weight.

Those who maintain that foreign precedent is completely irrelevant usually offer three reasons. First, they argue that since the Constitution is adopted and ratified by the people of the United States, the views of foreigners who are not part of its social compact have no bearing on what the U.S. Constitution means. Thus, any reliance on foreign views effectively surrenders control over the Constitution to outsiders.⁴⁴⁰ This view could be called the Social Covenant argument.⁴⁴¹ Chief Justice Roberts offered a variant of this view in his Supreme Court confirmation testimony.⁴⁴² Second, they assert that the meaning of the U.S. Constitution should be determined primarily by reliance on original intention of its framers and ratifiers, an inquiry on which foreign discussion cannot shed any valuable light.⁴⁴³ This view could be called the Originalist argument and is apparent particularly in Justice Scalia's portion of the AU

amount of research that advocates and judges would have to conduct because of the large number of foreign courts in existence and the inherent difficulty in locating the decisions handed down from these courts located all over the world).

438. See, e.g., Senator Jeff Sessions, Senate Floor Statement: Judge Samuel Alito Supreme Court Confirmation (Jan. 27, 2006), available at <http://sessions.senate.gov/pressapp/record.cfm?id=251075> (asserting that judges should look to legislative history, not European law, if there is any ambiguity in interpreting American law).

439. Proponents of this view include Richard Alford and, to a lesser extent, Vicki Jackson. See, e.g., Alford, *In Search of a Theory*, *supra* note 182, at 712-13 (explaining the comparative constitutionalism is particularly applicable to natural law but not helpful in analyzing the constitutional theory of majoritarianism); Jackson, *Comparative Constitutional Federalism*, *supra* note 145, at 95-102 (noting that while comparative constitutionalism is valuable for questions of individual rights, its usefulness is limited with regard to issues of federalism).

440. Cf. *Remarks at The University of Chicago Law School*, 7 CHI. J. INT'L L. 289, 296 (2006) (quoting Attorney General Alberto Gonzales: "[P]aying careful, scrupulous attention to foreign sources would inevitably sacrifice some attention to traditional sources. Will it become necessary for us to omit discussion of an older United States precedent in order to explore thoroughly the relevance of a more recent Chilean precedent to our Constitution?").

441. Brigid Kennedy-Pfister, *Continuity and Contradiction in the Theory and Discourse of Dependence*, 28 FORDHAM URB. L.J. 667, 669 (2001) (suggesting that the Social Covenant theory not only concerns the extent of state infringement on and protection of market economy, but also the rights that people relinquish and obtain as members of society).

442. *Supra* notes 18, 20 and accompanying text (noting that the application of foreign law in U.S. courts will circumvent the established judicial process and will unduly broaden judicial discretion).

443. See ERIC D. HARGAN, THE FEDERALIST SOCIETY, THE SOVEREIGNTY IMPLICATIONS OF TWO RECENT SUPREME COURT DECISIONS, <http://www.fed-soc.org/Intllaw&%20AmerSov/hargensov.pdf> (positing that foreign law is irrelevant because the Constitution becomes subordinated to an international regime that is not accountable to the American people).

conversation.⁴⁴⁴ Third, they argue that unique U.S. institutions and history are so integral to constitutional analysis that any precedent developed without them is irrelevant to the American experience.⁴⁴⁵ This can be termed the Exceptionalist argument and was advanced by Justice Alito in his confirmation hearing.⁴⁴⁶ I will address each of these arguments in turn.

The Social Covenant argument views the Constitution as a social contract, and it tries to limit constitutional reasoning by importing contractual norms into constitutional thinking.⁴⁴⁷ Since the Constitution is a contract, its meaning depends entirely on what the parties bound by it agreed.⁴⁴⁸ Their interpretation of particular language should thus control its meaning.⁴⁴⁹ Where there are doubts, they should be resolved in terms of the understandings, aims, and intentions of the contracting parties, not by resort to external evidence.⁴⁵⁰ Since foreign constitutional precedent by definition is not concerned with the intentions of Americans regarding American constitutional law, it has no place in American constitutional adjudication.⁴⁵¹ Resort to foreign precedent thus risks surrendering control over the meaning of the parties' agreement to external forces

444. See AU Conversation, *supra* note 1 (noting that the Framers looked to foreign nations when drafting the Constitution but that foreign law should not now be employed in interpreting the Constitution).

445. See *id.* (contending that it is not fair to compare the death penalty in the United States to the death sentences handed down in other countries because in the United States those sentenced to death have the right to appeal by virtue of the habeas corpus provision unlike in other countries where the punishment is carried out summarily).

446. Alito *Hearing*, *supra* note 18 ("The structure of our government is unique to our country, and so I don't think that looking to decisions of supreme courts of other countries or constitutional courts in other countries is very helpful in deciding questions related to the structure of our government.").

447. *Supra* note 23 and accompanying text.

448. Professor Jackson notes that each generation after the ratifiers has implicitly agreed to the terms of the Constitution by not amending it. Jackson, *Transnational Discourse*, *supra* note 143, at 330 (pointing to "consent by acquiescence").

449. See Chris Arledge & Todd Green, *Originalism and Its Discontents: How Should the Constitution Be Interpreted?*, ORANGE COUNTY LAW., Sept. 2005, at 18, 21, available at http://www.turnergreen.com/publications/GreenArledge_Originalism.pdf (positing that the Court lacks the authority to change the Constitution and must, therefore, avoid policymaking decisions that would be inherently illegitimate).

450. See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 625 (1999) (explaining that the Framers intended for the Constitution to be interpreted simply by looking to the common meaning of its terms and not by delving into the possible intentions of the Framers when drafting the document); cf. Delahunty & Yoo, *supra* note 182, at 311 (indicating that the American people are not interested in applying foreign judicial decisions where their constitutional powers and constitutional rights are at stake).

451. Cf. Kochan, *supra* note 182, at 542 ("If, indeed, sovereignty means the right to national autonomy, exclusion of foreign law is essential to the preservation of national identity and independence.").

and institutions that lack both authority and institutional legitimacy for making such decisions, as well as any accountability to the American people or American democratic institutions.⁴⁵²

It lies beyond the scope of this Article to examine this general view of constitutional interpretation in detail. For present purposes, it should be sufficient to cite a few major weaknesses in the Social Covenant thesis as it applies to the use of comparative precedent. Foremost, the Social Covenant view does not describe how the Constitution operates. Those who are bound to the Constitution today (and through most of history) were not part of the original agreement.⁴⁵³ Most of us did not, in any meaningful sense, consciously agree to be bound by the Constitution; rather, we simply inherited it as the law of the land when we were born or naturalized into citizenship. If the Constitution were a true social contract, it would have to self-destruct and be renegotiated by each new generation, or even (taking the logic to its absurd extreme) with the addition of each new citizen.⁴⁵⁴ This does not in fact describe either how the Framers envisioned that the Constitution would function, or the way it has actually functioned for more than two hundred years.⁴⁵⁵

Furthermore, what U.S. citizens inherited is not the Constitution as originally drafted, but rather the Constitution as it has been interpreted over the years.⁴⁵⁶ Though some theorists bristle at the

452. Chief Justice Roberts expressed this concern during his confirmation hearings. *Supra* note 18.

453. For example, in response the Court's decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), Frederick Douglass famously stated that "[The Framers] were for a generation, but the Constitution is for ages." Frederick Douglass, *The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?*, *Speech Delivered in Glasgow, Scotland (Mar. 26, 1860)*, in 2 PHILIP S. FONER, *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS* 467, 469 (1950).

454. See Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1408 (2001) (contending that a social contract is not the same as a legal contract because the individual has no bargaining power or an ability to consent, indeed, the social contract requires conformity).

455. See LEVY, *supra* note 218, at 324 (noting that the Framers intended the Constitution they created to "serve for ages to come"); BOWEN, *supra* note 218, at 241 ("Morris was setting down a working instrument of government which must be plain, brief and strategically a trifle vague in places, to give play for future circumstance.").

456. The ever-changing meaning of our Constitution has inspired the theory of a "living constitution," which Justice Holmes eloquently described in *Missouri v. Holland*:

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.

notion of a “living constitution,”⁴⁵⁷ the content of our constitutional “social contract” has undeniably evolved and is never fixed. For example, the Constitution that a U.S. citizen born or naturalized before 1954 inherited permitted racial segregation, while the Constitution inherited by those born or naturalized after 1954 did not. Yet the no-racial-segregation interpretation of *Brown v. Board of Education of Topeka*⁴⁵⁸ and its progeny is as binding on those who became citizens before 1954 as on those who became citizens after the Court struck down the “separate but equal” premise. That is because the Constitution gave the Supreme Court the authority to render that decision—to *change the meaning* of the social covenant with regard to race—and it gave the U.S. government both the authority and the obligation to enforce that decision.⁴⁵⁹

If the social covenant represented by the Constitution is not made by those it binds, and if its meaning is subject to continuous change after they are bound by it, it seems pretty obvious that ordinary notions of private contract making and interpretation have no particular relevance to constitutional interpretation. Rather, as Chief

252 U.S. 416, 433 (1920); see Eric R. Claeys, *The Limits of Empirical Political Science and the Possibilities of Living-Constitution Theory for a Retrospective on the Rehnquist Court*, 47 ST. LOUIS U. L.J. 737, 742 (2003) (positing that it is impossible to construe the Constitution by staying within the four corners of the document because the document is merely “a vehicle for the people’s changing conceptions of liberty”).

457. Joseph Story articulated a more static view of the Constitution in 1833 when he wrote, “[The Constitution] is to have a fixed, uniform, permanent construction. It should be, so far at least as human infirmity will allow, not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and for ever.” STORY, *supra* note 247, at 145. Many proponents of originalism still hold this perspective. Not surprisingly, Justice Scalia is an example of one who bristles at the notion of a living constitution. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989) (scoffing at the notion that non-originalists possess an “intellectually legitimate device” for construing the Constitution); see also Lee J. Strang, *The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation: Originalism Grounded in the Central Western Philosophical Tradition*, 28 HARV. J.L. & PUB. POL’Y 909, 980 (2005) (“The benefits of the writtenness of the Constitution are only realized, however, if the original meaning of the text is authoritative: if the text has a determinate, unchanging meaning.”).

458. 347 U.S. 483, 495 (1954).

459. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (asserting that “[i]t is emphatically the province and duty of the judicial department to say what the law is”); see also *Cooper v. Aaron*, 358 U.S. 1, 19 (1958) (“It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action.”); Reinstein & Rahdert, *supra* note 246, at 769-71 (invoking Justice Marshall’s language in *Marbury* to posit that the Supreme Court has the ability to overrule the legislature by virtue of the superiority of the Constitution); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 223 (1994) (arguing that the executive branch is the most powerful of the three branches because it is typically the last branch of government to act on most controversies).

Justice John Marshall recognized long ago in *Marbury v. Madison*, the Constitution is not a contract but a law.⁴⁶⁰ Contract notions do not determine how the Constitution is to be interpreted; methods of legal interpretation do. Those methods do not preclude the courts from looking beyond the shared understandings and mutual expectations of the “parties” to the social covenant when they seek to ascertain its meaning.⁴⁶¹ Nor do they bind the courts to particular techniques of interpretation or reinterpretation when they do so, so long as those methods are consistent with general processes of judicial interpretation.⁴⁶²

Indeed, the Constitution itself says *nothing at all* about interpretative method.⁴⁶³ It neither commands nor constrains the interpretative methods of the courts in their exercise of judicial review. It allows them to evolve in common-law fashion within the courts themselves. Thus, for example, it does not transgress constitutional rule for the courts to consider the social science data introduced into constitutional analysis by the “Brandeis brief,”⁴⁶⁴ to utilize methods of statistical analysis (as in some jury-selection cases),⁴⁶⁵ to rely on principles of economic theory that were unknown at the framing,⁴⁶⁶ or to organize constitutional analysis around different “tiers” of constitutional scrutiny.⁴⁶⁷ None of these

460. See *Marbury*, 5 U.S. at 177 (asserting that “[c]ertainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation”).

461. For example, legal methodology embraces many canons of construction. See John F. Manning, *Legal Realism & the Canons’ Revival*, 5 GREEN BAG 283, 285 (2002) (articulating the value in utilizing canons of construction in order to discern legislative intent in the face of ambiguous statutes).

462. Cf. GINSBURG, *LEGAL MATTERS*, *supra* note 261, at 148 (citing a Ninth Circuit opinion authored by Judge Kozinski for the proposition that binding authority is derived solely from case law, and that the principles articulated in case law from an authoritative court must be followed unless overruled) (quoting *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001)).

463. In fact, the Court has even looked to non-legal sources for inspiration. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 421-26 (1989) (Rehnquist, C.J., dissenting) (providing an extensive quotation of the poetry of John Greenleaf Whittier as well as the work of Ralph Waldo Emerson and Francis Scott Key).

464. See Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F.L. REV. 197, 198 (2000) (advancing the notion that non-legal materials should be inserted into appellate briefs in order to bolster policy arguments made by advocates).

465. See *Castaneda v. Partida*, 430 U.S. 482, 488 (1977) (suggesting that the Court was persuaded by statistical data that Mexican-Americans were underrepresented on grand juries in Texas).

466. See *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (explaining that the aggregate effects of individual non-economic behavior may significantly impact interstate commerce).

467. See, e.g., *United States v. Virginia*, 518 U.S. 515, 524 (1996) (requiring an “exceedingly persuasive” justification for state action, which approximates a strict scrutiny standard of review); *Craig v. Boren*, 429 U.S. 190, 197 (1977) (articulating a

interpretative methods existed in their current form when the Constitution was adopted. All of them have evolved as the Court has matured into its constitutional role. Consideration of foreign constitutional precedent is another such evolutionary step, one that is equally consistent with the general processes of judicial interpretation.

The backup argument of the Social Covenant theorists, the asserted danger of surrendering decision making authority to institutions outside American democracy, both misunderstands comparative constitutional adjudication and overestimates the potential force of foreign constitutional law. The argument might have validity if American courts simply deferred to the laws of other nations and imported them wholesale, regardless of their applicability. But that is not an accurate view of comparative constitutional analysis. No credible proponent proposes blind importation. Rather, prudent advocates of comparative constitutionalism and the courts that employ it envision a selective and evaluative process. This process entails American judges weighing the decisions of other nations against American principles and values, and only when appropriate adapting them to American institutions.⁴⁶⁸ Ultimate authority and accountability remain with the American courts. The foreign precedent serves as an aid to interpretation, not a substitute.⁴⁶⁹ A court using comparative constitutional precedent no more delegates authority to the foreign constitutional court than a court citing a scholarly article delegates authority to its author, or a court utilizing social science research delegates to the investigators.

A more accurate view of the U.S. Constitution treats the document, not as a social contract, but as the manifestation of a democratically controlled legislative and adjudicative process, which derives its

level of intermediate scrutiny); *Ry. Express Agency v. New York*, 336 U.S. 106, 112 (1949) (employing a standard of rational basis).

468. See, e.g., Taavi Annus, *Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments*, 14 DUKE J. COMP. & INT'L L. 301, 318 (2004) ("[F]oreign decisions themselves have no precedential authority, and thus no binding effect, in domestic courts. Therefore a court's discussion of foreign sources need not be justified from a legal point of view.").

469. Professor Jackson elaborates on this view of foreign precedent as an aid "in deepening understanding of the possibilities of interpretations that are available and also of deepening understanding of what is distinctive about our own constitutional commitments." Jackson, *Transnational Discourse*, *supra* note 143, at 284. Justice Breyer also drove this point home in noting emphatically that the U.S. Supreme Court is not bound to follow any foreign precedent. AU Conversation, *supra* note 1, at 523; see also Harding, *supra* note 242, at 417-18 (citing the Court's denial of certiorari in *Knight v. Florida* as evidence of its indifference, if not outright hostility, towards foreign law).

meaning and authority from that process's democratic legitimacy and historic continuity.⁴⁷⁰ This view of the Constitution leads some to argue that the original intention of the Constitution's Framers should therefore control its interpretation.⁴⁷¹ From their Originalist perspective, foreign constitutional precedent is irrelevant because it does not concern American original intent.⁴⁷² This Originalist argument figures prominently in Justice Scalia's outspoken opposition to comparative constitutional interpretation.⁴⁷³

As with the Social Covenant view, the larger contours of this Originalist view are part of a theoretical debate that goes beyond this Article. There are a few points, however, that are particularly pertinent to the relevance of comparative constitutional reasoning. Foremost, although individual Justices have at times championed original intention as the *sine qua non* of constitutional adjudication,⁴⁷⁴ the full Court has never confined itself to rigid Originalist thinking.⁴⁷⁵

470. Harding, *supra* note 242, at 444 (noting Justice Breyer's advocacy of a "democratic" approach to constitutional interpretation and adjudication"); see also Emil A. Kleinhaus, Note, *History as Precedent: The Post-Originalist Problem in Constitutional Law*, 110 YALE L.J. 121 (2000).

471. See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 370-71 (1995) (Thomas, J., concurring) (arguing that any contemporary value of anonymous sources is irrelevant to the question of what the Framers meant by the phrases "free speech" and "free press"); *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (chastising the majority's use of the "substantial effects" test in Commerce Clause jurisprudence as a departure from the original intent of the Framers); *Berger v. New York*, 388 U.S. 41, 87 (1967) (Black, J., dissenting) ("I believe it is the Court's duty to interpret these grants and limitations so as to carry out as nearly as possible the original intent of the Framers. But I do not believe that it is our duty to go further than the Framers did on the theory that the judges are charged with responsibility for keeping the Constitution 'up to date.'").

472. See Calabresi, *supra* note 182, at 1106 (distinguishing between constitutional matters of public policy and constitutional interpretations of concrete clauses which can only be understood by examining the Framers' original intent).

473. AU Conversation, *supra* note 1, at 521.

474. See H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 677 (1987) (describing Justices Hugo Black and William Rehnquist as "perhaps the two most consistent originalists in the Supreme Court's history"); David A. Strauss, *Originalism, Precedent, and Candor*, 22 CONST. COMMENT. 299, 308 (2005) (characterizing Justice Antonin Scalia as "perhaps the most prominent originalist of all"). Another recent proponent of originalism is Supreme Court Justice Clarence Thomas. See *supra* note 471 (citing cases criticizing the Court for invoking contemporary doctrines, rather than merely examining the intent of the Framers, to adjudicate constitutional matters).

475. See Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 914 (1998) ("Unlike their originalist brethren, most of the Justices on the Supreme Court have taken and should continue to take a conventionalist or common-law approach to constitutional adjudication."); Eric J. Segall, *A Century Lost: The End of the Originalism Debate*, 15 CONST. COMMENT. 411, 433 n.131 (1998) (listing a host of important Supreme Court cases to support the proposition that the Supreme Court has never consistently adopted the Originalist approach). See generally LEVY, *supra* note 218, at 351 (commenting that originalists on the Court criticize the

As the American constitutional method has evolved, original intention has emerged as one among many sources for inspiration that the courts use to determine the meaning of constitutional text.⁴⁷⁶

As a single, non-determinative, non-exclusive source, the Originalist view does not preclude the use of other resources and interpretative aids, including foreign constitutional precedent.

Additionally, the Originalist argument assumes that the search for original understanding yields a specific, consistent and clear directive on contemporary questions, one that was widely shared not only by those who drafted the Constitution, but also by those who ratified the particular constitutional command in question.⁴⁷⁷ There may be some constitutional questions on which this kind of specific intention is available. But on most unresolved constitutional questions today, finding an authoritative expression of specific intention is a pretty tall order that is unlikely to be filled. Most of the discussions at the time of drafting and ratification were too general (and too varied) to yield specific directives on twenty-first century problems and applications of constitutional norms.⁴⁷⁸ Many of the most important provisions, including much of the human rights content of the Constitution and the Bill of Rights, were cast in general terms, the specific contours of which were barely discussed.⁴⁷⁹ Further, the unresolved problems of

majority for acting "like a superlegislature or a continuous constitutional convention").

476. See Shannon Stewart, *The Art of Constitutional Interpretation*, 17 J. CONTEMP. L. 91, 99 (1991) ("Constitutional interpretation is a delicate balancing process of many values and interests, which is best accomplished by blending a variety of interpretive techniques and methods."). Stewart subsequently concludes that "[o]riginalism . . . fails as a comprehensive theory of constitutional interpretation." *Id.* at 109.

477. *Id.* at 108 (cautioning against the "occupational hazard of an overly intense quest for ascertaining the Framers' intent," as a treatment of intent as relevant requires that it "be one fairly inferable to a majority of the Framers and Ratifiers. But determining the general intent of any collective body will be nearly impossible").

478. See Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 59 (1985) (citing *Brown v. Board of Education* as an example of when the Court declined to rely on the original intent of the Framers of the Fourteenth Amendment).

479. See William J. Brennan, Jr., Associate Justice, United States Supreme Court, *The Constitution of the United States: Contemporary Ratification*, Address Before Georgetown University, Address at Georgetown University as part of its Text and Teaching Symposium (Oct. 12, 1985), in 19 U.C. DAVIS L. REV. 2, 2 (1985) ("The [Constitution's] phrasing is broad and the limitations of its provisions are not clearly marked This ambiguity calls forth interpretation, the interaction of reader and text."). Regarding the ability of interpreters to ascertain the intent of the Framers, Justice Brennan considered it "arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions," particularly when "all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions, and hid their differences in cloaks of generality." *Id.* at 4.

today involve applications that are too novel for that kind of specific intention.⁴⁸⁰

Third, most of what goes by the name of original intention is actually an extrapolation from a known (or partly known) intention at the framing to an arguably parallel situation today.⁴⁸¹ To illustrate, consider whether Congress has the power to regulate commerce in outer space. To imagine that the Framers voiced specific views about regulating commerce in outer space would be absurd. But would the absence of any specific discussion determine that Congress lacked the power? I doubt that any but the most doctrinaire Originalist would draw that negative conclusion. Instead, one may infer an intention to allow such power from the Framers' known intent to allow congressional regulation of commerce on, say, the high seas.⁴⁸² But it is we, not the Framers, who extrapolated the parallel between the high seas and outer space. Yet once we admit the legitimacy of such extrapolations, we have admitted the power of the courts to interpret constitutional language expansively, beyond the historical record, and to adapt it to new situations—in other words, to go beyond the specific limits of stated original intention.⁴⁸³ How far one is willing to go then becomes a question of constitutional policy for which original intention itself supplies no immediate answer.

Finally, there is the problem of interpreting the Framers' intention regarding the methods of constitutional interpretation. The Constitution makes no direct commands regarding methods of interpretation. Nor does the historical record disclose any strong evidence of an attempt by the Framers to make their intentions controlling. In fact, there is some evidence (such as the official secrecy of the original Constitutional Convention's deliberations and the lack of more than rudimentary official minutes) that points in the

480. Merrill, *supra* note 478, at 59 (citing *Brown v. Board of Education* as an example of the Court recognizing an issue too nuanced to rely merely on the Constitutional text).

481. See, e.g., David Chang, *A Critique of Judicial Supremacy*, 36 VILL. L. REV. 281, 359 (1991) ("Extrapolating from the decisions made by the framers to determine the constitutional decisions voters today would make is an exercise in indeterminate speculation."); Stewart, *supra* note 476, at 108-09 ("Extrapolating intent by analogy can become a speculative game in which the originalists can be as creative as the nonoriginalists they criticize.").

482. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 68 (1824) (concluding that the Framers must have understood the word "commerce" to comprehend navigation when writing the constitution).

483. See Scott Moriarity, Comment, *Originalism and the Commerce Clause: A Migratory Flight*, 28 WM. MITCHELL L. REV. 1575, 1590 (2002) (noting that extrapolation to shed light on how the Framers would address a current challenge "invites the sort of speculation that originalism was meant to avoid.").

opposite direction.⁴⁸⁴ While there is abundant evidence that the Framers anticipated constitutional interpretation by the judiciary as a means of resolving unanticipated constitutional questions,⁴⁸⁵ there is no evidence that they sought to confine the judiciary to particular interpretative methods or techniques.⁴⁸⁶ Instead, they expected the courts to follow the customs and usages of the common law, which even then went well beyond original intention *and included reliance on foreign legal sources*.⁴⁸⁷

Thus, to the extent there was a discernible “Framer’s intent” regarding resort to comparative constitutional norms, the evidence supports, rather than chastises, the use of comparative materials. The drafters of the Constitution themselves drew substantially from comparative sources.⁴⁸⁸ Unsurprisingly, since many were lawyers

484. See, e.g., Paul Finkelman, *The Constitution and the Intentions of the Framers: the Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 352 (1989) (relaying James Madison’s decision not to release the notes he took during the Constitutional Convention for fear that they may be used to influence the interpretation of the Constitution); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 903 & n.92 (1985) (noting the delegates’ decision not to publish the journal or other papers documenting their deliberation); see also LEVY, *supra* note 218, at 331 (“[N]o evidence, not a shred, exists to show that the Framers meant, wanted, or expected future generations to construe the Constitution as they, the Framers, had.”).

485. See, e.g., THE FEDERALIST NO. 63, at 345 (Alexander Hamilton) (E. H. Scott ed., 1898) (“[A]n attention to the judgment of other nations is important to every Government . . . independently of the merits of any particular plan or measure, it is desirable . . . that it should appear to other nations as the offspring of a wise and honorable policy . . . [and] in doubtful cases, particularly where the national councils may be warped by some strong passion, or momentary interest, the presumed or known opinion of the impartial world, may be the best guide that can be followed.”) (quoted in Vicki C. Jackson, *Could I Interest You in Some Foreign Law? Yes Please, I’d Love to Talk with You*, 2004-AUG LEGAL AFF. 43, 44 (2004)); THE FEDERALIST NO. 78, at 427 (Alexander Hamilton) (E. H. Scott ed., 1898) (declaring that “[t]he interpretation of the laws is the proper and peculiar province of the courts. A Constitution is, in fact, and must be regarded by the Judges as a fundamental law”); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1463 (2001) (finding ample evidence that the Framers expected there to be judicial review).

486. See Powell, *supra* note 484, at 889 (recognizing the anti-interpretive tradition of Anglo-American Protestantism and common law as the two main approaches to interpretation in American jurisprudence); LEVY, *supra* note 218, at 10-11 (citing Jefferson and Hamilton’s uniform belief that the Constitution ought to be interpreted “according to the conventional rules of interpretation”).

487. See Fontana, *supra* note 385, at 580-81 (noting that the Federalist Papers viewed experience, attained through consultation with a multitude of materials, as the basis for constitutional adjudication).

488. See McGinnis, *supra* note 182, at 307 (“In fact, the Framers may themselves have used international and foreign law as policy arguments when they debated the ratification of the Constitution.”); Douglas G. Smith, *Interstate Commerce and the Principles of the Law of Nations*, 2004 UTAH L. REV. 111, 112 (2004) (documenting the Framers’ reliance on writers such as Grotius, Pufendorf, and Vattel to gain an understanding of international law); Po-Jen Yap, *Transnational Constitutionalism in the United States: Toward a Worldwide Use of Interpretive Modes of Comparative Reasoning*, 39

trained in the common law tradition, they relied heavily on principles and practices of English common law, particularly Blackstone, which was by 1787 a foreign source, even though it supplied the roots of American law.⁴⁸⁹ They also drew from continental law and legal theorists, English political philosophy, Roman law, and other international sources for many of the norms and structures they incorporated into the Constitution.⁴⁹⁰

In his conversation with Justice Breyer, Justice Scalia acknowledged the use of these sources but refused to extrapolate from them.⁴⁹¹ He asserted that constitutional *drafting* is fundamentally different from constitutional *interpretation*, and that in any event, the historical record would only support reference to the very foreign sources the Framers themselves used.⁴⁹² Neither assertion withstands analysis.

U.S.F. L. REV. 999, 1013 (2005). Moreover, the Supreme Court has throughout history looked to foreign and international sources of law for inspiration and guidance. Calabresi & Zimdahl, *supra* note 101, at 756 ("It is thus not surprising that from its earliest years the Supreme Court considered and cited foreign sources of law.").

489. See Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 661 n.71 (1999) (describing Blackstone's influence on the Framers' understanding of the law as "widely acknowledged"); John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 982 (1993) (crediting Blackstone with guiding the Framers' protection of natural rights) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *41).

490. See, e.g., Genc Trnavci, *The Meaning and Scope of the Law of Nations in the Context of the Alien Tort Claims Act and International Law*, 26 U. PA. J. INT'L ECON. L. 193, 262-63 (2005) (documenting the influence of great scholars, such as Hugo Grotius and Emmerich Vattel, on the creation of the U.S. Constitution); Smith, *supra* note 488, at 129 (citing Vattel's influence); Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 681, 737 (1997) ("[T]he Roman law is important not only because it was studied extensively and cited as authority in nineteenth and eighteenth century America, but also because the natural law theories that influenced the framers of the Fourteenth Amendment were very much influenced by this body of law."); see also THE FEDERALIST NO. 18, at 102 (Alexander Hamilton & James Madison) (E. H. Scott ed., 1898) (following his description of the government structures around the globe, "I have thought it not superfluous to give the outlines of this important portion of history; both because it teaches more than one lesson; and because . . . it emphatically illustrates the tendency of Federal bodies, rather to anarchy among the members, than to tyranny in the head").

491. AU Conversation, *supra* note 1, at 525 ("[T]he Founders used a lot of foreign law. If you read the Federalist Papers, it's full of discussions of the Swiss system, the German system, etc. It's full of that because comparison with the practices of other countries is very useful in devising a constitution.").

492. *Id.* at 538-39 (responding to a comment that Alexander Hamilton urged attention to the judgments of other nations, Justice Scalia stated that Hamilton "was writing a Constitution, not interpreting one . . . [a]nd in writing one, of course you consult foreign sources, see how it has worked, see what they've done, use their examples and so forth. But that has nothing to do with interpreting it."). Justice Scalia noted that according to his philosophy of interpreting the Constitution, "obviously foreign law is irrelevant with one exception: old English law-because phrases like 'due process,' and the 'right of confrontation' were taken from English law." *Id.* at 525.

The former argument rests on the rather odd proposition that constitution making and constitutional interpretation are unrelated enterprises following fundamentally different methods. It is not clear why this should be, and the proponents of this view supply no reason. Taken to its logical extreme, Justice Scalia's curious line of distinction would defeat Originalism entirely, since *everything* the Framers did and said was by definition drafting rather than interpretation, making it all irrelevant to the interpretative process. From an Originalist standpoint, it would seem to make more sense to insist that, what the Framers regarded as relevant to their understanding of the Constitution, the courts should also take as relevant to theirs.

Justice Scalia's alternative argument, if followed rigorously, would produce untoward (if not absurd) consequences for constitutional law. It would, for example, deny the extrapolation of federal regulatory power from the high seas to outer space mentioned above. It would also confine the Second Amendment (whatever else it may mean) to blunderbusses, muskets and other eighteenth century arms.⁴⁹³ It would withdraw First Amendment protection for films, the Internet, and microwave broadcasts. And it would produce a host of Luddite constitutional consequences. No responsible Originalist views the Constitution in this limited fashion. If the evidence concerning original intention regarding foreign constitutional materials is to be used the way we typically use other historical materials, it should permit extrapolation to account for the passage of two centuries. Just as we can extrapolate from a book to a film, or a blunderbuss to an automatic assault rifle, we should be able to extrapolate from an eighteenth century comparative source to a twenty-first century one. If the Framers used and considered the comparative constitutional sources of their day, then the courts should be able to consider the comparative constitutional sources of ours.

Unlike the Social Covenant and Originalist arguments, the Exceptionalist argument against comparative constitutional analysis carries some weight, although it does not justify total exclusion of comparative materials. The Exceptionalist position is that American constitutional traditions are rooted in unique American historical experience, which so thoroughly colors our understanding of constitutional provisions that comparative evaluation, even of comparably stated foreign norms, has no helpful relevance.

493. Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 318 (2000).

As a wholesale rejection of comparative analysis, this argument proves too much. It ignores all the common constitutional ground that invites comparative constitutional analysis in the first place.⁴⁹⁴ It also overvalues the role of American history in defining constitutional powers and liberties.⁴⁹⁵ History certainly has its place in constitutional adjudication, but like Originalism, it is only one factor among many and does not displace all others.

As a partial limit on comparative precedent, however, the Exceptionalist argument carries some force. Some features of the American constitutional system are truly unique. They run the gamut from broad doctrines of major importance to relatively technical details. A list of exceptionally American constitutional concepts would probably include, for example, a good deal of federalism, some aspects of bicameralism, the structure and function of the Electoral College, the Dormant Commerce Clause; and the Twenty-first Amendment's treatment of alcoholic beverages. Each of these subjects springs from particular developments in American history that deviate markedly from the experiences of other nations and that significantly influence how the issues in question should be evaluated. There are other constitutional principles, however, that are less wholly rooted in particular American experience. These include protections against coerced confession, rights to assistance of counsel, limits on double jeopardy and ex post facto crimes, limits on cruel and unusual punishment, many equality rights, and a good deal of procedural due process. These and similar guarantees represent commitments to legal principles that operate independently of any single nation's specific historical developments, and are instead widely accepted as universal foundations of any fair and democratic government. In the middle of this idiosyncratic-universal spectrum are other principles, such as freedom of expression, free exercise of

494. See Sandra Day O'Connor, Keynote Address at 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, 350 (2002) (despite "reluctance on our current Supreme Court to look to international or foreign law in interpreting our own Constitution . . . there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here"); AU Conversation, *Transcript*, *supra* note 2 (Justice Breyer noted "these are human beings . . . called judges, who have problems that often, more and more, are similar to our own. They're dealing with this [sic] certain texts, texts that more and more protect basic human rights").

495. See Robert Justin Lipkin, *Constitution Revolutions: A New Look at Lower Appellate Review in American Constitutionalism*, 3 J. APP. PRAC. & PROCESS 1, 13 (2001) (describing multiple conventions for constitutional adjudication, including "text, intent, structure, tradition, or history"); LEVY, *supra* note 218, at 398 ("History can only be a guide, not a controlling force.").

religion, and racial equality that, though widely shared by other constitutional democracies, are nonetheless deeply intertwined in some of their applications with American historical experience.⁴⁹⁶ Some principles in these areas will find counterparts elsewhere, while others may acquire such an uniquely American character that the experience of other constitutional democracies will have little informative value.

The upshot is that Exceptionalist considerations speak to the weight of comparative constitutional evidence, not its admissibility. Whenever comparative material is consulted, the court should first determine the extent to which the right at issue is a product unique to the American experience, rather than a widely-recognized democratic value.⁴⁹⁷ Where exceptional characteristics of American history have colored American understanding of constitutional principles, less weight should be accorded to comparative precedent on ostensibly similar issues elsewhere. Occasionally, the exceptional factors of American law may be so strong as to defeat use of comparative precedent entirely. But most of the time there will still be room for comparative constitutional analysis to play a significant role in the American court's judgment.

2. Contextual difficulties

Even if we accept the potential relevance of foreign constitutional law, however, it does not follow that all such law will be useful.⁴⁹⁸ We must consider ways in which other nations' constitutions might deviate from basic American norms as a result of unique foreign national characteristics that American constitutionalism does not share.

496. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude . . . shall exist within the United States"); U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States . . . are citizens of the United States and of the state wherein they reside. No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."); U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude.").

497. See Jackson, *Ambivalent Resistance*, *supra* note 118, at 597 (acknowledging that, while several nations use the same doctrinal phraseology in their constitutions, unique national considerations often require nations to interpret such clauses differently); Slaughter, *Brave*, *supra* note 118, at 295 (recognizing that a judge may declare international law irrelevant when faced with an issue unique to the American experience).

498. See Anthony S. Winer, *A Speculation on Enlightenment Roots, Foreign Law, and Fundamental Rights*, 32 WM. MITCHELL L. REV. 509, 530-31 (2006) (arguing that not all foreign law is relevant to the United States and that, because there is a range of relevancy among those foreign jurisdictions that are appropriate for comparison, courts should employ a "different basis for selection" as necessary).

There is little doubt that such foreign national characteristics exist, or that they influence constitutional decisions in foreign states.⁴⁹⁹ These differences can be large or small, obvious or subtle. They may arise from differences in constitutional subject matter, commitment to different constitutional principles, differences in decisional structure or method, differences in the underlying society, differences in history, and a variety of other factors. Just as the previous Section argued that courts must consider the admissibility of any comparative constitutional analysis by first assessing the extent to which the constitutional interest is a by-product of the American experience, so too must a court examine the traditions and history of foreign nations to determine the availability of an analogously recognized interest. A few illustrations follow.

One area where such differences arise is the role of religion in public life. In the United States, religious establishment is constitutionally prohibited.⁵⁰⁰ In contrast, many foreign nations recognize one or more national religions,⁵⁰¹ a fact that will have a major impact on how issues of religious freedom are treated under that nation's constitution.⁵⁰² Even nations that do not formally recognize a national church may have deeply intertwined legal relations with a single dominant religion⁵⁰³—Italy's complex legal

499. See Rosenkrantz, *supra* note 182, at 289 (discussing value of negative borrowing as stemming from an "awareness of the categorical differences between countries" and constitutional systems).

500. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof"); see also *McCreary County v. ACLU*, 125 S. Ct. 2722, 2733 (2005) ("When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides.").

501. See Shimon Shetreet, *State and Religion: Funding of Religious Institutions—The Case of Israel in Comparative Perspective*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 421, 426 (1999) (describing the "established church model" of the relationship between church and state as a framework in which "the state recognizes a certain religion or church as the state's national church" but "does not mean that other religions are prohibited"). For example, some nations in Europe have constitutional provisions naming either Catholicism or various forms of Protestantism as the national religion. Others, though nominally secular, support religion in ways that would be contrary to American traditions. In France, for example, the Constitution provides that France is "secular," but the State appropriates funds for religious schools. 1958 CONST. art. I (France).

502. See Darin W. Carlson, *Understanding Chinese-U.S. Conflict Over Freedom of Religion: The Wolf-Specter Freedom From Religious Persecution Acts of 1997 and 1998*, 1998 BYU L. REV. 563, 569 (1998) (arguing that limits on the number of official religions and on registrations for religious meeting places "have a significant impact on religious freedom in China").

503. See Leszek Lech Garlicki, *Perspectives on Freedom of Conscience and Religion in the Jurisprudence of Constitutional Courts*, 2001 BYU L. REV. 467, 468-69 (2001) (noting that while "almost all countries formerly had a state church" in Europe, over time "the official relationship between church and state eventually broke down" although this

relations with Roman Catholicism and the Vatican is an obvious example.⁵⁰⁴ Since the First Amendment prohibits such religious entanglement in the United States, our constitutional law on religious freedom is likely to be very different in character from these other states.⁵⁰⁵

Another example concerns military power. In reaction to the horrors of World War II, Japan's constitution commits the nation to pacifism,⁵⁰⁶ a principle that obviously affects Japan's concept of government military authority and influences its foreign relations.⁵⁰⁷ In the opposite direction, Israel's legal framework is undoubtedly affected by its perpetual state of national military emergency.⁵⁰⁸

A third example concerns equality of ethnic minorities. Canada's constitution guarantees the vitality of two distinct and sometimes conflicting linguistic cultures.⁵⁰⁹ Such a commitment may afford a range of constitutional rights to linguistic minorities that goes beyond what linguistic minorities could claim in the United States.⁵¹⁰

Sometimes, the differences are more structural, or part of a different analytical method. Decisions of France's constitutional

change "does not foreclose the existence of some churches remaining closer to the state than other religious organizations or groups").

504. *Id.* at 471 (describing Italy's Lateran Pacts as "regulating the relations between the state and the Catholic Church").

505. See generally *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (declaring that a statute is invalid under the Establishment Clause when it fosters "excessive government entanglement with religion") (quoting *Waltz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

506. KENPŌ, art. 9, ¶¶ 1 & 2 ("In sincere pursuit of an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, are not maintained. The right of belligerency of the state will not be recognized.").

507. See generally Lawrence W. Beer, *Peace in Theory and Practice Under Article 9 of Japan's Constitution*, 81 MARQ. L. REV. 815, 815-16 (1998) (contending that Japan's constitutional commitment to pacifism may prove instructive to other nations).

508. CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: ISRAEL III (Gisbert H. Flanz ed., Oceana Publications, Inc. 2005) ("[The lack of an Israeli Constitution] is due in part to the unresolved security questions surrounding the existence of the state of Israel which were not favorable to the entrenchment of fundamental constitutional values.").

509. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.) (Canadian Charter of Rights and Freedoms) § 16, ¶ 1 ("English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada."). In addition to granting equal status to the English and French languages, the Canadian Constitution further accords protection to linguistic minorities by promoting equal language access for legal and education rights. *Id.* at §§ 17-23.

510. See Cristina M. Rodríguez, *Language and Participation*, 94 CAL. L. REV. 687, 705 (2006) (describing the American legal system's adaptation of its immigration stance to address the issue of multilingualism as inadequate).

tribunal are undoubtedly influenced by the relative ease with which the French Constitution can be amended.⁵¹¹ Decisions in many European nations must account for the concurrent supranational judicial authority of the European Union and the European Court of Human Rights.⁵¹² And many foreign constitutional courts use analytical concepts, such as the principles of “subsidiarity” and the “margin of appreciation,” which do not have American cognates.⁵¹³

As with American Exceptionalism, this foreign constitutional difference does not preclude the use of comparative constitutional principles. To the contrary, the benefits of comparative constitutional analysis actually depend on the existence of important constitutional differences, which highlight differences in perspective, which in turn illuminate common issues.⁵¹⁴ Foreign constitutional difference nevertheless requires the exercise of informed discretion in using foreign materials. Whenever foreign precedents are consulted, they must be situated in their indigenous legal context. There may be contextual differences that affect (or even sometimes defeat) the applicability of that precedent to the United States.⁵¹⁵ Occasionally, the differences might be so large that they render related constitutional precedent useful only as negative precedent or as part of a process of constitutional alignment. In other instances, the differences will not defeat the adaptability of the precedents but may influence the weight American courts are willing to give them.⁵¹⁶ The differences, however, go to weight, not admissibility.

511. BLAUSTEIN, *supra* note 47, at 8. The author recalls an anecdote in which a scholar asked the owner of Parisian bookstore if he could purchase a copy of the French Constitution. The clerk responded “I regret that I cannot help you, our bookstore does not carry periodicals.” *Id.*

512. SLAUGHTER, *NEW WORLD*, *supra* note 105, at 82-83.

513. See Bernard H. Oxman & Vincent P. Bantz, *Prompt Release of Vessels and Crews—Exhaustion of Local Remedies—Lis Pendens—Amount and Form of Reasonable Bond—UN Convention on the Law of the Sea*, 94 AM. J. INT’L L. 713, 721 (2000) (“Municipal courts in Europe are also learning that well-reasoned decisions are more likely to elicit deference from regional international tribunals, be it in the context of the principle of subsidiarity in the European Community or in the context of the margin of appreciation under the European Convention on Human Rights.”); James A. Sweeney, *Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era*, 54 INT’L & COMP. L.Q. 459, 473 (2005).

514. See Scheppele, *supra* note 352, at 298-99 (noting that rejections of other constitutional rules may be more instructive than borrowings).

515. MARKESINIS & FEDTKE, *supra* note 35, at 48.

516. Many U.S. law firms now have branches in foreign nations with resident experts in foreign law who may be consulted. See Carole Silver, *Globalization and the U.S. Market in Legal Services—Shifting Identities*, 31 LAW & POL’Y INT’L BUS. 1093, 1101 (2000) (observing that “[f]oreign offices function as a signal to the national and international community of a law firm’s commitment to a national and international identity, to a particular foreign location, and to the development of international

3. Informational demands

The need for contextualization of comparative precedent produces some fairly significant informational demands on courts and counsel. To engage in the weighing process, an American court may need to know a fair amount about a foreign system.⁵¹⁷ Where the foreign system has familiar features, as is the case for the United Kingdom, Canada, Australia, and some other common law systems, as well as the more prominent European constitutional courts, these informational demands should be easily satisfied.⁵¹⁸ In other instances, counsel will need to supply the American court with enough background about the foreign jurisdiction's constitutional system to place the precedent in perspective.⁵¹⁹ How much information is needed will depend on the nature and extent of the difference in the foreign system, the way the foreign precedent is being used, and the degree of importance given to the foreign precedent in the American court's reasoning.⁵²⁰

The practical challenge of contextualization leads some opponents of comparative constitutionalism to conclude that the task is too daunting and prone to error. Other critics argue that if comparative constitutional analysis is to occur, courts must develop elaborate rules about when and how the relevance of comparative precedent is to be determined.⁵²¹ These arguments neglect the essential role of legal advocacy.

expertise"). These foreign offices enable law firms to gain access to foreign scholars to gain assistance in contextualization.

517. See, e.g., Young, *supra* note 182, at 166 (noting that Daniel Halberstam criticized Justice Breyer's analogy between American federalism concerns and the German state-level system of implementing federal law in *Printz v. United States* due to Justice Breyer's failure to sufficiently appreciate "critical differences in institutional context" between the nations) (citing Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, in *THE FEDERAL VISION* 213, 249-51 (Kalypso Nicolaidis & Robert Howse eds., 2001)); McGinnis, *supra* note 182, at 320 (citing *Lawrence v. Texas* as an example of the Supreme Court invoking international law without considering material differences between the United States and Europe).

518. Compare *The Bill of Rights (Act) 1689 (UK)* art. I, part. 12 ("jurors ought to be duly impaneled and returned"), and *Part I of the Constitution Act, 1982*, being *Schedule B to the Canada Act 1982*, ch. 11 (U.K.) (Canadian Charter of Rights and Freedoms) § 11 ("Any person charged with an offence . . . [is] presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal"), and *AUSTL. CONST. Chap. III*, part 80 ("The trial on indictment of any offence against any law of the Commonwealth shall be by jury . . ."), with *U.S. CONST. amend. VI* ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury").

519. Breyer, ASIL Keynote, *supra* note 104, at 267 (noting that judges need lawyers to take the lead in supplying comparative background to courts).

520. *Id.* at 267-68.

521. See Ramsey, *supra* note 17, at 72 (advocating "a set of principles to ensure that [comparative analysis] is done as a part of a coherent, neutrally applied theory and practice").

Counsel should play a critical role in sorting foreign precedent, identifying relevant materials, contextualizing them, and determining their potential utility. In the U.S. adversarial system, courts typically depend on the advocates to perform these functions.⁵²² Courts also depend on adversarial exchange both to highlight the strengths of precedent and to expose its weaknesses.⁵²³ Obviously, advocates can do this effectively only if they know the law and understand its context. With domestic precedent, standardized legal education and practical experience ensure that competent advocates are sufficiently well versed in the law (or able to verse themselves) in order to perform these functions.⁵²⁴ With foreign precedent, however, we cannot presently assume such competence.⁵²⁵ Even highly experienced counsel face challenges in locating relevant foreign constitutional precedent, explaining its significance, or alternatively contesting its utility.⁵²⁶ Acquiring sufficient information to make effective use of comparative constitutional law will thus impose some potentially significant additional costs on adversaries.

4. *Language and access barriers*

One final limiting factor concerns the difficulties of finding and reading the material itself. This difficulty is greatest where there is a language barrier. Where precedent comes from non-English sources, it is unlikely that an American court will be able to treat the comparative material in its native language. Translation into English

522. See Kathleen Waits, *Work Product Protection for Witness Statements: Time for Abolition*, 1985 WIS. L. REV. 305, 338 (1985) (“[A]dvocates play an important role in tempering bias because they force factfinders to think hard before making up their minds.”). But see Ellen E. Sward, *Values, Ideology and the Evolution of the Adversary System*, 64 IND. L.J. 301 (1989) (acknowledging a modern trend moving away from the historic belief that the adversarial process as the best means to arrive at the truth, and instead suggesting more alternative means).

523. Jack M. Sabatino, *ADR as “Litigation Lite”: Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1316 (1998).

524. See Alberto Bernabe-Riefkohl, *Tomorrow’s Law Schools: Globalization and Legal Education*, 32 SAN DIEGO L. REV. 137, 141 (1995) (noting that the legal education framework in the United States has long focused on “develop[ing] the basic skills needed by all those wishing to practice law: legal theory and analysis through the study of precedent,” although this framework has undergone reform).

525. See Young, *supra* note 182, at 166 (arguing that most American lawyers lack the requisite training in comparative constitutional law).

526. See Thomas R. French, *Internet Resources for Researching International and Foreign Law*, 52 SYRACUSE L. REV. 1167, 1168 (2002) (noting that the emergence of international and foreign legal materials on the Internet has facilitated practitioners as “only a few libraries or law firms even attempt to comprehensively collect foreign and international materials”).

will be needed. This could be time-consuming and costly.⁵²⁷ Worse, awkward translation could interfere with an adequate understanding of the comparative text. Fortunately, English is rapidly becoming an international second language, so that many foreign legal texts are now routinely translated—some officially or semi-officially—into English.⁵²⁸ Yet the difficulty and expense of obtaining English translations, in addition to the inevitable delays in the translation process, may cause the most up-to-date comparative materials not to be readily available.

C. Evaluation: Is Comparative Constitutionalism Worth the Candle?

Ultimately, one must decide whether the light shed by comparative constitutional analysis outweighs its costs. The answer is not as obvious as some proponents of comparative constitutional analysis suggest. While there are certainly benefits to comparative constitutional reasoning, they are not mammoth. And while there are no absolute barriers to comparative constitutional reasoning, the factors counseling hesitation discussed above suggest that comparative analysis is neither an easy nor a cost-free undertaking. The practical concerns relating to the value of foreign precedent that arose in Justice Alito's confirmation hearings thus may have been his strongest arguments against using comparative precedent. They include the uncertainty over which countries U.S. courts should look to, the scope of foreign judicial power, and the risk of losing context for foreign legal systems when looking at individual laws.⁵²⁹

Notwithstanding these difficulties, there is more to be gained than lost from comparative constitutional analysis. The benefits, though not overwhelming, are nonetheless real, and comparative constitutional analysis includes several advantages that do not replicate domestic precedent. The costs of comparative analysis, though also real, do not outweigh the aggregate benefits. The grave

527. See Rose Kennedy, *Much Ado About Noting: Problems in the Legal Translation Industry*, 14 TEMP. INT'L & COMP. L.J. 423, 435 (2000) (noting that the cost of translation of legal materials is so high that it may be "prohibitive").

528. For example, the Taiwanese Constitutional Court, through its website, has provided transcripts of its decisions translated into English. SLAUGHTER, NEW WORLD, *supra* note 105, at 75; see also Stacy Amity Feld, Comment, *Language and the Globalization of the Economic Market: The Regulation of Language as a Barrier to Free Trade*, 31 VAND. J. TRANSNAT'L L. 153, 199 n.228 (1998) (chronicling efforts by the European Union to translate legal texts); Merit-Ene Ilja, *Estonian Legal Language Centre: Legal Translation and Terminology Work*, 33 INT'L J. LEGAL INFO. 274, 274 (2005) (describing efforts to translate Estonian legislation into English and EU legislation into Estonian); MARKESINIS & FEDTKE, *supra* note 35, at 142-44 (noting general improvements in access to English translations of foreign law).

529. *Alito Hearing*, *supra* note 18, at 471.

dangers supposed by those who fear a turnover of American constitutional law to foreign courts should never materialize, since any comparative principle is no more than persuasive authority that American courts are free to accept, challenge, or disregard according to their own judgment.⁵³⁰ Instead, the principal costs will be educational and informational, associated with the difficulties of locating, translating, contextualizing, and advocating relevant foreign precedent. Since these costs derive partly from general American legal isolation, globalization may reduce these costs over time. Educational and informational costs may be reduced further through some strategic adjustments in American legal education as discussed below.

D. The Best Uses of Comparative Constitutional Precedent

1. Results

To date, most use of comparative constitutional law, and most debate over it, has concerned comparison of results. Should the United States' ruling on the question follow the constitutional outcomes of other nations, or should the court disagree and go its own way? While results are certainly important, this is an unduly narrow view of the potential uses of comparative precedent. Beyond comparative results, American courts can and should use foreign constitutional precedent to evaluate a rule's potential administrability, its potential impact on government institutions, and the potential scope of it as precedent.

2. Administrability

Sometimes constitutional debate in the United States centers on whether a new or different constitutional rule would be easy or difficult to administer.⁵³¹ Courts need to know if a new rule will provide clear guidance or create confusion for those to whom it applies.⁵³² Where there is a choice, courts generally prefer a rule that can be easily and consistently applied.⁵³³ Thus, American judges often

530. MARKESINIS & FEDTKE, *supra* note 35, at 25.

531. See, e.g., *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 729-30 (1979) (declining to adopt a uniform federal rule where application of state laws would not adversely affect administration of the federal program).

532. See *id.* at 728-29 (fearing the proposed rule would upset the expectations and practices of creditors).

533. See, e.g., *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 832 (2002) (rejecting a proposed rule that would allow responsive pleading to create jurisdiction as it would undermine the clarity and ease of the "well-pleaded" complaint rule); *In re Berger*, 498 U.S. 233, 235-36 (1991) (adopting a bright-line

evaluate a proposed constitutional rule in terms of its capacity for sound administration.⁵³⁴ Since the rule is new, judicial arguments about administrability inevitably involve some amount of speculation regarding the rule's potential administrability.

Comparative precedent could help. Where an analogous rule has been adopted in a foreign jurisdiction, American courts can assess the experience of the foreign government in administering the rule.⁵³⁵ Did difficulties applying the rule materialize? Did the rule spawn a flood of litigation? Did the rule require additional legislation or detailed administrative rulemaking? Did the rule produce conflicting applications in lower courts or agencies? By considering the actual experience of other constitutional systems using a similar rule, the American court can arrive at a more informed determination of whether adoption of a similar rule in the United States would be administratively acceptable.

3. *Impact on governmental institutions*

Other times, the debate in American courts concerns the potential impact of a particular constitutional rule on the branches of government most directly affected by it.⁵³⁶ For example, will a particular constitutional protection for the accused or procedural safeguard for the detained interfere significantly with effective law enforcement? Will a limitation on government military authority endanger national security? Will a regulation of speech stifle public

rule for the award of attorneys fees in fear of the imprecise analysis that would accompany a case-by-case approach); *Texas v. New Jersey*, 379 U.S. 674, 683 (1965) ("We believe that the rule we adopt is the fairest, is easy to apply, and . . . will be most generally acceptable to all the States.").

534. See, e.g., *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 292-93 (1990) (Scalia, J., concurring) (finding the judiciary ill-equipped to administer rules regarding termination of life-sustaining treatment and abortion); *Mohasco Corp. v. Silver*, 447 U.S. 807, 833-34 (1980) (Blackmun, J., dissenting) (lamenting a rule that, in Blackmun's mind, adds complexity to the EEOC process); *Miranda v. Arizona*, 384 U.S. 436, 544-45 (1966) (White, J., dissenting) (fearing the new rule will jeopardize the crime solving abilities of investigators as it leaves many questions unanswered).

535. See, e.g., *Larsen*, *supra* note 180, at 1289 (providing that the Supreme Court's physician-assisted suicide decision, *Washington v. Glucksberg*, 521 U.S. 702, 705-06 (1997), "exemplifie[d] the 'empirical' use of comparative experience"); Jeremy Waldron, *Dirty Little Secrets*, 98 COLUM. L. REV. 510, 527 (1998) (urging advocates of legal change to use comparative law to identify *practical* alternatives to existing laws); MARKESINIS & FEDTKE, *supra* note 35, at 135 (noting that transnational dialogue is useful where "foreign law provides 'additional' evidence that a proposed solution has 'worked' in other systems").

536. See, e.g., *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977) (considering "whether the Act disrupts the proper balance between coordinate branches"); *United States v. Alves*, 688 F. Supp. 70, 72 (D. Mass. 1988) ("the impact [of legislation focused on criminal sentencing disparities] on the three branches . . . must be evaluated").

debate? In these situations, judges who oppose the rule often predict dire institutional effects, while judges who support it minimize institutional concerns. As in predictions of administrability, both sides speculate about the rule's likely impact.

Where an analogous rule has been adopted in another nation, American courts can find some helpful information. American courts can determine the practical effect of the rule on the other nation's comparable institutions or policies, and can thus glean insight into the possible institutional impact of a parallel decision in the United States. Of course, governmental institutions in other nations will never be exactly like the United States, and social or cultural expectations may influence the way a foreign rule has impacted the government, but these are factors for appropriate contextualization. The very process of examining such factors and debating their relevance should help American courts to clarify the potential domestic impact of the proposed new rule.

4. How horrible the parade? How slippery the slope?

When courts consider potential constitutional rules, one ubiquitous concern is the risk that the rule will usher in a parade of unacceptable results or start the courts down a path toward other, progressively more harmful extensions of the rule.⁵³⁷ Dissenters are fond of predicting such consequences from majority opinions with which they disagree.⁵³⁸ Majority opinions tend to respond with confident assurances that the supposed consequences will never materialize, or alternatively with reservation of judgment.⁵³⁹ Again,

537. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 785 (1997) (Souter, J., concurring) (regarding the constitutionality of physician-assisted suicide for terminally ill medical patients, the concurring opinion noted that "[t]he case for the slippery slope is fairly made out here, . . . because there is a plausible case that the right claimed would not be readily containable"); *McCleskey v. Kemp*, 481 U.S. 279, 314-15 (1987) (considering a study which showed evidence of racially biased capital-sentencing procedures, the Court noted that "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system").

538. See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 553 (1989) (White, J., dissenting) (contending that the Court "hit the bottom of the slippery slope"); *Bates v. St. B. of Ariz.*, 433 U.S. 350, 405 (1977) (Rehnquist, J., dissenting) (stating that "once the Court took the first step down 'the slippery slope' . . . the possibility of understandable and workable differentiations between protected speech and unprotected speech in the field of advertising largely evaporated").

539. See, e.g., *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 195 n.16 (1999) (dismissing "the dissent's suggestion that if the merely voter eligible are included among petition circulators, children and citizens of foreign lands will not be far behind. This familiar parade of dreadfuls calls to mind wise counsel: 'Judges and lawyers live on the slippery slope of analogies'" (quoting ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 169 (1990))); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 852 (1986)

both sides are speculating, and it is often difficult to determine which position has merit. We know that rules do sometimes have undesirable collateral consequences, but we also know that similar past claims of impending disaster have materialized far less often than predicted.⁵⁴⁰

Foreign constitutional precedent can give us some insight into the slipperiness of the slope or the horror of the parade.⁵⁴¹ Were the nations that adopted the rule forced to face an array of thorny collateral questions? Did they find the temptation of further extrapolation irresistible? Did collateral consequences of the rule overwhelm them? Did the predicted horrors materialize? From foreign experience we can gauge how likely it is that adoption of a proposed constitutional rule will have similar consequences in the United States.

V. IMPLEMENTING COMPARATIVE CONSTITUTIONAL ANALYSIS: THE IMPORTANCE OF ADVOCACY AND THE ROLE OF LEGAL EDUCATION

If American courts accept the theoretical utility of comparative constitutional analysis, the next questions concern implementation. Which foreign systems should be consulted? How should relevant foreign precedent be assembled and evaluated? How should its meaning and application be determined?

Underlying these questions is a concern, often raised by critics of comparative constitutional analysis, that without clear rules governing the comparative method, comparative constitutional reasoning will unravel into an arbitrary and sporadic process that is more useful for rhetorical effect or erudite window-dressing than for rigorous and consistent analysis.⁵⁴² Following Chief Justice Roberts, one might call this the “friend in the crowd” problem.⁵⁴³ Because of this concern, some scholars advocate complex metaprinciples governing the use of comparative constitutional law.⁵⁴⁴ Without such principles, these

(acknowledging the potential problems with importing “concepts of pendent or ancillary jurisdiction into the agency context,” the majority nevertheless “decline[d] to endorse an absolute prohibition on such jurisdiction out of fear of where some hypothetical ‘slippery slope’ may deposit us”).

540. See Frederick Schaver, *Slippery Slopes*, 99 HARV. L. REV. 361, 381 (1985) (noting that nearly every time one party makes a slippery slope argument, the opposition could do the same).

541. MARKESINIS & FEDTKE, *supra* note 35, at 127.

542. See, e.g., Ramsey, *supra* note 17, at 81 (arguing that unguided use of comparative precedent will reveal its use as a cover for a pre-determined agenda).

543. *Roberts Hearing*, *supra* note 18, at 201 (“[L]ooking at foreign law for support is like looking out over a crowd and picking out your friends.”).

544. See Ramsey, *supra* note 17, at 82 (cautioning that comparative constitutionalism may be unworkable).

scholars fear that comparative constitutionalism will ultimately do more harm than good.

These arguments are overdrawn. By layering a blanket of rules regarding legal method, they make the process of using comparative precedent unnecessarily cumbersome. More importantly, they ignore the influential role of counsel and the issue-sharpening function of adversarial advocacy, which together ought to serve as an adequate safeguard against misplaced reliance on foreign precedent. To borrow Holmes' famous dichotomy, experience, not logic,⁵⁴⁵ ought to determine what foreign precedent is used and how it is given effect. American advocates, after all, are not as clueless about comparative advocacy as some of the comparative constitutional theorists assume. Comparative advocacy is a well-established component of appellate advocacy, especially in federal circuit and state appellate courts.⁵⁴⁶ In many states, it is routine for courts to receive briefing on the treatment of a novel legal question by other jurisdictions.⁵⁴⁷ Counsel are adept both at identifying relevant law from other states and at arguing adversarially about its significance.

Although most American advocates do not have much experience with inter-nation comparative analysis, they can secure guidance about its contours both from the work of comparative scholars and from the comparative methods of foreign courts. The work of the South African constitutional court is particularly instructive. When South Africa adopted a new constitution following the collapse of apartheid, it explicitly drew on the constitutional experience of other nations.⁵⁴⁸ In recognition, the South African Constitution explicitly

545. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881) ("The life of the law has not been logic: it has been experience.").

546. See Jackson, *Constitutional Dialogue*, *supra* note 355, at 39 (noting that federal circuit and state courts have been learning from transnational and international decisions).

547. See, e.g., *People v. Djordjevic*, 584 N.W.2d 610, 612 (Mich. Ct. App. 1998) (considering decisions of Pennsylvania and California courts in a case of first impression under Michigan law); *Cruzan v. Harmon*, 760 S.W.2d 408, 412-16 (Mo. 1988) (en banc) (considering decisions of "sister states" on similar issues when resolving a case of first impression under Missouri law), *aff'd sub nom.*, *Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261 (1990); *Dubick v. Dubick*, 653 S.W.2d 652, 653 (Ky. Ct. App. 1983) (examining the views of other states when considering a proposed rule).

548. See, e.g., Davis, *supra* note 306, at 191 ("[T]he South African constitutional text was modeled largely on the Canadian Charter of Rights and Freedom, with liberal borrowings from Germany and the United States of America."); Jeremy Sarkin, *The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions*, 1 U. PA. J. CONST. L. 176, 177 (1998) (noting that borrowing is a trend among emerging democracies); MARKESINIS & FEDTKE, *supra* note 35, at 27 (stating that South Africa's constitutional drafters "not only used comparative law *themselves* when drafting the two Constitutions of 1993 and

authorizes comparative analysis for interpreting South African constitutional guarantees.⁵⁴⁹ Taking this directive seriously, the South African constitutional court has developed a reliable method for identifying and evaluating relevant foreign precedent.⁵⁵⁰ This method, supplemented by comparative scholarship, can supply American advocates with a basic model for the correct approach to comparative constitutional advocacy.

From these sources emerge a few simple, basic guidelines for the selection of appropriate comparative material. Advocates should confine their research to foreign systems that function as constitutional democracies. Within this group they should look for systems with: (1) roughly similar constitutional structures, (2) comparable legal norms, (3) professionally trained and reasonably independent tribunals, (4) transparent and impartial adjudicative processes, and (5) some degree of final decisional authority.⁵⁵¹ For many foreign systems reciprocity—the willingness of the foreign tribunal to consider U.S. constitutional precedent—can also serve as a reliable index of potential relevancy.⁵⁵²

Beyond this baseline, the rest of the process for determining which particular foreign decisions are most relevant and how they ought to be used should be left to the adversarial process. This is, after all, the process for domestic precedent. Despite the importance of precedent in judicial decisionmaking, there are remarkably few strict rules about what precedent advocates should cite or how precedents should be used. Instead, we rely on the adversarial process to isolate and identify the most pertinent material. An advocate who omits an important case, statute, or ruling does so at her peril, because her opponent is likely to take advantage of the omission. An advocate who places too much weight on an isolated precedent risks having her argument deflated when her opponent exposes the weakness of her position. Courts thus learn from the arguments of the parties

1996, but also felt that the judiciary . . . should be alerted to the rich bounty of foreign courts venturing into the uncharted waters of South African human rights protection”) (emphasis in original).

549. S. AFR. CONST. ch. 2, § 39(1)(b), (c) (providing that in interpreting the Bill of Rights, a court “must consider international law” and “may consider foreign law”).

550. See, e.g., Arthur S. Leonard, *Chronicling a Movement: 20 Years of Lesbian/Gay Law Notes*, 17 N.Y. L. SCH. J. HUM. RTS. 415, 544 (2000) (discussing the South African Constitutional Court’s analysis of foreign precedent in decisions regarding sexual orientation and marital status).

551. See Young, *supra* note 182, at 161 (encouraging courts to look to foreign jurisdictions most similar to the United States).

552. See also Ramsey, *supra* note 17, at 77 (noting that differing constitutional guarantees in comparative analysis opens U.S. courts to charges of selectively using foreign precedent).

what precedent to value and how much weight it can bear. There is no reason to treat comparative precedent differently. Good advocacy, not lots of rules, will enable courts to determine what comparative constitutional precedent counts, how much it counts, and for what it counts.

This reliance on adversarial advocacy presumes competent advocates, a presumption that is linked directly to the need for high quality legal education. Unless American lawyers are trained by American law schools to find and use foreign law, including foreign constitutional law, American lawyers will never be competent comparative constitutional advocates. And unless American lawyers develop competency as comparative advocates, comparative constitutionalism will never advance beyond its current occasional and largely cosmetic role. Without training and competence, advocates are unlikely to incorporate comparative constitutionalism at the early stages of litigation where it can make the greatest difference. Nor will the courts trust counsel to frame accurately the relevant comparative issues or debate their significance. Without changes in legal education, comparative analysis will never play more than a minor non-structural role in U.S. constitutional adjudication.

Existing patterns of comparative constitutional advocacy illustrate the competency-based barriers to comparative constitutionalism. In most cases—including many where relevant material could be introduced—comparative constitutional analysis never appears at all. In the exceptional cases where it does figure, it usually occurs late in the litigation, at higher appellate levels of review. Sometimes comparative material gets introduced only when the case arrives in the U.S. Supreme Court. The most likely reason for this late introduction is that the attorneys who first handled the case in the trial court simply did not know, think about, or look for relevant comparative constitutional law. Only in the late stages of appellate litigation, when the stakes were raised and the parties or their allied amici curiae called in sophisticated appellate counsel, did foreign constitutional material enter into the briefing process. By that point the foreign precedent necessarily came as an add-on. The pleadings were fixed, the issues were framed, the facts were developed, the record was set, and the lower court decisions—probably the most influential sources for ultimate resolution—were taken, all without regard to any pertinent foreign constitutional law. To be used at all, foreign precedent had to fit in around this existing framework, as either a complement or supplement to the advocacy that had already set the course and momentum for the decision. In circumstances like

these, it should be no surprise that comparative constitutional law seldom plays an influential role in the courts' thinking. In most cases it simply arrives too late in the process to have much impact.

If there is to be a trend toward greater and more significant use of comparative constitutional precedent, it must begin in the earlier stages of litigation when there is greater potential for impact. But this will not happen unless the advocates who file constitutional lawsuits, frame the pleadings, develop the facts, and do the spadework on the issues are able to incorporate comparative law into their thinking.⁵⁵³ This, in turn, will happen only if there are significant reforms in the way that legal research and advocacy are taught in American law schools. What we need is a system that exposes *most* law students, rather than just a relative few, to research and advocacy training that utilizes foreign and international legal materials, including materials concerning foreign constitutional law. We need to do something in legal education to combat the American legal profession's "comparative illiteracy."

What can be done? First, there needs to be significant change in the way that law libraries and legal databases make comparative resources available. Without raw materials, the comparative constitutional enterprise will stall at the starting gates. Law libraries that do not presently acquire such materials need to begin doing so. Those that presently segregate them need to integrate them into their collections. Legal research databases that do not include such materials need to make them available and more readily accessible. Where English versions are available they should be provided; where they are not, there should be efforts to increase the amount of translated material. The aim should be to increase substantially the amount of comparative constitutional precedent for lawyers and law students to find.

Second, there needs to be systematic instruction in research methods for comparative materials. This instruction should be given not only to law students, but to practicing lawyers and even to law faculty. Too few of us know how to find comparative materials, and the methods we use for domestic materials are unlikely to turn them up. If we do not know how to find these materials, we will not go looking for them. Thus, it is important to create some systematic and general instruction in legal research methods for comparative and

553. See Slaughter, *International Dimension*, *supra* note 157, at 417 ("Law schools should be sending the message to all law students that a working knowledge of international law should be a basic part of any lawyer's education in the 21st century.").

international sources. And there should be ample opportunities for putting comparative research skills into practice. In time, comparative work should be incorporated into standard law school research and writing courses, so that all students get some exposure to the process of finding comparative law and precedent.

Of course, just knowing how to find comparative sources does not mean they will be effectively used. Accordingly, there should be opportunities in law school for students to exercise comparative research skills by actually engaging in comparative advocacy. The Philip C. Jessup International Law Moot Court Competition provides one model. Law schools could provide similar moot court competitions that would encourage student advocacy in comparative international law. Unfortunately, however, such a specialized competition is likely to reach only a few students. To reach a broader spectrum, comparative advocacy opportunities could be worked into required legal research and writing courses, school-wide moot court programs, and moot court competitions with a constitutional or human rights focus. In these contexts it would be possible to select problems where comparative materials are available, make sure that students will be able to gain access to them, and make it clear to students that effective use of comparative materials will be an important component of their grade or score.

Beyond efforts directed specifically at comparative advocacy, there should be more attention to comparative materials and their use in non-comparative doctrinal law school courses, particularly those concerning constitutional law and/or human rights. For example, courses that could easily incorporate substantial comparative constitutional components include those on constitutional law, political and civil rights, civil procedure, criminal law and procedure, jurisdiction, immigration, labor and employment law, and property, as well as more explicitly international or comparative courses. In these courses, instructors can encourage students to compare alternative solutions to common legal problems, explore their implications for basic constitutional values, and construct comparative arguments in class discussion and on examination papers. These efforts would reinforce basic lessons about comparative reasoning and research to which they had been exposed in their legal research and writing courses.

With such comprehensive attention to comparative research, analysis, and advocacy, it might be possible for law schools to reverse the longstanding trend toward comparative illiteracy in the American bar. Doing so would increase the prospect for integrating

comparative constitutional analysis as a regular part of American constitutional advocacy and law.

CONCLUSION

This Article has probed the arguments for and against comparative constitutional analysis. Despite the reactions against comparative analysis in conservative circles, the Senate, and the confirmation hearings of Chief Justices Roberts and Alito, the arguments for use of comparative constitutional precedent are stronger than the arguments against it. Use of such precedent is consistent with the American legal method, and it provides significant benefits that would improve the quality of American constitutional decisionmaking. Arguments against it based on theories of social contract, claims of improper delegation and appeals to original intent ultimately fail, while arguments based on American exceptionalism and pragmatic concerns affect the weight to be given to comparative precedent, not its use.

The key to comparative constitutional advocacy's future, however, lies with legal education. Unless comparative research techniques and comparative analysis achieve greater prominence in American legal education, advocates will lack the skills that are needed to make sophisticated and effective comparative constitutional arguments, and the role of comparative precedent will remain largely cosmetic. With significant change in legal education, the forces of globalization and constitutional convergence, as well as the growing sophistication of foreign constitutional law, promise both greater and more effective use of comparative constitutional analysis in the future. This steady erosion of American constitutional isolation is probably inevitable. It should be welcomed and encouraged, not resisted.