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Author(s): Daniel E. Rauch

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## SAME DIFFERENCE: INTER-STATE LEGAL CITATION AND THE SUPREME COURT'S USE OF FOREIGN LAW

*Daniel E. Rauch*

"**W**e must never forget that it is a Constitution for the United States of America that we are expounding."<sup>1</sup> With these words, Justice Antonin Scalia registered his disapproval for an increasingly prominent practice: the Supreme Court's citation of non-American law. He is not alone; over the past decade, the Court's use of foreign and international materials has proven deeply controversial,<sup>2</sup> attracting both ardent support and scathing criticism. Yet, although the Court's glimpses abroad have proven polarizing, America has seen a similar practice flourish without controversy for centuries. Since the Founding, America's state court systems—each with its own judicial system and constitutional law—have cited each other when interpreting their state constitutions.<sup>3</sup> That two seemingly comparable techniques have drawn such dramatically different reactions logically suggests the question: if one practice is so widely accepted, what justifies rejecting the other? Addressing this question, in this analysis I argue that there is, in fact, justification for treating these practices differently, but that such justification is limited to concerns drawn from the practical difficulties each method presents.

Over the past decade, the Supreme Court's use of foreign materials has drawn comment from a panoply of scholars. Some, including Harold Koh,<sup>4</sup> Anne-Marie Slaughter,<sup>5</sup> and Paola Carozza, have touted this practice as a way to improve America's law and its global image.<sup>6</sup> Others, such as Roger Alford,<sup>7</sup> John O. McGinnis,<sup>8</sup>

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Daniel E. Rauch received his AB in politics summa cum laude from Princeton University. As an undergraduate, his research focused on international legal institutions, American legal history, comparative constitutional law, and the U.S. Supreme Court. Based on his academic work, he received the John G. Buchanan Prize, awarded to the graduating senior who attained the highest standing in the Princeton Department of Politics. Currently, Rauch teaches 8<sup>th</sup> grade English in downtown Newark as part of the Teach For America national service corp. In his free time, he enjoys long-distance running, swimming, and reading.

and Richard Posner have opposed the use of such materials on a variety of practical and theoretical grounds.<sup>9</sup> In comparison to this extensive academic exchange, state court use of material from other states has received limited attention, though scholars like Patrick Baude and Peter Harris have worked to document the scope and pattern of this practice.<sup>10</sup> Though I draw from each of these perspectives, my analysis ultimately departs from their scholarship as it focuses on examining the relationship between these practices.

Before proceeding, it is important to clarify which specific uses of non-jurisdictional law are at issue in this essay. In this analysis, my primary focus is on two judicial behaviors: the Supreme Court's use of foreign legal sources as persuasive authority when interpreting domestic law, and state supreme court use of out-of-state sources as persuasive authority when interpreting state law. Note that this excludes instances in which such non-jurisdictional sources are used to interpret laws that are not domestic,<sup>11</sup> such as international treaties or the few constitutional provisions explicitly requiring reference to non-American law. Instead, this analysis focuses on the practice of citing such authorities to interpret primarily domestic laws, such as a polity's due process guarantees. Additionally, this analysis is limited to instances in which non-jurisdictional sources are viewed as persuasive not merely due to the strength of their argumentation but also by virtue of the kind of sources they are, an attribute this essay refers to as "precedential persuasive authority." Though foreign and non-state sources have had other uses, it is this specific practice which will be shown to be the most fiercely contested and, as a result, most worthy of study.

With this in mind, the structure of my central argument is as follows: in the first part of my analysis, I outline the practices described above and observe that while they intuitively seem similar to each other, state court use of non-state materials is far more widely accepted than Supreme Court use of foreign sources.<sup>12</sup> Having established this, the main argument of the essay focuses on determining if there is a coherent rationale for accepting state supreme court use of non-state sources while rejecting the Supreme Court's use of foreign sources. To do so, I consider the leading objections against

the citation of non-American materials and consider whether each such argument, if valid, would also apply to state court citation of non-state law. Turning first to objections stemming from the practical difficulties of citing non-jurisdictional legal sources, I contend that such arguments furnish a plausible justification for accepting state citation of non-state law while rejecting the Supreme Court's use of non-American sources. When I consider arguments independent of such pragmatic concerns, however, I reach a different conclusion. Assessing objections to the Court's use of foreign law drawn from concerns over national sovereignty, the counter-majoritarian difficulty, legal particularism, judicial arbitrariness, constitutional genealogy, and text and original intentions, I argue that all apply equally to both practices in question. As such, I conclude that if the pragmatic difficulty of citing law from other nations were no greater than that of citing law from other states, then there would be no coherent justification for accepting one practice while rejecting the other.

In advancing my argument, Part I of this essay sketches the controversy surrounding recent Supreme Court references to foreign sources before identifying which specific usage of such materials is at issue in the current debate. In Part II, it is noted that this controversial usage seems similar to the widely accepted practice of state supreme courts citing each other's opinions when interpreting their own constitutions. Logically, this leads to the central question of this analysis: what can justify accepting one practice while rejecting the other? Taking up this inquiry, Part III considers objections to the use of foreign law drawn from the legal pragmatist perspective, arguing that the Supreme Court's use of foreign sources imposes greater practical difficulties than state court use of non-state sources. From this, it is concluded that objections drawn from questions of practical difficulty provide a coherent justification for embracing one practice but not the other. With this in mind, Part IV considers whether perspectives independent of these pragmatic concerns offer additional, independent grounds for treating these techniques differently. Here, six possibilities are examined, namely arguments stemming from: (1) sovereignty (2) the

counter-majoritarian difficulty (3) legal particularism (4) judicial arbitrariness (5) constitutional genealogy and (6) text and original intentions. Evaluating each in turn, I find that none provides a persuasive rationale for rejecting the Supreme Court's use of foreign law while embracing state court use of non-state sources. As such, I conclude that if the pragmatic costs of these practices were comparable, there would be no meaningful reason to accept one while rejecting the other.

## I. SHIPS IN THE DARK?

Though controversy over America's use of foreign law is nothing new,<sup>13</sup> current debate over this practice stems largely from three recent Supreme Court cases: *Atkins v. Virginia*, *Lawrence v. Texas*, and *Roper v. Simmons*.<sup>14</sup> In each of these cases, foreign sources—ranging from the United Nations Declaration of the Rights of the Child to the domestic law of the United Kingdom—served as a highly visible feature of the Court's opinion.

In *Roper v. Simmons* in particular, the majority implicitly addressed these growing concerns, going to great lengths to clarify that foreign materials were not controlling on the outcomes reached.<sup>15</sup> In spite of its avowedly limited scope, however, this use of foreign law still proved sufficient to touch off a firestorm of criticism from within the Court itself, academia, and Congress. Not content to rely on legislative action, some disgruntled citizens even issued death threats against Justices who dared to defend the citation of non-American materials as legitimate.<sup>16</sup> Clearly, the Court's turn to foreign law had touched a nerve.

Yet while widespread criticism reflects the existence of an intense and rancorous debate, it overshadows the fact that many Court citations of non-American sources are almost universally seen as legitimate. An obvious example is the interpretation of international treaties, a situation in which even ostensible opponents of judicial cosmopolitanism like Justice Scalia believe that the Court should "give considerable respect to the interpretation of the same treaty by the courts of other signatories."<sup>17</sup> Likewise, it

is broadly considered appropriate for the Court to cite foreign law to illustrate the empirical effects of legal rules, as when William Rehnquist cited the impact of European euthanasia laws in *Washington v. Glucksberg*.<sup>18</sup> As a result, claims that the current debate turns on whether or not foreign law should be used are inaccurate; instead, the crucial question is which specific uses of foreign law are acceptable and which are not.

With this in mind, one must identify the precise use of non-American materials that is actually at issue in the present controversy. One possibility is the prospect of foreign law being treated as a binding authority, one the Supreme Court would be obligated to obey.<sup>19</sup> Yet although this position has drawn scathing critiques, it is one few serious advocates of judicial cosmopolitanism actually hold.<sup>20</sup> Instead, those who support the use of foreign materials overwhelmingly claim that they should be used as non-binding, "persuasive authority."<sup>21</sup> The consensus regarding the question of whether foreign law should serve as binding authority in Supreme Court decisions, then, seems to be clear: it should not.

Yet if proponents of the use of foreign sources do not support treating such authorities as binding, what do they defend? The key lies in the term "persuasive authorities,"<sup>22</sup> which suggests that judges might look abroad not to receive marching orders, but rather to seek out insights and ideas from foreign experience. Given that innovative judges already cite inspiration found in anything from academic treatises to pop songs,<sup>23</sup> this use of foreign materials is generally viewed as unobjectionable, such that even hardened opponents of judicial cosmopolitanism have expressed some degree of acceptance for this practice.<sup>24</sup>

Taken together, the points of general agreement outlined above suggest a beguiling possibility: if the use of foreign law most fiercely opposed is one few advocate, and if the practice most often advocated is one few oppose, then perhaps nothing meaningful is actually at stake in the present debate. Recently, some scholars have concluded exactly this, characterizing the controversy as "two ships passing each other at night."<sup>25</sup> Yet although recent discussion has been couched in rhetoric, the current debate is no mere "storm in

a teacup,”<sup>26</sup> but instead a substantive disagreement over the role of foreign law in American jurisprudence. To understand why, one must carefully re-consider exactly what it means for a source to enjoy “persuasive authority.”

Because a “persuasive authority” is, by definition, one not binding on a court’s decision, citing foreign materials from this perspective initially seems to mollify many of the most scathing criticisms of judicial cosmopolitanism. Upon closer inspection, however, the claim that non-American materials should be used as “persuasive authority” is less informative than it might appear. The reason for this is simple: in American jurisprudence, almost no authority is binding on the Supreme Court’s decisions. Because of this, the category of persuasive authority is one that includes everything from the decisions of Federal Circuit courts to comic books.<sup>27</sup> As a result, it is necessary to ask not whether the Supreme Court should view foreign laws as a persuasive authority, but rather, what type of persuasive authority they will be accorded.

With this in mind, one must consider an important distinction within the category of persuasive authority.<sup>28</sup> On the one hand, some persuasive authorities, such as academic articles, are treated as persuasive only insofar as they contain effective or persuasive arguments.<sup>29</sup> There is a separate category of materials seen as persuasive not necessarily due to the strength of their reasoning but by virtue of their being produced by a specific entity.<sup>30</sup> The value judges have accorded the opinions of co-equal courts from other jurisdictions, for example, may be thought of as “precedential persuasive authority.” The result is a sort of “hierarchy” of authorities, in which some types of “persuasive authority,” such as co-equal courts, enjoy a qualitatively greater influence than others.<sup>31</sup> As a result of this “hierarchy,” even if consensus exists that foreign materials may serve as some form of persuasive authority, there is vast scope for disagreement over precisely where this authority lies. As a result, the controversy over the Supreme Court’s use of foreign law may best be understood not as “two ships passing in the night,” but instead as a substantive debate over the persuasive value non-American sources should receive.<sup>32</sup> Specifically the contested

practice at issue in the current controversy is the Supreme Court's use of non-American sources as a form of precedential persuasive authority.

## II. SAME DIFFERENCE?

Having identified the practice at the heart of the present debate, however, one may be struck by its apparent similarity to another feature of America's legal system: state supreme court use of out-of-state sources as persuasive authority. Commonalities between the practices abound: first, within the American federal system, each state is viewed as an "entirely separate jurisdiction" with its own laws and constitution, over which no other state has formal control.<sup>33</sup> Because of this, when state courts cite one another they are, in a meaningful sense, citing "foreign" law. Additionally, when using non-state materials, state high courts treat one another as "precedential" authorities, viewing "sister court" opinions as valuable precisely because they come from a certain type of respected legal institution.<sup>34</sup> Finally, and perhaps most importantly, states cite such non-state sources when interpreting "domestic" provisions of their laws, such as constitutional guarantees of privacy and due process.<sup>35</sup> Taken together, these shared features suggest that while the Supreme Court's use of foreign law is uniquely controversial, it may not be all that unique.

To further illustrate the apparent similarity between these practices, it is useful to examine opinions that employ the techniques in question. The case of *Roper v. Simmons* may provide insight into the Supreme Court's use of foreign law. In holding that the execution of minors represented an unconstitutionally cruel punishment, the majority observed that:

The United States is the only country in the world that continues to give official sanction to the juvenile death penalty... Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles .... It is



proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty.<sup>36</sup>

In this passage, several important features bear mentioning. First, and most obviously, the authorities cited in this passage are foreign sources, such as the laws of other nations or the stipulations of global conventions that the United States did not ratify. Second, the issue at stake in this opinion is a “domestic” constitutional question, namely the nature of cruel and unusual punishment in the American polity. Finally, and perhaps most importantly, the sources cited in this opinion seem to have been chosen not because of the merits of their argumentation but instead because they represent the decisions of respected authorities. Indeed, as at least one commentator has observed, the use of non-American sources in this decision seems largely devoid of “real analysis” as to why such materials matter beyond the “force provided by their very existence,”<sup>37</sup> a fact that suggests such materials are meant to serve as a form of precedential persuasive authority.

Turning to state supreme court use of sister-state opinions, one may examine *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*<sup>38</sup> In this case, the New Jersey Supreme Court held that the state constitution protected free speech rights in private shopping malls. In doing so, the Court argued that:

Every state that has found certain of its constitutional free-speech-related provisions effective regardless of “state action” has ruled that shopping center owners cannot prohibit free speech. There have been four such rulings: California (general free speech provisions), Massachusetts (free and equal election provision), Oregon (initiative and referendum provision), and Washington (initiative provision).

In this opinion, one finds many similarities to the Supreme Court’s use of foreign law outlined above. First, just as the sources cited by *Roper* were drawn from foreign polities, similarly, the precedents employed in this opinion were taken from courts outside of New Jersey’s jurisdiction. The “foreignness” of such sources is particularly salient in light of the divergent constitutional bases on which each cited decision seems to have been based. Second, as

was the case in *Roper*, the issues at stake in this case are primarily “domestic,” focused specifically on what speech rights New Jersey’s constitution guarantees to New Jersey citizens. Finally, the non-state materials cited by this opinion seem to have been used not as sources of novel legal thinking but instead as precedential authorities, valuable precisely because of their status as the decisions of sister courts. As a result, on an intuitive level the Supreme Court’s citation of foreign sources in *Roper* seems comparable to the New Jersey Court’s decision in *New Jersey Coalition*.

As a whole, it would appear that decisions like that of *New Jersey Coalition* are fairly representative. Among America’s state supreme courts, non-state precedent is employed in over 40 percent of decisions that substantively expand or re-define the state-constitutional rights of citizens.<sup>39</sup>

Despite their apparent similarities, however, there is at least one critical difference between the practices outlined above: while the Supreme Court’s use of foreign sources is deeply contentious and widely condemned, state citation of other states is almost universally accepted as appropriate. America’s state courts have cited one another for centuries,<sup>40</sup> and today non-state citations are found in almost 35 percent of state supreme court constitutional decisions.<sup>41</sup> Thus, even as the use of foreign law is viewed as deeply troubling and controversial, state court use of non-state sources is deemed to be emphatically “unremarkable.”<sup>42</sup>

Taken together, the apparent similarities of the practices in question combined with the widely divergent receptions they have received naturally lead to a simple question: what, if anything, justifies accepting one of these practices while rejecting the other? Unless such a rationale can be found, one would be left to conclude that if one practice is acceptable, the other should also be permitted. Were such an outcome established, it would provide a compelling argument for changing the way in which one or both of these practices should be viewed and employed. As such, the balance of this essay will focus on assessing whether there is, in fact, a coherent justification for embracing one of these practices while rejecting the other. To do so, one must look to the leading objections against

the Supreme Court's citation of foreign sources before considering whether each also applies to state court use of non-state law.

### III. PRAGMATIC CONCERNS

Many of the best-known arguments against the Supreme Court's use of foreign law stem from the framework of judicial pragmatism. According to the pragmatist perspective, the goal of legal decision-making is to craft decisions that reach the best practical outcomes.<sup>43</sup> From this viewpoint, the value of an interpretive practice is to be assessed by weighing its pragmatic "error costs" and "decision costs" against the consequentialist benefits it offers.<sup>44</sup> Many have objected to the practice of citing foreign law sources on the grounds that the pragmatic costs of doing so exceed the benefits.<sup>45</sup>

Having presented the general form of the pragmatist argument against citing foreign law, one must assess whether such objections apply equally to state court use of non-state precedent. One pragmatic argument against the use of foreign law is that it could lead to costly, rights-restricting decisions.<sup>46</sup> According to this argument, because America is more protective of individual rights than many other countries, the Supreme Court's use of foreign law may lead to decisions that limit the scope of such rights, an outcome assumed to be costly.<sup>47</sup> Of course, on its merits, the claim that such decisions are inherently costly is a dubious one, given that individual rights are generally protected only at the expense of other key interests.<sup>48</sup> More important, for the purposes of this analysis, is the fact that this objection is equally applicable to state court use of non-state sources. Among the states, there is significant variety in the rights protections afforded.<sup>49</sup> As a result, whenever a state with "above average" rights protections cites sister state courts, it would seem subject to the same "rights costs" that the Supreme Court's use of foreign law ostensibly entails. As such, it is unclear that objections drawn from such concerns apply with greater force to the use of foreign law than the use of non-state law.

A second, and potentially more significant, set of pragmatist

objections to using foreign law is one stemming from the problems of “legal transplantation.”<sup>50</sup> According to proponents of this argument, jurisdictional differences in “constitutional system, structure, culture” and “history” make it difficult to effectively cite outside legal materials.<sup>51</sup> As a result, the use of materials from foreign courts is said to lead to poor outcomes and, as a result, is to be avoided. In examining this argument, one finds that by almost any metric it appears to apply with greater force to the Supreme Court’s use of foreign law than to state court use of non-state material. The first area in which this is clear stems from the problems caused by cultural and historical differences.

Culture and history wield enormous influences over the legal institutions and meanings a polity adopts.<sup>52</sup> Significant cultural and historical differences between societies make transplanting law costly, complex, and less likely to succeed.<sup>53</sup> Even ostensibly similar countries like Britain and the United States retain significant and “indelible” cultural and historical differences that deeply influence their legal development, thus leading to the danger of legal mistranslation.<sup>54</sup> When America’s state courts cite one another, by contrast, they are drawing from cultural and historical contexts that are, by the standards of international differences, almost identical to their own. Although some minor differences do exist across the United States, the seamless mobility, communication and integration across America’s states mean that any such distinctions remain limited. As a result, the problem of “transplanting” the law of other American states is significantly less formidable than that of employing the laws of other nations.

International differences in governmental structure also present problems. If a concept is to be “transplanted” effectively, it is crucial that judges understand the framework of the executive, legislature, judiciary, and constitutional system that produced it.<sup>55</sup> Within the world community, the wide variety of constitutional and governmental institutions makes such a task incredibly daunting. Profound structural differences are apparent even among the democracies most similar to the United States; Britain, for example, has no formal written constitution,<sup>56</sup> while in Germany courts

have far deeper involvement in the legislative process than their American counterparts.<sup>57</sup> As a result, the use of foreign laws requires a complex and nuanced understanding of radically different political arrangements, a fact that greatly increases the chances that such sources will be incorrectly applied. Among America's states, by contrast, there is a common set of structural features. Though the states vary somewhat in their precise governmental structures, each is modeled after the same federal government and, as a result, shares many commonalities with the others, including three branch governments of executive, legislative and judiciary, formal written constitutions, and, with one exception, bicameral legislatures.<sup>58</sup> As a result, when states cite non-state materials, the possibility that differences in structure will lead to error is not very significant.

Beyond these challenges, there are also serious questions as to American judge's proficiency in applying foreign sources. American legal education offers little formal training in foreign law.<sup>59</sup> Moreover, many foreign courts do not conduct business in English, meaning their decisions must be accessed through potentially unreliable translations.<sup>60</sup> For the foreseeable future, these logistical challenges will make any but the most superficial use of foreign legal principles a serious practical challenge, one not present when America's states cite each other's law.

An additional objection against the use of non-American legal materials stems from costs to court legitimacy. As the *Federalist Papers* famously observed, American courts have neither "sword" nor "purse,"<sup>61</sup> and so are effective only if other actors view their decisions as legitimate. Because of this, if the court reaches decisions on grounds that the public views as dubious, such decisions impose harms to the court in the form of increased non-compliance and reduced institutional respect.<sup>62</sup> The practice of using foreign law, as noted earlier, is one that a large segment of America views as deeply troubling. As a result, the use of foreign legal materials may be seen as pernicious as it reduces the court's perceived legitimacy and thus its effectiveness. Such an argument is at least partially supported by recent empirical surveys, in which the Court's use of foreign law in cases like *Atkins*, *Lawrence* and *Roper* has been shown to

have caused a loss of “institutional support generally” and a backlash against these decisions in particular.<sup>63</sup> When states cite other states, by contrast, their actions are almost universally accepted or unnoticed by the public. As a result, insofar as there are legitimacy costs to citing non-jurisdictional sources, they seem unique to the use of foreign law.

Some might argue that the use of foreign materials could have practical benefits, such as improving America’s worldwide image or promoting human rights.<sup>64</sup> Yet even if one were convinced that the Court’s use of foreign law could sometimes benefit America’s foreign policy, however, such a practice could also undermine vital national interests. The constitutional structure of the American government is such that the executive and legislative branches are generally in a better position than the judiciary to determine what America’s foreign policy interests are and how they can best be pursued.<sup>65</sup> Additionally, even if citation to foreign law provided some degree of foreign policy benefit, it is unclear why such advantage could not be accessed equally well by using such sources without assigning them “precedential” persuasive value, treating them as one would law review articles.<sup>66</sup> As a result, the policy benefits of assigning non-American legal sources precedential persuasive authority seem, at best, quite limited.

Taken together, the arguments outlined above lead to an important conclusion: the Supreme Court’s citation of foreign law imposes greater pragmatic costs than state court use of non-state sources. When citing non-American source, the Supreme Court faces a host of uniquely severe practical problems, ranging from the dangers of cultural misunderstanding to the difficulties of translating law from a foreign language to the loss of institutional legitimacy. Against such costs, there appear to be few practical benefits unique to this practice. As a result, it may be concluded that from a legal pragmatist perspective, one can justify supporting state citation of other states while rejecting Supreme Court citation of other nations.

#### IV. ALTERNATIVE FRAMEWORKS?

At this point, it has been shown that the framework of judicial pragmatism furnishes a coherent rationale for accepting state citation of non-state law while rejecting Supreme Court use of non-American materials. Having reached this conclusion, it is important to question whether any framework independent of such concerns might provide additional, independent justification for treating these practices differently. This inquiry is important for at least two reasons: first, for purposes of theoretical completeness, it is inherently important to determine if there are multiple justifications for treating these practices differently. Second, and perhaps more relevant, the pragmatic rationale for treating these practices differently is one that may not always be applicable. As time passes, it is conceivable that the pragmatic challenges of citing foreign law will eventually be greatly reduced, rendering practical objections largely obsolete. As such, it is crucial to consider whether there are additional frameworks under which the Court's use of foreign law can coherently be treated differently than state court citation of non-state law.

#### Sovereignty

Many argue that the citation of foreign law undermines American sovereignty. As typically presented, this "sovereignist" argument begins from the premise that to be considered sovereignty, a polity's constitution and laws must be determined by its own people. If foreign sources were assigned legal weight, however, the rights of Americans would be subject to "laws made elsewhere,"<sup>67</sup> since Court rulings might hinge on courts outside of national borders. Thus, the use of non-American materials is said to undermine American sovereignty.

When compared to national governments, some might claim that American states are not meaningfully sovereign. America's states lack the ability to make many decisions about the rules of their polity, such as whether or not to permit free speech. More

specifically, state courts are expected to base many rulings on sources outside of the state polity, such as the Federal Constitution.

Ultimately, however, this line of argument belies a deep misunderstanding of America's federal system. Under American federalism, each state is an independent political entity whose people fully control their state "constitution, laws, and judiciary."<sup>68</sup> This authority is clearly at work when courts must interpret state-constitutional provisions that have no federal analogue, such as Nevada's right to a public education.<sup>69</sup> Moreover, even in areas where the Federal Constitution establishes a national rights "floor," such as protection from slavery, this does not mean that states lack sovereign authority over their own constitutional law; such national "floors" are instead the function of the Fourteenth Amendment of the U.S. Constitution.<sup>70</sup> In all cases, states retain complete sovereignty over their own constitution. Accordingly, if the Supreme Court's use of foreign law problematically undermines national sovereignty, state courts' use of non-state law would be equally troubling.

### The Counter-Majoritarian Difficulty<sup>71</sup>

A second objection to the Supreme Court's use of foreign law stems from the "counter-majoritarian difficulty."<sup>72</sup> The "counter-majoritarian difficulty" begins from the intuition that when the majority of a democratic polity expresses its preferences, this preference should be enacted. From this perspective, judicial review is problematic as it allows judges to strike down policies that enjoy majority support, hence the "difficulty."

In applying this argument against the use foreign sources, some argue that looking abroad poses an especially pernicious "international counter-majoritarian difficulty."<sup>73</sup> In a basic formulation, the term "international countermajoritarian difficulty" might mean that when courts cite foreign law to strike down domestic laws, they contradict the people's will. In this formulation, the "international" difficulty seems no different from the problems posed by any method of constitutional interpretation; the majority's will



is no more thwarted by foreign law than if it were struck down based on any other interpretive modality. More pertinently, this sort of “international counter-majoritarian difficulty” seems indistinguishable from an “interstate counter-majoritarian difficulty”; in both cases, majority will is equally frustrated.

In a more nuanced formulation, perhaps the “international counter-majoritarian difficulty” is that foreign legal sources are *uniquely* counter-majoritarian since they stem wholly from “outside the structure of American government.”<sup>74</sup> Once again, however, it is unclear why this objection does not apply equally to state court use of non-state law. As noted previously, the citizens of each American state have “no control over one another’s decisions.”<sup>75</sup> Simply put, the laws of other states are as far “outside the structure” of state control as the laws of a foreign nation. As a result, any uniquely counter-majoritarian difficulty raised by the citation of foreign law does not seem different from that imposed by states citing other states.

### Legal Particularism

A third set of objections to the Supreme Court’s use of foreign sources is drawn from the “legal particularist” paradigm. Proponents of this framework argue that each polity has an irreducibly unique culture and history.<sup>76</sup> Thus, the use of foreign law is inherently unacceptable, since such law is, by definition, foreign to the national socio-cultural consciousness.<sup>77</sup> Broadly speaking, the legal particularist argument takes two forms. One possibility is that national constitutional law is so bound to a specific culture and history that polities can never cite other legal systems. This “strong” legal particularism would clearly militate against the use of foreign law. However, it would also forbid state courts from using non-state law; each American state has a unique historical and cultural narrative,<sup>78</sup> and a unique philosophy toward democratic government, suggesting that a “strong” particularist would oppose the use of non-state sources.<sup>79</sup>

As a second possibility, a “weak” legal particularist might ar-

gue that when the cultural and political narratives of two polities differ *significantly*, then they should not use one another's laws. If such narratives are relatively similar, however, then polities could permissibly cite each other's laws. Such an approach could explain why America's states, which share common commerce, information, ideas, art, and histories, may cite each other, while foreign nations may not.<sup>80</sup> However, in its "weak" form, the legal particularist argument is indistinguishable from the pragmatic "transplant problem" noted earlier in this essay. Simply put, the force of the "weak particularist" perspective hinges wholly on the practical question of precisely how different two cultures are. Accordingly, legal particularism does not offer a unique justification for treating these practices differently from each other.<sup>81</sup>

### Arbitrariness

When opposing the use of foreign sources, many cite the danger of increased judicial arbitrariness. Proponents of this view fear that capricious judges will be able to justify any outcome they desire by "cherry picking" laws they agree with from the vast array of foreign legal systems.<sup>82</sup> Regardless of the analytical merits of this claim, it, too, seems equally applicable to state court citation of other states' law. When a state court judge looks to other states, he is presented with forty-nine complete legal systems that vary tremendously in their precedent, case law, and constitutional structures. The result is an abundance of sources for any state court to "cherry pick," especially when facing questions controversial enough to reach a state's highest tribunal. Against this backdrop, it is unclear that potential for arbitrariness is qualitatively greater when looking abroad than when looking beyond state borders.

### Constitutional Genealogy

A fifth objection to the Supreme Court's use of foreign law stems from the framework of constitutional genealogy. Often, a polity's constitution is largely taken from pre-existing charters,<sup>83</sup>

as when Oregon's founders largely adopted the Indiana State Constitution.<sup>84</sup> Because of these "relationships of descent and history," some argue that polities are justified in citing the laws of "foreign" polities when there is a "genealogical" relationship between them.<sup>85</sup>

Within this genealogical framework, some might argue that the use of foreign law is only permissible when a "daughter" polity cites the constitutional courts of its "parent," and not the other way around. From this perspective, since the American Constitution predates most other national constitutions, the Supreme Court may not use foreign laws, while the America's states, whose constitutions often descended from one another, may cite across state borders.<sup>86</sup> Yet under such logic, many states, such as the original thirteen colonies, would be barred from citing the law of other states. Moreover, if "descendant" polities may cite the contemporary law of their "parents" then the Supreme Court would be justified in citing the law of the modern United Kingdom. Accordingly, even the highly specific genealogical perspective offered above cannot explain why states may cite one another's constitutions while nations may not.

### Text and Original Intentions

A further objection to the use of foreign law is the claim that a court may only cite foreign law if its constitution provides an unambiguous "constitutional license" for doing so.<sup>87</sup> Internationally, several constitutions, such as South Africa's, include such explicit license provisions.<sup>88</sup> America's constitution offers no such explicit textual warrant.<sup>89</sup> However, neither do any of America's state constitutions. Across fifty state constitutions, one finds no "South Africa"-style calls to cite sister state courts, suggesting that if America cannot look abroad, states may not look to one another.

A more nuanced set of objections to foreign legal sources stems from the framework of original intentions. On the whole, supporters of original intent methodologies argue that the intentions of a constitution's drafters should hold priority as an interpretive tool.<sup>90</sup> Two broad categories of originalist perspectives must

be considered: “absolute,” or rigid originalists, and “soft,” or flexible originalists. For an absolute originalist, discerning the original intentions of a constitution’s founders is the only valid interpretive path. Such a viewpoint clearly forecloses the citation of contemporary foreign law, since such materials seldom explain what a constitution’s original drafters intended when they adopted a given clause.<sup>91\*</sup> However, for similar reasons, an absolute originalist would be unable to accept state court citation of non-state sources, since the state’s founders would have had no knowledge of modern non-state legal rulings.

In contrast to absolute originalism, a soft originalist might argue that while the intentions of a constitution’s ratifiers are the *best* interpretive tool, if evidence of intent is lacking, other interpretive methods can be used. Given the centuries of sustained scholarship surrounding the American Constitution’s founding period, one could plausibly argue that in many cases, evidence of the Founders’ intentions offers sufficient guidance to interpret the document. Looking to state constitutions, however, one may face a steeper challenge. Often, there is a relative dearth of scholarship on the founding period of state governments,<sup>92</sup> resulting in a “lack of adequate and available historical materials.”<sup>93</sup> Because of this, discerning the original intentions behind state constitutions might sometimes pose a “nearly impossible task of questionable legitimacy.”<sup>94</sup> In light of such challenges, a soft originalist might argue that when interpreting state constitutions, it is permissible to look to other states, since original intentions of state founders are often obscure.<sup>95</sup> Accordingly, a soft originalist might conclude that state courts may cite one another, while the Supreme Court may not cite foreign law.

Ultimately, however, even a soft originalist cannot clearly differentiate between state use of non-state law and Supreme Court use of foreign law. Even if the intentions of the national founders are often clearer than those of state founders, this is not always

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\* Unless it can be argued that the original intent of the founders was for contemporary foreign law to be used to determine a standard, as would be true in an originalist reading of the South African Constitution.

so.<sup>96</sup> Many states, such as New Jersey, Hawaii, and Alaska, have charters that were ratified in the past seventy-five years, documents that are the subject of extensive and readily accessible public records. Intuitively, the “original intentions” of the authors of these documents seem far more accessible than those of America’s centuries-dead Founders. Accordingly, if a soft originalist opposes the Supreme Court’s use of foreign law, he must also oppose a great deal of state court use of non-state law.

## CONCLUSION: SAME DIFFERENCE

Having considered the leading objections to the use of foreign legal citations, one may thus conclude that none justifies permitting states to apply the laws of other states while not allowing the Supreme Court to cite foreign law. Of course, this analysis cannot consider each and every possible difference between these practices, and so there remains the possibility that a framework not explored here might coherently justify treating these practices differently. Given the scope and breadth of arguments considered by this analysis, however, such an outcome is decidedly unlikely.

In this essay, I argued that concerns drawn from the pragmatist legal framework may coherently justify accepting state court use of non-state law while rejecting the Supreme Court’s use of foreign law, but frameworks independent of such concerns do not. Because of the magnitude of such practical challenges, it is possible that such obstacles will not ever be fully overcome and, as a result, that there will always be at least some reason for rejecting the use of foreign law. That said, the conclusion reached in this analysis is still an important one. By indicating the similarity between these practices, this argument challenges the assumptions undergirding two well-known judicial behaviors. On one hand, the result reached suggests that the use of non-state law is vulnerable to a host of objections it is not normally associated with and, as such, may be more suspect than currently thought. The more plausible implication of this argument, however, is that the Supreme Court’s use of foreign law as persuasive authority is less problematic than gener-

ally imagined. In suggesting the commonality between this fiercely controversial practice and a widely accepted one, this essay suggests that current attempts to demonize the use of foreign law may be inappropriate and ought to be reconsidered. Ultimately, though the divergence between nations may seem greater than the divergence between states, they are, in a meaningful sense, the same difference.

### Notes

1 *Atkins v. Virginia*, U.S. 304 (2002), quoting *Thompson v. Oklahoma*, 487 U.S. 815 (1988), no. 4 at 869.

2 Austen L. Parrish, "Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law," *University of Illinois Law Review* (2007): 638.

3 Eric A. Posner and Cass R. Sunstein, "The Law of Other States," *Stanford Law Review* 59 (2006): 133-134.

4 Harold Hongju Koh, "The United States Constitution and International Law," *The American Journal of International Law* 98 (2004): 45-46.

5 Anne-Marie Slaughter, "A Global Community of Courts," *Harvard International Law Journal* 44 (2003): 191-220.

6 Paolo G. Carozza, "My Friend Is a Stranger": The Death Penalty and the Global Ius Commune of Human Rights," *Texas Law Review* 81 (2003).

7 Roger P. Alford, "In Search of a Theory for Constitutional Comparativism," *UCLA Law Review* 52 (2005): 639-715.

8 John O. McGinnis, "Foreign to Our Constitution," *Northwestern University Law Review* 100 (2006): 303-330.

9 Richard Posner, *How Judges Think* (Cambridge: Harvard University Press, 2008).

10 Patrick Baude, "Interstate Dialogue in State Constitutional Law," *Rutgers Law Journal* 28 (1997); Peter Harris, "Ecology and Culture in the Communication of Precedent among State Supreme Courts, 1870-1970," *Law and Society Review* 19 (1985).

11 Ernesto Sanchez, "A Case against Judicial Internationalism," *Connecticut Law Review* 38 (2005): 190.

12 For clarity's sake, in the remainder of this essay, phrases like "Supreme Court citation of foreign sources" or "Supreme Court citation of foreign laws" will often serve as shorthand for the practice of Supreme Court citation and usage of foreign or international legal sources as "precedential persuasive authorities", while phrases like "state citation of other states" or "state court use of non-state sources" will often serve as shorthand for the practice of state supreme court citation and usage of the opinions of other state supreme courts as precedential persuasive authorities.

13 Steven G. Calabresi and Stephanie Doston Zimdahl, "The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision," *William and Mary Law Review* 47 (2005): 754.

14 David Zaring, "The Use of Foreign Decisions by Federal Courts: An Empirical Analysis," *Journal of Empirical Legal Studies* 3, no. 2 (2006): 299.

15 Ronald A. Brand, "Judicial Review and the United States Supreme Court Citations to Foreign and International Law," *Duquesne Law Review* 45 (2007): 435.

16 Holly Jones Magnes, "Ginsburg, O' Connor Received Death Threats after Republican Criticisms," *The Jurist*, March 3, 2006.

17 Antonin Scalia, "Keynote Address: Foreign Legal Authority in the Federal Courts,"

*American Society of International Legal Proceedings* 98 (2004): 305.

18 Matthew Raalf, "A Sheep in Wolf's Clothing: Why the Debate Surrounding Comparative Constitutional Law Is Spectacularly Ordinary," *Fordham Law Review* 73 (2004): 1253.

19 Youngjae Lee, "International Consensus as Persuasive Authority in the Eighth Amendment," *University of Pennsylvania Law Review* 152 (2007): 105.

20 Posner, *How Judges Think*, 349.

21 Ernest A. Young, "Foreign Law and the Denominator Problem," *Harvard Law Review* 119 (2005): 150.

22 Cindy G. Buys, "Burying Our Constitution in the Sand? Evaluating the Ostrich Response to the Use of International and Foreign Law in U.S. Constitutional Interpretation," *Brigham Young University Journal of Public Law* 21 (2007): 45.

23 Chad Flanders, "Toward a Theory of Persuasive Authority," (SSRN, 2008): 11.

24 Delahunty and Yoo, "Against Foreign Law," 295; John O. McGinnis, "Foreign to Our Constitution," *Northwestern University Law Review* 100 (2006): 295-310.

25 Lee, "International Consensus as Persuasive Authority in the Eighth Amendment," 105.

26 Parrish, "Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law," 637.

27 Flanders, "Toward a Theory of Persuasive Authority," 11.

28 Flanders, "Toward a Theory of Persuasive Authority," 4-5.

29 Mark Tushnet, "A Decent Respect to the Opinions of Mankind': Referring to Foreign Law to Express American Nationhood," *Albany Law Review* 69 (2006): 809.

30 Posner, *How Judges Think*, 349.

31 Flanders, "Toward a Theory of Persuasive Authority," 4-5.

32 See Parrish, "Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law," 641; Richard Posner, "No, Thanks, We Already Have Our Own Laws," *Legal Affairs* July/August 2004.

33 Harris, "Ecology and Culture in the Communication of Precedent among State Supreme Courts, 1870-1970," 449

34 Posner, *How Judges Think*, 349.

35 *Sterling V. Cupp*, 625 P.2d. 123 (1981); *State V. Geisler*, 222 Conn. 672 (1992).

36 *Roper V. Simmons*, U.S. 551 (2005), 575-79; Richard S. Kaye, "Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses," *Northwestern University Law Review* 82 (1988).

37 Sanford Levinson, "Looking Abroad When Interpreting the U.S. Constitution: Some Reflections," *Texas International Law Journal* 39 (2004): 363.

38 *New Jersey Coalition against War in the Middle East V. J.M.B. Realty Corp.*, 138 N.J. 327 (1994).

39 James N. G. Cauthen, "Horizontal Federalism in the New Judicial Federalism: A Preliminary Look at Citations," *Albany Law Review* 66 (2003): 791.

40 Harris, "Ecology and Culture in the Communication of Precedent among State Supreme Courts, 1870-1970," 449.

41 Posner and Sunstein, "The Law of Other States," 134.

42 Gregory A. Caldeira, "The Transmission of Legal Precedent: A Study of State Supreme Courts," *The American Political Science Review* 79, no. 1 (1985): 178.

43 Roger P. Alford, "In Search of a Theory for Constitutional Comparativism," *UCLA Law Review* 52 (2005): 692.

44 Posner and Sunstein, "The Law of Other States," 168.

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46 Kenneth Anderson, "Foreign Law and the U.S. Constitution," *Policy Review*, June 2005, 34.

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- 54 Diarmuid F. O'Scannlain, "What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?," *Notre Dame Law Review* 80 (2005): 1906.
- 55 Posner, "No, Thanks, We Already Have Our Own Laws."
- 56 James Allan and Grant Huscroft, "Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts," *San Diego Law Review* 43 (2006): 23.
- 57 See generally Thomas Gawron and Ralf Rogowski, *Constitutional Courts in Comparison* (New York: Berghahn Books, 2002).
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- 60 Watson, *Legal Transplants*, 11.
- 61 Alexander Hamilton, James Madison, and John Jay, *The Federalist: A Collection of Essays* (New York: The Colonial Press, 1901), 428.
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- 63 Brett Curry, "Looking for Law in All the Wrong Places: Foreign Law and Support for the U.S. Supreme Court," *Politics and Policy* 36, no. 6 (2008): 1107.
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- 65 J. Harvie Wilkinson, "The Use of International Law in Judicial Decisions," *Harvard Journal of Law and Public Policy* 27 (2003): 425.
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- 67 Parrish, "Storm in a Teacup," 661.
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- 78 Baude, "Interstate Dialogue in State Constitutional Law," 837.
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- 92 Peter R. Teachout, "Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law," *Vermont Law Review* 13 (1998): 26.
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