

JUSTIFYING THE USE OF FOREIGN PRECEDENT

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JUSTIFYING THE USE OF FOREIGN PRECEDENT IN CONSTITUTIONAL CASES

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Abstract

In this thesis, I attempt to justify the use of foreign precedent in Supreme Court constitutional cases and respond to various criticisms that have been brought forth. There are many critics of this process, as it is typically thought that Supreme Court Justices ought to look to their own domestic constitution and history of precedent when deciding cases. One of the critiques that I highlight is that the process is undemocratic and I respond to this by showcasing a distinction between procedural and constitutional conceptions of democracy.

As well, I attempt to justify the process by showing how the utilization of foreign precedent can actually help judges uphold important values that we cherish in a constitutional democracy. I also attempt to do this for those who do not endorse the constitutional conception of democracy, by distinguishing between a community's moral opinions and true moral commitments.

I also examine two landmark cases *Roper v. Simmons* and *Lawrence v. Texas*, in order to establish the reasons that judges utilize foreign precedent; namely, as a source of further legal information and not due to any binding requirement.

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Introduction

In our modern globalized world, citizens around the world are connected in a way that hasn't been seen in the past. With the use of technology we have vast amounts of information that is readily available to citizens and professionals of all sorts. This is the same with judges of the Supreme Court in the United States and Canada – they are now readily able to easily access case law from different countries than their own. Now, the use of foreign law in constitutional cases is not something that is new; however, there is an increasing amount of criticism that has been brought forth from critics who believe that foreign precedent has no place in domestic court cases. Common critiques are that the process is undemocratic, as judges are supposed to be using the settled domestic precedent in order to interpret their own Constitution or Charter. In this thesis, I will primarily be looking at the Supreme Court of the United States and Canada.

My ultimate goal in this thesis is to attempt to justify the use of foreign precedent in constitutional cases and showcase how many of the critiques that are levied by critics are inaccurate. In the first chapter, I will first discuss some general styles of constitutional interpretation and also explain the difference between binding and persuasive precedent; the purpose of distinguishing between these types of precedent is to show that often foreign precedent is merely used persuasively and in fact, domestic courts are in no way obligated to use them or are

bound in any way. Further, I will explain the anti-democratic critique that has been stated by originalists - like former Supreme Court Justice Antonin Scalia - and then respond to this critique by distinguishing between two conceptions of democracy that were highlighted by Dworkin in his book *Freedom's Law*. Then, I will examine how foreign precedent was used in the landmark case *Roper v. Simmons*, namely to show that foreign precedent is often used persuasively and isn't binding in any way. As well, I will argue that the usage of foreign precedent is more consistent with living constitutionalism and seems immediately inconsistent with some of the core beliefs of originalism. Further, I will use various passages from *On Liberty* in order to stress the importance of engaging with those with differing viewpoints – in this case, foreign countries. Finally, I will explain some of Waldron's arguments in favour of the use of foreign precedent.

In the second chapter, I will attempt to justify the use of foreign precedent by offering a theory in favour of its use. Firstly, I will re-examine the critic's case and respond to another critique, which states that allowing the constitution to be open to various interpretations and the use of foreign precedent takes away the common ground and anchoring effect that the Constitution provides. Then, I will explain the difference between practical and theoretical authorities and show how foreign precedent fits in with neither category. I will argue that the use of foreign precedent is akin to Supreme Court judges engaging with their epistemic peers and that using foreign precedent is a way for justices to access further legal knowledge and to see how their peers in the democratic process have handled similar cases. It is my belief

that this can be particularly informative for judges. Lastly, I will attempt to justify the use of foreign precedent for those who endorse both the procedural and constitutional conceptions of democracy. With the procedural conception, I will attempt to do this by distinguishing between true moral commitments and moral opinions. It is my belief that those who disagree with the use of foreign precedent when judges engage in judicial review are often doing so based on moral opinions. In fact, if citizens were able to come to some sort of reflective equilibrium where their internal beliefs were all consistent with one another, then they could see that the use of foreign precedent often allows judges to uphold core values that we hold dear in a constitutional democracy. I will also argue that even if laws are passed by parliament, this doesn't settle the question of whether a community's commitments are consistent with that law. And if it is the case that it isn't, after a discussion with those who find the law problematic, then maybe judges can be justified in looking to foreign precedents to help them understand how different governments have attempted to tackle similar issues and also, as a way of helping them uphold these true commitments that a community holds. I will also argue that the use of foreign precedent can be justified under a constitutional conception of democracy, in order to help uphold certain core democratic values or principles that are necessary in a democracy, under this constitutional conception. I will argue this by showcasing how, when judges are engaging with their peers in the democratic process, they are trying to figure out what these commitments are and what they entail. These judges

are looking to their peers across the globe that have struggled to understand these same democratic conditions.

In the last chapter, I will look to other reasons that judges may refer to foreign precedent. I will utilize Joseph Raz's distinction between merit and non-merit reasons in order to showcase that there are non-merit reasons why I judge might use foreign precedent. A non-merit reason is "a reason for adopting a constitutional provision or for amending it that" does not "derive from the good of being subject to it."¹ As well, I will address certain problems that are often levied against proponents of comparative constitutional law and I will also respond to another critique against the use of foreign precedent, which is that judges are using it in order to achieve a pre-conceived outcome. In essence, they are cherry picking foreign precedents in order to come to a conclusion that is in alignment with their personal political beliefs. Lastly, I will examine another landmark case *Lawrence v. Texas*, in order to further show how foreign precedent is used persuasively in constitutional cases and judges are in no way bound by foreign precedent or utilize it in order to justify the holding of the case.

¹ Joseph Raz, 349

Chapter 1

The aim of this thesis is to examine and justify the utilization of foreign precedent by Supreme Court justices in constitutional cases. This is a process that is objected to by many critics, and there are many different types of concerns. For example, a main objection is that the process is undemocratic because judges should be using their own country's constitution and precedents when deciding constitutional cases. These sorts of objections I will be commenting on directly and I will attempt to offer a theory of precedent for this transnational process. I will start by explaining some basic aspects of precedent and constitutional interpretation, before turning to the critics and my justification for the utilization of foreign law by Supreme Court justices – primarily in the United States and Canada.

Methods of Constitutional Interpretation

In the realm of constitutional interpretation, the debate between Originalists and Living Tree Constitutionalists consists of how we ought to interpret constitutions or charters. In particular, the American Bill of Rights or the Canadian Charter of Rights and Freedoms contain morally ambiguous phrases, such as the 8th Amendment right to never be subjected to “cruel and unusual punishment”² or in Section 7 of the Charter where it states the “right to life, liberty and security of the

² "U.S Constitution." *Legal Information Institute*, Cornell Law School, www.law.cornell.edu/constitution. Accessed 6 Aug. 2018.

person.”³ Originalists maintain that the constitution ought to be interpreted according to the original meaning at the time the constitution was written, or to the original intentions of the founders when crafting certain provisions. There are some originalists who are “content to leave a little leeway here, suggesting something like the following: though there is a presumption, perhaps a heavy one, in favor of interpretation as retrieval, it is one which can, on very rare occasions” be overcome and this “presumption of retrieval can be defeated when there is a discernible and profound sea change in popular views on some important issue of political morality.”⁴ However, whether this is consistent with “the spirit of originalism” is contested and it seems that this “faint hearted originalism” seems to collapse into Living Constitutionalism.⁵

On the other hand, those who advocate for a living document state that certain provisions, such as “cruel and unusual punishment” ought to be interpreted to include ordinary current meanings of the word or modern day conceptions of what that may include.⁶ There are different types of theorists who advocate that the constitution is a living document. For living constitutionalists, the document is living in the sense that it isn’t static and can in fact change with the times, due to changing public opinions of what the words mean and changes in the common law. On the

³ Dodek, Adam. *The Canadian Constitution*. 2nd ed., Toronto, Dundurn, 2016.

⁴ Waluchow, Wilfrid J. "Constitutional Interpretation." *The Routledge Companion to Philosophy of Law*, edited by Andrei Marmor, Routledge Taylor & Francis Group, 2012, 2015. 426.

⁵ *ibid*

⁶ Waluchow, 430

other hand, common law constitutionalism gives a direct answer to how the meanings of a constitution's provisions can legitimately change, which is through changes in the common law, where a new precedent is set that alters how certain provisions ought to be interpreted. This approach to constitutional interpretation "maintains that judges should undertake constitutional interpretation as common law courts building upon an elaborate body of law developed over the years, mostly by judicial decisions."⁷ When a precedent is no longer serving its purpose it can be overruled, as is the same with a statute – which can be amended or repealed if it is problematic.⁸ This is not so with a constitution, as one of their defining features is that they are "heavily entrenched."⁹ As well, they contain abstract moral provisions, which "limit the powers of government bodies in significant ways."¹⁰ These abstract moral provisions can "grow and adapt to its ever changing environment without losing its identity and its guidance function."¹¹ This process is done in a legitimate way, by utilizing the evolving common law, changed public opinions on moral issues and understandings of certain phrases; as well as tying the interpretation directly to the written text of the constitution. When it comes to deciding constitutional cases at the Supreme Court level, there is an accepted practice, due to the legal principle of *stare decisis* that judges ought to refer to their previous decisions when deciding

⁷ Berman, Mitchell. "Constitutional Interpretation: Non-originalism." *Philosophy Compass*, vol. 6, no. 6, 27 May 2011. 416.

⁸ Waluchow, 430

⁹ *ibid*

¹⁰ *ibid*

¹¹ *ibid*

cases. Ultimately, it is expected that judges will be referring to their prior decisions and the history of settled precedent, statutes, and the written constitution in order to make their decisions.

Despite the fact that constitutional interpretation can differ in interpretive methods - as Supreme Court justices deciding constitutional cases are required to draft opinions and make decisions according to what they believe the constitution requires - there is also a long history of precedent that judges must utilize to craft their decisions. In a common law system, there are a variety of rules surrounding the use of precedent. Precedent is typically divided into two different types, which are, horizontal or vertical precedent.¹² Vertical precedent is referred to as binding, in the sense that it is one that must be followed by all lower courts, due to the hierarchy of the American and Canadian court systems. For example, if the US Supreme Court sets a precedent in a certain case, all lower district or appeals courts are required to obey and utilize this precedent. In his book *Settled Versus Right: A Theory of Precedent*; Randy Kozel refers to one of the functions of precedent as being control.¹³ He states, “courts at one level of the judicial hierarchy can use precedents to control the decision-making of courts at lower levels” and further, “this obligation remains intact even if a judge concludes that the Supreme Court was wrong.”¹⁴ Another type of precedent is horizontal or persuasive precedent, where the same court’s previous

¹² Schauer, Frederick. *Thinking Like a Lawyer*. Harvard University Press, 2009. 36-37.

¹³ Kozel, Randy. *Settled Versus Right: A Theory of Precedent*. Cambridge University Press, 2017. 30.

¹⁴ *ibid*

decision is not binding, but judges can utilize these decisions persuasively in their opinions on constitutional cases.¹⁵ When courts are considering their own previous decisions, they aren't bound to them in the same way that they are vertical precedent and in some cases they can be overruled; for example, when they "recognize that the instant case presents the same issue decided in the precedent case but decide nevertheless to reject the earlier ruling."¹⁶

An important legal principle that grounds this process of referring to precedent is stare decisis, which involves the belief that judges ought to refer to the history of settled precedent when making decisions in legal cases. The idea behind this is that the wisdom of many different judges throughout the ages is better than just a few judges in a particular case. When utilizing precedent, Justice Brandeis said it correctly when he "described the tension inherent in the doctrine of stare decisis as pitting the importance of leaving the law settled against the value of getting the law right."¹⁷ Sometimes it's important to leave the law as it is – as after weighing potential implications for future cases, it could have a detrimental effect. As well, sometimes public opinion and changes in the common law have warranted the need to overrule a past decision. And further, Kozel has stated that "in deciding whether to overrule a flawed decision, it is natural to inquire into the bad effects the decision has created and to predict the beneficial effects that would accompany a change in direction", showcasing bad effects as another possible reason for overruling a past

¹⁵ Schauer, 37

¹⁶ Schauer, 57

¹⁷ Kozel, 9

decision.¹⁸ The factors that warrant the desire to leave the law settled or right depends on the “introspective theory that a particular judge adopts.”¹⁹ For example, an originalist such as Scalia might have a problem with how the majority of the Supreme Court voted in *Roe v. Wade*. A Living Constitutionalist on the other hand would potentially think that deciding the case in this way resulted in a progression in society and are less concerned with tying themselves to the “dead hand of the past.”²⁰ Further, Scalia believed that “no provision of the Constitution guaranteed the right to abortion, homosexual sodomy, or assisted suicide, and nothing prohibited the death penalty.”²¹ But, as we will see, especially with the death penalty, a living constitutionalist would have differing views on this based on some potential factors for change, such as changing public opinion and changes in the common law. Leaving the law settled, as opposed to getting it right, is going to be a large focus of this thesis as I attempt to justify a process that allows judges to engage in a transnational process of utilizing foreign precedent.

The Anti-Democratic Critique

This is all accepted practice, but what about referring to precedent that isn't from one's own country? The obligation to follow domestic precedent has been the

¹⁸ *ibid*

¹⁹ *ibid*

²⁰ Strauss, David. *The Living Constitution*. New York, Oxford University Press, 2010. 100.

²¹ “Scalia Defends Originalism as Best Method for Judging Law.” *University of Virginia School of Law*. N.p., 20 Apr. 2010. Web. 6 Aug. 2018.

http://www.law.virginia.edu/html/news/2010_spr/scalia.htm.

general consensus when deciding constitutional cases; however, there are ever increasingly mentions of foreign precedent in US Constitutional cases, which continue to inform and support the judicial opinion. Originalists such as Antonin Scalia have been vocal about their opposition to citation of foreign precedent in constitutional cases. For example, a common critique is that this process is undemocratic as we're referring to precedent from a different country and these decisions ultimately don't necessarily reflect the same kind of values that Americans hold. In Canada, for example, MPs are elected by the public based on their running platform and what kind of policies that they stand for. They then proceed to either implement what they think is best for their constituents or what their constituents directly ask for.²² The legislature will then create laws in Parliament, which will hopefully reflect the will of the people in Canada. The role of the judge is to interpret the laws, constitution and make sure that laws put forth by the legislature aren't in conflict with the Charter or constitution. They are able to strike down laws that are put forth by the legislature, if they are unconstitutional, through the process of judicial review. Further, it seems that the aim of the judges in interpreting a Charter or Bill of Rights, and its relevant statutes, is to reflect the wishes and values of its own domestic community. And thus, judicial review can only be justified if judges are looking to domestic laws. Therefore, in referring to foreign law, it can be argued to be problematic that judges are looking outside their own country for legal sources in deciding a case.

²² Waluchow, 91

Some vocal advocates of this sort of critique have been typically more conservative or formalist in their views on constitutional interpretation. Jed Rubenfeld of Yale Law School has stated, “Since World War II, much of ‘old’ Europe has been pursuing an anti-national, anti-democratic world constitutionalism that, for all its idealism and achievements, is irreconcilable with America’s commitment to democratic self-government.”²³ Further, former Supreme Court justice Antonin Scalia had been a prominent critic, with certain famous comments regarding the citation of foreign law. For example, in 1997 Scalia “asserted in *Printz v. United States* that ‘comparative analysis [is] inappropriate to the task of interpreting a constitution.’²⁴ Further, “during a public debate between United States Supreme Court Justices Breyer and Scalia” on the “Constitutional Relevance of Foreign Court Decisions” Scalia “repeated his view that foreign law should not be cited by domestic courts.”²⁵ In regard to his interpretation style, Scalia has stated that his style of interpretation is to “try to understand what it meant, what it was understood by the society to mean when it was adopted. And I don’t think it has changed since then.”²⁶ And further that, “If you have that philosophy, obviously foreign law is irrelevant

²³ Taylor Jr., Stuart. "Should Foreign Law Be Used To Interpret Our Constitution?." *The Atlantic*, The Atlantic, www.theatlantic.com/politics/archive/2004/03/should-foreign-law-be-used-to-interpret-our-constitution/378195/. Accessed 9 Aug. 2018.

²⁴ Murkens, Jo Eric Khushal (2008) *Comparative constitutional law in the courts: reflections on the originalists’ objections*. LSE law, society and economics working papers, 15-2008. Department of Law, London School of Economics and Political Science, London, UK. 1.

²⁵ *ibid*, 2

²⁶ Murkens, 4

with one exception: old English law – because phrases like “due process,” and the “right of confrontation” were taken from English Law.”²⁷ And the correct process for change for the United States, in Scalia’s opinion, is not through the courts, but through constitutional amendment or through the repealing of certain laws. Scalia has stated, “I have no problem with change. It’s just that I do not regard the Constitution as being the instrument of change by letting judges read [foreign] cases [...]. That’s not the way we do things in a democracy”, as you are supposed to “persuade your fellow citizens and repeal the laws. Why should the Supreme Court decide that question?”²⁸

Response to the Critics: Two Conceptions of Democracy

Now this antidemocratic critique made by Scalia (and other originalists), I believe can be combatted by referring to a distinction in differing conceptions of democracy made by Ronald Dworkin in his book *Freedom’s Law*. Dworkin states that under these differing conceptions, we can distinguish between the majoritarian conception and the constitutional conception of democracy. On the first conception, “democracy means government by the people” and basically “it insists that political procedures should be designed so that, at least on important matters, the decision that is reached is the decision that a majority or plurality of citizens favors, or would

²⁷ *ibid*

²⁸ *ibid*

favor” if they were provided with adequate information.²⁹ In essence, this conception just means that when adopting legislation, decisions should be made according to what the majority of citizens would favor. On the other hand, “the constitutional conception of democracy, in short, takes the following attitude to majoritarian government. Democracy means government subject to conditions – we might call these ‘democratic’ conditions – of equal status” for all the citizens of a state.³⁰ Basically, there are underlying constitutional principles that are inherent in any democracy – such as freedom and equality - and the government must make decisions that are in accordance with these democratic principles. These kinds of principles are inherent in either the American Bill of Rights or Canadian Charter of Rights and Freedoms. Dworkin states, “the democratic conditions plainly include, for example, a requirement that public offices must in principle be open to members of all races and groups on equal terms” and if “some law provided that only members of one race were eligible for public office, then there would be no moral cost – no matter for moral regret at all” if the court struck down that law as being unconstitutional.³¹ This clearly would be in opposition to the democratic condition of equality and would be struck down for that purpose. Basically, Dworkin is advocating for a moral reading of the Constitution and stating that there are certain ideals that a Bill of Rights or Charter is supposed to uphold and this is separate from

²⁹ Dworkin, Ronald. *Freedom's Law: The Moral Reading of the American Constitution*. Cambridge, Massachusetts, Harvard University Press, 1996. 16.

³⁰ *ibid*, 17

³¹ *ibid*

the procedural conception that he explains. He further states, “no explicit definition of democracy is settled among political theorists or in the dictionary” and “it is a matter of deep controversy.”³² Ultimately, we need to realize that there are some cases, like *Brown v. Board of Education* – which overturned popular legislation and they were still right.³³ This alternate conception of democracy that Dworkin describes still is utilizing the same political structures that we have in democratic societies; however, these majoritarian political structures are used “out of a concern for the equal status of citizens, and not out of any commitment to the goals of majority rule.”³⁴ Further, the point to recognize here is that majoritarian structures aren’t all that there is to a democracy. Another example would be that a structure that includes an anti-majoritarian institution like judicial review is required for a true democracy, or in other words, a democracy that is premised on this constitutional conception. It is my belief, that under this alternate conception of democracy, judges are able to respond to critics of this process, as I believe that the utilization of foreign precedent can help judges uphold democratic values, such as freedom and equality.

Roper v. Simmons

For example, in the court case *Roper v. Simmons*, a juvenile male was sentenced to death for the murder of a woman. This case was a landmark decision in

³² Dworkin, 8

³³ Dworkin, 16

³⁴ Dworkin, 17

the United States, which held that it is unconstitutional to impose the death penalty on citizens who are under the age of 18.³⁵ Ultimately, the opinion of the court was that “the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.”³⁶ Although, it was not before changes in the common law occurred to effect the decision in this case. Initially, in 1993, Simmons was sentenced to death at the age of 17. It was not until “2002, the Missouri Supreme Court stayed Simmons’ execution while the U.S. Supreme Court decided *Atkins v. Virginia*, a case that dealt with the execution of the mentally disabled.”³⁷ It was only after “the U.S. Supreme Court ruled that executing the mentally disabled violated the Eighth and Fourteenth Amendment prohibitions on cruel and unusual punishment because a majority of Americans found it” to be cruel, the Missouri Supreme Court decided to reopen the case.³⁸ Here it can be seen, that by parity of reasoning, if executing those who have intellectual limitations is unconstitutional, then executing juvenile citizens, whose brains haven’t fully developed, must be unconstitutional, as well. In *Thinking Like a Lawyer*, Schauer explains how judges and lawyers are able to apply precedents in similar situations, regardless of whether the facts of the precedent case apply directly to the

³⁵ “Roper v. Simmons.” *FindLaw caselaw.findlaw.com/us-supreme-court/543/551.html*. Accessed 6 Aug. 2018.

³⁶ *ibid*

³⁷ “Roper v. Simmons.” *IIT Chicago-Kent College of Law, Oyez*, <https://www.oyez.org/cases/2004/03-633>. Accessed 8 Aug. 2018.

³⁸ *ibid*

current case at hand.³⁹ In this case, ultimately, the U.S. Supreme Court held that executing minors, according to evolving standards of decency, consisted of cruel and unusual punishment and thus was prohibited by the Eighth Amendment.⁴⁰ As well, the precedent set in the earlier case was judged to be analogous. The interesting aspect for the purpose of this thesis is where Justice Kennedy in the opinion of the court stated “Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition” against capital punishment for those under the age of 18.⁴¹ As well, Kennedy stated that “only seven countries other than the United States have executed juvenile offenders since 1990: Iraq, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China.⁴² Kennedy further stated that since then, each of the countries has “either abolished capital punishment for juveniles or made public disavowal of the practice” and “in sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.”⁴³ And although it was stated that the international opinion doesn’t control the U.S. Supreme Court’s opinion, it “does provide respected and significant confirmation for our own conclusions.”⁴⁴ I believe that firstly, this shows the way that international opinions, conventions, or foreign law can

³⁹ Schauer, 44, 85

⁴⁰ *ibid*

⁴¹ “Roper v. Simmons. NPR,

www.npr.org/documents/2005/mar/scotus_juvenile.pdf. Accessed 8 Aug. 2018. 22

⁴² NPR, 23

⁴³ NPR, 23

⁴⁴ NPR, 24

contribute to upholding democratic principles. The foreign law utilized in this case helped the Justices frame their decision in a way that aimed at getting the law right, and tried to better uphold democratic principles according to evolving standards of decency. Under this conception of democracy – it can be seen that this transnational process actually helps to advance democratic principles. Secondly, it is clear that the utilization of foreign precedent wasn't responsible for the holding of the case, but was used as further support for the majority's opinion. It is my response to the critics that in a world where moral standards consistently need to be reappraised, foreign precedent can provide judges with further guidance in their decision. I think that it can be seen that the execution of minors is something that is morally wrong, which is something that most communities around the world now see to be true, for the reasons listed previously in this chapter. And it is that executing minors is in fact wrong that explains both why public opinion has changed and why the law should be changed along with it. If we are going to accept this constitutional conception of democracy, then it seems that the conditions it specifies as essential to democracy are conditions regardless of whether public opinion believes they are. As well, in an increasingly globalized world, if international norms and laws can contribute to adequately representing constitutional principles in a society – such as freedom and equality, or prohibition of cruel and unusual punishment – then they can be utilized and are not antidemocratic, if we are to accept this constitutional conception of democracy. Han Ru Zhou states in his article *A Contextual Defense of "Comparative Constitutional Law"*, "In the common law tradition, comparative law remains only

persuasive. It can serve as a relevant body of legal ideas, experience and wisdom” but “only if judges and lawyers recognize its usefulness” and use it “in further expounding their respective national constitutions.”⁴⁵ It is clear that foreign precedent isn’t considered binding under the domestic law of the country that it is utilizing it, to help in crafting in its decision; it is merely persuasive and can be drawn on to further support its decisions, which are already rooted in the domestic common law of the country.

A critic might respond to the process by stating that maybe there is some value to having our own people making a decision on constitutional cases. The argument could be just that there is value in having our own legislators making the laws, or relying on precedent that our own judges have decided upon. They might say that there is value in the decisions being made domestically as they not only (ideally) represent the values that our own citizens hold, but also, merely that they were decided by our own country’s own citizens. There is a tension here between the idea of leaving the law settled and getting it right. A critic would state that there is value in it being our decision, as opposed to it being the right decision. Engaging with foreign precedent, conventions or customs is utilized in order to supplement a judge’s decision in constitutional cases. It doesn’t constitute the holding of a case, but is merely used persuasively in order for the judges to better understand the situation at hand. This tension previously mentioned could be seen in the distinction

⁴⁵ Zhou, Han-Ru. "A contextual defense of "comparative constitutional common law"." *International Journal of Constitutional Law*, vol. 12, no. 4, 27 Jan. 2015. 1053.

between the majoritarian premise and the constitutional conception of democracy that Dworkin refers to. The constitutional conception, or upholding certain democratic values such as freedom and equality, would involve trying to discover what the right answer is in a constitutional case, as opposed to what the majority thinks it should be. According to this aspect of democracy, we actually are respecting rights and judges ought to do their best to make a decision that best attempts to uphold these values. As seen in the Roper case, foreign precedents were utilized to supplement the decision, which was already rooted in the common law, and show how the United States had been lagging behind other countries in certain advancements of how cruel and unusual punishment ought to be interpreted. Perhaps, it can be stated that there is an obligation to follow domestic precedent and judges just utilize foreign sources in order to further supplement their decisions. Further, maybe this obligation of utilizing domestic precedent can be trumped in high stakes cases, where the foreign source seems to offer a better understanding or better allows the judges to make decisions that uphold democratic values, as opposed to just following the settled law. I would argue that perhaps in certain cases binding precedent can be overruled or abandoned for the sake of commitment with principles found within the constitutional conception of democracy that I have described. I will return to this idea later in this thesis.

Living Constitutionalism and Compatibility with Foreign Precedent

Returning to the distinction between originalism and living constitutionalism, it seems to me that living constitutionalism seems more compatible with allowing for the use of foreign precedent, which is why throughout this thesis, I may refer to both Scalia and other originalists as being critics. Living constitutionalism seems more compatible because if a public's views change on something like the juvenile death penalty – and part of the judicial role is filling in the blueprint of law (about which I will discuss in more detail in chapter two) regarding areas that aren't consistent with the democratic conditions in this constitutional conception of democracy – then the law can change when taking into consideration these foreign viewpoints. And originalism, seems immediately inconsistent with this approach, because the only area to look for originalists, when determining the meaning of moral provisions in the Constitution, is either the original meaning of the written word, the framer's intentions, etc. In response to this, there may be different types of originalism that all take into consideration different things when interpreting the constitution; however, there is a certain core claim that is inherent regardless of the type of originalism. Mitch Berman has stated, "along one dimension – the dimension of strength – originalists are mostly united."⁴⁶ He describes this further stating "to a first approximation, they believe that judges must give some aspect of a provisions

⁴⁶ Berman, Non-Originalism, 4

original character priority over all other considerations”.⁴⁷ Jeffrey Goldworthy also makes an important crucial point in defining originalism’s core claim in stating, “originalists ‘insist that, unless it has been formally amended, the constitution continues to mean today what it meant when it was first enacted or adopted.”⁴⁸ As can be seen, regardless of the type of originalism, there is a core that seems immediately inconsistent with the citing of foreign precedent.

Engaging with Differing Viewpoints

In *On Liberty*, John Stuart Mill is famous for his discussion of freedom of expression. Mill believed that “the only way in which a human being can make some approach to knowing the whole of a subject, is by hearing what can be said about it by persons of every variety of opinion” and also by “studying all modes in which it can be looked at by every character of mind.”⁴⁹ It is important to engage with those who have differing views from yourself, in order to strengthen one’s own views and see if they hold up to the critiques of those who oppose them. Mill further stated, “the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it.”⁵⁰ As well, that “if the opinion is right,

⁴⁷ *ibid*

⁴⁸ Goldworthy, Jeffrey. ‘Constitutional Interpretation: Originalism.’ *Philosophy Compass* 4.4 (2009): 683.

⁴⁹ Mill, John Stuart. *On Liberty*. Dover Publications, Inc., 2002. 83.

⁵⁰ Mill, 74

they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception” that truth brings “produced by its collision with error.”⁵¹ Mill further states that “to refuse a hearing to an opinion, because they are sure that it is false, is to assume that their certainty is the same as absolute certainty.”⁵² As seen, it is important to engage with those who have opposing views, as this will either lead us to the right answer, or it will reaffirm us in our own beliefs. I believe that his thought applies directly to the engagement with foreign sources of law when deciding constitutional cases. Maybe viewing a foreign source will help a judge reaffirm his or her own belief? Or, maybe it will cause them to completely rethink their initial thoughts on the matter. I think that engaging with other opinions is essential, even when deciding cases related to a particular domestic issue. And if they aren’t necessary, at least, they certainly shouldn’t be denied, as in this increasingly globalized world that we now live in, judges are engaging with their transnational counterparts, on a level we haven’t seen before.

Waldron and Foreign Law

Jeremy Waldron states in his paper *Foreign Law and the Modern Ius Gentium*, that in creating a theory of the citation of foreign law, “it has to be complicated enough to answer a host of questions that the practice gives rise to – questions

⁵¹ Mill, 74-75

⁵² Mill, 75

about the authority that is accorded foreign law.”⁵³ To this question, I have already argued that foreign law is used as persuasive authority, and is a means for judges to supplement their opinion and consult other cases where judges have dealt with similar situations. As well, Waldron states that there ought to be an answer to question of “which foreign legal systems to cite to (democracies, for example, or tyrannies like Zimbabwe).”⁵⁴ My response to this is that citing case law from other constitutional democracies seems to be less problematic – as you’re dealing with other countries that have similar legal systems to your own. However, citing a tyranny like Zimbabwe could be used persuasively to show what we do NOT want to be doing. Judges can refer to foreign precedents from countries that have very different legal systems in the hopes of maybe showing how we ought not to act. For example, in *Roper v. Simmons* – the list of countries that had not abandoned the juvenile death penalty was used persuasively in order for the U.S to change their decision. Further, as I had said previously, maybe engaging with countries not like one’s own will offer a perspective that you had previously missed and will help judges in crafting their opinion. It has also been shown that countries that have had a less than ideal democratic history have cited nations such as the United States, Canada and Britain in order to distance themselves from their problematic past. This could be to “demonstrate to both domestic and international observers that they are

⁵³ Waldron, Jeremy. "Foreign Law and the Modern Ius Gentium." *Harvard Law Review*, vol. 119, no. 1, Nov. 2005, pp. 129-47. *JStor*, www.jstor.org/stable/4093562?seq=1#page_scan_tab_contents. Accessed 8 Aug. 2018. 1.

⁵⁴ *ibid*

willing to adopt to widely shared best practices and are serious about the rule of law.”⁵⁵ An example of this would be the case of Uganda, where “reference to foreign sources may be seen as a strategic ‘public relations’ practice that signals the court’s independence, legitimacy, and accountability to the outer world.”⁵⁶ It seems to me that any foreign engagement that can have a beneficial social and political change in a country, isn’t problematic, but should be embraced for the guidance and instruction that it can provide. In his concurring position in *Sosa v. Alvarez-Machain* (2004), Justice Scalia stated that “the notion that a law of nations, redefined to mean the consensus of states on any subject, can be used by a private citizen to control a sovereign’s treatment of its own citizens within its own territory” is problematic and “a 20th century invention of internationalist law professors and human rights advocates. The Framers would, I am confident, be appalled by the proposition that, for example, the American peoples’ democratic adoption of the death penalty” could actually be “judicially nullified because of the disapproving views of foreigners.”⁵⁷ This law of nations that Scalia describes, is the same kind of reasoning that is used in *Roper*. Waldron states, “I think Justice Scalia is right in thinking that this is the implicit theory behind the Court’s citation of foreign law in cases like *Roper*.”⁵⁸ The idea behind this law of nations that Scalia and Waldron describe is that “foreign law

⁵⁵ Hirschl, Ran. “How Universal is Comparative Constitutional Law?.” *Comparative Matters: The Renaissance of Comparative Constitutional Law*. : Oxford University Press, 2014-08-14. Oxford Scholarship Online. 2014-09-18. Data Accessed 8 Aug. 2018. 55.

⁵⁶ *ibid*

⁵⁷ Scalia J. (concurring), in *Sosa*, at 2775.

⁵⁸ Waldron, 3

represents part of an established legal consensus – the law of nations, *ius gentium* – to which recourse may properly be had for solving legal problems which various jurisdictions have in common.”⁵⁹ I don’t aim to fully defend this point here, but it does seem promising that judges should be able to draw on foreign law for guidance, regardless of where it comes from. An analogy that Waldron utilizes is the law of nations and the accumulated data composing scientific knowledge. We wouldn’t think that scientists should be confined to using scientific knowledge only from domestic sources, so why should judges have to do so? Just as scientists should be able to use scientific findings and information attained from experiments, regardless of where it comes from, judges should be allowed to draw on legal knowledge from around the globe to further inform their decisions. Waldron states that “the idea of the law of nations makes itself available to law-makers and judges as an established body of legal insight, reminding them that their confrontation with some specific problem – for example, whether adults can justly be executed” for crimes that they committed when they were children – “is not the first time mankind has grappled with the issue and that they, like scientists should try to think through the problems they face in the company (or on the shoulders) of those” who have dealt with similar issues previously.⁶⁰

This idea fits in with the individual limitations and collective wisdom that Randy Kozel describes as the justification for *stare decisis*. He states that “no judge is

⁵⁹ Waldron, 3

⁶⁰ *ibid*

infallible” and both judges of the past and present can make mistakes.⁶¹ Further, stare decisis “responds to this reality by encouraging judges to think about legal reasoning as a collective enterprise that spans generations” with the hope “to combine humility about the power of individual reason with recognition of ‘the collective wisdom of other people who have tried to solve the same problem.’”⁶² If that is the case, why can Supreme Court justices not utilize precedents from other countries who have dealt with similar issues? Like Waldron mentioned, should a scientist be bound to only domestic scientific information? If not, then why should a judge? Treating precedent with respect is an acknowledgement of individual limitations and maybe foreign justices are able to offer insights that our greatest legal minds might have missed or at least will help them realize that they are sound in the opinions that they have come to, by engaging with reasoning that is different than their own.

⁶¹ Kozel, 38

⁶² *ibid*

Chapter 2: Justifying the Use of Foreign Precedent

In Chapter 1 of this thesis, I first gave a brief introduction to different interpretive methods in constitutional law and then attempted to showcase the potential problems with citing foreign precedent in constitutional cases. For example, one major critique that is often made is that the process is undemocratic. I then responded to this critique by distinguishing between procedural and constitutional conceptions of democracy. Then, I examined the specific court case of *Roper v. Simmons* to further my argument on how foreign precedent is primarily used persuasively in cases. In this chapter, I will revisit the critic's view and respond to some of these criticisms. As well, I will draw distinctions between different conceptions of authority and how foreign precedent fits into this picture. Lastly, I will attempt to justify the use of foreign precedent under both the procedural and constitutional conceptions of democracy.

The Critic's View

One of the most vocal critics of comparative constitutional law is former American Supreme Court Justice, Antonin Scalia. In a January 2005 public debate at the American University Washington College of Law, Justice Scalia defended his views against Justice Breyer on the "Constitutional Relevance of Foreign Court

Decisions.”⁶³ Now, when referring to foreign law, Scalia’s view is that “foreign law should not be cited by domestic courts.”⁶⁴ This, apparently, is where his critique ends. As stated by Jo Eric Khushal Murkens, “the reference to, and utility of, foreign law is most clearly visible on three levels: in relation to constitutional and statutory interpretation, in relation to the drafting of a new constitution” and also, “in relation to institutional design (i.e. the creation, development and justification of state organs and constitutional practices that are efficient as well as legitimate).”⁶⁵ Scalia is only concerned with constitutional and statutory interpretation and appears to have no problems with the other methods of reliance on foreign law. In the legal realm, there seems to be consensus that “foreign law is admissible in the interpretation of a Treaty, in devising a constitution; and if it is old English law and helps to understand the meaning of the US Constitution when it was adopted.”⁶⁶ Now, my wondering is why is it acceptable to rely on foreign law when creating a constitution, but not when interpreting it? This seems to be a bit problematic. Even though individualism and exceptionalism are at the heart of American ideals, it doesn’t seem consistent to allow for one and deny the other. A critic may perhaps respond that consulting foreign views during the construction of a constitution is one thing, although interpretation of ambiguous moral provisions should be left to one’s own country, in order to reflect their country’s own moral beliefs. This is a

⁶³ Murkens, 2

⁶⁴ *ibid*

⁶⁵ *ibid*

⁶⁶ *ibid*

valid point – but, it seems still that at the heart of the American constitution there are still foreign values and ideals that helped in its creation and to turn away from this after its creation seems to be shutting down possible resources of legal intelligence that can inform and help with judicial decision making. It seems to me to be shortsighted not to look elsewhere for help in understanding moral issues, as this reluctance may prevent the judiciary from finding better alternatives.

In his paper *Comparative Constitutional Law in the Courts: Reflections on the Originalists' Objections*, Jo Eric Khushf Murkens does a good job of laying out the originalists' objections to the use of foreign law in constitutional cases. Murkens states that “the first argument against using foreign law in the courts relates to the legitimacy of the enterprise. The objection is based on classic sovereignty and a state-centered image of national law which conceives law as a body of rules” which are “enforceable through adjudication, with an emphasis on rule-orientation, professional (artificial) reasoning, and procedure.”⁶⁷ Now, this first argument is basically that “foreign law is not recognized as a valid source of law by the national legal system, and for that reason the legal system cannot cope with the migration of constitutional ideas through a comparative approach to constitutional law.”⁶⁸

In response to this, I would have to say that often when justices utilize foreign law in constitutional cases, it is done so as a means to supplement their opinion and doesn't constitute the holding of the case. For example, in *Roper v.*

⁶⁷ Murkens, 3

⁶⁸ *ibid*

Simmons, changes that occurred in the common law with *Atkins v. Virginia* resulted in it being declared unconstitutional to impose the death penalty on those who suffer from mental disabilities. Thus, the justices were able to carry this information over and utilize this information analogously to children and teens whose brains haven't fully developed. Kennedy stated in his opinion, "the evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held" that was "sufficient to demonstrate a national consensus against the death penalty for the mentally retarded."⁶⁹ Further, the reference to there being few other countries, who still engage in the archaic practice of imposing the death penalty on minors, was just supplemental data that was used as a further persuasive element to make Kennedy's opinion clear. Regarding this point, Kennedy described the fact that the United States is "the only country in the world that continues to give official sanction to the juvenile death penalty" and in response to this fact, Kennedy stated, "This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility."⁷⁰ Here it can be seen that Kennedy is clearly stating that this information is in no way binding.

Further, he stated that "at least since the time of *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition" on cruel and unusual

⁶⁹ "Roper v. Simmons, 543 U.S. 551 (2005)." *Justia US Supreme Court*, supreme.justia.com/cases/federal/us/543/551/. Accessed 9 Aug. 2018.

⁷⁰ *ibid*

punishment.⁷¹ Also, he states that “it is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability” and also the “emotional imbalance of young people may often be a factor in the crime.”⁷² Kennedy ends this paragraph by being clear in stating, “The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”⁷³ For a more in-depth examination of the reasoning in the opinion of Roper, this can be found in the first chapter of this thesis. So, in response to this criticism, it seems to me that regardless of whether the law is valid or not, it doesn’t matter as it’s not being treated as a binding precedent. Scalia is quoted as stating, “Why should a judge be bound by the dicta of a judge in Zimbabwe”?⁷⁴ The answer is that they shouldn’t be bound. Allowing judges the ability to reference foreign law if they feel that it might offer insights into the present case doesn’t seem to be me to be problematic. Just as judges aren’t bound by the holdings of foreign cases, they sure aren’t bound by the dicta. However, that doesn’t mean that they shouldn’t be allowed the opportunity to consult it. Just as a doctor would utilize all acquired medical knowledge in the world to treat their patients and not only domestic medical knowledge, judges shouldn’t be limited to domestic cases when dealing with hard constitutional cases.

⁷¹ *ibid*

⁷² *ibid*

⁷³ *ibid*

⁷⁴ Murkens, 3

Constitutional Interpretation and Common Ground

A second argument commonly raised against the use of foreign law by originalists “relates to hermeneutics, or the correct interpretation of the Constitution. It is important to differentiate between amending the Constitution and interpreting the Constitution.”⁷⁵ Famously, Scalia stated, “the only legitimate way to change the Constitution is through the formal amendment process, and not through an active judiciary which (illegitimately) changes the Constitution” purely based on “its own preferences and prejudices (which may or may not include non-US law).⁷⁶ However, it is clear that amending both the US Constitution and the Canadian Charter is an extremely difficult task.⁷⁷ And it is because it is so difficult, common law constitutionalism allows the constitution to change with the times, as we interpret certain morally ambiguous phrases according to modern day conceptions of what the words mean. Murkens describes accurately the current debate regarding constitutional interpretation of the text as being between “original meaning (the judge interprets statutes literally, based on ‘the original meaning of the text, not what the original draftsmen intended’), and ‘current meaning’ (the meaning of the US Constitution should be tailored to contemporary and changing social circumstances).⁷⁸ Murkens quotes Scalia as stating that “Now, my theory of what to do when interpreting the American Constitution is to try to understand what it

⁷⁵ Murkins, 4

⁷⁶ *ibid*

⁷⁷ Strauss, 1, 34-35

⁷⁸ Murkens, 4

meant, what it was understood by the society to mean when it was adopted.”⁷⁹ Further, he states “obviously foreign law is irrelevant with one exception: old English law – because phrases like ‘due process,’ and the ‘right of confrontation’ were taken from English law” as well, that “the reality is I use foreign law more than anybody on the Court. But it’s all old English law.”⁸⁰ This point can be seen as a kind of reason why Originalists might have a problem with the citing of foreign law, or at least contemporary precedents. Further discussion on the incompatibility of originalism with foreign precedent can be seen in Chapter one. Scalia believes that the Constitution is an “anchor” and a “source of social stability”.⁸¹ However, I would argue that parts of the constitution still do serve as an anchor – and a source of social stability, regardless of whether certain provisions change according to evolving standards of decency. Firstly, there are certain provisions within the Constitution, which will continue to stay stable and can serve as this anchor that Scalia refers to. For example, certain provision such as that the “President must serve a term of four years” will always remain the same and that will not change.⁸² In his book *The Living Constitution*, David Strauss aims to show the written constitution is used as a common ground for the American people and leaves certain rules firmly entrenched, whilst other are more ambiguous.⁸³ What I mean by ambiguity in law, is best

⁷⁹ *ibid*

⁸⁰ *ibid*

⁸¹ *ibid*

⁸² Strauss, 103

⁸³ Strauss, 99

described by Hart as its “open texture”⁸⁴ which makes it always open to “interpretation and contestation” which is “particularly true for constitutional law which not only tends to be postulated in abstract and general terms but is also characterized by its close nexus to national politics.”⁸⁵ This distinction between the abstract and the firmly entrenched showcases how the Constitution can still serve as an anchor, whilst leaving certain areas up for debate. Now, to be clear, I would recognize this common ground as being certain areas of the Constitution that are not up for debate – such as the amount of years a president is allowed to serve in office. Strauss singles out concrete rules like the length of office rule in order to show that their specificity is due to the perceived need for common ground. However, Strauss is clear in that he believes that all provisions, including the less concrete ones, establish some degree of common ground. He believes that every constitutional argument of interpretation must be tied to the written text. It is important that a theory of constitutional interpretation takes into account not only the written constitution, but precedents, as well. Throughout his book, Strauss offers various examples attempting to show how the evolution of precedent in the Common law has changed how the constitution is interpreted, “without being formally amended.”⁸⁶ When interpreting the constitution, Strauss believes that the written constitution can coexist with the living constitution, whilst still satisfying the Jeffersonian skeptic who asks, why are we being controlled by the “dead hand of the

⁸⁴ Hart, H.L.A. *The Concept of Law*. Oxford University Press, 1961. 128-136.

⁸⁵ Murkens, 2-3

⁸⁶ Strauss, 1

past.”⁸⁷ The provisions of the American constitution that remain static are such as “the qualifications for various offices”, “how long a president’s term should be” and “how many senators each state should have.”⁸⁸ These sorts of provisions seem to be outside of debate and further leaving these parts of the constitution settled make it possible for Americans to “settle disputes that might otherwise be intractable and destructive.”⁸⁹ Strauss continues and states that although they may not be the best answers, they gives us “good enough answers to important issues, so that we do not have keep reopening these issues all the time.”⁹⁰ These provisions of the Constitution are interpreted exactly as they are written and are not considered up for further debate.

Now, regardless of whether the provision is abstract or open-ended, Strauss believes that the interpretations have to be consistent with the text. In the case of abstract provisions in the constitution, they don’t eliminate disagreements in interpretation – as is the case for the term limit rule – but Strauss is clear that they at least narrow the range of disagreement and all arguments must be consistent with them. In that sense, even they provide common ground for argument. Strauss states in *The Living Constitution* that “Even when the constitutional provisions are open-ended, as in the case of the Religion Clauses, for example, having the text of the clauses as the shared starting point at least narrows the range” of possible

⁸⁷ Strauss, 100

⁸⁸ Strauss, 102

⁸⁹ Strauss, 101-102

⁹⁰ Strauss, 102

disagreement.⁹¹ As can be seen, the constitution is still able to serve as this anchor that Scalia refers to, as being bound by the written text serves as a potential common ground. And even if we disagree with this, I would argue that these concrete provisions of the constitution – that were mentioned earlier – can serve as some sort of common ground or anchor.

On the other hand, morally ambiguous phrases in the Constitution, such as in the 8th Amendment to the US Constitution, where the federal government is prohibited “from imposing excessive bail, excessive fines, or cruel and unusual punishment”⁹² are different in the sense that they contain moral principles that are open to different interpretations. Certain aspects of the constitution are beyond discussion, whereas these morally ambiguous provisions seem to be left open-ended so that they can evolve with the times – according to living constitutionalists – and differ from the original meaning or original intentions of the founders. Further, in *Freedom’s Law*, Dworkin states:

I believe that the principles set out in the Bill of Rights, taken together, commit the United States to the following political and legal ideals:
government must treat all those subject to its dominion as having equal moral and political status; it must attempt in good faith, to treat them all with equal concern; and it must respect whether individual freedoms are

⁹¹ Strauss, 104

⁹² Perry, John. “Textualism and the Discovery of Rights 1. “Philosophical Foundations of Language in the Law. : Oxford University Press, 2011-06-01. Oxford Scholarship Online. 2011-09-22. Date Accessed 8 Aug. 2018. 1.

indispensable to those ends, including but not limited to the freedoms more specifically designated in the document, such as the freedom of speech and religion.⁹³

This seems to commit the United States, a democratic government, to certain ideals or commitments that are essential to its being, such as freedom and equality of all persons. Or, other commitments that are inherent in the American Bill of Rights. Further, this directly ties to the previous distinction made between these two differing conceptions of democracy, posited by Dworkin, which are the procedural conceptions and constitutional conceptions of democracy. Further clarification of these two aspects of democracy can be seen in more detail in chapter one of this thesis.

Authority: Practical and Theoretical

Now, when discussing the authoritative quality of foreign precedents in deciding constitutional cases at the Supreme Court level, I have been clear in stating that these precedents are non-binding and are used merely persuasively when making decisions and allowing judges to craft their opinions. This discussion can be found in chapter one of this thesis. I think here it would be useful to showcase differing conceptions of authority and explain the exact relationships between judges and foreign precedent. In her book *Authorities: Conflict, Cooperation, and Transnational Legal Theory*, Nicole Roughan distinguishes between different types of

⁹³ Dworkin, 7-8

authority. Firstly, practical authority is “a normative power to change another’s normative relations” and further, “practical authority is a power. It is a kind of capability to do something. Second, practical authority has both a normative character and potential.”⁹⁴ This means that it “can introduce or remove obligations, including both personal and inter-personal obligations, for its subjects.”⁹⁵ And she states that this “normative character distinguishes authority from powers that are (merely) coercive, influential, or persuasive” and “Third, practical authority involves a tripartite relationship: A has authority over B with respect to C; where C refers to the domain of activity within which a practical authority can impose requirements upon B, the subject(s).⁹⁶ We can clearly see that foreign precedents don’t fall into this category, as they aren’t binding and have no authority over domestic judges. This can be clearly described by the distinction between binding and persuasive precedent, which was described in detail in chapter one. A binding precedent, would be something issued by a practical authority and a persuasive precedent is not. This power that a domestic practical authority has - like the Supreme Court of Canada - doesn’t apply to foreign courts, as they have no normative power over these foreign authorities. Examples of practical authority include a parent over a child, or a government over its subjects, where there is a moral requirement for the subject or

⁹⁴ Roughan, Nicole. *Authorities: Conflicts, Cooperation and Transnational Legal Theory*. Oxford University Press, 2013. 19.

⁹⁵ *ibid*

⁹⁶ *ibid*

the child to obey the authority. In the case of foreign precedent, domestic judges have no moral obligation to utilize these foreign judgments.

Other types of authorities include de facto and de jure authority. For example, the government and the parent impose duties only if, and to the extent that, they enjoy de jure authority. Roughan's previous analysis applies to de jure authority, as de jure authority explains what it is to have that particular kind of authority. A de jure government would be "the legal legitimate government of a state and is so recognized by other states."⁹⁷ Whereas a de facto authority "is in actual possession of authority and control of the state."⁹⁸ However, a de facto authority need not have any sort of legitimate authority. A further example to clarify would be where "a government that has been overthrown and has moved to another state will attain de jure status if other nations refuse to accept the legitimacy of the revolutionary government."⁹⁹ An example of a de facto authority would be the drug gangs that are running the Brazilian favelas, as they have no legitimate authority, but they actually do possess de facto authority and control over a portion of the state.

Roughan distinguishes practical authority from epistemic authority, "which denotes the superior knowledge or ability of an expert who is 'an authority' on an empirical subject, but who does not thereby have 'authority over' particular

⁹⁷ "De Jure Government and De Facto Government Law and Legal Definition." *US Legal*, <https://definitions.uslegal.com/d/de-jure-government-and-de-facto-government/>. Accessed 18 Apr. 2018.

⁹⁸ *ibid*

⁹⁹ *ibid*

individuals as subjects.”¹⁰⁰ An example of this would be “a doctor in relation to her patient, or an emeritus professor of architecture in relation to those who know little of his subject.”¹⁰¹ This is similar, however, does not seem to be equivalent to the relationship between foreign law and domestic judges. Foreign judges are typically considered experts on their own domestic law and thus, a judge in the Middle East wouldn’t be considered an expert on Canadian law. There doesn’t seem to be any authority to these precedents at all, and they don’t seem to have the same connection that a professor has to his students. These foreign judges and precedents aren’t usually equipped with superior knowledge on domestic law and thus, it seems that they shouldn’t be considered a theoretical authority, when being referenced by domestic courts. With a theoretical authority, the situation is where X has superior knowledge to Y, which is usually not the case with a foreign court. Unless, the case can be made that the foreign court has grappled with similar issues for a number of years, and in virtue of this greater experience, has a certain amount of practical knowledge that is lacking in the domestic court, who is approaching these issues for the first time. For example, this can be seen with Canada and the United States. The Charter of Rights and Freedoms in Canada is only a little more than thirty years old and especially following its inception, Canada looked to the US for guidance in certain cases, like free speech cases, as the United States has been dealing with these types of cases for centuries. In a study published in the Osgoode Hall Law Journal,

¹⁰⁰ Roughan, 20

¹⁰¹ *ibid*

entitled “American Citations and the McLachlin Court” there is reference to the “statistics on the sources of all citations by the Supreme Court of Canada.”¹⁰² It was found that “The highest rate of citations to U.S cases was 7.2% under former Chief Justice Dickson. During that same period, citations to cases from all other jurisdictions also reached their high point of 2%”.¹⁰³ This was largely “attributed to the adoption of the Charter of Rights and Freedoms in 1982” as in the “first few years, the absence of relevant case law in Canada naturally encouraged the courts to look at some foreign precedents” that were “respecting such rights as freedom of speech and freedom of association.”¹⁰⁴ These foreign precedents were “cited less as Canadian jurisprudence under the Charter grew at a far more rapid rate than was widely foreseen in 1982.”¹⁰⁵ Ultimately, foreign precedents are just a further source of knowledge and information for the judges.

Epistemic Peers

I think that a better way to categorize this relationship is that foreign judges are the epistemic peers of domestic judges, and they are seeking advice from these people who are highly knowledgeable about the law. It might be the case they have encountered a very similar situation and in turn – judges are looking to them for guidance. In this globalized world that we are living in, information can be shared

¹⁰² "The Impact of Foreign Law on Domestic Judgments: Canada." *Library of Congress*, www.loc.gov/law/help/domestic-judgment/canada.php. Accessed 9 Aug. 2018.

¹⁰³ *ibid*

¹⁰⁴ *ibid*

¹⁰⁵ *ibid*

more readily than ever before and thus domestic judges can easily converse with foreign counterparts. Why should judges be bound to domestic knowledge when seeking advice to help in deciding a constitutional case? Perhaps foreign precedents can offer insights or further knowledge that can supplement their decision.

Ultimately, to sum up, foreign precedents aren't authoritative in any way over domestic judges, but they do provide knowledge for judges. Looking to foreign precedent for guidance is more akin to seeking advice from a friend, or epistemic peer, as opposed to being bound "by the dicta from a ruling in Zimbabwe" as Scalia has stated.¹⁰⁶ An example of this was mentioned in the previous paragraph, where Canada looked to the US for guidance in the early years of the Charter. This was due to the greater experience that the US had in tackling certain issues and thus, Canadian courts benefited from examining how the US had tackled similar issues.

Further Differing Conceptions of Authority

If we are to define democracy in the typical sense, what often comes to mind is the procedural conception mentioned in the first chapter of this thesis. Legitimacy is given to elected representatives who are elected by the people and for the people. In Canada we vote for MPs who are members of a party, instead of directly voting for the Prime Minister, whereas in the United States, voting occurs for the President, certain judges, the senate, etc. However, according to the constitutional conception of democracy - that Dworkin references in *Freedom's Law* and also that I describe in

¹⁰⁶ Murkens, 3

the first chapter of this thesis - there are certain conditions or commitments that a democracy must satisfy if it is to be called so. If this is true, then the procedural conception, on its own, seems to be limited in certain ways.

According to this constitutional conception of democracy, there are certain commitments that have to be met. And these commitments have validity regardless of whether we've endorsed them. I would argue that judges looking to foreign precedents, for help when deciding constitutional cases, are looking to their peers, who have similarly struggled to understand these democratic conditions.

Procedural Democracy

At first glance, it seems that if we are looking to law as authoritative, purely because it has been passed by parliament, then foreign precedent is clearly meaningless as it falls outside the domestic bounds of a country. And further, I have argued previously in this thesis, that a constitutional conception of democracy is more compatible with the citing of foreign precedent. I think that this connection is most easily made. However, in response to those who advocate for purely a procedural conception of democracy, I would argue that this conception of democracy could also warrant reference to foreign precedents. I will attempt to do this by making the distinction between moral opinions and true moral commitments. Then, I will attempt to show how those who disagree with decisions being made in court cases could be doing so based on inconsistent moral opinions and further, even if a law has been passed by parliament, that doesn't settle the

question of whether a community's commitments are consistent with that law. And if it's the case that it isn't, after discussion with those who find the laws problematic, then maybe judges can be justified in looking to foreign precedents to help them understand how different governments have attempted to tackle similar issues and also, as a way of helping them to uphold these true commitments that a community holds.

In his book *A Common Law Theory of Judicial Review*, Wil Waluchow aims to justify the process of judicial review against prominent critics, such as Jeremy Waldron, who say that the process is undemocratic, elitist, etc. Part of the justification for his response to the critics is that the judges aren't merely referencing their own subjective opinions when interpreting morally vague or indeterminate provisions in a Charter or Bill of Rights and then striking down legislation passed by Parliament during the process of judicial review. Waluchow states in his book that "the popular complaint, recall, is that judges engaged in judicial review are being allowed, unjustifiably, to substitute their own moral views for those of the community and its democratic representatives."¹⁰⁷ The worry is that the judges will input their own personal morality, or subjective moral views, as opposed to that of the community. Waluchow explains this as the "moral views to which a judge, as an autonomous moral agent is personally committed and that she might wish to see endorsed by her community and legal system" and might wish to

¹⁰⁷ Waluchow, 220

see this “morality endorsed even if it flatly contradicts existing law.”¹⁰⁸ Waluchow also makes sure to clarify that this is how a judge can, in theory, be able to stray from public opinion. However, they can also diverge from the moral views “endorsed by the law in legislation and precedent” and in theory, as well, this divergence could be more in line with the views of the public.¹⁰⁹ Waluchow states that there could be cases where “the judge’s personal morality was clearly at odds with the law, but it is not so clear that it conflicted with the moral opinions of many Canadians.”¹¹⁰

A Community’s Constitutional Morality

In juxtaposition to the judge’s personal morality, is the community’s morality, “viewed not as a morality of any particular person or group of persons but of the community as a whole.”¹¹¹ Waluchow points out that “how one identifies the relevant community is of course a notoriously difficult and often the crucial question in a wide range of cases” and further, in a multicultural, pluralist society like our own, isn’t it near impossible to identify some particular aspect of a community’s morality?¹¹² Further, if a country like Canada involves a variety of cultures, each with their own distinct standards of morality, then “it may well be foolish to assume that we could discover a single community with a single set of moral norms about

¹⁰⁸ *ibid*

¹⁰⁹ *ibid*

¹¹⁰ *ibid*

¹¹¹ *ibid*

¹¹² Waluchow, 221

indecent and obscenity that could be said to be recognized or reflected in obscenity law.”¹¹³ And if this were the case, then why would things be any different when it comes to Charter norms?¹¹⁴ Despite this, Waluchow posits whether “on at least some of the moral issues addressed in Charter challenges” there is something in the relevant community akin to a “Rawlsian ‘overlapping consensus’”.¹¹⁵ This would be where differences in “citizens conceptions of justice” lead to “similar political judgments.”¹¹⁶ Further, it would be possible that different premises about why we ought to do something, or different moral values, could lead citizens to the same conclusion. This is the “overlapping consensus” that Rawls spoke about.¹¹⁷ Rawls is quoted as saying:

Of course, this overlapping consensus need not be perfect; it is enough that a condition of reciprocity is satisfied. Both sides must believe that however much their conceptions of justice differ; their views support the same judgment in the situation at hand, and would do so even should their respective positions be interchanged.¹¹⁸

¹¹³ *ibid*

¹¹⁴ *ibid*

¹¹⁵ *ibid*

¹¹⁶ *ibid*

¹¹⁷ Rawls, John. *A Theory of Justice*. The Belknap Press of Harvard University Press, 1971, 1999, p. 340.

¹¹⁸ Waluchow, 221

An example that Waluchow describes is “the situation in which an appeals court is unanimous in its judgment – for example, the defendant does not have the right to compensation that he claims – but the judges disagree on their reasons for judgment.”¹¹⁹

However, Waluchow is right to point out that this overlapping consensus can indeed occur with certain conclusions, the consensus is still possible “on the premises, with differences of opinion emerging as to what these shared premises require in the way of particular judgments or rules.”¹²⁰ This is different from a Rawlsian overlapping consensus, in that he described this consensus occurring over certain conclusions, whilst citizens may have different premises that get them to this shared point of overlap. Whereas, Waluchow believes that this can also occur on certain premises that citizens hold in common, but which can lead them to different conclusions. Waldron has described the situation as that “we often agree on abstract principles of justice, equality, and the like but disagree on the implications of these principles – more particular rules, policies and decisions – for the concrete circumstances of democratic politics.”¹²¹ An example of this would be that we all agree that equality is important and we should pursue this when making legislative decisions, “but there is considerable disagreement about whether this justifies affirmative action programs.”¹²² As can be seen, this is a tricky issue and it may be

¹¹⁹ Waluchow, 221-222

¹²⁰ Waluchow, 222

¹²¹ *ibid*

¹²² *ibid*

difficult to determine exactly in what ways there is this overlapping consensus. However, Waluchow argues that on questions of political morality that occur in Charter challenges or in US Supreme Court constitutional cases, “there is some measure of overlapping consensus within the relevant community on norms &/or judgments concerning justice, equality, and liberty that would emerge upon careful reflection.”¹²³ And it is no doubt the case that there is considerable disagreement within any community; however, Waluchow wants to say that “often these disagreements are not as deep as can appear at first blush” and that “a society that differs in many of its surface moral opinions is often one in which there is considerably more agreement than initially meets the eye” and that “even if these are agreements that are ‘incompletely theorized,’ and even if they emerge only after an attempt has been made to eliminate signs of evaluative dissonance.”¹²⁴ With that being said, there is typically some common ground within communities; regardless of whether they are aware or not. Often after careful contemplation, this can perhaps be found.

Types of Morality

When discussing types of morality, there are some typical elements that are referred to. In his book, *A Common Law Theory of Judicial Review* Waluchow describes these elements as “a) a number of very general principles, values, and

¹²³ *ibid*

¹²⁴ *ibid*

ideals; b) more specific rules and maxims; c) opinions and judgments about particular cases and types of cases. Some examples from “the first category include Mill’s Harm Principle, the value of autonomy, and ideals of democracy”; the second category “might include the rule that someone other than the attending physician should seek consent to the patient’s participation in a clinical trial, or the rule that one may keep the truth from one’s small children in order to spare them” from nightmares, etc; and lastly, the third category might “include the belief that same-sex unions are immoral, that gays should not be allowed to adopt, that Bill Clinton was wrong in having sex with ‘that woman,’” and even perhaps that “a woman’s provocative clothing serves as a mitigating factor in sexual harassment cases.”¹²⁵ What is important for my discussion is that it is quite common that an “individual’s personal morality, so understood, can be internally inconsistent, based on false beliefs and prejudices, and otherwise subject to rational critique.”¹²⁶ And if this is so, it is important that an individual have the view that “an ongoing task of moral life” is to “explore and adjust one’s personal morality so as to avoid such deficiencies, the source of what we earlier termed ‘evaluative dissonance’.”¹²⁷ Waluchow describes an end goal as something like Rawls’ “reflective equilibrium”, “wherein our principles, rules, values, and maxims are internally consistent with one another, based on true beliefs and valid inferences, and in harmony with our ‘considered

¹²⁵ Waluchow, 223

¹²⁶ *ibid*

¹²⁷ *ibid*

judgments” which are about “particular cases and types of cases.”¹²⁸ This in turns leads me to a required distinction that will help in justifying the transnational process of utilizing foreign precedent in constitutional cases.

Moral Opinions vs. True Moral Commitments

In recent pages, I have been attempted to respond to critics and justify the process of Supreme Court justices utilizing foreign precedents, and have aimed to do so using a constitutional conception of democracy. However, it is my hope that I can show that this can also been done with a procedural conception, as well. In drawing a distinction between moral opinions and one’s true moral commitments, I believe that this can be done. The former phrase “describes moral views that have not been critically examined so as to achieve reflective equilibrium” whereas “in calling the latter ‘true’ I do not mean to suggest that they are ‘correct’ propositions or beliefs, only that they are ones to which we are truly committed.”¹²⁹ And if we are to agree with Rawls, sometimes “we can say that our moral opinions sometimes conflict with our true commitments.”¹³⁰ An example of this would be that “A person might believe that it is permissible to base a hiring decision on gender grounds only to discover, upon reflection, that this particular opinion is deeply inconsistent” with certain “general beliefs that she is not prepared to relinquish.”¹³¹ And if this is so, perhaps

¹²⁸ *ibid*

¹²⁹ *ibid*

¹³⁰ Waluchow, 224

¹³¹ *ibid*

there are times when people can differ in their moral opinions, whilst “sharing the same moral commitments” which is a “source of common ground that often emerges as the product of vigorous, open-minded debate” and thus discover that it is possible that they agree on more than they originally thought.

More importantly, if we are to connect this with decisions made by the court, when they are criticized “for being out of sync with the moral views of citizens, the focus is almost always on some widespread moral opinion that is at odds with the court’s ruling.”¹³² In fact, the focus of the criticism is “almost never on the general principles and values to which most citizens are actually committed – that is, their true commitments – or on moral judgments about the issue in question” that would in turn “survive the test of reflective equilibrium.”¹³³ People also hold moral opinions that “upon reflection, flatly contradict fundamental beliefs, principles, values, and considered judgments, that enjoy widespread, if not universal, currency within the community” and are also opinions that are “inconsistent with any reasonable interpretation of the Charter.”¹³⁴ With that being said, perhaps under a procedural conception of democracy, we could justify utilizing foreign precedent, if judges are actively trying to uphold these true moral commitments, even though they contradict with some moral opinions of citizens within the state.

¹³²ibid

¹³³ ibid

¹³⁴ Waluchow, 224-225

Justification With a Nuanced Procedural Conception of Democracy

Now, in your typical procedural conception of democracy, legislation that is passed by elected representatives is considered authoritative because of the fact that they were voted in by the people, for example. And if we are only looking to parliament or domestic courts as a source of valid law, then there is no use in looking to foreign precedent. However, throughout the thesis, I have consistently been making the argument that these precedents aren't considered binding – they are merely used persuasively. Judges are looking to their epistemic peers to gain knowledge and evidence from similar cases that they've decided. Judges are reconciling certain values that we share in common and examining how they've managed to come up with reflective equilibrium. In the preceding paragraphs, I have showcased my views on how it is possible that those disagreeing with decisions in court cases could be doing so based on inconsistent moral opinions and not true commitments. And if this is the case, then even if a law has been passed by parliament, that doesn't settle the question of whether a community's commitments are consistent with that law. And if it is the case that it isn't, after discussion with those who find the laws problematic, then maybe judges can be justified in looking to foreign precedent in efforts to help them understand how different governments have attempted to tackle similar issues. These judges would be looking to foreign judgments as a source of knowledge and evidence, not forced by any authoritative means. So, if we are to say that legislation that is passed can be inconsistent with a

community's true commitments, then perhaps judges engaging in judicial review can utilize these foreign precedents as a way of helping to uphold these true commitments that a community holds.

Constitutional Conception

As stated previously, I have discussed Dworkin's alternate conception of democracy, which is referred to as the constitutional conception. This conception refers to certain commitments that have to be met when we conceive of a democracy. For example, as mentioned previously – this would be certain values or principles that are inherent in a Charter or Bill of Rights, such as freedom and equality of all citizens. Under this conception, these commitments will have validity regardless of whether we've endorsed them or not. When judges utilize foreign precedent under this conception – they are looking to their epistemic peers in the democratic process, when trying to figure out exactly what these commitments are and what they entail. These judges are looking to their peers across the globe who have struggled to understand these same democratic conditions.

Now, this may seem a little confusing – why would we look to foreign judgments for help in understanding our own commitments? Well, this depends on how you view the role of the judge and the role morality plays in their decision-making. If we are to conceive of these certain values and principles that we hold dear in our Charter or the American Bill of Rights as being underdetermined, then we can think of judges as filling in the blueprint, so to speak, of what certain

commitments – such as equality – actually entail. And we can think of this as not just a domestic task, but trying to fashion an understanding of these democratic commitments for all democracies. This is where judges can look to foreign judgments as a source of knowledge, as well as to see how other countries are approaching these problems.

Legal Morality Underdetermined

This idea of political morality being underdetermined and part of a judge's job is to fill in the blueprint is mentioned in Wil Waluchow's book, *A Common Law Theory of Judicial Review*. In responding to certain objections, Waluchow states that when "we view Charter provisions as involving standards of the community's constitutional morality" it "seriously underplays the fact that Charter cases are legal cases."¹³⁵ This is important to address, as similarly in my discussion regarding domestic law and foreign law – the critic would say that all in all what we are dealing with is constitutional law and not morality. And when Supreme Court Justices are addressing a Charter challenge, for example, "it draws support for its judgment from prior legal decisions and from legal doctrines and traditions."¹³⁶ And as discussed earlier in this thesis, lower courts are bound by decisions made at the Supreme Court level, and must follow the precedent that is set, regardless of whether they think it is right or whether it is line with their relevant community's general views

¹³⁵ Waluchow, 232

¹³⁶ *ibid*

on the matter. And if these lower courts aren't able to make decisions "in accordance with its views about the community's constitutional morality" then the inevitable result is that "over time, judicial decisions, not the community's political morality, sets the appropriate standards for decisions in Charter cases."¹³⁷ And thus, all the typical critiques that are offered against judicial review arise, that it is "unfair, undemocratic, and so on."¹³⁸ Which in fact, are similar criticisms that are raised about the specific usage of foreign law in constitutional cases. As can hopefully be seen, the worry here is that the judges are implementing their own views on constitutional morality and leaving it out of the hands of the relevant community. As Waluchow states "it is no longer the community's constitutional morality that is being enforced by common law reasoning in Charter cases; it is the constitutional morality of the judiciary."¹³⁹ Although this is slightly different from the utilization of foreign precedent, I would argue that these two issues are similar in many ways. In Waluchow's book, he attempts to deal with the worry that judges are basing their decisions on their own views instead of those of the community reflected in the decisions of their chosen and accountable representatives. However, I am tackling the problem of judges substituting the views of a foreign jurisdiction for those of the judge's own community. I think that a response to this issue in *A Common Law Theory of Judicial Review* can also be useful for the issue that I am tackling in this thesis.

¹³⁷ *ibid*

¹³⁸ *ibid*

¹³⁹ *ibid*

A response to the problem of judge’s substituting their own moral views is important for my purposes, as I hope will soon be clear. Waluchow states we need to be clear that judgments in cases that set precedents “under the Charter’s moral provisions are still, on the account herein defended, judgments about what the community’s constitutional morality requires” and that this “objection seems to rely on a misleading picture of the community’s constitutional morality as something wholly autonomous from the law and decisions of judges” when it is in fact the case that there is consensus amongst philosophers and other legal scholars, that “a community’s political morality influences and shapes its law in many ways.”¹⁴⁰ This for example, can be seen in the criminal law, where “our notions of moral responsibility explain why there is more than one category of murder” and why “some homicides are treated not as murders, but as instances of manslaughter.”¹⁴¹ In this section of the text, Waluchow aims to showcase the extent to which the community’s morality is shaped by the law, “is seriously under appreciated.”¹⁴² Both Joseph Raz and Tony Honore have stressed the importance of this, in stating, “the influence of law on morality is multi-faceted and significant.”¹⁴³ At the Hart Memorial Lecture, Honore stressed that the law “serves several crucial functions in regard to gaps in morality and to moral conflicts.”¹⁴⁴ Honore states:

¹⁴⁰ *ibid*

¹⁴¹ *ibid*

¹⁴² *ibid*

¹⁴³ *ibid*

¹⁴⁴ *ibid*

Over a wide range of cases there can be no way of determining the right course of action without a legal component. Even a society of well-disposed angels, uniformly anxious to do right, needs a system of laws in order to know the right thing to do...law is part of the morality of any complex society. The picture of morality as a blueprint and law as a structure put up according to or in disregard of it is misleading. Morality is more like an outline from which details are missing.¹⁴⁵

If we are to believe what Honore says, then it seems that the role of judges involves filling in these details in the outline of morality. To go back to what I said earlier in this thesis – call it an outline or a blueprint – but if there are certain commitments that democracies require under this democratic conception and the law is underdetermined in many areas, it can be seen, that it may be the role of the judges to fill in any holes in the outline of morality and in the law that are missing. For example, we have rights in a Charter or Bill of Rights that prevent us from receiving cruel and unusual punishment from the state, but what this actually entails can be problematic due to the vague and indeterminate nature of the provision. When judges are deciding cases, I would argue that looking to foreign law is a way of researching how similar democratic countries have grappled with similar issues and have attempted to satisfy these democratic conditions. Looking to foreign precedent is a way for judges to potentially make a more informed decision when filling in this

¹⁴⁵ *ibid*

outline of morality. And again, they are in no way bound by these non-authoritative foreign judgments; they are merely looking to their epistemic peers for knowledge, as they attempt – as all judges in good faith should do – to make the best possible decision in each case, that will have the best possible effect on society. All the while, still never forgetting the settled law that exists in one's own country.

Chapter 3

In this chapter I plan on exploring some alternative reasons that judges may offer to look to foreign precedent. In order to explore this area, I will utilize the distinction between merit and non-merit reasons that is showcased by Joseph Raz in his book *Between Authority and Interpretation: On the Theory of Law and Practical Reason*. I will also explore the concept of interlegality and respond to some criticisms of comparative law and the citation of foreign precedent. Further, I will look to the court case *Lawrence v. Texas* in order to further the arguments that have been utilized in the first two chapters; namely, that utilizing foreign precedent can be used to uphold domestic democratic principles that are enshrined in a Bill of Rights or Charter.

Merit and Non-Merit Reasons

Joseph Raz describes merit reasons as “reasons that bear on the merit of being subject to a particular constitutional provision” whilst non-merit reasons are “reasons for adopting a constitutional provision or for amending it that do not derive from the good of being subject to it.”¹⁴⁶ For example, a non-merit reason would be that “such a change will infuse a new spirit in society that has grown

¹⁴⁶ Raz, Joseph. *Between Authority and Interpretation: On the Theory of Law and Practical Reason*. : Oxford University Press, May 01, 2009. [Oxford Scholarship Online](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199562688.001.0001/acprof-9780199562688). Date Accessed 9 Aug. 2018 <<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199562688.001.0001/acprof-9780199562688>>. 349.

moribund and stagnant.”¹⁴⁷ Another example would be the Supreme Court of Uganda citing foreign precedent in constitutional cases in order to distance them from a past that they weren’t proud of.¹⁴⁸ This latter reason would be a political reason and not necessarily because of any clear benefit from being subject to a particular interpretation of a constitutional provision. And further, a non-merit reason would be a reason for adopting such a provision, which isn’t because of any benefit from being subject to it. A merit reason would refer to a type of benefit that one would receive by being subject to a certain interpretation.

Joseph Raz states that merit reasons “which show that one interpretation, innovative or not, makes the constitution better than its alternatives takes pride of place in constitutional interpretation”; however, other reasons “may defeat merit reasons on various occasions.”¹⁴⁹ For example, “the court may...adopt an interpretation that renders the constitution inferior to what it would be on one or more alternative interpretations” so that it can “placate a hostile legislature or executive, which may otherwise take action to limit the power of the courts or to compromise their independence.”¹⁵⁰ Ultimately, merit reasons are “the primary reasons because they define the task of the courts in constitutional interpretation:

¹⁴⁷ *ibid*

¹⁴⁸ Hirschl, 55

¹⁴⁹ Raz, 365

¹⁵⁰ *ibid*

Their task is to apply the constitution when it is adequate to its task and to improve it when it is wanting.”¹⁵¹

As stated in Chapter 2, lack of constitutional experience can lead countries to cite foreign case law. Also, engaging with foreign precedent can “demonstrate to both domestic and international observers that they are willing to adapt to widely shared best practices and are serious about the rule of law.”¹⁵² The example of Uganda previously described is a case where “reference to foreign sources may be seen as a strategic ‘public relations’ practice that signals the courts independence, legitimacy and accountability to the outer world.”¹⁵³ This is a clear description of a non-merit reason and offers an insight as to why judges may refer to foreign case law, for other reasons than the benefits they may incur by adopting a particular interpretation.

Departure from the State-Centered Approach

Ultimately, the utilization of foreign precedent by justices in constitutional cases departs from the typical state-centered approach, with “one national legal system, with one legitimate law-maker, and one coherent system of norms and legal reasoning.”¹⁵⁴ As I have stated earlier in this thesis, foreign law isn’t binding and thus, under a state-centered approach or according to a formalist originalist

¹⁵¹ *ibid*

¹⁵² Hirschl, 55

¹⁵³ *ibid*

¹⁵⁴ Murkens, 8

approach, “judicial references to foreign law become functionally unnecessary...and normatively illegitimate (foreign law should have no bearing on judicial decisions).”¹⁵⁵ A contrast to this approach can be seen in legal pluralism, where law can be seen as a “constellation of different [i.e. plural and interrelated] legalities.”¹⁵⁶ Under this pluralist conception of a state, “the intersection of different legal orders is called ‘interlegality’ which extends the concept of legitimacy beyond the boundaries of the nation state.”¹⁵⁷ In this current globalized world that we live in, there is more interplay between judges and foreign courts, as well as different legal systems, than has been seen in the past. Boaventura de Sousa Santos describes our current time as one of “porous legality or of legal porosity” with “multiple networks of legal orders forcing us to constant transitions and trespassings.”¹⁵⁸ Further, “our legal life is constituted by the intersection of different legal orders, that is, by interlegality” which is the “phenomenological counterpart of legal pluralism, and [that is why it is a] key concept in a postmodern conception of law.”¹⁵⁹

Problems with Comparative Constitutional Law

While this may be true, the comparative method has been critiqued for being “problematic epistemologically because it 1) presumes similarities in different legal systems, 2) suppresses differences, and 3) ignores the role of legal culture” and in

¹⁵⁵ *ibid*

¹⁵⁶ *ibid*

¹⁵⁷ Murkens, 9

¹⁵⁸ *ibid*

¹⁵⁹ *ibid*

order “to identify its subject-matter, the comparative method has to assume the unity and coherence of the public legal order.”¹⁶⁰ Murkens states, “the formalism of the comparative method tends to overlook the individual historical development and the internal rationalities of the two countries, and to overstress the legal characteristics of that development.”¹⁶¹ However, what is important for my purposes is that “the complexities underlying comparative constitutional law do not prevent the cross-cultural exchange of information.”¹⁶² Now, more than ever, in the globalized world that we live in, judges are conversing with one another like never before. Murkens states that a “degree of transnational harmonization occurs informally”; including global networks of lawyers, judges and prosecutors.¹⁶³ Justice Breyer of the US Supreme Court describes law as emerging from a “complex interactive democratic process” that “includes all legal professionals and laypersons” in which “he likens the process to a kind of transnational ‘conversation’ that in which constitutional court judges are engaged with each other.”¹⁶⁴ Murkens describes this conversation as being similar to Dworkin’s conversational interpretation. Dworkin describes conversational interpretation as being “purposive rather than causal in some more mechanical way” and that it “does not aim to explain the sounds someone makes the way a biologist explains a frog’s croak” but ultimately “it assigns meaning in the light of motives and purposes and concerns it

¹⁶⁰ Murkens, 13

¹⁶¹ *ibid*

¹⁶² *ibid*

¹⁶³ *ibid*

¹⁶⁴ *ibid*

supposes the speaker to have, and it reports its conclusions as statements about his ‘intention’ in saying what he did.”¹⁶⁵ This sounds akin to a kind of conversation to which Murkens refers; however, it is a transnational process. The aim of this discussion is to show that globalization and this interlegality have changed how countries engage with one another. And further, as has been discussed in chapter 2, the citing of foreign precedent isn’t binding and is more akin to the sharing of information between epistemic peers in the democratic process.

Foreign Precedent and Authority

As stated in chapter 2, there is no authority stemming from foreign courts when citing foreign law. In her book *Authorities*, Nicole Roughan states “many relationships of influence might look like relationships of authority, insofar as one authority purports to control another, but unless there is a normative relation” in which there is an “obligation to obey and a right to rule, the relationship remains one of coercion or influence.”¹⁶⁶ This description of influence without obligation seems to be a good way of describing the use of foreign precedent in constitutional cases. This relationship is described as being dialogical by Roughan, in that “coordination is a process of authorities making decisions with one eye upon how other authorities have treated similar issues in the past, and another attuned to

¹⁶⁵ Dworkin, 50

¹⁶⁶ Roughan, 55

influencing how other authorities treat those issues in the future.”¹⁶⁷ This description fits the picture that I have painted of the process over the last two chapters of this thesis. As well, I have tried to showcase that these relationships between certain institutions aren’t “organized into clear hierarchies yet seem to be responsive to one another” as “dialogues between courts and legislatures, national and supra-national courts, and different supra-national courts or tribunals” have all been subject to much attention amongst scholars over recent years in efforts to explore their effects “on legitimacy, and the drivers of dialogue.”¹⁶⁸

Justices Using Foreign Law for a Preconceived Outcome

Another critique that has been made of the process of utilizing foreign precedent in Supreme Court constitutional cases is that comparative constitutional law can be “used for the purpose of corroborating a preconceived thesis.”¹⁶⁹ The critique is that judges are using foreign precedent whenever it works for their desired outcome and in essence are cherry picking desired foreign precedents when it suits their desires. Former Supreme Court Justice Antonin Scalia’s fear was the same, in that he believed that “the invocation or rejection of comparative law is determined by the political preferences of the court.”¹⁷⁰ And to reference a previously discussed court case *Roper v. Simmons*, Scalia stated: “to invoke alien law

¹⁶⁷ *ibid*

¹⁶⁸ *ibid*

¹⁶⁹ Murkens, 5

¹⁷⁰ *ibid*

when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry."¹⁷¹ Firstly, in response to this, it is the case that judges are bound by domestic precedent and as stated previously, the use of foreign precedent is binding in no way and is used merely for a source of further legal information. Secondly, in response to the 'cherry-picking' concern, domestic judges can also use various types of domestic precedents when they see fit. It seems that judges could use certain domestic precedents to achieve a certain "preconceived thesis", but the only difference is that foreign precedents aren't utilized as the main justification for achieving a certain outcome in a constitutional case. Murkens responds to this by speculating if the foreign precedent benefited the arguments of those who rejected its usage, would they change their opinion? In fact, this same sort of ideological criticism has been levied against originalists in the past. It could be the case that certain originalists already held similar views to the founding fathers and thus adopting an originalist or formalist interpretation of a certain constitutional provision is being used as a front for advancing their own political views. In fact, it has been shown that each US Supreme Court Justice has their own political leanings and it can be shown that certain members tend to vote more liberally or conservatively on certain issues. For example, at the end of 2013 there were clearly distinct liberal and conservative wings on the court. This can be seen as "Justices Ruth Bader Ginsberg, Sonia Sotomayor and Elena Kagan" were seen as being on the left side of the political spectrum as they "cast liberal votes around 70 percent of the

¹⁷¹ *ibid*

time.”¹⁷² Whereas, “Justice Breyer was substantially more conservative, casting liberal votes 59 percent of the time.”¹⁷³ Looking to the conservative wing, “Chief Justice John Roberts Jr. and Justice Antonin Scalia were tied at about 44 percent. More to the right were Justice Clarence Thomas and Samuel Alito Jr.” as they “voted in a liberal direction around 40 percent of the time.”¹⁷⁴ So, if there is a pattern amongst justices regarding how they vote, then it seems that most can be seen to have a “preconceived thesis” and thus seem to have certain political biases that inform their decision-making. Therefore, it seems that domestic judges could have their own aims when deciding cases and this cherry-picking that is a concern by critics could be used even with domestic precedents. For example, couldn’t justices just state they used a certain precedent when it was really something else that motivated their decision?

Legal Realism

In line with the views I’ve showcased in this previous paragraph is that of Legal Realism. Legal Realism “is the name given to the views of a group of American jurists whose writing dominated American legal thought in the early to mid-

¹⁷² Fairfield, Hannah, and Adam Liptak. "Taking Sides: A More Nuanced Breakdown of the Supreme Court." *The New York Times*, The New York Times, 26 June 2014, www.nytimes.com/2014/06/27/upshot/a-more-nuanced-breakdown-of-the-supreme-court.html. Accessed 9 Aug. 2018.

¹⁷³ *ibid*

¹⁷⁴ *ibid*

twentieth century.¹⁷⁵ They are “best known for their opposition to the ‘classical’ or ‘formalist’ view that law consists of a body of definite, logically related rules applied in a logical and impersonal fashion by impartial judges.”¹⁷⁶ A common viewpoint amongst Legal Realists involves “their concern with the courts’ role in shaping the law” and they “claimed that judges are not impartial discoverers of pre-existing rules” as “such rules...far from being discovered and applied in a logical fashion, are flexible and open to interpretation, and that interpretation frequently depends on judges’ personal and political biases or philosophies of law and interpretation.”¹⁷⁷ An appropriate quote to summarize the “Legal Realists’ concern that courts do not operate in a neutral, impartial way” is expressed by Oliver Wendell Holmes in stating:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries,

¹⁷⁵ *Readings in the Philosophy of Law*, edited by Keith C. Culver, 2nd ed., Broadview, 2008. 193.

¹⁷⁶ *ibid*

¹⁷⁷ Culver, 194

and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics...¹⁷⁸

Legal Realists essentially argue that politics are as influential in determining legal decisions as the law.

So, it seems that criticism seems to apply regardless of whether judges are using foreign precedent or not. In fact, it has been stated that a way for a justice to make sure that they aren't just imposing their own personal views "into the Constitution's open-textured provisions is to see if differently situated judges elsewhere in the world are reaching the same normative judgment"¹⁷⁹, which is similar to a point I raised in the first chapter of this thesis, where using Mill, I showcased the importance of utilizing other views in order to either reaffirm one's own beliefs or cause one to reconsider one's beliefs. I will reexamine this point later in this chapter.

Lawrence v. Texas

The landmark case of *Lawrence v. Texas* is important not only for the advancement in homosexual rights in the United States, but also for the use of foreign law that was cited in the opinion of the court. In this case, the question before the court was "the validity of a Texas statute making it a crime for two

¹⁷⁸ *ibid*

¹⁷⁹ Eskridge Jr., William N. "United States: *Lawrence v. Texas* and the imperative of comparative constitutionalism." *International Journal of Constitutional Law*, vol. 2, no. 3, 1 July 2004. 556.

persons of the same sex to engage in certain intimate sexual conduct.”¹⁸⁰ In Houston, police officers were called to a private residence “in response to a reported weapons disturbance.”¹⁸¹ Upon entering the residence “one of the petitioners, John Geddes Lawrence” was found engaging in an intimate sexual act with another man, Tyron Garner.¹⁸² The two men were then “arrested, held in custody over night, and charged and convicted before a Justice of the Peace.”¹⁸³ The charges against the two men involved “deviate sexual intercourse, namely anal sex, with a member of the same sex (man)” which was illegal under a Texas statute at the time. Ultimately, the convicted challenged “the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment and of a like provision of the Texas Constitution.”¹⁸⁴ Eventually this case was appealed up to the Supreme Court where three questions were considered, namely, “Whether Petitioners’ criminal convictions under the Texas “Homosexual Conduct” law-which criminalizes sexual intimacy by same-sex couples violate the 14th Amendment guarantee of equal protection” under the law.”¹⁸⁵ Secondly, it was also considered “Whether Petitioners’ criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the 14th Amendment.”¹⁸⁶

¹⁸⁰ "Lawrence v. Texas." *Legal Information Institute*, Cornell University Law School, www.law.cornell.edu/supct/html/02-102.ZO.html. Accessed 9 Aug. 2018.

¹⁸¹ *ibid*

¹⁸² *ibid*

¹⁸³ *ibid*

¹⁸⁴ *ibid*

¹⁸⁵ *ibid*

¹⁸⁶ *ibid*

Lastly, it was questioned whether *Bowers v. Hardwick*...should be overruled.¹⁸⁷

Bowers v. Hardwick was a case decided in June 1986 "in which the Supreme Court upheld (5-4) a Georgia State Law banning sodomy."¹⁸⁸ Ultimately, in *Lawrence v. Texas* this ruling was overturned.

In delivering his opinion, Justice Kennedy stated that "the case should be resolved by determining whether the Petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause" and ultimately the court's holding in *Bowers* was reconsidered. In his opinion Kennedy cited discussion in *Bowers* which stated "the issue presented is whether the Federal Constitution confers a fundamental right upon individuals to engage in sodomy and hence invalidates the laws of many states" where such conduct is made illegal.¹⁸⁹ Kennedy highlighted this point because it is now maintained by the court that "that statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake" and "to say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."¹⁹⁰ In reference to *Bowers* and the statutes in question, Kennedy stated that "their penalties and purposes, though, have more far reaching consequences, touching upon the most private human conduct,

¹⁸⁷ *ibid*

¹⁸⁸ *ibid*

¹⁸⁹ *ibid*

¹⁹⁰ *ibid*

sexual behavior and in the most private of places, the home.”¹⁹¹ Ultimately, it is the case that these laws control a personal relationship which, although it didn’t have “formal recognition under the law,” is still “within the liberty of persons to choose without being punished as criminals.”¹⁹²

Now, as was shown with the review of *Roper*, there were several domestic precedents that were cited as the main justification for the holding of the case. Examples include *Pierce v. Society of Sisters*¹⁹³ and *Meyer v. Nebraska*.¹⁹⁴ However, the “most pertinent beginning point” in the decision of the court was that of *Griswold v. Connecticut*, where it was “established that the right to make certain decisions extends beyond the marital relationship.”¹⁹⁵ Further, in *Eisenstadt v. Baird*, “the court invalidated a law prohibiting the distribution of contraceptives to unmarried persons” and “the case was decided under the Equal Protection Clause...but with respect to unmarried persons”.¹⁹⁶ The court at that time stated that if “the right of privacy means anything, it is the right of the individual, married or single, to be free

¹⁹¹ *ibid*

¹⁹² *ibid*

¹⁹³ "Pierce v. Society of Sisters." *Oyez*, 17 Jul. 2018, www.oyez.org/cases/1900-1940/268us510.

¹⁹⁴ "Meyer v. State of Nebraska." *Oyez*, 17 Jul. 2018, www.oyez.org/cases/1900-1940/262us390.

¹⁹⁵ "Lawrence v. Texas." *Legal Information Institute*, Cornell University Law School, www.law.cornell.edu/supct/html/02-102.ZO.html. Accessed 9 Aug. 2018.

¹⁹⁶ *ibid*

from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”¹⁹⁷

As was discussed in the first chapter, analogous reasoning can be used in judicial opinions to offer support for a decision that doesn’t align perfectly with previous precedent; however, the aim of these cases was to show “the state of the law with respect to some of the most relevant cases when the Court considered *Bowers v. Hardwick*.”¹⁹⁸

In order to justify their decision in *Lawrence*, the US Supreme Court cited the history of stigmatization against sodomy, although it was made clear that “at the outset...that there is no longstanding history in [the US] of laws directed at homosexual conduct as a distinct matter.”¹⁹⁹ Even English prohibitions and laws against such conduct were, the Court added, “to include relations between men and women as well as relations between men and men.”²⁰⁰ With that in my mind, it is also important to note that there was a lack of domestic precedents referring to this specific issue at the time of *Lawrence*; as Kennedy stated in his opinion “it was not until the 1970’s that any State singled out same-sex relations for criminal prosecution, and only nine states have done so.”²⁰¹ This is an important point to highlight, as it was noted in an earlier chapter that citing foreign case law is often

¹⁹⁷ *ibid*

¹⁹⁸ *ibid*

¹⁹⁹ *ibid*

²⁰⁰ *ibid*

²⁰¹ *ibid*

used and is useful when there is a lack of domestic precedent on similar issues.²⁰² It was also noted by the Court that, even after *Bowers*, some states refused to enforce laws “suppressing homosexual conduct.”²⁰³ As well, “over the course of the last decades, States with same-sex prohibitions [had] moved towards abolishing them.”²⁰⁴ The opinion in *Lawrence* made clear that, in rendering its decision, the Court was distancing itself from certain views articulated in *Bowers*, such as the view that “decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization” and that “condemnation of these practices is firmly rooted in Judeo-Christian moral and ethical standards.”²⁰⁵ As Kennedy stated in *Lawrence* “scholarship casts some doubt” on this statement by Chief Justice Burger in *Bowers* as it relates to “private homosexual conduct between consenting adults.”²⁰⁶ What is important for my purposes and for the next part of this chapter, is that Kennedy was clear that “In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty,” offers protections to “adult persons in deciding how to conduct their private lives in matters pertaining to

²⁰² See p. 33-34

²⁰³ *ibid*

²⁰⁴ *ibid*. Some examples include *Jegley v. Picado*, 349 Ark. 600, 80 S. W. 3d 332 (2002); *Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1997); *Campbell v. Sundquist*, 926 S. W. 2d 250 (Tenn. App. 1996); *Commonwealth v. Wasson*, 842 S. W. 2d 487 (Ky. 1992); see also 1993 Nev. Stats. p. 518 (repealing Nev. Rev. Stat. §201.193).

²⁰⁵ *ibid*

²⁰⁶ *ibid*

sex.”²⁰⁷ This deliberate recognition of domestic law being the primary source in this case is important to acknowledge and falls in line with how I’ve described the used of foreign precedent previously in this thesis; it is a source of further information that is acknowledged by judges when they consult with their epistemic peers.²⁰⁸

Foreign Law in *Lawrence v. Texas*

As stated previously, *Lawrence v. Texas* is important for its citation of foreign law and the critiques that arose from this process. Those critiques are similar to that which was received after *Roper v. Simmons*. It is worth noting that, in crafting its opinion, the Court drew on “sodomy and gay-equality decisions by the European Court of Human Rights” and offered them as “one justification for overruling [the] Court’s decision in *Bowers v. Hardwick*.”²⁰⁹ It is also worth noting as well that, *Lawrence* was the first time that “the Supreme Court...cited foreign case law in the process of overruling an American constitutional precedent.”²¹⁰ When deciding *Bowers*, the court referenced the fact that “before 1961 all 50 states had outlawed sodomy, and at the time of the Court’s decision 24 states and the District of Columbia had sodomy laws.”²¹¹ However, as was mentioned earlier, “Justice Powell pointed out that these prohibitions often were being ignored...Georgia, for instance,

²⁰⁷ *ibid*

²⁰⁸ *ibid*

²⁰⁹ Eskbridge, 555

²¹⁰ *ibid*

²¹¹ "Lawrence v. Texas." *FindLaw*, caselaw.findlaw.com/us-supreme-court/539/558.html. Accessed 9 Aug. 2018.

had not sought to enforce its law for decades” and this “history of non-enforcement suggest[ed] the moribund character today of laws criminalizing this type of private, consensual conduct.”²¹² As can be seen, in addition to the citation of foreign law, there was a reliance on empirical fact that domestic laws restricting homosexual conduct weren’t being enforced.

In addition to this, in reference to Chief Justice Burger’s previous statement – mentioned earlier – about “the history of western civilization” and “Judeo-Christian moral and ethical standards” there was a multitude of other authorities that held opposing opinions on the rights of homosexuals.²¹³ For example, “a committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct”²¹⁴ and in 1963 drafted *The Wolfenden Report: Report of the Committee on Homosexual Offences and Prostitution*.²¹⁵ Ten years after this report was published, “Parliament enacted the substance of those recommendations” with the *Sexual Offences Act*.²¹⁶ As well, the ECHR decided the case of *Dudgeon v. United Kingdom*, which was similar to *Bowers* - five years before the latter was decided –

²¹² *ibid*

²¹³ *ibid*

²¹⁴ *ibid*

²¹⁵ This is the report that sparked the famous Hart-Devlin Debate. Devlin argued that no society could exist whilst having a shared political structure and not a shared moral structure. He believed that citizens’ actions that break from this moral structure could cause the dissolution of society. Hart believed that the problem with this view is that a change in a society’s morality would result in the destruction of that society and thus, a morality in a society does not change and if it does, we would have to say that one society had disappeared and another had begun. Hart instead believed that society could change with the times and still remain its identity by keeping certain core political commitments. See *Political Thought*, 138-141

²¹⁶ *ibid*

where “an adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct.”²¹⁷ However, it was the case at the time that “the laws of Northern Ireland forbade him that right.”²¹⁸ Despite this, “the court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights.”²¹⁹ Justice Kennedy drew upon this case in defending the decision in *Lawrence*, explaining that this convention is authoritative in “all countries that are members of the Council of Europe (21 nations then, 45 nations now).”²²⁰ He further noted that the “decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.”²²¹

As was shown previously in this thesis, the citation of foreign law seems to be inconsistent with the core views of originalism and has been criticized by popular originalists like former Supreme Court Justice Antonin Scalia. The case of *Lawrence v. Texas* has been no different as Scalia (one of the dissenters) criticized the court for its use of foreign law. Scalia stated in his dissent that “Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on criminal behavior. Much less do they spring into existence, as the Court

²¹⁷ *ibid*

²¹⁸ *ibid*

²¹⁹ "Lawrence v. Texas, 539 U.S 558 (2003)." *Justia US Supreme Court*, supreme.justia.com/cases/federal/us/539/558/case.html. Accessed 9 Aug. 2018.

²²⁰ *ibid*

²²¹ *ibid*

seems to believe, because foreign nations decriminalize conduct.”²²² The arguments of this thesis provide the basis for several responses to Scalia’s critique. Firstly, as has been stated previously in this chapter, foreign law in this case wasn’t drawn upon as a source of binding precedent. Kennedy specifically stated (also referenced earlier in this chapter) that domestic views ultimately are of most importance in the court’s decision-making process. Foreign law here seems to have been used persuasively, as providing evidence of the inaccuracy of some of the claims made in *Bowers*. The Court’s take in that case on the “evolving standards” governing the permissibility of same-sex relations actually could be seen to be inaccurate if one were to look to how different countries in the world were treating similar issues. The various examples that were cited by the court were used to show how other countries had been dealing with similar issues and it seemed that the world, and even the US through its widespread non-enforcement of anti-sodomy laws had been distancing itself from laws that discriminate against homosexual individual and certain sexual acts that they engage in in private. As stated previously in this thesis, the utilization of foreign precedent can help judges to uphold democratic values under Dworkin’s constitutional conception of democracy. Looking to foreign law can allow domestic judges to realize that their own society and its legal system may have swayed from certain fundamental democratic values that we hold dear in a constitutional democracy, such as freedom and equality. Discriminating against certain sexual acts that exist within certain homosexual relationships, seems to not

²²² *ibid*

be treating all couples as equal, as the law is basically stating that heterosexual sexual relationships are legal, whilst homosexual ones are not. This fact, which might not have been immediately apparent, became so when the Court looked to other jurisdictions and examined how they had more successfully implemented their core democratic commitments.

Scalia further stated that “The *Bowers* majority never relied on ‘values we share with a wider civilization’” but “rather rejected the claimed right to sodomy on the ground that such a right was not ‘deeply rooted in this Nation’s history and tradition’”.²²³ In reply, I would argue that regardless of whether or not the *Bowers* decision was ‘deeply rooted in the nations history and tradition’, there are some practices (like segregation and slavery) that were once deeply rooted in the history and tradition of the United States. These were deeply morally problematic – and the Court was right to strike down laws that enshrined them. Regardless of whether they were currently deeply rooted – they shouldn’t have been in any nation truly committed to democratic values. Once again, this point might not have seemed obvious till the Court turned its gaze towards foreign jurisdictions with different traditions and histories. Lastly, Scalia’s statement that “The court’s discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta” –indeed “dangerous dicta, ‘since this Court...should not impose foreign moods, fads, or

²²³ *ibid*

fashions on Americans” is highly problematic.²²⁴ Examining instances of other democratic countries holding progressive views on gay rights doesn’t seem to be ‘dangerous.’ On the contrary, it seems to be a further source of knowledge for judges to utilize when constructing their decisions.²²⁵ As stated previously, these foreign precedents are in no way binding; however, they are instructive and bring with them a whole host of benefits. For example, being able to uphold principles that we value in constitutional democracies under Dworkin’s constitutional conception of a democracy and having access to information on how other judges, or their peers in the democratic process, have tackled similar issues. There is nothing ‘dangerous’ about the justices’ citation of foreign precedent, when it is being used for these purposes and not as a source of binding precedent. Appeals to foreign precedent can offer further legal information and allows judges to better uphold constitutional principles that we hold dear in a constitutional democracy.

Emerging Normative Consensus

In his paper entitled *Lawrence v. Texas and the Imperative of Comparative Constitutionalism*, WN Eskridge describes how “relevant and informative” it can be for justices to “know how foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances”; this is especially the case when “those opinions reflect a legal tradition that also underlies

²²⁴ *ibid*

²²⁵ *ibid*

our own.”²²⁶ In fact, as stated previously, judges can use foreign precedent as a way to make sure that they aren’t just imposing their own ideologies on open-textured provisions and can see if judges in other parts of the world are “reading the same normative judgment.”²²⁷ Eskridge states that “if they are, an American jurist can be more confident that her judgment reflects some objective normative reality or consensus and not her own preference or ideology.”²²⁸ As well, if the normative consensus didn’t exist, then the justice has the option of reconsidering their position; however, there is no obligation to do so. In his paper, Eskridge summed it up nicely when stating “In *Lawrence*, one might suspect that the five justices joining the Kennedy opinion simply disagreed with *Bowers* – a scenario where the court should usually not abandon *stare decisis*”; however, “the fact that *Bowers* had received a hostile reputation among judges in Europe, as well as in such traditionalist states as Arkansas, Georgia, Kentucky, Montana, and Tennessee,” gave the justices a “neutral reason to believe there was an emerging consensus that this precedent had not merely misread America’s libertarian traditions.”²²⁹ It was also the case that “the foreign precedents were both normative focal points, helping an American judge to evaluate the consistency of sodomy laws with fundamental and shared constitutional principles, and normative feedback, deepening concerns” that members of the “majority had about the harmfulness as well as the incorrectness of

²²⁶ Eskridge, 556

²²⁷ *ibid*

²²⁸ *ibid*

²²⁹ *ibid*

Bowers.”²³⁰ This emerging normative consensus that Eskridge refers to is informative for domestic judges to refer to in order for them to have further legal information that can be helpful in their decision-making. This is in line with what I’ve been arguing throughout this thesis.

Signals of Respect to Foreign Courts

As was previously shown in this chapter, there are non-merit reasons for judges to utilize foreign precedent in constitutional cases. These can be reasons such as citing foreign precedent in order to distance your country from a past that you aren’t proud of, like the case of the Ugandan Supreme Court. As well, this instance could be seen as also a way of showing respect to foreign courts. There are diplomatic benefits that can occur from domestic judges utilizing foreign precedent and implicitly stating that they agree with ways that foreign judges have solved similar constitutional problems. Eskridge states in his paper that the *Declaration of Independence* states that “the colonists decision to separate from the UK was reached in a process that accorded “a decent respect to the opinions of mankind”, which showcases that the US at that time had respect for the opinions of other countries and didn’t outright close themselves off to what others in the world were doing.²³¹ Throughout US history, judges have utilized foreign law for various reasons. For example, Chief Justice John Marshall “interpreted admiralty and

²³⁰ *ibid*

²³¹ Eskridge, 557

maritime statutes (a great portion of the Court’s early work) to be consistent with international law and the law of the sea.”²³² As well, “Justice Harry Blackman wrote that this ‘decent respect to the opinions of mankind ‘requires that ‘evolving standards of decency’ should be measured, in part, against international norms.”²³³ What this suggests is that there are many reasons for the US and other countries to utilize foreign law. It seems that there are many benefits to doing so. Eskridge states “it is better for the US, and for the world, if it cooperates with other countries and shows them respect.”²³⁴ Further, if one country shows “cooperation and respect” then being respectful and reciprocal can be beneficial with a mentality of “we respect and help you, and we expect you to respect and help us.”²³⁵ “[T]he *Lawrence* majority would have invalidated the Texas sodomy law with or without the help of the transnational materials.” “[B]ut citing them so prominently was a way for the Court to signal other countries that the Court is attentive to their norms and is a cooperative court.”²³⁶ With this being said, and bearing in mind that citation of foreign precedent is not legally required, there are many further reasons for the Court to engage with foreign precedent. For example, doing so can go a long way towards enabling the US Supreme Court to remain a leader “in a range of constitutional issues.”²³⁷ If it truly does wish to play this role, then it needs to keep

²³² *ibid*

²³³ *ibid*

²³⁴ *ibid*

²³⁵ *ibid*

²³⁶ *ibid*

²³⁷ *ibid*

itself “informed as to the views of judges in other countries” and accord “them the respect that they deserve.”²³⁸

In wrapping up this chapter which largely focused on the use of foreign law in *Lawrence v. Texas*, I want to address Scalia’s rejection of the “cosmopolitan spirit” exemplified in Kennedy’s opinion.²³⁹ I believe that Eskridge summed it up nicely when he said that “the Lawrence dissenters should abandon this kind of unhelpful discourse and revert to the sentiments of an earlier Scalia dissent.”²⁴⁰

The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so implicit in the concept of ordered liberty, that it occupies a place not merely in our mores but, text permitting, in our constitution as well.²⁴¹

²³⁸ *ibid*

²³⁹ *ibid*

²⁴⁰ *ibid*

²⁴¹ *ibid*

Conclusion

As can be seen, there are various concerns put forth by critics regarding the use of foreign precedent in Supreme Court constitutional cases. The process has drawn criticism, for example, due to the utilization of law that exists outside of one's own domestic borders. A common critique that I have responded to in this thesis is that the process is undemocratic, as I mentioned in the first chapter, and attempted to respond to this critique by distinguishing between procedural and constitutional conceptions of democracy. I also looked at the case of *Roper v. Simmons* in order to further my argument that foreign precedent is primarily used persuasively in cases, as a further source of legal knowledge, and justices aren't bound in any way by foreign precedent.

In my second chapter, I acknowledged other critiques of the use of foreign precedent; namely, that this transnational process departs from the classic sovereignty and state-centered image of national law and that since foreign precedent isn't considered to be a valid source of law, it shouldn't be considered. Once again, it is important to point out that, like in *Roper*, the use of foreign precedent didn't constitute the holding of the case and was merely used persuasively in order to supplement their opinion with further legal knowledge. The changes in the common law of the US at the time justified the decision in *Roper*, as they believed that the death penalty shouldn't be utilized against citizens whose brains hadn't been fully developed. I also responded to a critique by Scalia that the

constitution should only be amended through proper procedures and not through the courts; as well as the critique that the constitution should serve as an anchor and this can't be done when the different provisions are constantly being reappraised. In this chapter, I also attempted to justify the use of foreign precedents under both the procedural and constitutional conceptions of democracy that Dworkin refers to in *Freedom's Law*. This is done through differentiating between true moral commitments and moral opinions. True moral commitments are something akin to what Rawls believed sometimes conflicted with our moral opinions, and if we were able to have all our beliefs become consistent with one another through some sort of reflective equilibrium, then this would become apparent. In this chapter, I attempted to show that often when foreign precedent are used, judges are appealing to these true moral commitments that the majority of citizens hold in constitutional democracies. When legislation is passed that is inconsistent with a community's true commitments, then perhaps judges engaging in judicial review can utilize these foreign precedents as a way of helping to uphold these true moral commitments that a community holds. I also attempted to justify this process under a constitutional conception of democracy, where there are other requirements that need to be met besides majoritarian procedures, in order for a country to be a true democracy.

In my last chapter, I showcased other reasons that judges may look to foreign precedent. I utilized Raz's discussion of merit reasons and non-merit reasons in order to show that examples of non-merit reasons for judges to use foreign precedent were examples like of the Ugandan Supreme Court trying to distance itself

from decisions in the past that they weren't proud of. As well, in this chapter I responded to other critiques of the use of foreign precedent. For example, another common critique is that judges are utilizing foreign precedent in order to justify a preconceived outcome that they are wanting. In essence, critics are worried that judges are cherry-picking foreign precedents that will help them get to a certain conclusion that will further certain political beliefs that they have. Lastly, I examined the landmark case of *Lawrence v. Texas* in order to further showcase how foreign precedent is used persuasively in constitutional cases and judges are in no way bound by these precedents or utilize them to justify the holding of the case.

Ultimately, with this thesis I have argued that there are benefits to the use of foreign precedent in Supreme Court constitutional cases. These foreign precedents provide justices with further pieces of legal knowledge that they can utilize in order to uphold domestic democratic values and to see how their peers in the democratic process have attempted to tackle similar situations. With the examples of *Roper* and *Lawrence*, it is my hope that it can be seen that foreign precedent helped American Supreme Court Judges strike down laws that were immoral and inconsistent with certain democratic values that are inherent in the Constitution.

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