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A Contest of Legitimacy: The Supreme Court, Congress, and Foreign Law

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Abstract

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Before 2003, the Justices on the United States Supreme Court routinely, if infrequently, cited foreign or international jurisprudence in their written opinions. Neither the media, nor members of Congress paid much, if any attention to the practice. However, after the decisions in *Lawrence v. Texas* (2003) and *Roper v. Simmons* (2005), what was an uncontroversial citation practice became a hotly contested issue in Congress, the media, and among conservative political activists. This debate had an effect on the Justices. In *Kennedy v. Louisiana* (2008), Justice Kennedy refrained from citing case law from the Inter-American Commission of Human Rights even though they were discussed in the briefs and in oral arguments. In 2012, Justice Sotomayor authored a dissent in *Blueford v. Arkansas* that explicitly omitted an 1861 decision of the Queens Bench in England that was discussed in the Court's opinion in *Arizona v. Washington* (1978) and in the petitioner's brief while

simultaneously citing the other cases contained in both documents, including several decisions from English courts issued before America's independence.

In this dissertation, I explain how this uncontroversial citation practice became controversial. I analyze how *The New York Times*, *The Washington Post*, *USA Today*, *The Wall Street Journal* and *The Washington Times* covered the Court's use of foreign law. I examine the resolutions and legislation introduced by members of Congress and the questioning of Supreme Court nominees by members of the Senate Judiciary Committee about the use of foreign law. I discuss how the Justices of the United States Supreme Court are less likely to cite foreign law than other courts with constitutional review powers. The Justices are sensitive and respond to the reaction of external audiences (Baum 2006). The reaction of the Justices to this controversy indicates that the Justices care more about cases than just their disposition or particular policy agendas, and provides further evidence that the Justices take into account their relationships with other actors and audiences.

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Chapter One: Introduction

On June 25, 2008, Justice Anthony Kennedy announced the decision for the United States Supreme Court in *Kennedy v. Louisiana*. The question presented in the case was whether the States violate the Eighth Amendment's ban on cruel and unusual punishment by imposing the death sentence for the crime of child rape. Patrick Kennedy was convicted of raping an eight-year old child and sentenced to death by the State of Louisiana. Justice Kennedy's decision for the Court asserted that the death penalty was not "a proportional punishment for the rape of a child" (*Kennedy v. Louisiana* 128 S. Ct. 2641, 2644 [2008]).

In discussing the application of the Eighth Amendment to the case, Justice Kennedy relied upon the "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions" (citing *Roper v. Simmons* 543 U.S. 551 at 563). In *Trop v. Dulles* (1958), Chief Justice Earl Warren stated that in considering the meaning of the Eighth Amendment, the Court must consider the "evolving standards of decency" (336 U.S. 86, 101). Those standards developed to include "historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made before bringing its own judgment to bear on the matter" (*Edmund v. Florida* 458 U.S. 782 at 788-789 [1982]). In analyzing how the sentence of death applied in Kennedy's case, Justice Kennedy discussed the content of crimes punishable by death in the laws of the various States and how jurors applied the death penalty in non-capital cases.

One element missing from Justice Kennedy's opinion in *Kennedy* was a discussion of international opinion and treaty obligations of the United States. At the time of the opinion,

the United States was a signatory of the International Covenant on Civil and Political Rights and the Court was made aware of several rulings of the Inter-American Commission of Human Rights about the application of the death penalty in cases of rape.¹ The Commission's jurisprudence was discussed in the briefs and during oral argument.² The Court previously discussed the applicability of foreign and international law and judgments in a series of cases prior to *Kennedy* involving the death penalty, including *Atkins v. Virginia* (2002) and *Roper v. Simmons* (2005). In his opinion, though, Justice Kennedy chose not to cite any foreign or international law in his decision.

In 2007, the State of Arkansas tried Alex Blueford for capital murder, first-degree murder, manslaughter, and negligent homicide. The jury was instructed to consider each charge in order. After finding Blueford not guilty of capital and first-degree murder, the jury deadlocked on the manslaughter charge. After the trial judge declared a mistrial prosecutors sought to charge Blueford again on the capital murder and first-degree murder

¹ The United States Senate expressed a general reservation about the application of the death penalty when approving the ICCPR. "the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future law permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age" U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights 1992).

² In the amicus brief submitted on behalf of the Leading British Law Associations, Scholars, Queen's Council and former Law Lords, the Court was directed toward several opinions of the Inter-American Commission of Human Rights illustrating a global consensus against the application of the death penalty in cases that do not result in death. The brief specifically referred to an advisory opinion issued in 1983 by the Court (*Restrictions to the Death Penalty* [Arts. 4(2) and 4(4) of the American Convention on Human Rights], Advisory Opinion OC-3/83 of September 8, 1983 at para. 56) that stated that no jurisdiction could reimpose the death penalty (Brief for Leading British Law Associations, 21). In addition, the brief provided a list of countries where the death penalty for rape remained legal.

charges. Blueford appealed those charges to the United States Supreme Court as violating the Double Jeopardy Clause of the Constitution.³

In his opening brief, Blueford described the historical development of the clause.

Nor can the state's refusal to formally memorialize the jury's verdict of acquittal prevent the Double Jeopardy Clause from barring retrial on those same offenses. To do so would be to open the door to one of the precise historical evils at which the protections of the Double Jeopardy Clause were aimed. In the case of *The Queen v. Charlesworth*, (1861) 121 Eng. Rep. 786, 801 (Q.B.), the court rehearsed the history of the "tyrannical practice"—committed most famously in the treason cases of Whitebread and Fenwick, *Ireland's Case*, 7 How. St. Tr. 79 (1678); *Whitebread's Case*, 7 How. St. Tr. 311 (1679)—of discharging a jury in the face of an impending acquittal in order to provide the prosecution with an opportunity to gather additional evidence and retry the defendant. As the Court explained, "[T]he prohibition against double jeopardy as it evolved in this country was plainly intended to condemn this 'abhorrent' practice" of "discharg[ing] a jury whenever it appeared that the Crown's evidence would be insufficient to convict." *Arizona v. Washington*, 434 U.S. at 507-508. See also David S. Rudstein, *Double Jeopardy: A Reference Guide to the United States Constitution*, 10 (2004) (Brief for Petitioners in 10-1320, 23).

This paragraph in the petitioner's brief drew heavily from the Court's opinion in *Arizona v. Washington* (1978). In *Arizona*, the Court discussed how the clause evolved under English case law.⁴

Writing in dissent in *Blueford*, Justice Sonia Sotomayor articulated the history of the Clause in the following manner:

³ Fifth Amendment of the Constitution of the United States of America.

⁴ Footnote 22 "*E.g., Whitebread*, 7 How. St. Tr. 311 (1679). See also *The Queen v. Charlesworth*, 1 B. & S. 460, 500, 121 Eng.Rep. 786, 801 (Q.B. 1861); Friedland, *Double Jeopardy* 13-14, 21-25 (1969); Sigler, *Double Jeopardy* 87 (1969); Douglas, *An Almanac of Liberty* 143 (1954). In reaction, the rule developed in England that the judge should not discharge the jury prior to verdict except in cases of "evident necessity." *Winsor v. The Queen*, *supra* at 304-305. However, if, for example, the judge discharged the jury because a key witness for the Crown refused to testify, see *The Queen v. Charlesworth*, *supra*, the accused could nevertheless be retried because jeopardy had not attached under the English rule. *Winsor v. The Queen*, *supra* at 390; *The Queen v. Charlesworth*, *supra*; *Friedland*, *supra*, at 22-23" (*Arizona v. Washington* [1978]).

This rule evolved in response to the “abhorrent” practice under the Stuart monarchs of terminating prosecutions, and thereby evading the bar on retrials, when it appeared that the Crown’s proof might be insufficient. *Washington*, 434 U. S., at 507; see, e.g., *Ireland’s Case*, 7 How. St. Tr. 79, 120 (1678). Accordingly, retrial is barred if a jury is discharged before returning a verdict unless the defendant consents or there is a “manifest necessity” for the discharge. *Perez*, 9 Wheat., at 580; see also *King v. Perkins*, 90 Eng. Rep. 1122 (K. B. 1698). (Slip Op 21).

In the opinion, Justice Sotomayor refrained from citing the 1861 case, *The Queen v. Charlesworth* (1861) 121 Eng. Rep. 786, 801 (Q.B.), which the Court previously cited in *Arizona v. Washington* (1978). The dissenters in *Blueford* refused to expressly acknowledge where relevant information about the Constitution came from even though the Court had previously credited that authority and the case was mentioned in the briefs alongside other cases that were cited.

The question, then, is why did Justices Kennedy and Sotomayor refrain from citing foreign authorities in their decisions. For most of the Court’s history, the Justices regularly cited foreign and international law in their opinions (Calabrisi and Zimdahl 2005). In many of the leading death penalty cases, the Justices expressed openness toward the citing of decisions from foreign courts and international tribunals. Within ten years, from 1999 to 2009, the practice of citing foreign jurisprudence became a controversial feature of the Supreme Court’s jurisprudence. In this dissertation I explain how the Justices, members of Congress, the media, and the Republican Party elevated a routine and uncontroversial practice into a highly contentious method of constitutional interpretation. After the decisions in *Lawrence v. Texas* (2003) and *Roper* (2005), multiple members of Congress introduced bills and resolutions that would prohibit the citation of foreign jurisprudence.

In 2011, the voters in Oklahoma and in 2012, the legislature in Kansas approved legislation that would make the practice of citing foreign law in the decisions of their courts illegal.⁵

The Justices on the Supreme Court are also affected by this controversy. Several of the Justices spoke publically defending the practice of citing foreign law, both to legal audiences but also on television. During the confirmation hearings of Chief Justice John Roberts, and Justices Samuel Alito, Sonia Sotomayer, and Elena Kagan, the nominees each expressed an unwillingness to cite foreign law in their decisions.⁶ The citation practices of the Justices also appear to change as a result of the new controversy as the Justices appear sensitive to the criticism of external audiences. While it is beyond the scope of this dissertation to explain whether this sensitivity is a result of avoiding controversy or an expression of the policy and legal preferences of the Justices, the Justices do appear to avoid citing foreign jurisprudence in their opinions.

Justices and their Audiences

During his questioning of Judge Sotomayor during her confirmation hearings as an Associate Justice of the Supreme Court, Senator Jon Kyl of Arizona offered one answer of why Justice Kennedy avoided citing foreign law. He suggested that foreign jurisprudence “cut against the majority opinion” in *Kennedy* (U.S. Senate 2009, 459). Senator Tom Coburn of Oklahoma argued during the Sotomayor confirmation debates on the Senate floor that “results-oriented, activist judges who seek to rule based on their personal sympathies and

⁵ Oklahoma: State Question 755, approved by the voters in 2011. Kansas: House Substitute for Senate Bill 79, approved by the legislature and signed into law in 2012.

⁶ The nominees did not fully repudiate the practice but did not express any endorsement of the practice either.

prejudices often look to foreign law when interpreting our statutes and the Constitution in order to reach their desired outcome” (Coburn 2009). To these Republican Senators, the Justices would only cite foreign laws that were favorable to their decisions and ignore jurisprudence unfavorable to their position.⁷

For Republicans, the challenge to the use of foreign law is another front in their efforts to reshape the federal judiciary. The decisions of the Warren and Burger Courts, especially *Griswold v. Connecticut* (1965) and *Roe v. Wade* (1973) enraged social conservatives who felt that the Court had become an enemy of “traditional values” (McGirr 2001, 159). In response to these decisions, Republican campaign tactics changed from disagreeing with the decisions to explicit rhetorical attacks against the Court’s role in governance, their theories of jurisprudence, and sources of interpretation (Mohr 2001). Richard Nixon argued for “strict constructionists” at the 1968 Republican National Convention (Siegel 2010). Beginning in 1980, the Republican platforms explicitly called for judicial restraint by the Justices. The 2008 platform stated, “Judicial activism is a grave threat to the rule of law because unaccountable federal judges are usurping democracy, ignoring the Constitution and its separation of powers, and imposing their personal opinions upon the public.” For Republicans, Supreme Court Justices must be faithful, open-minded, and “constitutionalist” (Republican Party platform of 2008).⁸

⁷ As I describe later in this chapter and elsewhere in this dissertation, opponents of the use of foreign law offered seemingly contradictory arguments against the practice. On one hand, the Justices would “cherry-pick” references to foreign jurisprudence. Other opponents would argue that they were opposed to foreign laws influencing the development of *American* jurisprudence. E.g. Senator James Inhofe’s comments during the Sotomayor confirmation debates: “Americans do not want the rest of the world interpreting our laws, and neither do I” (Inhofe 2009).

⁸ These arguments are not necessarily consistent. Like most Americans, Republican activists are primarily concerned about the results of the merits of a decision regardless of

The controversy about the use of foreign law fit squarely into the debate against the Court. In criticizing the use of foreign law, Republicans employed the rhetorical frames of patriotism, sacred values (of the Constitution and the founding period), and absolutist language.⁹ To Republicans, the references to foreign jurisprudence are inherently anti-American, as the Justices should rely upon American jurisprudence instead of turning to foreign courts to develop legal doctrine (U.S. House 2004a, 13).¹⁰ Related, if the only acceptable method of constitutional interpretation is to look to how the framers understood the Constitution, references to foreign and international law are improper.¹¹ While many of the critics of the use of foreign and international law find the citations of treaties and English laws and jurisprudence before independence an acceptable reference for the Justices, the text of the resolutions introduced by members of Congress or State legislators included absolute prohibitions against the use of foreign or international law.¹²

These concerns expressed by Republican officials and activists contributed to an atmosphere that made the citation of foreign law controversial. Washington University Law Professor Melissa Waters (2008) suggested that Justice Kennedy was “influenced by the increasingly rancorous nature of the public debate over the role of foreign authority in

the means to arrive at that decision. Judicial activism is appropriate to reach the “right” result, regardless of what theory of jurisprudence is applied.

⁹ See Morgan Marietta (2009) for a discussion of the frames Republican candidates use during Presidential debates. He explains that the Republican rhetorical advantage is “grounded in the greater use of sacred rhetoric, invoking sacred values, their boundaries, and moral outrage at their violation” (at 389).

¹⁰ Statement of Jeremy Rabkin during his testimony supporting H. Res 568 (2004).

¹¹ Critics of the use of foreign law based upon an original intent method of interpretation would find acceptable decisions of English courts and English laws passed prior to independence.

¹² As an example, Oklahoma State Question 755 stated in the text of the resolution, “Specifically, the courts shall not consider international or Sharia Law.” There was not any language that would permit the courts to cite international law when interpreting a treaty provision or customary international law.

constitutional interpretation” in his decision not to cite foreign jurisprudence in *Kennedy* (636). Lawrence Baum (2006) argued that the Justices seek and work to maintain approval from audiences external to the court system. This is especially true for in the Justices’ relationship with elite audiences, the legal profession, public interest organizations, and the news media (Baum and Devins 2010). Thus, the opinions in *Kennedy* and *Blueford* reflect a sensitivity of the Justices to the debates in the media and Congress about the appropriateness of citing foreign and international jurisprudence.

The dominant models of judicial behavior do not offer a good explanation why the Justices would respond to their critics or engage in a public debate over an esoteric subject such as the use of foreign law. Models of judicial behavior that narrowly focus on legal and policy goals treat the actual opinion as secondary or insignificant and are unable to explain extraneous acts such as the televised Breyer-Scalia debate at American University in 2005 over the role of foreign law in the Court or the Justices other defenses of the use of foreign law.

On many levels, the Justices have little reason to heed their external critics. The United States Constitution protects the life tenure of the Justices and prevents any diminution of salary from Congressional threats. The threat of impeachment is only a remote possibility and for most Justices, service on the Court is the apex of their careers.¹³ Since career goals are not a major motivation, other motivations must be present for why the Justices engage in public debates about the citation of foreign authorities.

¹³ Of course, there were prominent exceptions. Chief Justice John Jay ran for Governor of New York in 1795, Justice Charles Evans Hughes ran for President in 1916, Justice James Byrnes served as Secretary of State from 1945-1947 and later served as Governor of South Carolina from 1951-1955, and Justice Arthur Goldberg served as US Ambassador to the United Nations and ran for Governor of New York in 1970.

The public appearances (Baum and Devins 2010), oral dissents from the bench (Duffy and Lambert 2010), appearances before Congress, and extracurricular writing serves multiple purposes but all have the effect of making the Court more accessible to the public. In engaging directly with the public, the cloak of secrecy is lifted as the Justices provide transparency to the internal workings of the institution. These public appearances and extrajudicial actions may not just benefit the reputation of the individual Justices, but also benefit the Court as an institution. In 1937, Chief Justice Charles Evans Hughes' letter to Senator Burton Wheeler against President's Franklin Roosevelt's court packing plan served as a nail against the proposal (Friedman 1997; Shesol 2010). While the actions of the Justices today are not nearly as explosive as Chief Justice Hughes' letter, the thousand plus public appearances by the Justices from 1998 to 2008 serve as a defense against certain criticisms leveled against the Court by members of Congress, journalists, legal scholars and party activists (Baum and Devins 2010).

In this context, then, the engagement of the Justices about whether citations to foreign authorities constitute an appropriate method of constitutional or statutory interpretation is understandable. The Justices who seek to incorporate references to the decisions of foreign authorities perceive a responsibility to justify their use to certain audiences, while other Justices respond to different audiences. What this dialogue also indicates is that the Justices care more about cases than just their disposition or particular policy agendas. Instead, this engagement both in written opinions and public appearances provides further evidence that the Justices take into account their relationships with other actors and audiences.

The Written Opinion and the Legitimacy of the Court

At its core, law is not enacted statutes, executive orders, or judicial opinions, but a series of agreed upon symbols to harmonize human interaction. In each particular community, laws and norms are rooted in a particular moral vision, casting a shadow over political and individual behavior (Stone Sweet 2000). Stuart Scheingold (1974) believed the law provides American politics with powerful symbols of legitimacy, to which all political actors need to pay tribute (see also Gibson and Calderia 2009).¹⁴ Judges are especially not immune from the need to pay homage to the myths, practices, and rituals of the law. Scheingold argues, “the primary institutional influence of constitutional values is, therefore, heavily dependent on whatever tribute, beyond hypocrisy, judges are willing to pay to legal virtue” (1974, 93). Thus, while judges may reach different outcomes in deciding a case, the preservation of the myth of law requires that jurists justify their decision in a manner that retains the legitimacy of the law. In short, the various features of the written opinion are important to the public sphere than the actual disposition of a case.¹⁵ The

¹⁴ Among the premises of a general theory of legitimacy is that courts presume that other actors have a duty to comply with all of their decisions, even unpopular decisions and that the courts are not “viewed as just another political institution,” making political decisions like other elected officials (Gibson and Calderia 2011, 199).

¹⁵ Regardless of the level of public awareness or knowledge of the Court (Hoekstra 2003, Gibson and Calderia 2009), the decisions of the Court produce (or curtail) rights that “carry with them connotations of entitlement” (Scheingold 1974, 136; McCann 1994). The written opinion “explains the decision to the parties and establishes a precedent to guide future decision-making” (Abrams 2010, 393).

Knowledge of the winners or losers in a case may not adequately convey to the public what the Court decided. An example of this is the Ninth Circuit Court’s decision in *Perry v. Brown* (2012), where the Court did not embrace the right of marriage equality, but ruled that the California Constitutional Amendment would subject a minority group to “the deprivation of an existing right without a legitimate reason” (38). Another example is *Miranda v. Arizona* (1966), where Ernesto Miranda’s conviction was overturned, but the “right” was explained in the written opinion (Kelly 2008).

specifics involved in a dispute become lost in the rhetorical principles that reshape cultural resources, as the law or the role of the court is expanded (White 1990), or narrowed (Cover 1995), in the act of adjudication.

Therefore, in the act of adjudication, the citation behavior of jurists is important. In developing general rules that transcend the particularities of a given set of circumstances, jurists appeal to “custom, reasonableness, common sense, business necessity, fairness, or other similar covers of general social utility” (Shapiro 1981, 35). Thus, the citations to authority contained within a written opinion are important to the overall legitimacy of the opinion, especially for legal scholars and practitioners, who apply the logic developed in one case to subsequent cases.¹⁶

When crafting a written opinion, judges not only write to different audiences, but also write on behalf of particular legal, institutional, policy, or personal goals (Baum 1997; 2006). These goals not only suggest the audience(s) to which the Justice is writing for, but also serve as a means of gauging support for the decision. In addition, the historical and political context of the case, as well as the type of opinion (majority, concurring, or dissenting), has different implications for various audiences.

The ability to achieve compliance following a decision is only one crucial test of a court’s social legitimacy (Stone Sweet 1999). The reactions of legislators and other political and legal actors to the decision serve as important signals to the court suggesting the limits

¹⁶ Legitimacy is a distinct concept from acceptance of a decision. If a decision is perceived as legitimate, then the Justices exercise their discretion in a principled manner. In contrast, if the Justices act in a strategic or insincere manner, then the decision may be considered illegitimate (Gibson and Calderia 2011). The sincerity of the Justices in their decision-making are, of course, subject to debate.

of that compliance.¹⁷ Each court exists within a social, political and philosophical environment that constrains or expands the decision-making process of the court. With some issues, constitutional and supreme courts appear to operate with little interference from other political actors (Skowronek 1982; Moustafa 2003). In other areas, the court may work in conjunction with the other branches in the government to promote a particular set of policies (Bensel 2000). With other issues, the other branches of government may choose to defer to the judgment of the court (Graber 1993), or even encourage judicial intervention and interpretation (Lovell 2003). How the other branches respond, however, depends on the political circumstances surrounding the decision (Whittington 2007).

Legislators possess a variety of means to formally constrain the Court, from curtailing the docket or changing the duties or composition of the jurists to directly reversing the decision either through the passage of a statute or adoption of a constitutional amendment. Directly challenging the court is not the only option available to legislators and other political actors. Through *ad hominem* attacks against the court or the introduction of legislation criticizing the court, political actors may create a political environment hostile to the judiciary (Liptak 2006). Since legislators often respond to the decisions of the Court in one form or another (Whittington 1999, 2007; Pickerill 2004), how and the degree to which political actors respond to the Court may indicate the willingness to formally constrain or defile the judiciary.

¹⁷ Some examples of this criticism is President Thomas Jefferson's disapproval of *Marbury v. Madison* (1803), President Andrew Jackson's decision to ignore *Worcester v. Georgia* (1832), the debate exemplified by the Lincoln-Douglas debates over the *Dred Scott* (1857) decision, President Franklin Roosevelt's Court Packing Plan, and the refusal of Southern Governors to enforce *Brown v. Board of Education* (1953).

Judges, elected officials, and partisan activists are not immune from the effect of the rhetoric of members of Congress, the media, and partisan activists on the political environment. Constant disapproval of the Court may lead to a decline in the Court's approval rating.¹⁸ Unremitting denunciation of the Justices may lead to less efficacy of the Court. And, while the Justices as public figures are likely desensitized to many forms of criticism, Lawrence Baum (2006) suggested that judges do respond to their audiences. This might mean, as Waters (2008) argued about the Court's decision in *Kennedy*, that a political or legal environment hostile toward the use of foreign law would give the Justices second thoughts about whether they should cite a foreign authority. Thus, the public dialogue and actions of members of Congress may shape the actions of the Justices, even if Congress does not formally act.

The reactions by other government actors and the subsequent counter-reactions by the judiciary indicate that the existing literature on judicial independence may be narrowly conceived. Many theories of judicial independence suggest that autonomy is measured by the degree to which justices are insulated from pressure or undue influence by the other branches of the government (see Epstein et al. 2001; Moustafa 2003). However, studies that measure the institutional arrangements of the court, the decisions of the court, or when the decisions are overturned or ignored face important limitations (Larkins 1996). Instead, Christopher Larkins suggests, "judicial independence must be gauged through a careful reading of the courts' decisions and written opinions. ... [E]xamining outcomes

¹⁸ Despite this criticism, and occasional attempts to ignore its decisions, the Supreme Court remains the most popular branch of the United States government. 63% of American trust the Supreme Court, while 46% approve of the Supreme Court (Jones 2011).

alone is not sufficient; exactly *what* a court decides, *the way* it reaches it (sic) decisions, and *the words* it uses can speak volumes more about the position of the judiciary in a given country” (1996: 618-619). The references the judiciary uses in response to pressures and critiques from actors within the government may provide insights into the nature of those relationships.

Looking at their decisions, the judicial effort involved in writing opinions reflects a concern about the quality of the reasoning. Beyond their duties for the Court, the Justice’s extraneous speeches and writings serve as attempts to justify a particular approach to the law or the continued legitimacy of the Court. The increasing frequency of these public dialogues appears to be responses to external and increasingly partisan attempts to redefine the appropriate role of a judge in American society. This provides further evidence to Baum’s (1996) claims that judges write to and for different audiences.

It is certainly true that the debate over the appropriateness of citing foreign authorities is a surrogate for other debates about the appropriate role of judges in a democracy. The timing and rhetoric of the Republican Party and Republican candidates since 2004 in response to decisions of the Court suggest a relationship.¹⁹ Legal scholars argue as much in the debate in the law journals during between 2003 and 2012 (e.g. Alford 2004; Wells 2004; Connell 2004; Resnik 2006; Zehnder 2006; Larsen 2009). While it might be tempting to ignore the partisan rhetoric about the judiciary, chalking it up to symbolic speech, campaign rhetoric designed to please the Republican Party rank and file, or efforts to stimulate fundraising, the Justices have responded to the controversy in several ways. As

¹⁹ The debate over the appropriateness of foreign authorities emerged after the gay-rights decision in *Lawrence v. Texas* (2003) and the death penalty decision in *Atkins v. Virginia* (2002) and *Roper v. Simmons* (2005). All of these were controversial and left-leaning decisions.

I demonstrate in Chapter 5, there appears to be some decline in their citations to foreign and international law, several Justices publically defended their citation practices, and judicial nominees backed away from public statements supportive of the practice before members of the Senate Judiciary Committee.

Organization of this Dissertation

The dissertation will proceed as follows. In Chapter 2, I examine the role of the Supreme Court in American society and the Supreme Court's opinion writing process, including when and why the Justices cite. The scholarly literature on decision-making process in producing opinions provides a general overview of the strategic nature of opinion writing (e.g. Murphy 1964; Knight and Epstein 1998; Maltzman, Spriggs and Wahlbeck 2000). This strategic nature of opinion writing minimizes the institutional and societal factors that affect the Court, including the method of publication and reporting of their decisions.

Chapter 3 contains an explanation of why and how citations to foreign authorities became controversial, both among the Justices, and among members of Congress. I look at the debate about the use of foreign authorities in Justices' death penalty jurisprudence and how the Justices increasingly went outside the Court in an effort to provide transparency in the Court's procedures, including a defense of the use of foreign and international law. I also examine how members of Congress exerted pressure on the Justices through the introduction of resolutions in opposition to the practice of citing foreign law and questions of Supreme Court nominees.

In Chapter 4, I consider the role of the controversy outside the Beltway by analyzing media coverage of the debate, law review articles, and Party platforms. Between 1999 and 2010, *The New York Times*, *The Wall Street Journal*, *USA Today*, *The Washington Times*, and *The Washington Post* all covered the debate about the Court's use of foreign authorities. These newspapers would be readily accessible to the Justices. I also examined over 300 articles about the use of foreign law published in American law reviews from 1994 through 2011. Unlike the newspaper coverage, most of the law reviews contained a positive view of the use of foreign citations. In this chapter I examine the Republican and Democratic Party Platforms from 1968 to 2008 in their rhetoric about the proper role of a Supreme Court Justice.

Finally, in Chapter 5 I discuss how the United States Supreme Court is exceptional in its use of citing foreign authorities. This controversy about the use of foreign authorities is unique to the United States. In South Africa, as an example, the Constitution *requires* the use of international law in interpreting its Bill of Rights. In this chapter I discuss how the Supreme Court of Canada, the Constitutional Court of South Africa and the United States Supreme Court differ in their usage of foreign authorities.

In conclusion, I argue that even though there has not been a noticeable decrease in the Supreme Court's use of foreign authorities, the Justices are sensitive to criticism by responding to the public debate about foreign law. The contestation of norms of the Court will likely impact the direction of rights jurisprudence in the United States. If the Justices are handcuffed in understanding or responding legal developments abroad, law in the United States will remain narrow in scope and discourage development toward a universal understanding of human rights.

Chapter Two: Referencing Foreign Law

In these cases, the foreign courts I have mentioned have considered roughly comparable questions under roughly comparable legal standards. Each court has held or assumed that those standards permit application of the death penalty itself. Consequently, I believe their views are useful even though not binding.

- Justice Stephen Breyer dissenting from denial of certiorari in *Knight v. Florida* (1999) at 997-998.

Justice Breyer's dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative analysis inappropriate to the task of interpreting a constitution.

- Justice Antonin Scalia for the Court in *Printz v. United States* (1997) at 921 n 11.

A primary critique of the use of foreign law by the Supreme Court is that the citation of foreign law violates the proper and discernable way to interpret the Constitution and negatively impacts the legitimacy of the Court. Many legal scholars, and some Justices, say they believe that the Constitutional and statutory texts should be interpreted literally, or interpreted as it would have been understood at the time the provision was written (e.g. Bork 1971; 2003). To these scholars, Justices abandon proper methods of interpretation by referencing foreign jurisprudence, except for old English common law (Macaulay 2005). The selective usage of secondary source material (or non-legal material), including foreign law, is evidence that the Justices only “cherry-pick” favorable precedents that supports their preconceived opinion. To these critics, foreign and international law has no relevance in Constitutional jurisprudence (Rosenkranz 2009).

The current debate in the United States about the appropriateness of foreign law is not the first instance where the methodology used by some or all of the Justice's have been criticized. As early as 1820, Justice Henry Livingston argued in dissent in *United States v.*

Smith, “it is not perceived why a reference to the laws of China, or to any other foreign code, would not have answered the purpose quite as well as the one which has been resorted to” (18 U.S. 153, 181). After the Court cited social science data in footnote 11 of *Brown v. Board of Education* (1954), Constitutional scholar Edmond Cahn complained, “it would be quite another thing to have our fundamental rights rise, fall, or change along with the latest fashions of psychological literature.” (Cahn 1955, 167). In a symposium in the 1959 *Villanova Law Review*, William Ball asked, “Had the Court resorted to guides whose views sustained the states’ position would the principle of a court’s use of psychological data be so widely decried” (1959, 221)? More recently scholars argued, “social science findings are tentative, uncertain, and probabilistic, unreliable, misleading, inaccurate, and misapplied, not of great quality, and generally inconsistent” (Krieder 2002, 3; Scalia and Garner 2008).

As suggested in Chapter 1, the Justices on the U.S. Supreme Court have little reason to listen to their critics but remain sensitive to the concerns raised or expectations of various audiences. In this chapter I examine the Court’s role in the American political system and the Court’s internal processes to provide a broad overview of how the Justices make decisions. Because the Justices are sensitive to audience reaction, how judges justify their opinions illuminate the relationship between branches of government. This process of justification is equally important, if not more so, than the actual decision on the merits.

The actual usage of different types of authority in the written opinion(s) depends on what the Justices, both individually and collectively, believe will enhance the credibility of their legal rationale. This concern for acceptance of their opinion by various audience(s) pushes Justices to craft judgments using acceptable legal principles and references. Just as judges generally do not want their opinions to be created out of whole cloth, exposing their

preexisting ideological positions, their citations to authority in judicial opinions reflect legal norms and traditions that are likely to receive a positive reception.²⁰

What and Why Judges Cite

The public relies on the Supreme Court to be a legal institution, not a political institution (Gibson and Calderia 2011). One basic expectation of the Justices is that they justify their opinions in an honest, and transparent fashion (Leflar 1979; Shapiro 1987; Choudhry 1999; Wanderer 2002). At the same time, as a legal institution, only legal factors should influence the decisions of the Justices (Murphy 1964; Larsen 2012).²¹ The ideology or partisanship of the Justice should not influence their opinion (Cox 1987, Scheb and Lyons 2001). In order to preserve the legitimacy of the Court, the Justices face pressure to legitimate their rulings in a manner consistent with acceptable standards of legal reasoning (Cross et al. 2010).

“Citing to persuasive authority—be it domestic or foreign—when that authority informs the Court’s decision is an integral part of what it means to be a justice when writing transparent, candid, and reasoned opinions” (Parrish 2007, 680). In their study, John Sheb and William Lyons (2001) found that the public wanted the Justices to remain consistent in their decisions, by respecting the doctrine of *stare decisis*. They conclude that the demystifying the Justice’s adherence to the legal model of decision-making would erode

²⁰ As James Gibson and Gregory Calderia (2011) suggest, the Justices have a desire to come across in their opinions as principled and sincere.

²¹ “Further, if, in the interest of candor, the Court concedes the consideration of politics in its decisionmaking, then it will lose the legitimacy required to demand adherence to its most controversial decisions” (Murphy 1964, 794).

the public's support for the Court.²² Lee Epstein and Jack Knight suggest that the Justices realize that adherence to the doctrine of *stare decisis* "enhances the probability that society will consider the resulting decision legitimate (Epstein and Knight 1998, 45). Thus, if the Justices were concerned about legitimation, they would engage in efforts to enhance the internal consistency and strengthen the "external credibility" of their decisions (Schauer 1987, 600).

In this vein, citations to authority serve as efforts to legitimize the opinions of the Justices. This doctrine of *stare decisis* "enhances the power of the Justices," despite its limited utility (Easterbrook 1982). Since following precedent "enhances the institutional strength of the judiciary," in Justice John Paul Stevens' words (1982, 2), citations serve a "primary function of legitimation" (Walsh 1997, 339). As Lawrence Friedman et al. (1981) maintained:

Everybody knows-at least since the realists hammered home the point-that a judicial opinion does *not* tell us what went on in judges' minds. It may be mere rationalization. But we can say, with some certainty, that the opinion and its reasoning show what judges *think* is legitimate argument and legitimate authority, justifying their behavior. And such thoughts are important (794).

Thus, one strong motivation for citations to authority is to maintain proper appearances for external audiences (Walsh 1997).

For jurists, references to authority might serve benign purposes, but the actual citation may signal an endorsement of a controversial position or area of research that casts a shadow of the future direction of the court's jurisprudence. Similarly, citations of atypical material may indicate that justification of a particular position is not supported by

²² But see Gibson and Calderia (2011), who argue that the public recognize that the Justices base their decisions on their own beliefs, even if they reject the idea that the "judges are just politicians in robes" (208).

preexisting legal arguments, and that in order for judges to reach a particular viewpoint they must go beyond the usual sources for legitimation. However, citations to foreign jurisprudence or other foreign authorities may also reinforce the legal positions previously articulated by jurists. In either case, the citations contained within a judicial opinion may affect the legitimacy of the law.²³

As tools, citations reflect the quality of work judges put into crafting the opinion (Parrish 2007). Judge Richard Posner (1999) suggests citations serve four possible purposes in the legal field. First, citations may be informational in nature. These citations serve as a guide to readers where to find information about facts and other arguments. A second motivation is to acknowledge authorship of previously articulated ideas and concepts. A third motivation is to provide authoritative support for the Justice's conclusions. By contextualizing legal arguments, the citations to authorities allow the Justices to show how the legal principles of one case relate to the legal principles articulated in other cases. Finally, citations can be a reward, and provide credibility, to particular authors for their contribution to the advancement of law. Citations used in this manner may enhance the stature of the Justice's argument, but also may elevate the work of the cited author as suggestive of the Justice's preferred legal doctrine beyond the facts of a particular case.

The motivations described by Judge Posner assume that the Justices use citations to provide a sense of transparency of the intellectual journey the judge undertook. Other scholars view the citation practices of the Justices as another part of their attempts to

²³ Judge Frank Easterbrook of the United States Court of Appeals for the Seventh Circuit has a different take. He argues, "most citations are just filler, added by law clerks or by the Justices themselves when engaged in belt-and-suspenders reasoning. They do not imply that the cited sources have any legal effect" (Easterbrook 2006, 224).

achieve their policy and legal preferences. Harold Spaeth and Jeffrey Segal (1999) found that citations to authority were a cover for ideological decision-making. However, legal realists suggest that citations to authority, especially precedent, are central to the Court's decision-making process (Kahn 1999). Citations may facilitate intercourt communication (Caldeira 1985). Whatever the motivation for their use, whether citations are used as a mask of or a constraint on the Justice's policy preferences, the references to authority are influential on the decision-making process (Walsh 1997). Citations have an effect on the legitimacy of the Court and the development of the law (Cross et al. 2010).

The citation behavior of each Justice is different both in terms of rate of citing authorities, but also in the types of authorities cited (Manz 1995; Domnarski 1996; Cross et al. 2010).²⁴ While the vast plurality of citations are to precedent (Johnson 1985; Manz 2002), the Justices on the United States Supreme Court regularly cite non-traditional or non-legal authorities in their opinions including foreign authorities (Schauer and Wise 2000; Hasko 2002; Corley et al. 2005). Written opinions may contain references to statutory or constitutional texts, legislative or administrative histories (Brudney and Ditslear 2005), legal scholarship (Sirico and Margulies 1986; Sirico 2000; Liptak 2007), social science research (Rosen 1972; Bersoff 1987; Acker 1991; Erickson and Simon 1998), or include literary or cultural allusions. These citation practices are not limited to the United States; courts with constitutional review powers do as well. While some of these citations are attempts to develop an originalist or textual argument, all judges cite other authorities in writing their decisions. In his 1995 study, William Manz concluded that

²⁴ Manz's concluded that the Justices with the fewest number of citations would omit the oldest cases (1995, 57).

Justice Benjamin Cardozo was more likely than his colleagues to cite precedent, but more likely to cite British law and a greater number and variety of law review articles.

However, not all citations are created equal. Citations to Wikipedia, as an example, are not “an acceptable form of information” (*Nordwall v Secretary of Health and Human Services* 2008 US Claims LEXIS 86, 22 n.6).²⁵ Justice Scalia does not support the use of legislative history (Scalia concurring in *Zedner v. United States* [2006]).²⁶ The condemnation leveled at the social science research included in Footnote 11 of *Brown v. Board of Education* (1954) and the usage of foreign jurisprudence in *Lawrence v. Texas* (2003) suggest that other forms of citations may also be subject to intense criticism and may affect the willingness of some critics to accept the legitimacy of the outcome.

²⁵ “[I]nformation was drawn from Wikipedia.com, a website that allows virtually anyone to upload an article into what is essentially a free, online encyclopedia. A review of the Wikipedia website reveals a pervasive and, for our purposes, disturbing series of disclaimers, among them, that: (i) any given Wikipedia article “may be, at any given moment, in a bad state: for example it could be in the middle of a large edit or it could have been recently vandalized;” (ii) Wikipedia articles are “also subject to remarkable oversights and omissions;” (iii) “Wikipedia articles (or series of related articles) are liable to be incomplete in ways that would be less usual in a more tightly controlled reference work;” (iv) “another problem with a lot of content on Wikipedia is that many contributors do not cite their sources, something that makes it hard for the reader to judge the credibility of what is written; [**21] ” and (v) “many articles commence their lives as partisan drafts” and may be “caught up in a heavily unbalanced viewpoint” (*Campbell v Secretary of Health and Human Services* 69 Fed. Cl. 775, 781 [2006]).

²⁶ “It may seem that there is no harm in using committee reports and other such sources when they are merely in accord with the plain meaning of the Act. But this sort of intellectual piling-on has addictive consequences. To begin with, it accustoms us to believing that what is said by a single person in a floor debate or by a committee report represents the view of Congress as a whole—so that we sometimes even will say (when referring to a floor statement and committee report) that “Congress has expressed” thus-and-so. . . . There is no basis either in law or in reality for this naive belief. Moreover, if legislative history is relevant when it confirms the plain meaning of the statutory text, it should also be relevant when it contradicts the plain meaning, thus rendering what is plain ambiguous. Because the use of legislative history is illegitimate and ill advised in the interpretation of any statute—and especially a statute that is clear on its face—I do not join this portion of the Court’s opinion” (*United States v. Zedner* 547 U.S. 489, 510).

Despite the concerns raised about the use of social science data following *Brown*, Justices became *increasingly* likely to cite social science evidence in their decision-making (Morgan and Pullin 2011). Justice Felix Frankfurter defended the practice of social science data in 1959, “the types of cases that now come before the Court (as the present United States Reports, compared with those of even a generation ago, bear ample testimony) require to a considerable extent study of materials outside the legal literature” (*Dick v. New York Life Insurance Co.*, 359 U.S. 437, 458 [1959]). Other scholars believe that social science data can help courts to interpret facts, understand context (Monahan and Walker 1988), understand the policy consequences of possible decisions (Sperlich 1980), and educate the public or other justices (Bernstein 1968, 70).

Similarly, defenders of the practice of citing foreign authorities as a legitimate interpretive tool offer four basic rationales. First, courts and judges across time and across the globe consistently use foreign law. The “new” phenomenon of citing foreign law observed in the United States after *Lawrence v. Texas* (2003) and *Roper v. Simmons* (2005) is not really new. Second, the citation of foreign authorities does not influence the outcome of the case. As Ann Marie Slaughter (2004) suggests, the citations are persuasive, not binding. Third, courts are part of an international system and judges have a duty to learn from international legal developments. Fourth, domestic judges play an important role in developing international legal standards. This may be especially the case when the case involves fundamental human rights.

The first argument in support of using foreign law is that the citation of foreign law is not a novel development by the United States Supreme Court in the latter part of the twentieth century. For judges in the United States, the use of foreign law is acceptable for

two reasons. First, Article 6 the Constitution explicitly elevates international treaties to part of the supreme law of the land and Article 1 §8 grants Congress the power to punish “Offenses against the Law of Nations” (Stephens 2000). Daniel Gordon (2004) suggests that the substantive due process clause of the Fourteenth Amendment is based on foreign and international law. These Constitutional powers allow or even suggest that judges have a responsibility for incorporating international norms in their interpretation of statutory law.

Second, the framers of the Constitution were comfortable with using comparative constitutional law (Fontana 2001; Yap 2005; Farber 2007). Daniel Farber argues that the framers “had a global intellectual vision” and frequently looked to the law of nations for guidance (Farber 2007, 1347). The Court embraced the notion of being “amenable to the law of nations” as early as 1793,²⁷ and Chief Justice John Marshall argued that the Court should give full effect to the decisions of foreign tribunals in 1808 (Calabresi and Zimdahl 2005).²⁸ Throughout the Court’s history, the Justices regularly cite foreign authorities (Ayers 2004). Beyond the borders of the United States, regional borrowing and the use of foreign material was commonplace and enshrined in the South African Constitution (LaForest 1994; Smithey 2001). In Japan, judges routinely analyze and incorporate foreign judgments in their decisions (Keller 2004). The regularity of the citation of foreign law by the United States Supreme Court and other national courts indicate that constitutional drafters and judges accept foreign authorities as relevant to the interpretive process and any criticism of the practice is misplaced.

²⁷ *Chisholm v. Georgia* 2 Dall. 419 (1793).

²⁸ Marshall ruled that the Supreme Court should examine and accept the judgments of foreign courts. “[T]he sentence of a foreign court is conclusive with respect to what it professes to decide.” *Rose v. Himely* 8 U.S. 241 (1808).

A second argument offered in support of courts citing foreign authorities is that the references are illuminating or persuasive, as opposed to international law, which is binding on courts (Seipp 2006). Shirley Abrahamson and Michael Fischer (1997) argue that foreign judgments function in a manner akin “superstar amicus briefs (287).” Ronald Brand (2007) suggests that judges frequently cite a variety of material, from poetry to movie lyrics, in their decisions but do not claim those references are controlling. Instead, Brand argues that the references to foreign law are only persuasive when the underlying rationale is also persuasive (see also Howard 2009). Foreign law is only persuasive, as Diane Amann (2004) argues, when the external norm is already salient domestically. For supporters, since references to foreign law are not binding, and only potentially persuasive, the whole debate over foreign law is “much ado about nothing” (Donovan 2006). Thus, citations to foreign authorities are “legitimate tool that offers modest benefits for constitutional interpretation” (Jackson 2005, 111).

Other scholars support (and encourage) judges, especially in the United States, to participate in a broader global dialogue. These arguments fall into two different categories. The first suggests that courts are part of a comprehensive legal system that spans national borders and includes international law (Re 1996; Slaughter 2003). By failing to pay attention to the dialogue and experiences of other countries, judges miss out on important legal developments (Jackson 2001; Lefler 2001). More importantly, Harold Hongju Koh (2004) argues nations that consciously ignore global legal developments are at risk to be in constant friction with the rest of the world. Vincent Levy (2006) suggests that failing to participate in the global legal dialogue, courts make a “mockery” of the international legal system.

Instead of missing out on foreign legal developments in failing to cite foreign authorities, courts can gain insights into the meaning of their own constitutions through careful analyses of constitutional experiences in other nations (Tushnet 1999). Turning to comparative law allows judges to identify lessons learned by other courts, as well as to recognize normative assumptions made about their own national constitutions (Choundhry 2004; Jackson 2004). Thus, there is an obligation on the part of judges to consider accepted sources of international law (Wald 2004).

The second argument that judges should care about the development of international legal standards. This idea rests upon the belief that at its core, law generally, and human rights specifically, is universal (Frank 2006). As David Law (2005) suggests, “there exists a skeletal body of constitutional theory, practice, and doctrine that belongs uniquely to no particular jurisdiction” (659). Specifically, the Bills of Rights in several countries, including New Zealand, Canada, and South Africa, explicitly invite international comparisons (Allen and Huscroft 2006). In the context of the United States, Stephen Arvin (2005), argues that the views of all of humanity are relevant to determining what constitutes “cruel and unusual.” Anthony Winer (2006) contends that courts across Western Europe share the same legal traditions. In Africa, courts regularly look beyond their own constitutions to interpret the meaning of rights (Adjami 2002). Thus, citations to foreign authorities strengthen commonalities across nations, and may facilitate democratic principles and democratization (Ginsburg et al. 2008).

Under this conception, judges do not just internalize foreign norms, but play a role in shaping international legal standards (Waters 2008). In using a common language and using similar analytical and interpretative strategies, legal systems continue to grow closer

(Cohen-Eliya and Porat 2009). Scholars have found that the European Court of Human Rights is citing more cases from the United States Supreme Court (de Wolf and Wallace 2009) and that Advocates General regularly cite foreign law in their briefs to the European Court of Justice (Peoples 2008). As the differences between legal systems shrink, it becomes even more practical and easy to borrow from other courts as more and more “foreign” norms are incorporated into domestic legal systems.

Critics of the use of foreign law offer two basic arguments, originating from the idea that even if foreign judgments are not binding, they still appear authoritative and might affect the outcome of cases (McGinnis 2006a; Lee 2007).²⁹ The first concern is that the idea of a constitution leaves no place for references to foreign law. Americans believe that their Constitution is truly exceptional and judges have no reason to learn from of other courts. More broadly, the uses of foreign authorities limit national sovereignty. Additionally, there is not a theory of constitutional interpretation that accepts comparativism as an interpretative method. The second concern is that the citation of foreign authorities upsets the traditional role of the judge and society. The citation of foreign law increases the “democracy-deficit” of a country, and places more policy-making authority in the hands of the judiciary.

For some scholars, America’s history and ideals set it apart from the rest of the world. Steven Calabresi (2006) argues that most Americans reject the idea that the Supreme Court can learn from foreign courts. He suggests, drawing upon the insights of James Morone’s *Hellfire Nation* (2003) and other scholars of American exceptionalism, that

²⁹ Most opponents of the use of foreign law are comfortable with the citation of international law and treaties. In this dissertation I conflate the judgments of international courts and tribunals with the judgments from the courts of foreign countries under “foreign law” or “foreign jurisprudence.”

American ideology is profoundly moralistic and individualistic and its laws are not compatible with other Western democracies. This idea can also be seen in the structure and text of Constitution and the U.S. Bill of Rights (Rosenkranz 2007). Modern protections of rights, such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights, or the South African Constitution, are expressed in positive granting of individual and group economic or social rights (Allen and Huscroft 2006). Thus, the comparison of legal doctrines in the United States and other nations should be discouraged, especially if the pressures of convergence are non-existent (Dixon and Posner 2011).

The second basic question posed is what is the theory of interpretation that allows for the use of foreign authorities? References to foreign authorities are anathema to the process of interpretation, especially constitutional interpretation. Roger Alford (2005) argues that there is not a constitutional theory that can possibly justify using foreign authorities. Instead, comparativism is a fashionable accessory for constitutional interpretation. It is not that referencing foreign authorities are taboo under the theory of original intent, because the historical and legal records of pre-1776 England are relevant for understanding the ideas of the framers in the United States. Comparativism is incompatible with the theory of originalism because the references to foreign authorities are contemporary, not relevant to the process of constitutional interpretation (McGinnis 2006b).

An additional concern is that judges stack the deck and only cite foreign authorities that confirm their existing preferences (see *Roper v. Simmons* [2005], Scalia dissenting).³⁰ Alford argues that if the United States Supreme Court were to have examined the full scope of world opinion in 2003, it would notice that 84 nations had laws prohibiting same-sex behavior (Alford 2004). Until judges develop a rigorous and transparent method for examining foreign jurisprudence, the practice invites the unprincipled and selective use of foreign authorities (Kelbley 2005; Lee 2005). Because there is not a principled method for citing foreign authorities and judges are not internally consistent in how they cite foreign law, the disadvantages outweigh any potential advantages of using foreign law (Salvatore et al. 2009; Pearce 2010; Bryant 2011). The citation of foreign authorities can also serve as a signal about the lack of domestic support for a particular decision (Sanchez 2005).

A general concern among opponents to the use of foreign authorities is the loss of national sovereignty.³¹ Most nations are not expected to give blanket deference to decisions of international tribunals. Because the dualist philosophy toward international law is the predominant approach of most nations, judges must think critically about the degree of deference they accord to the decisions of other courts (Alford 2003; Bradley 2006). A concern raised by Ken Kersch (2006) is that political activists will turn to hopes to developing favorable foreign and international legal precedents that would change domestic law.

³⁰ “In other words, all the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends. Cf. *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in judgment).”

³¹ This argument is in many ways contradictory to the other arguments against the use of foreign law. Either foreign law is somehow binding on the Justices or it used in an unprincipled manner.

The process of citing foreign authorities also expands the power of the individual jurist beyond the role originally crafted for the judiciary (Easterbrook 2006). Most nations believe in the idea of an independent judiciary from politics with a limited role in society. Giving judges power to interpret and decide what rights or duties to attach to treaties transfers the power of making foreign policy from the executive to judges, violating the conception of separation of powers (Yoo 2004; Carodine 2006). Since world opinion is indeterminate, judges are able to act as “independent moral agents rather than mere conduits of society’s value judgments” in picking and choosing which and when international norms apply in domestic cases (Clark 2006, 1151).

Fundamentally, for critics, the practice of citing foreign law, especially in constitutional cases, is undemocratic and dangerous, “antithetical to popular sovereignty” (Larsen 2009). Deference to international legal norms upsets the balance between majoritarian rule and minority rights and judges and legislators (Alford 2004; Wells 2004; Connell 2004). By looking abroad, judges give assent to rules, standards, or processes that may not be reflected in their own domestic institutions. Through the dynamic incorporation of international legal principles, judges cede power from domestic lawmakers to policy makers accountable to foreign polities (Dorf 2008). Alfred Aman (2004) suggests that citizens and democratic institutions have less control and influence in a globalized world. This process expands the “democracy deficit” of the judiciary, especially in courts that possess the power of judicial review (McGinnis 2006c; McGinnis and Somin 2007). The result of the practice of citing foreign authorities is that decisions are less transparent and disguise the political decisions of the justices (Posner 2005). Ultimately,

critics argue judges must remain responsible not to international law or trends, but their own citizens (Zehnder 2006).

The debate over the use of foreign law by the Supreme Court exists in several permutations. It is a debate between the Justices, as suggested in the statements by Justice Breyer in *Knight v. Florida* (1999) and Justice Scalia in *Printz v. United States* (1997) and in other opinions.³² However, it is also a debate in the public sphere involving elected officials and voters. Oklahoma voters passed State Question 755 in 2010, which would prohibit the courts from considering international law.³³ In 2012, the Kansas Governor Sam Brownback signed a law prohibiting a Kansas court from basing a decision on foreign law (House Substitute for Senate Bill 79).³⁴ Also in 2012, the Florida House passed a measure prohibiting the courts from applying foreign law (HB 1209).³⁵

In a period of less than ten years, outside influences on the Court had the effect of turning a regular citation practice of the Justices into a controversial practice. This public debate over the use of foreign law suggests that the Justice's citation behavior does not occur in a vacuum. Instead, the Justice's citation practices, especially relating to the citing of

³² Further explained in Chapter 3.

³³ The courts shall not look to the legal precepts or cultures of other countries. Specifically, the courts shall not consider international law or Sharia law (Enrolled House Joint Resolution 1056).

³⁴ Any court, arbitration, tribunal or administrative agency ruling or decision shall violate the public policy of this state and be void and unenforceable if the court, arbitration, tribunal or administrative agency bases its rulings or decisions in the matter at issue in whole or in part on any foreign law, legal code or system that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights and privileges granted under the United States and Kansas constitutions, including, but not limited to, equal protection, due process, free exercise of religion, freedom of speech or press, and any right of privacy or marriage (Enrolled House Substitute for Senate Bill 79).

³⁵ Also in 2012, the South Dakota legislature passed HB 1253 that would prohibit the courts from considering religious codes. Bills banning foreign law by the courts were introduced in 24 states in 2012 (Sendesky 2012).

foreign authorities, affect how external audiences perceive the Court and the proper role of the Justices.

The Supreme Court in American Society

The Supreme Court derives its powers from Article III of the Constitution. However as Alexander Hamilton famously described in *Federalist 78*, the Court has “neither FORCE nor WILL, but merely judgment.” This means that the Court must rely upon other branches of the government and other elected officials to carry out the Court’s orders. The Court’s assertion of judicial supremacy is not sufficient to ensure compliance by other government officials because Constitutional meaning is often contested (Whittington 2007). The legitimacy, and the authority of the Court, exists because the Justices usually operate within the broad parameters established by other political actors.

In *Cooper v. Aaron* (1958), the Court declared the “basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution” (358 U.S. 1, 18). In declaring that this principle was a permanent part of the constitutional system, the Court wrapped itself in the cloak of *Marbury* ignoring the constant contestation of constitutional principles that exists in American society and between branches of government (Whittington 1999; 2007). This belief in a supreme judiciary even ignores the doctrine of constitutional review was contested throughout much of the nation’s history (Graber 1999; 2003).

Under the guise of constitutional review, judges make both “legal” and “political” decisions. Justices care about the development of the law, but despite their professed belief that policy or partisan goals mean nothing in the courtroom, they also recognize the

political nature of the cases that come before the Court.³⁶ The authority of the Court to declare laws unconstitutional provides incentives for litigants to transform political disputes into legal disputes (Stone Sweet 2000). Because judges become involved in determining the constitutionality or implementation of most legislation, they are, by necessity, policy-makers.

The act of judicial policy-making strains the relationship between the public and their expectations of the judiciary. In democratic systems, the principle of separation of powers provides legislatures supreme authority for creating laws, with the judiciary responsible for the interpretation of law. Since the Justices do exert tremendous political power in shaping and creating the law a natural tension exists between the two branches. This power of judicial review is anathema to the principles of democratic governance because the Justices are unelected and not accountable for their actions (Bickel 1962).³⁷

Bickel's articulation of the "countermajoritarian difficulty" may be overstated, since the limitation of sovereign authority in a constitution is counter to democratic principles (Dahl 2001; Barak 2006). In addition, the judges, by virtue of their method of appointment to the court are part of the national governing coalition and not likely to challenge fundamental constitutional principles (Dahl 1956; Spann 1993; Whittington 2007). However, the act of policy-making does highlight two additional challenges of the continued legitimacy of the Court.

The view held by many scholars today is that judges follow their own policy preferences (Rohde and Spaeth 1976; Segal and Spaeth 1993; 2002). However, the rule of

³⁶ "It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench" (Justice Felix Frankfurter dissenting in *Board of Education v Barnette* [1943] at 647).

³⁷ Alexander Bickel (1962) believes that this "difficulty" can be overcome.

law depends on the belief that the judges remain neutral arbitrators (Scheingold 1974; Stone Sweet 2000). That veil of neutrality disappears when judges expose their policy-preferences, at a cost to the legitimacy of the Court (Stone Sweet 2000).³⁸ In the practice of adjudication, judges must remain sensitive to the needs of society and respect for the legislators. Nevertheless, society's expectations of the role of judges are fluid, simultaneously an influence of and shaped by judicial activity (Barak 2006). These concerns about the maintenance of the rule of law provide incentives for the Justices to try to disguise their own policy preferences under the guise of deference to other governmental bodies or through the defense of their behavior using preexisting norms or forms of judicial reasoning (Baum 1997, 59; Stone Sweet 2000, 200).

This process of adjudication ensures constant contestation over the meaning of the Constitution. Because the Constitution primarily is a governing document, and not just a legal document (Whittington 1991), constitutional ambiguities necessitate each branch of the government to interpret the Constitution and act on those visions.³⁹ Issues brought before the Court involve a contest between constitutional visions, usually pitting one branch of the American system of government against another constitutional interpretations. In this political and legal environment, deference to the judiciary may be welcome by other branches to avoid accountability (Lovell and Lemieux 2006; Graber 2008). Despite this history of constitutional contestation, elected officials traditionally

³⁸ The presumption is that litigants will refrain from using the judiciary to resolve disputes if the Justices are considered partisan actors.

³⁹ Stephen Griffin (1996) argues that most constitutional development in the United States occurs through the course of ordinary struggles between Congress and the executive. Thus, large areas of the constitutional order are subject to ordinary political change, and the Court only enforces "a very small portion of the total policy output of all of the branches and agencies of the federal government" (Griffin 1996: 44).

provide, at minimum, diffuse support for the Court (Graber 2003; Lovell 2003). As long as the Justices operate within a range of politically supportable decisions, elected officials support the concept of judicial review (Graber 2003; Whittington 2007).⁴⁰

The weaknesses of the judiciary are evident in the Court's ability to influence policy. Gerald Rosenberg (1991) argues that the only times where the Courts influence policy are when the other branches of government support the Court. Without the support of the other branches of the government, Court decisions cannot be implemented. He points to the ability of the South to delay implementation of *Brown v Board of Education* (1954) as conclusive evidence that the Court's power is quite constrained. In a similar vein, Girardeau Spann (1993) also argues that the Justices do not have independent power without the support of Congress or the executive. However, Spann suggests that members of the judiciary are part of the "same elite political majority that controls the representative branches" (Spann 1993, 163), and would not be expected to oppose the will of the other political branches.

The social power and legitimacy of the Court cannot solely be measured by the ability to achieve compliance (Stone Sweet 2000). As Mark Graber (2003) and George Lovell (2003) demonstrate, Congress may empower and provide deference to the Court for a multitude of reasons (Skowronek 1982; Strauss 1989). From another standpoint, Michael McCann (1994) argues that that courts create and constrain opportunities for individuals to invoke certain legal claims. In the process of expanding or limiting opportunities for litigants to use the courts to make certain legal and constitutional arguments, the Justices

⁴⁰ Mark Graber (2003) suggests that the Court may diverge sharply from public opinion on contested constitutional issues. However, in periods outside of "normal politics," the meaning of the Constitution is settled elsewhere (Whittington 2007).

seek to change in how society views the ability of the courts to affect social or political change. Thus, the type of cases society wants the Court to adjudicate affects the perception of the legitimate role of the Justices.⁴¹

In constructing an opinion for the Court, the Justices can decide to support a constitutional interpretation offered by one of the parties or develop its own meaning of a constitutional position. The interpretative methodology of the Court influences political decision makers, including lower courts, legislative and executive branch behavior, and provides “private parties and organizations with information about future Court actions and thus [influences] private behavior as well” (Maltzman et al. 2000, 5). It is in the process of providing a written justification for its decision on the merits that the Supreme Court accepts or rejects the interpretation(s) of statutes or the Constitution offered by other branches.

⁴¹ Disagreement over the legitimate role of the Court in American society can easily be seen in several prominent examples. First, and for the most part, the Court has shut the door on federal taxpayer lawsuits (*Hein v. Freedom From Religion Foundation* [2007]). In ruling that the taxpayers had no standing to challenge the existence of the White House Office on Faith-Based and Community Initiatives, the Court in essence said that it is not a legitimate role of the Court to second guess spending decisions of legislatures. A second example is Congressional attempts at jurisdiction stripping in the field of education after *Brown* or the pledge of allegiance as a reaction to *Elk Grove Unified School District v Newdow* (2004). In these examples, at least some members of Congress believed that it was not appropriate for the Court to adjudicate certain issues.

A third example is the debate surrounding the appropriateness of the courts taking the lead in declaring laws against marriage equality unconstitutional, rather than waiting for other branches to grant full equality (Goldberg-Hiller 2004). In responding to the decision of the 9th Circuit Court of Appeals in *Perry v Brown* (2012), Erwin Chemerinsky (2012) wrote for the *Los Angeles Times*: “One central criticism of the 9th Circuit's decision is that it was wrong for the court to substitute its decision for that of the voters. However, it is a crucial judicial role to interpret the Constitution and to remedy unjust discrimination and violations of rights. It was not impermissible judicial activism when the Supreme Court invalidated laws prohibiting interracial marriage, and it is equally appropriate for courts to declare unconstitutional laws rescinding the right to same-sex marriage.”

How the judges write and which legal norms they cite in the opinion matters for several reasons. First, the language of the opinion has the effect of expanding or limiting the scope of the law, or to affect the relationship between the Court and the other branches of government. What judges write both reflect and become part of the public discourse. Judicial opinions can possess a moral power that other political actors may subsequently appropriate for their own cause(s). Specifically, rights discourse can have a powerful effect on the framing of future disputes or the availability or accessibility of certain remedies (McCann 1994). Second, the nature of the written opinion allows political actors and legal scholars and practitioners to evaluate the legitimacy of the legal rationale (Bybee 2000; Wittes 2005). Thus, the written opinion preserves the ritualistic nature and majestic power of the law as judges cloak their (preconceived) judgments on the outcome of a controversy with preexisting legal norms. The Justices face structural and institutional constraints when constructing the written opinion limiting the ability of judges to articulate their preferred legal rationale in their opinions.

In addition, the methods through which courts decide cases implicate the independence of the judiciary. Since the legal authorities courts reference in their written opinions attempt to legitimate the legal rationale, the citation practices of a court exposes how the court views its relationship with other actors in the political system and other legal systems as well as the fundamental values of the court. “The various features of legal reasoning – the doctrine of *stare decisis*, for example – are more than just means through which courts arrive at decisions; they define and constitute the fundamental identity of courts” (Choudhry 1999, 824).

Influences of Supreme Court Procedures on Citation Practices

Opinion Writing

For the most part, the process of disposing of a case by the Supreme Court is governed by informal rules and procedures. Article III of the Constitution describes the power and jurisdiction of the Court. Title 28 of the United States Code sets out the membership of the Court, quorum, rules of evidence, and allows for the Court to develop its own rules of procedure. The *Rules for the Supreme Court* specify how to petition and submit briefs to the Court, considerations for when certiorari might be granted, procedures for oral argument, and the process in which opinions will be released. The other aspects of opinion-writing and opinion-formation proceed based upon Court customs. Since the procedures of the Court are informal, the Justices on the Supreme Court of the United States have nearly unfettered discretion to dispose of a case in any way they see fit. Cases can be summarily dismissed or approved or the decision on the merits justified with hundred page opinions. The Justices can write one opinion for the Court or each Justice could write their own separate opinion.

However, tradition, custom, and practical workload concerns limit some options with opinion writing. Before Chief Justice Marshall, opinions were frequently authored “By the Court” and contained little legal analysis or the Justices delivered their opinions seriatim, following the practice of English courts (West 2006). This seriatim style was often used in the presence of a Constitutional issue or when the Justices were in disagreement. Changes to the form of opinion-writing occurred as early as 1797 when the Reporter began attributing authorship to the Chief Justice, as opposed to the Court (Kelsh 1999, 139-

143).⁴² Chief Justice Marshall firmly established the modern practice of opinion writing (Ginsburg 1990). By 1808, the practice of seriatim was abandoned in favor of one Justice, usually the Chief Justice, writing for the Court.⁴³ The custom of having one Justice writing for the Court required additional coordination and management, resulted in increasing power for the Chief Justice (White 2006).⁴⁴

Until the 1940s, the practice of circulating draft opinions among the Justices was rare (White 2006).⁴⁵ The Justices would agree in conference about the disposition of the case and assign an author of the opinion. Justices increasingly wrote separate opinions (Kelsh 1999), but the norm was to not circulate opinions until they were delivered. This custom of non-circulation meant that the Justices could not “snipe” at each other nor could they criticize the language of the majority of the opinion (White 2006, 1481).⁴⁶ Under this approach to opinion-writing, decisions for the Court were not seen as the views of the Court, but as the views of the Justice to whom the case was assigned (White 2006).

These procedures for opinion-writing both raised and lowered the stakes of each written opinion. To John Kelsh (1999), this change from per curium decisions to attributed authorship raised the stake of the opinions by focusing attention upon the ideas and justification of the individual Justices. The Justices would be accountable to their views, although they could silently acquiesce to the majority opinion. At the same time, the

⁴² *Brown v. Barry*, 3 U.S. (3 Dall.) 365, 366 (1797).

⁴³ However, Sonja West (2006) suggests that the current practice of multiple concurring and dissenting opinions approaches past practices of delivering seriatim opinions.

⁴⁴ The Chief Justice presides over the initial conference and if in the majority, assigns the majority opinion.

⁴⁵ See G. Edward White (2006) for examples of cases where the Justices did circulate draft opinions before the 1940s.

⁴⁶ White (2006) suggests that when the Justices *did* circulate draft opinions, it likely had the effect of dissolving conference majorities (1505).

practice of not circulating draft opinions decreased the stakes of each majority opinion. Judicial opinions were recognized and treated simply as application of existing legal principles, rather than establishing precedent for future cases (White 2006, 1484).⁴⁷

The modern practice of opinion-writing was in full effect by the 1940s. In 1947, the *United States Reports* began listing the votes of all the Justices participating in the case in its headnotes (White 2006). At the same time, *The New York Times* coverage of the Supreme Court increased, both in the number of front-page stories and opinion excerpts (Domnarski 1996). Since Justices could no longer silently acquiesce to the majority and their names were prominently attached to the opinion, G. Edward White (2006) argues that they had newfound motivation to understand both their vote on the disposition of the case, but also the justification used in the majority opinion. As drafts of opinions and memoranda circulated among the Justices, the final majority opinion could be considered a product of the Court, not just Justice assigned to write the case (White 2006).⁴⁸

As the majority opinion became a product of a collaborative process, the Justice assigned to write the majority opinion is forced to compromise. “While of necessity much latitude is given to the opinion writer, there are inevitable compromises” (Rehnquist 1976, 343). These negotiations might include significant decisions to avoid deciding particular issues, but may also entail attempts to narrow or expand the holding, or make more minor

⁴⁷ In this way, decisions had similar precedential value as decisions do in some civil law courts (Dennis 1993; Fon and Parisi 2005).

⁴⁸ During this same period, Congress began limiting the mandatory jurisdiction of the Court. The Judiciary Act of 1925 transferred many cases to the Court’s discretionary docket and had the effect of reducing the number of signed opinions issued each term (Cordray and Cordray 2001). The Court’s workload shrank again after Congress removed most of remaining vestiges of the Court’s mandatory jurisdiction with the passage of the Judicial Improvements and Access to Justice Act of 1988 (Hellman 1996; Cordray and Cordray 2001; Starr 2006). With fewer signed cases, the importance of each opinion increased.

modifications. The references used in draft opinions are fair game as a product of this process and must be agreed to by each Justice joining an opinion.

This change of customary writing practices had several other effects on Court procedures that affect the citation practices of the Justices. First, the process further encouraged writing separate opinions (West 2006). Second, as the Justices accepted more work in the form of circulating multiple memos and draft opinions, they needed more law clerks to help with their tasks (White 2006). Changes to the number of law clerks and changes in technology made it easier for the Justices to rely on primary sources rather than secondary sources such as law reviews and legal encyclopedias to understand legal principles (Bast and Pyle 2001). In addition, the norm of circulating written drafts opened another point for Justices to attempt to influence the decision (Maltzman et al. 2000). However, while citations may be part of the strategic game played by the Justices, the “opinion’s author appears to be central to citation choices” (Cross et al. 2010).

These internal processes affect how the Justices interact with each other to gain their preferred outcomes (Murphy 1964, Epstein and Knight 1998; Maltzman et al. 2000). Lee Epstein and Jack Knight (1998) suggest that the Justice assigned to author the opinion frames the issue and sets the tone for future discussion within the Court. They point to the opinion in *Craig v. Boren* (1976) as evidence that the author assigned to write the majority opinion is significant in the development of legal doctrine. Forrest Maltzman, James Spriggs II and Paul Wahlbeck (2000) find that in nearly a quarter of the cases they examined throughout the Burger Court, the Justices engaged in bargaining to achieve a preferred outcome in the decision. In cases where bargaining occurred, the Justices cited precedent more often (Cross et al. 2010). This strategic behavior observed in the opinion-writing

stage of the Court's deliberations serves as further indication that the Justices care about what they say in their opinions, not just the vote on the merits of the case.

The Norm of Stare Decisis

The practice of opinion-writing is not the only tradition in which the Supreme Court borrowed from England. While the concept of constitutional review was unique to the Supreme Court, the legal tradition in the United States retained its British character (Reid 1995; Wood 1998; Fried 2005). Many states codified the common law, and judges continued to rely on William Blackstone and other common-law authorities in making their decisions. Through this embrace of the common law system, judges in the United States continued to embrace the tradition of reasoning by analogy and the reliance on *stare decisis* (Merrill 1994; Epstein and Knight 1998).

In accepting the wisdom of *stare decisis*, both in common-law and within the new constitutional order, precedent serves as the foundation for any future cases. While precedent does not bind the Justices on the Supreme Court, especially if they did not support an earlier decision (Spaeth and Segal 1999), members of the Court often express a reverence to the wisdom of past decisions.

The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. See B. Cardozo, *The Nature of the Judicial Process* 149 (1921). Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. See Powell, "Stare Decisis and Judicial Restraint," 1991 *Journal of Supreme Court History* 13, 16. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed (*Planned Parenthood v. Casey* [1993] at 854).

The Supreme Court, State Supreme Courts, and other federal courts frequently cite *Casey* as authority respecting precedent.⁴⁹

In contrast, the opinions authored by Chief Justice William Rehnquist and Justice Scalia in *Casey* reasserted the ability of the Court to overturn the decision of previous cases, despite the reliance on *stare decisis*. “Our constitutional watch does not cease merely because we have spoken before on an issue; when it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the question” (Rehnquist concurring in the judgment in part and dissenting in part in *Planned Parenthood v. Casey* 505 U.S. 833, 955). This debate over the doctrine of *stare decisis* often reoccurs whenever the Court overrules its own precedent and during Senate confirmation hearings. However, because of the sheer number of decisions over the Court’s history and the inexact nature of the principles expressed in those decisions, Justices often are able to find a line of cases that support their decision on the merits of a case.⁵⁰

The different theories of constitutional or statutory interpretation may lead to different citation practices beyond the use of precedent. While there are several methods of interpretation, and while no judge subscribes completely to one or only one method of interpretation (Chemerinsky 2000), these methods may lead to different ways of discovering the true meaning of the contested provision. While there are a variety of

⁴⁹ E.g. *Lawrence v. Texas* (2003) (Justice Scalia dissenting at 587), *United States v. Aman* [31 F.3d 550 (1994)], *State v. Valentine* [935 P.2d 1294 132 Wash.2d 1 (1997)], *Etkin v. Suarez* [519 S.E.2d 210 271 Ga. 352 (1999)], *Sisters of the Visitation v. Cochran Plastering Company* [775 So. 2 759 (2000) Supreme Court of Alabama].

⁵⁰ This is easily seen in the decisions of *Parents Involved in Community Schools v. Seattle School District* (2007) and *Meredith v. Jefferson County Board of Education* (2007). Both the majority and dissenting opinions spent several pages claiming that their position was supported by the opinion in *Brown v Board of Education* (1954).

methods of construction, three prominent approaches today are textualism, originalism and a “living constitution” approach.

Each of these theories has a different approach to sources of authority. Textualism is a theory of interpretation where the judges look to, and can find plain meaning in the text of a document (Marzulla 2002; Weinstein 2005; Nelson 2005). Using this method, the judge would examine the actual words of the document, often from its normal or usual meaning at the time of the adoption of the document. To discover the plain meaning of the text, a judge might refer to dictionaries and legal dictionaries from the same era (Werbach 1994), and may compare language used in one section of a document to other sections in the same document. While often confused with a textualist approach to the Constitution, originalism or “original intent” is a distinct method of interpretation. Originalists, like textualists, believe that a “true meaning” of a document can be found. However, originalists may go beyond the text of the document to understand its meaning (Scalia 1997).⁵¹ A third method of constitutional construction is a “living constitution” approach. In this method, articulated by Benjamin Cardozo (1921), “the content of constitutional immunities is not constant, but varies from age to age.” This evolutionary approach to the Constitution suggests that judges must understand the Constitution based on the changing needs and concerns of society (Winkler 2001).

Regardless of how closely the Justices follow the doctrine of *stare decisis*, the common law doctrine continues to play a major part in the American legal system (Fried 2005). Law students in the United States are trained to reason by analogy, and extract the

⁵¹ The authors of the Federalist papers are consulted “because their writings, like those of other intelligent and informed people over time, display how the text of the Constitution was originally understood” (Scalia 1997, 38).

central principle(s) from one case and apply it to a subsequent case (Mertz 2007). This type of reasoning extends into the authoring of briefs and in oral argument, as the attorneys argue that existing precedent supports their side (Scalia and Garner 2008). Even after a case is handed down, legal scholars often attempt to extend the principles to future cases and debate whether the Court was correct in its application of *stare decisis*.

Previous studies of judicial references to authority indicate the prevalence of the citation of previous court decisions. Canadian Supreme Court Justice Beverly McLachlin argues, “It was thought safer and better that the law advance by doing what has been done in a previous case, subject to such modifications as the distinct facts of the case at the bar might demand” (1991, 543). By applying the logic of *stare decisis* in their opinions, judges articulate the position that they are not “discovering” new legal principles to adjudicate the present case, but applying the logic of previous cases.⁵² In John Merryman’s landmark study of the California Supreme Court, nearly half of its citations of authority in 1950, and his subsequent studies found similar patterns in 1960 and 1970 (1954; 1977). Studies of the United States Supreme Court indicate that the vast majority of its citations are its case law (Johnson 1985; Manz 2002). The prevalence of citing domestic precedent is present not just in the United States, but also in other nations with a common law heritage (Edelman 1994; McCormick 1996; Ostberg et al. 2001; Smithey 2001).⁵³

Procedural Influences on Opinion-Writing

⁵² It is not that the doctrine of *stare decisis* is not controversial or a difficult theory to defend, but the doctrine remains a cornerstone of the rule of law (Peters 1996).

⁵³ Even in nations with a judicial system rooted in a civil law tradition, Justices cite precedent when there is sufficient uniformity, or “settled jurisprudence” in previous case law (Dennis 1993; Fon and Parisi 2005).

A third institutional factor may also influence the citation practices of the Justices. Cases do not arrive before the Court in a vacuum. Except in the rare cases where the Court has original jurisdiction, cases arrive before the Court with a voluminous record. Before an issue reaches the Court, it has usually been argued before a trial or district court and at least one appellate court.⁵⁴ The lower court judge(s) that first adjudicate an issue often establish the facts surrounding the case and provide a preliminary analysis of the issues involved in the case. While the Justices are free to ignore the underlying analysis, they frequently borrow specific language from the briefs submitted by the petitioner or respondent (Corley 2008).⁵⁵

In order for most cases to come before the Supreme Court, the losing party at the lower court petitions for a writ of certiorari with an opportunity for responding party to respond.⁵⁶ In these initial briefs, the petitioner attempts to present a compelling legal question that the Court should address and how the Justices should understand the case (Wahlbeck 1998; Johnson 1996; Epstein and Kobylka 1992). While the Court limits the size of these briefs, the briefs for both parties often contain all of the elements of what will eventually go into the final opinion(s) for the Court (Corley 2008).⁵⁷ If the Court does grant the writ of certiorari, both parties will file additional briefs. In addition, because of the

⁵⁴ The differences in method depend on whether the case was brought in federal court or in a state court, and whether Congress passed legislation expediting the case.

⁵⁵ To place the reliance on the briefs in some context, William Manz (2002) argues that the Justices cite in their written opinions only a small percentage of the precedents found in the briefs.

⁵⁶ Most of the Court's docket is discretionary since the passage of the Judiciary Act of 1925 (Lanier 2003). However, Congress continues to require the Court to hear certain appeals – most notably civil rights cases.

⁵⁷ For the October 2007 term, the limits were 9,000 words for a petition for a writ of certiorari and 15,000 words for a brief on the merits (Rules of the Supreme Court 2007).

growth in the number of *amicus curiae* briefs filed each year (Collins 2007), the volume of written material before the Justices when the case is decided is immense.

This growth in the number of briefs submitted to the court is not just a measure of how often groups lobby the Supreme Court (Caldeira and Wright 1988; Epstein 1991; Collins 2004; Collins 2007). The information provided in the briefs supplements the Justices own knowledge of the issues involved in the case (Epstein and Knight 1998; Maltzman et al. 2000, Corley 2008), as well as complements the positions made by the petitioners and respondents (Ennis 1984; Puro 1971; Rustad and Koenig 1993; Spriggs and Wahlbeck 1997; Wasby 1995). The amicus briefs also provide information to the Court about the potential impacts of the Court's ruling, the ideological positioning of various organizations, and provide the Court social science or legal information about the case or the impact of the case (Collins 2004; Johnson 2004).

The Justices do rely on this information in not just the merits of the case, but rely on the briefs to write their opinion. In a study of the oral arguments during the Burger Court (1972-1986), Timothy Johnson found that nearly 70% of the legal and policy arguments found in the majority opinion syllabi came from the briefs (Johnson 2004, 127). It is not the case that every issue raised in the briefs is addressed by the Court in their opinion, or discussed during oral argument, but the Justices often address the salient policy and legal arguments made by the briefs during oral argument or in their written opinions (Johnson 2004).

Regardless of the influence of the briefs in the outcome of the case, the written briefs may contain suggestions for which precedents the Court should apply, analogical reasoning, or interpretative methodology (Corley 2008). In addition, the briefs may contain

references to lower court rulings on similar topics, legislative histories, legal treatises, law review articles, social science data, or international or foreign law and jurisprudence to justify their position. The “Brandies brief” was developed in *Muller v. Oregon* (1908) to show the “*reasonableness* of the specific law at issue and the *relationship* of the regulation to the *needs* of society” (Doro 1958; 791).⁵⁸ Often, this evidence is appended to the brief. This type of brief provided the Court with authoritative social science evidence of the social consequences of the law, and the policy implications of a judicial decision. The Court’s acceptance of this style of brief, and this type of authoritative evidence, acknowledged that cases were not purely decided by logic alone, but a concern for the policy implications involved in the case.⁵⁹

This volume of information provides Justices a starting point to begin their analysis. However, the development and growth of online legal material over the past decades transformed legal research and made it easier for judges to engage in primary research (Rachlinski 2011; Larsen 2012). Before online research, attorneys and judges relied on secondary source material, legal encyclopedias and prominent law review articles to understand the development of the law. Since the computer directories of LEXIS and Westlaw arose in the 1970s, researchers are able to quickly locate primary source material (Bast and Pyle 2001; Clark 2002) and more flexibility in searching for relevant precedents (Dragich 1995). As more courts across the globe have placed their decisions online, it has become easier for judges and attorneys to locate and employ the judgments and wisdom of foreign legal authorities in their opinions and briefs.

⁵⁸ Emphasis in original.

⁵⁹ In a concurring opinion in *Muller v. Oregon* (208 U.S. 402, 420 [1908]), Justice David Brewer suggested that the experts presented in the brief “may not be, technically speaking, authorities,” but nevertheless discussed them in his decision.

Pleasing External Audiences

The basic rationale for writing an opinion and for citing authorities is that they are the Justices way of communicating with society (Domnarski 1996). Much of the work of the Court is done behind closed doors, but the written opinions attached to most cases are an attempt to provide transparency in to that process.⁶⁰ As methods of communications, the Justices try to use the persuasive power and prestige of the Court to establish legal principles in the lower courts, adherence to the decision by elected officials and other actors, and legitimacy with the public. While the institutional structure of the Court affects how the Justices write opinions, the intended audience for their decisions exists outside of the judiciary.

Thus, the internal, norms, and rules of the Court only explain so much of the opinion-writing process of the Justices. Lee Epstein and Jack Knight (1998) argue that satisfying external observers, including Congress, the President, and the public, guides the decision-making process. They find that in nearly 60% of the cases they examined, the Justices discussed the preferences of other governmental actors (Epstein and Knight 1998, 149). They suggest that the Justices are often concerned about congressional reversal and adapt strategically to the external political environment (Epstein et al. 2001). In addition, the Justices may be even more willing to grant certiorari when the policy views of the

⁶⁰ The Court may dispose of a case with a summary affirmance or dismissal. In addition, the decision to deny *certiorari* is usually made without comment.

majority lined up with the policy views of the President (Epstein and Knight 1998, 83-84).⁶¹

Epstein and Knight also argue the Justices seek to please the public through their opinions. With every action of the Justices, the prestige of the Court is at stake. Epstein and Knight (1998) explain that attempt to encourage specialization by Chief Justice Burger may facilitate efficiency on the Court, but also may have the effect of ensuring the writing of “quality” opinions that “have a greater chance of being accepted and respected by the external community” (127). They also argue that the Justices rarely take action that risks the legitimacy of the Court. The Justices will usually not raise issues *sua sponte* because the Justices usually do not want to appear engaging in issue creation. In a similar fashion, the Justices rely on the doctrine of *stare decisis* because the reliance on the norm proves to maintain public legitimacy (Epstein and Knight 1998, 45). Thus, external influences affect the strategic behavior of the Justices.

Lawrence Baum (2006) expands on this work, arguing that the Justices are sensitive to the perception of other audiences. Among other legal and policy goals, the Justices desire praise for their work and the approval and esteem of external audiences. Since Congress, legal scholars, the media, and the public closely scrutinize the work of the Justices, this form of accountability may affect their decision-making (Baum 2006, 169). Not every audience carries equal weight for each Justice, but the social and political environment of

⁶¹ Epstein and Knight’s findings are inconsistent with the findings of proponents of the attitudinal model, including Jeffrey Segal (1997). Segal argues that the Justices seldom fear congressional reversal, due, in part, to the difficulties of congressional action.

the Justices influences their decision-making. Baum downplays the “Greenhouse effect,” but suggests that the effect of outside audiences is “clearly valid” (Baum 2006, 163).⁶²

Baum argues that the Justices are concerned about their self-presentation and their historical legacy. Baum points to Justice Kennedy’s concurring opinion in *Texas v. Johnson* (1989) as an example of a Justice trying to reduce disappointment to a decision. Kennedy, then a recent appointee of the Court, wrote, “the hard fact is that sometimes we must make decisions we do not like (420). In a similar fashion, Justice Thomas wrote in his dissenting opinion in *Lawrence v. Texas* (2003):

[This law is] uncommonly silly. If I were a member of the Texas Legislature, I would vote to repeal it. Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources (539 U.S. 558, 605).

Thomas joined the main dissent authored by Justice Scalia, so there was no reason beyond self-presentation for him to explicitly explain that he has a duty to the Constitution.

For Baum, the Justices’ concerns over their reputational legitimacy means that they will respond, in one form or another, to their respective audiences. Judges want the respect of others in the legal profession and want to “be perceived as committed to the law and skilled in tis interpretation” (Baum 2006, 106). The Justices may have personal ties or other close connections to other governmental policy makers, while other judges may desire approval from lawmakers or the public to further their careers. Finally, the Justices may seek favorable news coverage or show interest in the news. Both Epstein and Knight

⁶² The “Greenhouse effect” is the “push toward moderation that occurs when a conservative [Justice] is seduced by the attractions of Washington society, and the desire to be praised in the New York Times” (Tushnet 2005, 200).

(1998) and Richard Davis (1994) found that the Justices circulated newspaper stories and editorials to their colleagues.

This focus on self-presentation extends beyond the opinions the Justices write. The Justices frequently give speeches at law schools and for policy groups (Baum and Devins 2010). Many Justices contribute to law reviews and occasionally appear before Congress. In addition, the Justices frequently appear on CSPAN and before other audiences to explain their perspective on judging or debating the merits of referencing foreign law. These efforts of self-presentation, at minimum, suggest that the Justices recognize that external audiences judge their actions. Thus, it should be expected that subtle pressures from outside audiences or ideological allies, would influence the Justices' decision-making processes (Baum 2006; Hansford and Spriggs 2006).

In this manner, while policy goals may still be a primary motivation, other factors influence the Justices. The "incentive to be perceived as committed to the law and skilled in its interpretation" may contribute to the reputation of the Justices (Baum 2006, 107). The Justices may be committed to one method of interpretation or they might be committed to their statements before the Senate Judiciary Committee to enhance their reputation. While the Justices do many things to enhance their self-presentation, the opinions they write are the most visible and prominent methods for evaluating the Justices. Criticism of the style and substance of the Justices' opinions, including their citation practices would likely have an effect on their prestige.

Conclusions

The institutional norms and the pressures from external audiences affect the process of writing opinions. The opinions of the Justices are attempts to justify their opinions and to legitimate their actions and commitment to the rule of law. The art of legal reasoning may differ between the Justices, but each Justice face similar concerns about prestige and legitimacy of their actions.

Regardless of their reasoning, in any particular case, the Justices on the United States Supreme Court interact with a larger legal community. The decision to allow both parties to submit briefs for rehearing in *Kennedy v. Louisiana* (2008) following the discovery of a factual error in the majority opinion in the case, suggests that the Justices are sensitive to the criticism from legal scholars, and other audiences generally (Baum 2006). In 2005, Justices Steven Breyer and Antonin Scalia participated in a televised forum addressing the efficacy of the use of citing foreign law. These efforts at self-presentation, individually or collectively, suggest that external actors influence the actions of the Justices.

This interaction between judges and the larger legal community has led to an increasingly dynamic process of crafting judicial opinions (Domnarski 1996; Maltzman et al. 2000). Instead of law coming from the views of a single Justice, legal principles are increasingly created through a collaborative process, where judges turn to each other, to academics, and other audiences in articulating what the law means (or should mean). This process ensures that judges remain sensitive to the political and legal environment in which they operate. This dynamic process also suggests that individual legislators possess informal means of signaling their opinion of the court about the approach toward law they prefer without the formal passage of legislation.

In the case of citing foreign authorities, the Justices face two competing pressures. On one hand, Justices across the world as courts with constitutional review powers regularly cite decisions from foreign courts in their judgments (Manfrini 1990; Smithey 2001). While the interpretative worth of these citations is debated in the law reviews, most scholars support the enterprise of comparative law. At the same time, the Justices face profound pressure from Congress that the use of foreign law is not acceptable for the process of interpreting the Constitution. While each Justice places different weight on external sources, it should be expected that judges refrain from citing foreign jurisprudence when legislators or other actors are strongly opposed to the practice.

Chapter Three: Foreign Law: A Controversy Among the Justices and Among Members of Congress

The Supreme Court of the United States, in my view, is seriously drifting from its principles. We have had members of that court, more than one, start talking about European law as they analyze legal matters. They have forgotten the American Constitution is a contract between the American people and their Government. It empowers our Government to carry on certain powers and not to do others and retain to the democratic process other actions.

- Senator Jeff Sessions, speaking on the Senate Floor about the proposed Federal Marriage Amendment (July 12, 2004).

Ideas have no boundaries. Ideas are what set our creative juices flowing. They permit us to think. And to suggest to anyone that you can outlaw the use of foreign or international law is a sentiment that's based on a fundamental misunderstanding. What you would be asking American judges to do is to close their minds to good ideas, to some good ideas. There are some ideas we may disagree with, for any number of reasons. But ideas are ideas. And whatever their source, whether they come from foreign law, or international law, or a trial judge in Alabama, or a circuit court in California, or any other place, if the idea has validity, if it persuades you, [speaks in Spanish], then you're going to adopt its reasoning. If it doesn't fit, then you won't use it

- Judge Sonia Sotomayor speaking to the ACLU in Puerto Rico (July 9, 2009) (Sotomayor 2009).

The decisions in *Atkins v. Virginia* (2002) and *Lawrence v. Texas* (2003) were not the first cases to cite foreign law, but they sparked an intense debate in Congress and among the Justices about the appropriateness of referencing foreign authorities. Between 2004 and 2010, members of Congress signaled its displeasure through a variety of means including introducing legislation, statements in the Congressional Record, and questions to Supreme Court nominees. These strong, but unofficial signals, served as an attempt to clarify that citing foreign authorities was unacceptable for interpreting the Constitution.

The discussion between the Justices about the appropriateness of foreign law dates to the Marshall Court. In 1808, Chief Justice John Marshall stated that the Supreme Court

must respect decisions of foreign courts (*Rose v. Himely* [1808]). By 1820, Justice Henry Livingston argued in *United States v. Smith* that the Court did not need to look abroad for inspiration. Since the Court's denial of certiorari in *Knight v. Florida* (1999), the rhetorical barbs between the Justices increased about the relevance of citing foreign law in the opinions of the Court. In 2005, Justices Stephen Breyer and Antonin Scalia took the unusual step of participating in a public debate over the appropriate use of foreign law at American University, a debate televised by CSPAN and that received coverage in *The Washington Post* and other papers.

In this chapter I analyze the controversy over the use of foreign law between the Justices and within Congress. Within the marble palace, the Justices frequently disagree about how to interpret the Constitution. While the Court cited foreign law early in its history, other Justices have responded that only certain types of foreign or international law are applicable to providing meaning to the Constitution. While the debate about whether to cite foreign authorities has relevance in many issue areas, the intensity of the debate is greatest in the Court's death penalty jurisprudence. In this chapter I examine the development in intensity of the use of foreign authorities in death penalty jurisprudence since 1977 and how that debate has expanded into several other issue areas, including gay rights.

In Congress, the debate about the use of foreign authorities began after the Court's decision in *Lawrence v Texas* (2003) and continued through the confirmation hearings of Attorney General Elena Kagan as Associate Justice of the United States in 2010. Members of Congress introduced resolutions prohibiting the Court from citing foreign authorities, and members of the Senate Judiciary Committee asked pointed questions to Supreme Court

nominees about their beliefs about the practice. In this chapter I examine the bills and resolutions introduced in Congress and the associated committee hearing hearings. I also examine the discussion in the Senate about the use of foreign law through the Senate Judiciary Committee's confirmation hearings and the related floor debates about confirmation.

Both the debates with Congress and in the Judiciary are fundamentally about the proper method of interpreting the text of the Constitution. However, the debate is imbued with partisan undertones, as the ire of conservative Republican members of Congress fear that the Justices will turn to foreign law to enact social values that they perceive are outside American culture. The Justices responded to the criticism by becoming more public in their defense of the Court generally and their use of foreign authorities more specifically. Thus, the rhetoric in Congress is a new spin on the "countermajoritarian difficulty" and the proper role of the Justice in a democracy.

Foreign Law in the Court

William Blackstone argued that the reliance on precedent would enhance the credibility of the court and ensure the stability of the law (Barnhart 2006). However, jurists have always utilized all of the arts and sciences to understand and apply human behavior (including philosophy, history, literature, psychology, psychiatry, economics, political science, sociology, anthropology and religion) (Faigman 1989). In the twenty-first century, the United States Supreme Court regularly cites non-traditional authorities in their opinions (Hasko 2002; Corley et al. 2005).⁶³ Unlike precedent, jurists, lawmakers, and legal

⁶³ Also see Chapter 5.

scholars have polarized views of applicability of social science and foreign authorities to the law.⁶⁴

In practice, the doctrine of *stare decisis* is never as strong as commonly imagined (Spaeth and Segal 1999). During John Roberts' confirmation hearings as Chief Justice of the United States, Roberts described precedent as a starting place and afforded deference, not obedience (Sinclair 2007). Jurists frequently cite precedent that is favorable to their positions cloaking their opinions in a rich and unbroken line of constitutional law.⁶⁵ In a similar fashion, scholars argue that the uses of other forms of authorities are choices, not requirements. "Courts cite the result of psychological research when they believe it will enhance the elegance of their opinions but empiricism is readily discarded when more traditional and legally acceptable bases for decision making are available" (Bershoff 1986, 156). Even reliance on English common law is not a rigid requirement for the Justices. As early as 1829, the Court began to break away from the English common law tradition.⁶⁶ By 1934, the Court ruled there was no general federal common law in the United States.

For the Justices on the Supreme Court, the question, then, is not if foreign laws and foreign judgments are appropriate to use in a decision, but when they might be relevant. In *Abbott v. Abbott* (2010), Justice Anthony Kennedy, for the Court, and Justice John Paul Stevens, in dissent, debated the appropriateness of and utility of citing foreign judgments.⁶⁷

⁶⁴ See Chapter 2. The rise and fall of social science data in the Court was described by Donald Bershoff (1986).

⁶⁵ *Parents Involved in Community Schools v. Seattle School District* (2007) and *Meredith v. Jefferson County Board of Education* (2007).

⁶⁶ Justice Joseph Story, speaking for the Court, argued that the common law in the United States only included only certain portions of the English common law that were "applicable to their situation" (*Van Ness v. Pacard* [1829] at 145).

⁶⁷ What is interesting in the case in combination with *Olympic Airways v. Husain* (2004) is that Justice Scalia and Justice Clarence Thomas were on opposing sides in both cases. This

The doctrine for giving “considerable weight” to case law other signatory nations of a treaty originated from a decision of the 2nd Circuit in 1978 and adopted by the Supreme Court in 1985.⁶⁸ In *Olympic Airways v. Husain* (2004), the majority stated in a footnote that the Court did not need to follow foreign judgments when there were “substantial factual distinctions” between cases.⁶⁹

In *Abbott*, the Court determined that a *ne exeat* right granted to a parent by Chilean Supreme Court was an enforceable “right of custody” under the Hague Convention on the Civil Aspects of International Child Abduction (Zuber Law 2010). Justice Kennedy argued that the doctrine of “considerable weight” is important for “uniform international interpretation” of treaties and conventions. Kennedy then stated that an international consensus on *ne exeat* rights was emerging. He then used the court decisions in England, Australia, Austria, South Africa, Germany, Canada and France to provide evidence of the emerging uniformity across nations. This desire for consensus suggests that, to Justice Kennedy at least, that the United States should not stand apart from other nations when there is a universal understanding of treaty provisions.

In contrast, Justice Stevens, in an opinion signed by Justices Clarence Thomas and Breyer, argued that the Court “should not substitute the judgment of other courts for [its] own.” Stevens made three arguments why the decisions of foreign courts were not applicable in this case. First, he cited favorably a passage from *Beard v. Greene* (1998) that

suggests a disagreement in interpretive philosophy, with Scalia more willing to give considerable weight to “sister signatories” or foreign nations (*Air France v. Saks*, 470 U.S. 392, 404 [1985]).

⁶⁸ *Benjamins v. British European Airways*, 572 F.2d 913, 919 (CA2 1978), cert. denied, 439 U.S. 1114 (1979); *Air France v. Saks*, 470 U.S. 392 (1985).

⁶⁹ *Olympic Airways v. Husain*. 540 U.S. 644, n9 (2004). In dissent, Justice Scalia argued, “Today’s decision stands out for its failure to give any serious consideration to how the courts of our treaty partners have resolved the legal issues before us” (at 658).

stated the procedural rules of each county govern in the absence of a “clear and express statement to the contrary.” Second, Stevens argued the cases the majority referred to were in different factual situations and not useful to the Court.⁷⁰ Finally, Stevens argued that there was not a “uniform international interpretation” (Slip op. 25). While *Abbott* involved interpretation of a treaty, where the Justices are more inclined to cite the decisions of a foreign court, the reasoning for and against using international precedents is similar in deciding statutory or constitutional cases.

The discussion in *Abbott* involved the least controversial use of foreign law. The case hinged on when the Court should provide comity to the decisions of foreign tribunals. The foreign jurisprudence was not used to interpret the meaning of the Constitution or American statutes. Using foreign authorities to provide insight or guidance into constitutional law is more problematic. Many Justices believe that citing foreign law, in any fashion, is inappropriate for interpreting the Constitution. For nearly a twenty-year period, from 1987 to 2005, the Justices spilled lots of ink debating the appropriateness of citing foreign law. Most of the Justices participated in this debate, either in their written opinions for the Court, in law reviews, or in televised speeches.

Death Penalty Jurisprudence

The Court’s discussion of foreign law in its death penalty jurisprudence dates back to its decision in *Wilkinson v. Utah* (1878). Justice Nathan Clifford referred to Blackstone’s *Commentaries*, *Archbold’s Treatise*, *Chitty’s Treatise on Criminal Law*, and Hale’s *History of the Pleas of the Crown*, in arguing that the courts in England, and the laws of England, allow for “ignominious or more painful” methods in the case of high treason or sentences of death

⁷⁰ Referencing *Olympic Airways v. Husain*. 540 U.S. 644 (2004).

(99 U.S. 130, 135). Although not a death penalty case, Chief Justice Earl Warren argued in *Trop v. Dulles* (1958), that the Eighth Amendment to the Constitution must be interpreted through the “evolving standards of decency.”⁷¹ In his opinion, Warren pointed to the “virtual unanimity” of “civilized nations” to not revoke citizenship status for desertion (356 U.S. 86, 102). In *Atkins v. Virginia* (2002), and later in *Roper v. Simmons* (2005), the Court considered the “evolving standards of decency” through the consideration of world opinion through the death penalty. While at no point did the Court’s majority say that foreign or international law controls the meaning of the Eighth Amendment, in *Roper*, the Court said that international law as instructive to its meaning.⁷²

The debate about the appropriateness of considering world opinion in Eighth Amendment jurisprudence began as dueling footnotes before becoming a significant public debate. In 1977, Justice Byron White issued a plurality opinion for the Court in *Corker v. Georgia* declaring that the punishment for rape of a woman could not be the death penalty (Winick 2009). In his opinion, he made two references to international law and jurisprudence. In one footnote, White discussed that the legislative decisions in most countries do not support Georgia’s proposition that the punishment of death was indispensable to their criminal justice system.⁷³ In another footnote, White related his support for the relevance of using foreign law to understand the meaning of the Eighth

⁷¹ The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. (356 U.S. 86, 101).

⁷² The cases in this section are illustrative examples of how the Justices discussed the use of foreign law and jurisprudence in the meaning of “cruel and unusual punishment,” a concept discussed in *Weems v. United States* (1910).

⁷³ *Corker v. Georgia* 433 U.S. 584, 592 n.4 (1977).

Amendment.⁷⁴ In his dissent in *Corker* (1977), Chief Justice Warren Burger did not express any objection to White’s footnote about foreign law, but twice referred to legislation in the States as “*American jurisdictions*” (my emphasis) signaling at least some discomfort with considering foreign laws.⁷⁵

The back and forth nature of the Court’s death penalty jurisprudence during this period was also exhibited in how the Court approached foreign law. In *Thompson v. Oklahoma* (1987), Justice Stevens suggested that the “leading members of the Western European community” and the Soviet Union, ban the execution of individuals under 16 years old (830-831).⁷⁶ In dissent, Justice Scalia suggested in a footnote, that the laws of foreign nations have no relevance to the interpretation of the Constitution (869).

Two years later, Justice Scalia wrote the majority opinion in *Stanford v. Kentucky* (1989). In his opinion, Scalia reiterated his statement in dissent in *Thompson*. “We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici that the sentencing practices of other countries are relevant” (*Stanford v. Kentucky* 492 U.S. 361, 369 n.1 [1989]). Writing in dissent, Justice William Brennan argued, “Our cases recognize that objective indicators of contemporary standards of decency in the form of legislation in other countries is also of

⁷⁴ “In *Trop v. Dulles*, 356 U.S. 86, 102 (1958), the plurality took pains to note the climate of international opinion concerning the acceptability of a particular punishment. It is thus not irrelevant here that, out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue. United Nations, Department of Economic and Social Affairs, Capital Punishment 40, 86 (1968)” *Corker v. Georgia* 433 U.S. 584, 596 n.10 (1977)

⁷⁵ *Corker v. Georgia* 433 U.S. 584, 613, 614 (1977).

⁷⁶ “We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual. See *Trop v. Dulles*, 356 U.S. 86, 102, and n. 35 (1958); *Coker v. Georgia*, 433 U.S. at 596, n. 10; *Enmund v. Florida*, 458 U.S. at 796-797, n. 22” (*Thompson v. Oklahoma* 487 U.S. 815, 830 [1987])

relevance to Eighth Amendment analysis” (389). Brennan then detailed how world opinion was substantially opposed to the execution of minors and that the United States had signed treaties explicitly opposed to the execution of juveniles.

At the turn of the twenty-first century, the debate about the use of foreign law in determining the meaning of the Eighth Amendment continued unabated. However, the rhetorical stakes involved in the debate and prominence of the debate within the opinion increased. *Knight v. Florida* (1999), and its companion case *Moore v. Nebraska* (1999), would have been unremarkable denials of certiorari in the Supreme Court’s death penalty jurisprudence (Epstein, Landis and Posner 2011, 133). Except in these cases, Justice Breyer made the unusual point of dissenting from the denial of certiorari. Breyer began his dissent with a discussion that uncertainty in sentencing leads to unnecessary suffering, and no one can “justify lengthy delays by reference to constitutional tradition.” He then wrote two paragraphs discussing cases from the Privy Council, the Supreme Court of India, the Supreme Court of Zimbabwe and the European Court of Human Rights that supported his views.⁷⁷ He then mentioned that not every court had ruled that a delay in execution violated other human right standards with references to the Supreme Court of Canada and the United Nations Human Rights Commission.⁷⁸ Breyer devoted a paragraph to justifying the use of foreign authorities:

In these cases, the foreign courts I have mentioned have considered roughly

⁷⁷ *Pratt v. Attorney General of Jamaica*, [1994] 2 A. C. 1, 18, 4 All E. R. 769, 773 (P. C. 1993) (en banc); *Sher Singh v. State of Punjab*, A. I. R. 1983 S. C. 465.; *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General*, [1993] 1 Zimb. L. R. 239, 240, 269 (S) (Aug. 4, 1999); and *Soering v. United Kingdom*, 11 Eur. Ct. H. R. (ser. A), pp. 439, 478, ¶111 (1989).

⁷⁸ *Kindler v. Minister of Justice*, [1991] 2 S. C. R. 779, 838 (joint opinion); Views adopted by the United Nations Human Rights Committee, 44th Sess., Mar. 30, 1992, *In re: Barrett v. Jamaica* (Nos. 270/1988 and 271/1988) §8.4.

comparable questions under roughly comparable legal standards. Each court has held or assumed that those standards permit application of the death penalty itself. Consequently, I believe their views are useful even though not binding (997-8).

Breyer did make an explicit attempt to distance his reasoning from the foreign judgments. “Obviously this foreign authority does not bind us,” referencing Justice Scalia’s dissent in *Thompson v. Oklahoma* (1988).

In response, Justice Thomas authored a concurring opinion to the denial of certiorari dismissing Breyer’s claims and his reliance on foreign jurisprudence. Thomas argued, “were there any such support in our own jurisprudence, it would be unnecessary for proponents” to rely on foreign authorities (*Knight v. Florida* 528 U.S. 990 [1999]). Thomas went on to cite Judge Michael Luttig of the United States Court of Appeals for the Fourth Circuit, who described the claims of similarly situated petitioners as making a mockery of the justice system.⁷⁹ In a similar opinion respecting a denial of certiorari in *Foster v. Florida* (2002), Justice Thomas expressed additional displeasure with Justice Breyer’s reliance on foreign law. “In any event, Justice Breyer has only added another foreign court to his list while still failing to ground support for his theory in any decision by an American court” (*Foster v. Florida* 537 U.S. 990 n [2002]).

In *Atkins v. Virginia* (2002) the Court ruled that individuals with intellectual disabilities could not be executed. In his majority opinion, Justice Stevens buried in a footnote a discussion of the development of a national consensus against the execution of mentally retarded offenders, one sentence about world opinion.⁸⁰

⁷⁹ *Turner v. Jabe*, 58 F.3d 924, 933 (CA4 1995) (Luttig, J., concurring).

⁸⁰ “Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. Brief for European Union as *Amicus Curiae* 4” (*Atkins v. Virginia* 536 U.S. 304, 316 n. 21 [2002]).

In their dissents, both Justice Scalia and Chief Justice William Rehnquist aimed squarely at the use of foreign laws to determine the meaning of the Eighth Amendment. After illustrating why there was not a true national consensus about the application of the death penalty, Justice Scalia reserved his most pointed barbs for Stevens' attempt to link national consensus to world opinion.

But the Prize for the Court's Most Feeble Effort to fabricate "national consensus" must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called "world community," and respondents to opinion polls. I agree with the Chief Justice, (dissenting opinion), that the views of professional and religious organizations and the results of opinion polls are irrelevant. Equally irrelevant are the practices of the "world community," whose notions of justice are (thankfully) not always those of our people. "We must never forget that it is a Constitution for the United States of America that we are expounding. ... [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution." (347-348 citations omitted).

In his dissent, Chief Justice Rehnquist stated that he was writing separately just to "call attention to the defects in the Court's decision to place weight on foreign laws" (at 322). In contrast to Justice Scalia, and considering his stated purpose of writing separately, the Chief Justice mildly suggested the Court previously and "explicitly rejected the idea that the sentencing practices of other countries could 'serve to establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people'" (325). Chief Justice Rehnquist then suggested that the search for national consensus cannot, by definition, consider world opinion.

All of this back and forth about the use of foreign law came to a head in *Roper v. Simmons* (2005). Justice Kennedy authored the majority opinion declaring the execution of all juvenile defendants unconstitutional under the Eighth Amendment. While other

majority decisions discussed the appropriateness of looking abroad to understand the meaning of “evolving standards of decency” in contrasting footnotes, Kennedy addressed the issue directly in the main body of the opinion.

Kennedy began his analysis of the use of foreign law with a caveat – interpreting the Constitution remains the province of the Justices of the Supreme Court. From there, he quickly asserted that the Court routinely has cited foreign jurisprudence. “Yet at least from the time of the Court’s decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of “cruel and unusual punishments” (*Roper v. Simmons* 543 U.S. 551, 575 [2005]). After discussing the history of using foreign law to interpret the Eighth Amendment, Kennedy began describing the state of international and foreign law.

Kennedy devoted a paragraph to the United Nations Convention on the Rights of the Child, noting that the United States and Somalia were the only two nations that had not signed the treaty (*Roper v. Simmons* at 576), but the United States ratified other treaties containing prohibitions against the execution of juveniles.⁸¹ Kennedy then examined the laws of foreign nations, concluding “it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty” (*Roper v. Simmons* at

⁸¹ Kennedy refers to the International Convention on Civil and Political Rights (Art. 6(5), 999 U. N. T. S., at 175). However, the U.S. noted a reservation to that specific provision about the execution of juvenile offenders.

It is not within the scope of this dissertation to differentiate between Kennedy’s use of foreign law was for *constitutional interpretation* or whether the citation of foreign law was necessary to understand the *legal obligations* of the United States under various treaties. The Justices are able to reference the precedents that they deem are the most applicable to a particular case (Spaeth and Segal 1999) and the Justices are similarly able to determine which, if any, treaty obligations are relevant to a particular case. While most critics of the use of foreign law agree that the Court should cite treaties that the United States ratified, the citation of treaties, as well as the citation of foreign law, is dependent on the desire of the Justices on the Supreme Court.

577). After an examination of the evolution of the death penalty in the United Kingdom, Kennedy concluded that world opinion supported the conclusion of the Court.

Before concluding his opinion, Kennedy articulated one additional defense of the use of foreign law.

These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom (578).

This wholehearted defense of the use of foreign law suggests that the Justices' fidelity to the Constitution should not be threatened by comparative jurisprudence and may be strengthened by the comparative endeavor.

Justice Scalia began his dissent by explicitly stating that the opinion made a "mockery" of the intent of the framers (*Roper v. Simmons* 543 U.S. 551, 608 [2005]). To Scalia, the framers saw little risk in entrusting the Justices with the power to nullify acts of legislators. However, the dual acts of using world opinion to interpret the Constitution and overturning precedent upset the balance carefully created by the framers. Instead, Scalia claims that the Court "proclaims itself sole arbiter of our Nation's moral standards — and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures" (608).

After skewering the Court for taking away judgment from the legislature, Scalia focused his ire on Kennedy's justification of using foreign law. "Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage" (622). Scalia

pointedly criticized the majority for using treaties the United States did not sign. From there, he argued that the foreign authorities Kennedy turned to did not even address the issues involved in the particular case before the Court.

Scalia then pivoted to the larger question of whether foreign law would ever be appropriate to interpreting the Constitution.

More fundamentally, however, the basic premise of the Court's argument — that American law should conform to the laws of the rest of the world — ought to be rejected out of hand. In fact the Court itself does not believe it. In many significant respects the laws of most other countries differ from our law — including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself (624).

The dissent then explained the uniqueness of the United States Constitution – the exclusionary rule, the Establishment Clause, and the Court's own abortion jurisprudence.⁸² In order to provide consistency across countries, the “Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry” (627).

Finally, Scalia cut to the heart of Kennedy's defense of foreign law.

I do not believe that approval by "other nations and peoples" should buttress our commitment to American principles any more than (what should logically follow) disapproval by "other nations and peoples" should weaken that commitment... What these foreign sources "affirm," rather than repudiate, is the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America. The Court's parting attempt to downplay the significance of its extensive discussion of foreign law is

⁸² “And let us not forget the Court's abortion jurisprudence, which makes us one of only six countries that allow abortion on demand until the point of viability” (*Roper v. Simmons* 543 U.S. 551, 625 [2005]).

unconvincing. "Acknowledgment" of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court's judgment* — which is surely what it parades as today (628) (italics in original).

This final shot at the use of foreign law encapsulates the entire debate over the utility of citing foreign law by the Supreme Court. First, the use of “cherry-picked” foreign authorities exposes the moral and policy views of the Justices. Second, judicial shout-outs, informational citations, or even routine acknowledgement of foreign sources of law that citations are not “free,” or free from influence beyond the intent of the Justice’s. Instead, the references the Justices use in their opinions have meaning in supporting the judgment and affect the future development of the law. To Scalia, the Justices cannot have their cake and eat it too – acknowledge foreign authorities and subsequently downplay their importance.

Roper served as the rhetorical high point of the debate within the Court over the use of foreign law, but the debate continued throughout the remainder of the decade. The Court decided eight more cases involving the death penalty in one fashion or another by the end of the October 2009 term of the Court.⁸³ In seven of these cases, the majority opinion for the Court did not include any references to a decision made by a foreign or international court or tribunal or any reference to a foreign or international law. The only case where the majority opinion did reference the decisions made by foreign courts and international law was *Medellin v. Texas* (2008).

In *Medellin*, the Court grappled with the issue of the Court’s relationship with the International Court of Justice (ICJ). The ICJ ruled that José Medillin’s had the right under the Vienna Convention to notify the Mexican consulate of his arrest. In *Medellin*, the majority of

⁸³ *Oregon v. Guzick* (2006), *Hill v. McDonough* (2006), *Kansas v. March* (2006), *House v. Bell* (2006), *Medellin v. Texas* (2008), *Baez v. Rees* (2008), *Kennedy v. Louisiana* (2008), and *Harbison v. Bell* (2009).

the Court ruled that the decisions of the ICJ are not binding on the United States Federal Courts because treaties are not self-executing.⁸⁴ In his opinion for the Court, Chief Justice Roberts referred to nine decisions of the ICJ, and one decision made by the Tangier, Court of Appeals (Morocco) and one case by the Tribunal Civil, Brussels (Belgium). In dissent, Justice Breyer compared the Supremacy Clause in the United States with the position of treaties in England and the Netherlands. Neither the majority opinion, nor Justice Stevens' concurrence asserted that Breyer's comparisons were inappropriate for interpreting the Constitution.

The Supreme Court's reference to decisions made by foreign and international courts in *Medellin* is not surprising, since the role of the ICJ was the question directly confronting the Court and the case did not directly address the meaning of the Eighth Amendment. In contrast, the Court's decision about the application of the death penalty went to the core of the meaning of the Eighth Amendment.

In *Kennedy v. Louisiana* (2008), the Court was asked whether the death penalty was an acceptable form of punishment for crimes that did not lead to the death of the victim. In section IV of the case, discussing the "evolving standards of decency," Justice Kennedy did not refer to or reference and foreign or international law or judgment opposed to applying the death penalty for the rape of a child. Instead, Kennedy's opinion for the Court discusses

⁸⁴ See discussion in note 66 about the Justices use of treaty provisions in the decisions of the Court. One of the questions presented in *Medellin* was whether "the Constitution require[s] state courts to honor the treaty obligation of the U.S. by enforcing a decision of the International Court of Justice." This question turned into a constitutional argument about when treaties come into operation – whether treaties are self-executing or require an affirmative act of Congress. In this particular case, it was necessary to cite treaty provisions and decisions of international courts as part of the background of the case, but other citations to foreign laws and other treaties were choices made by the Justices as relevant to the debate about the meaning of implementing statutes of a treaty.

whether the punishment is proportional to the crime and whether the sentence would deter other criminals, concluding the “death penalty is not a proportional punishment for the rape of a child.”

Justice Kennedy found ample support for the Court’s decision using existing Supreme Court precedent, acts of state legislatures, and social science evidence. His discussion of the meaning of the Eighth Amendment began with connecting the Court’s decision in *Atkins* with the Court’s opinion in *Weems v. United States* (1910), describing how punishment must be proportionate to the crime. He then wove a tale of an unbroken string of Eighth Amendment jurisprudence that never departed from the core principle in *Weems*. Kennedy subsequently rejected the argument that state legislatures were consistently moving the opposite way on the use of the death penalty in the case of the rape of a child, or that there was no national consensus. Finally, Justice Kennedy discussed the problems with the reliability of child witnesses and the problems with underreporting of rape using psychological studies analyzed in the *Cornell Law Review*, *Child Maltreatment*, and three articles from *Child Abuse and Neglect*.⁸⁵ While Kennedy had opportunities to engage in a discussion of relevant international treaties and statutes prohibiting the death penalty except for the “most serious crimes,” he refrained.⁸⁶

Lawrence v. Texas

⁸⁵ The mission of *Child Maltreatment*, a journal published quarterly, describes itself as “foster professional excellence in the field of child abuse and neglect by reporting current and at-issue scientific information and technical innovations in a form immediately useful to practitioners and researchers from mental health, child protection, law, law enforcement, medicine, nursing, and allied disciplines.” *Child Abuse and Neglect*, published monthly “provides an international, multidisciplinary forum on all aspects of child abuse and neglect, with special emphasis on prevention and treatment.”

⁸⁶ Article III of the International Covenant on Civil and Political Rights.

The decision in *Lawrence* did not carry the same rhetorical punch as *Roper v. Simmons* (2005), but served to ignite the firestorm in Congress and in the public sphere. In the process of overruling *Bowers v. Hardwick* (1986), Justice Kennedy cited four decisions of the European Court of Human Rights (ECtHR). Kennedy used the decisions from the ECtHR to reject the notion that the Court's reasoning *Bowers* that prohibition against sodomy had "ancient roots" (478 U.S. 186, 192 [1986]). This portion of Kennedy's opinion rejecting the rationale in *Bowers* parallels the Court's rejection of the rationale of *Plessy v. Ferguson* (1896) in *Brown v. Board of Education* (1954).⁸⁷

The reaction to *Lawrence* and *Brown's* reasoning was similar. Both decisions were criticized for their methodologies upending traditional constitutional and common law foundations. Unlike the decision in *Brown*, the dissenting Justices took Kennedy to task for considering foreign law in the majority opinion. First Justice Scalia argues that Kennedy does not explain the criticisms leveled at *Bowers* in failing to provide justifications for departing from the principle of *stare decisis*. He then argues that the majority's rationale for looking abroad is misleading, since the majority *Bowers* never claimed to rely on values shared with "a wider civilization" (598). From there, Scalia posited, "the Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta" (598). In the next breath, Scalia described the practice of referencing foreign authorities as "Dangerous dicta" and quoted Justice Thomas' opinion in *Foster v. Florida* (2002): "this Court... should not impose foreign

⁸⁷ Compare "there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers*" (*Lawrence v. Texas* [2003] at 567-8) with "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected" (*Brown v. Board of Education* [1954] at 494-5).

moods, fads, or fashions on Americans” (598).

However, later in the opinion, Justice Scalia cited a decision of the Ontario (Canada) Court of Appeals as evidence of what he considered the true impact of the decision. After the decision in *Halpern v. Canada* (2003), the province became the first jurisdiction in North America to provide for marriage equality (Cohen 2003). This decision in *Halpern*, published only fifteen days before the decision in *Lawrence*, indicated that Justice Scalia, at least, follows legal developments abroad, despite the dangers inherent in their use.

Other Actions of the Justices

The opinions of the Court are not the only method for the Justices to express their views about the appropriateness of foreign law. As early as 1994, the Justices began expressing the views that a comparative approach to constitutional interpretation was appropriate in law review articles and public addresses. The most visible of these exchanges was the 2005 debate at American University between Justices Breyer and Scalia and broadcast on CSPAN.

Justice Harry Blackmun (1994) and Justice Sandra Day O'Connor (1997) asserted that judges should pay attention to developments in international law. At times, foreign law could even “constitute persuasive authority in American courts” (O'Connor 2002, 330). However, at the same time, O'Connor argued that courts should never lose their domestic character. Chief Justice Rehnquist similarly expressed measured views toward the use of foreign authorities. In a 1989 speech to a symposium on Germany's Basic Law, Rehnquist proposed that American jurists could learn from other nations. However his dissent in

Atkins v. Virginia (2002), suggested that his sympathies toward learning from foreign countries should not extend to their use by the Court.

Other Justices on the Supreme Court took a more supportive approach toward the use of foreign law. Justice Blackmun advocated that international law informs the interpretation of the Constitution (1994). After returning from a judicial conference, Justice Breyer (2000) argued the legal environment in Europe is similar to that in the United States.

After all, the nations we visited, like our own, attach great importance to the rule of law, representative democracy, the protection of basic human liberty, the division of power to avoid its accretion in too few hands, and equality in the sense of requiring some justification for governmentally-imposed distinctions. And the nations we visited, like our own, have come to believe that independent judicial systems can help secure these basic values for their citizens. That being so, we can learn from their structural efforts, just as they may learn from ours (Breyer 2000, 1060).

Justice Ruth Bader Ginsburg (2004) agreed that judges could learn from a comparative method, especially in the area of extraterritorial application of fundamental rights.

Beyond learning from other courts, Ginsburg argued that foreign law is not authoritative, but ornamental. The Court does not defer to foreign judgments, but uses material from abroad to shape the Justices' own views. In speaking at a symposium at the University of Hawai'i in 2004, Ginsburg stated:

So let me assure you that we don't attach authoritative significance to foreign decisions or decrease our own responsibility. But we do seek the best information we can get. We look abroad, as we look to the law professors and their commentaries to enlighten us (Ginsburg 2004, 336).

For Ginsburg, enlightenment can come from all across the globe, as jurists engage "in measuring ordinary laws and executive actions against charters securing basic rights" (Ginsburg 2005). This sentiment was repeated in a 2009 speech at Ohio State University

(Ginsburg 2009).

In contrast, Justice Scalia grew more outspoken in his opposition to the use of contemporary foreign and international law. In 1995, at a symposium for the Conference of the Supreme Court of the Americas, Scalia argued “international law has a place in our courts; but it is not a privileged place (Scalia 1996, 1119). When there is conflict between norms, the Court must apply national law instead of international law. While the Court is responsible for upholding ratified treaties and other instances of customary international law, human rights norms exist outside of the customary law of nations (Scalia 1996). In 2004, Scalia refined his argument stating, modern foreign legal materials can never be relevant to an interpretation of the United States Constitution, alluding to his opinion critical of using foreign legal material in *Printz v. United States* (1997) (Scalia 2004).⁸⁸

In January 2005, Justices Breyer and Scalia participated in a debate at American University and broadcast on CSPAN about the appropriateness of citing foreign law. The debate marked a rare on-camera appearance by Justice Scalia and received front-page newspaper coverage from *The Washington Post* (Lane 2005). The debate was also featured in segments on Fox News and MSNBC, coverage in *USA Today*, and an editorial in *The Pittsburgh Post-Gazette*.⁸⁹

In the debate, Justice Scalia began by stating that Justices who use comparative law in interpreting the Constitution want America to follow legal developments in other countries only when it is convenient. Scalia posited that the Court was willing to refer to

⁸⁸ “We think such comparative analysis inappropriate to the task of interpreting a constitution.” *Printz v. United States* 521 U.S. 898, 921 (1997).

⁸⁹ “High Court Justices Hold Rare Debate.” (*USA Today*. January 14, 2005). “Class of the Titans: A Lecture By Justices Scalia and Breyer is a Learning Experience, Not Just About Their Competing Views on Foreign Law.” (*The Pittsburgh Post-Gazette*. January 17, 2005).

foreign authorities in *Lawrence* when foreign laws are in congruence with the direction of the Court, but not in cases involving abortion or the exclusionary rule where U.S. law is contrary to foreign jurisprudence. He then questioned the fundamental justification for the use of foreign authorities:

What's going on here? Do you want it to be authoritative? I doubt whether anybody would say, "Yes, we want to be governed by the views of foreigners." Well if you don't want it to be authoritative, then what is the criterion for citing it not? That it agrees with you? I don't know any other criterion to bring forward (Transcript 2005).⁹⁰

Ultimately, Justice Scalia stated that his position is fixed and could not be converted.

Justice Breyer took a different approach, arguing that citations to foreign authorities are helpful and informative. His introduction began by relating a story he was telling to a member of Congress:

[F]irst, of course, foreign law doesn't bind us, constitutional law. Of course not. But these are human beings, more and more, called judges, who are human beings despite concern about that matter -- (laughter) -- human beings, called judges, who have problems that often, more and more, are similar to our own. They're dealing with this certain texts, texts that more and more protect basic human rights. Their societies more and more have become democratic, and they're faced not with things that should be obvious -- should we stop torture or whatever -- they're faced with some of the really difficult ones where there's a lot to be said on both sides. Hard to decide.

I said, "If here I have a human being called a judge in a different country dealing with a similar problem, why don't I read what he says if it's similar enough? Maybe I'll learn something." To which the congressman said, "Fine. Read it. Just don't cite it." (Laughter.) I thought, "All right" (Transcript 2005).

For Breyer, the controversy over the use of foreign law is overblown. First, opinions

⁹⁰ All references to the 2005 debate at American University are contained in the transcript of the proceedings available at <http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0>.

“should be as transparent as possible. And for reasons of transparency, if I thought it was helpful I might put it in.” Second, he asserted that other countries cite the United States Supreme Court on a regular basis without controversy. A little show of support or recognition to judges in other countries does not impact his fidelity to the Constitution.

While the debate, both between the Justices in the Court and in their extrajudicial writings and speeches, attempts to articulate a legitimate method for constitutional interpretation; their efforts are saturated with the Justices’ policy and moral ideology. In the 2005 debate, Justice Scalia argued:

The standards of decency of American society -- not the standards of decency of the world, not the standards of decency of other countries that don't have our background, that don't have our culture, that don't have our moral views.... if you're looking for the evolving standards of decency of American society, why would you look to France (Transcript 2005)?

Justice Scalia did not want the Justices to become the moral arbiter for the United States, and prefers legislators to have that responsibility. While his dismissal of the “evolving standards of decency” doctrine suggested a limited role of the Justices in the United States, it is dismissive of the moral and symbolic role the Court plays in American society. Thus, the debate about the appropriateness of citing foreign authorities serves as a proxy for larger political and moral debates and the Justices are willing participants.

The back and forth nature of the appropriateness of citing foreign law indicates that the Justices care about the legitimacy of the Court and their collective presentation beyond the marble walls. What began in the late 1980s as dueling footnotes became a very public debate about how the Court should interpret the Constitution. This debate foreshadowed debates in Congress and in the law reviews. Justice Thomas’ decision to respond the Justice

Breyer's dissent from granting certiorari in *Knight v. Florida* (1999) had the effect of taking a routine and academic difference in constitutional interpretation and turning it into a very public dialogue. No longer could the rest of the Justices sit in silence as two colleagues sparred over a minor footnote, and most of the Justices decided to wade into the controversy, further elevating the stakes and significance of comparative methodology. After the pair of cases overturning precedent in *Lawrence* and *Atkins*, it did not take long for members of Congress to enter the fray and exploit the controversy for political gain at the expense of the Court.

Foreign Law in Congress

When Judge John Roberts appeared before the Senate Judiciary Committee in September 2005 as President George Bush's nominee as Chief Justice of the United States, he likely expected that the members of the Committee would ask questions about the use of foreign law by the Justices. The questions raised at confirmation hearings are "quite predictable," tracking Supreme Court precedent and public opinion (Collins and Ringhand 2011, 32; Guliuzza et al. 1994). By the time of Roberts' confirmation hearings, the question about the appropriateness of foreign law had been in the American conscious since Justice Stephen Breyer's dissent in the denial of certiorari in *Knight v. Florida* (1999) (Greenhouse 1999; Biskupic 1999). In legal journals, the suitability of citing foreign authorities by the Court started in earnest in 1994 but did not pick up in intensity until the turn of the century (Clark 1994; Levasseur 1994).⁹¹ The salience of the use of foreign law increased in 2003, after the Supreme Court's decisions in *Atkins v. Virginia* (2002) and *Lawrence v.*

⁹¹ Also see Chapter 4.

Kennedy (2003). Thus, the question by Arizona Senator Jon Kyl during Judge Roberts' confirmation hearing, "what, if anything, is the proper role of foreign law in U.S. Supreme Court decisions?" did not emerge from thin air.

Congress has several formal and informal powers to sanction or empower the Court (Gunther 1984; Lovell 2003; Smith 2006; Chutkow 2008). Confirmation hearings are one way in which members of Congress can exert both formal and informal controls over the federal judiciary. Formally, Senators can confirm or reject a presidential nominee. Informally, Senators can influence the prospective behavior of the nominees through extracting promises or affecting their attitudes by sensitizing the nominee to likely Congressional reactions (Gerhardt 2005). Members of the Judiciary Committee often initiate exchanges with the nominee about their constitutional philosophy (Gulizza et al. 1994), or more specifically, their constitutional attitudes toward civil rights and judicial philosophy (Ringhand and Collins 2011).⁹²

Another method for sanctioning (or possibly empowering) the Court is through Legislative overrides (Eskridge 1991). However, Congress is not always clear in how (or if) it overrides a federal judicial decision (Widiss 2009). This threat of hostile Congressional action might mitigate the Court's rulings or shape the Court's agenda (Hansford and Demore 2000; Bergara et al. 2003; Harvey and Friedman 2009. but see Sala and Spriggs 2004; Owen 2010). If the Justices were to take into account congressional preferences in their decision-making, political change (Gely and Spiller 1990) or new legislative signals, either with or without formal votes, would impact the Justice's behavior. These threats of sanction, expressed during the Senate Judiciary Committee hearings or by the behavior on

⁹² Despite the prevailing belief that Supreme Court nominees evade answering, it appears that judicial candor depends on the type of question (Farganis and Wedeking 2011).

the part of members of Congress, impact the relationship between the Justices and Congress and may be expressed through the vote on the merits, the strength of the opinion, or the type of judicial reasoning (Owen 2010).

Legislators have many motivations for their actions, but their primary motivation is to win reelection. Introducing legislation and delivering floor speeches are an easy method for members of Congress to take positions and to claim credit for their constituents (Mayhew 1974). Since the Justices are sensitive to public reaction, the Justices are likely to interpret the attacks upon the Court by members of Congress as a lack of public confidence in the Court (Baum 2006; Clark 2010). At least one memorandum circulated by Chief Justice Warren Burger in 1975 showed an awareness of pending legislation in Congress (Clark 2010).⁹³ In 2006, Justice Ginsburg stated that the Justices follow attacks upon the Court's independence (Ginsburg 2006). Thus, even though the chance of legislation passing is remote, the Justices follow the actions of Congress as a measure of popular support for the Court.

The specific debate about the appropriate methodology of interpreting the Constitution is not a new phenomenon. In the late 1950s, the Court faced criticism from Congress regarding their use of social science data. In 1959, Senator Herman Talmadge of Georgia denounced the Supreme Court's practice of citing modern authorities, specifically Footnote 11 on the Senate floor. The Court "substituted modern authority for the Constitution, intangible considerations for legal precedent, and we-can-not-turn-back-the-clock doctrine for intent of the framers" (Talmadge 1959, 5420). He then suggested, "it is

⁹³ Chief Justice Burger does not mention the bill number in his memorandum published in Clark (2010, 78), but neither of the possible bills he might have referred to even received a hearing (S J. Res 14, S J. Res 16 94th Congress [1975]).

an elementary rule of law that a court may not consider treatises in a field other than law unless the treatises themselves are the subject of inquiry (Talmadge 1959, 5421). Republican Senator William Jenner of Indiana and Democratic Representative Dale Alford of Arkansas each inserted editorials opposed to the use of social science data by the Court into the Congressional Record (Jenner 1958, 9292; Alford 1959, 18292). During this same period, multiple bills were introduced designed to strip the Court of its jurisdiction on education and other issues (Clark 2010).

While attempts to curb the Court are a tactic used by both Democrats and Republicans, since the 1960s, Republicans introduced a vast majority of the court-curbing bills (Clark 2010). These attacks on the Court are responses to the decisions of the Warren Court and other “liberal” decisions from the Burger and Rehnquist courts (i.e. *Furman v. Georgia* [1972], *Roe v. Wade* [1973], *Lawrence v. Texas* [2003], and *Elk Grove v. Newdow* [2004]). These bills are primarily symbolic, but reinforce the perception of the public’s loss of support of the Court (Baum 2006).⁹⁴ Through these congressional attacks upon the Court, the decisions of the Court become politicized in a way that works to further undermine the legitimacy of the Court among certain audiences (Clark 2010).

⁹⁴ While the introduction of legislation may not be a necessary commitment to the *substance* of a bill, the act of introducing legislation “may serve political and policy goals in and of itself” (Frantzich 1979, 413; Krehbiel 1995). The introduction of Court-curbing legislation may be the only way for members of Congress to express their official displeasure at the outcome of a decision by the Court. In this sense, the introduction of legislation is a way to reassure their constituents that they are doing something against an unpopular decision (among their constituents) even if they believe the legislation has little chance of success (see Schiller 1995).

The Justices are certainly able to distinguish between sincere attacks upon the Court and credit-claiming bills introduced by members of Congress. However as they monitor legislation, the Justices are likely to perceive the introduction of legislation as an attack upon the Court, regardless of the likelihood of success.

Thus in the same way that attack ads in judicial campaigns decrease the legitimacy of state courts, attacks on the Court by members of Congress may decrease the legitimacy of the federal judiciary (Gibson 2008; Clark 2010). Since a motivation of the Justices is to preserve the prestige and legitimacy of the Court, they are likely to be sensitive to criticism from Congress when members of Congress attempt to curb the power of the Court by stripping jurisdiction, changing the composition of the Court, or other efforts that limit the internal processes of the Court (Clark 2010). Bills or resolutions that suggest limits for types of authorities the Justices consult are Court-curbing attacks, and the Justices have incentive to track the actions of Congress.

Formal Attempts to Curb the Court's use of Foreign Law

After the Court's decision in *Lawrence*, members of Congress jumped on Justice Scalia's argument that the citation of foreign law was "dangerous" for the country. Members of Congress connected the use of foreign jurisprudence to their opposition to the Court's rulings in *Lawrence* and death penalty jurisprudence, and implied that the use of foreign legal material constituted a breach of "good behavior" on the part of the Justices. Senator Jeff Sessions of Alabama articulated these concerns in a 2004 floor speech:

The Supreme Court of the United States, in my view, is seriously drifting from its principles. We have had members of that court, more than one, start talking about European law as they analyze legal matters. They have forgotten the American Constitution is a contract between the American people and their Government. It empowers our Government to carry on certain powers and not to do others and retain to the democratic process other actions. (Sessions 2004, S7918).

During a three-year stretch following the decision in *Lawrence* (2003-2006), the debate over foreign law swept through the halls of Congress. Members of the House and

Senate introduced multiple resolutions opposed to the citation of foreign jurisprudence as well as legislation that would make the practice of citing foreign laws in the federal judiciary illegal. From 2005-2009, members of both parties in the Senate Judiciary Committee questioned Judges John Roberts, Samuel Alito, and Sonia Sotomayor in their confirmation hearings about their views on citing foreign and international laws. Before *Lawrence*, Congress was silent on the issue. By 2010, the concerns over foreign law had died down, but were not forgotten during the confirmation process for Elena Kagan.

In the immediate aftermath of *Lawrence*, official reaction in Washington was subdued, with most of the outrage coming from conservative activists (Activists 2003; O'Neil 2003). President George W. Bush's administration initial statement to the press reiterated the fact that the federal government did not file a brief in the case (Greenhouse 2003a). Appearing on *ABC News'* "This Week," the Sunday after the decision, Senate Majority Leader Bill Frist stated that he respected the decision (Frist 2003). Most of the immediate focus by Republican congressional leaders was concern that the Court's approval same-sex marriage would quickly follow the decision, not the Court's citation of decisions from the European Court of Human Rights.

The first official mention of the problem members of Congress had about the use of foreign law by the Justices occurred nearly a month after the Court's decision in *Lawrence*. Representative Doug Bereuter of Nebraska went to the floor to insert the July 11th editorial of the *Omaha World Herald* into the Congressional Record. He argued that while he is a supporter of transAtlantic relations, "Supreme Court decisions should be (and, of course, generally are) based on the U.S. Constitution and U.S. legal precedent." He further stated

that Justice Kennedy's decision to cite from the European Court of Human Rights is a "damaging and dangerous precedent" (Bereuter 2003).

In the year following the decision in *Lawrence*, six bills or resolutions were introduced during the 108th Congress expressing criticism of the Court's citation of foreign jurisprudence. Representative Jim Ryun of Kansas introduced the first resolution criticizing the practice, H. Res 446, on November 18, 2003. Eight other Republican members cosponsored the resolution, which stated the Court "should base its decisions on the Constitution and the Laws of the United States, and not on the law of any foreign country or any international law or agreement not made under the authority of the United States." The text of this resolution specifically criticized the Court's use of foreign jurisprudence in *Lawrence* and *Atkins v. Virginia* (2002).

When Congress returned for the 2nd Session of the 108th Congress, several Republican members of the House and Senate introduced legislation designed to protect the Constitution from the Supreme Court. In February 2004, Representative Robert Aderholt of Alabama introduced the Constitution Restoration Act of 2004. This legislation was drafted by former Alabama Chief Justice Ray Moore, in response to the decision of the U.S. District Court in *Glassroth v. Moore* (2003) ordering the removal of the Ten Commandments from the Alabama Supreme Court Building. The primary focus of Aderholt's legislation was to prevent the Supreme Court from hearing religious liberty cases involving state and federal officials, but the legislation also would prevent the Justices from using "upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than the constitutional law and English common law" (H.R.

3799 2004). Senator Richard Shelby introduced a companion bill in the Senate with five cosponsors (S. 2082 2004).⁹⁵

In April, Texas Representative Ron Paul introduced the “American Justice for American Citizens Act” (H.R. 4118) This Act, cosponsored by Colorado Representative Marilyn Musgrave directly targeted the use of foreign laws by the Supreme Court. The legislative findings took direct aim at the use of foreign law generally, and in *Atkins* and *Lawrence* specifically.⁹⁶ The substantive portion of the legislation would prohibit the Justices from employing “the constitution, laws, administrative rules, executive orders, directives, policies, or judicial decisions of any international organization or foreign state, except for the English constitutional and common law or other sources of law relied upon by the Framers of the Constitution of the United States.” In introducing the legislation, Representative Paul quoted from a 2003 speech given by Justice O’Connor stating that she suspected “that with time, we will rely increasingly on international and foreign law in

⁹⁵ Senator Shelby introduced the Constitution Restoration Act of 2004 twice (S. 2082, 2004 and S. 2323, 2004).

⁹⁶ “(4) Departing from fidelity to the original constitutional text, the Federal judiciary has increasingly disregarded the will of the American people, transforming constitutional principles that were originally designed by the people to be permanent into a set of evolving standards subject to change by judicial opinion, and thereby undermining the American people’s right to establish a government according to written constitutional provisions ratified by their elected representatives in constitutional convention.

(5) The Supreme Court of the United States in *Atkins v. Virginia* and *Lawrence v. Texas* found individual ‘constitutional’ rights that are directly contrary to the American common-law tradition when it employed a new technique of interpretation called ‘transjudicialism’: the reliance by American judges upon foreign judicial and other legal sources outside of American constitutional law.

(6) Under this new system of ‘transjudicialism’ or ‘global law’, individual justices of the Supreme Court of the United States have publicly stated they expect American courts to increasingly base their opinions interpreting the Constitution in light of ‘international law’ or ‘transnational law’, thereby amending the Constitution from an expression of ‘We the People of the United States’ to an expression of the will of judges.”

resolving what now appear to be domestic issues” (Paul 2004). He went on to criticize the Justices for short-circuiting the democratic process.

The fourth piece of legislation sponsored in 2004 was a resolution introduced by Representatives Tom Feeney of Florida and Bob Goodlatte of Virginia. Their resolution, introduced on May 17th, the “Reaffirmation of American Independence Resolution,” (H.Res. 568 2004), expressed the sentiment that the “meaning of the laws in the United States should not be based on judgments, laws, or pronouncements of foreign institutions.” While the primary concern expressed by the members of Congress in these pieces of legislation was how to hold the judiciary accountable for its decisions, the rhetoric surrounding the focused on the appropriateness of the Court referencing the judgments and laws of foreign institutions.

Most legislation introduced in the House and Senate does not become law nor receives a congressional hearing. Introducing legislation is often a symbolic action, designed to please the member’s constituents, with little expectation that the bills will pass (Schiller 1995; Clark 2010). In 2004, multiple bills or resolutions in opposition to the use of foreign law received hearings in both chambers. One resolution (H.Res 568) and one bill (H.R. 3799) about the use of foreign law received hearings in the House and a Senate subcommittee held a hearing on S. 2082. While none of the Justices participated in these subcommittee hearings, the message to the Justices in each of the hearings was unmistakable – Republican members of Congress were upset about the Supreme Court’s rulings and that the use of foreign law was unacceptable.⁹⁷

⁹⁷ It is possible that the Justices received a more ambiguous message since none of these resolutions passed. However, the fact that these bills received Congressional hearings and a

The House Judiciary Committee's Subcommittee on the Constitution heard testimony from four legal scholars in its deliberations on H.Res 568, but the forum's intent was to decry judicial activism (Morag-Levine 2006). Representative Feeney railed against the use of foreign material in decisions of the Supreme Court. "With disturbing frequency, [the Justices on the Supreme Court] have simply imported new laws from foreign jurisdictions looking for more agreeable laws or judgments in the approximately 191 recognized countries throughout the world" (U.S. House 2004a, 5). In his prepared statement, Representative Feeney continued his declaration that the American judiciary has no need to refer to materials from foreign jurisdictions. "We are a nation unlike any other and our judges misunderstand our very foundation when they believe that we need to look to the 'international consensus'" (U.S. House 2004a, 59).

Other supporters of the resolution likened the use of foreign references in Supreme Court opinions to the loss of national sovereignty. In introducing the resolution, Representative Goodlatte commented, the utilization of international law in the jurisprudence of the Supreme Court "is an affront to both our national sovereignty and the broader underpinnings of our system of government" (Congressman Bob Goodlatte 2004). Citing Eric Hargan of the Federalist Society, Representative Steve Chabot of Ohio stated,

sizable number of cosponsors indicated that many members of the Republican Party wanted to send a message to the Court about their use of foreign law.

While most bills are not enacted into law, the number of co-sponsors of legislation can be a reliable gauge of popular support for the legislation (Burstein et al. 2007). H. Res 568 had 74 cosponsors in 2004. H.R. 3799 had 103 cosponsors in 2004. This constituted 32% and 45% of the House Republican Caucus respectively. H. Res 97 had 84 cosponsors in 2005 or 36% of the Republican Caucus. H. Res. 372 had 20% of the Republican Caucus sign as cosponsors in 2007 (49 cosponsors). In 2009, only 13% of the Republican Caucus cosponsored H. Res. 473 in the 111th Congress (24 cosponsors). While none of these bills commanded a majority of cosponsors from the House Republican Caucus, the Republican leadership allowed these bills in the 108th and 109th Congress to receive committee hearings, raising the salience of the legislation.

“The use of international sources and cases involving purely domestic concerns is alien to the American legal system and, if unchecked, will produce further erosion of American sovereignty in addition to the mischief already done by these cases” (U.S. House 2004a, 2).⁹⁸

Representative Chabot claimed that for the judiciary to remain legitimate in the American system of government, it should only interpret the Constitution based on its original meaning. “[I]t should be evident that the relevant consensus behind American law is not a world consensus, but rather the consensus of those in the United States on the meaning of the words used in the Constitution and legislation” (U.S. House 2004a, 2). To Chabot, the usage of foreign citations allows the Justices, “in interpreting the law, [to reach] beyond even their own imaginations to the decisions of foreign institutions to justify their decisions” (U.S. House 2004a, 1). George Mason Professor Jeremy Rabkin’s prepared statement to the Subcommittee echoed how the references to foreign citations could unsettle American jurisprudence.

If contrary foreign rulings provide justification for changing American law, then American judges may find many pretexts for abandoning existing precedents and launching in new directions. And the choice will almost always be up to the judges, since foreign courts and foreign standards reflect wide variation (U.S. House 2004a, 13).

The supporters’ critical comments on the usage of foreign citations rested on two points. First, they argued that the legitimacy of the Court depended on the ability of the Justices to justify their decisions based upon previous cases. Second, they believed that the cases where the Court referred to foreign material the foreign law determined the outcome on the merits of the case.

⁹⁸ Eric D. Hargan, “The Sovereignty Implications of Two Recent Supreme Court Decisions,” http://www.fed-soc.org/doclib/20070324_hargensov.pdf. Accessed February 27, 2005.

The allusion to the loss of national sovereignty through the Supreme Court's references to the growing body of foreign jurisprudence served as a pretext for sponsors of the resolution to question the legitimacy of *Lawrence* and the Court's other controversial decisions. The Subcommittee voted to refer the Resolution to the full Committee of the Judiciary where it languished at the end of the legislative session.

A similar story about the use of foreign law occurred in September 2004 in the House Subcommittee on Courts, the Internet, and Intellectual Property. The Subcommittee held hearings on H.R. 3799, but did not advance the legislation to the full Judiciary Committee.⁹⁹ Subcommittee Chair Representative Lamar Smith of Texas introduced the legislation in the hearings as an important oversight over the federal judiciary and a necessary response to "activist judges" (U.S. House 2004b, 8). While most of the hearing was devoted to the questions of whether Congress could strip the jurisdiction of the Supreme Court and the role of religion in society, several of the subcommittee members and panelists discussed the use of foreign jurisprudence. In his testimony, Roy Moore argued that the Justices should not "go to foreign law whatsoever" and that the citation of foreign law should be an impeachable offence (U.S. House 2004b, 57).

The Democrats on these subcommittees did not offer much of a defense of the use of foreign law. Representative Jerrold Nadler of New York described H.Res. 568 as "much ado about nothing" (U.S. House 2004a, 43). In the hearings on H.R. 3799, Representative John Conyers of Michigan simply argued in a prepared statement that the legislation prohibiting foreign law was just another assault on the independence of the judiciary, without

⁹⁹ The Senate version of the legislation received a hearing in the Senate Judiciary Committee Subcommittee on the Constitution, Civil Rights and Property Rights, but did not discuss the use of foreign law (U.S. Senate 2004).

defending the citation practice (U.S. House 2004b, 105). However, in their testimonies, Professor Vicki Jackson and Professor Michael J. Gerhardt did argue that the Justices did not use foreign law as binding precedent (U.S. House, 2004a, 43), and the use of foreign law by the Supreme Court was usually “*de minimus*” and occasionally relevant to constitutional interpretation (U.S. House, 2004b, 85).

While ultimately unsuccessful, this legislation and hearings served as a signal to the Justices that House Republicans, at least, were concerned about the practice of citing foreign law. In the 109th Congress, Representative Aderholt reintroduced the “Constitutional Restoration Act of 2005” with 25 cosponsors (H.R. 1070) and Senator Shelby reintroduced the companion bill in the Senate (S. 520) but neither bill received a hearing. The “Reaffirmation of American Independence Resolution” was reintroduced in the 109th and 110th Congresses by Representative Feeney (H. Res. 97 [2005]; H. Res. 372 [2007]) and in the 111th Congress by Representative Goodlatte (H. Res. 473 [2009]). The resolution did receive a hearing in 2005, but did not in subsequent Congresses. The number of cosponsors of the resolution dropped in each Congress, from 84 in the 109th Congress to 49 in the 110th to 24 in the 111th Congress, suggesting that the concern over the use of foreign law by members of Congress waned, but not forgotten, over the decade.

Confronting Supreme Court Nominees

The hostility of some members of Congress toward the Court’s use of foreign law carried through to the confirmation hearings of Judges Roberts, Samuel Alito and Sonia Sotomayer to the Supreme Court. While most of the hearings of each nominee pivoted around how each nominee understood the meaning of *stare decisis* and the proper role of

the Court in a democracy, Roberts, Alito and Sotomayer faced questions about the appropriateness of referring to foreign law in an opinion of the Supreme Court. By 2010, with the nomination of Solicitor General Kagan to the Court, the concern about the use of foreign law in the Senate had waned as well.

In their opening statements before the Senate Judiciary Committee of the nomination of Roberts as Chief Justice, Senators Sam Brownback, John Conryn, and Jeff Sessions spoke in opposition to the Court's usage of foreign law. Brownback stated that the Court's use of foreign and international law was an example of how the Court strayed from a position of judicial restraint (U.S. Senate, 2005, 47). Senators Conryn and Sessions were more pointed. Sessions argued, that the use of foreign law was arrogant on the part of the Justices (30), while Conryn stated, "On what legitimate basis can the Supreme Court uphold State laws on the death penalty in 1989, then strike them down in 2005, relying not on the written Constitution, which, of course, had not changed, but on foreign laws that no American has voted on, consented to, or may even be aware of" (U.S. Senate 2005, 42).

During direct questioning of Judge Roberts, several Senators were equally pointed in their criticism of the use of foreign law by the Supreme Court. In prefacing a question of the proper role of foreign law, Senator Kyl stated, the Constitution "is an America Constitution, not a European or an African or an Asian one, and its meaning, it seems to me, by definition, cannot be determined by reference to foreign law" (U.S. Senate 2005, 200). Senator Tom Coburn of Oklahoma asked, "My question to you is, relying on foreign precedent and selecting and choosing a foreign precedent to create a bias outside of the laws of this country, is that good behavior" (U.S. Senate 2005, 293)?

In response to these questions Judge Roberts stated that he too was wary of the use of foreign law by the Court, but did not reject the proposition that the Court should not cite foreign laws or judgments of foreign or international courts. Responding to Senator Kyl, Roberts stated, “relying on foreign precedent doesn’t confine judges. It doesn’t limit their discretion the way relying on domestic precedent does. Domestic precedent can confine and shape the discretion of the judges.” Later in his answer, Roberts argued that “looking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them, they’re there. And that actually expands the discretion of the judge. It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent because they’re finding precedent in foreign law, and use that to determine the meaning of the Constitution” (U.S. Senate 2005, 201).

In response to Senator Coburn, Roberts backed away from his earlier statement. “I think it’s fair to say, in the prior opinions, those are not determinative in the sense that the precedent turned entirely on foreign law, so it’s not a question of whether or not you’d be departing from these cases if you decided not to use foreign law (U.S. Senate 2005, 293). Roberts then went on to say that a Justice referencing foreign law would not equate to a violation of good behavior.

On the Senate floor many of the Republican members of the Chamber expressed praise for Roberts’ views on the usage of foreign jurisprudence. Senator Coburn proclaimed that Roberts “passes the bar” on his views about foreign law (Coburn 2005). Senator Mel Martinez of Florida argued that among Roberts’ valuable personality traits, was an “awareness of the dangers of looking to foreign jurisdictions” (Martinez 2005). Senator

George Allen of Virginia was more direct in connecting the use of foreign law to judicial activism.

We will not have others from another country tell us what our laws ought to be. I love his judicious approach that any judge who uses international laws or the laws from other countries to make decisions upon cases in the United States, those judges are trying to accrue to themselves more power than they should have. The powers of Federal judges in this country come from the laws that are passed by the people in the United States. If you start trying to get extraneous laws, that is judicial expansion. He understands the modest and respectful way a judge should handle cases (Allen 2005).

Senators Wayne Allard and Kit Bond also praised Roberts for his views about the use of foreign law. Senator Sessions was more direct about his criticism of the Court's use of foreign jurisprudence singling out Justice Ginsburg for her approach to deciding cases (Sessions 2005). Roberts was confirmed as Chief Justice by a vote of 78-22.

During the Alito hearings the following January, the Senators raised similar comments as the Roberts' hearings. In his opening statement, Senator Brownback warned, the "Court has injected itself into many of the political debates of our day," including "interpreting the Constitution on the basis of foreign and international laws" (U.S. Senate 2006, 47). During the questioning of Judge Alito, Senator Kyl argued, "reliance on foreign law is contrary to our constitutional traditions. It undermines democratic self-government and it is utterly impractical, given the diversity of legal viewpoints worldwide. And I would add that it is needlessly disrespectful of the American people, as seen through the widespread public criticism of the trend" (U.S. Senate 2006, 370). Senator Sessions asked a question about whether any value could be gleaned from the European Court of Human Rights (U.S. Senate 2006, 410), and Senator Coburn repeated his question he asked of Judge Roberts – is the citation of foreign law equated to violating the terms of good behavior (U.S.

Senate 2006, 471).

Judge Alito took a stronger stance against the use of foreign law or foreign jurisprudence by the Supreme Court in his testimony than Chief Justice Roberts. Responding to Senator Kyl, Alito argued that foreign law is not helpful in interpreting the Constitution because, “Our country has been the leader in protecting individual rights (U.S. Senate 2006, 370). In response to Senator Sessions, Alito stated that it might be interesting to see what the ECHR has done in interpreting the European Convention on Human Rights, but not for interpreting the Constitution (U.S. Senate 2006, 410). Finally, Alito pointed out to Senator Coburn, “The Framers did not want Americans to have the rights of people in France or the rights of people in Russia, or any of the other countries on the continent of Europe at the time (U.S. Senate 2006, 471).

In a discussion of the meaning of *Cruzan v. Director* (1990), Senator Patrick Leahy went back and forth with Judge Alito about the role of foreign law in shaping the meaning of the Constitution.

Senator LEAHY. One of those cases where we got something from that foreign law, in this case English common law; is that correct?

Judge ALITO. Well, that’s correct, and I think that our whole legal system is an outgrowth of English common law.

Senator LEAHY. That popped in to my mind because I was thinking of some of the people talking about paying attention to foreign law. Most of our law is based on foreign law (U.S. Senate 2006, 581).

This pushback, while minor, suggested that not every member of the Senate Judiciary Committee held a hostile attitude toward the citation of foreign law or foreign jurisprudence. However, since the claim was not resisted, both Roberts and Alito, and perhaps the entire Court, took away the message that Congress, or at least their ideological allies in Congress, did not support the citation of foreign law or foreign jurisprudence in the

opinions of the Court.

On the Senate floor, many of the same arguments about the dangers of foreign law were made. Senator Allen stated:

We also see judges ignoring the will of the people in a variety of other ways. They struck down some laws in Virginia within the last 2 years because of international standards. Friends, colleagues, we make the laws. We represent the people of this country. It is our Constitution. It is not the U.N. constitution or various conglomerations or what confederations of other countries may think our laws should be. The laws are made by the people of this country (Allen 2006).

Senator Kyl argued that Judge Alito would exercise judicial restraint by not relying on foreign law (Kyl 2006) and Senator Martinez posited that Judge Alito would be faithful to the Constitution, not foreign law (Martinez 2006).

Senator Sessions used part of his speech to again disapprove of Justice Ginsburg's defense of citing foreign jurisprudence.

This is contrary to our American legal system. A judge's duty is to apply the plain meaning of the words, if there is some dispute about it, to look to the legislative history or maybe the background of the bill from an American perspective, not a European perspective.... We have a lot of complaints. People are not happy with rulings of the Court. Many times, those rulings are justified and we are simply unhappy with the result. We are concerned about it. Maybe it is not justified. But I believe the American people understand that this is a dangerous trend by the Court that they would seek to interpret American law by looking to Nigeria and China--red China, last I heard--Yemen, where there are terrorists, and Iran, a pariah to the international community. They are quoting them, discussing what their views of our Constitution are relative to cruel and unusual punishment....

As somebody said in another context, looking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them, they're there. And that actually expands the discretion of the judge. It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent because they're finding precedent in foreign law, and use that to determine the meaning of the Constitution. I think that's a misuse of precedent, not a correct use of precedent (Sessions 2006a).

Sessions' language and criticism of the Court, and Justice Ginsburg specifically, suggest a

level of discomfort greater than his opposition to the ruling on the merits. In his floor speech, Sessions singled out the Court's decision in *Roper v. Simmons* (2005), where he said that over 20% of the legal analysis was of foreign jurisprudence. He also specifically mentioned Ginsburg's dissent in *Grutter v. Bollinger* (2003) where she cited a UN convention as another example of the Justices not being faithful to the Constitution (Sessions 2006a).

In Sessions' closing argument for Alito's confirmation, he accused liberals of wanting "a judge to quote foreign law to reinterpret the words in our statutes and in our Constitution." (Sessions 2006b) None of the Senate Democrats responded to Senator Sessions' accusation nor discussed Alito's thoughts toward the use foreign law during the Senate debate. Alito was confirmed as an Associate Justice of the Supreme Court 58-42 on January 31, 2006.

The 2009 confirmation hearings of Judge Sonia Sotomayor and the 2010 confirmation hearings of Solicitor General Elena Kagan, showed the debate about the use of foreign law had yet to died down. Judge Sotomayor herself fueled the fire by delivering a speech in April 2009 about the use of foreign law. General Kagan received fewer questions about the use of foreign law, but did get questions about her citation of foreign laws in a brief submitted by the federal government. In both cases, Sotomayor and Kagan pushed back against the claim that the citation of foreign jurisprudence was unacceptable by the Supreme Court.

Before Sotomayor's nomination, she gave a speech to the ACLU of Puerto Rico stating her views of the use of foreign and international law. In the speech, she clarified that "we don't use foreign or international law; we consider the ideas that are suggested by

an international court of law.” In her speech she articulated: “But ideas are ideas. ... if the idea has validity, if it persuades you, then you're going to adopt its reasoning” (Sotomayor 2009). Implications of this speech were discussed by in the *Wall Street Journal* (Levy 2009), the *National Review Online* (Whelan 2009), and by the Heritage Foundation (Groves 2009) in the month leading to her confirmation hearings.

During Sotomayor’s confirmation hearings, Senator Sessions, as ranking member of the Committee, began his opposition to the nomination by referring to the Court’s use of foreign law as one method “to push his or her own political or social agenda” (U.S. Senate 2009, 6). In their opening statements, Senators Conryn, Coburn and Senator Kyl each announced their opposition to the use of foreign law. Senator Kyl expressly stated, “laws and practices of foreign nations are simply irrelevant to interpreting the will of the American people as expressed through our Constitution” (U.S. Senate 2009, 23).

Answering questions by Senator Coburn, Judge Sotomayor agreed that Justices should be cautious in using foreign law and that the American legal structure is situated to not use foreign law. However, she explained that the entire debate about the use of foreign law is a misunderstanding of what judges do.

What judges do, and I cited Justice Ginsburg, is educate themselves. They build up a story of knowledge about legal thinking, about approaches that one might consider. But that is just thinking. It’s an academic discussion when you’re talking about thinking about ideas. Then it is how most people think about the citation of foreign law in a decision.

They assume that if there is a citation to foreign law, that is driving the conclusion. In my experience when I have seen other judges cite foreign law, they are not using it to drive the conclusion, they are using just to point something out about a comparison between American law or foreign law. But they are not using it in the sense of compelling a result (U.S. Senate 2009, 349).

This answer was not satisfactory to several Republican Senators, including Senator Coburn

who suggested that the Court was following world opinion in Eighth Amendment and Fourteenth Amendment cases (U.S. Senate 2009, 349).

Time and again, Judge Sotomayer defended her speech about the use of foreign law.

In responding to Senator Sessions, she argued:

Judges use Law Review articles, they use statements by other courts. The New York Court of Appeals, in a recent case, looked to foreign law to address an issue that it was considering, not in terms of a holding for the court, but a way of thinking about it that it would consider.

My point is that I wasn't advocating that it should ever serve as precedent or ever serve as a holding. I was talking about the dialog of ideas and—— (U.S. Senate 2009, 396).

She responded to Senator Conryn that she had not cited foreign jurisprudence in her 17 years on the Court of Appeals (U.S. Senate 2009, 432) and informed the Committee that she would not use foreign law to interpret the Constitution or statutes (U.S. Senate 2009, 442, 460). She reiterated the point that Judges engage in a global discussion of ideas in responding to Senator Conryn.

Senator CORNYN. I appreciate that. You testified earlier today that you would not use foreign law in interpreting the Constitution (463) and statutes. I would like to contrast that statement with an earlier statement that you made back in April, and I quote, "International law and foreign law will be very important in the discussion of how to think about unsettled issues in our legal system. It is my hope that judges everywhere will continue to do this."

Let me repeat the words that you used 3 months ago. You said "very important" and you said "judges everywhere." This suggests to me that you consider the use of foreign law to be broader than you indicated in your testimony earlier today. ...

Judge SOTOMAYOR. My part of the speech said people misunderstand what the word "use" means and I noted that "use" appears to people to mean if you cite a foreign decision, that means it's controlling an outcome or that you are using it to control an outcome, and I said no.

You think about foreign law as a—and I believe my words said this. You think about foreign law the way judges think about all sources of information, ideas, and you think about them as ideas both from law review articles and from state court decisions and from all the sources, including Wikipedia, that people think about ideas. Okay.

They don't control the outcome of the case. The law compels that outcome and you have to follow the law. But judges think. We engage in academic discussions. We talk about ideas. (U.S. Senate 2009, 462-3).

The concerns surrounding Sotomayor's speech in Puerto Rico were repeated during the debates on the Senate floor. Senators Chuck Grassley and Sessions pointed out that Sotomayor's speech and testimony to the Judiciary Committee were contradictory (Grassley 2009; Sessions 2009). Senator Orin Hatch of Utah argued that Sotomayor would not be faithful to the law. Instead she "endorsed the notion that judges may look either inside themselves to their empathy, or outside to foreign law, for ideas and notions to guide their decisions" (Hatch 2009). Senator James Inhofe of Oklahoma stated that her nomination was an affront to national sovereignty (Inhofe 2009).

During the confirmation debate, Senator Coburn reconnected the use of foreign law to activist judging. "Results-oriented, activist judges who seek to rule based on their personal sympathies and prejudices often look to foreign law when interpreting our statutes and the Constitution in order to reach their desired outcome." Coburn went on to argue, "Her judicial philosophy with regard to the use of foreign law is extremely important because it suggests that she will not strictly interpret our Constitution." During his speech, Coburn praised Justices Scalia and Thomas for criticizing the practice of citing foreign law by the Court (Coburn 2009).

Unlike the floor debates during Alito's hearings, several Democrats did respond to the Republican concerns. Senator Ron Wyden of Oregon suggested that Judge Sotomayor would not use international legal decisions (Wyden 2009), while Senator Amy Klobuchar of Minnesota said the Republicans had no proof that Judge Sotomayor would use foreign law

(Klobuchar 2009). Senator Dick Durbin of Illinois offered the strongest support for Sotomayor's views.

[Sotomayor] said that in limited circumstances, decisions of foreign courts can be a source of ideas, akin to law review articles or legal treatises.

She is hardly alone in her thinking on this. Justice Ginsburg took the same position and observed: "I will take enlightenment wherever I can get it."

This commonsense approach has been embraced by two conservative Supreme Court Justices appointed by President Reagan: William Rehnquist and Anthony Kennedy.

Indeed, we cannot expect the rest of the world to adopt the democratic principles and fundamental freedoms we promote as a Nation, while at the same time saying we will never consider ideas developed in other countries. This is plain common sense.

It is sad that some of my colleagues are in the thrall of small-minded xenophobes and don't appreciate that the march of democracy has reached many corners of the world and generated thoughtful reflection on our most basic values (Durbin 2009).

The Senate, 68-31, confirmed Sotomayor as an Associate Justice of the Supreme Court.¹⁰⁰

During General Kagan's hearings, the proper place of foreign law was discussed, but the Senators seemed less engaged than in the previous hearings. Before her nomination, she had two previous engagements with the use of foreign law that were discussed by the Senate Judiciary Committee. As Solicitor General, Kagan authored an amicus brief in *Samantar v. Yousuf* (2010) that contained citations to decisions of the Ontario (Canada) Supreme Court, the International Court of Justice, and recent cases from the United Kingdom (Brief for United States 2010). Her other controversial action occurred while she was Dean of the Harvard Law School (Editorial 2010). During her tenure, the faculty approved an overhaul to the law school curriculum in 2008, including a requirement that students would take a course on international law (Saenz 2008).

¹⁰⁰ The confirmation of Justice Sotomayor does indicate that a majority of the Senate (in 2009) did not consider her views about the use of foreign law disqualifying. However, members of the Senate are expected to confirm nominees from the President of their own party (McGinnis and Rappaport 2010).

During the hearings, Senator Sessions framed the context of the questions about foreign law. “there is a raging debate in this country, and no one denies it, over the extent to which foreign law can be cited to define the Constitution and laws of this country” (U.S. Senate 2010, 130). He then suggested that General Kagan agreed with the position of Justice Ginsburg rather than the position of Justice Scalia. On the last day of Kagan’s testimony before the Committee, Sessions asked her to respond to the Court’s discussion of the use of foreign law in *McDonald v. Chicago* (2010) and Justice Scalia’s sarcastic comment that “no determination of what rights the Constitution of the United States covers would be complete, of course, “without a survey of what other countries do,” close quote. In other words, he was saying, he thought this was a very unwise policy” (U.S. Senate 2010, 296).

In his questioning, Senator Kyl expressed skepticism of Kagan’s testimony because Justice Sotomayor said that she would not use foreign law to the Committee, but she did cite an English court case in *Milavetz, Gallop & Milavetz, P.A. v. United States* (2010). In his further questions, Senator Kyl continued to press General Kagan on when it might be appropriate to cite foreign jurisprudence.

I have seen that formulation before and I'm troubled by it because it suggests you can turn to foreign law to get good ideas, but that of course you wouldn't be bound by foreign legal precedent. I doubt that anybody who uses foreign law would suggest that they are bound by foreign legal precedent, but it hasn't stopped them from using foreign precedents, legal and otherwise. And so I'm back to the question of whether you believe that decisions of foreign courts or laws enacted by foreign legislatures should have any bearing on U.S. court interpretation of the U.S. Constitution? (U.S. Senate 2010, 258).

In these instances, and in response to questions from other members of the Judiciary Committee, General Kagan offered a forceful opinion about the appropriateness of foreign law. In responding to Senator Kyl, the nominee pushed back several times stating that citing foreign law was akin to citing a law review article and that foreign jurisprudence

could not be binding precedent or possess any independent persuasive power (U.S. Senate 2010, 258-259).¹⁰¹ Responding to Senator Grassley, Kagan stated “I guess I’m in favor of good ideas coming from wherever you can get them,” including foreign jurisprudence, law reviews, or other sources of authority (U.S. Senate 2010, 126). In response to Senator Schumer, Kagan stated when “there may be instances, such as some of the ones that -- that I suggested, where international law or foreign law is -- is -- is relevant.” she would often clarify her remarks that in general, the Constitution must be interpreted “by American judges using American sources” (U.S. Senate 2010, 155).

¹⁰¹ KAGAN: Senator Kyl, I do believe this is an American Constitution, that one interprets it by looking at the text, the structure, our own history and our own precedents, and that foreign law does not have precedential weight. Now, in the same way that a judge can read a law review article and say, “Well, that is an interesting perspective” or “I learned something from it,” I think that so, too, a judge may read a foreign judicial decision and say, “Well, that’s an interesting perspective; I learned something from it.” Suppose, you know, we have a Fourth Amendment exclusionary rule. Many countries don’t. Suppose that it were...

KYL: Yes, but -- excuse me, but of what relevance is that to the U.S. Constitution? We have many things other countries don’t because we have a unique Constitution.

KAGAN: I’m just trying to suggest that it is of the same kind of relevance as it would be if you read a law review article about a similar subject.

KYL: OK, well what you’re telling me is, then, that you would look to foreign law. You might relate it to the issues in the case. Would you cite it in an opinion as an interesting idea -- not legally binding, of course -- but supportive of your case, of your position?

KAGAN: I said yesterday, when I talked about the subject, I said it -- that I -- I used as an example a brief that the -- the solicitor general’s office had filed on the Foreign Sovereign Immunities Act. When we filed that brief, we talked about some -- what some other countries had done on the Foreign Sovereign Immunities...

KYL: Because you thought it might appeal to some of the members of the court?

KAGAN: Because...

KYL: Well, right or not?

KAGAN: ... the question of -- of -- of how one should look to the Foreign Sovereign Immunities Act and whether officials should be held liable is a question that a number of nations have tried to deal with, and in the same way that one might point to law review articles on the subject, I don’t think that foreign opinions should be out of bounds in that way.

But I do think that they do not have any kind of precedential weight, that they are not any kind of ground, independent ground for making a decision about... (U.S. Senate, 2010, 259).

When General Kagan's nomination came to the floor of the Senate, the only mention of foreign law occurred in the closing moments of the debate. In a quick back and forth, Senator Sessions explained his discomfort with Kagan's support of requiring an international law class at Harvard and Senator John Ensign of Nevada responding that her support of foreign jurisprudence was another reason that she would become a "judicial activist."¹⁰² In his remarks, Senator Mark Begich of Alaska defended Kagan's record involving the use of foreign law (Begich 2010).

In each of the four confirmation hearings between 2005 and 2010, the issue of the appropriateness of citing foreign law by the Supreme Court was brought forward during the televised Judiciary Committee hearings and on the Senate floor. While Republican members of the Senate primarily articulated the issue, especially Senator Sessions and Senator Coburn, a handful of Democrats spoke in defense of the practice of citing foreign law.¹⁰³

The confirmation of Judge Alito and Republican votes to confirm Judge Sotomayor despite their refusal to fully repudiate the practice of citing foreign law suggests that the debates about their citation behavior served as a proxy for other ideological arguments about the role of the Court. While it is likely that Senators Coburn and Sessions saw the

¹⁰² Mr. SESSIONS. If the Senator will yield, this is a troubling thing. Justice Scalia has been a fierce critic of this, pointing out: What country do you pick? Do judges get to pick their own?

It seems to me, from what the Senator said, it is clear that the President's nominee to our highest Court in the United States has felt that the world of international law is more important than studying our own Constitution. (Sessions 2010)

Mr. ENSIGN. That is the way it appears to me. This is another example of where her personal beliefs come in to affect the way she is going to be as a judicial activist. (Ensign 2010).

¹⁰³ Senator Chuck Schumer also pushed back against this theory as a member of the Senate Judiciary Committee.

controversy as a method to express a political point or curry favor with conservative activists, these are the same audiences that certain Justices might also desire to please (Baum 2007).¹⁰⁴ By pushing the debate, Senators Conryn and Sessions were able to string out the controversy and obtain concessions by Judge Sotomayor and Solicitor General Kagan that the citation of foreign laws is something that should be avoided in interpreting the U.S. Constitution.

These concessions, and the failure of Democrats to mount a public defense of the practice of citing foreign law suggest that the nominees, if not the entire Court, received a clear message that Congress discouraged the practice of citing foreign jurisprudence by the Court. Washington politicians, newspapers (e.g. Lane 2005; Bravin 2005; Kornblut 2005), and conservative law professors picked up these signals as a new front in the crusade against the Court. It may not be true that the Supreme Court follows the election results, but it is implausible that the Justices did not receive the message from the halls of Congress.

Conclusions

The debate about the utility of foreign law is meaningless from a purely attitudinal or strategic approach to Judicial decision-making. If the Justices were primarily focused on achieving their own policy goals, there is no reason for Justice Thomas to publically challenge Justice Breyer's dissent from granting certiorari in *Knight v. Florida* (1999). Eight other Justices agreed that certiorari should have been denied in the case. However, Justice Thomas' decision elevated a minor disagreement about how to interpret the Constitution

¹⁰⁴ It could be argued that Senator Sessions and Senator Conryn do not represent the views of the Republican Caucus, much less the entire Senate. Regardless of their standing within the Senate, their discussion of the use of foreign law was taken up by other political actors.

to what became a very public debate that may ultimately affect the legitimacy of the Supreme Court.

As the debate escalated in the public sphere, especially when Congress got interested in the subject, the Justices became more compelled to justify the reasons for and against the use of foreign authorities. Many of the Justices spoke about the controversy before law schools or on television. The rhetoric in their decisions became more inflammatory, channeling the public debate surrounding the controversy.

The newly appointed Justices were not immune from the controversy. All four of the Bush and Obama nominees faced questioning by Republican members of the Senate Judiciary Committee about how they would stand on the issue of using foreign law when on the bench. Justice Sotomayor was publically criticized for citing a foreign authority in a Supreme Court case after she had told the Committee that she would not. While their views on citing foreign law were not disqualifying for any of the nominees, they were required to publically address the controversy. The rest of the Justices likely paid great attention to the hearings.

This sequence of events, from 1999 to 2010, indicates that the Justices care more than just about policy goals, but also about the development of the law. Second, and fundamental to my argument, is that the Justice's justification of the use of foreign law supports the idea that the Justices care about the legitimacy of the Court and more importantly, their own prestige. The efforts by Justices Breyer and Scalia, especially, can be understood as their attempts to defend the legitimacy of the Court, even when their collective and public disagreement may have the opposite effect as it brought increased

scrutiny to the Court. The next chapter explains how these disagreements about the appropriate use of foreign law filtered to the public.

Chapter Four: Responses of Elite Audiences: The Media, the Legal Profession, and the Political Parties

The majority opinion was notable in many respects: its critical dissection of a recent precedent; its use of a decision by the European Court of Human Rights, supporting gay rights, to show that the court under *Bowers v. Hardwick* was out of step with other Western countries.
– Linda Greenhouse for *The New York Times*, June 27, 2003.

Frankly, who cares what the European Court of Human Rights thinks?
– Tom Nevin for *The Denver Post*, July 3, 2003.

The feedback to the Court's practices of citing foreign authorities developed over a period of years. Before 1994, the citation of foreign jurisprudence by the Court went ignored in the press, the academy, and in the halls of Congress. It was not until 1994 that legal scholars began to comment on the trends of citing foreign law, and not until 1999 that the media reported on the phenomenon. For a period of four years (June 1999 - June 2003), the media coverage and law review articles primed the Congressional agenda. When Justice Anthony Kennedy authored *Lawrence v. Texas* (2003), Congressional critics were prepared to run with an issue that already fit with two existing hot-button issues – judicial activism and threats to national sovereignty.

When the impression of the Court changes, or when the unexpected occurs, such as surprising outcomes or irregular voting coalitions, the media is more likely to cover the Court (Maltzman and Wahlbeck 2003). Justice Clarence Thomas' concurrence in the denial of certiorari in *Knight v. Florida* (1999) highlighted the controversy for veteran Court reporters who recognized a juicy story when they saw it. The opinions were, by themselves noteworthy since the Court usually does not comment when denying certiorari (Owen 2010). However, Justice Thomas' opinion criticizing Justice Stephen Breyer's provided an

important contrast that excites editors.

The attention paid to the controversy in law journals paralleled debates in the Court, Congress, and the media. Comparative legal scholars were active in discussing the effect of globalization and the law prior to the turn of the century, but comparative legal scholarship was a small subfield until *Atkins v. Virginia* (2002) and *Lawrence v. Texas* (2003) (Merryman 1983a). Unlike the news media, where most of the coverage was critical of the use of foreign law, most legal scholars either accepted or encouraged federal judges to engage more with comparative law.

The debate about the legitimate role of the Justices has not been limited to elites. Since the 1950s, the Republican Party has been increasingly critical of the Court. Over time, the Party's platform has evolved to be more specific about how the Justices should act and interpret the Constitution. This is evident in both the national Party's platform, but also in the platforms of the State parties. These platforms are a reflection of both the preferences of the Presidential candidates, but also of the mood of the electorate. In contrast, the Democratic Party's platforms have been much more supportive of the Court.

In this chapter I examine how the media, law journals, and the political parties have influenced the debate about the role of foreign law in the Supreme Court. Lawrence Baum (2006) suggests that the Justices may respond to a broader audience than just their colleagues or Congress. Conservatives claim there is a "Greenhouse effect" on the Justices, as they try to please the influential *New York Times* reporter. Many of the Justices now have an academic background and many of their peers are influential legal scholars. Finally, many of the Justices are connected to partisan officials. Thus, while they may not be aware of the platforms of the political parties, they are often aware of the statements made by the

Presidential candidates about the Court.

The Media, the Supreme Court, and Foreign Law

The media prefers to report about controversy and controversial issues when covering the government. Many scholars of the media effects believe that the media plays a significant role on shaping the public's agenda (Cohen 1963; Iyengar and Kinder 1987; Iyengar 1991). Previous studies of the news media's coverage of the courts, and the legal process more generally, show that the coverage is selective, and the stories that are covered reinforce preexisting political frames. W. Lance Bennett (1996) suggests that news worth depends on four interrelated proclivities: personalization, dramatization, fragmentation, and normalization. Herbert Gans (2004) suggests that the news media is more likely to cover government conflicts and personnel changes more than other issues. John Zaller (1992) suggests that public opinion follows that of elite discourse, and professional journalistic norms privilege elite opinion. When elite opinion is not in opposition, other views do not emerge as part of the political landscape. This widely accepted articulation of the agenda-setting ability of the press is significant to the public's perspective for the Court.

The existing literature is mixed about which factors are important in determining which legal issues are covered in the news media. Elliot Slotnick and Jennifer Segal (1998) suggest television stations are more likely to air First Amendment, criminal justice, and other rights cases. However, Forrest Maltzman and Paul Wahlbeck (2003) discovered that the *New York Times* judgments of front-page newsworthiness depend on both the nature of Court politics and the issues involved in the case. Both analyses recognize that the amount

of conflict involved in the case, as indicated by the size of the opinion or number of *amicus curiae* briefs, also influences which stories are reported.

Even within these general patterns of coverage, the media does not accurately describe the actions of judicial and legal actors. David Ericson argued that even readers of *The New York Times* do not “know what really happened in more than three-fourths of the Court’s decisions of the 1974 October Term” (Ericson 1977, 607). William Halton and Michael McCann (2004) demonstrate that news accounts of tort cases deemphasize the complexity involved in legal contests. The difficulty of deciphering and describing the activity of the courtroom is not limited to coverage of evidentiary trials, filled with conflicting narratives, but also the actions of the Supreme Court. Slotnick and Segal (1994) argue that television news stories often misreports denials of certiorari as a decision on the merits of the case. Even written decisions on the merits are difficult for reporters to digest. Linda Greenhouse states that Supreme Court reporters, often trained in the law, face the competing pressures of thoroughly evaluating the decision, and editorial pressures of word limits and print deadlines (1995). These pressures, do lead to incorrect, or misleading inferences about the action of the Court (Jamieson and Waldman 2003).¹⁰⁵ What exists, even for the astute consumer of news, is a noticeable lack of attention in the media’s coverage of legal issues, and the Supreme Court.

The general absence of coverage of the Court reinforces gaps of news media coverage of the Court and the law (Ericson 1977; Solimine 1980). While differences exist in the quality and quantity of coverage based on the type of publication (Tarpley 1984; Larson 1985), the news media’s coverage of the Court is minimal. Richard Davis’ study of press

¹⁰⁵ This pressure is what led to CNN and FOX News to misstate the Court’s decision in *National Federation of Independent Business v. Sebelius* (2012).

coverage of the Court found that the *Time Magazine* ran 62 articles about the Court while *CBS News* aired 112 stories between 1984 and 1989 (1994). Barbara Perry found *The Washington Post* published 90 stories about cases before the Court between September 1994 and August 1995 (Perry 1999).

Despite the low levels of Supreme Court coverage in the news media, recent research suggests that the public exhibits a higher than expected awareness of Supreme Court decisions (Hoekstra 2000; 2003). Citizens involved in religious groups are more aware of the Court's abortion decisions (Franklin and Kosaki 1989), and other issue engaged communities might become more aware of the actions of the Court than expected (Hoekstra 2000; 2003). However, most Americans base their images of the Court on crude ideological frameworks, responsive to the larger political environment (Caldeira 1986). The Justices also are aware of the coverage they receive in the media (Baum and Devins 2010).

In this section, I analyze all of the articles published in *The New York Times*, *The Washington Post*, *The Washington Times*, *The Wall Street Journal* and *USA Today* from 1990 to 2011 that discuss the Court's use of foreign law. Each of these papers is influential in Washington D.C. and on Capitol Hill (Glaberson 1994; Hall 2001).¹⁰⁶ Excluded from this analysis are any syndicated op-ed columns that may have also been published by any of the papers. I also searched for editorial columns written in the aftermath of *Lawrence v. Texas* (2003) about the use of foreign law in *LexisNexis* and the syndicated columns published by the Creators Syndicate.

¹⁰⁶ The *Washington Times* and the *Wall Street Journal* are known as conservative papers. The *New York Times* has a liberal slant, while *The Washington Post* and *USA Today* are known to have a more balanced editorial page.

Media Coverage: 1990 – 2003

While usually denials of certiorari do not get media coverage, three papers wrote articles mentioning the discussion of the use of foreign law in *Knight v. Florida* (1999).¹⁰⁷ Joan Biskupic of *The Washington Post* described Breyer's dissent as "a painstaking dissent heavy on comparisons to foreign law" (1999). In contrast, Linda Greenhouse's (1999) front-page article for *The New York Times* did not mention Breyer's use of foreign jurisprudence until the ninth paragraph, only noting that Breyer said that his decision was supported by case law from other common law nations and that he inserted the url of a decision of the Supreme Court of Zimbabwe. Greenhouse also foreshadowed the debate over the use of foreign law by quoting from Justice Thomas' opinion: "were there any such support in our own jurisprudence, it would be unnecessary for proponents" to rely on foreign authorities. *The Washington Times* ran a first page story on the back and forth between Breyer and Thomas and the use of foreign law (Murray 1999).

It was not until 2002 when "foreign laws" were again in the news. In *Atkins v. Virginia* (2002) the Court ruled that individuals with intellectual disabilities could not be executed. In the coverage of the Court's decision, several papers, including *The Austin American Statesman*, *The Daily Oklahoman*, *The Houston Chronicle*, and *The New York Times*, mentioned that in his dissent, Chief Justice William Rehnquist stated that the majority put "too much stock in opinion polls and views of national and international observers" (e.g.

¹⁰⁷ The discussion of the use of foreign law in *Knight* in the media is more remarkable since neither Linda Greenhouse nor Joan Biskupic discussed Justice Scalia's criticism of the use of comparative law in *Printz v. United States* (1997). In that decision, Justice Scalia wrote a three paragraph footnote arguing "We think such comparative analysis inappropriate to the task of interpreting a constitution" (Footnote 11), in response to Justice Breyer's dissenting opinion that discussed how the Court could benefit from the lessons of Switzerland and Germany about local control.

TABLE 4.1
 Newspaper Coverage of the Use of Foreign Law
 1990 – 2003

Newspaper	Total	1990-2002	2003	Editorials
New York Times	2	1	1	0
Wall Street Journal	2	1	1 (1)	1
USA Today	1	0	1	0
Washington Post	3	2	1	0
Washington Times	7	3	5 (2)	2

Editorials and op-ed columns in parentheses

Syndicated columns excluded

Search terms on ProQuest (full text): “Supreme Court” AND (“foreign law” OR “foreign court” OR “Europe”) plus an additional search for articles about *Lawrence v. Texas* and excluding irrelevant articles.

Constable 2002).¹⁰⁸ While the other papers discussed Rehnquist's opinion toward the end of the article, Joan Biskupic's article for *USA Today* mentioned the use of foreign law in the majority's decision in the article's second paragraph (Biskupic 2002).

In addition to the news coverage, at least two editorial pages immediately commented on the use of foreign law. *The Wall Street Journal* argued in a piece entitled "The Supreme Court Pollsters," that the Justices are not legislators, noting that the consensus found opinion in *Atkins* was based on "recent legal changes in 18 states, but in particular a stream of opinion polls, foreign laws and statements by religious and professional organizations." The opinion then referred to the change of heart of "Senator, er, Justice, O'Connor" (The Supreme Court Pollsters 2002). At least one smaller paper, the *Roanoke Times*, opined that Rehnquist's accusation of the majority relying on public opinion polls and international critics was misplaced (Court Shows State the Light 2002).

While few papers mentioned the use of foreign law in their news coverage or their initial editorials, several syndicated columnists and newspapers jumped in on subsequent days. Writing for *Slate Magazine*, former Solicitor General Walter Dellinger III, argued, "the court's opinion is no more convincing when it begins counting in the anti-execution views of foreign countries, religions, professional groups, and polling results" (Dellinger III 2002). In response to concerns, columnist Clarence Page of the *Chicago Tribune*, and picked up by other papers, argued "it is not unreasonable for the Supremes to reach out from their lofty legal towers to all sources, even opinion polls, to find out what our society views." He

¹⁰⁸ Pasztor, David. 2002. "Top Court Bars Execution of Retarded Killers: Ruling Could Open Door for Further Limits." *Austin American-Statesman*; Reinert, Patty. 2002. "Court Bans Executing Retarded: Justices Cite Shift in Public Attitude." *Houston Chronicle*; Greenhouse, Linda. 2002. "The Supreme Court: The Death Penalty; Citing 'National Consensus,' Justice Bar Death Penalty for Retarded Defendants." *The New York Times*.

concluded, *Atkins* “is not grounded primarily, as all court opinions must be, in law, evidence and precedent, not polls” (Page 2002). These articles and commentary suggest that the controversy about the decision was as much about the ruling as the method in which the Court overturned its previous decision of *Perry v. Lynaugh* (1989).

The media’s coverage of *Knight* and *Atkins* primed the subsequent outcry against the use of foreign law following the ruling in *Lawrence v. Texas* (2003). While Justice Kennedy only devoted two paragraphs to decisions of the European Court of Human Rights, many of the largest papers in the United States, including *The New York Times*, *USA Today* and *The Washington Post*, mentioned that the majority opinion included references to foreign jurisprudence in its next day coverage. Writing for *The New York Times*, Linda Greenhouse (2003a) posited:

The majority opinion was notable in many respects: its critical dissection of a recent precedent; its use of a decision by the European Court of Human Rights, supporting gay rights, to show that the court under *Bowers v. Hardwick* was out of step with other Western countries.

In *USA Today*, Joan Biskupic (2003a) took a more critical tone, arguing that Kennedy used international law “in a way that could influence future disputes.” Charles Lane (2003) of *The Washington Post* wrote that Kennedy stated that the European Court of Human Rights rejected the doctrine articulated in *Bowers v. Hardwick* (1986).

The editorials published on June 27, 2003 suggested that the debate about the decision would be intense, but only one editorial even suggested a connection between U.S. law and European law.¹⁰⁹ *The New York Times* said that *Bowers* belonged in history’s dustbin and *The Washington Post* suggested that America had made progress in the previous 17 years. *USA Today* published a commentary by Ken Connor (2003), the

¹⁰⁹ “EDITORIAL A matter of human rights.” *The Denver Post*.

President of the Family Research Council, stating, “the majority simply raised a dampened finger to see which way the cultural breezes are blowing.” In *The Washington Post*, syndicated columnist George Will (2003) argued, “the Constitution is not a scythe that judges are free to wield to cut down all laws they would vote to repeal as legislators.”¹¹⁰

Over the next several days and months, the conservative concern about judicial activism, national sovereignty and the use of foreign law started to coalesce in support of what Justice Scalia wrote in his dissent. Scalia argued that the Court’s discussion of foreign views was “dangerous dicta.”¹¹¹ Tom Neven (2003), writing for the *Denver Post* argued, “Frankly, who cares what the European Court of Human Rights thinks?” Conservative columnist Mona Charon argued, “the high court’s majority actually relied on everything but the actual words of the Constitution, citing even the European Union for the proposition that homosexual unions are not to be criminalized” (Charon 2003). On July 11, the *Omaha World Herald* editorialized, “Are U.S. citizens now to be bound by other countries’ laws and constitutions?” (Courting Foreign Ideas 2003). David Keene, the chair of the American Conservative Union, published an op-ed in *The Hill*, an influential Washington DC publication, speculated whether the Constitution would remain “‘relevant’ in the coming age of globalization” (2003). In August, Richard Lessner (2003) wrote for *The Washington*

¹¹⁰ Television coverage of the decision did not discuss foreign law. I searched the transcripts of the Sunday news programs on ABC, NBC, CBS, and FOX, as well as the transcripts of ABC’s Nightline and CNN and FOX News shows (including the O’Reilly Factor) on Factiva from June 26 to August 31, 2004 and did not find any mention of the use of foreign law. I was not able to search the daytime programming for either of the 24-hour networks.

¹¹¹ “The Court’s discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since “this Court ... should not impose foreign moods, fads, or fashions on Americans.” *Foster v. Florida*, 537 U.S. 990, n. (2002) (Thomas, J., concurring in denial of certiorari)” Scalia, J., dissenting in *Lawrence v. Texas* (2003) at 598.

Times that the Justices use of foreign law threatens “both our national sovereignty and the sovereignty of the Constitution.” Al Knight (2003) wrote for the *Denver Post*, “[i]t should not matter if some small European country has had an agreeable experience rehabilitating triple ax-murderers, or legalizing drugs and prostitution or using lethal injections to thin out the ranks of the old and infirm.” Very few columns supporting the decision in *Lawrence* mentioned the citation of foreign law.¹¹²

The news desk picked up on this editorial criticism about the use of foreign law. In her roundup of the October 2002 term, Linda Greenhouse (2003b) mentioned that Kennedy’s citation of a decision of the European Court of Human Rights “marked a stinging defeat for Scalia, who has tried to hold back the court’s steadily growing interest in foreign legal developments.” In July, *USA Today* published an article with the lead “the Supreme Court’s reference to foreign law in a ruling last month that overturned state anti-sodomy statutes stood out as if it were in bold print and capital letters” (Biskupic 2003b). In order to stem the criticism of the Court, on July 6, Justice Breyer appeared on *ABC News’* “This Week,” and defended the use of foreign law by the Court (Dorf 2003). Thus within a month of the decision, opinion leaders had ample opportunity to become aware of the controversy about the use of foreign jurisprudence.

News Coverage: 2004-2011

After the Court’s decision in *Lawrence*, conservative writers and activists, already predisposed to not like the direction of the Court, took aim at the invocation of foreign law. Phyllis Schlafly, the founder of the Eagle Forum and a syndicated columnist, took multiple

¹¹² See Jan Jarboe Russell’s (2003) article “Justice Breyer knows rights must be saved to win terror war” in *The San Antonio Express-News* as a counterexample.

shots at the Court for using foreign law. For a two-year period after the decision in *Lawrence* the outrage against the use of foreign law was primarily exhibited by conservative columnists in the op-ed pages. After the election of President Obama and his nominations of Judge Sonia Sotomayor and General Elena Kagan to the Court, the coverage of the Court's use picked up, both in the news desk and the editorial page.

For nearly two years from August 2003 to April 2005, Phyllis Schlafly took on the role of opposing the use of foreign law in the press.¹¹³ During this two-year period, nearly 10% of her columns mentioned her opposition to the use of foreign law. Her first column discussing the role of foreign law, published on August 13, 2003, took straight aim at Justice Breyer and his defense of citing foreign authorities.

Justice Breyer gleefully told George Stepanopoulos on ABC News how the United States is changing "through commerce and through globalization ... [and] through immigration," and that this change is having an impact on the courts. He speculated on "the challenge" of whether our U.S. Constitution "fits into the governing documents of other nations."

Where did he get the idea that the U.S. Constitution should "fit" into the laws of other nations? If a country can't make its own laws, how can it be a sovereign nation (Schlafly 2003)?

The column methodically discussed the use of foreign law by the Court in *Knight*, *Lawrence* and *Atkins*. Schlafly's article concluded, asserting that Democrats want activist judges to undermine American sovereignty.

It's obvious why the Democrats filibuster any judicial nominee they suspect of being a strict constructionist. The Democrats love an activist judiciary because court decisions can make fundamental changes that the American

¹¹³ Schlafly authored *The Supremacists: The Tyranny of Judges and How to Stop it*, with similar themes in 2004.

TABLE 4.2
Phyllis Schlafly Columns: 2003 – 2010

Article	Date
Can Globalism Amend Our Constitution?	August 13, 2003
Ginsburg Disdains The Lone Ranger	August 20, 2003
Stopping The Mischief Of Activist Judges	February 4, 2004
Does NAFTA Override The U.S. Constitution?	February 18, 2004
Restoring Constitutional Separation of Powers	February 25, 2004
We Don't Need Busybody Foreign Judges	April 14, 2004
To Celebrate Independence, We Must Have Sovereignty	July 7, 2004
Whom Is The Supreme Court Listening To?	November 10, 2004
Is Relying On Foreign Law An Impeachable Offense?	March 16, 2005
The Liberals Rally Round Judicial Supremacy	April 27, 2005
Supreme Court Case Proves "LOST" Must Sink	October 24, 2007
Ginsburg's Judicial Activism Goes International	April 21, 2009
Harold Koh Is Too Dangerous for America	May 26, 2009
If Obama Had Told Us Before His Election	October 13, 2009
Supreme Court Needs at Least One Veteran	March 30, 2010
Obama Steers the Court Sharp Left	May 10, 2010
Elena Kagan Should Be Rejected	June 29, 2010
Ginsburg Likes Use of Foreign Law	February 28, 2012

people and our elected representatives don't want.

It's also obvious why the Democrats like United Nations treaties. Activist judges can use them to circumvent our Constitution and laws -- and diminish American sovereignty (Schlafly 2003).

Schlafly was unrelenting in her opposition to the use of foreign law, arguing that Americans were “shocked” to learn that the Justices regularly cite foreign authorities (Schlafly 2004b). The use of foreign law, even in support of an international trade agreement, would set a “dangerous precedent” (Schlafly 2004a). In 2007, she even criticized President Bush for siding with a “murderer and a global court against American law” (Schlafly 2007).

Schlafly's reasoning was two-fold. Primarily, she saw the use of foreign law as liberal judicial activism. In 2004, Schlafly argued, “[L]iberals believe that new rights should be invented and public policies dictated by supposedly more enlightened judges” (Schlafly 2004a). *Lawrence* was devoid of reason, and served only to pander to liberal “elites,” using international opinion to impose their social preferences on American lawmakers and citizens (Schlafly 2005a). Instead of listening to the views of Mikhail Gorbachev about the death penalty, the Court should base their decisions on the U.S. Constitution (Schlafly 2004d). Fundamentally:

We should not tolerate judges who try to change the rules of our written Constitution by pretending that its meaning is evolving, or that they have discovered new privileges no one else has detected for 200 years, or that our Constitution must be changed to conform to modern trends in foreign law (Schlafly 2005a).

To Schlafly, the “living constitution” method of interpretation and the use of foreign law promote judicial supremacy.

The second concern articulated by Schlafly was that that foreign judges and bureaucrats would undermine American sovereignty. She expressed concern in February 2004 that the 9th Circuit Court of Appeals ruled that Mexican truckers could operate in the United States, affirming a decision of a NAFTA tribunal (Schlafly 2004c), or the decision of the International Court of Justice involving the application of the death penalty to Mexican nationals. She argued:

With all the real atrocities going on in uncivilized countries around the world, one would think that any world court looking into violations of human rights would have enough to do without trying to tell the United States how to conduct our criminal trials. But the busybody bureaucrats in the Hague masquerading as judges have just presumed to give orders to America (Schlafly 2004c).

In another 2004 column, she we need to be eternally vigilant at protecting American sovereignty (Schlafly 2004e).

Phyllis Schlafly was not the only columnist that argued against the use of foreign authorities in 2005. Thomas Sowell, a fellow at the Hoover Institute at Stanford University, argued in one of his columns that the use of foreign law prevents:

[T]he millions of people who want to be law-abiding citizens from knowing which laws to abide by, it deprives American voters of the right of self-government through elected representatives that is at the heart of American society (Sowell 2005).

He claimed that the liberal Justices “cherry-picked” ideas from foreign countries to justify decisions that could not be justified with the United States Constitution.¹¹⁴ These

¹¹⁴ Both Schlafly and Sowell are widely published. In September 2007, 141 papers with a circulation of over 6.5 million readers carried Sowell’s columns (Media Matters 2007). Schlafly claims that her column is published in over 100 papers (Eagle Forum 2012). The influence of Schlafly’s columns may not have reached the Court directly, but she was “still a conservative force” in 2004 and 2012 (Abraham 2004; Stan 2012).

conservative columnists carried the banner against the use of foreign law by the Supreme Court until the news desk began covering the controversy in 2005.

In January 2005, Linda Greenhouse used Chief Justice Rehnquist's annual message to Congress to frame a discussion about the developments against the use of foreign law by Congress. *The New York Times*, like the other papers, did not cover the hearings of any of the bills introduced in Congress prohibiting the citation of foreign law. In Greenhouse's article, she devoted five paragraphs to the Congressional developments, including a statement by Representative Tom Feeney, the prime sponsor of one of the House Resolutions. Greenhouse did quote the Chief Justice and Justice Sandra Day O'Connor as opponents to the measure. These measures, argued the Chief Justice, "could appear to be an unwarranted and ill-considered effort to intimidate individual judges" (Greenhouse 2005).

Also in January, *USA Today* and *The Washington Post* covered the debate between Justices Breyer and Scalia. Charles Lane of the *Post* described the debate as a "hot topic" of Constitutional law (Lane 2005). In her report of the debate, Joan Biskupic of *USA Today* stated that the Court had increasingly referred to foreign laws in their decisions and that Congress had introduced resolutions denouncing the practice (Biskupic 2005a). Coverage of the controversy simmered until March, when the Court released its decision in *Roper v. Simmons* (2005), which referred to international opinion in declaring the death penalty for juveniles unconstitutional.

The lead stories about the decision in *The New York Times*, *USA Today*, *The Wall Street Journal*, *The Washington Post*, and *The Washington Times* each mentioned that Justice Kennedy referred to "international opinion" (2005). In the fourth paragraph in Jess Bravin's piece for *The Wall Street Journal*, she mentioned that "The majority's citation of

foreign legal and ethical views in supporting its decision is likely to feed a growing debate over the proper influence of international law in American jurisprudence” (Bravin 2005). Joan Biskupic, for *USA Today*, quoted from Justice Scalia’s dissenting opinion: “American law should conform to the laws of the rest of the world -- ought to be rejected out of hand” (Biskupic 2005b). The only part of Justice Scalia’s opinion reprinted in *The New York Times* was his criticism of Kennedy’s use of foreign law (Excerpts 2005).

The controversy about the use of foreign law continued through the end of the October 2004 term of the Court and into the summer. At the end of the term, Justice O’Connor announced her retirement. This event and the subsequent nomination of John Roberts provided Supreme Court and political reporters opportunities to address the controversy. *The Wall Street Journal* published an article in July about potential female candidates to the Court containing information about an Internet advertisement by the Judicial Confirmation Network stating “foreign approval has no place” in the decisions of the Court (Cummings and Braven 2005). During the confirmation hearings, *The New York Times* published two articles mentioning Roberts’ stance on foreign law (Stolberg and Liptak 2005; Liptak and Toner 2005). *The Washington Times* also described Roberts’ attitudes toward foreign law in a full-length story of the back and forth between the nominee and Senator Jon Kyl (Lakely 2005). Only *The New York Times* published a story on Samuel Alito’s stance toward foreign law during his confirmation hearings in 2006 (Liptak and Nagourney 2006).

Until President Barack Obama’s election and the nomination of Judge Sotomayor to the Supreme Court, the controversy remained largely absent in the newspapers. From 2007 – 2008, only eight articles mentioned the Court’s use of foreign law. This was in part due to

TABLE 4.3
Newspaper Coverage of the use of Foreign Law
2004-2011

Newspaper	Total	2004	2005	2006	2007	2008	2009-11	Editorials
New York Times	30	1 (0)	8 (3)	3 (1)	1 (0)	3 (0)	14 (2)	6
Wall Street Journal	23	1 (1)	9 (6)	7 (5)	-	2 (2)	4 (3)	17
USA Today	10	1 (0)	7 (2)	1 (0)	-	-	1 (1)	3
Washington Post	23	1 (0)	9 (2)	8 (2)	-	-	5 (3)	7
Washington Times	31	4 (2)	9 (5)	1 (0)	1 (0)	1 (1)	15 (10)	19
Yearly Totals		8 (3)	43 (18)	20 (8)	2 (0)	6 (3)	39 (19)	

Editorials and op-ed columns in parentheses

Syndicated columns excluded

Search terms on ProQuest (full text): "Supreme Court" AND ("foreign law" OR "foreign court" OR "Europe") plus an additional search for articles about *Roper v. Simmons* and excluding irrelevant mentions.

the lack of controversial decisions made by the Court and that the Democrats controlled both the House and Senate, making it unlikely that a Republican measure criticizing the Court would get a hearing. Still, the controversy remained just below the radar of the Supreme Court reporters. In 2008, Adam Liptak of *The New York Times* published an article asserting that the Court was losing influence abroad. The front-page article analyzed citation rates of U.S. cases by the Supreme Court of Canada and the Australian High Court of Appeals and found fewer citations. He then quoted Israeli Chief Justice Ahron Barak, Australian Justice Michael Kirby, and Justices O'Connor and Ruth Bader Ginsburg explaining the value of citing foreign law (Liptak 2008).

After explaining the value of foreign law, Liptak directly engaged the controversy in a manner that no other news article previously had done.

The controversy over the citation of foreign law in American courts is freighted with misconceptions. One is that the practice is somehow new or unusual. The other is that to cite such a decision is to be bound by it (Liptak 2008).

He then explained that Supreme Court Justices cited foreign law since early in the republic, that State courts frequently cite rulings of other States (even though they have the same precedential value as a decision from Italy), and that the Justices frequently cite "all sorts of things in their decisions -- law review articles, song lyrics, television programs" (Liptak 2008). Liptak concluded that the controversy was primarily about the belief in American exceptionalism.

This reflective piece about the role of foreign law by the Supreme Court got lost again during the nomination of Judge Sotomayor to the Court. In May 2009, before she was nominated to replace Justice David Souter, Charlie Savage of *The New York Times* wrote that conservative groups were preparing to attack the nominee based on their statements

on the propriety of citing foreign law (Savage 2009). In June, *The New York Times* published an article suggesting that Senator Jeff Sessions would lead the opposition to the nomination because of her statements about foreign law that Sotomayor made that April (Herszenhorn 2009). *The Wall Street Journal* published an article during the hearings that discussed how her statements to the Senate Judiciary Committee did not reflect her past speeches, including backing down from her April speech about the use of foreign law (Bendavid 2009).

The editorial pages in *The Washington Times* and *The Wall Street Journal* repeatedly criticized Sotomayor for her stance on the use of foreign law. *The Wall Street Journal* published an op-ed by Collin Levy, asserting that Sotomayor's answers on the use of foreign law would be most revealing aspect of her judicial philosophy. She argued that the Court should not win "an international beauty pageant" but listen to the priorities of U.S. citizens. She went on to argue, "[J]udicial opinions are written with great precision and care because they matter, and each strand of argument becomes a part of the grit and texture of American law" (Levy 2009).

In *The Washington Times*, the editorial board wrote a scathing criticism of Sotomayor because of her stance on foreign law.

Worse than her muddle-headedness is Judge Sotomayor's lack of discretion or humility. In the American system, judges are not meant to be philosophers, legislators or diplomats. Their job is to apply the law as written, not to try to achieve some sort of cosmic justice as determined by their own inner ethical gyroscopes (Sotomayor's foreign ideas 2009).

This statement was not unexpected by the paper. *The Washington Times* previously published op-eds by Senator Sessions, Gary Bauer, and Frank Gaffney about Sotomayor and the use of foreign law. Before Sotomayor's nomination, the paper issued an editorial

opposing the confirmation of Goodwin Liu to the Ninth Circuit Court of Appeals because of his statements in support of citing foreign law (Liu Beholden to Foreign Law 2009). At the onset of the hearings, the *Times* ran another article opposing Sotomayor's confirmation, describing her as "the most radical Supreme Court nominee in memory" because, in part, of her statements about foreign law (Sotomayor in Review 2009).

These editorials in *The Washington Times*, *The Wall Street Journal* and elsewhere are reflections of a larger media climate aligned in opposition to the use of foreign law. The 2008 article by Adam Liptak explaining the Court's actual use of foreign law, or *The New York Times* editorial published in 2010 defending the use of foreign law did not drive the larger narrative – that the use of foreign law by the Court is a controversial practice.¹¹⁵ Instead, the op-ed pages of these influential newspapers were filled with ideological allies of the conservative Justices – heaping praise on Justice Scalia, Roberts, and Alito for their positions on the use of foreign authorities.

The Legal Profession and Foreign Law

In the congressional hearings about the use of foreign law by the Supreme Court and in several nomination hearings for the Court, several law professors played supporting roles as witnesses. Despite the appearance of division in the committees about the citation of foreign law, in the years leading up to the hearings, most legal scholars either accepted

¹¹⁵ "The reasoning in those cases was greeted with catcalls from legal isolationists, as no doubt will be Justice Ginsburg's brave speech. Foreign law will undoubtedly be cited this week as a reason why many Republicans will vote against Ms. Kagan's confirmation. They might want to re-read James Madison's description in the Federalist Papers of the ideal legislator: 'He ought not to be altogether ignorant of the law of nations'" (A Respect for World Opinion 2010).

or encouraged federal judges to engage more with comparative law. It was not until the debate began raging in Congress that a controversy started to emerge in the law journals.

In this section I examine the discussion over the debate of the Court's use of foreign law in the law journals from 1994 to 2011. During this period, I examined 304 articles found through a search of Google Scholar and following relevant citations. Most of the articles directly addressed the controversy about the use of foreign authorities in the United States, while others addressed the use of foreign law by other courts with constitutional review powers. I categorized each article into one of four categories – supportive, cautionary, in opposition, and international. An article categorized in opposition contained an expression that the use of foreign law was problematic or contained unintended consequences. An article categorized as cautionary either described the use of foreign law as appropriate in certain contexts or in limited circumstances. Articles categorized as supportive contained an expression of encouragement in the use of foreign law, did not express a criticism of the practice (often because foreign law was a minor part of the article), or described the practice as insignificant to the Court's decision-making process. Articles categorized as international focused on the use of foreign authorities by a court outside of the United States.

Legal Scholarship 1983-2003

In 1983, Stanford Law Professor John Henry Merryman described the scholarship of the use of foreign law in the United States as an "exotic subspecialty" (1983a). This field emerged from questions involving when and how to plead and prove foreign law in U.S. courtroom. The expectation was that judges were increasingly exposed to cases involving

foreign or international laws and they should understand how to deal with these issues. Before 1983, the challenge in the legal academy was in developing a doctrine that could handle conflict of laws, choice of law, or private international law issues.¹¹⁶ This line of scholarship often followed the development of conflict of law issues in U.S. and international courts (Wing 1983). While the focus of this early scholarship focused on the doctrine of conflict of laws, in a 1983 symposium in the *Stanford Journal of International Law*, Professor Merryman illustrated the difficulties of lawyers and judges face in understanding when or how foreign law might be applicable in a particular case.¹¹⁷

A new line of scholarship about the role of foreign law and the effects of globalization emerged in the mid to late 1990s reflecting the increasing trend toward internationalization of law (Clark 1994). In one of these early articles, David S. Clark, asserted that American law and judges took a parochial view toward international law. In another article, Alain Levasseur argued that outside of Louisiana, the development of American common law had drowned out the need for judges to consider comparative law in their judgments, despite the historical practice of comparative law or the promise of comparative law (1994). As the pace of globalization increased, so did the discussion about the role of comparative and international law in the courts.

Between 1994 and 2003, there was a great increase in the attention to comparative law, by legal scholars and practitioners, including Justices O'Connor and Ginsburg (Riles 1999; O'Connor 1997; Davis 1998). In 1994, Princeton Professor Anne-Marie Slaughter

¹¹⁶ These terms are in some ways interchangeable.

¹¹⁷ An example of Merryman's observation occurred in *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095 (2d Cir. 1995). In this case the majority opinion discussed that the case involved the "mysteries of foreign law" before ruling it was unwise to "glean the accepted practices and attitudes of other nations" in considering the differences between the French and American rules of discovery (Miner 1995).

authored an essay in the *University of Richmond Law Review* about the forms of transjudicial communications. She concluded that as courts are bound to each other by their commitment to the rule of law, communication between courts would increase (Slaughter 1994). Justice Sandra Day O'Connor argued in a speech to the American College of Trial Lawyers in Florida (and republished in the *International Legal Observer*) that in this increasingly shrinking world, American judges should pay more attention to foreign law. She argued that foreign legal concepts might improve the U.S. legal system and "enhance crossborder communication" (O'Connor 1997). In 1998, Canadian Supreme Court Justice Claire L'Heureux-Dubé (1998) criticized the Rehnquist Court for not participating in the global judicial dialogue. For the most part, this era of comparative law scholarship was supportive of the Supreme Court's use of foreign law and legal material or expressed a desire to see more constitutional borrowing by U.S. judges.

This enthusiasm for comparative law in the law journals for increased global borrowing and cross-judicial dialogue in the Supreme Court and in other countries continued virtually unabated until the decision in *Lawrence* (2003).¹¹⁸ Even Justice Scalia suggested that, "international law has its place in our courts; but it is not [a] privileged place" (Scalia 1996, 1119). The rebuke of the use of foreign law by the Supreme Court in *Printz v. United States* (1997) only seemed to increase the number of authors engaged in

¹¹⁸ The most critical of these arguments was from W. Kent Davis (1997). Davis foreshadowed many of the arguments later made by opponents of the Court's use of foreign law. In his response to Justice Ginsburg, Davis argued that she conflated the promise and potential of the protection of fundamental rights overseas, failed to see the danger of incorporating rights into the United States through judicial activism, and failed to acknowledge the dangers of transferring legal rights from one jurisdiction to another without recognizing the context of those rights. However, Davis ended on a note of caution about the use of foreign law, instead of criticism, stating, "comparative law... must be handled with care" (Davis 1997, 990).

understanding the role of globalization and judicial dialogue. After the decision and commentary surrounding *Lawrence*, the debate about the proper role of foreign and international law took new life.

In early 2003, Carlos Rosenkrantz, a Professor at the University of Buenos Aires, published an article in the *International Journal of Constitutional Law* criticizing the use of foreign law. He argued, “it will always be better that our constitutional authorities and courts look inward, rather than outward, in their search for constitutional arguments” (Rosenkrantz 2003, 294). The article was a modest success, and inaugurated a new era of criticism toward the use of foreign law.¹¹⁹ This change in attitude and approach toward the Court’s use of foreign law in the law journals is illustrated by the work of Pepperdine Professor Roger P. Alford. In 2003, Alford argued that federal courts must consider the degree of deference it gave to the judgments of foreign tribunals (Alford 2003), but by 2004, he argued that the use of foreign law “destabilizes the equilibrium of constitutional decision-making” (Alford 2004). Alford’s conclusions did not occur in a vacuum, as many legal scholars began to question the utility of the use of foreign law by the Supreme Court after 2003, including former Solicitor General Robert Bork.

By 2003, Bork was a senior fellow at the American Enterprise Institute, a conservative think tank. In this capacity, Bork published *Coercing Virtue: The Worldwide Role of Judges* (first edition published by Vintage Canada in 2002). In the book, he criticized the triumph of liberal judicial activism in courtrooms in the United States and around the world. He further argued that judicial review, judicial activism, and judges of international courts, work to “undermine democratic institutions” (Bork 2003, 10). He then contended

¹¹⁹ Google Scholar suggests that other articles have cited Rosenkranz’s article 42 times as of May 2012.

that the internationalization of law occurred because of judicial activism, as judges turned to ruling of other courts to impose the their own political ideas. In this sense, “international law is not law but politics” (21).

In many senses, Bork’s argument was nothing new - a concern about the countermajoritarian difficulty in constitutional courts, first raised by Alexander Bickel, in 1962. What was unique about his argument was his insistence that international law, and international courts, hamstring domestic elected officials (Somin 2004). National debates about morality, constitutional interpretation, human rights, and national sovereignty, Bork argued, have given way to universalist attitudes and morals. Thus, international law became “one more weapon in the domestic culture war” (Bork 2003, 21). He further argued, “if the views of foreign legislatures are relevant, they would surely be relevant to debates in American legislatures, not to judicial interpretations of the Constitution” (23). What was also unique about his work was that Bork’s concerns were accessible to other influential political actors.¹²⁰

Legal Scholarship 2004-2011

After the Court’s decision in *Lawrence*, the use of foreign law became a popular subject in the legal journals across the country and even abroad. From 2004 – 2012, there was a 167% increase in the amount of articles about the use of foreign law compared with

¹²⁰ Unlike many works by law school professors, *The Washington Times* reviewed Bork’s work (Murchison 2003). Bork’s experience as a public official, and position with the conservative think tank, made his scholarship handy for conservative lawmakers predisposed to concerns about the judiciary run amok. When Majority Leader Tom Delay (R-Texas) spoke on the House floor in supporting passage of the Federal Marriage Amendment (H.J.Res. 56), he cited *Coercing Virtue* as a reason why the Amendment was necessary (Delay 2004; H7890). Through a variety of delivery methods, other lawmakers were undoubtedly aware of Bork’s scholarship.

a twenty-year period from 1983-2003. The increase was seen in both the top twelve law journals and in other legal journals and law reviews as shown in Table 4.4.¹²¹

Among the top law reviews, the *Harvard Law Review* and the *Stanford Law Review* published the most articles about the use of foreign authorities by the Court. The *Harvard Law Review* published a debate about the Court's use of foreign law in *Roper v. Simmons*, with articles from Vicki Jackson, Jeremy Waldron, and Ernest Young in its November 2005 issue. The *Stanford Law Review* published a symposium on "Global Constitutionalism" with works from John McGinnis and Ilya Somin, David Gray, Nicholas Quinn Rosenkranz, and Eric Posner and Cass Sunstein in its March 2007 issue.

In these top legal journals, nearly two-thirds of articles were generally positive toward the use of foreign law as indicated in Table 4.5. Outside of the symposia in the *Harvard Law Review* and the *Stanford Law Review*, only the *Virginia Law Review* and the *University of Pennsylvania Law Review* published articles opposed to the practice of citing foreign authorities. The *University of Pennsylvania Law Review* was unique in that the only two published articles about the use of foreign law were opposed the use of foreign authorities by the Court (Lee 2007; Dorf 2008).

Outside of the top journals, support for the use of foreign law was even more overwhelming. Less than twenty percent of the published articles expressed adamant opposition to the citation of foreign and international law. While another fifteen percent of

¹²¹ The top-twelve journals according to the 2010 Eigenfactor scores, which measures the journals importance to the legal community, are the *Harvard Law Review*, *Yale Law Journal*, *Columbia Law Review*, *the Journal of Law and Economics*, *Stanford Law Review*, *Virginia Law Review*, *Michigan Law Review*, *Texas Law Review*, *the Journal of Law and Economic Organization*, *Georgetown Law Review*, *the University of Pennsylvania Law Review* and the *California Law Review*.

TABLE 4.4
 Number of Articles about the use of Foreign Law in Law Reviews
 Top 12 Journals

Law Review	Harvard	Yale	Columbia	Law and Economics	Stanford	Virginia	Michigan	Texas
1983-2003	1	2	1	0	2	1	0	1
2004-2012	6	1	1	0	5	3	0	0
Total	7	3	2	0	7	4	0	1

Law Review	Law and Economic Organization	Georgetown	Penn	California	Others	Total Top 12	Total	% Top 12
1983-2003	0	0	0	0	66	8	74	10.81%
2004-2012	0	1	2	1	178	20	198	10.10%
Total	0	1	2	1	244	28	272	

Top 12 Journals according to the 2010 Eigenfactor scores.

Harvard Law Review, Yale Law Journal, Columbia Law Review, the Journal of Law and Economics, Stanford Law Review, Virginia Law Review, Michigan Law Review, Texas Law Review, the Journal of Law and Economic Organization, Georgetown Law Review, the University of Pennsylvania Law Review and the California Law Review.

Article Count based on mentions about foreign law, excluding articles not related to the controversy.

TABLE 4.5
Support for the Court's Use of Foreign Law in the Law Reviews
2004-2011

	Total Articles	Opposition*	Percentage
Top 12 Journals	20	7	35%
Specialty Journals	62	20	32.2%
All Journals	198	65	32.8%

* Opposition includes articles explicitly opposed to the use of the Court's citation of foreign authorities and articles where the author(s) expressed that the Court should use caution while citing foreign authorities or only in certain contexts.

the articles expressed some caution or that the citation of international authorities was appropriate in only certain context, nearly two-thirds of all of the articles published between 2004 and 2011 articulated support for the Court's use of foreign authorities.

Over 30% of the articles about the use of foreign law were published in journals with an international focus including the *American Journal of Comparative Law*, the *Duke Journal of Comparative Law* and the *Tulsa Journal of Comparative and International Law*. While these journals often follow international legal developments and might cater to advocates already engaged in international law, these journals contained roughly the same percentage of support and opposition to other law reviews.

Among the most frequently cited articles about the use of foreign law came from a symposium published in January 2004 in the *American Journal of Comparative Law*. In introducing the Agora, the editors suggested that the "apparent willingness of the Court to consider international and foreign authorities in reaching its conclusions on contested issues of constitutional law has raised to new prominence the debate over the relationship between constitutional and international law" (Damrosch and Oxman 2004). The editors were able to publish articles by Harold Koh, Roger Alford, Gerald Neuman, Michael Ramsey and Alexander Aleinikoff in their attempt to contextualize the debate. According to Google Scholars' citation count, Koh's article in the Agora, "International Law as Our Law" was the second most cited article about the use of foreign authorities, behind only Richard Posner's article in the *Harvard Law Review* in 2005 opposing the use of foreign law (Posner

TABLE 4.6
Top Cited Law Review Articles about the Use of Foreign Law
2004-2011

Author	Date	Journal	Title	Citations
Richard Posner	2005	Harvard Law Review	A Political Court	374
Harold Hongju Koh	2004	American Journal of International Law	International Law as Our Law	279
Judith Resnik	2005	Yale Law Journal	Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry	205
Roger P. Alford	2004	American Journal of International Law	Misusing International Sources to Interpret the Constitution	183
Vicki C. Jackson	2005	Harvard Law Review	Constitutional Comparisons: Convergence, Resistance, Engagement	173
Melissa A. Waters	2005	Georgetown Law Journal	Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law	161
Sarah H. Cleveland	2006	Yale Journal of International Law	Our International Constitution	157
Jeremy Waldron	2005	Harvard Law Review	Foreign Law and the Modern <i>Ius Gentium</i>	146
Roger P. Alford	2005	UCLA Law Review	In Search of a Theory for Constitutional Comparativism	124
Ernest A Young	2005	Harvard Law Review	Foreign Law and the Denominator Problem	116

Citations count using Google Scholar – as of April 26, 2012.

2005).¹²² Roger Alford's article "Misusing International Sources to Interpret the Constitution" in the same forum as Koh's article, was cited over 180 times. Of the top cited law review articles about the use of foreign law, 60% of the articles supported the Court's engagement with international law.

The Proper Role of the Justice According to the Political Parties

The Court's use of foreign authorities drew the attention of political activists and Republican Party officials. While the platform of the Republican Party often expressed hostility toward activist judges since the 1960s, the platform of the national Party as well as several of the State Parties communicated a clear message that rank and file Republicans believed the citation of foreign laws was unacceptable. These planks opposing the Court, and the use of foreign law specifically, stand in marked contrast to the Democratic National platforms, which are comparatively silent on the role of the Justices in American society.

In this section I examined the rhetoric used by the Republican Party and the Democratic Party about the proper role of the judiciary found in the party platforms adopted by their respective national conventions from 1968 to 2008. I also examined many of the State Republican Party platforms adopted from 2008 and 2010 to see how local political activists responded to the controversy about the use of foreign law by the Supreme Court. I was also able to examine the State Platforms adopted by the Alaska, South Carolina, and Texas platforms adopted by their respective State conventions from 2002 to 2010.

¹²² The citation count of Richard Posner's article is misleading. The article was the Law Review's *Forward* to the 2004 term. The *Forward* is the lead article of each volume of the *Harvard Law Review* and may perhaps be the most prominent law review article published every year.

There are many reasons to discount the role of party platforms in American political culture. Very few people, even party activists, read the platform. The documents are not binding on politicians within the party nor do organized interest groups do not exert much effort into building or modifying a party's platform (Green and Coffey 2007). However, lawmakers do try to fulfill the commitments in party platforms (Elling 1979). In addition, "partisan rhetoric provides a window into the values and attitudes that have guided American politics" (Gerring 1998, 21). The platform allows "parties, through activists and elites to put in their own words what matters most in politics," visible for all to see (Green and Coffey 2007, 78).

Up until the 1980 National Republican Party platform, Republicans did not articulate a position about the role of the Justices. In 1968, the platform expressed that public confidence in the Court was absolutely essential (Republican Party platform of 1968). In 1972, after President Richard Nixon's first term, the platform expressed support for Nixon's appointees of possessing a "firm judicial temperament and fidelity to the Constitution" (Republican Party platform of 1972). After the Court's decision in *Roe* in 1973, the Republicans did not express outrage over the temperament or values of the Justices (Republican Party platform of 1976).

The Republican Party's relationship with the Court changed in 1980. Not only did the platform express a desire to appoint Justices who believed in the "sanctity of human life," but the platform also articulated a belief in the type of Justice that should serve on the Court. We pledge, the platform read, to appoint "women and men who respect and reflect the values of the American people, and whose judicial philosophy is characterized by the highest regard for protecting the rights of law-abiding citizens" (Republican Party platform

of 1980). Despite the successful nomination of Justice O'Connor to the Court, the 1984 Platform expressed, for the first time, a commitment of the party to the concept of judicial restraint (Republican Party platform of 1984).

After an eight-year reprise of criticizing the Court, in the 1988 and 1992 platforms, the 1996 Platform took straight aim at the Court.

The federal judiciary, including the U.S. Supreme Court, has overstepped its authority under the Constitution. It has usurped the right of citizen legislators and popularly elected executives to make law by declaring duly enacted laws to be "unconstitutional" through the misapplication of the principle of judicial review. Any other role for the judiciary, especially when personal preferences masquerade as interpreting the law, is fundamentally at odds with our system of government in which the people and their representatives decide issues great and small (Republican Party platform of 1996).

The Platform went on to assert that as President, Senator Bob Dole would appoint federal judicial nominees who are "first and foremost to be faithful to the Constitution and to the intent of those who framed it" (Republican Party platform of 1996).

The 2000 Platform took the attack upon the Court to the next level. In the Platform's section on Judicial Reform, the Republicans asserted that many judges "make up laws" (Republican Party platform of 2000). The Platform goes on to argue the judges presume superiority over the other branches of the government, and President Bush would appoint conservatives who respect the Constitution. In 2004, after the decisions in *Lawrence*, *Atkins*, and *Roper*, the Platform did not criticize those decisions for using foreign law, but that activist judges "threaten America's dearest institutions" (Republican Party platform of 2004).

It was not until the 2008 Platform where all of the attacks on the judiciary consolidated into one clear message.

Judicial activism is a grave threat to the rule of law because unaccountable federal judges are usurping democracy, ignoring the Constitution and its separation of powers, and imposing their personal opinions upon the public. This must stop....

Republicans will insist on the appointment of constitutionalist judges, men and women who will not distort our founding documents to deny the people's right to self-government, sanction federal powers that violate our liberties, or inject foreign law into American jurisprudence (Republican Party platform of 2008).

This sentiment was echoed in some of the speeches delivered by Senator John McCain during the 2008 Presidential campaign. In a speech at Wake Forest University, McCain asserted:

Federal courts are charged with applying the Constitution and laws of our country to each case at hand. There is great honor in this responsibility, and honor is the first thing to go when courts abuse their power. The moral authority of our judiciary depends on judicial self-restraint, but this authority quickly vanishes when a court presumes to make law instead of apply it (McCain 2008).

Later in his speech, McCain spoke out against the role of foreign law played in Court's decision in *Roper v. Simmons* (2005), concluding that the Justices disregarded "our Constitution" (McCain 2008).

Several of the individual State Republican platforms also contained planks opposing the use of foreign authorities by the Supreme Court.¹²³ The first time these statements appeared in a State Republican Party platform was in 2004.¹²⁴ By 2010, the Alaska, Arkansas, and Nevada Republican Platforms specifically expressed opposition to the use of foreign law. Nevada Republicans included a plank hostile to "global governance" (Nevada

¹²³ State party platforms can serve as a proxy for measuring party elite and activist ideology at the State level (Green and Coffey 2007).

¹²⁴ Alaska and Texas.

Republican Party platform of 2010; Nevada Republican Party platform of 2012).¹²⁵ Alaskan Republicans expressed a belief “in a judicial system that supports a strict, literal interpretation of the United States and Alaska Constitutions and recognizes the sovereignty of our laws and state’s rights without references to foreign precedent” (Alaska Republican Party platform of 2010).

These planks fit in with other statements contained in State Republican platforms against an activist judiciary. The 2010 Texas Republican Platform contained an entire section entitled “Judicial Restraint.” The Arizona, New Hampshire (2011), South Carolina (2011), South Dakota, and Wisconsin Republican platforms all contained statements that original intent or a strict construction approach are the only appropriate method of interpretation. The Vermont and Kansas Republican platforms expressed opposition to “legislating from the bench” (Vermont Republican Party platform of 2010) and judges being policy makers (Kansas Republican Party platform of 2010).

The evolution of the Texas Republican Platform over the decade is emblematic of the entire debate about the role of the courts and foreign law. In 2000, the platform contained a two-sentence plank supporting the principles of judicial restraint and original intent (Texas Republican Party platform of 2000). In 2002, the Party added a section strongly opposing “activist judges” (Texas Republican Party platform of 2002). At their 2004 convention, the Party came out against the use of foreign law. “We oppose judges abusing their constitutional authority by usurping jurisdiction organic to the States, assuming for themselves the legislative powers, or basing decisions on jurisprudence

¹²⁵ “We support our national sovereignty and reject the concept of global governance. No treaty shall override the U.S. constitution nor shall international foreign law be relied on or cited when Supreme Court cases are decided.”

TABLE 4.7**Evolution of the Texas State Republican Platform
2000-2008****Texas State Republican Platform 2000**

The Party supports the principle of judicial restraint, which requires that judges interpret and apply rather than make the law. We encourage the support of judges who strictly interpret the law based on the law's original intent.

Texas State Republican Platform 2002

The Party supports the principle of judicial restraint, which requires judges to interpret and apply rather than make the law. We encourage the support of judges who strictly interpret the law based on the law's original intent. The Party stands strongly against activist judges.

Texas State Republican Platform 2004

The Party supports the principle of judicial restraint, which requires judges to interpret and apply rather than make the law. We encourage the support of judges who strictly interpret the law based on the law's original intent. We oppose judges abusing their constitutional authority by usurping jurisdiction organic to the States, assuming for themselves the legislative powers, or basing decisions on jurisprudence emanating from jurisdictions foreign to our Constitution and laws.

Texas State Republican Platform 2006

We urge Congress to adopt the Constitutional Restoration Act and support the principle of judicial restraint, which requires judges to interpret and apply rather than make the law. We encourage the support of judges who strictly interpret the law based on the law's original intent. We oppose judges abusing their constitutional authority by usurping jurisdiction organic to the States, assuming for themselves the legislative powers, or basing decisions on jurisprudence emanating from jurisdictions foreign to our Constitution and laws.

Texas State Republican Platform 2008

We urge Congress to adopt the Constitutional Restoration Act and support the principle of judicial restraint, which requires judges to interpret and apply rather than make the law. We support judges who strictly interpret the law based on its original intent. We oppose judges who assume for themselves legislative powers.

emanating from jurisdictions foreign to our Constitution and laws (Texas Republican Party platform of 2004). The same language existed in the 2006 Platform, but was dropped from the 2008 platform.

In contrast with the Republican platforms, the Democratic national platforms since 1956 have not directly attacked the judiciary. In the 1956 Platform, the Party mentioned that the Court's decision in *Brown* "have brought consequences of vast importance to our Nation as a whole and especially to communities directly affected" (Democratic Party platform of 1956). However, the Platform also expressed support for "orderly determination" of school segregation cases by the courts.

This restraint in criticizing the judiciary as a whole continued unabated through the 2004 platform. From 1960 to 1980, if the Democrats discussed the role of the judiciary, it was in support of more women and minorities appointed to the federal court system. In 1980, the Platform was very specific about the number of women, African American and Hispanic appointees (Democratic Party platform of 1980). In 1984, the Democrats expressed a fear that more Reagan appointees would "drastically reinterpret existing laws" with references to a couple of issue areas (Democratic Party platform of 1984). The Democrats did not talk about the role of the judiciary in 1988 or 1992.

Beginning in 2000, the Democratic Party took a more proactive approach to articulating a vision for the judiciary. The 2000 platform stated "Al Gore will appoint justices to the Supreme Court who have a demonstrated concern for and commitment to the individual rights protected by our Constitution, including the right to privacy" (Democratic Party platform of 2000). In 2004, the Party pledged to appoint Justices "who will uphold our laws and constitutional rights, not their own narrow agendas" (Democratic

Party platform of 2004). In 2008, the Platform drew on some Republican themes about respect for the rule of law, but also incorporated many of the values expressed in earlier platforms.

For our Judiciary, we will select and confirm judges who are men and women of unquestionable talent and character, who firmly respect the rule of law, who listen to and are respectful of different points of view, and who represent the diversity of America. We support the appointment of judges who respect our system of checks and balances and the separation of power among the Executive Branch, Congress, and the Judiciary – and who understand that the Constitution protects not only the powerful, but also the disadvantaged and the powerless (Democratic Party platform of 2008).

The platform also expressed a belief “that our Constitution, our courts, our institutions, and our traditions work” (Democratic Party platform of 2008).

Conclusions

In the years leading up to the decision in *Lawrence*, Supreme Court reporters and scholars increasingly paid attention to the citation practices of the Justices and the effect of globalization on the judiciary. After 1999, each major, controversial decision that referred to a foreign law generated increased attention by journalists and conservative pundits, serving to prime the future debates in Congress. This debate over foreign law quickly fit into existing frames and narratives about judicial activism and national sovereignty. In the media, the coverage did not reflect the general support in the academic community about the use of foreign law. The articles themselves were saturated with criticism of the underlying decision rather than a thorough discussion of the underlying historical practice and use of foreign and international laws. By July 2003, when *Lawrence* was decided, the debate over the role of foreign law by the Supreme Court began in earnest in the halls of

academia and among party activists.

The Justices had plenty of opportunities to receive feedback about their use of foreign law. The controversy was covered in the major newspapers, the top law journals and expressed in the values of party activists through the Party platforms. However, the direction of the feedback was entirely one-sided against the Court's citations to foreign authorities.

In the media, most of the coverage about the use of foreign law served to indicate conflict between the Justices or of the opposition of conservative groups against the use of foreign citations. Many of the news articles described the controversy using "objective" values, repeating the claims of opponents without much analysis of those claims. Only one story in *The New York Times* analyzed the actual use of foreign law by the Court, both historically and its current practices (Liptak 2008).

On the editorial side of the paper, opponents of the citation of foreign law virtually dominated the conversation. While a more comprehensive analysis of editorial and op-ed columns was not completed, only one editorial in *The New York Times* defended the use of foreign law (2010). Instead, conservative syndicated columnists like Phyllis Schlafly and Thomas Sowell and featured columnists like Senator Jeffrey Sessions and Robert Bork published many columns expressing opposition to the practice of citing foreign law. Often that opposition was combined with concerns about judicial activism, legislating from the bench, or being unfaithful to the Constitution.

The discussion among the party activists also was one-sided in their beliefs on the Court's use of foreign authorities. Only Republicans engaged the controversy, expressing opposition in many State Platforms and in the 2008 Republican Party Platform. This

statement fit with earlier statements about an activist judiciary, so Party regulars were primed to add one additional sentence expressing opposition to using foreign law to interpret the Constitution.

Only in the law reviews was there a majority of expression in support of the use of foreign law by the Court. However, the overwhelming level of support among law review authors would likely be lost on most observers. In the symposiums published in the *Harvard Law Review* and the *Stanford Law Review*, the ratio of articles in support and opposition had a much higher level of opponents than supporters than reflected in the larger legal community.¹²⁶ In addition, a greater percentage of the top cited articles were articles opposed the use of foreign authorities.

This analysis indicates that Justices opposed to the practice of citing foreign authorities in their decisions could find lots of American allies. The newspapers, party platforms, and even casual readings of the leading law reviews could lend support to the Justices' positions. Outrage on the Court would lead to additional outrage in the papers and among party insiders. However, for Justices supportive of the role of foreign authorities, the world was a lonely place. Justice Breyer could find comfort reading most law review articles supportive of his position, but his natural allies were largely silent about the controversy.

¹²⁶ Based upon the proportion of law review articles published in support or in opposition to the use of foreign law.

Chapter Five: Is the Controversy About the Use of Foreign Law Uniquely American?

When interpreting the Bill of Rights, a court, tribunal or forum:

- a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - b. must consider international law; and
 - c. may consider foreign law.
- South Africa Constitution of 1996 ch. 2 § 39(1).

Different countries canvassed have taken different approaches. Most, however, give more weight to the value of freedom of expression and robust public debate than does the traditional Canadian approach.

- *Grant v. Torstar* 2009 SCC 62, 66.

During their televised debate in January 2005, Justice Stephen Breyer suggested that the very nature of adjudicating is a conversation between judges, professors, law students, and lawyers. Since every human society faces the same challenges, Breyer argued that judges have a responsibility to learn from the decisions made in other countries, and a duty to be transparent in their written opinions. When ideas are significant to his thinking, or may be useful to others, Breyer argued that they should be included in the opinion. In contrast, Justice Antonin Scalia, speaking to the same audience, first argued, that he “does not use foreign law in the interpretation of the United State Constitution” (Transcript 2005).

These contrasting theories offer an interesting insight into when (at least these two) judges might cite foreign or international authorities. However, especially in the case of Justice Breyer, they do not offer any real method for understanding the conditions under which he would turn to foreign jurisprudence. Justice Scalia is more specific, suggesting that foreign jurisprudence could be important for understanding certain phrases, which emanate from English law, or that foreign law could be used to interpret treaties. Still, these

insights only offer a starting point for when Justices would incorporate foreign law into their decisions.

Internationally, judges recognize the impacts of incorporating international law into the domestic legal systems (Waters 2005). The English were worried as early as 1366 about the comingling of Irish and English law (Smith 2006).¹²⁷ In the nineteenth century, the French resisted the growing German influence on continental law (Reiter 2004). The Supreme Court of Ireland rejected the construction of English law in 1974 (*Wyatt v. McLaughlin*; see also Carolan 2004).¹²⁸ Contemporary debates about the proper role of incorporating international law into the domestic legal system occur in Australia (*Al-Kateb v Godwin* 2004; Kirby 2006), England (Lester 1988), Italy (Grande 2000), India (Smith 2006) and elsewhere.

Most courts in common law nations routinely reference foreign and international legal authorities in their decisions (Benvenisti 2008). The Supreme Court of Canada regularly cites decisions from the United States and other common law nations (Manfrini 1990; Mason 1996; Lefler 2001; Ostberg et al 2001; Smithey 2001; Days 2007). Justices of the Supreme Court of Australia understand the value of learning from judges in other nations (Saunders 2006; Smyth 2008; Chandler 2011). The South African Constitution requires the Justices on the Constitutional Court to consider international law in their decision-making (Sarkin 1998; Webb 1998; Lollini 2007).

Outside of common law nations, many courts frequently cite foreign authorities. The

¹²⁷ The Statutes of Kilkenny (1366) stated “no Englishman be governed in the termination of their disputes by March law nor Brehon law, which reasonably ought not to, be called law, being a bad custom; but they shall be governed, as right is, by the common law of the land, as liege subjects of our lord the king” (O'Brien 2011).

¹²⁸ Walsh J. "in proceedings such as these [we are] not at all concerned with the construction of English law." *Wyatt v McLoughlin* [1974] I.R. 379 at page 395

ECtHR is citing more cases from the United States Supreme Court despite an earlier tradition of restraint by the Justices (de Wolf & Wallace 2009; Lupu and Voeten 2011). There is a rich tradition of using foreign law in Italy (Alpa 2001). Justices in Argentina (Rosenkrantz 2003), India (Khosla 2011), Japan (Takahashi 2002) and Singapore (Lee 2007) use foreign law in their decisions. What this suggests is that most courts, regardless of whether they come from a common law or civil law tradition, whether they come from Asia, Africa, the Americas or Europe, and whether they might be considered a “new” or “old” democracy.

Instead of being a rare occurrence, the citation of foreign law is relatively common in courts with constitutional review powers. In a ten-year period from 2000-2009, the United State Supreme Court, the Supreme Court of Canada, and the Constitutional Court of South Africa cited over 3,500 foreign laws or foreign jurisprudence in addition to over 550 references to UN and international treaties, conventions, and other documents.

In this chapter I illustrate that the United States Supreme Court is less likely to cite foreign or international jurisprudence than other similarly situated courts. There is little debate in other courts with constitutional review powers about the use of foreign law. I collected data from the *Southern African Legal Information Institute* for decisions of the South African Constitutional Court, the *Legal Information Institute* housed at Cornell Law School for decisions of the United States Supreme Court, and the *Judgments of the Supreme*

TABLE 5.1
Citations of Foreign Authorities
2000-2009*

Country	Total Citations	Majority	Plurality	Concurrence	Concurrence/Dissent	Dissent
Canada^a	2178	1543	14	215	79	327
South Africa^a	1254	939	9	124	72	110
United States^b	621	295	25	60	18	223

* Unique citation counts per opinion, including treaties and UN documents.

^a = Opinions delivered in the calendar year 2000 – 2009.

^b = Opinions delivered in the October 2000 – 2009 term of the Court.

TABLE 5.2
Citations of Foreign Authorities (Excluding Treaties)
2000-2009*

Country	Total Citations	Majority	Plurality	Concurrence	Concurrence/Dissent	Dissent
Canada^a	2069	1485	14	194	79	297
South Africa^a	1089	818	8	110	42	111
United States^b	423	245	12	39	14	125

* Unique citation counts per opinion, including treaties and UN documents.

^a = Opinions delivered in the calendar year 2000 – 2009.

^b = Opinions delivered in the October 2000 – 2009 term of the Court.

Court of Canada.¹²⁹ I read each case and collected each unique reference to a foreign or international law, judgment or resolution or treaty for each authored opinion. I also included cases that were included in a quote from another source. In determining the issues involved in each case, I used my own coding for cases from the Constitutional Court of South Africa, the issues developed by Harold Spaeth in the *U.S. Supreme Court Database* for cases in the United States, and the first header note of each decision of the Supreme Court of Canada. While each system is different, in some places I combined categories for a more direct comparison between courts.

Foreign laws or foreign jurisprudence were cited in all types of cases by every justice during this ten-year period. In 2005, South African Justice Dikgang Moseneke referenced twenty-eight judgments or statutes from the United Kingdom, Germany, Canada, the United States, the European Union and the Benelux Economic Union as well as provisions from the African Charter of People's Rights, the United Nations Declaration of Human Rights and the European Convention on Human Rights in *Laugh it Off Promotions v. South African Breweries International* ([2005] ZACC 7). Canadian Chief Justice Beverley McLachlin cited seventeen foreign judgments from Australia, New Zealand, South Africa, the United States and the United Kingdom in her decision in *Grant v. Torstar Corporation* (2009 SCC 69). In *District of Columbia v. Heller* (554 U.S. 570 [2008]), Justice Antonin Scalia cited two cases from the United Kingdom, one Scottish law, and five English laws.

These three cases are representative of the uses of foreign law and foreign jurisprudence by most of the justices across these countries. The justices use foreign laws

¹²⁹ Southern African Information Institute. <http://www.saflii.org/content/about-saflii-0>; Legal Information Institute. *Cornell Law School*. <http://www.law.cornell.edu/supct/supremes.htm>; Judgments of the Supreme Court of Canada. <http://scc.lexum.org/en/>

and foreign jurisprudence in several ways. First, foreign laws and foreign jurisprudence are used to reinforce common law principles that extend back to England. Second, the justices frequently refer to provisions of international treaties, declarations, and conventions. Often, these references allude to universal principles and standards of human rights or obligations the country is responsible for protecting. The third way the justices use foreign law and jurisprudence is to show that decision in one case is similar to cases decided in other countries.

The Use of Foreign Law by the South African Constitutional Court

In South Africa, the Constitutional Court exhibited independence and political influence nearly immediately after the fall of apartheid.¹³⁰ Two theories exist suggesting why constitutional drafters create courts with constitutional review powers. Bruce Ackerman (1997) suggests that the constitutional courts are institutions designed to prevent future governments from reneging on fundamental principles. In South Africa's case, the Constitution is a symbol of the repudiation of the era of apartheid and the Constitutional Court is the institution designed to uphold those principles. In some contrast, Thomas Ginsburg (2003) argues that the formation of courts with constitutional review powers serves as a check on the power of the government, especially in situations where delegates to the constitutional convention expect to lose power or where control over the future government is uncertain.

While these theories may not be incompatible as to why courts with constitutional review powers are created, neither theory explains why the Constitutional Court of South

¹³⁰ The interim Constitution was adopted in 1993.

Africa is remarkable for its citation of foreign and international jurisprudence in its written opinions. Ginsburg (2003) suggests that an important aspect of the character of judicial review in each democratic nation is the institutional design of the court. While the structure and autonomy of a court with review powers, as well as individual access, might predict the independence or affect of the court, other features of the constitution may be better predictors of how courts might operate.

Included in both the interim (1993) and final (1996) South African Constitution is a provision requiring the courts to interpret the Bill of Rights using foreign and international jurisprudence (Sarkin 1998; Webb 1998). This unique provision signifies the degree to which the drafters of the Constitution sought to limit the ability of the government to reshape the nation after decades of apartheid.

These provisions, Section 35 (interim) and Section 39 (final), are the primary reasons why the Constitutional Court of South Africa is exceptional in its use of comparative constitutional borrowing. The contested process of enacting both the interim Constitution and final Constitution, in the face of boycotts of the drafting process, illuminates how the drafters transformed international pressures supporting the enumeration of human rights to protect the rights of political minorities in the post-apartheid South Africa. While Section 39 of the final Constitution served as an additional guarantee that the government would not infringe on the rights of South Africa's minority population, the Constitutional Court utilized international and foreign law to expand the protection of human rights.

For "third wave" democracies, including South Africa, constitutional review demonstrates the new regime's commitment to democracy and the rule of law (Diamond

1996; Gibson and Calderia 2003; Black and Wilson 2004). This commitment to the rule of law in “third wave” constitutions includes a moral commitment to repudiating the previous regime through the protection of human rights (Arjomand 2003). Ackerman (1997) posits that the drafting of a constitution is either a transition of one regime to another or the crystallization of existing political relationships. In this former scenario, the constitution serves as a “symbolic marker of a great transition in the political life of a nation” (Ackerman 1997, 778). Through the “unconditional enforcement of individual rights” (Arjomand 2003, 13), constitutional courts play a critical role in securing the legitimacy of the new constitution for citizens and international observers alike. Since these constitutions signal a break from the past, independent judiciaries help ensure fidelity to the new founding principles.

As these founding principles include the commitment to protecting human rights, constitutional courts serve as the guardians of constitutional principles. In interpreting these constitutions, these principles achieve the form of higher, or natural law. With the commitment to human rights in these “third wave” constitutions and with increases in constitutional borrowing, in both common and civil law systems, constitutional interpretation of human rights may include the consideration of international or foreign law.

Only a few nations, including South Africa, contain constitutional provisions specifying how the courts should interpret the constitution, or the bill of rights (Webb 1998). In Canada, the Charter of Rights and Freedoms specifies that it “shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians (Section 27). However, the Hungarian and Ethiopian constitutions

are the closest to Section 39 of the South African Constitution in requiring the court to interpret the constitution with the guidance of international law. Article 7 of the Hungarian Constitution states the “legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law.” Chapter Three, Article 14 of the Ethiopian Constitution states, “The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia.” While Hungary and Ethiopia specifies that its courts must consider its treaty obligations in its constitutional interpretation, South Africa requires its legal system to utilize international law even without treaty responsibilities.

Section 39 of the South African Constitution obliges its courts to consider international law and explicitly permits the Court to consider foreign law and jurisprudence in interpreting the Bill of Rights.

- (1) When interpreting the Bill of Rights, a court, tribunal, or forum:
- a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - b. must consider international law; and
 - c. may consider foreign law.

This section of the 1996 Constitution is similar to Section 35(1) of the interim Constitution.

Section 35(1) read:

In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall where, applicable, have regard to public international law

applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

The adoption of both provisions indicates that the drafters of the Constitution desired its legal system to interpret its enumeration of rights in the context of international legal norms. However, while the constitutional design helps establish the boundaries of how the Court will operate, the Justices breathe life into the Constitution and author the judgments of the Court.¹³¹

Citation Practices of the Constitutional Court

In the first case ever decided by the Constitutional Court, *S v Makwanyane and Another* ([1995] ZACC 3), the Court argued that they should turn to foreign and international authorities not just because of Section 35 (of the interim Constitution), but because those authorities provide value because they analyze arguments for and against an issue, and because they show how other courts have dealt with similar issues. The Court went further, stating that both binding and nonbinding international law can be used as tools of interpretation; that the decisions of international and regional courts may provide

¹³¹ The supermajority status of the ANC in the South African National Assembly plays another check on the continued legitimacy of the Constitutional Court. The ANC supported the decisions on the death penalty and same-sex marriage even though the public opposed those decisions (De Vos 2010 [Pierre “On public opinion and the Constitutional Court” *Constitutionally Speaking* <http://constitutionallyspeaking.co.za/on-public-opinion-and-the-constitutional-court/>]). While this factor is beyond the scope of this project, it is important to point out that the overall political landscape plays an important part in shaping who the Justices respond to. In the case of South Africa, the role of the ANC on the citation practices of the Court appears to be non-existent. However, if the ANC were to take a more critical approach toward the Constitutional Court, this assumption would need to be scrutinized (Roux 2009).

guidance in interpreting the South African Bill of Rights.¹³² In the decision, the Court discussed capital punishment law in the United States, India and Tanzania, under the International Covenant on Civil and Political Rights and the European Convention on Human Rights, and limitations on rights in Canada and Germany. Subsequent rulings by the Court have not questioned the utility of foreign or international authorities to understand the meaning of the South African Constitution.

From 2000 – 2009, the Court cited 1,253 foreign or international authorities, including foreign and international court decisions, foreign or international laws, and treaties. Each opinion cited over 3 ½ international or foreign authorities on average. Individually, there was a range in number of citations used by each Justice. Of the Justices who wrote more than three opinions during this period, Justice Laurens Ackermann cited fifteen foreign or international authorities per opinion, while Justice Zak Yacoob cited less than one foreign or international authority per opinion. Several of the Acting Justices also cited foreign laws in their opinions.

The Justices cited foreign or international law in nearly every type of case that came before the Court between 2000 and 2009. As predicted, the Justices frequently cited foreign authorities in cases involving human rights or equality, but surprisingly, the Justices were more likely to cite foreign or international law in cases involving the separation of powers between the branches of government. The issue areas where the Court was least likely to reference foreign authorities were in federalism and standing cases.

Gender equality was one of the main issues the Constitutional Court dealt with during the 2000s. One of the cases involved the succession of property from a deceased

¹³² *S v Makwanyane and Another* ([1995] ZACC 3) at par 34-35.

TABLE 5.3
Citations of Foreign Authorities by Justice of the Constitutional Court of South Africa
2000-2009

Justice	Total Citations	Total # of Opinions	Citations per Opinion	Citations in Majority Opinions	Citations in Dissenting Opinions	Citations per Majority Opinion	Citations per Dissenting Opinion
Ackermann	90	6	15	15	-	15	-
Cameron	12	3	4	12	-	4	-
Chaskalson	72	11	6.55	67	-	7.44	-
Goldstone	43	7	6.14	6.14	-	6.14	-
Kriegler	42	5	8.4	42	-	8.4	-
Langa	106	24	4.42	79	-	4.39	-
Madala	31	12	2.58	13	18	3.25	2.25
Mokgoro	26	16	1.63	25	-	2.08	-
Moseneke	91	19	4.78	82	4	6.83	1
Ngcobo	171	44	3.89	90	23	4.73	5.75
Nkabinde	27	8	3.38	27	-	4.5	-
O'Regan	116	36	3.22	617	7	3.59	1
Sachs	127	42	3.02	69	21	4.93	3
Skweyiya	15	14	1.07	14	0	1.56	0
Van Der Westhuizen	33	16	2.06	33	0	2.75	0
Yacoob	21	33	0.64	19	1	0.95	0.2
The Court	95	19	5	95	-	5	-

Including citations to treaties and UN documents.

Court Composition (term): Lourens Ackermann (1994-2004); Edwin Cameron (2008-); Arthur Chaskalson (1994-2005); Richard Goldstone (1994-2003); Johann Kreigler (1994-2003); Pius Langa (1994-2009); Tholie Madala (1994-2008); Yvonne Mokgoro (1994-2009); Dikgang Moseneke (2004-); Sandlie Ngcobo (1999-2011); Bess Nkabinde (2006-); Kate O'Regan (1994-2009); Albie Sachs (1994-2009); Thembile Skweyiya (2003-); Johann van de Westhuizen (2004-); Zak Yacoob (1998-).

male relative. In a combined case, *Bhe v Khayelitsha Magistrate and Others* ([2004] ZACC 17), two women, joined by the Women's Legal Centre Trust, successfully challenged the decision under customary law to award an estate to a male relative. The majority opinion by Deputy Chief Justice Langa stated that the Court must consider international law (at para 55), but took a narrow approach analyzing how international conventions and foreign courts viewed the "rights of children." Langa quoted from several international conventions and, in a two-line paragraph, stated both the European Court of Human Rights (ECtHR) and the United States Supreme Court ruled that illegitimacy could not be grounds for discrimination, citing several decisions of both courts in a footnote (para 56). In his concurrence/dissent, Justice Sandile Ngcobo referred to 22 foreign or international cases in arguing that the Court should develop, rather than strike down customary law. Justice Ngcobo used the decisions of several African courts to show that the role of male primogeniture had outlived its usefulness ([2004] ZACC 17, para. 210). While both Justices cited foreign authorities, they took different approaches.

In both of these opinions, the Justices were united in accepting consideration of international law, but the usage was completely different. In the majority opinion, international authorities were considered only in one specific area that established whether extra-marital children suffer from social stigma that is prohibited under the South African Constitution ([2004] ZACC 17, para. 59). In contrast, the concurrence/dissent used international authorities to provide a broad understanding of how other courts dealt with similar issues. This case suggests that the individual Justices utilize foreign law differently, but both Justices find foreign law useful in their analysis of the law.

However, the Court does not always turn to foreign or international authorities in their decisions. In federalism cases, the Court showed reluctance to referencing foreign or international laws. Between 2000 and 2009, the Constitution Court decided seven cases dealing with the relationship between the national and provincial governments. Unlike other issue areas, where the Court frequently cited foreign or international authorities, the Justices rarely cited authorities from outside South Africa.

The Justice's apparent hesitancy in referencing foreign or international authorities in federalism cases suggests a natural limit in the use of international law. In these seven federalism cases (20 signed opinions), the Justices only referred to five foreign judgments in three different opinions. The purpose of these references appeared not to endorse a particular relationship between the federal government and provincial governments and local municipalities, but as an illustration of general constitutional principles or judicial powers.

In *Matatiele Municipality v President of the Republic of South Africa* (2) ([2006] ZACC 12), Justice Ngcobo cited cases from Germany, Canada, and the United States. Each of the references in the case were not to the holding on the merits of those cases, but to selected passages about the nature of constitutions,¹³³ or to the belief that people form attachments to their homes and communities.¹³⁴ These references added color to the opinion, and do

¹³³ "Like the German Constitution, it 'has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit [our] Constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate.' 1 BVerfGE 14 as translated by Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 2 ed (Duke University Press, Durham and London 1997) at 63." (para 36).

¹³⁴ "Indeed there are 'natural sentiments and affections which grow up for places [in] which persons have long resided; the attachments to [province], to home and to family, on

not seem to affect the holding of the case. In *Merafong Demarcation Forum v. President of the Republic of South Africa* ([2008] ZACC 10), Justice Ngcobo and Justice Sachs each cited one foreign judgment in their concurring and dissenting opinions respectfully. Justice Ngcobo approvingly cited a passage from the U.S. Supreme Court (*Carmichael v. Southern Coal and Coke* 301 U.S. 495 [1937]) limiting the role of the judiciary in how to interpret act of the legislature. In his dissent, Justice Sachs used a decision of the Court of Appeals of Quebec to say that participation in democratic processes is necessary for human dignity.¹³⁵ In these cases, the other Justices did not question the use or appropriateness of foreign law.

The only caveat to the general picture of the citing of foreign or international authorities is the trend over the decade of citing fewer authorities as the decade progressed. In 2000, the Justices cited 127 authorities in twenty-three cases, while in 2009, the Justices cited 82 authorities in thirty-four cases. This drop in citations cannot be solely explained by changes of the personnel on the Court, since the steepest drop occurred between 2006 and 2009, when the opinions averaged six citations of foreign or international authorities to less than two and a half citations. The only appointment made at the start of this period was Justice Bess Nkambinde in 2006, and she has cited an average of over three citations to foreign or international authorities in her opinions.¹³⁶ This decrease in citations serves as further confirmation of the argument made by Manfrini (1990) and Smithey (2001), that as courts grow more established over time, the less likely they would be to cite foreign or international law.

which is based all that is dearest and most valuable in life.' *Virginia v Tennessee* [1893] USSC 109; 148 U.S. 503, 524 (1893)." (para 79).

¹³⁵ At para. 298.

¹³⁶ Another Justice, Edwin Cameron, was elevated to the Constitutional Court in 2008. His appointment also does not account for the decreasing trend. In three opinions for the Court, he cited twelve foreign or international authorities.

TABLE 5.4
Citations of Foreign Authorities by the Constitutional Court of South Africa
2000-2009

Year	Unique Citations to Foreign Authority	Cases	Average per Case
2000	127	23	5.52
2001	118	25	4.72
2002	217	34	6.38
2003	66	25	2.64
2004	158	26	6.08
2005	138	24	5.71
2006	153	25	6.12
2007	110	27	4.07
2008	85	23	3.70
2009	82	34	2.41
Totals	1254	266	4.71

Including citations to treaties and UN documents.

Laugh it Off Promotions v. South African Breweries International (2005)

Laugh it Off involved a conflict between the free expression clause of the South African Constitution (Section 16) and the Trade Marks act of 1993. *Laugh it Off* Productions, a T-Shirt company specializing in the social satire of well known brands (Dean 2006). *Laugh it Off* sold a shirt mimicking the label of a popular South African beer, substituting the original trademark of Carling Black Label Beer with the text “Black Labour White Guilt” and “Africa’s Lusty Lively Exploitation Since 1652.” South African Breweries took *Laugh it Off* to court, claiming that the parody infringed upon its trademark – specifically claiming that *Laugh it Off* was diluting the beer’s distinctive character or reputation (Rutherford 2006).

South African Breweries won at both the trial court and the Supreme Court of Appeals. At the Supreme Court of Appeal, the Court ruled that *Laugh it Off* could not raise the constitutional defense of freedom of expression since the satire was offensive and detrimental to the trademark holder (Dean 2006). The Constitutional Court concluded that trademarks do not enjoy the same constitutional protections as the freedom of expression (Devenish 2005). In a large part, the Court concluded that it was not universally accepted that intellectual property rights are not a fundamental right (Dean 2006).

Justice Moseneke began his analysis of the law by illustrating the similarities and differences between the Trade Marks Act to laws in the European Union and the United Kingdom (para 36). Since the statutes were virtually identical to the United Kingdom, Justice Moseneke stated that the cases decided in the UK “provide a useful starting point in our understanding of the terms in our section 34(1)(c)” (para 36). In a subsequent section of the opinion, he illustrated a difference between South African and other foreign statutes.

In this instance, the South African statute did not require a company show an actual loss for the dilution of a brand, unlike laws in the UK, European Union, and the United States (para 54).

Justice Moseneke also examined case law from the United States in his decision to determine whether the Laugh it Off shirt amounted to parody and full protection under Article 16 of the Constitution. In the final paragraphs of his opinion, Moseneke rejects the approach of the United States Supreme Court to parody. In *Campbell v. Acuff-Rose Music* (1994), the U.S. Court provided protection to parody.¹³⁷ In a footnote, Moseneke stated that the Canadian Courts have not followed developments in the United States (para 65 n 68). While not providing blanket protection for parody, the Constitutional Court asserted that South African Brewers had not proved any material loss and dismissed the case.

In his concurring opinion, Justice Sachs closely analyzed the development of trademark law in the United States and the protection of parody. After discussing the paradox of parody, Sachs introduced the beneficial purpose of trademarks through a lengthy quotation from Justice Frankfurter in *Mishawaka Rubber & Woolen Manufacturing Co v S. S. Kresge Co* (1942). He then argued that under South African law, parody is not a separate defense, but an element of a court's analysis. He described what a court should do with the words of a 1997 decision of the Court of Appeals for the 9th Circuit.¹³⁸ Finally, he concluded that U.S. law recognizes that parody serves an important public function by quoting approvingly from the 1st Circuit's decision in *LL Bean v. Drake Publishing* (1987).

¹³⁷ "[T]he heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works.... whereas satire can stand on its own two feet and so requires justification for the very act of borrowing" *Campbell* (510 U.S. 569, 580-1).

¹³⁸ *Dr Seuss Enterprises, LP v Penguin Books USA Inc* 109 F3d 1394 (9th Cir 1997) at para 10.

“Denying parodists the opportunity to poke fun at symbols and names which have become woven into the fabric of our daily life, would constitute a serious curtailment of a protected form of expression” (para 106).¹³⁹

The two opinions shed light on how the Justices in South Africa use foreign authorities. In both opinions, the Justices believed that foreign authorities were relevant and important to understanding the meaning of South African law and in balancing competing constitutional rights. In many ways, Justice Moseneke took a more measured and comparative approach to using foreign law by comparing the Trade Marks Act in South Africa with similar laws in other countries and the European Union. While Moseneke did not go into much depth in analyzing foreign case law, he did state that two cases from the United Kingdom provide “instructive dictum” in understanding the meaning of South African law (para 39).¹⁴⁰ In some contrast, Justice Sachs took a more expansive approach to using foreign authorities in his concurrence. He frequently quoted with approval decisions made by U.S. courts, with the intent of incorporating those concepts into South African jurisprudence.

Final Thoughts about the use of Foreign Authorities in South Africa

This general picture of the citation habits of the Justices of the Constitutional Court suggests three things. First, the Justices appear collectively, to show no hesitancy in citing legal authorities from outside South Africa. The Justices referred to Section 39 of the Constitution, which explicitly states that they must consider international law, in only

¹³⁹ *LL Bean Inc. v Drake Publishers Inc.* 811 F 2d 26 at 34 (1st Cir 1987).

¹⁴⁰ *Premier Brands UK Ltd v Typhoon Europe Ltd* [2000] EWHC 1557 and *Pfizer Ltd and Pfizer Incorporated v Eurofood Link (United Kingdom) Ltd* [2000] E.T.M.R. (issue 10) 896.

eighteen decisions (6.7%) between 2000 and 2009.¹⁴¹ As the decade progressed, the Justices were even less likely to reference Section 39. This omission is important in understanding the motivations of the Justices. If the Justices do not feel compelled to justify the use of foreign law in their decisions, they must believe that the citation of foreign law is unquestioned by their audiences.

This level of comfort is indicated further by the fact that all of the Justices cite foreign and international authorities in their decisions. While significant variation exists between the Justices in their habits of citing foreign authorities, the Justices that do not cite foreign law as often have not objected to the citation of foreign law by the other Justices. No opinion during this period indicated a hostility toward or unease in the practice of citing foreign or international authorities by the Court.

There does appear to be the beginnings of a trend toward less reliance on foreign authorities by the Justices in South Africa. However, this trend could be illusory, since in 2003 there was also a significant drop in the usage of foreign citations and the newest Justice on the Court, Justice Cameron, showed little hesitancy in citing foreign authorities in his opinions. What is likely, though, is that the Justices on the Constitutional Court of South Africa will continue to reference foreign laws and foreign jurisprudence in their opinions and the Constitutional provision requiring the consideration international law is an invitation that the Justices readily accept.

The Use of Foreign Law by the Supreme Court of Canada

¹⁴¹ Two of those references were when the counsel for one of the parties stated the Court should consider international or foreign law (*Barkhuizen v Napier* [2007] ZACC 5; and *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* [2009] ZACC 33). Excluding those cases, the Court referred to Section 39 in 6% of its decisions.

The Supreme Court of Canada is neither a new Court, like the Constitutional Court of South Africa. Nor is the Supreme Court an older, established Court, like the United States Supreme Court. Instead, the Court is a mixture of both the old and new(er). What this indicates is that the Justices on the Court may still be experiencing some growing pains in interpreting the Canadian Charter of Rights and Freedoms and continue to face pressure of legitimation from the public, while at the same time, possesses a large body of Canadian precedent to draw upon.

Initially, the Supreme Court of Canada was established through the passage of the British North America Act of 1867, but the Court was not composed until the passage of the Supreme Court Act in 1875 (McCormick 2000). The British North American Act created a united Canada and the outlines of a unified, judicial system. Despite the national jurisdiction of the Court, decisions of the Court, or cases with the consent of both parties from a provincial Court could be appealed to the British Privy Council. The ability to appeal to the Privy Council for criminal appeals was not abolished until 1933 and until 1949 for civil appeals (Supreme Court of Canada 2009).

With independence from the Privy Council, the composition of the Supreme Court of Canada changed from seven members to nine, and the Justices serve for life, although they have a mandatory retirement age of 75. The next significant institutional change occurred in 1975, when the Canadian Parliament passed the Supreme Court Act of 1975. This Act changed the jurisdiction of the Court, eliminating most mandatory appeals to the Court, except in the case when dissent occurs in the lower court on criminal cases (Songer 2008).

These institutional changes provided an environment where the Charter revolution could occur.

The Charter of Human Rights expanded the power of judicial review in Canada, as the Charter enshrined a bill of rights in a new Constitution. This action established the Court in the forefront of interpreting the meaning of the Charter. The thought was that as rights became part of the constitution, regional concerns would diminish and replaced by a concern for national (or universal) rights, in which the Courts would play a prominent role (Trudeau 1968). The effect of the passage of the Charter was the judicialization of politics in Canada (Stone Sweet 2000; Manfredi and Maioni 2002).

One potential limitation on the judicialization of politics is included in the Canadian Constitution. Section 33 of the Charter allows Parliament or the legislature of a province to declare that a statute may still operate and override specific Charter provisions for up to five years.¹⁴² In theory, this provision places a check on the finality of judicial decisions, since Parliament could overrule the Court's interpretation of the Charter (Dixon 2009). Since Parliament can overturn the Court, many scholars argue that Section 33 encourages the Justices to anticipate the response of the legislators and act accordingly (Epstein et al. 2001; Bateup 2006). Peter Hogg and Allison Bushell (1997) describe this process between the Court and Parliament as a dialogue, as the Court and the legislature engage in a public debate over Charter values. However, other scholars have claimed that Section 33 allows for the Court to act more aggressively, since the Court does not need to worry about the finality of its decision (Roach 2001; Choudhry and Hunter 2003).

¹⁴² Section 33. (1) "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15."

In practice, the use of Section 33 has only occurred once, and not by Parliament, suggesting that the check on the Court is more theoretical than real (Tushnet 2003). John Ferejohn and Larry Kramer (2002) argue that mere presence of institutional constraints ensures “self-regulation,” by the Justices and that there is rarely a need to even employ threats against a Court. Thus, the Justices would be aware of the political responses and attitudes toward their decisions and would not unnecessarily antagonize Parliament in their opinions. This is played out in the level of deference to legislators, with the Government usually winning in cases involving allegations of Charter violations (Choudhry and Hunter 2003; 546).

The Supreme Court of Canada explicitly rejected an originalist approach to interpreting the Charter. Instead, the Justices have advanced a “contextual approach,” through a series of cases, first articulated in *Edmonton Journal v. Alberta (Attorney General)* (1989). This contextual approach for interpreting the provisions of the Charter emphasizes the “historical, social, and economic context” of the case (*R. v. Laba*, 1994; Leclair 2004). This approach for interpreting the Charter opens the door to a greater acceptance in what evidence might be considered persuasive. Christopher Manfredi and Antonia Maioni (2002) argue that the Court’s willingness to consider different sources of evidence have expanded the parameters of the types of evidence provided by litigators and interest groups to the Justices. The Justices themselves have argued that persuasive authorities from foreign countries are considered in their decision-making. Justice Gérard La Forest (1994) argued that foreign material enhances the effectiveness of the arguments made by litigators. Chief Justice Brian Dickson argued that Canada has a human rights obligation to

consider foreign law in its decisions (*Slaight Communication Inc. v. Davidson* 1989).¹⁴³ Justice Michel Bastarache argued in *Lavoie v. Canada* (2002), that widespread international acceptance of a doctrine is relevant to the interpretation of the Charter.¹⁴⁴ In *R v. Sharpe* (2001), the majority explicitly stated, international norms are relevant sources for interpreting domestic rights. Chief Justice McLachlin then approvingly quoted from *Driedger on the Construction of Statutes*, “the legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.”¹⁴⁵ Thus, despite some hesitancy in formally embracing foreign and international law, the Justices have routinely accepted the idea that foreign and international judgments may and should influence the interpretation of the Canadian Charter and statutes.¹⁴⁶

Several scholars of the Canadian Supreme Court noticed that the Court often turns to United States case law in interpreting the Charter (Bushnell 1986, Manfredi 1990, Ostberg et al. 2001, Ostberg and Wetstein 2007). They suggest several reasons for this phenomenon. A first rationale is that the nature of rights is universal, regardless of the constitutional or charter text. In *Hunter v. Southam* (1984), Justice Dickson argued that

¹⁴³ “I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.” *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

¹⁴⁴ “In this case, Parliament’s view is supported by common sense and widespread international practice.” *Lavoie v. Canada*, [2002] 1 S.C.R. 769.

¹⁴⁵ *R. v. Sharpe*, [2001] 1 S.C.R. 45

¹⁴⁶ “Canadian copyright law derives from multiple sources and draws on both common law tradition and continental civil law concepts” *Théberge v. Galerie d’Art du Petit Champlain inc.*, [2002] at para 116 Justice Gonthier dissenting.

warrantless searches were *prima facie* “unreasonable,” as articulated in *Katz v. United States* (1967), under both the Fourth Amendment of the United States and Section 8 of the Charter despite the differences between the two documents.¹⁴⁷ A second reason to cite American law is to conduct a general survey of American jurisprudence without necessarily endorsing any one doctrine (Ostberg et al. 2001). As Chief Justice Dickson explained in the *Queen v. Simmons* (1988), the American courts have over 200 years of experience in constitutional interpretation to learn from.¹⁴⁸ A third reason is for the Justices to use the doctrine as a persuasive tool (Ostberg and Wetstein 2007). Cynthia Ostberg and Matthew Wetstein (2007) found that the Justices referred to U.S. precedents more often when the decision on the merits was not unanimous. They suggest, echoing scholars of the attitudinal model in the United States, that the use of U.S. case law is just a smokescreen to mask the Justice’s policy preferences.

The Justices on the Supreme Court of Canada have shown only a little hesitancy in citing U.S. law, and less hesitancy in citing other foreign or international authorities. However, the Justices on the Court regularly urge caution in referencing American or other foreign jurisprudence. “While we must, of course, be wary of adopting American interpretations where they do not accord with the interpretive framework of our Constitution,” wrote Chief Justice Dickson in *Queen v. Simmons* [1988]. Justice Bertha Wilson cautioned, “this Court must exercise caution in adopting any decision, however compelling, of a foreign jurisdiction” (*Lavigne v. Ontario Public Service Employees Union* [1991]). “The United States Supreme Court has taken a different approach to freedom of

¹⁴⁷ *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145. *Katz v. United States*, 389 U.S. 347 (1967).

¹⁴⁸ *The Queen v. Simmons*, [1988] 2. S.C.R. 495.

expression and care must be taken not to blindly apply their decisions,” argued Justice Peter Cory in *U.F.C.W., Local 1518, v. KMart Canada* (1999). Despite these cautionary warnings, the Justices regularly reference foreign authorities in their decisions.

Citation Practices of the Supreme Court

Between 2000 and 2009, the Justices on the Supreme Court of Canada regularly cited foreign authorities. In this ten-year period, the Justices cited over 2,100 foreign authorities in about 1000 opinions. They cited 93 treaties, over 1100 cases or laws from England, and laws or court decisions from fifteen additional countries. The members of the Court also referenced decisions from many international and supranational courts including the Court of Justice of the European Union (ECJ), the ECtHR, the NAFTA tribunal, and the World Trade Organization.

References to foreign authorities depended upon the context of the case. Between 2000 and 2009, the Supreme Court of Canada decided 159 cases involving Charter claims, or nearly 25% of the Court’s docket. In those cases, they referenced a foreign or international authority 714 times, or about 4.5 citations per case. In the 517 non-Charter cases, the Justices cited a foreign authority less than three times a case.

The individual issues involved in each case also had an effect on the number of foreign citations. Broadly defined, patent and trademark cases contained an average of over 13 references to foreign or international authorities per case. Cases involving common law principles also contained a larger number of citations to foreign authorities. These cases contained an average of nearly 8 citations to foreign laws and jurisprudence. In contrast,

there were only five total references to a foreign or international authority in eleven family law cases, and no citations in privacy or language cases.

In cases involving common law principles: contracts, property, and torts the Justices frequently cited foreign authorities. In common law cases, over 70% of the total number of opinions contained at least one reference to a foreign law or foreign jurisprudence, often more. In *British Columbia v. Canadian Forest Products* (2004), a case involving compensation for environmental damages, Justice Ian Binnie cited 20 judgments from courts in Australia, the United Kingdom and the United States, and two statutes from France and the United States. Binnie spent four paragraphs explaining the development of *parens patriae* jurisdiction in the United States and the concept of the “public trust,” concluding that the Crown had the ability to sue for damages (paras. 77-81). Writing for three Justices in dissent, Justice Louis LeBel discussed eight cases from the United Kingdom and the United States that suggested the Crown’s theory for collecting damages were unprecedented.

The Court confronted the tort of negligent investigation in the 2007 case, *Hill v. Hamilton-Wentworth Regional Police Services Board*. The case involved an individual who was arrested and subsequently acquitted. The plaintiff then sued the Department for negligence in perusing the case against him. Chief Justice McLachlin argued that the police have a duty and responsibility to suspects, but ultimately decided that the police had not been negligent (Sutherland 2007). In dissent, Justice Louise Charron referred to twenty-five cases from Australia, New Zealand, the United Kingdom and the United States, which held that there was no duty to care for suspects (paras. 119-122).

In his dissent, Justice Charron relied on the *Anns* test, a two-step process of determining if an individual possessed a duty to care for another (Pitel 2002). The Court adopted the 1978 decision of the House of Lords in the Canadian case *Kamloops v. Nielsen* (1984). Between 2000 and 2009, the Justices referred to *Anns v. Merton LBC*, in thirteen cases, in fourteen different decisions and in three different issue areas. This use of *Anns* made it the most popular foreign authority of the Justices on the Supreme Court of Canada. In comparison, the Magna Carta was cited in six opinions, the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights in twelve opinions each, and the Fourth Amendment to the United States Constitution nine times. The Justices also referred to five additional cases from the United Kingdom more than five times: *Donoghue v. Stevenson* (1932) (9 opinions), *Edwards v. Attorney-General for Canada* (1930) (8 opinions), *R. v. Waterfield* (1963) (7 opinions) *Hadley v. Baxendale* (1854) (6 opinions), and *Hodge v. The Queen* (1883) (6 opinions). *Hadley* and *Donoghue*, like *Anns*, involved the development of common law doctrines and used in common law cases. *Waterfield* established the common law presumption of the ability for police to detain individuals. The Justices cited *Waterfield* in Criminal law cases and one Right to Counsel case. Both *Hodge's Case* and *Edwards* were Privy Council cases involving the question of how to interpret the Canadian Constitution. Unlike the other cases that were only used in one issue area, *Hodge's Case* and *Edwards* were used in a variety of cases: Aboriginal Law, Bankruptcy, Criminal Law, Education, Equality, Federalism and Separation of Powers. Only three cases from the United States were cited in more than two opinions *Terry v. Ohio* (1968) (search), *Hilton v. Guyot* (1895) (comity) and *Katz v. United States* (1967) (search).

The Justices referenced judgments from the United Kingdom much more often than decisions from the United States. Excluding cases from the United Kingdom issued before 1949, the date when the Privy Council stopped hearing cases from Canada, the number of citations to cases from the United Kingdom (547) is nearly the same as the total number of citations from the United States (555). However, the Justices did not ever make a distinction in the applicability of pre-1949 cases and post-1949 cases in their opinions. Occasionally the Justices will describe “Recent United Kingdom Jurisprudence” as in *Grant v. Torstar* (2009) or describe the law in “England” either with a description of the law in other nations or alone (see *Bruker v. Marcovitz* [2007]). The Justices were also inclined to cite recent cases from the United Kingdom. Three times during this period, the Justices cited a case issued in the same calendar year by a foreign authority: *R. v. Gunning* (2005), *Apotex Inc. v. Sanofi-Synthelabo Canada Inc.* (2008), and *F.H. v. McDougall* (2008).

Every Justice on the Court cited a foreign authority during this period, of those who wrote more than ten opinions during the ten-year period.¹⁴⁹ However, there is significant variation in the rate of citations. Three Justices referred to an average of two foreign authorities in their opinions. Justice Binnie referred to an average of over five foreign authorities in each of his opinions, and nearly seven authorities in his concurring opinions. In total, he alone cited over 25% of the total foreign authorities by the Supreme Court. Two Justices, Justice Marshall Rothstein and Justice Claire L’Heureux-Dubé also averaged over

¹⁴⁹ Except for Justice Thomas Cromwell, who was only elevated to the Court in December 2008 and not sworn in until January 5, 2009 (Fodden 2009). He authored six opinions in cases decided by December 2009, two majority opinions and four dissenting opinions. Chief Justice Antonio Lamar retired in January 2000, and only authored four opinions in this period.

two citations to foreign authorities in their opinions.¹⁵⁰ Excluding “as of right” cases, which are often decided the day of oral argument, Chief Justice McLachlin and Justice John Major also cited an average of over two foreign or international authorities in their opinions. Unlike Justice Binnie and Rothstein, L’Heureux-Dubé’s citations were found mostly in dissent.

About 25% of Justice Binnie’s citations (or 131 citations) occurred in patent, trademark, or copyright cases. Because of the specialization that often occurs on the Supreme Court of Canada, Justice Binnie authored the majority opinion in eight of the fourteen patent, trademark, or copyright cases during this ten-year period, and wrote one dissenting opinion in these cases. In *Free World Trust v. Électro Santé*, he began his analysis for a unanimous Court by explaining the concept of a patent with a discussion of the *Statute of Monopolies*, an English law passed in 1623, and an English case from the 17th Century.¹⁵¹ Later in the decision, Binnie describes two schools of thoughts for understanding patent protection, a German and Japanese system, and an Anglo-Canadian school of thought. In three paragraphs (36-39), he discussed two American patent cases and two British cases and listed eight decisions from Australia, New Zealand, South Africa, and Hong Kong that reached a similar conclusion.

In *Théberge v. Galerie d’Art du Petit Champlain* (2002), Justice Binnie cited 21 foreign authorities from four different countries and three treaties. The case involved the limits of a copyright claim, as the artist tried to prevent a Gallery that purchased the work from

¹⁵⁰ Both Justice Rothstein and Justice L’Heureux-Dubé served less than three years on the Court during this study. L’Heureux-Dubé retired in July 2002, and Rothstein was appointed in February 2006.

¹⁵¹ *Free World Trust v. Électro Santé Inc.* [2000] 2 S.C.R. 1024. para 13.

TABLE 5.5
Citations of Foreign Authorities by Justice of the Supreme Court of Canada
2000-2009

Justice	Total Citations	Total # of Opinions	Citations per Opinion	Citations in Majority Opinions	Citations in Dissenting Opinions	Citations per Majority Opinion	Citations per Dissenting Opinion
Abella	88	58	1.52	57	10	1.78	0.67
Arbour	82	55	1.49	46	21	1.28	2.1
Bastarache	164	86	1.91	102	35	2.22	1.59
Binnie	551	106	7.33	412	48	9.5	2.67
Charron	74	42	1.76	39	26	1.34	4.33
Cromwell	0	6	0	0	0	0	0
Deschamps	102	62	1.65	50	49	1.79	2.13
Fish	44	61	0.72	30	9	0.93	0.45
Gonthier	51	33	1.55	17	32	0.68	6.4
Iacobucci	62	56	1.11	16	2	0.32	1
L'Heureux-Dubé	51	22	2.32	9	34	1.8	3.78
Lamar	0	4	0	0	0	0	0
LeBel	187	113	1.65	117	29	1.89	1.53
Major	100	52	1.92	93	7	2.02	1.17
McLachlin	205	100	2.05	193	2	2.12	0.33
Rothstein	102	22	3.4	89	3	4.05	1.5
The Court	96	32	3	96	-	3	-

Including citations to treaties and UN documents.

Court Composition (term): Rosalie Abella (2004-); Louise Arbour (1999-2004); Michel Bastarache (1997-2008); William Ian Corneil Binne (1998-2011); Louise Charron (2004-2011); Thomas Cromwell (2008-); Marie Deschamps (2002-2012); Morris Fish (2003-); Charles Gonthier (1989-2003); Frank Iacobucci (1991-2004); Claire L'Heureux-Dubé (1987-2002); Antonio Lamar (1980-2000); Louis LeBel (2000-); John Major (1992-2005); Marshall Rothstein (2006-).

creating a canvass print from his original prints (Lesperence, n.d.). In ruling that the artist had not asserted a prohibition against the transfer to the canvass medium, Justice Binnie initially discussed French jurisprudence before asserting that a contrary ruling would “conflict with precedent from other jurisdictions” (at 66). While this statement was not determinative and just a subheading, Binnie explained two cases from the United States and mentioned that this particular issue had not been litigated in Australia or New Zealand. In dissent, Justice Charles Gonthier cited four English cases in discussing the history of copyright law in Canada.

At the other end of the spectrum, Justice Morris Fish was the least likely to cite foreign authorities on the Supreme Court of Canada. He cited just 44 foreign or international authorities in 61 opinions. Fish did refer to nearly one foreign authority in each majority opinion he authored, and cited at least one foreign authority in nineteen different opinions. While Fish cited foreign authorities at a less frequent rate in his dissenting opinions, he still cited foreign laws and jurisprudence at a rate greater than all of the Justices on the United States Supreme Court.

In several cases, Justice Fish mentioned, but rejected the applicability of foreign law. In *R. v. Déry* (2006), Justice Fish cited one treaty, three statutes from the United Kingdom and Australia and court decisions from the United State, South Africa, the East Africa Court of Appeals, and Fiji. In this case, he mentioned that the Attorney General suggested that the Court examine these cases, but Fish, on behalf of a unanimous Court, rejected the applicability of those cases.¹⁵² In his concurring opinion in *Canada (Justice) v. Fischbacher* (2009), Justice Fish posited that the Minister was not bound by an earlier understanding of

¹⁵² *R. v. Déry*. 2006 SCC 53, [2006] 2 S.C.R. 669 at para. 39

“premeditation,” because the State of Arizona decision that the Court had based that decision upon was qualified by a subsequent decision.¹⁵³ In *R. v. Singh* (2007), he spent several paragraphs describing the *Miranda* rule and subsequent developments, before rejecting importing the rule into Canadian law (paras. 89-94).

While in most areas of law, the Justices on the Supreme Court of Canada were likely to cite foreign authorities, in two areas of law, family law and privacy, they rarely did. In five privacy cases, the Justices did not cite any foreign authorities. However, Justice Gonthier did allude to the origins of the Canadian Ombudsman as Swedish in *Lavigne v. Office of the Commissioner of Official Languages* (2002).¹⁵⁴

In 19 opinions in Family Law cases, the Justices only cited five foreign authorities in three cases. Only in Justice Gonthier’s concurrence in *Nova Scotia (Attorney General) v. Walsh* (2002) did any Justice cite more than one foreign authority in the opinion. *Nova Scotia v. Walsh* involved the breakdown of a relationship between unmarried cohabitants (McClary 2005). Writing only for himself, he asserted that marriage is contractual in nature, and the Universal Declaration of Human Rights only contains a right to marry. He then turned to the 1866 decision of *Hyde v. Hyde* stating that English common law defined marriage as a voluntary union (between one man and one woman), ultimately concluding that couple had not made the choice to marry and the Charter could treat married and unmarried couples differently. In dissent, Justice L’Heureux-Dubé cited a decision of the

¹⁵³ *Canada (Justice) v. Fischbacher*. 2009 SCC 46, [2009] 3 S.C.R. 170 at para. 83.

¹⁵⁴ *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773 at para 39.

English Court of Appeals (*Gammans v. Ekins* [1950]), to illustrate the point that courts had expanded the concept of family to unmarried individuals.¹⁵⁵

Grant v. Torstar Corporation (2009)

In 2001, the Toronto Star published an unflattering piece about Peter Grant, a supporter of the Ontario Progressive Conservative Party, and friend of Ontario's premier, Mike Harris. Grant was involved in a property dispute with his neighbors about a proposed nine-hole golf course on Grant's property. The article published in the Star mentioned that most people thought the development was a "done deal" because of Grant's connections. Grant subsequently sued the Star alleging the "article effectively accused Grant of improperly using his influence to obtain government favour" (para 18). At the trial court, the jury sided with Grant, awarding him damages of nearly \$1.5 million. The Ontario Court of Appeal determined the jury instructions were flawed, because the trial judge did not present to the jury the Toronto Star's defense of responsible journalism (paras 21-25). The Canadian Supreme Court took the case to balance two conflicting values – the freedom of expression found in the Charter and the protection of reputation, a value protected in the common law.

Chief Justice McLachlin began her analysis of the case with an examination of the common law tort of defamation. She set the stage by discussing the elements of privilege, starting with the 1975 case of the House of Lords, *Horrocks v. Lowe* (1975) (para 30).¹⁵⁶ She then devoted several paragraphs devoted to why the current law does not afford sufficient

¹⁵⁵ *Nova Scotia (Attorney General) v. Walsh*. at para. 96.

¹⁵⁶ This decision of the House of Lords that recognized that in order for a plaintiff to succeed in a defamation suit stated the plaintiff must prove that the defendant did not believe the statement to be true or that the defendant acted with malice (Brazier 1974).

weight to the “constitutional value of free expression” (para 65). She subsequently considered the jurisprudence of other common law nations.

A consideration of the jurisprudence of other common law democracies favours replacing the current Canadian law governing redress for defamatory statements of fact on matters of public interest, with a rule that gives greater scope to freedom of expression while offering adequate protection of reputation. Different countries canvassed have taken different approaches. Most, however, give more weight to the value of freedom of expression and robust public debate than does the traditional Canadian approach (para 66).

In comparing the law in Canada to other common law nations, McLachlin first discussed *New York Times v. Sullivan* (1964). The Court rejected incorporating the “actual malice” rule in 1995,¹⁵⁷ but McLachlin noticed that most commonwealth courts were in the process of affording more defenses to press defendants in England, Australia, New Zealand and South Africa (para 68). She then discussed legal developments in England for 8 paragraphs and two or three paragraphs for each of the other commonwealth nations.

In her conclusion, the Chief Justice suggested that the developments in other countries provided the Court with several options for how to balance *Charter* principles.

A number of countries with common law traditions comparable to those of Canada have moved in recent years to modify the law of defamation to provide greater protection for communications on matters of public interest. These developments confront us with a range of possibilities (para 85).

From there, the Court used case law from the United Kingdom to develop a new test for determining a new defense for responsible communication. At no point did the Chief Justice blink or show any hesitancy in using foreign legal developments to shape the new doctrine. McLachlin did respect the decision of an earlier Court to reject the approach developed in

¹⁵⁷ *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130.

the United States, but did use the *Sullivan* decision as one alternative that the Court could have taken.¹⁵⁸

Final Thoughts about the use of Foreign Authorities in Canada

The consistent approach to the use of foreign authorities of the Justices on the Canadian Supreme Court suggest a comfort with utilizing foreign materials to inform their decisions. In the near term, this comfort is unlikely to change. While there will be variation from year to year in the rate that the Justices cite foreign authorities, that variation is dependent on the types of issues the Court deals with in any particular year.

In his study of foreign jurisprudence (1998-2003) by the Canadian Justices, Bijon Roy (2004), concludes that while the Justices are hesitant to adopt the doctrine and rules of foreign authorities, they possess an open-minded approach to recent developments and approaches. This appears to be consistent with this larger study. The Justices appear willing to examine the approaches used in other jurisdictions, even incorporating discussions of very recent foreign judgments in their opinions. However, the data in this study cannot verify the claim that the Justices do not “cherry-pick” the cases they reference. As Christopher Manfredi and Antonia Maioni (2002) suggest, there is a disjuncture between “the information and evidence found persuasive by courts—as revealed in their judgments—and the information and evidence on which they *could* have relied—either because they were included in the parties’ submissions or were accessible by consulting readily available data” (226). Thus, the appearance of an “open-minded” approach to

¹⁵⁸ Justice Rosalie Abella did issue a concurring opinion stating his agreement with the Chief Justice’s reasoning except with the proper division of power between a judge and jury (paras. 142-146).

foreign authorities is merely a willingness to reference and discuss foreign laws and judgments since there is an immeasurable amount of potentially relevant material for the Justices to utilize.

The actions of the Justices do suggest recognition that references to foreign authorities may affect the legitimacy of their rulings. Justice Fish's opinion in *R v. Déry* argued a "consistent line of case law in this country precludes us from adopting the American approach" (at para 35). In *R v. Singh* (2007), Justice Fish took pains in arguing, "I take care not to be misunderstood to suggest that *Miranda* either is now, or ought to be made, the law in Canada" (at para 94). In *Bruker v. Marcovitz* (2007), Justice Marie Deschamps argued in dissent, "the rules are different in Canada," rejecting legal remedies available in other nations (para 154). Unlike the Justices in the United States, these expressions that foreign law is inapplicable to the Canadian context is not a rejection of using foreign authorities. Instead, they are often contained in a debate of whether another Justice used foreign law correctly. In *Bruker*, Justice Aballa suggested that an international perspective was relevant to the case (at para 90), while Justice Deschamps rejected that conclusion.¹⁵⁹

Despite some expression of fears that the Justices should only use Canadian jurisprudence, it is more common that the Justices view developments abroad as reasons to reexamine Canadian jurisprudence. Justice Rothstein's statement for a unanimous court in *Apotex* (2008) suggests that the Justices are willing to change the trajectory of Canadian

¹⁵⁹ "This review leads me to conclude that, in the countries whose law is most similar to ours, the *get* issue is governed by internal private law rules. The solutions that have been adopted are quite varied. The decisions of each country's courts are based on mechanisms proper to that country. They establish no principle of public law that is so persuasive that Canadian courts should alter their approach. The Canadian solutions discussed above are both sensible and sufficient" (*Bruker* (2007) at para 155).

TABLE 5.6
Citations of Foreign Authorities by the Supreme Court of Canada
2000-2009

Year	Unique Citations to Foreign Authority	Cases	Average per Case	Percentage of Majority Opinions Containing a Foreign Authority
2000	204	65	3.14	41.54%
2001	340	90	3.78	45.56%
2002	359	86	4.17	46.51%
2003	138	74	1.86	39.19%
2004	227	73	3.11	38.36%
2005	149	67	2.22	40.30%
2006	159	46	3.47	58.70%
2007	286	52	5.5	57.69%
2008	196	64	3.06	43.75%
2009	191	59	3.24	38.98%
Totals	2249	676	3.33	44.38%

Including citations to treaties and UN documents.

law to match developments in other countries. “The convergence of the United Kingdom and the United States law on this issue suggests that the restrictiveness with which the *Beloit* test has been interpreted in Canada should be re-examined” (at para 60). Hesitancy on behalf of the Justices in citing foreign authorities – sometimes; rejection of the comparative method – no.

The Use of Foreign Law by the Supreme Court of the United States

Speaking at the Moritz College of Law at Ohio State University in 2009, Justice Ruth Bader Ginsburg stated: “I frankly don’t understand all the brouhaha lately from Congress and even from some of my colleagues about referring to foreign law.” In her speech, she suggested that the debate in the Court would diminish and return to the point where there was “no question that it was appropriate to refer to decisions of other courts” (Ginsburg 2009). Several months later, members of the Senate Judiciary Committee used Ginsburg’s speech in questions to Judge Sonia Sotomayor during her nomination hearings as Associate Justice of the United States (U.S. Senate 2009, 349).

In spite of their rhetoric about the use of foreign law, the Justices on the Supreme Court routinely cite international authorities in their decisions. During a ten-year period from the October 2000 through the October 2010 terms of the Court every Justice referred to a foreign authority in an opinion they authored. Justice Breyer referenced the most foreign authorities in his opinions, 141, mostly in dissent. Justice Scalia also cited over 100 foreign authorities across his 252 opinions during this period.¹⁶⁰ At the other end of the spectrum, Justice Samuel Alito referenced only four foreign authorities, all international

¹⁶⁰ Excluding references to treaties and executive agreements, Justice Breyer referenced 80 foreign authorities and Justice Scalia 96.

TABLE 5.7
Citations of Foreign Authorities by Justice of the Supreme Court of the United States
October Terms 2000-2009

Justice	Total Citations	Total # of Opinions	Citations per Opinion	Citations in Majority Opinions	Citations in Dissenting Opinions	Citations per Majority Opinion	Citations per Dissenting Opinion
Alito	4	89	0.04	0	4	0	0.15
Breyer	141	223	0.63	23	102	0.30	1.26
Ginsburg	31	166	0.19	16	7	0.20	0.14
Kennedy	78	164	0.48	63	10	0.85	0.34
O'Connor	12	91	0.13	2	7	0.05	0.44
Rehnquist	6	61	0.10	1	0	0.03	0
Roberts	37	70	0.53	32	5	0.86	0.42
Scalia	100	252	0.40	38	42	0.46	0.61
Sotomayor	4	13	0.31	1	3	0.14	1
Souter	64	161	0.40	55	4	0.80	0.08
Stevens	97	277	0.35	39	22	0.52	0.20
Thomas	45	245	0.18	23	17	0.30	0.22
The Court	2	44	0.05	2	-	0.05	-

Including citations to treaties and UN documents.

Court Composition (term): Samuel Alito (2006-); Stephen Breyer (1994-); Ruth Bader Ginsburg (1993-); Anthony Kennedy (1986-); Sandra Day O'Connor (1981-2006); William Rehnquist (1972-2005); John Roberts (2005-); Antonin Scalia (1986-); Sonia Sotomayor (2009-); John Paul Stevens (1975-2010); Clarence Thomas (1991-).

treaties, in his 82-signed opinions.

According to one study, the Justices' actual use of authority is arbitrary (Erickson and Simon 1988). In their study of the use of social science data by the Court, Rosemary Erickson and Rita Simon (1988) concluded the Justices use social science data when it is in their best interest, but not in any predictable or consistent manner. By 1959, at least one of the Justices came to believe that traditional legal authorities were not enough to understand the complicated cases the Court decided. Justice Felix Frankfurter wrote, "the types of cases that now come before the Court (as the present United States Reports, compared with those of even a generation ago, bear ample testimony) require to a considerable extent study of materials outside the legal literature" (*Dick v. New York Life Insurance Co.* 458 [1959]).¹⁶¹

While precedent may serve as the strongest form of justification, the Court has never "just" relied on precedent or "traditional legal authorities" in determining the outcome of a case (Koh 2004). In 1804, Chief Justice John Marshall argued, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."¹⁶² Harold Koh (2004) argued that in the early years of the republic, the Court did not distinguish between international and foreign law when considering the meaning of American law. In 1895, Justice Horace Gray, in *Hilton v. Guyot*, argued that it is in the law of nature not to give credit to the decisions of foreign courts. He recognized that the country must allow "within its territory to the legislative, executive, or judicial acts of another nation." While this principle of comity is specific to a particular individual or

¹⁶¹ Remarkably, Justice Frankfurter possessed strong belief in judicial restraint (see *West Virginia v. Barnette* [1943]) and the value of precedent (Gerhardt 2008).

¹⁶² *Murray v. The Schooner Charming Betsy*, 2 Cranch 64, 118 (1804).

judgment, it still suggested, in the 19th Century, a willingness on the part of the Justices to think broadly about how to understand American law and the Constitution.

Citations Practices of the Supreme Court

Compared with the Supreme Court of Canada or the Constitutional Court of South Africa, the Supreme Court of the United States infrequently cited foreign laws, foreign precedents, or treaties in its judgments. The Court referenced a foreign law or treaty occurred in about one of every three decided cases, or 621 times during the October 2000 and October 2010 terms of the Court. Excluding treaties and executive orders, the Justices cited a decision of a foreign court or foreign law, 440 times in ten years. In this period, the Justices on the Court referred to 178 treaties, 3 executive agreements and foreign laws or foreign court judgments from 21 different countries.

Of the 320 foreign or international judgments cited by the Justices between the 2000 and 2010 terms, 208 came from the United Kingdom (or 65%). This is not unexpected since the majority of the United States common law comes from England. Even Justice Scalia, a self-identified originalist, argued the only relevant foreign law is pre-1789 English law (Dorf 2005). However, during this period, the Justices referred to 83 English cases decided after the passage of the United States Constitution (or nearly 40% of the English court decisions cited by the Supreme Court).¹⁶³

¹⁶³ If you use the Continental Congress' approval of the Declaration of Independence as the break from England in 1776, then the Justices cited an additional 12 English cases that the United States would not be expected to follow. This would mean that only 55% of the English cases cited by the Justices would be relevant to current cases under Scalia's interpretive method.

Justice Scalia was the most prolific in referring to post-1789 decisions of the United Kingdom during this period. Justice John Paul Stevens was the next most prolific with thirteen references and only Justice Breyer cited more than ten modern English precedents. Scalia cited twenty-five cases from England decided after 1789 (or over 40% of his references to English judgments), including a 2003 decision of the England and Wales Court of Appeal (EWCA) in his dissent in *Olympic Airways v. Husain* (2004). In *Olympic Airways*, Scalia used the decision from the EWCA and a decision by the Supreme Court of Victoria, Australia to show that two other signatories of the Warsaw Convention issued rulings counter to the Court's majority. Interestingly, Scalia mentioned that both cases relied heavily on American precedents. Scalia also used modern English precedents to conclude discussion of the evolution of common law, as he did in *Crawford v. Washington* (2004).

Beyond citing English precedents, the Justices cited the 112 decisions of thirteen different countries and ten international tribunals. Most of the Supreme Court's references were to common law courts – Canada, Australia, South Africa and New Zealand. However, the Justices were not generous in citing the decisions of its northern neighbor. In ten years, the Justices cited the decisions of the Supreme Court of Canada 13 times in seven cases. In *Abbott v. Abbott* (2010), both Justice Anthony Kennedy for the Court and Justice Stevens in dissent cited the same two custody cases from the Canadian Supreme Court.¹⁶⁴ Stevens used the cases to show that other courts had reached a view similar to his on the meaning of the Hague Convention on the Civil Aspects of International Child Abduction. In contrast,

¹⁶⁴ The citations were to *D. S. v. V. W.* [1996] 2 S. C. R. 108 and *Thomson v. Thomson*, [1994] 3 S. C. R. 551.

Justice Kennedy stated that while the Canadian Court “stated a contrary view,” they were not on point.¹⁶⁵

Beyond the common law nations, which share historical ties with England, the Justices cited multiple cases from France, Germany, Ireland, Israel and the Netherlands. They also cited cases from Austria, Belgium, Iraq, and Morocco. The Justices also referenced statutes from Chile, Singapore, Russia, Cuba, Sweden, Mexico, and Zambia. Unlike the Justices of the Canadian Supreme Court, the references to French law was not to help understand the peculiarities of interpreting the civil code of Louisiana, but in a manner similar to the use of other foreign courts. In *New York Times v. Tasini* (2001), Justice Ginsburg referenced a judgment of a Court in Strasborg, France, as well as lower court judgments of Belgium and the Netherlands, to suggest that the Court’s understanding of copyright was similar to other nations. Justice Breyer cited a French court’s decision, along with judgments from England and the Netherlands to illustrate the concept of sovereign immunity. The use of the judgments of these countries serves to provide additional evidence of a uniform trend or to buttress a legal doctrine.

The Justices on the Supreme Court were more likely to cite an international or supranational court than a decision of a non-common law court. The Justices cited 38 decisions from the International Court of Justice (ICJ) and five decisions from the ECtHR. The Justices also referenced decisions from the UN War Crimes Tribunal, ECJ, the Iran-US Claims Tribunal, the Court of Arbitration and the International Criminal Tribunal for the former Yugoslavia. Most of the ICJ cases referenced by the Supreme Court occurred in two cases - *Sanchez-Llamas v. Oregon* (2006) and *Medellin v. Texas* (2008).

¹⁶⁵ *Abbott v. Abbott*. No. 08-645 (2010).

Medellin involved the arrest and conviction of a Mexican national without notification of his right to notify his consulate of his arrest under the Vienna Convention on Consular Relations. The ICJ previously ruled that he was entitled to a review of his conviction.¹⁶⁶ Chief Justice John Roberts wrote the majority opinion, ruling against *Medellin*. In his opinion, the Chief cited four treaties signed by the United States, two United Nations documents or statutes, eight decisions of the ICJ and one of its predecessor, the PCIJ, and a decision of the Supreme Court of Morocco. In his dissent, Justice Breyer referred to four decisions of the ICJ, a case from the United Kingdom, and wrote an appendix consisting of 45 treaties the United States was a signatory.

While *Medellin* was a case about the rights of foreigners in the United States, the case was also about the relationship between the United States Supreme Court and other international courts. The common-law tradition is one of comity, the recognition and enforcement of the decisions of foreign courts (Stephan 2009). The statute creating the ICJ states a judgment shall have “binding force ... between the parties and in respect of that particular case.” In 2004, the ICJ, in *Case Concerning Avena and Other Mexican Nationals*, required the United States to reexamine certain criminal proceedings. Roberts argued that ICJ judgments are not meant to be enforceable by United States courts, because the effects of noncompliance is a political decision made by UN Security Council. In dissent, Justice Breyer did not directly examine the relationship between the decisions of the ICJ and the Supreme Court, but argued the Vienna Convention was a “self-executing” treaty and the Court was obliged to respect the *Avena* decision.

¹⁶⁶ *Case Concerning Avena and Other Mexican Nationals (Mex. v. U. S.)*, 2004 I.C.J. 12 (Judgment of March 31).

Every Justice authored an opinion during this period containing a foreign law or reference to foreign jurisprudence. Justice Breyer referenced the most foreign authorities in his opinions, 141, mostly in dissent. Justice Scalia also cited over 100 foreign authorities across his 252 opinions during this period.¹⁶⁷ The Justice with the fewest citations to foreign authorities was Justice Alito. Justice Alito referenced four foreign authorities, all international treaties, in his 82-signed opinions. One of his references was to the United Nations Convention Against Transnational Organized Crime in his dissenting opinion in *United States v. Santos* (2008). In this instance, Alito described the convention as the leading treaty on money laundering and that the United States (and 14 other states) had adopted the same language.¹⁶⁸ He also referenced two of the four Geneva Conventions in his dissent in *Hamdan v. Rumsfeld* (2006).

The circumstances each Justice referred to foreign authorities differed. While Justice Alito only cited a treaty in dissent, Justice Kennedy and Chief Justice Roberts cited foreign laws and judgments more often as part of majority opinions and Justices Scalia and Breyer cited these authorities more often in their dissenting opinions. The differences in circumstance are reflective of the position each individual Justice plays on the Court,¹⁶⁹ but

¹⁶⁷ Excluding references to treaties and executive agreements, Justice Breyer referenced 80 foreign authorities and Justice Scalia 96.

¹⁶⁸ "The leading treaty on international money laundering, the United Nations Convention Against Transnational Organized Crime (Convention), Nov. 15, 2000, 2225 U. N. T. S. 209 (Treaty No. I-39574), which has been adopted by the United States and 146 other countries, is instructive."

¹⁶⁹ Justice Kennedy is known as the swing vote on the Supreme Court. In this position, Kennedy may cast the deciding vote on the merits of a case and votes more often with the majority. In cases where Kennedy is the deciding vote, he may write the opinion for the Court. Chief Justice Roberts only wrote twelve dissenting opinions during his tenure during this period. As Chief Justice, Roberts is often able to determine which Justice writes the majority opinion. Justices Scalia and Breyer served as intellectual foils on the Court during this analysis and often wrote animated dissenting opinions.

also the different role of dissenting and concurring opinions. Generally, the Justices have more leeway in writing dissenting (and concurring) opinions. Unlike a majority opinion, where the author needs to gain the support of at least four other Justices, a Justice writing in dissent may not need to gain support (or complete support) for their argument (Epstein and Knight 1998).

A plurality of Justice Scalia's citations to foreign authorities (42%) occurred in a dissenting opinion. Most of those references occurred in one case – *Hamdi v. Rumsfeld* (2004), but Scalia referenced a foreign or international authority in thirteen different dissents, or nearly 20% of his dissents. In *Hamdi*, Scalia began his discussion of the core democratic principle of liberty with passages from Blackstone's *Commentaries on the Laws of England*. From there, Scalia related the history of *habeas corpus* and the Due Process Clause. Included in this history, were 16 references to English laws and court decisions.

Justice Scalia's use of Blackstone in *Hamdi*, is reflective of his fondness for referencing Blackstone's *Commentaries*. The Justices cited the *Commentaries* or mentioned Blackstone in 57 different opinions between the October 2000 and October 2009 terms. Justice Scalia referred to Blackstone in 18 different opinions, while the next most frequent user of Blackstone was Justice Thomas with 9 references. However, the use of Blackstone, as the definitive source of the meaning of common law, is not necessarily a winning argument. Less than 45% of the citations of Blackstone were in majority opinions, while nearly 30% of the references were in dissention opinions. In nine cases, including *Boumediene v. Bush* (2008), both the majority and a dissenting opinion referenced Blackstone.

In contrast to Justice Scalia, over 80% of Justice Kennedy's citations to foreign or international authorities were in majority opinions. A majority of those references were contained in just two cases, *Boumediene* and *Abbott*, and over 70% of his citations (56) to foreign or international authorities occurred in just five opinions. In *Boumediene*, Kennedy recounted the history of the use of *habeas* as it applied abroad, especially Scotland. In his discussion, he referred to 23 foreign authorities, including the Magna Carta, ten judgments of English courts (five cases decided after 1789), six English laws, four treaties, and the United Nations War Crimes Commission.

The number of international authorities that the Justices were exposed to in the course of litigating *Boumediene* before the Supreme Court was more than what Kennedy or the other opinions cited. In the lead up to oral arguments, the Court received briefs from the three named petitioners in the case, the federal government, twenty-four amicus briefs on behalf of the petitioner and four amicus briefs filed on behalf of the respondent. The authors of the briefs illustrated many different approaches and references for the Justices to consider in their ruling.

In these 36 briefs, the authors of the briefs in *Boumediene* cited over 2,300 authorities. Included in these authorities were 226 references to judgments of foreign courts from eight different countries and the ECtHR, the ECJ, the International Criminal Court, the Inter-American Court of Human Rights, the International Court of Justice, and International Criminal Tribunal for the former Yugoslavia. The briefs included citations to thirty-six decisions of the UN Human Rights Commission and sixty-three foreign or international laws or resolutions. Six of the briefs discussed Blackstone's commentaries.

Justice Kennedy, for the Court, was both judicious and expanding in using the arguments and citations made in the briefs. Kennedy cited foreign authorities or treaties found in fourteen briefs, but appeared to draw most heavily from the amicus brief of the Commonwealth Lawyers Association.¹⁷⁰ Four members of the English Bar signed the Commonwealth Lawyers Association brief and it described the origins and history of habeas corpus. While it is unclear whether this brief was the source of the majority's argument, and also of Justice Scalia's dissent, or whether it was the decision of the 3rd Circuit that also discussed the history of the writ, nine of the citations found in the majority opinion also appeared in the Commonwealth Lawyer's brief. Kennedy did not limit his use of foreign authorities to the authorities referenced in the briefs. Five of Kennedy's twenty-three references to foreign authorities or treaties were not contained in the briefs, indicating that, in this case at least, Kennedy showed a willingness to independently research and cite foreign authorities.¹⁷¹

Over the course of the decade, the Justices on the Court were inconsistent in referencing foreign authorities in their decisions. In two terms of the Court, October 2003 and October 2007, the Justices cited over 100 foreign authorities during the term. During the October 2003 term, the majority of those citations occurred in three cases, *Crawford v. Washington* (2004), *Hamdi v. Rumsfeld* (2004) and *Rasul v. Bush* (2004). In the October 2007 term, four cases accounted for most of the citations to foreign authorities, *Medellin v. Texas* (2008), *Boumediene v. Bush* (2008), *Exxon v. Baker* (2008), and *D.C. v. Heller* (2008). Of these seven cases, four of the cases involved interpretations of treaty obligations.

¹⁷⁰ Many of the references were found in multiple briefs.

¹⁷¹ These citations were not contained in the decisions of the 3rd Circuit. *Boumediene v. Bush* 476 F.3d 981 (2007) nor in the earlier decision in *Al Odah v. United States* 321 F.3rd 1134 (2003) reversed by *Rasul v. Bush* 542 U.S. 466 (2004).

TABLE 5.8
Citations of Foreign Authorities by the Supreme Court of the United States
2000-2009

Year	Unique Citations to Foreign Authority	Cases	Average per Case	Percentage of Majority Opinions Containing a Foreign Authority
2000	48	81	0.59	8.64%
2001	18	77	0.23	3.90%
2002	34	75	0.45	6.67%
2003	110	74	1.49	13.51%
2004	73	75	0.97	13.33%
2005	73	74	0.99	12.16%
2006	14	71	0.19	2.82%
2007	165	69	2.39	10.14%
2008	38	76	0.50	11.84%
2009	48	84	0.57	4.76%
Totals	621	756	0.82	8.73%

Including citations to treaties and UN documents.

Medellin involved the obligations of the United States to the International Court of Justice. *Hamdi*, *Rasul*, and *Boumediene* involved the relationship between the United States, Cuba, and the international actions against Al Qaeda and other terrorist organizations. The other cases, *Crawford*, *Exxon*, and *Heller*, were not international in nature, but involved common law principles.

In other years, especially the October 2006 term, the Court rarely cited foreign authorities. In the October 2006 term, the Justices referred to a foreign authority (excluding treaties) in three cases. In one of those cases, *Powerex Corporation v. Reliant Energy Services* (2007), one of the parties (Powerex) was a Crown Corporation of the Province of British Columbia. In his dissent, Justice Breyer discussed two statutes that make BC Hydro a kind of governmental agency entitled to rights under the Foreign Sovereign Immunities Act.

In the October 2009 term, the Justices cited thirty-eight foreign authorities and an additional ten treaties. While the number of references to foreign authorities was more than the October 2008 term, there were fewer citations in majority opinions in October 2009. In 84 cases, only three Justices cited a foreign law or court case for a majority, Justice Breyer, Sotomayer, and Kennedy. In two of those cases, *Milavetz, Gallop & Milavetz, P.A. v. United States* (2010) and *Merck v. Reynolds* (2010), Justices Sotomayer and Breyer respectively, cited one case from the United Kingdom. The other case in the October 2009 term where the majority opinion contained a reference to a foreign authority was *Abbott v. Abbott* (2010), a case concerning the Hague Convention on the Civil Aspects of International Child Abduction. While the shift in referencing foreign authorities in October 2009, may not lead to a trend, it could be the effect of the changed composition of the Court.

Between October 2005 and August 2010, the composition of the court changed four times. President George W. Bush was able to elevate Chief Justice Roberts and Justice Alito to the Court. During his first two years in office, President Obama was able to see the confirmation of Justice Sotomayer and Kagan to the bench. Of those new Justices, only Chief Justice Roberts was more likely to cite a foreign authority in his opinions than his predecessor, Chief Justice Rehnquist. However, Roberts only cited a foreign authority in six cases, three of which involved a foreign treaty.¹⁷² The two others involved the role of and history of common law, and Justice Roberts cited Blackstone, John Locke, and several English cases in *Sprint Communs v. APCC Services* (2008) and *Robertson v. United States* (2010) (Bickford 2010).

Like the Constitutional Court of South Africa and the Supreme Court of Canada, the number of citations to foreign authorities by the Justices on the United States Supreme Court depended on the type of issue in each case. Using the issue codes contained in the *Supreme Court Database* for this ten-year period, the Justices were more likely to reference a foreign authority in Federalism, Due Process, and Criminal Procedure cases. In each of those issue areas, the Justices cited an average of more than one foreign authority per case. However, for Federalism and Due Process cases, one case accounted for a majority of those citations. Excluding *Medellin v. Texas* (2007) and *Hamdi v. Rumsfeld* (2004), the average citations per case is closer in line with the remaining issue areas. If the rest of the Guantanamo cases were excluded from the averages in the Criminal Procedure cases, the average number of references to foreign authorities drops below one citation per case, but Criminal Procedure cases would still retain the highest average of the thirteen issue areas.

¹⁷² *Sanchez-Llama v. Oregon* (2006), *Medellin v. Texas* (2008), and *Munaf v. Green* (2008).

In contrast, there was only one reference to a foreign or international authority in each of three issue areas: Unions, Attorneys, and Interstate Relations. Another issue area that averaged less than 0.25 citations per case were First Amendment cases. Despite many countries possessing similar protections in their constitutions regarding speech, the Justices on the Court only cited 12 foreign authorities in 6 of the 50 First Amendment cases decided between the October 2000 and October 2009 terms.

The actual use of foreign authorities in First Amendment cases suggest an even greater reluctance to cite than the averages might imply. Only three Justices referred to a foreign authority in a majority opinion: Justice Scalia's for a unanimous Court in *Thomas v. Chicago Park District* (2002), Justice Thomas' majority opinion in *Ashcroft v. ACLU* (2002) and Justice Roberts' unanimous opinion in the religions freedom case of *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* (2006).¹⁷³ This citation in *Gonzales* was the only religious case to contain a citation to a foreign authority, and this citation was to a treaty obligation of the United States.¹⁷⁴ Justice Scalia referred to foreign laws in two dissents, *McConnell v. F.E.C.* (2003) and to the French Constitution in *McCreary County v. ACLU* (2005). Justice Breyer cited four judgments from Canada, the ECtHR, Israel and South Africa in his opinion in *Ysursa v. Pocatella Education Association* (2009). Breyer did not discuss the opinion on the merits in those foreign judgments, but used the citations to say that courts across the globe have used the concept of proportionality to review free speech cases.

¹⁷³ The citation in *Gonzales* was to a treaty, while Justice Scalia referred to a 17th Century English law, and Thomas cited a 19th Century English case.

¹⁷⁴ United Nations Convention on Psychotropic Substances. Feb. 21, 1971, [1979-1980], 32 U. S. T. 543, T. I. A. S. No. 9725.

District of Columbia v. Heller (2008)

In 1975, the District of Columbia passed an ordinance restricting residents from owning handguns in the District. On the surface, this act was enacted contrary to the Second Amendment of the Constitution, which states, in part “the right of the people to keep and bear Arms, shall not be infringed.” However, in *United States v. Miller* (1939), the Court ruled that the National Firearms Act of 1934 was constitutional, upholding a conviction for transporting an unregistered firearm. Between 1939 and 2008, the Court did not specifically address the meaning of the Second Amendment (Nakamura 2007).

In the opinion for the Court, Justice Scalia began with the recognition that the Second Amendment consists of two parts, a prefatory clause, and then an operative clause.¹⁷⁵ Before discussing the two clauses of the Second Amendment, Scalia discussed the logic of statutory construction, that a prefatory clause does not limit the operative clause. He cited approvingly this rule of construction stated in *Rex v. Marks* 3 East, 157 (K.B. 1802), found in Joel Prentiss Bishop’s *Commentaries on the Written Laws and Their Interpretation* (1882). “It is nothing unusual in acts . . . for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law.” While Justice Scalia credited Judge Lawrence’s decision for the quotation, he omitted the words “of parliament” after the word “acts” in his quote in an attempt to obfuscate and Americanize the origin of the authority (Bishop 1901, 55).

Justice Scalia went on to analyze the meaning of the operative clause of the Second Amendment. In discussing the phrase “bear arms,” Justice Scalia found support in

¹⁷⁵ A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Blackstone, English statutes and William Hawkins' *Treatise on the Pleas to the Crown*, that the phrase meant an individual right. Scalia also turned to pre-1776 English law, including the English Bill of Rights, to discuss the meaning of the operative clause, going back to the Restoration and the Glorious Revolution to show that English citizens enjoyed the right to possess firearms.

Justice Scalia offered no apology for using English law and common law treatises to explain the meaning of the Second Amendment to the founders. In his comments about foreign law at the 2005 CSPAN debate, he explicitly stated that the Court should examine English law for to help understand the meaning of certain phrases in the Constitution. However, Scalia did not refrain from citing only English laws before Independence in *Heller*. In addition to his favorable quotation from *Rex v. Marks* (1801), he also discussed a 1780 debate in the House of Lords about an attempt to disarm English citizens and that that would violate the English Bill of Rights.¹⁷⁶

Justice Stevens, in his dissent, criticized the majority for its reliance on English law to understand the meaning of the Second Amendment. Unlike the majority, which argued that the English Bill of Rights afforded an individual right to bear arms, Justice Stevens suggested that the right was qualified, and could be regulated. Stevens concluded that the English Bill of Rights offered little meaning to the Second Amendment. Stevens also criticized the Court's reliance on Blackstone, by arguing again that the text of the clause

¹⁷⁶ "In a 1780 debate in the House of Lords, for example, Lord Richmond described an order to disarm private citizens (not militia members) as "a violation of the constitutional right of Protestant subjects to keep and bear arms for their own defense." 49 *The London Magazine or Gentleman's Monthly Intelligencer* 467 (1780). In response, another member of Parliament referred to "the right of bearing arms for personal defence," making clear that no special military meaning for "keep and bear arms" was intended in the discussion. *Id.*, at 467-468"

was different in England than the Second Amendment, but also that Blackstone's understanding of the meaning of prefatory clauses differed from the view articulated in the majority opinion.

In an op-ed published in *The Wall Street Journal*, Randy Barnett praised Scalia's opinion as being the "finest example of what is now called 'original public meaning' jurisprudence ever adopted by the Supreme Court" (Barnett 2008). The majority and the primary dissenting opinion grappled with the utility of English law to understand the meaning of the Second Amendment. (Cornell 2009). Stevens' dissent did not rise to the same rhetorical level as Scalia's dissent in *Roper* or *Lawrence*, but he still described the use of foreign law "unpersuasive." In that sense, the debate in *Heller* about the use of foreign law was unremarkable. While the cast in *Heller* was different than other cases, a majority believed that foreign authorities could illuminate the meaning of the Constitution while other Justices did not. The majority asserted the utility of foreign law, and the dissent rejected that contention.

The meaning of *Heller* is that the Justice Scalia is not loyal to his rhetoric about the use of foreign law. While Scalia hid the origin of the quotation from *Rex v. Marks*, suggesting that he should not overtly alienate his audience, the basis of his opinion was a discussion of English laws and rights. However, Scalia did not cite any modern English authorities despite reference to them in amicus briefs for the respondent.¹⁷⁷ Scalia's critics pounced on

¹⁷⁷ The Brief of the Cato Institute (2008) cited *King v. Hunt* 106 Eng. Rep. 768 (1820) that discussed that riots broke out in England after Parliament tried to ban firearms (60 Geo. III c. 1 §1 [1819]). The Brief for the Disabled Veterans for Self Defense (2008) included a reference to *Bowles v. Bank of England* 1 ch. 57 (1913) that stated that the English Bill of Rights was still in force (20). Other *Amicus Curiae* briefs cited other foreign authorities. The Brief of the Senate *Pro Tempore* of the Senate of Pennsylvania (2008) cited a 2006 report of the U.K. Home Office on the rise in firearm offenses in England when private ownership

the opinion for being unfaithful and authoring an activist opinion (Cornell 2009). His supporters saw the opinion the work of “good legal scholarship” (Barnett 2008).

Final Thoughts about the use of Foreign Authorities in the United States

Despite a perception that the Supreme Court of the United States does not refer to decisions of foreign courts, the Justices do with regularity. Even if the Court was composed of Justice Alitos and Rehnquists, Justices who rarely cited foreign authorities, the nature of the obligations to international and foreign authorities, means that the Court will occasionally cite foreign laws. As the United States adopts more treaties containing a form of dispute resolution, issues from those treaties will come before the Supreme Court. This was illustrated by the sequence of cases involving the decision of the International Court of Justice in *Mexico v. United States* (2004).¹⁷⁸ The Supreme Court dealt with this particular case three times during the decade (*Medellin v. Dretke* [2005] [writ improperly granted], *Sanchez-Llamas v. Oregon* [2006], cumulating in *Medellin v. Texas* [2008]). As more international tribunals emerge, the Court will continue to navigate in international waters.

Even excluding these cases involving international treaties, or international incidents (the series of Guantanamo cases), many of the Justices show a willingness to engage with decisions by foreign authorities. Justice Scalia referenced the French Constitution in an establishment case (*McCreary County*), a case from Australia in an

was outlawed (Kathryn Coleman et al., *U.K. Home Office, Violent Crime Overview, Homicide and Gun Crime 2004/2005*, 02/06 U.K. Home Office Bulletin at 76 [Jan. 26, 2006]) (36). The Brief of the Foundation of Free Expression (2008) discussed how the U.S. right to bear arms “stands in stark contrast to the practices of foreign nations” (31). The brief then discussed how the Chinese Constitution distinguishes military service from the right to bear arms (32).

¹⁷⁸ *Case Concerning Avena and other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. No. 128.

economic activity case (*Olympic Airways*), and a case from Ireland in a Criminal Procedure case. For a Justice who publically asserted that he does not use foreign law to interpret the Constitution, he has used foreign authorities to make his point.

Finally, in the more controversial cases that brought the spotlight on the Court's use of foreign law, the Justices barely cited foreign authorities. Justice Kennedy cited five foreign court decisions in *Lawrence v. Texas* (2003), and Justice Scalia cited a case from Canada. Thus, despite Chief Justice Rehnquist's concern in *Atkins v. Virginia* (2002), that the Court is placing too much weight on foreign authorities, the reality of usage is far from the perceived concern.

Conclusions

While the Constitution of South Africa is the only country that explicitly encourages or requires the use of foreign and international law, the debates in other courts with constitutional review powers do not resemble the debates in the United States. Only one opinion from the Australian High Court of Appeals forcibly rejects the application of international law to understand the meaning of its constitution in a manner similar to the debates in the *United States Reports*.¹⁷⁹ Even then, the judgment of Justice Michael McHugh criticizing the role of foreign law in Australian jurisprudence was only for himself (Curtin 2005). *Al-Katib v. Godwin* (2004) and other cases in Canada and South Africa where the

¹⁷⁹ *Al-Kateb v. Godwin* [2004] HCA 57 (Judgment of McHugh, J.). "The claim that the Constitution should be read consistently with the rules of international law has been decisively rejected by members of this Court on several occasions. As a matter of constitutional doctrine, it must be regarded as heretical" (para 63). Later, the opinion goes on to say, "If Australian courts interpreted the Constitution by reference to the rules of international law now in force, they would be amending the Constitution in disregard of the direction in s 128 of the Constitution' (para 68. Emphasis in original).

Justices reject the application foreign law serve as exceptions: the United States Supreme Court remains an outlier in the world legal community in its engagement with foreign law.

This use of foreign authorities in other courts with constitutional review powers suggests that the Justices of the United States Supreme Court respond to different pressures that exist in the United States. Even Justice Breyer, who argued in 2010 that the debate over foreign law was “pretty irrelevant” and is the most outspoken Justice defending the citation of foreign laws (Breyer 2010), cites fewer foreign authorities per opinion in his decisions than every Justice in Canada and South Africa.

Thus, the backlash against the use of foreign authorities dampened the enthusiasm in the United States for constitutional comparison (Alford 2008). It is not that the Justices in other courts are not aware of external pressures of legitimacy, or even face less pressure from external audiences, but that they face *different* pressures (see Epstein et al. 2001b; Moustafa 2003). In the United States, that pressure against the use of foreign authorities is visible and palpable, while in other nations, references to foreign authorities are routine and uncontested.

Chapter Six: Why the Justices Respond to External Audiences

Kansas courts will rely exclusively on the laws of our state and our nation when deciding cases and will not consider the laws of foreign jurisdictions.

- Spokeswoman Sherriene Jones-Sontag on Kansas Governor Sam Brownback's signing of Kansas Senate Bill 79 (May 25, 2012) (Hanna 2012).

I want to make sure people understand there's sometimes a conflict between other laws and the Constitution, and we need to assert our Constitution is still the law of the land

- Kansas Representative Peggy Mast, Sponsor of Kansas Senate Bill 79 (Chapman 2012).

Am I really concerned that Shariah law is going to take over the Kansas courts? No.

- Kansas Representative Scott Schwab on Kansas Senate Bill 79, which passed in the Kansas State House unanimously (Hanna 2012).

Conservative critics of the “liberal” Supreme Court manufactured the outrage over the citation of foreign authorities between 2003 and 2010. The Justices did debate the utility of citing foreign law in several death penalty cases, but it was not until 1999 when *The New York Times*, *The Washington Post*, and *The Washington Times* covered the internal debate among the Justices. When Justice Kennedy cited several decisions of the European Court of Human Rights in *Lawrence v. Texas* (2003), the reporters covering the Court and conservative activists were primed for Justice Scalia's comment that the reliance on foreign law was “meaningless” and “dangerous.”¹⁸⁰ Prompted by Justice Scalia's words, the citation of foreign law became a controversial practice in American politics, despite the use of foreign law by the Justices for centuries.

¹⁸⁰ *Lawrence v. Texas* 539 U.S. 558, 598 (2003)

The practice of citing foreign law is not a new phenomenon, nor are the citations particularly prevalent in the Justices opinions. Only two Justices on the United States Supreme Court, between 2000 and 2010, referenced a foreign authority in their decisions at a rate greater than $\frac{1}{2}$ of a citation per opinion. This stands in contrast to Justices of the Constitutional Court of South Africa or the Supreme Court of Canada where many of the Justices cited an average of at least 1.5 foreign authorities per opinion. Justice Sandlie Ngcobo of South Africa cited an average of nearly 4.8 foreign authorities in each of her decisions. The citation of foreign law in the United States is not the province of the liberal Justices either. While Justice Stephen Breyer cited the most foreign authorities in a ten-year period (141), in marked contrast to his rhetoric off the bench, Justice Antonin Scalia referred to the second largest number of foreign authorities (100).

The frequency of citing foreign law by the Justices of the Supreme Court continues a tradition of learning from foreign legal development that extends as far back as Chief Justice John Marshall. In every era of the Court's history, the Justices have referenced foreign laws in their decisions (Calabrisi and Zimdahl 2005). What makes the Rehnquist and Roberts Court unique in their attitude toward foreign law is that the Justices raised the salience of the issue and that debate entered the public sphere.

Like many aspects of American politics, the controversy about the use of foreign law has roots that date back to the 1950s. The Court's decision in *Brown v. Board of Education* (1954), and the subsequent reactions in the South to resist desegregation, affected how Americans viewed the Court. After *Brown*, critics of the decision attacked the Court for its methodology and its role in American politics (Cahn 1955; Norton 2006). The intensity of Southern segregationists against *Brown* marked a new era in politicizing the Court in

Congress, through attempts at jurisdiction stripping, and in American society (Gunther 1984; Norton 2006).

The Republican Party took advantage of the decision in *Brown*, and subsequent controversial decisions about abortion, school prayer, and criminal defendants, by making opposition to the Court one of the planks in their platforms beginning in 1968.¹⁸¹ In addition, Richard Nixon and George Wallace made law and order a salient part of their campaigns, drawing upon the political unrest of the late 1960s and the decisions of the Court (McCombs and Shaw 1972). Despite the confirmation of 12 Supreme Court Justices, Presidents Richard Nixon, Gerald Ford, Ronald Reagan, George H.W. Bush, and George W. Bush have not succeeded in formally overturning many of the Warren Court precedents that Republicans have opposed. For Republicans, the Court is filled with “judicial activists,” who are a “a grave threat to the rule of law,” ignore the Constitution, and impose “their personal opinions upon the public” (Republican Party platform of 2008). The controversy about the citation of foreign authorities fits in with this conservative criticism of the Court. Justices should be faithful to the United States Constitution, not to foreign law.

If the Court was truly insulated from American politics, the rhetoric of the two political parties should not have much impact on the actions of the Justices. However, the controversy over the references to foreign law is not just a conservative talking point. The public debate does have an effect on the actions of the Justices, as the Justices were less

¹⁸¹ “Public confidence in an independent judiciary is absolutely essential to the maintenance of law and order. We advocate application of the highest standards in making appointments to the courts, and we pledge a determined effort to rebuild and enhance public respect for the Supreme Court and all other courts in the United States” (Republican Party platform of 1968).

likely to cite foreign authorities in the term following lots of media coverage about the use of foreign law.¹⁸²

If there is an effect of the media, or the political parties, on the Court, whether a “Greenhouse effect” or something similar, the Justices should refrain from citing foreign authorities in their decisions to minimize the criticism and maintain the legitimacy of the Court. The number of articles about the use of foreign law in the elite newspapers in the United States peaked in 2005 and peaked again in 2009.¹⁸³ Since the Court usually determines its docket about year out, the controversy about the citation of foreign law would be fresh in the Justices minds as they made decisions on which issues and cases they granted certiorari, but also in the direction(s) they would give to their new law clerks. Thus, the drop in citations to foreign authorities during the October 2006 and October 2009 terms as seen in Table 6.1 reflect an awareness of the potential threat to the Court’s legitimacy.¹⁸⁴ This confirms Baum’s (2006) hypothesis that the Justices do respond to different external audiences.

The effect of Congress, the media, and to an extent, political activists affect the Justices in other ways beyond their citation practices. The Justices, individually and collectively, mounted a full-court press defending (and engaging in public relations) the Court in the aftermath of its decision in *Lawrence v. Texas* (2003). The most visible of these defenses occurred in the January 2005 CSPAN debate between Justices Breyer and Scalia.

¹⁸² However, it is unlikely that the debate had any affect on the decision on the merits of any case.

¹⁸³ 45 articles in 2005; 27 articles in 2009, and excluding syndicated columns.

¹⁸⁴ This relationship is only suggestive and should not be taken to indicate causation. However, if true, then we would expect to see fewer citations of foreign jurisprudence in the term following a year with large number of articles published in elite newspapers about the Justice’s use of foreign law.

TABLE 6.1
The Supreme Court of the United States Response to the Media

Year	Media Articles ^a	Court Term	Unique citations to foreign law ^b	Percent of Majority Opinions containing citations to foreign law
2000	2	OT 2000	48	8.64%
2001	6	OT 2001	18	3.90%
2002	7	OT 2002	34	6.67%
2003	9	OT 2003	110	13.51%
2004	8	OT 2004	73	13.33%
2005	43	OT 2005	73	12.16%
2006	20	OT 2006	14	2.82%
2007	2	OT 2007	165	10.14%
2008	6	OT 2008	38	11.84%
2009	27	OT 2009	48	4.76%

^a = Articles found in *The New York Times*, *USA Today*, *The Wall Street Journal*, *The Washington Post*, and *The Washington Times* (excluding syndicated op-ed columns).

^b = Including references to treaties and UN documents.

While Scalia spoke out in opposition to the use of foreign law, the debate between the Justices had the effect of making the Court more transparent to ordinary citizens.

In addition, nominees to the Supreme Court are pressed to take sides about the appropriate use of foreign law before the Senate Judiciary Committee. While none of the four candidates who appeared before the Committee since 2004 fully repudiated the use of all foreign citations, they did not express a willingness to use foreign law to interpret the meaning of the Constitution. Even Sotomayor back peddled away from her earlier statements about the relevance of foreign law to the Court's jurisprudence that she made only a few months before her nomination in 2009.

The Effect of the Controversy

At the peak of the controversy, during the October 2006 term, the Supreme Court Justices cited only fourteen foreign authorities in four opinions.¹⁸⁵ Two of those cases had an international component to them (*Permanent Mission of India v. City of New York* [2007] and *Powerex v. Reliant Energy Services* [2007]). Of the two remaining cases, Justice Stevens referred two treaties in *Massachusetts v. EPA* (2007) in his discussion of the development of climate science and government actions. In *Tellabs v. Makor Issues & Rights* (2007), Justice Scalia approvingly quoted from Sir Edward Coke in *Dr. Bonham's Case* (1610), in his concurrence. Of the fourteen total citations to foreign authorities during the 2006 term, five were citations of Canadian statutes in *Powerex* in Justice Breyer's dissent, and in *Permanent*

¹⁸⁵ *Massachusetts v. EPA* (2007), *Permanent Mission of India v. City of New York* (2007), *Powerex v. Reliant Energy Services* (2007), and *Tellabs v. Makor Issues* (2007).

Mission, Justice Thomas cited judgments from the District Court of the Hague and the Queens Bench discussing the scope of the Vienna Convention.

The Justices again limited the number of citations to foreign authorities during 2009, after the appointment of Justice Sotomayor. During the 2008 term, the Justices cited a foreign authority in over 10 percent of their majority opinions. In 2009, the number of majority opinions containing a reference to a foreign citation dropped to under five percent. References to foreign law were contained in only nine cases during the term or ten percent and a majority of all of the citations to foreign authorities was contained in just one case – *Abbott v. Abbott* (2010).

This apparent failure on the part of the Justices to cite foreign law, even when it is appropriate, is a strike against transparency of the written opinion. Justice Sotomayor's opinion in *Blueford v. Arkansas* (2012) and Justice Kennedy's opinion in *Kennedy v. Louisiana* (2008) indicate, at minimum, that the Justices appear to refrain from citing foreign law and jurisprudence even when the sources may be relevant to their opinion. In both of these cases, the opinion of a foreign court was mentioned in the briefs or discussed in oral argument, indicating some familiarity with the foreign authority on the part of the Justices.

The controversy about the use of foreign law might have other wide-ranging effects in other areas of the decision-making process. The Justices rely, heavily, on the information provided in the briefs, for citations and for legal analysis (Johnson 2004; Corley 2008). One effect of the debate is that petitioners, respondents, and *amici* may be discouraged in referencing foreign law in their briefs. Since the Court is generally reliant on the briefs to suggest relevant cases that bear on their deliberations or opinion-writing, it even less likely

that the Justices become aware of developments in other countries if attorneys stop citing foreign authorities in their briefs. In their brief in *Heller*, the Disabled Veterans for Self Defense (2008) stated:

It has also been argued that the militia system has fallen into disuse and the provisions of the Amendment have no current application. While mindful that there are those who disfavor foreign citations, an apt rejoinder is to be found in the decision of an English Court. (Citation omitted) (20).

While this statement in one brief is only suggestive that solicitors seeking certiorari or filing petitions on the merits are hesitant to discuss foreign authorities even when they may be relevant to the Court's deliberations, if routinely practiced, then the Justices may be unaware of foreign legal developments and may lead to unintended errors.

A prominent research error about legal developments in the United States occurred in *Kennedy v. Louisiana* (2008). In the case, none of the Justices realized that the United States Congress amended the Uniform Code of Military Justice in 2006 to include the death penalty as a possible sentence for the rape of a child (Sullivan 2008).¹⁸⁶ This was contrary to both Kennedy's statement for the Court, and in Justice Alito's dissent.¹⁸⁷ This error would not have come to light (and the subsequent reconsideration by the Court), if it was not for Linda Greenhouse mentioning the error in *The New York Times* after the decision (Greenhouse 2008). While the error of omitting recent changes to federal law in *Kennedy* is not the only time the federal government has failed to provide correct information to the

¹⁸⁶ Section 552(b) of the National Defense Authorization Act for Fiscal Year 2006, 119 Stat. 3136, 3264 (2006), provides that "[u]ntil the President otherwise provides pursuant to" UCMJ article 56, "the punishment which a court-martial may direct for an offense under" the amended UCMJ article 120 "may not exceed the following limits: . . . For an offense under subsection (a) (rape) or subsection (b) (rape of a child), death or such other punishment as a court-martial may direct" (Sullivan 2008).

¹⁸⁷ "Congress' failure to enact a death penalty statute for this tiny set of cases is hardly evidence of Congress' assessment of our society's values" (Justice Alito at)

Court, the result underscores the point that the Justices are unable to be comprehensive in their research of U.S. law, and much less comprehensive of global legal developments.

This chilling effect on information provided in the briefs because of the controversy about foreign law might affect how and what the Justices research future cases. In the case of marriage equality, the debate about the relevance of foreign jurisprudence might keep the Court unaware aware of the legal jurisprudence developed abroad. Courts with constitutional review powers in Canada, Mexico, South Africa found that same-sex marriages must be allowed under their constitutions.¹⁸⁸ At the same time, courts in Costa Rica, Portugal, the European Court of Human Rights, and the UN Human Rights Committee have upheld bans on same-sex marriages.¹⁸⁹ In addition to these court cases, ten countries legalized same-sex marriages and civil unions are recognized 22 countries. Other countries provide a certain level of protection to LGBT individuals.

These decisions and actions by foreign courts and legislatures may or may not be relevant to the Justices if or when the Court grants certiorari to a case involving the constitutionality of same-sex marriage or the Defense of Marriage Act. It is likely that an organization will discuss these foreign legal developments in support of marriage equality, because the salience of such a case will draw scores of *amici* on both sides of a case

¹⁸⁸ Canada: *Reference re Same-Sex Marriage*, 2004 SCC 79 [2004]; Mexico: Acción de Inconstitucionalidad promovida por el Procurador General de la República contra actos de la Asamblea Legislativa y del Jefe de Gobierno del Distrito Federal, demandando la invalidez de los artículos 146 y 391 del Código Civil del Distrito Federal, publicados en la Gaceta Oficial del Distrito Federal de 29 de diciembre de 2009. (2010); South Africa: *Fourie v. Minister of Home Affairs* [2005] ZACC 19.

¹⁸⁹ Costa Rica: Exp: 03-008127-0007-CO Res. N° 2006007262 (2006); Portugal: Tribunal Constitucional, Acórdão no. 121,2010 (2010); European Court of Human Rights: *Schalk and Kopf v. Austria* (Application no. 30141/04) [2010]. UN Human Rights Committee: *Joslin v New Zealand*, Communication No 902/1999, UN Doc CCPR/C/75/D/902/1999 (U.N. Human Rights Committee, July 17, 2002).

involving same-sex marriage (and possibly include briefs from foreign nations or organizations). However, in less salient cases, or those that draw fewer *amici*, the difficulty of researching decisions on an unfamiliar database or in a foreign language would present a greater obstacle for the Justices, acting on their own, to determine whether an appropriate case was decided in another jurisdiction. The failure to provide information about foreign legal developments in the briefs would make it less likely that the Justices would consider referencing foreign law in their opinions.

A Contest over Legitimacy

Alexander Hamilton described the Court's power as the power of its judgments In Federalist 78. The judges rely on the other branches to carry out their judgments. Any pronouncement by the Court requires the acceptance of the decision by other actors in the government. However, the legitimacy of the Court does not depend solely upon the ability to achieve compliance (Stone Sweet 1999). The formal reactions by Congress (passing a new law, jurisdiction stripping, jurisdiction granting, or Constitutional Amendment) are only one method to measure the legitimacy of the Court. While these formal actions of Congress are important, informal reaction and public opinion about the Court provide a better yardstick to measure the legitimacy of the Court.

Kathleen Parker published an op-ed in *The Washington Post* insinuating that the Justices would be tarred as "partisan, judicial activists," delegitimizing the Court if they struck down the Patient Protection and Affordable Care Act (PPACA) (Parker 2012). Despite this charge, many conservative and liberal law professors believe that the Justices account for legitimacy in their decisions (e.g. Somin 2012; Tushnet 2012). Ilya Somin

(2012) suggests that the Justices should consider how a decision might affect the Court's future ability to enforce the Constitution. Similarly, Mark Tushnet (2012) asks whether the Justices should consider the "verdict of history" when making their decisions. The question is not whether the Court should follow public opinion, but whether it is likely that the public will turn against the Court as an institution.

Public support for the Court and the concept of judicial review built gradually over American history. That support has been gradually chipped away with support for the Court in the mid 40% in 2011 (Gallup 2011). Republicans have used the Court as a rhetorical punching bag since the 1970s. President Obama declared that the possibility of the Court would strike down the PPACA would be "unprecedented" (Parker 2012). In recent years, Democratic activists have also turned against the Court for its decisions in *Bush v. Gore* (2000), *D.C. v. Heller* (2008), and *Citizens United v. FEC* (2010) decrying the Court as overly partisan (Washington State Democratic platform of 2012).¹⁹⁰ In this charged political environment, where attacks upon the Court come from both the right and left, the Justices seek to control how they are criticized and refraining from adding insult to injury by citing foreign authorities.

The decisions in *Kennedy v. Louisiana* (2008) and *Blueford v. Arkansas* (2012) are two examples where Justices of the Court refrained from citing foreign authorities, even when the citations would be relevant to the outcome of the case and the information readily accessible to the Justices. A larger study would undoubtedly find more examples of conscious decisions of the Justices refraining from citing foreign authorities. It is unclear

¹⁹⁰ "We oppose...the politicization of the judiciary" (Washington State Democratic platform of 2012).

from this study whether those decisions have increased over the past few years. However, the Justices output, based on the number of foreign citations, has decreased.

Despite the decrease in the amount of citations to foreign authorities from 2007-2010, the debate within the Court had the effect of serving as a counter-weight to the public criticism the Court faced from (mostly) conservative activists and providing insight into the decision-making processes of the Justices. While very few papers or individuals publically stood up to support the Justices use of citing foreign authorities, or even the nominees to the Court themselves, the debate between Justice Breyer and Justice Scalia in 2005 and other speeches and writings by Justices Sandra Day O'Connor, Ruth Bader Ginsburg and Sonia Sotomayor provided justification and legitimation to the use of citing foreign authorities.

For the foreseeable future the political climate will align against the Court's use of foreign law. However, this contestation over the legitimate use of citing foreign authorities will occur primarily outside of the marble chambers. It is likely that future Supreme Court nominees, both Republican and Democratic nominees, will be asked about their views about citing foreign law. Two of the members of the Senate Judiciary Committee who expressed the most concern about the practice of citing foreign law were first elected to the Senate in 2002 (Senator Conryn) and 2004 (Senator Coburn) and should have the opportunity to question several more nominees to the Court. For rank and file partisan activists, the outrage stemming from the Court's use of foreign law in *Lawrence* appears to have ebbed. The number of Republican Party platforms specifically opposed to the Court's citation of foreign authorities decreased from its peak in 2006. Mitt Romney, the 2012 Republican Party nominee for President, does not specifically mention opposition to the

use of foreign authorities by the Justices on his website (Romney for President 2012). However, if the Justices were to cite foreign law in another salient case that cut against Republican activists, it is likely that conservative commentators in the media would reengage the battle, with conservative activists primed to attack the liberal Justices.

Further Research Questions

Outside of the United States, Justices cite foreign authorities at a much greater rate without much or any controversy in salient and non-salient cases. In Canada and South Africa, the courts issued rulings in support of marriage equality. In *reference Re: Same-Sex Marriage* (2004), the Canadian Supreme Court specifically refused to follow *Hyde v. Hyde* (1866), a case involving the common law definition of marriage. In December 2005, the Constitutional Court's decision in *Minister of Home Affairs v. Fourie* contained a footnote to the U.S. Supreme Court's decision of *Lee v. Weisman* (1992) and a discussion of international law. In both cases, neither the Canadian papers, nor *Business Day*, or the *Sunday Times* in South Africa discussed how the courts used foreign laws in the opinions.

Still, differences remain in the rate of usage across courts and between Justices. In South Africa, Andrea Lollini (2007) suggests that the rate of citations to foreign and international law have decreased as the Constitutional Court is developing its own Constitutional traditions. How these factors influence the citing of foreign authorities remains to be examined.

While a majority opinion is the product of the Court, the Court is comprised of nine Justices with their own attitudes and beliefs about the proper role of the institution in the American system of government. Since each Justice brings to the Court their own ideas

about how the Constitution should be interpreted, a focus solely on the Court's overall citations to foreign authorities may miss the individual differences between the Justices.

These individual differences were apparent in the citation behavior of the Justices in the United States and among the Justices in Canada and South Africa. This finding is consistent with other studies of individual citation behavior. Elaine Mak (2011) concluded from her interviews with Dutch and United Kingdom judges that the "judges' backgrounds, experiences and personal opinions play an important role in their use of foreign legal material" (450). In a similar vein, Eric Voeten concluded that the ideology of the Justices on the ECtHR matter in their citation practices. Justices who were more supportive of an expansive interpretation of European Convention were more likely to cite foreign authorities (Voeten 2010).

The citation behavior of the Justices in the United States, and Canada and South Africa, do not appear to correspond with a liberal or conservative ideology. In the United States, the Justices with the most citations come from differing points on the ideological spectrum. Justice Breyer in the United States cited foreign authorities more often than any other Justice, but Justice Scalia cited the second most foreign authorities. Since Breyer and Scalia are considered to be on opposite sides of the ideological spectrum, ideology does not appear to be a determining factor of when judges cite foreign law.

Since ideology does not seem to be predictive of which Justices cite foreign law, several other factors appear to have relevance. This practice of elevating former academics to the bench, specifically in the United States, strengthened the ties between legal and academic writing (George 2001; Baum 2006). These former academics might have a different sense of what constitutes an acceptable reference and be more likely to cite

foreign authorities. The other variable that may affect when judges cite foreign law relates to the issues that come before the Court. The Court's agenda varies from year to year, responding to political and social change. Foreign authorities may be more appropriate for certain issue areas, although the Justices referenced foreign laws in most of the issue categories identified by Jeffrey Segal and Harold Spaeth. A broader study could identify which cases and issues are more likely to contain citations to foreign authorities.

In addition to the issues involved in each case, the complexity of the case or the division between the Justices may have an affect on when they might cite foreign authorities. As issues become more difficult for courts to decide, justices may feel more compelled to demonstrate their consideration of all relevant legal theories and data. In these cases, justices may desire to illuminate particular findings, studies, or legal, political, or religious theories that influence their thinking or in hope of future developments of the law. Related, references to secondary and non-legal authorities may be more prevalent when the justices are divided on the outcome of a case. When a court is divided, judges may utilize secondary authorities to demonstrate the strength of their claims, or to "educate" other justices. In their study of the citation of social science data, Rosemary Erickson and Rita Simon (1998) found that dissenting opinions referenced more social science research than majority opinions involving issues of abortion, sexual discrimination, and sexual harassment. However, in this study, only Justices Breyer and Scalia cited more foreign authorities in their dissenting opinions than their majority opinions. Additional research is necessary to determine whether Justices writing in dissent are more likely to cite foreign authorities.

A second avenue for further research is that courts in new or emerging democracies may be more willing to cite foreign authorities. Thomas Ginsburg (2006) suggests that an important aspect of the character of judicial review in each democratic nation is the institutional design of the court based upon the political climate that existed during the constitutional formation. Delegates or constitution-writers often give more power to the judiciary when delegates to the constitutional convention expect to lose power or where control over the future government is uncertain. In a similar vein, Lee Epstein and Jack Knight (2003) theorize that when political uncertainty is high, constitutional drafters are less likely to constrain courts with judicial review powers.

Constitutions are not neutral documents that merely describe the makeup of the nation's governmental institutions. Instead, constitutions are politically crafted documents designed to create, or maintain, a status quo. A constitution can provide a stable arena for the contestation of seemingly uncompromisable issues (Klug 2000). Constitutions can provide political stability by locking political arrangements and attitudes in place. Often constitutions contain provisions making them difficult to amend. By limiting the powers of the government to make dramatic changes to the political, economic and social systems, constitutions can prevent future governments from upsetting carefully crafted political compromises.

These "third wave" constitutions are not purely organic creations. Foreign governments, international organizations and Bretton-Woods institutions that encourage the development of the rule of law, economic liberalization, and the protection of human rights influence the development of modern constitutions (Abrahamsen 2000). Some of the influences of these outside influences include the creation of an independent judiciary with

constitutional review powers and the constitutional commitment to the protection of human rights.

While foreign actors encourage certain constitutional features, the adoption or subsequent development of an independent judiciary committed to protecting human rights may not be an inevitable development. Thus, a powerful judiciary might be the result of constitutional bargains designed to limit the ability of future governments to overturn constitutional compromises (Ginsburg 2003), or an institution designed to prevent future regimes from reneging on fundamental principles (Ackerman 1997).

For “third wave” democracies, including South Africa, constitutional review demonstrates the new regime’s commitment to democracy and the rule of law (Diamond 1996; Gibson and Calderia 2003; Black and Wilson 2004). This commitment to the rule of law in “third wave” constitutions includes a moral commitment to repudiating the previous regime through the protection of human rights (Arjomand 2003). Bruce Ackerman (1997) posits that the drafting of a constitution is either a transition of one regime to another or the crystallization of existing political relationships. In this former scenario, the constitution serves as a “symbolic marker of a great transition in the political life of a nation” (Ackerman 1997, 778). Through the “unconditional enforcement of individual rights” (Arjomand 2003: 13), constitutional courts play a critical role in securing the legitimacy of the new constitution for citizens and international observers alike. Since these constitutions signal a break from the past, independent judiciaries help ensure fidelity to the new founding principles.

These founding principles lead constitutional courts to serve as the guardians of constitutional principles. In interpreting these constitutions, these principles achieve the

form of higher, or natural law. By protecting constitutional principles and by virtue of the foreign influence on constitutional formation (Rosenkranz 2006), constitutional interpretation may include the consideration of international or foreign law. Justices may seek guidance or inspiration from other courts in understanding their own constitution. As the commitment to the rule of law matures, national courts develop their own precedents and own constitutional and legal norms. Since most legal systems generally abide by a concept of *stare decisis*, the older the court, the less likely it is to cite foreign law (McLachlin 1991; Lollini 2007). This study of citations of foreign authorities from 2000-2009 does not adequately capture how citation practices change over time.

Concluding Remarks

When Justice Kennedy wrote the decision of the Court in *Kennedy v. Louisiana* (2008), he, like the rest of the Justices, was aware of the controversy surrounding the use of foreign authorities. His decision to refrain from citing decisions of the Inter-American Commission of Human Rights discussed during oral argument reflected practical considerations about the maintenance of the Court's legitimacy. The decision, striking down a Louisiana law about the application of the death penalty for the rape of a minor, was likely to be controversial and Justice Kennedy knew that if he were to reference decisions of the Inter-American Commission, the opinion would be even more controversial.

Justice Kennedy's decision to *not* cite foreign law in *Kennedy* did not enhance the credibility or legitimacy of the Court. However, that decision to *not* cite foreign law likely did not add further fuel to activists who are critical of the role the Justices play in American

society. Citing foreign law in highly salient cases, especially those cases that support a left-leaning outcome, risk the legitimacy of the Court among politically-engaged conservative activists. Since most citations of foreign law are not binding, nor are they determinative of a particular outcome, Justice Kennedy's decision to not cite foreign authorities in *Kennedy* had and will have little effect on the development of death penalty jurisprudence in the United States.

However, the failure to refer to the decisions of the Inter-American Commission on Human Rights is a blow against transparency in how the Justices reach their decisions. If the written opinion is, as Justice Breyer explained, a window into the mind of the Court, then any failure to cite or discuss relevant judgments, laws, pronouncements, religious edicts, reports, or other authority limits the public's, and lower court judges, understanding of how and why the Justices make the decisions they do. Since the written articulation of a judgment serves as a moral force in American society, the actions (or inactions) of the Court affect our relationship with the government. Citations of foreign law serve to expand our conceptions of law and justice through the exposure of how foreign countries deal with similar problems.

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