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## STATE LAW AS “OTHER LAW”: OUR FIFTY SOVEREIGNS IN THE FEDERAL CONSTITUTIONAL CANON

The Supreme Court’s recent citations to and discussions of foreign law<sup>1</sup> have generated extensive and well-known controversy.<sup>2</sup> On the political front, members of Congress have attempted to pass legislation proscribing courts from relying on foreign materials in constitutional interpretation.<sup>3</sup> On the scholarly front, some commentators dispute whether foreign materials belong in the Court’s “canon of constitutional authorities” at all,<sup>4</sup> while many others assert that international sources need not be stricken from the constitutional canon altogether but debate the appropriate circumstances and means for the use of foreign law in constitutional adjudication.<sup>5</sup>

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<sup>1</sup> See, e.g., *Roper v. Simmons*, 125 S. Ct. 1183, 1198–1200 (2005); *Lawrence v. Texas*, 539 U.S. 558, 572–73, 576 (2003); *Atkins v. Virginia*, 536 U.S. 304, 316–17 n.21 (2002); see also *Roper*, 125 S. Ct. at 1226 (Scalia, J., dissenting) (asserting that the premise “that American law should conform to the laws of the rest of the world . . . ought to be rejected out of hand”).

<sup>2</sup> See, e.g., Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 85–86 (2005) (deeming citations to foreign law to provide “promiscuous opportunities” for judges to justify any outcome); Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1999 (2004) (noting that constitutional law is contingent on our “fundamental, democratically self-given legal and political commitments,” not those of other nations). See generally Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT’L L.J. 353 (2004); Mark Tushnet, *When Is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275 (2006). In 2004, the *American Journal of International Law* devoted an Agora to the topic. *Agora: The United States Constitution and International Law*, 98 AM. J. INT’L L. 42 (2004).

<sup>3</sup> See Constitution Restoration Act of 2005, S. 520, 109th Cong.; Constitution Restoration Act of 2005, H.R. 1070, 109th Cong. In addition, Senator John Cornyn introduced a “sense of the Senate” resolution critical of Court citations of foreign law. See S. Res. 92, 109th Cong. (2005); see also H.R. Res. 97, 109th Cong. (2005) (“[J]udicial determinations regarding the meaning of the Constitution of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution . . .”).

<sup>4</sup> See, e.g., Roger P. Alford, *Misusing International Sources To Interpret the Constitution*, 98 AM. J. INT’L L. 57, 58 (2004) (arguing that adding a source to the canon “fundamentally destabilizes the equilibrium of constitutional decision making”). But see Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 9 (2006) (arguing that the canon includes international law).

<sup>5</sup> See, e.g., Vicki C. Jackson, *The Supreme Court, 2004 Term—Comment: Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 116–18 (2005) (praising the Court for following an “engagement” model in addressing the relationship between the Constitution and transnational legal sources); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 142–46 (2006) (arguing that the Condorcet Jury Theorem, which states that widely held beliefs are likely to be accurate, supports consultation of foreign materials when specific criteria are satisfied); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT’L L. 69, 70 (2004) (focusing on how the Court has used international sources and pointing out “pitfalls of proceeding without a well-defined theory or rigorous command of the facts”); Ernest A. Young, *The Supreme Court, 2004*

While these controversies rage on, a more pervasive practice of citing the law of other jurisdictions has received little attention: the Court's citation of state law.<sup>6</sup> For decades, and in many cases that are now treated as landmarks in constitutional law,<sup>7</sup> the Court has explicitly relied upon state legislation in reaching its decisions.<sup>8</sup> This practice is not limited to cases in which the constitutionality of the particular state law is the question before the Court; rather, the Court also relies on state law in interpreting the meaning of various provisions of the Federal Constitution.

State law and foreign law both fall under the category of "other law," defined here as the law of a sovereign distinct from the one engaged in the interpretation.<sup>9</sup> State law, like foreign law, may share substance with United States law, but both state and foreign law are the products of a distinct political community's unique historical, social, and institutional forces. The Supreme Court has underscored this analogy between state and foreign law, treating state law as a form of "other law" in strands of its jurisprudence such as federal-state relations. Given the similarities between state and foreign law vis-à-vis the Constitution, it is striking that the Court's use of foreign law has generated intense controversy while its use of state law has been tolerated with scarcely a blink.<sup>10</sup>

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*Term—Comment: Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 153–56 (2005) (criticizing the Court's use of foreign law in *Roper* as mere "nose-counting").

<sup>6</sup> The expansive literature on constitutional dialogues between the Court and other entities has taken little notice of states. For example, Louis Fisher's book *Constitutional Dialogues* includes chapters on social movements, the Executive, and Congress, but none on states. See LOUIS FISHER, CONSTITUTIONAL DIALOGUES (1988). Similarly, in the related literature on state constitutionalism, there are scant references to the ways in which the Court takes cues from state law. An important exception is Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993). Professor Kahn does not comment on the Court's state law citations as a descriptive matter, but makes a normative argument that state constitutionalism is relevant to federal constitutionalism. See *id.* at 1148. One recent work that does focus on the Court's use of state legislation is Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1125–49 (2006). Professor Jacobi notes, however, that "[m]ost academic attention in this area has focused either on the use of foreign law, particularly in the *Roper* case, or on a more general assessment of the evolving standards doctrine." *Id.* at 1097 (footnote omitted).

<sup>7</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 571–72 (2003) (noting the paucity of states still proscribing and punishing homosexual conduct); *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967) (describing a trend of states repealing antimiscegenation statutes).

<sup>8</sup> The analysis here is limited to Court opinions that cite state legislation, as opposed to state court decisions or executive actions. This Note uses "state law" and "state legislation" interchangeably.

<sup>9</sup> See Posner & Sunstein, *supra* note 5, at 179 (describing "law that is 'foreign' in the sense that it does not emanate from the particular sovereign whose law is being interpreted").

<sup>10</sup> While on the Court, both Chief Justice Rehnquist and Justice O'Connor objected to some extent to the Court's use of foreign law but approved of its use of state law. See *infra* p. 1683.

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This Note questions the disparate attitudes toward the Court's use of state and foreign law.<sup>11</sup> It examines whether state law citations are qualitatively different from foreign law citations. Arguing that the two are more alike than different, this Note questions the premises of an interpretive theory that could justify categorically rejecting foreign law citations while supporting state law citations. Such a theory is plausible only on specific and contestable empirical and normative assumptions that current discussions gloss over. More broadly, this Note aims to challenge intuitions regarding appropriate constitutional authorities by analyzing the underexamined practice of citing state law.

This Note proceeds in three Parts. Part I examines the Supreme Court's use of state law in four substantive areas — the Fourteenth Amendment, the Fourth Amendment, the Sixth Amendment, and the Eighth Amendment — presented in ascending order of how firmly established state legislation is in the applicable doctrine. Part II describes state law and foreign law as forms of "other law" and emphasizes that their value depends on one's preferred interpretive theory. To hold the pro-state, anti-foreign law position evident in contemporary commentary, one must subscribe to a theory that this Note terms "patriotic cosmopolitanism." Part III challenges the premises of patriotic cosmopolitanism and argues that a strong form of the theory, which would deem state law invulnerable to common criticisms of foreign law, relies on untenable distinctions. A weak form of the theory deeming state law a lesser evil is plausible, but only under certain normative and empirical assumptions that warrant further attention.

#### I. SUPREME COURT CONSULTATION OF STATE LAW IN CONSTITUTIONAL ANALYSIS

In numerous cases spanning a range of substantive areas, the Supreme Court has relied on state legislation in its constitutional analysis. This Part examines the Court's state law citations in four areas: Fourteenth Amendment fundamental rights cases, Fourth Amendment search-and-seizure cases, Sixth Amendment jury cases, and Eighth Amendment capital punishment cases. For clarity, this Part presents these sets of cases in roughly ascending order of how well established state law citations are in each doctrinal area.

The Court's intermittent use of state law raises the first of three issues central to an evaluation of the practice: the threshold decisions of

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<sup>11</sup> This Note's primary endeavor is not to criticize or praise the Court's use of state or foreign law, but rather to facilitate reflective equilibrium between attitudes toward the two practices. See generally JOHN RAWLS, A THEORY OF JUSTICE 48 (1971) (defining "reflective equilibrium" as a state "reached after a person has weighed various proposed conceptions and . . . either revised his judgments to accord with one of them or held fast to his initial convictions").

when and how to consider state legislation. Except in Eighth Amendment cases, the Court tends to be opaque regarding the constitutional basis for consulting state law at all and its reasons for consulting state law in some cases but not in others. In addition, the Court varies widely as to how many states must agree on a policy before it treats the policy as a dominant view bearing authority.

A second key issue involves how the Court gleans and applies constitutionally relevant information from the dominant view it has discerned. In all substantive areas, the Court seems to treat state legislation as a source of “knowledge relevant to the solution of trying questions” — a usage Justice Ginsburg has advocated for foreign law.<sup>12</sup> What differs across doctrinal areas is the sort of information the Court gleans from state law and how directly it incorporates that information into its constitutional interpretations. In some cases, the Court treats the dominant view it discerns as a data point regarding values, traditions, or potential legal solutions, but not as a direct elaboration of constitutional meaning.<sup>13</sup> More commonly, the Court treats states as sovereigns capable of elaborating constitutional norms like reasonableness or standards of decency, and weighs or even defers to what it perceives as their judgments regarding the federal constitutional questions at hand.

A third important issue is the ends to which the Court applies the information it gleans from state legislation. The Court consistently treats state law as an authority, in that it accords weight to state positions without consulting their reasoning,<sup>14</sup> but it relies on that authority to reach different conclusions about challenged provisions. In some cases, the Court uses state legislation as evidence that a challenged practice is constitutionally valid and subsequently upholds the practice. In other cases, the Court uses dominant state law as evidence of the constitutional invalidity of another state’s law.<sup>15</sup> The latter usage

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<sup>12</sup> Justice Ruth Bader Ginsburg, “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication, Address Before the Constitutional Court of South Africa (Feb. 7, 2006) (alteration in original title) (transcript available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_02-07b-06.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_02-07b-06.html)). More specifically, Justice Ginsburg urged “learn[ing] . . . from the experience and good thinking” conveyed by foreign sources, *id.*, particularly regarding “common denominators of basic fairness,” *id.* (quoting Judge Patricia Wald) (internal quotation mark omitted).

<sup>13</sup> This type of usage resonates with Justice Breyer’s suggestion of using foreign sources to shed “empirical light” on consequences of potential legal solutions. *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

<sup>14</sup> According to Professor Ernest Young, the Court’s failure to consider a source’s reasoning means the Court is treating that source as an authority. See Young, *supra* note 5, at 151–56 (relying on notions of authority articulated by Professor Joseph Raz).

<sup>15</sup> In yet other cases, the Court uses state law as a mere policy point to defend a decision that may otherwise seem to disadvantage certain parties significantly. This Note does not focus on such cases because of the minor significance they accord state legislation, but a few examples bear

is a form of what Professor Michael Klarman has termed “outlier” suppression<sup>16</sup> and reflects a judgment that a dominant state practice is not merely constitutionally permissible, but also constitutionally required.

A. *State Law in Fourteenth Amendment Cases*

The Court has occasionally cited state law as an authority in Fourteenth Amendment cases. In cases sustaining the constitutionality of a challenged law, the Court has used state legislation to refute indirectly the notion that a fundamental right is at stake. In this analysis, the Court employs state legislation to demonstrate a historical fact rather than to adopt the constitutional values the legislation reflects: if states prohibit certain conduct, that conduct is not necessarily unreasonable, immoral, or unconstitutional, but the right to engage in it is not so “deeply rooted in this Nation’s history and tradition” as to be fundamental.<sup>17</sup> In *Bowers v. Hardwick*,<sup>18</sup> for example, the Court treated the fact that approximately half of the states still criminalized homosexual sodomy as evidence that Georgia’s anti-sodomy statute did not infringe upon a fundamental right.<sup>19</sup> Similarly, in *Washington v. Glucksberg*,<sup>20</sup> the Court relied on the fact that every state prohibited physician-assisted suicide as evidence that a “right to die” is not so deeply rooted in American history as to be fundamental.<sup>21</sup>

In Fourteenth Amendment cases striking down a challenged practice, the Court has used state legislation in two ways. First, the Court has treated state legislation as evidence of a liberty interest, implying

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noting. First, in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Court referenced existing state legislation as evidence that its holding, which declared damages suits against states under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–12213 (2000), barred by the Eleventh Amendment, would not leave disabled individuals without remedies: “[B]y the time that Congress enacted the ADA in 1990, every State in the Union had enacted such measures.” *Garrett*, 531 U.S. at 374–75, 374 n.9, 368 n.5. Similarly, in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), the Court tried to soften the blow of its controversial eminent domain ruling by pointing out that “many” states already protected citizens from exactly the kind of conduct it was upholding as constitutional. *Id.* at 2668. *Employment Division v. Smith*, 494 U.S. 872 (1990), provides a third example of this “silver lining” approach. To allay concerns regarding its ruling that burdens on the free exercise of religion were not subject to strict scrutiny, and thus that criminalization of Native Americans’ ceremonial use of peyote was permissible, Justice Scalia’s majority opinion noted that “a number of” states’ drug laws — including the laws of Arizona, Colorado, and New Mexico — already made exceptions for sacramental peyote use. *Id.* at 890.

<sup>16</sup> See Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 7–17 (1996).

<sup>17</sup> *Bowers v. Hardwick*, 478 U.S. 186, 192–93 (1986) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)) (internal quotation marks omitted), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>18</sup> 478 U.S. 186, *overruled by Lawrence*, 539 U.S. 558.

<sup>19</sup> See *id.* at 192–94.

<sup>20</sup> 521 U.S. 702 (1997).

<sup>21</sup> See *id.* at 710–19, 723.

that states' policy judgments can be direct evidence of constitutional meaning. For example, in *Lawrence v. Texas*,<sup>22</sup> the Court argued that *Bowers* had overlooked an "emerging recognition" of adults' liberty interest in making sex-related decisions.<sup>23</sup> Second, the Court has treated the existence of legislation in some states as evidence that a challenged provision in another state is not narrowly tailored and is thus invalid. In *Hodgson v. Minnesota*,<sup>24</sup> for example, the Court noted that Minnesota's parental consent requirements for abortions were more "intrusive" than those in the thirty-seven other states requiring parental consent, and that "virtually every state" treated one parent's consent as sufficient in other procedures requiring consent.<sup>25</sup> The Court referred to these statutes as evidence that "less burdensome means to protect the minor's welfare" existed and that Minnesota's requirement was unreasonable and unconstitutional.<sup>26</sup> Similarly, in *Troxel v. Granville*,<sup>27</sup> the Court pointed to state statutes deferring to parental judgment to show that a Washington statute allowing courts broad power to order third-party visitation infringed on parents' fundamental child-rearing right.<sup>28</sup>

#### B. State Law in Fourth Amendment Cases

State law citations are not a fixture in Fourth Amendment jurisprudence, but the Court "ha[s] . . . looked to" state legislation "[i]n evaluating the reasonableness of police procedures."<sup>29</sup> When doing so, the Court has treated widespread use or rejection of a practice among states as evidence of whether the practice is reasonable and should be upheld.<sup>30</sup>

In *United States v. Watson*,<sup>31</sup> for example, the Court used the fact that "almost all" states explicitly permitted warrantless arrests as one

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<sup>22</sup> 539 U.S. 558.

<sup>23</sup> *Id.* at 572. The *Lawrence* Court also determined that *Bowers* had "at the very least . . . overstated" the nation's history of rejecting homosexual sodomy. *See id.* at 571.

<sup>24</sup> 497 U.S. 417 (1990).

<sup>25</sup> *Id.* at 425 n.5, 454.

<sup>26</sup> *Id.* at 455.

<sup>27</sup> 530 U.S. 57 (2000).

<sup>28</sup> *See id.* at 69–72 (plurality opinion). The Washington statute allowed a court to order visitation rights to any person, without a prior showing of harm, if it determined such visitation was in the best interests of the child. *Id.* at 61. In arguing that the court order in question unconstitutionally infringed on the parents' fundamental childrearing right, the Court cited state statutes reflecting the "traditional presumption that a fit parent will act in the best interest of his or her child," as well as state statutes expressly limiting courts' ability to order third-party visitation. *Id.* at 69–72.

<sup>29</sup> *Tennessee v. Garner*, 471 U.S. 1, 15–16 (1985).

<sup>30</sup> On the history of state law in Fourth Amendment jurisprudence, see Note, *The Fourth Amendment's Third Way*, 120 HARV. L. REV. 1627, 1631–32 (2007).

<sup>31</sup> 423 U.S. 411 (1976).

ground for its holding that the practice did not violate the Fourth Amendment.<sup>32</sup> Four years later, in *Payton v. New York*,<sup>33</sup> the Court again pointed to state legislation as potential evidence of constitutional validity, but said that the allowance of warrantless searches of the home by twenty-four of the thirty-nine states that had taken a position on the issue was not sufficiently unanimous to be conclusive of reasonableness.<sup>34</sup>

When invalidating challenged practices, the Court has treated a trend in state legislation disfavoring a given practice as evidence that the practice is no longer reasonable. For example, in striking down the use of deadly force against a fleeing felon as an unreasonable seizure in certain circumstances, the Court in *Tennessee v. Garner*<sup>35</sup> pointed to “long-term movement” away from a rule allowing such force and the rule’s existence in fewer than half the states as evidence of its unreasonableness — and thus its unconstitutionality.<sup>36</sup>

In at least two Fourth Amendment cases, the Court has also suggested that respect for state autonomy, rather than inferences of reasonableness, may drive the Court’s use of state legislation. In striking down the admission of unconstitutionally obtained evidence in *Mapp v. Ohio*,<sup>37</sup> the Court noted that many states that had previously admitted such evidence no longer did so.<sup>38</sup> As a result, the Court no longer needed to be concerned — as it had been in *Wolf v. Colorado*<sup>39</sup> — that adopting the exclusionary rule would “brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy . . . by overriding the [States’] relevant rules of evidence.”<sup>40</sup>

### C. State Law in Sixth Amendment Cases

The Court has often used state legislation to determine the scope of the Sixth Amendment, the text of which provides little guidance regarding permissible jury practices.<sup>41</sup> In these cases, the Court has

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<sup>32</sup> See *id.* at 421–24. The Court explained that it “decline[d] to transform [a] judicial preference [for warrants] into a constitutional rule when the *judgment of the Nation* and Congress has for so long” authorized the practice in question. *Id.* at 423–24 (emphasis added).

<sup>33</sup> 445 U.S. 573 (1980).

<sup>34</sup> *Id.* at 600.

<sup>35</sup> 471 U.S. 1 (1985).

<sup>36</sup> *Id.* at 18.

<sup>37</sup> 367 U.S. 643 (1961).

<sup>38</sup> See *id.* at 651.

<sup>39</sup> 338 U.S. 25 (1949).

<sup>40</sup> *Mapp*, 367 U.S. at 651 (alteration and omission in original) (quoting *Wolf*, 338 U.S. at 29) (internal quotation marks omitted).

<sup>41</sup> In relevant part, the Sixth Amendment states that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” U.S. CONST. amend. VI.

treated states both as sources of empirical evidence regarding which jury practices are functional and as knowledgeable constitutional interpreters deserving deference.

*Ring v. Arizona*<sup>42</sup> demonstrates the former approach. In concluding that the Sixth Amendment gives defendants the right to have a jury determine the existence of aggravating circumstances necessary for capital punishment, the Court noted that “the great majority of States” entrust such factfinding to juries.<sup>43</sup> This fact was not dispositive of the ultimate constitutional question, but it served as an empirical rebuttal to Arizona’s argument that judicial factfinding was superior.<sup>44</sup>

In other cases, the Court has treated states as capable interpreters of the Federal Constitution. In *Williams v. Florida*,<sup>45</sup> which held that six-member juries do not violate the Sixth Amendment, the Court appeared persuaded by the fact that a contingent of states, albeit a minority, did not require twelve-member juries.<sup>46</sup> Justice Harlan’s concurrence pointedly criticized the Court for treating its “poll” of state law as persuasive, accusing the majority of conducting “constitutional *renvoi*” instead of “bind[ing] the States by the hitherto undeviating and unquestioned federal practice of 12-member juries.”<sup>47</sup>

The Court has exhibited similar deference to the judgments of a majority of states when invalidating challenged jury practices. For example, in *Burch v. Louisiana*,<sup>48</sup> the Court invalidated six-member juries authorized to render nonunanimous verdicts in trials of non-petty offenses.<sup>49</sup> The Court found compelling that only two states allowed such a practice and explained that the “near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.”<sup>50</sup>

<sup>42</sup> 536 U.S. 584 (2002).

<sup>43</sup> *Id.* at 607–08 & n.6.

<sup>44</sup> *See id.*

<sup>45</sup> 399 U.S. 78 (1970).

<sup>46</sup> Although the Court relegated most of its discussion of state law to a footnote, the footnote spanned two pages of the *United States Reports* and provided an exposition of historical and current state legislative approaches to jury size. *See id.* at 98 n.45. Justice Harlan also reported on state legislation in an appendix to his opinion. *See id.* at 138–43 (Harlan, J., concurring in the result). Although specific state rules varied, Justice Harlan’s count indicated that thirteen states allowed juries of fewer than twelve members in various circumstances. *See id.*

<sup>47</sup> *Id.* at 122 (Harlan, J., concurring in the result). *Renvoi*, French for “send back,” is the conflicts doctrine that refers a court to the laws of another jurisdiction. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 (1971).

<sup>48</sup> 441 U.S. 130 (1979).

<sup>49</sup> *Id.* at 139.

<sup>50</sup> *Id.* at 138.

The Court also seemed to defer somewhat to state judgments in *Duncan v. Louisiana*.<sup>51</sup> The *Duncan* Court concluded that jury trials are constitutionally required for crimes punishable by two years in prison and accordingly reversed a state judgment denying a trial by jury in such cases.<sup>52</sup> In reaching this conclusion, the Court treated as persuasive the fact that in every state but one, crimes subject to trial without a jury were punishable by no more than one year in jail.<sup>53</sup>

#### D. State Law in Eighth Amendment Cases

In Eighth Amendment cases, the Court has explicitly incorporated state legislation into its doctrine to elaborate the meaning of cruel and unusual punishment. Here, the Court has treated “national consensus” in state legislation as an indication of the “evolving standards of decency”<sup>54</sup> that a punishment must not violate.<sup>55</sup>

In some cases, the Court has used state legislation to justify upholding a punishment. If no consensus against a punishment exists, as was the case in *Stanford v. Kentucky*<sup>56</sup> and *Tison v. Arizona*,<sup>57</sup> or if

<sup>51</sup> 391 U.S. 145 (1968).

<sup>52</sup> *Id.* at 162.

<sup>53</sup> See *id.* at 161; see also *Baldwin v. New York*, 399 U.S. 66 (1970). The *Baldwin* Court, following the approach laid out in *Duncan*, observed that every court in the nation except for the criminal courts of New York City provided for a jury trial for offenses corresponding to more than six months in jail. The Court stated that this “near-uniform judgment of the Nation furnishes us with the only objective criterion by which a line could ever be drawn” on the basis of penalty between serious and petty offenses for the purpose of the jury trial right. *Id.* at 72–73. In *Taylor v. Louisiana*, 419 U.S. 522 (1975), the Court’s state-law-as-evidence reasoning was based on complete agreement among states: in holding the exclusion of women from juries unconstitutional under the Sixth Amendment, the Court accorded weight to the fact that its conclusion was “consistent with the current judgment of the country, now evidenced by legislative or constitutional provisions in every State and at the federal level qualifying women for jury service.” *Id.* at 533.

<sup>54</sup> This phrase originated in *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). Interestingly, the *Trop* Court looked to foreign authorities, not to state law, to determine the evolving standards. See *id.* at 102–03.

<sup>55</sup> In determining national consensus, the Court has stated that the “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.” *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002); see also *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989) (“[F]irst’ among the ‘objective indicia that reflect the public attitude toward a given sanction’” are statutes passed by society’s elected representatives.” (alteration in original) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987)), *abrogated by Roper v. Simmons*, 125 S. Ct. 1183 (2005). Less commonly, the Court also has consulted jury sentencing practices as evidence of contemporary values. See *Jacobi*, *supra* note 6, at 1091.

<sup>56</sup> 492 U.S. 361, 371 (detecting no national consensus against capital punishment for crimes committed at the age of sixteen or seventeen when only fifteen of thirty-seven death penalty states prohibited the former and twelve the latter), *abrogated by Roper*, 125 S. Ct. 1183.

<sup>57</sup> 481 U.S. 137, 154, 158 (1987) (concluding that no national consensus existed when only eleven of the thirty-seven death penalty states authorized the death penalty for major participation in a felony with reckless indifference).

consensus seems to favor the punishment, as in *Penry v. Lynaugh*,<sup>58</sup> the Court has deemed the punishment constitutional unless its own judgment dictated otherwise.<sup>59</sup> When national consensus disfavors a punishment, the Court has generally invalidated the punishment. In *Coker v. Georgia*,<sup>60</sup> for example, the Court struck down a Georgia statute imposing the death penalty for rape when Georgia was the only state to impose death for the rape of an adult and only three states imposed the death penalty for any rape.<sup>61</sup> In *Enmund v. Florida*,<sup>62</sup> the Court invalidated the death penalty for defendants who neither killed nor intended to kill their victim when only eight states imposed death solely on the basis of participation in a robbery during which a murder was committed.<sup>63</sup> Most recently, in *Roper v. Simmons*<sup>64</sup> and *Atkins v. Virginia*,<sup>65</sup> the Court reversed its prior judgments in *Stanford* and *Penry* after concluding that the national consensus had changed.<sup>66</sup>

## II. "OTHER LAW" AND THEORIES OF INTERPRETATION

This Part lays the conceptual groundwork for challenging disparate attitudes toward state and foreign law citations. It first explains that state and foreign law are both forms of "other law" — the law of other sovereigns.<sup>67</sup> Next, it examines the interpretive theory one must es-

<sup>58</sup> 492 U.S. 302, 334 (finding that no national consensus existed against capital punishment of the mentally retarded when only one state then prohibited such executions), *abrogated by Atkins*, 536 U.S. 304.

<sup>59</sup> To be more precise, the Court has actually oscillated over the years between treating state law as the only factor in the cruel and unusual analysis and relying on state law in conjunction with the Court's own opinion. Compare *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion) (relying on national consensus along with the Court's "own judgment"), with *Stanford*, 492 U.S. at 370 (relying only on national consensus), and *Atkins*, 536 U.S. at 312–13 (returning to the *Coker* approach of relying on both national consensus and the Court's own judgment). However, in all these cases, the Court ultimately took a majoritarian approach and followed the "consensus" it gleaned from state legislation — although in *Atkins*, this "consensus" was based on a trend involving a minority of states. See *id.* at 315.

<sup>60</sup> 433 U.S. 584.

<sup>61</sup> See *id.* at 595–96 (plurality opinion).

<sup>62</sup> 458 U.S. 782 (1982).

<sup>63</sup> See *id.* at 792. The *Enmund* Court noted that even if it included the nine additional states "where such a defendant could be executed for an unintended felony murder" if certain aggravating circumstances were present, "only about a third of American jurisdictions would ever permit a defendant who somehow participated in a robbery where a murder occurred to be sentenced to die." *Id.*

<sup>64</sup> 125 S. Ct. 1183 (2005).

<sup>65</sup> 536 U.S. 304 (2002).

<sup>66</sup> See *Roper*, 125 S. Ct. at 1192; *Atkins*, 536 U.S. at 314–16. In *Roper*, the Court altered the counting method it had used in *Stanford* and included non-death penalty states in the group of states opposing the death penalty for minors. See *Roper*, 125 S. Ct. at 1198.

<sup>67</sup> This discussion is not meant to imply that state or foreign law are "other" for all purposes or along all axes. The use of the label "other" in this context refers to the law's emanation from a distinct sovereign.

pouse to embrace citations to state law but not foreign law: patriotic cosmopolitanism. Part III challenges the premises of this theory.

A. *State Law as "Other Law"*

Intuitively, state law may not seem to be a form of "other law," because it emanates from sovereigns within the United States.<sup>68</sup> However, state law does not necessarily track national law or experience, and federal law is not merely the sum of state parts.<sup>69</sup> Citizens may prefer different policies for state and national governments, with state legislation reflecting only the former preferences. The assumption that state and national preferences are coextensive elides a nuance of federalism — that state "laboratories"<sup>70</sup> may not wish to nationalize their experiments<sup>71</sup> — and risks losing state legislation's meaning in the translation to the national sphere.

Indeed, the legal relationship between state and federal law bears similarity to relationships more commonly deemed to involve two "others": relationships between individual states within the nation and between the United States and other countries.<sup>72</sup> Each of these jurisdictional pairs shares a common legal thread but nevertheless involves two distinct sovereigns. Although states are different because they are *part of* the federal system, the views of even a majority of states are not interchangeable with those of the nation,<sup>73</sup> and states still have significant autonomy to regulate, subject to the constraint of the Supremacy Clause.<sup>74</sup> Moreover, states and the federal government share citizens, but they do not necessarily share more legal ground than individual states share with each other: adherence to the Federal Constitution and federal laws. The connection between the United States

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<sup>68</sup> Justice Scalia suggested this view in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), when he admonished that foreign law should be used only to confirm "a settled consensus among our own people" — a consensus determined by state legislation. *Id.* at 868 n.4 (Scalia, J., dissenting); see also *id.* ("We must never forget that it is a Constitution for the United States of America that we are expounding.")

<sup>69</sup> *Cf.* *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803 (1995) ("[T]he Framers envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead creating a direct link between the National Government and the people of the United States.")

<sup>70</sup> See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 386–87 (1932) (Brandeis, J., dissenting) (noting that one virtue of federalism is that states may "serve as laborator[ies] and try novel social and economic experiments").

<sup>71</sup> *But see* Levinson, *supra* note 2, at 361 ("The possibility that local values will in fact be trumped by national ones is the price one pays for entering into a federal union.")

<sup>72</sup> See Posner & Sunstein, *supra* note 5, at 133–34 (including state citations to other states and federal citations to other nations in the category of citations to "the law of other states").

<sup>73</sup> See *infra* p. 1685.

<sup>74</sup> See Martha A. Field, *The Meaning of Federalism*, 23 OHIO N.U. L. REV. 1365, 1369 (1997) ("Congress has never exercised nearly all of its legislative powers, and when it doesn't act, the states almost always have power to regulate.")

and other countries is parallel, albeit weaker: nations in the “global community” are legally interconnected largely through certain international norms.<sup>75</sup>

Many judicial doctrines of federal-state relations are premised on a notion of dual sovereignty, reinforcing the view of state law as “other law.” The notion of dual sovereignty is used in two ways: it is a common law doctrine under which an individual is deemed to have committed two offenses when the same conduct violates the law of two “separate sovereigns,”<sup>76</sup> and it also represents a general theory that state and federal governments are distinct sovereign entities.<sup>77</sup> The Court has demonstrated its commitment to the latter notion through the adequate and independent state grounds doctrine, under which the Court refuses to review decisions of state courts that are independently supported by state law grounds, even if they also involve federal questions.<sup>78</sup> This doctrine reflects the idea that the federal and state legal systems are distinct; state law is an unfamiliar “other,” and the federal courts are to avoid applying it when possible.<sup>79</sup>

### B. Interpretive Theories and the Role of “Other Law”

The fact that a source represents “other law” does not necessarily exclude it from the federal constitutional canon. The propriety of citing “other law” depends on the governing theory of interpretation.

Under originalism, both contemporary state and foreign sources are likely irrelevant to constitutional interpretation. Because originalism treats the Constitution’s original meaning as the basis for interpretation, evolving understandings are generally irrelevant to the constitutional inquiry.<sup>80</sup> “Other law” might inform originalist analysis if one

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<sup>75</sup> See Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 49 (1994) (“[T]he United States is part of the global community . . . and courts should construe our statutes, our treaties, and our Constitution, where possible, consistently with ‘the customs and usages of civilized nations.’” (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900))).

<sup>76</sup> *United States v. Dixon*, 509 U.S. 688, 725 (1993) (White, J., concurring in the judgment in part and dissenting in part) (quoting *Heath v. Alabama*, 474 U.S. 82, 88 (1985)) (internal quotation mark omitted).

<sup>77</sup> The Court often invokes the concept of dual sovereignty when praising the structural aspects of federalism. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

<sup>78</sup> See *Michigan v. Long*, 463 U.S. 1032, 1043–44 (1983).

<sup>79</sup> See *id.* at 1039 (“The process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar . . . .”); see also *id.* at 1065 (Stevens, J., dissenting) (“Th[is] case raises profoundly significant questions concerning the relationship between two sovereigns — the State of Michigan and the United States of America.”). Other federal courts practices, like the practice of abstaining in cases involving unclear state law, see *R.R. Comm’n v. Pullman Co.*, 312 U.S. 496, 500 (1941), and the practice of certifying questions of state law to state supreme courts for clarification, see generally Jonathan Remy Nash, *Examining the Power of Federal Courts To Certify Questions of State Law*, 88 CORNELL L. REV. 1672 (2003), also support the vision of state law as “other.”

<sup>80</sup> See generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

believes that the original meaning of the Constitution is tied to contemporary values. For example, if the Eighth Amendment's term "unusual" was originally understood to call for an evolving reflection of the practices society rejects, contemporary laws from other jurisdictions might be important data points. However, Justice Scalia has rejected this possibility, expressing distaste for reliance on both state and foreign law.<sup>81</sup>

Under a nonoriginalist, cosmopolitan theory of interpretation, by contrast, both state and foreign law are legitimate constitutional sources.<sup>82</sup> Cosmopolitanism is guided by the principles that political boundaries need not limit legal analysis and that external legal sources may supply valuable information to constitutional interpretation.<sup>83</sup> Although cosmopolitanism is usually discussed as approving of consulting foreign law, its guiding principles support embracing all forms of "other law." Justice Kennedy's jurisprudence exemplifies cosmopolitanism, fluidly moving between consultations of state and foreign law in his opinions in *Lawrence*<sup>84</sup> and *Roper*.<sup>85</sup> Justices Ginsburg and Breyer have also displayed cosmopolitan perspectives, advocating the utility of foreign law citations<sup>86</sup> and joining or authoring opinions citing state law.<sup>87</sup> For these cosmopolitans, "other law" provides relevant information regarding factual and moral judgments.<sup>88</sup>

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<sup>81</sup> See Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3, 39–40 (Amy Gutmann ed., 1997) (criticizing the Court's Eighth Amendment doctrine); see also *Roper v. Simmons*, 125 S. Ct. 1183, 1217 (2005) (Scalia, J., dissenting) (calling the Court's use of state legislation in Eighth Amendment cases "mistaken"); *id.* at 1226 (opposing the Court's use of foreign law).

<sup>82</sup> Originalism and cosmopolitanism, though easily juxtaposed, are not opposites. Coherent theories could include nonoriginalist noncosmopolitanism, reflected in Judge Posner's jurisprudence; nonoriginalist cosmopolitanism, reflected in Justice Breyer's jurisprudence; originalist noncosmopolitanism, reflected in Justice Scalia's jurisprudence; and even originalist cosmopolitanism, as would be the case if one believes the Eighth Amendment was originally understood to require looking to evolving standards across jurisdictions.

<sup>83</sup> See Posner & Sunstein, *supra* note 5, at 163–64; see also Levinson, *supra* note 2, at 356 (defining "jurisprudential cosmopolitanism" as the practice of "looking abroad for possible wisdom").

<sup>84</sup> See *Lawrence v. Texas*, 539 U.S. 558, 567–73 (2003).

<sup>85</sup> See *Roper*, 125 S. Ct. at 1192–94, 1198–1200.

<sup>86</sup> See Stephen Breyer, *Keynote Address*, 97 AM. SOC'Y INT'L L. PROC. 265, 266–67 (2003) (advocating consultations of foreign law in light of "the enormous value in any discipline of trying to learn from the similar experience of others"); Ginsburg, *supra* note 12.

<sup>87</sup> For example, Justices Ginsburg and Breyer both joined the majority opinion in *Atkins v. Virginia*, 536 U.S. 304 (2002). Justice Ginsburg also authored the majority opinion in *Ring v. Arizona*, 536 U.S. 584 (2002), in which the Court used state legislation as evidence that judicial fact-finding is not necessarily superior to that of juries in capital cases, see *id.* at 607–08 & n.6.

<sup>88</sup> Professors Eric Posner and Cass Sunstein have explained in greater detail how the cosmopolitan approach can add value: under certain circumstances, a large majority of bodies reaching the same answer to a given question are likely to be correct. See Posner & Sunstein, *supra* note 5, at 140–46.

To view state law but not foreign law as an acceptable constitutional authority, one must subscribe to an interpretive theory that lies between the poles of originalism and cosmopolitanism — a theory of patriotic cosmopolitanism that values contemporary state judgments but not foreign ones. The late Chief Justice Rehnquist held such a view, articulating strong support for state law citations but disdain for foreign law citations.<sup>89</sup> Justice O'Connor exhibited a more limited version of this view, expressing firm acceptance of state law citations but only qualified approval of foreign law citations.<sup>90</sup> In addition, numerous commentators seem to share patriotic cosmopolitan views.<sup>91</sup> All of these views rest on a belief that foreign sources are problematic in ways that state sources are not. Part III challenges this distinction.

### III. STATE LAW CITATIONS AND FOREIGN LAW CRITIQUES

Supporters of patriotic cosmopolitanism attribute several problems to foreign law citations that they implicitly or explicitly deem inapplicable to state law citations. Most commonly, the critiques variously assert that foreign law citations are undemocratic, inapposite, and unprincipled. Without endorsing any of these critiques, this Part demonstrates that they also apply, at least to some extent, to state law citations. Because of this overlap, a strong version of patriotic cosmopolitanism embracing state legislation as categorically invulnerable to critiques of foreign law citations seems untenable. The similarity between state and foreign law citations may also undermine a weak version of patriotic cosmopolitanism that supports state law citations because they are merely *less* vulnerable to the common critiques of foreign law citations. For even weak patriotic cosmopolitanism to be plausible, several normative and empirical assumptions must hold true. Normatively, despite their democracy-based rhetoric, patriotic cosmopolitans must allow courts to derive evidence of contemporary beliefs from sources that do not track a national majority. Empirically, patriotic cosmopolitans must assume that state laws provide

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<sup>89</sup> See *Atkins*, 536 U.S. at 324 (Rehnquist, C.J., dissenting) (arguing that “the work product of legislatures,” along with jury sentencing decisions, “ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment”).

<sup>90</sup> See *Roper*, 125 S. Ct. at 1210–12, 1215–16 (2005) (O'Connor, J., dissenting) (criticizing the Court for using foreign law to “confirm” national consensus when state legislation demonstrated no such consensus).

<sup>91</sup> See, e.g., Alford, *supra* note 4, at 58–61, 64 (arguing that if international sources are relevant to constitutional inquiry at all, they “deserve a status at the bottom of the hierarchy of the interpretive canon,” below domestic sources like state legislation); Young, *supra* note 5, at 161–67 (arguing that in community standards cases, the “denominator” for consensus should include “domestic” sources but not foreign sources). Professor Young’s discussion of *Roper* suggests that he includes state legislation in the category of domestic sources. See *id.* at 148–49.

more relevant information than foreign laws, that the risk of misunderstanding state law is substantially lower than the corresponding risk for foreign law, and that the risk of unprincipled use is greater for foreign law than for state law.<sup>92</sup>

*A. Foreign Law Citations Are Undemocratic*

As a threshold matter, some academic commentators allege that it is undemocratic and thus unacceptable for the Court to treat foreign materials as authoritative.<sup>93</sup> The nuances of this argument vary, but the central premise is that when the Court purports to consult evidence of contemporary public will, it should consult only those proxies that the American people can amend. Of course, many — if not most — sources courts cite, like case law and law review articles, cannot be amended democratically. A tailored version of the argument insists only that when the Court purports to consult contemporary public views or values, it must do so in a way that allows the public to correct misunderstandings or change its mind.<sup>94</sup> On this argument, when the Court treats foreign law as an authority, it violates democratic principles by depriving the populace of the opportunity to inform “evolving standards.”<sup>95</sup>

While this Note does not endorse the “undemocratic” critique,<sup>96</sup> the relevant point is that this critique can apply to state law citations as

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<sup>92</sup> Whether these conditions must all hold simultaneously depends on how much import one accords to each critique.

<sup>93</sup> See, e.g., Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFF., July–Aug. 2004, at 40, 42 (“[O]ur judges have a certain democratic legitimacy. But the judges of foreign countries, however democratic those countries may be, have no democratic legitimacy here. The votes of foreign electorates are not events in our democracy.”).

<sup>94</sup> See Young, *supra* note 5, at 162 (arguing that the problem with the Supreme Court’s use of foreign law from a democracy perspective “is not simply a lack of a common discourse but also the absence of supranational institutions that, through the legitimating force of representation and deliberation, could transform the Court’s nose counting into a meaningful democratic conclusion”).

<sup>95</sup> See Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 709–10 (2005) (criticizing constitutional comparativism because “there is no democratic check that the United States can impose upon the rulemaking power of foreign courts”).

<sup>96</sup> As Professor Mark Tushnet and others argue, the critique presumes a constitutionally unfounded limitation on federal judges’ authority. See, e.g., Tushnet, *supra* note 2, at 1287. Further, the critique ignores a range of “undemocratic” aspects of American democracy. See, e.g., Akhil Reed Amar, *A Constitutional Accident Waiting to Happen*, 12 CONST. COMMENT. 143, 143–44 (1995) (criticizing the electoral college as undemocratic); Jeb Barnes, *Adversarial Legalism, the Rise of Judicial Policymaking, and the Separation-of-Powers Doctrine*, in MAKING POLICY, MAKING LAW 35, 43 (Mark C. Miller & Jeb Barnes eds., 2004) (explaining that voting in Congress is not purely majoritarian). Perhaps the simplest response to the “undemocratic” critique is that courts consult foreign law as a source of information, not as authority — but this proposition is contested. Compare Posner & Sunstein, *supra* note 5, at 140 (“[T]he decisions of other courts provide relevant information.”), with Young, *supra* note 5, at 167 (arguing that the Court treats foreign law as an authority).

well as to foreign ones and therefore does not justify strong patriotic cosmopolitanism. Indeed, to espouse even weak patriotic cosmopolitanism, one must dispense with strict adherence to the democracy requirement.

The first reason the “undemocratic” critique can apply to state law citations is that aggregating state preferences denies citizens a federal election in which to decide an issue.<sup>97</sup> Citizens (through their representatives) can vote on what their state does, but they cannot deliberate over and vote on the national practice the Court may choose to follow<sup>98</sup> — and their preferences for state and national rules may differ.

Second, even if citizens lack distinct state and national preferences, there can be circumstances in which a national majority distributed among the states cannot change the Court’s calculation, since the Court looks to the number of state legislatures rather than the number of citizens who support or oppose a particular practice. This occurs when the group of states the Court follows does not correspond to a majority of the national population — a phenomenon facilitated by the concentration of the nation’s populace in a minority of states.<sup>99</sup> The 2000 presidential election demonstrates that the position of a majority of states may well diverge from that of the popular majority, and the red-state/blue-state discourse of modern politics suggests that this divergence may apply to other questions as well.<sup>100</sup>

The upshot is that even if normatively justified, the belief that the Court should consult only those indicators of public opinion that the people can change through democratic means undercuts rather than supports the strong version of patriotic cosmopolitanism. Instead, the belief most clearly supports a rejection of all “other law” citations. Weak patriotic cosmopolitanism could still be plausible under a democracy-based requirement, but only if one relaxed the absolute terms in which the requirement has been phrased. On this view, state law

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<sup>97</sup> Cf. Wayne A. Logan, *Creating a “Hydra in Government”: Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65, 89 (2006) (noting that federal deference to state practices does not enhance democracy because of the lack of “federal decision-making input, which ideally reflects collective national interests and values” (footnote omitted)).

<sup>98</sup> Cf. *id.* (“State laws naturally reflect the distinct positions of state legislators, who are not held accountable to, and need not accommodate the interests of, the nation as a whole.”).

<sup>99</sup> More than half of the national population is concentrated in the ten most populous states. See U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION FOR THE UNITED STATES, REGIONS, STATES, AND FOR PUERTO RICO: APRIL 1, 2000 TO JULY 1, 2006, at tbl. 1, available at <http://www.census.gov/popest/states/tables/NST-EST2006-01.xls>.

<sup>100</sup> See, e.g., Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1676–77 (2006) (discussing disagreement between red and blue states over religious issues); Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in “Symbolic” Versus “Executing” States in the United States*, 84 TEX. L. REV. 1869, 1910 (2006) (discussing the correlation of states’ death penalty practices with their “red” or “blue” political label).

citations might be permissible because they are at least *more* “democratic” than foreign law citations — at least whenever the state practice the Court follows happens to coincide with the preferences of a majority of U.S. citizens.

*B. Foreign Law Citations Are Inapposite*

Whereas the democracy critique is normatively contingent, the remaining critiques depend upon empirical assumptions. The second criticism of foreign law citations is that foreign laws may be born of such different institutions and understandings that they are inapplicable to domestic constitutional questions.<sup>101</sup> This argument comprises two strands — that foreign sources are per se irrelevant, and that federal judges are likely to misconstrue foreign sources’ meaning in translation to the American context and thus rely upon laws that do not in fact support the given proposition.<sup>102</sup>

On one hand, state law is likely to fare significantly better than foreign law under the irrelevance critique. Because states are bound by the U.S. Constitution and are, quite simply, part of the nation, their laws are by definition part of “national experience” in a way that foreign laws are not. In addition, states can be understood as part of a system of constitutional *values* shared by all entities within the nation. This understanding is consistent with Justice Breyer’s view that cross-border interactions and shared experiences can give rise to common principles that make state law relevant to federal constitutional analysis<sup>103</sup> and Professor Paul Kahn’s urging that all states are engaged in the project of “American constitutionalism.”<sup>104</sup>

On the other hand, the common constitutional ground between states and the nation does not mean that state law is *always* relevant to federal constitutional adjudication. First, on rare occasions, state law might be contingent on institutional differences — such as the absence of a bicameralism requirement, less frequent and shorter legislative sessions, or term limits for legislators — that separate most state legis-

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<sup>101</sup> See *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (“[O]ur federalism is not Europe’s.”); see also Levinson, *supra* note 2, at 362 (describing the values of France regarding religious freedom as “quite out of line with our own”).

<sup>102</sup> See Posner, *supra* note 93, at 42 (noting the risk that judges will not account for the historical and political differences between the United States and other nations).

<sup>103</sup> Justice Breyer has noted that state commercial law, “for example, has become close to a single, unified body of law . . . in part through a pattern of similar judicial responses to similar problems . . . . Formally speaking, state law is state law, but practically speaking, much of that law is national, if not international, in scope.” Breyer, *supra* note 86, at 267.

<sup>104</sup> Kahn, *supra* note 6, at 1148. Professor Kahn argues that although states’ individual experiences inevitably vary, all work with certain fundamental norms: “No state’s experiences are so different as to reject the norms of equality, liberty, and due process as the ideals of the constitutional order.” *Id.* at 1162.

latures from Congress.<sup>105</sup> Requiring wider consensus before according weight to state agreement can decrease the risk of influence of idiosyncratic state practices like Nebraska's unicameral legislature,<sup>106</sup> but it cannot eliminate the potential influence of institutional differences between state legislatures and Congress. Second, even if state legislation is not inapposite for institutional reasons, the information gleaned from nose-counting state legislation may be misleading as an indicator of national preferences. The majority position among state laws may not track the preferences of a majority of U.S. citizens.<sup>107</sup> In *Roper*, for example, the "national consensus" the Court discerned corresponded to a deeply divided nation.<sup>108</sup>

The inappositeness criticism may also have force when the Court extends a state position beyond its enactors' understanding. This may occur when grouping state laws on a binary distinction glosses over their complexity,<sup>109</sup> as when the Justices in *Roper* included non-death penalty states in the group that opposed executing minors.<sup>110</sup> Moreover, the risk of drawing unsupported conclusions regarding state preferences is high whenever the Court uses state legislation to invalidate a challenged proposition. Comparing *Watson* and *Garner* illustrates this risk. In *Watson*, the Court used states' approval of warrantless arrests as evidence that the practice was permissible under the Federal Constitution, a judgment with which states authorizing the practice must necessarily have agreed.<sup>111</sup> In *Garner*, by contrast, the Court used states' rejection of deadly force against fleeing felons as evidence that the practice was unconstitutional.<sup>112</sup> Logically, however, the state legislation revealed only that states disfavored the practice, not that they believed it was so unreasonable as to be beyond the constitutional pale. States might reasonably want to reserve the right to legalize

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<sup>105</sup> See James R. Rogers, *Judicial Review Standards in Unicameral Legislative Systems: A Positive Theoretic and Historical Analysis*, 33 CREIGHTON L. REV. 65, 68–74 (1999) (describing Nebraska's unicameral legislature and the recent consideration of unicameralism by fourteen other states); Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 562 (2001) (discussing institutional differences between state legislatures and Congress).

<sup>106</sup> See Rogers, *supra* note 105, at 68–74.

<sup>107</sup> See *supra* p. 1685.

<sup>108</sup> See Young, *supra* note 5, at 154 ("Justice Kennedy sought 'evidence of national consensus against the death penalty for juveniles,' but what he found was a nation deeply divided on the question." (footnote omitted) (quoting *Roper v. Simmons*, 125 S. Ct. 1183, 1192 (2005))).

<sup>109</sup> See Jacobi, *supra* note 6, at 1125–28.

<sup>110</sup> See *supra* note 66. Justice Scalia commented that characterizing non-death penalty states as opposing execution of minors was like "including old-order Amishmen in a consumer-preference poll on the electric car." *Roper*, 125 S. Ct. at 1219 (Scalia, J., dissenting).

<sup>111</sup> See *United States v. Watson*, 423 U.S. 411, 421–22 (1976).

<sup>112</sup> See *Tennessee v. Garner*, 471 U.S. 1, 15–18 (1985).

more stringent police procedures under changed circumstances — for example, if crime were to surge.

Because state law, like foreign law, can be vulnerable to the inappropriateness critique, the critique undermines the strong version of patriotic cosmopolitanism. The critique might not be fatal to a weak version of the theory if one assumes that despite state-national differences and judicial mischaracterizations, the information ascertained from state law will consistently be more apposite than that from foreign law. To support this assessment, one would want to compare state-to-nation and nation-to-nation differences in particular areas of law and the competence of judges in interpreting state as opposed to foreign sources.

### C. Foreign Law Citations Are Unprincipled

A third criticism mounted against the Court's use of foreign law is that the practice is unprincipled as implemented. This criticism has two interrelated prongs. First, critics argue that the Court's foreign law citations are haphazard in that the Court does not measure international "consensus" in an empirically rigorous way.<sup>113</sup> Second, commentators argue that the Court's use of foreign law is selective in that it invokes foreign law only in certain contexts — most notably, when international opinion would have a rights-enhancing effect.<sup>114</sup> On this point, then-Judge Roberts stated in his confirmation hearings that "[a]s somebody said in another context, looking at foreign law for support is like looking out over a crowd and picking out your friends."<sup>115</sup>

Neither of these criticisms is unique to the Court's use of foreign law. Indeed, the quotation used by then-Judge Roberts comes from a statement Judge Harold Leventhal made about the use of legislative history in statutory interpretation.<sup>116</sup> For present purposes, however, the key points are that both the haphazardness and selectivity criticisms apply to the Court's use of state law as well, such that strong patriotic cosmopolitanism is not justified by fears of unprincipled use and that weak cosmopolitanism requires questionable empirical assumptions regarding the susceptibility of state and foreign law to opportunistic citation.

<sup>113</sup> See, e.g., Alford, *supra* note 4, at 64–67; Ramsey, *supra* note 5, at 77–79.

<sup>114</sup> See, e.g., Alford, *supra* note 4, at 67–69; see also Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1575 (2006) (describing the connection between opposition to foreign law citations and America's "culture wars").

<sup>115</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 200–01 (2005) (statement of Judge John G. Roberts).

<sup>116</sup> See Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting a remark by Judge Leventhal).

The haphazardness critique applies to the Court's use of state law because the Court has been inconsistent regarding how many states are needed to constitute a persuasive bloc. The Fourteenth Amendment cases are too sparse to exhibit a pattern, but *Glucksberg* and *Lawrence*, taken together, indicate that the Court may be persuaded by agreement ranging from unanimity to merely an "emerging recognition."<sup>117</sup> In Fourth Amendment cases, the Court has fluctuated from requiring near unanimity in *Watson* and *Payton* to according significance to agreement among a bare majority of states in *Garner*.<sup>118</sup> The Court's Sixth Amendment jury cases display a similar variation: the Court relied on "near-uniform"<sup>119</sup> agreement in *Burch* and *Duncan*, but appeared persuaded by the practice of fewer than fifteen states in *Williams*.<sup>120</sup> Furthermore, the Court has regarded varying levels of agreement as "national consensus" in Eighth Amendment cases, ranging from virtual unanimity in *Coker* to supermajority agreement in *Enmund* and bare majority agreement in *Roper* and *Atkins*.<sup>121</sup>

The selectivity critique also applies to the Court's state law citations. While the Court consistently turns to state law in Eighth Amendment cases, there is no identifiable set of circumstances in which the Court consults state law in its Fourteenth, Fourth, and Sixth Amendment cases. Thus, although commentators have inveighed against the Court's selectivity in citing foreign sources only when such citation bolsters rights-enhancing outcomes, there is no inherent reason that the Court could not do the same for state law citations.<sup>122</sup> To embrace even weak patriotic cosmopolitanism, one would want evidence that opportunism in state law citations is less common or likely than in foreign law citations.

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<sup>117</sup> See *supra* pp. 1674–75.

<sup>118</sup> See *supra* pp. 1675–76.

<sup>119</sup> *Burch v. Louisiana*, 441 U.S. 130, 138 (1979).

<sup>120</sup> See *supra* pp. 1677–78. The inconsistency is more noteworthy in light of the fact that *Baldwin v. New York*, 399 U.S. 66 (1970), and *Williams* were decided on the same day. Justice Harlan explained the discrepancy in the Court's counting — adopting the less disruptive standard, whether supported by a majority or minority of states — as "constitutional schizophrenia born of the need to cope with national diversity under the constraints of the incorporation doctrine." *Williams v. Florida*, 399 U.S. 78, 136 (1970) (Harlan, J., dissenting in *Baldwin* and concurring in the result in *Williams*).

<sup>121</sup> See *supra* pp. 1678–79. Moreover, the *Atkins* Court suggested that even a majority might not be required for a consensus: "It is not so much the number of these States that is significant, but the consistency of the direction of change." *Atkins v. Virginia*, 536 U.S. 304, 315 (2002).

<sup>122</sup> See Kathleen M. Sullivan, *From States' Rights Blues to Blue States' Rights: Federalism After the Rehnquist Court*, 75 *FORDHAM L. REV.* 799, 801 (2006) (describing recent "progressive experimentation at the local level through policies that could not command a national majority").

## IV. CONCLUSION

Examining the Supreme Court's use of state legislation in constitutional adjudications leads to several conclusions. First, state legislation is firmly rooted in the Court's canon of constitutional authorities. Although this Note merely provides a sketch of the Court's practice of citing state law, it is apparent that the practice is both common and varied as an empirical matter. On at least some occasions, the Court accords state legislation significant weight in its analysis.

Second, state and foreign law citations are alike in that they both involve forms of "other law." Originalists therefore likely reject both state and foreign law citations, whereas nonoriginalist cosmopolitans embrace both. Given the similar status of state and foreign law vis-à-vis federal constitutional law, a theory that embraces state law citations but rejects foreign law citations — patriotic cosmopolitanism — must assume that qualitative differences exist between the two practices.

However, this Note argues that such a sharp distinction may be impossible: the criticisms usually leveled against foreign law citations apply to some extent to state law citations as well. State law citations tend to fare better than foreign law citations against these criticisms, but the two practices are more similar than they are different. Accordingly, a strong version of patriotic cosmopolitanism, which implicitly or explicitly treats state law as invulnerable to criticisms of foreign law, seems untenable.

A weak version of the theory may be coherent, but requires several normative and empirical assumptions. Normatively, patriotic cosmopolitanism is contingent not only on a rejection of originalist premises, but also on a tolerance of sources that are not amendable through democratic channels — despite language among patriotic cosmopolitans emphasizing the importance of democracy in citations. Empirically, weak patriotic cosmopolitanism is then contingent on the assumptions that state law consistently contains more useful information than foreign law, that judges are less likely to mischaracterize state law than foreign law, and that state law is less susceptible to unprincipled use than foreign law. All of these assumptions seem plausible, but none is irrefutable.

The lack of clear exposition of the patriotic cosmopolitan position in judicial opinions or academic commentary suggests that the pro-state, anti-foreign law stance may simply stem from a lack of reflection. This Note attempts to provide such reflection and to identify assumptions necessary to justify an apparently dominant perspective. Increased attention to state law citations, and to their similarities to foreign law citations, can enrich future debates regarding the canon of constitutional authorities.