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Reevaluating the Debate Surrounding the Supreme Court's Use of Foreign Precendent

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Cover Page Footnote

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NOTES

REEVALUATING THE DEBATE SURROUNDING THE SUPREME COURT'S USE OF FOREIGN PRECEDENT

*Osmar J. Benvenuto**

INTRODUCTION

Revolutionary. Radical. Antidemocratic. Alarming. Xenophobic. Who would have thought that citing certain legal materials could start such rancorous and vituperative debate?[1] The U.S. Supreme Court's use of foreign precedent has done just that. The descriptions spawned by the controversy are acerbic: The Court is described as giving consideration to an amicus brief on a death penalty case from "former Soviet dictator" Mikhail Gorbachev;[2] Justice Anthony Kennedy as communist China's comrade;[3] and Justice Ruth Bader Ginsburg as "offer[ing] an embarrassingly feeble defense of" citing foreign precedent.[4] One editorial sounded the alarms, claiming that the Court's citation to foreign precedent would result in the total usurpation of states' power and rights and urged Congress to "limit the jurisdiction of the Supreme Court."[5] The New Yorker featured an article remarking that Justice Kennedy has been called

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1. *See* Ann Althouse, Op-Ed., *Innocence Abroad*, N.Y. Times, Sept. 19, 2005, at A25, *available at* http://www.nytimes.com/2005/09/19/opinion/19althouse.html?ex=1284782400&en=062d2cd5ce70e74b&ei=5090&partner=rssuserland&emc=rss (characterizing the debate over foreign precedent as "alarming"). Even within legal circles, the debate has become shrill. *See, e.g.*, Sanford Levinson, *Looking Abroad when Interpreting the U.S. Constitution: Some Reflections*, 39 Tex. Int'l L.J. 353, 358 (2004) (stating that the author is "no fan of Justice Scalia" because Justice Scalia's "militant provincialism [is] embarrassing").

2. William P. Hoar, *Courting Foreign Opinion. (Between the Lines)*, New Am., Dec. 13, 2004, at 25, *available at* 2004 WLNR 16803483.

3. *See id.* (noting that Justice Anthony Kennedy "confers with 'judges' from Communist China").

4. Gregory J. Sullivan, Commentary, *Nothing More than Judicial Pretext*, 180 N.J. L.J. 807 (2005).

5. Editorial, *Other Nations' Laws*, Wash. Times, Mar. 13, 2005, at B2.

"the most dangerous man in America" because of his espousal of foreign law.[6] According to Judge Robert Bork, the Court's citation of foreign precedent is "risible, absurd, and flabbergasting."[7] It is no surprise that Professor Tim Wu has declared that "the flap over foreign citation will get stupider before it gets smarter."[8]

The controversy, however, has not just played out in the news media. Over the last decade, the literature on comparative law has increased exponentially.[9] Most of the articles discussing foreign precedent address a threshold question: whether foreign precedent should or should not be used by the Supreme Court in constitutional cases. These threshold articles have sought to justify the practice of using foreign precedent by detailing the benefits that can be wrought from looking to the experience of foreign courts.[10] Similarly, there are numerous articles describing the plethora of problems that purportedly stem from using foreign precedent.[11] These articles, though divergent in their positions, have much in common; one of the goals of this Note is to expose these commonalities.

The first commonality of these seemingly contradictory articles is their assumption that the Court's use of foreign precedent is substantive or robust.[12] Although there are a few articles that have intimated that the Court's use of foreign precedent is not substantive,[13] the literature is lacking a systematic and thorough analysis of the actual work that foreign precedent does in Supreme Court opinions.

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6. Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, New Yorker, Sept. 12, 2005, at 42, *available at* http://www.newyorker.com/fact/content/articles/050912fa_fact (attributing the quote to James Dobson).

7. John K. Setear, *A Forest with No Trees: The Supreme Court and International Law in the 2003 Term*, 91 Va. L. Rev. 579, 582 (2005) (internal quotation omitted).

8. Tim Wu, *Foreign Exchange: Should the Supreme Court Care What Other Countries Think?*, Slate, Apr. 9, 2004, http://slate.msn.com/id/2098559.

9. Much of the dialogue about the Court's use of foreign precedent has been subsumed within the broader discussion of comparative law.

10. *See infra* Part II.A.2.

11. *See infra* Part II.B.2.

12. The terms "substantive" and "robust" will be used interchangeably throughout this Note.

13. *See* Taavi Annus, *Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments*, 14 Duke J. Comp. & Int'l L. 301 (2004); Matthew S. Raalf, Note, *A Sheep in Wolf's Clothing: Why the Debate Surrounding Comparative Constitutional Law Is Spectacularly Ordinary*, 73 Fordham L. Rev. 1239, 1245 (2004). Matthew Raalf, a student commentator, describes the Court's use of "language which disclaims or otherwise attempts to reduce the impact of comparative materials." *Id.* at 1288. He terms this language a "rhetorical asterisk." *Id.* He goes on to argue that dropping this "rhetorical asterisk" would make the Court's opinions "clearer and richer" and the "weight of [foreign] persuasive authority would be more frankly recognized." *Id.* This Note, while recognizing that such language limits the amount of work that foreign precedent does, argues that even if such limiting language were dropped, the Court's use of foreign precedent would still be rhetorical. *See infra* Part III.A. Professor Taavi Annus has argued that "citing [foreign precedent] in the opinion does not make the argument itself stronger in terms of precedential authority." Annus, *supra*, at 348.

The second commonality, which follows from the first, is that the justifications and objections that these articles set forth implicitly require that the Court use foreign precedent substantively or robustly. Almost all of these justifications or objections lose their persuasive force, however, if the Court's use of foreign precedent is merely rhetorical (that is to say, not substantive or robust). Indeed, an examination of the literature reveals an astonishing dissonance between the scholarly justifications of, and perspectives on, foreign precedent and the reality of the Court's usage. The debate has taken on a life of its own. It seems that scholars, in their enthusiastic support for, or condemnation of, this use of foreign precedent, have failed to notice that the Court's usage is more rhetorical than substantive and is still in its infancy.[14]

This Note argues that the Supreme Court's use of foreign precedent is largely inconsequential to the outcome of its decisions and that foreign precedent is being used rhetorically, not substantively. The Note then makes two suggestions. First, the debate over the propriety of citing foreign precedent should be reevaluated in light of the Court's inconsequential and rhetorical use of it. Second, foreign precedent might be more useful and less controversial if used for informational purposes only, rather than as support for the Court's holding.

Accordingly, this Note will add to the growing body of literature on foreign precedent in several ways. After arguing that foreign precedent does little heavy lifting in the Court's opinions, the Note will present a perspective on foreign precedent that will seek to infuse the debate with some reality. This Note will contend that the scholarly debate has lost touch with the reality of the Court's utilization of foreign precedent[15] and that, as a result, the debate should be reevaluated. The Note then develops and argues for the adoption of Judge Richard Posner's view of using foreign precedent for informational purposes only. The adoption of informational citations is an effective and novel approach to reevaluating the debate on foreign precedent. Informational citations provide a middle ground, thus allowing the Court to learn from foreign experience, while limiting the substantive, undemocratic influence of foreign law.

Part I will describe the controversy that has developed. It presents the controversy as it has played out in the political arena and the blogosphere and sets forth the history of the Supreme Court's usage of foreign precedent. Because the phrase "foreign precedent" can denote a variety of legal materials, this part also defines exactly the types of foreign precedent with which the controversy is concerned. Part I then goes on to outline five of the most controversial cases in which the Court has used foreign

14. This is in no way intended as a criticism of the scholars that have put forth influential and innovative justifications for and objections to the use of foreign precedent.

15. As is later explained, one of the consequences of this is that the justifications and objections raised by scholars on both sides are incommensurate with their purported justifications and objections. *See infra* Part III.A.

precedent: *Atkins v. Virginia*,[16] *Knight v. Florida*,[17] *Thompson v. Oklahoma*,[18] *Printz v. United States*,[19] and *Lawrence v. Texas*.[20]

Part II of the Note lays out the substantive debate over the Court's use of foreign precedent. It divides the field into two camps: transnationalists, who argue that the Court's use of foreign precedent is legitimate and beneficial, and nationalists, who condemn its use. This part describes each camp's arguments. In addition, it summarizes the Justices' positions as set forth in their opinions, as well as their extrajudicial writings and speeches on foreign precedent. At the end of Part II, this Note discusses Judge Posner's idea of citing to foreign precedent for informational purposes.

Part III makes the case that the Court's use of foreign precedent is more rhetorical than substantive. To reach this conclusion, Part III.A engages in an analysis of the five cases outlined in Part I and draws some general conclusions about how much work foreign precedent actually does in these decisions. The Justices' extrajudicial writings and speeches on the subject of foreign precedent are also analyzed and an argument is made that the analysis reinforces the conclusion that the Court's use of foreign precedent is more rhetorical than substantive. This part goes on to conclude that the Court's use of foreign precedent and the debate surrounding its use should be reevaluated in light of the Court's rhetorical usage.

Part III.B then suggests that foreign precedent is more useful and less controversial if utilized for informational purposes only, rather than as support for the Court's holding. It argues that informational citations retain most of the benefits that transnationalists propose can be gained through the use of foreign precedent, while avoiding most of the criticisms leveled at the practice. Finally, by way of illustration, this part provides several examples of cases where the Supreme Court used foreign precedent for informational purposes. These cases make clear that informational citations can provide the best of both worlds: valuable information and democratic legitimacy.

I. CHARTING THE USE OF FOREIGN PRECEDENT IN THE UNITED STATES

A. *Foreign Precedent in Politics and Blogs*

The Supreme Court's use of foreign precedent as an interpretive tool in constitutional cases has effected a contentious scholarly debate within legal circles which has spilled over into politics, news media,[21] and web logs ("blogs"). In 2005, Senator John Cornyn and Representative Tom Feeney

16. 536 U.S. 304 (2002).
17. 528 U.S. 990 (1999).
18. 487 U.S. 815 (1988).
19. 521 U.S. 898 (1997).
20. 539 U.S. 558 (2003).
21. For a discussion of the news media's treatment of the Court's use of foreign precedent, see *supra* notes 1-8 and accompanying text.

introduced resolutions in the United States Senate and House of Representatives declaring that "judicial determinations regarding the meaning of the Constitution of the United States should not be based on . . . [foreign precedent] unless such . . . [foreign precedent] inform[s] an understanding of the original meaning of the Constitution."[22] The American Bar Association[23] and the American Civil Liberties Union[24] promptly wrote letters expressing their disagreement. More recently, foreign precedent has become an inquiry of choice among conservative senators during Supreme Court nomination hearings. Chief Justice John G. Roberts, at his confirmation hearings, was asked whether he understood a judge's citation of foreign precedent to constitute an impeachable offense.[25] Senator Coburn echoed this theme while questioning Justice Samuel A. Alito, claiming that citing foreign precedent "is a violation of the Constitution" and "violates . . . good behavior."[26]

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22. S. Res. 92, 109th Cong. (2005); H.R. Res. 97, 109th Cong. (2005). "In discussing the resolution, [Rep.] Feeney suggested that invoking foreign precedents . . . could be an impeachable offense." Tony Mauro, *Is Rehnquist's Olive Branch Too Late?*, 176 N.J. L.J. 803 (2004). While certainly beyond the scope of this Note, it is important to point out that there are possible separation of powers issues presented by Congress's passage of a resolution defining the range of legal authority that the Court may use.

23. *See* Letter from the American Bar Association to Representative Steven Chabot (Apr. 6, 2004) (on file with the Fordham Law Review).

24. *See* Letter from the American Civil Liberties Union to the House of Representatives (Sept. 27, 2005), *available at* http://www.aclu.org/CriminalJustice/CriminalJustice.cfm?ID=19187&c=15.

25. *See John G. Roberts, Jr., of Maryland, to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 293 (2005) (statement of Sen. Tom Coburn), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:23539.wais [hereinafter *Judge Roberts's Nomination Hearings*]. Senator Coburn asked Judge Roberts the following:

> My question relates to the Constitution and what is said in Article 3 that judges, both of the Supreme and inferior courts, shall hold their offices during good behavior. My question to you: Is relying on foreign precedent and selecting and choosing a foreign precedent to create a bias outside of the laws of this country, is that good behavior?

Id. In the year-end report on the federal judiciary, the late Chief Justice William H. Rehnquist wrote that "a judge's judicial acts may not serve as a basis for impeachment." *See* Linda Greenhouse, *Rehnquist Resumes His Call for Judicial Independence*, N.Y. Times, Jan. 1, 2005, at A10. For a discussion of Congressional threats of impeachment of judges and Justices for citing foreign precedent, see Marc O. DeGirolami, *Congressional Threats of Removal Against Federal Judges*, 10 Tex. J. C.L. & C.R. 111 (2005).

26. *See Samuel A. Alito, Jr., to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 471-72 (2006) (statement of Sen. Coburn); *see also* Posting of Fred Barbash to Campaign for the Supreme Court, http://blogs.washingtonpost.com/campaignforthecourt/2006/01/sen_coburn_1.html (Jan. 11, 2005, 10:54 EST).

The debate over foreign precedent has also invaded the blogosphere.[27] These discussions range from the argot-filled postings of law professors to the observations, often insightful, of laypeople. Most notably, Judge Posner has posted his views on foreign precedent on Professor Brian Leiter's blog.[28] Other comments and discussions on foreign precedent can be found at: Professor Eugene Volokh's blog,[29] Professor Ann Althouse's blog,[30] the "Foreign Precedent in American Law" post,[31] "Ich Bin Ja Vielleicht Nicht 'Amerikanisch' Genug,"[32] Talk Left blog,[33] and American Constitutional Society blog.[34] As reflected in the vigorous debate occurring on the web, in the media, and in the political arena, foreign precedent has produced passionate discourse in the legal community, leading to an outpouring of numerous (and voluminous) articles on the subject.

B. *Defining (What Is Not) Foreign Precedent*

A cursory glance at the last decade of commentary on the Supreme Court's usage of foreign precedent would lead to the conclusion that this is a recent and novel practice. Has the Supreme Court cited foreign precedent or, at least, expressed an interest in comparative constitutional law in the past? The answer is yes and no. Throughout its history, the Court has made extensive use of international materials and international law, also called "the law of nations."[35] Yet, the Court's practice of citing to what this

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27. *See* Bruce Moyer, *Who Let the Blawgs Out?*, 51 Fed. Law., Mar.-Apr. 2004, at 10, 10 (describing blogs and blawgs, law related blogs, as "an Internet phenomenon that's sweeping across" the country). *See generally* Lincoln Caplan, *Blawgs*, Legal Aff., May/June 2005, at 1, *available at* http://legalaffairs.org/issues/May-June-2005/editorial_mayjun05.msp (noting that the "Supreme Court recently made history by citing a blog"). *See also* Bruce Moyer, *Who Let the Blawgs Out?*, 51 Fed. Law., Mar.-Apr. 2004, at 10, 10 (describing blogs and blawgs, law related blogs, as "an Internet phenomenon that's sweeping across" the country).

28. For further discussion on Judge Posner's view on the use of foreign precedent, see *infra* Part II.C.

29. Posting of Professor Orin Kerr to The Volokh Conspiracy, http://volokh.com/posts/1117233315.shtml (May 27, 2005, 18:35 EST).

30. Posting of Professor Ann Althouse to Althouse, Looking at Foreign Law for Support Is like Looking out over a Crowd and Picking out your Friends, http://althouse.blogspot.com/2005/09/looking-at-foreign-law-for-support-is.html (Sept. 14, 2005, 9:17 EST).

31. Posting of Pejman Yousefzadeh to Pejmanesque, Foreign Precedent in American Law, http://www.pejmanesque.com/archives/003441.html (July 8, 2003, 13:32 EST).

32. Brett Marston: Law and Politics Worldwide, Etc. (That Description Should Stick for a While), http://www.brettmarston.com/blog/archive/2004_04_25_index.html (Apr. 28, 2004, 22:39 EST). The title of the posting, "Ignore this Post. Ich Bin Ja Vielleicht Nicht 'Amerikanisch' Genug," when translated from German to English, means, "I am Perhaps Not 'American' Enough."

33. TalkLeft, House Members Object to Supreme Court Use of Foreign Precedent, http://talkleft.com/new_archives/005634.html (Mar. 12, 2004).

34. Posting by Joel to ACSBlog, http://www.acsblog.org/assault-on-the-judiciary-1557-more-foreign-citeseeing-apparently-not-.html (July 7, 2005, 14:54 EST).

35. Philosopher Jeremy Bentham is credited as the first to use the phrase "international law" to describe the discipline of the law of nations. *See* Mark W. Janis, An Introduction to International Law 1 (4th ed. 2003).

Note refers to as "foreign precedent narrowly construed" only emerged in the 1940s. The Court's current use of foreign precedent, however, stands in stark contrast to the Court's utilization of foreign precedent at the practice's inception in the 1940s.

Before discussing the controversy surrounding the Court's practice of citing foreign precedent, the object of the controversy must be defined. The term foreign precedent, standing alone and as it has developed in the literature, is ambiguous. It can refer to a variety of decisions, from the judicial decisions of foreign nations to international law, common law, and foreign traditions. Most of the literature discussing the controversy does not distinguish among these very different types of law. However, the distinction is crucial because not all of these types of law are equally controversial when used by the Court. This Note will distinguish between two types of foreign precedent, one broad and the other narrow. What follows is an explanation of the difference between the broad and narrow types of foreign precedent.

1. Foreign Precedent Versus the Law of Nations

The term foreign precedent can denote a variety of legal judgments: decisions of foreign courts interpreting their domestic laws, decisions of foreign courts interpreting issues of international law, decisions of supranational tribunals interpreting domestic issues of a particular country, and decisions of a supranational tribunal interpreting a supranational constitution or bill of rights.[36] International law is composed of treaties, other international agreements or regimes, and custom, as well as the legal opinions of different nations interpreting treaties and international agreements or regimes.[37] Broadly speaking then, foreign precedent can include these treaties and the decisions of signatory nations that interpret them. However, if the term is utilized more narrowly, foreign precedent would include international law only when used for a non-international purpose. For example, the Court employs international law for a non-international purpose where the issue facing the Court is "purely" domestic in nature, but the Court draws on an international source to resolve that domestic issue. This is the narrow type of foreign precedent.

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36. For an in-depth discussion of supranational tribunals and adjudication, see Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L.J. 273 (1997).

37. *See, e.g.*, Janis, *supra* note 35, at 5 (noting that international law or "the laws of nations," is the product of treaties, cases interpreting such treaties, agreements of international organizations and regimes, custom, and fundamental general principles). *But see* Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 Harv. L. Rev. 129, 132 (2005) ("[d]eveloping an argument that the citation of foreign law can rest on the idea of the law of nations"); *cf.* Harold Hongju Koh, *International Law as Part of Our Law*, 98 Am. J. Int'l L. 43, 45 (2004) (arguing that "U.S. courts drew no sharp line between international and foreign law . . . because of the extensive overlap of these two bodies of law"). Dean Koh goes on to argue that it would be a "stunning reversal of history" for the Court to ignore foreign law. *Id.*

Conversely, foreign precedent broadly construed is where international law is relevant to the Court's determination or provides the rule of decision for the case. For example, in *Eastern Airlines, Inc. v. Floyd*,[38] a unanimous Court used the judicial decisions of other countries in determining whether Article 17 of the Warsaw Convention allowed damages for mental injuries unaccompanied by physical injury or physical manifestations of injury.[39]

This distinction between broad and narrow uses of foreign precedent is important because the controversy over foreign precedent is generally confined to the latter. As illustrated by the *Eastern Airlines* decision, there is universal agreement that foreign precedent broadly construed is relevant to the Court's adjudication of international issues or issues where international law provides the rule of decision.[40]

Accordingly, this Note uses the narrow meaning of foreign precedent—referring to the legal judgments of other nations not interpreting or dealing with international issues. Thus, for example, foreign precedent narrowly construed is employed by the Court when it cites a South African decision interpreting the South African Constitution[41] and a decision of the European Court of Human Rights striking down a British law as violating the European Convention on Human Rights[42] to decide an American domestic issue. Conversely, foreign precedent broadly construed is used where the Court's uses of a decision of a signatory nation, construing a treaty to which America is also a signatory, to aid in the Court's interpretation of that treaty.[43]

2. Foreign Precedent Versus English Common Law: Justice Scalia's Cure for Insomnia

Foreign precedent narrowly construed also does not include old English cases. The Supreme Court has often used the common law to "identify Anglo-American traditions to divine the meaning of vague constitutional provisions."[44] This practice is long-standing, widely accepted, and

38. 499 U.S. 530 (1991).

39. *Id. passim*.

40. *See, e.g.*, The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) (stating that "the Court is bound by the law of nations which is a part of the law of the land"); The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 123 (1812) (asserting that "justice is to be administered with a due regard to the law of nations" and holding that the international rule of absolute foreign sovereign immunity is part of American law); Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (noting that "an act of congress ought never to be contrued to violate the law of nations, if any other possible construction remains").

41. *See, e.g.*, O'Malley v. Woodrough, 307 U.S. 277, 281 n.8 (1939).

42. *See, e.g.*, Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. B) at 1 (1981).

43. *See, e.g., E. Airlines*, 499 U.S. 530.

44. *See* Samuel C. Kaplan, *"Grab Bag of Principles" or Principled Grab Bag?: The Constitutionalization of Common Law*, 49 S.C. L. Rev. 463, 470 (1998) (describing the Court's use of the common law in constitutional adjudication and examining the problems created thereby). Examples of vague phrases in the Constitution include: "public use," U.S. Const. amend. V, "due process," U.S. Const. amend. XIV, and "cruel and unusual

generally uncontroversial.[45] Thus, the common law is excluded in this Note's discussion on the debate over the Court's practice of citing foreign precedent.

Where the distinction becomes somewhat nebulous is when the Court cites to a slightly wider community or more recent Anglo-American traditions.[46] While this phenomenon is beyond the scope of this Note, the following example may help elucidate the distinction this Note makes between foreign precedent narrowly construed and English common law. Whether a right is fundamental (thus receiving strict scrutiny analysis) usually depends on whether that right is "long recognized"[47] in the "Anglo-American common law tradition" such that the right is "deeply rooted in this Nation's history and tradition."[48] Recently, however, some decisions have either slightly widened the relevant community or restricted the relevant time period.

Justice Kennedy did both in *Lawrence v. Texas*[49] by citing many foreign precedents in determining the traditions of our "Western civilization" and noted that the Court considered the "laws and traditions in the past half century . . . of most relevance."[50] In citing the most recent traditions of "our Western civilization," Justice Kennedy widened the relevant community from "Anglo-American common law traditions," which would exclude, for example, most of the members of the Council of Europe, and reduced the relevant time period by excluding most of the Anglo-American common law tradition, the roots of which date back centuries.[51] Thus, while foreign precedent narrowly construed does not include the uncontroversial old English common law cases, it does include precedents that reference a wider community or more recent Anglo-American traditions.

Nonetheless, foreign precedent narrowly construed does not include references to the practices of "English-speaking peoples."[52] The traditions and precedents invoked by the phrase "English-speaking peoples" include and are generally confined to the uncontroversial common law tradition.

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punishment[]," U.S. Const. amend. VIII. For further discussion on the use of common law in Constitutional adjudication and an argument that "[p]roperly understood . . . the common law provides the best model for both understanding and justifying how we interpret the Constitution," see David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877, 888 (1996).

45. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (citing Blackstone and English common law).

46. Lawrence v. Texas, 539 U.S. 558 (2003).

47. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

48. Washington v. Glucksberg, 521 U.S. 702, 711, 721 (1997) (citation omitted).

49. 539 U.S. 558. For further discussion on *Lawrence*, see *infra* Part I.E.1.e.

50. *Lawrence*, 539 U.S. at 571-72. Obviously the community of "our Western civilization" includes the English common law tradition. *Id.* at 573.

51. *See generally* Daniel R. Coquillette, The Anglo-American Legal Heritage: Introductory Materials (2d ed. 2004).

52. Wolf v. Colorado, 338 U.S. 25, 28 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

Indeed, Justice Antonin Scalia, a vigorous and vociferous opponent of citing foreign precedent narrowly construed, states, "I sleep very well at night, because . . . I use foreign law more than anybody on the Court. But it's all old English law."[53]

C. *History of Foreign Precedent in the United States Supreme Court*

Now that the object of the controversy has been defined and limited to foreign precedent narrowly construed, the following section will discuss the Supreme Court's history of citing such foreign precedent.

There are "few illustrations of the use of comparative law"[54] and foreign precedent narrowly construed in Supreme Court opinions from the founding through the late 1930s.[55] Indeed, the historical research of many scholars has shown that the Court "seldom cite[s] foreign law" and "until recent[ly] . . . there has been 'scant legal literature on the use of foreign and comparative law in U.S. courts because courts rarely cite foreign law.'"[56] While the founders made extensive use of comparative constitutional law in drafting and debating the Constitution,[57] the Court rarely mentioned foreign precedent narrowly construed.[58] One of those rare instances occurred several decades after the founding when Chief Justice John Marshall made

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53. Justice Antonin Scalia & Justice Stephen Breyer, A Conversation on the Relevance of Foreign Law for American Constitutional Adjudication, U.S. Association of Constitutional Law Discussion, (Jan. 13, 2005), *available at* http://www.freerepublic.com/focus/f-news/1352357/posts [hereinafter Scalia & Breyer Debate].

54. Alain A. Levasseur, *United States of America (II): The Use of Comparative Law by Courts*, *in* The Use of Comparative Law by Courts 315, 333 (Ulrich Drobnig & Sjef van Erp eds., 1997).

55. *Cf.* Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 Harv. L. Rev. 109, 111 (2005) (arguing that recent cases citing to foreign precedent "can . . . be seen as returning to [the] prior practice" that began in the 1940s).

56. Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 Yale J. Int'l L. 409, 420 (2003) (quoting David S. Clark, *The Use of Comparative Law by American Courts*, 42 Am. J. Comp. L. 23 (1994)).

57. *See, e.g.*, Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* Debate on the Constitution 195-96 (Bernard Bailyn ed., Library of America ed. 1993) (discussing the "Helvetic System," United Netherlands, Lycian Confederacy, British Parliament, Achaean League, and German Empire in debating whether to give Congress "a negative on the laws of the States"). Although beyond the scope of this Note, one scholar's argument is worthy of mention. David Fontana argues that because the "Founders themselves used comparative constitutional law . . . there must be clear and compelling evidence to support Justice Scalia's" conclusion that comparative constitutional law is useful in making a constitution, but not interpreting one. David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. Rev. 539, 579 (2001).

58. Fontana argues that, considering the lack of comparative constitutional materials available in the early nineteenth century, the Court actually made extensive use of comparative constitutional law. *See* Fontana, *supra* note 57, at 581 n.199. While this is a meritorious argument if one looks at the Court's use of international law, it certainly is not true if one distinguishes between citations to foreign precedent narrowly construed and international law. For a discussion of this distinction, see *supra* notes 36-53 and accompanying text.

reference to the world community in *McCulloch v. Maryland*.[59] In 1905, the Court cited to the "common law of Germany," "codes of the various States of the continent of Europe," and the "Code Napoleon . . . [as] incorporated in the Civil Code of Louisiana" in determining whether a Pennsylvania statute, which authorized the administration of the estates of absentees, violated the Fourteenth Amendment's Due Process Clause.[60] In addition to the dearth of Supreme Court opinions making use of foreign precedent, several States also banned the use of foreign precedent in their courts. Four states, New Jersey,[61] New Hampshire,[62] Kentucky,[63] and Pennsylvania,[64] proscribed the citation of English precedent.[65]

In most cases where the Court cites to foreign precedent it is actually citing to the "the laws of nations" or foreign precedent in the broad sense.[66] For example, in *Fong Yue Ting v. United States*,[67] the Supreme Court used "the law of nations" in deciding whether the Geary Act,[68] which extended the exclusion of Chinese laborers and forced all Chinese residents to carry a resident permit, was constitutional.[69] The Court looked to "accepted maxim[s] of international law," notions of "inherent . . . sovereignty," the "law[s] of nations," and cited to several commentators on international law in holding that the power to expel aliens was a corollary of the sovereign right to exclude aliens.[70] Throughout its opinion, the Court relied exclusively on international law and not at all on foreign precedent

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59. 17 U.S. (4 Wheat.) 316, 405-07 (1819) (referring to "mankind's views").

60. Cunnius v. Reading Sch. Dist., 198 U.S. 458, 471 (1905) (using these precedents to reinforce the proposition that States have the power to regulate the estates of absentees); *see also* Jacobson v. Massachusetts, 197 U.S. 11, 31 & n.1, 32-33, 35 (1905).

61. Elizabeth Gaspar Brown, British Statutes in American Law 1776-1836, at 82 (1964).

62. Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 Vand. L. Rev. 791, 806 (1951).

63. An Act Prohibiting the Reading of Certain Reports in This Commonwealth, 1807-1808 Ky. Acts 23 (1808), *reprinted in* Brown, *supra* note 61, at 132 n.52.

64. 1812 Pa. Laws 125 (1810).

65. A question exists as to the impetus behind the enactment of these statutes. Certainly an argument can be made that these statutes were motivated more by Anglophobia (rooted in the then recent Revolutionary War), than by an aversion to foreign precedent. *See* Brown, *supra* note 61, at 132 (noting that in Kentucky only "English precedents handed down after July 4, 1776" were proscribed). One possible counterargument is the following: Since there was a dearth of established common law courts and authoritative sources in the early nineteenth century, these state legislatures perceived that banning English precedent was tantamount to banning foreign precedent. This historical quandary is beyond the scope of this Note and it appears that the debate is continuing.

66. For a discussion of the distinction between broad and narrow uses of foreign precedent, see *supra* notes 36-53 and accompanying text.

67. 149 U.S. 698 (1893).

68. Act of May 5, 1892 (Geary Act), ch. 60, §§ 1, 6-8, 27 Stat. 25, 25-26 (repealed 1943).

69. For a thorough discussion of *Fong Yue Ting* and an argument that the Court should reverse the plenary power doctrine, which gives federal immigration laws immunity from judicial review, because of the doctrine's reliance on *Fong Yue Ting* and its racist underpinnings, see Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. Rev. 1 (1998).

70. *Fong Yue Ting*, 149 U.S. at 705-08.

narrowly construed. Furthermore, Justice Stephen Field, in his dissenting opinion, went so far as to declare that even international law's notion of sovereignty was irrelevant to American law. Justice Field stated that "usages . . . and former action of European governments" concerning "inherent sovereignty" meant "nothing" to the United States.[71]

To any observer, it would appear that beginning in the 1940s, however, the Court's use of foreign precedent increased exponentially. While there are certainly more cases citing to foreign precedent after 1940,[72] the number is not extraordinary if one distinguishes between foreign precedent narrowly construed, on the one hand, and international law, English common law, or cases citing Anglo-American or English-speaking communities[73] on the other.[74] This modest increase in cases citing foreign precedent narrowly construed is largely attributable to Justice Felix Frankfurter.

Justice Frankfurter referred to Canadian and South African decisions in determining the constitutionality of an income tax on judges,[75] noted that the High Court of Australia and Supreme Court of Canada continue the practice of issuing seriatim opinions,[76] observed that the federal systems of Canada and Australia have a much more robust notion of federal judicial review of state decisions than our system,[77] and informed readers that those two countries have "[n]o comprehensive system of lower federal courts."[78] In *Staub v. City of Baxley*,[79] Justice Frankfurter quoted an opinion by the Chief Justice of Australia, which discussed the problems inherent in

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71. *Id.* at 757 (Field, J., dissenting).

72. During the 1940s and then through the Cold War, a significant part of the arguments used when arguing race cases before the Supreme Court concerned America's image abroad and the international community's perception of racist policies. *See* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 Stan. L. Rev. 61 (1988).

73. A search on the Westlaw Supreme Court database for Court decisions citing to Anglo-American traditions and English-speaking peoples (or communities or countries) between 1940 and the present yields fifty-two such cases. Prior to 1940, the search turns up eleven cases and only three cases prior to 1900.

74. For an explanation of why this Note does not include such citations or cases in its discussion of foreign precedent, see *supra* notes 44-53 and accompanying text.

75. *See* O'Malley v. Woodrough, 307 U.S. 277, 281 n.8 (1939) (Frankfurter, J.) (noting that "[p]articular attention should be called" to the South African Supreme Court's decision because it was construing a clause identical to Article III, Section 1, of the U.S. Constitution).

76. *See* Graves v. New York, 306 U.S. 466, 487 n.1 (1939). Seriatim opinions are opinions handed down by each judge or Justice and the question of whether to continue the practice of issuing seriatim opinions was somewhat controversial in the Court's early history. Chief Justice John Marshall established the practice of issuing an "opinion of the Court," while Thomas Jefferson "thought that seriatim opinions were the only way so that the public would know where every judge stood." Interview by Professor Walter F. Murphy with William O. Douglas, Assoc. Justice, U.S. Supreme Court (Dec. 20, 1961), *available at* http://infoshare1.princeton.edu/libraries/firestone/rbsc/finding_aids/douglas/douglas2.html.

77. *See* Irvin v. Dowd, 359 U.S. 394, 408 (1959).

78. Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 361 (1959).

79. 355 U.S. 313, 326 (1958) (Frankfurter, J., dissenting).

federalism.[80] Justice Frankfurter also cited to foreign precedent in immigration,[81] Commerce Clause,[82] and free speech[83] cases. While Justice Frankfurter was the most prolific in citing foreign precedent, other Justices also cited foreign precedent during that time period.[84]

These older cases, however, diverge significantly from the more recent cases in at least two ways. First, many of these post-1940 but pre-1990 decisions use foreign precedent as a means of providing the reader with additional or noteworthy information.[85] Current Court decisions, in contrast, purport to use foreign precedent as support for their holding or rationale.

Second, these older Court opinions deal with issues that are less socially controversial. Current Court decisions, however, are markedly different. For example, *New York v. United States*[86] was a separation of powers case where the issue was whether the State of New York could assert immunity from a Congressional tax on mineral water and whether the Court would clarify "the amenability of States to the taxing power of the United States."[87] Justice Frankfurter announced that the Court could not and would not clarify the issue of Congressional taxes on states beyond "reject[ing] limitations upon the taxing power of Congress" based on "untenable criteria."[88] In the process, Justice Frankfurter informed the

80. *See id.* at 326 n.1 (citing O'Sullivan v. Noarlunga Meat Ltd. (1956) 94 C.L.R. 367, 375 (Austl.)).

81. *See, e.g.*, Jay v. Boyd, 351 U.S. 345, 372 (1956) (Frankfurter, J., dissenting) (noting that Congress's delegation of a power "may preclude redelegation" and citing as an example, Attorney-General of Canada v. Brent, [1956] 2 D.L.R. 2d 503).

82. *See* Freeman v. Hewit, 329 U.S. 249, 251 n.1 (1946) (citing an Australian precedent as an example of the judicial oversight required in federal systems over situations where both federal and state governments have an interest in the same transaction).

83. *See* Bridges v. California, 314 U.S. 252, 300 (1941) (Frankfurter, J., dissenting) (arguing that a powerful newspaper should not be able to use its power to demand that a court impose a particular sentence in a criminal trial).

84. *See* Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 344-45 (1970) (Douglas, J., dissenting) (discussing India's way of handling racial discrimination); Miranda v. Arizona, 384 U.S. 436, 488-89 (1966) (Warren, C.J.) (noting that India and Scotland have rules barring the use of most confessions yielded by police interrogations); Poe v. Ullman, 367 U.S. 497, 555 n.16 (1961) (Harlan, J., dissenting) (noting that Belgium, France, Ireland, Italy, Spain, Canada, Germany, and Switzerland have laws forbidding or regulating the use of contraceptives); McGowan v. Maryland, 366 U.S. 420, 450 n.21 (1961) (Warren, C.J.) (discussing foreign precedent in analyzing the history of Sunday legislation); *id.* at 459 n.40 (Frankfurter, J., concurring) (same); Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 651-52 (1952) (Jackson, J., concurring) (discussing the German, French, and British approaches to executive power during crises); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 189 (1951) (Reed, J., dissenting) (noting that Australia's legislative mechanism for managing communists was struck down as unconstitutional); Wickard v. Filburn, 317 U.S. 111, 125, 126 & n.27 (1942) (Jackson, J.) (discussing the measures taken by the national governments of Argentina, Australia, and Canada "for the relief of [agricultural] growers").

85. For further discussion on the informational use of foreign precedent and an argument that such use might be more useful and less controversial, see *infra* Parts II.C, III.B.

86. 326 U.S. 572 (1946).

87. *Id.* at 574.

88. *Id.* at 583-84.

reader of the problems that Argentina, Australia, Brazil, and Canada confronted in expounding such a general rule.[89] Compared to *Lawrence v. Texas*[90] and *Atkins v. Virginia*,[91] which presented the perennially problematic and contentious issues of homosexual sodomy and the death penalty, respectively, it is clear why citations to foreign precedent have only recently become controversial.[92]

The historical record reveals that citation to foreign precedent is clearly not a new-fangled practice in Supreme Court jurisprudence. As the above discussion demonstrates, the practice's emergence can be traced back to the 1940s and the appointment of Felix Frankfurter to the Court. Justice Frankfurter had a penchant for citing foreign precedent and his ascendancy to the Court marks the true naissance of the practice. Nonetheless, the practice of citing foreign precedent, as it currently stands, is much different from that "begun" by Justice Frankfurter. Today, members of the Court deploy foreign precedent to support the Court's or dissent's opinion in controversial cases, primarily involving social issues.[93]

D. *Judicial Globalization*

Globalization is a chief impetus for, and is also perhaps a justification for, using foreign precedent. Globalization has helped spread Western democratic values throughout the world.[94] Over the past two decades, there has been a dramatic increase in democratic nations and constitutional courts. International legal organizations are now ubiquitous, inspiring scholars and lawyers across countries to engage in transnational legal conversations. Moreover, judges are increasingly congregating and sharing both institutional and jurisprudential ideas, prompting some scholars to envisage a globalized judiciary.[95] Communication advancements, such as the Internet, have also facilitated the spread of transnational legal conversations, as well as international sources. This section will briefly elaborate on the increases in democratic nations and constitutional courts, international legal organizations, gatherings of the world's judiciaries, and advancements in communications, which have spurred the Supreme Court's practice of citing foreign precedent.

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89. *Id.* at 580 n.4, 583 n.5. This is an example of a passive use of foreign precedent, where the Court uses a foreign case to abstain from reaching a solution. Passive and negative uses of foreign precedent also tend to cause much less controversy than affirmative use. *See, e.g.*, Scalia & Breyer Debate, *supra* note 53 (Justice Antonin Scalia noting, with some approval, "you can cite foreign law to show . . . that if the Court adopts this particular view, the sky will not fall").

90. 539 U.S. 558 (2003). For a more detailed discussion of *Lawrence*, see *infra* Part I.E.1.e.

91. 536 U.S. 304 (2002). See *infra* Part I.E.1.a for a more thorough discussion of *Atkins*.

92. For further discussion of these cases, see *infra* Parts I.E.1, III.A.1.b.

93. For further discussion of the current Justices' use of foreign precedent, see *infra* Parts I.E.1, III.A.1.b.

94. *See generally* Ken I. Kersch, *The New Legal Transnationalism, The Globalized Judiciary, and The Rule of Law*, 4 Wash. U. Global Stud. L. Rev. 345 (2005).

95. *See id.* at 377.

Since the late 1980s, there has been a sudden and substantial growth in the number of democratic nations and constitutional courts.[96] Foreign constitutions, particularly the American Bill of Rights and the Canadian Charter of Rights and Freedoms, have afforded democracies such as South Africa, Israel, and New Zealand with comparative models to aid in establishing their own bills of rights.[97] A corollary to the sudden increase in democratic nations and constitutional courts has been the proliferation of constitutional law sources and courts engaging in comparative constitutional law analysis.[98] For example, the Constitutional Court of South Africa and the Supreme Court of Canada have engaged in "[e]xtensive and detailed treatments of foreign materials."[99] This has led some to posit that there is an "increasing number of... constitutional issues, where the decisions of foreign courts help by offering points of comparison."[100]

International legal organizations have contributed to cultivating a transnational discussion on constitutional and human rights issues among lawyers, judges, and legislators from different countries. For example, the International Association of Constitutional Law,[101] an organization of constitutionalists that has members from fifty countries, aims, among other things, "[t]o develop a network of constitutionalists from countries

96. *See* Paul R. Dubinksy, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 Yale J. Int'l L. 211, 249 n.175 (2005) (noting that "[s]ince the late 1980s, new constitutional courts have been introduced (or have come under serious consideration) in China, Japan, South Africa, Vietnam, the states of the former Soviet bloc, and throughout Latin America"); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 Am. J. Comp. L. 707, 715-16 (2001) (observing that Poland, Hungary, Russia, Bulgaria, Czech Republic, Slovak Republic, Romania, and Slovenia have created constitutional courts possessing the power of judicial review); Sandra Day O'Connor, Assoc. Justice, U.S. Supreme Court, Keynote Address at the Proceedings of 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, 351 (2002) (noting that as of 2002 there were "approximately 120 democracies out of 190 nation states"); *see also* Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 Law & Soc. Inquiry 763 (2002) (documenting the development of constitutional review in Korea and Taiwan); Luz Estella Nagle, *The Cinderella of Government: Judicial Reform in Latin America*, 30 Cal. W. Int'l L.J. 345 (2000); Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 Berkeley J. Int'l L. 161 (2001); Albie Sachs, *Constitutional Developments in South Africa*, 28 N.Y.U. J. Int'l L. & Pol. 695 (1996).

97. *See* Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 Ind. L.J. 819, 821-22 (1999); *see also* Constitutionalism and Rights: The Influence of the United States Constitution Abroad (Louis Henkin & Albert J. Rosenthal eds., 1990) (describing the U.S. Constitution's influence on foreign countries).

98. Choudhry, *supra* note 97, at 821.

99. *Id.* at 820.

100. Stephen Breyer, Assoc. Justice, U.S. Supreme Court, 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 (2003).

101. *See* International Association of Constitutional Law (IACL), http://www.iacl-aidc.org/ (last visited Feb. 24, 2006).

throughout the world" and "[t]o examine and compare common constitutional issues and phenomena."[102] The Conference of European Constitutional Courts brings together members from thirty-four European constitutional courts and publishes their proceedings.[103] These organizations have played an important role in breaking down national boundaries among lawyers and judges and have thus accelerated legal globalization.

In addition, American Justices are increasingly taking the initiative to meet with and discuss their jurisprudence and common legal issues with their counterparts in other nations. In 2004, Richard Goldstone, a retired member of the Constitutional Court of South Africa, was invited to lunch in the Justices' Dining Room.[104] The previous year, Justices Sandra Day O'Connor, Stephen Breyer, and Ruth Bader Ginsburg traveled to the European Court of Justice and then met Justices Anthony Kennedy and Clarence Thomas in Florence "for five days of conversation with European judges, officials, and law teachers."[105] Justice O'Connor has done work for, and is on the Executive Board of, the Central European Law Initiative.[106] Much more extensive than any other Supreme Court Justice, however, is Justice Kennedy's contact with foreign laws and judges. Justice Kennedy "spends his summers in Salzburg, Austria, where he teaches international and American law at the University of Salzburg and often attends the large yearly international judges conference held there."[107]

Moreover, the Internet provides a valuable source of international and foreign law materials, as well as an important medium of communication through which lawyers and judges can "form discussion groups . . . and share ideas."[108] Justices can sit in their chambers at One First Street, N.E., and instantly communicate with 301 Wellington Street, Ottawa,[109] or pull up an opinion of the European Court of Justice on their computer screen.

These four factors—the increase of democratic nations and constitutional courts, international legal organizations, gatherings of the world's judiciaries, and advancements in communications—have greatly

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102. *Id.*

103. *See* Conference of European Constitutional Courts, Welcome, http://www.confcoconsteu.org/ (last visited Feb. 24, 2006).

104. *See* Ruth Bader Ginsburg, *An Open Discussion with Justice Ruth Bader Ginsburg*, 36 Conn. L. Rev. 1033, 1034 (2004).

105. *Id.* at 1035.

106. *See* American Bar Association, CEELI—CEELI Liaisons and Legal Specialists, http://www.abanet.org/ceeli/about/execboard.html (last visited Feb. 24, 2006).

107. Wikipedia, Anthony Kennedy, http://en.wikipedia.org/wiki/Anthony_Kennedy (last visited Feb. 17, 2006); *see also* Anne-Marie Slaughter, *A Global Community of Courts*, 44 Harv. Int'l L.J. 191, 216-17 (2003) (noting that judges are increasingly meeting "face to face"); Jim Meyers & Phil Brennan, *Justice Kennedy's New Rule of Law*, NewsMax.com, Sept. 13, 2005, http://www.newsmax.com/archives/articles/2005/9/12/214140.shtml (quoting Representative Steven King as saying that "[b]etween 1998 and 2003, the justices took a total of 93 foreign trips").

108. Shirley S. Abrahamson & Michael J. Fischer, *All the World's a Courtroom: Judging in the New Millennium*, 26 Hofstra L. Rev. 273, 291 (1997).

109. This is the address of the Supreme Court of Canada.

contributed to the ever more symbiotic relationship among the world's judiciaries and legal professionals.

E. *The Current State of Foreign Precedent Narrowly Construed at the Supreme Court: The Transnational Five Versus the Nationalists*

1. The Transnational Five

Justices John Paul Stevens, O'Connor, Kennedy, Ginsburg,[110] and Breyer have all advocated the use foreign precedent in their opinions.[111] This section will provide an outline of the manner in which foreign precedent was used in: *Atkins v. Virginia*,[112] *Knight v. Florida*,[113] *Thompson v. Oklahoma*,[114] *Printz v. United States*,[115] and *Lawrence v. Texas*.[116]

a. Atkins v. Virginia

The death penalty is consistently one of the most controversial and polarizing socio-political questions in America.[117] For the past forty years, the Court has regularly split 5-4 on death penalty cases—often with spirited debate among the Justices.[118] The next three decisions that this Note examines, however, are even more controversial, because of the interplay of foreign precedent.[119]

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110. Although not covered in this Note, Justice Ruth Bader Ginsburg used foreign precedent narrowly construed in two recent affirmative action cases where she cited to the Convention on the Elimination of All Forms of Discrimination Against Women, which the United States has not ratified. *See* Grutter v. Bollinger, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring); Gratz v. Bollinger, 539 U.S. 244, 298-305 (2003) (Ginsburg, J., dissenting).

111. Justice David Souter has also cited foreign precedent. *See* Washington v. Glucksberg, 521 U.S. 702, 752 (1997) (Souter, J., concurring). However, unlike Justices Anthony Kennedy, Stephen Breyer, and John Paul Stevens, Justice Souter's use of foreign precedent is not extensive. Moreover, unlike Justices Sandra Day O'Connor and Ginsburg, Justice Souter has not promoted the practice of using foreign precedent in extrajudicial writings and speeches. Thus, he will be excluded from the discussion of the transnationalist Justices.

112. 536 U.S. 304 (2002).

113. 528 U.S. 990 (1999).

114. 487 U.S. 815 (1988).

115. 521 U.S. 898 (1997).

116. 539 U.S. 558 (2003).

117. *See generally* Death Penalty in America: Current Controversies (Hugo Adam Bedau ed., 1997).

118. *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361 (1989) (5-4 decision), *overruled by* Roper v. Simmons, 125 S. Ct. 1183 (2005) (5-4 decision); Enmund v. Florida, 458 U.S. 782 (1982) (same); Furman v. Georgia, 408 U.S. 238 (1972) (same); Trop v. Dulles, 356 U.S. 86 (1958) (same).

119. The death penalty cases which cite to foreign precedent examined in this Note are by no means exhaustive. *See, e.g.*, Foster v. Florida, 537 U.S. 990, 992-93 (2002) (citing to foreign precedent); *Enmund*, 458 U.S. at 796 n.22 (noting that the felony murder rule was abrogated in India, England, abrogated in part in Canada, and nonexistent in Europe); Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) (citing, as "not irrelevant," a survey of that showed that of sixty countries only three impose the death penalty for rape"); *see also* Case

In *Atkins v. Virginia*,[120] the Supreme Court held that the execution of mentally retarded felons was "cruel and unusual" as prohibited by the Eighth Amendment. In reaching this decision,[121] Justice Stevens noted that eighteen states and the Federal government had enacted statutes prohibiting the execution of mentally retarded criminals since 1986,[122] while no state passed legislation reinstating such executions.[123] New Hampshire and New Jersey, though continuing to authorize executions, have not "carried [one] out in decades."[124]

The Court stressed that "[t]he evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition."[125] This led to the conclusion that "a national consensus has developed against" executing mentally retarded criminal defendants.[126] In a footnote, appended to the sentence indicating that such a national consensus had developed, Justice Stevens cited the Brief for European Union for the proposition that the execution of mentally retarded criminals is "overwhelmingly disapproved" of in the "world community."[127] That was the extent of foreign precedent cited in *Atkins*.

Comment, *The Debate over Foreign Law in* Roper v. Simmons, 119 Harv. L. Rev. 103 (2005).

120. 536 U.S. 304 (2002).

121. Although the Court's Eighth Amendment jurisprudence is beyond the scope of this Note, it is worth mentioning that, in order to pass constitutional muster, a death sentence must comply with "[p]roportionality review" under the "evolving standards of decency that mark the progress of a maturing society" and those evolving standards must "be informed by 'objective factors' to the maximum possible extent." *See id.* at 311-12 (citing Harmelin v. Michigan, 501 U.S. 957 (1991); Trop v. Dulles, 356 U.S. 86 (1958)).

122. *Id.* at 313-17. In 1986, Georgia enacted the first state statute prohibiting the execution of mentally retarded offenders, which set off a chain reaction of states enacting similar proscriptions in the 1990s. *See id.* at 313-14 & n.9 (citing Ga. Code Ann. § 17-7-131(j) (Supp. 1988)). By 1989, however, only Georgia and Maryland had statutes banning such executions, and the Court held that two states, "even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus." Penry v. Lynaugh, 492 U.S. 302, 334 (1989), *overruled by Atkins*, 536 U.S. 304.

123. *Atkins*, 536 U.S. at 315-16.

124. *Id.* at 316.

125. *Id.* The Court compared the states' reaction to *Penry* to their reaction to *Stanford v. Kentucky*, 492 U.S. 361 (1989), *overruled by* Roper v. Simons, 125 S. Ct. 1183 (2005), which held that no national consensus existed prohibiting the execution of juvenile offenders over the age of fifteen. *Atkins*, 536 U.S. at 315 n.18. Only two states reacted to *Stanford* by "rais[ing] the threshold age for imposition of the death penalty." *Id.*

126. *Atkins*, 536 U.S. at 316. The Court went on to note that there is no national consensus on how to ascertain which felons are actually mentally retarded. *See id.* at 317 (concluding that the issue will be left to the states).

127. *Id.* at 316 n.21 (citing Brief for European Union as Amicus Curiae Supporting Petitioner, *Atkins*, 536 U.S. 304 (No. 00-8452)).

b. Knight v. Florida: *The Infamous Citation to the Supreme Court of Zimbabwe*

In a debate about foreign precedent with Justice Scalia, Justice Breyer self-deprecatingly remarked, "And then I think I may have made what I call a tactical error in citing a case from Zimbabwe—not the human rights capital of the world."[128] The issue in *Knight* was whether it is "cruel and unusual punishment" under the Eighth Amendment to execute felons who have spent "nearly 20 years . . . on death row."[129] Justice Breyer dissented from the Court's denial of certiorari believing that "petitioners' argument cannot be rejected out of hand."[130]

Petitioners Thomas Knight and Carey Moore were on death row for twenty-four and nineteen years, respectively.[131] Justice Breyer thought that the Court should consider petitioners' cases because "[w]here a delay, measured in decades, reflects the State's own failure to comply with the Constitution's demands, the claim that time has rendered the execution inhuman is a particularly strong one."[132] Justice Breyer cited to numerous American precedents that recognized that prolonged delay for execution causes tremendous suffering.[133] In past decisions, the Court described the uncertainty of the execution as "horrible,"[134] observed that the long wait for execution takes a "frightful toll,"[135] and Justice Frankfurter noted that the "onset of insanity" while waiting for execution is "not a rare phenomenon."[136] Moreover, "the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes."[137] Subsequently, the dissent outlined how foreign countries address the issue of delay in the imposition of the death penalty.

Justice Breyer, limiting his inquiry abroad to courts that do not proscribe the death penalty, found that an increasing number of foreign courts have held that protracted delays in the imposition of the death penalty "renders . . . [the] execution inhuman, degrading, or unusually cruel."[138] In

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128. Scalia & Breyer Debate, *supra* note 53.
129. Knight v. Florida, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting).
130. *Id.* at 998.
131. *See id.* at 993-94.
132. *Id.* at 993.
133. *Id.* at 994-95.
134. *Id.* at 994 (citing *In re* Medley, 134 U.S. 160 (1890)).
135. *Id.* (citing Furman v. Georgia, 408 U.S. 238, 288-89 (1972) (Brennan, J., concurring)).
136. *Id.* at 994-95 (citing Solesbee v. Balkcom, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting)). Justice Breyer also cited a study of Florida death row inmates showing that thirty-five percent attempted suicide and forty-two percent seriously considered suicide. *See id.* at 995 (citing Richard G. Strafer, *Volunteering for Execution*, 74 J. Crim. L. & Criminology 860, 872 n.44 (1983)).
137. *Id.* at 995. Justice Breyer also asserted that lengthy delays could not be justified in terms of originalism, since at the time of the founding the average delays between sentencing and execution were weeks and days. *See id.*
138. *Id.*

1994, the Privy Council of the United Kingdom held that it was an "'inhuman act to keep a man facing the agony of execution over a long extended period of time'"[139] and that "the delay of 14 years was 'shocking.'"[140] The Privy Council ruled that any delay of more than five years was presumptively "'inhuman or degrading' . . . unless 'due entirely to the fault of the accused.'"[141] The Supreme Court of India has held that courts must take delay into account in deciding whether to impose the death penalty[142] and the Supreme Court of Zimbabwe concluded that delays of five years or more were "'inordinate' and constituted 'torture or . . . inhuman'" treatment.[143] Lastly, Justice Breyer noted that the European Court of Human Rights, which interprets the European Convention on Human Rights, barred the United Kingdom from extraditing a potential defendant to Virginia, in part, because of the six to eight year delay that accompanies capital sentences in that state.[144]

Justice Breyer concluded by observing that this foreign authority was not binding.[145] However, because the foreign courts cited "have considered roughly comparable questions under roughly comparable legal standards," their views "are useful."[146]

c. Thompson v. Oklahoma

In *Thompson v. Oklahoma*, the Court considered whether the execution of juvenile offenders under the age of sixteen was prohibited by the Eighth Amendment.[147] Justice Stevens, writing for a plurality of three other Justices,[148] ruled that such executions were unconstitutional under the Court's "evolving standards of decency" framework.[149] In reaching its conclusion, the Court canvassed "relevant legislative enactments . . .

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139. *Id.* (quoting Pratt v. Att'y Gen. for Jam., 2 A.C. 1, 18 (P.C. 1993)).

140. *Id.* (quoting *Pratt*).

141. *Id.* (quoting *Pratt*).

142. *Id.* at 995-96 (citing Sher Singh v. State of Punjab, A.I.R. 1983 S.C. 465).

143. *Id.* at 996 (quoting Catholic Comm'n for Justice & Peace in Zimb. v. Att'y Gen., [1993] 1 Zimb. L.R. 239, 240, 269(S)).

144. *See id.* (discussing Soering v. United Kingdom, 11 Eur. Ct. H.R. (ser. A) 439, 478, 111 (1989)). Three years later Justice Breyer again dissented from the Court's denial of a petition for writ of certiorari in *Foster v. Florida*, 537 U.S. 990 (2002), which presented the identical issue. "[T]he Supreme Court of Canada recently held that the potential for lengthy incarceration before execution is 'a relevant consideration' when determining whether extradition to the United States violates principles of 'fundamental justice.'" *Foster*, 537 U.S. at 992-93 (citing United States v. Burns, [2001] S.C.R. 283, 355). Justice Breyer reiterated that the judicial decisions of foreign nations are helpful to the Court's adjudication of which punishments violate the Eighth Amendment. *See id.*

145. *Knight*, 528 U.S. at 997-98.

146. *Id.* Justice Breyer also concluded by mentioning that some foreign countries had reached different results, most notably the Supreme Court of Canada and the United Nations Human Rights Committee. *See id.* at 996.

147. *See* Thompson v. Oklahoma, 487 U.S. 815 (1988).

148. The plurality consisted of Justices Stevens, Brennan, Marshall, and Blackmun; Justice O'Connor concurred in the judgment. *See id.* at 818, 848.

149. *See id.* at 821 (citation omitted).

refer[ed] to jury determinations" and then "explain[ed] why these indicators of contemporary standards of decency confirm[ed]" the plurality's determination.[150]

First, the behavior of juries, an important determinant of "American sensibility," substantiated the notion that the execution of juveniles is no longer acceptable under "evolving standards of decency."[151] The Court found that only eighteen to twenty juveniles under the age of sixteen had been executed in the twentieth century, the latest occurring in 1948.[152] Second, the legislative enactments of all states recognized that there are real and important differences among children and adults.[153] The plurality found "complete or near unanimity among all 50 States and the District of Columbia in treating a person under 16 as a minor" and then noted that in a great majority of states "minor[s] are not eligible to vote, to sit on a jury, to marry without parental consent, . . . to purchase alcohol or cigarettes," to "purchase pornographic materials," or gamble.[154] Moreover, all eighteen states that had established a minimum age for the death penalty required that the defendant be at least sixteen at the time of the commission of the offense.[155]

In reaching its conclusion, the plurality had to address the fact that nineteen states had not established a minimum age for the eligibility of the death penalty and thus permitted the execution of juveniles under the age of sixteen.[156] The plurality's rejoinder was that the respondent (the State of Oklahoma), the dissent, and the concurrence all agreed that some age exists under which juveniles cannot be executed.[157] Thus, the group of states that had not addressed the issue should be ignored for purposes of determining a minimum age.[158] Instead, the Court should focus solely on the eighteen States that addressed the issue.[159]

Subsequently, Justice Stevens added that the views of foreign nations—nations rooted in Anglo-American heritage and "the leading members of the Western European community"—confirmed that the execution of juveniles under the age of sixteen offends "civilized standards of decency."[160] Justice Stevens observed,

> Although the death penalty has not been entirely abolished in the United Kingdom or New Zealand (it has been abolished in Australia, except in the State of New South Wales, where it is available for treason and piracy), in neither of those countries may a juvenile be executed. The

150. *Id.* at 822-23.
151. *Id.* at 821, 831.
152. *See id.* at 832.
153. *See id.* at 823-31.
154. *Id.* at 823-24 (citations omitted).
155. *See id.* at 829.
156. *See id.* at 826-27.
157. *See id.* at 828-29.
158. *See id.* at 829.
159. *See id.*
160. *Id.* at 830-31.

> 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.[161]

d. Printz v. United States

Printz was a significant and contentious case in the Rehnquist Court's jurisprudence—an aggressive effort to "readjust the state-federal balance [of power] in favor of the states."[162] The case presented the question of whether the interim provisions of the Brady Handgun Violence Prevention Act,[163] which required state and local chief law enforcement officials to carry out background checks on individuals purchasing handguns, were constitutionally permissible.[164] The Court, with Justice Scalia writing for the majority, held that "[t]he Federal Government may . . . [not] command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[165] The rule is categorical and no balancing of the "burdens or benefits" may limit its application.[166]

This result, Justice Scalia reasoned, is supported by the historical record,[167] the Constitution's structure,[168] and the Court's past jurisprudence.[169] On a structural analysis, the commandeering provisions of the Brady Act fail for three reasons: (1) The federal government's power "would be augmented immeasurably" if it could commandeer the law enforcement officers of fifty States;[170] (2) the President's powers would be diluted, because Congress could enforce laws without him or her by requiring State law enforcement officials to do so;[171] and (3) the Necessary and Proper Clause argument is ineffective because congressional power to regulate through the Commerce Clause is limited to direct regulation of interstate commerce, rather than "regul[ation] [of] state governments' regulation of interstate commerce."[172]

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161. *Id.* (citing Brief for Amnesty International as Amicus Curiae Supporting Petitioner, *Thompson*, 487 U.S. 815 (No. 86-6169), *available at* 1987 WL 864271).

162. Kermit L. Hall, *Printz v. United States*, *in* The Oxford Guide to United States Court Decisions 175, 176 (Kermit L. Hall et al. eds., 2005).

163. Pub. L. No. 103-159, 107 Stat. 1536 (1998) (current version at 18 U.S.C. § 922 (2000)).

164. *See* Printz v. United States, 521 U.S. 898 (1997).

165. *Id.* at 935.

166. *Id.*

167. *See id.* at 904-18 (noting that "[t]he constitutional practice we have examined . . . tends to negate the existence of the congressional power asserted here, but is not conclusive").

168. *See id.* at 918-25.

169. *See id.* at 925-35.

170. *Id.* at 922.

171. *See id.*

172. *Id.* at 924 (citing New York v. United States, 505 U.S. 144, 166 (1992)).

In turning to the Court's jurisprudence, the *Printz* Court found that *New York v. United States* was controlling and indistinguishable.[173] In that case, the Court held that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."[174]

Justice Breyer, who also concurred in Justice Stevens's dissent,[175] began his own dissent by stating, "I would add to the reasons Justice Stevens sets forth the fact that the United States is not the only nation that seeks to reconcile the practical need for a central authority with the democratic virtues of more local control."[176] Justice Breyer's survey of foreign experience and cases revealed that some countries with robust federal systems, like America, actually allow federal commandeering of local officers.[177] The experience of federal governments such as Switzerland, Germany, and the European Union—governments that require constituent states to implement many of the federal government's laws—casts "an empirical light" on an empirical question.[178] That is, "[w]hy, or how, would what the majority sees as a constitutional alternative—the creation of a new federal gun-law bureaucracy, or the expansion of an existing federal bureaucracy—better promote either state sovereignty or individual liberty?"[179] The experiences of these foreign countries, according to Justice Breyer, indicate that the Court's per se rule goes too far.[180] Some degree of federal commandeering of state officers is not inconsistent with basic principles of federalism.[181]

e. Lawrence v. Texas

From a Texas statute that "demean[s] [people's] existence," circumscribes "an integral part of human freedom,"[182] and is "uncommonly

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173. *See id.* at 925-35 (disposing of at least three of the federal government's arguments purporting to distinguish *Printz* from *New York*).

174. *New York*, 505 U.S. at 188.

175. Three dissents were filed in *Printz*, one by Justice Stevens, which Justices Souter, Ginsburg, and Breyer joined, one by Justice Souter, and another by Justice Breyer. *See Printz*, 521 U.S. at 900-01. Nonetheless, all three dissents made the same point: Some degree of federal commandeering of state officials is not unconstitutional and thus the per se rule that the Court sketches out is misguided. *See id.* at 939-70 (Stevens, J., dissenting); *id.* at 970-76 (Souter, J., dissenting); *id.* at 976-78 (Breyer, J., dissenting). Justice Stevens's dissent, like the Court's opinion, examined the historical record, the Constitution's structure, and the Court's past jurisprudence. *See id.* at 938-69 (Stevens, J., dissenting). However, Justice Stevens concluded that such an analysis led to the opposite result—namely, that some degree of federal commandeering of State officers is not unconstitutional. *See id.*

176. *Id.* at 976.

177. *See id.*

178. *See id.* at 977.

179. *Id.*

180. *See id.* (arguing that "there is no need to interpret the Constitution as containing an absolute principle" on the commandeering issue).

181. *Id.* at 977-78 (observing that the absolute rule that the majority stakes out is unnecessary and constitutes a major barrier to congressional attempts to address national exigencies).

182. Lawrence v. Texas, 539 U.S. 558, 577, 578 (2003).

silly"[183]—to the majority's "invo[cation] [of] principles . . . [of] greater freedom"[184]—to the dissent's allegation that the Court has "signed on to the . . . homosexual agenda"[185] and is "impos[ing] foreign moods, fads, or fashions on Americans"[186]—there is no doubt that the Court's decision in *Lawrence* engendered extreme controversy. As the dissent's comments undoubtedly suggest, Justice Kennedy's citation to foreign precedents exacerbated the controversy surrounding an already contentious case.

Lawrence was an especially ambiguous opinion[187]—muddying the already murky waters of modern substantive due process. Because Justice Kennedy's invocation of foreign precedents was limited to rebutting the Court's "sweeping [historical, moral, and ethical] references"[188] in *Bowers v. Hardwick*,[189] this Note will confine its discussion to that aspect of *Lawrence*.

In *Bowers*, the majority opinion and Chief Justice Warren E. Burger's concurring opinion rested their conclusions largely on the assertion that proscriptions against homosexual sodomy were widespread, have "ancient roots," and are "deeply rooted in this Nation's history and tradition."[190] The *Lawrence* majority, however, found that *Bowers* erred in this historical determination.

Justice Kennedy began with the history and tradition of American laws banning homosexual sodomy up to the time when *Bowers* was decided.[191] American laws were not directed specifically at homosexual conduct, but at "nonprocreative sexual activity more generally."[192] States did not begin to target homosexual sodomy until the 1970s and, even then, only nine states enacted such statutes.[193] Five of these states repealed their statutes in the subsequent decades.[194] Historically, statutes proscribing both heterosexual and homosexual acts have not been enforced in any meaningful or

183. *Id.* at 605 (Thomas, J., dissenting) (internal quotation omitted) .

184. *Id.* at 579.

185. *Id.* at 602.

186. *Id.* at 598 (Scalia, J., dissenting) (internal quotation omitted).

187. *See generally* Mary Anne Case, *Of "This" and "That" in* Lawrence v. Texas, 2003 Sup. Ct. Rev. 75, 75-76 (noting that the majority opinion is ambiguous down to the level of syntax); Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 Sup. Ct. Rev. 27, 29-31, 45 (outlining four possible readings of the Court's opinion and observing that it is "exceedingly difficult" to determine whether the opinion was decided on a fundamental rights analysis or rational basis review).

188. *Lawrence*, 539 U.S. at 572.

189. 478 U.S. 186 (1986) (holding that there is no fundamental right to engage in homosexual sodomy), *overruled by Lawrence*, 539 U.S. 558.

190. *Id.* at 192 (internal quotation omitted).

191. *See Lawrence*, 539 U.S. at 568.

192. *Id.* (noting that the distinction between heterosexual and homosexual persons is a recent development).

193. *Id.* at 570.

194. *Id.* at 570-71. The Court noted that it believed that the "laws and traditions in the past half century are of most relevance." *Id.* at 571-72.

nonarbitrary way.[195] Moreover, when the American Law Institute promulgated the Model Penal Code ("MPC") in 1955, it refused to provide criminal penalties for acts of "consensual sexual relations conducted in private"[196] and many states subsequently amended their laws to mirror the MPC.[197]

Furthermore, of the twenty-five states that prohibited both hetero-sexual and homosexual sodomy at the time of *Bowers*, twelve subsequently repealed their statutes, and merely "4 enforce the[m] only against homosexual conduct."[198] However, as with all states that proscribe both hetero-sexual and homosexual conduct, there is a constant "pattern of nonenforcement with respect to consenting adults acting in private."[199] Throughout this discussion, the Court never maintained that there was a longstanding tradition supporting a right of sexual autonomy, rather the Court intended to controvert the *Bowers* Court's sweeping statements in favor of proscribing such conduct.[200]

Then, the majority emphasized that the *Bowers* Court had failed to consider all the relevant authorities in discussing "the history of Western civilization and . . . Judeo-Christian moral and ethical standards."[201] Justice Kennedy pointed out that in 1967 the British Parliament followed the recommendations of the Wolfenden Report[202] and repealed laws criminalizing homosexual conduct.[203] "Of even more importance" was the European Court of Human Rights' striking down of a Northern Ireland law proscribing homosexual conduct because the law was "invalid under the European Convention on Human Rights."[204] With some swagger, the Court

195. *Id.* at 569 (observing that many sodomy prosecutions early in the Republic were directed at instances of pedophilia and bestiality).

196. *Id.* at 572 (citing Model Penal Code § 213.2 cmt. 2, at 372 (1980)). The American Law Institute offered three reasons for its refusal to include in the Model Penal Code penalties criminalizing consensual sexual relations conducted in private: (1) Such laws undermine respect for the law by penalizing common conduct; (2) consensual conduct is not harmful; and (3) such laws have historically been arbitrarily enforced and thus can facilitate blackmail. *See Model Penal Code* cmt. 277-80 (Tentative Draft No. 4, 1955).

197. *See Lawrence*, 539 U.S. at 572.

198. *Id.* at 573.

199. *Id.*

200. *See id.* at 571-72 (finding that the "laws and traditions in the past half century are of most relevance"); *see also* Sunstein, *supra* note 187, at 40 (observing that "the Court freely conceded that there is no history of accepting that practice" and "did not contend that traditions affirmatively support a constitutional right to sexual freedom").

201. *Lawrence*, 539 U.S. at 572 (internal quotation omitted).

202. The Wolfenden Report was put together by a committee of fourteen advising the British Parliament in 1957. *See* The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution (American ed., Stein & Day 1963) (1957). The committee chairman, John Wolfenden, is forty-fifth on a list of the top 500 gay and lesbian heroes. *See* Wikipedia, Wolfenden Report, http://en.wikipedia.org/wiki/Wolfenden_report (last visited Feb. 23, 2006).

203. *See Lawrence*, 539 U.S. at 572-73 (citing Sexual Offences Act, 1967, c. 60, § 1 (Eng.)).

204. *Id.* at 573 (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. B) at 1 (1981)).

emphasized that *Dudgeon v. United Kingdom*[205] was authoritative in the forty-five nations of the Council of Europe, thus rendering the sweeping and conclusory references in *Bowers* unmeritorious.[206]

The Court then went on to discuss two precedents on which its holding was most reliant: *Planned Parenthood of Southeastern Pennsylvania v. Casey*[207] and *Romer v. Evans*.[208] *Casey* is important to the Court's decision in *Lawrence* because it acknowledged the continuing validity of modern substantive due process, thus "confirm[ing] that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[209] In *Romer*, the Court invalidated an amendment to the Colorado Constitution that denied homosexuals, lesbians, bisexuals, and transgendered persons the protection of Colorado's antidiscrimination laws.[210] The Court found that the amendment was "'born of animosity'" and had no rational relation to a legitimate state interest.[211] The majority found that these two precedents so weakened the foundation of *Bowers* that the precedent could not stand.[212]

2. The Nationalists

Justices Scalia and Thomas, as well as the late Chief Justice William Rehnquist, have often expressed frustration, bordering on rage at times, at other Justices' use of foreign precedent. Although in the past Justice Scalia has not been completely consistent on the issue of foreign precedent,[213] recently he has been vocal in his opposition to the practice.[214] Throughout

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205. *Dudgeon*, 45 Eur. Ct. H.R. (ser. B) at 1. Justice Kennedy also cited *P.G. & J.H. v. United Kingdom*, 9 Eur. Ct. H.R. 56 (2001), *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (1993), and *Norris v. Ireland*, 142 Eur. Ct. H.R. (1988).

206. *Lawrence*, 539 U.S. at 573.

207. 505 U.S. 833 (1992).

208. 517 U.S. 620 (1996).

209. *Lawrence*, 539 U.S. at 573-74 (discussing *Casey*, 505 U.S. at 851).

210. *See id.* at 574-75 (discussing *Romer*, 517 U.S. at 624).

211. *Id.* (quoting *Romer*, 517 U.S. at 634).

212. *Id.* at 578 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."). Interestingly, in addition to being controversial in and of themselves, the five decisions just canvassed are also the most controversial cases in which the Court has cited to foreign precedent. The controversy notwithstanding, these five cases are fairly representative of the Rehnquist Court's use of foreign precedent.

213. *See* Koh, *supra* note 37, at 47 (observing that Justice Scalia "has been far from consistent in insisting upon the irrelevance of foreign . . . law"); *see also* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 381 (1995) (Scalia, J., dissenting) (noting there are proscriptions on anonymous campaigning in Australia, Canada, and England); Scalia & Breyer Debate, *supra* note 53 (noting, with some approval, "you can cite foreign law to show . . . that if the Court adopts this particular view, the sky will not fall"). Additionally, Justice Scalia has broken his usual practice of dissenting or filing a concurring opinion when the majority uses foreign precedent by joining Rehnquist's opinions discussing foreign precedent. *See* Raines v. Byrd, 521 U.S. 811, 828 (1997); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

214. *See infra* notes 218-22 and accompanying text.

some of his tenure on the Court, Chief Justice Rehnquist expressed interest in the Court's use of foreign precedent[215]—but later found that "the views of other countries" are irrelevant to the Court's "ultimate determination."[216] Furthermore, the former Chief Justice consistently joined Justice Scalia's opinions lampooning the majority's use of foreign precedent.[217] Thus, while Justice Scalia and the former Chief Justice have not been completely consistent in their criticism of other Justices' citation to foreign precedent, both Justices can accurately be called staunch opponents to the deployment of foreign precedent narrowly construed. The following section will outline these Justices' general views on foreign precedent as expressed in their opinions.

Justice Scalia, in his dissent in *Thompson v. Oklahoma*, declared that "the practices of the 'world community'" are "irrelevant," and was "thankful[]" that other countries' "notions of justice are . . . not always those of our people."[218] Foreign precedent is "totally inappropriate as a means of establishing the fundamental beliefs of this Nation," because it is "a Constitution for the United States of America that we are expounding."[219] Justice Scalia went on to accuse the majority of forcing the views of other countries upon Americans.[220] In another case, Justice Scalia remarked that the Court's citation to those foreign precedents that support its conclusion, and its simultaneous silence on precedents that are contrary to its view, was "meaningless" and "[d]angerous dicta."[221] "[C]omparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one."[222]

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215. *See, e.g.*, *Raines*, 521 U.S. 811 (discussing European courts' approach to standing); Washington v. Glucksberg, 521 U.S. 702, 710, 718 n.16, 785-87 (1997) (examining the legality of assisted suicide in foreign countries and citing the Supreme Court of Canada, the British House of Lords Select Committee on Medical Ethics, New Zealand's Parliament, the Australian Senate, and the Columbian Constitutional Court); *Casey*, 505 U.S. at 945 n.1 (Rehnquist, C.J., dissenting) (discussing the abortion rulings of the West German Constitutional Court and Canadian Supreme Court); William Rehnquist, *Constitutional Courts—Comparative Remarks*, *in* Germany and Its Basic Law: Past, Present, and Future—A German-American Symposium 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993) (predicting that the Court would take a more comparativist approach in the future).

216. Atkins v. Virginia, 536 U.S. 304, 325 (2002) (Rehnquist, C.J., dissenting).

217. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (Scalia, J., dissenting); *Atkins*, 536 U.S. 304 (Scalia, J., dissenting).

218. *Atkins*, 536 U.S. at 347-48 (Scalia, J., dissenting). Justice Scalia awarded the majority "the Prize for the Court's Most Feeble Effort to fabricate 'national consensus'" for its "appeal (deservedly relegated to a footnote) to the views of . . . members of the so-called 'world community.'" *Id.* at 347.

219. Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting).

220. *Id.* ("[W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.").

221. *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting).

222. Printz v. United States, 521 U.S. 898, 921 n.11 (1997) (going on to briefly discuss the founders' extensive use of foreign precedent). For a contrary argument, see Fontana, *supra* note 57, at 579.

In *Knight v. Florida*, Justice Thomas stated that if Justice Breyer had found "any such support in our own jurisprudence" for the proposition that it is cruel and unusual to execute prisoners who have spent twenty or more years on death row, "it would be unnecessary for . . . [him] to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council."[223] In a case denying certiorari on an identical issue, Justice Thomas responded to Justice Breyer's comment that the Supreme Court of Canada had expressed apprehension about the delays in the imposition of the death penalty in America by remarking, "I daresay that court would be even more alarmed were there, as Blackstone commended, only a 48-hour delay between sentence and execution."[224]

II. A SERBONIAN BOG:[225] THE DEBATE OVER USING FOREIGN PRECEDENT AS AN INTERPRETIVE TOOL IN U.S. CONSTITUTIONAL CASES

While the scholarly debate over the propriety of the Court's use of foreign precedent is quite extensive, a status quo has developed in the debate—transnational scholars advocating for and defending the practice against several, seemingly incensed, Supreme Court Justices.[226] Furthermore, as this Note argues, an examination of the literature reveals an astonishing dissonance between the scholarly perspectives on foreign precedent and the reality of the Court's practice (or what the Court's practice could ever be). It seems that the scholarly debate has greatly proliferated while failing to notice that the Court's use of foreign precedent is inconsequential, rhetorical, and still in its infancy.[227] Indeed, there is a

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223. Knight v. Florida, 528 U.S. 990, 990 (1999).

224. Foster v. Florida, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring) (citing William Blackstone, 4 Commentaries *397) (observing that Justice Breyer added one more foreign decision to those he cited in *Knight*).

225. The phrase "Serbonian bog" describes a mess from which there is no way of extricating oneself. It is thought to have originated in *Paradise Lost* in which Milton described "A gulf profound, as that Serbonian bog Betwixt Damiata and Mount Casius old, Where armies whole have been sunk." John Milton, Paradise Lost 124 (Mortimer J. Adler ed., 1952). The lake of Serbonis in Egypt was a bog, which had the deceptive appearance of being solid land by reason of sand blowing into it. *See* Wikipedia, Serbonian Bog, http://en.wikipedia.org/wiki/Serbonian_bog (last visited Mar. 2, 2006).

226. This statement is only partially hyperbolic since most of the literature discussing the Court's use of foreign precedent actually favors it. However, there are a few exceptions. *See, e.g.*, Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 Am. J. Int'l L. 57 (2004); Seth F. Kreimer, *Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing*, 1 U. Pa. J. Const. L. 640 (1999); Diarmuid F. O'Scannlain, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?, Address Before the Institute of Advanced Legal Studies of the University of London (Oct. 11, 2004), *in* 80 Notre Dame L. Rev. 1893 (2005); J. Andrew Atkinson, Note, *King Arthur in a Yankee Court: The United States Supreme Court's Use of European Law in Lawrence v. Texas*, 10 J. Int'l & Comp. L. 143 (2003).

227. *But cf.* David Fontana, *The Next Generation of Transnational/Domestic Constitutional Law Scholarship: A Reply to Professor Tushnet*, 38 Loy. L.A. L. Rev. 445, 482 (2004) (arguing that there is no valid debate over whether foreign precedent should be

serious question as to whether the Court can ever or will ever use foreign precedent more substantively (or as substantively as some scholars would like).

This part of this Note sets forth and examines the divergent views on the Court's use of foreign precedent as an interpretive tool in U.S. constitutional cases. Part II.A-B outlines the controversy that has developed between transnationalists, who promote the use of foreign precedent, and nationalists, who argue against the practice.[228] Along the way, this part discusses the extrajudicial speeches and writings of several Supreme Court Justices. Part II.C summarizes Judge Posner's view that courts should cite foreign precedent but limit its use to informational purposes.

A. *Transnationalists*

This section will examine the views of Supreme Court Justices and scholars on the use of foreign precedent. Part II.A.1 will provide an overview of the extrajudicial writings and speeches advocating the use of foreign precedent of Justices O'Connor, Ginsburg, and Breyer. Part II.A.2 will discuss the substantive arguments that supporters of the practice put forth. Lastly, Part II.A.3 will summarize the criteria that supporters of using foreign precedent have offered in an attempt to create a methodology for selecting, and a framework for using, foreign precedent.

1. The Extrajudicial Writings and Rhetoric of Justices O'Connor, Ginsburg, and Breyer

Justices O'Connor, Ginsburg, and Breyer have been the vociferous vanguard of foreign precedent—regularly writing and speaking about the plethora of purported benefits provided by foreign precedent.

In a speech given before the American Society of International Law, Justice Breyer outlined several reasons that some members of the Court are increasingly relying on foreign precedent.[229] Justice Breyer cited, as reasons for the Court's increased reliance on foreign precedent, both the rise of domestic legal questions that are interconnected with foreign law, as well as the rise of constitutional issues where foreign decisions "help by offering points of comparison."[230] This "empirical light" justification for the use of

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used in the first place and discussing the inevitability of foreign precedent globalizing American law); Michael Kirby, *Think Globally*, 4 Green Bag 2d 287, 291 (2001) (remarking that the U.S. is in danger of "becoming something of a legal backwater"). This is certainly not to say that all scholars have given unadulterated adulation to the practice. *See, e.g.*, Mark Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action*, 36 Conn. L. Rev. 649, 650 (2004) (offering "some reasons for caution about the use of transnational comparative law in interpreting domestic constitutions").

228. The terms nationalist and transnationalist are borrowed from Dean Koh. *See* Koh, *supra* note 37, at 56.

229. Breyer, *supra* note 100, at 266.

230. *Id.*

foreign precedent is often invoked by Justice Breyer, both inside and outside the Court.[231]

However, Justice Breyer often speaks in broader terms about the benefits of foreign law. The "growing . . . similarities" that courts are finding in the issues they face "are important because . . . they reflect a common aspiration. . . . Through their respect for basic human liberty, they thus may help to make that liberty a reality."[232] In another speech, Justice Breyer expressed disappointment at the dearth of lawyers citing foreign law in briefs.[233] The examination of foreign materials can provide a "broader outlook" and help lawyers and judges "garner the broad professional and human experience and knowledge needed to help create new law . . . that works well for all citizens."[234]

Similarly, in a debate with Justice Scalia, Justice Breyer commented on the broader benefits that could be derived from citing foreign courts. Justice Breyer noted the important similarities among the problems that the world's judiciaries are facing, especially regarding "basic human rights" issues.[235] Justice Breyer argued that reading and citing to foreign courts can help broaden domestic courts' perspective on these common issues.[236] Also, Justice Breyer asserted that the Court's citation to foreign courts may give foreign courts in nascent democratic societies "a leg up."[237]

Justice O'Connor has also spoken before the American Society of International Law about the benefits of using foreign law.[238] Globalization and the increasing impact of domestic decisions abroad were mentioned by Justice O'Connor as reasons for increasing the Court's use of foreign precedent.[239] Furthermore, Justice O'Connor stated that it is foolish for the Court to disregard the "rich resources" that foreign precedent provides and predicted that, in time, the Court would increasingly rely on foreign precedent to resolve "what now appear to be purely domestic issues."[240]

Nonetheless, much of the speech focused on the broader benefits of foreign law to lawyers personally, and the legal profession as an institution. For example, Justice O'Connor mentioned "how impressed . . . [she] was with watching the more efficient selection of jurors in British courts, and in observing a higher degree of respect and civility given by lawyers to each other and to courts in some nations other than our own."[241] Justice

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231. For further discussion on the "empirical light" justification for citing foreign precedent, see *infra* Part II.A.2.a.

232. Breyer, *supra* note 100, at 267.

233. Stephen Breyer, *The Legal Profession and Public Service*, 57 N.Y.U. Ann. Surv. Am. L. 403, 411 (2000).

234. *Id.* at 410-11.

235. Scalia & Breyer Debate, *supra* note 53.

236. *Id.* (noting that American courts can "learn something" from foreign courts).

237. *Id.* For a discussion of this line of reasoning in the context of justifications for citing to foreign precedent, see *infra* notes 268-72 and accompanying text.

238. O'Connor, *supra* note 96, at 348.

239. *Id.* at 349.

240. *Id.* at 351.

241. *Id.* at 352.

O'Connor concluded in a rhetorical arpeggio, comparing law to music and quoting a former classmate who compared law to the music of Bach, Verdi, Vivaldi, Wagner, and other musical giants.[242]

Justice Ginsburg has echoed the broad rhetorical speeches of Justices O'Connor and Breyer. In a speech given before the American Constitutional Society, Justice Ginsburg stated that pride in the Founders' development of a unique constitutional system should not "mean[] we should rest content with our current jurisprudence and have little to learn from others."[243] Justice Ginsburg also predicted that Justices who consider foreign law "inappropriate to" constitutional interpretation will be speaking "increasingly in dissent."[244]

2. Arguments Justifying the Use of Foreign Precedent as an Interpretive Tool in U.S. Constitutional Cases

Transnationalist scholars argue that foreign precedent can provide courts with copious benefits. The overarching premise for most justifications of using foreign precedent is as follows: Knowledge and information are good, more knowledge and information is better.[245] Accordingly, most of the benefits that scholars suppose can be derived from foreign precedent are those stemming from the examination and accumulation of information and knowledge.[246]

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242. *See id.* at 353. Justice O'Connor has also stated her belief that the Court is in danger of cultivating a "bad impression" on the world community. *See* Sandra Day O'Connor, *Courting the World: In a More Globalized Society, the Legal World Can't Remain Provincial*, Anniston Star (Anniston, Ala.), Dec. 7, 2003, *available at* https://www.annistonstar.com/opinion/2003/as-insight-1207-0-3105r0731.htm (analogizing the U.S. to an extremely rude woman on a bus).

243. Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication, Address Before the American Constitutional Society (Aug. 2, 2003), *in* 22 Yale L. & Pol'y Rev. 329, 332 (2003).

244. *Id.* at 331. Certainly these Justices have been outspoken in their support of using foreign precedent, much to the chagrin of the other Justices. However, what is notable about their extrajudicial writings and speeches, and common to all three Justices, is the sparse attention that is dedicated to the substantive debate on the propriety of the practice. The Justices seem to tailor their speeches to their audiences—indeed their speeches are evocative of a preacher giving sermons to the choir—which share a common perspective with their speakers but need encouragement.

245. *See* Abner S. Greene, *Constitutional (Ir)Responsibility*, 71 Fordham L. Rev. 1807, 1808 (2003) (arguing that "moral and political reasoning"—reasoning which requires a wide-ranging quantity of knowledge and information—"should play a . . . foreground role in a court's ultimate [constitutional] decisionmaking"); Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. Int'l L.J. 331, 336-37 (1998) (noting that the "first achievement of comparative legal studies is the accumulation of knowledge").

246. There is some doubt regarding informational justifications for the practice of citing to foreign precedent that, though beyond the scope of this Note, is useful to comment on. Many scholars argue that the discussion about justifications based on information or knowledge, indeed perhaps the debate over the legitimacy of foreign precedent, is reducible to a debate over methods of constitutional interpretation. *See, e.g.*, Scalia & Breyer Debate, *supra* note 53. The idea being that a pure form of originalism does not require judges to

a. *Shining the Empirical Light*

Foreign law can provide practical information on how certain judicial principles, rules, or standards would function in practice. Many commentators argue that issues of federalism are especially suitable for comparative analysis using foreign precedent.[247] Countries with similar federal systems, such as Germany and Switzerland, often face similar questions.[248] Consequently, the Court can learn from the practical effects of the solutions crafted by these "sister" federal courts.[249]

With this approach, there are three potential advantages to examining foreign precedent. First, it is plausible that foreign precedent will reveal a solution or a rule of which the Court was previously unaware.[250] Accordingly, the Court may choose to borrow another country's "workable [judicial] principle[]," "constitutional fact," or "interesting idea."[251]

Second, the foreign countries' experience with the solution or rule would give the Supreme Court some idea of its practical effect.[252] Transnationalist scholars argue that this presents an incredible resource to the Court because, in addition to state "laboratories" experimenting with

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consider the current practicalities and effects of their constitutional rulings. *See id.* One possible response to this argument is that there are many situations where an originalist theory of interpretation does not resolve the constitutional question. *See, e.g.*, Printz v. United States, 521 U.S. 898, 918-24 (1997) (concluding that the analysis of the framers' intent was inconclusive); *see also* Brown v. Bd. of Educ., 347 U.S. 483, 489 (1954) (finding the history of the Fourteenth Amendment inconclusive "with respect to segregated schools"). Thus, in situations where the Court must consider the practical effects of its decision, as in *Printz*, transnationalists' justification for using foreign precedent premised on the benefits of empirical information and knowledge still hold sway. Nonetheless, there is serious debate about how much weight ought to be given to the practical effects of constitutional rules and "the idea that the constitutional structure should be adjusted for maximum efficiency." Kreimer, *supra* note 226, at 642. Professor Seth Kreimer argues that there is room for debate on whether such analysis would "misconstrue the object of American constitutionalism." *Id. But see* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L.J. 1225, 1228 (1999) (arguing persuasively that there are "three ways—functionalism, expressivism, and . . . bricolage . . . in which comparing constitutional experience elsewhere might contribute to interpreting the U.S. Constitution").

247. *See* Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 Duke L.J. 223, 287 (2001) (concluding that "[c]omparative constitutional study . . . may be of substantial value in" resolving issues of federalism); *see also* Donald E. Childress III, Note, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 Duke L.J. 193 (2003).

248. *Printz*, 521 U.S. at 977 (Breyer, J., dissenting) (discussing the federal systems of Germany and Switzerland); New York v. United States, 326 U.S. 572 (1946).

249. To fully maximize the benefit of learning from the practical effects of other countries' solutions, however, the Court must use the foreign precedent of those countries with minimal "contextual differences." *See* Fontana, *supra* note 57, at 559 n.91. For further discussion on the methodology scholars have put forth for selecting foreign precedent, see *infra* Part II.A.3.

250. Fontana, *supra* note 57, at 567-68 (citing United States v. Then, 56 F.3d 464, 468 (2d Cir. 1995)); *see also* Schadbach, *supra* note 245, at 350 (articulating the justification but discussing examples outside the realm of constitutional law).

251. Fontana, *supra* note 57, at 568 (citations omitted).

252. *See Printz*, 521 U.S. at 977 (Breyer, J., dissenting).

issues that the Court has little information about or experience with, the Court could draw from the federal laboratories of other countries to garner valuable insights.[253] *Printz* is often mentioned as illustrative of this justification.[254] Because there was no controlling constitutional text on the issue of federal commandeering of State executive officers, Justice Breyer "appropriately . . . [took] considerations of policy [as] one factor in determining the Constitution's meaning" and "[e]xamin[ed] constitutional experience elsewhere [to] illuminate the relevant policy considerations."[255] Moreover, because structural considerations were also highly relevant, Justice Breyer's discussion of foreign precedent would also have helped determine which structure was most consistent with the Constitution.[256] Thus, the experience of foreign nations "cast[s] an empirical light on the consequences of different solutions to a common legal problem."[257]

A third way in which the Court can benefit from foreign precedent is by taking note of the difficulty that other countries have had in creating a rule that adequately addresses a set of issues. Learning from this experience, the Court can be either more circumspect in crafting the rule or abstain from expounding a rule altogether.[258] In *New York v. United States*, the Court refrained from crafting a general rule, in part because of the practical difficulties that other countries have had in creating a useful rule to address a similar issue.[259] Similarly, Justice David Souter, in *Washington v. Glucksberg*,[260] found that caution was necessary on the issue of physician-assisted suicide in light of the Dutch experience.[261] Thus, transnationalist scholars argue that foreign precedent is extremely beneficial to the Court because it shines an empirical light on possible solutions, allowing the Court to better decide whether to adopt or reject a particular solution,[262] or refrain from issuing a general rule.

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253. Fontana, *supra* note 57, at 567 (citations omitted).

254. *See* Mark Tushnet, *Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 U. Pa. J. Const. L. 325, 326 (1998). For further discussion on *Printz*, see *supra* Part I.D.1.d; *infra* Part III.A.1.b.iv.

255. Geoffrey R. Stone et al., Constitutional Law 255 (4th ed. 2001); *see also Printz*, 521 U.S. at 977 (Breyer, J., dissenting).

256. Stone et al., *supra* note 255, at 255; *see Printz*, 521 U.S. at 977 (Breyer, J., dissenting).

257. *Printz*, 521 U.S. at 977 (Breyer J., dissenting).

258. *See, e.g.*, New York v. United States, 326 U.S. 572 (1946).

259. *Id.* at 580 n.4, 583 n.5 (discussing the experience of Australia, Brazil, and Canada).

260. 521 U.S. 702 (1997) (presenting the issue of whether the State of Washington's proscription on physician-assisted suicide violated the Fourteenth Amendment of the U.S. Constitution).

261. *See id.* at 787-88 (Souter, J., concurring). The Netherlands has allowed physician-assisted suicide and euthanasia subject to state regulations and guidelines, which "yielded empirical evidence about how such regulations might affect actual practice." *Id.* at 785. Justice Souter found that there is "substantial dispute . . . about what the Dutch experience shows." *Id.* at 786.

262. Some scholars argue that this is a tenuous benefit because "it is risky to predict the way in which a legal doctrine will function in a new legal environment based on the way it functioned in its old one." *See* Kreimer, *supra* note 226, at 642. *But see* Fontana, *supra* note

b. *Self-Clarification*

A second benefit of using foreign law is its potential to help the Justices clarify their views and gain a better understanding of their own positions.[263] Foreign precedent can provide valuable background information on the possible range of solutions to a particular issue and may allow the Court "to clarify positions . . . allowing a more exact understanding of their ultimate conclusions."[264] David Fontana emphasizes that foreign precedent "force[s] courts to open their eyes to the true assumptions behind American constitutional law"[265] and overcome the notion that current constitutional rules were inexorably determined.[266]

Furthermore, comparative materials can often be used negatively—to reject another country's solution, rule, or standard—and the Court may benefit from examining how a foreign court disposed of particular arguments.[267]

c. *Law as a Transjudicial Debate*

Some scholars contend that the United States, the world's pioneer of constitutional court systems, ought to be engaged in the nascent transnational judicial dialogue. "'[T]he failure of the United States Supreme Court to take part in the international dialogue among the courts of the world . . . is contributing to a growing isolation and diminished influence.'"[268] These justifications for citing foreign precedent are made by transnationalist commentators, particularly referring to the human rights area.[269] Professor Gerald L. Neuman argues that the Court's eschewing of international law and foreign precedent "undermine[s] the bases of its influence" and "weaken[s] the human rights system."[270] Others argue that the Court's abstention from using foreign law is construed as "a form of

57, at 559-60 (arguing that "contextual differences" between the borrowing and lending countries can be effectively minimized).

263. *See* Schadbach, *supra* note 245, at 344 (noting that comparative study can provide "a more comprehensive understanding" of both systems being studied); Kirby, *supra* note 227, at 291.

264. Rebecca Lefler, Note, *A Comparison of Comparison: Use of 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, 171 (2001).

265. Fontana, *supra* note 57, at 568.

266. *Id.* at 568 & n.138.

267. *See* Lefler, *supra* note 264, at 171-72.

268. Melissa A. Waters, Note, *Justice Scalia on the Use of Foreign Law in Constitutional Interpretation: Unidirectional Monologue or Co-constitutive Dialogue?*, 12 Tulsa J. Comp. & Int'l L. 149, 160-61 (2004) (citation omitted).

269. *See* Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 Am. J. Int'l L. 82, 87 (2004).

270. *Id.*

unilateral arrogance, clearly arous[ing] resentment" and citing to foreign precedent may act as a "balm[] to these resentments and anxieties."[271]

Justice Breyer has also justified his citation to foreign materials in a similar manner. In a debate with Justice Scalia, Justice Breyer noted,

> [C]ourts . . . are trying to make their way in societies that didn't used to be democratic . . . . And for years people all over the world have cited the Supreme Court, why don't we cite them occasionally? They will then go to some of their legislators and others and say, "See, the Supreme Court of the United States cites us." That might give them a leg up, even if we just say it's an interesting example. So, you see, it shows we read their opinions. That's important.[272]

d. *Transparency in Judicial Reasoning and Opinions*

Lastly, another argument for citing to foreign decisions is transparency. Often judges may read foreign law or lawyers may cite to foreign law in briefs and that law may affect the judge's view of the issues. In order to infuse the Court's opinion with candor and transparency, Justices should cite the foreign precedent that affected his or her view of the case. As Justice Breyer put it, "[F]or reasons of transparency, if I thought it was helpful I might put it in. . . . But I think transparency is important in an opinion."[273] When a judge reads foreign law and it affects his or her view of the case, it is silly to suggest that the judge should not cite it merely because the law is foreign.[274]

3. Common Frameworks Put Forth for Selecting Foreign Precedent

One of the arguments leveled against proponents of using foreign precedent is that there is no useful framework for selecting and utilizing

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271. Kersch, *supra* note 94, at 377-78 (going on to recognize that this may cause "damage to the processes of domestic self-governance"). Certainly this raises the question of whether such thoughts in the international community are really a response to the Court's reticence in using foreign precedent or are really a function of American foreign policy. Nevertheless, the issue is clearly beyond the scope of this Note.

272. Scalia & Breyer Debate, *supra* note 53. While beyond the scope of this Note, it would be interesting to examine whether this justification presents any separation of powers issues insofar as the Court is, at least arguably, conducting a remote form of foreign policy and diplomacy. It should be noted that the Court has considered the foreign perceptions of America to some degree in the past. *See, e.g.*, Mary L. Dudziak, Cold War Civil Rights: Race and the Image of American Democracy (2000); Dudziak, *supra* note 72; Ruth Bader Ginsburg, Brown v. Board of Education *in International Context*, 36 Colum. Hum. Rts. L. Rev. 493, 494-95 (2005) (discussing the *Brown* Court's consideration of the effects on the American image of continued racial segregation after World War II and during the Cold War).

273. Scalia & Breyer Debate, *supra* note 53.

274. *Id.* Not everyone agrees with the transparency justification. Justice Breyer stated that while he was at a seminar he said to a congressman, "'If here I have a human being called a judge in a different country dealing with a similar problem, why don't I read what he says if it's similar enough? Maybe I'll learn something.'" *Id.* To which the congressman responded, "'Fine. Read it. Just don't cite it.'" *Id.*

it[275]—"the [comparative] discipline itself lacks a solid common methodological ground."[276] In response, some commentators have offered a variety of criteria that can help in creating a methodology for selecting, and a framework for using, foreign precedent. This section presents the various ideas offered by transnational scholars in an attempt to create such a methodology and framework.

Professor Laurence R. Helfer and Dean Anne-Marie Slaughter delineate and explain criteria they believe useful in supranational adjudication[277] and some of these criteria are applicable to the selection of foreign precedent.[278] One factor is the "composition of the tribunal" because, naturally, the decision "will wield greater authority if its members are known and respected."[279] The Court can also consider the "functional capacity" of the foreign court.[280] Overburdened dockets may indicate that the court is not dedicating sufficient time or resources to each case, which may result in less rigorous analysis.[281] Other relevant factors in considering the functional capacity of the foreign court include the court's procedures, rules on standing, fact finding, and what the powers are of the courts it is reviewing.[282] The Court should also consider the "formal authority" of the foreign court and whether its decisions are "legally binding."[283] Again, these factors are indicative of the level of legal analysis that the foreign tribunal engages in. The last three factors that are applicable to the selection of foreign precedent concern the tribunal's decisions and jurisprudence. The Court should consider the foreign tribunal's "[n]eutrality and [d]emonstrated [a]utonomy from [p]olitical [i]interests,"[284] "incrementalism,"[285] "quality of legal reasoning," whether

275. *See infra* Part II.B.2.b.

276. Schadbach, *supra* note 245, at 369.

277. *See* Helfer & Slaughter, *supra* note 36, at 298-336.

278. Indeed, Rex D. Glensy, who has also written about and attempted to resolve some of the difficulties in developing a framework to select foreign precedent, has borrowed from Professor Helfer and Dean Slaughter's criteria. *See* Rex D. Glensy, *Which Countries Count?:* Lawrence v. Texas *and the Selection of Foreign Persuasive Authority*, 45 Va. J. Int'l L. 357, 418-20 (2005).

279. Helfer & Slaughter, *supra* note 36, at 300. Another relevant subfactor here would be the areas of expertise of the members of the foreign court. *See id.* at 300-01.

280. *Id.* at 301-04.

281. *See id.* at 303.

282. *See id.* at 301-05. For example, some foreign courts are allowed to issue advisory opinions, which conflicts with the Constitution's requirement that decisions be made with regard to cases and controversies. *See* U.S. Const. art. III, § 2.

283. Helfer & Slaughter, *supra* note 36, at 304-07.

284. *Id.* at 312-14. Some scholars would question the usefulness of this factor since these scholars argue that a "[c]onstitutional [c]ourt [i]s a [p]olitical [c]ourt." Richard A. Posner, *Foreword: A Political Court*, 119 Harv. L. Rev. 31, 39-54 (2005).

285. Helfer & Slaughter, *supra* note 36, at 314-17. Incrementalism is an "awareness of political boundaries" and a recognition that law, especially constitutional law, is slow and predominately conservative. *See id.*

the foreign court itself uses foreign precedent, and the form of judicial opinions issued.[286]

Other scholars have also offered criteria for selecting foreign precedent. For example, Rex D. Glensy offers three criteria for selecting foreign authorities: whether the judgment comes from a nation that is a liberal democracy, consideration of its "[s]ocietal [c]haracter and [c]ulture," and the "[s]pecific [c]ontext of the [c]ase" in which the foreign precedent will be used.[287] David Fontana develops a sliding scale of "contextual differences" among foreign courts and the Supreme Court, such that the "more contextual differences" the Court finds "the less desirable utilizing [foreign precedent] will be."[288]

These scholars believe that foreign precedent can be soundly selected and applied to domestic issues. While "there has been a dearth of scholarship and attention devoted to the selection of foreign . . . authority," these scholars expect that a "coherent and practicable approach" to the selection of foreign precedent will develop as the discussion shifts from the justifiability of using foreign authorities to the method and selection of foreign precedent.[289]

B. *Nationalists*

This section examines the views on the other side of the debate. Part II.B.1 sets forth the views on foreign precedent of late Chief Justice Rehnquist, Justice Scalia, and Justice Thomas as set forth in their opinions and extrajudicial writings. Part II.B.2 delineates the substantive arguments against the use of foreign precedent in U.S. constitutional cases.

1. Extrajudicial Writings

In his extrajudicial writings, Chief Justice Rehnquist expressed interest in comparative constitutional law and foreign precedent, although later in his tenure he criticized its use by other Justices. At a conference celebrating the fortieth anniversary of the Basic Law of the Federal Republic of Germany, the Chief Justice noted that American courts "have been somewhat laggard in relying on comparative law and decisions of other countries."[290] The former Chief Justice went on to "predict that with so many thriving constitutional courts in the world today . . . that approach

286. *See id.* at 312-29. Whether a foreign court issues dissenting and concurring opinions can affect its quality of legal reasoning. For example, a court that has a tradition of issuing unanimous judgments may often craft judicial opinions that are ambiguous and contain "lowest common denominator statements of the law." *Id.* at 326-28. Here, nationalist scholars (and probably the U.S. Department of State) would point out the difficulty or inappropriateness of the Court making these types of determinations, many of which can potentially have foreign policy repercussions.

287. *See* Glensy, *supra* note 278, at 420, 433.

288. *See* Fontana, *supra* note 57, at 559-60.

289. Glensy, *supra* note 278, at 360.

290. Rehnquist, *supra* note 215, at 412.

will be changed in the near future."[291] Nonetheless, on the Court, the Chief Justice repeatedly joined Justices Scalia and Thomas in their criticism of other Justices' use of foreign precedent.[292]

Justice Scalia has expressed sharp disapproval of using foreign precedent law in the Court's decisions. Justice Scalia's principal objection with using foreign precedent law stems from its conflict with his judicial philosophy.[293] As an originalist, Justice Scalia interprets the Constitution by asking "what [the Constitution] meant, what was understood by the society to mean when . . . [the Constitution] was adopted."[294] Thus, foreign precedent is immaterial because it is silent on what the Constitution meant when it was adopted. Foreign precedent is similarly useless to the task of ascertaining what the founders understood a particular constitutional phrase, such as "cruel and unusual punishment" or "due process," to mean. As Justice Scalia asserts, "[foreign law] is very useful in devising a constitution," but not in interpreting one.[295]

2. Arguments Against the Use of Foreign Precedent

This section outlines the arguments against the use of foreign precedent in deciding U.S. constitutional cases. These arguments can be broken down into two categories: democratic and informational.

a. *Democratic Objections*

In *Chisholm v. Georgia*,[296] Justice James Wilson complained of those offering toasts to the United States.[297] Such toasts were meant to praise "the *first* great object in the Union" and, as such, they should be given to the "People of the United States."[298] To Wilson it was shocking that barely a decade after the Revolution was fought and won, citizens would forget that it was not the United States government that won the war—but "We the People."[299] Wilson's point resonates in the minds of scholars that argue against the usage of foreign precedent. These scholars argue that the practice is inherently undemocratic for the variety of reasons set forth below.

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291. *Id.*

292. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting); Atkins v. Virginia, 536 U.S. 304, 347-48 (2002) (Scalia, J., dissenting); Printz v. United States, 521 U.S. 898, 921 n.11 (1997) (Scalia, J.); Thompson v. Oklahoma, 487 U.S. 815, 874-78 (1988) (Scalia, J., dissenting).

293. Scalia & Breyer Debate, *supra* note 53.

294. *Id.*

295. *Id.*

296. 2 U.S. (1 Dall.) 419 (1793), *superseded by constitutional amendment*, U.S. Const. amend XI.

297. *Id.* at 462 (Wilson, J., seriatim opinion).

298. *Id.*

299. *See* Rogers M. Smith, Civil Ideals: Conflicting Visions of Citizenship in U.S. History 137 (1997) ("Wilson wished to stress, in good republican fashion, that the people, not their government, were sovereign.").

i. The Countermajoritarian Difficulty and Foreign Precedent

In democracies, popular will is the supreme ruler. In America, popular will is a supreme ruler—until the more supreme Supreme Court says it is not.[300] This is the "countermajoritarian difficulty."[301] In a democracy, it is problematic for unelected judges to invalidate laws which are enacted by the people's democratically elected representatives.[302] In America, limits on democracy are looked at askance,[303] even when the limits are imposed by judges who, though unelected, are appointed and confirmed by democratic institutions.[304] The countermajoritarian difficulty is further exacerbated by the practice of citing foreign precedent.[305]

There are several reasons why the countermajoritarian problem is aggravated by the use of foreign precedent. First, nationalist scholars argue that the American people have absolutely no democratic control over foreign laws, either through elections or judicial appointment by elected officials.[306] Furthermore, and in contrast to American judges, foreign judges are not subjected to the ruthless and unremitting debates over whether their judicial philosophies comport with "mainstream" American judicial thought.[307] These debates are important because they limit the field

300. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). For an interesting bit of history on how the principle of judicial review expounded in *Marbury* was almost relinquished as a compromise to the impeachment of Justice Samuel Chase, see Peter Irons, A People's History of the Supreme Court 109-11 (1999) (quoting a private letter from Chief Justice John Marshall to Justice Chase).

301. *See* Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16 (1962) (noting that the problem is that "judicial review is a counter-majoritarian force in our system").

302. For a thorough discussion of the countermajoritarian difficulty throughout American history, see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. Rev. 333 (1998); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 Geo. L.J. 1 (2002); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. Rev. 1383 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. Pa. L. Rev. 971 (2000); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 Yale L.J. 153 (2002).

303. *See* Martin S. Flaherty, *The Better Angels of Self-Government*, 71 Fordham L. Rev. 1773, 1775 (2003) (noting that "constitutional limitations inevitably appear suspect, especially when enforced by unelected judges").

304. *See* U.S. Const. art. II, § 2, cl. 2.

305. *See* Posner, *supra* note 284, at 88-89.

306. *See* Alford, *supra* note 226, at 58 ("Using global opinions as a means of constitutional interpretation dramatically undermines sovereignty by utilizing the one vehicle—constitutional supremacy—that can trump the democratic will reflected in state and federal legislative and executive pronouncements."); Posner, *supra* note 284, at 88. This is an area of possible further research: Are the democratic objections to foreign precedent as persuasive against foreign statutory laws (assuming such laws are enacted by a democratic legislature) as they are against judge-made case law?

307. The debates regarding the nominations of Janice Rogers Brown to the United States Court of Appeals for the District of Columbia and Robert Bork to the Supreme Court are illustrative.

of potential candidates for federal judgeships and similarly limit the ideological range of judicial decisions.[308]

Second, the countermajoritarian problem peaks when foreign precedent is used in cases involving "constitutional understandings of community standards,"[309] such as what constitutes "cruel and unusual punishment[]."[310] When the countermajoritarian problem is taken at face value, it is tenuous to claim that foreign precedent can aid in constitutional interpretation. If domestic "majoritarian values" are in accord with those of the international community, then foreign precedent is superfluous.[311] If, alternatively, international majoritarian values are in conflict with domestic majoritarian values, democratic principles would require that domestic values trump international values and thus foreign precedent is unnecessary.[312]

Third, nationalist scholars argue that the use of foreign precedent conflicts with the "structure and history" of the Constitution.[313] At its inception, the Constitution was a unique compromise among states that were suspicious of strong centralized powers.[314] "American federalism was a clear rejection of the values that European governments held at the time."[315] A federalist form of government is especially useful for dealing with contentious social issues, since such issues may be left to the states to decide individually and, presumably, in accordance with the majority views of their constituencies.[316] However, nationalist scholars argue that the use of foreign laws can potentially undermine our federal system by eviscerating the states' power to legislate on these issues.[317] Foreign

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308. *See* Posner, *supra* note 284, at 89.

309. Alford, *supra* note 226, at 58.

310. U.S. Const. amend. VIII.

311. Alford, *supra* note 226, at 59; Levinson, *supra* note 1, at 360 (noting that only differences among nations present "potentially interesting dilemmas").

312. Alford, *supra* note 226, at 59. This argument, of course, ignores the fact that there can be other situations where foreign precedent would be less offensive to democratic control. One is where there is a close call about whether national values are majoritarian. In such cases, the argument can be made that foreign precedent would function as a tie breaker—the equivalent of baseball's "tie goes to the runner" rule. Under this view, a tie would be decided by international majoritarian values. Another plausible, though much less likely, situation would be where national majoritarian values are so egregiously unjust or mistaken that international majoritarian values could be relevant.

313. *See* J. Harvie Wilkinson III, Judge, U.S. Court of Appeals for the Fourth Circuit, Debate from the Federalist Society National Lawyer's Conference, The Use of International Law in Judicial Decisions (Nov. 15, 2003), *in* 27 Harv. J.L. & Pub. Pol'y 423, 427 (2004).

314. *See, e.g.*, The Federalist No. 45, at 254 (James Madison) (E.H. Scott ed., 2002) (asking whether the powers given to the Federal government as a whole "will be dangerous" to the States).

315. Wilkinson, *supra* note 313, at 427.

316. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

317. *See* Wilkinson, *supra* note 313, at 428 (arguing that the use of foreign materials constitutes a "profound threat to our federalism").

precedent provides the Court with more support and reasons to invade areas of State power,[318] tipping scales of the state-federal balance in favor of the federal government.[319] To the extent that "state and local governments provide citizens a sense of control and empowerment in our democratic system, resort to international standards will convey a correspondingly magnified sense of helplessness and disenfranchisement"[320]—amplifying the countermajoritarian difficultly.

ii. Threatening the Court's Legitimacy

Related to the countermajoritarian difficulty is the argument that usage of foreign precedent threatens the Court's institutional legitimacy.[321] Because of the fundamental conflict between democratic government and judicial review, the Court is most legitimate when it "persuade[s], and not merely declare[s]."[322] Nationalist scholars argue that the Court's rulings are most persuasive when they invoke "common principles and ideas that form our shared American heritage."[323] In contrast, when the Court draws on foreign laws, it dilutes "democratic accountability and popular acceptance,"[324] thus appearing tyrannical and diminishing its legitimacy. Moreover, "reliance on foreign precedents may stimulate popular perceptions that judges are out of touch with American culture"[325] or, at least, segments of American culture.

Judge Posner argues that the need to persuade (and thus rule "cautious[ly]" and "respectful of public opinion and strong disagreement") is much more acute for the Supreme Court[326] because of the tremendous difficulty that is involved in overruling a constitutional decision by amendment.[327] Indeed, an extremely unpopular decision may subject an American Justice to impeachment before the Constitution can be amended to overrule that decision.[328] For many foreign countries it is relatively easy to overrule a constitutional decision—most requiring only a two-thirds vote

318. *See* Alford, *supra* note 226, at 60, 61 n.29 (employing the Court's use of foreign precedent in *Atkins v. Virginia*, 536 U.S. 304 (2002), as an example of the Court intruding into an area where "'deference . . . [is] owe[d] to the decisions of the state legislatures'" (quoting Gregg v. Georgia, 428 U.S. 153, 176 (1976))).

319. For a discussion on how Dean Koh, a transnational scholar, disagrees with Alford's arguments based on the international countermajoritarian difficulty, see Alford, *supra* note 226, at 61 n.30.

320. Wilkinson, *supra* note 313, at 428.

321. *See id.* at 426.

322. Posner, *supra* note 284, at 89.

323. Wilkinson, *supra* note 313, at 426.

324. *See id.* at 425-26 (stating that "over-reliance on foreign precedents may serve to compromise judicial decisions in the eyes of the American public").

325. *Id.* at 426.

326. Posner, *supra* note 284, at 89.

327. *See* U.S. Const. art. V.

328. *See* Posner, *supra* note 284, at 89 (conjecturing that Justices Hugo Black and Douglas would have "been flirting with impeachment" had their position that obscenity is absolutely protected by the First Amendment prevailed on the Court).

by their legislature.[329] One possible consequence of this is that the constitutional judges of foreign countries are less exacting in their analysis, more amenable to legal experimentation, and "indulg[ent] [of] their personal views."[330] In other words, because our Justices recognize that their ruling will, in all likelihood, be final, they will proceed with more caution, engage in rigorous analysis, and hesitate before engaging in experimentation. This institutional mismatch between many foreign courts and our Supreme Court, nationalist scholars argue, presents yet another reason why the Court should refrain from citing foreign precedent. Judge Posner posits, "Our Justices are fooled if they think that the audaciously progressive opinions expressed by foreign constitutional judges would be the same if those judges had the power of our Justices."[331]

iii. Constitutional Exceptionalism and Particularism

Exceptionalism is the idea that the Constitution is unique, as are the experiences surrounding its inception.[332] Exceptionalism has been constantly reinforced throughout the history of American constitutional law. Indeed, "American constitutional theory . . . evidences a clear isolationism"[333] and, particularly the textualist school of constitutional interpretation, features a pervasive "'heroic' vision of the Constitution."[334] If one holds an exceptionalist view of the Constitution and the founding, it is easy to see why foreign precedent is objectionable and irrelevant.[335] A corollary to the idea that the Constitution and founding were a uniquely American creation and experience, is the idea that "exclusively domestic sources should be used to interpret the Constitution."[336] Certainly,

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329. *See id.* at 89 n.167 ("Of the forty-seven countries that have a separate constitutional court and for which the requisite data were found, 79% allow a two-thirds vote by the legislature to overrule a decision.").

330. *Id.* at 89 (analogizing judges who are more bold when they do not have the last word to "dogs [that] bark more ferociously when they are behind a fence").

331. *Id.*

332. *See* Bruce Ackerman, We the People: Foundations 2 n.12 (1991) (taking note of the idea that the U.S. should define itself without foreign influence); Harding, *supra* note 56, at 421 (observing that research and commentary on U.S. constitutional law focuses on "the uniqueness of American constitutional experience"); Mark Tushnet, Taking the Constitution Away from the Courts 181-82, 188-93 (1999) (describing the Constitution as an expression of American character); Michael Kammen, *The United States Constitution, Public Opinion, and the Problem of American Exceptionalism*, *in* The United States Constitution: Roots, Rights, and Responsibilities 267 (A.E. Dick Howard ed., 1992); Louis J. Blum, Note, *Mixed Signals: The Limited Role of Comparative Analysis in Constitutional Adjudication*, 39 San Diego L. Rev. 157, 163 (2002); Raalf, *supra* note 13, at 1245 (discussing exceptionalism as one of the "threshold" objections to using comparative materials).

333. Harding, *supra* note 56, at 421.

334. *Id.* (citing David Strauss, *The New Textualism in Constitutional Law*, 66 Geo. Wash. L. Rev. 1153, 1154 (1998)); *see also* David Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 Yale L.J. 1717, 1719 (2003) (observing that admiration of the Constitution, the Founding Fathers, and the period of the Founding "are central to what it means to be an American").

335. *See* Raalf, *supra* note 13, at 1246 & n.40.

336. *Id.* at 1245.

"[c]onform[ing] to the interpretation of a foreign tribunal would challenge . . . [this] uniqueness.[337] Therefore, exceptionalists argue that foreign precedent can play no part in the Court's constitutional interpretation.

Constitutional particularism is the idea that the Constitution is an "important aspect[] of national identity."[338] While similar to the concept of exceptionalism, particularism is distinct in significant ways. Exceptionalism focuses on the uniqueness of the Constitution and the circumstances surrounding its framing,[339] while particularist focus is on the American people, who, under a particulist view, define the Constitution.[340] The particularist argument is that "[constitutional] tests are inherently ambiguous and require reference to extra-textual sources for their interpretation and application in concrete cases" and "courts, as a matter of empirical fact, do not look outward to foreign experiences; rather, they turn inward to sources which are internal to a particular country."[341] The Supreme Court's use of non-foreign sources of law, as a matter of course,[342] reflects the idea that constitutional decisions should "reflect . . . the legal culture in which the dispute is embedded, and, as such, are expressions of the . . . [Court's] constitutional identities.[343] Thus, the particularist objection to the use of foreign precedent is that, because the Constitution is defined by the American people, foreign precedent is irrelevant and useless in its interpretation.[344]

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337. *Id.* at 1246 n.38. For some possible responses to the exceptionalist argument, see *id.* at 1251-57.

338. *See* Choudhry, *supra* note 97, at 830; *see also* Blum, *supra* note 332, at 163 n.28 (noting that William P. Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 Wash. L. Rev. 945 (1986), George P. Fletcher, *Constitutional Identity*, 14 Cardozo L. Rev. 737 (1993), and Frederick Schauer, *Free Speech and the Cultural Contingency of Constitutional Categories*, 14 Cardozo L. Rev. 865 (1993), offer particularist objections to comparative constitutional analysis); Raalf, *supra* note 13, at 1249.

339. *See* Harding, *supra* note 56, at 421 (discussing the "uniqueness of American constitutional experience").

340. *See* Raalf, *supra* note 13, at 1249-50 ("[C]onstitutions are an integral component of national identity, and reflect one way in which those nations view themselves as different from others." (citation omitted)); *see also* Kreimer, *supra* note 226, at 649. A related objection is that the Court's use of foreign precedent interferes with the "President['s] and Congress['s] . . . control over American accession to international norms." *See* Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 Harv. L. Rev. 148, 163 (2005).

341. Choudhry, *supra* note 97, at 830, 831.

342. Historically, the Supreme Court has not often used foreign precedent narrowly construed. *See supra* Part I.C.

343. Choudhry, *supra* note 97, at 831 (internal quotations and citations omitted).

344. *See* Raalf, *supra* note 13, at 1249-50. Raalf goes on to observe that "implied authorization," the idea that "it is a part of the fabric of both the constitution and culture of the particular nation to be involved in the global discourse," constitutes a counter argument to the particularist objection. *See id.* at 1251.

b. *Informational Objections*

The following two objections to the Court's practice of citing foreign precedent, lack of institutional capacity and lack of a sound framework and methodology, are information based. These arguments are based on the idea that the Court does not currently have, and perhaps never will have, sufficient information or capacity to successfully deploy foreign precedent in its constitutional analysis.

i. Lack of Institutional Capacity

Nationalist scholars argue that the Court does not have the institutional capacity to use such materials correctly and thus "unduly relies on advocacy at its peril."[345] While David Fontana argues that trial courts have the means to make extensive use of comparative law by appointing experts and special masters,[346] he recognizes that this is probably not the case with the Supreme Court.[347] As a result, the Court must either rely on counsel to brief arguments based on foreign precedent or on its own research and limited knowledge of foreign precedent. Nationalist scholars argue that this is problematic because many lawyers and "expert advocates will . . . include in the international grab bag . . . only those international objects that promote a particular result."[348]

Supreme Court Justices (and even, more generally, American lawyers) are not usually trained in comparative law, are monolingual, and lack familiarity with the "complex social, political, cultural, and historical backgrounds" from which foreign decisions emerge.[349] This lack of

345. Alford, *supra* note 226, at 65; *see also* Young, *supra* note 340, at 165-66 (arguing that the Court's use of foreign precedent increases "decision costs (the time, effort, and expense involved in deciding cases in a particular way) and its error costs (the likelihood of making mistakes by pursuing a particular method)").

346. *See* Fontana, *supra* note 57, at 562-64. Fontana argues that trial courts can use Federal Rule of Civil Procedure ("FRCP") 44, providing for notice of intent to use foreign law to the court and adversaries, FRCP 53, providing for the appointment of special masters, and Federal Rule of Evidence ("FRE") 706, providing for the appointment of expert witnesses to assist the trial court in properly determining the relevance, scope, and applicability of foreign law. *See id.* While beyond the reach of this Note, it is useful to point out that trial judges would rarely, if ever, utilize these provisions to employ foreign precedent for several reasons. First, foreign precedent narrowly construed is rarely used or even needed at the trial court level. Second, even if foreign precedent were relevant to a determination at trial, the appointment of experts and special masters is a costly and time-consuming business, which trial judges are loath to engage in.

347. *Id.* at 565 n.124 (pointing out that there is a question as to whether the Supreme Court can appoint special masters for cases not within the Court's original jurisdiction). Fontana argues, however, that the Supreme Court could rely on trial courts that have used foreign precedent under the power given to them by the FRCP and FRE. While this is theoretically true, in practice trial courts will rarely, if ever, use these powers to employ foreign precedent. *See supra* note 346.

348. Alford, *supra* note 226, at 65.

349. Posner, *supra* note 284, at 86 (observing that the "judicial systems of the world are immensely varied and most of their decisions [are] inaccessible as a practical matter to our mostly monolingual judges and law clerks").

expertise and training increases the likelihood that the Court will "haphazardly use international sources that are at hand, (perhaps unwittingly) eschewing a systematic, empirical approach that comprehensively examines all 'relevant' international sources."[350] This places the Court under the sword of Damocles:[351] If it relies on lawyers briefing foreign precedent, it risks being misled because it does not have the expertise to see through their zealous advocacy; if it raises foreign precedent sua sponte, it risks erring precisely because of its lack of expertise. Therefore, nationalist scholars believe that the Court, as an institution, inherently lacks the capacity to use foreign precedent in any constructive or substantive way.[352]

ii. Lack of Framework and Methodology for Selecting and Using Foreign Precedent

Another set of information based arguments against the use of foreign precedent stem from the lack of a sound framework for selecting and applying it.[353] Nationalist scholars' argument is twofold: First, in its current state, the Court's selection of foreign precedent is results oriented and, second, there is doubt as to whether there can be a systematic and substantive way to apply foreign precedent.

To date, neither the Court nor transnationalist commentators have "articulated a coherent and consistent" method for selecting foreign precedents.[354] This leads to the conclusion that "such selections are self-serving."[355] Indeed, nationalist commentators argue that the Court's current use of foreign precedent is extremely results oriented.[356] The Court only uses foreign precedents "if they are . . . rights enhancing."[357]

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350. Alford, *supra* note 226, at 66. Alford concludes that the Court is at risk of engaging in "comparativism lite," in the same manner that Professor Flaherty argues that the Court has done with history. *See id.* at 67 (citing Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 Colum. L. Rev. 523 (1995)).

351. Damocles, a courtier of Dionysius I of Syracuse, often spoke licentiously about the happiness of Dionysius. Dionysius, in order to demonstrate the precarious nature of his sovereignty, invited Damocles to a lavish banquet and seated him under an unsheathed sword suspended by a single hair. Thus, the phrase under "the sword of Damocles" is meant to signify "an ever present peril." *See* Columbia Encyclopedia, *Damocles* 714 (6th ed. 2005), *available at* http://www.bartleby.com/65/da/Damocles.html.

352. One should take notice that the problem of capacity is not an insurmountable one. Perhaps future generations of American lawyers will acquire the knowledge and language skills necessary to successfully employ foreign precedent. Furthermore, as interest in foreign countries and comparative law increases, so will the resources available to practitioners and judges. For further discussion on the increase of international resources provided by judicial globalization, see *supra* Part I.B.

353. Alford, *supra* note 226, at 66.

354. Glensy, *supra* note 278, at 401.

355. *Id.*

356. *Id.*

357. Alford, *supra* note 226, at 67 & n.79 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003), as an example where the Court did not cite foreign precedent which would have

Nationalist scholars highlight that where Justice Kennedy cites foreign decisions for support in striking down a statute banning homosexual sodomy, Justice Scalia could just as easily cite to foreign "precedents supporting his views on homosexuality, abortion, capital punishment, and the role of religion in public life—for such precedents are abundant in the world's courts."[358] Another vice of this results-oriented approach is that it greatly increases the discretion of the Justices, because support for practically any proposition can be garnered if, as Judge Posner put it, one "troll[s] deeply enough in the world's corpora juris to find it."[359] Thus, nationalist scholars argue that the Court's current use of foreign precedent is ad hoc, results oriented, and unduly increases judicial discretion—further exacerbating the countermajoritarian difficulty and legitimacy problem.[360]

A related concern of nationalist scholars is that, once the foreign precedent has been selected, there are no useful guidelines for how to use it or to determine what effect it should have.[361] Should foreign precedent be used as a "global 'nose count,'"[362] or evidence of universality (like natural law)?[363] Should foreign precedent have the effect of binding law,[364] or persuasive authority?[365] If foreign precedent will have the effect of persuasive authority, then are there (or can there be) any criteria to systematize the Court's analysis of the arguments and minimize "transplantation problems"[366] or will it be left to each individual Justice's discretion?[367] Until these questions are satisfactorily answered, nationalist

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supported the proposition that the state's police power extends to morality). For further discussion of *Lawrence*, see *infra* Parts I.E.1.e, III.A.1.b.v.

358. *See* Posner, *supra* note 284, at 86. Indeed, if such a scenario ever transpires, the persuasiveness of the precedent would be reduced. Either the precedents on both sides would cancel each other out or judges and lawyers would be forced to determine which side's foreign precedent is more persuasive, certainly a tedious exercise and probably an impossible one.

359. *Id.* at 86; *see also Judge Roberts's Nomination Hearings*, *supra* note 25 (statement of Sen. Jon Kyl) ("[R]elying on foreign precedent doesn't confine judges. It doesn't limit their discretion the way relying on domestic precedent does. Domestic precedent can confine and shape the discretion of the judges. Foreign law, you can find anything you want.").

360. For further discussion on the countermajoritarian difficulty and legitimacy problems, see *supra* Part II.B.2.a.i-ii.

361. Alford, *supra* note 226, at 64 (calling the Court's current practice "haphazard" rather than "empirical . . . comparativism").

362. *See* Koh, *supra* note 37, at 56.

363. Posner, *supra* note 284, at 85. For a defense of natural law, see Robert P. George, In Defense of Natural Law (1999).

364. *See* Fontana, *supra* note 227, at 468 (noting that Professor Tushnet believes that objections to "situations in which American courts *must* use transnational law . . . amount to a 'tempest in a teapot'").

365. *See id.* at 449 (discussing transnational law as persuasive authority).

366. *See* Raalf, *supra* note 13, at 1248 (defining the transplantation problem as a situation where the countries being compared have elements that are inherently unique to each system).

367. *See* Alford, *supra* note 226, at 66-67. For a discussion of judicial discretion in the context of the dichotomy between rules and standards, see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989).

scholars argue, the Court should refrain from employing foreign precedent, so as to limit judicial discretion and democratic objections.

C. *Judge Richard Posner's View: Citing to Foreign Precedent for Informational Purposes Only*

This section discusses the idea of citing foreign precedent only when it contains valuable information or knowledge, in lieu of using it as persuasive authority.[368] Judge Posner objects to "citing . . . foreign decision[s] as authority in . . . case[s] involving" constitutional principles.[369] Posner explains that American courts should not even cite to foreign law even as persuasive authority.[370] Persuasive citations carry an "intrinsic persuasiveness" that is separate from the opinion's raison d'être.[371] That intrinsic persuasiveness flows from the fact that it was decided by a court, cloaked with authority, having "similar values, traditions, and outlook."[372] Accordingly, "[i]f many . . . courts have converged on a particular rule or doctrine, the fact of convergence will push a court that is confronted with the question for the first time toward the same result unless it has strong contrary feelings about the particular case."[373] Thus, the fact that a Court is using foreign precedent for its persuasive value does not defeat or even reduce the objections that nationalist scholars raise.[374]

However, Judge Posner does not object to all citations to foreign decisions.[375] Citations to foreign decisions are permissible when used as a source of arguments or helpful or interesting facts, rather than as support for the court's decision or rationales.[376] Judge Posner's point is that a foreign decision should be treated as a treatise or law review article, such that it is cited because of its value as knowledge rather than because it has "any force as precedent or . . . authority."[377]

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368. For a thorough discussion of persuasive authority, see H. Patrick Glenn, *Persuasive Authority*, 32 McGill L.J. 261 (1987).

369. Posting of Richard Posner to Leiter Reports Blog, http://leiterreports.typepad.com/blog/guest_blogger_richard_posner/index.html (Dec. 28, 2004, 11:56 EST) [hereinafter Posting on Leiter Blog].

370. *See id.*

371. Richard Posner, *No Thanks, We Have Our Own Laws*, Legal Aff., July/Aug. 2004, at 41, *available at* http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp.

372. *Id.*

373. *Id.*

374. For a discussion of these objections, see *supra* Part II.B.2.

375. *See* Posting on Leiter Blog, *supra* note 369 ("clarify[ing] what [he] mean[s] by saying that judges can properly (in [his] view) cite foreign cases as [a] source of relevant information, but not as precedents").

376. *See id.*

377. Posner, *supra* note 371, at 41.

III. REEVALUATING THE DEBATE SURROUNDING THE SUPREME COURT'S USE OF FOREIGN PRECEDENT IN LIGHT OF ITS RHETORICAL USE

This part demonstrates that an analysis of the five most controversial Supreme Court cases citing foreign precedent reveals that the Court's use of foreign precedent is inconsequential and thus more rhetorical than substantive. Subsequently two suggestions are made. The first is that the debate over the propriety of citing foreign precedent should be reevaluated in light of the Court's inconsequential and rhetorical usage. Second, this part posits that foreign precedent is more effective and less controversial if used for informational purposes, rather than as support for the Court's holding.

A. *A Debate Fueled More by Rhetoric than Substance*

1. Foreign Precedent Does Trivial Work in the Court's Jurisprudence

a. *Defining "Work" and Creating an Analytical Framework*

This Note argues that the Supreme Court's use of foreign precedent is rhetorical and bases that conclusion on an analysis of five controversial Court cases. Several ideas and concepts, however, need to be defined prior to delving into such an analysis. This section will define these ideas and concepts, beginning with a definition of what the Note will mean by the term "work" and then go on to provide a rudimentary framework of factors to analyze whether the work that foreign precedent does in Supreme Court decisions is rhetorical or robust.

The term "work" can be defined as the degree to which the foreign precedent, standing alone and apart from any other reasons or rationales, would make it more likely that the Court or a Justice will rule in accordance with that precedent. This definition characterizes the amount of work that foreign precedent does as varying in accordance with the Court's usage. The amount of work that a precedent does in an opinion can vary for a number of reasons, which can be described as intrinsic or extrinsic to the precedent. An intrinsic reason for this variance in work is that the precedent is only tangentially related to the holding of the case. Examples of extrinsic reasons are: The precedent is mentioned in a part of the opinion that is obiter dictum, constitutes cumulative authority, or the precedent may not be sufficiently explained and analyzed and is therefore unpersuasive.[378]

Conceptually, the work that foreign precedent does can be thought of as on a continuum or sliding scale. At one end of the continuum the

378. Unlike domestic precedents, which are sometimes offered as authority without explanation, the same is not true for foreign precedents. Foreign precedents are generally unknown to American lawyers and courts and therefore, to constitute persuasive authority, must have an explanation or discussion of the opinion. *See supra* notes 345-52 and accompanying text.

precedent's work can be characterized as robust. Here, an analysis of the court's use of the foreign precedent reveals that the precedent was a substantial reason that the court ruled the way it did. At the opposite end of the continuum, the work that foreign precedent does can be thought of as rhetorical or cumulative. In these cases, the court's use of the foreign precedent reveals that the precedent made it no more likely that the court ruled in accordance with the precedent—thus, the work that the foreign precedent does can be thought of as rhetorical.

Before moving on to a general set of factors that can help determine how much work foreign precedent does, an important question must first be answered. Is it even plausible to determine the amount of work that one particular precedent or authority does in an opinion? Undeniably, determining the exact amount of work that a precedent does is an impossible task. However, the claim that it is impossible to gain at least some general insights into the amount of work that a precedent does is easily dismissed apagogically.

If it were impossible to garner at least some general impression of the degree that a precedent, standing alone, makes it more likely that the court would rule in accordance with that precedent, then it is futile to cite to precedents at all. Why should a court cite to an authority if the reader cannot begin to fathom how likely that precedent made it that the court would rule in accordance with it? The very idea of supporting a decision with precedents or authorities assumes that the reader can garner at least some insight into how much that precedent supports or militates against the holding. Thus, it must be possible to generate some impression of the amount of work that foreign precedent does in an opinion. Thinking of work as on a continuum from robust to rhetorical avoids a level of specificity that is impossible, but allows for some general conclusions about the Supreme Court's use of foreign precedents.

The task, though not impossible, is nebulous and slippery, evocative of the visceral reaction that Justice Potter Stewart had to the similarly nebulous task of defining obscenity: "I know it when I see it."[379] To determine where on the continuum a particular foreign precedent falls, that precedent, as well as the opinion it is cited in, must be analyzed under a totality of the circumstances type test.

A few words about the value of limiting this analysis to the four corners of the opinion: Although decisions are affected by an infinite number of factors, some apparent and others undiscoverable, future courts and lawyers can only cite as authority what is written in the opinion. As far as future courts and lawyers are concerned, foreign precedent is only as robust and persuasive as the Court's opinion indicates. Accordingly, an analysis of the work that foreign precedent does should occur within the four corners of the opinion. Furthermore, because many of the factors that influence a Justice's decision in a case are undiscoverable, and thus not subject to either

379. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

qualitative or quantitative analysis,[380] the following framework is more procedural rather than substantive. Necessity, not choice, has given the framework this procedural nature.

To determine the amount of work that foreign precedent does in an opinion, the foreign precedents and the rationales that stem from them must be compared and weighed against other rationales supported by domestic sources of authority. The more the court relied on the foreign precedents and rationales relative to its reliance on domestic precedents and rationales, the more work that the foreign precedent does in that opinion. The circumstances under which the foreign precedent was employed can also be examined. For example, how much did the court emphasize the foreign precedent and with what language did the court describe and set forth the foreign precedent? Did the court engage in an in-depth and comprehensive examination of the foreign opinion and its rationales? Did the court use the foreign precedent for the merit or correctness of the opinion's conclusion or for some other purpose? Where in the opinion is foreign precedent discussed—towards the end of the opinion after in-depth discussion of other rationales or in a footnote? How much foreign precedent did the court use? These questions, when taken together, form a rudimentary framework that can help determine, generally, whether the Supreme Court uses foreign precedent in a robust and substantive fashion or simply as a rhetorical tool.

b. *Analysis*

While the controversy over the Supreme Court's use of foreign precedent is quite extensive, pervading politics, the media, blogs, and legal circles,[381] it is not clear that the Court's utilization of foreign precedent is of any consequence to its opinions. If the Court's use of foreign precedent is indeed more rhetorical than robust, it seems, at the very least, that the debate should be reevaluated. The following section will use the definition of work and the framework developed in the previous section to show that the work that foreign precedent does in the Court opinions discussed in Part I.E.1 is rhetorical.

i. *Atkins v. Virginia*

In *Atkins v. Virginia*,[382] the Supreme Court's use of foreign precedent was minimal—limited to a footnote.[383] Using the totality of the

380. For example, a particular Justice may feel that foreign precedent decided the issue for him or her. However, the strength of the foreign precedent, as far as other courts and lawyers can tell, will be lost unless the Justice makes clear the dispositive nature of the precedent.

381. For further discussion on the controversy over the Court's use of foreign precedent in politics, the popular media, blogs, and legal circles, see *supra* Part I.A.

382. 536 U.S. 304 (2002). For a brief synopsis of *Atkins*, see *supra* Part I.E.1.a.

383. *Atkins*, 536 U.S. at 316 n.21; *see supra* note 127 and accompanying text.

circumstances test[384] it is clear that the Court's use of foreign precedent was inconsequential and thus it fell on the rhetorical side of the robust-rhetorical continuum. A comparison of the arguments based on foreign precedent to the domestic-based arguments reveals that the domestic arguments were more substantial both quantitatively and qualitatively. The only foreign-based argument given was offered in a footnote stating that the world community "overwhelmingly disapproved" of the execution of mentally retarded criminals.[385]

Conversely, throughout its analysis the Court supported its holding in terms of national values.[386] The Court observed that since 1986 eighteen states and the Federal government had enacted laws prohibiting the execution of mentally retarded felons, in addition to the fourteen states that prohibit the death penalty altogether.[387] After this discussion of the issue as addressed by state legislatures, the Court concluded that there was "a national consensus" against executing mentally retarded felons.[388] Thus, a comparison of foreign-based rationales to domestic-based rationales reveals that the Court's decision relied almost exclusively on the latter.

Other factors do not indicate that the foreign precedent did anything other than rhetorical work in the Court's decision to strike down state laws permitting the execution of mentally retarded felons. The Court's citation to standards of the "world community" was buried in a footnote at the end of its discussion of the states' trend towards non-execution.[389] Moreover, the Court's citation was to the Brief for the European Union as Amicus Curiae ("EU Brief") and did not feature any analysis or discussion of world or European legal standards.[390] What's more, the Court actually went out of its way to limit the effect of the footnote. The Court warned that the views of the world community "are by no means dispositive" and that they only "len[t] further support" to the Court's conclusion.[391] Lastly, the quantity of foreign precedent used does not indicate that these precedents were a significant factor in the decision, since the only citation was to the EU Brief.[392] Therefore, in *Atkins*, the Court's use of foreign precedent fell on the rhetorical side of the robust-rhetorical continuum because the foreign precedent made it no more likely that the Court would decide the way it did.

384. For an explanation of the totality of the circumstances test, see *supra* Part III.A.1.a.
385. *Atkins*, 536 U.S. at 316 n.21.
386. *See supra* notes 122-26 and accompanying text.
387. *Atkins*, 536 U.S. at 313-15.
388. *Id.* at 316.
389. *Id.* at 316 n.21.
390. *Id.* at 316.
391. *Id.* at 316 n.21; *see also* Raalf, *supra* note 13, at 1288 (arguing that "language which disclaims or otherwise attempts to reduce the impact of comparative materials" reduces the persuasive force of the precedent).
392. *Atkins*, 536 U.S. at 316 n.21.

ii. *Knight v. Florida*

Justice Breyer's reliance on foreign precedent in his dissent in *Knight v. Florida*[393] was a bit more extensive than that of the *Atkins* Court. A comparison of Justice Breyer's use of foreign- and domestic-based precedents and arguments reveals that the use of foreign precedent fell somewhat more towards the center of the robust-rhetorical continuum, but was still closer to rhetorical. To support his argument (that the Court should issue certiorari on the question of whether it is cruel and unusual to execute felons who have spent nearly twenty years on death row),[394] Justice Breyer relied on numerous domestic authorities and arguments, including three Supreme Court decisions, one of them penned by Justice Frankfurter, an empirical study published in an American law journal, and an argument that lengthy delays could not be justified in terms of an originalist conception of the Eighth Amendment.[395] These domestic authorities and arguments supported Justice Breyer's conclusion that Petitioners' appeal was sufficiently meritorious to warrant a grant of certiorari.[396]

After setting forth the domestic precedents, Justice Breyer then relied on four foreign cases that considered the length of delay between sentencing and the imposition of the death penalty in deciding whether the execution would violate cruelty standards.[397] Justice Breyer's analysis and depth of discussion was about the same for both domestic and foreign precedents.[398] However, toward the end of the analysis of foreign cases, Justice Breyer limited the effectiveness of the foreign precedents by noting that the "United States Senate insisted on reservations to language imposing similar standards in various human rights treaties."[399] In other words, the Senate rejected the very standards found in the precedents Justice Breyer was citing. This constitutes an intrinsic reason why foreign precedent does less work in this dissent.[400] The precedent itself is less persuasive and therefore less useful as an authority in the context of this opinion.

Moreover, the context and type of the opinion in which the foreign precedent appears also diminishes the work that it does. In *Knight*, Justice Breyer utilized foreign precedents less for the correctness of their conclusion and more to argue that the petitioners may have had a meritorious claim worthy of a grant of certiorari.[401] Therefore, Justice

393. 528 U.S. 990, 995-98 (1999) (Breyer, J., dissenting). For a brief synopsis of Justice Breyer's dissent in *Knight*, see *supra* notes 128-46 and accompanying text.

394. *Knight*, 528 U.S. at 993.

395. *See id.* at 994-95; *see also supra* notes 134-37 and accompanying text.

396. *See Knight*, 528 U.S. at 999; *see also supra* notes 128-46 and accompanying text.

397. *See Knight*, 528 U.S. at 995-96; *see also supra* notes 138-46 and accompanying text.

398. *See Knight*, 528 U.S. at 994-96; *see also supra* notes 128-46 and accompanying text.

399. *Knight*, 528 U.S. at 996.

400. For a discussion on the intrinsic and extrinsic reasons that the work that foreign precedent does varies, see *supra* Part III.A.1.a.

401. Note that the argument here is not that Justice Breyer did not use the precedents at all for the correctness of their conclusions. The claim is softer—because this was not a

Breyer's use of foreign precedent in *Knight* falls somewhere in the middle of the robust-rhetorical continuum, but, for the foregoing reasons, was closer to rhetorical than robust.

iii. *Thompson v. Oklahoma*

In *Thompson v. Oklahoma*,[402] the totality of the circumstances test confirms that the Court's use of foreign precedent was rhetorical rather than robust. In contrast to its perfunctory use of foreign precedent, the plurality gave extensive domestic support for its holding that the execution of persons under the age of sixteen violated the Eighth Amendment.[403] In reaching its conclusion, the *Thompson* court canvassed "relevant [domestic] legislative enactments" and "jury determinations" across the fifty States.[404] Jury determinations revealed that no minors under the age of sixteen had been executed since 1948; prior to that date, the plurality found that only eighteen to twenty had been executed in the twentieth century.[405] The plurality also found that the legislative enactments in all fifty states recognized the important differences between children and adults and codified these differences in a plethora of statutes.[406] The plurality comprehensively reviewed and set forth in seven appendices state statutes dealing with age limitations in a variety of contexts.[407] The plurality then concluded that the age restrictions of the eighteen States that had enacted laws setting a minimum age for the death penalty should control.[408]

At the end of the plurality's analysis of relevant legislative enactments, Justice Stevens noted that the Court's conclusion is "consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community."[409] The Court then provided a simple list of European countries that prohibit the death penalty, as well as the execution of juveniles under the age of sixteen.[410] The Court did not set forth the basis for these countries' prohibitions.[411] Furthermore, the language employed in the body of the opinion supports the conclusion that the foreign precedents were intended to inform the reader rather than to support the Court's conclusion. Indeed, the Court only spoke of the foreign

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ruling on the merits, but rather a determination of whether plaintiffs had a colorable claim, the correctness of the precedents is less important.

402. 487 U.S. 815 (1988). For a brief summary of *Thompson*, see *supra* notes 147-61.

403. *Thompson*, 487 U.S. at 838. This is not intended as a normative statement about the Court's decision or the propriety of the Court's rationale, but rather a statement about the quantity of the Court's reasons.

404. *Id.* at 822.

405. *See id.* at 832; *see also supra* note 152 and accompanying text.

406. *See Thompson*, 487 U.S. at 823-25, 839-48; *see also supra* notes 153-55 and accompanying text.

407. *See Thompson*, 487 U.S. at 839-48.

408. *See id.* at 826-30, 838; *see also supra* notes 156-59 and accompanying text.

409. *Thompson*, 487 U.S. at 830.

410. *See id.* at 830-31.

411. *See id.*

precedent being "consistent with," not supporting, its holding.[412] Such use of foreign precedent demonstrates that, although the Court ruled in accordance with the precedent, the precedent itself made it no more likely that the Court would rule this way. Accordingly, the Court's use of foreign precedent in *Thompson* can be characterized as purely rhetorical on the rhetorical-robust continuum.

iv. *Printz v. United States*

Printz v. United States, through another Justice Breyer dissent citing foreign precedent, is demonstrative of the rhetorical work that foreign precedent does in Supreme Court jurisprudence.[413] A totality of the circumstances test again reveals that the work that foreign precedent does is more rhetorical than robust. Even though *Printz* had three dissenting opinions, all the dissenting Justices sought to make the same point: Some degree of federal commandeering of the states' officers is not unconstitutional and therefore the per se rule that the Court announced was erroneous.[414] Justice Breyer's invocation of foreign precedent had a narrow purpose—to bolster the dissent's argument that the per se rule that the majority announced was uncalled for.[415] Because Justice Breyer joined Justice Stevens's dissenting opinion,[416] Justice Breyer's separate dissenting opinion, which set forth foreign precedent-based arguments, constitutes only one reason for his dissent. The other reasons, which were extensive and all based on domestic precedents and arguments, were presented in Justice Stevens's opinion.[417] Consequently, a comparison of the foreign- and domestic-based precedents and arguments demonstrates the limited scope for which foreign precedent was employed in the dissents of *Printz*—to argue that some degree of commandeering is not necessarily inconsistent with a federal system.[418]

Moreover, even when the analysis is restricted to the narrow purpose for which the dissent and foreign precedent were offered, foreign precedent still falls closer to the rhetorical side of the rhetorical-robust continuum. Justice Breyer wrote that other countries with strong federal systems have found that some federal commandeering is not violative of local control or federalist principles.[419] Indeed, Justice Breyer argued, these countries have

412. *Id.* at 830. A footnote in the opinion may blunt some of this argument. In the footnote, Justice Stevens mentioned that the Court has "previously recognized the relevance of the views of the international community" in Eighth Amendment cases. *See id.* at 830 n.31. However, the language of the opinion does not indicate that the foreign precedent provided support for the Court's conclusion.

413. Printz v. United States, 521 U.S. 898, 976 (1997) (Breyer, J., dissenting). For a brief summary of the Court's opinion and Justice Breyer's dissent, see *supra* Part I.E.1.d.

414. *See supra* note 175.

415. *See supra* notes 176-81 and accompanying text.

416. *See supra* note 175.

417. *See Printz*, 521 U.S. at 939 (Stevens, J., dissenting).

418. *See supra* notes 176-81 and accompanying text.

419. *Printz*, 521 U.S. at 976-77 (Breyer, J., dissenting).

found that "such a system interferes less, not more, with the independent authority" of the local government.[420] However, there are several palpable questions that are raised by this type of argument.

If this is a "common legal problem" and foreign precedent can "cast an empirical light" on the different solutions to this problem,[421] why or how is it that these countries find that the commandeering of local officers does not overly infringe on federalist principles? Do countries like Switzerland and Germany allow commandeering because their federal system checks the dangers of commandeering in some way that the American federal system would not? Are there any relevant differences among the federal systems of these countries and our own that could affect how allowing commandeering would play out in America? How do these countries employ federal commandeering? How extensive is the practice and are there any checks on the extent to which federal commandeering is allowed?

These are important questions, bearing on the persuasiveness of the foreign precedent. Without an in-depth analysis and explanation, the foreign precedent is significantly less persuasive, which is an extrinsic reason for the foreign precedent doing less work.[422] Foreign precedent, without such an analysis, is merely rhetorical. Therefore, because the dissenting opinions in *Printz* relied predominately on domestic-based arguments and, even when considered for the narrow purpose it was offered, the foreign precedent lacked an in-depth analysis and explanation, the work that the foreign precedent does in *Printz* is more rhetorical than robust on the rhetorical-robust continuum.

v. *Lawrence v. Texas*

Justice Kennedy's use of foreign precedent in *Lawrence v. Texas*[423] is much different than that used in the other cases examined by this Note. Foreign precedent was used in *Lawrence* in order to refute or, at least, cast doubt on the historical presumptions upon which *Bowers v. Hardwick* was based.[424] Again, however, because of the manner in which the Court used it, the work that foreign precedent did fell quite short of being robust. A comparison of the domestic- and foreign-based arguments supporting the proposition that the *Bowers*'s Court erred in its historical determination establishes that the *Lawrence* Court relied almost exclusively on domestic-based arguments. The Court found that statutes banning sodomy were not specifically directed at homosexuals; states did not begin proscribing homosexual conduct until the 1970s; even then only nine states did so, of which five subsequently repealed the statutes; and, historically, statutes

420. *Id.* at 976.

421. *Id.* at 977.

422. For the distinction between intrinsic and extrinsic reasons that foreign precedent does less work, see *supra* Part III.A.1.a.

423. 539 U.S. 558 (2003). For a synopsis of the parts of *Lawrence* using foreign precedent, see *supra* Part I.E.1.e.

424. *See supra* notes 188-90 and accompanying text.

proscribing sodomy were never meaningfully enforced.[425] Furthermore, in reaching the conclusion that *Bowers*' historical underpinnings were misguided, the Court relied extensively on various "scholarly *amicus* briefs" which set forth numerous domestic-based arguments and precedents.[426]

In contrast to its extensive reliance on domestic authority, the Court only relied on two foreign precedents: the British Parliament's repeal of laws criminalizing homosexual conduct[427] and *Dudgeon v. United Kingdom*, which struck down a Northern Ireland law proscribing homosexual conduct.[428] There was no discussion of the findings of the Wolfenden Report, which was the impetus for the British Parliament's repeal, and only a bare summation of the facts of *Dudgeon*, omitting all discussion of its reasoning.[429]

c. *Conclusion: The Supreme Court's Use of Foreign Precedent Is Rhetorical*

While it is certainly difficult to determine the exact amount of work that foreign precedent does in Supreme Court decisions, thinking of the work that foreign precedent does as on a continuum that ranges from rhetorical to robust makes it feasible to draw some general conclusions. After an analysis of five of the most controversial Supreme Court cases it is quite clear that foreign precedent is used rhetorically. In two of these cases, *Atkins* and *Thompson*, the use of foreign precedent was inconsequential and

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425. *See Lawrence*, 539 U.S. at 568-70, 572-73; *see also supra* notes 190-200 and accompanying text.

426. *Lawrence*, 539 U.S. at 567-68. For example, a group of several scholars and historians argued that *Bowers* "rests on a fundamental misapprehension of the history of sodomy laws" and that "discrimination on the basis of homosexual status was an unprecedented development of the twentieth century." Brief for Professors of History George Chauncey et al. as Amici Curiae Supporting Petitioners, *Lawrence*, 539 U.S. 558 (No. 02-102), *available at* 2003 WL 152350, at *3, *10. Another brief argued that "sodomy statutes have historically focused on predatory and public activities; consensual 'homosexual' activities became their focus only in the mid-twentieth century." Brief for the CATO Institute as Amicus Curiae Supporting Petitioners, *Lawrence*, 539 U.S. 558 (No. 02-102), *available at* 2003 WL 152342, at *9. This Note does not express any opinion of the merit of these historical arguments—the citations are only meant to demonstrate the extent to which the Court relied on domestic-based arguments and precedents.

427. *See supra* notes 202-03 and accompanying text. Though beyond the scope of this Note, a question exists as to whether citations to foreign statutes would raise as many of the same objections, especially democratic objections, as do citations to case law. For further discussion about objections raised to the citation of foreign case law, see *supra* Part II.B.2.

428. *See supra* notes 204-05 and accompanying text.

429. *See Lawrence*, 521 U.S. at 572-73. It should be pointed out that, while there was no discussion of the reasoning of the opinion, such a discussion probably would have been awkward since the precedent was offered less for the correctness of its conclusion and more as authority contesting *Bowers*'s sweeping historical conclusions. Nonetheless, the fact that precedent was not offered entirely for the correctness of its conclusion is another extrinsic reason that the precedent does less substantive and robust work in the opinion. *See supra* note 401.

extremely limited, both quantitatively and qualitatively.[430] In these cases, foreign precedent made it no more likely that the Court would rule the way it did. In *Knight*, foreign precedent did somewhat more work, but was limited by the context of the decision, a dissent to a denial of certiorari as opposed to a ruling on the merits, and by an intrinsic restriction on the precedent's persuasiveness.[431]

In both *Printz* and *Lawrence*, the Court's extensive reliance on domestic precedents and rationales overshadowed the work that foreign precedent did.[432] Moreover, both decisions cited foreign precedent cursorily, without an in-depth explanation of the precedents or their rationales. These five opinions, though controversial in and of themselves, were especially controversial because of the Court's use of foreign precedent. Yet, ironically, foreign precedent was inconsequential and was used in a non-robust, rhetorical manner.

2. Comparison of the Justices' Jurisprudential Use of Foreign Precedent with Their Speeches and Extrajudicial Writings

A comparison of the Justices' jurisprudential use of foreign precedent with their speeches and extrajudicial writings confirms the notion that the Justices' use of foreign precedent is rhetorical. Indeed, a review of the Justices' extrajudicial writings reveals a remarkable absence of substantive discussion about the benefits or problems of the practice. The following section will discuss the Justices' extrajudicial writings on foreign precedent in light of their jurisprudential use and argue that the parallel between the two contexts gives more weight to the idea that the debate over foreign precedent is rhetorical and not substantive.

Justices O'Connor, Ginsburg, and Breyer have been especially outspoken in their support of using foreign precedent.[433] However, they have paid sparse attention to the substantive debate over the propriety of citing to foreign courts. Furthermore, even this sparse commentary on the substantive arguments about the debate is superficial and lacks depth. For example, in their various speeches before the American Society of International Law, the Justices' comments did not go beyond general reasons for the Court's increasing use of foreign precedent.[434] At no time have the Justices attempted to counter the many criticisms and arguments offered by nationalist scholars and judges.[435]

The amount of rhetoric and the lofty tone common to the speeches of all three Justices is striking.[436] Both Justices O'Connor and Ginsburg have

430. *See supra* Part III.A.1.b.i, iii.
431. *See supra* Part III.A.1.b.ii.
432. *See supra* Part III.A.1.b.iv-v.
433. *See supra* notes 229-44 and accompanying text.
434. *See supra* notes 229-30 and accompanying text.
435. *See supra* notes 229-44 and accompanying text.
436. *See supra* notes 229-44 and accompanying text.

predicted a great increase in the future use of foreign precedent[437]—with Justice Ginsburg predicting that those Justices opposed to the practice will find themselves "increasingly in dissent."[438] Moreover, all three Justices have seemed concerned with the possible benefits that citing to foreign courts can provide to international human rights.[439] Another point that the Justices have emphasized is the broader benefits that citing to foreign courts could provide to the legal profession, such as providing lawyers with a broader perspective and knowledge base.[440]

The most substantive commentary on foreign precedent by Supreme Court Justices comes from a debate between Justices Scalia and Breyer. Again, however, much of the discussion pertained to the broader benefits of citing to foreign precedent, such as the benefits that international human rights can derive from the practice.[441] Much of Justice Scalia's argument revolved around conflicting theories of constitutional interpretation, rather than substantive arguments about the practice.[442] Certainly constitutional interpretation is one, albeit minor, aspect of the debate over citing to foreign precedent.[443] The principal point, however, is that such a significant portion of the debate revolved around originalism, as well as the broader benefits that foreign precedent can provide, rather than around substantive arguments for and against the practice.

Why is it noteworthy that the Justices have not spent much time expounding or even discussing the pros and cons of citing foreign precedent? This lack of attention is relevant for two reasons. First, if the Justices thought that major substantive benefits could be derived from looking to foreign courts, it is natural to think that they would spend more time educating their audiences about these benefits. The second reason stems from the controversy that has developed over the practice, both inside and outside the Court. It seems that such a contentious practice would warrant significant substantive discussion in order to justify it or establish its importance notwithstanding its controversial nature. However, as discussed above, that has not been the case. The treatment given to the core issues of the debate indicates that the Justices are less interested in the substantive benefits that foreign precedent can provide.

While Justices O'Connor, Breyer, and Ginsburg have been at the forefront in arguing for the increased use of foreign precedent, an

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437. *See supra* notes 240, 244 and accompanying text.

438. Ginsburg, *supra* note 243, at 331.

439. *See supra* notes 232, 239 and accompanying text; *see also* Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 Cardozo L. Rev. 253 (1999). *See generally* Diane Marie Amann, *John Paul Stevens, Human Rights Judge*, 74 Fordham L. Rev. 1569 (2006) (positing that Justice Stevens's interest in foreign precedent arises from his belief in international human rights, to the extent that "foreign sources confirm American values of liberty and equality").

440. *See supra* notes 233-34 and accompanying text.

441. *See supra* notes 235-37.

442. *See, e.g.*, Scalia & Breyer Debate, *supra* note 53.

443. *See id.* (Justice Scalia noting that foreign precedent is of no value for his brand of originalism); *see also supra* note 246.

examination of their speeches and writings on the subject confirms the conclusion that the Court's opinions compel:[444] The Court's use of foreign precedent is rhetorical and not substantive. Most of the Justices' speeches and extrajudicial writings are rhetorical and concerned with the broader benefits that can be derived from citing to foreign precedent. This rhetorical treatment of the subject stands in stark contrast to the voluminous substantive arguments put forth by scholars and several judges.[445]

3. Reevaluating the Debate

The Supreme Court's use of foreign precedent and the Justices' extrajudicial treatment of the subject are more rhetorical than substantive. How does this affect the debate over foreign precedent?

To begin with, it seems that most of the scholarly debate is a few steps too many ahead of reality—that is, the Court's actual use of foreign precedent. One reason for this is that most of the articles on the subject have taken for granted that the Court's use of foreign precedent is robust and substantive.[446] This is especially problematic for writings purporting to show the copious benefits that flow from the Court's use of foreign precedent.[447] Most of the purported benefits emanating from this use of foreign precedent implicitly require that the precedent do something more than just rhetorical work in the opinion. For example, the amount of "empirical light" that decisions of foreign courts really provide the Court is greatly reduced if those foreign decisions are solely being used rhetorically.[448] Conversely, if there are possible benefits from the United States' participation in a transjudicial debate, is the Court actually and fully engaging in such a debate by using foreign precedent rhetorically rather than robustly?[449]

The assumption that the Court is using foreign precedent robustly and substantively is equally problematic for nationalist scholars who detail the numerous harms ostensibly caused by the practice.[450] The Court's rhetorical use of foreign precedent raises no—or at least vastly diminishes the strength of—democratic objections.[451] In other words, because foreign precedent is not doing any work in the Court's opinions, it is difficult to claim that foreign precedent is eroding democratic control. Indeed, it

444. For a discussion of the rhetorical use of foreign precedent in Supreme Court opinions, see *supra* Part III.A.1.a.

445. *Cf.* Wilkinson, *supra* note 313 (offering numerous substantive arguments against the use of foreign precedent).

446. *See supra* note 227 and accompanying text.

447. For a discussion of the benefits that using foreign precedent can provide, see *supra* Part II.A.2.

448. *See supra* Part II.A.2.a.

449. *See supra* Part II.A.2.c.

450. For a discussion of the problems that nationalist scholars argue stem from using foreign precedent, see *supra* Part II.B.2.

451. *See supra* Part II.B.2.a.

erodes democratic control no more than if the Court were to cite rhetorically to British literature.[452]

Similarly, if the foreign precedent version of the countermajoritarian difficulty is that the Court is overruling the will of the majority of the American people through the use of foreign precedent, then the rhetorical use of foreign precedent neutralizes the difficulty.[453] If foreign precedent plays no substantive role in the Court's decision, then foreign precedent cannot exacerbate the countermajoritarian difficulty. Thus, there is an incommensurability problem: The objections raised by transnationalist and nationalist scholars do not truly correlate with the reality of the Court's use of foreign precedent.

In light of the Court's rhetorical use of foreign precedent, the debate should refocus on trying to articulate a methodology that would allow the Court to use foreign precedent robustly, an area that has largely been ignored.[454] Furthermore, the debate over foreign precedent should also be reevaluated by courts in light of its polarizing effect on the judiciary.[455] Politicians and the news media have capitalized on the raucous back-and-forth among the Justices.[456] The judiciary needs to ask itself whether it is worth it to cite foreign precedent considering the precedent is used rhetorically, is largely inconsequential, and has aggravated the image of a polarized judiciary.

B. *A Bridge Across the Serbonian Bog: Informational Citations*

Given the controversy engendered by the Court's citation of foreign courts and the rhetorical and inconsequential nature of that use, perhaps there is another way of using foreign precedent that avoids these problems. The following section will argue that the use of foreign decisions for informational purposes,[457] rather than as persuasive authority, retains many of the benefits that transnationalists propose can be gained through the use of foreign precedent, while avoiding most of the criticisms leveled at the practice.

Foreign precedent is used for informational purposes when it is used as a source of arguments or helpful or interesting facts, rather than as support for

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452. *See, e.g.*, Allison Marston Danner & Adam Marcus Samaha, *Judicial Oversight in Two Dimensions: Charting Area and Intensity in the Decisions of Justice Stevens*, 74 Fordham L. Rev. 2051 (2006) (noting that Justice Stevens is "fond of British literature" and giving examples from his opinions).

453. *See supra* notes 305-20 and accompanying text. For a discussion of the countermajoritarian difficulty and its connection to the debate on foreign precedent, see *supra* Part II.B.2.a.ii.

454. *See supra* notes 276-89 and accompanying text.

455. For a discussion of the debate over foreign precedent in the media, politics, and blogs, see *supra* Part I.A.

456. *See supra* notes 23-28 and accompanying text.

457. For a discussion of what constitutes citation to foreign precedent for informational purposes, see *supra* Part II.C.

the court's decision or rationales.[458] This type of citation would have many advantages. First, it would obviate much of the controversy by quashing most of the objections that nationalist scholars have raised against citing foreign precedent as persuasive authority. Democratic objections presume that foreign precedent is employed to support the Court's decision, thus, eroding democratic control.[459] Accordingly, these objections lose their potency because the underlying principle of informational citations is that foreign experience is not being used to support the decision or the rationale of a decision.

So used, foreign precedent does not exacerbate the countermajoritarian difficulty, and the exceptionalism and protectionism objections are similarly muted. The countermajoritarian problem does not arise because foreign precedent is not being used by the Court as support for the invalidation of domestic laws. Similarly, exceptionalists and protectionists are satisfied because "exclusively domestic sources"[460] and domestic experiences[461] are being used to interpret the Constitution.

Of particular importance is the effect of informational citations on the Court's legitimacy. Nationalist scholars have been tremendously troubled about the threat that foreign precedent presents to the Court's legitimacy.[462] Informational citations can alleviate this concern in two ways. First, as informational citations are not used to support the decision and thus the Court must rely on purely domestic precedents for support, its decision will be more persuasive.[463] Second, the Court can avoid the appearance of Justices bickering about foreign precedent,[464] which, to a certain extent, impinges on the legitimacy of the Court. Moreover, it can do this while retaining most of the benefits that foreign precedent has to offer.

Informational citations retain most of the benefits propounded by transnationalist scholars.[465] Foreign precedent can still "shine an empirical light" though is not being used to support the Court's opinion.[466] For example, one of our courts may find the experience of a foreign court illustrative and helpful. Instead of using the foreign experience to support its holding, the U.S. court can search for domestic cases that are similarly exemplary and use those cases as support. Thus, foreign experience

458. *See supra* notes 375-77 and accompanying text. For an explanation of the difference between using foreign experience as a source, on the one hand, and as support, on the other, see *infra* note 472.

459. *See supra* notes 296-344 and accompanying text.

460. *See* Raalf, *supra* note 13, at 1246 & n.40; *see also supra* notes 335-36 and accompanying text.

461. *See* Raalf, *supra* note 13, at 1246 & n.40; *see also supra* notes 341-43 and accompanying text.

462. For a summary of nationalist scholars' views on this, see *supra* Part II.B.2.a.ii.

463. Nationalist scholars argue that the Court is unpersuasive when it relies on foreign precedent. *See supra* notes 321-23 and accompanying text.

464. *See supra* notes 21-26 and accompanying text.

465. For a discussion of these benefits, see *supra* Part II.A.2.

466. For a summation of this purported benefit of foreign experience, see *supra* Part II.A.2.a.

becomes the impetus for domestic courts to look more closely at domestic precedents that are similarly illustrative.[467]

Printz v. United States is another good example.[468] Most would agree that basing the conclusion that some degree of commandeering is acceptable solely on foreign experience is unsound. The dissenting Justices in *Printz*, of course, did not base their dissent solely on foreign experience.[469] Furthermore, foreign experience did little substantive work and was predominantly used rhetorically. So, why not cite the foreign experience solely as relevant information, perhaps in a footnote, and make clear that the foreign experience is not offered as support for the conclusion? Clarifying that the foreign experience is not offered as support guards against what Judge Posner calls the "intrinsic persuasiveness" that stems from the decision of another court.[470] The court could then go on to discuss the domestic reasons, independent of the foreign experience, that some degree of commandeering is constitutional.

So, the question becomes, exactly what purpose does the foreign precedent serve? First, the foreign experience would constitute a possible source of the argument that some degree of federal commandeering is not unconstitutional. The foreign experience, however, would not be offered as support for that argument.[471] Instead, domestic precedents, arguments, and ideas can be used to support that conclusion. Second, the foreign experience serves as relevant information to educate the readers about the legal systems of other countries, certainly not an insignificant endeavor.[472] Thus, foreign experience serves a minor role early in the decisional process—guiding or helping courts in their search for domestic arguments and rationales for their conclusions.

Informational citations also retain the benefit of helping judges to clarify their own views and gain a better understanding of their own positions on a case.[473] Foreign experience can be used in the same way that a legal encyclopedia or law review article is—as a self-pedagogical device. Again,

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467. Of course, informational citations would reduce the versatility of foreign precedent because there are probably principles that find support in other countries but not in the U.S.

468. Printz v. United States, 521 U.S. 898 (1997). *Printz* is discussed *supra* Parts I.E.1.d, III.A.1.b.iv.

469. *See supra* Part III.A.1.b.iv.

470. *See supra* notes 370-73 and accompanying text.

471. In other words, the idea would originate from reading about foreign experience, but since there would also be domestic support for the idea, the foreign experience would be irrelevant to the task of supporting that idea. For example, in *Knight v. Florida*, 528 U.S. 990 (1999), it would have been possible for one to have discovered the operative argument (that it is "cruel and unusual" to keep a prisoner on death row for over twenty years) by reading foreign cases where such an argument is made and sometimes accepted. *See id.* at 993-96. This would be the source of the argument. However, one would then look to support that argument with American cases and, in fact, a claim can be made that some domestic support exists for that argument. *See id.* at 994.

472. One of the hindrances to comparative law in the United States is the lack of knowledge that U.S. lawyers have about foreign legal systems. *See supra* note 349. Using informational citations is a possible way of alleviating that problem.

473. For a discussion of this benefit of foreign precedent, see *supra* Part II.A.2.b.

foreign experience is used as relevant information, but not as support for the decision.[474]

Also beneficial is the effect that informational citations will have on the transparency of judicial opinions.[475] Currently, decisions citing to foreign precedent are not very transparent because they create the impression that foreign precedent is an important part of the decision while in actuality foreign precedent is, at most, only used rhetorically.[476] Informational citations retain the benefits discussed above and achieve the maximum amount of transparency. Courts can use foreign precedent and candidly state that the foreign experience is relevant information but not support for the holding.

Most important, however, is the fundamental tension between transnationalist and nationalist scholars, which informational citations have the potential to resolve. The ultimate basis for the nationalist position on foreign precedent is that, for democratic reasons, nondomestic sources of law should play no substantive role in U.S. constitutional law.[477] On the other hand, transnational scholars appear to have a negative visceral reaction to the idea that we have nothing to learn from other countries.[478] To these scholars such an idea sounds preposterous and haughty. Informational citations strike a compromise: American judges can learn from foreign experience and cite what they read as pertinent information, but they have to find and rely exclusively on domestic precedents and rationales to support their conclusions.

One difficulty with informational citations is the fine line between citing foreign experience as support for a conclusion, that is, persuasive authority, and as pertinent information. This difficulty is not insuperable. In order to continue to use foreign precedent but allay the criticisms of nationalist scholars, courts must use unequivocal language indicating that the foreign experience is not offered as support for the holding. Courts must eschew all language and references indicating that they are relying on foreign experiences for support. In several opinions, the Supreme Court has managed to convey that idea without explicitly stating that foreign experience was not being used as support for the Court's holding.

For example, in *Freeman v. Hewit*, which considered the extent to which the Commerce Clause prohibited the power of the States to tax, Justice Frankfurter cited Australian and Canadian experience on the issue.[479] The citation occurs in the beginning of the opinion and it is clear that foreign

474. One benefit that informational citations do not retain is perpetuating the transjudicial debate. Since courts would be using foreign precedent only as information there would be no substantive analysis of foreign decisions and thus no American contribution to the transjudicial debate.

475. For a discussion of transparency in judicial opinions, see *supra* Part II.A.2.d.

476. *See supra* Part III.A.1.c.

477. *See supra* Part II.B.2.

478. *See supra* Part II.A.2.

479. Freeman v. Hewit, 329 U.S. 249, 251 n.1 (1946).

experience was in no way used to support the Court's holding.[480] Nonetheless, foreign experience may provide the reader with useful information about how foreign legal systems have dealt with the issue or perhaps how this information influenced Justice Frankfurter's thinking on the issue. Regardless of which one of these purposes the citation serves, the point is that in *Freeman*, foreign experience was used as relevant information but was not offered to support the holding.

In *Carter v. Jury Commission of Greene County*, Justice William O. Douglas cited foreign experience as a point of contrast.[481] Justice Douglas noted that India dealt with the problem of unrepresentative tribunals and other public institutions by constitutional amendment and set forth the relevant provisions of the Indian Constitution.[482] Justice Douglas noted, however, that the American "constitutional mandate against racial discrimination is sufficient without" the specificity that the Indian Constitution provided.[483] Thus, in *Carter*, foreign experience was used as pertinent information, but not to support Justice Douglas's conclusion.

In *New York v. United States*,[484] the Court was presented with the issue of whether a State could assert immunity from a federally imposed tax. The Court, with Justice Frankfurter writing for the majority, decided the issue in favor of Congress on purely domestic grounds, but refused to announce a general rule.[485] The only guidance that the Court gave was to announce that all limitations on the taxing power of Congress would be rejected if based on "untenable criteria."[486] Beyond that, future cases would be governed on a case-by-case basis.[487] In a footnote, Justice Frankfurter informed the reader of the difficulties that Australia, Brazil, and Canada had in developing a general rule that would adequately handle such an issue.[488]

New York illustrates the archetypal use of informational citations. The Court was learning from the experiences of foreign countries, yet not using foreign precedent to support its holding.

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480. *Id.*

481. Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 344-45 & n.2 (1970) (Douglas, J., dissenting in part).

482. *Id.* at 344 n.2.

483. *Id.* at 345.

484. 326 U.S. 572 (1946).

485. *Id.* at 574-84.

486. *Id.* at 583.

487. *Id.*

488. *Id.* at 583 n.5 ("Attempts along similar lines to solve kindred problems arising under the Canadian and Australian Constitutions have also proved a barren process . . . . Even where the Constitution of a federal system explicitly deals with the problem of intergovernmental taxation . . . litigation is not escaped and nice distinctions have to be made.").

CONCLUSION

The controversy surrounding the Supreme Court's use of foreign precedent is ubiquitous, both inside and outside legal circles.[489] Within legal circles, scholars have offered numerous justifications for and objections to the Court's use of foreign precedent.[490] These justifications and objections implicitly require that foreign precedent be used substantively.[491] An analysis of the five most controversial Court cases using foreign precedent has revealed, however, that the Court's use of foreign precedent is inconsequential and rhetorical.[492] Thus, there is an incommensurability problem in that the various objections and justifications offered do not actually justify or object to the reality of the Court's use of foreign precedent. Accordingly, the Court's use of foreign precedent and the debate surrounding the practice should be reevaluated.[493]

One possible method for the effective use of foreign precedent is for courts to consider using foreign precedent solely for informational purposes.[494] That is, using foreign precedent as a source of an argument or rationale, but then searching for and deploying domestic precedent to support that argument. While this would certainly restrict the breadth of possible uses of foreign precedent, this Note argues that informational citations would retain most of the benefits derived from looking to foreign experience, while limiting many of the possible harms. Informational citations, therefore, provide a middle ground and resolve a fundamental tension among transnationalists and nationalists. Informational citations allow America to learn from foreign experience, while limiting the substantive, undemocratic influence of foreign law.

489. *See supra* notes 1-8, 21-34 and accompanying text.
490. *See supra* Part II.A.2, II.B.2.
491. *See supra* Part III.A.3.
492. *See supra* Parts I.E.1, III.A.1.
493. *See supra* Part III.A.3.
494. *See supra* Part III.B.