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## Foreign Law as Legislative Fact in Constitutional Cases

A. Christopher Bryant\*

### ABSTRACT

*Do we really need another law review article about foreign law in constitutional interpretation? In fact, we do. In the vast literature on the subject, a fundamental point has received scant attention. In the recent rulings that have stoked the present controversy, the Supreme Court has employed foreign law not as law, but rather merely as evidence of a legislative fact made relevant by domestic constitutional law. Commentators, however, have largely directed their attention to the merits of a genuine constitutional comparativism in which foreign law serves as a model for the creation of domestic constitutional doctrine. Many commentators have advocated just such an approach, and at least one sitting Justice has joined in this chorus in both extrajudicial commentary and in a dissenting opinion. But to date, the Court has yet to take this much-mooted step, perhaps due to an awareness of the complex theoretical challenges such an approach would raise. A few opponents to the Court's actual practice have forcefully observed that the Court's use of foreign law has lacked the rigor and impartiality that would be necessary to make it credible. What even these scholars have not done, and what this Article ventures, is to consider these claims within the broader context of the Court's use, and misuse, of all manner of evidence employed in connection with questions of legislative fact in constitutional adjudication.*

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## I. INTRODUCTION

In November 2010, Oklahoma voters, by an overwhelming margin, amended their state constitution to command that “courts shall not look to the legal precepts of other nations or cultures.”<sup>1</sup> The Oklahoma ballot initiative is only the most recent of many manifestations of hostility to judicial reliance on foreign law. In the last decade, the propriety of the U.S. Supreme Court’s invocation of foreign law in constitutional cases has been one of the hottest topics in legal scholarship. Yet the heat generated so far has proven unusually disproportionate to the light cast. By examining the subject as one aspect of the Court’s confrontation with questions of legislative fact in constitutional cases, this Article seeks to correct that imbalance.

Legislative facts, also sometimes referred to as social facts, transcend the parties to a discrete case and concern the public policy judgment leading to the enactment of legislation. At least since the early 1940s, commentators and jurists have distinguished legislative facts from adjudicative facts, which concern the application of a general rule to the unique, concrete circumstances of a particular dispute. In contemporary jurisprudence, the constitutional validity of a challenged statute often turns on a question of legislative fact. For example, the constitutionality of the federal Partial-Birth Abortion Ban Act depended upon whether the proscribed procedure was medically necessary in a significant number of cases. Numerous physicians and six lower federal courts said that it was. But the Supreme Court concluded that the issue was subject to “documented medical disagreement” and that Congress was entitled to side with the skeptics.<sup>2</sup>

Likewise, the result in many of the most prominent constitutional rulings from the last decade ultimately turned on the Court’s assessment of a disputed question of legislative fact, including decisions concerning the scope of congressional power

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1. See *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1302 (W.D. Okla. 2010) (quoting Oklahoma State Question 755). The court granted a preliminary injunction prohibiting certification of the election results for the initiative pending the court’s ruling on the merits of a constitutional challenge to the initiative. *Id.* at 1308. Similar laws are under consideration, or have been enacted, in at least six other states. See Donna Leinwand, *States Enter Debate on Sharia Law: Are Bans Like Oklahoma’s Necessary, Constitutional, Anti-Islamic?*, USA TODAY, Dec. 9, 2010, at 3A.

2. *Gonzales v. Carhart (Carhart II)*, 550 U.S. 124, 162–66 (2007).

under the Commerce Clause<sup>3</sup> and Section 5 of the Fourteenth Amendment,<sup>4</sup> the requirements of due process<sup>5</sup> and equal protection of the law,<sup>6</sup> and the breadth of the First Amendment's protections of religious<sup>7</sup> and expressive freedom.<sup>8</sup> Nor is the centrality of legislative facts to constitutional litigation anything new, though the frequency and extent of the Court's reliance on them has increased with the late twentieth-century turn towards using balancing tests in constitutional law.<sup>9</sup> To some extent the significance of legislative facts in constitutional cases is an inevitable corollary to judicial review, which makes all the more astounding the judiciary's failure to establish a consistent or coherent approach to resolving disputes about them. Over the course of the last century, few issues have more persistently or profoundly perplexed judges than how they should address questions of legislative fact when reviewing the constitutionality of a challenged statute.

This context is relevant to the debate over the Court's use of foreign law in recent constitutional cases because in those cases the Court has employed foreign law not *as law* but rather merely as evidence of a legislative fact made relevant by the Court's domestic constitutional jurisprudence. An extraordinarily impressive and diverse list of scholars has addressed the Court's use of foreign law in constitutional cases.<sup>10</sup> But to date no one has examined the matter in the context of the more general problem of how courts should determine legislative facts in constitutional cases. This Article undertakes that effort.

The insights gleaned from considering the Court's recent citation of foreign law within the broader context of the role played by legislative facts in contemporary constitutional adjudication are significant and wide-ranging. By focusing on the analytical work being done by the Court's references to foreign law in the recent cases, it becomes clear that the Court has not truly engaged in

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3. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1 (2005).

4. *See, e.g.*, *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

5. *See, e.g.*, *Carhart II*, 550 U.S. 124.

6. *See, e.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701 (2007).

7. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507 (1997).

8. *See, e.g.*, *Ashcroft v. ACLU*, 535 U.S. 564 (2002).

9. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 974 (1987) (noting that the instrumental evaluation of competing interests is often expressed "in quasi-empirical terms").

10. *See infra* Parts IV A.2, IV.B.2

comparative constitutionalism. Accordingly, many of the criticisms directed at the practice prove wide of the mark. So, too, many of the theoretically rich defenses of the practice are inapposite to what the Court has actually done in the controversial cases. Much of the existing debate is relevant only to a mode of constitutional interpretation far more ambitious and debatable than the Court's actual method.

Moreover, to the extent that the concerns addressed in the extensive public debate are shown to be pertinent to the way the Court has in fact employed foreign law, those concerns are equally implicated whenever the Court resolves a disputed question of legislative fact. In the end, the most profound issues genuinely raised by the Court's recent interest in the laws of other nations can be traced to the confusion characterizing the Court's approach to questions of legislative fact in constitutional cases more generally. The most promising consequence of the attention lavished on the Court's relatively meager use of foreign law in a few salient constitutional cases may be a more widespread appreciation of the poverty of our understanding of the role questions of legislative fact do and should play in the practice of judicial review.

In Part II, this Article examines the role that legislative facts play in constitutional adjudication, providing a context for understanding the Court's reliance on foreign law in recent cases. Part III briefly discusses those cases in order to show that the Court employed foreign law merely as evidence of a legislative fact made relevant by established domestic constitutional jurisprudence. Next, Part IV demonstrates that the scholarly debate has so far not only largely ignored this reality but has also conjured a controversy unrelated to what the Court has actually done. In Part V, this Article places the Court's use of foreign law within the context of the Court's approach to all disputed questions of legislative fact, concluding with a discussion of the important but largely unexamined issues raised by the prevailing *ad hoc* approach to judicial determination of legislative facts in constitutional cases. Part VI concludes.

## II. THE FACTS OF THE MATTER

The judicial process is oriented to the discovery of adjudicative facts, which is to say facts relating only to the parties involved in the litigation. By contrast, questions of legislative fact concern issues that reach beyond any particular discrete dispute to the empirical

foundation of a generally applicable rule.<sup>11</sup> The speed at which a vehicle was travelling at the time of an accident is an adjudicative fact. Whether a lower speed limit would reduce the number and severity of accidents is a question of legislative fact, as is whether a specific abortion procedure is medically necessary in a significant number of cases. As these examples illustrate, questions of legislative fact often intertwine with predictive and normative assessments.<sup>12</sup>

Courts are notoriously bad at resolving questions of legislative fact.<sup>13</sup> The principal purpose of the judiciary, at least historically, has been to resolve discrete disputes between particular parties, and, accordingly, the institution is structured to that end.<sup>14</sup> The adversarial system assumes that the contest between the parties will supply appropriate incentives for the discovery and disclosure of the most pertinent information and persuasive arguments, unless and until the cost of doing so exceeds either party's estimation of the dispute's value (or either party's ability to pay). Much can and has been said on behalf of this structure as an engine for just resolution of particularized controversies.<sup>15</sup>

But this structure is ill-suited to ensuring the appropriate investigation and consideration of issues of legislative fact. Neither courts nor the parties appearing before them have anything like the vast resources available to a legislature. In the rare cases in which the

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11. *See, e.g.*, Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 77 n.9 (citing KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 15.03 (1958)) (noting that the “phrase virtually belongs to Professor Kenneth C. Davis”). Other scholars have at times preferred the term “social facts” to Davis’s “legislative facts,” though the two terms appear to be coterminous in coverage. *See, e.g.*, John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 69–70 (2008). This Article will use the term “legislative facts” throughout.

12. It is a fact's relationship, or not, to such issues that make it legislative, or not, in character. For purposes of classifying facts as either legislative or adjudicative, it is immaterial whether claims about them appear in the statute itself or the formal legislative record, or nowhere in the law or its legislative history. Regardless, such issues matter in constitutional cases whenever doctrine makes them significant. *See also infra* notes 24–27 and accompanying text (discussing the Court's varying treatment of factual findings in the legislative record).

13. This claim is developed at somewhat greater length in A. Christopher Bryant, *The Empirical Judiciary*, 25 CONST. COMMENT. 467 (2009) (reviewing DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS (2008)).

14. Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 979 (2009) (“[D]etermining the rights of the many on the basis of a lawsuit between the few can produce bad results.”).

15. *But see* T.H. WHITE, THE ONCE AND FUTURE KING 220 (1940) (analogizing the adversarial system to trial by combat).

legislature's prestige proves inadequate to draw forth voluntary production of information, resort may be had to virtually unlimited investigatory powers, including compulsory process.<sup>16</sup>

Whereas the judicial process is designed to discover the details of discrete disputes, the deliberative nature of legislative bodies enhances their ability to determine legislative facts. Ordinarily a record is built first in parallel committees in both chambers, often over many years. That process is not merely open; it is self-consciously orchestrated to stimulate public consideration of and ultimately involvement in a national debate, which in a feedback loop further informs and influences members of Congress. Perhaps most significantly, one aspect of the representation elected representatives provide their constituents is to reflect in miniature their constituents' experiences, interests, and values.<sup>17</sup> To be sure, the reflection is an imperfect and distorted one.<sup>18</sup> But it would be hard to find a less representative body than the federal judiciary in general and the U.S. Supreme Court in particular. Exacerbating the rarified nature of the Justices' backgrounds,<sup>19</sup> their extraordinary isolation and resulting insulation from the lives of most ordinary citizens leaves them exceptionally poor barometers of present social realities. By contrast, the nature of elected office compels legislators to preserve channels of communication and opportunities for

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16. See *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975) (reaffirming that the issuing of subpoenas is a legitimate congressional investigative power); *Watkins v. United States*, 354 U.S. 178, 187 (1957) ("It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action."); *McGrain v. Daugherty*, 273 U.S. 135, 173-75 (1927) (holding that Congress has not only its enumerated powers but "such auxiliary powers as are necessary and appropriate" to carry out its enumerated functions, including the power to compel the production of evidence).

17. See generally HANNA F. PITKIN, *THE CONCEPT OF REPRESENTATION* 60-91 (1967) (discussing descriptive representational theory).

18. The U.S. Senate, for example, is often referred to as "the millionaires' club." See, e.g., William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 NW. U. L. REV. 335, 369 n.189 (2000).

19. All nine sitting Justices received their law degrees from one of three northeastern, Ivy League law schools. The Justices are not even representative of the legal profession, which is itself hardly representative of the population at large. See John Schwartz, *Weighing the Effect of an Ivy-Covered Path to the Supreme Court*, N.Y. TIMES, June 9, 2009, at A18; cf. Lino A. Graglia, *Lawrence v. Texas: Our Philosopher-Kings Adopt Libertarianism as Our Official National Philosophy and Reject Traditional Morality as the Basis for Law*, 65 OHIO ST. L.J. 1139, 1141 (2004) ("Supreme Court Justices are almost always themselves products of elite academia and members of the cultural elite, seeking its approval and sharing its deep distrust of the mass of their fellow citizens . . .").

interaction with their constituents.<sup>20</sup> The point of this comparison is not that no separation exists between the lives of elected representatives and those they represent, but rather, merely that institutional forces preserve a far more intimate connection than would be conceivable for Article III judges, especially those serving in the highly secluded setting of the nation's highest Court.

The energy of congressional mechanisms for the reception of legislative facts is underscored by the poverty of their judicial counterparts. The primary medium for injecting public information and opinion into litigation is the amicus brief—a tool of indeterminate impact employed in a scandalously undisciplined fashion.<sup>21</sup> More generally, as recent decisions<sup>22</sup> have made only too clear, and as two commentators recently remarked, the Supreme Court “has been inconsistent and result-oriented in its approach to social fact-finding.”<sup>23</sup> Indeed, this claim understates the extent and depth of the doctrinal disorder.

In fact, the Court's approach to legislative facts in constitutional cases has been indefensibly ad hoc and, frankly, intellectually incoherent. Sometimes the formal legislative record reveals the legislature's efforts to address a question of legislative fact. In many such cases, the Court has sententiously intoned upon its duty to

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20. The notoriously contentious town-hall meetings on health-care reform in the summer of 2009 are merely the most vivid, recent illustrations that members of Congress expose themselves to public expression in ways unimaginable for a Supreme Court Justice. See Ian Urbina, *Beyond Beltway, Health Debate Turns Hostile*, N.Y. TIMES, Aug. 8, 2009, at A1. That the Chief Justice was “very troubl[ed]” by President Obama's relatively mild rebuke of the Court in his 2010 State of the Union address underscores the Justices' lack of familiarity with face-to-face criticism of their work. See Robert Barnes & Anne E. Kornblut, *It's Obama vs. the Supreme Court, Round 2, over Campaign Finance Ruling*, WASH. POST, Mar. 11, 2010, at A01.

21. See DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS 97–98 (2008) (“[C]ourts routinely accept amicus briefs chock-full of factual assertions from interested parties who might, or might not, have expertise on the subject”); see also PAUL M. COLLINS, JR., FRIENDS OF THE COURT: INTEREST GROUPS AND JUDICIAL DECISIONMAKING (2008) (discussing the dramatic increase in amicus briefs filed in the U.S. Supreme Court and evaluating their impact); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000) (same).

22. Compare *Stenberg v. Carhart* (*Carhart I*), 530 U.S. 914, 936–37 (2000) (concluding that in the “medically related evidentiary circumstances” of the case a prohibition of the so-called partial-birth abortion procedure violated the Constitution), with *Gonzales v. Carhart* (*Carhart II*), 550 U.S. 124, 163 (2007) (finding sufficient “medical and scientific uncertainty” to sustain a similar ban without overruling *Carhart I*).

23. McGinnis & Mulaney, *supra* note 11, at 72.



defer to those efforts.<sup>24</sup> When that has proven less convenient, the Court has stressed its obligation to resolve such questions independently.<sup>25</sup> More commonly, the legislative record fails to reflect the legislature's attempts, if any, to answer the question. In such cases, the Court has frequently acknowledged that legislatures are under no obligation to compile a record to serve the needs of the judiciary.<sup>26</sup> Still, on other occasions the Court has identified the legislature's failure to do just this as a reason to invalidate a statute.<sup>27</sup>

Regardless of the state of the formal legislative record, once in court controlling issues of legislative fact are sometimes fully vetted at the trial level. In such cases, cognizant of the trial judge's familiarity with the record and unique ability to hear live testimony (often from expert witnesses), the Court relies heavily upon the trial court's findings of fact,<sup>28</sup> unless and until it proves awkward to do so.<sup>29</sup> In any event, the Court limits its review to the record compiled

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24. *See, e.g.*, *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276–80 (1981); *Perez v. United States*, 402 U.S. 146, 155–56 (1971); *Katzenbach v. McClung*, 379 U.S. 294, 299–301 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252–53 (1964).

25. *See, e.g.*, *Carhart II*, 550 U.S. at 162–65 (“The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.”); *Crowell v. Benson*, 285 U.S. 22, 60 (1932) (“In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.”); *cf.* *United States v. Lopez*, 514 U.S. 549, 562 (1995) (discussing need for “independent [judicial] evaluation” of factual predicate for exercise of congressional power).

26. *See, e.g.*, *Perez*, 402 U.S. at 156 (disclaiming any inference that Congress must make factual findings in order to legislate); *see also* *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 133 (1989) (Scalia, J., concurring) (stressing that the Court's opinion ought not be read to suggest that evidence of the infeasibility of alternative regulatory regimes “must have been before Congress in order for the law to be valid,” because “[n]either due process nor the First Amendment requires legislation to be supported by committee reports, floor debates, or even consideration, but only by a vote”).

27. *See, e.g.*, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88–89 (2000) (citing congressional failure to document in the legislative record a widespread history of constitutional violations as a basis for the Court's invalidation of challenged statute); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639–40 (1999) (same). *See generally* A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New “On the Record” Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328 (2001) (documenting and criticizing the Court's reliance on perceived gaps in the formal legislative record as evidence in support of the Court's contrary resolution of questions of legislative fact).

28. *See, e.g.*, *Stenberg v. Carhart (Carhart I)*, 530 U.S. 914, 932–33, 936–37 (2000) (invoking district court findings of fact).

29. *See, e.g.*, *Carhart II*, 550 U.S. at 162–63 (rejecting the factual findings of three

by the trial court,<sup>30</sup> unless it looks to outside materials.<sup>31</sup> When doing the latter, the Justices limit their investigation to materials cited in the parties' briefs, except when they rely upon the briefs of amici,<sup>32</sup> or conduct their own independent investigations.<sup>33</sup> In the latter case, the parties are almost never offered any opportunity to examine, let alone rebut, the sources ultimately relied upon, which may or may not be cited in the Court's opinion.<sup>34</sup> Not only has the Supreme Court from time to time employed all of these contradictory methods, but indeed so have most of the individual Justices.<sup>35</sup> Most

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district courts that the banned abortion procedure was safer than alternatives in some significant subset of cases).

30. *See, e.g.*, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818–22 (2000); *Reno v. ACLU*, 521 U.S. 844, 876 (1997); *see also* *McGinnis & Mulaney*, *supra* note 11, at 83 nn.66–67 (noting that in *Reno v. ACLU* and *Playboy Entertainment Group* the Court “based its own factual judgments on the findings in [the record on appeal] and did not rely on evidence drawn from amicus briefs”).

31. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 330–31 (2003) (relying upon assertions of legislative fact made in briefs filed for the first time in the Supreme Court).

32. *See id.*

33. *See, e.g.*, LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* 83, 90–91 (2005) (describing Justice Blackmun's summer visit to the Mayo Clinic library and dinner-table discussion with his daughters about abortion while drafting the Court's opinion in *Roe v. Wade*, 410 U.S. 113 (1973)).

34. *See id.*

35. *Compare, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 529–532 (1997) (Kennedy, J., for the Court) (assuming without empirical inquiry that state governmental discrimination against religious minorities was a substantially less serious problem than similar discrimination against racial minorities), *with, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (Kennedy, J., for the Court) (remanding for an evidentiary hearing in the trial court because “[o]n the state of the record developed thus far,” the Court could neither confirm nor reject Congress's prediction that the economic viability of local broadcast television would be threatened absent the challenged statute's must-carry requirements); *compare also* *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 133 (1989) (Scalia, J., concurring) (stressing that the Court's opinion ought not be read to suggest that evidence of the infeasibility of alternative regulatory regimes “must have been before Congress in order for the law to be valid,” because “[n]either due process nor the First Amendment requires legislation to be supported by committee reports, floor debates, or even consideration, but only by a vote”), *with, e.g.*, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88–89 (2000) (Scalia, J., joining the opinion of the Court) (citing congressional failure to document in the legislative record a widespread history of constitutional violations as a basis for the Court's invalidation of challenged statute), *and* *Fla. Prepaid Postsecondary Ed. Exp. Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639–40 (1999) (same); *compare also* *Raich v. Gonzales*, 545 U.S. 1, 64 (2005) (Thomas, J., dissenting) (faulting Congress for failing to provide evidence in support of its finding that permissive state policies would disrupt efforts to enforce federal drug laws), *with* *Hamdi v. Rumsfeld*, 542 U.S. 507, 592 (2004) (Thomas, J., dissenting) (faulting the plurality for imposing a regime of “judicial second-guessing” on federal executive branch determinations that citizens must be detained indefinitely in support of the “war on terror”); *compare also*

bewildering has been the Justices' frequent failure even to acknowledge the issue, let alone acknowledge that it remains unsettled.

A few commentators have been somewhat more candid in acknowledging the problem.<sup>36</sup> Still, the subject has not received the kind of extensive and sustained scholarly investigation its import clearly merits. Though the problem is a ubiquitous and recurring one, scholarly efforts to solve it tend to come in waves, with several scholars addressing the question during a particular window of time (often in response to one or two salient decisions) and then ignoring the matter for years.<sup>37</sup> The issue implicates the very legitimacy of judicial review, so to disregard it is indefensible. At least some of the reasons for this neglect are apparent. Ironically, the very pervasiveness of the question accounts for a portion of the tendency to scholarly avoidance. The issue cuts across the areas of specialization that typically organize constitutional law scholarship. In any event, whatever the cause, judicial treatment of questions of legislative fact has proceeded ad hoc, if not haphazardly, a matter that constitutional theorists have largely neglected.<sup>38</sup>

The point is not that blind deference is owed to Congress or that the Court ought never decide issues of legislative fact, but merely that its capacity to do so is grossly underdeveloped when compared to that of Congress and, moreover, when it has done so its methods have lacked doctrinal consistency and intellectual coherence. In the context of this unfortunate state of affairs, the Court has recently resorted to foreign law.

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Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 551 U.S. 701, 841 (2007) (Breyer, J., dissenting in an opinion in which Ginsburg, J., joined) (insisting on the need for judicial deference to a school board's resolution of a disputed issue in the relevant social science literature), *with* Gonzales v. Carhart (*Carhart II*), 550 U.S. 124, 174 (2007) (Ginsburg, J., dissenting in an opinion in which Breyer, J., joined) (insisting that a division of professional medical opinion on the relevant issue precluded Congress from banning abortion procedure). The other four sitting Justices have yet to compile deep records on the matter, though it seems unduly optimistic to expect that they will fare much better.

36. See David L. Faigman, *Fact-Finding in Constitutional Cases*, in HOW LAW KNOWS 157 (Austin Sarat et al. eds., 2007) (noting that "the Court has never developed an intelligible constitutional fact jurisprudence" and listing other sources); McGinnis & Mulaney, *supra* note 11, at 72.

37. See Bryant, *supra* note 13, at 469–72 (discussing history of scholarly treatment of the issue).

38. See McGinnis & Mulaney, *supra* note 11, at 69 (describing "the peculiar and radically under-theorized nature of the treatment accorded congressional fact-finding" in constitutional cases).

## III. FOREIGN LAW AS EVIDENCE

The current, surprisingly high-octane controversy concerning the Court's citation of foreign law in support of a constitutional ruling can be traced to an inauspicious, but in retrospect highly revealing, footnote in the Court's 2002 opinion prohibiting the execution of the mentally retarded.<sup>39</sup> Near the end of his majority opinion for the Court in *Atkins v. Virginia*, Justice Stevens cited an amicus brief filed on behalf of the European Union in support of the proposition "that within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."<sup>40</sup> This largely non-controversial claim<sup>41</sup> was sandwiched between statements by representatives of diverse religious communities within the United States and public-opinion polling data, all reflecting opposition to execution of the mentally retarded.<sup>42</sup> The footnote itself explained that foreign practices merely served as "evidence of" a broad "social and professional consensus" against executing mentally retarded persons.<sup>43</sup>

Whether such a consensus existed was a question of legislative fact made material to the Court's analysis by the long established proposition that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>44</sup> The Court embraced that view of the Amendment in its 1958 opinion in *Trop v. Dulles*, which barred denationalization as punishment. There the Court had also observed that "the basic concept underlying the Eighth Amendment is

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39. For an exhaustive analysis of the Court's prior references to foreign law in constitutional cases, see Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005); see also A.E. Dick Howard, *A Traveler from an Antique Land: The Modern Renaissance of Comparative Constitutionalism*, 50 VA. J. INT'L L. 3 (2009) (essay overview of last half-century of constitutional comparativism).

40. 536 U.S. 304, 316 n.21 (2002).

41. Whereas the content of the assertion was not disputed, its relevance most surely was. See *id.* at 325 (Rehnquist, C.J., dissenting) ("[I]f it is evidence of a *national* consensus for which we are looking, then the viewpoints of other countries simply are not relevant.").

42. See Paolo G. Carozza, *"My Friend is a Stranger": The Death Penalty and the Global Ius Commune of Human Rights*, 81 TEX. L. REV. 1031, 1032 (2003) (noting that the reference to foreign practice was "almost buried among the opinions of medical associations, religious organizations, and general polling data").

43. *Atkins*, 536 U.S. at 316 n.21 (majority opinion).

44. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

nothing less than the dignity of man” and that “[w]hile the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of *civilized* standards.”<sup>45</sup>

The Court’s reference to “civilized standards” implied that those standards would be derived at least in part from the contemporary practices of all “civilized” nations, not just the United States. Indeed, the Court invalidated the federal statute authorizing denationalization as a punishment on the ground that “[t]he civilized nations of the world [we]re in virtual unanimity that statelessness [wa]s not to be imposed as punishment for crime.”<sup>46</sup> In so doing the Court demonstrated that the constitutionality of U.S. practices would be measured against other nations’ norms. Even the *Trop* dissenters acknowledged the relevance of other nations’ practices to the constitutional evaluation of a challenged punishment.<sup>47</sup> One might reasonably challenge the legitimacy of the *Trop* standard as an interpretation of the Eighth Amendment,<sup>48</sup> but it hardly constitutes an astounding twenty-first century innovation.

Three years after *Atkins*, the Court in *Roper v. Simmons* held that the imposition of the death penalty for crimes committed when the offender was less than eighteen years old violated the Eighth Amendment.<sup>49</sup> As in *Atkins*, the Court employed foreign law in support of its conclusion that a worldwide consensus existed against the execution of persons for their juvenile crimes. In *Roper*, however, foreign law played at once a far greater and more ambiguous role in Justice Kennedy’s opinion for the Court than in the Court’s opinion in *Atkins*. Kennedy devoted an entire section of his opinion to a

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45. *Id.* at 100 (emphasis added).

46. *Id.* at 102.

47. *Id.* at 126 (Frankfurter, J., dissenting) (concluding that the Eighth Amendment did not prohibit denationalization in part because “[m]any civilized nations impose loss of citizenship for indulgence in designated prohibited activities”).

48. Scalia, for example, has announced that he “detest[s]” the phrase “evolving standard of decency” because, in his view, “societies don’t always mature. Sometimes they rot.” *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. CONST. L. 519, 525 (2005) [hereinafter *A Conversation*]. For a defense of a “broad approach to constitutional interpretation in Eighth Amendment cases” on textual, historical, and instrumental grounds, see Timothy K. Kuhner, *The Foreign Source Doctrine: Explaining the Role of Foreign and International Law in Interpreting the Constitution*, 75 U. CIN. L. REV. 1389, 1411–14 (2007).

49. 543 U.S. 551 (2004). See generally Stephen Arvin, Comment, *Roper v. Simmons and International Law*, 83 DENV. U. L. REV. 209 (2005).

discussion of foreign and international law, the first sentence of which stressed “the stark reality that the United States [was] the only country in the world that continue[d] to give official sanction to the juvenile death penalty.”<sup>50</sup> This reality was not “controlling, for the task of interpreting the Eighth Amendment remains [the Justices’] responsibility.”<sup>51</sup> But as in *Atkins*, which the Court cited as exemplary of this point, foreign law could be “instructive” to the Court’s independent determination that a punishment was “cruel and unusual.”<sup>52</sup>

Exactly what instruction the Justices in the *Roper* majority took from foreign practice is unclear.<sup>53</sup> But the best reading of Kennedy’s opinion is that foreign law provided evidence of a crucial legislative fact—namely, that as of 2005, revulsion was the consensus reaction of the world community to the juvenile death penalty. As in *Trop* and *Atkins*, that fact—that “reality”—gave particularized content to the “civilized standards” long mandated by the Court’s Eighth Amendment jurisprudence. The “law” the Court enforced remained as American as apple pie; foreign law came into the analysis as evidence of a mere (legislative) fact to which the U.S. law was applied in turn.

To be sure, Kennedy’s opinion is also amenable to a reading in which foreign law is invoked as support for the Court’s independent moral reasoning.<sup>54</sup> On this view, the Court looks to foreign law as a model for the *rule it chooses* to impose on the United States, in much the same way that legislators in one state might look to sister states’ criminal codes when revising their own. When practiced by the Justices, this really would be comparative constitutionalism. But this reading attributes to *Roper* a construction of the Eighth Amendment

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50. *Roper*, 543 U.S. at 575; cf. Kuhner, *supra* note 48, at 1412 (“‘Cruel and unusual’ is a comparative phrase. It begs the question, ‘cruel and unusual compared to what?’”).

51. *Roper*, 543 U.S. at 575.

52. *Id.* at 575–76.

53. See Roger P. Alford, *Roper v. Simmons and Our Constitution in International Equipose*, 53 UCLA L. REV. 1, 9 (2005) (observing that “*Roper* is the latest of many decisions in which the Court has referenced comparative experiences to interpret constitutional guarantees without articulating a theoretical basis to justify the reference”).

54. For a classic exposition of the view that constitutional interpretation, rightly understood, obligates the Justices to engage in moral reasoning, see MICHAEL J. PERRY, *THE COURTS, THE CONSTITUTION, AND HUMAN RIGHTS* (1982); see also RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 37 (1996) (“[F]idelity to the Constitution and to law demands that judges make contemporary judgments of political morality . . .”).

that departs from, instead of carrying forward, the tradition launched in *Trop*, and echoed in *Atkins*, of looking to foreign law as evidence of civilization's consensus.

In any event, the extent of the *Roper* Court's discussion of foreign law compounded by the ambiguity of its analytical function sparked unusually spirited criticism. In Judge Posner's words, the "imprudence" of *Roper*'s most "egregious departure from conventionality" was demonstrated by "the surprising antipathy it [] provoked—surprising because the citations in judicial opinions rarely receive attention in the lay press."<sup>55</sup> Similarly, Frederick Schauer observed that the "focus of the debate on the citation to foreign (or, sometimes, international) law seems almost quaint."<sup>56</sup> To some extent, critics' disproportionate focus on the role foreign law played in *Roper* may be in part because, in the period between *Atkins* and *Roper*, the Court had prominently relied upon foreign law in another controversial ruling.

In *Lawrence v. Texas*,<sup>57</sup> the Court overruled its sixteen-year-old decision in *Bowers v. Hardwick*<sup>58</sup> and held that the Due Process Clause of the Fourteenth Amendment precluded states from criminalizing sodomy among consenting adults.<sup>59</sup> Again Justice Kennedy wrote for the Court and, along the way, took note of legal developments abroad. Specifically, he stressed that in 1957 an official report to the British Parliament recommended decriminalization of homosexual conduct, a recommendation Parliament enacted into law a decade later.<sup>60</sup> "Of even more importance" than this legislative revision was the 1981 ruling of the European Court of Human Rights in *Dudgeon v. United Kingdom*,<sup>61</sup> which found that Northern Ireland's legal prohibition on consensual homosexual conduct was invalid under the European Convention of Human Rights.<sup>62</sup>

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55. Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 32, 84–85 (2005) (footnote omitted).

56. Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1932 (2008) (footnote omitted).

57. 539 U.S. 558 (2003).

58. 478 U.S. 186 (1986).

59. *Lawrence*, 539 U.S. at 578.

60. *Id.* at 572–73.

61. *Id.* at 573 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at ¶ 52 (1981)).

62. *Dudgeon*, 45 Eur. Ct. H.R. (ser. A) at ¶ 52.

As in *Roper*, the analytical work accomplished by these references to foreign law was not altogether apparent from Justice Kennedy's opinion. Considered in the immediate context of their discussion, these pieces of foreign law refuted the comprehensive claims made by Chief Justice Burger in his concurring opinion in *Bowers*. There, Burger had asserted that legal condemnation of homosexual conduct was the norm "throughout the history of Western civilization," was "firmly rooted in Judeo-Christian moral and ethical standards," and was supported by "millennia of moral teaching."<sup>63</sup> These historical claims alleged legislative facts made relevant to the Court's substantive due process analysis by numerous decisions over decades, which had established that for a right to be "fundamental" it had to be "deeply rooted in this Nation's history and tradition."<sup>64</sup> Burger insisted that, to the contrary, not just the American but indeed the entire Western tradition was to prohibit homosexual conduct as morally reprehensible.

This context strongly suggests that Justice Kennedy cited the pre-*Bowers* laws of Europe because they gave the lie to the Chief Justice's over-confident and overly simplistic historical claims. The *Dudgeon* case, in particular, was "at odds with the premise in *Bowers* that the claim put forward was insubstantial *in our Western civilization*."<sup>65</sup> So understood, the responsibility for first injecting foreign law into substantive due process belonged to Chief Justice Burger, and the discussion of foreign law in *Lawrence* served only to set the record straight.<sup>66</sup>

In fairness, in *Lawrence*, as in *Roper*, the citation of foreign law could be understood as doing significantly more work. Near the end of his opinion, Justice Kennedy noted that "[t]he right the petitioners seek in this case has been accepted as an integral part of

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63. *Bowers*, 478 U.S. at 196–97 (Burger, C.J., concurring).

64. *Id.* at 192 (majority opinion).

65. *Lawrence*, 539 U.S. at 573 (emphasis added).

66. Accord Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69, 75–76 (2004) (concluding that the "*Lawrence* majority used actual examples to show that, in describing *modern* Western values, Burger . . . overstated the consensus."). Justice Kennedy's observation later in his opinion that "[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate sexual conduct," *Lawrence*, 539 U.S. at 576 (citing Brief for Mary Robinson et al. as Amici Curiae Supporting Petitioners at 11–12, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 U.S. S. Ct. Briefs LEXIS 68), can be understood as serving this same corrective function.



human freedom in many other countries” and that there “has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.”<sup>67</sup> This language suggests a genuine constitutional comparativism; it can be read to suggest that the Court constructs, rather than interprets,<sup>68</sup> the Constitution, and in so doing borrows liberally from the laws of other nations. As noted above, however, Justice Kennedy gave a more pedestrian explanation of foreign law’s relevance earlier in his opinion. Using foreign law to refute Burger’s overbroad historical summary fits seamlessly into the Court’s twentieth-century due process jurisprudence. A comparativism freed from such doctrinal constraints would, in contrast, represent a major restructuring of the Court’s role in our constitutional order. It is neither necessary nor prudent to read mere ambiguity to accomplish such a transformation, though scholars both celebratory and critical of such references to foreign law have been surprisingly quick to do so.<sup>69</sup>

Indeed, with few exceptions,<sup>70</sup> both friends and foes of foreign law in constitutional decision making start with the same, false premise: that foreign law operates *as law* in the analytical framework of the recent Supreme Court opinions invoking it. As noted above,<sup>71</sup> however, a more context-sensitive review of the citations undermines that assumption.

So why have so many thoughtful readers nevertheless shared this false premise? There are many possible explanations, no doubt including the anticipatory motives of either preventing or encouraging a genuine constitutional comparativism by mooting the wisdom of the practice, with the recent cases merely providing the excuse to do so. But to some extent commentators have been misled by the law label. In the jurisdictions from whence they come, the cited authorities operate as law; hence they are assumed to act as legal authorities, albeit persuasive rather than binding ones,<sup>72</sup> when

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67. *Lawrence*, 539 U.S. at 577.

68. On the distinction between constitutional interpretation and constitutional construction, see KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 5–7 (1999).

69. My focus has been on the role foreign law has played in the opinions for the Court; some opinions by individual Justices raise additional concerns, addressed at *infra* Part IV.B.1.

70. See *infra* notes 101–06, 137 and accompanying text.

71. See *supra* notes 39–69 and accompanying text.

72. Although, as Professor Schauer has demonstrated, “persuasive authority” is an

referenced in a Supreme Court opinion. How could a law itself become a fact?<sup>73</sup>

In reality this phenomenon is not unheard of, though it is almost invariably a cause for confusion. Consider the somewhat anxious debate among the Justices in *Gonzales v. Raich*.<sup>74</sup> There, a divided Court sustained the constitutionality of the federal Controlled Substances Act as applied to seriously ill California residents wishing to possess and consume small amounts of marijuana pursuant to California law.<sup>75</sup> Justice Stevens, in his opinion for the Court, reasoned that Congress had power to prohibit even the petitioners' marijuana possession because, were it unable to do so, Congress's undisputed power to govern the vast, albeit illegal, interstate market in the narcotic would be compromised.<sup>76</sup> The dissenters dismissed this threat, pointing to the extensive state-law regulatory regime in place to prevent in-state medical marijuana from leaking into the

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oxymoron, *see* Schauer, *supra* note 56, at 1940–52, I continue to use the term until his more descriptive “optional authority” gains wider currency. Other scholars have stressed that the nonbinding nature of the authority accorded foreign law mitigates the force of some critics' concerns, especially those related to protection of U.S. sovereignty. *See, e.g.*, T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989, 2010 (2004) (“[A]n account of popular sovereignty that is consistent with the dominant elements of the American political system . . . [m]akes application of transnational law within the U.S. system less problematic than is usually supposed.”); Traci Donovan, *Foreign Jurisprudence—To Cite or Not To Cite: Is That the Question or Is It Much Ado About Nothing?*, 35 CAP. U. L. REV. 761, 762 (2007) (arguing “that the Court’s references to international opinion and jurisprudence were simply parenthetical departures in the overall discussion and were not used by the Court to reach its conclusions” and that even “[i]f all references to foreign opinion and jurisprudence were removed from the opinions, the outcome would remain the same”); *cf.* Ronald A. Brand, *Judicial Review and United States Supreme Court Citations to Foreign and International Law*, 45 DUQ. L. REV. 423, 435–36 (2007) (“None of the references to foreign law in opinions of the Supreme Court in cases of constitutional interpretation has ever suggested that the reference denotes precedential authority of any sort for the foreign law cited.”).

73. Of course all law is a “social fact” in the sense that its meaning and significance is socially constructed; but I am focusing on the analytical function of the referenced authority in the Justices' train of reasoning. Some authorities operate as legal authorities. In the recent cases, however, the references to foreign law are best understood as providing support for a claim about a matter of legislative fact, which U.S. constitutional law (for better or worse) makes dispositive.

74. 545 U.S. 1 (2005). *See generally* A. Christopher Bryant, *The Third Death of Federalism*, 17 CORNELL J.L. & PUB. POL'Y 101, 146–51 (2007) (discussing the *Raich* decision and its significance within the context of twentieth-century Commerce Clause jurisprudence).

75. *Raich*, 545 U.S. at 9.

76. *See id.* at 22.

interstate recreational trade.<sup>77</sup> Justice Stevens answered this argument with a rather pedantic reference to the Constitution's Supremacy Clause.<sup>78</sup>

Of course, this reply missed the dissenters' point entirely. They had not argued that California law was supreme over a federal statute. Rather, they had pointed to California state law as information bearing on a question of legislative fact—in this case, whether California's medical marijuana regime would likely frustrate federal efforts to suppress the interstate trade in the drug for recreational use. The existence of a well designed state-law apparatus for preventing this from happening made it less likely and thus made the case for federal power weaker.<sup>79</sup> California law was a "fact" in the dissenters' legal argument; they never claimed that the California law operated to supplant an inconsistent federal statute.<sup>80</sup>

In sum, one jurisdiction's law occasionally itself becomes a fact to which a second jurisdiction's law is then applied. Though potentially (and sometimes actually) confusing because of the awkward nomenclature, the practice is not only coherent but practically inevitable in a world with numerous and sometimes overlapping legal

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77. *Id.* at 56 (O'Connor, J., dissenting); *id.* at 62–63 (Thomas, J., dissenting).

78. *Id.* at 29 (majority opinion) ("The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail."); *see also id.* at 29 n.38 (accusing Justice Thomas of "turn[ing] the Supremacy Clause on its head").

79. *Id.* at 55–56 (O'Connor, J., dissenting) (discussing California law and concluding that "[t]he Government has not overcome empirical doubt that the number of Californians engaged in personal cultivation, possession, and use of medical marijuana, or the amount of marijuana they produce, is enough to threaten the federal regime"); *id.* at 63 (Thomas, J., dissenting) (stressing the rigorous constraints imposed by California law and observing that "[t]hese controls belie the Government's assertion that placing medical marijuana outside the [federal statute's] reach would prevent effective enforcement of the interstate ban on drug trafficking") (internal quotation marks omitted) (citing Brief for Petitioners at 33, *Gonzalez v. Raich*, 545 U.S. 1 (2005) (No. 03-1454), 2004 U.S. S. Ct. Briefs LEXIS 480).

80. There are numerous other examples of one jurisdiction's law serving as a fact relevant to an issue arising under a second jurisdiction's law. Consider the role that state laws specifying the procedures for execution played in the Court's evaluation of the constitutional challenge to lethal injection in *Baze v. Rees*, 553 U.S. 35, 53 (2008) ("[W]e note at the outset that it is difficult to regard a practice as 'objectively intolerable' when it is in fact widely tolerated. Thirty-six States that sanction capital punishment have adopted lethal injection as the preferred method of execution."), or the relevance accorded state laws in the Court's opinion addressing a claimed due process right to DNA evidence in *Dist. Attorney's Office v. Osborne*, 129 S. Ct. 2308, 2316 (2009) ("[T]he States are currently engaged in serious, thoughtful examinations' of how to ensure the fair and effective use of this testing within the existing criminal justice framework. Forty-six States have already enacted statutes dealing specifically with access to DNA evidence.") (quoting *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997)), to choose but two additional examples from recent Supreme Court terms.

systems. In such a world it really should not be all that surprising or conceptually troubling that the legal regime of another sovereign might itself be an empirical reality relevant to the judicial task of applying general legal principles to particular cases. To the examples discussed above may be added the Court's use of foreign law in constitutional cases. Considered in this context, the practice appears routine. Yet it has nevertheless proven singularly controversial.

#### IV. MUCH ADO ABOUT VERY LITTLE

Never in the field of scholarly conflict have so many argued so much about so little as in the contemporary debate about foreign law as a tool for constitutional interpretation. Taken altogether, no more than five pages in the U.S. reports, of indeterminate significance to the result in three rulings, account for the entire controversy,<sup>81</sup> which has already produced thousands of law review articles from some of the most prominent scholars in legal academia.<sup>82</sup> Even more striking than the volume of the relevant literature is that so much of it bears so little connection to what the Court has actually done. Detractors and defenders alike have attributed to the Court a far more muscular constitutional comparativism than the Court's opinions actually warrant.

##### *A. Opponents*

The Court's references to foreign law in *Atkins*, *Lawrence*, and *Roper* have provoked unusually severe and sustained criticism both on and off the Court.

##### *1. Jurists*

The self-appointed spokesperson for the Justices dissenting from this practice is Justice Scalia, who, to his credit, has engaged in an extrajudicial debate with Justice Breyer and discussion with the general public about why he finds the practice so objectionable.

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81. See *supra* notes 40–68 and accompanying text.

82. See generally Roger P. Alford, *Lower Courts and Constitutional Comparativism*, 77 FORDHAM L. REV. 647, 647 (2008) (noting that “literally thousands of articles” have been published on the subject of the Supreme Court’s citation to foreign or international law in constitutional cases); Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court’s Use of Foreign Law*, 2007 U. ILL. L. REV. 637, 647 (describing the breadth and intensity of the academic debate).

Scalia's criticisms can be divided into two categories: originalist and other.

Justice Scalia has argued that an originalist jurist can find no enlightenment in modern legal developments, foreign or domestic. To the extent that an originalist method of interpretation fixes the meaning of a constitutional provision for all time at the moment of its ratification, it is hard to quarrel with Scalia's commonsense observation that subsequent practice can shed no light on what that meaning was,<sup>83</sup> though some have tried.<sup>84</sup> But as Scalia acknowledges, this objection is not to the use of foreign law in particular but rather to the concept of a living constitution more generally. For example, he resists on numerous grounds the half-century-old Eighth Amendment doctrine committing the Court to the enforcement of "evolving standards of decency."<sup>85</sup> Indeed, he has remarked: "I detest that phrase."<sup>86</sup> Scalia's arguments in opposition to a dynamic Eighth Amendment or Due Process jurisprudence have undeniable force. None of them, however, speak specifically to the use of foreign law as a source of information in interpreting a living constitution. To this extent, at least, his debate with Breyer is merely a warmed-over version of the decades-old controversy about originalism as a method of constitutional interpretation.<sup>87</sup>

Scalia also makes an argument in the alternative: even if one were to embrace the concept of a living constitution and thus find post-ratification moral sentiments to be relevant to constitutional interpretation, foreign law is a dubious source of relevant modern opinions.<sup>88</sup> He reaches this conclusion for a number of reasons. First

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83. See *A Conversation*, *supra* note 48, at 525.

84. See, e.g., David C. Gray, *Why Justice Scalia Should be a Constitutional Comparativist . . . Sometimes*, 59 STAN. L. REV. 1249 (2007).

85. See *A Conversation*, *supra* note 48, at 525.

86. *Id.*

87. See, e.g., Parrish, *supra* note 82, at 663 ("Largely, then, the rejection of the use of foreign materials rests on the argument that judges must confine themselves to considering the original intention of the Framers when deciding constitutional cases, something foreign law has little to say about.").

88. See *A Conversation*, *supra* note 48, at 526. At their confirmation hearings, Chief Justice Roberts and Justice Alito disclaimed both a thorough-going commitment to originalism as a method of, and reliance on foreign law as aid to, constitutional interpretation. See, e.g., Roger P. Alford, *Four Mistakes in the Debate on "Outsourcing Authority,"* 69 ALB. L. REV. 653, 661-62 (2006) (discussing Roberts' and Alito's expressions of "deep skepticism about the use of foreign authority in constitutional interpretation" during their respective

and foremost, he insists that the only post-ratification developments that could possibly be relevant to the meaning of the U.S. Constitution would be those occurring in U.S. society.<sup>89</sup> In the Eighth Amendment context, Scalia's position flies in the face of the fact that the "evolving standards" referenced in *Trop* were explicitly those of "civilized" societies.<sup>90</sup> Not only would it be excessively "narrow or provincial"<sup>91</sup> to conclude that the limits of civilization coincide with U.S. borders, but the analysis envisioned by *Trop* would have little meaning if it were insulated from reflection upon global trends.<sup>92</sup> So too in *Lawrence* Justice Kennedy was attempting to answer Chief Justice Burger's assertion in *Bowers* of universal legal condemnation of homosexual conduct "throughout the history of Western civilization."<sup>93</sup> Had Kennedy limited himself to consideration of domestic legal sources, his effort would have been patently nonresponsive. Once again, upon close examination, Scalia's objection is really to the *doctrine* of making legislative facts and incorporating foreign experience relevant to constitutional interpretation, not to the use of foreign law as evidence in support of conclusions about these matters of fact.

In at least one instance, though, Scalia objects to the latter instead of the former, and it is telling that this objection has perhaps gained the widest currency and proven most persuasive to the undecided.<sup>94</sup> Scalia has attacked the Court's recent invocation of foreign law as selective and results oriented,<sup>95</sup> which, as others have

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confirmation hearings); Michael J. Gerhardt, *The New Religion*, 40 CREIGHTON L. REV. 399, 402 (2007) ("One looks in vain in Roberts' and Alito's confirmation hearings for any description of them as 'originalists' or as approaching cases in a manner like Justice Scalia or Justice Thomas."). Other sitting federal judges have also expressed reservations about the use of foreign law as a tool for constitutional interpretation. See, e.g., Diarmuid O'Scannlain, *What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?*, 80 NOTRE DAME L. REV. 1893 (2005); J. Harvie Wilkinson III, *The Use of International Law in Judicial Decisions*, 27 HARV. J.L. & PUB. POL'Y 423 (2004).

89. See *A Conversation*, *supra* note 48, at 526.

90. See *supra* notes 44–48 and accompanying text.

91. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

92. See *supra* notes 46–47 and accompanying text.

93. See *supra* notes 63–66 and accompanying text.

94. See, e.g., Ramsey, *supra* note 66, at 69 (describing as "[t]he most trenchant critique" of the Court's use of foreign law in constitutional cases the accusation "that it serves as mere cover for the expansion of selected rights favored by domestic advocacy groups, for reasons having nothing to do with anything international").

95. See *A Conversation*, *supra* note 48, at 521–22.

demonstrated, it in some sense surely is.<sup>96</sup> As noted above,<sup>97</sup> however, this undisciplined approach to determining and documenting legislative facts relevant to the disposition of constitutional cases is hardly limited to foreign law. Scalia's concern about the Court's selectivity in its choice of evidence is well taken. But when the problem of citation to foreign law is considered within the broader context of judicial resolution of questions of legislative fact, it becomes clear that none of the Justices is wholly free from the sin of this particular type of selectivity. Indeed, in this regard, Scalia's fierce philippics against his colleagues' capricious use of foreign law rain down equally upon his own head.<sup>98</sup>

## 2. *Scholars*

Numerous, prominent commentators have both echoed Scalia's objections and added their own. As with some of Scalia's concerns, some of the scholarly criticism depends upon a commitment to originalism,<sup>99</sup> or can best be understood as hostile to the Court's longstanding commitment to "civilized standards" in its modern Eighth Amendment jurisprudence.<sup>100</sup>

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96. See, e.g., Ramsey, *supra* note 66, at 78; Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 167 (2005) ("[B]ecause there are so many foreign jurisdictions to choose from and because the sources of international law (particularly the customary kind) are often so ambiguous that the whole enterprise is profoundly manipulable.").

97. See *supra* Part II.

98. Compare, e.g., *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 133 (1989) (Scalia, J., concurring) (stressing that the Court's opinion ought not be read to suggest that evidence of the infeasibility of alternative regulatory regimes "must have been before Congress in order for the law to be valid," because "[n]either due process nor the First Amendment requires legislation to be supported by committee reports, floor debates, or even consideration, but only by a vote"), with, e.g., *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639–40 (1999) (Scalia joining opinion of the Court citing congressional failure to document in the legislative record a widespread history of constitutional violations as a basis for the Court's invalidation of challenged statute), and *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88–89 (2000) (same).

99. See, e.g., Steven G. Calabresi, Lawrence, *The Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097 (2004). See generally Zachary Larsen, *Discounting Foreign Imports: Foreign Authority in Constitutional Interpretation & the Curb of Popular Sovereignty*, 45 WILLAMETTE L. REV. 767, 769 (2009) (asserting that nearly all the scholarly objections to invocation of foreign law in constitutional adjudication "rest on either originalist or positivist assumptions about the Constitution that scholars who subscribe to non-originalist theories of the Constitution can easily ignore").

100. See, e.g., Charles Hobson, *Atkins v. Virginia, Federalism, and Judicial Review*, 11

But for present purposes the most telling critical commentaries stress the dubious link between foreign-law sources and the legislative facts for which they are cited as evidence. Michael Ramsey has exposed telling gaps in the presentation of foreign law to the Court in the *Atkins* and *Lawrence* cases.<sup>101</sup> In the former, one brief informed the Court that China does not execute the mentally handicapped, but Ramsey's review of the supporting citations made it "painfully obvious that no one connected to the matter even bothered to look up the relevant Chinese statute, much less make any inquiry into actual Chinese practice."<sup>102</sup> A second brief relied heavily on an incomplete and methodologically flawed voluntary-questionnaire study.<sup>103</sup> In *Lawrence* the briefs reported on a number of jurisdictions' laws, without explaining why those jurisdictions had been chosen and seemingly similar ones neglected, inviting the supposition that the selection was result-oriented.<sup>104</sup>

Professor Ernest Young has pointed out that use of foreign legal materials in constitutional interpretation may unduly strain the institutional competence of the legal profession. Both the "decision costs (the time, effort, and expense involved in deciding cases in a particular way)" and the "error costs (the likelihood of making mistakes by pursuing a particular method)" are unusually, and perhaps intolerably, high "given language and cultural barriers and most American lawyers' lack of training in comparative analysis."<sup>105</sup>

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WIDENER L. REV. 23 (2004).

101. Ramsey, *supra* note 66, at 73–79.

102. *Id.* at 78.

103. Brief of the European Union as Amicus Curiae Supporting the Petitioner, *McCarver v. North Carolina*, 533 U.S. 975 (2001) (No. 00-8727), 2001 WL 648609. This brief was resubmitted in the *Atkins* litigation. See Joint Motion of all Amici in *McCarver v. North Carolina*, No. 00-8727, to Have Their *McCarver* Amicus Briefs Considered in This Case in Support of Petitioner, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452), 2001 WL 1682012. Professor Ramsey identified numerous methodological problems with the study that served as the basis for the E.U. brief. See Ramsey, *supra* note 66, at 78–79.

104. Ramsey, *supra* note 66, at 73.

105. Young, *supra* note 96, at 165–66. Professor Young acknowledges that similar concerns about the competence of advocates and judges might be raised about issues of "economics in antitrust cases, science and engineering in patent cases, [and] psychology in criminal cases." *Id.* at 166. These parallels and their significance are discussed below. See *infra* Part V; see also Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, in *THE FEDERAL VISION* 213, 249–51 (Kalypso Nicolaidis & Robert Howse eds., 2001) (suggesting that Justice Breyer ignored context which may have made the foreign models he cited less appropriate for the U.S. than he implied); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 126 (2005)



These concerns have both widespread and lofty appeal. Writing in the *Harvard Law Review*, Judge Richard Posner excoriated the Justices' invocation of foreign law, branding it "promiscuous" on the grounds that it was selective, undisciplined, and result-oriented.<sup>106</sup> That these same adjectives might be used to describe the Court's treatment of disputes about legislative facts more generally has, however, gone largely unnoticed.

Other scholarly criticisms do not extend to the citation of foreign law as evidence of a legislative fact. Rather, they raise concerns implicated solely by a genuine constitutional comparativism—a judicial borrowing of foreign law in the construction of our own. Consider Professor Alford's assertion that the Court's citation to foreign law in recent constitutional cases creates an "international countermajoritarian difficulty."<sup>107</sup> This challenge raises important questions about a constitutional methodology in which judges "give expression to international majoritarian values to protect the individual from democratic governance."<sup>108</sup> With the possible exception of its half-century-old tradition of looking to the practices

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(conceding that "[d]etermining comparability" between foreign law and U.S. constitutional law "is a serious challenge, which cautions a slow and incremental approach to considering foreign law").

106. Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 32, 85–86 (2005) ("If foreign decisions are freely citable, any judge wanting a supporting citation has only to troll deeply enough in the world's *corpora juris* to find it."). Similarly, during his confirmation hearings, Chief Justice Roberts criticized the use of foreign law as an aid to interpreting U.S. law in part on the ground that it was an indeterminate and manipulable source. See *Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States, Hearing Before the S. Comm. on the Judiciary*, 109th CONG. 201 (2005) (statement of Judge Roberts) ("In foreign law, you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia, or Japan, or Indonesia, or wherever."); cf. Edward Lee, *The New Canon: Using or Misusing Foreign Law to Decide Domestic Intellectual Property Claims*, 46 HARV. INT'L L.J. 1, 24 (2005) ("[C]herry-picking of foreign authorities is always a potential problem when a court relies on foreign authority from one jurisdiction but does not consider other foreign jurisdictions.").

107. Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 59 (2004).

108. See *id.*; see also Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 HARV. L. REV. 1255, 1309–10 (2005) (stressing the U.S. Constitution's grounding in the concept of popular sovereignty and concluding that the "formal acceptance of constitutional legal materials from outside [the U.S. legal] system is, to say the least, inconsistent with the traditional understanding of the compact between the governed and the government"); Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2005–06 (2004) (noting that for "Europeans, one great marker of successful constitutional development is international *consensus and uniformity*," but "Americans do not always understand this view").

of all “civilized” nations to discern the contours of the Eighth Amendment,<sup>109</sup> however, the Court has yet to do this. Instead its controversial citation of foreign law has been limited to the more pedestrian project of substantiating or questioning claims of legislative fact made relevant by domestic case law.

To be sure, numerous commentators, and even individual Justices, have argued in favor of the kind of full-throated comparativism to which Professor Alford objects, and Alford’s comments contribute significantly to this on-going, but as yet academic, debate. But that discussion, as fascinating as it may be, ought not obscure the fact that what the Court has already done—namely, used foreign law as evidence of legislative fact—has been exposed as selective, incomplete, and results-oriented. These criticisms are all the more significant because they can be made of the Court’s approach to questions of legislative fact more generally.

### 3. *Politicians*

The singularly hostile reaction on the part of many in Congress to the Court’s recent foray into foreign law adds no new arguments to the conversation, but it nevertheless merits brief discussion.

*Atkins*, *Lawrence*, and *Roper* were flashpoint cases. Hence, it was not surprising that they provoked harsh criticism, including attacks by some in Congress.<sup>110</sup> What was surprising, however, was how much of the criticism focused on the Court’s invocation of foreign law in these decisions. As Judge Posner has observed, “the citations in judicial opinions rarely receive attention in the lay press.”<sup>111</sup> For similar reasons, they would ordinarily be ignored on Capitol Hill. But in the immediate wake of *Roper*, a resolution was introduced in the House of Representatives declaring that “it is the sense of the House of Representatives that judicial interpretations regarding the meaning of the Constitution . . . should not be based in whole or in part on judgments, laws, or pronouncements of foreign

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109. Arguably *Trop v. Dulles*, 356 U.S. 86 (1958), did commit the Court to the “expression to international majoritarian values to protect the individual from democratic governance,” Alford, *supra* note 107, at 59, in the Eighth Amendment context. See *supra* notes 44–48 and accompanying text. To that extent, however, Professor Alford’s quarrel is with that Warren Court ruling, not with the citation of foreign law by the Rehnquist and Roberts Courts.

110. See Alford, *supra* note 88, at 661–63.

111. Posner, *supra* note 106, at 85 (footnote omitted).

institutions.”<sup>112</sup> Representative Steve King, an Iowa Republican, investigated the Justices’ foreign trips, with an eye towards exposing the corrupting influence of such sojourns.<sup>113</sup> Others went so far as to call for the impeachment of Justice Kennedy as a remedy for his citation of foreign law in *Lawrence* and *Roper*.<sup>114</sup>

The passionate political opposition aroused by the Court’s recent rulings, no doubt, has many causes, including fears and resentment about globalization’s perceived tendency toward centralization and the empowerment of elites. But at least some of the intensity of the antipathy grows out of the dissatisfaction that comes with the realization that the emperor has no clothes. How else might one explain Representative Tom Delay’s peculiar pique upon learning that not only did Justice Kennedy cite foreign sources, but also that “he said in session that he does his own research on the internet,” an offense Delay deemed “just incredibly outrageous.”<sup>115</sup> Why would the mental image of Justice Kennedy googling the juvenile death penalty be especially likely to prompt Delay to grind his teeth? While he did not elaborate, it seems likely that the image captures the capriciousness of the Court’s use of foreign law. A Justice crafting his own internet queries is freed from even the modest discipline the appellate process ordinarily imposes; the parties (and their amici) do not have the chance to filter and interrogate the raw data reflected in foreign statutes and rulings—a chance that they might have, to some extent, were the foreign materials cited in the briefs.

Given the undisciplined manner in which the Justices have made use of foreign law, this reaction to Kennedy’s disclosure should come as no great surprise. What is surprising is that, to date, the outrage has been cabined and has not extended to the equally undisciplined way in which the Court treats most questions of legislative fact that arise in constitutional cases.

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112. H.R. Res. 97, 109th Cong. (2005).

113. See Jeffrey Toobin, *Swing Shift: How Anthony Kennedy’s Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER, Sept. 12, 2005, at 42, 44 (quoting Representative King as saying that his study of the Justices’ trips revealed “that there are at least a couple of Justices, chiefly Kennedy and Breyer, who are more enamored of the ‘enlightenment’ of the world than they are bound by our own Constitution”).

114. See Jason DeParle, *In Battle to Pick Next Justice, Right Says Avoid a Kennedy*, N.Y. TIMES, June 27, 2005, at A1.

115. Carl Hulse, *Delay Outlines Strategy Against Federal Judges*, N.Y. TIMES, Apr. 20, 2005, at A20.

*B. Proponents**1. Jurists*

Justice Breyer has been Justice Scalia's counterpart in the debate about the propriety of foreign law sources in constitutional cases. In both his extrajudicial defense of the practice and his work as a sitting Justice Breyer occasionally embraces what amounts to a genuine constitutional comparativism. In other words, he is, at times, willing to borrow the reasoning and conclusions of lawmakers in other jurisdictions when deciding what the U.S. Constitution both should and does mean. In collapsing these two inquiries, Breyer invites many of the criticisms discussed above.<sup>116</sup> But so far he has, in this regard, spoken only for himself.<sup>117</sup> And even then, he has often hastened to couch his position in ambiguous language that at once downplays its theoretical import and reflects diffidence about its legitimacy.

His enthusiasm for foreign law was reflected in his much publicized 2005 exchange with Justice Scalia at American University. Justice Breyer's description of the role that foreign law can and should play suggested a genuine comparativism, in which the Justices create U.S. law in the image of what they determine to be well-conceived foreign models. He characterized the practice as "opening your eyes to what is going on elsewhere, taking what you learn for what it is worth, and using it as a point of comparison where doing so will prove helpful."<sup>118</sup> Foreign statutes and judicial rulings comprise "food for [the] thought" of U.S. Supreme Court Justices. At other places in his remarks, however, Justice Breyer suggested that foreign law might merely serve as evidence of a legislative fact.<sup>119</sup>

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116. See *supra* notes 108–109 and accompanying text.

117. Reliance on foreign law in constitutional cases finds some support in the extrajudicial commentary of the late Chief Justice Rehnquist and Justices O'Connor and Ginsburg as well. See Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1, 1 (2003) ("We are the losers if we do not both share our experience with, and learn from others."); David M. O'Brien, *More Smoke than Fire: The Rehnquist Court's Use of Comparative Judicial Opinions and Law in the Construction of Constitutional Rights*, 22 J.L. & POL. 83, 85 (2006) (asserting that "[t]he late Chief Justice William H. Rehnquist and former Justice Sandra Day O'Connor were moderately open to the use of comparative law" in constitutional decision-making (footnotes omitted) (citing speeches by Rehnquist and O'Connor)). To date, however, Justice Breyer has taken the lead in advancing and defending the practice publicly.

118. *A Conversation*, *supra* note 48, at 524.

119. *Id.* at 529.

In practice, Justice Breyer's invocation of foreign law has been more guarded. A telling example is provided by his separate dissent in *Printz v. United States*.<sup>120</sup> There, a five-justice majority invalidated a provision of the federal gun legislation popularly known as the Brady Bill on the ground that it impermissibly impressed state and local executive officials into the enforcement of federal law.<sup>121</sup> Justice Breyer joined the principal dissent, written by Justice Stevens, but also wrote a short opinion of his own noting that "[t]he federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central 'federal' body."<sup>122</sup> He reasoned that this "comparative experience" demonstrated that there was "no need to interpret the Constitution as containing an absolute principle—prohibiting the assignment of virtually any federal duty to any state official."<sup>123</sup> His willingness to mold American constitutional law in the shape of three European nations provides a clear example of his enthusiasm for a genuine constitutional comparativism.

Nevertheless, even here, Justice Breyer qualifies his endorsement of such an approach by couching it in language suggesting the use of foreign law as evidence of legislative fact. The experience of foreign nations

here offers *empirical confirmation* of the implied answer to a question Justice Stevens asks: Why, 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?"<sup>124</sup>

Even so, his separate dissent was joined by only one of his three fellow dissenters. His opinion in *Printz* simultaneously provides evidence of his willingness to embrace constitutional comparativism, his ambivalence about the theory underlying the practice, and the Court's reluctance as yet to go so far.

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120. 521 U.S. 898, 976 (1997) (Breyer, J., dissenting).

121. *Id.* at 933 (majority opinion).

122. *Id.* at 976 (Breyer, J., dissenting).

123. *Id.* at 977.

124. *Id.* (emphasis added) (internal citation omitted).

## 2. *Scholars*

Some of the criticisms directed at the Court's reliance on foreign law appear, on close examination, to be anticipatory, if not alarmist. But nowhere is the disconnect between what the Court has actually done and the extrajudicial commentary more stark than in the writings of the practice's academic defenders.

Dean Harold Koh has long stood at the forefront of a general campaign for legal globalization. He has called for the creation of a transnational jurisprudence "whereby domestic systems incorporate international rules into domestic law through a three-part process of interaction, interpretation, and norm internalization[,] . . . with judicial interpretation of domestic constitutions representing" one important channel for this evolutionary process.<sup>125</sup> As even he occasionally concedes, however, his views run ahead of the Court as an institution, though perhaps not some of its individual members. While he roots his vision in the writings of "Chief Justice (and former congressional secretary for foreign affairs) John Jay and Chief Justice (and former secretary of state) Marshall,"<sup>126</sup> he also acknowledges that his project is a work in progress insofar as the current Court is concerned.<sup>127</sup> Indeed, he characterizes judicial invocation of foreign law in death penalty cases as "looking to foreign practice for *additional evidence* of modern standards of decency in a civilized society,"<sup>128</sup> a description suggesting foreign law constitutes a source of empirical data concerning legislative facts made relevant by domestic law.<sup>129</sup>

Professor Anne-Marie Slaughter has articulated a compelling vision of a global community of courts in which "participating judges see each other not only as servants and representatives of a particular polity, but also as fellow professionals in an endeavor that transcends national borders."<sup>130</sup> But she has also acknowledged that

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125. Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 55-56 (2004).

126. *Id.* at 52.

127. *Id.* at 52-56 (contrasting a transnationalist jurisprudence, exemplified by one wing of the Court, with a nationalist jurisprudence promoted by other Justices skeptical of a transnationalist approach).

128. *Id.* at 55 n.89 (emphasis added).

129. See *supra* notes 44-52 and accompanying text for a similar characterization of the Supreme Court's use of foreign law in the Eighth Amendment context.

130. Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191,

“the global community of courts does not yet include all courts from all countries, or even all international courts and tribunals” but rather “is a partial, emerging community”<sup>131</sup> in which “U.S. judges are beginning to take part.”<sup>132</sup> So too, Jeremy Waldron’s celebration of a modern *ius gentium*<sup>133</sup> and Gerald Neuman’s defense of a “suprapositive” or normative role for foreign law in domestic constitutional deliberation<sup>134</sup> outrun the actual judicial practice described above. To be sure, the visions articulated by these and other scholars advocating a greater role for foreign law in U.S. constitutional litigation may accord with the aspirations of Justice Breyer. But they far exceed the present juridical reality, in which foreign practice is cited as evidence of emerging consensus (or, as in *Lawrence*, the lack thereof) on questions of legislative fact.

My point is not to denigrate these important contributions to a rich and on-going academic debate. Rather, my modest goal is only to note that the debate in which they play a part has, to date, remained an academic one. What is lamentable, however, is that the brilliance of this conversation has obscured the more pedestrian, but no less meaningful, questions the Court’s actual practices raise. Those questions are not limited to the few cases in which the Court cites foreign authority but instead include the wide array of cases in

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193 (2003). *But see* Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63, 114 (2007) (arguing that “the Court’s tendency [in its Eighth Amendment jurisprudence] to avoid deep questions, count noses, and seek incompletely theorized agreements” suggests “that the Court is unlikely to become the kind of thoughtful, sophisticated comparativist that engages with other legal systems envisioned by some scholars”).

131. *See* Slaughter, *supra* note 130, at 194.

132. *Id.* at 199.

133. *See generally* Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005). The Latin phrase refers to the Ancient Roman recognition of a law common to all peoples. *See generally* Genc Trnavci, *The Meaning and Scope of the Law of Nations in the Context of the Alien Tort Claims Act and International Law*, 26 U. PA. J. INT’L ECON. L. 193, 199–213 (2005) (recounting the origins and evolution of the term).

134. *See* Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT’L L. 82, 87 (2004). Neuman acknowledges that the Court’s invocation of foreign law in cases such as *Lawrence* “represents a rather modest use of international law in aid of constitutional interpretation.” *Id.* at 89; *see also* Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 704 (2005) (essaying, and critiquing, “an emerging inchoate comparative constitutional theory” drawn from “various writings advocating the use of international and foreign material in constitutional adjudication”).

which the result turns, even implicitly, on judgments about debatable issues of legislative fact.

#### V. THE CONTEXT OF LEGISLATIVE FACTS

Most of the discussion provoked by the Supreme Court's recent reliance on foreign law has been premature. To a great extent, that debate has addressed doctrinal innovations that the best reading of the Court's opinions do not support, let alone require. To date, the Supreme Court has not engaged in a genuine constitutional comparativism in which it freely and forthrightly molds our fundamental law to make it more like that of favored foreign nations. To be sure, numerous commentators,<sup>135</sup> and even a few sitting Justices,<sup>136</sup> have advocated just this kind of constitutional borrowing. But the Court has yet to take this step.

Consideration of the Court's citation of foreign law within the broader context of its effort to discern and detail legislative facts reveals that the most trenchant criticisms of what the Court has already done have nothing to do with the extraterritorial origin of the cited sources.<sup>137</sup> The ways in which the Court has to date used foreign law in constitutional analysis pose no greater threat to U.S. sovereignty<sup>138</sup> than the Court's selective reliance on factual claims made in amicus briefs. To be sure, a "democratic deficit" may result from reliance on foreign sentiment, but to no greater extent than when the Justices substitute their own impressions of social reality for those of the legislature they are reviewing.<sup>139</sup> Foreign laws

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135. *See supra* Part IV.B.2.

136. *See supra* Part IV.B.1.

137. *Cf.* Parrish, *supra* note 82, at 655 (acknowledging that the "worry of cherry picking is a legitimate concern" but asking rhetorically how is reliance upon foreign law "different in kind from citation to a whole host of other sources that the Supreme Court uses regularly, tendentially or not, without comment"). Professor Parrish suggests that the lack of "comment" vindicates reliance on foreign law. But the parity he identifies is better understood to mean that the Court's undisciplined use of foreign law is merely a tiny tip of a huge iceberg.

138. *See supra* note 108 and accompanying text; *see also* ERIC D. HARGAN, *THE SOVEREIGNTY IMPLICATIONS OF TWO RECENT SUPREME COURT DECISIONS 1* (2003), available at [http://www.fed-soc.org/doclib/20070324\\_hargensov.pdf](http://www.fed-soc.org/doclib/20070324_hargensov.pdf).

139. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) (invalidating the Religious Freedom Restoration Act in part because the Court deemed discrimination against religious minorities an insufficiently widespread and serious problem to justify a prophylactic remedy); *see also* A. Christopher Bryant, *The Pursuit of Perfection: Congressional Power to Enforce the Reconstruction Amendments*, 47 *HOUS. L. REV.* 579, 588-89 (2010) (developing this reading of *Flores* in greater detail).



provide evidence of facts to which the U.S. Constitution applies, but they do not supplant it.

These observations in turn teach that much of the scholarly debate, and especially the more heated rhetoric from Congress, has been beside the point. It is of course entirely appropriate to debate the wisdom of an approach that is, at present, hypothetical. But now it should be clear that that is what scholars have been doing, to a great extent. And in any event, the possibility that the Court may take this step in the future provides scant basis for threatening sitting Justices with impeachment.<sup>140</sup>

Increasing awareness that the Court's use of foreign law in constitutional cases has to date been confined to proving legislative facts does much more than merely mute some of the more strident elements of the discourse. It promises to guide the debate in a more promising direction. As jurists and commentators have forcefully argued, the Court's use of foreign law, even when properly understood as evidence of legislative fact, remains problematic. The Court's selection of foreign nations for study, determination and characterization of the laws of those nations, comprehension of their legal and social contexts, and inferences from these materials to the complex and contested claims of legislative fact leave much to be desired in terms of intellectual rigor and consistency.<sup>141</sup> Even defenders of the Court's use of foreign law in constitutional cases concede as much.<sup>142</sup> The most compelling critiques call for

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140. See DeParle, *supra* note 114, at A1 (noting calls for the impeachment of Justice Kennedy in part for his invocation of foreign law in constitutional cases).

141. See *supra* notes 101–106 and accompanying text.

142. See *A Conversation*, *supra* note 48, at 530 (Justice Breyer acknowledging as a “fair criticism” the claim that the Justices’ use of foreign law has at times been selective and result-oriented); see also Dianne Marie Amann, *International Law and Rehnquist-Era Reversals*, 94 GEO. L.J. 1319, 1338 (2006) (conceding that consultation of foreign sources cannot play an appropriate role until “it occurs within a predictable and consistent interpretive framework” which has yet to emerge); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 96 (2006) (admitting that “aspects of the Court’s approach to international law raise cautionary flags” and that “[t]he use of international law can be sloppy, misguided, and even opportunistic”); Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 497 (2010) (noting that the “connections between American law and that of other communities remain contested” and that accordingly “the rule of law requires that material taken across boundaries bear a defensible relationship to existing cultural practices and political commitments”); cf. Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 AM. J. COMP. L. 947, 987 (2008) (urging adoption of a proposed methodology to guide comparative inquiry in part because it would “answer the concern, raised by critics of comparison, about the potential for selectivity or ‘cherry-picking’ on the

improvement in these areas, though some commentators doubt whether the flame can ever be made worth the candle.<sup>143</sup>

Thus, one result of the Supreme Court's controversial citation to foreign law in *Atkins*, *Lawrence*, and *Roper* has been to direct attention to the rigor, or more accurately the lack thereof, with which the Court uses such sources as evidence of legislative fact. What even the commentators who have noted as much have not done, however, is consider the controversy over citation to foreign law within the context of the Supreme Court's efforts to ascertain and document relevant legislative facts in constitutional cases more generally.

Perhaps the most valuable outcome of this sprawling debate will be an increased awareness of the central role that disputes about legislative facts have come to play in modern constitutional law. Such disputes are ubiquitous, occasionally obviously determinative,<sup>144</sup> but more frequently of somewhat indeterminate significance,<sup>145</sup> if not altogether inchoate.<sup>146</sup> Many of the criticisms leveled at the Court's use of foreign law apply with equal force to the Court's approach to questions of legislative fact more broadly. The impetus to bring greater caution and discipline to the Court's use of foreign law as evidence should be extended to the Court's use of social science, reliance on empirical claims in *amicus* briefs, and trust in the Justices' unexamined hunches based on their idiosyncratic experience. Furthermore, critics have questioned the Court's institutional capacity to learn the cultural and legal context necessary to achieve sophisticated appreciation of foreign law's empirical significance.<sup>147</sup> A

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part of the Justices"); Parrish, *supra* note 82, at 653 (noting that "scholars who have championed comparative constitutionalism . . . recognize that foreign sources must be used with care" and that "Justices should use foreign sources in a refined manner and be wary of cultural context") (footnotes omitted).

143. *See, e.g.*, Ramsey, *supra* note 66, at 82.

144. *See, e.g.*, *Gonzales v. Carhart (Carhart II)*, 550 U.S. 124 (2007).

145. *See, e.g.*, *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 89 (2000) (concluding that Congress's extension of the Age Discrimination in Employment Act to the states "was an unwarranted response to a *perhaps* inconsequential problem," raising questions as to that unresolved legislative fact's constitutional relevance) (emphasis added).

146. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 529–532 (1997) (assuming without empirical inquiry that state governmental discrimination against religious minorities was a substantially less serious problem than similar discrimination against racial minorities).

147. *See supra* notes 101–106 and accompanying text.

similar skepticism is in order insofar as the Court relies on other sources of evidence about disputed or uncertain legislative facts.<sup>148</sup>

Finally, some have reasonably concluded that the incremental value of foreign law to constitutional adjudication is outweighed by the burdens on both jurists and litigants that are associated with its careful excavation and use. In much the same way scholars might profitably reflect on the balance of efforts and rewards involved in the employment of other sources of information to determine and document claims about legislative facts. The late-twentieth-century turn towards balancing “tests” in constitutional law made jurists’ conclusions about legislative facts, whether express or implicit, central to the operation of constitutional law.<sup>149</sup> Arguably a little-perceived cost of this move has been to tax the judiciary with tasks beyond any claims it makes to competence, let alone expertise. Ultimately, the challenges posed by Justice Scalia and Professor Ramsey, if taken to their logical conclusion, threaten to unravel much of modern constitutional law. Whether one condemns or reveres them for this consequence depends much on the extent of the beholder’s attachment to the constitutional status quo.

Not only has the bulk of the discussion applied only to what the Supreme Court *might* do in the future, but the genuine problems presented by what the Court has done have long stymied commentators addressing them in parallel contexts. As noted above, over the course of the last century, few issues have more persistently befuddled judges and their fellow travelers than how courts should address questions of legislative fact when reviewing the constitutionality of a challenged statute.<sup>150</sup> In light of this history, it should surprise no one that the Court’s approach to foreign law in constitutional cases has been ad hoc, undisciplined, and arguably result-driven. The same has been said of the Court’s use of scientific

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148. See generally FAIGMAN, *supra* note 21; see, e.g., *id.* at xiii (“The Constitution was founded upon enlightenment principles, yet the Court’s approach to the empirical world remains mired in the Dark Ages.”). Whereas some of those critics who have acknowledged that foreign law has served as evidence of a relevant legislative fact in the recent controversial cases have reasonably questioned the rigor with which this evidence is uncovered and employed, what has heretofore gone unremarked is that the Court’s treatment of legislative facts more generally is subject to the same criticisms.

149. See Aleinikoff, *supra* note 9, at 974.

150. See *supra* Part II.

data,<sup>151</sup> in particular, and approach to questions of legislative fact, such as the scope of perceived social problems, more generally.<sup>152</sup>

Only recently have constitutional law scholars again turned their attention to the Court's underdeveloped approach to questions of legislative fact presented in constitutional cases. Evaluation of the Court's invocation of foreign law in *Atkins*, *Lawrence*, and *Roper* should be made a part of the broader effort to bring coherence to the Court's treatment of legislative facts, whatever sources the Justices cite. A comprehensive discussion of this larger issue is beyond the scope of an Article identifying its relevance to the foreign-law debate. Nevertheless, some of the questions raised are identified below in order to illustrate how the larger effort might proceed and how it would advance the analysis of the recent cases.

The one certainty concerning the Court's approach to legislative facts in constitutional cases is that the Court ought to do better than it does. As noted above,<sup>153</sup> the chief deficiency with the current methodology is that there isn't one. A first step towards establishing a self-conscious methodology would be to articulate principles allocating responsibility for decisions of legislative fact issues among trial and appellate courts. These principles must not only take account of the relative institutional strengths of each level of judicial hierarchy but must also incorporate such considerations as the need for uniformity of result and the competency of other branches of government to engage in constitutional construction.

The most that can be hoped for from an understanding that foreign law has acted as evidence of fact in recent constitutional cases is that this insight will serve to spur analysis of the ubiquitous problem of the Court's haphazard and under-theorized approach to legislative facts. Justice Scalia and Professor Ramsey, among others, have struck a nerve with their observations that the Court's treatment of foreign law has lacked a theoretical foundation and empirical rigor and, accordingly, has appeared selective and result-oriented. Even the most ardent defenders of current practice concede that the invocation of foreign law could and should be done

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151. See generally FAIGMAN, *supra* note 21 (critiquing the judiciary's approach to scientific issues in constitutional cases).

152. *Id.* (discussing and criticizing the Court's approach to facts in constitutional cases); see also McGinnis & Mulaney, *supra* note 11, at 74–83 (identifying fundamental inconsistencies in the Court's approach to congressional fact-finding in constitutional cases).

153. See *supra* Part II.

with greater attention to the domestic context in which that law is found as well as to the practices of all similarly situated nations.<sup>154</sup> One can hope that the foreign law debate's attention to the rigor with which such sources are used will in turn inform the Court's use of other types of evidence invoked as proof of relevant legislative facts.

#### V. CONCLUSION

One commentator recently characterized the judicial and scholarly debate over foreign law in constitutional interpretation as a "storm in a teacup," and to the extent that the controversy has outgrown the reality of judicial practice to date, the label is a fair one. Allowing the insight afforded by another common metaphor, however, where there is so much smoke there must be fire. In this instance, the genuine difficulty underlying the Court's use of foreign law in recent constitutional cases is that the Justices' approach to this evidence has lacked the rigor requisite to inspire confidence in their conclusions.

But that concern is by no means limited to the Court's use of foreign law. To the contrary, it extends to the Court's treatment of all manner of evidence of legislative facts. The concern is endemic to the modern practice of judicial review and deserves far greater sustained, critical inquiry than it has been accorded.

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154. See sources cited *supra* note 137.