

9-16-2008

The Use and Abuse of Foreign Law in Constitutional Interpretation

Ganesh Sitaraman

Harvard Law School, gsitaraman@law.harvard.edu

Follow this and additional works at: http://lsr.nellco.org/harvard_faculty

 Part of the [Comparative and Foreign Law Commons](#), [Constitutional Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Sitaraman, Ganesh, "The Use and Abuse of Foreign Law in Constitutional Interpretation" (2008). *Harvard Law School Faculty Scholarship Series*. Paper 23.

http://lsr.nellco.org/harvard_faculty/23

This Article is brought to you for free and open access by the Harvard Law School at NELCO Legal Scholarship Repository. It has been accepted for inclusion in Harvard Law School Faculty Scholarship Series by an authorized administrator of NELCO Legal Scholarship Repository. For more information, please contact tracy.thompson@nellco.org.

The Use and Abuse of Foreign Law in Constitutional Interpretation

Ganesh Sitaraman*

This article provides an exhaustive typology of the uses of foreign law in order to provide insight into whether foreign law can be appropriately used in constitutional interpretation, when, and what the stakes and parameters are in each case. In doing so, the article addresses two significant problems in the debate on foreign law. First, much of the commentary has focused on the justifications for using foreign law and the principled or practical arguments against using foreign law. But the focus on the why of foreign law has obscured the more basic question – the ways in which foreign law can be used, that is, the how of foreign law. Focusing on the why of foreign law threatens to generalize arguments into debates on “foreign law” when it may be more helpful to debate particular methods of foreign law usage. Some methods of use may be more easily justified and others totally unjustifiable. The second problem is one of exhaustiveness: some scholars have recognized the need to focus on the how of foreign law, but they have identified only a limited set of ways in which foreign law could be used. This limited categorization of foreign law usage prevents clear evaluation of which uses are appropriate. The article’s typology demonstrates that most uses of foreign law are not problematic, and as a result, that the foreign law debate should focus specifically on the few uses that are potentially problematic, rather than on “foreign law” more generally.

These days, everyone has something to say about the use of foreign law in constitutional interpretation. Sparked by the use of foreign and international materials in *Atkins v. Virginia*¹ and *Roper v. Simmons*,² commentators have written much on whether and when foreign law can be appropriately considered in constitutional interpretation.³ In opinions or speeches, virtually every

* Public Law Fellow, Harvard Law School. The author thanks Brad Clark, Dan Epps, Daryl Levinson, Cass Sunstein, Mark Tushnet, and David Zions for helpful comments.

¹ 536 U.S. 304 (2002).

² 125 S. Ct. 1183 (2005).

³ See Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 Am. J. Int’l L. 57 (2004); Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 Wm. & Mary L. Rev. 743 (2005); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 Ind. L.J. 819 (1999); Sarah H. Cleveland, *Our International Constitution*, 31 Yale Int’l L.J. 1 (2006); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 Harv. L. Rev. 109 (2005); Harold Hongju Koh, *International Law as Part of Our Law*, 98 Am. J. Int’l L. 43 (2004); 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 State L.J. 1283 (2004); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 Am. J. Int’l L. 82 (2004); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 Am. J. Int’l L. 69 (2004); Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 Int’l J. Const. L. 269 (2003); Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: the Case for Studying Cross-Constitutional Influence through Negative Models*, 1 Int’l J. Const. L. 296 (2003); Jeffrey Toobin, *Swing Shift*, *The New Yorker*

Supreme Court Justice has weighed in: Justice Thomas considers foreign law to be similar to “moods, fads, or fashions.”⁴ Justice Scalia thinks that foreign law can make the opinions of Americans “essentially irrelevant.”⁵ At the same time, Justice Kennedy believes the use of foreign law is a central part of American moral leadership in the world because it can help express a “unified concept of what human dignity means.”⁶ Justice Ginsburg thinks it merely involves “sharing with and learning from others.”⁷ And Justice Breyer sees foreign law as shedding “empirical light” on common problems.⁸

Although so many have weighed in on both sides of this topic, and have fleshed out so many of the important issues,⁹ the literature has suffered from two important problems. First, much of the commentary has focused on the justifications for using foreign law and the principled or practical arguments against using foreign law. To be sure, this approach is of obvious purchase and considerable intellectual interest. Whether or not foreign law should be used in constitutional interpretation should be dependent on the reasons why it can or cannot be used. But the focus on the *why* of foreign law has obscured the more basic question – the ways in which foreign law can be used, that is, the *how* of foreign law. Before we can evaluate the principled arguments for or against foreign law, we need to identify a method of usage whose propriety is being judged. Focusing on the why of foreign law threatens to generalize arguments

(Sept. 12, 2005); Mark Tushnet, *When is Knowing Less Better than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 Minn. L. Rev. 1275 (2006); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L.J. 1225 (1999); Jeremy Waldron, *Foreign Law and the Modern ius gentium*, 119 Harv. L. Rev. 129 (2005); Ernest Young, *Foreign Law and the Denominator Problem*, 119 Harv. L. Rev. 148 (2005).

⁴ *Foster v. Florida*, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring).

⁵ *Roper v. Simmons*, 543 U.S. 551, 622 (2005) (Scalia, J., dissenting).

⁶ Toobin, *supra* note 3.

⁷ Justice Ruth Bader Ginsburg, Remarks to the American Society of International Law: “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication (Apr. 1, 2005) (transcript available at <http://www.asil.org/events/AM05/ginsburg050401.html>).

⁸ *Printz v. United States*, 521 U.S. 898, 921 n.11, 977 (1997) (Breyer, J., dissenting).

⁹ In particular, see Tushnet, *Knowing Less*, *supra* note 3 (assessing the arguments against foreign law); Calabresi & Zimdahl, *supra* note 3 (reviewing on the history of foreign law usage).

into debates on “foreign law” when it may be more helpful to debate *particular* methods of foreign law usage.¹⁰ Some methods of use may be more easily justified and others totally unjustifiable. The second problem is one of exhaustiveness: Some scholars have recognized the need to focus on the how of foreign law, but they have identified only a limited set of ways in which foreign law could be used, in many cases defining three categories.¹¹ This limited categorization of foreign law usage prevents clear evaluation of which uses are appropriate.

This article seeks to be clearer about the varieties of foreign law usage¹² in order to provide insight into whether foreign law can be appropriately used in constitutional interpretation, when, and what the stakes and parameters are in each case. It attempts to outline an exhaustive¹³ set of ways in which foreign law can be used, and it evaluates each method with respect to the central values at issue in the foreign law debate. It finds that most uses of foreign law are not problematic, and as a result, that the foreign law debate should focus specifically on the few uses that are potentially problematic, rather than on “foreign law” more generally. Part I briefly outlines the central arguments for and against the use of foreign law, in order to establish

¹⁰ Of course, breaking up categories into many component parts may or may not be helpful. The optimal amount of “clumping” of practices into categories will depend on what value the clumping brings and what clarifications or analytic distinctions are lost in using larger categories.

¹¹ See Jackson, *supra* note 3 (outlining the convergence, resistance, and engagement models); Koh, *supra* note 3, at 45 – 46 (noting that foreign law is used for parallel rules, to shed empirical light, or for considering community standards); Larsen, *supra* note 3, at 1288 – 92 (describing the expository, evidentiary, and substantive ways foreign law is used); Choudhry, *supra* note 3, 833 – 38 (presenting the universalist, dialogical, and genealogical approaches to using foreign law); Tushnet, *Possibilities*, *supra* note 3 (outlining functionalism, expressivism, and bricolage); Cleveland, *supra* note 3 (arguing that international law can be directly invoked, used as a background principle, or cited to incorporate common values). Others use groupings of four. See Rosenkrantz, *supra* note 3, 278 – 82 (noting genealogical approaches, similar situations, procedural reliability, and expressive reasons), Larsen, *supra* note 3, 1303 – 19 (categorizing foreign law for under justifications of objectivity, originalism, foreign policy, and good results). Ernest Young makes a more exhaustive list but does not explore the categories. See Young, *supra* note 3, at 149 – 51.

¹² A brief word on “foreign law.” I shall use the term foreign law to refer to two types of law: the domestic law of foreign states and international law. It is worth noting that there are potentially relevant differences worth separate exploration. International law might pose fewer concerns in terms of accuracy, see *infra* TAN 34 – 53, because there are fewer contextual complexities; customary international law might also not face the denominator problem discussed *infra* TAN 164. Likewise, international law might pose fewer democratic concerns, see *infra* TAN 17 – 33, because the nation has greater ability to shape international law than it does the domestic law of foreign states.

¹³ Of course, this effort is necessarily an *attempt* at exhaustiveness. There may be additional uses, but I have tried to develop as exhaustive a list as possible from the literature and cases, without creating overlap in the categories.

a set of metrics upon which each particular type of foreign law usage can be evaluated. Part II presents a typology of ten ways in which foreign law can be used, describes the contours of each usage, and outlines the challenges to each usage. Part III concludes.

I. Arguments about the Use of Foreign Law

Before outlining and evaluating the ways in which foreign law can be used in constitutional interpretation, it is necessary to outline the criteria upon which the acceptability of foreign law use will be measured. There are many critiques of and justifications for the use of foreign law, but they can be loosely grouped into two categories: arguments about liberal democratic values and arguments about accuracy. The first category encompasses the argument that liberal democracy is undermined when judges rely upon the decisions of foreign courts or statements of international bodies and the counterargument that the existence of a democratic society relies on preconstitutional values in the form of basic human rights or conditions for democratic participation. The second category includes the argument that considering foreign materials has innumerable methodological problems such as selective or shallow use of sources and the counterargument that considering foreign law provides more information and better judicial decision making. This section briefly considers each of these arguments as a reference point for evaluating the various modes of foreign law usage developed in Part II.

In addition to the arguments presented here, the more foundational debate between theories of constitutional interpretation is essential to understanding the core justifications for and criticisms of using foreign sources of law. Describing that debate is beyond the scope of this Article, but it is worth briefly noting a few leading theories of constitutional interpretation, as

their claims loom large in the background of this more particular debate. Originalists believe that the Constitution should be interpreted in accordance with the original public meaning of the text; that is, what a person at the time of the ratification of the provision would have understood the meaning to be.¹⁴ Under this theory, foreign sources would be permissible sources if they would have been part of the understanding of a provision at the time of ratification. In contrast, those who follow a moral reading¹⁵ of the Constitution would look to foreign sources if they bore on answering the deep moral questions that undergird constitutional principles. Followers of James Bradley Thayer would hold that Courts should be highly deferential to legislatures.¹⁶ Foreign sources that validate deferential decisions may perhaps be unobjectionable to Thayerites. The goal of this article is not to resolve this debate but rather to provide greater clarity, and with it, helpful insights, regardless of the theory of constitutional interpretation to which one subscribes.

A. Arguments from Liberal Democracy

Evaluating the use of foreign law requires considering its effects on democratic decisionmaking and on freedom and democracy as constitutional values. A trenchant critique of foreign law use argues that a “constitution is, first and foremost, supposed to be the foundational law a particular polity has given itself through a special act of popular lawmaking.”¹⁷ The legitimacy and validity of constitutional law are derived from the opinions of the people,¹⁸ and it is through the process of democratic self-governance that the constitution expresses the values of

¹⁴ See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989).

¹⁵ See, e.g., Ronald Dworkin, *Freedom’s Law: The Moral Reading of the Constitution* (1996).

¹⁶ James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law* (1893).

¹⁷ Rubinfeld, *supra* note 3, at 1975.

¹⁸ See Rosenkrantz, *supra* note 3, at 284.

the nation.¹⁹ What is important is the specificity of constitutional ideas to the nation, and maintaining specificity – a distinct constitutional culture²⁰ – is dependent on decisions being both created by and accountable to the people within the country. Only then is it democratic and expressive of national values.

Thus, this “nationalist” approach²¹ resists the use of foreign materials in constitutional interpretation.²² Foreign materials represent the considered ideas not of the national citizenry, but of other communities, whose citizens have less (perhaps even no) right to, interest in, or responsibility for the expressive values of a nation. If constitutional democracy is to mean anything, this argument runs, it requires that constitutional meaning is shaped by the domestic community. To be sure, there are many sets of expressive values in any national community,²³ but the community must embrace a set of principles through the process of self-governance for any particular value to be brought legitimately into the canon of constitutional values.

This nationalist approach often attaches a structural critique to its values-based expressive critique. Given the centrality of democracy, unelected judges are in the worst position among the three branches of government to determine fundamental issues of national values. In *Roper*, for instance, the Supreme Court ignored that the political branches had placed reservations on various international agreements, such as the International Covenant for Civil and Political Rights. Instead, it cited those agreements as confirmation of its decision to strike down the juvenile death penalty.²⁴ On the structural account, the problem in the *Roper* case was that the political branches had clearly expressed the will of the democracy through reservations,

¹⁹ Tushnet, *Possibilities*, *supra* note 3, at 1229.

²⁰ Rosenkrantz, *supra* note 3, at 293 – 94.

²¹ Koh, *supra* note 3, at 52.

²² Jackson, *supra* note 3, at 113.

²³ See Tushnet, *Knowing Less*, *supra* note 3, at 1284.

²⁴ See *Roper v. Simmons*, 543 U.S. 551 (2005); see also Young, *supra* note 3, at 164.

but judges overturned that decision in favor of international opinion. This “international countermajoritarian problem”²⁵ parallels the domestic countermajoritarian problem,²⁶ and cautions a limited role for the judiciary.²⁷

Arguments from liberal democracy are not all against the use of foreign law. Liberal democracy is conditioned on individuals having certain basic rights. Some thus argue that constitutions “express universal rights and principles, which in theory transcend national boundaries, applying to all societies alike.”²⁸ Justice Kennedy perhaps put it best, “there’s some underlying common mutual interest, some underlying common shared idea, some underlying common shared aspiration, underlying unified concept of what human dignity means.”²⁹ Looking to foreign and international law is a way to identify what that common meaning of human dignity is and a way to understand how it manifests itself in the practical contexts that arise in judicial cases. The weaker form of this universality argument is that values and rights are less like natural law and more like “community standards,” a shared understanding of what particular ideas mean at a particular time. Whether the strong or weak form, the basic idea is that certain values or rights are too fundamental to be left in the hands of majorities – they are preconditions for democracy itself.³⁰

²⁵ See Alford, *supra* note 3, at 58 – 59; see also Koh, *supra* note 3, at 55.

²⁶ See Alexander Bickel, *The Least Dangerous Branch* (1962).

²⁷ In the context of foreign relations, the structural critique has had particular power, given the common law approach to foreign relations cases. Traditionally, common law doctrines such as the act of state doctrine and comity narrowed the scope of what judges could decide in order to prevent international conflict or controversy. Courts would choose not to decide in order not to offend. If controversies were desired, the political branches could undertake them itself and pay the political consequences at the ballot box. Notably, however, the modern use of foreign law often involves adopting human rights principles and in that context, the limited judicial role argument might be less persuasive. When judges do *not* use foreign law, they might create international controversy – at once rejecting the opinions of world and entrenching an interpretation into constitutional law. Some argue, therefore, that it is *necessary* to use foreign law to avoid damaging foreign policy. *Cf.* Koh, *supra* note 3, at 47; Larsen, *supra* note 3, at 1316 & n. 145.

²⁸ See Rubinfeld, *supra* note 3, at 1975; Cleveland, *supra* note 3, at 63 – 87; Choudhry, *supra* note 3, at 833 – 35.

²⁹ Toobin, *supra* note 3.

³⁰ See also John Hart Ely, *Democracy and Distrust* (1980) (arguing that rights related to political processes need to be safeguarded as preconditions of democracy).

But preconditions go further than just individual rights. Nations do not exist in a vacuum. Rather, every nation needs to be accepted as legitimate within the international system, and that too might require a broader role for foreign law in constitutional interpretation. The use of foreign and international law can act as a “shout out” to other nations to signal inclusion in a shared community of nations.³¹ It can assist in establishing global legitimacy for certain behaviors and practices because practices and norms will converge over time creating single standards.³² And it can help promote an international system of justice that links and strengthens the community of nations.³³ By considering foreign and international law, a nation signals it is part of a broader community, earns goodwill, and shapes the community itself. The international community, in turn, affirms and embraces the place of the nation within it. Respect and legitimacy are, under this approach, prerequisites for a secure, democratic state.

B. Arguments from Accuracy

The second set of critiques and justifications for the use of foreign law can broadly be captured as involving judicial accuracy. Critics of foreign law on accuracy grounds are perhaps inspired by Alexander Pope’s famous lines: “A little learning is a dangerous thing / drink deep or taste not the Pierian spring.”³⁴ The trouble with using foreign law is that the laws of different countries are complex³⁵ and contextual.³⁶ For any judge to get even the basic facts of another country’s constitutional system, structure, culture, history, and processes correct would require

³¹ Young, *supra* note 3, at 154.

³² Koh, *supra* note 3, at 47; *cf.* Jackson, *supra* note 3, at 112

³³ Koh, *supra* note 3, at 53.

³⁴ Alexander Pope, *An Essay on Criticism*.

³⁵ Rosenkrantz, *supra* note 3, at 293.

³⁶ Tushnet, *Possibilities*, *supra* note 3, at 1265.

considerable time, effort, and expense.³⁷ Even though a factual situation or legal issue might be similar, the constitutional text that must be interpreted might differ,³⁸ rendering the similarities merely superficial given traditional methods of constitutional interpretation. Beyond just the text, different nations might have different traditions or expressive values with respect even to basic human rights, such as the famous difference in American and British views of libel and free speech.

In addition, a foreign decision might be based on political interests, values, or in a political context, thus decreasing its usefulness as a data point that denotes a reasoned position. For example, the U.S. Supreme Court has decided many cases in the midst of war, offering broad deference or avoiding significant constitutional questions, only to reverse their position and address the question head on after the conflict has abated.³⁹ Because such decisions grow out of the political context, the use of those cases out of context might lead to unfortunate conclusions about civil liberties or the balance of powers between the branches of government. More commonly – and with greater difficulty for judges seeking to use foreign law – judicial decisions may be driven by, or at least influenced by, the political ideology of the judge.⁴⁰ Because the dominant political ideology of another nation’s courts might change over time, some past decisions might not be upheld even by the court that issued them. A judge who seeks to use those foreign decisions would therefore need to know the changing political dynamics of the foreign country and the political preferences of its judiciary. As a result, ensuring what Mark Tushnet has called “quality control”⁴¹ might simply be too difficult, particularly given that the current

³⁷ Young, *supra* note 3, at 165; *see also* Ramsey, *supra* note 3, at 77 – 79.

³⁸ Ramsey, *supra* note 3, at 73.

³⁹ Compare, e.g., *Ex Parte Vallandigham*, 68 U.S. 243 (1863) with *Ex Parte Milligan*, 71 U.S. 2 (1861).

⁴⁰ See generally Cass R. Sunstein, David Schkade, Lisa M. Ellman & Andras Sawicki, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* (2006).

⁴¹ Tushnet, *Knowing Less*, *supra* note 3, at 1294.

modes of legal education do not involve a significant training in history and methodology for comparative law and the substantive laws of other nations.

A second accuracy-based worry is that judges with little knowledge of foreign systems will use foreign law material selectively or haphazardly.⁴² The most suspicious suggest that judges are opportunistic, seeking to support their own personal positions.⁴³ They can “cherry pick” the countries they cite or the provisions and cases within those countries because so few people know the laws in detail. A less suspicious critique is that judges merely rely upon whatever information is available to them – a practice Professor Tushnet has termed “bricolage.”⁴⁴ The difference between bricolage and the complexity and context problems noted above is important: the “little learning” argument suggests that judges have a shallow understanding of another country’s legal system, but one that is potentially broad; the bricolage argument would suggest that a judge’s understanding might not just be shallow but also incomplete in breadth. To be sure, these “little learning” and selectivity criticisms are not unique to foreign law.⁴⁵ Judges may know very little about areas of domestic law (ERISA is a good example⁴⁶) and nothing stops them from selecting domestic legal materials opportunistically or haphazardly.

At the same time, however, the use of foreign law may be beneficial or even necessary from the perspective of accuracy. Reference to foreign law might be helpful to understand how a constitutional provision arose and to determine what it means. Even when it is not directly relevant to the text, foreign law use could be beneficial to judicial perspective in decisionmaking. Foreign jurisdictions might have confronted similar problems and thus have insightful analysis or

⁴² See Koh, *supra* note 3, at 56; Alford, *supra* note 3, at 64, 67; Ramsey, *supra* note 3, at 73.

⁴³ Ramsey, *supra* note 3, at 69.

⁴⁴ Tushnet, *Possibilities*, *supra* note 3, at 1230.

⁴⁵ Tushnet, *Knowing Less*, *supra* note 3, at 1280.

⁴⁶ *Id.* at 1297.

reasoning in how they resolved those problems. That analysis might be helpful for judges to consider at the least to ensure they do not overlook possible approaches.⁴⁷ Additionally, if many jurisdictions reach the same answer, there is a better chance that approach is “right.” It may be that “two heads are better than one.”⁴⁸ Finally, using foreign and international law might be similar to having a liberal education⁴⁹ – it may provide ideas,⁵⁰ clarity,⁵¹ and contrasts⁵² that help elucidate principles. Jeremy Waldron analogizes it to learning in the scientific community: science “stands as a repository of enormous value to individual researchers . . . and it is unthinkable that any of them would try to proceed without drawing on that repository to supplement their own individual research.”⁵³ So too with foreign law.

C. Conclusion

Evaluating any particular use of foreign law should take into account each of the above factors: that constitutions express democratic values, that some values are universal, that there are significant methodological problems with using foreign law, and that foreign law might be beneficial, and at times necessary, to constitutional interpretation. It is to this evaluation that we now turn.

II. A Typology of Foreign Law

⁴⁷ Koh, *supra* note 3, at 45; Alford, *supra* note 3, at 57 (quoting Breyer, J.); Rosenkrantz, *supra* note 3, at 279; Jackson, *supra* note 3, at 116.

⁴⁸ Larsen, *supra* note 3, at 1319; *see also* Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 69 STAN. L. REV. 131, 169-71 (2006); Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, Am. J. Comp. L. (forthcoming).

⁴⁹ Tushnet, *Possibilities*, *supra* note 3, at 1236.

⁵⁰ *Id.* at 1228.

⁵¹ Choudhry, *supra* note 3, at 836.

⁵² Scheppele, *supra* note 3, at 300; Koh, *supra* note 3, at 46, 50 – 51; Jackson, *supra* note 3, at 116.

⁵³ Waldron, *supra* note 3, at 132 – 33.

Given the values of judicial accuracy and democracy, this Part considers to the ways in which foreign law can be used in constitutional interpretation. It attempts an exhaustive list of the varieties of foreign law usage and evaluates each with respect to the values discussed in Part I. This Part presents ten modes of foreign law usage and, for clarity, groups them into three categories: those that are unproblematic, potentially problematic, and troublesome. It shows that only a few types of foreign law use seriously implicate the values above, and that most uses, therefore, are acceptable. Each use of foreign law is referred to by a name and mode number.

A. Unproblematic Uses of Foreign Law

Mode 1: Quoting Language. Judges might cite foreign law or international law because they like a particular turn of phrase used. This type of citation is similar to cases in which the Court cites great works of literature⁵⁴ or pop music,⁵⁵ and like citations of literature or music, this type of citation does not offend any significant values. It does not undermine expressive, democratic, or institutional competency values because the court is merely using words not their underlying reasoning, and the sources themselves are not authoritative. That Bob Dylan or William Shakespeare used the phrase is not the reason the court is adopting a certain rule. Nor is quoting language methodologically troubling. It is unnecessary to have a deep or broad knowledge of the foreign nation's laws in order to merely restate a phrase. Indeed, quoting

⁵⁴ See, e.g., *Bartnick v. Vopper*, 532 U.S. 514, 554 (2001) (Rehnquist, C.J., dissenting) (“Although the Court recognizes and even extols the virtues of this right to privacy, these are “mere words,” W. Shakespeare, *Troilus and Cressida*, act v, sc. 3, overridden by the Court's newfound right to publish unlawfully acquired information of ‘public concern.’”).

⁵⁵ See, e.g., *Sprint Comm. v. APCC Services, Inc.*, 554 U.S. ___ (2008) (Roberts, C.J., dissenting) (“The absence of any right to the substantive recovery means that respondents cannot benefit from the judgment they seek and thus lack Article III standing. ‘When you got nothing, you got nothing to lose.’ Bob Dylan, *Like a Rolling Stone*, on Highway 61 Revisited (Columbia Records 1965).”).

language might actually prove to have benefits without drawbacks, in that it provides a “shout out” or signal to other nations that their opinions are read by prominent American jurists.

Mode 2: Illustrating Contrasts. Sometimes courts use foreign law or practices to illustrate a contrast with domestic practices or law. In *Raines v. Byrd*,⁵⁶ for example, Chief Justice Rehnquist found that members of Congress did not have standing to challenge the line item veto, but he noted that the opposite rule would not be irrational because some courts in Europe have such a regime. Still, he concluded that the American Constitution did not follow the European approach.⁵⁷ Some have called this practice “negative borrowing,”⁵⁸ others “aversive constitutionalism,”⁵⁹ but the point is the same: seeing what another country does may help clarify the practices one’s country seeks to avoid. As a method of “engagement,” in Vicki Jackson’s words, the foreign sources are “interlocutors, offering a way of testing understanding of one’s own traditions and possibilities by examining them in the reflection of others.”⁶⁰

Illustrating contrasts does not gravely implicate any of the values at stake in the foreign law debate. Democratic or expressive values are actually strengthened because the court is affirming a distinctive constitutional approach that is unique to the national community. In terms of accuracy, greater information from other countries helps clarify the constitutional question and its answer through both analogical reasoning and creative thinking. To be sure, methodological problems may arise from the complexity of foreign law and the context of foreign institutions and politics. But these methodological concerns are of minor significance

⁵⁶ 521 U.S. 811 (1997).

⁵⁷ *Id.* at 828; *see also* Larsen, *supra* note 3, at 1288 – 89.

⁵⁸ Rosenkrantz, *supra* note 3, at 290.

⁵⁹ Scheppele, *supra* note 3, at 300.

⁶⁰ Jackson, *supra* note 3, at 114.

because judges are merely contrasting the situation to one they prefer. They could just as well identify the same phenomenon in a hypothetical to draw their contrast, or they could state their reasoning without drawing a contrast at all. Illustrating contrasts might also offend the idea of universal values and engage the judiciary too far into foreign policy. If a court rejects a universal value, it may undermine the idea of its universality and in the process, overextend the judicial role by offending foreign nations. Whether countries are offended will likely depend on the tone and style of the opinion and the nature of the provision. Ultimately, therefore, because the decision relies primarily on domestic sources, the citation and discussion of foreign law is extraneous and optional. A decision that omitted discussion of foreign law would likely not offend; and one that discusses it respectfully would likely be received without controversy.

Mode 3: Logical Reinforcement. Professor Steven Calabresi and Stephanie Zimdahl have identified a set of cases as “logical reinforcement” cases, “in which the Court looks to foreign law and practice to demonstrate that its decisions are logical and supported by reason.”⁶¹ The Court’s decisions themselves rely upon domestic sources, but the Court uses foreign sources to show that its interpretation is not unreasonable or peculiar. What is important is that the court’s decision is not predicated on the foreign sources. It may be helpful to imagine the judge’s decision-making process temporally. The judge would first make a decision based on domestic sources or on her own logical reasoning. Then, having reached a conclusion, the judge looks abroad and finds that others have made the same decision. The foreign source is thus not grounds for the decision but reinforces it.

⁶¹ Calabresi & Zimdahl, *supra* note 3, at 899.

A few examples will illustrate the point. In *Ker v. Illinois*,⁶² the Court held that it had jurisdiction over a criminal defendant even though the defendant was forcibly kidnapped from another country, in violation of an extradition treaty. Ker argued that the extradition treaty gave him a positive right to be removed only in accordance with the treaty.⁶³ Justice Miller found no such protection in the treaty or in the Constitution,⁶⁴ and then to support his conclusion, cited two British cases – “authorities of the highest respectability” – holding that forcible abduction was insufficient to limit a court’s jurisdiction.⁶⁵ In *O’Malley v. Woodrough*,⁶⁶ the Court held that applying a general income tax to federal judicial salaries was not unconstitutional under Article III’s provision that compensation “shall not be diminished” during tenure in office.⁶⁷ Writing for the majority, Justice Holmes concluded that subjecting judges to “a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government.”⁶⁸ But Justice Holmes also noted that the contrary rule, one that the Court had upheld only two decades earlier,⁶⁹ was contrary to the interpretations of “other English-speaking courts,” and he cited to decisions of Australian, Canadian, and South African courts as illustrations.⁷⁰ The opinions of these courts do not appear to have been dispositive for Justice Holmes, but they did provide additional support to the Court’s interpretation. The best recent example of the logical reinforcement approach is of course *Roper v. Simmons*, in which Justice Kennedy wrote that foreign and international law offered “respected and significant confirmation

⁶² 119 U.S. 436 (1886).

⁶³ *Id.* at 441.

⁶⁴ *Id.* at 442 – 43.

⁶⁵ *Id.* at 444 (citing *Ex parte Scott*, 9 Barn. & C. 446 (1829); *Lopez & Sattler's Case*, 1 Dears. & B. Cr. Cas. 525 (1858)).

⁶⁶ 307 U.S. 277 (1939).

⁶⁷ U.S. Const. Art. III, s.1.

⁶⁸ 307 U.S. at 282.

⁶⁹ See *Evans v. Gore*, 253 U.S. 245 (1920).

⁷⁰ 307 U.S. at 281 & n. 6, n. 8.

for our own conclusions” that the juvenile death penalty was unconstitutional.⁷¹ In *Roper*, Justice Kennedy announced the decision of the Court based on the domestic practices of the states, the national trend, and the Court’s own judgment. Only then did he cite foreign sources, and they were presented as secondary confirmation of an independently made decision.

Because logical reinforcement is predicated foremost on domestic sources, methodological concerns about misunderstanding or misappropriating foreign sources are minimal. The foreign sources do very little “work” in these cases. What “work” they do is indirect. First, using foreign sources for logical reinforcement provides a signal to the international community that its opinions are considered worthy of citation and respect. By finding confirmation with those views, instead of finding contrasts against those views, logical reinforcement citation links the country to the larger community of nations, and potentially to converging international consensus on the particular issue. Finally, as a matter of persuasive rhetoric, the logical reinforcement model signals to domestic readers that the decision is not ridiculous or unreasonable.

Mode 4: Factual Propositions. Judges can cite foreign or international law to establish factual propositions about history, practices, structure or other facts. Consider the famous case of *Muller v. Oregon*,⁷² known primarily for the introduction of social scientific evidence via the Brandeis Brief. In that case, the Court distinguished *Lochner v. New York*’s⁷³ assertion of a broad right to freedom of contract and instead upheld a maximum hours law for women working in a laundry under the theory that there were inherent differences between the sexes.⁷⁴ In a footnote,

⁷¹ *Roper*, 543 U.S. at 578.

⁷² 208 U.S. 412 (1908).

⁷³ 198 U.S. 45 (1905).

⁷⁴ 208 U.S. at 423.

Justice Brewer cited to the Brandeis brief's "very copious collection" of legislation, reports, and studies from the United States and from seven European countries.⁷⁵ This citation might be interpreted as a form of mode 3, logical reinforcement. But Justice Brewer would not have seen it that way. He noted that these laws and studies were not "technically speaking, authorities," and that they did not discuss "the constitutional question presented to us for determination."⁷⁶ However, they provided "general knowledge" of "woman's physical structure, and the functions she performs in consequence thereof."⁷⁷ This "general knowledge" comprised facts which the court could consider.

It is important here to distinguish between types of factual propositions – between what we can term *legal* facts and *non-legal* facts. Legal facts are those facts that are necessarily or easily presented in a legal opinion. Such a citation may be as simple as establishing that a company underwent bankruptcy proceedings in a foreign country, and the court might cite to the filing. Alternatively, a court could cite a foreign decision to establish the foreign court's holding and the rule of law it established. Non-legal facts are indirect facts, facts that could be determined via social science, history, or other sources, but that are stated in a foreign court opinion. For example, in *Muller v. Oregon*, the fact that Germany, England, Italy and other European states had maximum hours laws for women would be a legal fact – and citation to legislation would be appropriate. But absent discussion in the law itself, the reason why the legislation exists – in this case Justice Brewer's belief that it reflected inherent differences between men and women – would be a non-legal fact. The answer could be varied and could differ from country to country.

⁷⁵ *Id.* at 419 n. +.

⁷⁶ *Id.* at 420.

⁷⁷ *Id.* at 420 – 21.

The distinction in the type of fact is important for the accuracy of the underlying information. Legal facts are facts that are established by the foreign court itself and are thus reliable. Non-legal facts, on the other hand, have sources outside the foreign court and could be established by citation to those sources directly. The foreign court's decision or a piece of foreign legislation may not be the best evidence for the proposition because the court or legislature may have made a mistake, mischaracterized the evidence, or had other reasons for its decision. If the original factual sources are available, they would form a more accurate source from which to establish the factual proposition than would the foreign court or legislature's decision.⁷⁸ Thus in *Muller*, the Court's citation to the studies included in the Brandeis brief⁷⁹ would be a more accurate source than its citation to legislation.

Aside from the accuracy concern facing non-legal facts, citing factual propositions is unlikely to be problematic. It does not offend democratic or expressive values because the citation is used to establish a fact of another country, not to provide persuasive or authoritative reasoning for a decision. In fact, citation to foreign law may in some cases be helpful to establish basic facts or context surrounding the case.

B. Potentially Problematic Uses of Foreign Law

Mode 5: Empirical Consequences. A close relative of mode 4, factual propositions, is the use of foreign law to determine empirical consequences. That is, foreign law might be helpful for judges to identify what consequences a certain rule might have if adopted. In these cases, the judges seek to ascribe the occurrence or non-occurrence of a consequence to a certain legal

⁷⁸ See Posner & Sunstein, *supra* note 51, at 146 – 47.

⁷⁹ 208 U.S. at 419 n. +.

norm. Consider two examples: *Miranda v. Arizona*⁸⁰ and *Washington v. Glucksberg*.⁸¹ In *Miranda*, the Warren Court held that procedural safeguards were necessary to protect against self-incrimination when an individual is subjected to custodial interrogation.⁸² To address the counterargument that the Miranda requirement would be a “danger to law enforcement,” the Court looked to “the experience in some other countries” to show that such a danger was “overplayed.”⁸³ The Court then discussed the procedural requirements in England,⁸⁴ Scotland,⁸⁵ India,⁸⁶ and Ceylon,⁸⁷ noting that some of these countries had even more stringent requirements than the Miranda rule would impose. The best recent example of the empirical consequences approach is in *Washington v. Glucksberg*.⁸⁸ In that case, the Court held that the right to assistance of a physician in committing suicide was not protected by the Due Process Clause of the Constitution, and thus upheld a Washington law banning assisted suicide. In the course of his opinion, Chief Justice Rehnquist referred to the experience of the Netherlands to show that Washington State had a reasonable fear that involuntary euthanasia might result from allowing physician assisted suicide.⁸⁹ In both these cases, foreign sources were used to demonstrate that certain consequences were unlikely to result from a particular rule.

This use of foreign law is potentially problematic from the perspective of accuracy. On the one hand, greater information fits the “liberal education” value of foreign law use – seeing the consequence of a rule in a country can help identify whether speculative consequences are likely, and as in the case of *Glucksberg*, determine whether fear of that consequence is

⁸⁰ 384 U.S. 436 (1966).

⁸¹ 521 U.S. 702 (1997).

⁸² 384 U.S. at 478 – 79.

⁸³ *Id.* at 486.

⁸⁴ *Id.* at 486 – 88.

⁸⁵ *Id.* at 488.

⁸⁶ *Id.* at 489.

⁸⁷ *Id.*

⁸⁸ 521 U.S. 702 (1997).

⁸⁹ *Id.* at 734 – 35.

reasonable. But at the same time, the actual consequences of a legal rule in any country are difficult to evaluate. In the euthanasia case, it may be that other laws, national norms, traditions, or public or private regulations (or their absence) influence the practice of physician assisted suicide. The law itself might not be enough from which to draw consequences.

Still, this complication does not necessarily eliminate the value of the empirical consequences use of foreign sources. When a court seeks to demonstrate the occurrence of a consequence as a result of a legal rule, the accuracy problem is considerable, as any number of factors could have caused the result. But when a court, as in *Glucksberg*, seeks to establish that a certain consequence is merely *possible*, rather than likely, inevitable, or impossible, the court may be on firmer ground. Because the empirical consequences approach is at bottom a variation on mode 4, the factual propositions approach, it may be abused if better social scientific evidence is available.

Mode 6: Direct Application. Sometimes foreign law should be applied directly. The constitutional text may require or suggest looking to foreign or international law for interpretation. In these cases, the use of foreign law via direct application merges into the foundational debate over theories of constitutional interpretation.

A few cases will help illustrate the point. In *New York v. Hendren*,⁹⁰ the Waite Court found that it had no jurisdiction over a contract dispute arising during Civil War because the case was based on “principles of general law” rather than any federal question.⁹¹ Justice Bradley, dissenting, argued that the claim of “extinction of a contract on the ground of existence of a

⁹⁰ 92 U.S. 286 (1876).

⁹¹ *Id.* at 287.

war”⁹² was based on “the laws of the United States by which trade and intercourse with the enemy are forbidden”⁹³ and grounded in the Constitutional powers to declare and carry out war. He then announced that “the laws which the citizens of the United States are to obey in regard to intercourse with a nation or people with which they are at war are laws of the United States. These laws will be the unwritten international law, if nothing be adopted or announced to the contrary.”⁹⁴ For Justice Bradley, the laws of war applied directly in the United States as international law, unless a contrary provision was adopted. Thus, international law would be relevant for citation. In *Julliard v. Greenman*,⁹⁵ one of the legal tender cases, the Court upheld the issuance of paper money. The Court found that this power was “incident to the power of borrowing money, and issuing bills or notes of the government for money borrowed” and was “universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adopting of the constitution of the United States.”⁹⁶ To prove its point, the Court cited to an English chancery court case in which the Emperor of Austria, as King of Hungary, obtained an injunction against issuance of notes that were claimed to be Hungarian currency.⁹⁷ Citation to foreign law was used to explore the contours of sovereignty, a feature built into the Constitution and its fiscal clauses.

As Professor Michael Ramsey has noted, “[i]nternational sources are obviously relevant to the scope of the Constitution’s structural provisions defining the international powers of the U.S. government, where the Constitution directly appeals to matters of international relations

⁹² *Id.* at 288.

⁹³ *Id.* at 287.

⁹⁴ *Id.* at 288.

⁹⁵ 110 U.S. 421 (1884).

⁹⁶ *Id.* at 447.

⁹⁷ *Id.* at 447.

such as declaring war, making treaties, and enforcing the law of nations.”⁹⁸ In these cases, the constitution itself “assume[s] an international law background,” which should be considered in interpreting the relevant terms.⁹⁹

But which provisions “assume an international law background” is not always clear. Take, for example, the Second Amendment’s provision that a militia is “necessary to the security of a free state.”¹⁰⁰ The term “free state” could be seen as a reference to the states’ rights debate in the founding era and thus not be linked to international understandings of government power; but it could also be interpreted as “free country,” as Professor Eugene Volokh has recently argued.¹⁰¹ Should we cite to foreign sources to determine the meaning of “free state”? Perhaps the most debated example is the Eighth Amendment’s prohibition on “cruel and unusual punishment.”¹⁰² In *Trop v. Dulles*,¹⁰³ the Warren Court found that forfeiture of citizenship was unconstitutional as punishment for the crime of wartime desertion. Although he found that citizenship was “not subject to the general powers of the National Government,”¹⁰⁴ Chief Justice Warren went on to state that the “cruel and unusual” clause would forbid such a punishment.¹⁰⁵ “The basic concept underlying the Eight Amendment,” he wrote, “is nothing less than the dignity of man.”¹⁰⁶ The meaning of the phrase is “not precise” and its scope is “not static”; rather, the meaning must be determined by consideration of “the evolving standards of decency that mark the progress of a maturing society.”¹⁰⁷ The Court then went on to find that the “civilized nations of the world”

⁹⁸ Ramsey, *supra* note 3, at 71; *see also* Koh, *supra* note 3, at 47; Alford, *supra* note 3, at 58 n. 10; Neuman, *supra* note 3, at 82 – 83.

⁹⁹ Neuman, *supra* note 3, at 82.

¹⁰⁰ U.S. Const. Amend. II.

¹⁰¹ Eugene Volokh, “*Necessary to the Security of a Free State*,” 83 *Notre Dame L. Rev.* 1 (2007).

¹⁰² U.S. Const. Amend. VIII.

¹⁰³ 356 U.S. 86 (1958).

¹⁰⁴ *Id.* at 92.

¹⁰⁵ *Id.* at 93 – 104.

¹⁰⁶ *Id.* at 100.

¹⁰⁷ *Id.* at 100 – 01.

reject the idea that statelessness can be imposed as punishment.¹⁰⁸ In that case, international understandings of cruelty were built into the Eighth Amendment.

Unlike provisions relating to war or foreign affairs, the Eighth Amendment does not obviously require some international background assumptions to determine its meaning. But it may still be the case that international or foreign perspectives are relevant to the scope of the provision. Ultimately, the use of foreign law through direct application depends on one's theory of constitutional interpretation. On the one hand are those like Justice Scalia, who argue that the meaning of constitutional provisions should be determined by the ordinary meaning of the words at the time of ratification.¹⁰⁹ On the other hand are those like Ronald Dworkin, who see words as establishing moral principles that require grappling with deep moral questions for successful interpretation.¹¹⁰ And in their midst are numerous other theories of constitutional interpretation that might take different approaches to considering foreign law in determining the meaning of constitutional provisions. Depending on which theory one follows, the Court's action in a case like *Trop* will look very different. Justice Scalia might reject the approach because "cruel and unusual" had a specific public meaning at ratification; Dworkinians might embrace it as a valuable way to consider deep moral questions of human dignity.

In addition to those specific textual provisions that incorporate international ideas, constitutional interpretation may require foreign law use when two constitutions are related "genetically" or "genealogically."¹¹¹ Genetic relationships exist when one constitution influenced the framing of another, or when two constitutions were influenced by another.¹¹² Genealogical

¹⁰⁸ *Id.* at 102.

¹⁰⁹ *See* Scalia, *supra* note --.

¹¹⁰ *See* Dworkin, *supra* note --.

¹¹¹ Choudhry, *supra* note 3, at 838; Rosenkrantz, *supra* note 3, at 278.

¹¹² *Id.*; *see also* Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, 14 *Cardozo L. Rev.* 533 (1993).

relationships exist when one constitution order literally springs from another. For example, the Canadian Constitution's recognizes "existing aboriginal . . . rights," requiring an understanding of British imperial constitutional law to determine the content of those rights.¹¹³ The American Constitution also inherited principles governing aboriginal rights from British imperial law. Thus, according to Professor Choudhry, when Canadian constitutional interpreters look to decisions of Chief Justice Marshall on questions of aboriginal rights, they are using the shared genealogical relationship as a basis for clarifying constitutional meaning.¹¹⁴ When a constitution influences the framing of another constitution or when one constitution is the offspring of another, citation to interpretive decisions of the older constitution may be necessary or at least helpful for determine the origins, purpose, and scope of a provision, and to understand how that provision has been understood with changing conditions over time.

Whether one sees these forms of direct application as appropriate uses of foreign law will largely depend on one's theory of constitutional interpretation. But there is, at the very least, a persuasive argument that genetic, genealogical, and provisions obviously related to structural foreign affairs powers are good candidates for the use of foreign law under any theory – even despite problems with selectivity, bricolage, and the complexity and difficulty of context.¹¹⁵ Rejecting international sources that clarify the meaning of "marques and reprisal" or "treaty" would seem to undermine careful constitutional interpretation. And ignoring genetic or genealogical relationships would leave a judge without potentially important sources of information. In cases where the provisions are not obviously linked to foreign law assumptions, advocates of foreign law must of course rely more heavily on their theory of constitutional interpretation. If their theory establishes recourse to foreign sources, use of foreign law would

¹¹³ Choudhry, *supra* note 3, at 838 & n. 81.

¹¹⁴ *Id.* at 871.

¹¹⁵ See discussion *infra* --.

not offend democratic or expressive values. Judges would not be offending others via a judicial foreign policy; international standards would be supported. And because the domestic constitution is democratically adopted and under that theory of interpretation establishes recourse to foreign and international sources, any challenges from democratic and expressive values would be unpersuasive.

Mode 7: Persuasive Reasoning. Justice Breyer has suggested that judges face the “same kinds of problems . . . armed with the same kinds of legal instruments.”¹¹⁶ The use of foreign law for persuasive reasoning argues that different nations may face similar situations and therefore that one judge’s analysis of a situation may be helpful to another judge elsewhere.¹¹⁷ These “parallel rules”¹¹⁸ provide justification for considering foreign law. Persuasive reasoning involves a judge considering the argumentation or logic of a foreign decision and using that argument in her decision. The foreign case is not authoritative, but merely provides an example of an intelligent person reasoning through a legal problem – perhaps similar to an academic article that seeks to analyze a problem and suggest an answer. In other words, the substance of the reasoning and not the identity of the source provides the reason for adopting the argument.

Evaluating persuasive reasoning is necessarily a theoretical enterprise. As Joan Larsen has noted, courts rarely engage in this type of foreign law usage: “None of the recent opinions invoking international or comparative law sources has explicitly looked to the reasoning of a foreign decision-maker.”¹¹⁹ Even though the Court has not looked to reasoning, it is still possible

¹¹⁶ Alford, *supra* note 3, at 57 (quoting Stephen Breyer, Address to the 30th Congress of the Association of French-Speaking Constitutional Courts (June 20, 2003) available at http://www.supremecourtus.gov/publicinfo/speeches/sp_06-20-03.html)

¹¹⁷ See Rosenkrantz, *supra* note 3, at 279.

¹¹⁸ Koh, *supra* note 3, at 45.

¹¹⁹ Larsen, *supra* note 3, at 1286.

to determine what might be at stake in its use of persuasive reasoning. Democratic or expressive values are not likely to be curtailed because the reasoning is persuasive, rather than authoritative. The court is merely searching for persuasive logical reasoning and it happens to discover that reasoning in a court case rather than a treatise or article. The court's practice will likely strengthen universal norms and international standards because citation and interconnection between courts creates a shared transnational jurisprudence.¹²⁰ Informational values are fulfilled because the additional information might provide interpretations that would have been incompletely theorized or even overlooked. But there is a significant difficulty – methodology. In cases of persuasive reasoning, the court must of course pay close attention to the internal logic of the opinion. But it is also crucial that the court considers the context surrounding the foreign case. The texts of the provisions interpreted might be different, the foreign country's core values might differ, and the politics of the foreign country may have been instrumental in shaping the outcome of the decision.¹²¹ As long as the court is careful, persuasive reasoning can be an effective way to use foreign law.

C. Troublesome Uses of Foreign Law

Mode 8: Authoritative Borrowing. The first of the problematic uses of foreign law, authoritative borrowing, involves a judge using a foreign law decision as binding precedent on her court. The basic idea of authoritative borrowing is captured in the distinction between what Professor Schauer has called content-independent reasons and substantive reasons for following

¹²⁰ See Anne-Marie Slaughter, A New World Order 65 – 103 (2004).

¹²¹ See *supra* TAN 41 – 43.

a rule.¹²² A substantive reason for following a rule is a reason grounded in an inherent value of the practice – among other things, the practice could be efficient, desirable, or fair.¹²³ For example, people look both ways before crossing the street because they do not want to be hit by an oncoming car. Safety is a substantive reason. In contrast, content-independent reasons are reasons for following a rule that derive solely from the fact of another stating the rule. A child may obey a parent who says “because I said so,” not because the child understands the substantive reasons for the command, but merely because the parent ordered it.¹²⁴ Authoritative borrowing is the use of foreign materials for content-independent reasons; mode 7, persuasive reasoning, would use foreign materials for substantive reasons.

Though the U.S. Supreme Court has not pursued authoritative borrowing, Argentina’s Supreme Court has.¹²⁵ The Argentine constitutional tradition was founded on the model of the U.S. Constitution – and with its doctrinal interpretations as authoritative statements of Argentine constitutional law. Although Argentina had two constitutions in the early 19th century that were not inspired by the U.S. Constitution, the Constitution of 1853 was explicitly inspired by the American model in hopes that the constitutional system would create the same kind of political and economic success that the Americans had.¹²⁶ To achieve these goals, the Argentine framers intended that “substantive interpretations of the U.S. Constitution should also be binding in Argentina.”¹²⁷ Thus, Domingo F. Sarmiento, an important intellectual figure and later President of Argentina, wrote in his commentary on the 1853 Constitution that “North American constitutional law, the doctrine of its statesmen, the declarations of its tribunals, the constant

¹²² Frederick Schauer, *Authority and Authorities*, Virginia L. Rev. (forthcoming 2008).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ See Rosenkrantz, *supra* note 3, at 270, 273.

¹²⁶ *Id.* at 270 – 71.

¹²⁷ *Id.* at 273.

practice in analogous or identical points, are authority in the Argentine Republic, can be alleged in litigation, ... and adopted as genuine interpretation of our own Constitution.”¹²⁸ To the extent that the Argentine Constitution reflects a genetic relationship, the use of American interpretations by the Argentine Court is a form of mode 6, direct application. But when the Argentine Court has relied on U.S. precedents in spite of its own (and distinct) constitutional provisions and interpretations, it is a form of authoritative borrowing. For example, in the case of *Ercolano v. Lanteri de Renshaw*,¹²⁹ the Argentine Court upheld a rent-control scheme based on the U.S. case of *Block v. Hirsh*,¹³⁰ despite a different textual provision from the U.S. Constitution and contrary Argentine precedent.¹³¹

Authoritative borrowing is obviously problematic. It offends democratic values by directly implementing the law of a foreign country without judges considering domestic values and interpretive materials. It is methodologically problematic because it requires a considerable amount of knowledge about a foreign jurisdiction’s law, culture, history, and tradition, one that judges are unlikely to have in most cases. Although it would not offend foreign nations and would add another adherent to what could be considered growing international values and norms, because the court’s decision is not independent but rather reliant on another nation, it only provides marginal analytic support to those values. Judges did not find that the people of their nation do or should adhere to such values, rather they found that *another* people adhere to their own values. Authoritative borrowing, then, appears to be clearly in the category of abuses of foreign law.

¹²⁸ *Id.* at 273 (quoting Domingo Faustino Sarmiento, *Comentarios de la Constitution de la Confederacion Argentina de 1853* 872 (Editorial Talleres Graficos Argentinos de L.J. Rosso 1929).

¹²⁹ 136 Fallos 161 (1922).

¹³⁰ 256 U.S. 135 (1921).

¹³¹ *See Rosenkrantz, supra* note 3, at 275 – 76.

But we cannot stop there. Of particular worry is that the category of authoritative borrowing might be broader than this account so far has suggested. Even distinguishing between content-independent and substantive reasons, and thus between authoritative and merely persuasive sources, it may be the case that citation of a source for *any* purpose – whether for logical reinforcement, persuasive authority or even mere factual propositions – grants legitimacy to that type of source and can transform it into an authoritative source. As Professor Schauer has argued, “in reality the status of an authority *as* an authority is the product of an informal, evolving, and scalar process by which some sources become progressively more and more authoritative as they are increasingly used and accepted.”¹³² As an example, Schauer argues that the Tenth Circuit need not cite the Second Circuit in a securities case, but given that the Second Circuit is the most important court in securities law, failure to cite to its decisions “would likely raise some eyebrows.”¹³³ That raising of eyebrows indicates an *expectation* of citation; in practice and over time, the citation transforms an optional authority of the Second Circuit into what is essentially a mandatory authority. In the context of foreign law usage, using foreign sources for innocuous purposes could result in foreign law becoming a legitimate source that people expect to be cited – even in cases in which the use of foreign law is not innocuous. Under this line of thinking, authoritative foreign law usage may grow over time.

This is essentially a slippery slope argument.¹³⁴ It holds that the citation of foreign law in the instant case might be innocuous because it is not authoritative, but fears the possibility that in the future, litigants and judges will take non-authoritative foreign law citations as an indicator that foreign law is legitimate in dissimilar situations. In essence, it is a “general plea for caution

¹³² Schauer, *supra* note --.

¹³³ *Id.*

¹³⁴ For discussion of the nature of slippery slope arguments, see Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 Harv. L. Rev. 1026 (2003); Frederick Schauer, *Slippery Slopes*, 99 Harv. L. Rev. 361 (1985).

in the face of an uncertain future.”¹³⁵ But slippery slope arguments are not trump cards; there are many strategies for reducing the likelihood of future slippage.¹³⁶ In the case of foreign law, the best response to the slippery slope argument is to have a more completely theorized and precise understanding of how and when foreign law can be used and why. Drawing these lines requires meeting one of two conditions: the lines must be precise or the reasons for the lines must be comprehensible.¹³⁷ If the lines drawn between permissible and impermissible uses are imprecise, slippery slopes may be more likely, as future cases could be seen as extensions of a vague standard.¹³⁸ Lines will also be more effective if the reasons for the lines are comprehensible. Although there is no inherent reason why arbitrarily-drawn lines can be effective for stopping slippage, when decision-makers do not know the reason a line was drawn in a particular place, they will have a harder time justifying the decision when confronted with the inevitable question – why draw the line there? In the absence of comprehensible reasons, decision-makers may be more cautious about the enterprise of line-drawing altogether.¹³⁹ The slippery slope argument, then, does not imply that all citations of foreign sources will become authoritative and thus problematic, but rather just that it is vital to have clarity on when, how, and why courts use foreign law.

Mode 9: Aggregation. The aggregated information approach collects jurisdictions that adhere to a particular position, aggregating them into a larger total, and uses the fact of numerical

¹³⁵ Schauer, *supra* note --, at 376.

¹³⁶ Professors Rizzo and Whitman provide six: (1) accepting trade-offs, (2) creating arbitrary “stoppage” rules, (3) appealing to higher standards, (4) adopting open-ended rules, (5) altering the scope and power of precedent, (5) establishing presumptions and levels of scrutiny, and (6) creating supermajority requirements or constitutional constraints. See Mario J. Rizzo & Douglas Glen Whitman, *The Camel’s Nose is in the Tent: Rules, Theories, and Slippery Slopes*, 51 UCLA L. Rev. 539, 579 – 591 (2003).

¹³⁷ See Schauer, *supra* note --, at 370 – 73, 378 – 81.

¹³⁸ *Id.* at 370 – 73.

¹³⁹ *Id.* at 380 & n. 50.

consensus to indicate the validity of the widely-held position. Aggregation can sometimes be undertaken as a form of logical reinforcement with merely persuasive force (mode 3), but the distinction between aggregation and logical reinforcement is that aggregation is justified under theories that give normative force and legitimacy to the numerical dominance of the particular position. Because aggregation has normative weight, it faces significant challenges. Indeed, aggregation should be the locus of future debates on the use of foreign law.

The precise contours of the aggregation approach can be described in different ways. Professor Young calls this approach “nose-counting authority,”¹⁴⁰ and characterizes it as those situations in which the Court “is deferring to numbers, not reasons.”¹⁴¹ In a recent article, Professor Waldron has tried to recover the idea of the *ius gentium*, which he states is “a body of law purporting to represent what various domestic legal systems share in the way of common answers to common problems.”¹⁴² It is a “source of normative insight grounded in the positive law of various countries,”¹⁴³ and its goal is “not to preempt [domestic] law but to guide its elaboration and development.”¹⁴⁴ Whether it is called nose-counting or the *ius gentium*, the basic idea is the same: the aggregation of countries’ practices with respect to a particular issue or position.¹⁴⁵

¹⁴⁰ Young, *supra* note 3, at 153.

¹⁴¹ *Id.* at 155.

¹⁴² Waldron, *supra* note 3, at 133.

¹⁴³ *Id.* at 143.

¹⁴⁴ *Id.* at 139.

¹⁴⁵ Professor Young makes an important distinction between his approach and Waldron’s. Waldron’s *ius gentium*, he notes, uses foreign law as “a repository of common wisdom” and distinguishes nose-counting as relying on the fact of foreign practice, not on the wisdom of the practice. Young, *supra* note 3, at 153. The line, however, is not so clear. Waldron likens the use of the *ius gentium* as akin to scientific processes. He ultimately concludes that those who think of “law as a matter of reason may well be willing to approach it in a scientific spirit that relies not just on our own reasoning but on some rational relation between what we are wrestling with and what others have figured out.” Waldron, *supra* note 3, at 147. This looks much like the aggregated information approach described here.

It is not entirely clear whether the Supreme Court has actually used the aggregated information approach in its decisions. In *Roper v. Simmons*,¹⁴⁶ for example, Justice Kennedy grounded the decision of the Court in conclusions that were independent of foreign law – namely, the practice of the states, the national trend regarding the juvenile death penalty, and the Court’s “own independent judgment.”¹⁴⁷ Having analyzed the juvenile death penalty under those rubrics, he then looked to foreign law because the “opinion of the world community, *while not controlling our outcome*, does provide respected and significant *confirmation* for our own conclusions.”¹⁴⁸ The Court was therefore explicit in not granting normative weight to foreign practices. But at the same time, some commentators have worried that the confirmatory use in *Roper* is frighteningly close to an authoritative usage of aggregate practices. Professor Young, for example, argues that “[i]t is unclear what ‘confirm’ means in this context” and questions whether a conclusion “*not confirmed by foreign practice [would] be insufficient.*”¹⁴⁹ Although he acknowledges reasons why the Court’s confirmatory approach could be taken seriously, Young is concerned that the Court might be more willing to impose its own moral beliefs if other nations concur. In that case, foreign law use becomes authoritative.¹⁵⁰ Thus, even if the Court did not use the aggregation approach in *Roper*, it is still therefore important to determine the promise and pitfalls of aggregation.

Aggregation of foreign law is most frequently defended under “many minds” arguments, which claim that the opinions of many will be better than those of just one.¹⁵¹ But there are many varieties of “many minds” arguments, each of which has different contours and risks. Professor

¹⁴⁶ 543 U.S. 551(2005).

¹⁴⁷ *Id.* at 1192.

¹⁴⁸ *Id.* at 1200 (emphasis added).

¹⁴⁹ Young, *supra* note 3, at 154.

¹⁵⁰ *Id.* at 155 - 56.

¹⁵¹ See, e.g., Posner & Sunstein, *supra* note -- (justifying the citation of foreign law as potentially providing accurate information under the Condorcet Jury Theorem).

Vermeule has recently outlined four types of “many minds” arguments: the information aggregation approach, the evolutionary approach, arguments from tradition, and arguments about deliberation.¹⁵² The information aggregation approach is most closely associated with the Condorcet Jury Theorem. The theorem posits that if each person has a greater than 50% likelihood of being correct as to choosing between two alternatives, the greater number of people, the more likely a majority vote of the people will result in the correct answer. The information aggregation approach requires first that individuals are competent (that is, more likely than not of getting the correct answer and as a result, better than random) and second that their guesses are statistically independent such that any biases are uncorrelated.¹⁵³ It remains unclear whether independence is compromised by deliberation, social background, training, or deference to opinion leaders, but if those factors do undermine independence of opinion, then the aggregation may not result in more accurate collective decisions.¹⁵⁴ Crowds would thus not have the wisdom they are so often credited with having.

The evolutionary approach seeks to explain the development and maintenance of a specific practice or a general system over a period of time. In evolution, mutations come about randomly, but the survival of the mutant gene is based on its fitness. Similarly, regardless of how a legal practice comes into being, over time those practices or systems that are more fit will continue, and the practices or systems will tend towards efficacy.¹⁵⁵ Vermeule’s third species of “many minds” arguments is arguments from tradition, which assert that tradition embodies the collective wisdom of the past.¹⁵⁶ Arguments from tradition are problematic because of the difference between individuals and generations. Although an old woman might have greater

¹⁵² See Adrian Vermeule, *Many Minds Arguments in Legal Theory*, forthcoming, J. Legal Analysis (2009).

¹⁵³ *Id.* at 3 – 4.

¹⁵⁴ *Id.* at 4 – 5.

¹⁵⁵ *Id.* at 7 – 8.

¹⁵⁶ *Id.* at 12.

wisdom from her considerable experience, later generations actually have more information, perspective, and thus wisdom than those that came before. New generations have the benefit of seeing how the plans and experiments of prior generations turned out.¹⁵⁷ The final approach, arguments about deliberation, asserts that through communication and discussion, groups can come to better decisions.¹⁵⁸ Deliberation, however, can often lead to errors, extremism, or entrenched disagreement.¹⁵⁹

The aggregation mode of foreign law usage parallels Vermeule's information aggregation justification for "many minds" arguments. Courts around the world confront similar questions. If we assume that each high court has a greater than 50% chance of reaching the right decision, then aggregating the use of foreign law provides helpful information that tends towards accuracy. But there is an important caveat. Under Vermeule's typology, aggregation theories are synchronic – they explain a position at a certain time.¹⁶⁰ In contrast, the decisions of foreign courts take place over a long period of time, with each court aware of, and potentially influenced by, other courts. Such influence is likely to undermine the Condorcet Jury Theorem's requirement of statistical independence and uncorrelated biases among participants.

The threat that an earlier decision may have on another's later decision is a problem of cascades. Cascades come in two varieties: informational and reputational.¹⁶¹ Informational cascades exist when later actors follow the decisions of earlier actors not because they are persuaded by their reasons but because they overweight the earlier decisions or merely follow the crowd. Reputational cascades occur when later actors follow the decisions of earlier actors,

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 14 – 15.

¹⁵⁹ *Id.* at 16.

¹⁶⁰ Vermeule makes this point with respect to invisible hand approaches, but the distinction is significant for intentional approaches as well. Intentional aggregation approaches rely upon statistical independence and uncorrelated biases. But the passage of time may make these preconditions less likely to manifest.

¹⁶¹ See Posner & Sunstein, *supra* note --, at 161.

perhaps even against their own opinions, because they want to maintain a certain reputation. To see how a cascade works, compare the situation of ten countries that have adopted a system of authoritative borrowing and thus all interpret a constitutional value following the parent country's decisions with the situation of ten countries that all adopt the constitutional value of one country through persuasive reasoning. Although it appears in the first case that all ten countries have affirmed a certain value, in reality, one country has made a principled argument for a rule and ten have merely gone along with it. It would be misleading, and potentially fallacious, to grant added weight through aggregation to those decisions. There is no independence in their judgments. In the second case, however, each of the ten countries has independently verified the rule. Thus, the aggregation of the eleven countries' judgments may have some greater normative weight.

To guard against the problem of cascades, courts would need to engage in a meta-analysis of foreign law usage within each of the countries whose practice is being aggregated. The court aggregating foreign practices would need to know how each individual court used foreign law in its decision-making process. If a country only cites foreign law as persuasive reasoning, for example, then its preferences could likely be aggregated as not suffering from informational cascades. If the country used authoritative borrowing, however, its decisions would be of questionable use because they would likely violate the independence condition needed to make aggregation successful. Importantly, correcting for reputational cascades might be impossible, as it is unlikely that courts will declare that the primary reason for their decision is not principle but rather desire to be accepted or to maintain a certain reputation in the world community.

A second threat to successfully aggregating decisions is the denominator problem.¹⁶² When aggregating foreign decisions, courts will distinguish between the number of courts that have adopted the rule in question and the total number of courts considered. If the ratio is high, the deciding court can refer to widespread opinions. If the ratio is low, the court will know that the rule is limited to a few outliers. The problem is that judges may be selective or haphazard in choosing which nations constitute the denominator¹⁶³ and thus skew the aggregation. Still, determining which countries to use in the aggregation process is not impossible. Professors Eric Posner and Cass Sunstein suggest three conditions for including a foreign nation's sources: the foreign source must reflect private information (information that the U.S. court could get more easily from the foreign court than from other sources), the foreign source must address a similar problem, and the foreign state must reflect an independent judgment.¹⁶⁴ Because this approach is tailored to the particular case at hand, it might itself create some risk of "cherry picking" foreign nations whose practices align with a certain outcome. It may also require considerable knowledge of foreign systems, a problem discussed extensively above. It is worth noting that the Court itself has used different baselines for evaluating decisions – including the "English-speaking world"¹⁶⁵ and "civilized countries."¹⁶⁶ However, Posner and Sunstein's narrow approach will likely be better than these blanket categories or a category such as liberal democracies. That rule would be substantially overinclusive, requiring consideration of foreign practices when the country's context might be so different to render a comparison unhelpful, or

¹⁶² See generally Young, *supra* note 3.

¹⁶³ See Koh, *supra* note 3, at 56; Alford, *supra* note 3, at 64, 67; Ramsey, *supra* note 3, at 73.

¹⁶⁴ See Posner & Sunstein, *supra* note --, at 144 – 45.

¹⁶⁵ See, e.g., *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting); see also *Adamson v. California*, 332 U.S. 46, 67 – 68 (1947); *Rochin v. California*, 342 U.S. 165, 169 (1952).

¹⁶⁶ See, e.g., *The Selective Draft Cases*, 245 U.S. 366 (1918).

worse, misleading. And such a rule would be substantially underinclusive, rejecting comparisons in non-democracies even though a non-democracy might have a helpfully similar provision.¹⁶⁷

Aggregation faces the third problem of raising all the accuracy-based challenges that faced the persuasive reasoning approach – the complexity of foreign legal systems, the context in terms of text, values, structure, and politics, and the challenges of comparative education for lawyers. In the case of aggregation, each of these challenges is multiplied over the number of nations whose laws are being aggregated. The requirement of careful analysis is thus considerably harder to meet in cases of aggregation.

Finally, aggregation raises serious questions regarding democracy and the expressive values of the nation. To be sure, judges can choose when to use aggregation, thus providing some accountability to their usage.¹⁶⁸ But at the same time, aggregation provides authoritative influence on the decision at hand. It takes the fact of many nations having a rule as itself providing a reason for deciding in line with that rule – absent the justifications given in the particular jurisdictions. In cases when the expression of national values is at stake, such a policy would give weight to contrary foreign opinions even though they conflict with longstanding domestic traditions or with national opinion.

Even more concerning, although “foreign practice is not the *only* reason” that is considered,¹⁶⁹ it may nonetheless become the *determinative* factor. Should foreign sources be able to play this role?¹⁷⁰ To be sure, the answer to this question will depend on the theory of

¹⁶⁷ See *id.* at 159. Indeed, as Posner and Sunstein note, the fact of a non-democracy supporting certain norms might actually grant added weight to that norm than if a liberal democracy supported the norm. *Id.*

¹⁶⁸ See Tushnet, *Knowing Less*, *supra* note 3, at 1286.

¹⁶⁹ Young, *supra* note 3, at 156.

¹⁷⁰ This phenomenon occurs elsewhere in the law. The most obvious example is in the affirmative action context, in which the use of race is allowed as one of many factors, but not the only factor, in high education admissions. In that case too, it may be that race is the factor that tips the balance. Is race then not decisive for admission? To some extent, the question of determinativeness is related to the question of authority and persuasiveness discussed under

constitutional interpretation to which one subscribes and on the nature of the constitutional provision at issue. Even those who believe in originalism will consider foreign law, regardless of whether it is determinative, if foreign understandings are necessary to determining the constitutional provision as it was understood at the time of ratification. In *Boumediene v. Bush*,¹⁷¹ for example, the Court held that prisoners at Guantanamo Bay, Cuba, had a right to habeas corpus and that the Military Commissions Act was an unconstitutional suspension of that right. In dissent, Justice Scalia stated that even excluding Supreme Court precedent that he believed supported his position, he would have affirmed the Court of Appeals given the history and text of the Suspension Clause. To support his understanding of the Clause, he cited foreign law – including cases and practices of British Courts.

Still, in order to determine how concerned we should be about the determinativeness concern, it may be helpful to parse carefully the situations in which the determinativeness concern arises. Democratic and expressive values are only implicated when the aggregation of foreign decisions is granted normative weight *and* when aggregation results in a determinative outcome.¹⁷² In only that set of cases, the opinions of the world may potentially overthrow the opinions of the domestic constituency.

These situations can be broken down into four cases, as a function of whether domestic and foreign law are each determinate or indeterminate and whether they concur or conflict with each other. The first type of question is a case in which domestic law is determinative and foreign law concurs. In those cases, the use of foreign law is merely confirmatory and serves no authoritative function. The domestic law would have yielded the same results, so democratic

mode 9, authoritative borrowing. Even if an authority is merely persuasive, not authoritative, it could still be the factor that tips the balance – the determinative factor.

¹⁷¹ 553 U.S. __ (2008) (Scalia, J., dissenting).

¹⁷² Of course, this does not only apply to aggregations of foreign law, but any use of foreign law with normative weight.

concerns are limited to broader issues of symbolism in constitutional interpretation. In terms of practical consequences, democracy has not faltered. The second type of case is one in which domestic law is indeterminate and foreign law is indeterminate. The use of foreign law is irrelevant here too from the perspective of practical consequences because it does not change the decision. The ultimate decision will have to be made on some ground. It might be arbitrary and even overextend the judicial role – but the use of foreign law is not problematic on democracy-grounds because it does not lead to any determination, and is thus not authoritative. Deference to political branches or delay might be a better solution for courts in the face of complete indeterminacy, but again, the foreign law issue is not the central one.

The third type of case arises when the domestic law is determinative and the foreign law conflicts. Presumably, the domestic law should trump the foreign law. To argue otherwise would undermine democracy. But as Professor Rubinfeld has shown, for some subject areas, people may believe the foreign law should trump national law.¹⁷³ That argument relies upon the idea that certain values are universal and not subject to democratic decisions. In essence, this is the countermajoritarian virtue of courts – they can protect or aspire to entrench fundamental rights from majorities that infringe upon them. Whether foreign law should be used in these cases depends, then, on whether we believe that some values are universal, and if so, which values those are. It is most likely that political issues such as separation of powers or unique structural regimes such as federalism would be excluded. Those issues are more likely to be grounded in the particulars of a national system and are thus less general and universal. Questions of fundamental human rights – life and death, slavery, torture, and the like – are better candidates for cases in which foreign law could trump domestic law. Ultimately, the question comes down to which rights are included – and that question is certainly contestable, as is the meaning of

¹⁷³ Rubinfeld, *supra* note 3, at 1975 – 76.

those human rights. Still, the scope of the contest over these meanings is relatively limited. If the fundamental rights that a court seeks to impose are described in a treaty or convention or are a matter of customary international law, in those cases, the question is merely whether those rights are incorporated by domestic law. The situation in which this case is potentially troubling, then, is limited to the much narrower situation of incorporating rights that are not enshrined in international law.

The universal values argument only presents one side of the coin. There are actually two types of reasons why we might follow aggregated norms.¹⁷⁴ *Intrinsic* reasons are reasons for following the aggregated norm that are derived from the merits of the norm itself. In a sense, this is a form of aggregating persuasive reasoning. The norm itself is a desirable one.¹⁷⁵ *Extrinsic* reasons for following the aggregated norm are reasons that are derived from the very fact that the norm is widely held. Merely being part of the community of nations that shares the norm might be reason itself for adopting the norm – it might provide access to those nations, legitimacy, goodwill, or standing. Each of these reasons is independent of the merits of the norm itself.¹⁷⁶ A court might even disagree with the norm, but it believes that the link to a broader network of nations sharing that norm has greater value than its contrary opinion. The ultimate and debatable question here is whether courts or more democratic bodies should make the decision to adhere to international norms for extrinsic reasons.

The final type of case is one in which domestic law is indeterminate and foreign law is clear. This is probably the hardest category of case because it raises serious concerns. First, the foreign law would determine the outcome of a particular case, which seems to undermine democratic values of self-governance. At the same time, however, the values at stake might be

¹⁷⁴ See David Singh Grewal, *Network Power* 32 (2008).

¹⁷⁵ *Id.*

¹⁷⁶ See *id.*

preconstitutional or predemocratic (in the case of Ely’s process values) or they might be basic human rights that all persons should be entitled to, regardless of place – they might implicate what Justice Kennedy called a “unified concept of what human dignity means.”¹⁷⁷ Moreover, given the indeterminacy on the domestic scene, the fact that other nations have grappled with a similar problem and reached a conclusion provides added information that is valuable for moral and political consideration. Foreign law could provide important additional information that helps a court get the “right” answer in cases of indeterminacy. Still, methodologically, issues of selectivity, complexity of context, and cascading effects will make the foreign law enterprise difficult. An alternative approach in such cases would be to reject foreign law and require judges to defer to political branches or make no decision. Justice O’Connor appears to have taken this approach in *Roper*, preferring the “Nation’s legislatures” to the judgment of the Court.¹⁷⁸ Notably, Justice O’Connor noted that she had no general problem with the use of foreign law.¹⁷⁹ The downside to this approach is that judicial omission might be equivalent to judicial action, and thus have real consequences.

The significance of this breakdown is that in practical consequentialist terms, the use of foreign law via aggregation is seriously concerning to democratic values only in situations when domestic law is unclear and foreign law is clear. Although it is unclear how frequently these situations arise compared to other cases in which foreign law is used, further debate on the use of aggregation should account focus on these cases in particular, or on the underlying question of constitutional interpretation generally.

¹⁷⁷ Toobin, *supra* note 3.

¹⁷⁸ *Roper*, 543 U.S. at 588 (O’Connor, J., dissenting).

¹⁷⁹ *Id.* at 1215 – 16.

Mode 10: No Usage. The final mode of foreign law use is not using foreign law in constitutional interpretation. This approach would certainly not offend democratic values of self-governance, because decisions made would be limited to domestic materials that would have a place in the constitutional structure. Still, and perhaps counterintuitively, not citing foreign law is not a clear solution to the problem of foreign law usage. If some rights are so important to be preconstitutional, then perhaps foreign law should be included to identify those rights and bring their normative influence to bear, despite the democratic concerns. This is the purpose of a countermajoritarian court in the political system.¹⁸⁰ As importantly, not using foreign law might result in absurd and inaccurate results. As the sections describing mode 5, factual propositions, and mode 7, direct application, showed, there are many instances when foreign law *must* or strongly should be used in constitutional interpretation. A blanket ban on the citation and discussion of foreign and international materials would not lead to sound decision making in those cases. Important facts, textual provision, and other interpretive materials may be needed in the process of domestic constitutional interpretation.

III. Conclusion

This breakdown of the various uses of foreign law presents some compelling conclusions. First, the vast majority of ways in which foreign law can be used are not necessarily problematic, meaning that any broad, zero-sum debate over foreign law use is largely overblown. The first seven of the ten uses of foreign law are relatively unproblematic, challenged significantly by arguments neither from democratic values nor from methodology and accuracy. Importantly, a blanket position of *not* citing to foreign law *is* problematic because some uses of foreign law are

¹⁸⁰ See Bickel, *supra* note --.

necessary. Debates on the use of foreign law should be more precisely focused on the manner in which foreign law is used – blanket pronouncements about “fads” or the “irrelevance” of the citizenry might be good rhetoric, but they do not find much analytic purchase unless limited to a narrow mode of foreign law usage.

At the same time, the foreign law debate cannot be clearly resolved by an intuitive distinction such as that between authoritativeness and persuasiveness. Some authoritative uses of foreign law are not only permissible but also necessary. When domestic law incorporates foreign or international law and when constitutions are genetically or genealogically related, sound constitutional interpretation might require the use of foreign law in an authoritative way.

Third, it is important to have great clarity as to the parameters of foreign law use. In this analysis of foreign law and, in particular, of aggregation, I have focused on the consequences of decisions. But the symbolic statement made by the citation of foreign law may itself have significance. As shown in the discussion on authoritative borrowing, if foreign law is cited non-authoritatively, that practice might make the citation of foreign law itself broadly acceptable, and thus create a migration toward the authoritativeness of foreign law use. The solution to such slippery slope problems is to have clear rules to stop slippage or to have clear reasons for when, how, and why foreign law is used, so judges in the future will know how to interpret new situations and draw reasonable lines.

Finally, the most complex mode of foreign law use, aggregation, raises important themes and issues in constitutional interpretation. Whether aggregation is acceptable may depend on one’s view of the countermajoritarian role of courts in the political system and the extent to which universal or community values exist and can or should be protected by courts. Moreover, the practice of aggregation raises the methodological bar for engaging comparative sources, not

only because it requires analyzing many countries' decisions but also because it requires assessing how those countries use foreign law. Failing to engage in that meta-analysis may result in overcounting and distorting the aggregation. Lastly, the nature of the provision itself being interpreted seems crucial to any analysis. If a provision is narrowly drafted or has a well-documented set of domestic constitutional doctrines to interpret situations, it may be more likely to provide decisive answers to constitutional problems, thus creating less room for the authoritative and determinative versions of aggregation that are the most problematic. On the other hand, if a provision is broad, involves factors like "unusual" that change based on the time and place, or does not have a detailed doctrinal foundation, constitutional interpretation is less likely to be determinative solely from domestic materials. As a result, the challenges to aggregation may be more significant even as the added value of foreign law is greater.

The use of foreign law in constitutional interpretation has had many critics and defenders. But the debate over foreign law could be furthered if scholars focused more narrowly on particular ways in which foreign law is used. Some uses seem largely innocuous, while others implicate serious democratic and methodological concerns. A more carefully tailored debate might help guide courts to develop a set of doctrines on when and how foreign law can be used.