

**LOOKING AT THE CONSTITUTION
THROUGH WORLD-COLORED GLASSES:
THE SUPREME COURT'S USE OF
TRANSNATIONAL LAW IN
CONSTITUTIONAL ADJUDICATION**

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To ascertain that which is unwritten, we resort to the great principles of reason and justice: but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect.¹

1. *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 198 (1815), (cited with approval in RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 112 (1987) cmt. b).

I. WHY IS THE COMPARATIVE CONSTITUTIONAL LAW INDISPENSIBLE?

In comparative constitutional law,² as in life, “[i]t is always wise to look ahead, but difficult to look farther than you can see.”³ Common sense dictates that when facing a difficult problem, one must research solutions. In ordinary life, a person might speak with his coworkers, friends, or an experienced individual with wisdom to share. Likewise, when engaged with a difficult constitutional issue, the Supreme Court should, and frequently does, look first to American⁴ and then to Anglo-law⁵ for solutions.

But what if initial efforts yield no solution to our protagonist’s intractable problem, and similarly, the Supreme Court finds no answers in domestic law? He must then look to outside, experienced sources for answers, as the Supreme Court has done increasingly in recent years.⁶ In recent cases, the Supreme Court has made significant inroads in recognizing the

2. For this Comment, comparative constitutional law is defined as a court using foreign or international law, including treaties and a foreign or international tribunal’s decision, to interpret its domestic constitution.

3. Sir Winston Churchill, *reprinted in* J.M. COHEN & M.J. COHEN, THE PENGUIN DICTIONARY OF TWENTIETH-CENTURY QUOTATIONS 82 (1996).

4. *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (proclaiming that the Constitution protects “fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition”) (internal quotations omitted); *see also* Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989), *overruled by* Roper v. Simmons, 543 U.S. 551 (2005) (“[I]t is American conceptions of decency that are dispositive, [not] . . . the sentencing practices of other countries.”).

5. The Court will look to Anglo-law, or English common law, when it must interpret text through historical comparison. Donald E. Childress III, Note, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 DUKE L.J. 193, 200 n.50 (2003) (drawing upon the occasional cases in which the Supreme Court has cited William Blackstone’s Commentaries, an old English treatise on common law).

6. Nina Totenberg, International Law Leaves Mark on High Court Decisions (NPR Morning Edition, July 13, 2004), <http://www.npr.org/templates/story/story.php?storyId=335107>. In contrast to using international law for constitutional interpretation, resorting to such law to interpret contracts or treaties is a mostly settled practice. Tony Mauro, *The World According to The Supreme Court*, LEGAL TIMES, Nov. 22, 2004, available at <http://www.law.com/jsp/article.jsp?id=1100535371397> (quoting Justice Scalia as stating that foreign law is never relevant to constitutional interpretation, but “it is impossible to say never”).

value of and drawing assistance from legal developments around the world.⁷ Also increasing is “cross-pollination and dialogue between [national] jurisdictions,”⁸ which results from foreign and international sources being treated as transnational law⁹ that “transcend[s] [n]ational frontiers.”¹⁰

Can law truly transcend boundaries and should it? It has famously been written that despite relevant political differences, other countries’ “experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem.”¹¹ Several Justices take a similar position.¹² Yet,

7. Linda Greenhouse, *In a Momentous Term, Justices Remake the Law, and the Court*, N.Y. TIMES, July 1, 2003, at A1.

8. Elizabeth M. Schneider, *Anna Hirsch Lecture: Transnational Law as a Domestic Resource: Thoughts On the Case of Women’s Rights*, 38 NEW ENG. L. REV. 689, 693 (2004).

9. See Robert E. Lutz, *On Educating Transnational Lawyers*, at 2 n.3, <http://www.aals.org/international2004/Papers/lutz.pdf> (last visited Apr. 1, 2006) (defining “transnational law” as all law that “regulates actions or events that transcend national frontiers” including public and private international law) (citing PHILIP C. JESSUP, *TRANSNATIONAL LAW* 2 (1956)); cf. Matthias Lehmann, Comment, *A Plea for a Transnational Approach to Arbitrability in Arbitral Practice*, 42 COLUM. J. TRANSNAT’L L. 753, 753–54 (2004) (characterizing “transnational law” as law “describing general principles of law that are recognized by a significant number of national laws” created by “fundamental ideas of justice . . . found in a wide spectrum of national laws and directly appli[cable] to legal disputes”).

10. See Lehmann, *supra* note 9, at 753–54.

11. *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting). The Scalia-authored opinion, which surprisingly included Justices Kennedy and O’Connor, noted that interpreting a constitution through comparative law was inappropriate, although “quite relevant to the task of writing one.” *Id.* at 921 n.11.

12. Justices Ginsburg, Breyer, Kennedy, and O’Connor have been especially vocal in advocating courts’ use of international law when dealing with difficult issues. See, e.g., Ruth Bader Ginsburg, *Remarks for the American Constitution Society: Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitution Adjudication* (Aug. 2, 2003), <http://www.americanconstitutionsociety.org/pdf/Ginsburg%20transcript%20final.pdf> [hereinafter Ginsburg, *Comparative Perspective*]; Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 281–82 (1999); Stephen Breyer, Keynote Address at the American Society of International Law Proceedings (Apr. 2–5, 2003), in 97 AM. SOC’Y INT’L L. PROC. 265, 266 (2003); Sandra Day O’Connor, Keynote Address at the Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 16, 2002), in 96 AM. SOC’Y INT’L L. PROC. 348, 350 (2002); Hope Yen, *O’Conner Extols Role of International Law*, POL. NEWS, Oct. 27, 2004, <http://www.political-news.org/breaking/697/oconnor-extols-role-of-international-law.html>; Anne-Marie Slaughter, *Judicial*

some Justices criticize this practice as contravening American views.¹³ Fundamentally the issue is: “In what circumstances, if any, should the United States Supreme Court cite a decision by an international or other foreign court?”¹⁴

Throughout its history, the Supreme Court has used nondomestic court decisions, international law, and customary international law in interpreting difficult constitutional issues.¹⁵ Today, it incorporates these sources through transnational or transjudicial discourse.¹⁶

The Supreme Court’s use of such law has given rise to much controversy involving its appropriateness. This Comment will explore the Supreme Court’s historical practices, both sides of the transnational law citation debate, comparative methodology’s differing tradeoffs, and will conclude with recommendations for improving transnational discourse. The United States has exported so much constitutional law and related framework that many respected countries and intergovernmental unions now have constitution-reviewing

Globalization, 40 VA. J. INT’L L. 1103, 1119 n.64 (2000) [hereinafter Slaughter, *Judicial Globalization*]; Vicki Jackson, *Yes Please I’d Love To Talk with You*, LEGAL AFF., July/Aug. 2004, http://www.legalaffairs.org/issues/July-August-2004/%20feature_jackson_%20julaug04.msp (noting six Justices have used international legal sources for constitutional interpretation). See generally Jeffrey Toobin, *Swing Shift*, NEW YORKER, Sept. 12, 2005, at 42–50 (quoting Justice Kennedy’s “passion for foreign law” throughout).

13. See, e.g., Childress, *supra* note 5, at 203 n.62 (citing *Atkins v. Virginia*, 536 U.S. 304, 324 (2002) (Rehnquist, C.J., dissenting)); *Knight v. Florida*, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of certiorari); *Schneider*, *supra* note 8, at 694–95 nn.26–27 (citing *Thompson v. Oklahoma*, 487 U.S. 815, 869 n.4 (1988) (Scalia, J., dissenting)); *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989), *overruled by Roper v. Simmons*, 543 U.S. 551 (2005) (Scalia, J.); *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting).

14. Richard Posner, *No Thanks We Already Have Our Own Laws*, LEGAL AFF., July/Aug. 2004, http://www.legalaffairs.org/issues/JulyAugust2004/feature_posner_julaug04.html.

15. See generally Vincent J. Samar, *Justifying the Use of International Human Rights Principles in American Constitutional Law*, 37 COLUM. HUM. RTS. L. REV. 1 (2005) (providing various examples and making predictions as to the use of international law to interpret the U.S. Constitution).

16. Transjudicial discourse is the two-way information exchange resulting from the use of transnational law in opinions between courts of different countries by which courts will approve, disapprove, or acknowledge another court’s decision or reasoning.

courts dealing with situations that parallel those dealt with by the Supreme Court. The Court should heed these opinions, while taking into account relevant differences, insofar as there is useful reasoning to be gained and global standards to be gleaned.¹⁷ Given the pressing need to expand the debate over the use of transnational law in the Court's decisions,¹⁸ this Comment will argue, notwithstanding the Court's infrequent misuses of transnational law, that the Court should look to transnational law as persuasive when faced with a difficult constitutional issue. This Comment proposes that the Court can overcome current shortcomings in transnational citation by citing transnational sources more cautiously, using sound methodology, and fostering related education and discussion both domestically and internationally.

Part II will explore why the Supreme Court is allowed to use transnational law in its constitutional decisions and will survey copious ways in which the Court has used transnational law in its decisions, from its earliest uses to the current transnational discourse period. Part III will explore arguments for transnational law's use in constitutional cases, its misuses and potential pitfalls, and tradeoffs between various comparative

17. Justice Kennedy agrees that America must engage in a two-way judicial "conversation" if the world is to take America's ideas about freedom seriously. Toobin, *supra* note 12, at 50.

18. This need is made all the more pressing by the appearance of resolutions expressing disapproval of such use, which include "The Reaffirmation of American Independence Resolution," sponsored by Rep. Tom Feeney (R-FL) and submitted by seventy-four House Representatives on March 17, 2004. H.R. RES. 568, 108th Cong. (2004). An identical one known as S. RES. 92, was introduced in the Senate a year later by Sen. John Cornyn (R-TX). S. RES. 92, 109th Cong. (2005). Both resolutions have been referred to their respective judiciary committees. Bill Summary and Status, H.R. RES. 568, 108th Cong. (2004); Bill Summary and Status, S. RES. 92, 109th Cong. (2005). The resolutions were in part a response to the Court's reliance in *Lawrence* on foreign judgments to buttress its interpretations of U.S. laws and to call for a strict originalist view (that is, using foreign sources only to inform the original meaning or intent of U.S. laws) while wholly rejecting any use of transnational law as interpretive authority. *Id.* These resolutions are simply more attempts by the coordinate branches of government to bully the Court into submission. Past bullying includes President Roosevelt's failed court-packing scheme in 1937, which nonetheless achieved its underlying goal, and President Thomas Jefferson's unsuccessful impeachment of Justice Chase in 1804 for his "partisan" ways and unbecoming conduct. See WILLIAM H. REHNQUIST, *THE SUPREME COURT* 268-69 (2001).

methods. Ultimately, in Part IV, the Comment will offer solutions to current deficiencies in transnational law citation by proposing increased efforts aimed at education and experience with transnational law, encouraging more transnational discourse, cautioning that Justices should engage in an examination or acknowledgement of all relevant transnational material, whether supportive or adverse to their position, and exercising restraint and consideration when applying transnational law for constitutional interpretation.

II. BACKGROUND

A. *Why is the Supreme Court Historically Allowed to Use Transnational Law in Its Decisions?*

From the time of its founding, the United States has had respect for international law. On July 4, 1776, America's thirteen colonies declared their independence from Great Britain, but "a decent respect to the opinions of mankind" required their thorough explanation.¹⁹ The founding fathers themselves drew ideas from a wide arc of modern and historical republics.²⁰ Examples include the Constitution's clause to "define and punish . . . Offences against the Law of Nations"²¹ and the unique structure of the U.S. government's three branches.²² Further, the Third Restatement of the Foreign Relations Law of the United States provides that its international law sources are drawn from the International Court of Justice Statute Article 38(1), which accepts judicial decisions, international conventions, and customary international law as sources.²³

19. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

20. See David A. J. Richards, *Revolution and Constitutionalism in America*, H14 CARDOZO L. REV. 577, H 584–86 (1993) (noting the Framers' comparative use of Enlightenment legal ideas); see also THE FEDERALIST NO. 47 (James Madison) (accepting Montesquieu's separation of powers theory while rejecting British governmental structure); DAVID MCCULLOUGH, JOHN ADAMS 376–78 (2001).

21. U.S. CONST. art. I, § 8, cl. 10.

22. See MCCULLOUGH, *supra* note 20, at 376–78.

23. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 reporters' notes (1987); see also U.S. CONST. art. VI (making U.S. authorized treaties "the supreme Law of the Land").

Inasmuch as no international or foreign court is subject to the U.S. Constitution, it may seem at first blush that the comparative constitutional law, or transnational citation, approach is fundamentally flawed. There is no flaw, however, because high courts' consideration of such areas as international human rights standards creates customary international law,²⁴ valuable even to countries' domestic jurisprudence. Through this transjudicial exchange, a global community is created in which human rights exist on a common normative plane.²⁵ As this global community becomes increasingly interconnected, customary international law, tribunals' decisions worldwide, and treaties, whether ratified or not, are more likely to "be implicated by the conduct of a nation's government to its own people."²⁶

Constitutional courts like the Supreme Court recognize their decisions' potential to influence international law.²⁷ Consequently, a relational authority results whereby various prominent domestic courts realize an obligation to examine or acknowledge, though not necessarily to accord with, the actions of other influential courts regarding customary international law and documents embodying the human rights aspect thereof, such as the U.S. Constitution.²⁸ Likewise, Justice Ginsburg believes to the extent that South Africa, Canada, and the European Union operate under norms similar to that of the United States, they will face the same problems, making their jurisprudence ripe for observation.²⁹

24. See Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 LOY. L.A. L. REV. 271, 317 (2003) [hereinafter Jackson, *Transnational Discourse*].

25. *Id.* at 317.

26. *Id.* at 313; see also Albie Sachs, *Social and Economic Rights: Can They Be Made Justiciable?*, 53 SMU L. REV. 1381, 1388 (2000) (arguing when the Court defends America's "evolving constitutional traditions," it defends core values of "world jurisprudence").

27. Jackson, *Transnational Discourse*, *supra* note 24, at 313.

28. See *id.* at 314; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 reporters' note 2 (1987).

29. HTranscript of Oral Argument at 24, *Gratz v. Bollinger*, 539 U.S. 244 (2003)H (No. 02-516).

B. How has the Supreme Court Used Transnational Law in the Past?

When the United States was but a young country with nearly no laws of its own, it generally adopted and borrowed laws from other countries.³⁰ The United States frequently used international law in various cases until the approach of the twentieth century.³¹

In *Chisholm v. Georgia*³² of 1793, the Court determined an action of assumpsit could lie against the state because the U.S. decision to coexist with the nations of the earth made it subject to “the laws of nations.”³³ The Court also cited the Prussian King for an equal justice proposition.³⁴

In the seminal 1824 case of *Gibbons v. Ogden*,³⁵ the Court held that the federal government’s power under the Commerce Clause³⁶ to regulate interstate commerce was supreme over any repugnant state law.³⁷ In his concurrence, Justice Johnson argued that the law of nations, because it legitimized all commerce in peace time, prescribed the exclusive interstate commerce power to the federal government.³⁸

A very unfortunate use of transnational law³⁹ is found in the 1857 case of *Dred Scott v. Sandford*, in which the Supreme Court held petitioner was not a citizen and could not bring the

30. Harold Hongju Koh, *The Globalization of Freedom*, 26 YALE J. INT’L L. 305, 308 (2001) [hereinafter Koh, *Globalization of Freedom*].

31. *Id.* at 308–09.

32. 2 U.S. (2 Dall.) 419 (1793), *superseded by* U.S. CONST. amend. XI.

33. *Id.* at 474.

34. *Id.* at 460.

35. 22 U.S. (9 Wheat.) 1 (1824).

36. U.S. CONST. art. I, § 8, cl. 3.

37. *Gibbons*, 22 U.S. (9 Wheat.) at 1.

38. *Id.* at 227–28 (Johnson, J., concurring). *See also* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832), *overruled on other grounds by* *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (declaring that the law of nations validated a Cherokee self-governance treaty with the United States that granted the Cherokee nation sovereignty).

39. National Archives and Records Administration, Civil War and Reconstruction (1850–1877): *Dred Scott Decision*, http://www.archives.gov/exhibits/american_originals/scott.html (last visited Apr. 1, 2006) (disparaging *Dred Scott* as the worst decision ever rendered).

action in a court because he was a slave of African descent.⁴⁰ As support, the Court quoted the Declaration of Independence for original racial inferiority intent,⁴¹ and waxed supremacist by declaring the civilized world's governments and nations had agreed to exclude the "negro race," considering slavery its destiny.⁴²

After the U.S. Civil War and until the New Deal era, the Supreme Court clarified U.S. standards through comparativism,⁴³ which facilitated a shift in legal development beyond domestic law.⁴⁴ For instance, in *Muller v. Oregon*, the Court took notice of foreign legislation from Great Britain, France, Germany, and Holland, under which women were ostensibly "protected" from long labor hours.⁴⁵

The United States became increasingly separatist around World War II and for some time afterwards, usually distinguishing itself from other countries' laws.⁴⁶ The Court's fixation with American law (and concomitant rejection of international law) during this period and through the Cold War excluded any possibility that lawyers or public policy makers would realize just how integral international law was to America's own laws.⁴⁷ While other countries developed their jurisprudence through a constitutional framework parallel to the United States',⁴⁸ the Court largely did not accord the same respect to such countries with parallel systems.⁴⁹

40. 60 U.S. (19 How.) 393, 393–99 (1857), *superseded by* U.S. CONST. amend. XIV.

41. *Id.* at 409–10.

42. *Id.* at 410.

43. Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570, 2589 (2004) (reviewing COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS (Norman Dorsen et al. eds., 2003)).

44. *Id.*

45. 208 U.S. 412, 419 n.1 (1908).

46. See Ginsburg, *Comparative Perspective*, *supra* note 12.

47. Koh, *Globalization of Freedom*, *supra* note 30, at 308–09.

48. Jackson, *Transnational Discourse*, *supra* note 24, at 312; see also Louis Henkin, *Introduction to CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* 1, 2 (Louis Henkin & Albert J. Rosenthal eds., 1990).

49. The Court's practice was especially incongruous considering that postwar constitutions contained references to "human dignity" analogous to U.S. constitutional decisions of the period. Jackson, *Transnational Discourse*, *supra* note 24, at 312.

One scholar posits three ways in which the Supreme Court has used nonbinding authority with an “implicit assumption of relationality”⁵⁰ in the mid-twentieth century. The first way is that of superiority,⁵¹ as in *Miranda v. Arizona*, in which the Court emphasized its holding resulted from this country’s unique principles of justice.⁵² The second way is to acutely distinguish U.S. constitutional protection from evils (such as Nazism) present in other countries.⁵³ In this vein, the Supreme Court has used aversive authority to distinguish America’s freedom of speech and promotion of a marketplace of ideas as something that positively distinguishes it from totalitarian regimes.⁵⁴ In contradistinction, the Court noted in *Wolf v. Colorado* that other common law jurisdictions’ admissions of illegally obtained evidence were a sign that exclusion of illegal evidence may not be “an essential ingredient of [a Fourth Amendment] right.”⁵⁵ A third way makes reference to on-point decisions from another country rooted in constitutionally mandated structural similarities, as the Court did in a case concerning intergovernmental tax immunity.⁵⁶

In 1958, the Court began to look outside its borders for support. In *Trop v. Dulles* the Court momentarily declared that the Eighth Amendment would “draw its meaning from the evolving standards of decency that mark the progress of a maturing society,”⁵⁷ giving the Justices substantial discretion in

50. *Id.* at 288.

51. *Id.*

52. 384 U.S. 436, 489–90 (1966).

53. Jackson, *Transnational Discourse*, *supra* note 24, at 289 (citing such cases as *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593–94 (1952)).

54. *Terminiello v. City of Chicago*, 337 U.S. 1, 4–5 (1949); *see also* *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965) (Goldsmith, J., concurring) (comparing the view that “the Constitution protects the right of marital privacy” with the “shocking” majority view that the Constitution does not protect against totalitarian limits on family size).

55. 338 U.S. 25, 28–29 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

56. Jackson, *Transnational Discourse*, *supra* note 24, at 289–90; *Graves v. New York*, 306 U.S. 466, 491 (1939) (Frankfurter, J., concurring).

57. 356 U.S. 86, 101 (1958). Curiously, this case, which involved stripping a citizen of his status in the international community (and which relied on transnational law), gave rise to a decency test that Justice Scalia contends involves American, rather than international, standards. Antonin Scalia & Stephen Breyer, U.S. Supreme Court Justices, Discussion at the American University Washington College of Law:

using international law to define the Eighth Amendment's scope.⁵⁸ The indecency in this case, denationalization as punishment, was barred by the Eighth Amendment because it "strips the citizen of his status in the national and international political community," a punishment that is "more primitive than torture."⁵⁹ Signaling a turning point in comparative constitutional law, the Court relied on two U.N. documents and a Haitian law in concluding "the civilized nations of the world are in virtual unanimity" that denationalization is never appropriate.⁶⁰

In the seminal *Miranda v. Arizona* decision, the Court held that a person taken into custody and questioned without being apprised of his rights violated the Fifth Amendment.⁶¹ The Court examined Scottish, English, Indian, and Ceylon legal safeguards as evidence that excluding custodial confessions under certain circumstances or without counsel did not result in decreased law enforcement in these countries.⁶² Although Americans' rights are grounded in the Fifth Amendment and other countries' practices are based on dissimilar principles,⁶³ America's law enforcement conditions were "sufficiently similar to permit reference" to other countries' "experience[s] as assurance that lawlessness will not result from warning an individual of his rights or allowing him to exercise them."⁶⁴

Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005), <http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC21899785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument> (contending that the "evolving standards of decency that mark the progress of a maturing society" to which an American judge looks in the constitutional context are exclusively those of American society).

58. See Vicki Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 110–11 (2005). But see Ernest Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 148–49 (2005).

59. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

60. *Id.* at 102 nn.35 & 37, 103 n.38.

61. 384 U.S. 436 (1966).

62. *Id.* at 488–89.

63. *Id.* at 489–90.

64. *Id.* at 489. The *Miranda* rule has been adopted by other countries on similar grounds. See Scalia & Breyer, *supra* note 57.

C. *The Supreme Court's Current Practice: Transnational Discourse*

Transnational discourse⁶⁵ between courts or a court and nonbinding international sources of law involve a court becoming “familiar with and discuss[ing], distinguish[ing], or borrow[ing] from related constitutional approaches of other nations and systems.”⁶⁶ Although engaging in transnational discourse at a slower pace than other national courts,⁶⁷ the Supreme Court has achieved parity, particularly on constitutional human rights issues.⁶⁸ The Supreme Court’s advantages in using transnational discourse derive from a more expansive forum in which its constitutional decisions may be compared, contrasted, and constrained through

judges’ awareness of competing constitutional traditions—both as a source of approaches to be adopted or distinguished and as a reminder of the transnational context in which their own work will be viewed. Particularly in a system in which constitutional decisions are not easily changed through amendment, to the extent that awareness of transnational constitutional developments tends to lead to more thoughtful and reasoned decisions, it is surely to be valued.⁶⁹

65. See Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 102–03 (1994) [hereinafter Slaughter, *Transjudicial Communication*]. For this Comment’s purposes, transjudicial or transnational discourse means discourse between courts of penultimate status. See also Harold Hongju Koh, *International Law As Part of Our Law*, 98 AM. J. INT’L L. 43, 52–53 (2004) [hereinafter Koh, *International Law*]; Slaughter, *Judicial Globalization*, *supra* note 12, at 1112–20.

66. Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 18 (2004) [hereinafter Jackson, *Constitutional Dialogue*]; see also DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW xxi (Vicki C. Jackson & Mark Tushnet eds., 2002).

67. Jackson, *Constitutional Dialogue*, *supra* note 66, at 18.

68. See *id.*

69. Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 261 (2001) [hereinafter Jackson, *Continuities*] (internal citations omitted).

Often relegated to a dissent or concurrence,⁷⁰ the use of transnational law for constitutional interpretation in majority opinions has been rapidly increasing.⁷¹ During the 2002 Term, the Court began to use international law at a rate never before seen⁷² and has continued since. In other cases during this most recent era, transjudicial discourse played a prominent role.⁷³

The Court's use of transnational law was recently highlighted in *Roper v. Simmons*, in which the Court held that the Eighth and Fourteenth Amendments prohibit executions of offenders who committed their crimes when under age eighteen.⁷⁴ The Court used various sources in its determination, including "evolving standards of decency"⁷⁵ and evidence of national⁷⁶ and international consensus⁷⁷ supporting the prohibition. The Court's desire to conform to near-unanimous facial and global prohibition of juvenile offender execution,⁷⁸ given national consensus, is acceptable because acknowledging other nations' express affirmation of fundamental rights "simply underscores the centrality of those same rights within our own heritage of freedom."⁷⁹

70. See, e.g., *HPatterson v. Texas*, 536 U.S. 984, 984 (2002)H (Stevens, J., dissenting in denial of a stay of execution of death sentence); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring); *Knight v. Florida*, 528 U.S. 990, 993–95 (1999) (Breyer, J., dissenting in denial of certiorari); *Printz v. United States*, 521 U.S. 898, 976 (1997) (Breyer, J., dissenting); *United States v. Stanley*, 483 U.S. 669, 710 (1987) (O'Connor, J., concurring in part and dissenting in part).

71. See, e.g., *infra* notes 74–79, 100–03, 111–12 and accompanying text.

72. See Javier H. Rubinstein, *International Law's New Importance in the U.S.*, NAT'L L.J., Sept. 15, 2003, at 1.

73. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 721 (2001); *Washington v. Glucksberg*, 521 U.S. 702, 710 n.8, 718 n.16, 785–87 (1997); *Raines v. Byrd*, 521 U.S. 811, 828 (1997); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 381 (1995); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 945 n.1 (1992); *Holder v. Hall*, 512 U.S. 874, 906 n.14 (1994); *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989), *overruled by Roper v. Simmons*, 543 U.S. 551 (2005); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988); *Enmund v. Florida*, 458 U.S. 782, 796–97 n.22 (1982).

74. 543 U.S. 551, 578 (2005).

75. *Id.* at 560–61.

76. *Id.* at 564.

77. *Id.* at 575.

78. *Id.* (emphasizing that the United States stands alone in its official sanction of the juvenile death penalty).

79. *Id.* at 578.

In her dissent, Justice O'Connor criticized the majority for citing an international consensus against juvenile execution as confirming a contrived national consensus against the same.⁸⁰ Yet, Justice O'Connor disagreed with Justice Scalia's dissent, instead insisting on international law's general relevance to Eighth Amendment jurisprudence,⁸¹ just not in this case. The majority so incensed Justice Scalia that he read his dissent from the bench⁸² and stated, "I dissent," sans "respectfully."⁸³ As well as criticizing the majority's "national consensus" both mathematically⁸⁴ and conceptually,⁸⁵ he chastised the majority for citing a convention as support while ignoring America's explicit reservation thereto to permit juvenile offender execution,⁸⁶ for relying on foreign authority without accounting for relevant differences,⁸⁷ and for imposing its moral views on the nation.⁸⁸

In *Sosa v. Alvarez-Machain*,⁸⁹ the Court denied respondent's outrageous conduct claims arising from an overnight detention and abduction from his home country of Mexico under the Federal Tort Claims Act⁹⁰ and the Alien Tort Statute⁹¹ because

80. *Id.* at 604 (O'Connor, J., dissenting) (arguing there is no true domestic consensus).

81. *Id.* (O'Connor, J., dissenting).

82. Dahlia Lithwick, *Death Row by the Numbers*, SLATE, Mar. 1, 2005, <http://www.slate.com/toolbar.aspx?action=print&id=2114192>.

83. *Simmons*, 543 U.S. at 608; see also Adam Cohen, *Can the Court Recover?*, TIME, Dec. 25, 2000, at 76 (noting that omitting "respectfully" is an unusual sign of vehemence).

84. See *Simmons*, 543 U.S. at 609–15 (Scalia, J., dissenting).

85. See *id.* at 610–13 (Scalia, J., dissenting).

86. See *id.* at 622–23 (Scalia, J., dissenting).

87. *Id.* at 623–25 (Scalia, J., dissenting).

88. See *id.* at 608, 615–16 (Scalia, J., dissenting). *But see id.*, at 563–64 (majority opinion) (citing multiple Supreme Court cases supporting the Constitution's contemplation for High Court discretion regarding the death penalty's acceptability).

89. 542 U.S. 692, 732–34 (2004).

90. The Act authorizes "suit for personal injury caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." *Id.* at 698 (citing 28 U.S.C. § 1346(b)(1)) (internal quotations and ellipses omitted).

91. The Alien Tort Statute, 28 U.S.C. § 1350 (2000), grants district courts original jurisdiction over civil tort actions by an alien alleged to be in violation of the law of nations or a U.S. treaty.

respondent's claims were not based on an international norm recognized by the civilized world,⁹² which otherwise would have extended Fourth Amendment rights to extraterritorial jurisdictions.⁹³ The Court admitted, however, that judgment guided by an international norm will necessarily involve substantial discretion in the decision.⁹⁴ Nonetheless, this discretion was acceptable because U.S. domestic law "recognizes the law of nations"⁹⁵ and applies international law as part of domestic law in appropriate situations.⁹⁶ The Court thus rejected respondent's international authority as being subject to different international norms, and moreover, involving a worse detention than respondent's.⁹⁷ While rejecting respondent's claims, the Court affirmed the adequacy of the law as a remedy for intolerable human rights crimes⁹⁸ and upheld the federal courts' right to identify which international norms should be enforceable,⁹⁹ affirming the federal courts' role in transnational discourse.

In *Lawrence v. Texas*, the Court held a state may not criminalize consensual adult sexual behavior in a private context.¹⁰⁰ As support for America's shared universal values¹⁰¹

92. See *Sosa*, 542 U.S. at 725.

93. *Id.* at 736–37.

94. See *id.* at 725–26.

95. *The Paquete Habana*, 175 U.S. 677, 700 (1900), cited in *Sosa*, 542 U.S. at 729–34 (announcing "[i]nternational law is part of our law," and where there is no domestic precedent or statutory law, the Court must resort to civilized nations' "customs and usages" and the related writings of preeminent jurists and commentators as evidence thereof).

96. *Sosa*, 542 U.S. at 729.

97. *Id.* at 737 n.27 (rejecting *United States v. Iran*, 1980 I.C.J. 3 (May 24), which involved a far harsher detention than the one at issue). The Court also refused to follow the United Nations Working Group on Arbitrary Detention's finding that his detention was arbitrary under customary international law. *Id.* at 738 n.30.

98. Michael McClintock, Human Rights First, International Law and the Fight for Civil Rights, Memorandum Prepared for the Continuing Legal Education Seminar of the 95th Annual Convention of the National Association for the Advancement of Colored People (NAACP) (July 12, 2004), http://www.humanrightsfirst.org/discrimination/pdf/naacp_mmck_072004.pdf.

99. See *Sosa*, 542 U.S. at 730–31.

100. 539 U.S. 558 (2003).

101. *Id.* at 576.

and petitioners' sexual privacy rights, which were widely accepted by scores of countries as a component of human freedom,¹⁰² the Court cited to a 1957 committee recommendation to the British Parliament condemning homosexual sodomy laws. The Court also cited the 1981 *Dudgeon v. United Kingdom* European Court of Human Rights case finding Northern Ireland's laws prohibiting homosexual sodomy incompatible with the European Convention of Human Rights.¹⁰³ Justice Scalia's harsh dissent, with whom Chief Justice Rehnquist and Justice Thomas joined,¹⁰⁴ criticized the majority's reliance on the European Court of Human Rights decision as meaningless but dangerous dicta¹⁰⁵ because the Court "should not impose foreign moods, fads, or fashions on Americans."¹⁰⁶

In *Grutter v. Bollinger*, the majority held that a public institution may constitutionally consider race in law school admissions as a "plus" factor within individualized applicant consideration.¹⁰⁷ Justice Ginsburg's concurrence noted that the majority's opinion accorded with the international community's understanding that affirmative action must eventually expire,¹⁰⁸ citing the International Convention on the Elimination of All Forms of Racial Discrimination, ratified as nonself-executing in 1994,¹⁰⁹ and the Convention on the Elimination of All Forms of Discrimination against Women, not ratified by the United States.¹¹⁰ Treaties used as exemplary are acceptable, but to use a nonratified treaty as the basis for a decision is a misuse of transnational law this Comment will discuss in Part III.

102. *Id.*

103. Rubinstein, *supra* note 72.

104. The Justices also joined Scalia's dissent in the 2005 *Roper v. Simmons* decision. 543 U.S. 551, 607 (2005) (Scalia, J., dissenting).

105. *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting). Curiously, Scalia refers to a Canadian court decision as demonstrating ill effects of the majority's erroneously perceived freedom of action. *Id.* at 605.

106. *Id.* at 598 (internal quotations and citations omitted).

107. 539 U.S. 306, 334 (2003).

108. *Id.* at 344–46.

109. Annex to G.A. Res. 2106(xx), Annex, U.N. Doc. A/6014/art. 2(2) (Dec. 21, 1965); Jackson, *Transnational Discourse*, *supra* note 24, at 294.

110. G.A. Res. 34/180, Annex, U.N. Doc. A/34/46/art. 4(1) (Dec. 18, 1979); Jackson, *Transnational Discourse*, *supra* note 24, at 294.

In *Atkins v. Virginia*, the majority held that the Eighth Amendment prohibits the execution of mentally retarded criminals.¹¹¹ The Court's holding was partially based on the European Union's Amicus Brief, which argued that the world community overwhelmingly disapproved of imposing the death penalty on mentally retarded offenders.¹¹² Although at times a transnational law proponent,¹¹³ Chief Justice Rehnquist's dissent, with whom Justices Scalia and Thomas joined, criticized the majority for relying on other countries' seemingly irrelevant views that he felt could not support the Court's decision.¹¹⁴ Significantly, neither Justice Scalia nor Justice Thomas "challenged the majority's use of international human rights law as a source of law or supportive authority," despite their lengthy Lawrence dissents later in the Court's 2002 Term.¹¹⁵

Notably, certain seminal cases could have had startlingly different outcomes by resorting to easy and apparent transnational law, as such decisions could have benefited greatly from transnational discourse.¹¹⁶

The Court may use international law in appropriate circumstances without giving up America's sovereignty to the

111. 536 U.S. 304, 306, 321 (2002).

112. *Id.* at 316 n.21.

113. See Childress, *supra* note 5, at 202–03 (quoting WILLIAM REHNQUIST, CONSTITUTIONAL COURTS—COMPARATIVE REMARKS (1989), reprinted in GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993)).

114. *Atkins*, 536 U.S. at 325–26.

115. Richard J. Wilson, *International Law Issue in Death Penalty Defense*, 31 HOFSTRA L. REV. 1195, 1199–1200, 1200 n.25 (2003).

116. For instance, in *Bowers v. Hardwick*, 478 U.S. 186 (1986) (overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003)), the Court did not consider *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. 52 (1981), thereby misperceiving worldwide practice—that homosexual sodomy laws were actually globally disfavored. See also Brief for Equality Now et al. as Amici Curiae Supporting Petitioners, *Nguyen v. INS*, 533 U.S. 53 (2001) (No. 99-2071), 2000 WL 1702031 (positing that under Article VI of the U.S. Constitution, the United States' ratification of the International Covenant on Civil and Political Rights disallows domestic sex discrimination based on parenting stereotypes); Brief for International Law Scholars and Human Rights Experts as Amici Curiae Supporting Petitioners, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29), 1999 WL 1037253 (arguing domestic law allows the United States to fulfill its international obligations by enacting the Violence Against Women Act).

will of foreigners.¹¹⁷ Justice O'Connor feels that in cases involving treaty issues with no domestic precedent, courts may properly look to other countries' decisions.¹¹⁸ Yet, even where domestic precedent does exist, such as in an American admiralty law case, international law may properly be incorporated into decisions because the Supreme Court expressly approved such use for admiralty cases in *The Charming Betsy* decision.¹¹⁹ However, when only tenuous international precedents exist, a decision should not rely on international law, such as in a Fifth Amendment's Takings Clause case, because most nations would not have any material sufficiently similar to permit any useful comparison.¹²⁰

III. THE ADVANTAGES, CRITICISMS, AND METHODS, OF THE SUPREME COURT'S CURRENT APPROACHES TO TRANSNATIONAL DISCOURSE

In Part II this Comment demonstrated how the Court has engaged in transnational discourse in the past and why the Court has license to do so. Subpart III.A explores arguments for the Court to continue engaging in transnational discourse. Subpart III.B enumerates the pitfalls and misuses of transnational discourse. Subpart III.C considers the tradeoffs between various comparative methods.

A. *Arguments for the Court's Transnational Discourse*

1. *Furtheres Global Dynamism in Constitutional Interpretation*

The Supreme Court should be thought of as a mediating force that holds a firm balance between the government's interests and the individual's interests, while remaining vigilant "not to consciously elevate one at the expense of the other."¹²¹ To

117. See Justice Sandra Day O'Connor, Address at the University of Houston Law Center (Mar. 10, 2005) (on file with author).

118. *Id.*

119. *Id.* (citing *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804)).

120. See *id.*

121. WILLIAM H. REHNQUIST, *THE SUPREME COURT* 279 (2001).

the extent other countries' high courts engage in this delicate balancing act, their experiences can be demonstrative to the Supreme Court. Because there are no experiments in law—only experience—the Supreme Court should use other countries' experience to inform its decisions. It has been said that a wise man learns from his mistakes, but a genius learns from the mistakes of others.¹²² Why shouldn't the U.S. Supreme Court learn from other countries' relevant experience?

Additionally, the Court must engage in transnational discourse due to international legal interdependence and transnational areas of law. Justice Breyer notes that “we face an increasing number of domestic legal questions that directly implicate foreign or international law.”¹²³ Additionally, the Court faces numerous issues, constitutional or otherwise, that would benefit from comparison to foreign courts' decisions.¹²⁴ These comparison points have never been more relevant to the United States. By some accounts, 120 countries exist under some form of democratic self-governance, amounting to sixty-four percent of the population.¹²⁵ Further, some areas of law, like human rights, have become fundamentally transnational, fusing national law with international law, despite its constitutional interface in the United States.¹²⁶

2. *Advances Global Development of the Law*

The President of the Institute for Liberty and Democracy has implored American leaders to recognize America's influence on the global community and embrace its responsibility as a leader.¹²⁷ With this responsibility, the Court has contended, comes America's duty to consider as instructive the

122. See DAVID MACFARLANE, *THE LITTLE GIANT ENCYCLOPEDIA OF PROVERBS* 344 (2001).

123. Breyer, *supra* note 12, at 265.

124. *Id.* at 266.

125. Koh, *Globalization of Freedom*, *supra* note 30, at 310.

126. Koh, *International Law*, *supra* note 65, at 53; see also Jackson, *Transnational Discourse*, *supra* note 24, at 308–09 (discussing human rights law's global normativity).

127. Hernando de Soto, *Property, People, and Prosperity: Address to the Houston World Affairs Council*, 27 HOUS. J. INT'L L. 467, 478–79 (2005).

international community's stance.¹²⁸

Increasingly prevalent today is the Supreme Court's reliance, justification, and development of transnational law, both through the Court's opinions¹²⁹ and individual Justices' meetings with world leaders.¹³⁰ Through transnational legal development, the United States has become involved in a multilateral relationship of law-giving and taking—engaging in a dialogue rather than as a one-sided conversationalist.¹³¹ As law becomes increasingly transnational, multifaceted norms emerge. Critics, such as Justice Scalia, assert that the modern legal development's global nature provides no assurances that norms are actually evolving rather than devolving,¹³² so perhaps they should not be used.

Although judgment of such norms can be subjective, these norms can be helpful aids to an acceptable legal solution. When the law is viewed as a solution to a problem, whether legal, societal, or otherwise, the varying circumstances under which cultures attempt to solve a common problem will lead to varying solutions. These varying solutions, combined with transnational discourse and intelligent discussion, create a global marketplace of ideas from which the greatest ideas can rise to the top to be acknowledged, studied, or implemented. The Court must of course adhere to the Constitution, but it should not act as if the global marketplace of ideas does not exist.

Commonalities in respected countries cause the United States to participate either passively or actively in the law's global development. In 1989, Chief Justice Rehnquist called on domestic courts to consider international precedents, noting that in light of the establishment of “solidly grounded” constitutional traditions “in so many countries, it is time that U.S. courts begin looking to the decisions of other constitutional courts to aid in

128. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

129. See, e.g., Rubinstein, *supra* note 72.

130. See Slaughter, *Judicial Globalization*, *supra* note 12, at 1120 and accompanying text.

131. See generally William H. Rehnquist, *The Future of the Federal Courts*, 46 AM. U. L. REV. 263, 274 (1996) (discussing ideas envisioned by the Framers of the Constitution that have and have not been adopted by other nations).

132. See Scalia & Breyer, *supra* note 57 (stating that sometimes societies degrade).

their own deliberative process.”¹³³ This practice is not new. In fact, when America’s “legal rules seem to parallel those of other nations, particularly those with similar legal and social traditions,” the Court has examined international and foreign opinions to assist its interpretation of the Constitution.¹³⁴ For instance, the Court has recognized “ordered liberty” as a concept rooted in various Anglo-law countries.

Similarly, other legal concepts are not uniquely domestic but arise by virtue of a country’s democratic system. Like the United States, other democracies do not create law “from on high but [law] bubbles up from the interested publics, affected groups, specialists, legislatures, and others, all interacting through meetings, journal articles, the popular press, legislative hearings, and in many other ways.”¹³⁵ The sheer multiplicity of sources and interactions, along with discussion and debate around the world, virtually ensure a law is applicable to a broader community than just its country of origin.¹³⁶ One example is the “global human rights movement” concerned with such universal aspirations as “liberty, equality, and privacy.”¹³⁷

This simultaneous domestic and global legal development is not haphazard. Only after the democratic process has resulted in legislation, and legislation’s consequences are familiar, does the Supreme Court hear a case and make a judicial decision.¹³⁸

133. WILLIAM REHNQUIST, CONSTITUTIONAL COURTS—COMPARATIVE REMARKS (1989), reprinted in GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

134. Koh, *International Law*, supra note 65, at 45.

135. Breyer, supra note 12, at 268.

136. *Id.* (arguing that democratic legal development “affect[s] people in many democratic societies”).

137. Koh, *International Law*, supra note 65, at 54.

138. Breyer, supra note 12, at 268; see also U.S. CONST. art. III, § 2, cl. 1.

3. *Leads to Judicial Innovation and Dispels “False Necessity”¹³⁹ for Courts and Lawyers*

Justice O'Connor propounded that the Court has much it can learn from other legal systems' innovations, experiments, and “new solutions to the new legal problems that arise each day.”¹⁴⁰ Even if the Court were to critically distinguish a foreign court's decision or dismiss its reasoning as flawed, the Court's own reasoning could be improved by explicating its rejection of the foreign law, as well as making its decisions more transparent to the many interested attorneys, courts, citizens, and lawmakers.¹⁴¹

Transnational discourse not only enlightens a judge as to different, but acceptable interpretations of universal concepts,¹⁴² leading to “richer judicial dialogue,”¹⁴³ but it also serves to increase the decision's legitimacy, or confirm its universally sound reasoning.¹⁴⁴ Thus, although complacency naturally lulls a democracy's citizens to take their private rights for granted during the time at which the citizens should actively defend their rights,¹⁴⁵ transnational discourse can counter this

139. Mark Tushnet, *Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 325, 327 (1998) [hereinafter Tushnet, *Returning with Interest*] (defining “false necessity” as a parochial scholar's belief—possibly false depending on the circumstances—that familiar arrangements must be used to secure a valuable intrasystem principle).

140. Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, 45 FED. LAW. 20 (Sept. 1998).

141. Jackson, *Continuities*, *supra* note 69, at 260–61. *But see* WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 302 (1987) (noting that irrelevant paragraphs are sometimes inserted into opinions to appease Justices and cause them to join therewith).

142. *See* Scalia & Breyer, *supra* note 57 (statement of Justice Breyer, explaining that international law can be used to open judges' eyes); *see also* Tushnet, *Returning with Interest*, *supra* note 139, at 326–27.

143. David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 566 (2001).

144. Jackson, *Continuities*, *supra* note 69, at 261–64.

145. *See generally* ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 265–67 (Harvey C. Mansfield & Delba Winthrop eds., 2000); *see also* CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 23–24 (2001) (discussing “group polarization”); Paul D. Carrington & H. Jefferson Powell, *The Right to Self-Government After Bush v. Gore* (Duke Law Sch., Working Paper No. 26, 2001), *available at*

complacency by leading a judge to decisions with deeper considerations and reasoning,¹⁴⁶ and serving as an indication of the Court's true global audience.¹⁴⁷ Further, as a practical matter, the Court can look to other countries to determine the effects of adopting a particular legal rule.¹⁴⁸

B. *Objections to Transnational Discourse*

1. *Lack of Expertise in Using Transnational Law*

Opponents often argue that there is great danger in incorrectly citing or using transnational law, and look upon judges' and lawyers' lack of expertise in transnational legal application as inevitable. The Supreme Court Justices and American law professors admit that more experience is needed to properly use the full resources of international law. Their sense of urgency underscores the need for education in properly applying international law and avoiding confusing or obscure applications.

Justice Breyer calls attention to difficulties the Justices and their clerks experience in finding relevant comparative material¹⁴⁹—a common argument against transnational discourse. He asks lawyers to recognize that the courts are now receptive to international law and to perform the legal research necessary to bring relevant international law to the Court.¹⁵⁰ Justice O'Connor believes experience with international law should begin at the legal education level, especially due to the increasing frequency of international and foreign law in American courts.¹⁵¹ She emphasizes that expanded knowledge in

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=293934.

146. Jackson, *Continuities*, *supra* note 69, at 261.

147. *Id.*

148. See *supra* note 11 and accompanying text; Kelley Beaucar Vlahos, *Judge Bork: Judicial Activism Is Going Global*, FOX NEWS, Sept. 11, 2003, <http://www.foxnews.com/story/0,2933,97117,00.html> (quoting a law professor supporting the use of foreign legal precedent to aid judges in making difficult decisions).

149. Breyer, *supra* note 12, at 267.

150. *Id.* at 267–68.

151. O'Connor, *supra* note 12, at 351.

the field of comparative constitutional law is needed now.¹⁵² Comparative law professors agree and reveal that they can best understand legal global changes in the law by making trips to emerging countries that are “some of the world’s most dynamic centers of legal change.”¹⁵³

However, what first appears to be incompetence when decisions are rendered may actually be something profound for its time. David Fontana brings up an interesting point for consideration: “Even when using American sources, judges do not know all that much. When the Warren Court decided *Brown v. Board of Education*, it may have known something about the South, but did it really know what would happen in the years following its decision?”¹⁵⁴ In many cases, only through hindsight will a decision come to be known as a well- or poorly-reasoned one. Though competence in comparative constitutional law cannot be presently assured, judges, clerks, and lawyers can assure high competence by using, discussing, and interacting with transnational law.¹⁵⁵

2. *Misuses of International Law*¹⁵⁶

Judge Posner argues that the Court should never use a foreign court’s decision as precedent in any way.¹⁵⁷ He sees problems with using transnational sources of law arising in four ways: (1) citing foreign decisions that subvert our democracy through the “international” countermajoritarian role of the Court;¹⁵⁸ (2) integrating international sources into the fundamental reasoning of the case rather than using it as simple dicta;¹⁵⁹ (3) “judicial fig-leafing” or overparticular use of

152. *Id.*

153. See Koh, *Globalization of Freedom*, *supra* note 30, at 310.

154. Fontana, *supra* note 143, at 622.

155. See Jackson, *Continuities*, *supra* note 69, at 268.

156. Some of this taxonomy is borrowed from Roger P. Alford, *Misusing International Sources To Interpret the Constitution*, 98 AM. J. INT’L. L. 57, 58–67 (2004).

157. See Posner, *supra* note 14 (outlining the problems that arise when a court cites foreign sources as persuasive or authoritative).

158. See *id.* at 42.

159. *Id.* at 41.

international law;¹⁶⁰ and (4) disregarding different and “complex socio-historico-politico-institutional background” from which foreign cases arise.¹⁶¹ Finally, arising from these preceding misuses, some argue the Court assumes the improper role of a moral arbiter when it chooses to rely on countries and sources it feels have the “right” law conforming to its own judgment.

The Countermajoritarian Problem

Critics admonish the Court for subverting democracy through countermajoritarianism based on transnational sources. After all, the Justices are not elected by the people, and if through their actions they contravene acts by the people’s elected representatives, the Justices effectively contravene the people’s will. Using transnational sources to further this contravention, opponents contend, would thus amount to imposing a foreign people’s will over American citizens if transnational sources were to constitute a decision’s foundation rather than its supporting authority.

Excessive countermajoritarianism can occur in various ways. One argument is that an inherent flaw in American democracy is that judges with “too many open-ended procedures” accrue a power that makes them deliberately or unconsciously subvert the legislature’s judgment.¹⁶² Thus, the countermajoritarian role would be impossible to abrogate in a democratic society without sacrificing the judiciary’s checks and balances role. Critics also contend that if global opinions were allowed into American jurisprudence’s highest level, that is, constitutional interpretation, they would “trump the democratic will” of local and state governments¹⁶³ because Congress cannot enact legislation effectively nullifying a Supreme Court constitutional ruling. Yet, proponents and opponents both agree that international standards must be commensurate with our national experience before they can serve as community

160. *Id.* at 42. Other scholars have referred to this method as “bricolage.” See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1229–38 (1999) [hereinafter Tushnet, *Possibilities*].

161. Posner, *supra* note 14.

162. Scalia & Breyer, *supra* note 57.

163. Alford, *supra* note 156, at 58.

standards.¹⁶⁴

If the Court reflected a historical domestic attitude to a sensitive constitutional issue, concern for private rights would be lost when needed most.¹⁶⁵ The Constitution exists to protect the minority against the will of the majority.¹⁶⁶ Thus, the Court should continue to subvert the majority's will when it threatens individual constitutionally protected rights.¹⁶⁷ When the Court must act in this capacity, it should prevent domestic tunnel-vision by looking to international sources, thereby making a broader-minded decision than would be made with domestic sources alone.¹⁶⁸ When something as valuable as individual rights is at stake, the Court should use all the resources at its disposal to make the sturdiest, best-reasoned decision possible. Nonetheless, the Court must be mindful not to create an "international countermajoritarian difficulty," which would result by giving greater weight to unique international majoritarian values rather than to America's own values, while purporting to defend the individual from his democracy.¹⁶⁹

Elevated Uses of International Sources

This misuse usually arises when the Court or a Justice advances an argument based on a widely-accepted international agreement, notwithstanding the fact that because the United States has not ratified the cited convention, it is in no way

164. See *id.* at 59; *Roper v. Simmons*, 543 U.S. 551, 604–05 (2005) (O'Connor, J., dissenting).

165. See generally Carrington, *supra* note 145.

166. See *U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court* (C-SPAN television broadcast Jan. 9, 2006) (statement of Sen. Dick Durbin (D-Ill.) that the Supreme Court is the "last refuge . . . for . . . rights and liberties").

167. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (finding that Texas' antisodomy law served no legitimate state interest and that it unconstitutionally intruded on the personal life of the individual); *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing that the right of privacy includes the individual's right to an abortion and restricting states' regulations of abortion to instances where they serve a legitimate state interest); *Engel v. Vitale*, 370 U.S. 421, 436 (1962) (finding that a New York school's daily prayer program was inconsistent with the Establishment Clause of the Constitution and that it infringed on the individual's right to free exercise of religion).

168. See subpart III.A.3; Jackson, *Continuities*, *supra* note 69, at 266–68;

169. Alford, *supra* note 156, at 59.

binding on the United States.¹⁷⁰ In *Roper v. Simmons*, the Court used U.S. refusal to ratify the United Nations Convention on the Rights of the Child to distinguish the United States as a lone dissenting country, following a pattern some commentators identify as misuse of international law.¹⁷¹

A more indisputable misuse occurred when the Court cited the International Covenant on Civil and Political Rights with approval while ignoring the 1992 U.S. reservation expressly allowing juvenile offender execution.¹⁷² This reservation, which was made expressly to allow the U.S. government the right to execute criminals under eighteen, should have served as strong evidence against a national consensus on prohibition of juvenile offender execution, contrary to the Court's position.¹⁷³ By ignoring the U.S. reservation, the Court effectively reratified the Convention itself sans reservation.¹⁷⁴

One scholar contends that the Court would create an anomaly if it interpreted the Constitution using a treaty that

170. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 344–46 (2003); *supra* notes 108–10 and accompanying text (citing treaties the United States has either not ratified or ratified merely as nonself-executing, without noticing the actions that illustrate the U.S. position on these agreements); OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES, 11 (2004), <http://www.unhchr.ch/pdf/report.pdf> (indicating that the United States has merely signed the Convention on the Elimination of All Forms of Discrimination against Women, and now fifteen years after its signature has yet to ratify it); Comm. on the Elimination of Racial Discrimination, *Reports Submitted by State Parties Under Article 9 of the Convention: United States of America*, 43–44, U.N. Doc. CERD/C/351/Add.1 (Oct. 10, 2000), available at [http://www.unhchr.ch/%20tbs/doc.nsf/0/4c02eba071d735f4c1256a1700588ba0/\\$FILE/G0044926.pdf](http://www.unhchr.ch/%20tbs/doc.nsf/0/4c02eba071d735f4c1256a1700588ba0/$FILE/G0044926.pdf) (stating that U.S. ratification of the International Convention on the Elimination of All Forms of Racial Discrimination as nonself-executing results in the Convention's nonimplementation in U.S. domestic law).

171. See 543 U.S. 551, 576–78 (2005); Alford, *supra* note 156, at 59; Scalia & Breyer, *supra* note 57.

172. See *Simmons*, 543 U.S. at 566–68; see *id.* at 622–23 (Scalia, J., dissenting).

173. *Simmons*, 543 U.S. at 622–23 (Scalia, J., dissenting).

174. This is true to the extent a country cannot invoke domestic law as justification for failure to fulfill its international obligations. Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331, 339. Because the Convention reflects customary international law, even states not formal parties to it—like the United States—are thought to be bound to it. Frederic L. Kirgis, *Reservations to Treaties and United States Practice*, ASIL INSIGHTS, May 2003, <http://www.asil.org/insights/insigh105.html>.

could be superseded by a statute without constitutionally interpretive power.¹⁷⁵ Essentially, if the legislative branch may enact laws that change the Constitution's meaning and application, then he contends the Constitution could not "be superior, paramount law, unchangeable by ordinary means."¹⁷⁶

This argument is a mischaracterization of the Court's practices because the Court has never used a treaty to interpret the Constitution, *per se*.¹⁷⁷ On the contrary, the Court has, on occasion, merely analogized a treaty to the Constitution as a way of supporting the Court's conclusion. This practice alters no constitutional rights.

Overparticular Use of International Sources

The Supreme Court practices overparticular or selective use of international sources when it cites only those sources that support its argument, while excluding negative sources. Justice Scalia never misses an opportunity to criticize what he perceives as the Court's selective use of international law.¹⁷⁸ In *Lawrence v. Texas*, Scalia criticized the Court's use of the European Court of Human Rights decision as a global proxy when, in fact, the world was equally divided as to homosexual sodomy prohibition.¹⁷⁹ After *Lawrence*, Scalia called attention to America's abortion jurisprudence, which is inconsistent with that of the entire world save six countries, indicating that perhaps the Court uses foreign law selectively.¹⁸⁰ In *Roper v. Simmons*, Scalia rebuked the majority for citing only nations that support the Court's decision but not relevant adverse

175. Alford, *supra* note 156, at 62.

176. *Id.* (quoting *City of Boerne v. Flores*, 521 U.S. 507, 528–29 (1997)).

177. The Supreme Court treats the Constitution and treaties independently. *Cf.* *Rasul v. Bush*, 542 U.S. 466, 473–75 (2004) (discussing habeas corpus applications involving U.S. constitutional or treaty violations).

178. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 625–27 (2005) (Scalia, J., dissenting); Scalia & Breyer, *supra* note 57; *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting)).

179. *See Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting); *see also Simmons*, 543 U.S. at 627 (Scalia, J., dissenting) (arguing that the use of "alien law" only "when it agrees with one's own thinking" is "sophistry").

180. Scalia & Breyer, *supra* note 57.

authority.¹⁸¹

Selective use is an inherent problem with most types of citation.¹⁸² As jurisprudence's international scope increases the number of sources available, selectivity becomes a greater issue. Selectivity and uncertainty are challenges all judges face; however, diligence in citation and full acknowledgement of positive and negative sources, as Justice Breyer advocates, can overcome these challenges.¹⁸³ Indeed, it would be parochial and shortsighted to reject all international sources for fear that contrary international or foreign law might be overlooked.¹⁸⁴ On balance, it is better for a judge to selectively use world knowledge than utterly deny it.¹⁸⁵

Relevant Differences Between Legal Systems Disregarded

James Madison described differing legal interpretations in his own time: "In Europe, charters of liberty have been granted by power. The United States has set the example, and France has followed it on charters of power granted by liberty."¹⁸⁶

In this contemporary era, the Court has been accused of using foreign authorities for support that are not related to the issue before the Court.¹⁸⁷ For instance, suppose the Court cited Russia's adoption of the U.S. Miranda rule to show worldwide support for a principle embodying informed consent for

181. See *Simmons*, 543 U.S. at 628 (Scalia, J., dissenting). He also reproaches the Court for merely "pick[ing] out its friends" in agreement from among the crowd. *Id.* at 617.

182. Scalia & Breyer, *supra* note 57.

183. See *id.*

184. See Koh, *International Law*, *supra* note 65, at 56 (recognizing that wholesale rejection of foreign law would erode "U.S. influence over the global development of human rights"). To the extent informational technologies are increasing the availability of foreign and international sources, finding them is becoming a rapidly diminishing problem. Jackson, *Continuities*, *supra* note 69, at 267–68.

185. See Tushnet, *Possibilities*, *supra* note 160, at 1229.

186. James Madison, *Charters*, NAT'L GAZETTE, Jan. 19, 1792, http://www.constitution.org/jm/17920119_charters.htm.

187. *Roper v. Simmons*, 543 U.S. 551, 623–24 (2005) (Scalia, J., dissenting). Scalia highlights the relevant differences between the United States' death penalty and foreign death penalty jurisprudence. *Id.* at 623–26.

testimony given while in custody.¹⁸⁸ The Court's citation would be misleading if Russia had not adopted the Exclusionary Rule (and this fact was disregarded) because without the Exclusionary Rule, Russia would not have truly adopted the Miranda rule or its spirit.¹⁸⁹

Not only should a court take into account political, cultural, historical, and interpretive differences, but actual state practice as well. For instance, a citation to the South African Constitution as a progressive human rights document is misleading if it focuses only on its text and not on actual state practice, which has been criticized as contrary to its explicit constitutional protections.¹⁹⁰ Comparative constitutional law has developed various methods, discussed in Part IV, to align the United States with the target country on relevant similarities while attempting to minimize distorting differences.

Disguised/Unconscious Moral Imposition

Justice Scalia has amplified the concern that foreign legal citation enables "judicial elites to impose their own moral and social views."¹⁹¹ In *Simmons*, he blasted the Court for overstepping its bounds by constructively becoming the Nation's "sole [moral] arbiter."¹⁹² The Court accomplished this, he contended, by choosing only those authorities that supported its morals and "discharging that awesome responsibility" with

188. See Scalia & Breyer, *supra* note 57.

189. See *id.*; cf. LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 128–29 (1998) (noting differences in jury systems among various parts of Britain and in Japan, despite its U.S.-created constitution); James R. Alexander, *Obscenity, Pornography, and the Law in Japan: Reconsidering Oshima's In the Realm of the Senses*, 4 ASIAN-PAC. L. & POL'Y J. 148, 157 n.37 (discussing the differences between Japanese and U.S. free speech interpretations); John M. Hull, *The Contribution of Religious Education to Religious Freedom: A Global Perspective*, reprinted in COMMITTED TO EUROPE'S FUTURE—CONTRIBUTIONS FROM EDUCATION AND RELIGIOUS EDUCATION: A READER 107–10 (Peter Schreiner et al. eds., 2002), available at <http://www.johnmhull.biz/International%20Association%20for%20Religious%20Freedom.html> (discussing separations between church and state in the United States, France, and other countries).

190. See, e.g., *Strengthening Human Rights in South Africa*, ALTERNATIVES, Mar. 31, 2004, <http://www.alternatives.ca/article1200.html>.

191. Scalia & Breyer, *supra* note 57.

192. *Roper v. Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting).

direction from foreign authorities.¹⁹³ Justice O'Connor agreed that the Court improperly made an independent moral judgment, and quite egregiously, because no genuine national consensus against juvenile crime execution exists. Essentially, she wrote, the Justices substituted their own judgment for a jury's determination that an accused should be sentenced to death for youthful crimes.¹⁹⁴ The majority countered that it was charged with exercising judgment on "the acceptability of the death penalty" just as the Constitution had contemplated.¹⁹⁵

Certainly it is not the judge's position to give his personal moral values the effect of law, but nothing can completely isolate moral views from judgment, especially in the adjudication of sensitive issues. Judge Robert Bork levels an even stronger accusation against the "liberal elite[s]" mission to use nondomestic courts and treaties to administer its moral and legal agendas for American society.¹⁹⁶ Such critics contend that if no nation's law is particularly appropriate for the case before the Court, then transnational sources' nonbinding nature leaves the judge to pick and choose the "right" law, according to his moral view.¹⁹⁷ However, this argument severely underestimates the countervailing forces that prevent such alleged judicial indiscretion. The supporting, but never dominant, role of transnational law does not empower a judge to make legal judgments based on his moral views.¹⁹⁸ Indeed, the Court's legitimacy as a coordinate government branch is as important to enforcing its decisions as the decisions themselves.¹⁹⁹ Therefore, strict natural constraints exist on a judge's power to manifest

193. *Id.*

194. *Id.* at 588 (O'Connor, J., dissenting).

195. *Id.* at 563-64 (majority opinion) (quoting *Atkins v. Virginia*, 536 U.S. 304, 312 (2002)).

196. Vlahos, *supra* note 148.

197. Elizabeth Ryan, *Citing International Law Sets Poor Precedent*, VAND. TORCH, Feb. 4, 2005, <http://www.vutorch.org/blog/archives/000098.html>.

198. See WILLIAM H. REHNQUIST, *THE SUPREME COURT* 278 (2001) (quoting OLIVER WENDELL HOLMES, JR., *THE COMMON LAW AND OTHER WRITINGS* 311 (1982)); see also Stephen L. Carter, *Constitutional Improprieties: Reflection on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357, 383 (1990) (arguing judges do not "possess a comparative advantage over legislators in making moral choices").

199. See WILLIAM EATON, *WHO KILLED THE CONSTITUTION?* 7 (1988).

his moral views in the Court's decisions insofar as they contravene the majority's morals.²⁰⁰

C. Considerations of Comparative Methodology

The Court must exercise sound comparative methodology because the integrity of its methodology speaks directly to "the authority and legitimacy of foreign law."²⁰¹ Sound methodology should not stretch or pull persuasive authority to fit into nonanalogous circumstances, but rather it should enlighten a judge instead of suffocating him.²⁰² Citation to transnational law, whether used positively, negatively, or simply as mere acknowledgement, should fully engage the underlying reasoning to further dynamic discourse without misunderstanding. The noncomparativist perspective is considered first.

1. Originalism, or Noncomparativist Interpretative Perspective

Justice Ginsburg pokes fun at the prototypical originalist's seemingly contradictory nature: Originalists consider a comparative perspective essential to the Constitution's formation but such perspective unsuited to the task of interpreting it.²⁰³

Scalia, as a staunch but not unflappable²⁰⁴ originalist, argues that the Constitution does not give judges license to look at foreign materials for good ideas to apply to an issue before the Court, as that would be undemocratic.²⁰⁵ Yet, good ideas are no

200. See *id.*; Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 WM. & MARY BILL RTS. J. 427, 513–14 (1997).

201. Teitel, *supra* note 43, at 2572.

202. See Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 25–48 (1986) (discussing the "Harringtonian's republican conception" and "Cartesian Anxiety," Western society's ontological search for the objective truth).

203. Ginsburg, *Comparative Perspective*, *supra* note 12, at 10–11 (citing *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997)).

204. See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 381 (1995) (Scalia, J., dissenting); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 820 (1993) (Scalia, J., dissenting).

205. Scalia & Breyer, *supra* note 57; see also *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting) ("[T]he views of other nations . . . cannot be imposed upon Americans through the Constitution.").

more than ideas; no Justice would knowingly advance a political objective or an ideological view.²⁰⁶

According to Justice Story's well-respected treatise from 1833 in which the originalist's rules are enumerated, when judges take an oath to adhere to the Constitution they accept the tremendous responsibility to uphold not a mere compact, but an agreement between government and people.²⁰⁷ Because government and people are equal parties under the Constitution, a final arbiter—the Court—must have the power to make decisions binding on both government and people.²⁰⁸ The arbiter's first and foremost objective is to construe the Constitution "according to the sense of the terms, and the intention of the parties."²⁰⁹ In determining the intention of the parties or Framers, the Court must use standard document interpretation rules, such as resorting to extrinsic evidence only when terms are ambiguous.²¹⁰ Next, interpretation must comport with the spirit of the document.²¹¹ Other rules involve interpreting general versus limited terms, implied powers, and textual federalism concerns.²¹² Most importantly, a Justice "should never forget, that it is an instrument of government" he is construing, and he must aim to engage in "the truest exposition, which best harmonizes with its design, its objects, and its general structure."²¹³

The United States has evolved greatly in 200 years, and originalists apply interpretive rules to situations not possibly contemplated by the Founders. These interpretation guidelines—though affirming an originalist perspective as

206. Scalia & Breyer, *supra* note 57.

207. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION §§ 360, 371–72 (Brown Shattuck, and Co. ed., Constitutional Society 1997) (1833), available at http://www.constitution.org/js/js_005.htm (follow link to "Chapter III Nature of the Constitution—Whether a Compact 306–372").

208. *Id.*

209. *Id.* § 400.

210. *See id.* §§ 401–404.

211. *See id.* § 405.

212. *See id.* §§ 405–454.

213. *Id.* § 455.

fundamental during the early nineteenth century—nevertheless have the flexibility to allow for comparativist interpretation, especially with regard to extrinsic evidence, (that is, foreign and international law) when encountering ambiguous terms or concepts while adjudicating sensitive constitutional issues.

2. *Modern Functionalist Methods*

In the context of comparative law, functionalism historically was concerned with a particular problem and a corresponding legal remedy divorced from other concerns, such as the state or nation from which the problem and remedy arose.²¹⁴ This functionalist approach is the root of every method of comparative constitutionalism.²¹⁵

The Neofunctionalist Method

In contrast to originalism, the neofunctionalist method “considers legal problems and their solutions in isolation”²¹⁶ from political history and geopolitical structural differences and “assumes comparativism’s contribution as a general matter in contemporary globalizing conditions.”²¹⁷ Essentially, the neofunctionalist attempts to resolve common constitutionally-based problems with enduring answers.²¹⁸ The neofunctionalist method can be useful if one can accept sweeping universalist notions, which are consequently very general.²¹⁹ This is somewhat akin to viewing Earth from outer space in the sense that one cannot distinguish borders because all countries appear as indistinct gradients of green and brown. Of course, this is both a benefit and a problem.

A critique contends the neofunctionalist approach is “limited in its capacity to comprehend comparative law’s present role and evolution in contemporary globalizing politics.”²²⁰ Indeed,

214. See Teitel, *supra* note 43, at 2574.

215. See *id.*

216. *Id.* at 2573.

217. *Id.*

218. *Id.*

219. *Id.* at 2577.

220. *Id.* at 2573.

severing private law problems from their relevant political considerations is hardly as problematic or controversial as the neofunctionalist's current attempt to do the same for constitutional law problems.²²¹ The Court echoes this sentiment. Although Justice Scalia has publicly announced that foreign law is irrelevant to U.S. constitutional interpretation,²²² comparative foreign law for contract cases presents no controversy.²²³ Ultimately, a neofunctionalist approach may obscure any hint of a possible solution by "abstract[ing] constitutional problems from their contexts." When normative questions are involved, the neofunctionalist approach becomes useless.²²⁴ Thus, the neofunctionalist method's limited usefulness dictates that it should only be used in combination with other comparative approaches.

Universalist Interpretation

In contrast to the pure neofunctionalist approach, universalists feel that comparativism can distill various international law into a stronghold of universal principles.²²⁵ Although the neofunctionalist method is partially defined by its universal characteristics, a pure universalist would seek to collect solutions or principles before tackling a particular legal problem,²²⁶ whereas a neofunctionalist would seek out universal problems and then solutions.

Universalism, as a multidisciplinary comparative technique, has been criticized as being only the "white Western male view of the world."²²⁷ Such a critical view is unwarranted in legal

221. *Id.* at 2576. However, this is not to say that neofunctionalists are unconcerned with whether viewing a problem is sensible, or if their borrowed framework or solution will reasonably work. Tushnet, *Possibilities*, *supra* note 160, at 1229.

222. Mauro, *supra* note 6 (quoting Justice Scalia at the American Society of International Law, Mar. 2004).

223. Scalia & Breyer, *supra* note 57.

224. Teitel, *supra* note 43, at 2578.

225. Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 *IND. L.J.* 819, 834 (1999).

226. *See id.*

227. Karen Knop, *Here and There: International Law in Domestic Courts*, 32 *N.Y.U. J. INT'L L. & POL.* 501, 527 (2000) (discussing "Anglophile" comparativism resulting from monolingual judges); *see also* Fontana, *supra* note 143, at 619–20.

comparativism because, after all, legal precepts are simply “intellectual tools to be used and, if necessary, to be cast aside.”²²⁸ This exploratory aim holds true if the scholar compares actual practices and not law that is merely “on the books,”²²⁹ which would introduce false legal precepts.

Mainstream universalism assumes “an intelligible norm” can be imported,²³⁰ and to the extent it can, these imported norms or case law “offers [a court] a convenient shortcut to attaining the same goal” as if it were to formulate the ideals itself.²³¹ However, American universalists may “confuse the universal and the cultural” principles and assume that “all elements and values” of compared legal precepts “are somehow equal and equivalent.”²³² Ultimately, because universalism’s inherent “horizontal vantage point allows it to see the place of the domestic, as well as the foreign, legal system in giving meaning to a foreign law within that system,”²³³ it is an advantageous method, but one to be used cautiously.

3. *The Dialogical Perspective*

The dialogical perspective is so named due to courts’ practice of engaging in dialogue “with comparative jurisprudence in order to better understand their own constitutional systems and jurisprudence.”²³⁴ The dialogical perspective concerns itself with the process of constitutional interpretation,²³⁵ which can lead to cross-fertilization of ideas²³⁶ and alternative reasoning for “principled decisionmaking.”²³⁷ Consequently, this dialogue helps

228. See Choudhry, *supra* note 225, at 834 (quoting OTTO KAHN-FREUND, *COMPARATIVE LAW AS AN ACADEMIC SUBJECT* 21 (1965)) (internal quotations omitted).

229. See *id.*

230. Knop, *supra* note 227, at 528.

231. Choudhry, *supra* note 225, at 835.

232. See Knop, *supra* note 227, at 523.

233. *Id.* at 528.

234. Choudhry, *supra* note 225, at 836 (internal quotations omitted).

235. Teitel, *supra* note 43, at 2586.

236. Anne-Marie Slaughter, *A Global Community of Courts*, 44 *HARV. INT’L L.J.* 191, 193 (2003).

237. Teitel, *supra* note 43, at 2586. *But see* Ugo Mattei, *An Opportunity Not To Be Missed: The Future of Comparative Law in the United States*, 46 *AM. J. COMP. L.* 709, 711 (1998) (arguing that as a systemic legal educational problem, lawyers often lack the

one fully recognize the flaws or virtues of one's own legal system, by exposing its practices as arbitrary or inscrutable and stimulating one to "legal self-reflection."²³⁸ After extensive self-reflection and comparison, a court may justify "making a legal transfer or reception" from another country.²³⁹

Various dialogical methods exist, including the "judicial shout-out,"²⁴⁰ through which the Supreme Court lends credibility to a foreign court's decisions,²⁴¹ and announcements of the "global law," much like a state's supreme court would announce the state's law. Additionally, a court may explicitly approve or disapprove of a foreign court's decision or other international law source, thereby engaging in an ongoing intercourt dialogue.

The dialogical perspective, however, is not contained merely in the written word. The Supreme Court Justices have actively engaged in meeting with other national high court justices from England, France, Germany, India, and Belgium, as well as in conferences between the Court and the European Court of Justice.²⁴² In doing so, judges will hopefully open their eyes to the ways other countries deal with similar problems.²⁴³

4. *Genealogical Comparativism, or Ahistorical Comparativism*

Genealogical comparativism describes the relationship between the United States and the country from which the Supreme Court borrows information and policies.²⁴⁴ Genealogical comparativism involves a "historical, cultural, and legal relationship[] between the United States and [that country]."²⁴⁵

background to realize when they are being parochial, and legal theorists often reinvent the wheel).

238. Choudhry, *supra* note 225, at 835–36.

239. *Id.* at 837.

240. Tim Wu, *Should the Supreme Court Care What Other Countries Think?*, SLATE, Apr. 9, 2004, <http://www.slate.com/id/2098559/>.

241. See Koh, *International Law*, *supra* note 65, at 43–44; see also Scalia & Breyer, *supra* note 57.

242. Slaughter, *Judicial Globalization*, *supra* note 12, at 1120.

243. See Scalia & Breyer, *supra* note 57.

244. Fontana, *supra* note 143, at 550.

245. *Id.* at 550.

Another scholar equates genealogical comparativism to a familial system of constitutions either related “like parent and child, or like siblings who have emerged from the same parent legal system.”²⁴⁶ Because our law originated from its English parent, it makes sense to use original English law to interpret our law. This method, however, would make just as much sense if applied to other countries due to the many legal, historical, and cultural relationships that exist between the United States and countries other than England.²⁴⁷

Professor Alan Watson’s widely discussed comparative law approach incorporates genealogical comparativism in the theory’s second half.²⁴⁸ His approach arose from perceived shortcomings resulting from traditional comparative law and a historically based comparative approach.²⁴⁹ The two halves of Watson’s intricate theory can be summarized as follows:

First, he defines the relationships among legal systems strictly in historical terms. A historical relationship exists “where one system or one of its rules derives from another system, probably with modifications; where more than one system or rules of such systems derive from a further system; or (where derive is too strong a term) when one system exerts influence on another.” The second dimension of Watson’s theory follows from the first. Given the prevalence of “legal transplants” from one system to another, Watson asks what role they have played in legal development. . . .

For him, legal transplants between systems are a significant engine of legal change.²⁵⁰

Professor Tushnet describes Watson’s theory as an internally directed borrowing system driven by coherence

246. Choudhry, *supra* note 225, at 838.

247. Fontana, *supra* note 143, at 550.

248. See Choudhry, *supra* note 225, at 839.

249. See Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1121, 1121–23 (1983) (leveling criticisms against traditional legal historians).

250. Choudhry, *supra* note 225, at 838–39 (quoting ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 6 (1993)); see also Alan Watson, *Legal Transplants and Law Reform*, 92 LAW Q. REV. 79 (1976).

demands,²⁵¹ and criticizes its genealogical half for its “limited applicability”²⁵² due to its overreliance on legal transplants (or “borrowing”) that “ha[ve] nothing to do with the overall operation of the political, economic, or social system within which the legal system is located.”²⁵³ In this regard, it would be much more helpful for a scholar to identify and analyze a decision’s relevant feedback mechanisms to understand the decision’s “after-effects,” which would then indicate whether the court made the right decision at the time, and whether it could be the right one in the current situation.²⁵⁴

IV. RECOMMENDATIONS FOR THE IMPROVEMENT OF TRANSNATIONAL DIALOGUE

Even those Justices most strongly in favor of transnational citation acknowledge its limitations.²⁵⁵ The Court should take Justice Breyer’s lead and acknowledge more than just their “friends at the cocktail party,” that is, positive authority.²⁵⁶ The future for transnational dialogue looks bright when even those typically strongly against the practice admit they would accept it under certain circumstances.²⁵⁷

251. Tushnet, *Returning with Interest*, *supra* note 139, at 334.

252. *Id.* at 335.

253. *Id.* at 334.

254. *Id.*

255. *See* Scalia & Breyer, *supra* note 57 (quoting Breyer’s admonition that it would not be feasible for the practice of citing opposing authority to become more than occasionally relevant).

256. *Id.* (quoting Breyer’s assertion that he acknowledges both positive and negative authority).

257. *Id.* (quoting Scalia’s concession that foreign law could be validly used in a latitudinal, or surveying, approach to the Establishment Clause to show that taking a particular stance will not cause societal ills).

A. *Increased Education and Awareness of Transnational Comparative Law*²⁵⁸

One commentator expresses concern at legal education's current dearth of transnational law instruction compared to the "explosive growth of transnational public law" and its growing real world importance.²⁵⁹ Justice Breyer recommends fundamental changes to legal education whereby foreign law would be incorporated into a law student's torts or contracts courses to reflect the ways in which business, contract law, and human rights law are becoming increasingly international.²⁶⁰ The University of Houston Law Center has recognized international law's educational gravitas by allowing first-year students to take an international law elective during their second semester.²⁶¹ In these ways, not only will future lawyers become more adept at finding and dealing with international law, but their expertise will help courts do so as well.²⁶²

Justice O'Connor identifies three compelling reasons why lawyers and judges should become better versed in comparative law and foreign legal systems: to properly practice foreign law application in domestic courts, to borrow the best ideas for our institutions, and to better enable international cooperation.²⁶³ Further, she contends that with increased choice-of-law provisions and international transactions, transnational litigation costs will increase, but this can be counteracted through lawyers' and judges' increased familiarity and expertise with the laws of other countries.²⁶⁴

258. See also *supra* subpart III.B.1.

259. Koh, *Globalization of Freedom*, *supra* note 30, at 312. Koh further laments that "[a]t a time when the American legal academy should be turning outward, we are instead turning inward." *Id.*

260. See Scalia & Breyer, *supra* note 57.

261. See THE UNIVERSITY OF HOUSTON LAW CENTER SPRING 2005 REGISTRATION INFORMATION PACKET 4 (on file with author).

262. SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW* 235 (2003).

263. See *id.* Justice Breyer agrees. Breyer, *supra* note 12, at 266 ("It may well be valuable to determine how other democracies have responded in similar circumstances.").

264. *Id.* at 234–35.

For their part, law schools have been sponsoring conferences, exchanges, and seminars to promote international law exchange among judges and students.²⁶⁵ However, due to the lack of “professional, general comparative law scholars,”²⁶⁶ most law students will not receive an education enabling them to become aware of their own parochialism.²⁶⁷ Without parochial awareness, students and lawyers alike will not look outside their borders or prepare for a world of global relevance.²⁶⁸ This could explain why most comparative law professors are not from the United States.²⁶⁹

Regardless of the explanation, American legal education must now move forward because the United States will remain a world leader only if it can “borrow ideas from other legal systems.”²⁷⁰ The reality is that future judges and many presently practicing lawyers have interacted with foreign law in today’s highly globalized world, and thus the future judge will have translatable skills which, for him, will make applying foreign law as familiar as interpreting domestic statutes.²⁷¹

B. Engage in More Discourse with Foreign Countries

Justices Breyer and Kennedy are actively engaged in transnational discourse because only through promoting discussion and debate regarding comparative citation practices “will you get the system to move towards possibly better answers.”²⁷² Further, a court should help other courts interpret, understand, and apply its decisions, as the European Court of

265. Slaughter, *Judicial Globalization*, *supra* note 12, at 1122 (providing examples of law school programs such as N.Y.U.’s Global Law School Program, Harvard Law School’s Anglo-American Exchange, and Yale Law School’s seminars for constitutional court judges).

266. Mattei, *supra* note 237, at 711.

267. *See id.* Parochialism in this context means bias in favor of one’s own legal system or jurisdiction. *See* Scott A. Rosenberg, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. REV. 933, 950 (1982).

268. Mathias Reimann, *The End of Comparative Law As an Autonomous Subject*, 11 TUL. EUR. & CIV. L.F. 49, 54 (1996).

269. *See* Mattei, *supra* note 237, at 711.

270. SANDRA DAY O’CONNOR, *supra* note 262.

271. Fontana, *supra* note 143, at 620–21.

272. Scalia & Breyer, *supra* note 57; *see* Toobin, *supra* note 12, at 44.

Justice has done on its website.²⁷³ Next, while summits and meetings including the Supreme Court, the European Court of Justice, and high courts in France, Germany, England, and India, facilitate discourse, more justices and more courts should become involved in such invaluable face-to-face discussions that explore judges' legal analysis and differing jurisprudence.²⁷⁴ Finally, transnational discourse should extend beyond decisions to include practical solutions for courts struggling with similar institutional problems, such as overcrowded dockets.²⁷⁵

C. *Encourage Transparency in Opinions*

It is favored when a Justice strongly supports making the Court's sometimes opaque opinions "as transparent as possible."²⁷⁶ Other countries' supreme courts have made similar commitments to increased transparency.²⁷⁷ Through transparency, or a court's complete explanation of why it held as it did,²⁷⁸ an advocate may observe which international sources the Court found persuasive and why.²⁷⁹ In this way, a transparent opinion will add to the collective, well-reasoned body of persuasive international sources with relevance to

273. Breyer, *supra* note 12, at 266; CURIA Homepage, <http://www.curia.eu.int/en/transitpage.htm> (providing procedure texts, current developments, synthesis of principal decisions of national courts and tribunals, and other helpful materials and guidance).

274. Slaughter, *Judicial Globalization*, *supra* note 12, at 1120–21.

275. *See* Breyer, *supra* note 12, at 266–67 ("Indian judges believe they can benefit from American methods for alternative dispute resolution.").

276. Scalia & Breyer, *supra* note 57; *see also* Dahlia Lithwick, *Frank Admissions*, SLATE, Apr. 1, 2003, <http://slate.msn.com/id/2080999/> ("[The] Supreme Court . . . permit[s] live audio broadcasts of . . . oral argument[s] . . . for only the second time in history.").

277. *See, e.g.,* *Judiciary Promises Greater Transparency*, IFEX, Jan. 15, 2004, <http://www.ifex.org/en/content/view/full/56285/> (Mexican judiciary); Council of Europe, *The Supreme Court: Publicity, Visibility and Transparency* (1999), available at [http://www.coe.int/t/e/legal_affairs/legal_co-operation/legal_professionals/judges/Presidents_of_European_Supreme_Courts/1999\(Ljubljana\)Conclusions.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/legal_professionals/judges/Presidents_of_European_Supreme_Courts/1999(Ljubljana)Conclusions.pdf) (European Supreme Court).

278. Michael Donohue, *The NFIB Legal Foundation Scores First Supreme Court Victory*, NFIB, Mar. 7, 2005, http://www.nfib.com/object/IO_20828.html.

279. *See* Fontana, *supra* note 143, at 556–57. After all, "a lawyer must press any available legal argument that may 'win the case' of his client." Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1, 27 (1981).

constitutional issues, proving helpful to litigants citing international law in any federal court. Most importantly, transparency acts as a feedback mechanism, furthering transnational discourse through the Supreme Court's published critique of other courts' decisions,²⁸⁰ whether positive or negative.²⁸¹

D. Always Use Transnational Sources in Constitutional Interpretation with Restraint and Due Consideration

Justice Rehnquist warns of the dangers faced by the Court when deciding tough constitutional questions:

If the Supreme Court wrongly decides that a law enacted by Congress is constitutional, it has made a mistake, but the result of its mistake is only to leave the nation with a law duly enacted by the popularly chosen members of the House of Representatives and the Senate and signed into law by the popularly chosen president. But if the Court wrongly decides that a law enacted by Congress is not constitutional, it has made a mistake of considerably greater consequence; it has struck down a law duly enacted by the popularly elected branches of government, not because of any principle in the Constitution but because of the individual views of desirable policy held by a majority of the nine justices at that time.²⁸²

This consideration lies behind the "refined comparativism" argument that the Court should resort to the persuasiveness of

280. See Slaughter, *Judicial Globalization*, *supra* note 12, at 1124 (arguing that even passive cross-fertilization furthers judicial globalization and recognizes participation in a global enterprise independent of specific legal systems' constraints).

281. Some supreme courts make a point of specifically acknowledging all relevant material. For instance, in a seminal death-penalty decision, the South African Supreme Court cited all relevant authority, not just authority supporting its views. See, e.g., *State v. Makwanyane*, 1995 SACL R LEXIS 218, at *1 (CC June 6, 1995). See also Slaughter, *Transjudicial Communication*, *supra* note 65, at 99-100 (discussing the Supreme Court of Zimbabwe's citation to the European Court of Human Rights (ECHR), the ECHR's citation to the European Court of Justice, the Inter-American Court of Human Rights' citation to European courts, and the majority of Quebec courts' citations to non-Quebec courts).

282. WILLIAM H. REHNQUIST, *THE SUPREME COURT* 279 (2001).

transnational or comparative constitutional law only when faced with “hard cases.”²⁸³ A hard case involves a question not easily resolved by “higher-order sources of constitutional meaning,” such as the Constitution’s text, or by clear American sources, due to the issue’s originality or conflicting sources.²⁸⁴ In such cases, a court may justifiably use refined comparativism whereby a judge would look “at American sources, deciding that these sources lead to a particular concept, and affixing a particular comparative conception to that concept.”²⁸⁵ The judge would take care to nip possible problems of transferability in the bud by, for instance, adopting only a particular case in a line of cases rather than a “wholesale” adoption, and limiting the precedential effect as to the time or scope of his decision.²⁸⁶ Most importantly, the judge must recognize when too many contextual differences will make the legal transplant unsuitable or lessen the authoritative weight of citation accordingly.²⁸⁷ As long as the Supreme Court creates “broad, abstract legal rules” that will be substantively informed by successive cases, American comparative constitutional law will have a happy ending.²⁸⁸

V. CONCLUSION

The United States has spoken about its law to other countries for many years but only recently has it begun to listen once again with fervor. Because the Constitution does not exhaustively catalog rules nor has any part of it been endorsed by a “superior authority,”²⁸⁹ the Court must continue using transnational law in constitutional interpretation, while

283. Fontana, *supra* note 143, at 557.

284. *Id.* at 557–58.

285. *Id.* at 616.

286. *Id.* at 617.

287. *See id.* at 559. Fontana illustrates this “sliding scale” approach with Justice Breyer’s “use of comparative constitutional law” in *Knight v. Florida*, 528 U.S. 990 (1999) (Breyer, J., dissenting from denial of certiorari). *Id.* at 559–60.

288. *Id.* at 560.

289. Thomas A. Bowden, *Supreme Court Should Uphold Rights, Not Majority Sentiment in Ten Commandments Cases*, AYN RAND INST., Feb. 23, 2005, http://www.aynrand.org/site/News2?page=NewsArticle&id=10885&news_iv_ctrl=1021.

remaining vigilant to adroitly step around the minefield that is the misuse of international law. If the Court continues down this propitious path, its attentiveness and interest in global legal development will secure its position of influence in the global development of rights and norms that are fundamentally international in nature. Additionally, although citing international law is nothing new, this practice will ensure U.S. constitutional jurisprudence naturally evolves as the United States and other respected societies evolve.

The Framers did not contemplate modern technology and the current global interaction that has vitally changed constitutional jurisprudence, but they did accept other countries' views as informative.²⁹⁰ As Justice Breyer proclaims, "I believe the 'comparativist' view that several of us have enunciated will carry the day—simply because of the enormous value in any discipline of trying to learn from the similar experience of others."²⁹¹ The Court should proceed cautiously toward using the best sources for constitutional interpretation so that it may exercise, to the best of its ability, its "judicial Power [which] shall extend to all Cases, in Law and Equity, arising under this Constitution."²⁹²

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290. Richards, *supra* note 20.

291. Breyer, *supra* note 12, at 266.

292. U.S. CONST. art. III, § 2, cl. 1.

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