Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority

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I. INTRODUCTION

At the end of the 2002-2003 term, in Lawrence v. Texas,¹ the U.S. Supreme Court struck down a state anti-sodomy statute as an unconstitutional violation of due process. In reaching its decision, the Court relied in part on foreign sources of authority, directly citing to decisions of the European Court of Human Rights and to the Wolfenden Report, a legislative committee report to the British Parliament. The Court also indirectly cited foreign courts of several nations by incorporating portions of the amicus brief submitted by Amnesty International, which cited such authorities.

The Court’s citation of foreign authority sparked some vigorous criticism. Dissenting in the Lawrence opinion, Justice Scalia noted that the “Court’s discussion of...foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) [was] meaningless dicta,” but nevertheless, “[d]angerous dicta...since ‘[the Supreme] Court...should not impose foreign moods, fads, or fashions on Americans.’”² Moreover, Congressman Feeney (R-Florida) introduced in the U.S. House of Representatives an initiative in which Congress “directs” the courts not to call upon foreign materials in interpreting provisions of domestic documents because such a practice will inevitably contradict the “original meaning of the laws of the United States.”³ Those attacking Lawrence’s use of foreign sources of

¹. 539 U.S. 558 (2003).
². Id. at 598 (Scalia, J., dissenting) (quoting Foster v. Florida, 537 U.S. 990 (2002) (Thomas, J., concurring in denial of certiorari)).
³. The text of the resolution is as follows:

 Resolved, That it is the sense of the House of Representatives that judicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements are incorporated into the
persuasive authority charged that this was "new stuff," an "alarming new trend" which has resulted in a "shift of tectonic plates." Critics also charged that an unchecked comparative practice is "subversive of the whole concept of sovereignty," would "undermine respect for law in this country," and would ensure that "the foundation of liberty turns to sand."

This Article contends that these criticisms of comparative analysis are incorrect. First, comparative analysis is hardly a "new" phenomenon; it has been debated and utilized both in this country and abroad for centuries, if not millennia. Furthermore, the claim that the sovereignty of the United States is somehow compromised by the use of foreign authorities is insupportable, when placed under scrutiny, for the simple fact that domestic judges, guided by their domestic training, will always be the decision makers that determine whether to engage in this form of comparative analysis. Nevertheless, critics of comparative analysis do raise one valid concern. In the words of Congressman Feeney: "[H]ow is a judge, if [comparative analysis] is an appropriate process, to discern which of the countries is appropriate to cite and which of the countries is not?"


7. See Legislative Hearing on H.R. Res. 568, supra note 4, at 72 (testimony of Prof. Jeremy Rabkin, Cornell Univ.).

8. Id. at 31 (Prepared Statement of Prof. Jeremy Rabkin, Cornell Univ.).

9. Hearing Statement, supra note 5.


This is indeed a very difficult question. The foreign sources cited by the Supreme Court in *Lawrence*, either directly or indirectly, were generally those of traditional democratic allies, such as the United Kingdom or Canada. What about China? What about Saudi Arabia? Do these countries count? The question of which countries count has profound implications. First, if the Court selectively relies on the pronouncements of some foreign countries rather than others, how does it respond to the charge that only countries that support the Court’s conclusions are cited? In this way, the use of foreign authorities is subject to the charge that it is self-serving and biased. Second, what justification does the Court have for omitting certain foreign authorities, when it remains reluctant to say that the practices of some countries are more meaningful than others?

This Article defends the domestic use of foreign authorities, and responds to the critics’ concerns over the process by which the Court determines which countries count. Proponents of the use of foreign authority have generally skirted around this question; to date, there has been a dearth of scholarship and attention devoted to the selection of foreign persuasive authority for domestic application. The debate on foreign authorities has instead centered largely on whether the use of foreign authority is justifiable.\(^\text{12}\) Unless we answer the question of which countries count, however, we will never be able to develop a coherent and practicable approach to the use of foreign persuasive authority.

By tracing the history of comparative analysis in the United States and describing its normative impulse, this Article will illustrate that, even though the justifications for selecting certain nations’ authorities rather than others have been sometimes clumsy and uncouth, an underlying coherent selectivity process has been at work. This is confirmed by the *Lawrence* opinion where, although the majority could have been more explicit in articulating the motivation behind its selection of the foreign authorities to which it referred, it nevertheless conducted such analysis according to proper parameters. The result was a selection of foreign materials appropriate to the topic and circumstances of the case.

The answer to the question of which countries count can only begin

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by dispelling the notion that comparative analysis must be hampered by
an artificial axiom perpetrated by a resilient, but dying, brand of
international law that looks upon all nations as juridically equal. In
differentiating between the various nations of the world, this Article
looks both to social sciences, and to a distinction between "liberal"
versus "non-liberal" states already put forward by various members of
the academy over the last twenty years.\textsuperscript{13} The Article then presents three
parameters by which courts should be guided in locating foreign
authority. The first of these parameters deals with the democratic
quotient of the institutional body which American courts are proposing
to cite. The second parameter concerns the societal affinities that the
nation which originated the proposed persuasive authority shares with
the United States. The third parameter is purely practical, and constructs
a playing field for comparative analysis that will vary on a case-by-case
basis according to the context of each case. An explicit reference to
these three selection criteria would strengthen the cohesion of any
judicial opinion in which comparative analysis is employed, and
contribute to a more intellectually grounded product.

To summarize, Part II of this Article explores how courts in the
United States have been dealing with this issue over the years. Part III
describes various normative justifications for the whole comparative
process. Part IV provides a framework for locating the appropriate
sources of foreign persuasive authority. Finally, Part V builds on the
parameters illustrated in Part IV and applies them to the comparative
analysis used in \textit{Lawrence}.

\section{Past Use of Foreign Sources in United States Courts}

United States courts have, from the founding of the nation to the
present day, referenced foreign legal sources in a variety of different
contexts. Although such usage has not been frequent, it has occurred
with sufficient regularity such that examples can be taken from almost
every period of this nation's history. This fact dispels the very premise
(or purported premise) of the Feeney Resolution, which presents as one

\textsuperscript{13} See Michael W. Doyle, \textit{Kant, Liberal Legacies, and Foreign Affairs}, 12 PHIL. 
& PUB. AFF. 205, 206 (1983) (referring to the "separate peace" achieved since WWII between "liberal"
states); \textit{See also} Anne-Marie Burley, \textit{Law Among Liberal States: Liberal Internationalism and the 
states...are defined broadly as states with juridical equality, constitutional protections of
individual rights, representative republican governments, and market economies based on 
private property rights," while "'non-liberal' states, by contrast, are defined as those states lacking these
characteristics.'

of its tenets the notion that the "use of international sources in cases involving purely domestic concerns is alien to the American legal system, historically..."\(^{14}\) In this light, the further assertion, made in the Hearing Statement of the Feeley Resolution, that "[t]he citation of foreign judgments in opinions by American judges is far out of the mainstream,"\(^{15}\) is factually inaccurate.

A brief survey of United States court opinions in which the court references foreign sources, among others, to reach its rulings, reveals certain patterns and methods. The survey undertaken below is not confined to instances of comparative analysis, where foreign materials are referenced to aid in the resolution of "purely" domestic cases,\(^{16}\) but also includes an observation of instances where the courts enter into analyses pertaining to public and private international law. The reasons for the enlargement of this survey to encompass the international law framework are three-fold. First, the process of determining the substantive content of customary international law, one of the main sources of public international law, is inherently comparative in nature in that it requires courts to canvass a variety of materials, including some sources which originate abroad.\(^{17}\) Second, a large number of issues pertaining to private international law (that is, the conflict of laws) require inquiry by courts into the legal process of foreign nations;

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15. Id at 9 (testimony of Rep. Chabot).
16. The term "purely" is referenced in quotations because even matters of constitutional, statutory, or common law interpretation that on their face might appear to address solely domestic issues, possess certain latent qualities that transcend an isolationist "pure" domestic framework in favor of a paradigm that transcends borders. See infra Part III.
17. Primary sources of international law are treaties and customary international law. Customary international law "results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) of the Foreign Relations Law of the United States §102(2) (1987) [hereinafter Restatement (Third) of Foreign Relations]. A legal practice is, or becomes, customary international law if it is common among a sufficient number of states within the framework of international relations, the particular practice is continued and repeated over a long period of time, or countries accept that a particular practice is necessary or consistent with current international law. See id. §102, cmts. b-d; Maarten Bos, A METHODOLOGY OF INTERNATIONAL LAW 58 (1984). Customary international law does not have to be universally followed, and can be regionalized so that it does not apply to some countries but does apply to others. For example, a country can exempt itself from customary international law if it expresses its objection at the formation of a particular custom. Restatement (Third) of Foreign Relations §102, cmts. d-e. This article, while discussing customary international law within the framework of comparative analysis, does not address international law grounded in treaties. This is because when a nation enters into a treaty, there is a presumptive voluntary acquiescence in the abandonment of state insularity, while the premise of comparative analysis, to a large extent, implies the reliance on sources which the referencing nation has had little or no role in crafting.
which is in itself a comparative exercise. Third, the motivations behind adherence to international law and the motivations to engage in comparative analysis, both within and without the ambit of international law, overlap significantly, and are often the same.

When the full range of domestic precedents for reference to foreign sources by U.S. courts is examined, it becomes clear that the recent negative focus on this issue, with the concomitant characterization of the practice as "disturbing," is selective at best, and disingenuous at worst. Moreover, the breadth and depth of the U.S. Supreme Court's foray into this enterprise dispels any notion that "[t]o date, the U.S. Supreme Court has invoked the legal standards of foreign countries in only a handful of cases—that is, cases dealing with the U.S. Constitution." Even confining the survey of comparative analysis to only those instances where the Supreme Court used foreign materials as persuasive authority to interpret a particular provision of the U.S. Constitution, one can find a variety of cases, pertaining to different constitutional provisions, which number significantly above "a handful of cases."

As shall be discussed below, the recent alarm bells raised by certain scholars and Congress alike reached a new crescendo in the aftermath of the Lawrence decision. For many of these critics, a torpedoing of Lawrence on these more esoteric grounds is more convenient, and easier, than a direct criticism of Lawrence on the merits. Certainly, in academic circles, if not in the halls of Congress, standing up for a substantive principle that supports the right of the government to use its police power to arrest adult gay and lesbian Americans on charges that they had consensual sex with each other would seem quite distasteful. In

18. This is the case, for example, with respect to the forum non conveniens doctrine. See, e.g., Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981) (United States forum deemed not convenient with respect to Scotland in a wrongful death action resulting from an airplane crash in Scotland).

19. The selectivity of the criticism seems to stem from the fact that even though the practice of referring to foreign sources for issues involving purely domestic issues is not new, and has been recently employed in instances which did not cause much controversy, it is only when the results of these references produce rulings which irk a certain anti-progressive constituency that an outcry is heard from this very constituency.

20. In the Legislative Hearing on H.R. Res. 568, one commentator described the caselaw referencing foreign sources in matters of constitutional interpretation as "disturbing." See Legislative Hearing on H.R. Res. 568, supra note 4, at 8 (testimony of Rep. Chabot) ("Justice O'Connor's prediction follows an already disturbing line of precedents in which the U.S. Supreme Court in several recent cases has cited decisions by foreign courts and treaties not ratified by this country...").

that light, despite all the caveats offered by the proponents of the Feeney Resolution that they are not attacking the result in Lawrence, the use of comparative analysis as a proxy for vilifying the Lawrence decision is an expedient way of discrediting that opinion. Thus, the use of the term “mischief” to describe the comparative practice is, in reality, a not-so-veiled attempt to use that term to describe the result of Lawrence. In fact, as shown below, the use of comparative materials by United States courts throughout the years, being reasonably consistent and always open to scrutiny, is far from “mischievous.”

A. The Early Years

The Declaration of Independence proclaimed that the newly formed republic would exhibit a “decent respect for the opinions of mankind.” Although this proclamation reveals little detail of how its authors would have viewed the specifics of comparative analysis, it certainly sets the stage for a belief that the Founders were conceptually open to incorporating foreign thought into the establishment and maintenance of the new nation. In other words, if this issue could be clarified by looking at the original intent of the Founders, it seems that the reference to foreign sources would be welcomed, and indeed encouraged.

Combining the novelty of the constitutional republican form of governance that came into existence in the United States in the late eighteenth century, with the practical communication difficulties which existed at that time between the United States and the rest of world, it is easy to see why U.S. courts in the formative years of the nation did not refer to foreign materials as persuasive authority. Other than English common law, from which American common law was a direct descendent, there simply was not much foreign law available to the judges of those early years from which to derive comparative reasoning.

The exception to the norm illustrated in the paragraph above was international law or, as it was referred to at the time, the “law of

22. In the Legislative Hearing on H.R. Res. 568, Lawrence v. Texas is attacked for its use of comparative analysis on a “purely” domestic issue. See Legislative Hearing on H.R. Res. 568, supra note 4, at 8 (testimony of Rep. Chabot) (“Whatever one’s views on [same-sex sodomy], it should be evident that the relevant consensus behind American law is not a world consensus, but rather the consensus of those in the United States on the meaning of the words used in the Constitution and legislation when originally enacted.”).

23. In the Legislative Hearing on H.R. Res. 568, Rep. Chabot describes the Feeney Resolution as necessary for, among other reasons, stopping “the mischief already done by these cases” which use international sources to review issues involving “purely” domestic matters. See id.

In the early stages of U.S. Supreme Court jurisprudence, the law of nations, and abidance by it, became a way for the United States to stake out its presence as a sovereign nation on the international scene. In other words, compliance with the law of nations was an expression of governmental legitimacy to the rest of world. As Chief Justice John Jay noted, "the United States had, by taking a place among the nations of the earth, become amenable to the laws of nations." While revealing the mindset of the early court, such generic pronouncements do not shed much light on the use that the law of nations could have within the law of the United States.

Within a few years, however, a more substantive role emerged for the law of nations. The Supreme Court began to assert that the law of nations served as an advisory backdrop against which U.S. decisions had to be squared and reconciled, whenever possible. Thus, "the laws of the United States ought not, if it be avoidable, ... be construed as to infract the common principles and usages of nations, or the general doctrines of national law." Chief Justice John Marshall reiterated this principle: "an act of Congress ought never to be construed to violate the law of nations if any other possible construction" exists. The element of persuasion represented by the law of nations might be rather passive in these early cases (in that comparative sources were not sought out, but merely invoked as a substantive and normative backdrop), but it is nevertheless apparent that sources of law whose genesis was foreign to the United States could, and did, impact federal statutory construction. Thus, if two interpretations of an act of Congress were plausible, that interpretation which complied with the law of nations would be preferred over that which did not.

The question then arises as to how a court sitting in the United States in the early part of the nineteenth century was to determine the content of the law of nations. The U.S. Supreme Court provided an answer to that question, too. Thus, to determine the content of the law of nations, "the decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority,

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25. The law of nations (the precursor to international law) comprised the "law merchant, maritime law, and the law of conflicts of laws, as well as the law governing the relations between states." Stewart Jay, The Status of the Law of Nations in Early American Law, 42 VAND. L. REV. 819, 821-22 (1989) (footnote omitted).
26. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793); see also Warr v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796) (explaining that "when the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.").
27. Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 43 (1801).
but with respect.” In this statement lies the essence of comparative analysis—a canvassing of sources outside the body of law which would normally provide binding authority, coupled with the recognition that these sources function purely in an advisory role. Thus, from the very early years of the nation, the Supreme Court made itself familiar with comparative methodology and its relevance to the development of U.S. law.

Having announced the theoretical impact of a foreign source of law upon decisions within the United States, and explained how the content of such law was to be determined by U.S. courts, the Supreme Court eventually used these sources as persuasive authority to determine the issues before it. In other words, the law of nations became a comparative source of foreign law, used in particular cases as a source of persuasive authority. Thus, in *Worcester v. Georgia*, Chief Justice John Marshall looked to the law of nations in the Supreme Court’s effort to define the status of Indian tribes under the U.S. Constitution. Similarly, in *Holmes v. Jennison*, Chief Justice Roger Taney looked to foreign law to decide whether the U.S. Constitution allowed a state governor to extradite a defendant to Canada. In both of these cases, a foreign source of law was used to determine an issue which appeared on its face to be purely (or mostly, as in the case of *Holmes*) domestic.

Within fifty years of the founding of the nation, the U.S. Supreme Court had embarked on an interpretative enterprise that allowed for the use of comparative law derived from foreign sources. The location for such sources was primarily the law of nations, later renamed international law, but soon the U.S. Supreme Court (and lower courts) would utilize a more diverse array of potential sources of persuasive authority.

**B. The Use of Foreign Sources by U.S. Courts in the Twentieth and Twenty-First Centuries**

Throughout the twentieth century, the Supreme Court expanded its horizons and sought out foreign comparative materials, beyond the law of nations, as persuasive authority. Usually, when reference was made to foreign authorities, it would be in the “positive” vein, meaning that the reference would serve as an exhortation to follow the foreign example. Less frequent, but nevertheless present, were those references

30. 31 U.S. 515, 560-61 (1832).
emphasizing the "negative" aspect of foreign law and the reasons why U.S. courts should not follow it. It is also possible to categorize the Supreme Court's foray into comparative analysis as pertaining either to interpretations of the U.S. Constitution (the majority), or not (the minority).

What is more difficult to extrapolate is whether the Supreme Court has acquired a methodology for determining when references to foreign authorities are appropriate. After examining some of the cases in which such references are made, giving greater weight to more recent cases, it is possible to reach preliminary findings that indeed point to a certain type of case that the Supreme Court deems worthy to provide insight from outside the country. Boiled down to their essential characteristics, those cases where the Supreme Court seems most inclined to venture outside U.S. borders for guidance deal with fundamental human rights, such as the death penalty or euthanasia. From a legalistic angle, these types of case invoke primarily the Eighth Amendment’s prohibition against cruel and unusual punishment, or the Fifth and Fourteenth Amendments’ due process clauses. As will be shown below, however, it is the specific right being protected, rather than the textual basis for its protection, that motivates the Court to invoke foreign materials. Rarely is there a textual correlation between the referenced foreign opinion and the text interpreted by the Court. Rather, it is the humanistic value of the right, or its importance to the Court, which appears to set the analytic tone and the tools with which the issue is tackled and resolved.

It is equally difficult to establish whether the Supreme Court, having determined that comparative references are helpful to shed light on a particular issue, then employs a system for locating the appropriate sources (or the appropriate countries) where it would find persuasive authority. Aside from superficial explanations, no such system appears to exist on the surface. On a deeper level, however, it is clear that the Supreme Court is engaging in certain forum selection and discrimination.

1. Federal Statutes through the Lens of Comparative Analysis

A small minority of cases where the Supreme Court references foreign sources as an interpretative aid to resolve the issue before it deal with interpretations of federal statutes. These references are both scant and generally incidental to the holding of the Court. For example, in ICC v. Baltimore and Ohio R.R. Co., 32 the Supreme Court interpreted a

32. 145 U.S. 263, 282-84 (1892).
federal statute, in part, by relying on a similar, previously-enacted English counterpart. No real premise or explanation for the foreign reference accompanied its use in the opinion. Because of the relative non-use of foreign comparative materials as a tool for the interpretation of federal statutes, the statistical sample is too small to derive any system the Supreme Court may have used under these circumstances.

2. Establishing the Link between Comparative Law and the U.S. Constitution

In matters pertaining to the interpretation of the U.S. Constitution, the Supreme Court has been far less parsimonious. Particularly in matters concerning fundamental human rights, the Supreme Court has been inclined to look abroad to determine the “state of the world” vis-à-vis the particular human right being examined. One of the earliest examples of this information gathering occurred in *Fong Yue Ting v. United States*. In *Fong Yue Ting*, the Supreme Court was examining the constitutionality of a federal statute that allowed for the expulsion of Chinese laborers. As part of its analysis, the Court majority examined the practices of “every sovereign and independent nation” to conclude that such expulsions were within the right possessed by the state. The dissenters also used comparative analysis in their arguments, invoking foreign countries as a model which the United States should not follow due to such countries’ “despotic” or “barbaric” roots. Encapsulated within *Fong Yue Ting* are, therefore, examples of both “positive” and “negative” reinforcement derived from foreign materials.

As evidenced by the Court’s canvassing technique, there was no true selection process applied in this case. The method of choosing foreign authority appeared instead to be a simple matter of data collection, probably motivated by the international nature of the statute at issue. Presumably for the majority, the more countries resorting to

33. Another case of the same period offers a similar context. See Muller v. Oregon, 208 U.S. 412, 419-20 (1907) (adopting as persuasive authority, in an opinion authored by Justice Brewer, the various foreign statutes initially presented by the soon-to-be Justice Louis Brandeis in the famous “Brandeis Brief”).
34. 149 U.S. 698 (1893).
35. Id. at 711.
36. Id. at 737 (Brewer, J., dissenting) (characterizing countries allowing the expulsion practice as “despotic”); Id. at 757 (Field, J., dissenting) (using the term “barbarous” in an analogous context).
37. In its canvassing technique, the Supreme Court takes an undifferentiated look at the practices of foreign nations to create a catalogue upon which it draws when deciding the issue at hand.
this kind of expulsion, the more in line the United States would be if it, too, resorted to such means. Rather than providing a final resolution to the issue at hand, however, the majority’s comparative inquiry merely served as a supporting consideration. That is, the practices of “every sovereign and independent nation” bolstered the Court’s own conclusion that the federal statute was well within the international mainstream.

On the other hand, the dissenters used the comparative analysis adopted by the majority as a sort of “Snow White mirror.” Thus, the dissenters, when looking into the looking glass of foreign countries, saw an ugly image reflected therein. As a result, they asked the rhetorical question whether the United States really wanted to look like the wicked queen. In other words, the content of the dissenters’ exhortation is primarily normative, laying claim to higher natural values to which, in their opinion, the United States should have aspired.38

As litigation pertaining to civil rights increased in the latter half of the twentieth century in the United States, so did the Supreme Court’s reference to foreign materials as a source of persuasive authority. The correlation between a higher incidence of civil (human) rights issues that the Supreme Court tackled in this period and the higher occurrence of comparative analysis within these cases is not accidental. There is an element to civil rights issues that, as an intrinsic matter, transcends the notion of borders, and reflects directly on the society dealing with such issues. And it is in those instances—when issues approach the core of our collective consciousness—that the Supreme Court has deemed it appropriate to consult with other nations as to which road, from a normative perspective, should be taken. In other words, it is our humanity above all else that binds us to other nations, and consequently, other legal systems.

One of the pioneers in the search for a common humanity derived from the experience of other legal systems in matters of civil rights was Justice Frankfurter. From the wealth of opinions he authored, be they majority opinions, concurrences, or dissents, it is apparent that Justice Frankfurter felt that he could add legitimacy to his arguments by referencing the practices of other nations. To Justice Frankfurter, on this

38. This type of counter-use of comparative materials is quite unusual but not unique to Fong Yue Ting. See, e.g., Flora v. United States, 362 U.S. 145, 176-77 (1960) (upholding a domestic statute mandating full payment of taxes before a taxpayer could file suit for a refund, and, in doing so, admonishing that a contrary conclusion would be inadvisable because holding otherwise could, among other things, “cause the chaotic tax collection situations which exist in some European countries.”).
issue, safety came in numbers—thus, the greater the number of foreign nations that subscribed to his resolution of cases, the greater the likelihood that his resolution was correct, and the greater the likelihood that other nations’ practices would appear somewhere in his opinions.

The extent to which Justice Frankfurter resorted to foreign sources as persuasive authority varied from opinion to opinion. On one end of the spectrum are Justice Frankfurter’s detailed analyses of foreign sources; on the other end stand passing references which seem more a figure of speech than a product of research. Regardless, the fact that Justice Frankfurter would use foreign materials, even figuratively, to bolster his arguments reveals the relevance that the Justice attributed to the opinions of foreign judicial bodies. An example of the more detailed version of Justice Frankfurter’s comparative references can be found in Culombe v. Connecticut.39 In Culombe, Justice Frankfurter engages in a substantial discussion of foreign materials to illustrate the “unanimity” on the subject that personal liberty includes a guarantee that little time should pass between arrest and appearance before a court.40 As such, Culombe represents Justice Frankfurter’s typical comparative analysis, in that a wider range of materials is used to add legitimacy to his opinion. An example of Justice Frankfurter’s comparative references used as a “figure of speech” occurs in Rochin v. California,41 where, to add credence to his decision, Justice Frankfurter refers to “notions of justice of English-speaking peoples.”42

Following Justice Frankfurter’s lead, other justices on the Supreme Court proceeded, on occasion, to reference foreign comparative materials in cases dealing with civil rights issues. In fact, some of the most noted civil rights cases of the 1960s and 1970s contain less-noted portions where comparative references occur. In Miranda v. Arizona,43 for example, the Court examined the protection given to citizens in England, Scotland, and India, pertaining to custodial interrogation, and then noted that the United States should:

40. Id. at 583-84, n.25.
41. 342 U.S. 165 (1952).
[G]ive at least as much protection to these rights as is given in [these] jurisdictions...[given the fact that] [w]e deal in our country with rights grounded in a specific requirement of the Fifth Amendment of the Constitution, whereas other jurisdictions arrived at their conclusions on the basis of principles of justice not so specifically defined.44

The majority opinion in Miranda thus uses these foreign materials as a floor because these nations awarded criminal defendants certain protections during custodial interrogation, even without the specific directives of a constitutional clause. The foreign materials serve as a springboard from which the United States will depart upward given the superior protections the Court assumed were contained within the U.S. Constitution in light of its Fifth and Fourteenth Amendment due process protections.45

Both Trop v. Dulles46 and Roe v. Wade47 also contain comparative analysis in the majority opinions. In Trop, the Supreme Court looked at a great number of foreign laws (eighty-four, to be precise) to bolster its argument that stripping a deserter of his nationality was unconstitutional in the United States. Such a practice, the Court noted, was “universally decried by civilized people [and the] international community of democracies.”48 In Roe, Justice Blackmun cited in the majority opinion to Greek, Roman, Persian and English laws to show that abortion before quickening was not an indictable offense.49

In contrast to the use of comparative sources employed by the Supreme Court in Roe, Trop approaches foreign sources with a more discriminating eye. For the Trop majority, a qualification that only the practices of “civilized...democracies” were relevant to its comparative analysis was necessary, presumably, so that the practices of “uncivilized autocracies” could be expunged from the analysis. In Roe, on the other hand, no such discrimination occurred, as the majority harkened back to

44. Id. at 489-90.
45. In the next decade, Justice Rehnquist would lament the further protections offered by the United States to criminal defendants as compared to lesser protections offered by other countries. See California v. Minjares, 443 U.S. 916, 919 (1979) (Rehnquist, J., dissenting). Other cases in which the Supreme Court employed comparative analysis are: Enmund v. Florida, 458 U.S. 722, 796 n.22 (1982) (noting the absence, severe limitation, or abolishment of the doctrine of felony murder in England, Canada, India, and a “number of other Commonwealth countries”); and Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) (noting that of sixty major nations surveyed in 1965, only three retained the death penalty for rape).
47. 410 U.S. 113 (1973).
48. Trop, 356 U.S. at 102-03.
49. Roe, 410 U.S. at 129-33.
civilizations long defunct in making its comparisons. This elasticity of the size of the universe of foreign materials is fundamental to the exercise of comparative analysis even though the case-by-case explanations of the reasons behind the choice of a particular universe are generally scant or absent. Although this aspect will be discussed in detail in Part IV, suffice it to say at this juncture that, despite the absence of an explicit explanation for its selection of particular foreign sources, the Supreme Court has relied upon history, doctrine, culture, and, above all, social structure in its comparative analyses.

In sum, beginning in the middle part of the twentieth century, the Supreme Court amplified its resources by making references to foreign materials—particularly when deciding cases pertaining to human rights issues, whose universal importance transcends national borders. These references often appeared in opinions as asides, or as part of a greater normative discussion, and were seldom, if ever, accompanied by a challenge to their very use. This last aspect would change significantly in the latter part of last century.

3. The Last Twenty Years

One commentator recently conducted research to locate references to foreign materials in opinions by the U.S. Supreme Court in the last ten years. She concluded that, aside from old English cases cited for historical reasons, very few references to foreign sources existed. In those rare instances, moreover, the foreign materials cited “appeared as nothing more than polite reference.” Similarly, another commentator has stated that the use of foreign materials in U.S. courts is such that it is “not central to any conclusion reached, and that the resulting interpretation of the Constitution could stand independently of foreign support.” Although recent U.S. Supreme Court decisions that contain comparative analysis are, in keeping with historical trends, not numerous, characterizing them “as nothing more than polite” or “not central to any conclusion reached” slightly misses the mark. In fact, even though rare, when they appear, comparative references are integrated within the broader analyses being executed. Moreover, these references contain wider implications pertaining to how the jurisprudence of particular doctrines being interpreted via the use of

51. Id.
foreign precedent is to be viewed by courts and practitioners in the future. Thus, given the increasing use of comparative analysis, one should not minimize the doctrinal impact of foreign materials on Eighth Amendment and Due Process jurisprudence, or the fact that the Supreme Court sees fit to engage in this type of analysis in these contexts.

a. Eighth Amendment Cases

As noted above, in *Trop* the Supreme Court engaged in comparative analysis to resolve a case arising under the Eighth Amendment. *Trop*, however, is more renowned as the case that announced the modern standard under which the Eighth Amendment's prohibition against cruel and unusual punishment is measured. In *Trop*, the "court made no attempt to define the contours of [cruel and unusual punishment]." Rather, "[t]hey delegated that task to future generations of judges who have been guided by the 'evolving standards of decency that mark the progress of a maturing society.'"53 In keeping with this delegation, subsequent generations of Supreme Court justices have, indeed, taken the *Trop* court at its word, and looked to contemporary standards of decency to resolve Eighth Amendment cases. Such standards have been evidenced, in part, by foreign authorities, particularly in the death penalty context.

Thus, in *Thompson v. Oklahoma*, the Court referenced foreign law, as well as portions of the International Covenant on Civil and Political Rights, to illustrate the international consensus forbidding the execution of juveniles, and to urge an approach that looked to "other nations" in a search for "civilized standards of decency."54 In particular, the Court stated:

> The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views expressed by...other nations that share our Anglo American heritage, and by the leading members of the Western European community.55

The use of comparative materials provoked an outraged dissent from Justice Scalia, who noted that the Court "must never forget that it is the

54. *Id.* at 830, 831 n.34.
55. *Id.* at 830.
Constitution of the United States that [it is] expounding." He specified that:

The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so ‘implicit in the concept of ordered liberty’ that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well.\(^{57}\)

However, Justice Scalia concluded by emphasizing that “where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices...may think them to be, cannot be imposed upon Americans through the Constitution.”\(^{58}\)

*Thompson* is instructive on different levels. First, it reveals an obvious split in the Court pertaining to whether comparative analysis is justified under the rubric of Eighth Amendment analysis. On one hand, the majority suggests that “contemporary standards of decency” encompass other nations’ practices as a matter of doctrine. Thus, under this view, foreign sources will always be one tile in the mosaic that the Court is mandated to construct when dealing with the Eighth Amendment. On the other hand, the dissent suggests an approach which on its face, is more nuanced, but which upon further review reveals its true dogmatic colors (and lack of substance). Justice Scalia states that, before the Court can inquire as to the practices of other nations, it has to first satisfy itself that such a practice exists in the United States. However, as Justice Scalia well knows, if such practice is deemed to exist in the United States a priori, then the practices of foreign nations are irrelevant because the decision of the Court will be dictated by the practice prevalent within the United States. Thus, Justice Scalia envisions a comparative analysis that is meaningless.

*Thompson* also begins to reveal where the Court believed it should look when engaging in comparative reasoning. Without any explanation in support of its selection, the majority stated that countries which exhibited an “Anglo American heritage,” or were “leading members of the Western European community” were appropriate sources of persuasive authority. The dissent is even vaguer in noting that the precedents from “other nations, particularly other democracies,” could be used for its window-dressing version of comparative analysis. Both

\(^{56}\) *ld.* at 868 n.4 (Scalia, J., dissenting).
\(^{57}\) *ld.*
\(^{58}\) *ld.*
these renditions of the appropriate universe from which foreign persuasive authority should be drawn reveal that, however vague, the justices were creating a hierarchy of nations for the purposes of comparative analysis. In other words, there was a process at work by which discrimination among nations took place, resulting in the notion that only certain nations’ practices were relevant to comparative analysis in the United States.

The Court was soon to revisit both the constitutionality of executing juvenile offenders, and the appropriateness of using comparative materials for the analysis of this issue. This time, in Stanford v. Kentucky,\(^{59}\) the result on both issues was exactly contrary to that reached in Thompson. The Court decided that the execution of juvenile defendants was not per se unconstitutional and, through the voice of Justice Scalia, “emphasize[d] that it is American conceptions of decency that are dispositive” and that “the sentencing practices of other countries are [not] relevant.”\(^ {60}\) This time it was the dissent that offered the pro-comparison position. Justice Brennan used foreign decisions (as well as a portion of the International Covenant on Civil and Political Rights) within the context of the Eighth Amendment analysis to serve as an “indicator of contemporary standards of decency,” and to note that “choices of governments elsewhere in the world also merit our attention as indicators whether a punishment is acceptable in a civilized society.”\(^ {61}\) Thus, with no real reason or explanation, the Court simply reversed itself as to the status of comparative analysis within the framework of the Eighth Amendment, with foreign authorities playing no part in the substantive result. The Court, however, was to commit yet another reversal merely a decade later, reinstating the reasoning of Thompson with regard to the relevance of comparative analysis.

In Atkins v. Virginia,\(^ {62}\) the Court tackled the question of whether it was unconstitutional under the Eighth Amendment to execute the mentally challenged. In an opinion by Justice Stevens, joined by five other justices, the Court ruled that such executions were unconstitutional. In reaching this conclusion, Justice Stevens noted that executions of the mentally challenged have “become truly unusual, and it is fair to say that a national consensus has developed against it.”\(^ {63}\) In fact, he continued, “within the world community, the imposition of the

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60. Id. at 369-70. Justice Scalia went on to quote from his dissent in Thompson. Id.
61. Id. at 384, 389, 390 n.10 (Brennan, J., dissenting).
63. Id. at 316.
death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved,” thus offering “further support to our conclusion that there is a consensus among those who have addressed the issue.” 64 This last comment in a footnote by Justice Stevens engendered a couple of direct attacks by the dissents. Justice Scalia, after repeating verbatim for the third time his passage on this issue which first appeared in Thompson, added:

The Prize for the Court’s Most Feeble Effort to fabricate “national consensus” must go to its appeal (deservedly relegated to a footnote) to the views of...members of the so-called “world community....” I agree with the Chief Justice.... Equally irrelevant are the practices of the “world community,” whose notions of justice are (thankfully) not always those of our people. 65

Justice Scalia’s mention of his agreement with the Chief Justice refers to the following passage in Chief Justice Rehnquist’s dissent:

I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court’s ultimate determination. While it is true that some of our prior opinions have looked to “the climate of international opinion” to reinforce a conclusion regarding evolving standards of decency, we have since explicitly rejected the idea that the sentencing practices of other countries could “serve to establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people.” 66

Aside from the above illustrated exchanges pertaining to the appropriateness of reliance on foreign sources, all of which occurred in

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64. Id. at 317 n.21. This passage in Atkins has served as ammunition for the proponents of the Feeney Resolution who have alleged that the Atkins majority made no attempt to show why foreign practice is relevant in Eighth Amendment cases. See Legislative Hearing on H.R. Res. 568, supra note 4, 49-51 (Prepared Statement of Prof. Michael D. Ramsey, Univ. of San Diego Law School).

65. Lawrence v. Atkins, 536 U.S. at 347-48 (Scalia, J., dissenting). Curiously, contradicting his definitive assurances of the perennial irrelevance of comparative analysis, in his dissenting opinion in McIntyre v. Ohio Elections Commission, 514 U.S. 334, 381-82 (1995), Justice Scalia canvassed the laws of other countries (Australia, Canada, and the United Kingdom) to reach a conclusion regarding the constitutionality under the First Amendment of an Ohio law prohibiting anonymous pamphleteering during elections.

66. Id. at 324-25 (Rehnquist, C.J., dissenting) (quoting Thompson, 487 U.S. at 868-69 n.4 (Scalia, J., dissenting)). Chief Justice Rehnquist’s rejection of the practice of comparative analysis within the context of the Eighth Amendment is inconsistent both with public pronouncements that he has made pertaining to the usefulness of such analysis, and with his uses of such analysis. See infra notes 100, 102, 103, and 171, and accompanying text.
opinions tackling the substantive merits of the issue at hand, denials of writs of certiorari have provided the Supreme Court with opportunities to address the relative merits of comparative analysis within the Eighth Amendment context. In particular, Justice Breyer seems to have taken on Justice Frankfurter’s mantle as the chief proponent of the use of foreign sources of persuasive authority by the Supreme Court. Thus, in *Knight v. Florida*, Justice Breyer, dissenting from the denial of certiorari, appealed to the notion that foreign authorities could help to shed some light on the question whether long delays prior to the carrying out of executions constituted cruel and unusual punishment under the Eighth Amendment. In particular, Justice Breyer cited foreign authorities, such as the Supreme Courts of Zimbabwe and India, which use international law in their resolutions of similar issues to bolster his claim that the U.S. Supreme Court should also use international norms in such circumstances. Accordingly, he explained that “former Commonwealth nations” are a good source of comparative materials because those nations “reflect a legal tradition that also underlies our own Eight Amendment.” He added that the U.S. Supreme Court “has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances” and, therefore, the “views [of these foreign courts] are useful even though not binding” because ultimately it is the U.S. Constitution that is to be interpreted.

Justice Thomas felt that Justice Breyer’s exhortation deserved a comment. He thus noted:

I write only to point out that I am unaware of any support in the American constitutional tradition or in this Court’s precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed. Indeed, were there any such support in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council.

68. *Id.* at 995-97 (Breyer, J., dissenting from the denial of certiorari).
69. *Id.*
70. *Id.* at 998.
71. *Id.*
72. *Id.* at 990 (Thomas, J., concurring in the denial of certiorari).
Both opinions raise important points. First, Justice Breyer recognized that any foreign materials referenced by the Supreme Court will function as persuasive, rather than binding, authority. Thus, any foreign materials will be observed through the lens of American traditions. Second, like some of his predecessors, Justice Breyer not only advocated some reliance on foreign materials, but offered an opinion as to which nations would serve the comparative enterprise best. He grounded his preference in Commonwealth countries because of the legal-historical heritage which they supposedly share with the United States. Although this link is undoubtedly present with the authorities that Justice Breyer cited in *Knight* (India and Zimbabwe), some persuasive criteria for selecting nations in this context are more cogent than those offered by Justice Breyer. Historical roots can serve as a starting point for locating the appropriate sources of comparative reference, but different countries have different evolutions, and the difference that two hundred years of legal separateness can have on two independent nations could be extremely marked.

Justice Thomas did not seem to rule out the use of foreign sources altogether. Rather, he implied that, when resort to such sources is made, it will necessarily be because of the absence of relevant domestic materials. Thus, the implication is that reference to comparative materials will function “negatively,” i.e., to negate the existence of a domestic doctrine to that effect. Even though this use of comparativism is extremely limited, it does have its value, as foreign sources can provide valuable examples of failed experiments and warn of the consequences of bad doctrine and policy before U.S. courts venture down such paths.

Justices Breyer and Thomas rekindled their discussion on this same topic within a few years. In *Foster v. Florida*, Justice Breyer, again in the context of dissenting from the denial of certiorari on the same issue as *Knight*, stated that, because the Supreme Court of Canada had opined that a lengthy delay before execution was relevant in deciding whether an extradition to the United States was justified (such a factor being considered a definite negative), the issue as to whether such lengthy delays were a violation of the Eighth Amendment should be reviewed by the full court in the United States. Justice Thomas, in reply, noted

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73. Interestingly, Justice Thomas was not so sparing in his use of foreign comparative materials when he used other nations' practices to evaluate the constitutionality of domestic voting procedures. See *Holder v. Hall*, 512 U.S. 874, 904 n.14 (1994) (Thomas, J., concurring).

74. 537 U.S. 990 (2002).

75. *Id.* at 992-93 (Breyer, J., dissenting from denial of certiorari).
that "Justice Breyer has only added another foreign court to his list while still failing to ground support for his theory in any decision by an American court," and that "this Court’s Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans."\(^{76}\)

The most exhaustive discussion about the relevant role of international law and opinions of foreign nations was to come in the most recent case to date pertaining to the interpretation of the Eighth Amendment. In, \textit{Roper v. Simmons},\(^{77}\) the Court, essentially reversing \textit{Stanford}, ruled that applying the death penalty to juvenile offenders was an unconstitutional violation of the Eighth Amendment’s prohibition against cruel and unusual punishment.\(^{78}\) Notably, the Court devoted an entire section of its opinion to "acknowledge [that] the overwhelming weight of international opinion [was] against the juvenile death penalty," which led it to conclude that "the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."\(^{79}\)

To reach this conclusion, the Court consulted several international sources, including international treaties (such as the United Nations Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights) and a 1930 legislative report to the British Parliament which "recommended that the minimum age for execution be raised to 21," something the British Parliament did in 1948 (before it abolished the death penalty in its entirety).\(^{80}\) The Court explained its reliance on international sources in unusual detail. First, it noted that it had referred "to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments.’"\(^{81}\) Second, it offered a particularized explanation of why it chose to look at British law. The Court explained that the "United Kingdom’s experience bears particular relevance [to the issue of the juvenile death penalty] in light of the historic ties between our countries and in light of the Eighth

\(^{76}\) \textit{Id.} at 990 (Thomas, J., concurring in the denial of certiorari).

\(^{77}\) 2005 U.S. LEXIS 2200 (Mar. 1, 2005).

\(^{78}\) \textit{Id.}

\(^{79}\) \textit{Id.} at 9. The Court repeated this assertion several times. See also \textit{Id.} at 47 ("it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.").

\(^{80}\) \textit{Id.} at 48.

\(^{81}\) \textit{Id.} at 44 (citing cases).
Amendment’s own origins." 82 Finally, and most importantly, the Court described its comparative ethos as being one where the “opinion of the world community, while not controlling [the Court’s] outcome, does provide respected and significant confirmation for [its] own conclusions.” 83

Predictably such an endorsement of the comparative enterprise by the majority engendered a dissent on the issue by Justice Scalia. He noted at the outset that “the basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.” 84 To illustrate his point, Justice Scalia indulged in some comparative analysis of his own, albeit in the negative vein. He pointed out that several nations (such as the Netherlands, Britain, Germany, Australia, and France) had refused to adopt certain policies of the United States, such as the categorical exclusionary rule, the complete separation of church and state, and the fundamental right to have an abortion. 85 This, he argued, proved his point that the Court was engaging in pure “sophistry;” merely invoking the opinions of “like-minded foreigners,” which he characterized as “alien law,” to affirm “the Justices’ own notion of how the world ought to be, and their diktat that it shall be so henceforth in America.” 86

Interestingly, Justice O’Connor, who also dissented from the majority’s ruling, did not join Justice Scalia’s dissent, and in fact, explicitly rejected his exhortation to abandon comparative analysis. Justice O’Connor disagreed with Justice Scalia both on legal grounds (“the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency”), and on normative grounds (inquiry into international opinion pertaining to Eighth Amendment issues “reflects the special character of the Eighth Amendment, which, as the Court has long held, draws its meaning directly from the maturing values of a civilized society.”) 87 Indeed, Justice O’Connor appealed to a notion of shared humanity of which the Eighth Amendment is but one embodiment and noted that “this Nation’s evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries.” 88

82. Id. at 47.
83. Id. at 92.
84. Id. at 127 (Scalia, J., dissenting).
85. Id. at 127-30 (Scalia, J., dissenting).
86. Id. at 100, 133, 135 (Scalia, J., dissenting).
87. Id. at 93 (O’Connor, J., dissenting).
88. Id. at 94 (O’Connor, J., dissenting).
This uncharacteristically candid and detailed exchange between various members of the Court sheds a great deal of light on the Court’s view of the propriety and scope of comparative analysis in general, as well as some light on the selection criteria to be used by the Court in finding appropriate sources for its comparative analysis.\textsuperscript{89} The majority was emphatic: in cases pertaining to “the express affirmation of certain fundamental rights,” viewing such affirmation “by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”\textsuperscript{90} In other words, the thrust is always about the place of the United States within the international community in matters pertaining to the human condition. Justice O’Connor did not disagree with this notion, but merely added that such comparisons which revealed “the existence of an international consensus” could only be useful “to confirm the reasonableness of a consonant and genuine American consensus.”\textsuperscript{91}

Justice Scalia provides what could not be a starker counterpoint, introducing the radical concept that there is no such thing as an international community which he referred to as the “so-called international community.”\textsuperscript{92} That is, Justice Scalia explicitly subscribed to a hyper-particularist vision of the world where every country, including our common ancestor the United Kingdom, experiences “a legal, political, and social culture quite different from our own.”\textsuperscript{93} Thus no comparison is ever possible because no common reference can be found. In making this announcement on the nature of global society, Justice Scalia found fault in the lack of selection criteria used by the Court to identify the appropriate sources of persuasive authority by criticizing the Court’s reliance on the practices of “every foreign nation—of whatever tyrannical political makeup and with however subservient or incompetent a court system.”\textsuperscript{94} Indeed, the majority had noted that “Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China,” had all curtailed the practice of executing juveniles since 1990.\textsuperscript{95} Thus, for Justice Scalia, the

\textsuperscript{89} There is less clarity on this second issue because the majority opinion concluded that the United States was alone in its propensity to execute juvenile offenders. Thus, there was no need to select appropriate sources of foreign persuasion because, according to the Court, all nations had reached a consensus on the matter.
\textsuperscript{90} \textit{Id.} at 49.
\textsuperscript{91} \textit{Id.} at 94 (O’Connor, J., dissenting).
\textsuperscript{92} \textit{Id.} at 123 (Scalia, J., dissenting).
\textsuperscript{93} \textit{Id.} at 132 (Scalia, J., dissenting).
\textsuperscript{94} \textit{Id.} at 126 (Scalia, J., dissenting) (emphasis added).
\textsuperscript{95} \textit{Id.} at 46.
Court’s use of comparative analysis was especially reproachful because it relied on countries whose despotic tendencies might pose a danger to the notions of freedom espoused by the United States. Of course, what Justice Scalia ignored was the fact that the Court’s majority singled out those despotic nations to underscore how far out of the mainstream the United States had become on the issue of the juvenile death penalty—so much so that even countries with dubious track records on human rights now disapproved of the practice. Curiously, as will be discussed in detail in Part V of this Article, Justice Scalia found fault with the Court’s use of comparative references in Lawrence for precisely the opposite reason. He took issue with the majority in that case because the Court did not include sources originating from countries which were not our traditional Western allies.

b. Substantive Due Process Cases

As demonstrated in the preceding section, the nature of Eighth Amendment jurisprudence lends itself to the integrated use of foreign precedent. For similar reasons, substantive due process jurisprudence is equally amenable to comparative analysis. This is primarily because the doctrine urges an inquiry into practices that are “implicit in the concept of ordered liberty,” a concept that transcends borders.\(^{96}\) Thus, reliance upon foreign precedent has continued throughout the last two decades in substantive due process cases and has momentarily culminated in the Lawrence decision. Before Lawrence, however, some references to sources outside the domestic realm appeared within the context of substantive due process analysis from unexpected quarters. Chief Justice Burger fired one salvo in Bowers v. Hardwick\(^{97}\) when he supported his position that states could criminalize the consensual sexual behavior of adult gays and lesbians, by generically referring (without any citations) to the supposed Judeo-Christian condemnation of homosexuality.\(^{98}\)

Chief Justice Rehnquist was to resort to foreign materials in greater detail. First, in Planned Parenthood v. Casey,\(^{99}\) he looked to abortion-related decisions of other nations (Canada and West Germany, in particular) to lend support to his argument that there was nothing fundamental about a woman’s right to seek an abortion.\(^{100}\) Second, in

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98. Id. at 196-97 (Burger, C.J., concurring).
100. Id. at 945 n.1 (1992) (Rehnquist, C.J., concurring in part and dissenting in part).
Washington v. Glucksberg,\textsuperscript{101} Chief Justice Rehnquist used foreign materials to inform the Court's decision to uphold a Washington state law that criminalized assisted suicide.\textsuperscript{102} In particular, he referred to a decision of the Supreme Court of Canada, which upheld a ban on assisted suicide, and observed that "in almost every western democracy[,] it is a crime to assist a suicide."\textsuperscript{103} Thus, to Chief Justice Rehnquist, at a minimum, the empirical evidence offered by courts which have addressed the same or similar questions can have some relevance to a comparable decision by the U.S. Supreme Court. In other words, if nothing else, the experience of other nations offers data to be interpreted by the U.S. Supreme Court. In that vein, Justice Souter also referred to foreign practice in his concurrence in Glucksberg.\textsuperscript{104}

c. Federalism Cases

Although a less obvious theater for the use of foreign comparative analysis, the area of law generally denoted as federalism has also seen its share of references to foreign materials. Chief Justice Rehnquist again referenced foreign nations and their practices in Raines v. Byrd,\textsuperscript{105} where the Supreme Court struck down the Line Item Veto statute. In Raines, Chief Justice Rehnquist, adopting the "negative" component of comparative analysis, used the governmental systems of foreign countries to distinguish their constitutional structures from that existing in the United States with regard to standing: "there would be nothing irrational about a system which granted standing in these cases; some European constitutional courts operate under one or another variant of such a regime. But it is obviously not the regime that has obtained under our Constitution to date."\textsuperscript{106}

A more detailed examination of the federal systems of foreign countries occurred in a different case decided the day before Raines. In Printz v. United States,\textsuperscript{107} the Supreme Court struck down portions of the Brady Bill (dealing with gun control). Justice Breyer engaged in a detailed discussion of other federal systems (namely, Switzerland, Germany, and the European Union) and concluded that such foreign experiences are informative as to whether a federal body should

\textsuperscript{101} 521 U.S. 702 (1997).
\textsuperscript{102} Id. at 718 n.16, 732-35. Curiously, Rehnquist’s excursion into comparative reasoning received barely a whimper from those critics that have wailed at such reasoning in Lawrence.
\textsuperscript{103} Id. at 710 n.8, 718 n.16.
\textsuperscript{104} Id. at 785-87 (Souter, J., concurring) (discussing the Dutch experience on the matter).
\textsuperscript{105} 521 U.S. 811 (1997).
\textsuperscript{106} Id. at 828.
\textsuperscript{107} 521 U.S. 898 (1997).
mandate that state and local officials carry out its imperatives. Justice Breyer noted that "[o]f course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own, [b]ut their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem." Thus, Justice Breyer, in urging the United States to follow the example of its foreign federal counterparts, concluded that other nations with federal systems "have found that local control is better maintained" by allowing the national government to use local governments to administer national law. In response, Justice Scalia repeated his mantra by noting that references to foreign materials to interpret domestic laws was "inappropriate." The referencing of foreign sources in these federalism cases indicates that the Supreme Court is comfortable in expanding the category of cases that it feels are ripe for comparative considerations. No more are the "humanistic" areas of the law the only contexts amenable to comparative inquiry. Even though these references are tentative and circumspect, the Supreme Court seems to have begun a process of exploring issues of federalism, encompassing the structure of government itself, through comparative analysis.

d. Equal Protection Cases

Another context in which the Supreme Court is beginning to consult foreign sources as an interpretative tool is the Fourteenth Amendment's guarantee of equal protection under the law. This exploration is exemplified in Grutter v. Bollinger. In upholding the University of Michigan Law School's affirmative action program, the Grutter case...

108. Id. at 976 (Breyer, J., dissenting).
109. Id. at 977.
110. Id. at 921 n.11.
111. The Supreme Court has ventured into comparative reasoning in the context of other doctrinal areas as well. See, e.g., Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 403 (2000) (Breyer, J., concurring) (commenting on similar European Court of Human Rights and Canadian decisions in similar "complex" First Amendment cases); McIntyre v. Ohio Elections Commission, 514 U.S. 334, 381-82 (1995); United States v. Stanley, 483 U.S. 669, 710 (1987) (O'Connor, J., concurring in part and dissenting in part) (discussing the Nuremberg Court as relevant precedent in the context of a soldier's claim under the Federal Tort Claims Act pertaining to the ill effects of a government study on lysergic acid diethylamide (LSD)). Lower courts have acted similarly. See, e.g., Sandoval v. Calderon, 241 F.3d 765, 777 (9th Cir. 2000) (rejecting the practice of having a prosecutor refer to biblical scripture in a criminal case and noting that such practice was deemed "inappropriate" in a Canadian case as well).
majority indicated that, at a certain point in the future, it would revisit the issue to determine whether the remedial necessity which generated such programs was still present. In a concurring opinion, Justice Ginsburg expanded on this notion of revisiting the issue. She noted that "[t]he Court's observation that race-conscious programs 'must have a logical end point'...accords with the international understanding of the office of affirmative action." She illustrated her point by explaining:

The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994...endorses "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms."

Justice Ginsburg concluded by noting that "such measures, the Convention instructs, 'shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.'" Thus, in this instance, an international treaty to which the United States is a signatory functions as a normative beacon for the Equal Protection clause. In other words, an international obligation is instrumental in confirming U.S. domestic policy in the same area.

Another opinion which has received some attention in this area is a concurrence by Judge Calabresi in the Second Circuit case United States v. Then. This attention is probably due to the combination of the high level of rhetoric contained in the concurrence and the respected prominence of the jurist penning the opinion. In Then, the Second

113. Id. at 342.
114. Id. at 344 (Ginsburg, J., concurring).
115. Id. (citation omitted).
118. 56 F.3d 464 (2d Cir. 1995).
Circuit held that the ten-to-one disparity in sentence length for crack versus cocaine violations contained in the sentencing guidelines had a rational basis and, therefore, withstood a Fourteenth Amendment equal protection challenge. Judge Calabresi, concurring, noted that, although the majority opinion was correct at the moment in time the case was being decided, it might prove to be incorrect in the future. He explained:

American courts might nonetheless take note of what the Constitutional Courts of some cognate countries have done in like situations. Both the Constitutional Courts of Germany and Italy have addressed the problem of laws that were rational when enacted, but which, over time, have become increasingly dubious. Rather than jumping in and striking the laws down, or leaving them undisturbed and thereby allowing legislative inertia to dominate, these Courts have found a middle ground. They have, in a few cases, announced that laws, because of changed circumstances, were heading toward unconstitutionality.... In this way, the continental Courts have put their parliaments on notice that a serious and thoughtful legislative review and reconsideration was in order and that failure to undertake such a review might in time result in judicial action and perhaps even nullification of the laws. 

Judge Calabresi did not limit himself to applying comparative reasoning to the case at hand. Rather, he coupled this fact-specific reasoning with a more general exhortation:

At one time, America had a virtual monopoly on constitutional judicial review, and if a doctrine or approach was not tried out here, there was no place else to look. That situation no longer holds. Since World War II, many countries have adopted forms of judicial review, which—though different from ours in many particulars—unmistakably draw their origin and inspiration from American constitutional theory and practice.... These countries are our ‘constitutional offspring’ and how they have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues. Wise parents do not hesitate to learn from their children.

Through this concurrence, Judge Calabresi synthesized certain policy

119. Id. at 466.
120. Id. at 469 (Calabresi, J., concurring).
121. Id.
rationales behind some of the many benefits of comparative reasoning within the context of constitutional judicial review. First, this passage indicated that to him, from a normative perspective, the search for the right answer cannot be prejudiced by limiting the sources from which that answer is obtained to domestic sources alone. The implication is of a certain universality of the concept of “correctness.” Second, Judge Calabresi also acknowledged a historical construct implicit in comparative analysis which will operate as a selector of the appropriate sources of foreign authority. That is, comparison will most likely bear successful fruits when the parallels being sought share some commonality. The commonality identified in Then is a constitutional system modeled, or at least premised, in some part, on the U.S. Constitution. Third, and related to the second point, is the notion of reverse feedback. In other words, even though the point of origin for the comparison is the U.S. Constitution, other countries which had no role in the creation of the Constitution may have obtained a better insight into constitutional problems contained therein. Last, Judge Calabresi, by using the qualifier “difficult” in describing the type of constitutional case that would warrant a comparative research, limits this enterprise to those instances where the impact of comparative analysis would be felt the most. A “difficult” case is presumably one where the issue is not clear cut, or else one that involves important policy choices. In such a case, the metaphoric “weight of the world” might be the factor that pushes the deciding court in one way as opposed to the other.

In sum, the last twenty years have evidenced a diversification of the circumstances in which courts have seen it proper to engage in comparative analysis to help resolve a case dealing with what, on the surface, appears to be a purely domestic issue. As our courts become increasingly familiar with the procedure and practice of foreign nations, this enterprise is bound to continue and develop further.

C. International Law Precedents that Exhibit Characteristics Common to Comparative Analysis

This survey concludes with a brief examination of precedent that is not, strictly speaking, comparative law. That is, this section describes certain U.S. court decisions which use international law as binding, rather than persuasive, authority\textsuperscript{122} when the issue at hand pertains to a

\textsuperscript{122} I use the term “binding” loosely in this context in that, as mentioned above, international law is “binding” in the United States only to the extent that it does not conflict with U.S. constitutional provisions.
particular interpretation of international law (in both its public and private dimensions). As explained above, the reason for the inclusion of these cases is that, in each instance, the courts either employ comparative analysis or else they use normative considerations that are equally valid within the comparative context. Whichever the scenario, the following cases illustrate the courts’ dexterity at resolving cases which employ either comparative methodologies or comparative norms.

1. Public International Law Cases

In dealing with public international law issues, the United States Supreme Court has often had to use a “canvassing” technique to determine the substance of the public international law issue at hand. In such instances, such as in The Paquete Habana, the Supreme Court has given an explanation as to which sources of authority are appropriate to its inquiry. In The Paquete Habana, the Supreme Court traced the development of the international norm that forbids the seizure of coastal fishing boats as prizes of war, noting that this norm existed “by an ancient usage among civilized nations, beginning centuries ago,” and was gradually adopted “throughout the civilized world.” After creating a vague universe of international jurisprudence outside which it would not venture (the “civilized” world), the Court continued:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction.... For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.

In other words, the Court, as may be expected, identified formal sources—treaties, executive or legislative acts, and judicial

123. See supra Part II, Section A.
124. 175 U.S. 677 (1900).
125. Id. at 686-88.
126. Id. at 700. The Supreme Court employed similar parlance, albeit in less detail, in other cases. See, e.g., Jones v. United States, 137 U.S. 202, 212 (1890) (“the law of nations, recognized by all civilized States” within the ambit of boundary disputes). See also Edwin D. Dickinson, The Law of Nations as a Part of the National Law of the United States (pt. II), 101 U. PA. L. REV. 792, 821 (1953) (noting that the “Supreme Court from the beginning has resolved interstate boundary disputes in recourse to the Law of Nations.”).
decisions—as appropriate materials to examine in the correct determination of public international law. What might be less expected is the willingness of the Court to expand its horizons and indicate that the opinions of scholars and commentators who are well-versed in the subjects being explored, are available sources to determine the substance of rules that the court will then adhere to as binding authority. This apparent readiness to treat as binding authority sources that have not undergone the “test of democratic enactment” highlights the fact that the Supreme Court did not view legislative or judicial imprimatur as a necessary precursor to the viability of materials that it wished to rely upon. Rather, the Supreme Court seemed to value the reputation of the originator of the source above all other criteria. This reputational component was to become increasingly important in dictating the legitimacy of sources to which courts would look to determine the substantive content of public international law.

A major example of the U.S. courts’ expanding view of what serves as binding authority in determining substantive rules of public international law is found in *Filartiga v. Pena-Irala*. In *Filartiga*, the Second Circuit held that even non-binding international instruments, such as the Universal Declaration of Human Rights (not a treaty but an enunciation of “basic principles”), “[create] an expectation of adherence, and insofar as the expectation is gradually justified by State practice...may by custom become recognized as laying down rules binding upon the States.” The court upheld federal jurisdiction over a lawsuit between non-citizens for alleged human rights violations in a foreign country (drawing on, as noted above, the Universal Declaration of Human Rights), concluding that torture “violates established norms of the international law of human rights, and hence the law of nations.” Like the Supreme Court in *The Paquete Habana*, the court of appeals in *Filartiga* was less concerned with the procedural genesis

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127. 630 F.2d 876 (2d Cir. 1980). *Filartiga* embodies the concept that public international law is no longer a matter of concern just between states, but also can regulate how a state treats its own citizens. Commentators have not understated the importance of *Filartiga* in the ambit of modern human rights litigation. See, e.g., David J. Bederman, *Dead Man’s Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT’L & COMP. L. 255, 256 (1995) (“[I]n a sense, all current human rights litigation owes its fortune to Filartiga.”).

128. *Id.* at 883. Other cases have, in the aftermath of *Filartiga*, held the Universal Declaration of Human Rights to be a positive source of binding customary international law, even though the document itself is non-binding. See, e.g., Van Dardel v. USSR, 623 F.Supp. 246, 261 (D.D.C. 1985) (holding that the former Soviet Union was in violation of international law by interpreting the Universal Declaration of Human Rights (to which the Soviet Union was a signatory) as part of customary international law).

129. *Id.* at 880.
of the source it identified as binding authority (the Universal Declaration of Human Rights), than it was with the perceived status of the source, which the court determined was crucial in imbuing it with binding force.

Because these courts amplified the range of materials which were considered appropriate repositories of public international law, such new materials gained greater legitimacy. As a result, the fact that a source bore the official stamp of government was no longer considered a necessary facet of binding authority. Elevated to status of binding authority were thus materials whose origins reflected a perception of legitimacy. This legitimacy was, in large part, determined by the reputation or respectability of the proponent of the source, be it an individual or an institutional body. Thus, in the examples listed above, either an educator who with “years of labor” projected herself as an authority on a particular subject, or an institution such as the United Nations (which promulgated the Universal Declaration of Human Rights), serves as an adequate authority on the content of public international law. This notion of legitimacy based on reputation is equally applicable in the comparative law context. If a source can function as binding authority based almost exclusively on the reputation of the creator of such source, then a source can function as persuasive authority for identical reasons. Therefore, the canvassing courts should be able to use such considerations in either instance.

One final case that bears noting in this section is United States v. Alvarez-Machain.\textsuperscript{130} In this case the Supreme Court was asked to decide whether federal courts had jurisdiction to try a Mexican citizen who had been kidnapped and brought to the United States by federal agents. The Court ruled that federal courts did have the requisite jurisdiction.\textsuperscript{131} Justice Stevens, in a dissent joined by Justices Blackmun and O’Connor, disagreed on grounds that the kidnapping constituted a violation of the extradition treaty between the United States and Mexico.\textsuperscript{132} In disagreeing with the majority’s decision, Justice Stevens expressed his concern over the effect that Supreme Court decisions have on the jurisprudence of other countries. Thus, he noted that “[t]he significance of the Court’s precedents is illustrated by a recent decision of the Court of Appeal of the Republic of South Africa,” which ruled that such kidnappings would result in a violation of pertinent extradition

\textsuperscript{130} 504 U.S. 655 (1992).
\textsuperscript{131} Id. at 670.
\textsuperscript{132} Id. at 688 (Stevens, J., dissenting).
treaties. He then went further:

The Court of Appeal of South Africa—indeed, I suspect most courts throughout the civilized world—will be deeply disturbed by the ‘monstrous’ decision the Court announces today. For every nation that has an interest in preserving the Rule of Law is affected...by a decision of this character.

By adopting comparative reasoning, Justice Stevens was not only illustrating, in his opinion, the wrongness of the majority’s holding, but the potential international impact (and consequences to the United States) that such a holding would entail. Thus, foreign materials were used by Justice Stevens to illustrate one of the normative underpinnings of his argument. This kind of illustration is all the more prevalent in private international law cases.

2. Private International Law Cases

As the examination in the previous section dealing with public international law shows, certain interpretative techniques, such as canvassing materials outside traditional sources of law, translate well from the international to the comparative arena. In the case of private international law, the parallel between the international and comparative spheres is primarily based on the similarities between the rationales underlying particular private international law doctrines and the general pursuit of comparative practice. In other words, the normative concerns underlying certain aspects of private international law are similar to those forming the basis of comparative analysis.

Comity is one such example. Within private international law, comity, a somewhat fluid concept, has been defined by the Supreme Court as:

[N]either a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Thus, comity is related to the notion of reciprocity, but is mostly

133. Id.
134. Id. at 687-88.
invoked by courts to justify inaction in a certain matter, rather than action. This invocation tends to occur in cases “in the correct adjudication of which foreign nations are deeply interested...[and] in which the principles of the law and comity of nations often form an essential inquiry.”\(^{136}\) However, comity can, and does, have wider implications and applications.

One commentator has summarized the various definitions and uses of comity as representing:

\[T\]he basis of international law, a rule of international law, a synonym for private international law, a rule of choice of law, courtesy, politeness, convenience or goodwill between sovereigns, a moral necessity, expediency, reciprocity or “considerations of high international politics concerned with maintaining amicable and workable relationships between nations.”\(^{137}\)

It follows from this description that comity is an amalgam of pragmatist thought that counsels, rather than dictates, “the true foundation and extent of the obligation of the laws of one nation within the territories of another,”\(^{138}\) and lubricates the wheels of the international system (at least between nations that wish to be bound by it).

From this last vantage point, another commentator defines comity as “a principle grounded not on courtesy but on a conception of the transnational rule of law.”\(^{139}\) Whether it is courtesy or the desire to create a structured transnational system that forms the normative underpinning of comity, however, the effect on adjudicating bodies is the same: courts invoking notions of comity stress that it is not obligation that dictates its observance, but rather considerations that are akin to persuasion. In other words, the doctrine of comity is persuasive in nature within the framework of private international law, and thus operates on the same authoritative plane as foreign sources of law within the framework of comparative analysis. Moreover, the motivation that leads courts to justify reliance on notions of comity is similar to that which courts use to justify reliance on comparative materials.

One of the main areas in which courts refer to notions of comity is where they are confronted with requests to enjoin legal proceedings

\(^{136}\) Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 335 (1816).


\(^{138}\) Joseph Story, Commentaries on the Conflict of Laws V § 38, at 37 (1st ed. 1834).

\(^{139}\) Burley, supra note 13, at 1948.
taking place in other countries. In such instances, the moving party seeks an encroachment by the U.S. court onto the jurisdiction and sovereignty of the foreign nation. Under such circumstances, appeal to the persuasive authority of comity is routine. However, courts are divided as to how comity shapes the determination that a particular foreign legal proceeding should be enjoined.

On one hand, a mild form of comity focuses "on the potentially vexatious nature of foreign litigation." Thus, in *Kaepa, Inc. v. Achilles Corp.*, the Fifth Circuit enjoined a suit in a Japanese court because such a suit would be an "absurd duplication of effort" and "frustrate and delay the speedy and efficient determination" of the subject matter of the case, which was already under consideration in a U.S. court. In this case, the court employed a standard that barely paid lip service to any notion of comity. Indeed, as pointed out by the court, it refused "to require a district court to genuflect before a vague and omnipotent notion of comity every time that it must decide whether to enjoin a foreign action."

A related mild interpretation of comity is present in *Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.* In deciding that comity should not be construed to prevent a lower court from enjoining the relevant foreign proceedings, the Seventh Circuit looked to the competence of the foreign body. Judging the body incompetent, the court then required that empirical evidence of jeopardy to relations with such nation be shown before comity abstention could take place. Even though the notion of comity apparent in the *Allendale* case is as weak as that presented in *Kaepa*, it is the impact on foreign relations, rather than the "vexatious nature of the foreign litigation," that underscores the implications of comity for the Seventh Circuit. What is more apropos for the purposes of this Article is the *Allendale* court's affirmative evaluation of the competence of the foreign body whose proceedings were sought to be enjoined. That is, the *Allendale* court did not hesitate to delve into a description of the process that would take place in the foreign country, and then to proceed with a judgment on the merits of that process. Thus, the *Allendale* court considered itself fully competent to engage in this evaluation. There is no reason to believe that this competence would vanish should the evaluation take place within the

140. *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996).
141. *Id.*
142. *Id.*
143. 10 F.3d 425 (7th Cir. 1993).
144. *See id.* at 428-29.
context of comparative analysis.

A stronger application of comity is to be found in Laker Airways v. Sabena, Belgian World Airlines.\textsuperscript{145} Here, the court upheld an injunction against a suit in a foreign court but employed a stricter notion of comity, holding that such injunctions will only be honored if the foreign litigation threatens the jurisdiction of the lower court or permits one of the parties to evade an important policy of the forum state.\textsuperscript{146} Such policy could be, for example, the smooth functioning of foreign relations with the foreign country. Thus, in this “stronger” form, comity acquires teeth, to bite in those circumstances where the court believes real reciprocal harm, such as the threat of retaliation by the foreign court, could occur should an injunction on the foreign proceeding be imposed. In such instances, comity is a proxy for reciprocity.\textsuperscript{147}

Two other doctrines which pertain to private international law also have a bearing on comparative analysis and therefore bear mentioning: the act of state doctrine and dormant foreign relations preemption doctrine. The act of state doctrine is best illustrated by the seminal case Banco Nacional de Cuba v. Sabbatino.\textsuperscript{148} In Sabbatino, the plaintiff wanted to recover proceeds from the sale of his property that had been taken without process by the nationalizing Cuban government. The Supreme Court held that, under the act of state doctrine, which holds that “[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory,”\textsuperscript{149} the court would not question the validity of the Cuban government’s expropriation.\textsuperscript{150} The court stated that exceptions to this doctrine existed, either by treaty or by an “unambiguous agreement regarding controlling legal principles,” but found no such exception in the instant case.\textsuperscript{151}

The dormant foreign relations preemption doctrine is best illustrated by Zschernig v. Miller.\textsuperscript{152} In Zschernig, the Supreme Court examined the constitutionality of an Oregon statute that denied inheritance rights to citizens of the former Republic of East Germany because of lack of

\textsuperscript{145} 731 F.2d 909 (D.C. Cir. 1984).
\textsuperscript{146} See id. at 927-28.
\textsuperscript{147} See, e.g., Hilton v. Guyot, 159 U.S. 113 (1895). Here, the court refused to enforce a French judgment on the ground that no reciprocity with France existed.
\textsuperscript{148} 376 U.S. 398 (1964).
\textsuperscript{149} Underhill v. Hernandez, 168 U.S. 250, 252 (1897).
\textsuperscript{150} Sabbatino, 376 U.S. at 416.
\textsuperscript{151} Id. at 428.
\textsuperscript{152} 389 U.S. 429 (1968).
reciprocity from East Germany pertaining to American citizens. The U.S. government did not oppose the statute but the Supreme Court struck it down anyway, performing an independent assessment of the foreign relations implications, to include a non self-executing treaty which had not been ratified by federal legislation.\textsuperscript{153} The Court ruled that the Oregon statute had such potentially negative implications that it impermissibly infringed on the federal government's exclusive control over foreign relations.\textsuperscript{154}

Through the policy considerations undertaken in these two cases, the Supreme Court demonstrated the relevance of the doctrines in question to both the private international law and comparative analysis contexts. The act of state doctrine can be seen as either a supranational conflict of laws doctrine or a foreign proceedings abstention doctrine. Under the first interpretation, the act of state doctrine requires U.S. courts to apply the law of foreign states absent a violation of fundamental domestic public policy or international law (either customary or treaty-based). Under the second interpretation, the act of state doctrine functions to circumscribe the role of the judiciary in matters that impact foreign relations. Under either interpretation, the Supreme Court noted that the act of state doctrine was not required by international law, nor by the Constitution, but flowed from a concept which the Court articulated as the ordering of "our relationships with other members of the international community."\textsuperscript{155}

Thus, the normative seed which has grown into the act of state doctrine is persuasive in nature, rather than binding. The Supreme Court saw the ordered relationships between nations as an overarching benefit to the United States, and therefore constructed a rule of law to favor this policy. As it stated in the \textit{Sabbatino} opinion, it was under no obligation to reach this result. Instead, the Court believed it necessary to look beyond the case at hand to the implications of its decision, and therefore adopted a rule based on the importance it attributed to the normative policy that it announced. Consequently, a persuasive policy gave rise to a hard rule of law.

The comparative law parallel to the court's reasoning adopted in \textit{Sabbatino} is not hard to spot. If the Supreme Court can rely on sources, indeed abstract policies, outside of the normal realm of sources of authority to announce binding rules of law, it should be no scandal that it can rely on less abstract sources of persuasive authority, such as

\textsuperscript{153} Id. at 440.
\textsuperscript{154} Id. at 432.
\textsuperscript{155} \textit{Sabbatino}, 376 U.S. at 425.
foreign precedent. The comparative law context, in fact, is far less dramatic. In such cases, the interpreting court is doing just that: interpreting. That is, it is looking to a prescribed source of binding authority through the looking glass of foreign experience, but it is nevertheless announcing a rule of law based on a pre-existing definitive source of domestic authority. In the case of the act of state doctrine, reliance is not made on a constitutional text, or on international norms set down by custom or treaty, but rather on an amorphous policy notion. The reliance on foreign sources as an interpretative aid presumes the underlying stability of the material being interpreted, and is therefore more constrained and more constraining than the process adopted by the Supreme Court in *Sabbatino*.

The process adopted by the Supreme Court in *Zschernig* is equally instructive to the possible use of comparative sources as persuasive authority. The very nature of the dormant foreign relations preemption doctrine presumes that a court will inquire into a foreign country’s institutions and relationship with the United States. Thus, in certain circumstances, the U.S. court will not apply the law of that foreign country should the Court deem that country to be “uncivilized.” This raises a couple of important issues relevant to comparative analysis.

First, similar to the *Allendale* case pertaining to anti-suit injunctions, it is apparent that in a variety of contexts, U.S. courts, as a matter of doctrinal directive, are ready and competent to analyze the substance and process of foreign law. This longstanding competence should dispel any notion that our courts are simply not equipped to analyze anything foreign. Second, the dormant foreign relations preemption doctrine not only directs examination of foreign legal process, but also encourages the drawing of distinctions between the nations whose processes are examined. Thus, as was the case in *Zschernig*, a nation such as East Germany that did not grant fair treatment to the United States received reciprocal treatment from the United States. The labeling of East Germany as “uncivilized” by the Supreme Court, while superficial and crude, is the tip of the iceberg of a process which presumes the unequal treatment by our courts of foreign nations based on certain characteristics—which, in *Zschernig*, was simply delineated as a distinction between “civilized” and “uncivilized” nations. As is the main thesis of this Article, not all nations’ laws have been, nor will be, accorded equal treatment by U.S. courts in their comparative analyses. What is needed, and what will be explored later, is a framework for a

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credible distinction between possible foreign sources of persuasive authority that goes beyond the coarse “civilized”/“uncivilized” divide.\textsuperscript{157}

III. CURRENT THOUGHTS ON COMPARATIVE ANALYSIS

The world is witnessing a “globalization of human freedom” which is “the most profound social revolution of our time.”\textsuperscript{158} One of the results of this social revolution has been the rekindling of comparative impulses.\textsuperscript{159} Consequently, the realities of the practice of law have already moved beyond an old-school concept of borders to encompass a more pan-national order.\textsuperscript{160} These facts notwithstanding, lawyers in the United States have demonstrated “astonishing indifference” to constitutional developments abroad, such developments thus not having “the slightest impact on American constitutional thought.”\textsuperscript{161} In fact, “American practice and theory have moved in the direction of emphatic provincialism.”\textsuperscript{162} Regardless of this “legal xenophobia,”\textsuperscript{163} global governance and its legal ramifications are proceeding apace, and the only issue that the domestic legal community needs to address is whether it will participate in such governance (as the United States has historically chosen to do) or sit on the sidelines and watch as others forge ahead.

One of the ways in which participation in this global legal enterprise is possible is through an engagement in comparative analysis which encompasses the use of foreign materials as persuasive authority. This is because “[c]omparative legal practice is founded on an underlying idea that the laws of the world are commensurable or comparable, and on an equally fundamental idea that comparison can only continue to take place amidst ongoing diversity.”\textsuperscript{164} That is to say, “[t]he contribution of comparative law emanates not from pseudoscientific, information gathering pretenses [because]...[w]hat comparativists share...is a passion for looking beyond, an empathy for differences but also for similarities, a faith in the self-transformative task of learning, and an

\begin{thebibliography}{99}
\bibitem{157} See infra Part IV.
\bibitem{159} See Blum, supra note 52, at 161.
\bibitem{160} See H. Patrick Glenn, Comparative Law and Legal Practice, 75 TUL. L. REV. 977, 977 (2001).
\bibitem{161} Bruce Ackerman, The Rise of World Constitutionalism, 83 VA. L. REV. 771, 772 (1997).
\bibitem{162} Id. at 773.
\bibitem{163} Shirley S. Abramson & Michael J. Fischer, All the World’s a Courtroom: Judging in the New Millennium, 26 HOFSTRA L. REV. 273, 278 (1997).
\bibitem{164} Glenn, supra note 160, at 1002.
\end{thebibliography}
interest in the form of knowledge itself." Thus, the aim of comparative law "is less to borrow than to seek the benefit of comparative deliberation."

As demonstrated by the vehement reaction against the Lawrence majority's employment of comparative analysis, it appears that those who advocate the use of comparative law in domestic courts must consistently defend their position. However, in recent times, these advocates in the United States have had their position bolstered by highly regarded sources: several justices of the current Supreme Court. As shown above, Chief Justice Rehnquist, and Justices Stevens, Souter, Kennedy, Ginsburg, and Breyer have all clearly signaled their amenability to the practice by authoring opinions in which they each use foreign materials as persuasive authority.

Some justices have also been vocal in their praise of the comparative enterprise off the bench. Justice Ginsburg, in two recent articles, decried the "island" or "lone ranger" mentality that sometimes infects domestic jurists and noted that "[w]e are the losers if we do not both share our experience with, and learn from others." Justice O'Connor has indicated that she thinks, along with other justices on the present Court, that the justices will "find [them]selves looking more frequently to the decisions of other constitutional courts" because "[a]ll of these courts have something to teach...about the civilizing functions of constitutional law." She added on another occasion that she was in favor of the U.S. Supreme Court citing decisions of the European Court of Justice. Chief Justice Rehnquist has similarly indicated his support

169. Sandra Day O'Connor, Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law, INT'L JUD. OBSERVER, June 1997, at 2; see also Sandra Day O'Connor, Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 16, 2002), in 96 AM. SOC'Y INT'L L. PROC. 348, 350 (2002) ("While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from...distinguished jurists [in other places] who have given thought to the same difficult issues that we face here.").
for an increased role for comparative analysis in the United States:

[Although] United States courts, and legal scholarship in our
country generally, have been somewhat laggard in relying on
comparative law and decisions of other countries...it is time that
the United States courts begin looking to the decisions of other
constitutional courts to aid in their own deliberative process.171

This is necessary, Rehnquist argues, because modern "constitutional law
is solidly grounded in so many countries."172

With the blessing of a solid majority of the justices on the Supreme
Court, it appears that comparative analysis has gained a foothold within
the mainstream of American jurisprudence. The strength and resiliency
of this foothold will very much depend on the analytic and logical
coherence of the judges who decide to employ this avenue of judicial
interpretation. Part of this strength can be derived from a normative
grounding of the entire practice.

As demonstrated above, comparative analysis, in the form of
reference to foreign materials,173 has been present within the
jurisprudence of the U.S. Supreme Court and select lower courts
throughout this nation's history. Even so, Justice Shirley Abramson of
the Wisconsin Supreme Court has remarked that, "while growing
numbers of American lawyers now recognize the importance of other
countries' laws for their clients, American lawyers and judges seem to
pay little or no attention to the law of other countries when focusing on
the domestic issues they litigate and adjudicate here at home."174
Similarly, Professor Jackson, a proponent of the use of foreign materials
as persuasive authority, sees the Supreme Court as holding itself "aloof"

171. William H. Rehnquist, Constitutional Courts—Comparative Remarks (1989), reprinted
in GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN
SYMPOSIUM 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993) (predicting that with so
many thriving constitutional courts in the world today, "United States courts would shed their
reticence in consulting foreign materials as sources of persuasive authority in the near future.").

172. Id.

173. Part II does not include in its historical description any comparative references that go
beyond the usage of foreign (or international) materials. However, the jurisprudence of the U.S.
Supreme Court, of lower federal courts, and of state courts is replete with examples of
comparative analysis that reference materials as persuasive authority which do not necessarily
originate from abroad. See Vicki Jackson, Yes Please, I'd Love to Talk With You, LEGAL AFFAIRS
Vol. 3 No. 4, July-Aug. 2004, at 44 (persuasive authority used in Supreme Court decisions
"include the rulings of lower federal courts and of state courts (even when interpreting their own
state constitutions), law review articles, and even works of fiction by Shakespeare, Mark Twain,
or George Orwell.").

174. Abramson & Fischer, supra note 163, at 279.
or "out in the cold" with respect to such practice.\textsuperscript{175} Professor Jackson sees this as a form of self-imposed isolation by the Supreme Court, with few references to foreign materials which, when they do occur, take place without much attention to the normative reasoning behind the results reached in such materials.\textsuperscript{176} Notwithstanding the perceived paucity of references to foreign materials described by those advocating a greater use of the practice, (a paucity which is clearly in the eye of the beholder considering the numerous examples identified in Part II), sufficient instances exist within the jurisprudence of the United States for one to extrapolate the normative content of such references. In addition, there exist certain justifications for the use of foreign materials as persuasive authority that have not yet been used by U.S. courts.

In the debate that ensued in the wake of Lawrence and, to a lesser extent, prior to the Lawrence decision, commentators articulated several of these other justifications.\textsuperscript{177} Among these are that comparative analysis furthers the globalization of human rights,\textsuperscript{178} helps solve similar problems that various courts around the world might encounter,\textsuperscript{179} creates a coordinating transnational legal system,\textsuperscript{180} fosters judicial dialogue,\textsuperscript{181} expands horizons,\textsuperscript{182} enhances the self-awareness of

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\textsuperscript{176} See id. at 249-50. Others have noted how the practice of citing foreign materials as persuasive authority is trending in the opposite directions in other countries. See, e.g., Gerard V. La Forest, The Use of American Precedents in Canadian Courts, 46 ME. L. REV. 211, 212 (1994).

\textsuperscript{177} See, e.g., Koh, supra note 12; Jackson, supra note 12; Elizabeth M. Schneider, Transnational Law as a Domestic Resource: Thoughts on the Case of Women's Rights, 38 NEW ENG. L. REV. 689 (2004).


\textsuperscript{182} See Vicki C. Jackson, Narratives of Federalism of Continuities and Comparative
participating nations, and increases the global influence of those countries which choose to engage in it. In response, the commentators advocating against the practice have attempted to debunk these reasons by superimposing other normative values that, in their opinion, trump those offered by the other side. Because this Article offers a framework from which proper sources of foreign persuasive authority can be located, it assumes a net worth for this type of comparative practice. That is not to say that detractors of this practice do not have some legitimate normative concerns, but only that a full exploration of those concerns would exceed the scope of this Article.

IV. A FRAMEWORK FOR SELECTION OF FOREIGN AUTHORITIES

As noted in Part II, courts that reference foreign authorities have seldom articulated a coherent and consistent justification for the selection of those materials. This shortcoming has led to accusations that U.S. courts supposedly select foreign sources at random. For similar reasons, charges that such selections are self-serving squarely follow. Only by explaining the normative reasoning and process behind the selection will courts succeed in revealing the intellectual cohesion that comparative analysis inherently possesses. Thus, a method of canvassing choices and delineating guidelines should go some way to refute those who presume that "not the rules but the personalities of the


judges are of transcendent importance in the working of the judicial process.\textsuperscript{186} In this way, at a minimum, a dent will be made in the opposition to the comparative practice.

Critics of the use of foreign materials by courts interpreting "purely" domestic provisions of law were given ample opportunity to present their case in the hearings on the Feeney Resolution, held by the Subcommittee on the Constitution of the House Judiciary Committee. As part of their critique, these critics focused on the alleged "inherently selective" nature of comparative analysis supposedly exemplified by the \textit{Lawrence} decision.\textsuperscript{187} The criticisms relating to the allegedly unprincipled enterprise of finding proper sources of foreign persuasive authority ranged from legitimate to farcical. This last category is best illustrated by commentator Stuart Taylor, Jr., who, as quoted by the Subcommittee in the Hearing Statement warned us of the sticky end to which we will be led if we continue down the perilous path of comparative analysis: "[W]hat will be next? Constitutional interpretation based on the sayings of Chairman Mao? Or Barbra Streisand?"\textsuperscript{188}

Although containing less rhetorical flourish, the question posed by the Chairman of the Subcommittee on the Constitution of the House Judiciary Committee, Congressman Steve Chabot, during the hearings is equally problematic and lacking in substance: "Assuming the views that the, quote, 'world community' should be considered when interpreting American law, what principle, if any, would exclude the consideration of the policies of, say, Communist China whose population alone includes nearly one-quarter of the entire world’s population?"\textsuperscript{189}

On its face, this question seems rather reasonable but, by referring to the \textit{world} community in general, and referring to Communist China as an example, the most superficial answer (being that China is not a liberal democracy), while answering the question in a satisfactory manner, reveals nothing of the process of selection that the question is meant to scrutinize. In fact, for three distinct reasons, such a superficial answer does not begin to construct a composite of prerequisites that makes a particular foreign source suitable for comparative reference in U.S. courts. First, given the modern paradigm of the disaggregated state, a simple reference to Communist China, being unitary and not

\textsuperscript{186} Jerome N. Frank, \textsc{Law and the Modern Mind} 136 (1930).
\textsuperscript{187} \textit{Legislative Hearing on H.R. Res. 568, supra} note 4, at 43 (Prepared Statement of Prof. Ramsey).
\textsuperscript{188} \textit{Legislative Hearing on H.R. Res. 568, supra} note 4, at 9.
\textsuperscript{189} \textit{Id.} at 69.
dissembling, describes an entity that, for purposes of comparative analysis, does not really exist. Second, because of this disaggregated state paradigm, what would appear to be the most fundamental component that the originating nation should possess before reference by U.S. courts is attempted, i.e., that such nation be a "liberal democracy," might not always be necessary. And third, because it is conceded by all sides of the argument that, *ab initio*, it is not the opinions of the *world* community that are sought out, but rather, opinions originating from selected nations, the very premise of the question is erroneous.  

Thus, Congressman Chabot would have his questioned answered, but the answer would not contain what the Congressman really sought: a real explanation of the process.

A more reflective skeptical inquiry into the practice of selecting appropriate nations from which to borrow persuasive authority comes from Professor Michael Ramsey. In his appearance at the hearings on the Feeney Resolution he testified that there is no "principled way to draw a line" to determine which countries to look at and which to ignore. In particular, Professor Ramsey noted that:

[W]hen you start talking about countries that are large, prosperous, rights-enjoying democracies, but not out of exactly the same tradition as ourselves or at least some of our people, such as India[,]... Japan, Thailand, the Philippines. Those countries, we have many things in common with, many things not in common with.  

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190. As further illustrated below, a *world* consensus, in fact, a *consensus*, on any particular issue, is not necessary before comparative analysis can take place. *See infra* Part IV, Section B, sub-part ii. In his testimony before the Subcommittee on the Constitution of the House Judiciary Committee on this specific issue (pertaining to whether it is the opinions of the *world* community that supporters of the comparative practice seek), Professor Jeremy Rabkin premises his opinion on a misconception. He states that when the proponents of comparative analysis say they want to consult the opinions of the *world* community, what "they mean is their friends in Europe and also in Canada." *Legislative Hearing on H.R. Res. 568, supra* note 4, at 69. Contrary to Professor Rabkin's assertion, proponents of comparative analysis make no pretense about where U.S. courts should look to find the appropriate sources of persuasive authority, and do not hide the fact that materials from certain countries are inapposite for this purpose. Thus, the fact that proponents "mean...their friends in Europe and also in Canada" is not the result of some colossal ruse perpetrated by supporters of comparative analysis (as implied by Professor Rabkin), but rather a result of an explicit approach to comparative analysis which inherently selects only particular nations from which materials can be referenced for this purpose. *See infra* Part IV, Section B, sub-part ii.

191. *Id.* In his prepared remarks, Professor Ramsey does concede that "some countries are better moral models than others." *Id.* at 56. However, he adds that to attempt "to articulate a legal principle justifying this sort of selectivity, if done explicitly, leads courts into another
In other words, Professor Ramsey was making the point that simply categorizing countries as "large, prosperous, [and] rights-enjoying democracies" is insufficient to successfully and systematically determine which countries are suitable sources of persuasive authorities for U.S. courts and which are not. His implication is that because we have differences with these countries (and presumably many others) that go beyond his listed criteria, any categorization is arbitrary, and therefore "unprincipled," and should not be undertaken.\footnote{Professor Ramsey is not alone in making this argument as it pertains to both the usage of comparative and international law. See, e.g., Alan Watson, \textit{Legal Transplants: An Approach to Comparative Law} (1974), reprinted in Mary Ann Glendon et al., \textit{COMPARATIVE LEGAL TRADITIONS} 4-5 (2d ed. 1994) ("Variations in the political, moral, social and economic values which exist between any two societies make it hard to believe that many legal problems are the same for both except on a technical level.").}

Aside from suffering from excessive particularization,\footnote{Thomas S. Kuhn, \textit{THE STRUCTURE OF SCIENTIFIC REVOLUTIONS} 10 (Phoenix ed. 1964).} Professor Ramsey's question is based on a premise which expects an open-and-shut rule as an answer. Thus, according to this premise, "principle" can only be adhered to if an applicable rule exists which, under all circumstances, produces consistent results in the selection of appropriate sources of persuasive authority. However, it is not a rule which will best establish a framework for locating among nations the most appropriate sources of comparative material, but a paradigm. A paradigm, in this sense, is a system that is "sufficiently unprecedented to attract an enduring group of adherents...[and] simultaneously...sufficiently open-ended to leave all sorts of problems for the group of practitioners to resolve."\footnote{Thomas S. Kuhn, \textit{THE STRUCTURE OF SCIENTIFIC REVOLUTIONS} 10 (Phoenix ed. 1964).} Once a paradigm is described, its open-endedness will leave room for rules to be developed according to the particular circumstances of each case and the individual issues presented therein. "Rules...derive from paradigms, but paradigms can
guide research even in the absence of rules.\textsuperscript{196} Thus, "principle" can be achieved by the development of a framework, even if no one-answer-that-fits-all exists.\textsuperscript{197}

A. Beginning to Differentiate Between Nations

1. The Fallacy of Equality Among Nations

One of the basic underlying principles of comparative analysis is that not all nations will be able to provide materials suitable for positive comparative usage by U.S. courts.\textsuperscript{198} Put another way, for the comparative enterprise, a "global community of courts does not...include all courts from all countries."\textsuperscript{199} Thus, the implication is that U.S. courts will engage in a selection process by which the suitable nations will be separated from the unsuitable ones.\textsuperscript{200} Within the context of each particular inquiry,\textsuperscript{201} the practices and authorities of those nations deemed unsuitable will be disregarded. To enable this selection process to proceed in a principled manner, a psychological impediment and fundamental fallacious tenet of international law must be shed: that all nations are equal.\textsuperscript{202}

\textsuperscript{196} Id. at 42.

\textsuperscript{197} This seems especially apposite in the context of comparative law because, as explained in detail in Part III, recourse to comparative sources results in large part from a view that judicial reasoning entails the pronouncement of standards, rather than rules, which give continuity to the texts or doctrines being interpreted. \textit{See generally} Kathleen M. Sullivan, \textit{The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards}, 106 HARV. L. REV. 22 (1992).

\textsuperscript{198} The emphasis here is on the word "positive." As described above in Part II, some U.S. courts have invoked foreign materials to emphasize the "negative" aspect of these materials and their lack of persuasiveness for the United States. It is unlikely that this "negative" aspect is of any concern to detractors of the comparative practice. Rather, it is more likely that the critique offered by those arguing in favor of the Feehey Resolution is implicitly premised on the allegedly "unprincipled" process of selecting particular nations for "positive" reference. Thus, Stuart Taylor, Jr.'s purported concern is that Chairman Mao's writings will be found to be persuasive by U.S. Courts, not that Chairman Mao's writings will be considered and then rejected by those same courts.

\textsuperscript{199} Slaughter, \textit{supra} note 166, at 194.

\textsuperscript{200} This selection of applicable nations not only applies to countries exporting persuasive authority but also to countries importing such authority. "Whether persuasive authority from abroad is in fact persuasive at home will vary sharply from country to country." Slaughter, \textit{supra} note 166, at 201. Thus, a country that produces institutions willing to consult authority outside of its own borders will often have a very different face from one unwilling to do so from a governmental, political, sociological, and cultural perspective.

\textsuperscript{201} This qualification is necessary seeing that those nations which are suitable for comparative reference by U.S. courts in certain contexts might be unsuitable in others. \textit{See infra} Part IV, Section B, sub-part iii.

\textsuperscript{202} Other commentators have similarly pointed to this misconception by noting that, at least within the context of international theory, one of the pitfalls is the indoctrinated fallacy of a
The traditional notion that all sovereign nations are considered equal in the international community is longstanding, and has been recognized in the United States from its inception: "No principle of general law is more universally acknowledged, than the perfect equality of nations." 203 This precept is so endemic that it forms the basis of the UN Charter, which states that the United Nations will be "based on the principle of the sovereign equality of all its Members." 204 It does not take a very in-depth analysis (which would exceed the scope of this Article) to show that the equality of sovereign nations under international law is a chimera. 205 A mere superficial glance at the make-up of the UN Security Council, the only body within the United Nations with real power, demonstrates the falsity of the national parity concept. 206 Moreover, it should be noted that the United States is not a neutral observer in the dissolution of this egalitarian concept, but an active participant in its

203. The Antelope, 23 U.S. (10 Wheat.) 66, 122 (1825) (Marshall, C.J.); see also Lassa Oppenheim, 1 International Law 20 (2d ed. 1912) ("Since the Law of Nations is based on the common consent of States as sovereign communities, the member States of the Family of Nations are equal to each other as subjects of International Law.").


206. As is well known, the UN Security Council consists of fifteen countries, ten of which are elected by the countries comprising the geographic area in which these countries exist for a two year term in two rotations (meaning five countries are elected every year), and five of which are permanent members (China, France, Russia, the United Kingdom, and the United States). Each permanent member possesses a veto right on any resolution. Even in bodies outside the Security Council within the UN, this stated notion of national parity is extremely ephemeral. For example, the difference in institutional make-up of the diverse countries of the world is tacitly given credence by the United Nations Human Rights Commission in its efforts to implement and interpret the supposedly Universal Declarations of Human Rights. See Rosalyn Higgins, The United Nations: Still a Force for Peace, 52 MOD. L. REV. 1, 7-8 (1989) ("What may be an appropriate and sensitive interpretation for the Western European democracies is not necessarily so for a global system embracing highly diverse political and economic systems."). The reality of the inequality among nations has been pointed out by other commentators. See, e.g., Karen Knop, Here and There: International Law in Domestic Courts, 32 N.Y.U. J. INT’L L. & POL. 501, 503 (2000) (highlighting the fact that modern institutional international law bodies are not comprised of countries that have equal status within such bodies and noting that as a result these bodies are critiqued as being vehicles of hegemonic powers). Others still have noted how because of this hegemonic concept of power pervasive within the context of international law (in contradiction to the parity ideal) normative obligations become extinguished when rules are applied in a differentiated manner. See Eduardo Moises Penalver, The Persistent Problem of Obligation in International Law, 36 STAN. J. INT’L L. 271, 271-75 (2000).
demise. Thus, within the framework of international organizations, the United States does not treat all sovereign nations as equal. As one commentator has observed, because “[d]eveloping an immediate consensus in universal membership organizations can be extremely difficult...[t]o facilitate consensus, the great powers first ensure agreement among a coalition of the willing” and then coerce the remaining nations into agreement, thus not only enforcing, but actually creating, customary international law through coercion (i.e., with sanctions).

As described in broad terms in Part II, a certain “sifting” among nations also occurs within the framework of international law propounded by courts (as opposed to international law exemplified by make-up of international organizations) in contradiction of the idea of sovereign equality. Usually, the two main criteria used to differentiate nations pertain to the closeness of the relationship between the foreign country and the United States, and the nature of the domestic regime of the foreign country, i.e., whether it is a democracy. As such, this kind of superficial geo-political nation sorting has occurred in international conflict of laws cases where, for example, the New York Court of Appeals refused to enforce laws of foreign countries (e.g., Nazi Germany, or the Soviet Union) when they considered those laws “unjust” and “barbarous,” but agreed to apply the laws of Holland, “a friendly sovereign State.” Similarly, the “better law” doctrine in private international law is also one of those examples where comparisons between nations are regularly made by courts. These and other developments have led Professor Slaughter to note that “[i]nternational law has moved...from a discipline in which distinguishing between states in terms of domestic regime type was


208. This is the case even though legal scholarship tends to recoil from such pronouncements as “Clash of Civilizations.” See Samuel P. Huntington, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996).


210. See Robert LeFler, Choice-Influencing Considerations in Conflicts Law, 41 N.Y.U. L. REV. 267, 296 (1966) (noting that such a rule requires the judge to decide which law is better “in terms of socio-economic jurisprudential standards.”).
virtually taboo to...acceptance and incorporation of democratic peace theory.”

The importance of these examples is not limited to the fact that they exemplify the hollowness of the supposed equality among nations. In separating out various nations, international organizations and courts are creating a hierarchy among nations, thus interposing a value-laden judgment which, in the context of private international law, generates a binding substantive rule of law. Therefore, despite the U.S. Supreme Court’s occasional protestations to the contrary, the practice of domestic courts in the context of private international law refutes any notion of the equality among sovereign nations. In other words, commentators and judges alike have announced an unwavering adherence to the notion of parity between sovereign nations, even while reaching decisions and conclusions which create a distinct hierarchy among those nations.

2. An Interdisciplinary Perspective

Other disciplines have been less reticent in shedding the artifice of nation equality that still permeates international law. One such discipline is political science. Political scientists (dominated by a realist bent) have had no problem accepting the notion that all states are not created equal, and have based their differentiation on the concepts of power and security. As stated above, at least as far the prevalent rhetoric is concerned, this creation of hierarchy and the reasons behind its creation are anathema to legal scholars. However, the two areas of

211. Slaughter, supra note 180, at 384. Interestingly, Professor Slaughter (formerly Burley), in an earlier article, had specified that “international law, whether public or private, does not distinguish among sovereign states” and that within the ambit of the academy, then, “it remain[ed] taboo to use distinctions between different categories of sovereign states as a basis for legal analysis.” Burley, supra note 13, at 1909 (arguing that the reality on the ground was different from the purported equality among nations by showing that states interact with one another differently, and such interaction is at its most effective when it is between “liberal” states).

212. Such protestations are exemplified by the Supreme Court which, notwithstanding a myriad of cases holding to the contrary, held that, in the context of private international law, no judicial inquiry can be made into foreign acts “where the search...for the ‘democracy quotient’ of a foreign regime” creates a “great potential for...embarrassment” to the United States and its ability to conduct relations with other countries. See Zschernig v. Miller, 389 U.S. 429, 435 (1967).

213. Often, ingrained traditions are hard to dispel even if they have very little, or no, basis in fact. For example, those same traditional notions that rationalized a juridical equality of nations under international law similarly theorized upon the outdated notion that international law “is a law for the intercourse of States with one another, not a law for individuals.” Lassa Oppenheim, 1 INTERNATIONAL LAW 4 (2d ed. 1912).
scholarship are closer than would appear at first blush. Professor Slaughter notes that "[f]rom a moral perspective, differentiating among states solely on the basis of military and economic strength ignores the community of humanity behind the sovereign facade." In other words, it is not the differentiating by political scientists that should be the object of reproach, but rather the method of creating such differentiation. Presumably (and practically, as demonstrated in Professor Slaughter’s article), a different paradigm of sorting out the nations would lead to a result welcomed by the legal academia. Her proposal is to look at the relationship between “state and society,” (not at power ratios, or “arid formalities of sovereignty”), and consequently to examine the disaggregated elements of the state as secondary players in the equation. Thus, for Professor Slaughter, it is the nature of society itself within each nation which functions as a category of distinction between the various nations. For the purposes of comparative analysis, and the consequent task of selecting persuasive sources from some nations but not from others, this method of categorizing different nations is extremely important and effective in achieving an intellectually honest result.

Notwithstanding the superficial wariness that appears to accompany the notion of judges inquiring into socio-political aspects of foreign countries, it is clear from case precedent that judges routinely perform this task in the contexts of international conflict of laws cases, forum non conveniens determinations, and asylum claims. In fact, one commentator suggests that, should the courts feel incompetent to make such inquiries, they could “seek assistance from the executive branch, non-governmental organizations, and even political scientists, through amici briefs to the court or introduction into evidence of State

215. Justice L’Heureux-Dube of the Supreme Court of Canada articulates this form of distinction as a warning about the dangers of using comparative material willy-nilly without bearing in mind the “[p]olitical and social realities, values, and traditions,” of the lending nation, and the differences in such characteristics that might exist in the borrowing nation. See Claire L’Heureux-Dube, Globalization and the International Impact of the Rehnquist Court, 34 TULSA L.J. 15, 26 (1998). Given such differences, “different solutions in different places are unquestionably necessary,” and:

[c]onsidering and articulating the differences that mandate the adoption of a different solution is...a particularly useful exercise [in that it] helps not only when we accept the solutions and reasoning of others, but when we depart from them, since even then, understanding and articulating the reasons a different solution is appropriate for a particular country helps make a better decision.

Id. at 26-27 (emphasis added).
Department documents and similar reports. In any case, determinations influenced, at least in part, by social sciences already play a role in the legal arena, such that judges already have a certain experience and competence in the area, or a body of legal precedent to which they can turn should they not have such individual experience and competence.

The link between social sciences and law is not only established on the practical level (through reference by judges to social sciences in the context of private international law or asylum cases), but also on the normative plane. Law and social sciences work well together because social sciences connect law to actual "on the ground," empirically-verifiable, socio-cultural activities. This connection to socio-cultural activities is instrumental in aiding the comparative practice. Because social and cultural affinities between lending and borrowing countries are an important factor in determining which nations' authorities will be selected for comparative analysis, a discipline which facilitates exploration of these affinities will prove vital to the proper functioning of the enterprise. In fact, certain scholars have already dipped into the social studies pool to advocate certain techniques of comparison. Notably, Professor Tushnet borrows one of his methods of approaching comparative constitutional law from social studies, i.e., bricolage. By referencing social studies within the sphere of comparative analysis, not only is the enterprise given practical effect through the experience of social studies practitioners, but, on the whole, the legal horizons are broadened to encompass such experience.

Although political science is the most noteworthy discipline which has already formulated theories based on the reality of inequality among nations, it is not the only such discipline. Within the sphere of international relations theory, comparative politics has also become a field of interest to expose the nexus between international and domestic law and politics. As a result of this type of study, differences in internal regime structure become important in that interstate relations are now looked upon "as a function of state-society relations, relations that are

217. Id. at 532.
218. See supra Part II.
221. See Shirley S. Abrahamson & Michael J. Fisher, All the World's a Courtroom: Judging in the New Millennium, 26 HOFSTRA L. REV. 273, 288 (1997) (Chief Justice Abrahamson of the Wisconsin Supreme Court urges judges and lawyers alike to use comparative analysis as a way to broaden horizons within legal practice.).
structured very differently across different societies and cultures.\textsuperscript{222} Comparative law studies, given the contextual differences, can produce a similar insight and lead to a better understanding as to why sources from certain countries are relevant to comparative analysis and why sources from other countries are not. In sum, there is a great deal of material from other disciplines that can guide the comparative practitioner (whether judge or counsel) in forming cohesive explanations as to why only materials from select nations are worthy to be considered persuasive authority for the United States. These explanations begin to form a rebuttal to the charge that any such selection is unprincipled. In fact, these disciplines spell out only some of the rationales behind the selection process which domestic courts have already undertaken, but failed to properly articulate.

B. Major Criteria for Distinguishing Between Nations

1. Democracy versus Non-Democracy

One of the concerns articulated by the proponents of the Feeney Resolution is that the sudden spread of comparative practice will see domestic courts using as persuasive authority materials from Communist China or the writings of Chairman Mao. History teaches us that this is an unfounded fear. Even a cursory look at precedent in this country shows that positive persuasive authority is not derived from nations which do not exhibit a modicum of democratic impulse.\textsuperscript{223} In other words, countries which have not reached a certain level of democratization exist below the “event horizon” of the comparative enterprise.\textsuperscript{224}

\textsuperscript{222} Slaughter, supra note 180, at 384.
\textsuperscript{223} This is admitted even by critics of the comparative enterprise:
Resort to foreign precedents may not be disciplined by any sort of clear theory or strict doctrine—as it surely is not now. But it is not likely to be random. Our judges will not invoke precedents from China or Russia or Saudi Arabia. What we are most likely to get is what we have recently gotten—appeals to the sensibilities of western European judges or officials. We share many notions with European legal systems and for just this reason, drawing instruction or inspiration from European courts may seem plausible.
Legislative Hearing on H.R. Res. 568, supra note 4, at 31 (Prepared Statement of Prof. Rabkin). Professor Rabkin is incorrect about both the requirement of a “strict doctrine” to justify the usage of an interpretative tool and the lack of theory underlying the selection process involved in comparative analysis (although such theory has, up until the present, only been articulated in the vaguest forms), but he is certainly right about the lack of randomness of such selection process and its consequent exclusion of certain countries.
\textsuperscript{224} “Event horizon” is a term derived from theoretical physics and refers to the boundary of a black hole. In simple terms, what is on the other side of that boundary is irrelevant to theoretical physicists because any theory as to the composition existent there cannot be tested or verified.
Past U.S. court decisions that make use of comparative analysis have delineated a selection of nations deemed suitable lenders of persuasive authority. This demarcation of acceptable nations, however, is often implicit, rather than explicit. On a case-by-case basis, the selection factors analyzed by the court can act as a proxy for an outright declaration that one country is a “liberal democracy” or not. In other circumstances (mostly in more remote examples), a simple reference to “civilized” nations suffices to define the relevant categorization. In more recent times, however, the language used by courts has become more direct, with courts claiming that only authority originating from democracies will be considered as persuasive.225 Today, this realm of suitable nations has been further restricted, with courts qualifying the democracies which they reference as “western,” “Western European,” “former Commonwealth nations,” or “of Anglo American heritage.”226 Bruce Ackerman summarizes this panoply of nomenclatures by suggesting that the type of nation that domestic courts are really looking for when engaging in comparative analysis is one that can be defined as a “genuine liberal democracy.”227

This raises a basic normative question. Why is a “genuine liberal democracy” a legitimate originator of persuasive authority for use by U.S. courts, while a nation existing outside this category is not? The answers are varied, but before discussing them, it is important to define what is meant by a “genuine liberal democracy.” On the surface, defining “genuine liberal democracy” would seem straightforward, but if courts throughout the last three centuries have struggled to achieve such a definition by throwing around terms such as “civilized,” “western,” and “of Anglo American heritage,” as pseudo-synonyms for “genuine liberal democracies,” it becomes clear that this definition is not so self-evident.

Definitions of democracy have varied throughout the ages, generally ranging from philosophically abstract notions to descriptions of

225. See, e.g., Trop, 356 U.S. at 102-03 (looking to law in the “international community of democracies” in the context of Eighth Amendment analysis).
227. Ackerman, supra note 161, at 787.
practical characteristics. John Stuart Mill presented a cogent description of what was, in his opinion, the major attribute of democracy from which all other characteristics flow: a system which allows a pluralistic tolerance and a dynamic competition between divergent opinions. That is, in a democracy, each opinion is of the same moral equivalence, and is entitled to equal space in the marketplace. A similar definition views democracy as an "institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote." In other words, "a key characteristic of democracy is the continuing responsiveness of the government to the preferences of its citizens, considered as political equals." Other definitions also focus on the process which characterizes a democracy, but extend their vision beyond the mere fact of competitive elections by noting that democracy "includes rights of access to information, to participate in decision-making processes, and to have effective access to judicial and administrative proceedings, including redress and remedy."

As noted, the definitions of democracy illustrated in the paragraph above all deal with the process of democracy rather than the substance of the ideas being advanced through that process. Other theories of democracy focus on the substantive. For John Rawls, the ultimate substantive component of democracy is justice, which allows for the repression only of those who destroy freedom. Others view "human rights, equal rights and government under law [as] important [substantive] attributes of democracy." One commentator has summarized what, in his opinion, are the four chief characteristics of a "liberal democracy" (three of which involve the protection of certain substantive rights): (1) protection of private property; (2) a market economy; (3) equality under the law and respect for human rights; and (4) a representative government deriving its authority from the consent of individuals. Based on the summary outlined above, the image of a "liberal democracy" emerges as a country whose institutions are

234. See Doyle, supra note 13, at 206-09.
representative of the wishes of its people, which guarantees individual
and property rights to its citizens, and whose economy is governed by
capitalist impulses.

Given these definitions, it is now possible to better answer the
question posed above: Why is a “genuine liberal democracy” a
legitimate originator of persuasive authority for use by U.S. courts while
a nation existing outside this category is not? The overriding answer can
best be framed in sociological terms: to wit, we deem the product of a
“genuine liberal democracy” worthy of consultation (with a
predisposition to be instructed by this product) because we tend to
accept the legitimacy and guidance of those who look most like
ourselves.235 Because people living in the United States view themselves
as constituents of a “genuine liberal democracy” their natural, ingrained
impulse is to gravitate towards those countries that are perceived as also
being “genuine liberal democracies.”236 Thus, the first push towards
referencing other democracies is purely instinctive. In the case of the
selection of foreign persuasive authority, normative and practical
reasoning confirm this natural instinct.

Aside from simply “looking like us,” confining the pool of nations
from which we take our persuasive authority to “genuine liberal
democracies” survives the test of reason. From a normative perspective,
the distinction stems from the thought that “democracies, or, more
precisely, ‘liberal states,’ are presumed to behave differently from
dictatorships, not only domestically but also internationally.”237 The
different behavior is a consequence of the fact that the representative
institutions of liberal democracies are supposed to express a collective
consciousness, which was instrumental in creating those very
institutions and placing the would-be decision-makers onto such bodies.
The paradigm of the modern democratic society is one that fosters

235. In common parlance, this compulsion towards congregating with those who look similar
is sometimes referred to as the “pack phenomenon.” This is slightly different than the notion of
surrounding ourselves with those with whom we have things in common. Although these two
criteria for congregating will lead to an overlap of personalities who would inevitably end up
together under either scenario, the thrusts leading to the two types of congregation arise from
different places. In the case of grouping by similarity of appearance, the impulse is not fruit of
learning, but of feeling. Familiarity, comfort, and belonging all contribute to this instinctive want.
However, in the case of grouping by similarity of interest, the generating force is not instinct, but
learning: a rational choice borne out of experience. Within the context of comparative analysis,
both grouping tendencies play a part, but it is the former instinctive impulse that is the major of
the two selection processes.

236. Perception is the key component here. We might be wrong, but nevertheless, perception
overrides concerns of the possible inaccuracy of our instinct pertaining to how we see ourselves.

237. Anne-Marie Burley, International Law and International Relations Theory: A Dual
individual identity within an atmosphere of plural equality, and allows this individuality to express itself, by means of regular elections, through selection of accountable representatives. Thus, a "liberal democracy," will theoretically not act on the whim of the few or the one like an oligarchy or an autocracy, but will, through collective self-identification and experience, adhere to higher concepts of internal order. In other words, the different behavior of "established liberal democracies with strong domestic traditions of the rule of law" is normatively congenial to our own sense of self. Because, as a society, we are not interested in emulating oligarchies and autocracies, the behavior exhibited by members of those types of regimes does not even enter the radar screen for the purposes of comparative analysis. Therefore, if one accepts that comparative analysis has a role to play in domestic jurisprudence, "to confine such comparisons to those countries where legal proceedings meet standards of rationality that are more or less comparable to those in the U.S." is both advisable and normatively preferable. Indeed, when the Supreme Court has articulated a reason for engaging in nation selecting under the rubric of comparative analysis, it has alluded to this sort of affinity of behavior which we share with other


239. See Judith N. Shklar, Legalism 1-2 (1964). Professor Shklar equated the idea of adherence to higher concepts of internal order to her definition of "legalism." She stated that

legalism:

has provided the standards of organization and the operative ideals for a vast number of social groups, from governmental institutions to private clubs. Its most nearly complete expression is in the great legal systems of the European world…. The court of law and the trial according to law are the social paradigms, the perfection, the very epitome, of legalistic morality.

ld. Professor Shklar identified "legalism" as an attribute possessed solely by democratic states, and noted that "legalism" penetrated all strata of the democratic society in that "a legal caste, once it had established the 'rule of law' securely against threats from absolutist arbitrariness, was bound to prefer order to liberty." Id. at 6.

240. Helfer & Slaughter, supra note 181, at 276.

241. This is the rationale explained by Professor Jackson in her testimony before the Subcommittee on the Constitution of the House Judiciary Committee in an exchange with Congressman Forbes who was questioning her on the matter:

FORBES: Is there any country in the world today which you would be willing to say our court should not look for interpreting our Constitution or our laws, the laws of that country? JACKSON: Well, as I've tried to say, I think there are different kinds of uses to be made, and, if there are, for example, dictatorships that we don't want to be anything like and there is an aspect of their law that facilitates the dictatorship...we do not want to be a place that has a feature like that which results in a dictatorship. So...I think that the uses that can be made are so different in good judicial decision-making. I would tend to approach it in that way, what is the use, what are you trying to show by it.

Legislative Hearing on H.R. Res. 568, supra note 4, at 97.
liberal states.\textsuperscript{242}

In this light, given the fallacy of the equality of nations, and the reasoned gravitation towards similar nations, the charge that the selection of foreign authority is driven by some unspoken nefarious motive is completely unfounded.\textsuperscript{243} In his prepared statement on the Feeney Resolution, Professor Ramsey complained about the "selective" use of foreign materials.\textsuperscript{244} In particular, he criticized the notion of a comparative analysis which only draws its persuasive authority from some countries and not from others.\textsuperscript{245} He noted that domestic courts only look to countries which support their conclusions and not to others which would not.\textsuperscript{246} He then concluded by stating that this "selectivity confirms that courts are not really being guided by foreign materials in their readings of specific texts, but are using foreign materials to support decisions of moral and social policy reached on other grounds."\textsuperscript{247}

Professor Ramsey's criticisms of the nation-selecting aspect of comparative analysis are both factually inaccurate and normatively indefensible. First, as illustrated in Part II, comparative analysis entails a negative form, such that domestic courts will refer to countries which have specifically reached conclusions that are contrary to the holding being issued by the domestic court. Thus, domestic courts will, and do, look to countries whose decisions do not support their conclusions. Second, proponents of the Feeney Resolution cannot both complain about the risk of having domestic courts use materials from "Communist China" or "Chairman Mao," and then, in their next breath, object to the fact that materials from "Communist China," through a process of selection, are excluded from comparative consideration. What these critics would have one believe is that there is no intellectually honest way to distinguish between various nations, and therefore, because we would not want domestic courts to imitate autocracies or oligarchies, we should cast asunder the whole comparative exercise. In other words, according to proponents of the Feeney Resolution and its supporters, domestic courts are unable to engage in line drawing. Aside from holding our courts in very low

\textsuperscript{242} See, e.g., Knight, 528 U.S. at 998 (Breyer, J., dissenting from the denial of certiorari).

\textsuperscript{243} Presumably, this nefarious motive would be that, a priori, judges would decide the result they intended to reach, and then would backtrack into finding only the foreign persuasive authority which supported their prefabricated decision.

\textsuperscript{244} See Legislative Hearing on H.R. Res. 568, supra note 4, at 44 (Prepared Statement of Prof. Ramsey).

\textsuperscript{245} Id. at 56.

\textsuperscript{246} Id.

\textsuperscript{247} Id.
esteem, this position is belied by past practice and by the fact that it is, indeed, possible to draw distinctions between nations on the basis of political, cultural, social, and normative aspects for the purposes of conducting a meaningful comparative analysis. Thus, there is nothing novel, nor problematic, in refusing to adopt an "all nations or no nations" approach in this context.

What might be demanded on particular occasions, however, is a more detailed look into separate institutions within foreign countries to determine those institutions' democratic quotient, rather than allocating a democratic label to a nation as a whole. In today's world, where nations increasingly behave in a non-unitary fashion, this "democratic" label is more appropriately applied to the specific institutional body from which material is being sought, rather than to the nation to which the institutional body belongs. Thus, the validity of the foreign law being sought for comparison initially must be premised as a result of democratic institutional law-making. In most circumstances, this is a distinction without a difference: for example, the institutional bodies of various EU members exhibit the same democratic tendencies that the nations themselves possess. Nevertheless, in certain instances, a country whose political branches might not meet the threshold requirements of liberal democracy (and therefore, whose pronouncements would be irrelevant as sources of positive persuasive authority), might nevertheless possess an independent judiciary which shares common values and traditions (such as the common law) with the United States. Therefore, because "the legitimacy and power of the state rests solely on the actual source of its authority, [being] the aggregated preferences of individuals within it,"248 in some cases, a wholesale rejection of all sources from a particular nation because of the supposed non-democratic regime in that country might exclude valuable materials. Nevertheless, even from the disaggregated nation perspective, it is apparent that, for comparative analysis purposes, "nation states still matter [a]nd some nation states clearly matter more than others."249

As noted, other disciplines have already begun to construct theories founded on a differentiation between domestic regime types. Within legal scholarship, this trend has also recently begun, but it encompasses both the drawing of distinctions between "liberal democracies" and other regime types, and the breaking down of each nation into a composite picture of the individual bodies contained therein.250 This

248. Burke-White, supra note 216, at 472.
250. In fact, contemporary legal theory that rejects the notion of sovereign equality also
recent upsurge in legal scholarship which analyzes the disaggregated interaction between the various components of sovereign states (be they individuals, agencies, organizations, or institutions) is premised on an overarching model of international law denoted as the "liberal international law theory." 251

"Liberal international law theory" is a "positive model" which is "void of normative values," i.e., it makes no judgments. 252 In short, this model, through descriptive observations of the way various components within a particular nation relate to their foreign counterparts, asserts that the disaggregated elements of "liberal states" interact differently with each other than they do with such elements of "non-liberal states," thus creating a dual-track form of international law (and relations). 253 Under this dual-track version of international law, the expectations and behavioral standards to which the different components of "liberal states" hold themselves when dealing with each other are markedly different (and generally higher) than the standards to which these components of "liberal states" hold their counterparts in "non-liberal states." This is not, as it might appear, a benefit to the "non-liberal states." Rather, "non-liberal states" are denied a whole host of privileges by being kept at arm's length by the "liberal states." One such negative impact is a decrease in influence on the world stage which, in terms pertinent to this Article, means being ignored as possible originators of persuasive legal material for use by the relevant bodies within the "liberal states."

Several commentators have used the precepts of the positivistic "liberal international law theory" to develop scholarship specific to a narrower legal topic. Professors Slaughter and Laurence Helfer have presented their theory of supranational adjudication by using "liberal international law theory" as a launch pad. 254 They posit that descriptions

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252. See Burke-White, supra note 216, at 468, 470.
253. See Burley, supra note 13, at 1910.
254. See, e.g., Helfer & Slaughter, supra note 181, at 331-35 (recognizing that their theory of supranational judicial adjudication is limited to nations that exhibit a "liberal democratic" bent (even though they concede that such a definition begins to explain, but does not fully succeed in explaining, the general assent that would be given by such nations to supranational judgments that would have to be enforced by the domestic entities)).
such as "liberal democracy" are better used to describe separate elements of the disaggregated state because of the modern nation’s lack of a unitary identity, noting that "[n]ondemocracies may have democratic impulses, embodied in specific institutions; illiberal states may have strong liberal leanings [and thus the] same ability to penetrate the surface of the state that gives supranational tribunals their potential power also creates opportunities for them to operate beyond the club of western liberal democracies."  

William Burke-White superimposes normative values upon the value-neutral “liberal international law theory” to evaluate current amnesty legislation of differing countries.  

In another article, Professor Slaughter, after describing in detail the structural bases of “liberal international law theory,” then shows how the act of state doctrine is affected by the different type of relationships that “liberal states” share among themselves, as compared to the type of relationships that “liberal states” have with “non-liberal states.”  

In sum, what the “liberal international law theory” in general, and its more narrow applications in particular, show, is that the way nations relate to one another depends in large part on whether a particular country is a liberal democracy or not. All of the above applications of the “liberal international law theory” contain several aspects that reveal the normative underpinnings of comparative analysis and illustrate the inherent necessity of comparative analysis to distinguish between the different components of the nations of the world—deeming some to be worthy, and others unworthy, of becoming possible sources of persuasive authority for the United States. Similar to the “liberal international law theory” and its applications illustrated above, comparative practice embraces a value-laden “sifting” among nations, with the goal of creating a hierarchy of suitable sources of foreign authority which courts can reference. In this way, the comparative practitioner, in confining her pool of resources to nations that are democratic, not only puts into practice a jurisprudential normative conscience, but also takes into account the actual realities of how countries deal with one another on a regular basis. As a result, within the comparative framework, nation “sifting” should be welcomed and not feared, not only because it is principled and intellectually cohesive,  

255. Id. at 335. 

256. See Burke-White, supra note 216. The values that Burke-White superimposes upon the “liberal international law theory” are legitimacy (of the political regime being examined) and scope (of the crimes covered by the specific amnesty provisions being scrutinized). See id. at 471-81. 

257. See Burley, supra note 13.
but also because it is backed up by a long body of precedent.

Thus, while the democratic credentials of the proposed authoritative entity are a necessary characteristic of the originating source, they are not the end of the line. Other criteria exist to further reduce the quantity of nations from which sources of persuasive authority should be obtained, thus making the whole comparative process more manageable and pertinent to contemporary jurisprudential goals.

2. Societal Character and Culture

Further categorizations of liberal democracies can be delineated by grouping nations according to their social characteristics and culture. Social characteristics and culture are fundamental to every country, and have been observed and described by social scientists, generally, and anthropologists in particular. Apart from the use of political science described above, reliance on other social sciences and anthropology to formulate a legal construct is by no means unprecedented. In fact, understanding collective behavior and its modern trends is fundamental to formulating a working relationship between society and its representative institutions. "If social science has any validity at all, the postulates developed, [for example], by political scientists concerning patterns and regularities in state behavior must afford a foundation and framework for legal efforts to regulate that behavior."  

This Article imputes in broad terms a different meaning to the concepts of "society" and "culture." In short, the main distinction between these two characterizations is that society originates internally within each individual and is reflected outwardly through the collective, while culture originates from the exterior and collapses

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258. For example, anthropological ideas have already been used in connection with legal theory to show the evolution of legal trends within the international system. See, e.g., Riles, supra note 219, at 598 (deeming certain legal culture to be "primitive" when compared to others). Similarly, Robert Post has explained that because constitutional law is a social activity that contributes to the definition of a particular culture, any examination of constitutional law must embody an anthropological component. See Robert C. Post, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 65 (1995).

259. Burley, supra note 237, at 205.


In order that any society may function well, its members must acquire the kind of character which makes them want to act in the way they have to act as members of the society or of a special class within it. They have to desire what objectively is necessary for them to do. Outer force is to be replaced by inner compulsion, and by the particular kind of human energy which is channeled into character traits.
onto each individual. As a result, a functioning society tends towards homogeneity, while the culture within such society can be either homogenous or fragmented. Clearly, society and culture feed off each other, but each nevertheless maintains a distinct physiognomy.

Society is the group demonstration of the wills of the individuals comprising it.\textsuperscript{261} It is a "living organism."\textsuperscript{262} It manifests itself in the way people treat one another, and in the formation of the basic tracks within which the individuals expect everyone to travel.\textsuperscript{263} For example, mass media, work ethic, public appearance, and tolerance of diversity (to list but a few), are all components that, when amalgamated, produce a certain kind of society which can be differentiated from others. The key is that all components are channelled through an implied notion of collective acceptability which creates the boundaries of that particular society.\textsuperscript{264} Every individual brings an internalized value system to such society, is impacted by the internalized value system of other individuals within that society, and consequently ends up impacting the society that she, in her small part, is helping to shape.\textsuperscript{265} Specifically, to use the components articulated above, the limits of what images the mass media of a particular nation is willing to transmit, the extent to which expressions of public nudity are tolerated, and the level of racial/ethnic/religious stereotyping within mainstream discourse, are all

\textsuperscript{261} Some view this group demonstration rather cynically by suggesting that it is merely a potpourri of the state's self-interest. Nigel Purvis, Critical legal Studies in Public International Law, 32 Harv. Int'l L.J. 81, 93-95 (1991) (indicating that within the context of international organizations, such regimes are set up primarily for the benefit of the "ruling class.").


\textsuperscript{263} The impact of society on the ability to regulate behavior has a psychological component. "Even among those who believe that cultural conditions, social rules and roles, and other social phenomena do effectively channel and organize individual conduct, such cultural forces are viewed as effective only insofar as they are able to overcome personal desires, needs, and predispositions." William R. Bishin & Christopher D. Stone, LAW, LANGUAGE, AND ETHICS 900 (1972). In this context, society functions as a massive superego imposed on each individual's id.

\textsuperscript{264} Put another way, "state behavior primarily [is] a function of the constraints placed on state actors by being embedded in domestic and transnational civil society." Burley, supra note 237, at 227.

\textsuperscript{265} This dual process of impacting society through the osmosis of one's values to and from others, results in a collective force that gives rise to plural notions of individual rights. "Rights generated [in this way] are more likely to take account of the particular preferences and traditions of individual countries...[and] are more likely to resist political gusts that put pressure on rights because they will be more securely rooted in the soil of these countries." John O. McGinnis, The Political Economy of Global Multilateralism, 1 Chi. J. Int'l L. 381, 392 (2000) (arguing that the primary goal of multilateralism (being the promotion of the well-being of citizens of participatory nations) is best served in the area of trade agreements because it can effect change by impacting the global market within a framework where each nation's self-interest is served, while it is less effective in promoting global civil rights).
indicators of what kind of society exists in the location where these components are examined. By looking at these factors, and many others, it is possible to create groupings of nations whose societies may resemble each other, or markedly differ.

Culture, on the other hand, has more narrow connotations. Culture is the input given to each individual initially by the familial unit in which she happens to be born, and later, by the circles of people and interests that she more or less chooses to pursue. Local tradition and religious affiliation are the most typical cultural affects, but not the only important ones. As such, "[c]ulture is broader than religious or traditional values, but encompasses material possessions," and therefore "culture is not bounded by national territory; it is the product of subnational and transnational influences [so that] [n]ations cross-trade culture." It follows that local tradition and religious identity are flanked by artistic, musical, and literary interest, as well as facets of daily life such as gastronomical preference, club affiliations, and manner of clothing, to comprise the picture of a particular culture. Therefore, similar to society, it is possible to observe the particular culture or cultures of the countries of the world and to group the nations according to such observations. Unlike a functioning society, however, which exhibits mostly uniform characteristics nationwide, many different cultures may exist within one society. For example, the gay neighborhoods of West Hollywood (and the people who frequent them) and the Amish farmlands of Eastern Pennsylvania (and the people who dwell there) illustrate markedly different cultures which

266. These illustrative components have been picked because of their particular contemporary relevance. The recent images of beheadings and maimed corpses strewn on the ground have tested the limits of how willing the mass media in each country is to show such images, with media representing certain types of society opting for more censorship than others. The pictures of the prisoner abuse at Abu Ghraib have reminded the world of how standing naked before members of the opposite gender might be considered an act of extreme humiliation in some societies, but certainly not in others.

267. Thus, "the moral sense and life-styles of most people reach far beyond the confines of domestic and community mores in which they were first fashioned," moving beyond those beginnings to becoming a present, yet "peripheral" aspect of "our personal integrity." See Gordon W. Allport, BECOMING: BASIC CONSIDERATIONS FOR A PSYCHOLOGY OF PERSONALITY 35 (1955). We are thus only partly reflections of our "home, class, and cultural ways of living," but it is the transcending of such mores which shapes the modern sense of self. Id.


269. This would seem especially appropriate given the transnational nature of contemporary culture.
nevertheless are allowed to flourish within the same American society. 270

Given the wide array of possibilities within both society and culture, an indiscriminate borrowing of foreign persuasive authority without a closer look at societal and cultural characteristics which gave rise to such authority might indeed lead to dangerous results. For example, in the context of the Lawrence case, a positive reference to Saudi Sharia law (where homosexuals are beheaded for acts of sodomy) without an understanding of the nature of contemporary Saudi society and culture, would seek to impose affinity where none exists. Indeed, fundamental to the comparative enterprise is the necessity of common normative values between the giving and receiving countries so that even though the persuasive authority might come from a geographically “foreign” place, in reality, the overlapping normative convergence make it so that the authority referenced is not “foreign” at all. In other words, the common normative values of the United States and the nation whose authority is to be referenced are given most strength through a shared history consisting of civilization and liberalism, 271 even though those norms might not be practiced in their social contexts as much as they are preached. 272

Acceptance of the value of comparative analysis is contingent upon the existence of certain key common characteristics between the institutions of the nations being compared. “Depending upon the scrutinized legal area, this acceptance is more likely to occur where the compared legal systems share socio-cultural, economic, or political factors.” 273 Thus, the comparative practitioner must bear in mind the

270. It is therefore much more difficult to define a one culture in a non-homogenous society especially in the disaggregated state, beyond merely defining a culture of diversity. See David Kennedy, New Approaches to Comparative Law: Comparativism and International Governance, 1997 UTAH L. REV. 545, 553 (“The term ‘culture’ creates difficulties when it wriggles free of the term ‘nation’—when the nation-state becomes a formal, legal, administrative unit, and culture an alternative pattern of differences and solidarities, a conflicting set of loyalties.”). David Kennedy illustrates how the current development of international law and institutions attempts to push cultural differences beneath the surface so that any cultural conflict does not impact international law but remains “below the waterline of sovereignty.” Id. at 568-69, 571.

271. Of course, these normative values will be illustrated, among other ways, by the accumulated legal body of the nation. See Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 459 (1897) (“The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men.”).


“long tradition of common history, religion, culture, and human values” of the nations and/or institutional bodies being compared. The sociological and cultural backgrounds of each nation are assumed to be reflected in the legal systems being compared. Thus, the legal system is the filter through which all the different social and cultural streams flow. As aptly put by Aharon Barak, Justice on the Supreme Court of Israel:

Comparative law is not merely the comparison of laws. A useful comparison can exist only if the legal systems have a common ideological basis. The judge must be sensitive to the uniqueness of each legal system. Nonetheless, when the judge is convinced that the relative social, historical, and religious circumstances create a common ideological basis, it is possible to refer to a foreign legal system for a source of comparison and inspiration. Indeed, the importance of comparative law lies in extending the judge's horizons.

Given the more uniform, collective nature of society—as opposed to the more divergent individual nature of culture—the "common ideological basis," referred to by Justice Barak, necessary for a dynamically functioning comparative enterprise is more likely to be evidenced by comparing societies rather than cultures. As mentioned,

compatible sources of foreign persuasive authority cannot give way to "cultural chauvinism—the claim that cultural differences prevent us from adopting and adapting the superior procedural devices of other legal systems—[because this claim is a thinly disguised] effort to switch off the searchlight of comparative law." Id. at 362-63 n.170 (quoting John H. Langbein, Cultural Chauvinism in Comparative Law, 5 CARDOZO J. INT'L & COMP. L. 41, 48-49 (1997)).


275. Aharon Barak, A Judge on Judging: The Role of a Supreme Court in a Democracy, 116 HARV. L. REV. 16, 111 (2002). Justice Barak also notes that, for comparative analysis to work, all of the common factors that he lists must be premised on an allegiance to democratic principles. See id. at 113.

276. The difficulty of reconciling the import of culture into the comparative enterprise has led to the justified criticism that comparativists often take simultaneous contrasting opinions about the impact of culture on the method of comparative analysis.

Comparativists generally make two sorts of arguments, explicitly or implicitly, about cultural differences between nations: First, that cultural differences are not that big a deal and one might safely assume that they will either stay below the waterline of sovereignty, perhaps within the realm of personal preferences, or will yield softly to the pressures of assimilative globalization; and second, that they are a big deal and may well limit the ambit of universal or internationalist governance.

Kennedy, supra note 270, at 615-16. This dichotomy and paradox has been aptly summarized by Professor Paul: "Tolerance counsels us to regard cultural differences as unimportant; we strive to find common ground among cultures. Yet, the politics of cultural identity celebrates cultural differences and seeks to preserve them." Paul, supra note 268, at 5.
for the purposes of comparative practice, different cultures existing within a single society reflect more on the type of society that allows such cultures to exist than on the cultures themselves. Indeed, a disproportionate focus on culture might be counterproductive in that, by excessively zeroing in on the particular, one might lose the forest for the trees. For example, when comparing the culture of the United

277. There is no doubt, and it is important to acknowledge, that the application of comparative law to a search of societal affinities will yield results that will exhibit a distinctly progressive tilt. This is not a predetermined result, but a mere consequence of the fact that the United States and its sister nations (with similar societies) are, more or less, at the vanguard of those nations who see the protection of human rights as a staple of their societies.

The ceaseless progression of a society and its constant changes in values, vigorously discussed in open democratic societies and oppressed in ideological or religious dictatorships, affects the role of law as the written articulation of current sociological understanding. It should not be forgotten that many of the taboos of the past are reflected in contemporary ethics and notions of justice.

Schadbach, supra note 273, at 387-88. Thus, the progressive tint of comparative law merely reflects the progressive direction in which the United States and its nation counterparts are generally heading.

278. In fact, “[s]ome states also invoke their culture to defend discrimination against, and persecution of, sexual minorities, including loss of family rights, denial of employment opportunities, physical abuse, imprisonment and even capital punishment.” Paul, supra note 268, at 10 (citing Eric Heinze, SEXUAL ORIENTATION: A HUMAN RIGHT 3-9, 89-104 (1995)); see also id. at 80 (“Cultural claims derive from sentiment, nostalgia, insecurity; they are rooted in non-rationality.”). Thus, in such instances, the repressive use of culture is a reflection of the society which has created, or allowed, such repression to exist.

279. The decontextualized comparison of particular cultures will not shed much light on the normative affinities that two different nations might share and how these norms are reflected in the legal arena. This is because the authority of culture, as a generative source of rules is separate from the authority of society as a generative source of the same. Professor Paul notes the fallacy of collapsing law and culture into the same thing. He observes that one criticism of universalizing human rights norms as a proxy for Westernizing indigenous cultures is the supposed double standard that the West employs with such norms which it deems cultural. The argument is that “cultural exceptions to international legal norms are no more or less suspect than domestic legal exceptions to international law.” Paul, supra note 268, at 25. As an example, “when Islamic countries object to extending certain rights to women based on the Koran, we regard that as cultural. Yet, if the United States objects to certain rights based on federalism concerns, we would characterize that objection as legal or constitutional.” Id. Therefore, the argument goes, cultural exceptionalism is akin to legal particularism. As stated above, Professor Paul debunks this argument by pointing to the essential differences between cultural and legal arguments, even though he accepts that “law is both a product and an instrument of culture.” Id. at 26. In particular, and of fundamental value, is Professor Paul’s accurate description of the different natures of legal versus cultural arguments. Cultural arguments (usually being grounded on the supposed will of God) are by nature immutable, while legal argumentations are temporal and subject to much more rapid change. See id.

280. But a value judgment of what constitutes culture is always in play. In other words, genital mutilation can be endowed with as much cultural significance as slavery, anti-Semitism, segregation, etc. Note, What's Culture Got to Do With It?: Excising the Harmful Tradition of Female Circumcision, 106 HARV. L. REV. 1944, 1959 (1993). One country’s culture is another country’s scourge.
States to the culture of another country, which culture do we pick as the representative of our own? While gay West Hollywood culture and Amish Eastern Pennsylvanian culture are both valid representations of American culture, the foreign persuasive authority selected on the basis of one culture’s comparison to foreign nations would differ drastically from a selection process based on the other. The problematic over-emphasis on culture, as opposed to society, derives from the assumption that “in part the nation-state is identified with a particular national culture.”

As shown above, while a “national culture” might exist in certain monolithic countries (which tend not to exhibit a democratic impulse), cultures in democracies tend to be varied. Therefore, to justify reliance on a certain nation’s authority on the ground that such nation has a cultural affinity to the United States would smack of that “unprincipled” tinge condemned by the proponents of the Feeney Resolution. Such affinity would be based on linking the culture of that foreign nation to a random selection of a certain domestic culture rather than another. To avoid such randomness, a focus on societal affinities, of which multiple cultures are a part, is preferable.

Two important considerations must be kept in mind when instituting a comparison of the societal characteristics of various nations. The first concerns the temporal aspect. The identification of a certain type of society must be based on an examination that forms a picture of a society emerging over a period of time, rather than a snapshot of one particular instant. For instance, if one took an instant picture of today’s society in the United States, one would see an attempt by the executive branch to curtail long-established civil liberties. This portrait would be an inaccurate representation of American society as a whole, unless it was understood within a larger context. Thus, the image of a

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282. One could refer to this type of society (prevalent in the United States) as one of plural equality based on “the idea of self-realization, [and] the glorification of the self” where “anglo-conformity” is rejected in favor of the lack of dominant group. See Friedman, supra note 238, at 33.
284. These select snapshots can also mislead the observer into believing that a particular frozen image is reflective of societal mores in general. For example, in earlier days in the United States, “[c]ensorship boards saw themselves vested with the duty of defending and upholding ‘traditional values.’ But these were not, of course, everybody’s values; they were hardly eternal verities. Rather, they were historically and culturally specific. They were, in essence, the values and the morality of white Protestant male America.” Friedman, supra note 238, at 27.
particular society at a particular time can yield deceptive results.

The second consideration involves not yielding to the fallacy of the institutional artifice. This means that there are certain characteristics which a society possesses that might, on the surface, seem fundamental and might differ from those of another society, but in reality, such different characteristics are “more fanciful than real,” and do not form a proper basis for deeming two societies too different for the purposes of comparative analysis. Those characteristics that are “more fanciful than real” tend to be reflected in the institutional structure and make-up of a particular nation, hence the term “institutional artifice.” Thus, the fact that the United States is a federal republic with a written fixed constitution based on a tripartite separation of federal powers; whose judicial branch is appointed by the executive, possesses the power of judicial review, and functions largely under a common law regime; does not mean that comparative sources must be confined only to those nations which have the same structural characteristics. In other words, institutional and structural facets, however ingrained inside a nation, do not a society make.

This assertion has been disputed by certain commentators who subscribe to the view that structural and institutional fundaments, such as the Constitution, express the current embodiment of a changing national character. Hence, holders of this view are said to adhere to an expressivist position pertaining to the implications that can be drawn about a society based on the institutions that such society exhibits. According to this theory, the institutional structure of a nation “tells stories about the culture that helped to shape it and which it in turn helps to shape.”

The expressivist position suffers from the fatal defect that it defines society from the top down, rather than from the bottom up. It assumes

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285. See Kennedy, supra note 270, at 616 (referring to the supposed societal differences between nations, pointing to common versus civil law traditions, and noting that such a difference was not relevant to determine whether these societies were in reality much different from each other).

286. Also included within the artifice are items that are so commonplace that they seem to define a particular society, but whose reality transcends such definition. “For example, is the metric system fundamentally national or international? Is Greenwich Mean Time fundamentally national or international? Is the term ‘dot.com’ fundamentally national or international?” Koh, supra note 158, at 306 (Professor Koh’s answer is both, and thus a measure of commonality and not difference).

287. See, e.g., Tushnet, supra note 220, at 1307.

288. Mary Ann Glendon, ABORTION AND DIVORCE IN WESTERN LAW 8 (1987). Professor Glendon uses the term “culture” to mean “society” as used in this article.

289. Herein lies one of the strengths of the liberal international law theory which describes the interrelationships between different national actors from the “bottom up...rather than...top
that national character or society is reflected institutionally as if the transition from collective consciousness to government apparatus occurs without transactional costs at a one hundred percent efficiency rate. However, as aptly expressed by Professor Tushnet, “nations vary widely in the degree to which their written constitutions are organically connected to the nation’s sense of itself.”

Therefore, while some nations’ constitutions might give credence to the expressivist position, others will not. Hence, to take as a uniform rule the notion that one can deduce national character from the constitutional framework of a particular nation would lead to misleading and inconsistent data.

Rather, it is criteria found within the society, rather than on top of it, that better identify those nations whose characteristics are most akin to our own. Thus, characteristics such as the freedom of people to form “their own kinds of relationship,” and the freedom of each individual “to choose an aspect of the self and make it the center of gravity in one’s own life,” are more accurate indicators of a particular type of society than is, for example, the peculiar structure of the government institutions of such society. In short, it is the principles espoused by a particular society which will determine its affinity to the United States.

Indeed, one need only observe the institutional make-up of the nation which is one of our favorite targets for comparison, the United


290. Tushnet, supra note 220, at 1270. Professor Tushnet describes a framework where interpretations of a constitution that is “unified by a few important principles but not tightly integrated,” function as preferred foreign sources of persuasive authority, in that it is the “important principles” enshrined within such a constitution that form the basis of the comparison. See id. at 1294.

291. See id. at 1271-74 (noting that, on the one hand, “it seems inaccurate to suggest that the Indian Constitution as interpreted by the nation’s Supreme Court expresses much about India,” and that “one would not expect to learn much about what it means to be French from reading the decisions of the French Constitutional Council,” but on the other, both Germany’s historic encounter with Nazism and Ireland’s constitution’s reference to Christian values do portray these countries’ cultural embodiments within the legal documents).

292. See Friedman, supra note 238, at 32 (observing elements within society).

293. Professor Slaughter suggests that judicial dialogue between courts of different nations should be premised on a commonality of “principles of checks and balances, positive conflict, pluralism, legitimate difference, and the value of persuasive authority.” Slaughter, supra note 166, at 194. Indeed, Canada enshrines this notion of comparative analysis premised on a commonality of “principles” between itself and the lending nation in that Canada’s Charter of Rights and Freedoms has been interpreted to mandate reference to “experience and practice in other free and democratic societies.” Claire L’Heureux-Dube, Globalization and the International Impact of the Rehnquist Court, 34 TULSA L.J. 15, 19-20 (1998) (also noting that if a Canadian court ends up rejecting a foreign law as persuasive authority in Canada, that court will articulate both the legal and the societal reasons for doing so).
Kingdom, to realize that the governmental superstructure of a nation is but window dressing to the true definition of the society that the superstructure governs. The United Kingdom is a non-federal constitutional monarchy with an unwritten constitution. It has a parliament giving rise to a government that fuses the executive and legislative; a largely self-appointed judicial branch without a defined power of judicial review; and laws that must comply with the laws of the European Union. In other words, from an institutional point of view, the United States and the United Kingdom have little in common. However, the structural differences between these two nations (and the societies comprising them) are "more fanciful than real,"294 in that an examination from within reveals a commonality of history, direction, and outlook, which shows that the society of the United Kingdom closely resembles that of the United States.295 In sum, the comparative practitioner will be able to cut through the institutional artifice and distinguish between real societal differences which must be taken into account and false societal differences which can be ignored.

Once it is understood that internal societal characteristics will determine whether a particular nation falls within or outside the comparative pool, the question becomes at what level of generality the search for common societal characteristics should take place. Thus, at one end of the spectrum it can be said that "[p]erhaps the only relevant constitutional experiences [used in a societal context to determine the appropriateness of the proposed foreign source] are those that have so large an overlap that we might fairly say that constitutional systems have arrived at a consensus on the question."296 However, if one were to pursue the search for societal affinities "at the most general level[,] there is the difficulty of identifying functions in a way that goes beyond platitudes."297 These platitudes could take the form of banalities that are so general, such as defining "military policy in terms of whether one is

294. However, sometimes "external appearances of difference are no more than surface traits concealing the universal core beneath." Lucia Zedner, In Pursuit of the Vernacular: Comparing Law and Order Discourse in Britain and Germany, 4 SOC. & LEGAL STUD. 517, 518 (1995).

295. Bruce Ackerman has commented on the guiding principles of English society: "The English had never indulged the Enlightenment conceit that a formal constitution was necessary for modern government. It was their culture of self-government, their common sense and decency, that distinguished their evolving commitment to democratic principles—not paper constitutions and institutional gimmicks like judicial review." Ackerman, supra note 161, at 771-72.


297. Id. at 337.
for peace or for war." as to prove meaningless. On the other end of the spectrum, one could adopt such a high level of specificity that it would lead to a conclusion that "every country's constitutional arrangements are unique." Thus, the inherent uniqueness would produce a slew of nations so insular in nature that the chasm separating them could not be bridged by comparative analysis.

Neither of the extremes illustrated above is grounded in reality and, therefore, neither serves any purpose from a comparative analysis perspective. No society is truly unique in each and every way, nor is it truly identical to a foreign counterpart. Thus, to have operational validity, the societal characteristics which serve as an indicator of possible comparative affinity have to be fractioned at a "middle level of generality." This "middle level of generality" is achieved by employing a varied form of the principle of macrocomparison, whereby a "general comparison" of the systems of different nations reveals "the common core of all law." Such a method ensures the broad emphasis required by the comparative enterprise, but does not overlook specific facets of society (such as a commitment to equal treatment) which can have a direct bearing on the specific issue being analyzed by the court.

In light of the fact that it is societal affinity to the United States that will dictate the particular location of a source of persuasive authority, and the fact that such affinity will, on most occasions, be found among societies that most reflect our own, the pool of nations from which persuasive authority can properly be plucked will likely consist mostly of Western-style democracies. Some commentators have expressed concern over this result by noting that:

[I]t [is] all the more important that [the comparative practice]

300. To put this assertion in an artistic context, "neither works of art, responses to them, individual tastes, nor problems of appraisal are by any means unique: each is a little different from every other, but common factors recur." Thomas Munro, Toward Science in Aesthetics 78 (1956).
301. Tushnet, supra note 220, at 1307. Professor Tushnet refers to this "middle level of generality" in the context of determining the usefulness of comparative analysis as it pertains to a particular issue. Thus, he posits that the issue presented for comparative treatment should not be defined too generally (which would appear banal) nor too specifically (which would inevitably lead to uniqueness in all circumstances). See id. at 1238. This concept is equally applicable to the level of generality applied to the search for common societal characteristics.
302. Schadbach, supra note 273, 379 n.276 (quoting Lucia Zedner, In Pursuit of the Vernacular: Comparing Law and Order Discourse in Britain and Germany, 4 SOC. & LEGAL STUD. 517, 518 (1995) (sometimes "external appearances of difference are no more than surface traits concealing the universal core beneath."))).
does not result in a Eurocentric [model]—although a comparativist judge may naturally look to Germany and France, it is all the more important now that the judge look to the countries from which the most recent wave of American citizens come from originally.\footnote{303}

According to this view, a non-Eurocentric model of comparative practice is more desirable:

Because a growing number of citizens come from parts of the world whose traditions are not reflected in traditional American constitutional law, [and a form of comparativism that includes looking to materials from the places of origin of these new citizens] is a strategy of inclusion and of giving expression to our culture through the use of comparative constitutional law.\footnote{304}

In the same vein, others assert that it is imperative not to confine the United States’ transnational judicial reference to Western courts, but to be receptive to non-Western cultures because such practice sends the message that transjudicialism is a “shared enterprise.”\footnote{305}

This type of approach to comparative law through a politically correct lens is counterproductive, non-reflective of the current conditions of the global legal enterprise,\footnote{306} and, if adopted, would lead to undesirable results. Putting the above suggestion into effect would derail the whole notion of seeking a societal parallel between lending and borrowing nations. A well-meaning but misguided concept of inclusion would thus de-contextualize comparative analysis by having practitioners and judges ignore the milieu that gave rise to a particular source of foreign authority. This would produce the very result contemplated by the backers of the Feeney Resolution. The search for “genuine liberal democracies” with societal affinities to that of the United States cannot be substituted with a random search of the jurisprudence of those nations who happen to have provided the most recent wave of immigrants. Surely a better reason is needed to consult Vietnamese or Haitian law than merely the fact that many recent immigrants come from these countries. As indicated by both proponents

\footnote{304. \textit{Id.} at 616.}
\footnote{306. See Paul W. Kahn, \textit{Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order}, 1 CHI. INT’L L. 1, 10 (2000) ("Western ideas of rights and of individuals have come to occupy the center of international law.").}
and critics of the comparative enterprise, an effective comparative practice must be grounded in the realities of U.S. jurisprudence. Eyeing certain foreign materials for the sole purpose of creating the illusion of cultural diversity forfeits such realities.

Moreover, the germ giving rise to the notion that materials originating from non-Western countries ought to be consulted as a general rule in the context of comparative analysis might not be as benign as a mere wish to be inclusive. Instead, this impetus to be over-inclusive with respect to the sources of persuasive authority, in part, arises from an excessive introspection; an introspection which in turn stems from a critique of the “dominant democratic discourse” since the end of World War II as equating “democracy with the Western emphasis on civil and political rights,” to the exclusion of everything else. In fact, Professor Paul has observed how the processes of “[d]emocracy and market liberalization have contributed to a backlash against western ideology and culture in the form of religious fundamentalism and extreme nationalism.” To assuage the paranoid instinct of others which takes shape in the pursuance of reactionary policies does not seem to be a meritorious goal to which the comparative enterprise should aspire.

Furthermore, the exhortation to include more non-Western countries in the pool of potential lending nations is also premised on the misconception that the value judgments which will lead courts to exclude materials originating from certain nations are absolutist. That is to say, the exclusion is a precursor to the actual analysis. The reality, however, does not bear this out. In those numerous occasions where courts are directed to examine the regimes of foreign nations for the purposes of determining a forum non conveniens motion, the courts do not prejude or belittle the systems that they find, but rather engage in a comparison whose benchmark is the standards existent in the United States. This is to be expected, considering that the evaluation is made by a court sitting in the United States. Thus, what appears as a bias against the judicial systems of non-Western countries actually translates into a more in-depth adjudication of the characteristics of such countries’

307. It is important to note that I am not suggesting a per se exclusion of materials stemming from non-Western nations. Such materials, like all others, must pass through the rigors of a legitimacy inquiry based on the factors illustrated throughout this Article.


judicial systems.\textsuperscript{310}

In sum, the confinement of comparative references to those sources that originate from countries which exhibit similar societal (a notion which sublimates the concept of culture) facets to that of the United States is fundamental to the success of the enterprise. A foreign country with a collective consciousness most akin to that prevalent in this nation will both ensure that the selection of a particular foreign authority is not random, and achieve the general goals of comparative law outlined in Part III.

3. \textit{The Specific Context of the Case}

A point which seems self-evident, but is often overlooked and deserves some attention, is that not all nations which are democracies and have societal affinities to the United States will, per se, have produced materials that are of use to U.S. courts in all circumstances. This means that the ability to garner information that will be relevant as persuasive authority will vary on a case-by-case basis according to the context and issue being decided in that instance. Because of this variability, an institutional arm of a foreign nation that has produced a body of law on two topics might have some highly valuable material for one of those topics but not for the other. Thus, comparative analysis will prove to be “more useful in one area of the law but less useful in others.”\textsuperscript{311}

Because their essence transcends notions of boundaries and nationhood, cases dealing with human rights seem best suited for the application of some form comparative analysis.\textsuperscript{312} Indeed, Justice Ginsburg has commented that because “irrational prejudice” seems to be a global phenomenon that cuts through political barriers, the fight against it which takes place within courts is benefited by the use of comparative reasoning.\textsuperscript{313} Even though this position seems to internalize a preordained progressive outlook, reality shows that this might not

\textsuperscript{310} For a list of these cases see Anne-Marie Slaughter, \textit{A Typology of Transjudicial Communication}, 29 U. RICH. L. REV. 99, 105 n.20 (1994); Slaughter, \textit{supra} note 166, at 211-12.

\textsuperscript{311} Harding, \textit{supra} note 50, at 460.

\textsuperscript{312} In fact, some commentators have suggested that the choices of which sources and issues warrant a venture outside our borders “are more likely to be shaped by political and symbolic factors than by the intrinsic merit of the legal ideas that they are borrowing,” thus leading to the conclusion that because of the high representative value of human rights cases (especially those with a high profile), such cases are particularly susceptible to comparative analysis. Slaughter, \textit{supra} note 166, at 198.

always be the case. One only need look at two particular human rights issues to illustrate how a confinement of comparative analysis to democracies with societal affinities to the United States could reveal progressive-leaning persuasive authority in one case and conservative-leaning persuasive authority in another. Thus, with respect to the decision not to prohibit the execution of juveniles, the United States seems to have surrounded itself as a matter of policy with countries with which it retains a comparatively modest amount of legal and social commonality. 314 A comparison on this issue with the practices of democratic countries closer to the United States in terms of societal behavior would persuade the United States to adopt a blanket prohibition of the exercise. However, on abortion, certain democratic countries with close societal affinities to the United States, such as Germany or Canada, either have distinct peculiarities in their histories, or simply have tackled the issue from a different normative standpoint to justify, from their point a view, a more restrictive approach to reproductive rights. Thus, a United States court looking to compare approaches pertaining to abortion might find from the German or Canadian experience a reason to back away from the more permissive approach prevalent in the United States. Other human rights issues could well produce added perspectives from foreign nations (following selection by the criteria articulated above) which are similarly more conservative in outlook than positions presently articulated by United States courts. 315

While cases presenting human rights issues naturally lend themselves to the comparative enterprise, references to foreign authorities “may be of less help in interpreting constitutional terms that allocate power to one or another level of government.” 316 Because governmental structure is a true artifice, i.e., it is by nature man-made, it is more difficult to reach that level of basic commonality on which comparative analysis inherently depends. That is not to say that U.S. courts should not consult the jurisprudence of other democratic federal republics with societies similar to that of the United States (such as Germany, Canada,


315. For example, democratic nations with societal similarities have highly different outlooks pertaining to family law. See, e.g., Schadbach, supra note 273, at 363 n.171 (comparing family law traditions in different countries with generally similar legal systems).

316. Jackson, supra note 175, at 272.
Switzerland, South Africa, or Australia), but in these instances the U.S. court must be especially wary. If the case concerns a principle of federalism (such as standing), the comparison might be more legitimate than if the case presents an issue pertaining to a more textually grounded doctrine (such as state sovereign immunity), which might be an artifice not present in the governmental structure put in place by the foreign nation.

Critics of the comparative practice will see this textual limitation of the impact of comparative law on cases pertaining to the structure of government as vindication of their argument that comparative law can only be of use if the foreign case deals with the identical text to which the forum case pertains. But this is not the case because such a claim of vindication would ignore the fundamental normative underpinning of comparative law. That is, what the comparativist searches for is a commonality of *principle* that goes beyond text, and is a unifying force in itself. For example, the wording of the First Amendment of the U.S. Constitution's free exercise clause might differ from the equivalent clause in Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, but there is no doubt that both documents enshrine the same thought and principle in their respective texts: that everyone should be free to practice religion in the way they best see fit, without governmental interference. 317 In this way, interpretations of the latter Article by the European Court of Human Rights might inform interpretations of the U.S. Constitution's First Amendment. This leads to the aforementioned distinction between the relative usefulness of comparative reasoning as it concerns human rights cases, versus cases pertaining to governmental structure. Texts pertaining to the structure of government do not enshrine much *principle* within them because the structure of government is inherently an artificial construct. If they do, they only do so at the most basic level, e.g., to articulate whether the nation will operate in a highly centralized or localized way. But principle alone is not sufficient to articulate the details of governmental shape, thus making the particulars of the forming texts important in a way that the precise language of texts enshrining human rights is not. 318 Thus, whether a legal system is based

317. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const., amend. I. "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance." European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9.

318. That is not to say that the text of human rights protections is not important at all. Just
on common law versus civil law, or whether a country is a federal republic versus a constitutional monarchy, is not particularly relevant to the comparison of those countries' decisions pertaining to equal treatment of their citizens, but would be very pertinent to a comparison of the extent to which a central government can force state actors to carry out the dictates of federal legislation. In other words, the governmental artifice gets transcended only when not at issue in the case.

In sum, the context of the case matters to the relative utility of comparative analysis. Foreign materials stemming from democracies with compatible social characteristics which deal with issues that are close in principle to those being examined by the U.S. court are in the best position to act as persuasive authority. In the past, "the U.S. Supreme Court [has been] resistant to considering foreign constitutional law [as well as foreign law in general], even in areas where there are materials close at hand that address similar problems within the context of a western, liberal democratic republic." \textsuperscript{319} However, as shown in Part II, this might be changing, and standardizing the selection of foreign persuasive authority by basing such selection on the factors outlined above could go some way to cement comparative analysis as a fully legitimate interpretative tool at the disposal of practitioners and judges alike.


Once the criteria for selecting the appropriate nations as originators of sources of persuasive authority are determined, the actual selection can start taking place. The means of reaching this selection will vary in complexity, depending on which criteria are applied. The specific issue and context of the case should be easy to identify, and thus lead courts to nations which have tackled similar issues within similar contexts. The identification of whether the institutional body giving rise to the comparative material is the product of a democratic regime should also, in most circumstances, not be too troublesome.\textsuperscript{320}


\textsuperscript{320} Sometimes this inquiry might not be so simple. As described above, because of the nature of the modern disaggregated state, particular arms of certain nations might reflect higher indicia of democracy and than other arms of that same nation. In such circumstances, a cursory acknowledgment by the court of the reasons behind the selection of such an arm might not be normatively sufficient and further explanations might be warranted. Hence, Justice Breyer's
However, even upon adoption of the above-described framework for the identification of a particular nation’s societal indicia, it might not always be a straightforward exercise for courts to rationalize societal affinities beyond the most basic acknowledgments. For example, to justify a comparison to Canadian law, a court might simply note that “[c]ountries like Canada have a similar culture [used to mean “society” as defined previously] and also have British common law legal roots that are quite similar to those of the United States,”321 or that the United States and Canada are “two pluralist multi-ethnic and multi-religious constitutional democracies, both steeped in a common law tradition inherited from the British.”322 Or else, to contextualize a reference to decisions by the French or Spanish constitutional courts, the referring U.S. courts might note that these countries are now entering a second full generation of judicial review.323 Furthermore, resort to international law as a source of persuasive authority could be explained by noting the inherently universal character of international law and the United States’ prevalent tradition of abiding by it.

In other instances, such verbalizations might not be sufficient to fully explain the motivation behind the selection of a particular foreign source.324 Therefore, a more detailed look at the internal societal

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321. Fontana, supra note 303, at 602.

322. Michel Rosenfeld, Constitutional Migration and the Bounds of Comparative Analysis, 58 N.Y.U. ANN. SURV. AM. L. 67, 77 (2001) (first noting the general similarities between the United States and Canada, and then contrasting the “melting pot” Americanism focused on individual rights with the “ethnic mosaic” Canadian approach focused on group rights).

323. See Ackerman, supra note 161, at 774.

324. In certain cases different courts sitting in liberal democracies will not always come up with similar solutions, and therefore the societal differentiations become critical to the decision of which foreign authorities, if any, may be pertinent to a reviewing court in the United States. However, it is important for proponents of comparative analysis to concede that in rare occasions, after examining the selection criteria illustrated in this Article, it might not be possible to separate out certain nations (that meet all necessary criteria) which come to one solution, from others (that similarly meet all criteria) which come to another. One need only compare the laws (or former laws) of the United Kingdom, the European Union, and Portugal involving the protections of the rights of gays and lesbians, to see that, even in recent times, different courts come up with conflicting and mutually exclusive solutions. For example, in Smith and Grady v. U.K., App. Nos. 33985/96 & 33986/96 (1999) and Lustig-Prean & Beckett v. U.K., App. Nos. 31417/96 & 32377/96 (1999), the European Court of Human Rights struck down the United Kingdom’s former policy of excluding gays from the military under Article 8 (the right to privacy) of the Convention for the Protection of Human Rights and Fundamental Freedoms. In Salgueiro v. Portugal, App. No. 33290/96 (1999), the European Court of Human Rights ruled that homosexuality was not a basis on which parental rights could be decided (as a violation of Article
structure of the compared nation might be required. Clearly, it will not be the deciding court that undertakes this inquiry, but experts in the appropriate fields to whom the courts and practitioners will refer. Because society, as defined above, is a complex web of interrelated aspects of a particular nation, a comprehensive rendition of all aspects of society will not be necessary, or desirable, for the purposes of justifying a choice of a particular source of persuasive authority. Rather, a reference to the societal aspects relevant to that particular case will suffice to rationalize comparison or non-comparison. For example, in a case involving the outer limits of freedom of the press, an appropriate exercise of comparative analysis would require that the originating country possess certain fundamental common societal characteristics to the United States. These characteristics might include notions of freedom of speech, expression, association, and political assembly, lack of state control over the overall content of media, and the pluralistic expression of views that make their way onto the public forum. The deciding court could easily verify this type of information (and more) from, for example, the regularly published and updated official State Department reports on all nations.

However, the societal aspects which are brought forward by other cases might be more general or subtle, and thus be more difficult to ascertain than by simple reference to a State Department report. Even in these cases, such societal characteristics can be typified by reference to other material which has identified different ways to classify different societies. One need only look to studies undertaken by social scientists about the United States which have striven to answer the basic question: “How is it that every society seems to get, more or less, the social

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8 (Privacy) and Article 14 (Equal Protection) even though the Portuguese court had stated that “homosexuality is an abnormality and children must not grow up in the shadow of abnormal situations.” While good practical and doctrinal arguments exist for favoring decisions of the European Court of Human Rights over the statutory provisions of EU members such as Portugal or the United Kingdom, it should be recognized that these arguments are not always conclusive, and resort to normative principles will often be required to justify persuasion.

325. This is a different inquiry from that involving the specific context of the case. When making the contextual inquiry, one merely ascertains that the proposed comparative foreign materials were dealing with subject matters or issues that have a sufficient commonality with the issues dealt with in the domestic case. The focus on specific societal aspects, on the other hand, does not reflect an inquiry on the commonality of issues, but rather on the commonality of practice and principle. For example, certain nations might be democracies with laws on the books pertaining to freedom of the press which resemble, to a large extent our own. However, in practice, the reality on the ground may be another, where the people employ self-censorship and the marketplace is devoid of a pluralistic vision. Because conformity to a certain pattern of behavior is the way that a society achieves its shape, the behavior of its collective is more revealing of its character than any putative set of rules.
character it 'needs'? Many studies have approached this question initially by looking at the societal character of the United States as it existed in the nineteenth century. Beginning from this platform, such studies then investigate "the way in which one kind of social character, which dominated America in the nineteenth century, [has been] gradually...replaced by a social character of quite a different sort." These studies succeed in describing and explaining the metamorphosis of American society, and in doing so, not only illustrate different types of society that existed in the United States, but present society classifications that, in broad terms, can also reflect the societies of other nations.

To go through many examples of different studies of "social" character and the conclusions based thereon exceeds the scope of this Article. However, what should be emphasized, given the substantial materials that exist in this area, is that in distinguishing between nations for the purposes of conducting an effective comparative analysis, the legal comparative enterprise is not operating in a vacuum, or blazing a trail scarcely traveled. Rather, by integrating within comparative analysis a reason, derived from social sciences, for differentiating between the societal fabric of nations, the comparativist is merely taking into account knowledge already accumulated, and is articulating a rationale behind such differentiation which is currently absent in the

327. Alexis de Tocqueville described the American character in the nineteenth century, as being "individualist" meaning "a mature and calm feeling, which disposes each member of the community to sever himself from the mass of his fellows and to draw apart with his family and his friends, so that after he has thus formed a little circle of his own, he willingly leaves society at large to itself." Alexis de Tocqueville, DEMOCRACY IN AMERICA 98 (Henry Reeve trans., A.A. Knopf 1945).
328. Riesman, supra note 326, at 17.
329. One description sums up the societal changes which took place after World War II as a transition "from assimilation and anglo-conformity to plural equality; from a single, dominant moral code, to a multiplicity of codes," premised on "[c]omplex social forces" such as "the technological revolution, the rise of the horizontal society, advertising, the media, individualism, and the culture of the self." Friedman, supra note 238, at 43.
330. For example, David Riesman describes three society arch-types that he terms "tradition-directed," "inner-directed," and "outer-directed" (respectively) based on the personality traits inherent in the components of each society. See Riesman, supra note 326, 13-17 (Yale Univ. Press 1961). Others have studied societal arch-types. See, e.g., Friedman, supra note 238, 30-32; Carl Landauer, Deliberating Speed: Totalitarian Anxieties and Postwar Legal Thought, 12 YALE J. L. & HUMAN. 171, 181 (2000); Arthur M. Schlesinger, Jr., THE VITAL CENTER: THE POLITICS OF FREEDOM 1 (Da Capo Press 1988); Erich Fromm, ESCAPE FROM FREEDOM (1941). All these examples, and many others not cited herein, serve to illustrate the fact that the discipline of social sciences is replete with analyses of societal characteristics that transcend notions of times and borders and which can be of use to the comparative enterprise.
majority of decisions that employ some form of comparative reasoning. In other words, instead of leaving its position implied or unstated, based on notions of democratic legitimacy, context, and societal characteristics, the court should articulate, in a sentence or two, a "principled" rationale for choosing (or not choosing) a particular nation's material as persuasive authority.

V. THE SELECTION OF FOREIGN AUTHORITIES IN LAWRENCE V. TEXAS

Having set the parameters by which courts should locate their foreign sources of persuasive authority, it is possible to examine the parts of the Lawrence decision which engage in comparative analysis to see whether such analysis adopts a "principled" way of choosing the foreign materials on which it relies as persuasive authority, i.e., whether the considerations outlined in Part IV are reflected in the Lawrence majority. The majority's use of foreign material as persuasive authority in Lawrence is confined to three paragraphs following a section that cites former Chief Justice Burger's concurrence in Bowers v. Hardwick,331 in which Chief Justice Burger invoked the supposed universal condemnation of homosexuality contained within Western civilization and the Judeo-Christian tradition. In these three paragraphs, the majority first rebutted Chief Justice Burger's assertion by noting that "[t]he sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction," such as the Wolfenden Report and several decisions of the European Court of Human Rights. The majority then stated that, "[t]o the extent Bowers relied on values we share with a wider civilization, it should be noted that the reasoning and holding in Bowers have been rejected elsewhere." After citing and referencing other decisions rejecting Bowers, the Court concluded that "[t]here has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent" than in those countries which rejected Bowers, and that the right to engage in consensual sexual conduct is "an integral part of human freedom in many other countries."332

Justice Scalia included in his dissent a characteristic broadside attack against comparative analysis as a whole, but also noted that the majority

had ignored “the many countries that have retained criminal prohibitions on sodomy.” This reproach has been echoed by the scholars appearing to testify in favor of the Feeney Resolution, who complained that the Lawrence majority “discussed some jurisdictions that had overturned or repealed their sodomy laws, but did not discuss anything close to a general practice of nations.” Criticism of the supposed ad hoc nature of selecting foreign persuasive authority in Lawrence was similarly characterized as the Court “simply [feeling] free to pick and choose from decisions around the world the ones that it like[d], to use them as justification or at least decoration for its own ruling, and to ignore decisions that are contrary.” On the surface, it would seem that Justice Scalia and his followers are complaining that the Lawrence majority did not consult the laws of theocratic countries such as Saudi Arabia, Iran, or Bangladesh. In fact, it is ironic that these protestations come from the same people who, in one breath, decry the very practice of comparative analysis for the supposed dangers that it entails—such as reliance on the jurisprudence of “Communist China”—but, in the next breath, complain that, when such comparative analysis occurs, it does not encompass consultation with

333. Id. at 598. Scalia premises his opposition to comparative analysis of foreign authority in large part on his “originalist” theory of judicial interpretation. See Anne Gearan, Foreign Rulings Not Relevant to High Court, Scalia Says, WASH. POST, April 3, 2004, at A7 (“It is my view that modern foreign legal material can never be relevant to any interpretation of, that is to say, to the meaning of the U.S. Constitution.”) Congressman Feeney inexplicably elevates originalism to the sole acceptable judicial interpretative technique when he articulates the goal of the Feeney Resolution “is to suggest to courts that they could not look at, for example, a recently enacted statute or a recently enacted constitution overseas to interpret a constitutional provision that may be 215 years old.” Legislative Hearing on H.R. Res. 568, supra note 4, at 15. In other words, no developments that have occurred in the last 215 years should be taken into consideration in interpreting the Constitution—a mantra of the originalist ethos. Justice Scalia’s protestations notwithstanding, “stringent formalism in constitutional understanding has not swept the field.” Williams Eskridge, Jr. & John Ferejohn, Super-Statutes, 50 DUKE L.J. 1215, 1229 (2001).

334. Legislative Hearing on H.R. Res. 568, supra note 4, at 43 (Prepared Statement of Prof. Ramsey).

335. Legislative Hearing on H.R. Res. 568, supra note 4, at 66 (Prepared Statement of John O. McGinnis, Northwestern Univ. School of Law) (also noting that “[w]hile the European Union protects sodomy as a constitutional right, many nations still criminalize sodomy”).

336. So much so that Professor Ramsey noted that “if we are serious about the project of using foreign materials, we must ‘take the bitter with the sweet,’ and use foreign materials to contradict, not merely confirm, our own view of rights.” Legislative Hearing on H.R. Res. 568, supra note 4, at 55 (Prepared Statement of Prof. Ramsey). This apparent yearning for the opinions of undemocratic repressive dictatorships or theocracies is bolstered by the fact that one commentator who, in supporting the Feeney Resolution, expressed disdain at the Lawrence majority’s use of European law, describing the European legal tradition as consisting of “the imposition of elite moral views” on a non-consenting populace. Legislative Hearing on H.R. Res. 568, supra note 4, at 66 (Prepared Statement of Prof. McGinnis).
materials from regimes like China—the same regimes which are used to illustrate the alleged danger of the comparative enterprise.337

Notwithstanding all the bluster and inconsistency with which the detractors of comparative analysis accompany their postulations, the fact remains that there does exist an appropriate, or “principled,” way to select foreign materials as persuasive authority, as illustrated in Part IV. The question is whether the Lawrence majority adhered to this framework or, as intimated by the scholars defending the Feeley Resolution and expressly articulated by Justice Scalia’s dissent, instead engaged in a random, self-serving selection of nations with the predetermined notion of finding only those that had repealed their sodomy laws. The answer is that the Lawrence majority faithfully executed its analysis within the parameters outlined in Part IV, even though it failed to articulate the elements which comprise such parameters.

Specifically, the universe of foreign authority relied upon by the Lawrence majority can be broken down into two categories: (1) those foreign sources actually cited in the opinion; and (2) those foreign sources mentioned indirectly via reference to a third party source. The materials comprising the first category are four cases of the European Court of Human Rights (with particular emphasis on one of these) and a committee report prepared for the British Parliament. The materials comprising the second category are incorporated into the opinion by reference to the amicus brief presented to the Court by Amnesty International. The brief references opinions from the United Nations Human Rights Committee, as well as Australia, Canada, New Zealand, Israel, South Africa, and Colombia.338 Professor Jackson, in her testimony against the Feeley Resolution, correctly identifies two purposes for which these foreign decisions were cited, as non-binding authority, in Lawrence: (1) to rebut Chief Justice Burger’s erroneous statements pertaining to the unanimity of thought of the Judeo-Christian tradition; and (2) to formulate questions, in light of European decisions contrary to Bowers, as to “whether there were different governmental interests in the United States that would support” a different outcome.339

337. See Legislative Hearing on H.R. Res. 568, supra note 4, at 44-58 (Prepared Statement of Prof. Ramsey).
338. The reference to Australia in the amicus brief is somewhat cryptic, although incontestably present. See Amnesty International Amicus Brief, at 11 n.15. The reference to Colombia occurs on page 13 of the amicus brief, while the Lawrence majority only cites to pages 11 and 12 of such brief. See id.; Lawrence, 539 U.S. at 577.
In other words, the Lawrence majority's use of foreign materials served both a narrow and a broad purpose.

Almost from the moment Bowers came down, it received significant criticism both for its result and for the poor quality of reasoning with which such result was reached.\textsuperscript{340} Chief Justice Burger's concurrence was equally an object of scorn, in particular because of his ignorance of the Dudgeon decision by the European Court of Human Rights on exactly the same issue reached five years before Bowers.\textsuperscript{341} The Lawrence majority, undoubtedly aware of this criticism, felt it necessary to address the principle failing of Bowers: its complete failure to recognize the reality of a changing world which was moving against the direction that the Bowers majority was taking, especially in those countries rooted in the "Judeo-Christian" tradition that Chief Justice Burger erroneously trumpeted as examples supporting his cause. Given the factually inaccurate comparative invocation present in Bowers, it follows that a rebuttal of such invocation would have to be factually backed up by the proper foreign materials of which the Bowers court should have been aware, such as Dudgeon.\textsuperscript{342} In that light, Professor Rabkin's statement that the Supreme Court in Lawrence invoked "foreign opinion...to give more respectability to [its] change of heart" because it was "at pains to explain why the Constitution had meant one thing in the 1980s and now should mean something else,"\textsuperscript{343} is completely off the mark. The Lawrence majority was not at "pains" to explain anything, as it comfortably noted that "Bowers was not correct when it was decided" and that, in any event, the Constitution is

\textsuperscript{340} See Mary Ann Glendon, RIGHTS TALK 146-51 (The Free Press 1991); see also Jennifer F. Kimble, Comment, A Comparative Analysis of Dudgeon v. United Kingdom and Bowers v. Hardwick, 1988 ARIZ. INT'L & COMP. L. 200 (1988); Richard B. Lillich, The Constitution and International Human Rights, 83 AM. J. INT'L L. 851, 861 (1989) ("If Dudgeon had been relied upon, Justice White might not have characterized Mr. Bowers' claim that his right was 'implicit in the concept of ordered liberty' as being 'at best, facetious.'").

\textsuperscript{341} See id. ("[L]f Dudgeon had been properly briefed...Chief Justice Burger would surely have narrowed the observation in his concurring opinion that, 'to hold that the act of homosexual sodomy is somehow protected as fundamental right would be to cast aside millennia of moral teaching."). Chief Justice Burger's religious infusions are problematic not only because of their lack of substantiation, but because of the stunted world vision which they represent: "If we encounter in a personality fear of divine punishment as the sole sanction for right doing, we can be sure that we are dealing with a childish conscience, with a case of arrested development." Gordon Allport, BECOMING 73 (Paperback. Ed. 1960).

\textsuperscript{342} Professor Ramsey acknowledges that the use of Dudgeon to rebut Bowers "seems appropriate." See Legislative Hearing on H.R. Res. 568, supra note 4, at 43 (testimony of Prof. Ramsey).

\textsuperscript{343} Legislative Hearing on H.R. Res. 568, supra note 4, at 29 (Prepared Statement of Prof. Rabkin).
amenable to invocation by successive generations of people seeking the benefit of its protections. The Constitution can mean different things at different times.

Once the Bowers background is explained, the citation to two pre-Bowers foreign authorities as a direct rebuttal to Bowers (being the narrow justification identified by Professor Jackson) seems totally unremarkable. Dudgeon, decided five years prior to Bowers in 1981, held that, under Article 8 of the European Convention on Human Rights and Fundamental Freedoms, Northern Ireland's proscription on consensual sexual conduct between two persons of the same gender could not stand. The 1957 committee report to the British Parliament, known as the Wolfenden Report, was asked to evaluate whether the proscriptions and criminal penalties for male-to-male sexual conduct should stay on the books or be repealed. The Wolfenden Report answered the question unequivocally in favor of repeal. The Report noted that “the function of the criminal law...is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others.” Even given that premise, the Report concluded:

[H]omosexual behavior between consenting adults in private should no longer be a criminal offence.... Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is in brief and crude terms, not the law’s business.

Both the Dudgeon opinion and the Wolfenden Report are foreign sources that fit the profile of foreign materials that are appropriate for use as persuasive authority by a U.S. court. Both materials come from institutions that are part of “genuine liberal democracies” with similar societies to that of the United States. The European Court of Human Rights is a body that derives its authority and jurisdiction via the consent of nations, all of which exhibit democratic characteristics. The use of the Wolfenden Report by the Lawrence majority shows that the Court is willing to explore non-judicial materials so long as the parameters explored in Part IV are met. Moreover, both Dudgeon and the Wolfenden Report deal with exactly the same issue, being the

344. Lawrence, 539 U.S. at 578.
347. Id.
normative advisability of rendering consensual adult sexual conduct criminal.

Critics of the comparative practice would vehemently disagree with the last sentence of the previous paragraph. For example, Professor Ramsey, in his testimony pertaining to the Feeney Resolution, complained that reliance on *Dudgeon* was inapposite because "the language in the two documents [the U.S. Constitution as construed in *Lawrence* and the European Convention on Human Rights and Fundamental Freedoms as construed in *Dudgeon*] and the interpretation courts have placed upon that language is totally different." While this is undoubtedly true, the real question is whether Professor Ramsey is pointing out a distinction without importance. The key to remember is that one of the reasons that the *Lawrence* majority pursued comparative sources was to rebut *Bowers*, which seemingly reached to the normative level and indiscriminately proclaimed the evils of homosexuality in a manner that was separate and independent from any textual authority (except possibly the Bible). Thus, the terms of the debate were set by *Bowers*, and the *Lawrence* majority was simply responding in equal kind.

Moreover, the lack of proximity of the textual bases for the *Dudgeon* and *Lawrence* opinions ties in with the broader scope of the comparative inquiry undertaken by the *Lawrence* majority, which can be synthesized to a basic normative question: Do we want to be a country where we subject adults of the same gender who engage in consensual sexual conduct in the privacy of their own homes to criminal

348. *Legislative Hearing on H.R. Res. 568, supra* note 4, at 41. The European Court of Human Rights uses what it knows as a "margin of appreciation" doctrine which, in European human rights law, refers to the level of deference that the supervisory body will allow to the sovereign nation, depending on the type of activity involved. See *Dudgeon v. United Kingdom*. 3 Eur. Ct. H.R. (Ser. A) 40 (1981).

349. The U.S. Supreme Court was interpreting the Due Process Clause which provides, in relevant part, that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, sec. 1. The European Court of Human Rights was interpreting a provision of the European Convention on Human Rights and Fundamental Freedoms which provides, in relevant part, that "[e]veryone has the right to respect of his private and family life." European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953), as amended by Protocol No. 3 (entered into force Sept. 21, 1970), and Protocol No. 5 (entered into force Dec. 21, 1971).

350. It is noteworthy that Justice Scalia's opposition to the *Lawrence* majority echoes that of Lord Devlin, an arch-critic of the Wolfenden Report. Devlin's criticism was bound up in religious dogma (à la Chief Justice Burger in *Bowers*): "A state which refuses to enforce Christian beliefs has lost the right to enforce Christian morals," and "without the help of Christian teaching the law will fail." Lord Patrick Devlin, *Morals and the Criminal Law*, in *The Enforcement of Morals* 10, 25 (O.U.P. 1965).
sanction, including jail, and all the attendant detractions which occur as a result of such a penalty such as registering as a sex offender? If one accepts that there are legitimate interpretative techniques beside hyper-formalist textualism (which views documents as embodying merely words and not principles), and that it is inapposite to try to separate law from the rights of the individual, the above question is a perfectly legitimate one for a court to ask, particularly when dealing with fundamental human liberties. This question merely reflects the emergence of global substantive norms in “areas such as the death penalty and privacy rights,”\textsuperscript{351} and the fact that many prominent jurists around the world (including several U.S. Supreme Court justices) espouse the belief that, when it comes to human rights, a commonality of principle exists throughout the world so that experience on these questions, can, indeed should, be shared. Thus, there is no need for the \textit{Lawrence} court to limit itself to exploring opinions where the identical text has been interpreted (which of course, in this case, would lead to close to zero hits, as the U.S. Constitution is particular only to the United States), but can focus its inquiry on materials which treat the same, or similar, question.

Therefore, once the question outlined above is asked, the parameters for selecting and limiting the appropriate foreign sources of persuasive authority described in Part IV are brought to bear. As noted above, the authorities relied on by the \textit{Lawrence} majority originate from the United Nations Human Rights Committee, the European Court of Human Rights, and from Great Britain, Australia, Canada, New Zealand, Israel, South Africa, and Colombia. The institutional bodies which produced the materials relied upon by the \textit{Lawrence} majority either come from liberal democracies, or are the products of a transnational body in which liberal democracies are predominantly or exclusively represented.

The societal aspect is more differentiated. While transnational bodies (which do not embody a society per se)\textsuperscript{352} do not have a societal aspect, the nations referenced by the \textit{Lawrence} majority can be grouped by the different societal characteristics that each exhibits. Great Britain, Australia, Canada, New Zealand, and Israel are all nations whose

\textsuperscript{351} Slaughter, \textit{supra} note 166, at 193. It is noteworthy that following \textit{Lawrence}, at least one district court judge cited this emergence of global substantive norms in the human rights arena as reason enough to allow the opinions of foreign jurisdictions “which share our traditions” to play a role in deciding cases that presented Eighth Amendment issues. See United States v. Sampson, 275 F. Supp. 2d 49, 65-66 (D. Mass. 2003).

\textsuperscript{352} It could be argued, however, that the principles motivating the creation of these transnational bodies (equality, tolerance of diversity, and the protection of human rights) constitute a characteristic that can be likened to a societal characteristic of a nation state.
societies closely resemble that of the United States, with plurality, diversity, capitalism, and respect for the rights of the individual all figuring highly in the value systems of the individuals comprising such societies. South Africa is a new democracy that has a particular recent past that its people are trying to shed by embracing a value system that reflects a societal ideal based on tolerance and the values of Western democracies. Colombia is also a new democracy which has experienced serious turmoil due to the international drug cartels that call it home, but whose judicial institutions have demonstrated independence and a serious commitment to law, as well as a respect for due process, a key societal characteristic especially relevant for the type of issue presented to the Lawrence court. In sum, all the sources referenced by the Lawrence majority originate from institutions and nations that exhibit relevant societal affinities to the United States.

Last is the question of context. With one exception, all the materials cited or referred to by the Lawrence majority deal squarely with the issue of the propriety of laws criminalizing same gender sexual conduct. One case, P. G. & J. H. v. United Kingdom,\textsuperscript{353} deals indirectly with the issue. Relying in part on Dudgeon’s definition of privacy rights, the European Court of Human Rights held that covert police recordings of defendant co-conspirators used by the prosecution to obtain a conviction in that matter constituted an interference with the defendant co-conspirators’ “right to respect for private life” within the meaning of Article 8 of the European Convention of Human Rights and Fundamental Freedoms. Thus, all the materials are contextually pertinent to the issue of privacy rights being presented to the Lawrence court.

In sum, the foreign materials referenced by the Lawrence majority follow the parameters set forth in Part IV. All are the product of institutions that originate in or are created by liberal democracies which, in pertinent part, share societal affinities with the United States, and are relevant to the issue presented in Lawrence. While the Lawrence majority selects appropriate sources for its comparative analysis, it does not do as well explaining the motivation behind its selection of these authorities.\textsuperscript{354} Simply referring to the practices of “other nations” and “many other countries” is unsatisfactory because it presents a


\textsuperscript{354}. An important distinction should be noted here. The Lawrence majority explains that it is engaging in comparative analysis in order to rebut the comparative analysis present in Bowers and to conduct a global normative appraisal of the issue at hand. However, it does take the extra step of explaining why it selects the foreign materials that it does.
conclusion without explaining the process which led to that conclusion. As stated earlier in this Article, a detailed sociological appraisal of the nations to which the Supreme Court is referring is not what is required. A clause limiting the pool to those nations "which share our traditions" will most likely suffice for references to countries which we have traditionally viewed as closely linked to ours (such as the United Kingdom or Canada), while a more detailed explanation is more desirable if references are made to authorities arising out of countries which have not been traditionally viewed as kindred spirits (such as Zimbabwe). Such verbalizations, if accurately researched and intellectually coherent, will end up lending credibility to both the comparative enterprise and the specific results reached in those opinions where such analysis takes place.

VI. CONCLUSION

As suggested by Aristotle many centuries ago, the evolution of humanity is a product of the evolution of "skill." Interpretative comparative techniques are merely one more thread in the ongoing weaving of the tapestry of legal thought which will enhance the skill of the weaver. Even though history demonstrates that the use of foreign materials by U.S. courts is by no means new, it matters not, on the global scale of things, whether such enterprise is of recent or ancient inception. If ancient, the current state of affairs merely represents a point in the continuum. If recent, then we should strive to "undo [a] mental habit sanctified by dogma or tradition," that rejects comparative analysis on the grounds of its supposed novelty and "overcome immensely powerful intellectual and emotional obstacles [created by both] the inertial forces of society" and ourselves. In this way;

A few decades hence, constitutional lawyers may find it as natural to invoke constitutional experience elsewhere in support of their arguments for interpretations of the U.S. Constitution as today's lawyers arguing a tort case in New York find it natural to invoke developments in Michigan or California tort law to support their arguments for what New York tort law should be.

A flourishing comparative enterprise requires sound analytical

356. See Aristotle, POETICS, at ix (Penguin Classics 1996) (the term 'skill' is referred to as "teckne.").
358. Tushnet, supra note 220, at 1306.
grounding. That grounding cannot be established by “courts [that] have been less than forthcoming about justifying their use of comparative materials.”

Therefore, rather than leave the comparative process in the murky penumbra of implication, because “comparison is inevitable, [it] should be conscious, knowing, well-informed, and reasoned.” This new openness will not only help cement the propriety of comparative analysis within the panoply of interpretative techniques, but will also provide explicit justification for the selection process inherent in such analysis. The holistic aspect that such a forthcoming approach will express is the “proposition that no man should be a judge of his own cause [as an embodiment] of the ancient wisdom that only a many-perspectived view of the world can relieve us of the endless anarchy of one-eyed vision.” The specific aspect of this new openness will demonstrate, through a lens which shows that all nations are not created equal, that the comparative enterprise seeks a “horizontal engagement of ideas rather than vertical engagement of authority,” so that the comparative connections are established on an “intersocietal” rather than “internationalist” level. Starting from a premise of sound theoretical backing, U.S. courts will, therefore, be able to consult with a select body of foreign materials based on affinities that run deeper than any structural artifice. As a result, the reinvigorated, effective, and productive comparative practice will contribute to create a contemporary legal system that is adequately equipped for the challenges presented by a rapidly changing, globalizing world.


361. Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 242 (1950). This view was echoed by Justice Cardozo: “We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.” Loucks v. Standard Oil Co., 120 N.E. 198, 201 (N.Y. 1918).

362. See Kennedy, *supra* note 270, at 554-55 (using the term “intercultural” to mean “intersocietal”).