Comparative Reasoning and Judicial Review

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I. INTRODUCTION

Much has been written recently about the value of comparative analysis in constitutional decision-making.1 Most of this literature begins with the

† Associate Professor, Chicago-Kent College of Law; Visiting Research Fellow, Law Program, Research School of Social Sciences, Australian National University (2002-2003). My initial thinking about this topic was greatly assisted by comments from David Gerber and Patrick Glenn. I am also grateful for comments from David Fontana, participants in the comparative constitutionalism panel at the 2002 Law and Society Meeting, particularly Harry Arthurs, Sujit Choudry, David Schneiderman, and Mark Tushnet, and participants in workshops at Chicago-Kent College of Law and the Faculty of Law at the University of New South Wales. My colleagues at the Australian National University, particularly Christos Mantziaris and Adrienne Stone, were very helpful in the final stages of writing. Finally, I am immensely grateful for the wonderful research assistance of Eric Bourget, Jon Neuleib, and Zoe Guest.

observation that, in the past few decades, other nations have enacted constitutions that have been influenced to varying degrees by the U.S. Constitution. The courts charged with interpreting those constitutions have freely looked to American and other foreign jurisprudence for guidance. The U.S. Supreme Court, on the other hand, has generally ignored constitutional developments in other countries. As Judge Calabresi so incisively noted, the U.S. Supreme Court has so far failed to "learn from [its] children."  

Nonetheless, a few U.S. Supreme Court Justices have called for greater openness to foreign decisions, particularly in the context of constitutional issues dealing with human rights concerns such as the death penalty. The broad recognition and application of principles protecting human rights and liberties make such issues particularly well-suited to a transnational analysis. Aside from this burst of interest in comparative constitutional law, there is little literature on the nature of comparative judicial reasoning more generally. Professor Anne-Marie Slaughter and a handful of others have written about when, why, and how courts engage in transnational communication, but questions about the appropriateness and effects of comparative analyses in judicial decision-making remain relatively unexamined. In some respects it is odd that the bulk of thinking on these issues has occurred in constitutional law. Comparativists have traditionally focused on private rather than public law, and one would expect judges to reflect this practice by thinking about


3. See, e.g., William Rehnquist, Constitutional Courts—Comparative Remarks, in Germany and Its Basic Law: Past, Present, and Future—A German-American Symposium 411, 412 (Paul Kirchof & Donald P. Kommers eds., 1993) ("[N]ow that constitutional law is solidly grounded in so many 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."). But see Atkins v. Virginia, 306 U.S. 304, 321 (2002) (Rehnquist, C.J., dissenting) (explicitly calling attention to the “defects in the Court’s decision to place weight on foreign laws”).

4. See, e.g., Atkins, 536 U.S. at 316 n.21 (2002) (Stevens, J.) (citing the opinion of the “world community” that “executing the mentally retarded is wrong”); Knight v. Florida, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting from denial of certiorari) (citing law from a variety of foreign jurisdictions).


6. In addition to the increasing interest in comparative constitutional law, there is a significant increase in both comparative and international course work in American law schools. See Mary Kay Kane, President’s Message: Teaching and Scholarship in a World Without Borders, AALS NEWSLETTER, Nov. 2001, http://www.aals.org/pmnov01.html.

7. Anne-Marie Slaughter, A Typology of Transnational Communication, 29 U. RICH. L. REV. 99 (1994) (discussing different forms of transnational judicial dialogue and the importance of such dialogue to the judiciary as an institution); Anne-Marie Slaughter, Judicial Globalization, 40 VA. J. INT’L L. 1103 (2000) (discussing the emergence of a global legal community through judicial dialogue); see also, e.g., Choudhry, supra note 1 (discussing comparative approaches to constitutional law); Tushnet, supra note 1 (discussing how U.S. courts might use the constitutional experiences of other nations in interpreting the Constitution); see also, e.g., Patrick McFadden, Provincialism in United States Courts, 81 CORNELL L. REV. 4 (1995) (commenting on the embarrassing absence of foreign and international law in cases that involve the interests of other nations); Eric Stein, Uses, Misuses—And Nonuses of Comparative Law, 72 NW. U. L. REV. 198 (1977) (discussing the importance to lawmakers of studying foreign legal options).

8. In fact, it is interesting to note that many of the comparative constitutional scholars in the United States are first and foremost constitutional scholars who have developed an interest in
foreign law in private law issues before incorporating it in constitutional cases. But questions remain: What are the larger ramifications of adopting a comparative approach to judicial reasoning? Is there room for more foreign law in judicial reasoning?

At first glance, the answers would probably be no. Legal systems reflect the cultures within which they are situated and thus have unique and highly contingent identities. In particular, the organic quality of the common law firmly embeds it in local norms and customs. The interdependency between law and the culture within which it is situated is indeed one of the defining features of the common law, and is crucial to its ongoing vitality. Given this close connection between law and local culture, foreign law seems to have very little place in judicial reasoning. And yet, as borders between cultures are porous, should the borders between legal systems not be equally porous?

Many have written about the interdependency of legal systems over time and the porous nature of the boundaries between legal systems. Most recently, Professor Patrick Glenn has written eloquently and convincingly about "reconciling legal traditions." And, as already noted, there is a growing body of literature on sharing constitutional law and norms. But most of this material focuses on the development of law itself. By contrast, this Article explores how a comparative approach to decision-making fits within or even influences a larger model of judicial reasoning and examines the pros and cons of such a model. There is no better place to examine these questions than in the attitudes and jurisprudence of the Supreme Courts of Canada and the United States.

The U.S. and Canadian legal systems, including the Supreme Courts of both countries, share many common characteristics. As followers of the common law tradition, they adhere to similar interpretations of the rule of law, follow similar procedural and evidentiary rules, and believe strongly in the concept of stare decisis. Both Courts also adhere to a robust notion of judicial review. But unlike its U.S. counterpart, the Supreme Court of Canada consistently looks to the law of other nations for guidance and inspiration. In fact, the Supreme Court of Canada's use of foreign law has not diminished with the establishment of a uniquely Canadian body of law, but rather has

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9. Perhaps the most well known of such works is ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1974); see also ALAN WATSON, LEGAL TRANSPLANTS AND LAW REFORM, 92 LAW Q. REV. 79 (1976) (discussing the centrality of legal transplants to legal change).


11. The Supreme Court of Canada also adheres to the civil law tradition in its review of cases emerging out of Quebec, a civil law jurisdiction.


13. Glenn, Persuasive Authority, supra note 10, at 294 (noting that in Canada the openness to foreign sources increased in the latter half of the 20th century). However, Canada did unsuccessfully attempt to turn inward and shut out foreign influences around the end of the 19th century. See G. Blaine Baker, The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire, 3 LAW & HIST. REV. 219 (1985).
increased in frequency and diversity. The U.S. Supreme Court, on the other hand, has focused on the formation of a highly autonomous national legal system. The use of foreign law in the past few decades by the Supreme Court of Canada is most prominent in the area of human rights, leading Professor Kent Greenawalt to comment that Canadian courts have attempted to give “meaning to liberties that transcend national boundaries.” But the Supreme Court of Canada by no means limits the influence of foreign law to such cases. Foreign law appears in the entire range of cases that fall within the Court’s jurisdiction.

The premise of this Article is that these separate and distinct attitudes to foreign law cannot be understood or critiqued in isolation—that such attitudes should be looked at and assessed in conjunction with other elements of judicial reasoning. When looked at in this broader context, it becomes possible to link, at least conceptually, perceptions about foreign authority and local authority. In other words, the rejection of foreign law by the U.S. Supreme Court is justified, at least partially, by reasons that also help explain its concerns about authority within the American legal system. Its isolationism (at least compared to the Supreme Court of Canada) can be seen as a response to both local and global influences.

Similarly, the openness of the Supreme Court of Canada to foreign authority can be linked to its slightly more ambiguous attitude toward its authority within the Canadian legal system. The notion of “dialogue,” which has become a common metaphor for the Canadian constitutional decision-making model, can be used to describe both global and local relations. Let me reiterate that I am not focusing on the impact of comparative decision-making on the development of legal doctrine. My aim is not to detail the process of “borrowing” foreign law or other ways in which it might be used. Instead, I will be focusing on how acceptance or rejection of foreign law as persuasive authority fits with or even affects other aspects of judicial reasoning. The arguments stem from the recognition that a comparative perspective in decision-making must have some impact on the decision-making body itself and the system within which it operates, not simply on the outcomes it reaches.

This is primarily a discursive article, not positive or prescriptive. It is an exploration of distinct styles of judicial reasoning and review. Nonetheless, the final section goes beyond a mere descriptive intent and suggests that if we look at the use of comparative reasoning in this broader context, some of the

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16. The most comprehensive discussion of this model of decision-making can be found in Kent Roach, Constitutional and Common Law Dialogues Between The Supreme Court and Canadian Legislatures, 80 CAN. B. REV. 481 (2001). While the term “dialogue” is now commonly used to describe the Canadian approach it has also come under significant criticism as being inaccurate. See, e.g., F.L. Morton, Dialogue or Monologue?, POLICY OPTIONS, Apr. 1999, at 23.
17. The notion of culturally distinct forms of judicial review comes from Tom Ginsburg, Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan, 27 LAW & SOC. INQUIRY 763 (2002).
concerns about coherence, legitimacy, and uniformity that drive the rejection of foreign law by the U.S. Supreme Court begin to diminish.

Section II begins with a discussion of the attitudes of the Supreme Courts of Canada and the United States with respect to the use of foreign law, particularly, but not exclusively, in constitutional law. Section III explores how rejecting or accepting foreign law as persuasive authority fits with other aspects of judicial reasoning. In this Section, I construct two models of judicial reasoning—the dialogic and enforcement models—based on the jurisprudence and attitudes of the Supreme Court of Canada and the U.S. Supreme Court, respectively, focusing again on constitutional law. Section IV then turns to concerns about the use of foreign law, in particular to the concern that it poses a threat to the basic principles underlying and legitimating decision-making in a common law system.

II. GLOBAL AND LOCAL JUDICIAL REASONING: A COMPARATIVE CASE STUDY

A. The Supreme Court of Canada

The Supreme Court of Canada refers to foreign law and foreign cases on a regular basis. As stated by Justice La Forest, "Canadian courts have never been averse to the use of foreign materials."\(^{18}\) Foreign law is so common in Canadian Supreme Court decisions that it is difficult to find general statements regarding the use, relevance or value of such authorities; comparative judicial reasoning is integral to the Court's methodology. But the stark contrast between this approach and that followed by the U.S. Supreme Court has led a few Canadian Supreme Court justices to remark in extra-judicial contexts on the use of foreign law in decision-making.\(^{19}\)

In an article on judicial dialogue, Justice L'Heureux-Dubé bypasses the question of the relevance of foreign law and focuses on how the use of foreign law in Canada and elsewhere—with the exception of the United States—has changed over time.\(^{20}\) She states:

> [T]he process of international influence has changed from reception to dialogue. . . . As judgments in different countries increasingly build on each other, mutual respect and dialogue are fostered among appellate courts. Judges around the world look to each other for persuasive authority, rather than some judges being "givers" of law while others are "receivers."\(^{21}\)

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21. Id. at 17 (emphasis in original). L’Heureux-Dubé goes on to discuss four reasons for the increased dialogue and globalization within the legal community: (1) courts seem to be grappling with similar issues; (2) human rights are by their very nature international; (3) advances in technology have
Justice La Forest makes a similar observation, commenting that, while the short history of the Canadian legal tradition may at one point in time have made it necessary for Canadian courts to look beyond their borders for law, more recent use of foreign law stems from a genuine interest: “Necessity has been replaced by a sincere outward-looking interest in the views of other societies, especially those with traditions similar to ours.”

There are obvious reasons why the Canadian Supreme Court would frequently cite American cases, not the least of which are shared cultural and legal traditions. Like many other nations with newly enacted bills of rights, Canada naturally turned to its neighbor, the United States, for guidance in interpreting its 1982 Charter of Rights. Many key Canadian constitutional cases include lengthy discussions of entire areas of American constitutional law. Christopher Manfredi, writing critically about this reliance, points out that while U.S. decisions “constituted only 2.9 per cent” of the total cases cited in pre-Charter decisions, by 1990 the “proportion of citations to authority drawn from U.S. sources rose to 8.6 per cent.” Furthermore, Manfredi notes that between 1984 and 1990, the first crucial years of Charter litigation, 40 percent of all Charter cases cited U.S. decisions with an average of six U.S. decisions per case.

But there are strong indications that the Canadian Court’s interest in foreign law, including American law, is indeed “sincere” and not a passing fancy that is likely to die out as Canada develops its own rich body of Charter cases. First, as already made evident in the comments of Justice L’Heureux-Dubé, the Supreme Court of Canada refers to cases from a wide selection of countries, not simply the United States. Justice La Forest comments that, while “[r]eference to American authority abounds,” so do “references to . . .

made the dialogue possible; and (4) there is increased personal contact between judges. Id. at 23-26.

22. The strength and necessity of the use of foreign precedents was very much a product of Canada’s deep connection, both formal and informal, with legal traditions in Britain and France. Even after confederation, the Judicial Committee of the Privy Council in Britain was the final court of appeal in Canada until 1949. La Forest, supra note 18, at 212.

23. Id.

24. Justice La Forest comments that Canada and the U.S. share a “common law heritage in private law and in liberal democratic and federal structures of government” as well as commercial forces “peculiar to the North American legal and societal development.” Id. at 212-213.

25. CAN CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms) [hereinafter Charter]. There was a legislative Bill of Rights existing prior to the Charter. Canadian Bill of Rights, S.C. 1960, c.44. Canada also had a written constitution prior to the passage of the 1982 Constitution Act, but that constitution, still in force, deals primarily with separation of powers. British North America Act, 1867, 30 & 31 Vict., c. 3 (U.K.)

The influence of the United States Bill of Rights is certainly apparent in the Canadian Charter, but equally if not more apparent is the influence of international human rights documents. See L’Heureux-Dubé, supra note 19, at 19.


28. Id. at 321-22.

29. L’Heureux-Dubé, supra note 19. See also La Forest, supra note 18, at 216.
general international covenants.\textsuperscript{30} In fact, Justice L'Heureux-Dubé is of the opinion that if the U.S. Supreme Court continues to see itself as predominantly a "giver" and refuses to consider the relevance of decisions from other legal systems, this will eventually lead courts in other legal systems, including Canada, to view U.S. Supreme Court jurisprudence as irrelevant and isolated. To date, the United States has undoubtedly been the largest exporter of human rights law to Canada, but as a more global law of human rights develops through dialogue between courts, those not interested in engaging in that dialogue, according to Justice L'Hereux-Dubé, will no doubt see their influence diminish.\textsuperscript{31}

Second, the use of foreign law in the Canadian Supreme Court extends back much further than the passage of the Charter. During the period in which the Court's decisions were subject to review by the Privy Council, the Supreme Court of Canada cited more British cases than Canadian cases.\textsuperscript{32} Not until the 1960s did citations to Canadian cases exceed British citations. But at the same time, between the 1950s and 1970s, references to foreign law, generally speaking, nearly tripled in frequency.\textsuperscript{33} Furthermore, while references to U.S. authority have increased since the passage of the Charter, they first began to appear with some regularity in the mid-1970s under Chief Justice Laskin.\textsuperscript{34}

Finally, the Canadian Supreme Court cites to foreign law in a wide array of cases, not just Charter cases.\textsuperscript{35} Justice La Forest makes this point in his analysis of the use of foreign law, citing examples in labor law, sovereign immunity, conflict of laws, tort, contract, and fiduciary relationships.\textsuperscript{36} Foreign law even appears in statutory interpretation cases. For example, Thomson v. Canada, referred to a leading Australian case in trying to

\textsuperscript{30} Gérard V. La Forest, The Expanding Role of the Supreme Court of Canada in International Law Issues, 1996 CAN. Y.B. INT'L L. 89, 97.

\textsuperscript{31} One example of this diminishing support can be found in a decision of the Supreme Court of South Africa, Witwatersrand Local Division, Ferreira v. Levin NO., 1995 (4) BCLR 437 (WJ(SA)). The case concerned freedom from self-incrimination and the court examined and quoted numerous Fifth Amendment cases. But surprisingly, the U.S. cases, including Miranda, took a back seat to comparable jurisprudence from Canada, Germany, Britain, and the European Court of Human Rights. For further discussion of this issue, see L'Heureux-Dubé, supra note 19, at 29-30. Justice Barak of the Supreme Court of Israel has also suggested that the influence of American law might be declining for a complex set of reasons, including its failure to engage in comparative reasoning. Aharon Barak, Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy, 116 HARV. L. REV. 16, 27, 114 (2002).


\textsuperscript{33} Glenn, Persuasive Authority, supra note 10, at 296. But see id. at 292 (noting a certain hostility to foreign law in some of the mid-century cases).

\textsuperscript{34} McCormick, supra note 32, at 535-38. One of the explanations for this growth in U.S. citations under Chief Justice Laskin is that he was the first Chief Justice to have received some legal education in the United States.

\textsuperscript{35} The jurisdiction of the Supreme Court of Canada is much broader than U.S. Supreme Court jurisdiction. It is the final court of appeal for any and every legal issue whether provincial or federal, statutory or common law, public or private law. For a discussion of the differences in the jurisdiction of the highest courts of Australia, the United States, and Canada, see H. Patrick Glenn, Divided Justice? Judicial Structures in Federal and Confederal States, 46 S.C. L. REV. 819 (1995); Glenn, supra note 12, at 272.

\textsuperscript{36} La Forest, supra note 18, at 216-17.
determine the definition of "recommendation." In private law cases during a four-year time period (1989-1993), the Court cited one American case for every four Canadian cases. This was, in fact, double the ratio of American cases cited in Charter decisions. The best indication of the level of citation to foreign law in Canadian Supreme Court decisions can be found in a study that measured such citations in all cases. In the ten years between 1984 and 1994, approximately twenty-three percent of all cases cited by the Supreme Court of Canada were foreign and close to seven percent of all cases cited were from the United States. In addition to this extensive use of foreign cases, the Supreme Court of Canada is also comfortable citing foreign academic writings and secondary sources, such as the writings of Oliver Wendell Holmes.

It is worth noting that even Canadian provincial courts are comfortable with the use of foreign law. In a study of the highest court in the province of Alberta, judges expressed some reluctance about using American law unless presented with a persuasive reason to do so—for example "if there are no Canadian or English cases" on the issue. But the judges were on the whole very comfortable citing English cases and admitted to finding New Zealand, Australian, South African, and European Community law useful on occasion. With respect to the European Court of Human Rights, one judge stated that it "had some very interesting cases that are most instructive." Justice La Forest, citing the use of Maine law by the Supreme Court of New Brunswick, has commented that while borrowing and discussing foreign law is not as common at the regional level as it is at the national, there is nonetheless some history of regional dialogue. While these remarks may seem random, a more methodical look at citation patterns revealed that approximately twenty percent of provincial court citations in cases published in the Dominion Law Reports were to foreign law.

Canadian courts—in particular the Supreme Court of Canada—may present a particularly striking example of openness, but they are not alone in their interest in foreign law. Professor McCrudden and others have remarked that use of foreign law is on the rise even in British courts,

39. Id. at 533.
42. Id.
43. La Forest, supra note 18, at 211.
44. Glenn, supra note 12, at 286-87.
45. McCrudden, supra note 5, at 504-05, cites the following comment from Lord Steyn: "Law Lords expect a high standard of research and presentation from barristers . . . . For example, if the appeal involves a statutory offence we would expect counsel to be familiar with . . . . comparative material from, say, Australia and New Zealand." Eric Stein comments that even British lawmakers has opened to foreign influence in an unprecedented way. Eric Stein, supra note 7 at 210. See also Basil Marksiniis, Foreign Law Inspiring National Law: Lessons from Greaterex v. Greaterex, 61(2) Cambridge L.J. 386 (2002) (discussing the High Court's reliance on German Law in resolving a specific negligence based issue); and Anne-Marie Slaughter, Judicial Globalization, supra note 7, at 1117.
regarded as being both nationalistic and imperious. And in human rights cases, courts nearly everywhere seem to be taking an interest in “borrowing and lending across porous cultural boundaries.”

Finally it is worth pointing out how it is that the Supreme Court of Canada uses foreign law, or, to draw on the title of this Article, engages in comparative reasoning. Comparative reasoning does not mean that in every case the foreign law in question is followed or is perceived to be binding; its relevance is at the level of persuasive authority. Foreign cases are taken as providing statements of principles that the Court can use directly to shape its own jurisprudence or to distinguish a uniquely Canadian approach and solution. Foreign reasoning is rarely imported wholesale in Canadian cases as it once was with respect to cases from the House of Lords and the Privy Council. Under the current approach, referred to by Professor Sujit Choudhry as “dialogical interpretation,” courts “identify the normative and factual assumptions underlying their own constitutional jurisprudence by engaging with comparable jurisprudence of other jurisdictions.”

There are certainly occasions when the Supreme Court of Canada has found a foreign case extremely useful and has, in part or whole, adopted the foreign law in question, but there are comparable numbers of situations where foreign law is rejected as inapplicable in the context of Canadian law and society. Thus, the problems and pitfalls of foreign jurisprudence are as important as the useful and persuasive bits.

B. The United States Supreme Court

In light of the recent body of scholarship on comparative constitutional law, it hardly needs to be stated that the U.S. Supreme Court ranges from indifferent to hostile in its reaction to foreign law. Several of the Justices currently sitting on the Court have no interest in foreign law, a position that was more than adequately conveyed by the denial of certiorari in Knight v. Florida. The petitioners, Moore and Knight, argued that twenty years on death row was cruel and unusual punishment under the Eighth Amendment. In the opinion denying certiorari, Justice Thomas criticized the petitioners for their reliance on law from foreign jurisdictions—the Privy Council, India, Zimbabwe, and the European Court of Human Rights. Implicit in his choice of words rejecting foreign law is the somewhat remarkable position that reliance

46. In this way Glenn sees the United States and England as very much adopting the same attitude toward foreign law. In both cases, law is viewed as a “national response.” Glenn, Persuasive Authority, supra note 10, at 283-4.
48. See Glenn, Persuasive Authority, supra note 10.
49. Choudhry, supra note 1, at 825.
50. L’Heureux-Dubé, supra note 19, at 19-20.
on foreign law is a clear indication of failure or lack of support under U.S. constitutional law. He stated:

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 [defendant's] proposition. . . . 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.53

In short, foreign law was not only unwelcome and lacking in persuasive value, its very foreignness undermined the petitioners' case. In a more recent denial of certiorari, nearly an exact replay of the Knight decision, Justice Thomas reaffirmed his position on the use of foreign law, referring to the findings of European and Canadian courts in cases cited by Justice Breyer as "foreign moods, fads, or fashions."54

In his dissent in Knight, Justice Breyer argued that foreign law is useful in interpreting the Eighth Amendment, at least with respect to the death penalty issue then before the Court. Justice Breyer justified his openness to foreign law by arguing that the U.S. Supreme Court has a history of looking at "the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances."55 But Justice Breyer's argument does not find much support. The examples he gives are few and far between and only three of his cited cases are from the last twenty years.56 Nonetheless, Justice Breyer is not alone in arguing that the U.S. Supreme Court has a tradition of comparative reasoning, rather than an "ambivalent resistance"57 to foreign law.

In his article on the use of foreign law in human rights cases, Professor Christopher McCrudden notes that the Court's mid-twentieth century search for "pre-formed moral judgments" in areas such as due process increased the potential for use of "opinions of other countries in the Anglo-Saxon tradition 'not less civilized than our own.'"58 And later in the century, "comparative experience" gained some credibility in capital punishment cases.59

53. Id. at 990.
55. Knight, 528 U.S. at 997. See also Foster, 123 S.Ct. at 472 (Breyer, J., dissenting from denial of certiorari) (citing The Federalist No. 63 in support of the idea that "attention to the judgment of other nations" is useful). Justice Breyer made a similar argument in Printz v. United States, 521 U.S. 898 (1997):
Of 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. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem.
Id. at 977.
57. Jackson, supra note 1, at 589.
59. McCrudden, supra note 5, at 509; Thompson, 487 U.S. at 830 (noting that the Court
Fontana also notes the extensive use of comparative reasoning in U.S. Supreme Court cases. He observes that almost every current Justice has used comparative reasoning in drafting constitutional opinions at one time or another and a few have even spoken of the importance of foreign constitutional law in speeches.\(^{60}\) For example, Chief Justice Rehnquist and Justice O'Connor, neither one particularly known for the use of foreign law, have nonetheless each expressed an interest in foreign law in extra-legal contexts.\(^{61}\) Fontana remarks that comparative reasoning in constitutional cases actually "has had a long career in American constitutional law" going all the way back to the Founders.\(^{62}\) Even Professor Jackson who coined the phrase "ambivalent resistance" more recently noted that "the Court's manifest awareness of other constitutional systems is on the rise."\(^{63}\)

While references to foreign constitutional law and practices may indeed be on the rise, they continue to be few and far between. Even those who have commented on the growing significance of foreign law willingly admit to a need for more comparative reasoning. For example, the purpose of Fontana's article is to argue for increased use of foreign law in constitutional cases—what he terms "refined comparativism."\(^{64}\)

A search of U.S. Supreme Court cases turns up a remarkably low number of cases in which there is even a passing reference to foreign law or legal practice.\(^{65}\) In a simple online search of the past ten years, I was able to locate only ten cases referring to Canadian law,\(^{66}\) four referring to Australian law\(^{67}\) and two referring to New Zealand law.\(^{68}\) A search for cases from the

\(^{60}\) Fontana, supra note 1, at 545-49.


\(^{62}\) Fontana, supra note 1, at 591. See also James H. Lengel, The Role of International Law in the Development of Constitutional Jurisprudence in the Supreme Court: The Marshall Court and American Indians, 43 AM. J. LEGAL HIST. 117 (1999) (exploring the constitutional principles developed to govern the relationship between the new United States and the Indian nations that existed at the time of the European conquest).


\(^{64}\) Fontana, supra note 1, at 566-74 (Section III, "The Virtues of Refined Comparativism," identifying both the "pragmatic" and "normative" virtues of "refined comparativism.")

\(^{65}\) By reference to foreign law, I mean the law of a foreign nation was considered or at least mentioned as either supporting an American legal doctrine or providing an alternative approach.


\(^{67}\) Glucksberg, 521 U.S. at 718 n.16 (Rehnquist, C.J.); McIntyre, 514 U.S. at 381 (Scalia, J., dissenting); Barclays Bank, 512 U.S. at 324 n.22 (Ginsburg, J.); Vimar Seguros y Reaseguros v. M/V, 515 U.S. 528, 537 (1995) (Kennedy, J.).
United Kingdom turns up many more, but this is largely due to historical references rather than the use of current English law in analyzing American legal disputes. Counting only once the cases that cited laws of one of more of these common law jurisdictions during the last ten years, there are a total of eleven cases. Perhaps of greater significance is the fact that in all of these cases, the foreign law appeared as nothing more than a polite reference; there was no extended discussion of the foreign law being cited.

This, of course, does not represent the totality of references to foreign law in the past ten years of U.S. Supreme Court jurisprudence. But without doing a search for references to every country, it is reasonable to speculate that references to other non-common law jurisdictions are not likely to be any more prevalent than references to the common law jurisdictions mentioned above, perhaps with the exception of Germany and more generally the European Community. In short, the U.S. Supreme Court and U.S. courts in general seldom cite foreign law and, until the recent surge in comparative constitutional experience, there has been “scant legal literature on the use of foreign and comparative law in U.S. courts because courts rarely cite foreign law.”

With this background in mind, perhaps the view of the current Court, generally speaking, is not represented by Justice Breyer’s statement that “this Court has long considered as relevant” opinions of foreign courts, particularly those of “former Commonwealth nations.” Instead, Justice Scalia’s comment in his opinion for the court in Stanford v. Kentucky seems more accurate: “it is American standards of decency that are dispositive, rejecting the contentions of the petitioners . . . that the sentencing practices of other countries are relevant.” The Court, in an opinion by Justice Stevens, quite recently referred to the opinion of the “world community” in support of what he called a “national consensus” against the execution of the mentally retarded. But the reference was limited to a single footnote and was roundly criticized in dissents by both Chief Justice Rehnquist and Justice Scalia. Justice Scalia stated, “the Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’ must go to its appeal . . . to the views of assorted professional and

68. Glucksberg, 521 U.S. at 718 n.16; El Al Israel Airlines, 525 U.S. at 176 n.16.
69. The law of Germany is more frequently cited than other civil law jurisdictions because its constitution, both in design and function, shares more in common with the U.S. Constitution. See Printz v. United States, 521 U.S. 898, 976 (1997) (Breyer J., dissenting) (citing principles of federalism in Germany and the European Union); Planned Parenthood v. Casey, 505 U.S. 833, 945 n.1 (1992) (Rehnquist C.J., concurring in part and dissenting in part).
71. David S. Clark, The Use of Comparative Law by American Courts, 42 AM. J. COMP. L. 23 (1994). See also Glenn, supra note 12, at 288 n.106 (noting a study on citation practices from the California Supreme Court in which “citations to English authorities represent less than one-half of one per cent of citations; the rest of the world is absent”).
religious organizations, members of the so-called ‘world community,’ and respondents to opinion polls.”

In short, the U.S. Supreme Court rarely treats foreign constitutional or other legal experience as relevant. But this approach is not limited to the Court. American constitutional theory also evidences a clear isolationism. Professor Marian McKenna has remarked that constitutional research in the United States has tended to cluster around questions of constitutional origins, the intent of the framers, and the uniqueness of American constitutional experience. While there are many competing schools of constitutional theory and thought, a “heroic” vision of the Constitution, stressing connections between the text and another time in American history when “someone got it right” is a particularly conspicuous feature of American constitutional theory. Beyond constitutional theory, Professor Patrick Glenn has argued that the American obsession with creating a self-contained and binding national legal system, combined with the vast build-up and publication of national law, naturally led to the development of a sort of “national implosion” in which “legal writers . . . have . . . become largely preoccupied with giving ‘an account of what is happening amongst themselves.”

Even popular opinion about the Constitution reflects a certain parochialism. Professor McKenna observes that Americans tend to think of questions of basic human rights and public policy almost exclusively in terms of their Constitution, as if it were the center and source of all such policies domestically and internationally. Indeed, even American insistence on the use of the terms “civil” and “constitutional” rights, rather than “human” rights as used in other places, is evidence that a sense of shared common experience with other jurisdictions regarding such rights is missing. In keeping with this reflection, Professor Paul Stephan has recently criticized the tendency of U.S. courts, particularly the Second Circuit, to widen their spheres of influence over foreign matters. The aim of this extension of power, according to Stephan, reflects an unbecoming “ambitious use of U.S. civil justice for righting international wrongs.” He begins his comments by stating, “our courts might surrender some of their pride in favor of a more becoming modesty.”

If we turn our focus back to the Court and its failure to use foreign law, a possible counterargument might be found in the diversity existing within the

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75. Atkins, 536 U.S. at 337 (Scalia, J., dissenting).
78. Glenn, Persuasive Authority, supra note 10, at 287.
79. Id. (quoting Christopher D. Stone, From a Language Perspective, 90 YALE L.J. 1149, 1151 n.7 (1981)).
80. McKenna, supra note 76, at xiii.
81. McCrudden, supra note 5, at 529-30.
83. Id. at 628.
United States legal system. Each of the fifty states, with their own separate jurisdiction and body of constitutional, statutory and common law, provides a wealth of "foreign" jurisdictions to draw from, and the Court indeed does draw case law and opinions from these jurisdictions.\textsuperscript{84} As Justice Aharon Barak of the Supreme Court of Israel notes in a discussion of comparative reasoning, "American law is comprised of not one but fifty-one legal systems."\textsuperscript{85} With so many separate jurisdictions, there is already a great deal of diversity in U.S. law, and so perhaps it is not necessary for the U.S. Supreme Court to resort to law from outside the United States.

A number of responses to this argument spring to mind. First, this hardly explains the disparity in the use of foreign law between the U.S. Supreme Court and the Supreme Court of Canada. While fifty different state jurisdictions can no doubt provide more diversity and legal options than Canada's ten provinces, the added advantage of additional jurisdictions cannot account for the stark differences in approach. As a consequence of their federal structures, both countries have rich and diverse bodies of state or provincial law. While the difference in numbers of legal jurisdictions might produce slightly different rates of foreign law citation, it is not on its own a convincing explanation for the vastly different attitudes toward foreign law.

Second, and related to the first point, the law of the fifty different U.S. states is not likely to be as diverse as the numbers suggest, particularly in the area of constitutional law, which is the primary focus of this Article. While there have been calls for state courts to be more independent in interpreting state constitutional provisions that mirror or are largely similar to federal constitutional provisions, in reality many states adhere to a "lockstep approach." In this way, "congruence with federal decisional law is assumed to be the norm, and deviation is for all intents and purposes impossible."\textsuperscript{86} Uniformity is the primary justification offered in support of this approach.

Third, the most vocal isolationists on the Court, particularly Justice Scalia, do not point to the diversity of domestic law as a reason for refusing to use foreign law. Justice Scalia's rejection of foreign law is based on a principled distinction between American and foreign sources of law, not the amount of existing diversity within American law. Furthermore, when U.S. Supreme Court Justices have called for more consideration of foreign law, it has not been because of a lack of diverse legal positions within the American legal system, but, from all appearances, out of a sincere interest in examining the approaches of entirely different systems.

Two additional comments are worth making before moving on. First, the U.S. Supreme Court has historically been a "rights expander," and this expansion has occurred in relative isolation. Until quite recently only the European Court of Human Rights could claim to be as rights-focused as the

\textsuperscript{84} For an interesting discussion of the potential for "dialogue" between state courts and the U.S. Supreme Court with respect to shared state and federal constitutional provisions, see Lawrence Friedman, The Constitutional Value of Dialogue and the New Judicial Federalism, 28 Hastings Const. L.Q. 93 (2000).

\textsuperscript{85} Barak, supra note 31, at 114.

\textsuperscript{86} See Friedman, supra note 84, at 102-03.
U.S. Supreme Court, or more specifically, the Warren Court, and so by necessity it pursued its rights expansion without reference to foreign law.\textsuperscript{87} Given this history, it is not surprising that the U.S. Supreme Court would look upon foreign precedents with some skepticism. This, however, is little more than an explanation for its current position, not a serious justification when other nations have embraced rights discourse within their constitutional frameworks.

Second, the U.S. Supreme Court is not alone in its skepticism. Professor Christopher McCrudden remarks that, with respect to human rights decisions, there has been a "persistent undercurrent of scepticism" about the use of foreign law in a number of countries. The concern is that the randomness of choice of jurisdiction reflects a "cherry picking" approach and raises questions of relevance.\textsuperscript{88} These are legitimate substantive concerns that have been addressed by others who have tried to determine the right context for the use of foreign law, as well as appropriate sources.\textsuperscript{89} But as a justification for the Court's isolationism, this is seriously lacking. To argue in one breath that a foreign perspective is inapposite and in the next that foreign courts share this view would be contradictory. In short, while the views of foreign courts about the use of foreign law might on their own account be interesting, they cannot support the U.S. Supreme Court's rejection of foreign law.

Although this brief discussion of the use of foreign law in the Supreme Courts of Canada and the United States is in no way exhaustive, it strongly suggests two very different approaches to judicial reasoning. Despite the fact that a few U.S. Supreme Court Justices have expressed interest in comparative judicial reasoning, the Court as a whole has so far hesitated to move in that direction. The Supreme Court of Canada, on the other hand, has fully embraced a comparative approach to decision-making. Its use of foreign law is extensive both in the variety of legal systems to which it refers and in the substantive range of cases it cites. In short, the Supreme Court of Canada has developed a form of judicial review that is global and dialogic while the U.S. Supreme Court remains focused on local, binding authority.

III. FORMS OF DIALOGUE AND MODELS OF JUDICIAL REASONING

The first section of this paper briefly sketched out the differences between the Supreme Court of Canada and the U.S. Supreme Court with respect to the use of foreign law. This section explores more deeply the different attitudes of these two courts toward foreign law and connects such attitudes with other elements of their respective approaches to judicial review. In particular, this section will explore the potential impact of a comparative approach on a court's perception of its role in the larger legal community. To

\textsuperscript{87} McCrudden, supra note 5, at 527 ("The high point of [a rights-expanding] agenda in the U.S.A. was surely to be found during the Warren Court era when the Court seldom used foreign judicial precedents.").

\textsuperscript{88} Id. at 507.

\textsuperscript{89} See Fontana, supra note 1; Tushnet, supra note 1.
frame this as a question, if the Supreme Court of Canada routinely refers to foreign law, does this tell us something about how the Court perceives its place in the Canadian legal landscape? And if the U.S. Supreme Court makes a point of rejecting foreign influence, does this have larger implications for its role in the American legal landscape? In other words, what happens when one institution focuses on horizontal connections, while another institution prefers to view its place in vertical and hierarchical terms? \(^90\)

The following Section will define two models based on the jurisprudence and attitudes of the two courts discussed above. The dialogic model is centered on horizontal, transnational, and interdependent decision-making. Courts that fall under this model are open to foreign law and international judicial dialogue, as well as dialogue with domestic legal institutions—legislatures and other courts. In short, the dialogic model introduces the possibility of a wider range of influences and shifting—or at least less defined—lines of authority. All of this leads to a greater level of, and indeed tolerance for, ambiguity in the authority of the court and its decision-making. The enforcement model, based on the approach of the U.S. Supreme Court, is centered on local, independent, and final decision-making. It privileges finality and certainty over dialogue. Like the dialogic model, this approach extends beyond the court’s attitude to foreign law. Courts adhering to the enforcement model view themselves not as mediators or partners in an active dialogue, but rather as local law enforcers whose position with respect to legislatures and other courts is clearly defined. Through the assertion of strong authoritative and definitive decisions, the court establishes itself as an ultimate authority in its own self-defined realm.

The following section will elaborate on each of these models as they emerge from the jurisprudence and attitudes of the Supreme Court of Canada and the U.S. Supreme Court.

A. Dialogic Model

1. Foreign Law and Transnational Dialogue

The nature and usefulness of cross-border judicial dialogue has been explored in a variety of articles. For example, Professor Choudhry has written about “dialogical interpretation” in constitutional law, \(^91\) Professor McCrudden has explored “transnational judicial conversations” in the area of human rights, \(^92\) and Professor Slaughter has more generally focused on “transjudicial dialogue.” \(^93\) These and other individuals who have touched on the subject consistently recognize that cross-border judicial dialogue or conversation is something different from the more limited notion of borrowing legal

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90. See Lawrence Friedman, The Horizontal Society 5-15 (1999) (discussing the distinction between legal identities based on vertical relationships and identities based on horizontal relationships).
91. Choudhry, supra note 1.
92. McCrudden, supra note 5.
precedes. Borrowing entails the direct application of foreign law,\textsuperscript{94} whereas judicial dialogue involves many more forms of interaction and interpretation. The notion of “comparative reasoning” is being used here to describe a general willingness on the part of judges to discuss, analyze, and distinguish, as well as to borrow foreign precedents.

A good example of this approach to foreign law can be found in the Canadian case \textit{The Queen v. Keegstra},\textsuperscript{95} upholding hate speech legislation. Much has been written about the differences and similarities between this case and \textit{R.A.V. v. City of St. Paul},\textsuperscript{96} which was decided just a few years later by the U.S. Supreme Court, and which found comparable hate speech legislation to be unconstitutional.\textsuperscript{97} But what makes \textit{Keegstra} interesting for our present purposes is Chief Justice Dickson’s discussion of American First Amendment jurisprudence. Dickson spends much time and energy detailing the evolution of the “fighting words” doctrine and the current position of the U.S. Supreme Court regarding the regulation of hate speech. At the conclusion of this discussion, Dickson argues that the rejection of hate speech legislation as impermissible content and viewpoint-based regulation under the First Amendment is consistent neither with Canadian free speech principles nor American First Amendment jurisprudence.

Chief Justice Dickson’s use of foreign law is thus quite remarkable. He does not explore American jurisprudence as a viable alternative but rather raises it as a way to elaborate on a position that he is not willing to follow. American First Amendment doctrine becomes “the other”\textsuperscript{98} legal position against which Chief Justice Dickson is able to discern and then define a unique Canadian approach. He states:

\begin{quote}
Though I have found the American experience tremendously helpful in coming to my own conclusions regarding this appeal, and by no means reject the whole of the First Amendment doctrine, in a number of respects I am thus dubious as to the applicability of this doctrine in the context of a challenge to hate propaganda legislation. . . . [T]he special role given equality and multiculturalism in the Canadian Constitution necessitates a departure from the view, reasonably prevalent in America at present, that the suppression of hate propaganda is incompatible with guarantee of free expression.\textsuperscript{99}
\end{quote}

While Chief Justice Dickson makes it clear that his concerns surround the application of First Amendment doctrine in a Canadian context, his arguments suggest that he is not convinced of the validity of the current American approach, even in an American legal context. He states, relying on the work of American legal scholars, that “hate propaganda can undermine the very values which free speech is said to protect . . . [and] First Amendment

\textsuperscript{94} For recent discussion of some of the difficulties of directly borrowing foreign law in the American context, see Oscar Chase, \textit{American Exceptionalism and Comparative Procedure}, 50 Am. J. Comp. L. 277 (2002).
\textsuperscript{95} [1990] 3 S.C.R. 697.
\textsuperscript{96} 505 U.S. 377 (1992).
\textsuperscript{97} See, e.g., Jackson, supra note 1; Steven J. Heyman, Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression, 78 B.U. L. Rev. 1275 (1998).
\textsuperscript{98} McCrudden uses this same phrase to describe the Irish Supreme Court’s discussion and rejection of \textit{Roe v. Wade}. McCrudden, supra note 5, at 518.
doctrine might be able to accommodate statutes prohibiting hate
propaganda. 100

Chief Justice Dickson’s attempt to distinguish First Amendment doctrine
regarding hate speech is an excellent example of a dialogic approach to the
use of foreign law. Needless to say, the conversation was one-sided—the U.S.
Supreme Court did not discuss Keegstra when it decided R.A.V. just two years
later. But the way he incorporates, critiques, and suggests alternative
interpretations of American law is a robust example of the eagerness of the
Supreme Court of Canada to engage in a cross-border judicial dialogue while
still paying close attention to local circumstances.

In a more recent Canadian case, United States v. Burns, 101 authored by
the Court as a whole, the laws of a number of foreign nations, as well as
international agreements, were reviewed to determine whether extradition of
an accused suspect without assurances that the death penalty would not be
imposed violated Charter requirements of fundamental justice. 102 In finding
that extradition without assurances would be a violation of Charter rights, a
departure from the Court’s previous opinion on this question, the Court relied
on international initiatives to abolish the death penalty, 103 “accelerating
concern about the potential wrongful convictions” in the United States, 104 and
the “death row phenomenon” in the United States 105 Thus the Court’s
decision was based on a close critique of a host of legal and social factors
from Canada, the United States, and the rest of the world community. 106

Keegstra is a well-known case involving an area of law that is closely
identified with American constitutionalism. Burns, as an extradition case
concerning the death penalty, is a logical place to find a discussion of foreign
law. But there are plenty of examples from more obscure, less sensational
cases. In Canadian Council of Churches v. Canada, 107 Justice Cory, writing
for the Court, launched into an analysis of United Kingdom, Australian, and
United States law on the question of public interest standing. Each of these
jurisdictions, he decided, took a more restrictive approach than is warranted in
the Canadian constitutional context.

More generally, Justice La Forest advocates an analysis of international
law similar to the approach to foreign law followed in Keegstra. He states:

[We do not confine ourselves to polite references to the international agreements
themselves, but examine with care the interpretations given to them by international
institutions and domestic courts of many countries, as well as in the writings of learned
authors . . . . What is happening, then, is that we are absorbing international legal norms
affecting the individual through our constitutional pores . . . . Although in some cases . . .

100. Id. at 741.
104. Id. at 342-50.
105. Id. at 350-53.
106. Recently, Justice Breyer cited Burns in support of his position that prolonged periods of
"incarceration before execution" are worthy of the Court's consideration under the Eighth Amendment.
our Court has departed from international norms.\textsuperscript{108}

This is a classic example of Professor Choudhry’s “dialogical interpretation.” Foreign law, in this instance, is not presented as a choice but rather as an interpretive tool.\textsuperscript{109} According to Professor Choudhry, what distinguishes “dialogical interpretation” from other approaches to the use of foreign law in constitutional decision-making is that it does not necessarily rely on drawing essential connections, either through historical lineage or through an appeal to universal principles. In place of looking for connections, “dialogical interpretation” is used to identify and enhance the court’s awareness of itself. This method is a process of identifying and justifying the normative and factual assumptions underlying one’s own constitutional jurisprudence by engaging with comparable jurisprudence of other jurisdictions.\textsuperscript{110} The point therefore is not to search for solutions in foreign jurisprudence, thereby eradicating constitutional differences, but rather “to learn from foreign experience without assimilating constitutional \ldots jurisprudence into a larger transnational conversation about rights and democracy.”\textsuperscript{111} It is fundamentally a process of distinction rather than assimilation.\textsuperscript{112}

Professor Choudhry’s concept of dialogical interpretation is a key component of what I have termed the dialogic model of judicial reasoning, but only a component. What is of particular interest to me is the extent to which the dialogue that takes place with foreign or external legal institutions mirrors a dialogue at the local level. In short, just as the Supreme Court of Canada is willing to engage in a dialogue with foreign courts, so it has adopted what might be described as a dialogic relationship with legislatures and lower courts in the Canadian legal system.

2. Lower Courts, Legislatures, and Local Dialogue

There are two prominent features of the Supreme Court of Canada and its particular brand of judicial review that could be viewed as supporting a dialogic model with respect to domestic legal institutions. The first is the Supreme Court of Canada’s tendency to rely on general standards and balancing approaches, or put another way, its willingness to engage in more openly normative analyses, rather than a rigid rule-based approach. How this relates to a dialogic approach will become clear later on. The second is the fluid and flexible, maybe even ambiguous relationship that the Court appears to have with the legislative branches of government. These two aspects of the

\textsuperscript{108}  La Forest, supra note 30, at 98.
\textsuperscript{109}  Choudhry, supra note 1, at 836-37.
\textsuperscript{110}  Id. at 855-58.
\textsuperscript{111}  Id. at 890.
\textsuperscript{112}  Christopher McRudden makes a similar observation in discussing the uses of foreign law: “Even where the result of the foreign judicial approach has not been adopted, it has often been influential in sharpening the understanding of the court’s view of domestic law.” McRudden, supra note 5, at 512. McRudden takes his discussion one step further and remarks on the non-explicit use of foreign human rights law in Japan. There, U.S. law is studied and consulted on a regular basis but is rarely cited. Id. at 511.
Supreme Court of Canada’s jurisprudence, along with its use of foreign law, support the idea that the Supreme Court of Canada has developed its own dialogic form of judicial review.

a. Standards, Balancing, and Normative Reasoning

Professor Kathleen Sullivan’s classic discussion of rules and standards is a useful place to begin a discussion of the Supreme Court of Canada’s approach to judicial reasoning.\(^{113}\) According to Professor Sullivan, a “legal directive is ‘rule’ like when it binds a decision-maker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decision-maker to facts.”\(^{114}\) A “legal directive is ‘standard’ like when it tends to collapse decision-making back into the direct application of the background principle or policy to a fact situation.”\(^{115}\) Standards give “the decision-maker more discretion than do rules.”\(^{116}\)

This distinction is supported in the broader jurisprudential literature on rules and principles. While there is not complete agreement on how best to understand and describe the differences between these concepts, the notion that “[r]ules prescribe relatively specific acts; principles prescribe highly unspecified actions,”\(^{117}\) is a commonly shared proposition.\(^{118}\) Like principles, “standard-like” legal decisions thus provide more possibilities for future decision-making whereas rules are more focused and constraining.\(^{119}\)

As Professor Sullivan notes, while rules are sometimes associated with the right of the political spectrum and standards with the left, there is in fact very little correlation between political ideologies and the use of rules or standards. Rather, standards are more closely associated with moderation, and rules with more extreme, ideological positions, whether on the right or left. Professor Sullivan states: “The choice of standards over rules thus dampens ideological swings as compared with a shift from one polar rule to another.”\(^{120}\) Another distinction relevant to the present analysis is that standards, unlike inflexible rules, tend to be the agents of change. They “better accommodate a world in which . . . formerly clear boundaries . . . have been relativized or dissolved.”\(^{121}\)


\(^{114}\) Id. at 58.

\(^{115}\) Id.

\(^{116}\) Id. at 59.

\(^{117}\) Joseph Raz, Legal Principles and the Limits of Law, 81 Yale L.J. 823, 838 (1972).

\(^{118}\) See also Frederick Schauer, Prescriptions in Three Dimensions, 82 Iowa L. Rev. 911, 914 (1997).

\(^{119}\) While the commonalities in “standards” and “principles” are clear, these concepts do not completely overlap. Through the stipulation of a list of important, albeit non-determinative factors, standards do aim to constrain both reasoning and outcomes, arguably more so than principles. It may also be the case that these concepts differ in their function, with standards serving to “measure” the legality of behavior whereas principles serve to provide “mutual orientation.” Peter Drahos & John Braithwaite, Global Business Regulation 19 (2000). However, for my present purposes it is enough to note that by nature standards are closer to principles than rules in their directive capacity.

\(^{120}\) Sullivan, supra note 113, at 99.

\(^{121}\) Id. at 107.
If we stopped here in our description of the distinction between rules and standards, the argument for associating standards with a more dialogic approach to decision-making should be clear. Standards imply an ongoing openness to interpretation and change. In formulating a standard or a balancing type of test, a judge is implicitly accepting a wider set of possible interpretations by both lower courts and future judges. In this way, standards foster a dialogue focused on change and varying circumstances rather than fixing—or attempting to fix—a solution for other decision-makers whether present or future. Dialogue between judges and courts occurs in the implicit interpretive space provided by balancing tests and standards. While rules may in fact provide as much interpretive space, such a consequence is indeed contrary to their intended constraining effect.

Professor Sullivan, however, goes on to make an additional point that further evinces the connection between standard-like decision-making and a dialogic approach. She argues that judges who feel it is important to craft rules that they suppose to be value-free also view their judicial role as being a mouthpiece for the unambiguous text of the law, including the Constitution. Judges who are comfortable with standards are more concerned with "continuity" and they view the Constitution as a "coherent succession." They see social practices and shared understandings, not a discontinuous set of authorities and texts, as providing the foundation for line drawing. They are more inclined to see legal precedents as an ambiguous, multidirectional and yet continuous series of ideas and decisions. In short, standards indicate a more dialogic approach in that they are, by their very nature, more explicit about the presence of ongoing interpretation, and judges who choose standards seem to have a more partnership-like understanding of their judicial role.

While a standard-based approach to decision-making implies a certain level of comfort with ambiguity and discretion, the same amount of discretion and ambiguity could be found in the task of choosing a rule or in recognizing an exception. In other words, judicial discretion is implicit in both rule and standard-based approaches, and the primary difference rests in how explicit a court is in its toleration of judicial discretion. In this way, it could be argued that the difference between rule-like and standard-like decisions is primarily stylistic rather than substantive.

But the argument here is that style is important, not only in the message conveyed to lower courts, but also in what it says about the attitudes of those judges who are choosing between different styles of decision-making. A standard-based approach to judicial reasoning tells us, among other things, that the court is comfortable with—in fact may even prefer—dialogue and

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122. For a civic republican defense of the "communicative" nature of standards or balancing tests, see Frank Michelman, The Supreme Court, 1985 Term—Foreword: Traces of Self-Government, 100 HARV. L. REV. 4, 34-35 (1986).
shared responsibility for the creation of legal norms rather than a more top-down and constrained development of legal doctrine.

A number of scholars writing in the area of comparative constitutional law have remarked that the Supreme Court of Canada relies on standard and balancing approaches in decision-making more so than the U.S. Supreme Court. Professor Kent Greenawalt notes in an article on free speech law in Canada that the Canadian Supreme Court has very much embraced a balancing approach, “openly weigh[ing] crucial factors,” whereas the U.S. Supreme Court employs a “conceptual approach” utilizing “categorical analysis.”

So whereas the U.S. Supreme Court has a well-crafted body of rules dealing with the constitutional protection of speech, Canada has yet to create a comparable body of rules and “the contextualized standard . . . will probably limit such doctrinal proliferation by making much of it unnecessary.”

He goes on to mention that what has determined the choice between these two approaches is largely “constitutional language and broader traditions concerning review of legislative and executive action.”

Specifically, Professor Greenawalt discusses Section 1 of the Charter which is an explicit balancing provision, requiring a court to determine whether the violation of a substantive Charter right is nonetheless a reasonable limit “prescribed by law as can be demonstrably justified in a free and democratic society.” While the mere presence of this provision ensures a certain amount of balancing in many Charter decisions, the Court’s comfort with balancing and a more contextual standard-like approach is evident in the elaborate balancing procedure established under Section 1. In *The Queen v. Oakes*, the Court held that an otherwise unconstitutional law will be upheld if it pursues an objective of “sufficient importance,” is “rationally connected to the objective,” impairs Charter rights “as little as possible,” and is not disproportionate severe in its application when measured against the objective.

This proportionality test, in particular the least restrictive means requirement, has done much of the heavy lifting in Charter cases.

Professor Vicki Jackson also comments on the use of proportionality tests in Canadian Charter decisions and draws a comparison to the relatively cautious attitude the U.S. Supreme Court evinces to proportionality tests in comparable fundamental rights decisions. The differences between these two courts are evident in the two hate speech cases already mentioned. In *R.A.V. v. City of St. Paul*, the court struck down an ordinance prohibiting “fighting words” based on race, color, creed, religion, or gender as being an

126. Greenawalt, supra note 15, at 6-7
127. Id. at 10.
128. Id. at 7.
129. Section 1 states in full: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Charter, supra note 25, § 1.
impermissible content and viewpoint-based regulation. A comparable provision under the Canadian Criminal Code was upheld in *The Queen v. Keegstra*. 133 Although the Court in *Keegstra* recognized that the provision clearly infringed the guarantee of free expression found in section 2(b) of the Charter, it went on to uphold the provision as protecting a legitimate and important interest—the prevention of hate speech. Jackson notes the "degree to which the justices explicitly identify competing constitutional values and make comparative normative assessments about those values, and in doing so consider the relevance of comparative materials" in *Keegstra* and other Canadian cases. 134 In short, the proportionality analysis in Canadian constitutional cases has led to a more comparative, frank, open, and contextual discussion of constitutional norms and conflicts. 135

Another example of this distinction can be found in the exclusionary rule in criminal law. 136 Professor James Stribopolous observes that contrary to the categorical approach of the U.S. Supreme Court regarding the exclusion of illegally obtained evidence, the Supreme Court of Canada has treated the matter from the start as discretionary and has encouraged judges to exercise that discretion on a case-by-case basis to determine whether there has been a violation of a constitutional right. 137 Not unlike Professor Jackson, Professor Stribopolous goes on to argue that one of the benefits of a discretionary or balancing approach is that it leads to a more expansive and honest definition of constitutional rights because "[c]ourts are not continually preoccupied with the consequences that flow from their interpretation of constitutional guarantees." 138

The terms used in this discussion have been loose and varied. I began with Professor Sullivan’s term "standard" and have since used principles, balancing, and proportionality almost interchangeably. These ideas are distinct and perhaps should not be substituted so easily. But in a broad comparative context it does not seem inappropriate to group them together as generally indicating a more contextual, open-ended approach to judicial reasoning. Professor Wayne MacKay has recently noted, speaking of the Canadian Court, that "contextualizing judicial decisions has become the hallmark of the modern judiciary and an important principle to be followed in all areas, not just constitutional law." A few paragraphs later, MacKay, citing interviews with Canadian Supreme Court justices, notes that while the justices are aware

134. Jackson, supra note 1, at 612.
135. Id. at 612-13.
137. The Supreme Court of Canada in *Collins v. R.*, [1987] 1 S.C.R. 265, set forth guidelines for interpreting Section 24(2) of the Charter, which concerns the exclusion of evidence. The Court organized its considerations into three categories: (1) trial fairness; (2) seriousness of the Charter violation; and (3) effect of excluding the evidence. Stribopolous also mentions that a comparable, discretionary approach has been adopted in search and seizure and privacy concerns under the Canadian Charter. Stribopolous, supra note 136, at 134-35.
138. Stribopolous, supra note 136, at 84.
that lower courts desire ""one right answer'... the majority thought that it would be intellectually dishonest to move in that direction."

This tendency toward greater contextualization is perhaps most apparent in the Court's equality jurisprudence under Section 15 of the Charter. Justice Iacobucci, writing for the Court in an age discrimination case, states:

It is inappropriate to attempt to confine analysis under s. 15(1) of the Charter to a fixed and limited formula. A purposive and contextual approach to discrimination analysis is to be preferred, in order to permit the realization of the strong remedial purpose of the equality guarantee, and to avoid the pitfalls of a formalistic or mechanical approach.

In a recent article on the equality jurisprudence of the Supreme Court of Canada, Justice L'Heureux-Dubé suggests that this purposive and contextual approach—as compared to the "rigidity of United States equal protection doctrine"—has contributed to the significant divergence in the equality jurisprudence of these two countries.

The picture of the Supreme Court of Canada that emerges from this discussion is of an openly normative institution, comfortable with contextual analysis and more willing to live with some ambiguity in its decisions. Supreme Court of Canada decisions tend to invite discussion rather than impose a rule. While much of this can be traced to the text of the Charter, the Court has clearly embraced this as a defining feature of its jurisprudence.

b. The Supreme Court and Democratic Deliberation

For most of its history, the Supreme Court of Canada adhered to the British constitutional tradition of parliamentary sovereignty and thus deferred to the federal and provincial legislatures. Prior to 1982, the Supreme Court of Canada had the power to interpret the constitution and to declare legislation unconstitutional, but only on the narrow grounds found in the British North America Act (BNA), a document focusing primarily on the distribution of legislative powers. In essence, the powers of the federal and provincial governments were limited only by the federalism scheme found in the BNA—


142. Id. at 52-53.

143. Jeff Rosen has commented that Justice Breyer of the U.S. Supreme Court is also more openly normative. He states:

But even when you disagree with Breyer in a particular case, it's hard not to be impressed with his transparency: More than any other justice, he takes us behind the curtain of his constitutional reasoning—explicitly identifying the competing interests that he has weighed in his decision, and showing us how he has weighed them....


144. Originally cited as the British North America Act, 1867, the Act is now referred to as the Constitution Act, 1867.
their powers were as "plenary and ample" as those of the United Kingdom Parliament."

The Constitution Act of 1982 both entrenched and broadened the scope of judicial review. Section 52(1) explicitly states that the Constitution is "the supreme law of Canada" and provides that any law inconsistent with the Constitution is "to the extent of the inconsistency, of no force or effect." This section along with the enforcement and remedies section has become the source and foundation of judicial review in Canada. The Charter, included in the Constitution Act, 1982, also broadened the Court's power of judicial review, creating new limits on provincial and federal legislatures. Like the Bill of Rights found in the American Constitution, the Charter entrenches a set of human rights thus limiting the power of the legislative branches to interfere with such rights.

Since 1982, the Supreme Court of Canada has been more than willing—some have argued too willing—to use its explicit and extended powers of judicial review, creating a more politicized judiciary. But others have argued that the Court is distinctly aware of its delicate position with respect to democratically elected legislatures. This can be at least partly attributed to the language of the Charter itself. Section 1, as already discussed, requires the Court to take a serious look at legislative objectives before it finds legislation to be unconstitutional. While the same delicate balancing may take place in constitutional analysis in the United States, the explicit balancing requirements found in Section 1 seem to add greater weight and significance to the legislative voice. As Professors Hogg and Bushell note in their study of "Charter Dialogue," the proportionality analysis in Section 1 provides the most important forum for dialogue between courts and legislatures.

The most interesting provision concerning the relationship between courts and legislatures in Canada is Section 33, the "notwithstanding clause." Section 33 was adopted in the final stages of Charter negotiations and was clearly a compromise between the model of parliamentary sovereignty that Canada had inherited from Britain and the American model

147. Id. at § 24(1).
148. Prior to 1982, the Supreme Court of Canada's limited powers of judicial review were located in the notion that an imperial statute (the DNA) could override colonial legislation. The ultimate power to review legislation for its constitutionality originally rested with the Privy Council, the then final court of appeal for Canada. See Hogg, supra note 145, at 5.5(a), 122-25.
149. It is worth noting here that while the American Bill of Rights greatly influenced the drafting of the Charter, it is commonly accepted that the European Convention on Human Rights and the International Covenant on Civil and Political Liberties were equally if not more influential.
151. See infra text accompanying notes 161-71.
152. Hogg & Bushell, supra note 131, at 85.
153. Can. Const. (Constitution Act, 1982) § 33(1) states: "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." A legislative override can be in effect for up to five years. Id. § 33(3).
of judicial supremacy in constitutional interpretation.\textsuperscript{154} Under Section 33, Parliament and provincial legislatures have the power to pass legislation overriding some of the key Charter provisions, in essence providing for “legislative review of judicial review.”\textsuperscript{155} While Section 33 has been flagged by some as providing a prime vehicle for dialogue and shared responsibility between courts and legislatures,\textsuperscript{156} others argue that Section 33 has failed in this regard and that “[s]omething like a convention against its use may have emerged, precisely because the political costs of invoking the power turned out to be too great.”\textsuperscript{157}

In a recent article, Professor Stephen Gardbaum argues that there is indeed a unique relationship between courts and legislatures embedded in the Canadian Constitution.\textsuperscript{158} The Charter, along with the recently passed U.K. Human Rights Act\textsuperscript{159} and the New Zealand Bill of Rights,\textsuperscript{160} protect fundamental liberties along the lines of those protected by the U.S. Bill of Rights and give interpretive authority over such rights to the judicial branches. At the same time, each of these recent commonwealth bills of rights “empower[s] legislatures to have the final word”\textsuperscript{161}—they were “self-consciously designed to provide a new solution to the old problem of the incompatibility of legislative supremacy and the effective (that is, judicial) protection of fundamental rights.”\textsuperscript{162}

Professor Gardbaum goes on to argue that this new approach to constitutionalism recognizes the need for dialogue and joint responsibility between legislatures and courts in protecting fundamental liberties. He states: “The enforced dialogue, competition, and joint responsibility between courts and legislatures that the Commonwealth model aims to ensure promises to add new dimension and perspective to the task of constitutional interpretation and to enrich the enterprise.”\textsuperscript{163}

This enforced dialogue, according to Professor Gardbaum, is an effective compromise between legislative and judicial supremacy and “courts might actually be emboldened in their interpretation of the content and scope of rights” knowing that there is always the counterbalancing influence of legislatures.\textsuperscript{164} Alternatively, it may also embolden legislatures to respond quickly and confidently through new substantive legislation knowing they have the option of a full override. While there are other mechanisms for maintaining a balance of power between courts and democratic institutions,
Professor Gardbaum argues that none are as successful as the collection of approaches found under the emerging commonwealth model. For example, there are comparable mechanisms for dialogue—from the judicial perspective, restraint—under American constitutional law and theory, typically associated with the writings of James Bradley Thayer, but they are informal and run the risk of under-enforcement of constitutional rights.\textsuperscript{165} The commonwealth model, according to Professor Gardbaum, is most effective at striking the right balance and ensuring a robust protection of constitutional rights.

Aside from the explicit language and structure of the Canadian Constitution, the Supreme Court of Canada has been open to, one might even say has pursued, a dialogue or partnership with legislatures, implicitly acknowledging the importance of democratically elected governance of constitutional issues. A good example is the Quebec Secession case\textsuperscript{166} in which the Court examined the legality of secession in both domestic and international law. In this decision, the Court established a "legal framework" for secession but chose not to undermine the "obligation of the elected representatives to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately assess."\textsuperscript{167} In so deciding, the Court recognized that while it has an important role to play in constitutional interpretation, so do political actors. The Court went on to say:

\begin{quote}
We have interpreted the questions as relating to the constitutional framework within which political decisions may ultimately be made. Within that framework, the workings of the political process are complex and can only be resolved by means of political judgments and evaluations. The Court has no supervisory role over the political aspects of constitutional negotiations. Equally, the initial impetus for negotiation, namely a clear majority on a clear question in favour of secession, is subject only to political evaluation, and properly so.\textsuperscript{168}
\end{quote}

While it might be tempting to discount this example as the articulation of something like the "political question" doctrine found in U.S. constitutional theory, there are other examples where the issue in question is clearly and fully within the Court's jurisdiction and far from "political" in a traditional sense. For example in, \textit{R. v. Morgentaler},\textsuperscript{169} Justice Beetz made it very clear that while the provisions of the criminal code regulating access to an abortion were unconstitutional, it was still within the competence of Parliament to determine what would be a constitutional mechanism for regulation.\textsuperscript{170} Justice Wilson makes a similar point: "The precise point in the development of the foetus at which the state's interest in its protection becomes 'compelling' I leave to the informed judgment of the legislature which is in a position to receive guidance on the subject from all the relevant disciplines."\textsuperscript{171}

This approach may seem unremarkable, but it does take on new meaning if one considers that it was decided in the wake of the comparable U.S.

\begin{thebibliography}{9}
\bibitem{165} \textit{Id.} at 748-52.
\bibitem{166} Reference re Secession of Quebec, [1998] 2 S.C.R. 217
\bibitem{167} \textit{Id.} at 271.
\bibitem{168} \textit{Id.}
\bibitem{170} \textit{Id.} at 128.
\bibitem{171} \textit{Id.} at 183.
\end{thebibliography}
Supreme Court decision, *Roe v. Wade*. In that decision, the U.S. Supreme Court not only found a provision regulating abortion unconstitutional, but went on to determine precise rules for the constitutional regulation of abortion. The Supreme Court of Canada cited and discussed *Roe* but in the final analysis rejected its precise formula, leaving such matters to the legislature.

While a willingness to work with Parliament is evident in *Morgentaler*, Parliament ultimately failed to pass subsequent legislation regulating abortions. In this sense, *Morgentaler* seems unusual. In a 1997 study, Professors Hogg and Bushell found that eighty percent of all Charter cases in which legislation was found to be unconstitutional were followed by some sort of legislative response. For example, in *R. v. Seaboyer*, the Supreme Court of Canada found the rape shield provisions of the Canadian Criminal Code unconstitutional. Consequently, Parliament responded with new legislation that was eventually upheld in *R. v. Darrach*. While not all legislative responses have been similarly positive, Hogg and Bushell conclude that the rate of response is strong evidence of at least a limited dialogue between legislative bodies and the courts.

There are of course examples where the Canadian Supreme Court’s interference with legislative decisions might seem to go beyond a model of cooperation. In *Vriend v. Alberta*, the Court chastened the Alberta Provincial legislature for omitting “sexual orientation” as a prohibited ground for discrimination under its Individual Rights Protection Act. But even when exercising such a broad scope of review, the Court was cautious about appearing to overstep its authority. Justice Cory explicitly recognized the importance of legislative deference in his discussion of justiciability, as did Justice Iacobucci in his Section 1 and remedy analyses. Justice Iacobucci also spoke to and agreed with the notion of “dialogue” as a description of the “dynamic interaction among the branches of governance.” So while the Supreme Court of Canada may at times be aggressive in its approach to judicial review, it is careful not to undermine what it perceives as a legitimate role for legislative bodies in constitutional interpretation.

178. The Individual’s Rights Protection Amendment Act, R.S.A., ch. 27 (1980) [hereinafter “IRPA”].
180. Id. at 561-66 (“[R]espect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others’ role and the role of the courts.”).
181. Id. at 565. In his partial dissent, Justice Major agreed with the findings of the court but rejected the remedy—reading “sexual orientation” into the IRPA—on the basis that “it is the legislature’s responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution’s requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.” Id. at 586 (citing Hunter v. Southam Inc., [1984] 2 S.C.R. 145, 169).
While “dialogue” has become the dominant metaphor for understanding the relationship between courts and legislatures in the Canadian model of judicial review, other commentators have preferred more prosaic and arguably more accurate terms. Professors Sujit Choudhry and Robert Howse have labeled the Canadian approach “joint constitutional responsibility.” Accordingly, “[j]udicial decisions only demarcate the limits of its judicial enforcement,” and beyond that “it is for the political organs of the Constitution to frame their own interpretations of those norms and assess their own compliance with them. Thus interpretive responsibility for particular constitutional norms is both shared and divided.” Leighton McDonald prefers the idea of “institutional interaction.” It may not, he observes, be as “catchy, but it does usefully emphasize the contingency, complexity, and changeability of the observed ‘dialogue’ without implying that Canadian courts and legislatures are engaged in an amicable, standing seminar on rights discourse.”

However one wishes to label this approach, it is clear that the Supreme Court of Canada is engaged in at least attenuated dialogue or interaction with Canada’s political and democratic institutions rather than casting itself in a dominant, isolated role. This is undoubtedly the result of a complex combination of historical, textual, and cultural influences. But whatever the reason, and whether for good or for ill, the Supreme Court of Canada has developed into an institution that has much of the same authority as the U.S. Supreme Court, and yet it exercises that authority with a different understanding of its role in a deliberative democracy.

3. Dialogue and Comparative Reasoning

The purpose of this Section has been to piece together a number of seemingly unconnected observations about the Supreme Court of Canada and to construct a larger cultural description of the court. The Court in this analysis is an institution focused on an ongoing dialogue and partnership with both domestic and foreign legal institutions. At this point, a question that immediately comes to mind is whether the local and foreign dialogic positions are connected in anything more than a descriptive sense. Has the Supreme Court of Canada’s traditional openness to foreign law influenced how it deals with local legal institutions in its judicial reasoning? The causal relation, if there is one, is most certainly complex and multi-, rather than uni-, directional, so it would be unwise, not to mention difficult, to argue for a causal

183. Id. at 160-61.
185. While I have tended to cite scholars and studies that seem to support this dialogic model or reject its existence, there are those who recognize it exists but find it inappropriate and weak-minded. For a quick outline of the debate, see Kirk Makin, *Has Democracy Been Dulled?*, THE GLOBE AND MAIL, Apr. 10, 2002, at A4.
connection. Nonetheless the Supreme Court of Canada’s ongoing dialogue with foreign legal systems arguably supports its internal dialogic perspective.

The argument for this loose connection goes as follows. The introduction of foreign law broadens the context for decision-making and as that context grows, the usefulness and plausibility of authoritative rules with general application become increasingly less apparent. This broader perspective is general in nature, extending to the persuasive value of multiple influences both foreign and domestic.

Professor Patrick Glenn comes closest to making this argument in his discussion of “persuasive authority.” Professor Glenn argues that what judges who cite foreign law learn over a long period of time is not to take single institutions too seriously. [Judges] are called upon to decide cases or enact norms or give opinions, but the search for law is too important for any potential external source to be eliminated a priori. The law is never definitively given; it is always to be sought in the endlessly original process of resolution of individual disputes through the law.186

Professor Glenn goes on to comment that “multiplying the sources of law means multiplying the sources of legal dialogue. Law is less precise but more communal.”187 So rather than giving law, the Supreme Court of Canada engages other legal decision-makers in Canada in a “communal” process of resolving disputes and refining law.

Another way to understand this connection is to look at what is said about comparative law in general because this should have some application to judges who choose a comparative analysis. Professor Annelise Riles comments that “the contribution of comparative law emanates not from pseudoscientific information gathering pretense... [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 interest in the form of knowledge itself.”188 If a comparative perspective involves an appreciation of what lies “beyond” the familiar, it naturally provides a critical perspective and a more contingent understanding of one’s own approach. What might have once appeared to be an objectively correct legal approach begins to look more subjective requiring more open and constant discussion and refinement. In short, a comparative perspective in widening the scope of potential solutions encourages a rejection of rule-bound and formulaic decision-making authority in favor of more flexible, fluid and contingent decision-making. It is this aspect of comparative law that Professor George Fletcher has labelled its “subversive potential.”189

Thus, the Supreme Court of Canada appears to have embraced an “enquiry” or dialogic model of legal reasoning. It perceives enquiry and

186. Glenn, Persuasive Authority, supra note 10, at 293.
187. Id. at 297-98.
dialogue as essential not only to the process of forming law but additionally to the authority of law itself. Legal decisions under this model are legitimated by the input of multiple voices, rather than through restrictions on the sources of law. The Court sees itself not as a creator or discoverer of exclusively local standards but rather as an institution deeply connected to a host of other institutions, some existing within the Canadian constitutional framework, others existing outside that framework, but all joined in a collective and ongoing process of refinement. While the current tendencies of the Court are deeply connected with its history—and it has, as stated earlier, always used foreign law—my observations here are limited to the recent history of the Court, in particular the post-Charter years.

B. The Enforcement Model

As stated in the introduction to this Section, the enforcement model\(^\text{191}\) is based on a preference for local, independent, and final decision-making. Under such a model, the focus is less on dialogue and more on finality. The following Section will explore how this model of judicial review emerges from the attitude of the current U.S. Supreme Court concerning both foreign law and domestic legal institutions.

1. Foreign Law and the Problem of Coherence

As discussed in Part I of this paper, the U.S. Supreme Court is generally disinclined to discuss or cite foreign law. While some Justices of the Supreme Court have indicated a willingness to cite foreign law, the limited number of foreign references indicates a distinct lack of institutional enthusiasm. The terms of this rejection, however, are as important to this analysis as the rejection itself. What appears to drive the Court’s rejection of foreign law is less a question of the wisdom of foreign legal options and more a question of the importance of local accountability. With local accountability as the focus of concern, foreign law not only becomes irrelevant, but the mere suggestion of it becomes a threat to the supposed integrity of the system.

Again, consider Justice Thomas’s rejection of foreign law in *Knight v. Moore*. As previously mentioned, Justice Thomas stated that the petitioners’ use of foreign law was itself a clear indication of the lack of local legal support for their argument. If we consider this position for a moment, it becomes clear that foreign law under Justice Thomas’s reasoning is and will always be inconsistent with local authority: the mere introduction of foreign law is the source of its own demise as persuasive authority. Put another way, foreign and domestic law are mutually exclusive sources of law. This argument has very little to do with the quality or persuasive value of any

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191. Harold Krent has written about the U.S. Supreme Court as an “enforcement agency,” and there are some parallels in his arguments and the arguments made here. But in general, Krent is focused more on how the Court engages in strategic behavior that is similar to that of an administrative agency acting in its enforcement capacity—in essence under or over enforcing constitutional rights for strategic purposes. See Harold J. Krent, *The Supreme Court as an Enforcement Agency*, 55 WASH. & LEE L. REV. 1149 (1998).
specific foreign law and everything to do with its pedigree—its foreignness strips it of any authority in domestic legal disputes. It is inherently irrelevant.

The same argument surfaces in Justice Scalia's frequently cited rejection of foreign law in *Printz v. United States*: "comparative analysis [is] inappropriate to the task of interpreting a constitution."192 Justice Scalia is very clear here. His opinion is not obfuscated by statements about the wisdom or usefulness of foreign law—it is simply "inappropriate."193

There are of course other voices on the U.S. Supreme Court. As already mentioned, Justice Breyer is comfortable with the use of foreign law in specific circumstances and has openly argued for its relevance. Professor Mark Tushnet has argued that Justice Breyer seems to be adopting a "functionalist" approach to constitutional interpretation, whereas Justice Scalia seems to be taking an "organicist" approach.194 The continuing lack of foreign law in U.S. Supreme Court opinions seems to indicate that the "organicists" are winning, or at least dominating. But the question remains: What does this "organicist" approach tell us about the U.S. Supreme Court, or at least those Justices who hold firmly to it?

Professor Tushnet has explained that "a strong organicist position" views the Constitution, in fact all constitutions, as springing from local circumstances. Only local political and civil culture as reflected in ongoing legal interpretation counts. But the desire of "organicists" to construct an impermeable boundary around constitutional law is not explicable simply on the grounds of parochialism or political conservatism. Neither of these explanations fully accounts for the terms upon which foreign law is rejected. Rather, in tracing the legal boundaries so precisely over national boundaries, Justice Scalia, the most vocal "organicist," seems to be expressing concern about legitimacy and its dependence on coherence.

There is a huge amount at stake here for the "strong organicist." If constitutional interpretation is untethered from its local context there is a risk that it will appear more arbitrary, less clearly the instantiation of truths already embedded in the Constitution. Constitutional interpretation begins to look more like constitutional policy-making, unrestrained by precedent, text, and other traditional (and binding) sources of authority. This in turn undermines the existing coherence and thus authority of the system. In short, the concern is that foreign law will undermine the reality and idea of internal coherence upon which local legal authority is based.195

Key to this concern is the assumption that a true or correct legal proposition does not relate or correspond to any outside facts about the world but rather to the source of the proposition itself. If the meaning of a legal proposition depends exclusively on references to the legally specified authoritative source of that proposition rather than a host of external influences, then legal interpretation becomes suitably independent and self-

193. Id.
195. I owe an enormous debt to my student Jon Neuleib for his assistance with this argument.
referential, rather than dependent on the personal views of the decision-maker. The coercive nature of judicial pronouncements, so the argument goes, requires this level of independence and internal coherence. While I am ascribing this view to the “strong organicist’s” rejection of foreign law, it can also be used to describe other elements of Justice Scalia’s approach to constitutional interpretation, including originalism. 196

While the “organicist” position fits comfortably with formalism, it is also heavily focused on coherence; the answer to the question “What counts as law or legal analysis?” is not only limited to language and arguments internal to the law broadly speaking. It is further limited to only those legal ideas connected with local binding authority. 197 The conception of coherence here is important. Coherence, as Wittgenstein explains in his early works, is a question more of intent than of description. 198 A system—e.g., a legal or constitutional system—coheres when those participating in its creation intend to account for all the relevant facts and experiences. Like all grammars, our legal and constitutional system has a totalizing intent. The danger, then, from the perspective of someone like Justice Scalia, is not just the problems of interpretation involved in drawing on foreign law; the danger is that in drawing on these sources we undermine the intent and thus call into question the legitimacy of the structure as a whole. In short, reference to foreign law entails accepting and thus revealing inadequacies in local law, and this in turn poses risks for the legitimacy and authority of binding local law.

Neither Justice Scalia nor others on the Court have explicitly connected their rejection of foreign law to concerns about internal coherence (although this is the most plausible explanation for Justice Thomas’s statement in Knight). Nonetheless this does help explain variations or inconsistencies in what have been termed “intermestic” 199 cases—cases with both international and domestic elements. Crosby v. National Foreign Trade Council 200 is a good example. In Crosby, the Court rejected a Massachusetts law concerning trade with Burma on the basis that the law in question was preempted by subsequently passed federal legislation imposing sanctions on trade and business with Burma. The case, as Professor Tushnet notes, is a departure from the Court’s federalism decisions, 201 leading one to speculate that the international nature of the case prompted the court to prefer greater centralization of authority. While there are numerous plausible explanations

196. See Benjamin C. Zipursky, Legal Coherentism, 50 SMU L. REV. 1679, 1682-95 (1997) (discussing the various jurisprudential responses to the cluster of ideas associated with the correspondence theory of truth, including originalism). See also id. at 1693 (discussing originalism specifically).

197. This is different from the legal coherentism defined in Zipursky’s article. See supra note 196. He outlines an approach that regards “legal discourse as autonomous,” not in need of arguments from economics, philosophy, or other external disciplines. But, he argues, this approach can encompass a broad range of ideas about legal reasoning, unlike the limited understanding of law found in formalist legal thinking. Id. at 1681, 1705-07.

198. LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS (1922).


for the Court's decision in this case, one partial explanation is that the Court was concerned about maintaining internal coherence on matters of foreign affairs. When the issue involves foreign affairs, speaking in one voice becomes important not only because of the strength and unity that is inherent in one voice but, more importantly, because many voices will reveal the lack of authority in any one voice.

This interpretation of the "organicist" position, particularly as articulated by Justice Scalia, also finds support in the circumstances under which Justice Scalia views foreign law to be relevant. First, he admitted in Printz that foreign law might indeed be relevant to the drafting or designing of a constitution. Second, he has said repeatedly in extrajudicial statements that a transnational judicial dialogue outside of decision-making is fine. It simply has no place in the Court's actual decisions or formal judicial reasoning. These points are very revealing, for they indicate that the boundaries being drawn map onto the boundaries of existing and formal constitutional law and relate directly to the Court's official authority. Once the constitutional system is in place, it alone must provide the answer to all formal constitutional queries and issues. The fact that it must provide all answers naturally transforms into a belief that it indeed does provide all answers. Foreign law thus becomes unnecessary and even threatening to a belief in the authority of the Constitution.

There is an important weakness in this argument in that it depends almost exclusively on statements made by Justice Scalia. Is it legitimate to pin Justice Scalia's views about foreign law on the rest of the Court, or at least on those Justices who have shown no serious interest in using foreign law in their judicial reasoning? The answer is probably no. Yet, given the lack of any other explicit statements from the Court, it is hard to know how else to explain the lack of enthusiasm for foreign law. Clearly the Justices that have not shied away from foreign law, specifically Justices Breyer and Stevens, are exceptions. In addition, the statements of other Justices indicate they do not wish to be associated with the extreme position of Justice Scalia. Yet to the extent that there continues to be reticence concerning the citation or discussion of foreign law in most areas falling under the Supreme Court's jurisdiction, Justice Scalia's explanation seems as valid as any others that we might hypothesize.

Thus anxiety and concern about coherence help explain at least the "strong organicist" position and perhaps has some application to those less clearly in the "strong organicist" category. But how does this relate to what I

202. See id. at 38-41.
204. See, e.g., Antonin Scalia, Program V: Commentary, 40 ST. LOUIS U. L.J. 1119, 1122 (1996) ("I welcome international conferences . . . in which the judges of various countries may exchange useful insights and information, and, by association with their colleagues in the law, may strengthen their sense of dignity and independence.").
205. The dispute in Printz between Justices Breyer and Scalia over the use of foreign law was in the context of a disagreement over whether there was any local authority on the issue. Justice Breyer believed that local authority was wanting; Justice Scalia disagreed. See Tushnet, supra note 194, at 326 n.9.
have labeled an enforcement model? The clear demarcation of what is in and what is out, I have argued, stems from a desire to understand the internal legal system as coherent, and upon this foundation rests the law’s authority. It is a rejection of the existence and even the possibility of ambiguity. When these ideas are understood in the context of the Supreme Court, Constitutional interpretation and decision-making becomes primarily a process of enforcement. Enforcement implies not only a process of finding and applying the existing coherent body of law rather than making new law; it further presumes a sense of final and conclusive authority.

However one explains the isolationist or “organismic” tendencies in U.S. Supreme Court constitutional interpretation, such tendencies are arguably not random but are part of a larger model of decision-making. Just as it was possible to draw connections in the Canadian context between the use of foreign law and other aspects of judicial reasoning, so it is possible in the U.S. context. These connections will be discussed in the next Section.

2. Lower Courts, Legislatures, and Supreme Authority

The arguments at the foundation of the “strong organicist” rejection of foreign law are also apparent in other aspects of its jurisprudence and legal reasoning. These aspects are only roughly diametrically opposed to those addressed in the section on the Supreme Court of Canada. So while the Supreme Court of Canada has a less clear-cut and distinctly non-authoritative relationship with legislatures, it could be argued that the U.S. Supreme Court has clearly established its authority over such bodies. The rules/standards debate is less helpful here because the U.S. Supreme Court seems to evade definition on these terms. But the Court has in other more direct ways defined itself as clearly above lower courts rather than in partnership with them. These trends may not fully describe or explain the attitudes of all those on the Rehnquist Court, but they are nonetheless generally associated with the current U.S. Supreme Court and they contribute to an overall picture of that Court’s jurisprudence and attitude.

a. Rules, Standards, Minimalism, and Authority

The rules/standards debate has been a peculiar fascination of U.S. constitutional and Supreme Court theory. The work of Professor Frederick Schauer has generated a robust, abstract jurisprudential debate about the value of rules versus principles or standards. As perhaps the most prominent defender of rules, he has attracted a host of both admirers and detractors. But the more interesting debate for the purposes of this paper is how these concepts apply to the Rehnquist court. In a prior Section this article has argued that the Supreme Court of Canada tends toward the use of standards in its judicial decision-making. Does the current U.S. Supreme Court favor the use of rules?

The answer is, predictably, yes and no. Certainly Justice Scalia is a strong advocate of clear, direct binding rules and has stated so in his decisions as well as in his academic writing. Justice Thomas seems to be following Justice Scalia’s lead, and Chief Justice Rehnquist also tends to favor the use of rules. But what of the others? Where do they lie on the rules/standards continuum?

According to Professor Sullivan, the centrist contingent on the Court (Justices O’Connor, Kennedy, and Souter) lean more toward the use of standards in their decisions. In fact, central to Professor Sullivan’s argument is a connection between the use of standards and political moderation. At the time Professor Sullivan was writing, Justice Stevens was the strongest advocate of the use of standards. Since Professor Sullivan’s article, Justices Ginsburg and Breyer have been added to the Court and both seem to side with those favoring standards. Justice Breyer, perhaps more vocally than any others, has embraced a “democratic” approach to constitutional interpretation and adjudication that is skeptical of a “literalist” and rule-bound approach to judicial reasoning and decision-making.

So this window into the jurisprudence of the current Court sheds little light on the question of the relationship of the U.S. Supreme Court to other courts, most particularly the federal judiciary. The Court appears to be significantly and very vocally split on the question of rules versus standards. Another prominent theory of recent constitutional decision-making by the U.S. Supreme Court that has implications for questions of authority over lower courts is Professor Cass Sunstein’s “minimalism.” Minimalism, an idea that stresses the limited nature of judicial inquiry as it relates to both the facts before it (“width”) and basic principles (“depth”), is, according to Professor Sunstein, “democracy-promoting” precisely because it leaves so much to be resolved by lower courts, future courts, and legislatures. Professor Sunstein states: “Minimalist judges... try to reduce the burdens of judgment for the Supreme Court justices, to minimize the risks of error introduced by broad rules and abstract theories, and to maximize the space for democratic deliberation about basic political and moral issues.” If indeed

207. See Print, 521 U.S. at 932 (“[W]here... it is the whole object of the law to direct the functioning of the state executive... balancing analysis is inappropriate.”); Morrison v. Olson, 487 U.S. 654, 733 (1988) (Scalia, J., dissenting) (“A government of laws means a government of rules.”).


210. Id. at 88-95.


215. Id. at 99.
the Court is leaning in this direction then it could be said that the Court is limiting rather than trying to reinforce its authority over the resolution of constitutional issues, particularly in relation to other courts.

But there are some important distinctions between minimalism and the standard-based or balancing approach to decision-making that the Supreme Court of Canada appears to follow. Standard or principle-based legal reasoning proceeds on the assumption that setting out a general framework for legal reasoning in future cases is important. So while such an approach does not anticipate the same constraining effect as a rule-based approach, it would be incorrect to describe it as a narrow form of decision-making. On the other hand, the virtue of minimalism as advocated by Professor Sunstein is indeed its limited and narrow nature—an "appreciation of the passive virtues" of the Court. While both of these approaches might be "democracy-promoting" they rest on separate foundations. Minimalism is meant to be democracy-promoting because the court takes a back seat in setting policy, restricting itself to the limited role of resolving specific disputes. It relies very much on the importance of separation between various forms and levels of legal institutions. Standard-based decision-making assumes more of an active cooperation and partnership model. Standards do indeed provide much material for future decision-making but they nonetheless promote dialogue between courts because they remain flexible and stop short of explicitly constraining lower and future courts.

This is a subtle, and some might even find picky, self-serving distinction, and I certainly do not wish to enter into a debate about which of these approaches is indeed better at promoting democracy. My only point is that minimalism as a theory of adjudication is less focused on direct dialogue than a standard-based approach and consequently has less bearing on the relationship between the U.S. Supreme Court and lower courts.

If we turn away from abstract theories of adjudication toward more direct statements, there is ample support for characterizing the U.S. Supreme Court as being more concerned with enforcement than dialogue when it comes to lower courts. The Court has itself explicitly stated that under no circumstances are lower courts to rule contrary to a direct Supreme Court precedent, even when good reasons and respect for subsequent Supreme Court decisions might dictate such action. For example, in Rodriguez de Quijas v. Shearson, Justice Kennedy for the Court stated, "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." It should be noted that the Court did indeed affirm the Appeals Court decision in this case while nonetheless scolding it for its impudence.

216. Id. at 8 n.8 (recognizing the connections and distinctions between the theory he presents and that put forth by Alexander Bickel in The Least Dangerous Branch).
218. The double-sided nature of this decision—both affirming and rebuking—make it a classic example of Frederick Schauer’s defense of formalism. Formalism, according to Schauer is primarily about limiting the options of other decision-makers to reduce the risk of error. Thus the U.S. Supreme Court as a final decision-maker or policy-maker should be concerned about departures from its
The dissent in this case was equally incensed at the actions of the Court of Appeals.219 This decision is now more than a decade old but the Court has not changed in this respect. The statement of Justice Kennedy has been cited and affirmed in more recent cases220 and the Court has engaged in direct debates with at least the Court of Appeals for the Ninth Circuit regarding judicial discretion and authority.221

On one level the statement of the Rodriguez court is nothing more than a truism. Stare decisis is a defining feature of all common law systems and accordingly lower courts must follow the dictates of higher courts as they appear in precedents. But such an explicit and aggressive show of authority is arguably a recent and questionable development.222 Professor Ashutosh Bhagwat writes that for the Court to have the final word on its own authority is itself problematic in the absence of any other checks or balances.223 Additionally, Professor Bhagwat argues, it limits the legitimate participation of other courts in the ongoing evolution of legal norms. He states:

Instead of viewing the exercise of the judicial power as a cooperative venture in reasoned decision-making and precedent-building, where there is value to be gained from participation by all levels of the judiciary, the Court increasingly seems to see it as an exercise of raw power, so that any sharing of that power is necessarily at the expense of the Court's own authority.224

There are deep and complicated questions about the legitimacy of this increasingly aggressive display of authority but whatever one thinks of it, the fact of it remains. The Court has assumed a more explicit position of authority and control over lower courts.

Another example of the Court's increasing concerns about authority can be found in a recent article by Professor Laura Fitzgerald. Under the title "Suspecting the States," Professor Fitzgerald argues that while the Court has significantly immunized state courts and laws from Congressional challenges and lower federal court review, the Court has extended its own powers of review. Without any reason "to suspect [the] state court of having evaded or otherwise cheated federal law,"225 the Court has assumed the right to review directives even when it ultimately agrees with the basis for that departure. Frederick Schauer, Formalism, 97 YALE L.J. 509 (1988).

219. Rodriguez, 490 U.S. at 486 (Stevens, J., dissenting) ("[T]he Court of Appeals therefore engaged in an indefensible brand of judicial activism.").


221. See Calderon v. Thompson, 523 U.S. 538 (1998) (holding that the 9th Circuit abused its discretion when it sua sponte recalled its mandate to revisit the merits of an earlier decision denying habeas relief to a state prisoner); Vasquez v. Harris, 503 U.S. 1000 (1992) (vacating a 9th Circuit stay of execution and prohibiting any further stays of Harris's execution by the federal courts except upon order of the Supreme Court).

222. See Ashutosh Bhagwat, Separate But Equal?: The Supreme Court, the Lower Federal Courts and the Nature of the "Judicial Power," 80 B.U. L. REV. 967, 968-77 (2000) (discussing Rodriguez and other cases in which the Court has reprimanded or even interfered with the exercise of judicial authority in lower federal courts). But see Harold Krent, The Supreme Court as an Enforcement Agency, 55 WASH. & LEE L. REV. 1149, 1201-02 (1998) (arguing that such strong assertions of authority might be necessary for uniformity at least in the context of "overenforced" constitutional norms).


224. Id. at 978.

“state-law decision[s] that [block] a state court from considering a federal claim.”226 The salience of Fitzgerald’s primary observations is hard to resist: while the Court expects other courts and Congress to give states the benefit of the doubt, the Court itself has adopted no such standard when it comes to state court review.

So while the minimalist or standard-based decision-making of some members of the Court might be a sign of movement towards a less dominating Supreme Court, explicit statements by the Court limiting the interpretive role of lower federal courts and even state courts seem aimed at reinforcing its dominance.

b. The Supreme Court as a Supreme Institution

So far I have tried to argue that the reasons for rejecting foreign law—concerns about coherence and authority—are also reflected in the Court’s attitude to other domestic courts. In both contexts the Court is focused on limiting the influence and/or discretion of other courts. The same dynamic appears in the Court’s relationship with legislatures.

Debates about the relationship between the U.S. Supreme Court and legislative bodies have flourished since John Marshall’s declaration in Marbury v. Madison that the Supreme Court has the power to invalidate legislation found by the Court to be unconstitutional.227 Aggressive interpreters and defenders of this power have argued that ultimate constitutional authority must rest with the courts as the only effective institution to protect minorities from the tyranny of the majority.228 On the other hand, more conservative interpreters of the power of judicial review have argued that such power, a clear contradiction of the democratic process, should be exercised sparingly, only in cases of clear and convincing constitutional error.229 But most participants in this debate agree that Congress is indeed a coequal branch of government and respect for democracy requires some deference to its legislative enactments. For most of its history, the U.S. Supreme Court has agreed with this and “respect for Congress has been regularly voiced.”230 This however, may no longer be the case.

The scholarship on this question has primarily focused on the demise of the political question doctrine, most evident in the Court’s interference in the 2000 presidential election.231 What makes that particular episode in Supreme Court jurisprudence so interesting is not just that the Court interfered when many thought the matter lay within the competence and authority of the Florida legislature, but that the Court, as Professor Rachel Barkow argues, “never seemed to consider that the matter could be decided by a body other

226. Id. at 83.
than a court."232 While Professor Barkow falls short of calling this institutional arrogance, she does argue that this assumption of jurisdiction, framed as an obligation to resolve all constitutional issues, flies in the face of the "whole point of the political question doctrine . . . that some issues are for the political branches, not the federal judiciary, to confront and resolve."233

The demise of the political question doctrine puts jurisdictional questions at the heart of the tensions between the Court and legislative bodies, but, as Professor Barkow argues, this is part of a "broader trend in which the Court overestimates its own powers and prowess vis-à-vis the political branches."234 Just as the Court has concocted jurisdictional supremacy at the expense of the political question doctrine, so it has developed an "inflated opinion of its own interpretive powers."235

Professor Barkow is not alone in her observations. Professors Ruth Colker and James Brudney argue that since 1995 the U.S. Supreme Court has moved away from a position of respect and deference towards skepticism about the scope of congressional authority. This is particularly prominent in the Court’s decisions dealing with the Commerce Clause and Section Five of the Fourteenth Amendment. While the classic understanding of this skepticism is a renewed interest in federalism, Professors Colker and Brudney argue that this is an incomplete explanation: "The repeated abrogation of federal statutes—including statutes expressly supported by the States themselves—has resulted in a considerable transfer of power to the judiciary."236 In a subsequent article, Professor Colker, writing with Keith Scott, further supports her argument in an empirical study of the Court’s record of invalidating state action. She concludes that the "federalism" label cannot, on its own, explain the Court’s record on invalidation. "Conservative ideology" and the concomitant interest in greater control over sensitive Constitutional issues is equally apparent in the cases.237

While there are many cases that are used to support the argument that the Court is attempting to expand its influence over Congress,238 one of the most prominent displays of judicial supremacy can be found in *City of Boerne v. Flores*.239 What makes this a particularly strong example is not that the Court struck down federal legislation it found unconstitutionally interfered with State powers of regulation (in itself not unusual), nor that it rejected congressional interference in an area upon which the Court had already

233. *Id.* at 300.
234. *Id.*
235. *Id.*
spoken, but that it did so with insistent expressions of the supremacy of judicial interpretations. In writing for the majority, Justice Kennedy stated:

When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its predecessors with the respect due them under settled principles, including stare decisis, and contrary expectations must be disappointed.  

Aside from the cases, Professors Colker and Brudney draw direct support for their argument from the extra-judicial comments of Justice Scalia:

> My Court is fond of saying that acts of Congress come to the Court with the presumption of constitutionality. But if Congress is going to take the attitude that it will do anything it can get away with and let the Supreme Court worry about the Constitution then perhaps that presumption is unwarranted.  

Perhaps the most thorough and trenchant critique of the shift in judicial review engineered by the Rehnquist Court comes from Professor Larry Kramer. In the introduction to his review of the 2000 Supreme Court term, Professor Kramer states, “The Rehnquist Court no longer views itself as first among equals, but has instead staked its claim to being the only institution empowered to speak with authority when it comes to the meaning of the Constitution.” This shift in power, argues Professor Kramer, fundamentally contradicts and undermines the historically and normatively favored notion of “popular constitutionalism” which embraces shared interpretive responsibility. This is not simply a shift in politics, argues Professor Kramer, but rather a shift in the entire meaning of constitutionalism: “The Rehnquist Court’s activism explicitly denies the people any role in determining the ongoing meaning of their Constitution, other than by the grace of the Justices themselves.”

While all of the above scholars have expressed concern about this change in attitude, my purpose in reviewing this material is not to join the chorus of criticism. While I lean towards supporting Professor Kramer’s critique of recent Supreme Court jurisprudence, I have neither the expertise nor space to enter into this hugely significant constitutional debate. But

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240. The federal legislation in question in Boerne was the Religious Freedom Restoration Act of 1993 which was passed in direct response to Employment Division v. Smith, 494 U.S. 872 (1990), in which the court upheld against a free exercise challenge a state law of general applicability criminalizing peyote use, as applied to deny unemployment benefits to Native American church members who lost their jobs because of such use.

241. Boerne, 521 U.S. at 536. See also Kimel, 528 U.S. at 63 (“The ultimate interpretation and determination of the Fourteenth Amendment’s substantive meaning remains the province of the Judicial Branch.”); Garrett, 531 U.S. at 365 (“It is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees.”).


244. Id. at 130.

whether one agrees or disagrees with the attitudes of the current Court, its presump-
tion of superiority is evident and that is all that counts for my present purposes. The significant increase in instances where the Court has invalidated federal legislation (not always contrary to states’ interests) in terms that convey its sense of superiority speaks volumes about its skepticism of congressional competence.246 While some of this can legitimately find refuge under the protection of states’ rights, this neither fully explains the cases nor the terms the court has chosen. So while there may be legitimate disputes about the pros and cons of the Court’s increased hostility to Congress, the hostility itself is hard to dispute.

The notion of dialogue in U.S. constitutional decision-making is not foreign to the Court or commentaries about constitutional decision-making.247 But one of the dominant themes in current constitutional scholarship is that there is a tendency on the part of the Rehnquist Court to establish a monopoly on constitutional interpretation, to articulate a “juricentric” vision of the Constitution,248 or to adhere to a strong form of judicial supremacy.249 Not only, then, is the Court unwilling to engage in a dialogue about the meaning and content of constitutional provisions, it has insisted on overseeing and setting the terms for all constitutional analysis. It has rejected congressional input not because it is “illogical,” but because it has not been amenable to Court review. According to Professor Kramer, the Supreme Court has unequivocally established that:

Rules that do not enable the Supreme Court sufficiently to control the substantive meaning of the Constitution . . . are rules that need to be changed. This is true whether they are rules of process (such as standard of review) or rules of substance (such as the scope of equal protection or the reach of the Commerce Clause). What matters, above all,

246. See Colker & Brudney, supra note 230, at 87-105 (detailing the increase in statutory invalidation—or “new judicial activism”). See also Timothy Zick, Marbury Ascendant: The Rehnquist Court and the Power To “Say What the Law Is,” 59 WASH. & LEE L. REV. 839 (2002) (arguing that the Court’s recent Section 5 jurisprudence reflects an overall decline in deference to Congress). Interestingly, Zick also discusses a similar decline in deference in the Court’s decisions reviewing the actions of executive agencies.

247. See, e.g., Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577, 655-59 (1993) (discussing dialogue between courts and legislatures); Robert C. Post & Reva B. Siegel, Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power 78 Indiana L.J. (forthcoming 2003), available at http://ssrn.com/abstract_id=378500 (discussing the dialogue between U.S. Supreme Court interpretation of the Constitution and the constitutional ideals embraced by the nation during the 1960s and the following decades, particularly with respect to Section 5 legislation.)


249. Here, I am relying on the definition of judicial supremacy recently provided by Keith Whittington. There are multiple elements to his definition, but the part that is most applicable here is as follows:

Judicial supremacy requires deference by other government officials to the constitutional dictates of the Court, even when other government officials think that the Court is substantively wrong about the meaning of the Constitution and in circumstances that are not subject to judicial review. Likewise, judicial supremacy requires that other government officials regard judicial opinions as generative, binding not merely in a particular case, but indicating correct constitutional principles that may apply in a wide variety of future, not-yet contemplated cases.

is keeping the Constitution safely in the Court’s sole custody. 250

3. Coherence and Authority

All of these elements combined give one the impression that the U.S. Supreme Court views itself not as a mediator or partner in an active dialogue but rather as a local law enforcer in the strictest sense. Through direct assertions of authority over both legislative bodies and lower courts, the Court has established itself as very much the final, and if we follow Professor Kramer’s arguments, exclusive authority in constitutional interpretation. Its refusal to engage foreign legal systems arguably stems from similar concerns about maintaining a tight grip on authority.

The connections between questions of internal and external authority should be evident. Again, without making any claims about their causal relation, they share common foundational concerns about coherence and legitimacy. The U.S. Supreme Court is consistent in its belief that restricting the sources of legal ideas and the ultimate authority for constitutional interpretation is essential to the maintenance of a coherent body of law. In this way, the enforcement model rests on the presumption that limitations in sources and a well-defined legal hierarchy are essential to the coherence of constitutional interpretation. Coherence and thus legitimacy under this model are secured through structural constraints rather than rational argumentation or persuasive reasoning. In short, ensuring coherence through the limiting of sources and participants, rather than persuasion through dialogue, is at the heart of the U.S. Supreme Court’s approach to judicial review.

The argument for the existence of common underlying ideas in all the elements of the enforcement model is further generated and supported by the fact that one Justice is most vocal on all counts. Justice Scalia is the most adamant defender of rule-like legal reasoning, the superiority of the Supreme Court on constitutional interpretation and the rejection of foreign law. The mere fact that the enforcement model in all its elements is most strongly and explicitly represented by the judicial reasoning of one Justice suggests at least a presumptive connection between the various elements.

There is also a more theoretical connection here. The notion that structural constraints rather than rational argumentation or persuasive reasoning are key to legitimate decision-making is entirely in keeping with Justice Scalia’s other interpretative commitments—textualism and originalism. 251 While these separate theories of, respectively, statutory and constitutional interpretation are different, the former emphasizing plain meanings and literal applications, the latter historical or “original” meanings, they each derive strength from a belief in pre-existing, limited and extra-judicial constraints 252 on judicial reasoning. Both theories are formalist 253 and

251. See ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997).
252. But note here that the extrajudicial constraints in question are not institutional—that is coming from the other branches of government—but textual and historical, and as such still entirely dependent on judicial interpretation.
as such view the legitimacy of the Court resting fundamentally on the structural and presumably neutral constraints on its judicial reasoning and decision-making powers. To broaden both the types and sources of legal arguments, as well as legal directives, leaves decision-making too open-ended, and, as such, susceptible to the subjective normative leanings of individual judges. The concern is that this in turn will lead to claims of incoherence and illegitimacy.

As in the section on the dialogic model, I wish to avoid overstating the connection here. While the rejection of foreign law by most of the current Justices of the U.S. Supreme Court sits comfortably with other aspects of its approach to decision-making and indeed, I have argued they seem to share common theoretical foundations, proving the existence of a more solid link is beyond the scope of this Article and may, in fact, be very difficult. The arguments set out above establish a loose connection, but in doing so support something more than a coincidence. The rejection of foreign law is thus not an isolated issue or simply a question of parochialism, but is arguably connected to and supported by other elements in the pattern of judicial reasoning and the model of judicial supremacy currently embraced by the U.S. Supreme Court. While there may be continuities between this approach and the history of the U.S. Supreme Court, my comments here are intended to apply only to the current Court, or more broadly, the Rehnquist court. 254

IV. LEGITIMACY AND LOCAL ACCOUNTABILITY—CONCERNS ABOUT DIALOGUE AND COMPARATIVE REASONING

The question that remains is, “So what?” The Supreme Court of Canada leans toward a dialogic model of judicial reasoning, while the U.S. Supreme Court prefers an enforcement model. Does this matter beyond simply understanding the cultures of these two institutions? In particular, is anything to be gained or lost from adopting the comparative perspective embedded in the dialogic model?

Given the extent to which these models reflect deep cultural and historical differences in the two courts and the broader legal systems, it is probably unwise to argue strongly for one model over another. 255 The current

253. A label that Scalia does not shy away from. See SCALIA, supra note 251, at 25.
254. Those well-versed in comparative law might find my analysis at this point in conflict with Professor Mirjan Damaska’s discussion of the “hierarchical ideal” and the “coordinate ideal,” respectively mapping on to civil and common law systems of adjudication. See MIRJAN R. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY (1986). The American system under this model is more consistent with the “coordinate ideal.” But I have described the U.S. Supreme Court, a key part of the American legal system, as more hierarchical or vertical in its thinking. There are three responses to this issue. First, Professor Damaska is comparing entire systems, whereas I am only looking at a small, albeit important, piece. Second, Professor Damaska’s analysis focuses more on structures and formal lines of authority, whereas I am interested more in informal attitudes with respect to exercising that authority. Finally, it may be the case that within the common law generally speaking, some legal systems might be more “coordinate” than others. Oddly, Canada is more hierarchical in its formal structure with a single unified system of adjudication compared to the American approach with its parallel (state/federal) systems of authority. But again, the formal structure of authority and the exercise of authority under that structure are different questions.
255. This is indeed the age-old problem in comparative law, how to get beyond the subjective
Canadian approach certainly reflects a history of Parliamentary sovereignty, something conspicuously absent in American constitutional history. In addition, the openness of the Canadian Court may have something to do with Canada’s history of cultural compromise, the legacy of a strong French Canadian community.\textsuperscript{256}

The jurisdictional differences of the two courts may also play a significant role. One commentator has suggested that the U.S. Supreme Court’s concern about maintaining authority is necessary precisely because it has a narrower jurisdiction than the Canadian Court—when it speaks it needs to speak with greater force to provide some semblance of coherence in the midst of a jumble of state and federal jurisdictions.\textsuperscript{257} Even the current and quite different geopolitical strengths of both countries may have an impact on the questions addressed; it is not hard to see parallels in the unilateralism of the Court and the current Bush Administration.

So there are many reasons for caution in arguing for one model over another. But there is enough interest in the use of comparative law even from some of the Justices of the U.S. Supreme Court to explore some central concerns about the comparative/dialogic approach, concerns that are reflected in the enforcement model. There are two sets of concerns I would like to explore here. The first deals with the maintenance of traditional common law norms. The second is the appropriate balance between global and local contexts for decision-making.

A. \textit{Traditional Common Law Norms}

Constitutional adjudication generates its own set of norms and methods, but within common law systems, it is also influenced by traditional common law methodological concerns. Common law decision-making traditionally has been highly focused on precedent and dependent on uniformity, predictability, and certainty. These features have indeed become the hallmarks of the common law; while it proceeds and builds on a case-by-case basis, always moving forward, its authority is constantly being rooted in what has already been laid down. It is the backward-looking and seemingly constrained aspect of this Janus-like common law, embodied in the notion of stare decisis, that generates expectations of uniformity. As the final interpreters of law, judges have supreme authority, but they must, in principle, adhere to the constraints imposed by earlier cases. Pre-existing law in the form of binding precedent is necessarily something indigenous to the legal system. Its authority rests in both the principle of its prior application and the need for continuity. Within this understanding of the common law approach, even non-binding authority is more persuasive if it is local. Local authority poses less of a challenge to the


\textsuperscript{257} I am grateful to Alan Brownstein for this observation.
uniformity of the system, not to mention that in substance it may be more responsive to local concerns, customs, and habits. The following section explores this argument through the concepts of uniformity and legitimacy.

1. **Uniformity, Certainty, and Predictability**

The argument that the use of foreign law undermines the stabilizing role of precedent is intuitively appealing. If disputes are constantly being evaluated or re-evaluated in light of principles found in the jurisprudence of foreign legal systems, then local law arguably becomes un-hinged from its local context. This presents problems not only in the increased potential for the law to be unresponsive to and unreflective of local concerns, but also because it may undermine its formal foundations of authority. Viewed this way, the use of foreign law is tied to concerns about increased judicial activism. In short, the use of foreign law may be a particularly problematic instance of irresponsible judicial behavior and judicial law-making. Does this multiplication of sources and options lead to a crisis of accountability and legitimacy?

One can see parallel arguments in discussions of the impact of technology on decision-making, where it is argued that quick and easy access to non-legal materials may lead to a decontextualization (or perhaps recontextualization) of decision-making, thus undermining the authority and predominance of judicial decisions.258 Whether we are talking about non-legal information or foreign legal information, the concern is that introducing this new variant poses problems for the coherence of the system. The very detached and remote nature of such information risks fragmenting the core and generating inconsistency in the law, so it is best not to even consider it “law.”259

One answer to this problem would be to challenge the existence of these presumptive features of the common law: uniformity, predictability, and certainty have always been illusory, so why worry about them now?260 Without revisiting a century of debate on this issue, it is enough for my present purpose to state that our perception of the common law and its authority does indeed depend on these central notions of accountability. Whether attainable or not, the law must appear to be neutral, constant, and insulated from the specific normative leanings of individual judges. As Professor Carol Greenhouse observes, “the special temporal symbolism of the law requires a special ‘kind’ of person, one who will find the law, not make it;

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258. For a discussion but ultimate rejection of this argument, see Richard Ross, *Communications, Revolutions and Legal Culture: An Elusive Relationship*, 27 LAW & SOC. INQUIRY 632 (2002).

259. Patrick McFadden notes that two of the many reasons for the rejection of international law in domestic courts, even when it is clearly relevant, are that it is not really law, and in any case is not applicable. Patrick McFadden, *Provincialism in United States Courts*, 81 S.C. L. REV. 4, 37-38 (1995). While these arguments are directed at international law, they are reflective of the same arguments used to reject the use of foreign law.

know the law, but not preach it; be a representative of the national community, but have no causes of his or her own.\textsuperscript{261}

So if we operate on the assumption that at least the appearance of uniformity, predictability, and certainty are important within the common law, are these norms undermined by expanding the available sources of law and by embracing a dialogic approach to judicial reasoning?

Here we can probably draw some important lessons from work that has been done on "legal certainty" as generated by standards or principles versus rules. The standard positivist assumption is that precise and accurate rules lead to greater legal certainty—and thus uniformity and predictability—whereas more fluid, less specific directives in the form of standards or principles generate uncertainty and inconsistency. Some recent work on legal regulation indicates that this is not necessarily the case. Indeed the opposite holds true when dealing with complex matters—the more general the regulatory principles the greater the likelihood of achieving consistent, predictable results. According to Professor John Braithwaite, there are numerous reasons why this is the case, but in general, the matter boils down to the fact that rules generate rule-like behavior, including the desire to find loopholes and expand the number of rules, creating an unwieldy, confusing body of rules and exceptions. This, not surprisingly, leads to uncertain and inconsistent applications. Principles or loose standards, on the other hand, generate principled and more persuasive consistent reasoning in any given area.\textsuperscript{262}

While this may indeed be an accurate analysis of rules and principles in the area of regulation, two questions remain: First, can we extend this to judicial decision-making, and second, what does this have to do with the use of foreign law?

Professor Braithwaite admits in his study that there are no data with which to test his hypothesis in judicial decision-making and for this reason he resorts to studies focusing on regulatory officials. But there is no reason to believe that judges are significantly different from regulatory officials when it comes to the application of rules. In both cases formalistic behavior combined with a "bottom-up" approach—reasoning driven by basic instincts about the best result in any given case—is more likely to generate inconsistencies in rule application than the use of more general principles.\textsuperscript{263} So while there is no indication that this hypothesis holds true in judicial decision-making there are good reasons to consider its general applicability.

With respect to the use of foreign law, I have tried to argue that this is part of a broader approach to decision-making that encourages ongoing discussion about legal ideas. The global dialogue, if not causally connected, appears to be in symbiosis with the local dialogue, and together they compose a dialogic approach. It is dialogues or conversations of this sort that Professor


\textsuperscript{263} \textit{Id.} at 64.
Braithwaite argues assist in the creation of more certain results. Professor Braithwaite states:

Certainty does not flow so much from objective features of the clarity and precision of the words in rules, as lawyers sometimes assume, but from shared assumptions in a regulatory community about the interpreted shape of a rule.\textsuperscript{264}

In Professor Braithwaite’s analysis, the discussions or conversations that are necessary to the creation of shared assumptions are more likely to occur through the application of principles. And in my analysis, such discussions are encouraged rather than defeated by embracing the influence of foreign law.

It may be the case that discussion and dialogue as sources of certainty are indeed more important in constitutional law than in other areas. Professors Larry Alexander and Frederick Schauer argue forcefully that the “settlement function of the law,” something akin to the simpler notion of certainty, is primarily generated through judicial supremacy.\textsuperscript{265} Professor Keith Whittington, on the other hand, argues that this is wrong in the context of constitutional decision-making. First, it is not clear, according to Professor Whittington, that “settlement” is a constitutional virtue:

It is sometimes better for constitutional rules to be relatively unsettled because it can foster socially beneficial experimentation and allow political diversity. The founders in fact left a large number of constitutional issues unsettled, allowing for future constitutional development rather than seeking to close it off.\textsuperscript{266}

Whittington goes on to argue that constitutions also fundamentally embody “substantive values.” Ignoring these substantive values in the interest of finality and “settlement” seems to fly in the face of the importance of constitutions. Thus, decisions that take seriously the balancing of constitutional values or “incremental and ambiguous decisions leaving room for further political negotiation” may be more appropriate, particularly on highly complex and divisive constitutional issues.\textsuperscript{267}

Second, even accepting some positive role for “settled expectations” in constitutional law, it is not clear that these expectations can be generated by any one institution, let alone the judiciary. All that judicial decisions can really expect to accomplish is to shape rather than settle the nature of legal discourse and the resolution of future disputes.\textsuperscript{268} In this way legal decisions are more “constitutive” than “regulative”\textsuperscript{269}—terms that map well onto the dialogic and enforcement models. Again, these limitations are more pronounced in the area of constitutional decision-making because, as Professor Whittington states, “the appropriate place of precedent in

\textsuperscript{264} \textit{Id.} at 71 (relying on the work of Julia Black).
\textsuperscript{266} Keith Whittington, \textit{supra note} 249, at 791.
\textsuperscript{267} \textit{Id.} at 796.
\textsuperscript{268} \textit{Id. at} 797-99.
\textsuperscript{269} \textit{Id.} at 798.
constitutional decision-making is far less resolved than proponents of judicial supremacy suggest.\textsuperscript{270}

Thus, for these reasons and others relating to the nature of "extrajudicial settlement," Professor Whittington argues that there is no reason to think that judicial decision-making is any better at providing "settled expectations" than extrajudicial decision-making.\textsuperscript{271} To this we can add Professor Friedman's observation that in constitutional law, such settled expectations or "uniformity has a chimerial quality, based as it is upon the assumption that U.S. Supreme Court doctrine provides some reasonable measure of predictability and stability."\textsuperscript{272} The Court's jurisprudence on freedom of religion, for example, certainly goes a long way to dispel any expectations of "predictability or stability."\textsuperscript{273}

So to return to my arguments, judicial supremacy and the enforcement model approach are not necessary to preserve certainty or the "settlement function of the law." A dialogic/comparative approach does not undermine the common law norms of certainty, predictability, and uniformity. Rather, this model proceeds on the assumption that judicial reasoning alone can only ever be marginally successful on these counts and, more importantly, that settled expectations are more likely to occur through the persuasion that comes with open dialogue and shared responsibility for constitutional interpretation. In this sense, a formal notion of uniformity based on "imposition" is here replaced with an expectation of uniformity built on "persuasion."\textsuperscript{274} Professor Glenn makes this point exceedingly well: "Multiplying the sources of law, however, means multiplying the source of legal dialogue. Law is less precise but more communal and there are more possibilities of persuasion and adherence to law."\textsuperscript{275}

If we hold to the view that uniformity, predictability, and certainty can only be achieved by limiting both the sources of legal authority and the number of participants engaged in constitutional interpretation, then of course broadening the category of legitimate sources and engaging in a never-ending dialogue will undermine these common law norms. The point of this section and Professor Glenn's statement, however, is to argue that the creation of a broader community of legal knowledge through dialogue at all levels is more likely to support rather than undermine these norms.\textsuperscript{276} This resonates with

\textsuperscript{270} Id. at 801-03 (relying on the willingness of judges to "routinely flaunt the regulative authority of precedent" in constitutional cases).

\textsuperscript{271} Id. at 802-08. It is important to recognize that this does not, in Whittington's analysis, dictate against judicial review, just against the notion of judicial supremacy.

\textsuperscript{272} Friedman, supra note 84, at 130.

\textsuperscript{273} Id.

\textsuperscript{274} Glenn, Persuasive Authority, supra note 10, at 298.

\textsuperscript{275} Id. at 297.

\textsuperscript{276} Related to this idea is the generally acceptable notion that finding ways to educate the populace about constitutional norms is necessary in the creation of new constitutional regimes. This debate often finds its way into discussions of centralized versus decentralized structures of constitutional review. See Louis Favreau, Constitutional Review in Europe, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 38 (Louis Henkin & Albert J. Rosenthal eds., 1990).
what Alexander Bickel saw as the important educative function of the Supreme Court and the role of such a function in justifying judicial review.277

Finally, the use of persuasion and dialogue in creating convincing, certain, and uniform legal norms may be particularly important in democratic societies. We can take it for granted that conversation and dialogue broadly speaking are indispensable to democratic societies. It may also be the case, as Professor Maimon Schwarzschild argues, that pluralism helps generate dialogue. If this is indeed the case, there is every reason to believe that a more pluralistic approach to judicial reasoning also encourages dialogue. To turn this around, excessive centralization and uniformity in decision-making may, Professor Schwarzschild argues, undercut "conversation" and thus hinder democracy itself.278

Surely the idea of multiple separate voices engaging in dialogue is one of the central insights of the U.S. Constitution. As Professor Friedman writes, "the dialogic process animates the regulating lines of relationships established by the U.S. Constitution itself."279 If this is the case, why should the Court shy away from a comparable model of judicial reasoning in constitutional cases? If the contribution of multiple perspectives is key to the stability of constitutional democracy, can multiple voices and sources of ideas be that much of a threat to the stability of constitutional norms in judicial reasoning? The argument in this section has been that expanding the sources of law, thus creating a rich dialogue around legal norms, is more likely to lead to, rather than undercut, greater certainty in the law and a more robust democratic society.

2. Legitimacy

Certainty is not the end of the inquiry. Justice Scalia's rejection of foreign law relates to concerns about certainty, uniformity, and predictability. But more than anything else, Justice Scalia is concerned with legitimacy, and in his opinion only direct, organic, text-based, and binding rules can preserve the Court's legitimacy. Foreign law, popular opinions, and politics are all unacceptable sources of judicial reasoning because they reveal or implicate personal value judgments and, as such, undermine the legitimacy of the law.280 As mentioned earlier, Justice Scalia does not object to transnational extra-judicial conversations so long as such "conversations" stay out of actual decision-making.281 And so the question remains: does the use of foreign law pose problems for the legitimacy of a court such as the U.S. Supreme Court or, for that matter, the Supreme Court of Canada?

279. Friedman, supra note 84, at 115.
281. See, e.g., Antonin Scalia, supra note 73, at 1122 ("I welcome international conferences . . . in which the judges of various countries may exchange useful insights and information, and, by association with their colleagues in the law, may strengthen their sense of dignity and independence.").
To begin with, it is important to note that some scholars writing about comparative constitutional law have suggested that in some contexts, foreign and international law are actually necessary to legitimate decision-making. For example, it may be necessary for courts in burgeoning or transitional democracies to resort to foreign law as a way to legitimate both the court and its decisions. The Constitutional Court of South Africa, for example, may need to resort to foreign law to effect a smooth transition to a new rule of law based legal system. Foreign law, in this context, can be used to legitimate the Constitutional Court and its decisions to a skeptical international legal and business community, not to mention a wary local population. So in the absence of convincing or inappropriate local precedent, foreign law can actually validate a court and its key decisions.

But the situations where foreign law is actually necessary are far removed from the established constitutional democracies discussed in this paper. So if outside authority is not necessary, as is clearly the case in both Canada and the United States, are we inevitably led to the conclusion that it is damaging, or at a minimum inappropriate, as Justice Scalia would have us believe?

A partial answer to the question of legitimacy is embedded in the discussion in the prior section. Legitimacy in the dialogic model is presumed to emanate from the persuasiveness of the arguments and the enhancement of communal knowledge. So it should come as no surprise that Canadian Supreme Court justices perceive the use of foreign law along with the acceptance of more amicus briefs and non-legal information as boosting the Court’s legitimacy. According to Justice Iacobucci, such sources are presumed to enhance the persuasiveness of the Court’s decisions and thus contribute rather than undermine the Court’s legitimacy.

Besides the arguments already made in the prior section, there are other important observations about legitimacy and the dialogic/comparative approach, many of them suggested by Professor McCrudden’s analysis of the use of foreign law in human rights cases.

Professor McCrudden argues that the answer to concerns about legitimacy partially depends on the audience for any given decision. He states, “where the view among public opinion is current that human rights are not subject to international debate, either because of unilateralism, relativism,
isolationism, or particularism, then reference to other foreign courts’ decisions are much less likely.”287 And then a little later, “[w]here the audience is sufficiently convinced that its role in the world is to lead rather than follow, the use of other courts’ approaches is also unlikely.” 288

While there may be something intuitively appealing about this “audience” perspective rationale, it presumes the court itself has little to say about what its audience should expect. While this may be the case with respect to courts just beginning to establish their authority, this can hardly be said of the U.S. Supreme Court. If the question is simply what does the audience expect, surely established courts, such as the Supreme Courts of Canada and the United States, have some role in shaping the answer. The U.S. Supreme Court has actively, and in some cases aggressively, participated in defining and redefining both the scope of its authority and the expectations of its audience since Marbury. In short, this is a two-way street. It is both counter-intuitive and historically anomalous to imagine that the U.S. Supreme Court passively relies on cues from its audience for the scope of its authority and methods of adjudication. As Professor Jackson states, “if Justices refer more to the constitutional decisions of other courts, this practice to some extent will become self-legitimating.” 289

Professor McCrudden also remarks that being in a position of leadership may contribute to a lack of interest in foreign law. This may be a convincing explanation for the enforcement model but it does not address the question posed in this Section. The fact that the U.S. Supreme Court has little interest in foreign law may confirm that a comparative analysis is unnecessary in a purely functional sense, but it says nothing about whether its use would actually undermine the Court’s legitimacy. To the extent that the Court has a foreign audience and wishes to retain some legitimacy in that context, it may indeed be important for it to pay attention to constitutional developments elsewhere. As Justice Stevens has suggested, being in a position of leadership may, in fact, require the Court to be more sensitive to foreign legal developments and how its own analysis influences foreign law. 290

Another question relevant to this discussion is the suitability of foreign law in specific areas of law. It may be the case that foreign law is more useful in one area of law but less useful in others. In those areas where it might be more useful it could also be argued that it is unlikely to have a negative effect on legitimacy. The increasing interest in comparative constitutionalism may indicate greater receptivity to using foreign law here rather than in, for example, statutory interpretation. But even within constitutional law, there are disputes over where and when foreign authority is appropriate or useful.

287. Id. at 519.
288. Id. at 520.
289. Jackson, supra note 63, at 263.
290. United States v. Alvarez Machain, 504 U.S. 655, 687-88 (1992) (“The significance of this Court’s precedents is illustrated by a recent decision of the Court of Appeal of the Republic of South Africa . . . . 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.”) (Stevens, J., dissenting).
Professor McCrudden, as previously noted, has some concerns about the use of foreign authority when dealing with human rights, and Professor Jackson has commented on the irrelevance of foreign law to questions of federalism. Constitutional provisions establishing a federalism "package" are, according to Professor Jackson, "often peculiarly the product of political compromise in historically situated moments, generally designed as a practical rather than a principled accommodation of competing interests." As the products of highly contextualized "packages," federalism issues are thus, Professor Jackson argues, poorly suited to transnational constitutional discourse.

A full analysis of where and when the use of foreign law is most appropriate and thus less likely to undermine a court's legitimacy is beyond the scope of this Article. Many have already tackled this topic from the perspective of utility and functionality, and so it is enough here to flag it as part of the general concerns about legitimacy. One related question that does, however, warrant further comment is whether in a more general way the degree of contextualization of law should, as Professor Jackson suggests, affect the introduction of a comparative analysis. In other words, if the area of law in question is deeply contextualized and highly dependent on local circumstances, would the introduction of a comparative analysis lead to greater concerns about the legitimacy of the decision in question (and thus the legitimacy of the court)?

I do not disagree with Professor Jackson's view if we restrict our analysis to the utility of the foreign law in question. Discussion of foreign law in the area of federalism may indeed be less useful than comparable discussions in the area of, for example, free speech. But if foreign law, or a comparative analysis, is used in a less determinative, more dialogic manner, then the promise of a richer internal dialogue lessens concerns about utility and relevance. In other words, the point of this Article has been to broaden the scope of analysis on the use of foreign law, to understand the larger context of decision-making in which the use of foreign law is just a piece, and through such larger context to determine whether connected concerns about legitimacy, certainty, coherence, and utility are valid. I have argued that tapping into a more global pool of legal reasoning may enrich rather than overwhelm dialogue and discussion at the local level, thus minimizing concerns about the usefulness of comparative analysis in specific areas of law.

Concerns about uniformity and legitimacy are important when considering the use of a comparative analysis in judicial reasoning. But to assume that foreign material will always create such problems is to ignore the persuasive component of judicial reasoning as well as the influence of high courts on questions of relevancy. More importantly, such an assumption is based on the conclusion that foreign law is inherently inapposite. Not only

291. McCrudden, supra note 5, at 529-32.
292. Although, interestingly, human rights and federalism are two of the few areas of law in which the U.S. Supreme Court has discussed the value of foreign law and engaged in some comparative reasoning.
293. Jackson, supra note 63, at 272-274.
294. See, e.g., Tushnet, supra note 1, at 1265-69.
does this seem incapable of proof as a broad ranging rule, it also ignores the complexity of comparative analysis and its place in a discursive model of decision-making.

B. Globalization and Local Legal Culture

I began this Section by asking whether there is anything to be gained or lost from a comparative/dialogic approach to decision-making, and I went on to discuss this from the perspective of existing common law norms—concerns about certainty and legitimacy. However, there is another perhaps more interesting approach to this question that takes us away from specific, internal legal norms towards an external view of legal systems. If law and individual legal systems can be understood as having distinct local identities with identifiable authentic experiences, what happens when such experiences are continually exposed to external influences? Put another way, if law has a dynamic relationship with local culture, then do we risk a “feeling of lost authenticity . . . ruining some essence or source” in the process of globalizing legal analysis?

To translate this more specifically into the topic at hand, the trend in U.S. jurisprudence has been to keep as firm a grip on an authentic legal experience as possible. This is evident in all aspects of the enforcement model—the resistance to foreign law, the insistence on exclusive authority, and the originalist and textualist interpretive methodologies preferred by those who most strongly endorse this model. The enforcement model tends to enshrine the past, marking it as the source of principled, definitive, and closely tailored legal norms. Not only does this legal past hold out the promise of virtue and integrity in legal reasoning—for the past always has at least precedent on its side—it also can be cast as a uniquely local experience. While this claim is problematized in Constitutional law by the influence of non-American thinkers on the drafting of the Constitution, it has some credibiltiy given the unique history of American constitutional law. With such a unique and culturally contingent experience, perhaps there is something to the fear of “ruining some essence or source” of American constitutional law in the introduction of comparative analysis in decision-making.

This concern raises an entirely different set of issues, in particular the relationship between law and culture and the evolution of legal systems—issues that require more elaboration than is possible here. But I do want to address two discrete issues that at least scratch the surface of this concern about authenticity.

First, if the notion of “dialogue” or the idea of a global legal analysis requires an acceptance of the shifting and fluid meanings of law, then can any one legal principle or idea ever command the authority that is so necessary to the rule of law? We might consider this the relativism objection, but this, as I already tried to argue in the prior Section, mistakes the nature of legal process. It operates not exclusively on the foundation of a defined and bounded set of

practices, but rather on its ability to adjust and accommodate, and yet remain in some sense constant. Reconciliation, rationalization, and persuasion are at the heart of this process, not authenticity. Professor Glenn makes a similar argument in his discussion of the interdependency of complex legal systems: "[I]f all of its elements are constantly engaged with one another—in conversation, dialogue or argument—then there is no place for the indecision of relativism."297

So if relativism is not a concern, what about universalism, the second globalism trap? Through a dialogic/comparative model of judicial reasoning do we risk going in the opposite direction? If we give up grasping for an authentic local legal experience, do we necessarily give ourselves up to the notion of a unitary legal system founded on universal legal principles? Is the "organicism" so central to the enforcement model eliminated by globalism and dialogue in legal analysis?

While globalism and the ease of transnational legal communication may give greater immediacy to these issues, Professor Glenn argues that the strength of highly distinct legal traditions has always depended upon connections, diversity and what he terms "multivalence":

The multivalence of major, complex legal traditions, and the interdependence between them, has necessary consequences for their ongoing survival . . . . Multivalence allows for movement within the tradition itself, such that disaffection in one of its branches does not imply exit on the part of those disaffected, or an overall loss in adherence to the major tradition. It is the advantage of the big tent.298

Diversity both within and between legal systems is thus in Professor Glenn's analysis "perhaps inevitable or natural." And yet in his careful prediction of the next obvious question, he argues there are benefits to actively sustaining diversity rather than ignoring or even attempting to stifle it in the interest of authenticity. The robustness of one's own tradition becomes dependent on recognition of the mutual interdependence of all systems. Globalization is not, in this sense, a one-way process of universalization, globalization is the "universalization of particularism and the particularization of universalism."299

So, in an odd sort of way, we are back at the local. One of the unintended consequences of a global/dialogic approach to legal reasoning may in fact be the encouragement of a local interpretive legal process. Such a process is not local in the sense that it constantly seeks to restrict and limit analysis to only those legal traditions and ideas that have a discernible local pedigree but rather local in the sense that it is communal and participatory. It is local because local legal actors are viewed as legitimate and active participants in the constant redefinition of law. Thus organicism and globalism in legal interpretation may not be dichotomous but rather intricately connected through a process-oriented or discursive understanding of law.300

297. Glenn, Legal Traditions, supra note 10, at 329.
298. Id. at 331.
300. This argument should neither be surprising nor controversial given the scholarship.
It is important not to overstate this argument. Recognition of mutual interdependence does not necessarily require the same sort of active pursuit of transnational judicial dialogue that is evident in the Canadian model. Additionally, if we follow Professor Glenn’s argument, the focused decision-making of the enforcement model is no doubt not as insular and independent as those who support it might imagine. But the real object of this Section has been to argue that fears inherent in a rejection of the dialogic model are simply unfounded. Dialogue, diversity, and even ambiguity are not indications or harbingers of a weakening system but rather the foundation of a distinctive and stable legal identity.

V. CONCLUSION

There is no reason to believe that highly distinct legal systems are somehow impervious to external influences—whether overt, as in the case of comparative decision-making—or discrete. Professor Glenn writes, “[t]he better notion seems to be one of interdependence, or of nonseparation, and this emerges as the most fundamental idea in the existence of major, complex, legal traditions.” 301 While this is an observation of the unintended nature of law and legal systems, this paper has attempted to explore what happens when this interdependence is intentional, specifically in the context of constitutional decision-making.

Most of the constitutional scholars who have commented on the use of foreign law or comparative judicial reasoning focus on functional questions—when and how foreign law should be used and what its limitations are. What I have attempted to do in this paper is look at comparative judicial reasoning in a broader context. I have constructed models of judicial review that relate to the rejection or acceptance of comparative analysis and then used these models to examine concerns associated with the use of comparative judicial reasoning.

There is nothing immanent or inevitable or universal about these models—there is no necessary connection between comparative judicial reasoning and the dialogic model or between a rejection of comparative reasoning and the enforcement model. But the dialogic model tells us that there is also no necessary connection between an exclusive focus on local legal analysis and the production or preservation of local legal authority, at least in the context of constitutional law. Comparative analysis neither undermines local authority nor disconnects legal analysis from its local origins when encompassed in a larger dialogic model. Rather it holds out the promise that courts can move beyond enforcement and fully engage in the “reconciliation of differences.” 302

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301. Glenn, Legal Traditions, supra note 10, at 328 (footnote omitted).
302. Glenn, supra note 12, at 292.