

FOREIGN LAW AND THE U.S. CONSTITUTION: DELIMITING THE RANGE OF PERSUASIVE AUTHORITY

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In recent years, hostility against judges who invoke foreign law in constitutional cases has escalated dramatically. Comparative approaches are presumed to present a significant threat to democratic accountability. In addition, judges have been faulted for failing to articulate objective criteria for selecting foreign authorities. The issue, however, is more nuanced than critics tend to acknowledge, and many systemic errors can be corrected without devising a novel theory of constitutional interpretation.

In this Comment, I identify three comparative approaches that are capable, in theory, of eluding criticism on democratic-accountability grounds. I then compare the methods for selecting authorities under each of the three approaches to demonstrate that, in practice, comparative law conventions are no more inherently dubious than those employed under traditional, even wholly domestic, interpretive methods.

Implementing the neutral criteria suggested herein will operate to curb judicial discretion and impose limits on the permissible range of persuasive authority. Though I ultimately advance constraints on the application of foreign sources, my intention is not to deter examination of such material, but rather, to illustrate how foreign authorities can be selected impartially so as to engender less criticism.

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INTRODUCTION

The practice by American judges of citing to foreign law in judicial opinions is hardly a recent phenomenon. Not surprisingly, the U.S. Supreme Court has cited to foreign law where it has been specifically called upon to interpret treaties and apply international law.¹ More significantly, however, the Court has also used foreign law to inform the meaning of the U.S. Constitution in cases addressing “evolving standards of decency” under the Eighth Amendment,² substantive due process,³ criminal procedure rights,⁴ and state sovereignty.⁵

1. See Jeffrey Toobin, *Swing Shift*, NEW YORKER, Sept. 12, 2005, at 42, 42–43 (quoting New York University School of Law professor Norman Dorsen) (“When it comes to interpreting treaties or settling international business disputes, the Court has always looked to the laws of other countries, and the practice has not been particularly controversial.”).

2. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 604 (2005) (O'Connor, J., dissenting) (“Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency.” (citing *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002); *Thompson v. Oklahoma*, 487 U.S. 815, 830–31, 830 n.31 (1988) (plurality opinion); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (plurality opinion); *Trop v. Dulles*, 356 U.S. 86, 102–03 (1958) (plurality opinion))).

3. Among the tests that the Court has articulated “for whether a [Bill of Rights] guarantee . . . implicated ‘fundamental fairness’[, a] few expressly called for examination of non-U.S. sources: Justices asked in some instances if the guarantee was ‘enshrined in the history and the basic constitutional documents of English-speaking peoples,’ and in others if it was ‘part of the Anglo-American legal heritage.’” Diane Marie Amann, *International*

Following the Court's recent decisions in *Roper v. Simmons*,⁶ *Lawrence v. Texas*,⁷ and *Atkins v. Virginia*,⁸ comparative methods of constitutional interpretation have garnered significant attention—and disapproval.⁹ This upsurge in criticism has culminated with some legislators calling for the outright prohibition of any consideration of foreign law or practices by judges in constitutional cases.¹⁰ However, such a prophylactic measure is not warranted, as the issue is more nuanced than critics tend to acknowledge.

In Part I of this Comment, I describe the bases for the current wave of opposition to the use of foreign legal materials in constitutional cases. Critics offer three primary objections: that foreign lawmakers are not accountable to the American public, that comparative methods lack adequate protocols to limit judges' discretion in selecting foreign authorities, and finally, that judges relying

Law and Rehnquist-Era Reversals, 94 GEO. L.J. 1319, 1330–33 (2006) (citing *Duncan v. Louisiana*, 391 U.S. 145, 148–50 (1968); *Irvine v. California*, 347 U.S. 128, 148 (1954); *Ingraham v. Wright*, 430 U.S. 651, 673 n.42 (1977); *Snidach v. Family Fin. Corp. of Bay View*, 395 U.S. 337, 343 (1969) (Harlan, J., concurring)).

4. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 486 (1966) (“The experience in some other countries also suggests the danger to law enforcement in curbs on interrogation is overplayed.”); *Wolf v. Colorado*, 338 U.S. 25, 27, 30, 39 tbl.J (1949) (examining prevailing international practice in order to find that the exclusionary rule under the Fourth Amendment was not “implicit in the concept of ordered liberty”), discussed in Posting of Orin Kerr to The Volokh Conspiracy, Foreign Law and the Exclusionary Rule, <http://volokh.com/posts/1160159100.shtml> (Oct. 10, 2006, 15:53 PST). For a discussion of *Miranda*, see Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 700–01 (2005).

5. See, e.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471–72 (1793) (Jay, C.J.) (contrasting European sovereignties, which exist on “feudal principles,” with those of the states, which were founded on compacts).

6. 543 U.S. 551 (2005) (striking down the juvenile death penalty).

7. 539 U.S. 558 (2003) (striking down a ban on sodomy).

8. 536 U.S. 304 (2002) (striking down the execution of mentally retarded offenders).

9. See *infra* Part I.A.

10. In 2003, sixty members of the U.S. House of Representatives supported a measure “[e]xpressing disapproval of the consideration by Justices of the Supreme Court of the United States of foreign laws and public opinion in their decisions, urging the end of this practice immediately to avoid setting a dangerous precedent, and urging all Justices to base their opinions solely on the merits under the Constitution of the United States.” H.R. Res. 468, 108th Cong. (2003), cited in Diarmuid F. O’Sconnlain, *What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?*, 80 NOTRE DAME L. REV. 1893, 1898 (2005). Within a few months, seven U.S. Senators followed with a bill known as the Constitution Restoration Act of 2004, which provides: “In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law.” S. 2323, 108th Cong. § 201 (2004), cited in O’Sconnlain, *supra*, at 1899. In 2005, several members of the House supported a similar resolution. H.R. Res. 97, 109th Cong. (2005). See also generally Noga Morag-Levine, *Judges, Legislators, and Europe’s Law: Common-Law Constitutionalism and Foreign Precedents*, 65 MD. L. REV. 32, 38 (2006) (describing the congressional response to *Lawrence*).

on foreign law have an international agenda to promote. Meanwhile, many judges' attempts to counter these attacks have been ineffective.

Comparative approaches, however, need not inexorably further the goals of particular interest groups at the expense of others. The remainder of the Comment is devoted to the identification of neutral criteria for selecting foreign sources. In Part II, I differentiate among various modes of relying on foreign law to identify three comparative approaches that are capable, in theory, of eluding criticism on democratic-accountability grounds. In Part III, I compare the methods for selecting authorities under each of the three approaches to demonstrate that, in practice, comparative law conventions are no more inherently dubious than those employed under traditionally accepted interpretive methods. Implementing the criteria suggested herein will operate to curb judicial discretion and substantially limit the permissible range of persuasive authority. The intention is not to deter examination of such material, but rather, to illustrate how foreign authorities can be selected impartially so as to engender less criticism.

I. OPPOSITION TO COMPARATIVE APPROACHES

The current climate of hostility toward judges who employ comparative interpretive approaches is not entirely surprising. Thoughtful commentators have levied valid criticisms of the practice—challenging that comparative approaches present a significant threat to democratic accountability, criticizing the lack of protocols to limit judges' discretion in selecting foreign authorities, and charging comparativists with attempting to advance a new legal order in U.S. courts. Meanwhile, judges' attempts to publicly justify the use of comparative approaches have been either vague or incomplete, or have gone unnoticed.

A. Common Objections

1. Lack of Accountability

One compelling objection is that “[f]oreign judges and legislators are not accountable to the American people.”¹¹ The danger, according to Attorney General Alberto Gonzales, is that when “our courts rely on a foreign judge’s

11. Alberto Gonzales, U.S. Att’y Gen., Statement at George Mason University Law School (Oct. 18, 2005), cited in Mark Sherman, *Attorney General: Justices Are Wrong to Cite International Law*, LAW.COM, Oct. 19, 2005, <http://www.law.com/servlet/ContentServer?pagename=OpenMarket/Xcelerate/Preview&c=LawArticle&cid=1129626313552>.

opinion or a foreign legislature's enactment, then that foreign judge or legislature binds us on key constitutional issues."¹² Justice Scalia shares Gonzales's disapproval: "[I]t is a Constitution for the United States of America that we are expounding [T]he views of other nations, however enlightened the Justices . . . may think them to be, cannot be imposed upon Americans through the Constitution."¹³

2. Lack of Standards

In addition, critics assume that the practice of citing foreign law lacks standards, arguing that judges are merely "looking over the heads of the crowd and picking out their friends" when citing foreign law.¹⁴ In an oft-cited opinion, Justice Thomas claims that by considering the actions of other nations, the Court subjects the United States to "foreign moods, fads, or fashions," rather than to a more reliable standard of justice.¹⁵ Similarly, Justice Scalia has remarked that "[t]o invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry."¹⁶

3. International Agenda

Finally, comparativists have been charged with believing that "proper theoretical guidance is . . . not needed."¹⁷ Some critics maintain that advocates of the use of foreign law are "international" scholars who have a "different"

12. *Id.*

13. *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting); see also O'Scannlain, *supra* note 10, at 1899–1900 (arguing that citing foreign law undermines sovereignty and "runs counter to the democratic accountability and federal structure envisioned by our Constitution" (quoting J. Harvie Wilkinson III, *The Use of International Law in Judicial Decisions*, 27 HARV. J.L. & PUB. POL'Y 423, 429 (2004))). Diarmuid F. O'Scannlain is a judge on the Ninth Circuit Court of Appeals. Judge Wilkinson sits on the Fourth Circuit Court of Appeals.

14. Mary Ann Glendon, *Judicial Tourism*, WALL ST. J., Sept. 16, 2005, at A14 (citing *Roper v. Simmons*, 543 U.S. 551, 617 (2005) (Scalia, J., dissenting)).

15. *Foster v. Florida*, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of certiorari).

16. *Roper*, 543 U.S. at 627 (Scalia, J., dissenting). Chief Justice Roberts made a similar point during his confirmation hearings in the U.S. Senate: "[R]elying on foreign precedent doesn't confine judges. It doesn't limit their discretion the way relying on domestic precedent does." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 201 (2005) (statement of John G. Roberts, Jr., Nominee to Be Chief Justice of the United States), cited in Alberto R. Gonzales, *Remarks at the University of Chicago Law School*, 7 CHI. J. INT'L L. 289, 293–94 (2006).

17. Alford, *supra* note 4, at 643 (quoting Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 416–18 (1985)).

agenda to promote.¹⁸ Therefore, because their goal is “to advance a conception of transnational law in American courts,” comparativists extol “the internationalization of constitutional law as if it were an inherent good, used to cure the American legal system of its insularity.”¹⁹ Having concluded that the comparative position lacks grounding in any classic constitutional theory, many scholars have called on the Court to develop a clearer method for comparing foreign laws.²⁰

B. Attempts to Cure

It is highly unlikely that any judge would believe that no proper theoretical basis is needed for citing foreign law; yet, the current climate renders it too easy for critics to fault them for failing to provide one.

First, judges have offered inherently vague justifications for the practice. For example, in a speech at the Southern Center for International Studies, Justice O'Connor stated that using comparative materials to interpret the Constitution might make a “good impression,” thereby enhancing America’s ability to act as a rule-of-law model for other nations.²¹ Justice Breyer has observed that “[w]illingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from

18. *Id.* at 641–42.

19. *Id.* at 642. For example, Roger Alford attributes to Harold Koh the idea that the judicial branch ought to function as a central channel for making international law part of U.S. law. *Id.* (citing Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 44 (2004)). Anne-Marie Slaughter contends that increasing evidence of “constitutional cross-fertilization” is . . . resulting in an ‘emerging global jurisprudence,’ and argues that the United States ought to make greater contributions to this field. *Id.* (citing Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 193, 198–99, 204 (2003)). Alford cites Bruce Ackerman and Paolo Carozza for making similar points. *Id.* at 642–43 (citing Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 772–73 (1997); Paolo G. Carozza, “My Friend Is a Stranger”: *The Death Penalty and the Global Jus Commune of Human Rights*, 81 TEX. L. REV. 1031, 1087 (2003)).

20. See, e.g., Alford, *supra* note 4; Christopher McCrudden, *A Part of the Main? The Physician-Assisted Suicide Cases and Comparative Law Methodology in the United States Supreme Court*, in *LAW AT THE END OF LIFE* 125, 128 (Carl E. Schneider ed., 2000); Jeremy Waldron, *The Supreme Court, 2004 Term—Comment: Foreign Law and the Modern Jus Gentium*, 119 HARV. L. REV. 129, 129 (2005) (identifying Justice Kennedy’s failure, in writing for the majority in *Roper*, to “explain the jurisprudence behind [his] view,” and censuring the dissenters for simply denouncing the practice of citing to foreign law without “articulat[ing] a theory of citation to foreign law that they could squarely refute”); Shane B. Kelbley, Note, *Reason Without Borders: How Transnational Values Cannot Be Contained*, 28 FORDHAM INT’L L.J. 1595, 1640–43 (2005).

21. Sandra Day O’Connor, Remarks at the Southern Center for International Studies (Oct. 28, 2003), available at http://www.southerncenter.org/OConnor_transcript.pdf, cited in Alford, *supra* note 4, at 643.

its birth has given a 'decent respect to the opinions of mankind.'"²² And Judge Calabresi reasoned that, though at one time America's monopoly on judicial review rendered it pointless to look elsewhere, since World War II many countries have adopted forms of judicial review inspired by American constitutional theory and practice.²³ "Wise parents," he noted, "do not hesitate to learn from their children."²⁴ While such explanations may embody sound policy goals, they fall short of providing an adequate defense of the practice.²⁵

Meanwhile, more profound efforts by judges to justify their comparative approaches tend to be overlooked. Judges' attitudes toward foreign law cannot be viewed in isolation from their respective approaches to judicial reasoning²⁶ or their broader theories of

22. *Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting from denial of certiorari) (quoting THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776)).

23. See *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring).

24. *Id.*, discussed in Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 521 (2000). For a description of these changes, see *infra* notes 167–173 and accompanying text.

25. To be fair, U.S. Supreme Court Justices regularly articulate their rationales for citing foreign legal materials in speeches before interest groups, such as the American Society of International Law, and even before groups representing the broader nonlegal community. For lists of some recent public events where the Justices have spoken on this issue, see Human Rights First, Supreme Court Justices' Recent Remarks and Essays on Security, Liberty and International Law, http://www.humanrightsfirst.org/us_law/inthecourts/supreme_court_03.htm (last visited Mar. 14, 2007), and Supreme Court of the United States, Speeches, <http://www.supremecourtus.gov/publicinfo/speeches/speeches.html> (last visited Mar. 14, 2007). Sound bites from such events are frequently reported on the Internet by journalists and bloggers, and are arguably more widely disseminated to the general public than, for example, the books authored by the Justices that are based on the very same speeches. See Posting of Roger Alford to *Opinio Juris*, Wall Street Journal on Blogs and Law Reviews, <http://www.opiniojuris.org/posts/1140542400.shtml> (Feb. 21, 2006, 12:20 EST) (identifying "the current conversation about the role of foreign authority in constitutional interpretation" as one that is "occurring at every level one can imagine, from Supreme Court confirmation hearings, to academic symposia, to friendly dinner conversation among informed lay people"); see also STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997). Justice Breyer's book was based on his materials from the 2004 Tanner Lecture and the 2001 Madison Lecture, see Paul Gewirtz, *The Pragmatic Passion of Stephen Breyer*, 115 YALE L.J. 1675, 1692 (2006), while Justice Scalia's was based on his 1995 Tanner Lecture, see Charles Lane, *In Print: Bookends of Ideology*, WASH. POST, Oct. 26, 2005, at A17.

26. See Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 424 (2003). The "dialogic" model of judicial reasoning, which is "centered on horizontal, transnational, and interdependent decision-making . . . introduces the possibility of a wider range of influences and shifting . . . lines of authority," *id.*, insofar as it permits judges to "identify the normative and factual assumptions underlying their own constitutional jurisprudence by engaging with comparable jurisprudence of other jurisdictions," *id.* at 417 (quoting Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 825 (1999)). By contrast, the

constitutional interpretation.²⁷ Ironically, one implication of this is that judges' contributions to the foreign law debate may be lost in the larger debate between proponents of original understanding and proponents of more flexible interpretive approaches. For example, in his 2005 book, *Active Liberty*, Justice Breyer explains how the democratic theory of "active liberty" guides his interpretation of the Constitution.²⁸ In his view, "[t]he judge should recognize that the Constitution will apply to 'new subject matter . . . with which the framers were not familiar.'"²⁹ He advocates a purposive view of statutory and constitutional interpretation that urges judges to be sensitive to the consequences of a proposed construction on the community to be affected.³⁰ Significantly, he maintains that in undertaking this task, since "the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded."³¹ If foreign legal materials can shed light onto the likely consequences of a proposed construction, either because they were issued under "social, industrial, or political"³² conditions comparable to those here, or even perhaps because they were not, it therefore follows that such materials would be logically relevant. One need not have an international agenda to promote to appreciate this fact. While Justice Breyer's discussion provides insight into his position on the propriety of relying on foreign legal sources, its contribution to the debate over foreign law may be obfuscated because the book addresses the issue only indirectly.

Presupposing the defensibility of Justice Breyer's approach toward constitutional and statutory interpretation, I seek to explain in the

"enforcement model"—which is generally favored by the Supreme Court—is "centered on local, independent, and final decision-making" and "privileges finality and certainty over dialogue." *Id.* at 424. However, Justice Ginsburg has argued that the drafters and signers of the Declaration of Independence and the early Supreme Court Justices would have expected judges to engage in dialogue with foreign jurists. Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, "A decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication, Speech at the Constitutional Court of South Africa (Feb. 7, 2006), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_02-07b-06.html.

27. See Posting of William S. Dodge to *Opinio Juris*, Justice Scalia on Foreign Law and the Constitution, <http://www.opiniojuris.org/posts/1140644381.shtml> (Feb. 22, 2006, 16:39 EST) ("Breyer and other believers in the 'living Constitution' are willing to look to foreign materials to help them fashion solutions for modern problems, while Scalia rejects such materials because he believes that all the answers must be found in the original understanding.").

28. BREYER, *supra* note 25, at 6–7.

29. *Id.* at 18.

30. *Id.*

31. *Id.* (quoting LEARNED HAND, *THE SPIRIT OF LIBERTY* 109 (3d ed. 1960)).

32. *Id.*

remainder of this Comment how judges can invoke logically relevant foreign and international legal materials without succumbing to the accountability and standards criticisms described above.

II. IDENTIFYING THEORETICALLY PERMISSIBLE COMPARATIVE APPROACHES

Few, if any, would dispute the assertion that foreign judges and legislatures should not “bind[] us on key constitutional issues.”³³ However, it is misguided to assume that all modes of comparative analysis necessarily mandate such an undemocratic result. Of the following four comparative approaches that I describe,³⁴ three are insulated from such a charge.

Under the historical approach, a court examines historical (usually English) practices in an attempt to ascertain the original intent of the framers of the Constitution. The empirical approach, whereby a court utilizes foreign data to better understand the potential impact of adopting a certain rule, may actually permit greater deference to domestic legislatures. Under the reason-borrowing approach,³⁵ a court acknowledges the foreign source whose reasoning it adopts, but the court is not bound by the foreign laws it cites. Finally, the moral fact-finding approach relies on foreign sources for the purpose of identifying a universal norm, the existence of which informs the meaning of the Constitution. This approach, I concede, may not be immune from criticism on democratic-accountability grounds. I now address each approach in turn.

A. Historical Approach

Under the historical approach, judges examine historical English and, sometimes, continental European practices to ascertain the original intent of the framers of the Constitution or the drafters of a

33. See Gonzales, *supra* note 11.

34. See generally Joan L. Larsen, *Importing Constitutional Norms From a “Wider Civilization”: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283 (2004) (detailing a typology of different uses of foreign law, which I have adopted with certain modifications).

35. This term was coined by Joan Larsen. See *id.* at 1288.

statute.³⁶ This approach is not what critics have in mind when objecting, on accountability grounds, to comparative methods.³⁷ Rather, such objections tend to emanate from the presumption that relying on contemporary foreign materials compels deviation from an original understanding of the Constitution.³⁸ The historical approach, by contrast, utilizes foreign materials to ascertain the intent or expectations of domestic lawmakers.

There are at least two limitations to the probative value of the historical analysis. First, it is clearly debatable whether and when the Constitution should be limited to its original understanding.³⁹ Moreover, historical events are generally prone to several competing interpretations and historiography can be very subjective. The first limitation is beyond the scope of this Comment; however, I address the second limitation in Part III.A.

36. Justice Scalia is probably the quintessential advocate of this approach. See, e.g., *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (offering an extensive discussion of the original understanding of the Sixth Amendment's Confrontation Clause informed, in part, by distinctions between the common law and civil law traditions); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 724 (1988) (finding that "courts looked without hesitation to international law for guidance in resolving the issue [of] which State's law governs the statute of limitations," determining that international law historically permitted states to apply their own statutes of limitations to actions litigated in their courts, and concluding that the Full Faith and Credit Clause permits the same). The approach is also incorporated into tests commonly applied by state courts. See, e.g., *Evans v. Gen. Motors Corp.*, 893 A.2d 371, 379–81 (Conn. 2006) (examining English common law to ascertain whether an action was one at law or equity in 1818, when the state constitution was adopted, to determine the availability of a jury trial).

37. See H.R. Res. 97, 109th Cong. (2005) (including in the House resolution against reference to foreign laws an exception that would permit judges to rely on foreign laws to "inform an understanding of the original meaning of the Constitution of the United States"). Nor does the examination of historical English practices disserve the goals of the "enforcement model" of judicial review. See Harding, *supra* note 26.

38. See SCALIA, *supra* note 25, at 38 ("[T]he great divide with regard to constitutional interpretation is not that between Framers' intent and objective meaning, but rather that between *original* meaning (whether derived from Framers' intent or not) and *current* meaning."). Thus, reliance on historical foreign (usually English) materials to inform the original meaning of the Constitution or statutes does not in itself present theoretical difficulties for advocates of Justice Scalia's position. But see David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539 (2001); Posting of William S. Dodge, *supra* note 27 (speculating that Justices who rely on foreign laws may be more "faithful to the original understanding of foreign and international law's place in our constitutional system and its relevance to constitutional interpretation" than Justices who are opposed to the practice).

39. See, e.g., BREYER, *supra* note 25, at 117; Osmar J. Benvenuto, Note, *Reevaluating the Debate Surrounding the Supreme Court's Use of Foreign Precedent*, 74 FORDHAM L. REV. 2695, 2726 n.246 (2006) (noting that in *Printz v. United States*, 521 U.S. 898, 918–24 (1997), and *Brown v. Board of Education*, 347 U.S. 483, 489 (1954), the Court determined that the framers' intent was inconclusive). See generally H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

B. Empirical Approach

Under the empirical approach, courts rely on foreign experiences to provide information about the consequences of adopting a particular rule. This application of foreign law has provoked relatively little controversy. According to Joan Larsen, because “[m]uch of constitutional law depends upon predictions about the likely effect of a rule . . . there is no theoretical reason why domestic courts should reject good evidence gathered from other nations simply because it is foreign.”⁴⁰ Instead, if empirical data are to be rejected, it should be on account of the fact that the data are the product of unreliable principles or methods, or because the data are irrelevant to the issue before the court.⁴¹

Perhaps the most prominent recent example of the empirical use of foreign sources is Chief Justice Rehnquist’s opinion in *Washington v. Glucksberg*.⁴² Relying on data from the Netherlands, which is “the only place where experience with physician-assisted suicide and euthanasia has yielded empirical evidence,”⁴³ the Court learned that there had been more than 1000 cases of euthanasia without an explicit request and 4941 cases in which physicians had administered lethal morphine doses without the patient’s explicit consent.⁴⁴ In concluding that the “regulation of the practice

40. Larsen, *supra* note 34, at 1299–1300. Even in the United Kingdom, where rules governing the exclusion of materials on which courts may rely are in certain ways much stricter than in the United States, the House of Lords has relied on foreign experiences. In *Pepper v. Hart*, the famous decision in which the House of Lords overturned longstanding precedent and acquiesced to the use of legislative history in limited circumstances, Lord Browne-Wilkinson’s leading judgment commented on the effect of the relaxed rule in foreign countries. *Pepper v. Hart*, [1993] A.C. 593, 637 (H.L. 1992) (Browne-Wilkinson, L.) (“Experience in the United States of America, where legislative history has for many years been much more generally admissible than I am now suggesting, shows how important it is to maintain strict control over the use of such material. That position is to be contrasted with what has happened in New Zealand and Australia (which have relaxed the rule to approximately the extent that I favour): there is no evidence of any complaints of this nature coming from those countries.”). That the House of Lords presumed it was acceptable to cite foreign evidence in *Pepper*—where the question presented to the panel was whether extrinsic legislative sources should be admitted—underscores the potential probative value of such materials.

41. I address these issues in Part III.B.

42. 521 U.S. 702 (1997). This opinion is generally hailed as an appropriate use of foreign law. Larsen, *supra* note 34, at 1290–91 (“[*Glucksberg*] exemplifies the ‘empirical’ use of the comparative experience.”); see also Glendon, *supra* note 14 (praising *Glucksberg*, notwithstanding Glendon’s general skepticism of judges’ use of foreign materials).

Another case in which foreign law was cited to uphold a government restriction is *Burson v. Freeman*, 504 U.S. 191, 199–206 (1992) (plurality opinion) (studying foreign voting practices to demonstrate the necessity of restricted voting areas), discussed in Alford, *supra* note 4, at 700–01.

43. *Glucksberg*, 521 U.S. at 785 (Souter, J., concurring).

44. *Id.* at 734 (majority opinion).

may not have prevented abuses in cases involving vulnerable persons,”⁴⁵ the Court utilized the data from the Netherlands to uphold the rational basis of the State of Washington’s prohibition on assisted suicide.

Glucksberg’s examination of the Netherlands’ experience illustrates that giving weight to foreign materials may permit courts to exhibit greater deference to domestic legislatures. Robert Post and Reva Siegel have pointed out that the different levels of review characterize constitutional rights “in terms of the specific institutional purposes of the judiciary,” rather than in absolute terms.⁴⁶ Thus, the substance of rights is articulated “by reference to the deference that the judiciary should adopt vis-à-vis the democratically accountable branches of government.”⁴⁷ When the government is permitted to point to foreign experiences to bolster its argument that “a measure is necessary, or that an interest is rational or compelling,”⁴⁸ a court functionally exhibits greater deference to the government’s assertion of its interests. It is for this reason that foreign empirical data are frequently “used by the state to justify curtailments of a purported constitutional right.”⁴⁹ Because the scope of deference is prescribed by the applicable standard of review,⁵⁰ the extent to which reliance on empirical data may generate undemocratic results is not a function of the origin of the material, but of a court’s willingness to discredit the materials offered by the other branches of government.⁵¹

45. *Id.*

46. Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1967 (2003).

47. *Id.*

48. Alford, *supra* note 4, at 703.

49. *Id.* at 702 (noting that the majority opinions in *Muller v. Oregon*, *Burson v. Freeman*, *Eldred v. Ashcroft*, and *Washington v. Glucksberg* “all used comparative experiences to assert the legitimacy of the government measure”).

50. Compare *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (applying “contextualized” strict scrutiny to the University of Michigan Law School’s race-based affirmative action program), discussed in Eric K. Yamamoto, Carly Minner & Karen Winter, *Contextual Strict Scrutiny*, 49 HOW. L.J. 241, 242, 298 (2006) (arguing that the “contextualized strict scrutiny” test articulated in *Grutter* brings “the status of social science in law to new heights” by permitting courts to inquire into the “linkage of racial group history to current social and economic conditions undergirding the challenged classification”), with *Glucksberg*, 521 U.S. at 728 (applying rational basis review), discussed *supra* text accompanying notes 42–45.

51. The willingness of the majority of the Justices to defer to legislative fact-finding even where it conflicts with that of the federal district courts was a factor in the Supreme Court’s recent decision to uphold the Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 120. Compare *Gonzales v. Carhart*, No. 05-380, slip op. at 30–37 (U.S. Apr. 18, 2007) (accorded deference in the face of medical uncertainty to the congressional findings of fact on which the Act rests), with *id.* at 7 (Ginsburg, J., dissenting) (arguing that Congress’s findings “do not withstand inspection” and had been rejected by all of the federal district courts that considered the issue). For an argument that the structure of judicial review in the United States may be designed to

Notwithstanding its relatively widespread acceptance on theoretical grounds, the use of empirical materials—foreign or domestic—is not immune from error, or even bias. Yet, the prevailing view today is that the benefits of such information outweigh the burdens, as long as courts cite empirical data with care.⁵² In Part III.B, I introduce guidelines for selecting foreign sources under the empirical approach in light of these concerns.

C. Reason-borrowing Approach

Under the reason-borrowing approach, a court looks “to the *reasons given* by a foreign or international decision-maker to support a domestic constitutional [or statutory] interpretation.”⁵³ Judges often rely on persuasive authority to defend their reasoning. The reason-borrowing approach merely advocates that foreign legal sources be included in the universe of potentially relevant persuasive authority. Engaging in dialogue with judges in foreign jurisdictions should therefore present no inherently greater threat to democratic accountability than that presented by dialogue with judges in different districts or states.

A recent example of the reason-borrowing approach can be found in *Roper v. Simmons*,⁵⁴ in which the Court held that imposing capital punishment for crimes committed as a minor violated the Eighth Amendment’s ban on cruel and unusual punishment.⁵⁵ The Court concluded that the weight of international opinion against the death penalty for minors “rest[ed] in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime.”⁵⁶ In other words, the Court acknowledged the basis for international opinion, agreed that minors lack the moral culpability required to impose the death penalty, and concluded that a per se ban on the death penalty for minors would preserve the retributive goals of the penal system.

In addition, the Court is applying the reason-borrowing method in cases in which it surveys foreign law, distinguishes the foreign and American

accord greater deference to legislative choices than is generally recognized, even when strict and intermediate scrutiny tests are applied, see Stephen Gardbaum, *Limiting Constitutional Rights*, 54 UCLA L. REV. 789 (2007).

52. See *infra* Part III.B.1.

53. Larsen, *supra* note 34, at 1292.

54. 543 U.S. 551 (2005).

55. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

56. *Roper*, 543 U.S. at 578. This is not to say that *Roper*’s use of foreign and international sources is entirely without fault. See discussion *infra* Part III.C.2.

experiences, and determines that adoption of the foreign rule would be inappropriate.⁵⁷ Though many scholars affix a different label to this practice,⁵⁸ the process used to reach the conclusion that the foreign rule is inapposite ought to be identical to the process used to reach the conclusion that the foreign rule should be given weight.

The reason-borrowing approach is motivated by a rather benign premise, namely, that judges have “much to learn from other distinguished jurists who have given thought to the same difficult issues.”⁵⁹ The theoretical permissibility of citing to persuasive authority in the domestic context seems uncontroverted enough that I will presume an elaborate defense is unnecessary. As Judge Kozinski explained in *Hart v. Massanari*,⁶⁰ “[w]hen ruling on a novel issue of law, [federal courts] will generally consider how other courts have ruled on the same issue.”⁶¹ The Supreme Court may cite authority from lower federal courts⁶² or from state courts.⁶³ Judge Kozinski made essentially no distinction between foreign and domestic authorities in this context, acknowledging in the same breath that “[i]t is not unusual to

57. See, e.g., *Raines v. Byrd*, 521 U.S. 811, 828 (1997). For an older example, see *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 217–18 (1953) (Black, J., dissenting) (arguing that to permit an alien's continued imprisonment on the basis of secret information unavailable even to the court renders American law no different than the then-current laws of Russia and Germany).

58. Larsen notes that the “expository” method of comparativism, whereby a court refers to a foreign rule “to contrast and thereby explain a domestic . . . rule,” is acceptable. Larsen, *supra* note 34, at 1288–89, 1299. Alford captures the same idea under the term “negative pragmatism,” by which “foreign experiences are offered as object lessons of what not to do.” Alford, *supra* note 4, at 699–700. Both Alford and Larsen cite *Raines*, 521 U.S. at 828, for an example of this method. Alford, *supra* note 4, at 699; Larsen, *supra* note 34, at 1288. *Raines* examined “whether certain Members of Congress had standing to challenge the alleged dilution of their legislative votes brought about by the Line Item Veto Act.” Larsen, *supra* note 34, at 1288. Acknowledging that “[t]here would be nothing irrational about a system that granted standing” in such a case, and noting that some European courts operate under such a regime, Chief Justice Rehnquist nevertheless concluded that such “is obviously not the regime that has obtained under our Constitution,” which “contemplates a more restricted role for Article III courts.” *Raines*, 521 U.S. at 828, cited in Larsen, *supra* note 34, at 1288–89.

59. Sandra Day O'Connor, *Keynote Address*, 96 AM. SOC'Y INT'L L. PROC. 348, 350 (2002), cited in Larsen, *supra* note 34, at 1286 n.14.

60. 266 F.3d 1155 (9th Cir. 2001) (exercising its discretion not to impose sanctions on an attorney who cited an unpublished Ninth Circuit disposition in violation of the Ninth Circuit's rules).

61. *Id.* at 1169.

62. *Id.* (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491 (1989) (citing *Assoc. Gen. Contractors of Cal. v. City of San Francisco*, 813 F.2d 922, 929 (9th Cir. 1987))).

63. *Id.* at 1169–70 (citing *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 198 (2001) (citing *J & K Painting Co. v. Bradshaw*, 53 Cal. Rptr. 2d 496 (Ct. App. 1996))).

cite the decision of courts in foreign jurisdictions, so long as they speak to a matter relevant to the issue before [the court].”⁶⁴

To be sure, there may be an “inherently countermajoritarian tendency” to reason-borrowing, insofar as a judge who “look[s] abroad for solutions to common problems . . . risks eschewing the distinctive choices that have been made at home.”⁶⁵ However, it does not follow that insularity is an appropriate defense. Just as studying a foreign language can often improve one’s comprehension of the grammar and vocabulary of her native tongue, learning how foreign practices differ may improve judges’ capacities to appreciate and, therefore, defend local policies.⁶⁶ In light of the potential risks to local policymaking that are presented by allowing judges to select persuasive authority from foreign jurisdictions, in Part III.C, I identify neutral criteria for differentiating among foreign authorities.

D. Moral Fact-finding Approach

Under the moral fact-finding approach, courts look to foreign and international practices as evidence of universal consensus on an issue, which is then used to supply the content of a constitutional rule.⁶⁷ For advocates of this method, “the mere existence of a foreign or international law norm is sufficient to make it at least a potential source of domestic constitutional content.”⁶⁸ In contrast to the three approaches discussed above, the moral

64. *Id.* at 1170 (citing *Mozes v. Mozes*, 239 F.3d 1067, 1071 (9th Cir. 2001) (citing *Re S* and another (minors) (abduction: wrongful detention), [1994] 1 All E.R. 237, 248 (Eng. Fam. Div.)).

65. Alford, *supra* note 4, at 697. Dissenting in *Roper*, Justice O’Connor agrees that the Court’s independent judgment may be brought to bear on the question of constitutionality under the Eighth Amendment, but declines to find that there is also adequate evidence of a national consensus, as required under the Eighth Amendment, to support abolition of juvenile capital punishment. *Roper v. Simmons*, 543 U.S. 551, 590, 605–07 (2005) (O’Connor, J., dissenting).

66. See Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on “Proportionality,” Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 600 (1999); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1236–37 (1999). For discussions of the advantages of comparative approaches, see Kai Schabach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. INT’L L.J. 331 (1998) (identifying knowledge, understanding, and a source of ideas and solutions as benefits), and Benvenuto, *supra* note 39, at 2728 (identifying self-clarification as a benefit). Other scholars have underscored the necessity of engaging in dialogue with foreign judges to prevent becoming “irrelevant and isolated.” Harding, *supra* note 26, at 415 n.31 (citing Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 27, 114 (2002); Claire L’Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 29–30 (1998)).

67. Larsen, *supra* note 34, at 1295.

68. *Id.* at 1302.

fact-finding approach is difficult to justify on democratic-accountability grounds, and thus, remains controversial.

Writing for the majority in *Roper v. Simmons*, Justice Kennedy noted “the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty” to lend support to the Court’s determination that the death penalty is a disproportionate punishment for offenders under eighteen years of age.⁶⁹ Of the numerous foreign and international laws, charters, and conventions banning juvenile execution cited in the opinion,⁷⁰ the Court only examined the reasons underlying the prohibitions on juvenile executions in one instance.⁷¹ For the most part, the Court deemed the existence of the prohibitions alone sufficient to confirm its conclusion.

Though the decision is typically lauded for its use of the empirical comparative approach, Chief Justice Rehnquist’s majority opinion in *Washington v. Glucksberg* provides another example of the moral fact-finding approach.⁷² In *Glucksberg*, the Court addressed a challenge to the constitutionality of the State of Washington’s statute banning assisted suicide. In upholding the statute, the Court observed that “[i]n almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide”⁷³ to bolster its conclusion that there exists “a consistent and almost universal tradition that has long rejected . . . and continues explicitly to reject” any right to assisted suicide.⁷⁴ Thus, the mere existence of foreign statutes banning or protecting suicide informed the Court’s discernment of the requirements of substantive due process.

The Court’s actual motivation in surveying foreign sources in such cases remains elusive. If the intention is to render certain obligations under the Constitution coextensive with those under international law, overt discussion of customary international law has been “notably absent” from the Court’s

69. 543 U.S. 551, 575 (2005).

70. *Id.* at 576–78.

71. The Court noted that the perceived emotional instability of young people led the United Kingdom to recognize the “disproportionate nature of the juvenile death penalty,” but did not state why other countries had abolished the practice. *Id.* at 577.

72. See *supra* notes 42–45 and accompanying text for a discussion of *Glucksberg*’s reliance on empirical materials.

73. *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997); see also *id.* at 718 n.16 (noting that many countries are embroiled in debates over the propriety of assisted suicide).

74. *Id.* at 723. While there is an obvious historical component to this inquiry that may be defensible for the reasons outlined in Part II.A, the survey of modern laws and practices is distinguishable.

recent decisions.⁷⁵ Thus, the official position in *Roper* was that international “opinion” merely confirmed the rationality of the Court’s conclusion.⁷⁶ Had the Court examined the reasons underlying the conclusions reached by more than one foreign country, the official position would not seem fallacious. However, where offenses are defined in terms of the opinion of a relevant community, inclusion of foreign jurisdictions in such communities arguably gives those jurisdictions “authoritative legal weight.”⁷⁷

Whether such jurisdictions should be included within the relevant community is, I concede, an open question to which I do not purport to provide an adequate answer in this Comment. To the extent that international “opinion” serves as a proxy for international law,⁷⁸ acknowledgement of international opinion is prescribed by certain statutes. For example, some laws, such as the Alien Tort Claims Act⁷⁹ and Torture Victim Protection Act,⁸⁰ expressly provide jurisdiction to hear cases arising out of the law of nations. Where there is no controlling treaty, executive or legislative act, or judicial decision, “resort must be had to the customs and usages of civilized nations.”⁸¹ Finally, where there is a controlling statute that does not expressly reference international law, the *Charming Betsy* doctrine instructs courts not to construe a law to violate the law of nations

75. See JOHN F. MURPHY, *THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS* 94–95 (2004).

76. *Roper*, 543 U.S. at 578.

77. Ernest A. Young, *The Supreme Court, 2004 Term—Comment: Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 149 (2005).

78. To be sure, there is considerable division over the proper identification of sources of customary international law and of the law of nations. Compare *The Paquete Habana*, 175 U.S. 677, 700 (1900) (stating that “trustworthy evidence of what the law really is” can be found in “the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat”), and *Filartiga v. Pena-Irala*, 630 F.2d 876, 881–84 (2d Cir. 1980) (examining the U.N. Charter, the Universal Declaration of Human Rights, scholarly articles, and foreign constitutions to reach the conclusion that “official torture is now prohibited by the law of nations”), with *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735–38 (2004) (finding that materials offered in support of the assertion that unlawful detention lasting several hours amounted to a violation of customary international law lacked the requisite specificity).

79. 28 U.S.C. § 1350 (2000) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

80. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2000)) (enacted “[t]o carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing”).

81. *Paquete Habana*, 175 U.S. at 700, discussed in MURPHY, *supra* note 75, at 95–96.

if such a construction is possible.⁸² In contrast to the previous three examples, however, the Court has never decided whether constitutional analysis ought to be adjusted in light of international legal norms,⁸³ though numerous scholars have sought to identify normative reasons for doing so.⁸⁴

82. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch.) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.”), discussed in MURPHY, *supra* note 75, at 92.

83. In *Boos v. Barry*, 485 U.S. 312 (1988), discussed in MURPHY, *supra* note 75, at 92–93, the Court examined whether a Washington, D.C., ordinance prohibiting the display of certain signs within five hundred feet of an embassy constituted an unreasonable time, place, and manner restriction under the First Amendment. The government argued that because its interest in protecting diplomats is recognized under international law, it is automatically “compelling” for the purposes of First Amendment analysis. *Id.* at 324. The Court agreed that “the United States has a vital national interest in complying with international law.” *Id.* at 323. However, because the ordinance was not narrowly tailored to serve the asserted governmental interest, the Court avoided answering the difficult question of whether “the dictates of international law could ever require that First Amendment analysis be adjusted to accommodate the interests of foreign officials.” *Id.* at 324.

84. For a mathematically based argument that international opinion should have authoritative legal weight, see Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006). According to the Condorcet jury theorem, where the probability that an individual voter will reach the correct result exceeds 50 percent, the probability of a correct answer by a majority of a group of such voters increases toward 100 percent as the size of the group increases. *Id.* at 141. Thus, “if we are not skeptics, and if we believe that moral questions do have right answers, then . . . the view of most states is probative of what is right.” *Id.* at 142–43.

The choice-of-law context also provides a relevant analogy. Under the “comparative impairment” variant of governmental-interest analysis, the forum should apply the substantive law of the state that would be most impaired by the nonapplication of its law. *Offshore Rental Co. v. Cont’l Oil Co.*, 583 P.2d 721, 726 (Cal. 1978). In deciding whether the policy of the forum should defer to the policy of another interested state, judges consider the “anachronism” of the conflicting laws. *Id.* An anachronistic statute may be an antique compared to the laws of other states, or compared to other laws enacted within the same state. *Id.* Such a statute is probably infrequently enforced or interpreted even within its own jurisdiction. *Id.* The more anachronistic a law is, the less likely it is that the law reflects modern policy goals, and the less impaired that state will be if the other state’s substantive law is applied. *Id.* at 726–27; see also Note, *Desuetude*, 119 HARV. L. REV. 2209 (2006).

Finally, scholars increasingly argue that the natural-law origins of the Constitution may permit judges to interpret the Constitution in accordance with customary international human rights norms. See Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law*, 42 HARV. L. REV. 149, 152 (1928) (“[Natural rights] are external to all Will as such and interpenetrate all Reason as such. They are eternal and immutable.”), cited in Alford, *supra* note 4, at 659. Roger Alford believes that the natural-law roots behind the substantive due process doctrine of implicit ordered liberty are “underappreciated.” Alford, *supra* note 4, at 665–67 (discussing the natural-law underpinnings of *Twining v. New Jersey*, 211 U.S. 78 (1908), and *Palko v. Connecticut*, 302 U.S. 319 (1937)); see also Brian Tierney, *The Idea of Natural Rights—Origins and Persistence*, 2 NW. U. J. INT’L HUM. RTS. 2, 31 (2004) (“[T]he idea of natural rights never was necessarily dependant [sic] on some now outmoded metaphysical theory . . .”). But see Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL’Y 291, 325 (2005) (“[N]atural-law thinking has been eclipsed in American jurisprudence

There is a compelling democratic-process justification to refrain from applying the *Charming Betsy* doctrine to the Constitution. Where an ambiguous statute is construed in conformity with international law, the political branches are not precluded from subsequently amending the statute.⁸⁵ But where ambiguous provisions of the Constitution are deemed to conform to international law, it is commonly argued that the only popular recourse would be by constitutional amendment.⁸⁶

There are at least two weaknesses in this claim. First, it is not clear that such recourse is even warranted where “[t]he entire edifice of constitutional law rests on the foundation that the acts of the political branches are subject to and limited by the Constitution.”⁸⁷ Second, to the extent that including international law as “part of the canon of constitutional material . . . empowers the political branches to create source materials—treaties and executive agreements—that serve as interpretive inputs to the process of constitutional decision making,”⁸⁸ it may actually serve to diminish the undemocratic character of judicial review. On more than one occasion, the Court has implied that creating such source materials is precisely the job of the political branches.⁸⁹

* * *

My goal here is not to resolve the foregoing dilemma. Instead, I have sought to show that there are at least three comparative approaches—historical, empirical, and reason-borrowing—under which the examination of foreign

by *Erie*.”) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)); A. Mark Weisburd, *Using International Law to Interpret National Constitutions—Conceptual Problems: Reflections on Justice Kirby’s Advocacy of International Law in Domestic Constitutional Jurisprudence*, 21 AM. U. INT’L L. REV. 365, 369 (2006) (“[A]ny view of law as somehow independent of the human institutions that create it . . . has been untenable in this country since *Erie*.”). Nevertheless, Jeremy Waldron maintains that “positivism’s general credentials are suspect today.” Waldron, *supra* note 20, at 142. He reads *Erie* more “as a case about the role of federal courts than a case about the concept of law.” *Id.*

85. See MURPHY, *supra* note 75, at 92–93.

86. See *id.*; see also SCALIA, *supra* note 25, at 40; Glendon, *supra* note 14, at A14 (noting that “the court’s constitutional mistakes are exceedingly hard to correct” in the United States, where the process of amending the Constitution is quite difficult).

87. Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT’L L. 57, 61 (2004).

88. *Id.*

89. See *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989) (“[T]he primary and most reliable indication of [a national] consensus is . . . the pattern of enacted laws.”); see also *Roper v. Simmons*, 543 U.S. 551, 608–09 (2005) (Scalia, J., dissenting); *Washington v. Glucksberg*, 521 U.S. 702, 711 (1997).

materials does not pose any increased threat to democratic accountability or federalism principles than would the same methods examining solely domestic materials. Nevertheless, a comparative approach that is theoretically justifiable may be of no benefit if its application appears entirely unprincipled. In the next Part, I turn to the second concern voiced by many critics, namely, that in selecting foreign sources, judges engage not in “reasoned decisionmaking, but sophistry.”⁹⁰

III. IDENTIFYING NEUTRAL SELECTION CRITERIA

Courts have an obligation to determine the probative value of authorities, foreign or domestic, within the bounds of appropriate legal reasoning.⁹¹ Critics have charged that comparative approaches are wholly unregulated, permitting judges to choose favorable foreign authorities and to ignore the rest.⁹² Suggested frameworks for selecting foreign authorities typically emphasize some combination of historical traditions⁹³ and modern societal and cultural ideals.⁹⁴ While such factors are not entirely extraneous, any solution that emphasizes shared values may be incapable of articulating when American exceptionalism

90. *Roper*, 543 U.S. at 627 (Scalia, J., dissenting).

91. A new commitment to practical reasoning, which came to be known as “reasoned elaboration,” developed in the 1950s in the scholarship of the *Harvard Law Review*’s forewords to its annual Supreme Court survey. ANTHONY J. SEBOK, *LEGAL POSTIVISM IN AMERICAN JURISPRUDENCE* 120 (1998). Judges themselves came to be judged on the strength of their legal reasoning. *Id.* at 122. In the 1954 foreword, Albert Sacks criticized the Warren Court’s use of summary opinions to dispose of many of “the year’s most difficult legal issues.” *Id.* at 122–23. “The difficulty is not in the result reached, but in the absence of explanation of what was decided,” wrote Sacks. *Id.* at 123 (quoting Albert Sacks, *Foreword to the Supreme Court*, 1953 Term, 68 HARV. L. REV. 96, 103 (1954)). “Right result without right reason [does] not further the project of constitutional law” *Id.* at 125.

92. See *supra* notes 14–16 and accompanying text.

93. See *Roper*, 543 U.S. at 575 (observing “the abolition of the juvenile death penalty ‘by other nations that share our Anglo-American heritage, and by the leading members of the Western European community’” (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 830 & n.31, 831 (1988))); Shawn E. Fields, Note, *Constitutional Comparativism and the Eighth Amendment: How a Flawed Proportionality Requirement Can Benefit From Foreign Law*, 86 B.U. L. REV. 963, 995–97 (2006) (applying English law first, followed by the laws of other Commonwealth countries, before searching elsewhere).

94. See Rex D. Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT’L L. 357, 439 (2005) (suggesting that selection procedures should not “operat[e] in a vacuum” and that comparative analysis should integrate reasons, derived from social sciences, for differentiating between the societal fabric of nations).

is justified.⁹⁵ To be sure, when comparative law is employed, in the words of Roscoe Pound, as “one mode of quest for [an] ideal body of rules, ascertainable by reason,”⁹⁶ it may be difficult to avoid the foregoing value-laden selection criteria. However, the three comparative approaches endorsed in Part II—historical, empirical, and reason-borrowing—are not quests for ideal rules. Because the approaches embody diverse aims, the criteria for selecting authorities under each must be altered accordingly.

The perception that the field of comparative law has failed to impart an adequate framework for selecting foreign sources is perhaps unavoidable, given critics’ expectation that comparativists provide crystal-clear outcome-determinative rules of selection.⁹⁷ The constraints supplied by the field of comparative law are not necessarily less coherent or more subjective than historiographical conventions or social science methods employed in wholly domestic historical and empirical analyses. The American legal system, however, has entrusted judges, assisted by the adversarial process, to reject mistaken readings of history and to ascertain the validity of empirical studies by applying the often abstruse methodologies prescribed by those fields.

In this Part, I compare the methods for selecting authorities under each of the three approaches. After demonstrating the inherent flexibility and uncertainty of the prevailing methods for selecting and analyzing sources under the historical and empirical approaches, I illustrate how comparative law conventions for selecting authorities for application under the empirical and reason-borrowing comparative approaches operate to curb judicial discretion.

A. Selection of Authorities Under the Historical Approach

Under the historical approach, foreign sources provide a basis for identifying the framers’ intent. Because existing historiographical conventions apply equally to foreign and domestic sources, the historical approach does not require jurists to employ any new methodologies for selecting or interpreting foreign sources.

95. See, e.g., *Roper*, 543 U.S. at 624 (Scalia, J., dissenting) (asking why the Court does not also choose to follow England and other European countries, which have “universally rejected” the categorical exclusionary rule).

96. Roscoe Pound, *The Place of Comparative Law in the American Law School Curriculum*, 8 TUL. L. REV. 161, 163 (1934).

97. See Glensy, *supra* note 94, at 404 (criticizing the demand for a selection principle that would, “under all circumstances, produce[] consistent results in the selection of appropriate sources of persuasive authority”).

These conventions, however, are neither static nor transparent. Experience has shown that all accounts of constitutional history are purposive,⁹⁸ “rest[ing] on certain theoretical assumptions.”⁹⁹ Because historical events are generally prone to several competing interpretations,¹⁰⁰ any reliance on history in constitutional interpretation thus “raises a question about [the] historiographical method” applied to reach the result.¹⁰¹ Moreover, lawyers undoubtedly have an incentive to select only the evidence from the historical record that supports their textual interpretation.¹⁰² Yet those who criticize the use of foreign law due to its perceived lack of standards nevertheless tend to embrace the use of history.¹⁰³

Why is the inherent malleability of historical interpretive principles tolerated under our legal regime?¹⁰⁴ As the historical profession has become “increasingly sensitive to normative and theoretical

98. See Robert W. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC'Y REV. 9, 30 (1975) (noting that for pragmatists, history had “the important but auxiliary [role] of clearing away the rubbish of pointless old law,” for the goal was “to liberate the present from law that had arisen out of entirely different social contexts and modes of thought and was not, as a consequence, necessarily suited to modern needs”); Paul L. Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64, 64 n.2 (1963) (noting the “long and heavy reliance of conservatives upon history, ‘as a useful device for the consecration of an already established order of things’” (quoting Edward S. Corwin, *The Constitution as Instrument and as Symbol*, 30 AM. POL. SCI. REV. 1071, 1072 (1936))).

99. See, e.g., Herman Belz, *History, Theory, and the Constitution*, 11 CONST. COMMENT. 45, 49 (1994); Mitchell Gordon, *Adjusting the Rear-View Mirror: Rethinking the Use of History in Supreme Court Jurisprudence*, 89 MARQ. L. REV. 475 (2006) (noting that the Court has used history for different purposes, including deliberative and forensic); Morton J. Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275, 275–76 (1973) (arguing that “legal historiography,” which involves the search for the origin of legal principles, is nevertheless inherently ideological).

100. See, e.g., Alford, *supra* note 4, at 656 (noting the inconclusiveness of the historical record); Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 594 (2000) (“When one law professor says that the equal protection clause is about securing the basic political equality of blacks and another that it is about creating an evolving, generative concept of equality, their disagreement is over interpretive theory and cannot be resolved by a deeper or better study of history. History might reveal the interpretive presuppositions of the drafters or ratifiers of an enactment, but it would not reveal the weight that a modern interpreter should give to those presuppositions.”); see also *infra* note 108.

101. Belz, *supra* note 99, at 45; see also Murphy, *supra* note 98, at 67–69 (describing the tension between pragmatists and traditional constitutionalists).

102. Murphy, *supra* note 98, at 77 (“Law office history . . . [is] deliberately calculated to win cases.”) (internal quotation marks omitted).

103. See *supra* note 37 and accompanying text.

104. See Murphy, *supra* note 98, at 64, 75–76 (noting that the Court has always used, and has always been expected to use, history, and describing how the Court relied on history in some of its most activist rulings).

concerns,”¹⁰⁵ judges, litigants, and amici have been presumed capable of doing the same. Whereas the Justices, in earlier Supreme Court opinions, relied all too often on “archaic historical works of the earlier devotees of ‘revealed’ history, [or] turned to history written by nonhistorians,”¹⁰⁶ scholarship is increasingly devoted to identifying the methodological flaws in the Court’s analyses.¹⁰⁷ Today, the Justices frequently debate the merits of competing interpretations of the historical record.¹⁰⁸ The Court has even felt obligated to overturn existing precedent after recognizing flaws in its earlier readings of history.¹⁰⁹

105. Belz, *supra* note 99, at 46 (citing PETER NOVICK, *THAT NOBLE DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION* (1988), and *THE PAST BEFORE US: CONTEMPORARY HISTORICAL WRITING IN THE UNITED STATES* 19–46 (Michael Kammen ed., 1980)).

106. Murphy, *supra* note 98, at 77.

107. See, e.g., *id.* at 65 n.4 (noting that Justice Black relied on long-dismissed and outdated works to trace the historical development of church-state relations in *Engel v. Vitale*, 370 U.S. 421 (1962)); *id.* at 76 & n.47 (arguing that Justice Sutherland relied upon “a shockingly inaccurate use of historical data concerning the original transfer of power from the Continental Congress to the new government under the Constitution, [laying] the constitutional basis for virtual plenary executive authority in the area of foreign relations” in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)); see also Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901, 913 (1993) (arguing that the Court’s use of history is frequently selective); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998) (providing a historiography of the use of history in constitutional interpretation, and arguing that history-grounded constitutional interpretation cannot be limited to the time of the founding).

108. The original understanding of the Eleventh Amendment has been particularly contested in recent years. See, e.g., *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006) (demonstrating disagreement between the majority and the dissent over the relevance of historical English bankruptcy law to support the majority’s claim that the framers would have understood the ratification of the Constitution’s Bankruptcy Clause to constitute a waiver of the states’ sovereign immunity in bankruptcy proceedings); *Alden v. Maine*, 527 U.S. 706, 715, 741–43 (1999) (debating the character of the framers’ understanding of sovereignty, with the five Justices in the majority relying on the absence of a historical record to confirm that states must be immune from suits for claims arising under federal law in their own courts, where it had been “well established in English law that the Crown could not be sued without consent in its own courts”); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 130 (1996) (Souter, J., dissenting) (debating the extent to which early colonists intended to incorporate, rather than reject, English common law).

109. Striking down a statutory ban on sodomy in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court determined that “the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate.” *Id.* at 571 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)). In *Bowers*, the Court had declined to find a “fundamental right to homosexuals to engage in acts of consensual sodomy” based on its determination that “[p]roscriptions against that conduct have ancient roots.” *Bowers*, 478 U.S. at 192. In *Lawrence*, the Court acknowledged the existence of laws in effect in England as early as 1533 prohibiting sodomy between consenting adults, *Lawrence*, 539 U.S. at 568, but noted that “American laws targeting same-sex couples did not develop until the last third of the 20th century,” *id.* at 570. Because “this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons,” *id.* at 569, the Court held that the “historical premises of [Bowers’s majority opinion and Chief Justice Burger’s concurrence] are not without doubt and, at the very least, are overstated,” *id.* at 571.

In short, even though historical analyses can be used to supply an aura of objectivity to otherwise purposive goals, jurists evidently feel confident in their own ability, with the assistance of respected historians, to identify and reject clearly erroneous pronouncements of history.

B. Selection of Authorities Under the Empirical Approach

Under the empirical approach, judges consider foreign experiences to predict the impact of adopting a particular rule. The materials selected must accurately depict the effect of the law abroad, and must reliably portend how the rule would perform domestically.

1. Accuracy of Empirical Evidence

The accuracy of foreign empirical data is a function of the statistical methods used to collect the data, for which the social sciences supply the requisite standards. As with the interpretation of historical data, the use of empirical materials, whether foreign or domestic, is not immune from bias. In *Muller v. Oregon*,¹¹⁰ which upheld state restrictions on the working hours of women, the Court relied upon the renowned Brandeis Brief for evidence, gathered from home and abroad, of reasons “so important and so far reaching that the need for such reduction [in the working hours of women] need hardly be discussed.”¹¹¹ The Brief noted that several “leading” European countries had enacted legislation to limit the hours worked by adult women to protect women’s health, safety, and the public welfare.¹¹² The foreign practices purportedly proved that women’s “special physical organization” rendered physical labor “dangerous for women,” lending support to the Court’s conclusion that the law was not an “unreasonable, unnecessary, and arbitrary interference” with a woman’s right to contract in relation to her labor.¹¹³ This conclusion, of course, seems patently absurd today. *Muller*’s problematic treatment of foreign experiences, however, was due to defects generally attributable to empirical materials, which can often

110. 208 U.S. 412 (1908).

111. *Id.* at 420 n.1, discussed in Alford, *supra* note 4, at 700.

112. Brief for Defendant in Error at 11, *Muller*, 208 U.S. 412 (No. 107) (citing statutes from Great Britain, France, Switzerland, Austria, Holland, Italy, and Germany).

113. *Muller*, 208 U.S. at 419.

serve to corroborate prevailing stereotypical assumptions rather than to present any insightful new knowledge.¹¹⁴

Notwithstanding its potential for misuse, the use of social science data has advanced since the time of *Muller*, when it was in a “primitive state.”¹¹⁵ The legal profession has exhibited confidence in social scientists’ ability to produce reliable data,¹¹⁶ and courts now frequently rely on empirical evidence, both domestic and foreign, in landmark constitutional cases.¹¹⁷ Because of the public’s faith in the adversarial system and in the capacity of judges to exercise independent discretion, the competence of the

114. See James R.P. Ogloff, *Jingoism, Dogmatism and Other Evils in Law and Psychology: Lessons Learned in the Twentieth Century*, in *PSYCHOLOGY IN THE COURTS: INTERNATIONAL ADVANCES IN KNOWLEDGE* 1, 4 (Ronald Roesch et al. eds., 2001) (“The [Brandeis] brief has also been criticized because of the low quality of the empirical evidence presented; it consisted primarily of ‘broad value-laden statements supported largely by casual observation and opinion.’” (quoting JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* 8 (3d ed. 1994))); see also Shawn Kolitch, Comment, *Constitutional Fact Finding and the Appropriate Use of Empirical Data in Constitutional Law*, 10 LEWIS & CLARK L. REV. 673, 698, 699 (2006) (arguing that the Court “has shown a willingness to invoke empirical considerations in a disingenuous manner,” and suggesting that “the Court either must delay consideration of the data until it demonstrates unequivocal statistical facts, or it must relax stare decisis to allow the scientific method to clarify prior results, and in some cases overturn those results”).

115. Ogloff, *supra* note 114, at 4; see also Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 822–26 (providing a history of empirical legal scholarship and its contribution to changes in judicial decisionmaking).

116. See Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 161–62 (1993) (“The alternative to admitting social science data is to return to nineteenth century legal formalism, according to which justices or other powerful groups substitute their own normative beliefs for scientific findings.”), quoted in Madeleine Schachter, *The Utility of Pro Bono Representation of U.S.-Based Amicus Curiae in Non-U.S. and Multi-National Courts as a Means of Advancing the Public Interest*, 28 FORDHAM INT’L L.J. 88, 107 (2004); see also Heise, *supra* note 115, at 819. But see Schachter, *supra*, at 106–07 (noting that the introduction of empirical data contained in amicus briefs may, in some circumstances, violate due process, because it is not subject to the Federal Rules of Evidence and is not tested by the adversarial process); Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115, 140–45 (2003) (critiquing constitutional empiricism as a method of constitutional adjudication and construction).

117. See Schachter, *supra* note 116, at 105 (citing, inter alia, *Roe v. Wade*, 410 U.S. 113 (1973) (relying on empirical evidence of the physical risks of abortion at various stages of pregnancy)). See generally ROSEMARY J. ERICKSON & RITA J. SIMON, *THE USE OF SOCIAL SCIENCE DATA IN SUPREME COURT DECISIONS* (1998); Patricia J. Falk, *The Prevalence of Social Science in Gay Rights Cases: The Synergistic Influences of Historical Context, Justificatory Citation, and Dissemination Efforts*, 41 WAYNE L. REV. 1, 24–28 (1994) (explaining that modern courts are more likely to cite empirical evidence than their predecessors on account of the interdisciplinary collaboration between law and social science, as well as liberalized rules of evidence).

judiciary to ascertain the strength of empirical studies and reject unreliable data is called into doubt with relative infrequency.¹¹⁸

2. Relevance of Empirical Evidence

In contrast to the methods employed to assess the reliability of empirical evidence, which apply equally to domestic and foreign materials, a set of unique analytical conventions is required to portend the domestic impact of importing a foreign rule. The tools for predicting the implications of adopting a foreign rule are supplied by comparative law methods devoted to the study of “legal transplants,” or the transferability of legal rules.¹¹⁹ For example, where one procedural right is expressly protected by the Constitution, certain corollary procedures designed to protect the primary right may gain constitutional significance. Thus, many of the differences between domestic and foreign trial procedures and evidentiary rules are attributable to the fact that in no other country is the right to a trial by jury as expansive as it is in the United States.¹²⁰ Empirical evidence regarding the operation of a foreign exclusionary rule (or lack thereof) may therefore be irrelevant if gathered from a jurisdiction where the judge is the factfinder. Even where a procedure is designed with the objective of furthering substantive goals that are generally shared by many countries,¹²¹ it is rare that a specific procedure from one system can be transplanted effectively to another without disturbing the equilibrium of the receiving system.¹²²

118. In *Lockhart v. McCree*, 476 U.S. 162 (1986), the Court rejected social science research that purported to demonstrate that a bias toward execution occurs when every juror who serves in a capital case is required to believe in the death penalty. *Id.* at 168–74, discussed in ERICKSON & SIMON, *supra* note 117, at 17. The majority and the dissent ultimately disagreed over how to evaluate the fact that different methods were used in the various studies. Compare *Lockhart*, 476 U.S. at 172–73 (disregarding the results of a study that lacked a particular methodological infirmity, because a “‘per se constitutional rule’ as far reaching as the one [the respondent] proposes should not be based on the results of the lone study that avoids this fundamental flaw”), with *id.* at 189 (Marshall, J., dissenting) (“The chief strength of respondent’s evidence lies in the essential unanimity of the results obtained by researchers using diverse subjects and varied methodologies.”).

119. See generally ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993).

120. See U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI; *id.* amend. VII. Thanks to Professor Stephen Gardbaum for instructing me on this subject.

121. Examples include preserving a criminal defendant’s right to a fair trial, and preserving the truth-seeking function of a trial.

122. An exchange between the majority and the dissent in *Miranda v. Arizona*, 384 U.S. 436 (1966), illustrates this point. After the majority points to the existence in other countries of supposedly equally rigid rules regarding the admissibility of evidence obtained without an attorney present, see *id.* at 486–90, the dissenting Justices note that such rules are counterbalanced by other

In light of the multitude of relevant considerations, predicting the success of a given transplant is quite difficult and articulating a typology that would apply to all possible situations may be impracticable.¹²³ Nevertheless, the substantial scholarship devoted to the study of specific legal transplants¹²⁴ improves the prospect that “[g]rossly inappropriate or unhelpful investigations or comparisons are apparent or easily demonstrable.”¹²⁵ Therefore, even if legal transplant theory is not in any way settled,¹²⁶ as with history and the sciences, that there is an ever-growing body of scholarship upon which to rely in order to commence an evenhanded investigation of the particular issue militates in favor of permitting courts to consider the information and ascertain its relevance.

C. Selection of Authorities Under the Reason-borrowing Approach

Under the reason-borrowing approach, judges examine foreign authorities to determine why another country adopted a law and to ascertain whether those policies are relevant domestically. Because the reason-borrowing approach has been underutilized,¹²⁷ the applicable selection criteria have eluded many critics.

prosecutorial advantages, see *id.* at 500 n.3 (Clark, J., dissenting); *id.* at 522–23 (Harlan, J., dissenting) (explaining why the majority misconstrued the exclusionary rules of Ceylon, England, India, and Scotland). Justice Clark also criticized the “total lack of [both domestic and foreign] empirical knowledge on the practical operation of requirements . . . announced by the majority.” *Id.* at 500 & n.3, 501 (1966) (Clark, J., dissenting). *Miranda* is discussed in Alford, *supra* note 4, at 700–01.

123. See WATSON, *supra* note 119, at 11 (acknowledging that comparative law may not always be systematic).

124. See, e.g., GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* (1978) (criminal law); P.D.V. MARSH, *COMPARATIVE CONTRACT LAW* (1994) (contracts); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 717–18 (2001) (judicial review); Richard L. Marcus, *Putting American Procedural Exceptionalism Into a Globalized Context*, 53 AM. J. COMP. L. 709 (2005) (civil procedure); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1353 (2006) (judicial review); Mark D. West, *The Puzzling Divergence of Corporate Law: Evidence and Explanations From Japan and the United States*, 150 U. PA. L. REV. 527 (2001) (corporate law).

125. WATSON, *supra* note 119, at 11.

126. See Steven J. Heim, Note, *Predicting Legal Transplants: The Case of Servitudes in the Russian Federation*, 6 TRANSNAT’L L. & CONTEMP. PROBS. 187, 189 & nn.9–10 (1996) (describing the debate between Jack Hiller, R.B. Seidman, and Alan Watson over whether legal transplants are possible, and the debate between Otto Kahn-Freud and Watson over the specific methods that ought to be used to predict the success of a proposed transplant).

127. See Larsen, *supra* note 34, at 1286 (“Reason-borrowing simply does not describe what members of the Rehnquist Court have done.”); see also Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 225 (2001) (“U.S. constitutional decisions, majority as well as dissenting opinions, lack a rich tradition of engagement with the reasoned elaboration of constitutional norms around the world.”), cited in Larsen, *supra* note 34, at 1291 n.37. But see *supra* text accompanying notes 57–58.

The Court often refers to the laws of other countries without differentiating between statutes, case law, and constitutions. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 557 (2005); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (stating that “within the world community, the

In determining whether to rely on a foreign authority under the reason-borrowing approach, the essential question is whether the material constitutes a meaningful source of the foreign lawmaker's intent. Only then is it possible to determine whether the foreign policies bear any relevance to the domestic situation.

This task entails an individual examination of case law, statutes, and treaties to identify the flaws—and strengths—inhering in different types of legal documents. Since the inquiry focuses on the processes of foreign lawmaking, rather than merely the conclusions reached, the selection principles avoid the types of value-laden judgments typically used to defend the selection of a foreign authority.

1. Case Law

While foreign case law provides a fertile source of authorities for use under the reason-borrowing approach, it also generates many complications that would not arise in a domestic analysis. Differences between the two prominent legal traditions¹²⁸—those, like the United States, which are based on the English Common Law,¹²⁹ and those based on Justinian's *Corpus Juris Civilis*¹³⁰—account for many of them. Recognizing the chief variations between the two systems will help avoid unproductive or misleading reliance on foreign case law. While the differences between

imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved," though neither the opinion nor the brief cited stated in what manner countries of the world have banned such executions). In *Roper*, the Court remarked that "the United States now stands alone in a world that has turned its face against the juvenile death penalty." *Roper*, 543 U.S. at 557. Though it mentioned one instance of abolition by statute, *id.* at 577 (United Kingdom), the Court failed to note by what mechanisms other countries around the world had abolished this punishment. Some countries have abolished the death penalty by treaty, some by statute, some by an express constitutional provision, and some by judicial decisions. See AMNESTY INT'L, CONSTITUTIONAL PROHIBITIONS OF THE DEATH PENALTY 1 (2005), available at [http://web.amnesty.org/library/pdf/ACT500092005ENGLISH/\\$File/ACT5000905.pdf](http://web.amnesty.org/library/pdf/ACT500092005ENGLISH/$File/ACT5000905.pdf). Of the eighty-four countries that have abolished the death penalty for all crimes, at least half have done so through explicit constitutional provisions. *Id.* That several countries around the world have reached the same conclusion on an issue does not mean that they have all invoked similar reasons to get there.

128. See H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* (2d ed. 2004) (examining the common and civil law traditions, as well as the Asian, Hindu, Islamic, and Talmudic traditions).

129. For example, Australia, Canada, Great Britain, Ireland, and New Zealand. See JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 4 (2d ed. 1985).

130. For example, Argentina, Brazil, Chile, France, Germany, Italy, Switzerland, as well as Louisiana, Puerto Rico, and Quebec. See *id.* at 1–3.

the systems are not so pronounced as to eliminate the possibility that citing to civil law court opinions will be effective, neither should they suggest that citing to opinions of common law courts is foolproof. This Subpart examines limitations on foreign case law arising from the following four factors: the depth of the reasoning; the precedential value of the ruling; whether the foreign court employed abstract or concrete review; and finally, the specific language of the foreign statute under review.

a. Depth of Reasoning

For the purposes of the reason-borrowing approach, the conclusion of a foreign court is not relevant unless its reasoning can be tested.¹³¹ While the depth and strength of reasoning naturally varies from case to case, the reasoning of common law courts is generally more transparent and, hence, more open to comparison, than that of civil law courts.

Three models of judicial reasoning have been recognized, each used by different countries.¹³² In the “discursive alternative justification” model, used in common law countries such as the United Kingdom and the United States, the final decision is presented as “the outcome of judicial choices made according to arguments or priority rules.”¹³³ The result is that “colliding arguments are stated and discussed, or weighed, the possible alternative choices identified [and] the open choices made, for stated reasons.”¹³⁴ Where an opinion exhibits transparent and thorough reasoning, both the strength of its analysis and its relevance to the issue before the domestic court can be critically evaluated, demonstrating its potential utility under the reason-borrowing method.

By contrast, in the “simple subsumptive” model, employed in some civil law countries such as France, the court states only the legal rule, the relevant facts, and the logical conclusion of the legal syllogism.¹³⁵ Any notion that a decision may be the product of a series of competing choices is eliminated. For example, in its famous 1975 abortion decision,¹³⁶

131. For a discussion of “reasoned elaboration,” see *supra* note 91.

132. See JUHA RAITIO, *THE PRINCIPLE OF LEGAL CERTAINTY IN EC LAW* 315 (2003).

133. *Id.*

134. *Id.*; see also *Semtek Int’l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508–09 (2001) (utilizing the discursive alternative justification model to announce a new rule of federal common law).

135. RAITIO, *supra* note 132, at 315; see also Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT’L L. 81, 100 (1994) (exposing the “inaccessibility, lack of candor, and absence of policy discussion” in French judicial opinions).

136. CC decision no. 74-54DC, Jan. 15, 1975, Rec. 19, translated at <http://www.conseil-constitutionnel.fr/langues/anglais/a7454dc.pdf> (official translation).

the French Constitutional Council upheld certain constraints on the voluntary termination of pregnancy¹³⁷ based on the following series of conclusions:

[The Act] respects the freedom of persons who resort to or take part in a termination of pregnancy, whether for reasons of distress or on therapeutic grounds; consequently, the Act does not conflict with the principle of freedom set out in Article 2 of the Declaration of Human and Civic Rights;¹³⁸

The Act . . . does not allow any departure from the principle of respect for all human beings from the inception of life . . . except in case of need and on the terms and subject to the restrictions contained therein;

None of the exceptions allowed by the statute is . . . inconsistent with any of the fundamental principles recognised by the laws of the Republic, nor with the principle set out in the preamble to the Constitution of 27 October 1946 whereby the nation guarantees health care to all children, nor with any of the other principles of constitutional status established by that text.¹³⁹

The Council decided that the restrictions on abortion are compatible with a woman's right to liberty and the principle of respect for the human life of the child. What the decision omits is an explanation of why it reached this conclusion. The Council simply asserted that the statute respects a woman's liberty, without discussing whether there are less burdensome alternatives and, if so, why the liberty principle of the French Constitution permits more burdensome restrictions to be imposed. Given its opaqueness, it would be difficult for American courts to analogize to the reasoning of this case, particularly under, for example, the undue burden framework of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹⁴⁰

The third model, the "sophisticated subsumptive" model, used in such civil law countries as Finland, Germany, and Italy, is similar to the French model, but more complex insofar as statements of premises are buttressed by

137. The statute under examination permitted abortion only in cases of "necessity." MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 85 (2d ed. 1994). In the first ten weeks, the condition is met if the pregnant woman considers herself "in distress." *Id.* After ten weeks, the condition is met only if the health of the woman or child is seriously threatened. *Id.* at 85–86.

138. La Declaration des Droits de l'Homme et du Citoyen [Declaration of the Rights of Man and of the Citizen] art. 2 (Aug. 26, 1789), translated at The Avalon Project at Yale Law Sch., <http://www.yale.edu/lawweb/avalon/rightsof.htm> (last visited Apr. 14, 2007) ("The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.").

139. CC decision no. 74-54DC.

140. 505 U.S. 833 (1992).

identification of subpremises.¹⁴¹ For example, in its well-known 1975 abortion decision,¹⁴² the West German Federal Constitutional Court struck down a law liberalizing abortion on the ground that it violated the right to life guaranteed by the Basic Law of the Federal Republic of Germany.¹⁴³ The court commenced by acknowledging Germany's distinctive history, noting that "[t]he express incorporation into the Basic Law of the self-evident right to life . . . may be explained principally as a reaction to the 'destruction of life unworthy of life,' to the 'final solution' and 'liquidations,' which were carried out by the National Socialistic Regime as measures of state."¹⁴⁴ The court then examined the language of the relevant provision of the Basic Law, which states: "Everyone has a right to life."¹⁴⁵ The key question was whether "everyone" included the unborn. The court answered in the affirmative, based on the following:

Life, in the sense of historical existence of a human individual, exists according to definite biological-physiological knowledge, in any case, from the 14th day after conception (nidation, individuation) . . . The process of development which has begun at that point is a continuing process which exhibits no sharp demarcation and does not allow a precise division of the various steps of development of human life . . . Therefore, the protection of . . . the Basic Law cannot be limited either to the "completed" human being after birth or to the child about to be born which is independently capable of living. The right to life is guaranteed to everyone who "lives"; no distinction can be made here between various stages of the life developing itself before birth, or between unborn and born life. "Everyone" in the sense of [the relevant provision of] the Basic Law is "everyone living"; expressed in another way: every life possessing human individuality; "everyone" also includes the yet unborn human being.¹⁴⁶

Notably, the German court determined, as a matter of fact, that life begins the fourteenth day after conception.¹⁴⁷ The court's application of the explicit human rights protections in the Basic Law logically followed

141. RAITIO, *supra* note 132, at 315.

142. Abortion I Case, 39 BVerfGE 1 (1975), translated in *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 J. MARSHALL J. PRAC. & PROC. 605 (Robert E. Jonas & John D. Gorby trans., 1976) [hereinafter *West German Abortion Decision*].

143. See *West German Abortion Decision*, *supra* note 142, at 637 ("[T]he Basic Law . . . protects the life developing itself in the womb of the mother as an intrinsic legal value.").

144. *Id.* at 638.

145. *Id.*

146. *Id.*

147. *Id.*

from the subpremise that commencing fourteen days after conception, fetuses are unquestionably human beings, with all of the attendant rights.

While such elaboration improves the prospect that decisions of the German constitutional court will possess utility for purposes of the reason-borrowing method, jurists must identify these subpremises and be prepared to acknowledge whether they have been rebuffed in the United States. Chief Justice Rehnquist's opinion in *Casey* omitted the necessary acknowledgement. Presumably with the intent to undermine the jurisprudence of *Roe v. Wade*,¹⁴⁸ the Chief Justice cited the West German abortion decision. Only "[t]wo years after *Roe*," he wrote, "the West German constitutional court . . . struck down a law liberalizing access to abortion on the grounds that life developing within the womb is constitutionally protected."¹⁴⁹ However, the German court's syllogism relies on subpremises that the U.S. Supreme Court expressly refused to accept in *Roe*. The *Roe* majority determined that "the word 'person,' as used in the Fourteenth amendment, does not include the unborn,"¹⁵⁰ without "resolv[ing] the difficult question of when life begins."¹⁵¹ It does not appear that

148. 410 U.S. 113 (1973); see also Alford, *supra* note 4, at 655 (noting Chief Justice Rehnquist's failure to indicate the relevance of the German abortion opinion).

149. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 945 n.1 (Rehnquist, C.J., dissenting in part). The German constitutional court, moreover, found that the guarantee of the right to life imposed on the state a "duty to carry the pregnancy to term" and to "view . . . its interruption as an injustice." *West German Abortion Decision*, *supra* note 142, at 644. Consequently, the court not only declined to find any right to abortion, but went further and held that the state was required to criminalize abortion. *Id.* ("The condemnation of abortion must be clearly expressed in the legal order."). Underlying its conclusion, the court stated that the Basic Law can only be understood "in light of the historical experience and the spiritual-moral confrontation with the previous system of National Socialism," in response to which "Germany has erected an order bound together by values which places the individual human being and his dignity at the focal point of all its ordinances." *Id.* at 662.

The holding was later refined in *Abortion II Case*, 88 BVerfGE 203 (1993), in which the court substituted criminal penalties for "counseling oriented toward preserving the life of the fetus" during the first twelve weeks of pregnancy. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 354 (2d ed. 1997). See generally *id.* at 349 (translating selected excerpts of the opinion).

150. *Roe*, 410 U.S. at 158–59.

151. *Id.* ("When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."); see also *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, 552–54, 556, 566, 570 (rejecting metaphysical, scientific, and linguistic attempts to settle "the difficult and controversial question of whether a foetus was intended by the National Assembly of Quebec to be a person under [the Charter]," and surveying the treatment of fetal rights in civil law and common law jurisdictions to conclude that "it would be wrong to interpret the vague provisions of the Quebec Charter as conferring legal personhood upon the foetus").

Chief Justice Rehnquist was seeking to persuade his fellow Justices that the Court was now prepared to resolve this question,¹⁵² so it was misleading to state the holding of the German court without identifying the crucial presumption that enabled the court to logically reach such a conclusion—particularly where the presumption is one that the U.S. Supreme Court is unwilling or unable to accept.

The varying frequency with which dissenting opinions are issued by foreign courts is another consequence of the disparities between the three models of judicial reasoning. Dissenting opinions create the impression that a case could have been wrongly decided, and in this regard, they call into question the reliability of the majority's reasoning.¹⁵³ Though a few groundbreaking decisions have been issued by a unanimous court,¹⁵⁴ common law panels of judges typically issue a range of concurrences, dissents,

152. The plurality opinion in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), which was authored by the Chief Justice and acknowledged in *Casey*, 505 U.S. at 944 (Rehnquist, C.J., dissenting in part), arguably speaks to this issue. See *Webster*, 492 U.S. at 519 (plurality opinion) ("[W]e do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability."). However, it appears that *Webster* was cited not for its suggestion that states may have a compelling interest in protecting pre-viable fetuses, but rather for its pronouncement of what the minority of Justices maintained to be the proper standard of review. See *Casey*, 505 U.S. at 966 (claiming that "the Constitution does not subject state abortion regulations to heightened scrutiny" and therefore that "the correct analysis is that set forth by the plurality opinion in *Webster*").

By contrast, Justice Scalia has unambiguously voiced his belief that the state should decide when life begins. See *Casey*, 505 U.S. at 982 (Scalia, J., dissenting in part) ("The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child is a *human life*. Thus, whatever answer *Roe* came up with after conducting its 'balancing' is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. There is of course no way to determine that as a legal matter; it is in fact a value judgment."); Kirk Makin, *Senior U.S., Canadian Judges Spar Over Judicial Activism*, *GLOBE & MAIL* (Can.), Feb. 17, 2007, at A2 (reporting on a recent debate between Justice Scalia and Canadian Supreme Court Justice Binnie, in which Justice Scalia ridiculed the U.S. Supreme Court's failure in *Roe v. Wade* to decide when life begins).

153. Those opinions that are praised for their progressive content may one day become the majority view. R.C. VAN CAENEGEM, *EUROPEAN LAW IN THE PAST AND THE FUTURE: UNITY AND DIVERSITY OVER TWO MILLENNIA* 44 (2002).

154. With the aim of securing legitimacy, many significant U.S. Supreme Court decisions that have since gained canonical status were issued by a unanimous court. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *McCulloch v. Maryland*, 17 U.S. (1 Wheat.) 316 (1819); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). On the other hand, even unanimous opinions are often members of "yoked pairs" whose noncanonical counterparts reaching the opposite conclusion are found elsewhere. Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 *DUKE L.J.* 243, 254–55 (1998). For example, *Brown's* counterpart is found in the majority opinion of *Plessy v. Ferguson*, 163 U.S. 537 (1896). See *id.* at 255.

and plurality opinions.¹⁵⁵ In the United Kingdom, for example, all judges typically issue separate opinions, even where they concur in the majority's reasoning.¹⁵⁶ In civil law countries, by contrast, dissents are not normally publicized.¹⁵⁷ Therefore, due to their infrequency, the mere issuance of a dissenting opinion in such jurisdictions highlights the vulnerability of the majority's reasoning to a greater degree than it would in the United States.¹⁵⁸ The publication of a passionate dissenting opinion in the West German abortion case¹⁵⁹ underscores the controversiality of the majority's determination of the scope to which life in the womb is constitutionally protected.¹⁶⁰ Chief Justice Rehnquist failed in his *Casey* dissent to acknowledge this weakness in

155. In 1995, only 37 percent of all U.S. Supreme Court decisions had the backing of all Justices. See Ludger Helms, *The Federal Constitutional Court: Institutionalising Judicial Review in a Semisovereign Democracy*, in INSTITUTIONS AND INSTITUTIONAL CHANGE IN THE FEDERAL REPUBLIC OF GERMANY 84, 90 (Ludger Helms ed., 2000). In the 2005 term, 44 percent of the decisions were unanimous. See *The Supreme Court, 2005 Term—The Statistics*, 120 HARV. L. REV. 372, 377 tbl.1 (2006). However, there were fewer majority opinions written than the number of concurrences and dissents combined. *Id.* at 372 tbl.1 (counting eighty-one opinions of the court, thirty-five concurring opinions, and sixty dissenting opinions).

156. See, e.g., *Pepper v. Hart*, [1993] A.C. 593 (H.L. 1992).

157. See RAITIO, *supra* note 132, at 315; Gardbaum, *supra* note 124, at 718 n.44 (noting that Austria, Belgium, France, and Italy do not permit dissents).

Despite the introduction of dissenting opinions in 1971, the German constitutional court unanimously decides more than 90 percent of its reported cases. KOMMERS, *supra* note 149, at 26. Dissents are barred in all other German courts. *Id.* at 56. In Belgium, "the secrecy of the deliberation is considered so paramount that a judge cannot publicize his dissenting opinion." VAN CAENEGEM, *supra* note 153, at 45. In an attempt to shelter judges from nationalistic pressures and critics, dissenting opinions are not allowed in the European Court of Justice. THOMAS R. VAN DERVORT, INTERNATIONAL LAW AND ORGANIZATION: AN INTRODUCTION 451 (1998). In Puerto Rico, where there is a civil law tradition, concurring and dissenting opinions emerged in 1899, only after they were introduced by American judges. Ennio Colón et al., *Puerto Rico*, in MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 364, 405–06 (Vernon Valentine Palmer ed., 2001).

158. See Gardbaum, *supra* note 124, at 718.

159. See *West German Abortion Decision*, *supra* note 142, at 663. The dissent censures the majority's "neglect [of] the 'uniqueness of the interruption of pregnancy in relation to other dangers [to] human life.'" *Id.* at 671; see also *id.* ("In the European legal history . . . a distinction has been constantly made between born and unborn life . . . [T]o be sure, w]here the defense against state encroachments is involved, a distinction cannot . . . be made between prenatal and postnatal stages of development . . . [B]ut [t]his equal treatment under the law . . . in no way . . . can . . . be applied to the refusal of the woman to allow the child *en ventre sa mere* to become a human being.").

160. During the period between 1970 and 1980, when the decision was issued, the rate of dissents in the German constitutional court was 11.6 percent. See Helms, *supra* note 155, at 89. During the 1980s and 1990s, the rate dropped to 6.5 percent, with the exception of 1995, when it was 20 percent. See *id.*

the German decision,¹⁶¹ and, in this regard, overstated the persuasiveness of the German majority's reasoning.

b. Stare Decisis

It is important to be aware of the extent to which a foreign judicial opinion creates binding precedent in its own country, because a decision that lacks precedential force in its own country typically should be accorded less weight abroad. As a general matter, the quality of reasoning in precedential opinions is superior to nonprecedential opinions. In deciding whether to impose sanctions on an attorney who violated Ninth Circuit rules by citing to an unpublished opinion, Judge Kozinski explained: "Writing a precedential opinion . . . involves much more than deciding who wins and who loses in a particular case. It is a solemn judicial act that sets the course of the law for hundreds or thousands of . . . potential litigants. When properly done, it is an exacting and extremely time-consuming task."¹⁶² By contrast, in a nonprecedential decision that affects only the litigants directly involved in the case, there is less pressure on the court to clearly spell out its reasoning or test the soundness of the rule. Where the reasoning of a judicial opinion is not a source of law in its own country, its reliability for the purposes of the reason-borrowing approach is thus called into question. In common law countries, the doctrine of stare decisis generally renders appellate rulings binding in future cases.¹⁶³ By contrast, in many civil law countries, decisions of reviewing courts are, at most, binding in the same case, but not in future cases.¹⁶⁴

However, there are significant exceptions to the general rule that decisions of civil law courts lack binding authority. Rulings acquire de facto precedential weight where subsequent judges adhere to a particular judicial interpretation of a statute or a code over a period of

161. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C.J., dissenting).

162. *Hart v. Massanari*, 266 F.3d 1155, 1177 (9th Cir. 2001).

163. For an analysis of the doctrine of stare decisis in the United States, see Mortimer N.S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 AM. J. COMP. L. 67, 85–86 (2006).

164. See MERRYMAN, *supra* note 129, at 22; Sofie M.F. Geeroms, *Comparative Law and Legal Translation: Why the Terms Cassation, Revision and Appeal Should Not Be Translated . . .*, 50 AM. J. COMP. L. 201, 205–06, 209 (2002) (noting that in Belgium and in France, a trial court hearing a case on remand is not necessarily bound by the interpretation of the law pronounced by the higher court).

many years.¹⁶⁵ That judges would choose to follow a rule from which they are free to deviate may underscore the validity of the reasoning. By contrast, when common law judges acknowledge that they are compelled by the doctrine of *stare decisis* to follow precedent with which they disagree, the soundness of the authority is brought into question.¹⁶⁶

In addition, civil law countries may generate more binding constitutional decisions on questions of fundamental rights than common law countries due to differences in the nature of judicial review. Many civil law countries actually adopted the American model of judicial review following World War II, due to the "[t]he . . . failure of the legislative supremacy model of constitutionalism to prevent totalitarian takeovers . . . before and during [the War]."¹⁶⁷ Moreover, decisions of the specialized courts empowered to undertake such judicial review may even be irreversible.¹⁶⁸ In France, the Constitutional Council examines legislation for constitutionality before it is enacted.¹⁶⁹ Problematic legislation is either sent back to the legislature for revision, or, in some cases, the Council performs the adjustments itself.¹⁷⁰ Decisions of the

165. See *Jand'heur v. Les Galeries Belfortaises*, Cour de cassation [Cass. ch. réuns.] [highest court of ordinary jurisdiction], Feb. 13, 1930, D. 1930, I, 57, note H.R. (establishing a stricter form of liability in auto accidents), translated in ARTHUR T. VON MEHREN & JAMES R. GORDLEY, *THE CIVIL LAW SYSTEM* 631 (2d ed. 1977); MARTIN SHAPIRO & ALEC STONE SWEET, *ON LAW, POLITICS, AND JUDICIALIZATION* 168 (2002) ("Even in civil law cultures where *stare decisis* is not formally acknowledged, constitutional law almost invariably becomes case law employing precedential reasoning even when the court's opinions do not formally announce such reasoning." (citation omitted)); Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-)Portraits: Judicial Discourse in The French Legal System*, 104 YALE L.J. 1325, 1392 (1995) ("[T]he French judiciary has constructed almost all of modern French tort law on the basis of a mere five articles of the Civil Code."); Andre Tunc, *The French Law of Traffic Victims Compensation: The Present and the Possible*, 31 AM. J. COMP. L. 489, 489-90 (1983) (describing the two basic rules governing auto accident liability that the French Cour de cassation deduced in *Jand'heur* from select articles of the 1804 Civil Code).

166. See *Orozco v. Texas*, 394 U.S. 324, 328 (1969) (Harlan, J., concurring) ("[P]urely out of respect for *stare decisis*, I reluctantly feel compelled to acquiesce in today's decision of the Court, at the same time observing that the constitutional condemnation of this perfectly understandable, sensible, proper, and indeed commendable piece of police work highlights the unsoundness of *Miranda*."); *In re Mich. Real Estate Ins. Trust*, 87 B.R. 447, 463 (Bankr. E.D. Mich. 1988) ("Although persuaded by the *M & E Contractors* line of cases that [*Schoenthal v. Irving Trust Co.*] requires that a demand for jury trial of preference avoidance actions be honored, we are compelled by *stare decisis* to hold otherwise.").

167. Gardbaum, *supra* note 124, at 714-16.

168. For a discussion of structural differences across the constitutional courts of various European countries, see GEORG VANBERG, *THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY* 79-81 (2005).

169. See TIM KOOPMANS, *COURTS AND POLITICAL INSTITUTIONS: A COMPARATIVE VIEW* 71 (2003). For a discussion of abstract judicial review, see *infra* Part III.C.1.c.

170. See Dominique Rousseau, *The Constitutional Judge: Master or Slave of the Constitution?*, in *CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES* 261, 268-69 (Michel Rosenfeld ed., 1994).

Council are final,¹⁷¹ so legislation that is passed can never be struck down as unconstitutional. By contrast, British courts, for example, do not have the power to strike down an act of Parliament.¹⁷² At best, courts are empowered to declare statutes incompatible with the European Convention on Human Rights. Because it is not incumbent upon Parliament to repeal such statutes,¹⁷³ however, such declarations of incompatibility are essentially dicta.

Ultimately, in light of the numerous exceptions to the doctrine of stare decisis and the ways in which those exceptions can render civil law rulings more persuasive than common law decisions, jurists cannot overlook the importance of researching the applicable rule in individual cases to determine whether a foreign court opinion constitutes binding authority within the relevant jurisdiction.

c. Abstract Versus Concrete Judicial Review

Differences in the nature of judicial review from country to country substantially limit the persuasiveness of foreign case law. Where judicial review of legislation is permitted, there are two predominant models: the European model of abstract judicial review and the American model of concrete review.¹⁷⁴ Under abstract review, judicial review of legislation is initiated—typically by members of the political branches—prior to the enactment of a law.¹⁷⁵ Therefore, the court reviews the constitutionality of legislation in the absence of adversarial litigation and decides the issue without reference to the facts of any case. The American model of concrete review is reinforced by the Article III requirement that bars federal courts from hearing a dispute unless there is a

171. See KOOPMANS, *supra* note 169, at 72.

172. See Gardbaum, *supra* note 124, at 712–13 (contrasting judicial review in the United States, where “the supremacy of the U.S. Constitution is enforced by the judiciary,” with that in Britain, where “the sovereignty of Parliament means that no court has the power to question the validity of an Act of Parliament, the supreme law of the land”); Beverley McLachlin, *Bill of Rights in Common Law Countries*, 51 INT’L & COMP. L.Q. 197, 200 (2002). Then again, the doctrine of parliamentary sovereignty does not preclude British courts from reviewing the constitutionality of administrative or executive action. See Anupam Chander, Note, *Sovereignty, Referenda, and the Entrenchment of a United Kingdom Bill of Rights*, 101 YALE L.J. 457, 474 & n.89 (1991) (citing STANLEY DE SMITH & RODNEY BRAZIER, CONSTITUTIONAL AND ADMINISTRATIVE LAW 471–76, 546–600 (6th ed. 1989)).

173. See Gardbaum, *supra* note 124, at 733–34.

174. See SHAPIRO & SWEET, *supra* note 165, at 343–44.

175. See *id.* at 344.

live case or controversy.¹⁷⁶ This requirement compels the facts to drive, and thereby, to constrain the decision of the court.

Because courts that utilize abstract review have no particular facts on which to base their rulings,¹⁷⁷ their decisions are frequently based on broad conceptual principles identified in the applicable constitution or charter. For example, in the French abortion case, the constitutionality of the proposed abortion restriction was contingent on whether the law conflicted with the “principle of freedom” laid down in article 2 of the Declaration of Human and Civic Rights or the “principle of respect for all human beings from the inception of life.”¹⁷⁸ Under this system, judges enjoy intellectual discretion to defend or strike down proposed legislation in watershed policy announcements that are not cloaked by the particular facts of the case, but exposed for all to see.

Nor are courts undertaking abstract judicial review expected to steer clear of policymaking. In nearly all European countries, the authority to review legislation is expressly granted to one single court,¹⁷⁹ and there may be no possibility of appeal.¹⁸⁰ These specialized constitutional courts enjoy a broad quasi-legislative power, and tend to wield more political

176. See *id.* The U.S. Constitution confers on the judicial branch jurisdiction over nine categories of cases and controversies. See U.S. CONST. art. III, § 2, cl. 1.

177. See Gardbaum, *supra* note 124, at 717 (describing abstract review as “essentially a binding advisory opinion in which the validity of the legislation is considered in the abstract and outside the context of any particular set of facts or application”).

178. CC decision no. 74-54DC, Jan 15, 1975, Rec. 19, translated at <http://www.conseil-constitutionnel.fr/langues/anglais/a7454dc.pdf> (official translation). For a discussion of the case, see *supra* text accompanying notes 136–140.

179. See SHAPIRO & SWEET, *supra* note 165, at 140; Gardbaum, *supra* note 124, at 717. In Germany, the constitutional court’s authority to review legislation is authorized by the constitutional charter. See KOMMERS, *supra* note 149, at 55.

Unlike in the United States, where “any judge of any court, in any case, at any time, at the behest of any litigating party, has the power to declare a law unconstitutional,” in Europe, the ordinary courts are truly considered slaves of the legislature. SHAPIRO & SWEET, *supra* note 165, at 343–44 (quoting Martin Shapiro & Alec Stone, *Special Issue: The New Constitutional Politics of Europe*, 26 COMP. POL. STUD. 397, 400 (1994)). One exception is Estonia, where the highest court of general jurisdiction also functions as the constitutional court. See Rait Maruste & Heinrich Schneider, *Constitutional Review in Estonia—Its Principal Scheme, Practice, and Evaluation*, in CONSTITUTIONAL REFORM AND INTERNATIONAL LAW IN CENTRAL AND EASTERN EUROPE 91, 98 (Rein Müllerson et al. eds., 1998). Nevertheless, it is a special chamber of the supreme court, known as the Constitutional Review Chamber, which engages in such review. *Id.*

For an explanation of why the task of constitutional judicial review was delegated to special tribunals outside the ordinary hierarchy, see VANBERG, *supra* note 168, at 79 (explaining how the European system of judicial recruitment—in which judges enter into the judicial bureaucracy directly out of law school—renders judges unprepared for the value-oriented, quasi-political demands of judicial review).

180. See SHAPIRO & SWEET, *supra* note 165, at 152 (describing France and Hungary).

capital than American judges.¹⁸¹ For example, the French Constitutional Council may devalue or even revise certain legislative provisions before approving legislation.¹⁸² Ironically, one justification for according the Council such power arises from distrust of the judiciary. Due to France's "vivid anti-judicial tradition,"¹⁸³ the court is staffed by politicians who are not required to have judicial or legal training.¹⁸⁴ And even in countries where the members of the constitutional court are selected from the upper ranks of the judiciary, other efforts are made to ensure that they have a broad base of political support.¹⁸⁵

Concrete review operates at a greater level of specificity than abstract review. Under concrete review, American courts ostensibly decide only discrete issues as framed by the facts of a case. It will therefore always be possible to articulate the precedent of earlier cases quite narrowly—for example, that the basis of a decision was the right of a married couple to purchase contraceptives,¹⁸⁶ rather than a right to liberty or a right to privacy. This model of case-by-case adjudication is thought to soften the effects of policy changes because new law can be announced in small cases that may go (at least initially) unnoticed.¹⁸⁷

181. See *id.* (comparing the French Constitutional Council to a third branch of the legislature); Gardbaum, *supra* note 124, at 717 (noting that in some countries, only "certain specified political actors" have the authority to challenge the constitutionality of a law); Rousseau, *supra* note 170, at 269 (describing the council as a "co-legislator").

182. See Rousseau, *supra* note 170, at 268 (describing how the Council may preserve the wording of legislation, while inserting a statement that certain items are merely declarations of intent, or it may modify the language altogether).

183. SHAPIRO & SWEET, *supra* note 165, at 151; Lasser, *supra* note 165, at 1332 (describing the attempt to restrict judicial power in the wake of the French Revolution).

184. See KOOPMANS, *supra* note 169, at 72; VANBERG, *supra* note 168, at 81.

185. The requirement that judges be approved by a legislative supermajority ensures that there is broad parliamentary consensus. VANBERG, *supra* note 168, at 83. In Germany, judges are chosen by the democratic legislature and are appointed for nonrenewable twelve-year terms. KOMMERS, *supra* note 149, at 55–56.

186. See *Carey v. Population Servs., Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

187. See SHAPIRO & SWEET, *supra* note 165, at 169; see also WILLIAM O. DOUGLAS, *WE THE JUDGES: STUDIES IN AMERICAN AND INDIAN CONSTITUTIONAL LAW FROM MARSHALL TO MUKHERJEA* 433 (1955) ("The overruling of a decision on constitutional law is, at times, not the true measure of the change. Commonly the change extends over a long period; the erosion of a precedent is gradual. The overruling does not effect an abrupt change in the law; it rather recognizes a *fait accompli*.").

The recent string of decisions by the New York Court of Appeals, culminating in the court's overturning of its long-standing interpretation of the New York statute governing depraved-indifference murder, provides a fascinating illustration of such gradual doctrinal change and the difficulties it can create (though, in this instance, the question was one of statutory interpretation). Compare *People v. Feingold*, 852 N.E.2d 1163 (N.Y. 2006), *People v. Suarez*, 844 N.E.2d 721 (N.Y. 2005), *People v. Payne*, 819 N.E.2d 634 (N.Y. 2004),

Concrete review, after all, is an instrumentality of the separation of powers principle, which is designed to exclude judges from an overt policymaking role. As a result, American judges sometimes feel constrained to reject reasoning that is otherwise rational and logical.¹⁸⁸ However, the extent to which abstention from abstract deductive reasoning is constitutionally compelled or merely prudential is itself a policy determination within the discretion of judges to resolve. It is conceivable that the Court's position on this issue will continue to evolve along with shifts in the political and social climate. For now, advocates seeking to introduce abstract reasoning from foreign case law to bolster their position should be cognizant of the obstacles that they can expect to encounter.

d. The Textual Provisions Under Review

Even where the determinative facts of a foreign case are indistinguishable from those in a domestic case, the textual provisions being interpreted by the respective courts are rarely identical, and, in many cases, are not even comparable. Where the text of the constitution or statute examined by the foreign court materially differs from the U.S. provision at issue, it is disingenuous to compare the results reached by the courts and the reasoning used to reach those results without acknowledging and addressing such differences.

For example, dissenting in part in *Casey*,¹⁸⁹ Chief Justice Rehnquist misrepresents the holding of the Canadian Supreme Court in *R. v. Morgentaler*,¹⁹⁰

People v. Gonzalez, 807 N.E.2d 273 (N.Y. 2004), and People v. Hafeez, 792 N.E.2d 1060 (N.Y. 2003), with People v. Sanchez, 777 N.E.2d 204 (N.Y. 2002), and People v. Register, 457 N.E.2d 704, 708 (N.Y. 1983).

Gradual policy change of this nature may achieve injustice to the extent that it renders the standards governing retroactivity of a new rule of law difficult to apply. See Policano v. Herbert, 859 N.E.2d 484, 495 (N.Y. 2006) (acknowledging that "individual judges hold differing views as to where along this trajectory a majority of the court may have effectively passed the point of no return—the limit beyond which, hard as [they] may have tried, it was simply not possible to reconcile [their] developing case law with *Register* and *Sanchez*").

188. See, e.g., Washington v. Glucksberg, 521 U.S. 702, 723–28 (1997) (expressly declining to "deduce[] from abstract concepts of personal autonomy" the existence of a constitutional right to commit suicide with the assistance of another); see also *id.* at 764 (Souter, J., concurring) ("It is a comparison of the relative strengths of opposing claims that informs the judicial task [of substantive due process review], not a deduction from some first premise.").

189. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., dissenting).

190. [1988] 1 S.C.R. 30. *Morgentaler* was a landmark case in Canada, leaving the country with no criminal code on abortion. See RAYMOND TATALOVICH, THE POLITICS OF ABORTION IN THE UNITED STATES AND CANADA: A COMPARATIVE STUDY 22 (1997). The plaintiff, Dr. Morgentaler, had argued in an earlier case before the court that the Canadian

ostensibly because he did not carefully examine the relevant text of the Canadian Charter of Rights and Freedoms¹⁹¹ that had provided the basis for the court's declaring certain abortion restrictions unconstitutional.¹⁹² Chief Justice Rehnquist claimed that in striking down the restrictions, the *Morgentaler* court followed reasoning similar to *Roe v. Wade*.¹⁹³ However, the absence of a majority opinion in the case renders this assertion immediately suspect. The *Morgentaler* court ruled five to two in favor of striking down the law.¹⁹⁴ The five justices in the majority generated three opinions, with no opinion garnering more than two votes.¹⁹⁵ Thus, in order for Rehnquist's claim to be correct, at least two—and possibly three—of the opinions written by justices in the majority would have had to follow reasoning similar to *Roe*.

The unique language of the relevant textual provision, however, permitted the majority of justices to reach their conclusions without relying on the reasoning of *Roe*. The Charter reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."¹⁹⁶ Chief Justice Dickson, joined by Justice Lamer, remarked that the case could be decided without determining whether the right to "security of the person" also included a privacy right or other interest unrelated to criminal justice.¹⁹⁷ Justices Beetz and Estey acknowledged, in

Bill of Rights of 1960 had imported American common law decisions into Canadian law, and thus, that *Roe v. Wade* should be followed; however, the high court dismissed his constitutional claims in the first case. *Id.* at 74 (citing *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616).

191. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

192. *Id.* § 7.

193. *Casey*, 505 U.S. at 945 n.1 (Rehnquist, C.J., dissenting) (citing *Roe v. Wade*, 410 U.S. 113 (1973)). It is unclear why Chief Justice Rehnquist even referred to the *Morgentaler* decision, except to suggest that where other countries have protected the right to abortion, their reasoning has been flawed.

194. See TATALOVICH, *supra* note 190, at 75–76.

195. See *id.* The opinions in the majority were written by Chief Justice Dickson (joined by Justice Lamer), *Morgentaler*, [1988] 1 S.C.R. at 45, Justice Beetz (joined by Justice Estey), *id.* at 80, and Justice Wilson, *id.* at 161. Justice McIntyre's dissenting opinion was joined by Justice La Forest. *Id.* at 132 (McIntyre, J., joined by La Forest, J., dissenting).

196. Part I of the Constitution Act, 1982, § 7, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

197. *Morgentaler*, [1988] 1 S.C.R. at 51 (Dickson, C.J.C., joined by Lamer, J.); see *id.* at 53 (noting that "it will be sufficient to investigate whether or not the impugned legislative provisions meet the procedural [rather than substantive] standards of fundamental justice"); see also TATALOVICH, *supra* note 190, at 78 ("[*Morgentaler*], unlike *Roe*, was not grounded in privacy rights and did not preclude parliamentary restrictions on abortions. Rather, the reasoning of the Canadian Supreme Court hinged on the unworkable nature of the existing abortion law, which posed a threat to the 'security' of women, unlike the U.S. Supreme Court opinion, which made virtually no mention of abortion services.").

dictum, that a right of access to abortion founded on liberty would have required the court to determine at what point there is a compelling interest in protecting the life of the fetus (as in *Roe*), but determined that the appeal could be resolved “without attempting to delineate the right to ‘liberty’ in s. 7 of the *Charter*.”¹⁹⁸ Only one member of the court based her conclusion on *Roe*, arguing that the right to liberty contained in the *Charter* guarantees individual autonomy.¹⁹⁹

Given the distinctive language of the Constitution of Canada and the obvious disagreement among the Canadian justices themselves, Chief Justice Rehnquist’s assertion that *Morgentaler* “followed reasoning similar to that of *Roe*” warranted further explication.²⁰⁰ When relying on foreign case law, the importance of ensuring that the textual provision interpreted by the foreign court has an analogous U.S. counterpart cannot be overstated.

2. Enacted Law: Direct Citation to Statutes and Constitutions

For the purposes of the reason-borrowing approach, the mere existence of a foreign law is relatively insignificant without understanding how it has been enforced and whether the reasons for its enactment are transferable to the United States. Where the foreign provision is ambiguous, it would be a mistake to attempt to use it as evidence of any foreign practice or rule of law without first deferring to the proper foreign institutions to clarify how the provision has been applied. Consequently, the proper examination reverts back to an analysis of the case law and

198. *Morgentaler*, [1988] 1 S.C.R. at 113–14 (Beetz, J., joined by Estey, J.); *id.* at 114 (“The violation of the right to ‘security of the person’ and the relevant principles of fundamental justice are sufficient to invalidate s. 251 of the Criminal Code.”); *see also* TATALOVICH, *supra* note 190, at 76–77 (attributing to Justices Beetz and Estey the conclusion that the *Charter* did not preclude the legislature from restricting access to abortions to situations in which the woman’s health is threatened and asserting that they struck down the law because the required delays in fact imposed an additional risk on the woman’s health).

199. *Morgentaler*, [1988] 1 S.C.R. at 163, 169–71 (Wilson, J.), *discussed in* TATALOVICH, *supra* note 190, at 76. Justice Wilson argued that the approach taken by the four other justices in the majority “begs the central issue in the case” insofar as it “commence[s] the analysis with the premise that the s. 7 right encompasses only a right to physical and psychological security and [fails] to deal with the right to liberty in the context of ‘life, liberty and security of the person.’” *Id.* at 163. Justice Wilson concluded that the right to liberty, “properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance,” *id.* at 166, noting that this reasoning is consistent with American jurisprudence, including *Roe*, *id.* at 169–71.

200. *See* Alford, *supra* note 4, at 655 (noting Chief Justice Rehnquist’s failure to indicate the relevance of *Morgentaler* and the German constitutional court’s abortion opinion).

related issues addressed in Part III.C.1. Where a document is unambiguous, it may be unnecessary to defer to a foreign interpretation to determine its content; its relevance then turns on whether the reasons for adopting the foreign law are transferable to the United States.

For example, in *Roper v. Simmons*,²⁰¹ the U.S. Supreme Court stated that the United Kingdom abolished the juvenile death penalty in recognition of the disproportionate nature of the punishment.²⁰² The Court inferred that this determination resulted from Parliament's acknowledgement of the diminished capacity of juveniles.²⁰³ If true, the English laws and legislative history bore logical relevance to the issue before the Court in *Roper*, since the diminished capacity of juveniles is not exclusive to England. To support its statement, the Court cited both ambiguous and unambiguous English law.

First, the Court remarked that the English experience "bears particular relevance"²⁰⁴ because the Eighth Amendment²⁰⁵ "was modeled on a parallel provision in the English Declaration of Rights of 1689."²⁰⁶ The English Declaration of Rights might very well be relevant if it illustrates an English policy against disproportionate punishments, which is what the Eighth Amendment has been held to prohibit.²⁰⁷ However, because the English Declaration is hardly a model of clarity, an American court should defer to an authoritative interpretation of the provision by an English court,²⁰⁸ or even members of Parliament, to learn how it has been applied. In *Roper*, however, the Court failed to acknowledge any such authority. Justice Scalia, dissenting, speculated that the English Declaration of Rights merely precluded those punishments

201. 543 U.S. 551 (2005) (holding that imposing the death penalty on persons for crimes committed while under eighteen is "cruel and unusual" punishment prohibited by the Eighth Amendment).

202. *Id.* at 577.

203. *Id.* at 577–78.

204. *Id.* at 577.

205. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

206. *Roper*, 543 U.S. at 577. The English Declaration of Rights of 1689 provides: "[T]he said Lords Spiritual and Temporal and Commons, pursuant to their respective letters and elections . . . declare . . . [t]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." English Declaration of Rights of 1689, available at The Avalon Project at Yale Law Sch., <http://www.yale.edu/lawweb/avalon/england.htm> (last visited Nov. 3, 2006).

207. See *Weems v. United States*, 217 U.S. 349, 367 (1910) ("[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense.").

208. Recall that there is no judicial review of legislation in the United Kingdom; however, review of administrative or executive action may be allowed. See *supra* notes 172–173 and accompanying text.

that were “out of [the judges’] power,” in the sense that they were not authorized by common law or statute,²⁰⁹ and thus determined that the Declaration should have no bearing on the modern Court’s Eighth Amendment jurisprudence. Irrespective of which understanding of the text is in fact more accurate, the *Roper* majority’s reliance on the existence of the Declaration, without more, illustrates that the mere fact of a shared history is insufficient to elucidate the logical relevance of an ambiguous textual provision.

In addition, the Court acknowledged two English statutes that expressly restrict the imposition of a death sentence on juveniles.²¹⁰ Parliament barred the imposition of a death sentence against a person under the age of eighteen as early as 1933,²¹¹ and in 1948 extended the prohibition to adults who had committed death-punishable offenses as juveniles.²¹² Because the content of the statutes needs no elucidation, the issue is whether the statutes were promulgated for reasons that are applicable in the United States.

First, the *Roper* majority informs us that a 1930 House of Commons report recommended that the minimum age be raised to twenty-one.²¹³ The report’s conclusion was based on the fact that full civil responsibility is not assumed until the age of twenty-one, and that “the emotional balance of young people under the age of [twenty-one]”—which “may even amount to a form of mental disorder”—is “very often a factor in the crime.”²¹⁴ To the extent that the report addresses psychological factors that are not exclusive to juveniles in the United Kingdom, the content of the report was potentially quite relevant. However, there is a further question

209. *Roper*, 543 U.S. at 626 (Scalia, J., dissenting) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 973–74 (1991)).

210. *Id.* at 577 (majority opinion); see Brief for Nobel Peace Prize Laureates as Amici Curiae Supporting Respondent at 13, *Roper*, 543 U.S. 551 (No. 03-633). The death penalty was abolished for all crimes in the United Kingdom in 1998. Amnesty Int’l, *The Death Penalty Worldwide: Developments in 1998* (May 1, 1999), <http://web.amnesty.org/library/Index/engACT500041999#CWA> (citing the Crime and Disorder Act of 1998 and the Human Rights Act of 1998, which, together, resulted in the abolition for all crimes, including military crimes).

211. Children and Young Person’s Act, 1933, 23 Geo. 5, c. 12, § 53(1) (“Sentence of death shall not be pronounced on or recorded against a person under the age of eighteen years, but in lieu thereof the court shall sentence him to be detained during His Majesty’s pleasure . . .”).

212. Criminal Justice Act, 1948, 11 & 12 Geo. 6, c. 58, § 16 (replacing § 53(1) of the Children and Young Person’s Act, 1933, as follows: “Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years; but in lieu thereof the court shall sentence him to be detained during His Majesty’s pleasure . . .”).

213. *Roper*, 543 U.S. at 577.

214. HOUSE OF COMMONS, REPORT FROM THE SELECT COMMITTEE ON CAPITAL PUNISHMENT paras. 189–93 (1930).

as to whether Parliament was in fact prompted to repeal the juvenile death penalty in response to this report. The amicus brief that the Court cited assumed that it was: “[T]he statutory developments formed part of an ‘elaborate legislative scheme which reflected a general policy of treating young offenders quite differently from older ones.’”²¹⁵ However, at least one scholar contends that the report was never considered by Parliament and that its findings were not published.²¹⁶ Nevertheless, the Court was persuaded by the amicus brief, and inquired no further.²¹⁷

Alternatively, an articulation of the connection, if any, between the 1689 Declaration of Rights and Parliament’s eventual abolition of the death penalty could have underscored the logical relevance of Parliament’s abolition of the juvenile penalty to the American experience and served to bolster the Court’s pronouncement that the English experience was particularly relevant. However, notably absent from *Roper* is an explanation of any direct connection between the 1689 Declaration and either the 1930 report or the acts abolishing the death penalty.²¹⁸

Further, it is not always self-evident what prompts a foreign legislature to act, even in passing an unambiguous law. The evidence relied upon by the Court in *Roper*—consisting essentially of a single report published three years prior to the passing of the first law curbing the juvenile death penalty, and eighteen years prior to the complete abolition of the death penalty for adults who had committed crimes as juveniles—was scant. A more comprehensive analysis might have included parliamentary debates or records with a closer temporal connection to the passing of the 1933 and 1948 legislation. In addition to traditional legislative history, decisions of “supranational courts,”²¹⁹ such as the European Court of Human Rights, are potentially valuable resources for deciphering foreign legislative intent. Parties to the European Convention on Human Rights must respect judgments of the European Court and, where applicable, must pay damages, provide equitable remedies to the aggrieved party, or cure the violation

215. Brief for Human Rights Committee of the Bar of England and Wales et al. as Amici Curiae in Support of Respondent at 11, *Roper*, 543 U.S. 551 (No. 03-633), cited in *Roper*, 543 U.S. at 578.

216. See LEON RADZINOWICZ, ADVENTURES IN CRIMINOLOGY 246 (1999).

217. *Roper*, 543 U.S. at 578.

218. *Id.* at 577–78.

219. Mary L. Volcansek, *Supranational Courts in a Political Context*, in LAW ABOVE NATIONS: SUPRANATIONAL COURTS AND THE LEGALIZATION OF POLITICS 1, 1 (Mary L. Volcansek ed., 1997).

through legislative or constitutional reform.²²⁰ When legislative action is prompted by a decision of a supranational reviewing court, the reasoning of that court will bear particular relevance to the inquiry. Ultimately, however, it remains within the discretion of the judge to evaluate the adequacy of the proffered evidence of legislative intent.

3. International Treaties: The Countermajoritarian Difficulty Revisited

To the extent that international agreements (including treaties, covenants, and conventions) constitute valuable sources of international legal norms, their application is limited by the fact that the Supreme Court has never held that the U.S. Constitution must conform with international law.²²¹ However, the reason-borrowing method does not preclude citation to treaties where it is possible to ascertain the reasons why countries have entered into the treaty and whether they are applicable in the United States. In this regard, the constraints placed on citing to treaties should be essentially the same as those placed on statutes, as outlined in Part III.C.2.

On the other hand, to specifically cite a treaty that the United States has declined to ratify would seem to confirm the suspicion, as expressed by Roger Alford, that judges applying the reason-borrowing approach are simply “eschewing the distinctive choices that have been made at home.”²²² In *Roper*, Justice Scalia fiercely objected on these grounds to the majority’s citation to treaties into which the United States had not entered²²³:

That the Senate and the President—those actors our Constitution empowers to enter into treaties . . . have declined to join and ratify treaties prohibiting execution of under-18 offenders can only suggest

220. See Council of Europe, Human Rights: Execution of Judgments of the European Court of Human Rights, http://www.coe.int/T/E/Human_rights/execution (last visited Mar. 14, 2007) (describing how judgments of the European Court of Human Rights are executed by member states). The binding force of the European court’s decisions was acknowledged in *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

221. See *supra* note 83.

222. Alford, *supra* note 4, at 697; see also *supra* note 65 and accompanying text.

223. The majority cited two treaties that the United States had failed to ratify: “Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under [eighteen].” *Roper*, 543 U.S. at 576 (citing United Nations Convention on the Rights of the Child, art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3). In addition, the United States entered into the International Covenant on Civil and Political Rights subject to a reservation permitting the United States to impose capital punishment on any person, other than a pregnant woman, as punishment for a crime committed by persons below the age of eighteen. *Id.* at 567, 576 (citing the International Covenant on Civil and Political Rights art. 6(5), Dec. 19, 1966, 999 U.N.T.S. 171).

that *our country* has either not reached a national consensus on the question, or has reached a consensus contrary to what the Court announces.²²⁴

Although actions of the legislature can be indicative of “distinctive choices” that have been made in the United States, Justice Scalia’s critique overestimates the conclusiveness of congressional acts as evidence of a national consensus. First, the decision not to ratify the treaties could have been strategic rather than substantive, designed to ensure that the United States is not subject to the jurisdiction of foreign or supranational courts for enforcement of the treaty, or that the United States would not be found in automatic violation of the covenant.²²⁵ Though many senators would have chosen to abolish juvenile capital punishment had it been practicable to do so at that time, they nonetheless recognized other reasons to support the covenant.²²⁶ If strategic reasons for entering into international treaties can be isolated from ethical ones, it is evident that the failure to sign a treaty does not automatically mean that the policies underlying the rule have been rejected by the American public.

Second, congressional action (or inaction) was not the only relevant evidence of a national consensus on the specific question before the Court in *Roper*. As the majority explained, objective indicia of a national consensus against capital punishment of juveniles included the fact that “[a] majority of States have rejected the imposition of the death penalty on juvenile offenders under [eighteen].”²²⁷ Such evidence exists because states are competent to legislate on matters of criminal law. By contrast, with

224. *Id.* at 622–23 (Scalia, J., dissenting).

225. Upon ratification “the covenant will become binding international obligations of the United States.” 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992) (statement of Sen. Moynihan). The reservations were designed “to insure that the United States will in fact comply with the obligations that it is assuming. This can certainly be viewed as an indication of the seriousness with which the obligations are regarded rather than as an expression of disdain for the obligations.” *Id.*

226. See *id.* (“[L]et none assume that a vote for the covenant is equivalent to acquiescence in any particular domestic practice [A] Senator might well conclude that it is in the interests of the United States to ratify the covenant with this package of reservations even if that Senator disagrees strongly with a particular domestic practice which has prompted a reservation. Some of those practices are most controversial and I know that *many Senators who will vote to give consent to ratification will nonetheless continue their efforts to change these domestic practices in the committees of jurisdiction in the Senate.* The two are not inconsistent in the least.”) (emphasis added); *id.* at S4781 (statement of Sen. Pell) (arguing that the United States’ “failure to ratify the covenant has blemished our record” as a “[leader] in the international struggle to promote and protect human rights” and “cast doubt, in some quarters, about the seriousness of our commitment to human rights”).

227. *Roper*, 543 U.S. at 567 (citing as objective indicia the “infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice”).

respect to fields where legislative competence is exclusively reserved to the federal government, and states are prevented from enacting legislation that could serve as objective indicia of a national consensus, the actions of Congress could carry more weight. The true countermajoritarian effect of acknowledging foreign law under the reason-borrowing approach is, therefore, highly contextual (if not entirely indeterminate) in our federalist system in which legislative competence is delegated to several competing legislatures.

CONCLUSION

In this Comment, I have identified three comparative approaches that are capable of eluding criticism on democratic-accountability grounds. Under the historical approach, foreign sources inform the original understanding of the Constitution. Under the empirical approach, courts consider the experiences of other countries in order to forecast the consequences of adopting a particular rule of law. Finally, courts applying the reason-borrowing approach learn why foreign countries have adopted certain rules and then ask whether those reasons are relevant domestically.

I have also sought to demonstrate that the outcome of the foreign law debate need not necessarily prejudice one interest group or another. Of the three approaches, the historical approach has traditionally been regarded a "useful device for the consecration of an already established order of things."²²⁸ By contrast, approaches that examine contemporary foreign laws are frequently derided as tools of liberal judges to overturn existing precedent in furtherance of liberal agendas.²²⁹ However, as the overturning of *Bowers v. Hardwick*²³⁰ illustrates, the inherent flexibility of historiographical methods renders historical conclusions capable of recharacterization and revision.²³¹ Likewise, subjecting foreign authorities to the tests advocated in this Comment could generate results that conservatives would favor in many

228. Murphy, *supra* note 98, at 64 n.2.

229. See Steven G. Calabresi, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 750–51 (2005); see, e.g., *Roper*, 543 U.S. at 574–78 (overturning *Stanford v. Kentucky*, 492 U.S. 361 (1989), and holding the juvenile death penalty unconstitutional); *Lawrence v. Texas*, 539 U.S. 558, 576–78 (2003) (overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986), and holding a Texas law criminalizing sodomy unconstitutional).

230. 478 U.S. 186.

231. For a discussion on the overturning of *Bowers* by *Lawrence*, based in part on the *Lawrence* majority's revised understanding of history, see *supra* note 109.

important areas of constitutional law.²³² For example, if the Court were to decide that life begins at the moment of conception,²³³ the West German abortion decision²³⁴ could become very relevant.

Those expecting to find in this Comment a set of precise, determinate rules for selecting foreign sources may be disappointed by the flexibility of the rules described here. However, it is evident that the legal profession, for better or worse, has acquiesced to the introduction of vague, indefinite, and potentially biased principles for testing the reliability of historical assertions and empirical evidence. The traditional presumption has been that through a combination of learning and the adversarial process, courts would be capable of discarding materials with weaker foundations. There is no compelling reason why comparative sources should be held to a different standard. To be sure, to reap the full benefits of comparative methods would necessitate the allocation of substantially greater judicial resources to foreign research than are currently available.²³⁵ At a minimum, however, jurists can acquire sufficient familiarity with elementary comparative law methodologies to ensure that irrelevant sources are immediately identifiable, and potentially valuable materials are not prematurely discounted.

232. See Calabresi, *supra* note 229, at 751 (noting that foreign law tends to be more conservative than U.S. constitutional law when it comes to principles of separation of church and state, free speech, evidentiary rules in criminal cases, and abortion).

233. See discussion *supra* notes 149–152.

234. *West German Abortion Decision*, *supra* note 142, at 605.

235. Although “[m]ore and more of the Supreme Court’s law clerks come from foreign countries,” David Fontana, *Foreign Exchange*, NEW REPUBLIC ONLINE, Mar. 3, 2005, <http://www.tnr.com/doc.mhtml?i=w050228&s=fontana030305>, some countries, such as South Africa and Israel, actually *reserve* spots for foreign law clerks to advise the justices of the highest court on foreign law and customary international law, see, e.g., Constitutional Court of South Africa—Law Clerks, <http://www.constitutionalcourt.org.za/site/lawclerks/southafricanlawclerks.htm> (last visited Mar. 14, 2007); The State of Israel, The Judicial Authority: Foreign Clerkships With the Supreme Court of Israel, http://elyon1.court.gov.il/eng/Clerking_opportunities/index.html (last visited Mar. 14, 2007).

Attorney General Alberto Gonzales acknowledged that “[i]f we accept that foreign law could properly be used in construing the meaning of the Constitution, at a minimum . . . we would only want to do so in a way that ‘comprehensively examines all ‘relevant’ international sources’”—an approach that is “probably unachievable.” Gonzales, *supra* note 16, at 294 (quoting Alford, *supra* note 87, at 66).
