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**J O I N T   C E N T E R**

AEI-BROOKINGS JOINT CENTER FOR REGULATORY STUDIES

## **The Law of Other States**

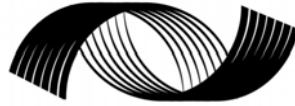
**Eric A. Posner and Cass R. Sunstein\***

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## Executive Summary

The question whether courts should consult the laws of “other states” has produced intense controversy. But in some ways, this practice is entirely routine; within the United States, state courts regularly consult the decisions of other state courts in deciding on the common law, the interpretation of statutory law, and even on the meaning of state constitutions. A formal argument in defense of such consultation stems from the Condorcet Jury Theorem, which says that under certain conditions, a widespread belief, accepted by a number of independent actors, is highly likely to be correct. It follows that if a large majority of states make a certain decision based on a certain shared belief, and the states are well motivated, there is good reason to believe that the decision is correct. For the Jury Theorem to apply, however, three conditions must be met: states must be making judgments based on private information; states must be relevantly similar; and states must be making decisions independently, rather than mimicking one another. An understanding of these conditions offers qualified support for the domestic practice of referring to the laws of other states, while also raising some questions about the Supreme Court’s reference to the laws of other nations. It is possible, however, to set out the ingredients of an approach that high courts might follow, at least if we make certain assumptions about the legitimate sources of interpretation. Existing practice, at the domestic and international levels, suggests that many courts are now following an implicit Condorcetian logic.

## The Law of Other States

Eric A. Posner and Cass R. Sunstein

### **1. Introduction**

Consider the following cases:

1. The Supreme Court of Texas is deciding whether to give a broad reading to the “public policy exception” to its general rule that employment is at-will.<sup>1</sup> The court is concerned that a broad reading, intruding on the ability of employers to manage the workplace, might have serious adverse effects on the economy of Texas. Because of that concern, the Court investigates the practices of other states. It notices that most state courts have read the public policy exception broadly, and have done so without causing noticeable adverse effects on the economy of their states. Influenced by those decisions, the Court adopts a broad reading of the public policy exception.

2. The Supreme Court of Vermont is deciding whether to rule that under its state constitution, discrimination on the basis of sex is subject to “strict scrutiny,” ensuring that such discrimination will almost always be struck down. The Supreme Court of Vermont consults the practices of other states, and discovers that the overwhelming majority of state courts interpret their constitutions so as to subject sex discrimination to strict scrutiny. It follows the practice of that overwhelming majority.

3. The Supreme Court of the United States is deciding to rule whether government may execute people under the age of eighteen.<sup>2</sup> Believing that the question is difficult, the Court decides to consult the practices of other nations.<sup>3</sup> It happens that few nations impose the death penalty on people under the age of eighteen. Influenced by that judgment, the Court rules that the United States may not constitutionally do so.

The practice of consulting “foreign precedents” has received a great deal of attention in connection with recent decisions of the Supreme Court of the United States.<sup>4</sup>

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<sup>1</sup> On the public policy exception, see Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third Party Effects*, 74 *Tex. L. Rev.* 1943 (1996). On the phenomenon of interstate citations in this particular domain, see David J. Walsh, *On the Meaning and Pattern of Legal Citations: Evidence from State Wrongful Discharge Precedent Cases*, 31 *L. & Soc. Rev.* 337 (1997).

<sup>2</sup> This is of course the issue in *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

<sup>3</sup> See *id.* at 1198-1200.

<sup>4</sup> See Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 *Am. J. Int'l L.* 57 (2004); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 *Yale L.J.* 1225 (1999);

In those decisions, the Court has referred to comparative law in deciding whether a state practice violates the United States Constitution.<sup>5</sup> The references have proved exceptionally controversial.<sup>6</sup> But in some ways, it is quite standard to refer to the decisions of other jurisdictions, and the debate over the references of the Supreme Court should be understood in the context of that standard practice. Within the United States, for example, state courts frequently refer to the judgments of other state courts in ruling on questions of private and public law, and indeed in ruling on the meaning of state constitutions.<sup>7</sup> Significant numbers of out-of-state citations have been found in Arkansas,<sup>8</sup> New York,<sup>9</sup> Kansas,<sup>10</sup> Ohio,<sup>11</sup> Montana,<sup>12</sup> California,<sup>13</sup> and North Carolina,<sup>14</sup>

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Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 *Loy. L.A. L. Rev.* 239 (2003); Ernest A. Young, *The Supreme Court, 2004 Term--Comment: Foreign Law and the Denominator Problem*, 119 *Harv. L. Rev.* 148 (2005); Vicki C. Jackson, *The Supreme Court, 2004 Term--Comment: Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 *Harv. L. Rev.* 109 (2005); Jeremy Waldron, *The Supreme Court, 2004 Term--Comment: Foreign Law and the Modern Ius Gentium*, 119 *Harv. L. Rev.* 129 (2005); Eugene Kontorovich, *Disrespecting the "Opinions of Mankind": International Law in Constitutional Interpretation*, 8 *Green Bag 2d* 261 (2005); Kenneth Anderson, *Foreign Law and the U.S. Constitution*, *Pol'y Rev.*, June-July 2005, at 33; 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.* (2005); Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 *Tex. Int'l L.J.* 353 (2004); Rex Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 *Va. J. Int'l L.* 357 (2005). A recent article by Mark Tushnet provides a comprehensive and concise overview of the debate, see Mark Tushnet, *When Is Knowing Less Better Than Knowing More?: Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, unpub. m.s., 2005. A bill in the House would forbid courts to rely on foreign law, see *Reaffirmation of American Independence Resolution*, H.R. Res. 568, 108<sup>th</sup> Cong. (2004).

<sup>5</sup> In recent years, the Court has referred to foreign precedents on several occasions. See *Lawrence v. Texas*, 539 U.S. 558, 568-74 (2003); *Roper*, supra; *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (Ginsburg, J., concurring); *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C.J., concurring in part, dissenting in part); *Foster v. Florida*, 537 U.S. 990, 992-93 (2002) (Breyer, J., dissenting); *Elledge v. Florida*, 525 U.S. 944, 944-45 (1998) (Breyer, J., dissenting from denial of certiorari); *Washington v. Glucksberg*, 521 U.S. 702, 734 (1997); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *Raines v. Byrd*, 521 U.S. 811 (1997).

<sup>6</sup> See note supra.

<sup>7</sup> See, e.g., *Commonwealth v. Wasson*, 842 S.W.2d 487, 498-99 (Ky. 1992) (invalidating state sodomy statute after citing for support other state court constitutional decisions from New York, Pennsylvania, Michigan, and Texas); see Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 *Mont. L. Rev.* 15, 19-20 (2004).

<sup>8</sup> A. Michael Beaid, *Citations to Authority by the Arkansas Appellate Courts, 1950-2000*, 25 *U. Ark. Little Rock L. Rev.* 301 (2003) (finding 1,508 out-of-state citations by Arkansas Supreme Court, out of 15,128 total citations).

<sup>9</sup> William Nanz, *The Citation Practices of the New York Court of Appeals: A Millennium Update*, 49 *Buff. L. Rev.* 1273 (2001) (finding out-of-state citations accounting for 27.7% of case citations in 1999 and 22.3% in 2000).

<sup>10</sup> Joseph Custer, *Citation Practices of the Kansas Supreme Court and Kansas Court of Appeal*, 7 *Kansas J. L. & Pub. Pol'y* 120 (1998) (finding sister state citations at level of 13.9% in 1995).

among others.<sup>15</sup> In constitutional cases, state courts have been found to cite out-of-state courts in no less than 34.8% of their decisions, with substantially higher percentages in Massachusetts, Arizona, and Vermont.<sup>16</sup> It is not taken to be illegitimate, or even controversial, for one state to consult the practices of others in deciding on the meaning of the state's founding document.<sup>17</sup> On the contrary, "comparative law" is a routine and uncontroversial feature of the jurisprudence of state courts.<sup>18</sup>

Many national courts regularly consult "foreign precedents" in deciding on the meaning of their own constitutions.<sup>19</sup> The Supreme Court of Ireland cites foreign law with great frequency.<sup>20</sup> Between 1994 and 1998, South Africa Supreme Court and Constitutional Court decisions made no fewer than 1,258 references to American, Canadian, British, German, European, and Indian courts.<sup>21</sup> The Supreme Court of Israel makes heavy use of foreign law in multiple domains.<sup>22</sup> At least in some cases, German

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<sup>11</sup> See James Leonard, *An Analysis of Citations to Authority in Ohio Appellate Decisions*, 86 *Law. Libr. J.* 129, 137-38 (1994) (finding 8.9% of citations to sister states in 1990).

<sup>12</sup> Fritz Snyder, *The Citation Practices of the Montana Supreme Court*, 57 *Mont. L. Rev.* 453, 462 (1996) (finding 7% of citations were to sister states in 1994, significantly lower than in 1954-1955 and 1914-1915)

<sup>13</sup> See John Henry Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 *S. Cal. L. Rev.* 381 (1977) (finding 13% out-of-state citations in 1950, 12% in 1960, and 6.3% in 1970)

<sup>14</sup> See Robert Mann, *The North Carolina Supreme Court 1977: A Statistical Analysis*, 15 *Wake Forest L. Rev.* 39 (1979) (finding sister states cited 9% of the time).

<sup>15</sup> See Lawrence Friedman et al., *State Supreme Court: A Century of Style and Citations*, 33 *Stan. L. Rev.* 773 (1981); David Blumberg, *Influence of the Massachusetts Supreme Judicial Court on State High Court Decisionmaking 1982-1977: A Study in Horizontal Federalism*, 61 *Alb. L. Rev.* 1583 (1998).

<sup>16</sup> See James Cauthern, *Horizontal Federalism in the New Judicial Federalism: A Preliminary Look at Citations*, 66 *Alb. L. Rev.* 783 (2003). See also Patrick Baude, *Interstate Dialogue in State Constitutional Law*, 28 *Rutgers L.J.* 835, 838 (1997). An interesting study can be found in Douglas A. Hedin, *The Quicksands of Originalism: Interpreting Minnesota's Constitutional Past*, 30 *Wm. Mitchell L. Rev.* 241 (2003) (discussing citations of other state courts, by Minnesota Supreme Court, in interpreting provisions of Minnesota Constitution derived from out-of-state constitutions, and showing diminution of out-of-state citations over time).

<sup>17</sup> See *id.*; Gregory A. Caldeira, *Legal Precedent: Structure of Communication Between State Supreme Courts*, 10 *Soc. Networks* 29 (1988).

<sup>18</sup> For a reputational ranking, based on citations, see Gregory A. Caldeira, *On the Reputation of State Supreme Courts*, 5 *Pol. Behav.* 83, 95-101 (1983).

<sup>19</sup> See, e.g., *S. v. Mamabolo*, 2001 (1) SACR 686 (CC) (S.Afr.). A great deal of relevant information can be found in *The Use of Comparative Law by Courts* (Ulrich Drobnig and Sjeff van Erp eds. 1997).

<sup>20</sup> See Bruce Carolan, *The Search for Coherence in the Use of Foreign Court Judgments by the Supreme Court of Ireland*, 12 *Tulsa J. Comp. & Int'l L.* 123 (2004).

<sup>21</sup> See Basil Markesinis and Jorg Fedke, *The Judge as Comparativist*, 80 *Tul. L. Rev.* 11, 57-58 n. 158 (2005); in the same vein, see Hoyt Webb, *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 *U. Pa. J. Const. L.* 205 (1998).

<sup>22</sup> See Renee Sanilevici, *The Use of Comparative Law by Israeli Courts*, in *The Use of Comparative Law by Courts*, *supra* note, at 197-221. For several examples from the domain of rights, see *Israel Laws Reports 1992-1994* (Jonathan Davidson ed. 2002).

courts consult foreign courts as well,<sup>23</sup> and Swiss and Austrian practice makes a regular appearance.<sup>24</sup> Canadian courts hardly restrict themselves to Canadian precedents,<sup>25</sup> and Australian courts reach far and wide.<sup>26</sup> Use of foreign law also occurs, if tacitly, in Italy and France.<sup>27</sup> In Britain the practice is common, and it appears to be growing over time.<sup>28</sup> Consultation of foreign law seems to be the rule, not the exception.

Our goal here is to set out a framework for assessing the question whether courts should consult the practices of other states, either domestically or nationally. Our starting point is admittedly unusual: the Condorcet Jury Theorem.<sup>29</sup> We suggest that the Jury Theorem provides the simplest argument for following the practices of other states: it suggests that if the majority of states believe that X is true, there is reason to believe that X is in fact true. In our view, the Jury Theorem also provides the foundation for assessing the problems and limits of following the practices of other states.

In supplying a governing framework, we attempt to give structure to a debate that so far has consisted mainly of ad hoc (though often reasonable and illuminating) arguments for or against following the practices of other states. Our hope is that this framework might have broad applicability to many situations in which legal authorities are deciding whether to consult the decisions of other legal actors. Suppose, for example, that it is ultimately agreed that in interpreting the American Constitution, the United States Supreme Court should not consult the practices of other nations. It may remain possible that other high courts, interpreting their own constitutions, should consult such

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<sup>23</sup> Markesinis and Fedke, *supra* note, at 35-45.

<sup>24</sup> Ulrich Drobnig, *The Use of Foreign Law by German Courts*, in *The Use of Comparative Law by Courts* 127, 134-35 (Ulrich Drobnig and Sief van Erp eds. 1999).

<sup>25</sup> See S. Ian Bushnell, *The Use of American Cases*, 35 *U. New Brunswick L.J.* 157 (1986); J.M. MacIntyre, *The Use of American Cases in Canadian Courts*, 2 *U. British Columbia L. Rev.* 478 (1966); H. Patrick Glenn, *Persuasive Authority*, 32 *McGill L.J.* 261 (1987); Peter McCormick, *Judicial Authority and the Provincial Courts of Appeal: A Statistical Investigation of Citation Practices*, 22 *Man. L.J.* 286 (1993).

<sup>26</sup> See Russell Smyth, *What Do Intermediate Appellate Courts Cite? A Quantitative Study of the Citation Practice of Australian State Supreme Court*, 21 *Adelaide L. Rev.* 51 (1999).

<sup>27</sup> See Markesinis and Fedke, *supra* note, at 26-31 (noting that Italian and French courts do not cite foreign sources but extrinsic evidence suggests they are influenced by them).

<sup>28</sup> *Id.* at 31-35.

<sup>29</sup> See Marquis de Condorcet, *Selected Writings* (Keith Michael Baker, ed., Indianapolis: Bobbs-Merrill 1976). Importantly, the Theorem does not apply only to binary decisions; it can be extended to decisionmaking when there are multiple issues (rather than a single yes/no question) and the outcome is chosen by a plurality. See Christian List & Robert E. Goodin, *Epistemic Democracy: Generalizing the Condorcet Jury Theorem*, 9 *J. Pol. Philosophy* 277 (2001). For helpful overviews, see Dennis C. Mueller, *Public Choice III* 129 (2003); Robert E. Goodin, *Reflective Democracy* 95-96 (2005).



practices. The analysis here might justify and inform such consultation. The same analysis might apply not only to state courts operating domestically, but also to judgments by legislatures, of states or of nations, that are deciding whether to follow the majority view of apparently relevant others.<sup>30</sup> In structuring a program to protect endangered species, the legislature of Montana may or may not want to follow the general practices of other state legislatures; in deciding on national energy policy, or in seeking to control global warming, Congress may or may not want to adopt the approaches of other nations. For such judgments, the Condorcet Jury Theorem provides a helpful place to start.

Four clarifications before we begin. First, we assume initially that judges can interpret foreign materials both easily and adequately. It is important to see how the analysis should proceed if judges could undertake it properly; but of course there is no assurance that they can. In Part V we will discuss the extent to which more realistic assumptions about judicial capacities would complicate our basic claims, and perhaps justify a departure from them in the interest of easy administration. Second, we are concerned with the use of foreign decisions as relevant information for resolving disputes, not with the use of foreign decisions as “precedent”; indeed, we do not believe that anyone seeks to use those decisions in that way.<sup>31</sup> Third, we assume that the Supreme Court has been candid about its reasons for using foreign sources, and so the controversy is over doctrine and not judicial rhetoric.<sup>32</sup> The fact that state courts regularly use

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<sup>30</sup> Note in this regard that Attorney General Alberto Gonzales, a critique of judicial reliance on foreign decisions, finds it “entirely appropriate for our elected representatives in the Congress or the State legislatures to consider how lawmakers in other countries have approached problems when our representatives write the laws of the United States.” Alberto Gonzales, *Foreign Law and Constitutional Interpretation* 3 (Nov. 9, 2005), available at <http://www.law.uchicago.edu/news/Gonzales-speech-intro.html>.

<sup>31</sup> There are tricky jurisprudential questions here, to be sure. Ernest Young argues that a court treats foreign decisions as authoritative if they are “deferring to numbers, not reasons,” Young, *supra*, at 155, relying on Joseph Raz’s argument that an institution has authority when others defer to its judgments not because of its reasons but because of its epistemic advantages. See Joseph Raz, *The Morality of Freedom* 35 (1986). Perhaps this is so, but it seems odd to say that the body of foreign legislation and decisions has “authority,” just as it is odd to say that a public opinion poll has authority. But the debate should not be a semantic one. What is really at stake is not a semantic or even jurisprudential question, but whether judicial decisions will be improved if judges consult foreign materials for additional information and use that information to make their decisions. We do not think it matters if this practice is labeled as giving “authority” to foreign courts or not.

<sup>32</sup> For the latter view, see Richard A. Posner, *The Supreme Court, 2004 Term-- Foreword: A Political Court*, 119 *Harv. L. Rev.* 31, 88-89 (2005). For criticism of this view, see Tushnet, *When Is Knowing*, *supra*.

“foreign” sources in the same way that the Supreme Court has done provides some assurance on this count.

Finally, we hope that our analysis will prove useful to people with diverse views about the proper interpretation of the Constitution. It is tempting and to some extent correct to think that originalism,<sup>33</sup> by itself, excludes reference to foreign precedents; if the Constitution means what it originally meant, the contemporary practices of foreign nations are usually immaterial.<sup>34</sup> And indeed, our analysis will help show why, exactly, those with different approaches to constitutional interpretation reach different conclusions about the relevance of foreign law. But at least in some cases, our conclusions should be attractive to originalists as well as to those who reject originalism or prefer some middle way. Whenever the court has to make a factual or moral inquiry that is required by original understanding, then the framework provided by the Jury Theorem provides a useful place to start.<sup>35</sup> Of course some theories of constitutional interpretation will be relatively less willing to ask about the factual and moral questions on which comparative law might bear, and we shall pay considerable attention to variations on that count.

Our emphasis is normative, but the central argument has positive as well as normative implications. Indeed, we are willing to hypothesize that an implicit understanding of the Condorcetian argument helps explain a wide range of existing practices, including the fact that state courts consult the legal materials of other state courts more than national courts consult the legal materials of foreign courts, and the fact that national courts in young nations consult the legal materials of foreign courts more frequently than do national courts in older nations. In Part VI, we derive some specific testable hypotheses from the Condorcet approach, provide tentative support for those

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<sup>33</sup> For an outline, see Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997).

<sup>34</sup> See Gonzales, *supra*. Consider in particular Attorney General Gonzales’ suggestion that it is appropriate to consult English sources to carry “out the original political will reflected in the Constitution,” *id.* at 5, and the contrasting claim that the “present trend” reflects an illegitimate effort “to consider evolving, contemporary legal judgments and policy preferences of other nations.” *Id.*

<sup>35</sup> Tushnet provides one example: if the proper original interpretation of the eighth amendment requires courts to determine evolving norms, this is a factual inquiry that would benefit from consultation of foreign decisions, at least if evolving norms are not merely those internal to the United States. See Tushnet, *When Is Knowing*, *supra*, m.s. at 7. But the value of comparative law for originalists is broader than this. To the extent that any original understanding requires courts to measure the extent to which a law burdens some behavior (speech, religious practice, commerce, etc.), the experience of foreign states with similar rules should be relevant.

hypotheses, and suggest other ways that they could be evaluated empirically.

## **2. The Jury Theorem and Following Other States**

To see how the Jury Theorem works, suppose that people are answering the same question with two possible answers, one false and one true. Assume too that the probability that each voter will answer correctly exceeds 50%, and that these probabilities are independent. The Jury Theorem says that the probability of a correct answer, by a majority of the group, increases toward 100% as the size of the group increases.<sup>36</sup> The key point is that groups will do better than individuals, and large groups better than small ones, so long as two conditions are met: majority rule is used and each person is more likely than not to be correct.

The theorem is based on some fairly simple arithmetic. Suppose, for example, that there is a three-person group in which each member has a 67% probability of being right. The probability that a majority vote will produce the correct answer is 74%. As the size of the group increases, this probability increases too. It should be clear that as the likelihood of a correct answer by individual members increases, the likelihood of a correct answer by the group increases as well, at least if majority rule is used. If group members are 80% likely to be right, and if the group contains ten or more people, the probability of correct answer by the majority is overwhelmingly high – very close to 100%.<sup>37</sup> In countless domains, imperfectly informed individuals and institutions adopt a heuristic in favor of following the majority of relevant others (the “do-what-the-majority-do” heuristic<sup>38</sup>); and this heuristic reflects the logic of the Jury Theorem.

### **The basic argument**

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<sup>36</sup> See note supra.

<sup>37</sup> For a lucid discussion of the Jury Theorem, and its application to legal problems, see Paul H. Edelman, *On Legal Interpretations of the Condorcet Jury Theorem*, 31 *J. Legal Stud.* 327 (2002).

<sup>38</sup> See Gerd Gigerenzer, *Moral Intuition = Fast and Frugal Heuristics?* (forthcoming 2006); see also the discussion of imitation as a fast and frugal heuristic in K. Laland, *Imitation, Social Learning, and Preparedness As Mechanisms of Bounded Rationality*, in *Bounded Rationality*, in *Bounded Rationality: The Adaptive Toolbox* 233 (Gerd Gigerenzer and Richard Selten eds. 2002); and Joseph Henrich et al., *What Is the Role of Culture in id.* at 343, 344 (“Cultural transmission capacities allow individuals to shortcut the costs of search, experimentation, and data processing algorithms, and instead benefit from the cumulative experience stored in the minds (and observed in the behavior) of others.”).

It should be easy to see how the Jury Theorem might be invoked to support use of the law of other states. Suppose that the Supreme Court of Texas is deciding whether to adopt rule A or instead rule B. Suppose too that the vast majority of states have adopted rule A. If we assume that each state is more likely than not to make the right decision, in the sense of being well motivated and more likely than not correct in its beliefs, then there is good reason to believe that the Supreme Court of Texas should, in fact, adopt rule A. When states are deciding on appropriate policies, it is at least reasonable to assume that each is, or most are, likely to do better than random, which is an adequate basis for analyzing the question in terms of the Jury Theorem. At least at first glance, the point applies to constitutional law no less than to statutory and common law.<sup>39</sup> If a state court is deciding on the meaning of its own Due Process Clause, it might well consult the decisions of other state courts, simply because the majority view, under the stated assumptions, has a high probability of being correct.

This argument is easiest to accept if we can assume uncontroversially that there is a right answer to the question whether a state should prefer rule A or rule B. Suppose that the choice between the two turns on a disputed question of fact. For example, will rule A cause significant disemployment effects on the state's economy? Will rule B increase prices, or increase the incidence of racial discrimination? If the court is focusing on a factual question, and if a majority of states has answered that question a certain way, the court has some reason to believe that the majority view is correct. We might therefore arrive at a simple conclusion: *Where the choice of legal rule turns on an answer to a disputed factual question, the practice of a substantial majority of states should be followed, at least as a presumption.* The conventional practice in state courts – of consulting and often following the clear majority view – is easily understood and defended in these terms.

Suppose, however, that the question is not simply or largely one of fact. Perhaps it is largely a moral question; perhaps the state wants to know whether it is morally acceptable to ban same-sex relationships, to refuse to protect an asserted right to housing

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<sup>39</sup> We explore below why the first glance might be misleading. In brief, if the meaning of a constitutional provision is a matter of uncovering the original understanding, the views of other states may not be terribly informative. Interestingly, however, states nonetheless consult other states in interpreting their own constitutions. See notes *supra*.

or health care, or to execute juveniles. (Let us simply stipulate that the question of moral acceptability is relevant to the legal judgment; we will return to that stipulation below.) If we are skeptics about morality, and believe that moral questions do not have right answers, then it is pointless to care what other states do; it is also difficult to see how a state court could go about answering the relevant question. But if we are not skeptics, and if we believe that moral questions do have right answers, then it makes sense to consult the majority's view. Most ambitiously, we might believe that moral questions simply have right answers as such, and hence the view of most states is probative of what is right. Less ambitiously, we might believe that the right answer to a moral question sometimes turns on the right answer to factual questions, and the view of most states is probative on that count as well.

It is imaginable, for example, that the right answer to a question about same-sex relationships depends, in part, on whether children will be harmed by permitting such relationships. Or suppose that the legitimacy of capital punishment for juveniles depends, in part, on whether such punishment has a significant deterrent effect on juveniles. The practices of most states might be taken to provide some evidence on these questions. As a single practice obtains widespread support, the likelihood that it is right might appear to be very high.

### **An initial puzzle and underlying assumptions**

This, then, is the core of a reasonable argument for consulting the law of other states. But when and how the Jury Theorem can be applied to that practice of consultation depends on whether the assumptions underlying the Theorem apply. An initial puzzle is what we will call the *who votes?* problem. Suppose that a court seeks to determine whether some law, X, has some desirable effect, Y. The court observes that a majority of other states have enacted law X, but it also discovers that, in the aggregate, more legislators oppose X than support it – in the states with X, a bare majority of legislators voted in favor of the law, while in states without X, nearly all legislators voted against the law. Should the court count the states with law X or the legislators who voted for X? Or suppose that polls show that the majority of populations in all states oppose X while the majority of legislators voted for X. Should the court count the legislators or the people?

Similarly, should courts that look at outcomes in other courts count the number of judge-votes or the number of court-votes? These complications can be multiplied.

In principle, the *who votes?* question is easily answered. From the Condorcetian perspective, the court should focus on the people who have the best relevant information. Suppose that foreign legislators focus on the deterrent effect of the juvenile death penalty, foreign populations focus on its moral permissibility, and foreign courts focus on its consistency with local law. If so, then an American court that cares only about the deterrence issue should count the legislators rather than the other agents. In practice, it may be difficult for courts to make such fine distinctions. The motives of legislators, the thinking of populations, and the workings of government are sufficiently opaque to foreigners that it is probably appropriate to rely only on the authoritative outcomes – duly enacted legislation, judicial opinions – and ignore the rest.

For the Condorcetian argument to work, moreover, each state, or most states, must be more likely than not to make the right choice. The arithmetic has some complexity here,<sup>40</sup> but the intuition is simple: If each state is more likely to be wrong than right, then the likelihood of an incorrect answer, from a majority of states, approaches 100% as the size of the group expands. If Massachusetts has reason to believe that states are likely to err on the question of same-sex marriage (perhaps for reasons of what Condorcet himself called “prejudice”<sup>41</sup>), then it might choose to ignore the majority view. If the United States believes that most nations are likely to blunder on a question of free speech, or antitrust law, then the Jury Theorem argues in favor of ignoring their practice – or perhaps even doing the opposite of what they do. We shall refer to this point at various stages below. For the moment we focus on three less obvious assumptions, each of which may or may not hold in relevant contexts.

First, a foreign state’s law must reflect a *judgment* based on that state’s *private information* about how some question is best answered. Otherwise, the law is not analogous to a vote that aggregates information. We will also address the possibility that the judgment reflects the hidden preferences of the voters rather than hidden facts that they know. In the former case, there is a case for relying on foreign law, but it is weaker

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<sup>40</sup> See Cass R. Sunstein, *Infotopia: How Many Minds Produce Knowledge* (forthcoming 2006).

<sup>41</sup> Marquis de Condorcet, *Selected Writings* (Keith Michael Baker, ed. 1976).

than in the latter case.<sup>42</sup>

Second, a foreign state's law must address a problem that is similar to the problem before the domestic court. This *similarity* condition refers not only to the facts (does the foreign state have a similar crime problem?) but also to the legal principles, institutions, and values of the foreign state. Otherwise, the foreign law is not analogous to a vote on the same issue. It is possible, of course, that pertinent difference between the foreign and domestic arenas make the foreign judgment irrelevant to the issue at hand. Perhaps other states do not allow same-sex marriage, but perhaps they are relevantly different from Massachusetts, whose Supreme Judicial Court might therefore feel free to ignore the consensus judgment.<sup>43</sup> It is here, we shall suggest, that different views about constitutional interpretation, and its proper sources, can lead to different judgments about the relevance of foreign law. The Constitutional Court of Germany, for example, might believe that a moral judgment bears on the meaning of a constitutional guarantee, whereas another high court might reject that belief.

Third, and perhaps most interestingly, the law of the foreign state must reflect an *independent* judgment; it must not be a matter of merely following other states. If the foreign law exists because the foreign state mimicked some other state, then the law would not count as an independent vote, as required by the Jury Theorem. When this condition is violated, we will say that foreign law reflects a *cascade effect*.<sup>44</sup> The problem with a cascade effect is that a state, apparently contributing to information about what must be done, is actually following the relevant judgments of others. To the extent that states and nations are participating in cascades, they are undermining a key assumption on which consultation of foreign law depends. The possibility of cascade effects weakens the argument, not only for following other courts, but more generally for following the practices of other states and nations, including legislatures and administrative agencies.

For a preliminary sense of the nature of these conditions, consider the question in *Roper* itself, which was whether the juvenile death penalty is "cruel and unusual."<sup>45</sup> The

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<sup>42</sup> This corresponds to the two main CJT models emphasized by Edelman: the polling model and the information aggregation model. See Edelman, *supra*.

<sup>43</sup> *Goodridge v. Department of Public Health*, 440 Mass. 309 (Mass. 2003).

<sup>44</sup> See Sushil Bikhchandani et al., *Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades*, 12 *J. Econ. Persp.* 151 (1998).

<sup>45</sup> See *Roper*, 125 S. Ct. at 1187.

issue is whether we should consider the abolition (or the lack of) the juvenile death penalty in most other countries as relevant information for the Supreme Court of the United States. Suppose, first, that the issue that the Court cares about is whether the juvenile death penalty deters juvenile crime. (We do not claim that this issue was crucial to the Court's decision, though the Court mentioned the point.<sup>46</sup>) Can the Court plausibly conclude that nearly all other nations have expressed an independent judgment that the juvenile death penalty does not deter crime -- and that therefore the probability that the juvenile death penalty deters crime is very low, perhaps close to zero?

The first condition says that the Court should ignore states that (say) abolished the juvenile death penalty for explicitly moral, religious, or ideological reasons independent of any juvenile crime problem. The reason is that the abolition of the penalty did not reflect a judgment about the relevant issue here, whether the juvenile death penalty deters. The second condition says that the Court should ignore states that do not have a juvenile crime problem -- perhaps because families or clans have much more control over children than families do in the United States. The third condition says that the Court should ignore states that abolished the juvenile death penalty merely because other states abolished the juvenile death penalty. The abolition by the later states does not provide additional information about whether the juvenile death penalty deters.

Note that whether and how these conditions apply depends heavily on how the question is framed. Suppose that the Court does not care whether the juvenile death penalty deters but sees itself as determining whether the juvenile death penalty is immoral or in some other way a violation of evolving social norms. The question now is not whether the juvenile death penalty deters (though this may remain a relevant consideration) but whether other states' laws provide information about the evolving norms with respect to the morality of the juvenile death penalty. The first condition requires that the foreign states have in fact made a moral judgment (which may be hard to ascertain) and also whether the foreign state has private information about the morality of the juvenile death penalty (which may or may not seem unlikely). The second condition requires that the foreign state regard the juvenile death penalty as a moral issue, and also that moral norms in the foreign state be similar to those in the United States. The third

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<sup>46</sup> Id.



condition requires that the foreign state, as before, not merely mimic the laws of other states.

We now turn to a more detailed discussion of these points.

### **3. The Judgment Condition**

The Jury Theorem requires that the voter have a probability estimate and then vote sincerely on the basis of it. There are two points here. First, the voter must have private information. Second, the voter must sincerely reveal this information. Let us consider these points with more care, and see how they apply to states.

The first point is that the voter (the foreign state, here) has private information. In our running example, it must be the case that, say, Germany abolished the juvenile death penalty because the government had information, not available to other countries (or, in our example, the U.S.), about the juvenile death penalty. The type of information depends on context. As our juvenile death penalty example showed, the Supreme Court might want to look at German law for relevant facts (whether Germany believes that the juvenile death penalty deters), including “moral facts” (whether Germans believe that the juvenile death penalty is immoral).

One should not take the requirement of private information too literally. The deterrent effect of the juvenile death penalty in Germany is in some sense public, given that the German legislature must base its decision on an assessment of facts that must be widely available within Germany. The point is rather that an American court will often be able to determine these facts more cheaply and reliably by consulting German law than by doing its own research about the facts on which German law is based. When this is not the case, of course, then the argument for consulting foreign law is much weaker. If the United States court has direct and unmediated access to the facts, it should consult the facts, rather than another nation’s attitude about the facts. The same point holds in the domestic context. If a New York court seeks to know whether a certain policy has a certain effect, it might investigate that issue directly, rather than asking what most states believe the effects to be. But a New York court might not be in a good position to

investigate the issue, rather than the belief. We will return to this question – whether it is better to consult foreign law or the facts or attitudes that it reflects – in a later section.

A further point is that a foreign law will often be consistent with multiple factual conditions, and this weakens its value as a “vote.” The absence of the juvenile death penalty may be the result of “pure” moral convictions, not a local assessment about its lack of deterrent effect. If so, an American court interested in learning about the deterrent effect of the juvenile death penalty will learn nothing from German law -- and, indeed, may not even know whether German law reflects moral considerations or information about deterrence. Or suppose that Germans oppose the juvenile death penalty not because of moral convictions (that is, private information about what we are treating as moral facts) and not because of private information about its deterrent effect, but simply because they find the juvenile death penalty distasteful. The lack of the death penalty, then, just tells us that Germans find it distasteful. If most other countries also lack the death penalty, the Jury Theorem might just tell us that most people find the death penalty distasteful. This is not likely to be relevant to American adjudication.

This latter problem leads to our second inquiry, which is whether the state is “sincere.” In the standard application of the Jury Theorem, sincerity means that the voter’s vote is based on her private information, and that she does not vote “strategically,” in order to obtain some other end. As an example, consider the application of the Jury Theorem to an ordinary jury. A juror votes sincerely if her vote reflects her assessment about the defendant’s guilt. A juror votes insincerely if her vote reflects some other purpose – for example, to ensure that deliberations end quickly, or to impress other jurors, or to show other jurors that she has an independent mind.

In our setting, the sincerity requirement can be understood as the requirement that the state’s political system produces laws (or its legal system produces judicial decisions) that accurately reflect the “private” facts or values.<sup>47</sup> Here, the question is whether the foreign government enacted the law in question (or failed to repeal it) because of the relevant private information or because of political dynamics of no concern to the American court. Suppose that Germany lacks the juvenile death penalty because of the

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<sup>47</sup> We will put aside one way of being insincere – mimicking other states for ulterior reasons – because we address this under the heading of independence.

disproportionate influence of an interest group, one that does not much care about the relevant facts or moral principles. The influence of the interest group muddies the informational value of the vote. It may be that the interest group would not be able to effect the repeal if Germans believed strongly that the juvenile death penalty is justified on moral or deterrence grounds; but since the American judge cannot determine the extent of the interest group's influence, it cannot measure the quality of the information on the basis of which Germans resist its pressure or not.

States are not people and some may find it odd to label a state law as “sincere” or not. What is important is not sincerity in the psychological sense but whether the laws of other states, including judicial decisions, reflect a political or legal process that incorporates information that is private to the state – in the sense that government officials have that information as a result of their own research, their own local knowledge, or their ability to aggregate the information, judgments, and values of the mass of citizens. Political and legal systems may be defective in various ways. The laws might reflect the choices of a tiny ruling elite; so might the judicial opinions. In these cases, it would be wise for the American court to ignore or discount the law of the other state.

#### **4. The Similarity Condition**

The similarity condition is both straightforward and important, but easily misunderstood. It says that the foreign law provides relevant information – it is a “vote” on the relevant question – only if the foreign country is sufficiently similar *in the right way* to the United States. All countries are different from all other countries, and the laws of countries that are similar in many ways may nonetheless diverge considerably because the two countries are dissimilar in some crucial way. The relevant question is not whether the U.S. and some other country like Germany are similar in some general or abstract sense; the question is whether the German law or judicial opinion that might be relevant information for an American court addressing a factual, moral, or institutional problem that is similar in Germany and the United States.

Indeed, in many cases dissimilarity will be affirmatively desirable, for purposes of using the Jury Theorem, as long as the dimensions along which other countries differ from the U.S. are not correlated. Suppose, for example, that all states (except the United States) ban the juvenile death penalty. If all the other states were identical, we might be worried that the ban reflected some invisible institutional aspect of these other countries rather than a robust moral conviction. Suppose, now, that the countries all have different moral and legal traditions, and that some countries have serious juvenile crime and others not, and so forth. The fact that such different nations all ban the juvenile death penalty might indicate that the death penalty violates universal moral norms, or that the juvenile death penalty is ineffective because of universal characteristics of the problem (for example, that juveniles discount the future more than adults do, and thus are not deterrable). However, we will put aside this consideration and focus on how courts can determine whether the similarity condition is met.

### **Factual differences**

Suppose that a factual question is at issue: Will a certain practice create disemployment effects? Perhaps a practice will have such effects in one state, with its distinctive mix of employers, even though it does not have such effects in other states, with their very different mix of employers. We started with the example of Texas trying to determine whether a public policy exception to employment at will would have an adverse effect on the employment market and looking at the law of other American states in order to find an answer. Is there any reason why Texas should not also look at the law in France or the United Kingdom?

One reason not to do this is that France is more different from Texas than, say, Vermont is. But many of the differences, including many of the most dramatic differences, are immaterial. For example, the fact that French is spoken in France, and English is spoken in Texas and Vermont, is not relevant. The fact that France has more generous employment benefits, so that high unemployment may be more willingly tolerated in France than in Texas or Vermont, is relevant. So in this case, it might be unwise for Texas to place weight on French law.

Consider again the juvenile death penalty. The absence of such a law in a nation like Switzerland, where there is very little violent crime among juveniles, may provide little information; perhaps Switzerland has never had to confront the question of whether to have a juvenile death penalty because no one thinks there is a juvenile crime problem. But suppose that Russia has a serious problem of violent juvenile crime, a death penalty for adults, but no juvenile death penalty. Even though Russia is a very different country, the absence of the juvenile death penalty there might tell an American court that the Russians have concluded that such a law would not have a significant deterrent effect.

Now the Russian experience may be further distinguishable – perhaps juveniles there do not have access to guns to the same degree as in the United States – but these differences can also be taken account. The differences between Russia and Texas, on the one hand, and between Vermont and Texas, on the other, are a matter of degree, not of kind.<sup>48</sup>

## **Moral differences**

### *Prerequisites.*

The relevance of the Jury Theorem when moral judgments are at issue is more complex, and depends on a number of conditions. First, one must reject any strong form of cultural relativism, according to which the appropriate moral rules are culture-dependent, so that the moral requirements that are suitable for one culture need not be suitable for another culture. If a court subscribes to this strong form of cultural relativism, then it should not consult foreign law for information about what morality requires. In Jury Theorem terms, a foreign country's rejection of some practice on moral grounds provides no information about whether this practice is morally acceptable in the United States. We believe that strong forms of cultural relativism are difficult to sustain,<sup>49</sup> and hence this objection may be safely ignored; but for those who are committed to cultural relativism, consultation of comparative law will make little sense.

It is possible that some opposition to such consultation depends on a form of cultural relativism or, perhaps more interestingly, a form of cultural relativism with

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<sup>48</sup> For evidence that the U.S. Supreme Court has relied on foreign law to resolve factual questions, see Calabresi & Zimdahl, *supra* at 903-06 (2005) (citing abortion, euthanasia, and Miranda cases).

<sup>49</sup> See Bernard Williams, *Morality: An Introduction to Ethics* (1972).

respect to law in general or constitutional law in particular. It is here that different approaches to constitutional interpretation might lead to different judgments about comparative law; and hence opposition to use of foreign law<sup>50</sup> might be brought in close contact with the Condorcet Jury Theorem. On one understanding of originalism, for example, the practices of other nations are generally irrelevant, because the interpretive goal is to recover the original understanding of the relevant provision, and on the original understanding, the constitutional issue must be resolved without reference to those practices.<sup>51</sup> On this view, constitutional law is culturally relative even if morality is not; perhaps the meaning of the founding document does not depend on what other nations do. When the United States Supreme Court is deciding on the meaning of the equal protection clause, perhaps it is not making anything like a moral inquiry into the requirements of equality, and perhaps the information that comes from the practices of other nations is almost never relevant.<sup>52</sup>

If this position is accepted, of course, a degree of cultural relativism is appropriate in the domain of constitutional law. On this view, American states properly consult the practices of other states, certainly in making common law decisions and perhaps more generally;<sup>53</sup> but the United States Supreme Court ought rarely, if ever, to consult the practices of other nations. When some nations consult comparative law, it is because their own interpretive practices justify the consultation; there is no reason to think that every nation must follow the same such practices.<sup>54</sup> Under the constitutional approach in South Africa, for example, the constitutionality of certain laws legitimately turns, in part, on the views of other nations;<sup>55</sup> and here the Condorcet Jury Theorem helps to explain why. The

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<sup>50</sup> See Gonzales, *supra* note.

<sup>51</sup> See Scalia, *supra* note; Gonzales, *supra* note.

<sup>52</sup> But see note *supra*.

<sup>53</sup> In state constitutional law, the question would depend on whether originalism is the appropriate method. If the meaning of the Constitution of Montana turns on the original understanding in Montana, or is otherwise depends on norms and principles specific to Montana, the practices of other states are irrelevant, subject to the provisos in note *supra*.

<sup>54</sup> Note, however, that the Jury Theorem might itself operate at the meta-level, in helping nations select among theories of interpretation, at least in the face of reasonable doubt: If the vast majority of nations consult the practices of other nations, then any particular nation might do so for that reason, assuming that the three conditions are met. It will be noticed that our own argument for attending to comparative law is informed by the fact that this practice is widely endorsed.

<sup>55</sup> See note *supra*.

United States might be different; whether it is depends on a judgment about the right theory of constitutional interpretation.<sup>56</sup>

Second, and related, one must probably reject any moral theory that holds that the legally relevant moral judgments are best understood as a product of a nation's distinctive traditions and history – at least if the theory does not always acknowledge that the lessons of a particular history can be universal. If Germany rejects the death penalty simply because of its Nazi past, for example, and if that rejection does not offer a general moral lesson, this rejection has little informational value for the United States. Perhaps Germany's judgment is a product of the nationally specific associations of the death penalty, in a way that has no implications for other nations. Third, one must, of course, reject any skeptical moral theory that holds that morality is just a matter of personal preferences, or that moral rules are sufficiently obvious that research does not shed light on them – one just consults one's own conscience.

#### *Moral practices and moral contenders*

Mainstream philosophical theories reject strong forms of skepticism and relativism,<sup>57</sup> and thus provide a reasonable foundation for courts to consult foreign materials in order to determine moral rules, where legal decisions are legitimately based in whole or in part on moral judgments. Here we shall focus on those judgments, assuming for purposes of analysis that they bear on the proper resolution of a legal controversy.

It is possible that legal actors should reason from the moral judgments of other nations without asking anything about the foundations of those judgments. Consider, for example, the Universal Declaration of Human Rights.<sup>58</sup> The emergence of the Universal Declaration involved something closely akin to what we are describing here: an effort to root legal norms in an understanding of the independent judgments of relevant nations.<sup>59</sup> Indeed the process had a powerful if implicit Condorcetian feature, involving as it did an

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<sup>56</sup> Note again that the Jury Theorem might help in selecting that approach. If every nation in the world rejected originalism, the argument for originalism would surely be weakened. See note supra.

<sup>57</sup> See, e.g., Williams, supra; John Rawls, *A Theory of Justice* 18-19, 42-45 (1971) (discussing the search for reflective equilibrium).

<sup>58</sup> Universal Declaration of Human Rights, available at <http://www.un.org/Overview/rights.html>.

<sup>59</sup> See Mary Ann Glendon, *A World Made Anew: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001).

inquiry into the practices of all or most. The basic enterprise operated by surveying the behavior of most nations, and by building a “universal declaration” on the basis of shared practices. A philosophers’ group, involved in the project, “began its work by sending a questionnaire to statesmen and scholars around the world.”<sup>60</sup> At a key stage, those involved in drafting the declaration produced “a list of forty-eight items that represented ... the common core of” a wide range of documents and proposals, including judgments from “Arabic, British, Canadian, Chinese, French, pre-Nazi German, Italian, Latin American, Polish, Soviet Russian and Spanish” nations and cultures.<sup>61</sup> Jacques Maritain, a philosopher closely involved in the Universal Declaration, famously said, “Yes, we agree about the rights, but on condition no one asks us why.”<sup>62</sup> Hence a judgment in favor of a set of rights can emerge across disagreement or uncertainty about the foundations of those rights. Law rarely requires deep engagement with high-level moral disputes; legal controversies can thereby be resolved with less ambitious judgments, even those with a moral component.<sup>63</sup>

Suppose, for example, that the Supreme Court of Idaho is deciding whether the free speech provision of its Constitution protects commercial advertising. Idaho might notice that the overwhelming majority of states have concluded that their state constitutions do, in fact, protect commercial advertising. If so, the Supreme Court of Idaho might rule in favor of commercial advertising, without making any particularly ambitious claims about the foundations of constitutional law or even of the free speech principle. The examples could easily be multiplied.

It is also possible, however, to see how the Jury Theorem might be relevant for the two main high-level moral contenders: utilitarian or welfarist approaches<sup>64</sup> on the one hand and deontological approaches on the other. As before, we are assuming that one or the other approach is relevant to the interpretation of the relevant legal materials.

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<sup>60</sup> Id. at 51.

<sup>61</sup> Id. at 57.

<sup>62</sup> Id. at 77 (citing Maritain); also quoted at [http://www.catholicculture.org/docs/doc\\_view.cfm?recnum=405](http://www.catholicculture.org/docs/doc_view.cfm?recnum=405).

<sup>63</sup> See Cass R. Sunstein, *Incompletely Theorized Agreements*, 103 Harv. L. Rev. 1733 (1995).

<sup>64</sup> Utilitarianism is a species of welfarism, and should not be identified with it. It is possible to believe that what matters is people’s welfare, without also believing that welfare should be measured in utilitarian terms. For relevant discussion, see Amartya Sen, *Utilitarianism and Welfarism*, 76 J. Phil. 463 (1979).



A welfarist court would think that when the law is ambiguous, it should interpret the law so as to maximize social welfare.<sup>65</sup> On this view, a vague constitutional provision such as the Eighth Amendment must be given some welfarist content. If the court believes that foreign courts and legislatures also care about maximizing welfare (though this need not be their exclusive concern), then the court can take foreign legal materials as evidence about what these foreign institutions believe are the rules that maximize welfare. Near-universal rejection of the juvenile death penalty provides evidence, on this view, that nearly every decisionmaker who has considered the question believes that the deterrent effect of the rule is small or nil, and that any deterrence benefits are outweighed by the costs (administrative, the welfare cost to the executed criminal and the criminal's family, and so forth).

A court could similarly believe that it should interpret ambiguous laws in a manner that respects rights, which qualify as such on the basis of a deontological account. Some theories of rights hold that rights are universal; if so, perhaps the same set of rights will be respected in most nations in which people can freely debate and openly.<sup>66</sup> Of course, distortions will occur; there can be no assurance that free debate will lead to the proper account of rights. But on the Condorcetian view, we might suppose that if most or all liberal democracies ban the juvenile death penalty, it is reasonable to infer that the death penalty would be rejected on the proper account of rights. (This may be the account that would be chosen by people behind the veil of ignorance, in Rawls's terms,<sup>67</sup> or in an ideal speech situation, in Habermas' terms.<sup>68</sup>) Here, the frequency with which the penalty is rejected gives one confidence that the rejection is not based on local or particular moral intuitions but reflects universal moral convictions, and hence the right understanding of human rights.

As long as the societies allow free debate, the very fact that very different societies come to the same conclusions increases one's confidence that the norms are

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<sup>65</sup> For an argument in this vein, see Richard A. Posner, *Not a Suicide Pact* (forthcoming 2006).

<sup>66</sup> Jürgen Habermas, *Between Facts and Norms: An Author's Reflections*, 76 *Denv. U. L. Rev.* 937, 940–41 (1999).

<sup>67</sup> See Rawls, *supra*.

<sup>68</sup> See Habermas, *supra*.

genuinely universal and transcend merely historical or institutional differences.<sup>69</sup> Here is a way, noted above, that differences, rather than similarities, among societies strengthen the case for consulting foreign materials. Recall in this regard that agreement on outcomes, across disagreement or uncertainty about foundational questions, may itself fortify the argument for consulting the law of other states. If the overwhelming majority of states agree that there is a right to free speech, and also agree on a particular entailment of that right, we have some reason for confidence in their view, at least if it is supposed that all or most are at least 50% likely to be right. We have seen that the Universal Declaration of Rights can be understood in these terms, and so too for many international agreements about appropriate content of rights or about proper social practices.

Consider, for example, the International Covenant on Civil and Political Rights, a treaty that refines and establishes as law many of the civil and political rights in the Universal Declaration.<sup>70</sup> Many of the rights recognized by the ICCPR are ones that Americans take for granted, including prohibitions on slavery (Art. 8) arbitrary arrest (Art. 9), freedom of movement (Art. 12), and freedom of conscience (Art. 18). But for many countries emerging from authoritarian regimes in the 1980s and 1990s, the fact that this treaty existed, and reflected the judgments of numerous diverse countries, must have provided good reason for believing that the rights recognized in the treaty ought to be respected in their countries as well. Note that at least one country, Egypt, states in a declaration that the ICCPR was not inconsistent with the Sharia; the ratification of the ICCPR by other Muslim-dominated states might be similarly interpreted.<sup>71</sup> This suggests that, at some (relevant) level, people from different social and political systems may recognize that some norms transcend their differences – and that the very pervasiveness of a moral commitment is reason to accept it.

By contrast, most states have refused to ratify the second optional protocol to the ICCPR, which bans the death penalty.<sup>72</sup> This refusal shows that judgments about the

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<sup>69</sup> Again a point of this sort played a key role in the Universal Declaration of Human Rights. See Glendon, *supra*.

<sup>70</sup> Universal Declaration of Human Rights, G.A. Res. 217 A, U.N. GAOR, 3d Sess., art. 1, U.N. Doc. A/810 (1948).

<sup>71</sup> International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, art. 1, S. Exec. Doc E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

<sup>72</sup> Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (adopted by UNGA Res. 44/128 of 15 Dec. 1989).

effectiveness or desirability of the death penalty are more diverse, and that therefore a state deciding whether to eliminate the death penalty may learn relatively little from the judgments of other states.<sup>73</sup>

*What's relative?*

Morality may or may not be relative. But the right answer to a legal question with moral components will often vary from one state to another. Suppose, for example, that Georgia has no doctrine of “substantive due process,” whereas most states do have that doctrine. Georgia would not do well to borrow the practices of the states with such a doctrine. The reason is that any underlying moral judgment, relevant in states with a doctrine of substantive due process, is immaterial in Georgia.

This last point is potentially general, in a way that raises difficulties for use of the Condorcet Jury Theorem to justify reference to the views of other states (understanding that word to include nations). Suppose that all states have constitutional provisions that provide some sort of guarantee of “equality under the law.” It is nonetheless possible that any particular state has a distinctive or even unique approach to that guarantee. We might imagine that the vast majority of states do not believe that bans on same-sex marriage violate the equal protection clause. But perhaps one state, or a few states, understand their equal protection clause in an unusually expansive way, and that this understanding fits with the state’s traditions. If so, the state (call it Massachusetts<sup>74</sup>) legitimately rejects the judgments of other states. The broader point is that one does not have to be any kind of moral skeptic or relativist to think that insofar as they are properly translated into law, some moral norms are state-specific. In such cases, courts that are required to draw on the relevant local moral norms in order to interpret the law may be justified in ignoring conflicting norms in other states. This claim is a generalization of the suggestion that on some theories of constitutional interpretation, the practices of other states are usually irrelevant.

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<sup>73</sup> As of January 2006, 155 states had ratified the ICCPR; only 56 had ratified the second optional protocol. See Status of Ratifications, at <http://www.ohchr.org/english/countries/ratification/12.htm>; <http://www.ohchr.org/english/law/ccpr-death.htm>.

<sup>74</sup> See Goodridge, *supra*.

## Legal and institutional differences

Legal and institutional differences also matter. The stock example in the literature is Justice Breyer's reliance on German law in making arguments about the meaning of American federalism.<sup>75</sup> German federalism allows the German states to enforce national law; so why not in America? The question may make sense if the practice of Germany is informative on some question of relevance to American law. The problem with the argument is that in Germany, the states play a far greater role in creating national law than American states do, and this institutional difference may well make German law uninformative on the questions that concern Americans.<sup>76</sup>

The point is, again, that differences matter when they are large and relevant, and not when they are small or irrelevant. Justice Breyer meant to suggest that the German practice helps to show what the American practice ought to be, or might legitimately or reasonably be; perhaps he erred in ignoring institutional differences between the two systems. Justice Breyer might therefore have been wrong to rely on German institutions. Note, however, that even under current practice it is quite common to appeal to British laws and institutions notwithstanding the fact that the British parliamentary system is more different from the American system than the various presidential systems in Latin America and elsewhere that are indeed modeled on the American system. Consider this remark of Justice Scalia:

I don't use British law for everything. I use British law for those elements of the Constitution that were taken from Britain. The phrase "the right to be confronted with witnesses against him" – what did confrontation consist of in England? It had a meaning to the American colonists, all of whom were intimately familiar with my friend Blackstone. And what they understood when they ratified this Constitution was that they were affirming the rights of Englishmen. So to know

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<sup>75</sup> *Printz v. United States*, 521 U.S. 898, 976 (1997).

<sup>76</sup> See Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, in *The Federal Vision* (Nicolaidis & Howse eds. 2001). For a discussion, see Tushnet, *When Is Knowing*, *supra*, m.s. at 27.

what the Constitution meant at the time, you have to know what English law was at the time. And that isn't so for every provision of the Constitution.<sup>77</sup>

On originalist grounds, Justice Scalia's assumption that the criminal defendant's confrontation right had the same understanding in the United States as in Britain is plausible, and his reliance on British law is therefore reasonable.<sup>78</sup> But note that the implicit assumption here is that eighteenth century Americans believed that the confrontation right should exist in America as it did in Britain, despite the enormous institutional differences between the two countries – Britain was a constitutional monarchy and America a quasi-democratic republic. One could imagine someone arguing in the eighteenth century (or today) that because the U.S. was a democratic country, it did not need to grant as generous protections to criminal defendants as Britain did, for politically motivated prosecutions would be punished at the polls (as they indeed were, in the election of 1800<sup>79</sup>). If this argument is correct, the confrontation right in the U.S. should be understood more narrowly than the confrontation right in Britain. The contrary view, which prevailed, is that politically motivated or otherwise unfair prosecutions could be a serious problem in a democracy as well as in a monarchy.

Thus, for some purposes large institutional differences do not matter. An obvious example involves the question whether the executive can use military force without a congressional declaration of war. On one view, the American Constitution should be understood with close reference to British practice, where the executive did not need legislative approval.<sup>80</sup> But on another view, the British practice is irrelevant, because a republic rests on different principles.<sup>81</sup>

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<sup>77</sup> See Transcript of Scalia-Breyer Debate on Foreign Law, American University, January 13, 2005, available at: <http://www.freerepublic.com/focus/f-news/1352357/posts>.

<sup>78</sup> Compare John Yoo's reliance on British practice in attempting to understand the allocation of authority between the President and the Congress for purposes of making war. See John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (2005).

<sup>79</sup> James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (1956).

<sup>80</sup> See Yoo, *supra*.

<sup>81</sup> See, e.g., James Wilson, Legislative Department, Lectures on Law, in 3 *The Founders' Constitution* 94-95 (Philip Kurland and Ralph Lerner eds. 1987); Remarks of Pierce Butler, South Carolina Legislature, in *id.* at 94.

Consider again the juvenile death penalty. Is it relevant that it was abolished in countries with different political systems? One reason that it might be irrelevant is if we think that those political systems do not aggregate values and information well; but this seems highly unlikely, at least as a claim about the extremely wide range of systems that have abolished the death penalty. Another reason that it might be irrelevant is if we adopt a particular understanding of constitutional interpretation, in accordance with which the Eighth Amendment contains a fixed category of prohibitions, or a category of prohibitions that, if not fixed, evolves with changing values and practices in the United States alone. It is certainly possible to think that what counts as “cruel and unusual” is a function of the views of Americans, not of the world as a whole. If so, consultation of the practices of other nations is a blunder, because those practices do not bear on the proper interpretation of the American Constitution. We have seen that originalists so believe.<sup>82</sup> If correct, the same idea applies to many imaginable uses of comparative materials by federal courts; and so too, the same idea might be turned into an objection to consultation, by one state, of the practices of other states.

The public policy question faced by the Texas court can be evaluated in a broadly similar way. Suppose that some foreign court also has a public policy exception to employment at will. Relevant considerations would include (1) whether the foreign employment market is relatively free or relatively constrained in other ways; (2) whether the foreign court is as capable as American courts in addressing these issues; and (3) whether the foreign country has other institutions for resolving employment disputes (such as pervasive unionization). For the Texas decision, however, it is unlikely that comparative practices would be deemed relevant, given the existing sources of law. The question is how informative those practices are on the particular question that concerns Texas.

The upshot is that whether legal and institutional differences matter depends on context, and there is no reason to treat legal and institutional questions as different from factual and moral questions.

### **The regression approach**

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<sup>82</sup> See Scalia, *supra*; Gonzales, *supra*.

One objection to the argument so far, which we call the regression problem, is not an objection to comparative constitutionalism *per se*, but to the method advocated by its supporters, which might seem excessively crude. If we want information, then the right way to obtain information is to perform regressions that control for differences among states, not to pick and choose among the states, and take those that seem similar in some ill-defined way, while ignoring those that seem different. To be sure, it would be exceedingly difficult for courts to perform regressions, a point to which we will return; for the moment we are trying to specify the right analysis and to bracket the question of whether judges can engage in it.

Suppose that an American court wants to know whether the juvenile death penalty deters juvenile crime. A social scientist would answer this question by collecting data from different countries. The dependent variable would be, say, the juvenile crime rate. The main independent variable is whether a state has the juvenile death penalty or not. Other independent variables would attempt to control for factors that may affect the juvenile crime rate independently of the existence of the death penalty for juveniles: whether guns are available, whether the population is homogenous or ethnically mixed, whether there are great wealth differentials, whether the criminal justice system is effective or not, and so forth. These control variables would ensure (or try to ensure) that any relationship between the juvenile crime rate and the juvenile death penalty reflects the causal influence of the latter, and not some other factor that is partially correlated with the penalty. The court should perform the regression, and then conclude that the juvenile death penalty has deterrent effect if and only if the regression reveals such an effect.<sup>83</sup>

Regressions are not always possible, however. To see why, imagine that all states (except the U.S.) reject the juvenile death penalty. A regression will not reveal information about the deterrent effect of the juvenile death penalty because of lack of cross-state variation. Nonetheless, the rejection by all states of the juvenile death penalty may be informative: it may reveal that the government of each state believes that the juvenile death penalty is immoral, ineffectual, or otherwise unacceptable for its citizens.

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<sup>83</sup> In this particular example, the regression would be uninformative because so few states have the juvenile death penalty.

There are other ways to collect relevant information. One could conduct surveys asking people which punishment is more cruel; one could consult doctors and other experts. All of this might be useful information and in some settings courts should perhaps take advantage of it. But the benefit of relying on foreign law, rather than regression results based on foreign data, is that the law itself, in the right conditions, already embodies the regression results, in the sense that legislatures use their knowledge of local conditions in order to decide whether or not to implement the law. If American courts and experts have access to all the data in all countries, then the regression approach is the proper one. But if, as must be the usual case, American courts and experts do not have access to all data in all countries – because cultural differences and logistical problems make data collection and interpretation impossible – then foreign states’ laws and policies are the best evidence of what the underlying data say, and the Jury Theorem is properly applied. Comparative law, then, is a short cut that allows American courts to aggregate information through intermediaries such as national legislatures and courts.

### **Are only liberal democracies relevant?**

One might think that American courts should consult the legal materials only of liberal democracies. There may be reasons of administrative cost for limiting the field in this way, a point to which we will return.<sup>84</sup> And on Condorcetian grounds, democracies seem to deserve special attention, on the theory that on facts and morality, they are more than 50% likely to be right, as nondemocracies may not be. It may well be that democracies, because they are democratic, are more likely to incorporate information about what is true. Suppose, by contrast, that the relevant nations are dictatorships, inclined to oppress their people. Perhaps we will believe that the practices of dictatorships are less than 50% likely to be right. There may be an analogue at the domestic level; perhaps some states legitimately distrust most states on certain issues. But as a matter of principle, the argument for restricting consultation to liberal democracies seems vulnerable, at least in its crudest forms.

First, many countries that are not liberal democracies nonetheless have some good laws and institutions. There is no reason to think that a nondemocracy enacts only bad

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<sup>84</sup> See below.



laws; the leaders of most nondemocracies want the public to be satisfied as long as they can accomplish this goal without undermining their own ends. Indeed, much ordinary law – criminal law, contract law, and so forth – is relatively constant across both democracies and nondemocracies. For the purpose of comparative constitutionalism, relying on foreign legal materials is not meant to express approval of all aspects of the foreign country; it is simply a way of taking advantage of unexploited mines of information.

Second, the very fact that nondemocratic nations recognize a particular norm may show that the norm is exceptionally strong. For example, we are accustomed to think that nondemocracies are less tolerant of crime than democracies, and therefore have stricter criminal penalties. Thus, the fact that the vast majority of authoritarian states do not have the juvenile death penalty was frequently cited by its critics as powerful evidence that the penalty violates a significant norm – a norm so significant that even crime-obsessed authoritarian states cannot ignore it.

As a general matter, however, it is true that democracies are a more reliable source of information about facts and norms, simply because democratic governments are more tightly constrained by public opinions and values. Political competition gives parties an incentive to gauge popular attitudes, and itself generates information when elections reveal that a particular program is not as popular as one might have thought.<sup>85</sup> But this is a matter of degree, and there is no reason in principle to doubt that successful authoritarian governments maintain power by catering to the interests of the public to some degree.<sup>86</sup> It follows that an ideal exercise in comparative constitutionalism would survey all countries, democracies and nondemocracies alike; place more weight on the legal materials of democracies than on those of nondemocracies; but not neglect the latter. However, it will often be more realistic to limit oneself to a small number of

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<sup>85</sup> Cf. Goodin, *supra*.

<sup>86</sup> An inconclusive literature debates whether dictators who seek to maximize their power would choose laws that the public desires, except where they directly interfere with the dictator's monopoly on power (for example, electoral laws), or would choose laws that are frequently undesirable. Compare Casey B. Mulligan, Ricard Gil, and Xavier Sala-i-Martin, *Do Democracies Have Different Public Policies than Nondemocracies?*, 18 *J. Econ. Perspectives* 51 (2004) (taking the former view) and Mancur Olson, *Power and Prosperity: Outgrowing Communist and Capitalist Dictatorships* 111–134 (2000) (taking the latter view). For a discussion, see Thráinn Eggertsson, *Imperfect Institutions: Possibilities and Limits of Reform* 60–62 (2005). Common sense suggests that, at least sometimes, dictators choose popular policies in order to maximize their support, but that democracies are more effective.

countries, in which case one should focus on democracies, which probably do provide more reliable information.

## **5. The Independence Condition and Cascades**

The independence condition says that the decision of each state to adopt or reject a particular law must be independent (at least partially so) from the decisions of other states. As this condition is more complicated than the others, and as its violation can lead to some especially interesting results, we will go into more detail here.

The reason that independence is an important condition is that voters who have exactly the same information or views, or simply mimic other voters, do not, by agreeing on whether the outcome is good or bad, provide additional information about the sense or value of the outcome. Suppose, for example, that former colonies of the United Kingdom adopted certain British laws and institutions just because they were British, and not because the former colonies had made an independent judgment that those laws and institutions served their interests. We might imagine that some newly independent states adopted those laws and institutions because they did not have the time and resources to study the legal systems of other states, and so maintaining existing laws and institutions reduced transition costs.<sup>87</sup> In this case, the existence of identical British-derived legal rules in dozens of states provides no more information about the value of the rules than if they existed in only one state, Britain itself.

The violation of the independence condition can have an interesting effect known as a cascade. When cascades occur, there is far less reason to trust the judgments of many voters, or states, because the particular judgments of many or most do not add information. If one hundred voters say something, but ninety-seven are participants in a cascade, there is not much reason to trust their statement. Hence it is not the case that the probability of a correct judgment, by a large number of states, is high, simply because many of those states are not offering useful information.

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<sup>87</sup> See Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2d ed. 1993). As Watson shows, some countries, such as Japan, carefully studied the legal systems of other states before reforming their own; others did not.

There are two kinds of cascades: informational<sup>88</sup> and reputational.<sup>89</sup> Both kinds can occur across states as well as across individuals. To see how an informational cascade works, suppose that an urn contains seventy red chips and thirty black chips. One hundred people take turns taking a chip from the urn at random, examining it privately, and returning it to the urn. Each person must, in sequence, announce whether he thinks that the urn contains more red chips or more black chips. Everyone who guesses correctly receives a prize. The first person will rationally guess that the urn contains more red chips if the chip he selected is red, and that the urn contains more black chips if the chip he selected is black. The second person, in making his guess, will rationally take account both of the first person's public guess and of the color of his own chip. For example, if the first person said "red," the second person has reason to believe that the first chip was red. If the second person's chip is also red, he will guess red; if it's black he might guess red or black (at random). The third person will similarly take account of the public guesses of the first and second person as well as of the color of his own chip.

Four points should be made about this example. First, the majority of the group would almost certainly make the right guess if each person stated his own guess in isolation, unaffected by the judgments of those who came before. Second, people benefit each other by announcing their decision; in doing so, they disclose information about the number of red and black chips in the urn. Third, it is rational for everyone to take account of the public guess of prior speakers: one is more likely to guess correctly if one takes account of prior guesses than if one takes account only of the color of one's own chip, as long as the prior guesses are honest statements about the color of the chip that was drawn. Fourth, people are less likely to guess right than they would if they were informed of the color of the chips chosen by those who preceded them as well as that person's guess.

This last point raises a serious problem. As more people guess, subsequent participants will place more weight on the prior guesses than on their own chip, and eventually people will simply repeat what was said before. A possible result is an informational cascade: The first three players might draw and therefore announce black, and then everyone will announce black, even though 70% of the actual draws are red.

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<sup>88</sup> See, e.g., Bikhchandani et al., *supra*.

<sup>89</sup> See Timur Kuran, *Ethnic Norms and Their Transformation Through Reputational Cascades*, 27 *J. Legal Stud.* 623 (1998).

It is easy to create erroneous cascades in the laboratory. The simplest experiment asked subjects to guess whether the experiment was using Urn A, which contained two red balls and one white, or Urn B, which contained two white balls and one red.<sup>90</sup> The point of the experiment is to see whether people will decide to ignore their own draw in the face of conflicting announcements by predecessors – and to explore whether such decisions will lead to cascades and errors. Cascades often developed and they often produced errors. Over 77% of “rounds” resulted in cascades, and 15% of private announcements did not reveal a “private signal,” that is, the information provided by people’s own draw. Here is an actual example of a cascade producing an entertainingly inaccurate outcome (the urn used was B)<sup>91</sup>:

Table 1  
An informational cascade

	1	2	3	4	5	6
Private draw	a	a	b	b	b	b
Decision	A	A	A	A	A	A

There is a clear analogue at the level of states, both domestically and internationally. If two states have adopted a law, or if two state courts have made some innovation, a third may do so, not because of any kind of independent judgment, but because it is following its predecessors. And if three states have made the same decision, a cascade might be forming. The problem is that subsequent states might assume that decisions have been made independently, even though most have been following the crowd.<sup>92</sup>

In a reputational cascade, people think that they know what is right, or what is likely to be right, but they nonetheless go along with the crowd in order to maintain the

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<sup>90</sup> See Lisa Anderson and Charles Holt, Information Cascades in the Laboratory, 87 *Amer. Econ. Rev.* 847 (1997).

<sup>91</sup> See Marc Willinger and Anthony Ziegelmeyer, Are More Informed Agents Able To Shatter Information Cascades in the Lab?, in *The Economics of Networks: Interaction and Behaviours* 291 (Patrick Cohendet et al. eds., 1996).

<sup>92</sup> For a discussion in the context of court of appeals decisions, see Andrew Daugherty and Jennifer Reinganum, Stampede to Judgment, 1 *Amer. L. and Econ. Rev.* 158 (1999).

good opinion of others. Suppose that Albert suggests that global warming is a serious problem, and that Barbara concurs with Albert, not because she actually thinks that Albert is right, but because she does not wish to seem, to Albert, to be ignorant or indifferent to environmental protection. If Albert and Barbara seem to agree that global warming is a serious problem, Cynthia might not contradict them publicly and might even appear to share their judgment, not because she believes that judgment to be correct, but because she does not want to face their hostility or lose their good opinion. It should be easy to see how this process might generate a cascade. Once Albert, Barbara, and Cynthia offer a united front on the issue, their friend David might be reluctant to contradict them even if he thinks that they are wrong. The apparent views of Albert, Barbara, and Cynthia carry information; that apparent view might be right. But even if David thinks that they are wrong and has information supporting that conclusion, he might not want to take them on publicly. The problem, of course, is that the group will not hear what David knows.

The same problem emerges at the level of states. Some states follow others, not because of private information, but because of reputational pressures. Suppose, for example, that a number of states have adopted some version of Megan's Law – a statute requiring registration of sex offenders.<sup>93</sup> Additional states might follow the first group, not because they believe the statute is a good idea, but because its supporters are able to impose reputational pressure by virtue of the practice of prior states. When this is so, the decisions of those in a cascade fail to provide additional information.

The cascade model provides an important warning about using the Condorcet Jury Theorem to justify reliance on the view of a majority of states. Suppose that the law of all states is identical, all states chose their law as an act of judgment (condition 1), and all states are similar along the relevant dimensions (condition 2). Nonetheless, the fact that all states have the same law is no more informative than if only one or two states had the same law if it turns out that later states imitated earlier states – as they should, under our analysis! In this sense, use of the Condorcet Jury Theorem, to justify reference to the law of other states, turns out to be self-defeating; it undermines its own precondition.

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<sup>93</sup> See Linda Greenhouse, *The Supreme Court: Sex Offenders; Justices Reject Challenges to Megan's Laws*, *The New York Times* March 6, 2003, at A29 (discussing legal challenges to Megan's Law).

This odd implication should not, however, be taken too seriously. It would be true only if a relevant number of states did in fact merely imitate and fail to make independent judgments. They might sometimes, especially in the important but narrow case where new states adopt or inherit wholesale foreign legal systems, which is known as legal transplant.<sup>94</sup> In this case, and possible other cases where the evidence suggests that a law was adopted out of imitation and not as a result (at least partially) of independent judgment, an American court should discount the law of another state. But in the usual case, states imitate laws and policies of other states only after going through a process of deliberation, one that takes account of local conditions and difference between the earlier adopters and the state in question. In this case, the “vote” is only partially dependent, and thus reveals some information about the general desirability of the laws and policies at issue.

A further implication is that a state that ignores the decisions of the other states and instead makes a decision based on its own “draw” confers a positive externality on other states by revealing information – information that later decisionmakers would benefit from. The private incentive is to herd, but the public-spirited thing to do is to decide on the basis of one’s own information, at least in many circumstances. Thus, the cosmopolitan – the person who believes that national boundaries are morally arbitrary and that people owe moral obligations to foreigners to the same extent as to fellow citizens<sup>95</sup> – ought to prefer states *not* to imitate other states, or at least, not to imitate other states as often as a state would if it consulted only its private interest.

This last point bears emphasis. If our conditions are met, it is rational for a state to imitate other states but it may not be in the global interest for the state to imitate other states. If our conditions are not met, it is neither privately rational nor globally desirable for a state to imitate other states.

To complicate our analogy, we might distinguish between a state’s public decision (the “guess”) and the reasons (if any) that it gives for its decision. In our urn example, a public-spirited person would both announce the color of his chip and make his guess (which would be partially based on the guesses, and hence the chip colors, of the

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<sup>94</sup> See Watson, *supra* note.

<sup>95</sup> See, e.g., Peter Singer, *Famine, Affluence, and Morality*, 1 *Phil. & Pub. Affairs* 229 (1972).

prior decisionmakers). Subsequent decisionmakers would ignore the guess and pay attention only to the announcement of the chip color. This would lead to the optimal result.

Similarly, public-spirited states ought to make their decision and announce the reasons for their decision. For example, a state might announce that it abolishes the juvenile death penalty because citizens do not believe that it deters crime, because citizens think it is wrong to execute people for crimes they committed as juveniles, or because it cannot join the EU unless it abolishes the juvenile death penalty. Another state might rationally take account of the first state's decision only in the first case, and not in the second or third. But all this depends on states giving a candid explanation for their decision; we suspect that in many cases there is either no official explanation, there is disagreement about what the explanation is, or (in the case of authoritarian states) the true explanation and the official explanation are different. Note that in some cases a state might delegate to academics or foreign service agents or others the duty to find out what the real explanation is. For example, one could commission a statistical study to see whether abolishing the juvenile death penalty has an effect on crime across countries. This returns us to our earlier point that empirical studies might be helpful but they must be more carefully done than those that have appeared so far in the opinions of the Supreme Court.

## **6. Foreign Law Versus International Law**

In *Lawrence v. Texas*, the Court justified its abandonment of *Bowers v. Hardwick* partly by reference to international materials:

To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*.<sup>96</sup>

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<sup>96</sup> *Lawrence v. Texas*, 123 S.Ct. 2472, 2483 (2003).

*Bowers* had upheld a law criminalizing homosexual sodomy; *Lawrence* found that a similar law violated the due process clause. In citing the ECHR, *Lawrence* did not cite “foreign law,” in the sense of a decision of a foreign *national* court interpreting a foreign statute or constitution; it cited international law, in the sense of an *international* court interpreting an international treaty.

International law is different from foreign law. International law is the law that states create to govern their relations with each other. Foreign law, as used in the literature, is the domestic law of foreign states. The literature has so far not made much of these differences; where it has, most authors have treated international law as deserving of the same consultation that foreign national law deserves.<sup>97</sup> However, the differences between foreign law and international law are important, and the case for relying on international law is trickier than the case for relying on foreign law.

One puzzling question is whether the European Court’s application of a regional convention ought to receive more or less weight than a national court’s application of a national constitution. Should the ECHR’s application of the European Convention on Human Rights to a particular set of fact receive more weight than the application of, say, the German high court of German law or of European law? Several factors are relevant. First, the European Court has jurisdiction over 45 states, not just one; these 45 states have agreed on the underlying convention and on the authority of the court to interpret it; and therefore, the Court’s outcome may reflect the aggregate wisdom of a very large population rather than a relatively small one. If this is so, there is a Condorcetian reason to give special weight to the views of the European Court. However, there is no reason to count the treaty – or the decision of an international court charged with interpreting the treaty – as an extra Condorcet vote beyond the votes of the 45 states. On the most optimistic account, the treaty and the decision simply reflect the aggregate judgment of the 45 states.

Second, one might worry that a treaty is less likely to reflect the independent judgments of the states than national law does. Many parties to the convention became parties in order to obtain the benefits of cooperation with other European countries. These

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<sup>97</sup> See the essays in *Agora: The United States Constitution and International Law*, 98 *Amer. J. Int’l L.* 42 (2004). For an important exception, which we will discuss below, see Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 *Am. J. Int’l L.* 69 (2004).



states may have entered the ECHR system despite their doubts about particular rules or norms rather than because of them.<sup>98</sup> If so, the European Court's judgment may be worth less, or not much more, than the judgment of a national court interpreting national law.<sup>99</sup>

Third, the ECHR's judgment might be considered less valuable than that of a clear treaty because the ECHR may not have the private information that the separate governments have. Suppose, for example, that the ECHR's decision was based on the views of the ECHR's judges about whether laws against sodomy are likely to discourage unsafe sexual practices that spread disease, not on clear treaty language. One might worry that these judges' views of the facts reflect less private information about this question than the aggregate information contained in the judgments of 45 courts in 45 countries, deciding independently. Something similar might be said if the decision of the ECHR reflects judgments of morality rather than judgments of fact.

Taken together, these factors suggest that a domestic court should not place any weight on international treaties, except as the equivalent of a "vote" by each of the parties. The European Convention on Human Rights, as interpreted by the European court, indicates that 45 states reject criminalizing sodomy, and nothing beyond that; or it might simply reflect one court's views about the risks associated with sodomy. Further, because of the ambiguities surrounding the states' motives for entering the treaty, one might want to count the ECHR decision as something less than 45 votes.

Another set of issues is raised by treaties that the United States has ratified. Imagine that the U.S. government enacts a statute permitting American agents to torture suspects in the war on terror, and a constitutional challenge has been mounted. The U.S. court must decide whether torture violates the doctrine of substantive due process.<sup>100</sup> In

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<sup>98</sup> Although the facts are disputed, the Council of Europe may have demanded that Hungary abolish the death penalty in return for admission to the Council. See George P. Fletcher, *Searching for the Rule of Law in the Wake Of Communism*, 1992 B.Y.U. L. Rev. 145, 159-60.

<sup>99</sup> As another example, consider the Helsinki Accord of 1975, in which the west recognized the Soviet sphere of influence in return for the Soviet Union's agreement to respect basic human rights. The Soviet Union's signature did not reflect the leadership's judgment that human rights are worthy to respect. The recognition was simply the price to be paid for obtaining certain geopolitical goals, and indeed the Soviets did not intend to change their behavior. The value of the agreement as information about what the Soviet Union and its satellites thought about human rights was nil.

<sup>100</sup> For a discussion of this issue, see Seth Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. Pa. J. Const. L. 278 (2003). As always it is possible to endorse a theory of constitutional interpretation that makes the views of other nations irrelevant, or irrelevant to the key questions.

doing so, it might consult foreign materials on Condorcetian grounds – including foreign legislation and judicial decisions regarding torture. But should it consult the Convention Against Torture, which the United States ratified?<sup>101</sup> The Convention might be a useful shortcut for determining foreign law, at least if one believes that foreign states ratified the Convention because they believed that torture is never justified and that foreign states act consistently with the Convention. A court with limited resources might do better by consulting the Convention than by consulting the law and practices of each party to the Convention, as long as it recognizes that practices may diverge. But should the Convention count for more than evidence that its parties oppose torture?

Our comments above suggest not: at best, the Convention aggregates the information of its parties. As for the American “vote,” the new statute permitting torture simply reflects a new judgment by legislators about the appropriateness of torture, so the Convention does not provide any information about American attitudes or facts, except as they existed in the past. Thus, there does not seem to be any reason for an American court adjudicating a hypothetical torture statute to attach any weight to the Convention beyond using it as a proxy for the laws of its other parties.

These observations apply with even greater force when the United States enters human rights treaties subject to reservations that ensure that the treaties do not infringe on domestic constitutional restrictions and, in some cases, do not modify existing domestic law. Thus, a particular term in a treaty that the U.S. has ratified may not reflect American policy. The claim that such treaties should nonetheless inform American law – a claim made so far by commentators, not by judges<sup>102</sup> – cannot rest on a straightforward application of the Jury Theorem, given that American legislators are just as able to rely on the Theorem as judges are, and presumably have good reasons for rejecting the views of other countries.

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<sup>101</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1468 U.N.T.S. 85.

<sup>102</sup> See, e.g., Harold Hongju Koh, *International: Law as Part of Our Law*, 98 *Am. J. Int'l L.* 43 (2004). Some courts, however, have relied on these treaty instruments, albeit obliquely. In particular, courts have discovered international norms for Alien Tort Statute purposes in treaty instruments, even when few states comply with those treaty instruments and the U.S. has not incorporated them into domestic law. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 881-83 (2d Cir. 1980).

A further point, which has been made by Michael Ramsey,<sup>103</sup> is that many international institutions that have been cited as authorities do not necessarily have independent information about international practices, and in some instances may not have good incentives to report them honestly. An EU brief in the *Atkins* case, for example, cited a statement of the United Nations Commission on Human Rights as support for the statement that application of the death penalty to mentally disabled people violate international norms.<sup>104</sup> The problem with relying on the UN Commission on Human Rights is not just that many of its members are countries that engage in abusive human rights practices: after all, maybe this just shows that applying the death penalty to mentally disabled people is even worse than other human rights abuses. The real problem, from the perspective of the Jury Theorem, is that the UN Commission does not have any information that is unavailable to anyone else, and that its collective judgment does not reflect wisdom that exceeds what can be gleaned from independent examination of the national laws and decisions of the states who are its members.

In sum, international treaties and the decisions of international courts are best treated as proxies for the “votes” of the states that are parties to the treaties; beyond this, they have no independent weight for the Condorcetian judge. If fifty states have ratified a treaty that prohibits a particular action, and the states appear to comply with their treaty obligations, then, in the best case, the treaty (or the decision based on it) should be counted as fifty votes. The treaty itself should not have influence beyond this function as a proxy: it should not be treated as an extra vote or, otherwise, as a special source of information. When evidence suggests that some states entered into the treaty for ulterior motives, or refuse to obey it, then the treaty’s value as a proxy should accordingly be discounted. And when international commissions render decisions that are not based on private information about facts (moral or non-moral), these decisions should not be entitled to any weight.

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<sup>103</sup> See Ramsey, *supra*.

<sup>104</sup> *Id.* at 79.

## **7. Judicial Competence and a Framework**

We now turn to a large question that we have bracketed throughout. How, if at all, can courts (or other institutions, such as legislatures and administrative agencies) undertake the relevant inquiries?

### **Issues of administrability**

The Jury Theorem implicitly assumes that the person who implements the policy chosen by the jury will adequately interpret the jurors' votes. In the actual jury setting, this assumption is harmless: jurors clearly vote "guilty" or "not guilty" and the judge can accordingly order the internment or release of the defendant. In the setting of comparative constitutionalism, the assumption becomes more problematic. Can judges reliably interpret foreign materials, so that they can tell whether a particular law or decision should be considered a "vote" in favor of some moral norm, empirical fact, or policy?<sup>105</sup> More generally, can they assess the three relevant conditions?

Our analysis so far might seem to suggest that the proper use of foreign materials requires such exhaustive information about foreign norms and institutions that judges could not possibly use foreign materials properly. Here, we think, is the strongest argument against the use of comparative materials, to the effect that the best inquiry is so complex, so unlikely to be helpful, and so likely to produce error, that it should not be undertaken at all. Note as well that an emphasis on the question of competence might, as a first approximation, support the use of "comparative law" in the domestic context, by suggesting that the relevant inquiries will generally argue that one state should pay attention to the views of other states – while also suggesting that the same inquiries counsel against attention, by the United States Supreme Court, to the views of other high courts. On this view, an intuitive but plausible understanding of decision costs and error costs justifies use of comparative law in the domestic setting, but not internationally.

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<sup>105</sup> Critics include Anderson, *supra*; Posner, *supra*; Alford, *supra*. Tushnet, *When Is Knowing*, *supra*, acknowledges the force of this criticism.

Perhaps state courts much benefit from the use of decisions by other state courts, because they learn a great deal without running into intractable problems of assessing the relevant conditions. Perhaps the opposite conclusion holds for national courts deciding whether to consult materials of other nations. If so, an interesting mystery would remain, which is why so many courts, interpreting their own constitutions, do refer to the practices of other nations.<sup>106</sup>

Suppose, however, that comparative constitutionalism may be challenged because of problems of judicial competence.<sup>107</sup> When judges are required to make difficult decisions based on complex facts, the usual response is not to direct them to ignore the facts. On the contrary, the standard alternative to provide a doctrinal framework – a set of rules – that simplifies the factual analysis. These rules typically direct judges to ignore facts that are unlikely to be relevant, or to rely on presumptions that reflect what is generally accepted. The standard tradeoff is between bright-line rules and standards: the more that the law embodies a rule, the lower the decision costs and the greater the error costs. When decision costs are high, errors are tolerable, and rules should be used. In extreme cases, the decision and error costs may be so high that the optimal rule would simply forbid courts to take account of the relevant facts; but such a conclusion is premature for comparative constitutionalism,<sup>108</sup> as standard practices throughout the world tend to suggest.

## Principles

To discipline the inquiry, consider a few possibilities. These are designed for any English-speaking high court, but they could easily be adapted by courts of many different kinds.

- The Condorcet Jury Theorem teaches that the informational value of an additional vote declines rapidly after a certain number of votes have been registered. In other words, surveying 10 countries is much more important

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<sup>106</sup> See notes *supra*.

<sup>107</sup> An additional problem is that use of comparative materials puts new informational demands on litigants, who must learn about, and argue over, the practices of other nations. See Gonzales, *supra* note. At the domestic level, this is a less forceful objection, simply because the cases are both easily available and intelligible.

<sup>108</sup> See Tushnet, *When Is Knowing*, *supra*.

than surveying 5; but surveying 190 countries adds little beyond a survey of 185. Perhaps, then, judges should survey the legal materials of 10 or 20 other (relevant) countries, and not try to survey the legal materials of all 190 or so countries. This will allow them to spend more time avoiding errors, and will reduce the aggregate information by very little. As we have suggested, a point of this sort strengthens the idea that the United States Supreme Court should restrict itself to the practices of other democracies.

- As we noted, the value of using foreign legal materials depends on their being an accurate gauge of the sentiments and judgments of the population. This point suggests that judges should not survey the legal materials of foreign nations that have highly authoritarian or dysfunctional institutions. We suspect that there is, for similar reasons, little reason to consult the legal materials of nations with small populations, which are the overwhelming majority.
- Judges should consult nations whose legal materials are translated into English and adequately understood in the English-speaking world.
- Judges should favor recent sources over old sources, because the recent sources are more likely to reflect modern conditions.
- Judges should be alert to cascades, which are most likely when uniform legal change occurs rapidly without much debate or deliberation across different countries.

Taken together, these principles suggest that English-speaking courts should probably confine themselves to only about twenty or thirty countries, including the western liberal democracies, plus countries like India, Japan, Brazil, Israel, and South Korea. The precise set of countries might appropriately be constant across cases (a bright-line rule), or it might be better to have the set depend on the type of case. In any event, we think that if courts are to take comparative constitutionalism seriously, they should be required to go through each of the countries in the relevant set and describe explicitly in the opinion whether the outcomes in those countries are consistent and support the constitutional interpretation advanced by the court. It may be that this level of care is unnecessary in most cases. But when the Supreme Court of Ireland, the Constitutional Court of South Africa, or the Supreme Court of Australia is consulting foreign practices,

principles of these kinds should help to discipline and systematize the inquiry. In most cases, the analysis should be relatively straightforward. Where foreign law is most useful, it is because there is a consensus or strong majority on one or another side, and it is usually simple to establish that fact. State courts often examine the practices of other states in search of a clear majority position, and the same can easily be done, most of the time, at the international level.

Because the legitimate sources of American constitutional law are sharply disputed, some people will reject the claim that a framework of this sort should be used in the United States.<sup>109</sup> But some of these principles exist, in nascent form, in the U.S. Supreme Court opinions that rely on foreign legal materials. Although *Atkins* too casually claimed that the “world community” rejected capital punishment of the mentally retarded,<sup>110</sup> and *Roper* also referred to the rejection of the juvenile death penalty by nearly the entire world,<sup>111</sup> *Lawrence* limited itself to western Europe<sup>112</sup> and so did other earlier cases.<sup>113</sup> The problem is that none of the relevant decisions provided anything like a systematic account of the relevant laws, and for this reason they can be legitimately criticized. If such an account would be too difficult, then courts should limit themselves to a few countries, so that one can be confident of their assessment of the laws, rather than surveying the entire world.<sup>114</sup>

The general point is that the imperfection of judges does not imply that judges should refuse to consult foreign law on the ground that they are incompetent to do so. Intermediate bright-line rules can guide them so that they rely on the right sort of facts and not the wrong sort of facts. Although in principle the optimal decision rule might forbid judges to engage in comparative constitutionalism because of the empirical difficulties,<sup>115</sup> this conclusion seems speculative and premature. As we have suggested, the very fact that the high courts of so many nations engage in this practice counts against

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<sup>109</sup> See, e.g., *Gonzales*, supra note.

<sup>110</sup> *Atkins*, 536 U.S., at 316 n. 21

<sup>111</sup> *Roper*, 127 S. Ct., at 1187.

<sup>112</sup> *Lawrence*, supra at, 576. Note that some members of the ECHR are not in western Europe.

<sup>113</sup> E.g., *Thompson v. Oklahoma*, 487 U.S. 815, 830-831 (1988).

<sup>114</sup> Ramsey points out that the casual citation to world opinion in *Atkins* is not adequately supported; the EU brief on which it relied did not contain adequate sources. Ramsey, supra, at 78-79.

<sup>115</sup> Note also that if the right theory of constitutional interpretation makes such materials infrequently relevant, see supra, the gains of consultation might not be worthwhile.

the speculation. It may be too much to contend that the pervasiveness of the practice suggests a Condorcetian argument in favor of a Condorcetian procedure. But at the very least, the fact that the practice is common raises a cautionary note about those who would confidently dismiss it.

### **A framework**

Drawing the strands of the analysis together, we propose the following formulation, designed both for state courts within the United States and for high courts consulting the practices of other nations. Courts should use foreign law to interpret constitutional provisions when the proper interpretation requires factual or moral information, and that factual and moral information is likely to be reflected in foreign legal materials. Foreign legal materials are likely to be useful in this way when (1) the foreign legal materials are relatively uniform; (2) the foreign legal materials are the result of legislative or judicial judgments in the foreign states; (3) the problems addressed by those materials are relatively similar; and (4) the foreign legal materials reflect relatively independent judgments.

Within the United States, the standard practice of consulting the law of other states reflects this idea. In private law, the practice of determining the law in a particular state by reference to the “majority rule” is so common as to be virtually invisible; this is also usually what state courts do when they rely on restatements. It is well known but nonetheless worth emphasizing that when state courts rely on cases from other jurisdictions, they are relying on “foreign law,” unlike, say, a federal court that relies on a federal decision in another state or circuit. The implicit rationale for state law comparativism is that the state courts understand themselves to be addressing similar problems despite cultural, historical, institutional, and demographic differences across states. The Condorcet Jury Theorem helps to explain the general practice

With respect to non-American cases, the American court should first discard the legal materials of the foreign states that do not meet conditions (2), (3), and (4); and then should determine whether the remaining legal materials are uniform, and occur in a nontrivial number of states (say, 5 or more). Some useful proxies may further narrow discretion. An American court might simplify its task by considering only relatively



recent laws and decisions (under point 2), by considering the laws of only states that have similar problems along the relevant dimension (under point 3), and by considering only laws that appear to be the result of substantial legislative process or litigation (under point 4).

This framework might work better for some cases than others. If the applicable theory of interpretation makes international practice irrelevant, the argument for consulting international practice is over before it begins. In addition, much depends on whether judges are capable of evaluating whether these conditions are satisfied. But in our view, this proposal offers a good starting point.<sup>116</sup>

### **Beyond courts**

Our analysis of judicial decisionmaking might easily be generalized; it has broad applications to other types of decisionmaking. Nonjudicial officials – including presidents, decisionmakers in regulatory agencies, and legislators – also can benefit from looking at the laws and institutions of other states. Indeed, this practice is so common and entrenched as to be almost invisible. Leaders of newly independent states after World War II, and states emerging from communism after the cold war, made basic choices about market and democratic institutions after observing the experiences of successful states. American state legislatures frequently imitate the lawmaking of legislatures in other states. Megan’s Law and Three Strikes Laws are among the most well known of countless examples.<sup>117</sup>

Foreign governments have frequently imitated the U.S. as well as each other – consider the deregulation and privatization movement over the last several decades, and the more recent influence of cost-benefit analysis and tradable permit programs.<sup>118</sup> And the American government has occasionally imitated other states as well. In all of these cases, the decisionmakers considered the experiences in other states because these experiences provided valuable information about the likely effects of the law or program

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<sup>116</sup> Other proposals, such as Glensy’s (see Glensy, *supra*), which overlaps ours in some respects, are ad hoc, and not derived from a plausible theory about the costs and benefits of comparative constitutionalism. See also Ramsey’s four principles, which are sensible and valuable but also have an ad hoc character. See Ramsey, *supra*.

<sup>117</sup> See Elizabeth Scott and Lawrence Steinberg, *Blaming Youth*, 81 *Tex L Rev* 799 (2003); Daniel Filler, *Terrorism, Panic, and Pedophilia*, 10 *Va. J. Soc. Pol’y & L.* 345 (2003).

<sup>118</sup> See Robert Hahn, *Global Regulatory Reform* (2002).

in question. Not all of these cases were successes; some states learned more from other foreign institutions than other states did.<sup>119</sup> The process of learning, we suggest, is appropriately disciplined by a framework of the general sort proposed here.

## **7. Some Empirical Implications**

Our argument has had a normative orientation, but it also has some testable empirical implications. It is plausible to suppose that state courts and foreign national courts implicitly rely on Condorcetian logic when consulting the decisions of other states or nation states. The arithmetic may not be familiar, but it is intuitive to think that if a large number of states have chosen to do X, there is reason to believe that X is right. If Condorcetian logic is indeed at work, we can derive two noteworthy hypotheses.

### **The young state hypothesis**

Some states are younger than others in a political sense. Alaska and Hawaii are younger than Massachusetts. Israel is younger than the United States. Many nation-states are old but have recently undergone a revolution or acquired radically new (for them) institutions – South Africa, Hungary, China, the Czech Republic, Poland, and others. These nation-states are “young” in our sense. We hypothesize that young states are more likely to rely on foreign law than old states are. The reason is that young states have more to learn, and old states have more entrenched practices that are harder to change.

Anecdotal evidence on behalf of this hypothesis is the frequently noted fact that American courts relied heavily on the law of Britain in the early years of the republic, but rarely consult foreign law today.<sup>120</sup> In addition, the frequently cited examples of consultations mostly come from young states such as Israel,<sup>121</sup> South Africa,<sup>122</sup> and

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<sup>119</sup> We mention the case of Japan above; China was less successful early in the twentieth century but has been more successful since 1980. India injured itself by imitating statist policies after independence; more recently, it has adopted more successful policies influenced by foreign institutions. Examples could be multiplied.

<sup>120</sup> Calabresi and Zimdahl find in historical survey that the Supreme Court relies on foreign sources today more than in the distant past, although it has always relied on them to some extent. See Calabresi & Dotson Zimdahl, *supra*. Although the article does not control for caseload, types of cases, and other relevant factors, it is a good start to the inquiry. Even more interesting would be a study of the practices of lower courts.

<sup>121</sup> See note *supra*.

Hungary. It would be useful to test this hypothesis on American state courts. Do Alaskan courts consult the law of other states more than Massachusetts court do, controlling for population and legal activity? If so, this would support the Condorcetian hypothesis.

In fact, we can find more systematic support for that hypothesis from the evident fact that within American courts, citations to sister states have been decreasing over time. In Montana, for example, 50% of citations were to out-of-state courts in 1914-1915, 39% in 1954-1955, and merely 7% in 1994.<sup>123</sup> A similar decline has been found in California.<sup>124</sup> In Minnesota, out-of-state citations were common in the early years, but have diminished over time with the development of in-state constitutional precedent;<sup>125</sup> this is precisely the pattern we would predict on Condorcetian grounds. A broader study, involving 16 state supreme courts from 1870 to 1970, shows a significant decline in citations to out-of-state law.<sup>126</sup> As states built up their own jurisprudence, there is a reduced need to rely on sister states for relevant information. Note in this regard the straightforward prediction for South Africa: “As the Court gains experience and precedents take root, the Court’s need to canvass international and foreign comparative jurisprudence for insights and guidance may diminish.”<sup>127</sup>

### **The good state hypothesis**

Some states are “better” than others. The population is healthier, freer, happier, and wealthier. It is reasonable to think that better states have better institutions,<sup>128</sup> and therefore that states that seek to improve the well being of their citizens will copy the institutions of the more successful states. As we noted above, during the Meiji restoration the Japanese establishment carefully and self-consciously surveyed foreign institutions and tried to establish domestic versions of those that they thought were superior. Similarly, courts might believe that they should consult the foreign materials of “good” states while ignoring those of bad states. The reason follows from the logic of the Jury Theorem: States should consult comparative materials because of the information they

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<sup>122</sup> See note supra.

<sup>123</sup> See Snyder, *The Citation Practices of the Montana Supreme Court*, supra note.

<sup>124</sup> See Merryman, supra note.

<sup>125</sup> See Hedin, *The Quicksands of Originalism*, supra note.

<sup>126</sup> See Friedman, supra note, at 801-09.

<sup>127</sup> See Webb, supra note, at 281.

<sup>128</sup> See, e.g., Rafael La Porta et al., *The Quality of Government*, 15 *J.L. Econ. & Org.* 222 (1999).

convey, and the practices of some states are more likely to convey relevant information than the practices of others. The “votes” of good states are more likely to be correct than the votes of bad states; thus, a court facing resource constraints and unable to survey the legal materials of all states, should focus on the better states.

Evidence in support of this hypothesis is that foreign courts typically consult the legal materials of the western liberal democracies, and not of failed states such as the Soviet Union or authoritarian states such as China and Cuba.<sup>129</sup> Domestically, the data also provide some support for the hypothesis. From 1870 to 1970 state supreme courts cited the opinions of the New York, Massachusetts, and California courts much more frequently than the opinions of other courts; other frequently cited courts include those of Illinois, Michigan, New Jersey, and Minnesota.<sup>130</sup> All of these states are among the wealthier states in the country. It is also worth noting that the citation dominance of New York, Massachusetts, and California has declined since the nineteenth century.<sup>131</sup> This trend could reflect their loss of relative position as the south reemerged and wealth and population spread through the country, and other states built up their own jurisprudences.

The argument for focusing on good states is that resource constraints may prevent courts from relying on all states, as Condorcetian principles require. As long as bad states are likely to be right with a probability greater than one half, their legal materials are a valuable source of information.<sup>132</sup> However, American jurisprudence has discovered a useful device for aggregating the information of all states in such a way that judges can benefit from this information without doing their own surveys, case by case. This device is the restatement. Restatements reflect the aggregated wisdom – the majority rule – of all states, and hence show an implicit Condorcetian logic as well.<sup>133</sup> Before the restatement

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<sup>129</sup> See Markesinis and Fedke, *supra* note.

<sup>130</sup> See Friedman et al., *supra* at 806-07; Peter Harris, Ecology and Culture in the Communication of Precedent Among State Supreme Courts 1870-1970, 19 *Law & Soc’y Rev.* 449 (1985).

<sup>131</sup> Friedman, et al., at 806-07. Harris, *supra*, found that state courts tend to cite courts from more populous and more urban states; these states are generally wealthier than other states (Alaska is an exception).

<sup>132</sup> See note *supra*.

<sup>133</sup> Note in addition the United States Sentencing Guidelines, which were rooted not in any theory of punishment, but in an effort to use the average practice among trial judges. See Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises on Which They Rest, 17 *Hofstra L Rev* 1, 14-19 (1988). If most trial judges were deciding better than randomly, there was a firm Condorcetian logic behind this choice. Similarly, federal bankruptcy exemptions enacted in 1978 were, roughly, the median of existing state exemptions. See Richard Hynes, Anup Malani, & Eric A. Posner, *The Political Economy of*

project began in the 1920s, one would have expected a heavy citation bias in favor of the good states; as the restatements were published, the bias should have declined as states increasingly relied on the restatements. As noted above, the dominance of the good states has declined over time; however, we do not have evidence about restatement citations. We hypothesize that restatement citations displaced citations to good states; this hypothesis is of course testable.

### **Competing Theories**

Both of the principal hypotheses discussed so far should be compared to those that might be derived from other theories of comparative constitutionalism. We will briefly consider two such theories: the theory that courts consult foreign law not for information but because they seek, as much as possible, to harmonize domestic and foreign law – in order to ease crossborder transactions<sup>134</sup> – and the theory that courts choose among foreign legal materials partly on the basis of political or symbolic agendas.<sup>135</sup> A third theory, the rationalization theory, which holds that courts cite foreign law in order to rationalize decisions based on personal preferences,<sup>136</sup> does not have any testable implications, as far as we can tell, and so we will not address it. Although the theory follows from the attitudinal model advanced by many political scientists, for which there is some evidence,<sup>137</sup> no one has explained why judges who decide according to personal preferences would cite foreign materials in some opinions and not others, and why some judges who decide according to personal preferences cite foreign materials and other judges who decide according to personal preferences do not.

The harmonization hypothesis reflects a common belief about the behavior of state courts in the United States. This theory does not imply as strongly as the Condorcetian theory does that state courts would more frequently consult legal materials from older or wealthier states. Instead, it implies that state courts would use foreign legal

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Property Exemption Laws, 47 *J. Law & Econ.* 19, 28 (2004). If state legislators decided better than randomly, the federal approach follows the Condorcetian logic.

<sup>134</sup> See Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 *Va. J. Int'l L.* 743, 746-49 (1999) (describing and criticizing this theory).

<sup>135</sup> See Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, in *Governance in a Globalizing World* 253 (Joseph S. Nye Jr. & John D. Donohue eds. 2000).

<sup>136</sup> See *supra* note.

<sup>137</sup> Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (1993).

materials even when there is no possibility of obtaining information from them. Some evidence supports the harmonization hypothesis: state courts more frequently cite courts from the states in the same region.<sup>138</sup> If, as seems likely, most crossborder transactions occur across neighboring states, the regional bias in citation practices supports the harmonization thesis. However, if regional proximity also indicates similarity, the evidence also supports the Condorcetian view. Interestingly, a stronger empirical effect is that state courts cite courts from states from which they have drawn migrants.<sup>139</sup> If most crossborder transactions are between states connected by migration, this evidence supports the harmonization thesis. However, there is no reason to believe that transactions are correlated with migration. More likely, the bias in favor of states that send migrants reflects the similarity condition of the Condorcet theory, namely, that similar states provide more relevant “votes” than different states, where culture is an important aspect of similarity.

The global version of the harmonization thesis implies that national courts will cite national courts from nation states with which the home state has significant trade relationships, at least for areas of law touching on transactions. The major trading partners of the United States include Canada, China, Germany, Japan, Mexico, and the United Kingdom.<sup>140</sup> The U.S. Supreme Court does not seem inclined to cite China’s, Japan’s, or Mexico’s decisions. Canada’s largest trading partner is the United States, yet the Canadian Supreme Court avoids citing the U.S. Supreme Court.<sup>141</sup> Although firm conclusions should await a formal test – one that determines whether correlations exist between citation and trade or other crossborder transactions, holding relevant variables constant – the anecdotal evidence we have cited suggests that the harmonization thesis is an unpromising account of foreign citation practices.

The geopolitics theory suggests that geopolitics explain the pattern of citation. Frederick Schauer argues that courts might cite the legal materials of nation states that are

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<sup>138</sup> See Harris, *supra*.

<sup>139</sup> *Id.*

<sup>140</sup> United States Department of Transportation, Bureau of Transportation Statistics, U.S. International Trade and Freight Transportation Trends tble. 3 (2003), available at: [http://www.bts.gov/publications/us\\_international\\_trade\\_and\\_freight\\_transportation\\_trends/2003/html/table\\_03.html](http://www.bts.gov/publications/us_international_trade_and_freight_transportation_trends/2003/html/table_03.html).

<sup>141</sup> See Schauer, *supra*, at 260.

allies and avoid citing the materials of rivals or historic enemies.<sup>142</sup> He observes, for example, that the Canadian Supreme Court avoids citing the U.S. Supreme Court, which, on his view, might be a product of Canadian sensitivity about being perceived as a fifty-first state. He also observes that the Irish Supreme Court avoids citing British law, and argues that this may reflect the historic enmity between these two countries. We could extend this argument. The Israeli Supreme Court does not much cite the law of the Arab states, and vice versa, and we suspect that the India Supreme Court does not cite the decisions of Pakistani courts.

However, Schauer's argument that that citation practices reflect geopolitical rivalries and alliances seems doubtful on other grounds. If Schauer's argument is not just a reformation of the Good State hypothesis, it must mean that courts avoid citing the law of good states in order to make a symbolic point or play to public opinion. Consider his claim that Canada's high court is frequently cited by foreign courts because Canada is esteemed as a wealthy and secure country that is not the United States. Although we have not found poll data on world attitudes toward Canada,<sup>143</sup> we have found data about popular attitudes around the world to other states or (in the case of Europe) regional entities. A poll of the attitudes of people in 33 countries found that the state/entity regarded most favorably was Europe, followed by Japan, France, Great Britain, India, China, Russia, and the United States.<sup>144</sup> Yet, as far as the evidence suggests, citations to the courts of Japan, India, China, and Russia are uncommon.<sup>145</sup>

A further problem with the geopolitics theory is that it does not fit, or imply anything special for, the behavior of the courts of American states. Perhaps we might predict that states in the former confederacy were less likely to cite northern states after the civil war than each other, and vice versa, and perhaps we would expect that this effect would fade with time, as mutual hostility diminished. This prediction is testable. Otherwise, American states are not allies or rivals in the geopolitical sense, and it is hard to think of a domestic analogy to Schauer's argument.

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<sup>142</sup> Id.

<sup>143</sup> Canada is not independently assessed in recent studies of world opinion. See, e.g., [http://www.worldpublicopinion.org/pipa/articles/home\\_page/168.php?nid=&id=&pnt=168&lb=hmpg1](http://www.worldpublicopinion.org/pipa/articles/home_page/168.php?nid=&id=&pnt=168&lb=hmpg1)

<sup>144</sup> Global Poll Finds Iran Viewed Negatively, [http://www.worldpublicopinion.org/pipa/articles/home\\_page/168.php?nid=&id=&pnt=168&lb=hmpg1](http://www.worldpublicopinion.org/pipa/articles/home_page/168.php?nid=&id=&pnt=168&lb=hmpg1)

<sup>145</sup> See notes supra, none of which finds significant citations to the courts of these nations.

In sum, many testable hypotheses emerge from the Condorcetian theory and its rivals. Existing studies and anecdotal evidence provide some suggestive support for the Condorcetian view. We suspect that courts are implicit Condorcetians, and we have provided some evidence for the suspicion; but more research would need to be done to provide confirmation.

## **8. Conclusion**

One of our principal claims here is that the debate over consideration of foreign law by the United States Supreme Court should be seen not in isolation, but instead in the context of the frequent consultation, by state and national courts alike, of law that is “foreign” in the sense that it does not emanate from the particular sovereign whose law is being interpreted. We have suggested that the pervasiveness of this practice is best understood by reference to the Condorcet Jury Theorem: If many courts have decided on a particular course of action, and if each of them is likely to make choices that are better than random, there is excellent reason to believe that this course of action is right.

But this judgment holds only if three conditions have been met. First, the courts in question must be making judgments based on private information. Second, those courts must be relevantly similar to the jurisdiction that is consulting them. Third, the court must have made their judgments independently, and must not be participating in a cascade. An understanding of these conditions helps to explain the fact that in the United States, it is so much less controversial for state courts to consult other state courts than for the Supreme Court to consult other high courts. Most important, the similarity condition is frequently met in the domestic case, whereas it is less clear that other nations are relevantly similar to the United States for purposes of interpreting disputed constitutional provisions. Perhaps the meaning of the United States Constitution does not turn on factual or moral issues with respect to which international consensus is relevant. Perhaps the meaning of other national constitutions does turn, in part, on the existence of such a consensus.

We have not attempted to resolve such questions here; our analysis is agnostic on the proper sources of constitutional interpretation. But whenever a national court is



concerned with establishing what is right, on facts or on morality, such a consensus is legitimately brought to bear. The same point applies to other public and even private institutions. For this reason, our analysis of the Jury Theorem, and of the three conditions that bear on its pertinence, has implications not only for judicial practices, but for legislative and administrative behavior as well. And while our principal argument is normative, we suggest, more tentatively, that an intuitive appreciation of the Jury Theorem helps to explain both domestic and international behavior, much of which seems to reflect an implicit Condorcetian logic.