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Article

The Judicial Role in New Democracies: A Strategic Account of Comparative Citation

Johanna Kalb†

I.	INTRODUCTION	424
II.	THE JUDICIAL ROLE IN TRANSITION.....	430
	A. Diagonal Accountability	430
	B. Institutional Empowerment.....	433
III.	COMMUNICATING THROUGH FOREIGN CITATION.....	437
	A. Constitutional Frameworks.....	438
	B. Judicial Decisionmaking.....	439
	C. Public Relations	441
	D. Institution Building	442
IV.	CREATING DIAGONAL ACCOUNTABILITY THROUGH FOREIGN CITATION.....	444
	A. Establishing Judicial Legitimacy and Independence.....	445
	B. Legitimizing Domestic Institutions.....	448
	1. Foreign Citation as Acceptance	449
	2. Foreign Citation as Resistance.....	451
	3. Foreign Citation: Mediating Acceptance and Resistance	452
	4. Foreign Citation: Co-option.....	452
V.	LESSONS FOR THE DEBATE.....	453
	A. Reconsidering the Antidemocratic Critique.....	454
	B. Reconsidering the Methodological Critiques.....	454
	C. Beyond Transition: Comparative Citation Continued	459
VI.	CONCLUSION	463

† Associate Professor of Law, Loyola University New Orleans College of Law. This Article has benefited tremendously from conversations with Andrea Armstrong, Denny Curtis, Claire Dickerson, David Fontana, Robert Garda, Tom Ginsburg, Jancy Hoefel, David Law, David Landau, John Lovett, Sachin Pandya, Rachel Rebouché, Judith Resnik, Nicholas Robinson, Jessica Roberts, Craig Senn, Reuben Teague, Robert Verchick, and Keith Werhan, and from the feedback given during presentations at the Law & Society and SEALS annual meetings, at Tulane University Law School, at the University of Connecticut Law School, and at the American University Washington College of Law 2011 Judges and Judging Workshop. I am very grateful for the editorial assistance of the staff of the *Yale Journal of International Law*. Aaron Hurd, Emily Posner, Krystal Norton, and Patrick Reagin provided diligent research assistance, and Etheldra Scoggin offered invaluable help in collecting research materials. Thanks finally to Deans Brian Bromberger, Kathryn Venturatos Lorio, and María Pabón López of Loyola University New Orleans College of Law for their financial support during this project.

I. INTRODUCTION

Courts in countries as diverse as Uganda,¹ India,² South Africa,³ and Japan⁴ have regularly cited foreign and international law in their decisions, particularly when in the early stages of democratic transition. Other courts, in countries such as Taiwan and Hungary, also rely consistently on comparative sources, but are less likely to identify them explicitly in decisions, in part because of the way in which opinions are drafted.⁵ Nevertheless, their adoption of key foreign concepts means that “the impact of foreign constitutional courts is easy to detect in many decisions.”⁶

Part of the explanation for the prevalence of this comparative practice in the democracies formed following World War II is clearly structural—their new constitutions often explicitly incorporated international standards or foreign-rights models into their constitutional commitments.⁷ Additionally, many such foreign and comparative references are likely utilitarian; new courts lacking legitimate indigenous jurisprudence may need to borrow early on to

1. Emily Posner, Uganda Constitutional Court Research (Sept. 22, 2011) (unpublished manuscript) (on file with author). In 2011, we reviewed the ninety-eight electronically available decisions of the Ugandan Constitutional Court, which serves as the intermediate court of appeals for nonconstitutional matters and as the court of original jurisdiction for constitutional matters. See Tina Kiiza, *Court of Appeal, THE JUDICIARY OF THE REPUBLIC OF UGANDA* (Dec. 14, 2011), http://www.judicature.go.ug/index.php?option=com_content&task=view&id=57&Itemid=101. The court’s decisions are subject to review by the Supreme Court of Uganda. Just under half of these decisions referenced either comparative or international law. While this measure is limited by the sample, it is clear that the Constitutional Court regularly references these sources.

2. Approximately one quarter of all Indian Supreme Court judgments rely on foreign or international law, although that percentage has varied dramatically over time. In the early days of the Court, approximately sixty-five percent of its decisions relied on foreign law, while by the 1990s, approximately ten percent did so. Adam M. Smith, *Making Itself at Home—Understanding Foreign Law in Domestic Jurisprudence: The Indian Case*, 24 BERKELEY J. INT’L L. 218, 240 (2006).

3. In its first three years of existence, the South African Constitutional Court cited foreign law in more than seventy-three percent of its cases. Jacob Foster, *The Use of Foreign Law in Constitutional Interpretation: Lessons from South Africa*, 45 U.S.F. L. REV. 79, 90 (2010). That percentage then declined and has not exceeded sixty percent since 1997. Nevertheless, foreign law is still cited in almost half of the Court’s most recent cases. *Id.*

4. See LAWRENCE W. BEER & HIROSHI ITOH, *THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990*, at 19 (1996) (“[T]he study and use of precedent, including foreign judicial decisions (especially of U.S. and German courts) has become a common feature of judicial life.”); see also Yasuo Hasebe, *Constitutional Borrowing and Political Theory*, 1 INT’L J. CONST. L. 224, 235-36 (2003) (describing the process by which “[t]he Japanese Supreme Court gradually accepted . . . American doctrines” dealing with the protection of individual rights, “with some modifications”).

5. See LÁSZLÓ SÓLYOM & GEORG BRUNNER, *CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT 5* (2000) (providing examples of comparative citation in Hungary); David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523, 557-62 (2011) (discussing comparative citation in Taiwan). This is true even in some well-established national judiciaries. See, e.g., Basil Markesinis & Jörg Fedtke, *The Judge as Comparatist*, 80 TUL. L. REV. 11, 28-29 (2005) (explaining that the *avocats généraux* who advise France’s Cour de cassation “are nowadays expected to consult foreign law when preparing their recommendations” even though these sources do not, for historical reasons, appear in French judicial opinions).

6. SÓLYOM & BRUNNER, *supra* note 5, at 4-5; see also Law & Chang, *supra* note 5, at 559 (observing the same with Taiwanese constitutional jurisprudence).

7. See Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT’L L. & POL. 707 (2006).

speed up the decisionmaking process.⁸ Constitutional commitment, however, is only a partial explanation, for in many of these countries the rate of use of foreign and international law references does not seem to track directly with constitutional requirements. In other words, engagement with foreign and international law does not seem to vary measurably between nations based on differences between their specific constitutional commitments. For example, South Africa's Constitutional Court is among the courts most active in considering the experience of other countries, even though its Constitution does not require it to do so.⁹ Similarly, the Ugandan Constitutional Court regularly cites both foreign and international law and practice¹⁰ despite the absence of any explicit constitutional directive.¹¹ Despite the constitutional directive to consider international law as part of domestic law, the Namibian Supreme and High Courts consider comparative law more frequently than international law in some areas of their jurisprudence.¹²

Further undermining a purely structural explanation for the level of citation practice is the fact that courts are frequently unclear as to how they are considering the comparative sources.¹³ They often do not distinguish between the level of authority accorded to ratified treaties and unratified or hortatory instruments, for instance. Rather, courts tend to draw on a wide variety of nonbinding foreign and international law sources that include formal international legal instruments, the opinions of other courts, and descriptions of the practices of other nations to support their reasoning.

The debate about the wisdom and legitimacy of this posture towards considering foreign authority has been most heated in the United States,¹⁴

8. The South African Court was quite explicit about this in its early decisionmaking, noting that "[c]omparative 'bill of rights' jurisprudence will no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw." *State v. Makwanyane* 1995 (3) SA 391 (CC) at 414 E, ¶ 37 (S. Afr.). In other courts, no explanation is given for the borrowing, but the court's jurisprudence shows obvious signs of this utilitarian focus. In 2011, we reviewed all electronically available cases from the Malawi Supreme Court of Appeal. The Court cites foreign or international law for persuasive effect in the majority of its electronically available cases; however, these references are commonly to the judicial process of British and other Commonwealth courts. The Court may not consider such citation of law from the historic colonial power as drawing upon "foreign" authority. See Johanna Kalb, Malawi Supreme Court of Appeal (Fall 2011) (unpublished manuscript) (on file with author).

9. The South African Constitution requires consideration, though not adoption, of international law, and permits consideration of foreign law in interpreting the Bill of Rights. S. AFR. CONST., 1996, § 39(1)(b-c).

10. Posner, *supra* note 1.

11. CONST. OF UGANDA, 1995, § 137.

12. Dunia P. Zongwe, *Equality Has No Mothers but Sisters: The Preference for Comparative Law over International Law in the Equality Jurisprudence in Namibia*, in INTERNATIONAL LAW AND DOMESTIC HUMAN RIGHTS LITIGATION IN AFRICA 123-24 (Magnus Killander ed., 2010).

13. For an account of this phenomenon in the jurisprudence of the U.S. Supreme Court, see Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501, 522-24 (2000).

14. For a discussion of some of the political responses to cases considering foreign authority, see Mark Tushnet, "The Constitution Restoration Act" and *Judicial Independence: Some Observations*, 56 CASE W. RES. L. REV. 1071 (2006). None of the proposed legislative initiatives went anywhere in Congress, nor did a proposed constitutional amendment pass. See generally Nicholas Quinn Rosenkranz, *An American Amendment*, 32 HARV. J.L. & PUB. POL'Y 475, 479-82 (2009) (arguing in favor of a

responding to the U.S. Supreme Court's recent use of these sources in resolving a number of hotly contested decisions relating to the death penalty,¹⁵ gay rights,¹⁶ affirmative action,¹⁷ and federalism.¹⁸ The primary substantive critique of the practice has been that its use by the Court is antidemocratic, as these decisions appear to be privileging the views of the "international community," or some subset thereof, over the preferences of this country's citizenry as expressed through the legislative actions of their elected representatives.¹⁹ There are a few different variations on the antidemocratic critique, depending on what type of international or foreign law is under study. One is that the process by which international law is made is itself antidemocratic.²⁰ Another is that reliance on international law to resolve constitutional ambiguities "could effectively result in the subordination of all domestic law" to international standards,²¹ which could (perhaps counterintuitively) weaken domestic constitutional guarantees.²² The crux of the concern appears to be, however, that "[t]he ability of courts to step outside of the 'four corners' of the text and to fill an existing normative cast with contents derived from international law sources liberates judges from the obligation to abide by the original intent of the norm's drafters . . . [and] amplifies their law-creating role"²³ In this way, the debate over the uses of foreign authority has reinvigorated American constitutional theory's long-standing preoccupation with the "counter-

constitutional amendment to foreclose judicial reliance on foreign law in interpreting the U.S. Constitution).

15. See *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

16. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 573 (2003); see also *Bowers v. Hardwick*, 478 U.S. 186, 196-97 (Burger, C.J., concurring), *overruled by Lawrence*, 539 U.S. 558; *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012); *In re Marriage Cases*, 43 Cal. 4th 757, 762 n.70 (Sup. Ct. Cal. 2008).

17. See *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

18. See *Printz v. United States*, 521 U.S. 898, 977-78 (1997) (Breyer, J., dissenting).

19. See, e.g., John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739 (2009). There is also a related methodological critique, which I discuss in more detail below. See *infra* note 156 and accompanying text.

20. See John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1204 (2007) (discussing the process through which customary international law norms are identified and the difficulties inherent in changing them); Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2012 (2004) (discussing the politics of treaty-drafting).

21. Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 686 (2007).

22. See Roger P. Alford, *Misusing International Sources To Interpret the Constitution*, 98 AM. J. INT'L L. 57, 58 (2004).

23. Yuval Shany, *How Supreme Is the Supreme Law of the Land? Comparative Analysis of the Influence of International Human Rights Treaties upon the Interpretation of Constitutional Texts by Domestic Courts*, 31 BROOK. J. INT'L L. 341, 378 (2006).

majoritarian difficulty” of judicial review,²⁴ and has stoked the fires of the national political conversation over the appropriateness of “judicial activism.”²⁵

Nonetheless, as the conversation has expanded beyond our borders to include the experience of other countries’ courts, the presumption as to the antidemocratic nature of the practice has continued to frame the discussion.²⁶ Even supporters of the practice often frame their justifications in terms of the counter-majoritarian critique and offer solutions for resolving the democracy deficit of foreign citation.²⁷ As a result, the most important comparative discussion of foreign citation has been primarily methodological.²⁸

24. Alexander Bickel popularized the notion that judicial review poses a “counter-majoritarian difficulty.” ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 17 (2d ed. 1986). He argued that when striking down the acts of elected officials as unconstitutional, the Supreme Court “exercises control, not on behalf of the prevailing majority, but against it.” *Id.*

25. See Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT’L L. 82, 82 (2004) (“The arguments for categorical ignorance of international law in constitutional adjudication play on exaggerated fears: fear of foreign domination, fear of judicial activism, fear of the unknown.”); Austin L. Parrish, *Storm in a Teacup: The U.S. Supreme Court’s Use of Foreign Law*, 2007 U. ILL. L. REV. 637, 647 (“Citation to foreign law sources has become synonymous with judicial activism, sometimes eliciting shrill claims of an out-of-control Court.”); see also *Judicial Reliance on Foreign Law: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 5 (2011) (statement of Rep. Lamar Smith, Chairman, H. Comm. on the Judiciary) (“Reliance on foreign law exacerbates judicial activism and empowers judges to impose their own policy preferences from the bench.”). The Heritage Foundation’s Rule of Law Initiative includes cases that cite foreign law in their database of “Cases of Judicial Activism.” See *Cases of Judicial Activism*, HERITAGE FOUND., <http://www.heritage.org/initiatives/rule-of-law/judicial-activism> (last visited Apr. 15, 2013).

26. See, e.g., ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 11, 13 (2003) (describing the Supreme Court of Israel as “the most activist, antidemocratic court in the world” as demonstrated in part by its reliance on international and foreign sources); JENNIFER A. WIDNER, *BUILDING THE RULE OF LAW* 184 (2001) (describing a trend towards international law citation in the late 1980s in eastern and southern African courts and noting the potentially antidemocratic impact of this interpretative strategy); Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT’L J. CONST. L. 269 (2003) (arguing against persuasive citation of foreign authority as antidemocratic both generally and in the Argentinian context).

27. Exemplary in this regard is Melissa Waters’s comprehensive comparative study of the nonbinding use of the International Covenant on Civil and Political Rights (ICCPR) by the high courts of Australia, Canada, New Zealand, the United States, and the British Privy Council in the Commonwealth of the Caribbean. See generally Waters, *supra* note 21, at 695 (arguing that courts should evaluate “the legitimacy . . . of a given interpretive technique . . . taking into account various factors that are unique to their nations’ experience with the treaty in question and their domestic context generally”). Based on these courts’ jurisprudence, Waters diagnoses a trend of “creeping monism” among judges and Justices in common law jurisdictions. As part of this trend, judges are “utiliz[ing] treaties in their work despite the absence of implementing legislation giving formal domestic legal effect to the treaties.” *Id.* at 636. She challenges this practice across countries on the grounds that it undermines democratic legitimacy, explaining that “[i]t is from domestic constitutional texts—not from vague notions of a ‘global judicial community’—that domestic courts obtain their legitimacy. Thus, it is to these domestic legal sources, and not to international human rights treaties, that they owe their final allegiance.” *Id.* at 701. Waters concludes by suggesting that this criticism is not fatal to the practice, but rather that common law courts may continue to draw upon unincorporated treaties, assigning them weight based upon their domestic value, as demonstrated by external indicators of the legislative and executive intent. *Id.* at 701-02. In other words, she contends that the practice requires an additional check from the elected branches to ensure democratic legitimacy.

28. See, e.g., Ursula Bentele, *Mining for Gold: The Constitutional Court of South Africa’s Experience with Comparative Constitutional Law*, 37 GA. J. INT’L & COMP. L. 219 (2009); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999); David Fontana, *Refined Comparativism in Constitutional Law*,

The problem is that outside of the United States (and, perhaps, other well-established and wealthy constitutional democracies), the institutional assumptions that underlie the counter-majoritarian critique are absent. Its core idea—that the role of the U.S. judiciary should be limited because these are tasks more appropriate for the legislature—does not hold in many countries because it relies upon basic presumptions about the relative strengths, responsibilities, and competences of different political institutions that are simply inapplicable.²⁹ Thus, the theoretical underpinning of the antidemocratic critique of foreign citation does not translate well to the regimes in which its use is most common.³⁰ Given the prevalence of comparative citation in new democracies, particularly among some of the most successful transitional judiciaries, a full understanding of the meaning of the practice must take into account the context in which it is adopted.

This Article reframes the question about the purpose and effect of foreign citation as one in which meaning and methodology are intertwined within a particular institutional context. It situates the debate about foreign citation within the larger conversation surrounding the judicial role in democratic transition and consolidation. Modern democratic transitions are characterized by a tremendous degree of international influence and pressure, which continues beyond the formal establishment of a democratic government and can threaten the representativeness and accountability of new political institutions. I explain the prevalence of comparative citation among the courts in transitional democracies as in part the result of strategic behavior that aims to legitimate the judiciary and other national institutions and to protect the domestic spaces where democratic processes occur. As such, it may be a tool not just of judicial autonomy and independence, but also, in some cases, of “democracy,” both in the basic sense of enabling political bodies to reflect majoritarian preferences³¹

49 UCLA L. REV. 539 (2001); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005).

29. See David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT'L L.J. 319, 323-32 (2010) (articulating the institutional differences that undermine the counter-majoritarian critique in developing countries).

30. Although the citation practice of all courts has not yet been empirically studied, the existing evidence suggests that it is more common in new and weak democracies. However, the Supreme Court of Canada has been regularly identified as one of the courts most actively engaged in comparative judicial dialogue. See Law & Chang, *supra* note 5, at 532. In a study of the 402 Charter cases the Court decided between 1998 and 2003, foreign or international law was cited in thirty-four. See Bijon Roy, *An Empirical Survey of Foreign Jurisprudence and International Instruments in Charter Litigation*, 62 U. TORONTO FAC. L. REV. 99, 123-24 (2004). Thus, even this very active court seems to reference foreign and international law at a relatively low rate (approximately eight percent of cases decided).

31. See, e.g., J. ROLAND PENNOCK, *DEMOCRATIC POLITICAL THEORY* 7 (1979) (“‘Rule’ [by the people] means that public policies are determined either directly by vote of the electorate or indirectly by officials freely elected at reasonably frequent intervals and by a process in which each voter who chooses to vote counts equally . . . and in which a plurality is determinative.”); ALBERT WEALE, *DEMOCRACY* 14 (1999) (“[I]n a democracy important public decisions on questions of law and policy depend, directly or indirectly, upon public opinion formally expressed by citizens of the community . . .”).

and also in the structural sense of protecting and preserving democratic institutions.³²

Parts II and III provide a theoretical framework to explain both the role that the judiciary may play in advancing a democratic transition and the ways in which comparative citation can support these efforts. I begin in Part I by considering the challenges facing the prototypical judiciary in transition and describing how, in new and fragile democracies, courts have an important role to play in developing the mechanisms of “horizontal accountability,”³³ as between governmental institutions, and “vertical accountability,”³⁴ as between the population and the national government. In other words, for the democratic transition to be effective, courts must work to maintain the newly created division of authority between the branches of the government while simultaneously defining and preserving the individual rights that ensure the accountability of that government to its people. Moreover, in many cases, the judiciary must manage these complicated domestic relationships under the watchful eye of the international community of foreign donors, nongovernmental organizations (NGOs), and other powerful international actors, who may be asserting their own pressures on domestic actors. Mediating these multidimensional relationships creates the opportunity for courts to engage in “diagonal accountability.”³⁵ The network of domestic and international relationships that often give rise to the democratic transition in the first instance³⁶ then allows the judiciary to depart from formal, hierarchical accountability paths to mobilize arguments along one axis of accountability in support of promoting accountability along the other.

Of course, whether judges are willing and able to act as agents of diagonal accountability depends on both their internal motivations and their external constraints. But there is reason to believe that diagonal accountability is of real concern to judges. Judges, like other political actors, may be personally and professionally invested in the nation-building project. Even in the absence of this kind of commitment, however, a strategic judge might respond to an unstable political environment by seeking out bases of support beyond the regime in power in order to ensure her own survival after the transition. The strategic judge might thus be seeking ways to communicate her value to both domestic and international audiences.

32. See, e.g., ROBERT A. DAHL, *ON DEMOCRACY* 38, 85 (1998) (explaining that “[d]emocracy provides opportunities for: 1. effective participation, 2. equality in voting, 3. gaining enlightened understanding, 4. exercising final control over the agenda, [and] 5. inclusion of adults;” and that the political institutions that are necessary to pursue these goals are “1. elected officials, 2. free, fair and frequent elections, 3. freedom of expression, 4. alternative sources of information, 5. associational autonomy, [and] 6. inclusive citizenship”); S.M. LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 45 (1960) (defining democracy “as a political system which supplies regular constitutional opportunities for changing the governing officials, and a social mechanism which permits the largest possible part of the population to influence major decisions by choosing among contenders for political office”).

33. See *infra* notes 42–43 and accompanying text.

34. See *infra* note 44 and accompanying text.

35. See *infra* note 49 and accompanying text.

36. See *infra* notes 45–47 and accompanying text.

As Part III explains, foreign citation offers courts a powerful tool for signaling their fidelity to good governance to both domestic and international actors. By limiting their own discretion and adopting widely acknowledged international norms or foreign best practices, courts can draw attention and lend authority to their own decisionmaking. The impact of this strategy extends beyond simply promoting acceptance of the outcomes in particular cases. Rather, as Part IV illustrates through a series of national examples, the strategic and consistent use of foreign citation can work to promote the institutional goals of diagonal accountability by allowing courts to enhance their own legitimacy and autonomy and protect the authority of the elected branches in the face of challenging domestic and international pressures. From a democratic theory perspective, the use of comparative citation is thus acceptable in that it draws on “transnational checks and balances”³⁷ to help create and maintain space for the democratic deliberation necessary to validate the authority of the new governmental structure and its institutions.

Finally, Part V concludes with reflections on how this strategic account fits into the broader debate on both the appropriateness of foreign citation and its proper application. Long after democracy is established, institutional failures and international pressures may threaten the legitimacy of representative institutions, particularly in countries at earlier stages of economic development.

II. THE JUDICIAL ROLE IN TRANSITION

The role of the judiciary in transitional regimes has received increasing attention in the last few decades based largely on two historical developments. First, constitutionalism and judicial review have become increasingly pervasive attributes of late twentieth-century political transitions, which has increased the predominance of the judicial role in most new democratic regimes. Second, a growing number of countries that once held democratic elections have regressed into authoritarian or semi-authoritarian rule³⁸ or have simply failed to move beyond the thin electoral definition of democracy.³⁹ In this historical context, scholars have turned their focus to the role that courts can play in helping to consolidate or solidify the post-election transition to a democratic order.

A. *Diagonal Accountability*

According to Juan J. Linz and Alfred Stepan, democratic consolidation is complete

when a government comes to power that is the direct result of a free and popular vote, when this government *de facto* has the authority to generate new policies, and

37. Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law By National Courts*, 102 AM. J. INT'L L. 241, 269 (2008).

38. See generally Guillermo O'Donnell, *Delegative Democracy*, 5 J. DEMOCRACY 55 (1994) (analyzing various countries that replaced authoritarian regimes with democratic governments and discussing the transition from a democracy in name alone to a truly representative democracy).

39. *Id.*

when the executive, legislative, and judicial power generated by the new democracy does not have to share power with other bodies *de jure*.⁴⁰

As is now widely acknowledged, the project of democratic consolidation is inhibited by accountability failures in political institutions. In other words, democracy stalls⁴¹ or collapses because institutional weaknesses undermine the processes by which governmental actors are held responsible for performing their appropriate functions. Courts can aid in democratic consolidation by reinforcing constitutional structures of accountability across a number of different planes.

First, a credible and autonomous judiciary may serve as an important mechanism of horizontal accountability. “In institutionalized democracies, accountability runs . . . horizontally across a network of relatively autonomous powers (i.e. other institutions) that can call into question, and eventually punish, improper ways of discharging the responsibility of a given official.”⁴² Given the primacy of judicial review in most new regimes, courts are well positioned to ensure that other governmental actors are subject to the constraints of the law. An effective judiciary may thus be a key institutional actor in preventing the reconsolidation of power in the executive that has characterized so many nations in transition.⁴³

Courts also play a role in vertical accountability, which can be understood to characterize the relationship between the citizenry and the national government. In introducing this concept, Guillermo O’Donnell focuses on the methods by which nonstate actors in media and civil society can continue to hold state actors to account through regular election, social mobilization, and media oversight.⁴⁴ An effective judiciary can protect and enable these processes of vertical accountability by ensuring governmental respect for the individual rights that underlie them—for example, by ensuring access to the voting booth and protecting freedom of speech and association.

40. JUAN J. LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE 3 (1996). More simply, consolidation occurs when democracy is “the only game in town.” *Id.* at 5. Robert Dahl’s “polyarchy” also requires not only democratic electoral conditions, but also the political institutions of modern representative democracy. See ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 218 (1989). These notions deepen the concept of democracy from earlier definitions that focused entirely on the existence of free and fair elections as the marker of democracy.

41. A number of scholars have recognized that democracies may persist without reaching consolidation. See, e.g., O’Donnell, *supra* note 38, at 56, 61-62 (defining delegative democracy as those governments where ultra-presidentialism blocks the rule of law and other democratic institutions).

42. *Id.* at 61-62.

43. See MARINA OTTAWAY, DEMOCRACY CHALLENGED: THE RISE OF SEMI-AUTHORITARIANISM 3-4 (2003) (describing the emergence of semi-authoritarian regimes in the Soviet successor states, North and Sub-Saharan Africa, Latin America, and Asia); see also MICHAEL BRATTON & NICHOLAS VAN DE WALLE, DEMOCRATIC EXPERIMENTS IN AFRICA: REGIME TRANSITIONS IN COMPARATIVE PERSPECTIVE 235 (1997) (highlighting the importance of political institutions, including the judiciary, in enabling democratic consolidation).

44. O’Donnell, *supra* note 38, at 55-69; see also GUILLERMO O’DONNELL, DEMOCRACY, LAW, AND COMPARATIVE POLITICS: STUDIES IN COMPARATIVE INTERNATIONAL DEVELOPMENT 1, 7-36 (2001) (exploring the concept of agency as it is expressed in the legal systems of existing democracies); Guillermo O’Donnell, *Horizontal Accountability in New Democracies*, in THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES 29, 29-30 (Andreas Schedler et al. eds., 1999) (examining how media and a professionalized judiciary promote horizontal accountability).

While O'Donnell's vertical axis ended with the national government, in the democracies of the last fifty years, the notion of vertical accountability arguably extends further to characterize the relationship between the domestic population, the national government, and the international community, which includes international courts, the governments of other nations, and international NGOs. Most recent democratic transitions were in fact driven by pressures from both internal and external constituencies, sometimes in concert.⁴⁵ For example, "[f]ew would question the central role played by occupation forces in fostering democratic government in Germany and Japan after World War II," while "the American security umbrella played a similar facilitating function for democracy in South Korea, and Taiwan."⁴⁶ In recent decades, international sanctions have helped to force internal political change (perhaps most notably in South Africa), while "the export of election monitoring technologies such as parallel vote tabulation and exit polls played a crucial role in bringing down Augusto Pinochet in Chile in 1988, unseating Slobodan Milošević in Serbia in 2000, and sparking the Orange Revolution in 2004."⁴⁷ In each of these cases, donor funding has helped to generate and preserve a global web of civil society groups, which has helped to inspire and operationalize the indispensable efforts of domestic advocates during transitions.⁴⁸ Moreover, even long after the formal democratic transition has occurred, new governments, particularly in the economically underdeveloped countries of the Global South, continue to confront pressures from the international community to maintain systems of democratic governance, to protect and promote human rights, and to facilitate economic integration.

Thus, governmental actions during the transitional period and beyond are under increased levels of scrutiny from both vertical and horizontal audiences, which can mobilize each other in support of accountability at the national level. The judiciary can also play a role in mediating these relationships by protecting the domestic rights that enable these transnational connections—by protecting access to the Internet and to international travel, for example. The ongoing activity along both of the axes creates the opportunity for the judiciary to engage in what we may describe as "diagonal accountability."⁴⁹ In modern

45. See generally LAURENCE WHITEHEAD, *THE INTERNATIONAL DIMENSIONS OF DEMOCRATIZATION: EUROPE AND THE AMERICAS* (1996) (discussing the role of international relations in the democratic development of states in the Americas); Kristian Skrede Gleditsch & Michael D. Ward, *Diffusion and the International Context of Democratization*, 60 INT'L ORG. 911 (2006) (arguing that international context influences democratic transition); Jon Pevehouse, *Democracy from the Outside-In? International Organizations and Democratization*, 56 INT'L ORG. 515 (2002) (theorizing the influence of regional international organizations on successful democratic transitions).

46. Michael McFaul, Amichai Magen & Kathryn Stoner-Weiss, *Evaluating International Influences on Democratic Transitions 5* (Stanford Ctr. on Democracy, Dev. & the Rule of L. Working Paper, 2007), http://iis-db.stanford.edu/res/2278/Evaluating_International_Influences_-_Transitions_-_Concept_Paper.pdf.

47. *Id.* at 5.

48. *Id.* at 5-6.

49. Anne Marie Goetz and Rob Jenkins introduced this term to describe the potential role that nonstate actors, such as NGOs, could play in promoting horizontal and vertical accountability. See Anne Marie Goetz & Rob Jenkins, *Hybrid Forms of Accountability: Citizenship Engagement in Institutions of Public-Sector Oversight in India*, 3 PUB. MGMT. REV. 363, 368 (2001). They describe, as an example,

regimes in transition, the judiciary must be responsive to activities on both the vertical and horizontal axes. The challenge is in satisfying these different audiences that are sometimes in harmony and sometimes in conflict. The courts, given their responsibility for preserving the possible channels of horizontal and vertical accountability, are uniquely positioned to manage this overlap and can mobilize one axis “diagonally” in support of promoting accountability along the other. Courts may draw on international support “vertically” to protect against encroachment from the other branches “horizontally”—for example, by reaching out to influential international institutions to put pressure on the president to comply with judicial orders limiting executive authority. Alternatively, courts may be well positioned to safeguard the authority of other domestic institutions along the horizontal axis by acting as a site of resistance against coercive international pressures—for example, by striking down as unconstitutional domestically unpopular legislation forced on the elected branches by international actors.

My use of the notion of “diagonalism” thus recognizes the multidimensional channels of accountability that are available to judges in these transitional regimes. Because the formalized mechanisms of individual rights and separation of powers are not well established in these countries, alternative and informal channels of communication and leverage between domestic and international audiences may be much more effective in promoting accountability. This Article explains how courts can use comparative citation to engage these channels of diagonal accountability. Before turning to this discussion, however, the next Section considers why judges might choose to take on this role.

B. *Institutional Empowerment*

Whether a judiciary is able and willing to be an effective agent of diagonal accountability depends on both internal motivation and external constraints. As the judiciary’s role in democratic transition has become more prominent, scholars have begun to examine the behavior of judges in these regimes in order to identify the conditions most conducive to the emergence of independent judicial institutions. This project initially drew from the U.S. literature exploring strategic models of judicial behavior. The strategic models

the role of public interest litigation in India to demonstrate the way in which citizens can “enter into legal-constitutional accountability institutions to become active demanders of answerability in a forum that carries the weight of enforceability.” *Id.* This term has since been expanded to encompass entities like citizen-led institutions that operate from outside the state to promote horizontal accountability. See Mitchell O’Brien, *Social Accountability—Citizens, Civil Society, and the Media Working with Parliament to Prevent Conflict and Reduce Poverty*, in WORLD BANK, *PARLIAMENTS AS PEACEBUILDERS IN CONFLICT-AFFECTED COUNTRIES* 111 (Mitchell O’Brien et al. eds., 2008) (“[D]iagonal accountability . . . breaks down the strict division between vertical and horizontal accountability and augments the limited effectiveness of civil society’s watchdog function by breaking the state monopoly for executive oversight . . .”). Alternatively, it has been used to describe administrative accountability mechanisms like ombudsmen and inspectorates that stand in no “hierarchical relationship to public organisations and have few powers to enforce their compliance.” Marc Bovens, *Analysing and Assessing Public Accountability: A Conceptual Framework*, 13 *EUR. L.J.* 447, 460 (2007).

find that judicial decisionmaking is based significantly on the anticipated reactions to those decisions by other institutional and political actors.⁵⁰ The early studies, which focused on the U.S. Supreme Court, supported the strategic account by demonstrating that the Justices are more likely to tailor their decisions to avoid reversals by Congress⁵¹ or to align their decisionmaking with the preferences of the executive administration.

This account of judicial behavior has been challenged by Segal and Spaeth, who adopt the “attitudinalist” approach to judicial behavior. They argue that “institutional protections for judges and high costs in reversing judicial decisions [mean that] judges do not need to fear the reactions of other branches. The institutional structures of the American government effectively enable judges to follow their ‘sincere’ policy preferences.”⁵² Even if Segal and Spaeth are correct that the presence of these institutional structures undermines the strategic theory in the U.S. context,⁵³ their critique would make it more relevant to countries in transition. The robust protections that allow U.S. judges to decide cases without real fear are not well-established in transitional regimes: “Protections for security of tenure are untested, extra-institutional threats to judges’ safety abound, and expectations that political actors will actually follow judicial orders are uncertain.”⁵⁴ Thus, attention to how other actors will behave is pressing for judges in these societies. While all judiciaries lack the power of the sword or the purse,⁵⁵ for courts in transitional democracies, this problem is more than theoretical.

Recognizing these differences, scholars have begun to develop models of judicial independence specifically for nondemocratic⁵⁶ regimes. Given the lack of real institutional protections and the potentially high cost of noncompliance,⁵⁷ courts in these countries could reasonably be expected to

50. LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); Lee Epstein & Jack Knight, *Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead*, 53 POL. RES. Q. 625, 628 (2000).

51. See Pablo T. Spiller & Rafael Gely, *Congressional Control or Judicial Independence: The Determinants of United States Supreme Court Labor-Relations Decisions, 1949-1988*, 23 RAND J. ECON. 463 (1992).

52. Peter VonDoepp, *Politics and Judicial Assertiveness in Emerging Democracies: High Court Behavior in Malawi and Zambia*, 59 POL. RES. Q. 389, 390 (2006) (citing Jeffrey A. Segal, *Separation of Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997)).

53. There is considerable dispute as to whether even the U.S. Justices are so immune to external pressures. See, e.g., Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1997) (summarizing and critiquing the attitudinal model).

54. VonDoepp, *supra* note 52, at 390.

55. THE FEDERALIST NO. 78, at 300 (Alexander Hamilton) (John Spencer Bassett ed., 1921).

56. Nondemocratic or “hybrid” governments are “regimes [that combine] both democratic and authoritarian elements.” Larry Diamond, *Thinking About Hybrid Regimes*, 13 J. DEMOCRACY 21, 23 (2002).

57. See, e.g., *Further Attacks upon the Judiciary in Zimbabwe Lead to Resignation of Judge*, INT’L BAR ASS’N HUM. RTS. INST., http://www.ibanet.org/Human_Rights_Institute/About_the_HRI/HRI_Activities/HRI_Media/HRI_Interventions/archive/000501_Zimbabwe.aspx (last visited Jan. 17, 2013) (describing a Zimbabwean judge’s resignation in response to public threat to attack him in his home); *International Bar Association Condemns Attacks on Judiciary*, COLOMBO TELEGRAPH (Oct. 31, 2012), <http://www.colombotelegraph.com/index.php/international-bar-association-condemns-attacks-on-judiciary>

align their decisionmaking with the preferences of power-holders.⁵⁸ Nonetheless, the reality on the ground is far more complex, with judiciaries in nondemocratic systems often acting in ways that limit the power of the governing regime. A growing literature attempts to account for these unexpectedly independent courts by identifying the incentive structures in these regimes that would reward independent behavior.⁵⁹ Most of the work in this area has focused on the concerns that would motivate political actors to delegate power to the courts.⁶⁰ For example, even nondemocratic regimes may value the public legitimacy that legal approval of their actions bestows.⁶¹ For the validation of the courts to be meaningful, however, “judicial institutions must enjoy some degree of real autonomy from the executive, and they must, at least on occasion, strike against the expressed will of the regime.”⁶² External pressures may also push nondemocratic regimes to allocate power to courts. The establishment of independent courts may be necessary to attracting much-needed foreign direct investment or development aid.⁶³ These structural accounts have significant explanatory power, but they tend to center the narrative of judicial independence on the desires of other political actors, reflecting an underlying assumption that “courts operate in an environment of national political constraints that compromise their own institutional legitimacy and decisional efficacy.”⁶⁴

A small but growing body of work focuses more directly on the actions of the judges themselves. Jennifer Widner argues that the incentives that political actors have to delegate power during a constitutional transition may not ensure their continued respect for judicial independence, particularly once it has

(reporting on the International Bar Association Human Rights Institute’s response to threats and attacks on members of the Sri Lankan judiciary); *Venezuela: Stop Attacks on Judicial Independence*, HUMAN RIGHTS WATCH (Apr. 8, 2010), <http://www.hrw.org/news/2010/04/08/venezuela-stop-attacks-judicial-independence> (describing a Venezuelan judge’s jailing in retaliation for her enforcement of a law limiting pretrial detention to two years).

58. See Tom Ginsburg & Tamir Moustafa, *Introduction: The Functions of Courts in Authoritarian Politics*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 1, 14-18 (Tom Ginsburg & Tamir Moustafa eds., 2008).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 6.

63. For some transitional regimes in the least developed countries (LDCs), donor support is critical to the government’s operations and thus to its survival. In Uganda, for example, foreign aid has made up as much as thirty percent of the government budget in recent years. Haggae Matsiko, *Uganda: Donors Cut Budget Support*, ALLAFRICA: INDEPENDENT (Kampala) (Aug. 9, 2010), <http://allafrica.com/stories/201008101266.html>. This level of support is not uncommon among LDCs. See Rousbeh Legatis, *Translating Southern Successes into Helping Least Developed Countries: An Interview with Josephine Ojiambo, Kenya’s Ambassador to the U.N. and President of the General Assembly’s High-Level Committee on South-South Co-operation*, GUARDIAN (London), May 6, 2011, <http://www.guardian.co.uk/global-development/2011/may/06/southern-successes-ldcs-josephine-ojiambo> (discussing the role of donors within African LDCs and how offering advancement and stability is important to maintaining the forty percent of the FDI that is from foreign donors).

64. Nancy Maveety & Anke Grosskopf, “Constrained” Constitutional Courts as Conduits for Democratic Consolidation, 38 *LAW & SOC’Y REV.* 463, 463 (2004).

actually been asserted.⁶⁵ She therefore proposes an important role for the judges in “lock[ing] in” their own independence.⁶⁶ In the African cases that she discusses, judicial reformers worked to professionalize their court systems to make their operations more accessible and more transparent to users and to the judges themselves. This reflected the recognition, in the words of Tanzania’s Chief Justice Nyalali, that “[t]he ultimate safeguard [of judicial independence] is really public opinion.”⁶⁷

Widner’s account also begins to explain why a judge would be motivated to engage in independent behavior even after it becomes clear that the regime will no longer protect (and may even punish) insubordination. If judicial actors are led to believe, either through historical experience or perhaps through signals from the electoral process,⁶⁸ that the dominant party’s control is tenuous, they may seek to broaden their base of support in order to ensure their own survival when and if the regime changes. In other words, in a climate (or in a culture) of political instability, judges may believe that it makes sense not to put all their “eggs in the basket” of the existing government. Instead, in times of uncertainty, judges may be able to build a more reliable base of support external to the government by demonstrating their own neutrality and commitment to good governance.⁶⁹ Rather than trying to pick a winner, judges may “opt for a form of behavior labeled ‘strategic neutrality.’ These judges have incentives to conceal their preferences and render decisions based on legal considerations in political cases, so that they can avoid being labeled as either pro- or antigovernment.”⁷⁰

While “strategic neutrality” was proposed as a response to political instability, even a regime-friendly judge might adopt this strategy as a way of perpetuating the existing power structure in which he holds a privileged position. As others have explained, the ruling government often benefits from the continued participation of the opposition in electoral politics.⁷¹ If the opposition believes that there is nothing to be gained through participating in the political process (because both elections and judicial procedures will always be resolved in favor of the regime), it is more likely to resort to force. Moreover, external observers of the political process, both domestically and

65. JENNIFER A. WIDNER, *BUILDING THE RULE OF LAW: FRANCIS NYALALI AND THE ROAD TO JUDICIAL INDEPENDENCE IN AFRICA* 34-35 (2001).

66. *Id.* at 35.

67. *Id.* at 36 (citing Interview by Jennifer A. Widner with Francis L. Nyalali, Chief Justice, Tanzania High Court, in Washington, D.C. (May 1995)); see also *id.* at 107 (“In the final analysis, [Georges] wrote, the only real safeguard is an alert public opinion, quick to show its resentment when restrictive measures are proposed which are not reasonably justified in a democratic society.” (quoting Philip Telford Georges, *Traditionalism and Professionalism, in LAW AND ITS ADMINISTRATION IN A ONE PARTY STATE: SELECTED SPEECHES OF TELFORD GEORGES* 49 (R.W. James & F.M. Kassam eds., 1973))).

68. See generally Jill I. Goldenzeil, *Veiled Political Questions: Islamic Dress, Constitutionalism, and the Ascendance of Courts*, 61 AM. J. COMP. L. 1, 11-12 (2013) (arguing that when courts see opposition groups gaining power in elections, they begin to “strike bargains between competing political interests and attempt to further their own institutional goals”).

69. VonDoepp, *supra* note 52, at 397 (citation omitted).

70. *Id.* at 397.

71. See Goldenzeil, *supra* note 68, at 1.

internationally, may be watching the court's behavior for indications as to whether the democratic process is functional (and therefore whether the regime in power is worthy of support). Exercising judicial power entirely in support of the existing regime might actually hasten its dissolution. Thus, a regime-friendly judge might engage in strategic neutrality in order to preserve the opposition's continued participation in the constitutional system of governance, and to assure court observers that the process is working properly.

For strategic neutrality to work, however, the judiciary must have an audience for its "good governance" behaviors. The challenge faced by the judiciary in many transitional democracies (particularly those that are economically underdeveloped) is that the domestic constituency for judicial independence is often limited or nonexistent and very difficult to build, given weak social, legal, and technical infrastructure. Judges may be rendering fair and well-reasoned decisions, but if the population isn't aware of or does not understand them, they will do little to mobilize public support for the courts. In these circumstances, judges may find it easier to communicate with and demonstrate their value to an international audience. Furthermore, powerful international actors like foreign donors may also be able to offer more concrete and immediate protection from retaliation or regime change.

To summarize, this Part has presented a frame through which to understand the challenges facing judiciaries in transition. First, in order for the democratic transition to succeed (or at least not fail), the judiciary must perform its accounting and legitimating functions at the intersection of the horizontal and vertical axes because the relevant political community for their decisionmaking extends beyond national borders. Moreover, the judges themselves are internally motivated to engage with these foreign and domestic audiences, as a way of separating their personal or institutional futures from the success of the regime in power. Thus, a strategic account of judging in this environment suggests that these courts will be looking for tools to navigate their domestic responsibilities in a way that helps protect their own institutional reputation and autonomy.

Through this institutional lens, the practice of comparative citation must be reexamined. The next Part considers the use of comparative citation not in terms of the substantive outcomes that it allows in particular cases, but rather as a possible tool of diagonal accountability in a new regime.

III. COMMUNICATING THROUGH FOREIGN CITATION

I have suggested that judges in new and weak democracies may adopt judicial independence as a response to political uncertainty, and that they will be looking for ways to communicate this commitment to a variety of internal and external actors. This Part contends that references to international and foreign law in a court's decisions⁷² can perform an important communicative

72. As others have noted, the debate over this practice has generally been characterized by definitional imprecision. Commentators tend "to conflate foreign and international legal sources and to treat both kinds of sources as part of a broad, vaguely defined category known as 'foreign authority.'"

function about the court's fidelity to rule of law principles. In recent decades, constitution drafters have recognized the potency of making these commitments, and have thus incorporated international and foreign legal norms into the constitutive documents of new regimes. This Part explores the ways in which courts' continued references to these norms may help to legitimate the legal order beyond the drafting period.

A. *Constitutional Frameworks*

As Tom Ginsburg has demonstrated, new constitutional regimes incorporate international law norms to show internal and external pre-commitments to the rule of law.⁷³ "Constitutions [therefore] represent self-binding acts, whereby drafters restrict the actions available to future politicians."⁷⁴ Codifying specific international norms within the constitutional document or adopting a receptive procedural posture towards international and foreign law within the constitutional framework demonstrates to the external audience that the government is serious about building a legal system that adheres to widely accepted standards for legitimate behavior. These foreign and international law commitments serve an expressive purpose for nations emerging from oppressive or dictatorial regimes and eager to reinvent themselves on the international stage. For example, "Argentina borrowed in order to manifest its adherence to the same restrictions on governmental power that characterized the foreign and international law it adopted."⁷⁵ Several of the post-Communist countries did so to differentiate the new order from the past regime.⁷⁶ Finally, South Africa adopted its provision on foreign and international law to rejoin the world community from which it had been excluded during the apartheid regime.⁷⁷

Waters, *supra* note 21, at 630; *see also* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 10-11 (2006) (noting the U.S. Supreme Court's lack of clarity on its use of these sources). For my purposes, foreign law refers to the decisions of foreign national or international courts. International law, by contrast, refers to international agreements like treaties or to customary international law. I use the term "comparative citation" or "foreign citation" to refer collectively to instances when judges and Justices rely on either foreign or on international treaty law for persuasive effect. This generalization creates some ambiguity about what "counts," but this same ambiguity is apparent in the way in which many judicial opinions consider these references. *See supra* note 13 and accompanying text.

73. Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT'L L. & POL. 707 (2006).

74. *Id.* at 710 (citing JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 36-111 (1979); STEPHEN HOLMES, PASSION AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 134-77 (1995); Stephen Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 195 (John Elster & Rune Stagstad eds., 1988)).

75. Rosenkrantz, *supra* note 26.

76. *See* Wictor Osiatynski, *Paradoxes of Constitutional Borrowing*, 1 INT'L J. CONST. L. 244, 249 (2003).

77. The Preamble to the South African Constitution makes this point explicitly, stating that the Constitution is adopted to "[b]uild a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations." S. AFR. CONST., 1996, pmbi.; *see also* John Dugard, *International Law and the South African Constitution*, 1 EUR. J. INT'L L. 77 (1997) (discussing the international legal foundations of the Constitution and their role in allowing South Africa to rejoin the international community).

Additionally, external pressures may require conformity with particular constitutional templates.⁷⁸ In modern transitions, the inclusion of particular constitutional ideas has been a necessary condition of independence,⁷⁹ foreign aid,⁸⁰ or peace.⁸¹ This account of the role of international and foreign law in the drafting process recognizes that “constitution-making is framed not only by domestic ‘upstream’ and ‘downstream’ constraints, but also by constraints of acceptability among and anticipated reaction by other nations.”⁸²

These constitutional precommitments also speak to domestic constituencies. Ginsburg suggests that these constitutional provisions operate in three ways: by committing to subject future performance to international monitoring; by committing to pay costs for future noncompliance with constitutional commitments; and by delegating decisionmaking authority on particular issues to international actors.⁸³ Each of these mechanisms permits constitutional negotiators to delegate some control over constitutional compliance to outsiders. Placing such “international law commitments in the constitution may help to ‘lock in’ democracy domestically by giving important interest groups more confidence in the regime.”⁸⁴ And, because ordinary domestic politics have been so discredited in these countries, insiders are more willing to trust in the validity and integrity of international processes to protect their own interests after the moment of constitutional commitment.

B. *Judicial Decisionmaking*

Given the powerful commitment function that references to international and comparative law serve at the drafting period, it makes sense that comparative citation continues to be invoked as a tool by transitional judiciaries even beyond what is necessitated by newer constitutional structures. Citation of foreign authority provides these transitional judiciaries with a common language for mediating between national and international audiences to legitimate the new institutions of the transitioning nation in ways that loosely follow some of its functions at the drafting stage.

78. See David Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163, 1178 (2011).

79. See CHARLES PARKINSON, *BILLS OF RIGHTS AND DECOLONIZATION: THE EMERGENCE OF DOMESTIC HUMAN RIGHTS INSTRUMENTS IN BRITAIN'S OVERSEAS TERRITORIES 1-19* (2007) (discussing Britain's insistence on the inclusion of a bill of rights modeled after the European Court of Human Rights in the post-independence constitutions of its African and Caribbean colonies).

80. See, e.g., CAROL LANCASTER, *FOREIGN AID: DIPLOMACY, DEVELOPMENT, DOMESTIC POLITICS* 17, 47 (2007) (explaining that during the “third wave” of democracy, aid was provided “both as an incentive for governments to implement political reforms and a source of financing for activities related to democratization”).

81. See Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 857-59 (2005) (describing the conditions surrounding constitutional development in the former Yugoslavia, East Timor, Afghanistan, Iraq, post-war Germany, and post-war Japan).

82. See VICKI JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* 85 (2010) (footnote omitted).

83. See Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT'L L. & POL. 707 (2006).

84. *Id.* at 712.

First, paralleling its function of constitutional precommitment, comparative citation may demonstrate to both internal and external audiences the judges' willingness to commit to reasoned, legal decisionmaking. For court systems with a reputation for corruption and abuse, reference to widely adopted international standards may communicate that judges are willing to cabin their discretion to outcomes that fall within broadly accepted standards of behavior. Of course, the extent of these limitations "depends on the degree of determinacy provided by the international body of law."⁸⁵ Open-ended international standards may do little, as a practical matter, to define boundaries on judicial decisionmaking. Nonetheless, their use can still communicate a posture of self-restraint and fidelity to international "best practices" that make other actors internally and externally more willing to accept the court's judgments.

Related to the courts' commitment to bounded discretion and rationality is their ability persuasively to articulate the foundations of their decisionmaking. For courts beginning the process of building a constitutional framework, as well as constructing the legal process in which it is embedded, beginning the persuasive narrative presents a challenge. "Legal process" scholars would suggest that a requirement for establishing the "[r]ule of [l]aw" is "reasoned elaboration of the connection between recognized, pre-existing sources of legal authority and the determination of rights and responsibilities in particular cases."⁸⁶ For transitional regimes, the "recognized, pre-existing sources of legal authority" may, out of necessity, be foreign and international law. Beyond adopting an "originalist" approach—an orientation that may or may not be favored in countries in transition⁸⁷—there is often little indigenous jurisprudence upon which to draw for justification.

Finally, citing to parallel reasoning by more established courts may allow for a borrowing of their perceived legitimacy by a court lacking in its own. Like constitution drafters, courts may build confidence in the regime by delegating some authority over decisional outcomes to external decisionmakers. Demonstrating that a conclusion is widely adopted law in successful democratic regimes can provide authority for reaching a similar conclusion at home.⁸⁸ For well-established courts in nations like South Africa,

85. JACKSON, *supra* note 82, at 48. ("While international human rights law may have fairly determinate application on some issues—for example, the prohibition on torture—given the breadth of human rights provisions and the absence of hierarchically final decision-makers to resolve the meaning of those provisions there is considerable room for national discretion in the interpretation of these rights and thus for indeterminacy.")

86. Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 18 (1997).

87. Most leading South African jurists have, for example, explicitly rejected originalism as an interpretive basis for their country's constitutional commitments. See Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 3 (2009). In fact, as Greene has argued, despite its enthusiastic reception in the United States, the appeal of originalism appears to have limited international reach. See *id.* at 2-4.

88. In these cases, "[t]he information value of an international legal norm is not simply the norm and reasons for it but that it is enforced as law in other countries; in other words, its 'status' as law is relevant to the 'information' the source provides." JACKSON, *supra* note 82, at 148 (footnote omitted).

Israel, and Taiwan whose political histories have isolated them from the international community, judicial reference to international and comparative law principles can help demonstrate a posture of acceptance and engagement. David Law and Wen-Chen Chang report, based on interviews with members of the Constitutional Court of the Republic of China in Taiwan, that the Justices are well aware of the role they play in helping “Taiwan . . . generate badly needed support and acceptance among the international community by following in the footsteps of powerful and prestigious countries.”⁸⁹ For courts in economically developing countries, citing international and foreign law principles may work to demonstrate competence and relevance. Moreover, even if a court diverges from some or all of the cited international or foreign authorities, the practice of developing and challenging domestic jurisprudence against the framework of international law or practice creates a frame of reference for articulating both what the new constitution is and what it is not.⁹⁰

C. *Public Relations*

Beyond its direct impact on the development of the legal regime, the practice of comparative citation may raise the prominence of the court and the nation on the international stage. Decisions that would have been interesting based solely on their outcomes take on increasing significance because of their connection to international trends.⁹¹ Citing foreign and international law (or adopting parallel concepts from other jurisdictions) may draw attention to decisions in ways that make them more likely to be of interest to foreign judges and scholars.⁹² And there are international institutions dedicated to measuring

89. Law & Chang, *supra* note 5, at 570.

90. See Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 260-61 (2001) (“Even if the reasoning of a foreign court ultimately is rejected, explaining why it is inapplicable or wrong could improve the quality of the [U.S. Supreme] Court’s reasoning, making its choices more clear to the audience of lawyers, lower courts, legislators and citizens.”).

91. The format of judicial opinions means that they can be more persuasive and comprehensive than legislation, a phenomenon the recognition of which generated controversy in the early history of the United States. See JOHN PHILLIP REID, *LEGISLATING THE COURTS: JUDICIAL DEPENDENCE IN EARLY NATIONAL NEW HAMPSHIRE* 8-9 (2009) (noting that legislators opposed case publication on the grounds that it privileged the pronouncements of judges over legislators).

92. As Vicki Jackson explains:

References to transnational sources may relate not only to the place of the court’s nation in the community of nations, but also to the status and relationship of courts to each other in the development of law, thus fostering an autonomous professionalism of independent courts (to which end the display of knowledge alone may have some perceived value) and/or the autonomous content of law under the interpretive control of judges.

Vicki C. Jackson, *Transnational Discourse, Relational Authority and the U.S. Court: Gender Equality*, 37 LOY. L.A. L. REV. 271, 283 (2003). Scholars have noted that the jurisprudence of the Indian, South African, and Colombian courts should and do receive increased attention and discussion due to their extensive and innovative consideration of foreign and international law. See Bentele, *supra* note 28, at 265 (noting that the South African Constitutional Court’s studied use of foreign law has resulted in increasing attention to that court’s decisionmaking by other foreign courts); Martha F. Davis, *Public Rights, Global Perspectives, and Common Law*, 36 FORDHAM URB. L.J. 653, 682 (2009) (suggesting that the opinions of the South African and Colombian Constitutional Courts might be useful sources for comparative consideration “given their leadership in adjudication involving human rights norms”); Cesar Rodriguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 TEX. L. REV. 1669, 1671-72 (2011) (“The South African Constitutional

progress on international human rights issues, which collect and publicize court decisions if they discuss human rights treaty instruments.⁹³ These references can thus operate as a sort of marketing tool to promote developments on the ground in terms that make the judgments that incorporate them more likely to resonate internationally. Particularly for courts in countries that, for geographic, geopolitical, or financial reasons, may have limited opportunities to interact personally with key international constituencies, comparative citation is a way to speak to these audiences and increases the likelihood that they will be heard.

D. *Institution Building*

To this point, I have suggested reasons why foreign citation may build confidence in a court's decisionmaking, both internally and externally, by linking it to well-established international norms and practices. Comparative citation may, however, also be alienating in particular cases, particularly when its use supports outcomes that run counter to widespread domestic practices. For instance, in the African context, "with high levels of legal pluralism and a limited rights culture,"⁹⁴ reliance on international law norms may cause the court to be viewed as out of step with the general population, if not with internationally educated elites. The sensitivity may be heightened, in some instances, by the historical experience of Western colonialism.⁹⁵ Some transitional courts seem to respond to concerns about the legitimacy of comparative citation by borrowing international and foreign law concepts, without specifically attributing these ideas to their origins.⁹⁶ In so doing, they

Court has also elicited international attention in judicial and scholarly circles, as demonstrated by the interest in the court by U.S. and European scholars and the reliance on its jurisprudence in U.S. and European constitutional theory."). See generally Arun K. Thiruvengadam, *In Pursuit of "the Common Illumination of Our House": Trans-Judicial Influence and the Origins of PIL Jurisprudence in South Asia*, 2 INDIAN J. CONST. L. 67, 70 (2008) (arguing that the influential Public Interest Litigation jurisprudence of the Supreme Court of India builds upon and contributes to the comparative judicial dialogue).

93. Additionally, a number of NGOs maintain databases of the human rights decisions of national courts. See *Mission and Governance*, INT'L NETWORK FOR ECON., SOC. & CULTURAL RTS., <http://www.escri-net.org/cat/i/1372> (last visited Mar. 7, 2013) (collecting decisions of national courts related to economic, social, and cultural rights); *Search INTERIGHTS Website and the Commonwealth and International Human Rights Case Law Database*, INT'L CTR. FOR THE LEGAL PROT. OF HUM. RTS., <http://www.interights.org/search/index.html> (last visited Mar. 7, 2013) (collecting human rights decisions of national courts in Commonwealth countries); *ICRC Databases on International Humanitarian Law*, INT'L COMM. OF THE RED CROSS, <http://www.cicr.org/eng/resources/ihl-databases/index.jsp> (last visited Mar. 7, 2013) (collecting decisions of domestic courts implementing international humanitarian law). Additionally, through the human rights reporting processes connected to the major United Nations treaties and the Universal Periodic Review, which provides for a holistic human rights review of every U.N. member state, governments can highlight the judicial decisions of domestic courts on human rights issues for national and international scrutiny.

94. Jennifer Widner, *Building Judicial Independence in Common Law Africa*, in *THE SELF-RESTRAINING STATE*, 177, 189-90 (Andreas Schedler et al. eds., 1999).

95. See Thiruvengadam, *supra* note 92, at 71 (2008) ("In respect of colonies, the historic reasons favouring trans-judicial influence have been counteracted by the pressure to cast off the imperialist past to establish strong foundations of indigenous constitutionalism.").

96. This sentiment was expressed by a Justice of the Taiwanese Constitutional Court, who stated that "it is 'harder to justify mentioning foreign law in opinions,' when 'we feel we are writing for the country.'" Law & Chang, *supra* note 5, at 559 (quoting Interview with Justice G., Justice of the

may mask what they are doing domestically, while continuing to communicate with their audiences internationally (assuming that legal experts in the nation of origin recognize the appearance of their own legal concepts).

But even in these controversial cases, where courts act in ways that are counter-majoritarian, comparative citation may work to legitimate the judicial system and thus contribute to the process of democratic consolidation. As David Law has posited: “[T]he more often that a court renders unpopular (or unpersuasive, or unenforceable) decisions, that are nevertheless obeyed, the *greater* the court’s power . . . may become.”⁹⁷ This observation seems like it would be particularly true in countries in which law has historically been subordinate to power. Observing executive or legislative compliance with adverse court decisions is likely to do substantially more than a well-reasoned court decision to demonstrate the power and influence of the judiciary. Of course, courts may also undermine their legitimacy by “render[ing] decisions that are visibly the subject of disobedience.”⁹⁸ The use of comparative citation thus plays into a strategic choice that all courts face about which uses of power reinforce and which undermine their own authority. Courts in fragile democracies may, however, have more difficulty assessing these outcomes. Moreover, the diagonal account suggests an additional complexity to this narrative, in that courts may also have to take into account how external audiences view their outcomes and authority and balance these perceptions with those of domestic observers. And to the extent that jurists are unable to make good guesses, following the path of comparative citation to an unpopular outcome is a risky proposition.⁹⁹

This account also suggests that there may be an interactive dynamic between domestic courts and international and comparative law that is more complex than in the examples previously discussed.¹⁰⁰ Thus far, I have argued that international and foreign citation may lend support to domestic institutions. In fact, the relationship may be more nuanced. Citing foreign and international law to support “popular” outcomes may build support for the court and respect for its authority. The court can then draw upon its own institutional legitimacy when engaged in comparative citation in support of unpopular outcomes

Constitutional Court of the Republic of China, in Taipei, Taiwan, Dec. 27, 2010). Additionally, the stylistic norms of the Court disfavor lengthy opinions or footnotes. *Id.* at 558-59.

97. David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 780 (2009); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 48 (1980) (“[O]ne of the surest ways to acquire power is to assert it.”).

98. Law, *supra* note 97, at 781.

99. Even adopting domestically popular outcomes may be dangerous. The new Hungarian Constitution explicitly limits the powers of the constitutional court on budget and tax matters, in part in response to the Court’s decisions referenced in Subsection III.B.2, *infra*. See also Judy Dempsey, *Hungarian Parliament Approves New Constitution*, N.Y. TIMES, Apr. 18, 2011, <http://www.nytimes.com/2011/04/19/world/europe/19iht-hungary19.html> (explaining that curbing the Constitutional Court’s power is “[o]ne of the most disputed provisions” of the new Constitution).

100. Expanding the sample beyond new and fragile democracies further complicates the story. While my account frames the diagonal relationship as mediating pressures from the international community on the national regime, in other contexts, the trajectory may be reversed in countries whose powerful national courts can influence international norms.

without serious fear of popular reprisal.¹⁰¹ The strategic citation of comparative authority may thus be self-reinforcing and self-sustaining, building support not only for domestic courts and institutions, but also for the international norms themselves once the court's authority as a decisionmaker is recognized.

Law's account of judicial legitimacy points to another challenge in the practice of foreign citation. His theory of the efficacy of judicial review depends on the court's ability to provide clear signals as to the legitimacy of governmental behavior. One of the criticisms that has been lodged against the practice of comparative citation is that it renders court decisions lengthier and more difficult to comprehend due to its reliance on borrowed concepts and norms.¹⁰² If true, this could potentially diminish a court's "coordinating" power by limiting its ability "to send clear and unambiguous signals."¹⁰³ In some cases, there may be a tension between using comparative and international law accurately and persuasively, and preserving the communicative force of court opinions, particularly when the court views its audience as extending beyond the educated elites.

While potentially legitimating, therefore, comparative citation practice is certainly not unambiguously positive. Nevertheless, the challenges posed by its use are also not unique. Rather, they raise the same questions about the sources of legitimacy and power that are posed by the broader project of judicial review. The strategic account views judges as political actors, who quite self-consciously navigate these complicated decisions, sometimes in the interests of their own credibility and autonomy, and sometimes to further the national governance project.

In sum, comparative citation practice offers courts a potent tool for communicating with both domestic and international audiences about the qualities of the court and the other institutions of the new regime. The next Part examines the role of comparative citation as a mechanism through which the judiciary may develop and promote the channels of diagonal accountability.

IV. CREATING DIAGONAL ACCOUNTABILITY THROUGH FOREIGN CITATION

Because of its signaling value, comparative citation can be exercised as a tool of diagonal accountability to build internal and external support for new domestic institutions in ways that protect their autonomy and ability to operate despite the pressures of the domestic transition and globalization. Comparative citation can thus operate on two fronts: it can legitimate the outcomes of the particular decisions within which it appears, while communicating certain characteristics of the new regime in ways that can help to build institutional autonomy.

This Part examines ways in which the judiciary can invoke comparative citation in service of diagonal accountability. Because this institutional use of

101. See *infra* note 190 and accompanying text.

102. See Rosencrantz, *supra* note 26, at 292-93.

103. See Law, *supra* note 97, at 777.

comparative citation operates outside the substantive outcomes in particular cases, the connections are difficult to draw based on the reasoning in individual cases. Moreover, as others have noted, measuring international influence by counting citations misses the more complete picture of the ways in which international and foreign laws are transmitted between courts.¹⁰⁴ My purpose here is, therefore, not to offer an institutional explanation for comparative citation as either exclusive or causal, but rather to articulate the paths through which diagonal accountability may be operating to protect the autonomy of challenged domestic institutions in transition.

A. *Establishing Judicial Legitimacy and Independence*

Judges are perhaps the most immediate beneficiaries of the comparative citation practice. Referencing foreign and international law norms, as demonstrated in the reasoning of other courts or the practice of other nations, can help establish the credibility of the judges to both their internal and external audiences. This is a challenge faced at some level by most new judiciaries. In some situations, as in South Africa, members of the founding generation are shifting from being political advocates to judicial decisionmakers. To do this successfully, they must convince the parties in conflict that they are “independent” and can be neutral arbiters of the cases before them.¹⁰⁵ In other situations, there is more long-term consistency in the composition of the bench.¹⁰⁶ This presents its own challenge when the prior legal (or even constitutional) regime has been discredited and the judges and Justices are asked to legitimate themselves within a new legal framework. Relying on comparative and foreign citation may demonstrate the neutrality of the decisionmaking process by showing that reasoning or outcomes are consistent with either international norms or the practice of other established democracies, rather than with political pressures.

Creating a reputation for neutrality is only part of that process of building judicial credibility, however. As previously discussed, judges also need to have a base of support to protect themselves against the fallout of unpopular decisions and to ensure that their orders are observed. Supporting its decisionmaking with comparative citation could help a court avoid being labeled as either pro- or antigovernment—or as aligned with a particular faction or interests—which might help it survive fluctuations in power. Additionally,

104. See *Law & Chang*, *supra* note 5, at 533 n.33.

105. Heinz Klug has explained that in the early years of the South African Constitutional Court, the central challenge faced by its judges was to demonstrate its ability to mediate political conflict that might threaten violence in the absence of an established domestic jurisprudence. See HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION* 157-59 (2000).

106. In Uganda, for example, the current Chief Justice of the Supreme Court was first appointed to a position in the judiciary while the country was under the rule of Idi Amin. He was elevated to the Supreme Court in 1986 shortly after Milton Obote was deposed and the National Resistance Movement took power. In 1989, he was asked to chair the Uganda Constitutional Commission. He returned to the Court in 1993. See, e.g., BENJAMIN J. ODOKI, *THE SEARCH FOR A NATIONAL CONSENSUS: THE MAKING OF THE 1995 UGANDA CONSTITUTION*, at v-vi (2005).

by demonstrating a commitment to the rule of law (again with reference to international norms), judges can build a base of support domestically—but also (along the vertical axis) with international allies, which could include judges on other national courts, other governments, or international organizations. The latter is a powerful constituency, which may help the court survive attacks from the other branches.

Although the complexities of the interactions make it difficult to prove causality, the experience of the Ugandan courts offers an example of how courts can draw upon mechanisms of diagonal accountability to protect their autonomy in the face of internal challenges to their independence. By presenting themselves as committed to the rule of law, evidenced, at least in part, through the regular citation of international and comparative law in their decisionmaking,¹⁰⁷ the Ugandan courts have effectively mobilized domestic, regional, and international NGOs, as well as donors, on their own behalf.

Perhaps the most significant recent threat to the independence of Uganda's judiciary came in the government's response to a series of judicial decisions rebuffing the politically motivated attempts to prosecute a key opposition leader, Kizza Besigye, and his supporters for treason, and Besigye himself for rape.¹⁰⁸ The Attorney General and the military attempted to remove the defendants from the jurisdiction of the civilian courts by drawing on the newly passed Antiterrorism Act for the authority to try them in a military court martial.¹⁰⁹ The case brought the executive branch and the judiciary into direct conflict. The defendants' first bail hearing was interrupted by the arrival of thirty armed commandos who tried to force their way into the holding cells, resulting in an evacuation of the judges by court security.¹¹⁰ When reports of the behavior of the "Black Mambas" reached the press, the government banned media discussion of the treason, claiming that the *sub judice* rule precluded public discussion of any case before the court. President Yoweri Museveni publicly criticized the courts, accusing them of playing partisan politics by supporting Besigye.

Despite these attacks, the Ugandan courts continued to defend their independence with the support of both domestic and international constituencies. Some of the judges and Justices spoke out publicly against the attacks on the judiciary. Domestically, "[t]he Uganda Law Society (the bar association) and the Ugandan Human Rights Commission both issued statements critical of the government throughout the episode, publicized the issues externally, and got people in the streets to demonstrate."¹¹¹ Despite governmental bans, several newspapers continued to write critical editorials. A long list of international actors also weighed in.

107. See Posner, *supra* note 1.

108. This account is drawn primarily from Jennifer Widner & Daniel Scher, *Building Judicial Independence in Semi-Democracies: Uganda and Zimbabwe*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 235, 238-48 (Tom Ginsburg & Tamir Moustafa eds., 2008).

109. *Id.* at 240-42.

110. *Id.* at 241.

111. *Id.* at 246-47.

A group of foreign envoys paid a visit to the court on the day of the first bail hearing. They were prevented from reaching the containment cell by the Black Mambas, but their presence sent a clear signal to the crowd. The Danish ambassador, chief of Uganda's development partners, tried to attend the court martial but was ordered out by the generals. The human rights groups issued reports and monitored events closely. The International Commission on Jurists sent representatives to monitor the trials, creating reputational pressure for the judges and lawyers. By mid-December, the governments of Sweden, the Netherlands, Norway, Ireland, and Britain had cut their bilateral aid programs in protest. Tony Blair spoke publicly against the actions at the opening of the Commonwealth Conference. The EU demanded a fair trial and expressed concern about the charges. The U.S. State Department issued a statement expressing concern about events.¹¹²

These protests were somewhat effective. Besigye was allowed to stand for the election and lost, although by a smaller margin than in 2001.¹¹³ Following the election, the government announced that it would comply with the Constitutional Court's ruling that only the civilian courts could hear the case against Besigye. The rape case was tried before Justice John Katutsi, who ultimately acquitted Besigye and criticized the government in his judgment for abuse of process. The treason charges continued in civilian court before a new judge, Vincent Kagaba, who stayed the trial to permit the defense to challenge the constitutionality of some aspects of the trial.

In October 2010, the Constitutional Court unanimously dismissed the treason cases against Besigye and his supporters,¹¹⁴ holding that in light of the governmental attacks on the petitioners' human rights, no subsequent prosecution could meet the constitutional standard for a fair trial. In enjoining the continued prosecution, the Court relied on language from the courts of Kenya and the United Kingdom to bolster its authority:

These authorities are not binding on Uganda courts but they are highly persuasive. The situation their Lordships were dealing with in Kenya and in Britain is very [similar] to the situation we are dealing with in this petition. We cannot stand by and watch prosecutions mounted and conducted in the midst of such flag[r]ant, egregious and malafide[sic] violations of the Constitution and must act to protect the constitutional rights of the petitioners in particular and the citizens of Uganda in general as well as the Rule of Law in Uganda by ordering all the tainted proceedings against the petitioners to stop forthwith¹¹⁵

112. *Id.* at 247.

113. Besigye challenged the fairness of the election in a suit against the election commission. In a decision characterized by Widner and Scher as "slightly reminiscent of *Marbury*," the Supreme Court acknowledged widespread problems with the election, but concluded that no remedy was necessary because the irregularities had not affected the electoral result. *Id.* at 245. Besigye responded to the court's decision with a veiled threat that candidates in future elections might resort to bush struggle if the electoral processes were not to be trusted. *Id.* at 245-46.

114. Anne Mugisa & Hillary Nsambu, *Uganda: Col. Besigye Treason Case Dismissed*, ALLAFRICA: NEW VISION (Oct. 12, 2010), www.allafrica.com/stories/201010130033.html.

115. *Besigye v. Att'y Gen.*, [2010] U.G.C.C. 6 (Uganda) at pt. 7 (citing *Mwasia Mutua v. Republic*, (2006) Criminal Appeal No. 120 of 2004 (Kenya), http://kenyalaw.org/Downloads_FreeCases/Albanus%20v%20R%20120.04.pdf; *Republic v. Karuga Karatu* (Kenya), High Court Criminal Case No. 12 of 2006, http://kenyalaw.org/Downloads_FreeCases/violation_of_rights_pdf.pdf; *Regina v. Horseferry Rd. Magis. Ct.*, [1994] 1 A.C. (H.L.) 42, available at <http://www.ulii.org/ug/judgment/constitutional-court/2010/6>.

Besigye has since been rearrested on other charges and the struggles for accountability in Uganda continue.¹¹⁶ Nonetheless, the judiciary in Uganda continues to maintain its respected position as a reasonably neutral arbiter of constitutional conflicts. Its regular reliance on international and foreign law allows it to draw “diagonally” on sources of legitimacy and authority that extend beyond national borders and call attention to its attempts to constrain the overreaching acts of the executive, even in the face of threats to their personal and institutional security. Moreover, the perceived independence of the judiciary and the high levels of political support it enjoys internationally likely explain why Besigye continues to challenge Museveni through the political process,¹¹⁷ rather than by the forceful means that have characterized Uganda’s previous political transitions.¹¹⁸

B. *Legitimizing Domestic Institutions*

While judges are perhaps the most direct beneficiaries of the legitimating effects of comparative citation, courts may also use the practice strategically to mediate the democratic effects of external pressures on the elected branches. Transitional regimes, particularly those in the developing world, face significant international pressures to adopt legal reforms that enable economic globalization and to enforce internationally recognized human rights standards. These pressures may conflict with domestic norms and even with domestic constitutional protections.¹¹⁹ For newly established governments, dependent on donor support and eager to generate economic development, these global pressures are difficult to resist.

Additionally, the increasing prevalence of supranational courts puts harmonization pressure on domestic courts.¹²⁰ If transnational regimes provide greater legal protections than domestic regimes, the domestic regime becomes

116. See Uganda’s Kizza Besigye ‘Put Under House Arrest,’ BBC NEWS, May 19, 2011, <http://www.bbc.co.uk/news/world-africa-13452143>.

117. See *supra* note 113.

118. The experience of the Ugandan courts in drawing on diagonal accountability is not unique. Peter VonDoepp describes similar incidents at the domestic level both in Zambia and Malawi, two other judiciaries that have established relatively good reputations for independence in the face of political pressure. See PETER VONDOEPP, *JUDICIAL POLITICS IN NEW DEMOCRACIES: CASES FROM SOUTHERN AFRICA* 41-113 (2009). Freedom House assessments of judicial independence score Zambia at 4.15 and Malawi at 4.13 in the “rule of law” category. To give some perspective on what this means, Freedom House groups these countries in the same category with much more economically developed nations like South Africa (4.28), Argentina (4.18), and Brazil (4.06). Jake Dizard et al., *Countries at the Crossroads 2010: An Analysis of Democratic Governance*, FREEDOM HOUSE (2010), <http://www.freedomhouse.org/report/countries-crossroads/countries-crossroads-2010>. While neither court is particularly innovative in its use of foreign and comparative law, their decisions are usually permeated with citations to other Commonwealth countries. Only rarely are these decisions described as foreign.

119. For example:

In Colombia, the Philippines, and Mexico constitutional provisions for the protection of national resources and control over resources have come under challenge when they are seen to obstruct economic globalization. Courts in some of these countries have relied on particular provisions of national constitutions to resist certain foreign investment, privatization, or foreign or transnational standards of compensation that differ from the domestic rule.

JACKSON, *supra* note 82, at 36.

120. David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 715 (2005).

irrelevant.¹²¹ This observation applies with even greater force to the legal regimes of new democracies, which generally lack a presumption of relevance to begin with. Providing protections lower than could be achieved through international adjudication undermines investment in the new legal regime for insiders and outsiders. It can also set the country up for embarrassing or costly losses in international or regional human rights courts, or in international investment disputes (for example, if property protection regimes do not match international standards for expropriation).

On the flip-side, adopting unpopular legislation to meet the demands of international harmonization pressures can undermine the credibility of these new, elected institutions with the voters. The elected branches thus face something of a “Catch-22,” in that the actions they must take to satisfy powerful international constituencies may directly threaten their domestic political survival. The judiciary can help mediate these conflicts through the language of comparative citation.

1. *Foreign Citation as Acceptance*

By relying on foreign citation in constitutional interpretation, courts may give politically challenging legislative acts a stamp of domestic legitimacy by demonstrating that international principles are constitutionally embedded. Lending its constitutional approval to “controversial, national legislation made under conditions of international influence, the constitutional court [can] settle[] political conflict over legislative policy in a national way.”¹²² In other words, by making the explicit connection between international norms and domestic constitutional principles, the courts can provide cover for the political branches engaged in internationally defined democratic reforms.

This observation builds on the work of Nancy Maveety and Anke Grosskopf, who proposed this theory of the judicial role in the context of deeply disputed minority-language protections in Estonia. The 1992 Estonian Constitution guarantees protection for minority rights and separately grants noncitizens the right to vote in municipal elections. Nonetheless, in the mid-1990s, the Estonian parliament passed the Language Act, which designated Estonian as the national language and required facility in it for public and private employment, and the Local Councils Election Act, which, *inter alia*, made proficiency in Estonian a voting qualification. These national decisions restricting minority rights placed Estonia in conflict with international organizations like the Organization for Security and Cooperation in Europe and the European Union, which exerted pressure on the nation to revise its domestic legislation.

Maveety and Grosskopf credit the Supreme Court with breaking the impasse on minority language rights. In 1998, the Court issued two cautious rulings on minority rights, relying on “technical rather than value-based

121. *Id.*

122. Maveety & Grosskopf, *supra* note 64, at 464.

arguments in deciding the cases.”¹²³ However, the decisions also contained carefully worded hints as to the potential constitutional implications of the measures, invoking significant principles from European jurisprudence. Thus, while the Court returned the challenged legislation to the parliament purely on procedural grounds, it provided substantive guidance that ultimately was adopted, although reluctantly, as the acts were revised. The Court’s “recasting of international constraints—and national, nationalistic constraints—into a debate about constitutional power reconstituted the choice context of the legislature in such a way as to present obeisance to international standards as nationally acceptable.”¹²⁴

Comparative citation aids in the process Maveety and Grosskopf describe. By referencing the practice of other nations following similar international norms, courts can give meaning to domestic constitutional principles in ways that help legitimate unpopular outcomes. Moreover, even speaking in terms that outside observers understand, as the Estonian Supreme Court did in referencing the European concepts of proportionality and relevance, may help to buy time for domestic deliberation by signaling to the international community that its concerns are registering domestically.

While the Estonian language restrictions appear to have had majoritarian support domestically, in other cases a small but influential minority may make harmonization politically challenging. Through drawing national and international parallels, courts can provide additional justification for controversial legislative initiatives in ways that diffuse these political pressures. An example, again from the Ugandan context, might be the recent outlawing of the practice of female genital mutilation (FGM). After the constitutionality of the practice was challenged in court, the Parliament of Uganda criminalized the practice, despite concerns among some members that this action would provoke a backlash among village elders deeply committed to its continuation.¹²⁵ The Constitutional Court thereafter declared FGM unconstitutional, finding that the practice violates Uganda’s constitutional commitments under international law. In reaching this holding, the Court relied most heavily on a nonbinding U.N. statement on the elimination of FGM as persuasive evidence both of the medical problems with the practice and of the international consensus against its continued use in light of “well-established human rights principles.”¹²⁶ Thus, the Court’s reliance on foreign practice helped to provide cover for a controversial domestic legislative initiative.¹²⁷

123. *Id.* at 477.

124. *Id.* at 476

125. Wambi Michael, *Female Circumcisions Still a Vote Winner*, INTER PRESS SERV. (Oct. 19, 2009), <http://ipsnews.net/news.asp?idnews=48915> (discussing the political challenge posed by enacting national legislation banning female genital mutilation).

126. The court’s reliance on international human rights principles was reported as a basis for its decision in the Ugandan press. See *Court Outlaws Female Genital Mutilation*, ALLAFRICA: NEW VISION (July 29, 2010), <http://allafrica.com/stories/201007290467.html>.

127. While the practice of FGM has not ended in Uganda, there has been no reported backlash against the Parliament for its action. International agencies have praised Uganda for its initiative and are now working on educational programs to maximize the impact of the legislation. See Brenda Asiimwe,

Both of these examples demonstrate ways in which the judiciary can translate international norms into domestic law in ways that are more palatable to domestic audiences. At some point, however, international pressures may require policy changes so counter to domestic desires—or so politically impossible to implement—that adopting them fundamentally undermines the authority and credibility of domestic power structures. In these cases, courts may offer a way of resisting internationally imposed demands by relying on the language of other broadly accepted international norms.

2. *Foreign Citation as Resistance*

Because of their relative insulation, courts may be better positioned to legitimate a posture of resistance than the elected branches. The international norm acknowledging the importance of judicial independence means that these actors are unlikely to be the subjects of direct international coercion in the way that the elected branches are. Moreover, the judiciary may draw on the practice of comparative citation as a way of challenging international actors on their own terms. Through carefully drafted opinions, jurists may express the conflict not only as national versus international, but also as between international legal commitments.

For example, some courts have drawn on international human rights principles—either directly or as expressed in the jurisprudence of other national courts—to reject pressures toward economic harmonization. The Hungarian Constitutional Court rejected as unconstitutional some of the austerity measures imposed by the elected branches in response to pressure from the International Monetary Fund (IMF).¹²⁸ It legitimated these decisions, in part, by drawing on the jurisprudence of other European constitutional courts.¹²⁹ The Supreme Court of India has also relied extensively on international law norms to develop a robust constitutional protection against environmental degradation—a protection that can now be invoked to resist claims based on trade law or treaties.¹³⁰ In these cases, domestic courts may be raising broad international human rights principles to resist the pressures of globalization in a way that draws in other international actors (like environmental advocates) as allies, and

U.N. Agencies Join Hands to Fight FGM, NEW VISION (Feb. 3, 2011), <http://www.newvision.co.ug/D/8/13/745703>. And Uganda is encouraging a regional initiative against FGM to prevent women from crossing national borders in order to engage in the practice. See Taddeo Bwambale, *Uganda Calls for Regional Fight Against FGM*, NEW VISION (Dec. 14, 2010), <http://www.newvision.co.ug/D/8/13/741155>.

128. Kim Scheppele, *A Realpolitik Defense of Social Rights*, 82 TEX. L. REV. 1921, 1941-42 (2004).

129. László Sólyom, *Introduction to the Decisions of the Constitutional Court of the Republic of Hungary*, in CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT I, 37. (László Sólyom & Georg Brunner eds., 2000).

130. Benvenisti points to the decision of the High Court of Madras in *Novartis AG v. Union of India*, 2007 A.I.R. 24759 (Madras H.C.), in which it refused to adjudicate the company's claims that India's revised patent laws violated the nation's obligations under the TRIPS Agreement "as a possible harbinger of this trend." Benvenisti, *supra* note 37, at 268. The court's "seemingly technical reasoning" in dismissing the suit based on venue, "did hint at the underlying concern, the constitutional right to health: at stake was the patentability of Gleevec, a life-saving drug for leukemia patients, and the continued supply of the much cheaper generic version by Indian companies to patients in India and other developing countries." *Id.*

which the broader international community must publicly address and negotiate.

3. *Foreign Citation: Mediating Acceptance and Resistance*

More frequently, perhaps, the domestic path will be one both of acceptance and resistance. Because it is generally not the institution responsible for actual implementation, the judiciary is well situated to mediate these pressures in ways that maintain the credibility of the domestic regime for both internal and external audiences. The South African Constitutional Court's decision in *Government of the Republic of South Africa v. Grootboom* offers an example of this kind of balancing.¹³¹ The case involved a constitutional challenge brought by a homeless community to their local municipality's refusal to provide them with temporary shelter. Amici curiae in the case argued that the Court should adopt the substantive standard of review provided by the International Covenant on Economic, Social and Cultural Rights, an instrument South Africa has not yet ratified.¹³² The Court acknowledged the position of the United Nations Committee on Economic, Social and Cultural Rights, which interprets the Covenant to require state parties to devote all resources at their disposal, first, to satisfy the "minimum core content" of the right to adequate housing.¹³³ The Court suggested, however, that it was institutionally ill-positioned to define the "minimum core content" of the right in the South African context.¹³⁴ It concluded instead that the measures taken by the State must be "reasonable," and that in this situation, they were not.¹³⁵

The *Grootboom* decision thus represents a careful balance between broadly accepted international human rights standards and domestic political realities. While engaging with and acknowledging the international norm, the Court ultimately deferred to the political branches in the first instance to set the priorities of the national housing program. In so doing, the Court communicated the national commitment to meeting internationally recognized socioeconomic standards, but also validated the primacy of the domestic democratic process in making policy determinations for the nation.¹³⁶

4. *Foreign Citation: Co-option*

The efficacy of foreign citation as a tool of diagonal accountability depends on the norms that its audiences are willing to reinforce. These last examples demonstrate how foreign citation may help courts mobilize support in ways that protect judicial independence, democratic accountability, and legitimacy. In some countries and moments, however, the norms that

131. *South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.).

132. Brief for Human Rights Commission of South Africa and Community Law Centre as Amici Curiae, *South Africa v. Grootboom* 2001 (1) SA 46 (CC), ¶¶ 16-29 (S. Afr.).

133. *Grootboom* 2001 (1) SA 46 (CC), ¶¶ 29-33.

134. *Id.* ¶¶ 32-33.

135. *Id.* ¶¶ 54, 67-69.

136. *Id.* ¶¶ 41-43.

international audiences are willing to reinforce may run counter to domestic preferences. Tamir Moustafa argues that in Egypt the regime created independent courts as a way of demonstrating to foreign investors that private property rights would be respected, even against claims made by the State.¹³⁷ Moustafa explains that the Supreme Constitutional Court then used this space to create protections for domestic civil and political rights.¹³⁸ It is at least possible, however, to envision a scenario in which judges would choose to protect their personal and institutional interests by aligning entirely with powerful foreign investors. This could translate into court decisions limiting the government's ability to regulate private economic activity, thus preventing the elected branches from responding to domestic demands for labor or environmental protections. While this particular threat seems somewhat unlikely to materialize given recent trends in international investment law,¹³⁹ the example illustrates the risk that a particular international interest might be able to "capture" the judiciary and undermine domestic democratic processes.

While theoretically possible, the strategic account suggests that this outcome is relatively unlikely. As the preceding discussion demonstrates,¹⁴⁰ power dynamics in new and hybrid democracies are characterized, first and foremost, by uncertainty. Shifting interests and allegiances, both domestically and internationally, mean that it will rarely be in the best interests of the judiciary to be transparently and fully aligned with a single international constituency—no matter how powerful. Rather, judicial self-interest is better served by maintaining support amongst a broad coalition of domestic and international actors.

In sum, this Part has argued that comparative citation can aid in diagonal accountability because it allows for courts to mediate conflicts between domestic and international audiences in ways that build the credibility of new democratic institutions. And, for courts acting strategically to preserve their own autonomy and legitimacy, comparative citation represents a unique and effective tool.

V. LESSONS FOR THE DEBATE

This institutional account of the practice of comparative citation sheds a very different light on the study and critique of the practice. This Part examines

137. See generally Tamir Moustafa, *Law and Resistance in Authoritarian States: The Judicialization of Politics in Egypt*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 132 (Tom Ginsburg & Tamir Moustafa eds., 2008).

138. *Id.* at 149 (describing Supreme Constitutional Court rulings reforming the electoral system and protecting the freedom of the press).

139. Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 *CHI. J. INT'L L.* 471, 472 (2009) ("[I]nvestment treaties have proliferated to an unprecedented degree, having surged from less than 400 in 1989 to well over 2,500 bilateral, regional, and sectoral treaties today."); Joshua B. Simmons, *Valuation in Investor-State Arbitration: Toward a More Exact Science*, 30 *BERKELEY J. INT'L L.* 196, 200 (2012) ("The past decade has witnessed a well-documented growth spurt of international investment arbitration."). The growing availability of private investment arbitration is likely to further weaken investor interest in the jurisdiction of domestic courts since more of these disputes will be resolved outside of them.

140. See *supra* Section I.B.

what the strategic account has to offer in the way of understanding the current debate, both as to nations in transition and to the United States.

A. *Reconsidering the Antidemocratic Critique*

Viewed in this political and institutional context, the antidemocratic critique that has permeated much of the existing literature on foreign citation becomes problematic for three reasons. First, the appropriate role for the judiciary is much less understood in countries where the legitimacy and efficacy of the elected branches is questionable. Second, these countries have a much different relationship with international and foreign law, both because of their constitutional commitments, and, more meaningfully, because of their tenuous position on the international stage and their more pressing need for international support. Finally, judges in these countries lack the institutional protections available to judiciaries in more established regimes, and thus must rely on different strategies to create and protect themselves and their institution. Thus, the relationship between accountability and independence in these courts is different than the one assumed in the U.S. context. Rather than viewing them in tension, or as different sides of the same coin,¹⁴¹ in transitional regimes, accountability and independence may be reinforcing, as courts try to protect themselves from horizontal attacks by building a base of popular support.¹⁴²

The problem in these transitional democracies is therefore not one of overly independent federal judges and Justices, stepping outside of their constitutionally delegated roles to override the more accountable branches in order to impose their own preferences in individual cases. Rather, this is a story of judges under tremendous internal and external pressures mediating a very complicated system of transnational checks and balances through “the language of foreign and international law,”¹⁴³ with the goal of protecting and preserving the new institutions of democracy. The strategic explanation of foreign citation, thus, turns the antidemocratic critique on its head. Foreign citation may be enabling judges and Justices in transitional democracies to play a crucial role in building and maintaining the pathways of diagonal accountability among new governmental institutions. To the extent these efforts are successful, the practice is actually contributing to democratic consolidation (or at least, as the Ugandan example suggests, in democratic preservation).

B. *Reconsidering the Methodological Critiques*

This account also problematizes the study of foreign citation within the context of individual case outcomes. While most comprehensive comparative studies tend to look at how courts use foreign and comparative citation in

141. Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 9, 14-15 (Stephen B. Burbank & Barry Friedman eds., 2002).

142. Interestingly, this may mean that the problem is one of majoritarianism by the courts, rather than the reverse.

143. See Benvenisti, *supra* note 37, at 271.

individual cases and interpret their usage in light of these outcomes,¹⁴⁴ this study suggests that this kind of parsing may miss important big-picture conclusions about the practice.

This is not to suggest that methodology is irrelevant; rather, these critiques should be considered in light of the systemic function of the practice. For example, one of the major criticisms in the U.S. context has been that the Court is engaged in “cherry-picking” or “nose-counting.”¹⁴⁵ The cherry-picking charge suggests that the Court is not truly considering the collective wisdom of the world experience in its comparative scan, but rather is selectively picking those jurisdictions that support its desired outcome. A variation on this critique accuses the Court of “nose-counting.” Ernest Young suggests that decisions like *Roper v. Simmons* cite foreign law not for their reasoning, but rather to increase the “denominator” of jurisdictions that reject a certain practice (like the juvenile death penalty) in order to make clear that the challenged U.S. practice is an outlier.¹⁴⁶

If the strategic account is accurate, then these concerns may be less applicable in countries in transition because the purpose of the citations is at least as much about signaling as it is about outcomes. The selection of comparators indicates to both domestic and international audiences that the court is joining a particular community of respected or similar actors.¹⁴⁷ And it may simultaneously suggest to those national or international courts a commitment to their core principles.

These decisions may be both pragmatic and political. Jörg Fedtke has described this calculus in the context of the Iraqi constitution-drafting process:

[P]urely political reasons did *not* make the American model (despite its undisputable qualities) ‘an ideal’ choice in the search for inspiration. The German and South African variations did, on the other hand, offer intriguing and (more importantly) *politically acceptable* possibilities to an emerging nation desperately trying to come to grips with a model of federalism and human rights protection which best suits its troubled realities.¹⁴⁸

While his account focuses on the concerns surrounding the constitutional commitment, these same factors likely inform the process of judicial borrowing as well.

144. See, e.g., Foster, *supra* note 3, at 126-30.

145. See Christopher McCrudden, *A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 507 (2000).

146. Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 153 (2005).

147. In other words, as Aharon Barak said in response to the cherry-picking critique: “What’s wrong with looking out over a crowd and picking out friends? Should I look out over the crowd and pick out my enemies?” Aharon Barak, President, Israeli Supreme Court, Address to Students at Yale Law School (Sept. 20, 2007) (quoted in Harold Hongju Koh & William Michael Traenor, *Keynote Address: A Community of Reason and Rights*, 77 FORDHAM L. REV. 583, 586 (2008)). The African cases that I have studied, for example, generally tend to draw upon the jurisprudence of the established liberal democracies of the United States, Canada, and Western Europe, together with the jurisprudence of other respected African courts.

148. See BASIL MARKESINIS & JÖRG FEDTKE, *JUDICIAL RECOURSE TO FOREIGN LAW: A NEW SOURCE OF INSPIRATION?* 171 (2006).

The selection of comparators may also reflect a deeper cultural or linguistic bond with a particular set of nations and, therefore, a greater familiarity with their jurisprudence. Law and Chang's study of the Taiwanese Constitutional Court suggests that "the most proximate cause of foreign law usage . . . is the educational and professional background of the [j]ustices."¹⁴⁹ Likewise, Markesinis and Fedtke's analysis of the German influence on the South African Constitutional Court emphasizes the close linguistic relationship between Afrikaans and Germans (and the resulting professional opportunities for South African academics) as a bridge facilitating the consideration of German constitutional law.¹⁵⁰ These examples suggest that a court's choice of sources can have significant contextual meaning that goes far beyond the holding of a particular case. Furthermore, if the citation is viewed as more about communicating legitimacy and less about determining outcomes, the choice of appropriate references must be subject to a different set of evaluative criteria. "Cherry-picking," therefore, may be a valid communicative strategy rather than a cause for concern.

There may also be methodological concerns that are unique or more relevant to the use of comparative citation in the transitional context. There is the question of whether the strategic use of foreign citation detaches its function from the outcome in particular cases in ways that are problematic. While citation to "best practices" may have positive systemic effects, this may come at the expense of individual cases and the parties that bring them.

Alternatively, the citation of foreign and international law may be rights-reducing, particularly in cases where new democracies' aspirational constitutions seek to provide protections that exceed generally accepted international practice. Jacob Foster has characterized the early decision of the South Africa Constitutional Court in *Du Plessis v. DeKlerk* in these terms.¹⁵¹ In this case, the Court was asked to consider the "horizontal" application of the interim Constitution to a defamation suit against a newspaper. The majority opinion made extensive reference to foreign law in rejecting the defendants' invocation of the Constitution as a defense, finding that the Constitution applied only to government action. In dissent, Justice Kriegler argued that the unique constitutional context in which the Justices were operating negated the relevance of foreign law to the case. He explained:

The Constitution promises an "open and democratic society based on freedom and equality", a radical break with the "untold suffering and injustice" of the past. It then lists and judicially safeguards the fundamental rights and freedoms necessary to render those benefits attainable by all. No one familiar with the stark reality of South Africa and the power relationships in its society can believe that protection of the individual only against the state can possibly bring those benefits

149. Law & Chang, *supra* note 5, at 571.

150. See MARKESINIS & FEDTKE, *supra* note 148, at 88-89.

151. 1996 (5) BCLR 658 (CC) (S. Afr.); see Foster, *supra* note 3, at 119-21. Of course Foster's view of *Du Plessis* is not uncontroverted. Basil Markesinis and Jörg Fedtke contend that the Justices were "fairly balanced in their use of foreign law" and note their sensitivity to the unique South African context. MARKESINIS & FEDTKE, *supra* note 148, at 99, 97.

....

I find it unnecessary to engage in a debate with my colleagues on the merits or demerits of the approaches adopted by the courts in the United States, Canada or Germany We do not operate under a constitution in which the avowed purpose of the drafters was to place limitations on government control. Our Constitution aims at establishing freedom and equality in a grossly disparate society.¹⁵²

This is not an isolated example, of course. When the Bangladesh Supreme Court was deciding challenges to various aspects of its “Emergency,” the Justices cited foreign precedents to legitimate aspects of the military takeover. In *Anti-Corruption Commission v. Nazmul Huda*,¹⁵³ the Court overturned a High Court decision granting bail to a former state minister who, along with much of the political opposition, had been incarcerated on corruption charges. The Supreme Court held that the Emergency Powers Rules of 2007 make clear that appellate courts may not grant bail with these cases and cited with approval cases from the U.S. Supreme Court for the proposition that emergency situations necessitate extreme legal measures.¹⁵⁴ As Jackson has cogently stated: “The transnational is no guarantor of wise judgment.”¹⁵⁵

And of course, courts may simply get it wrong. The use of comparative constitutional law is tricky and even very conscientious courts err when working across linguistic, historic, and cultural barriers.¹⁵⁶ While this objection has been raised in the U.S. debate, it may be a more salient concern for courts that are relatively isolated for political or economic reasons, and thus may have more difficulty getting a complete picture of the context in which a particular foreign judgment operates.¹⁵⁷

At the most extreme, international or comparative precedents might be manipulated or misstated to try to place an international imprimatur on

152. *Du Plessis v. De Klerk* 1996 (5) BCLR 658 (CC), ¶¶ 145, 147 (S. Afr.) (Kriegler, J., dissenting) (footnote omitted).

153. 37 CLC (AD) (2008) (Bangl.).

154. The Court wrote the following:

Legal history is replete with examples that extreme situations often demanded a nation to take extreme legal measures [The] American Supreme Court approved without dissent such powers decision in the case of *Harabayashi v. United States* (1943) that involved more than one lac Americans who were expelled from their communities for disloyalty Suspension of Constitutional rights had to be sanctioned by the Court during war time In India in 1975 though[] 9 High Courts [had] held writ petitions in the nature of habeas corpus was maintainable during emergency, the Indian Supreme Court in *ADM Jabalpur vs. Sukla AIR*, AIR 1976 (SC) 1207., held that no person has locus stadi to move any writ petition for direction to enforce any right to personal liberty of a person detained under MISA.

Id. ¶ 42.

155. JACKSON, *supra* note 82, at 284.

156. Moreover, even with a good grasp of the facts, “it is difficult to determine when a comparison between one legal system’s rules and another’s is likely to be fruitful for any purpose other than simply acquiring knowledge. Particular rules are inserted into complex legal systems and may not travel well without their companions.” Mark Tushnet, *International Law and Constitutional Interpretation in the Twenty-First Century: Change and Continuity*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* 507, 513 (David L. Sloss et al. eds., 2011).

157. Rachel Rebouché has noted how this has informed (or misinformed) comparative abortion jurisprudence. Rachel Rebouché, *Comparative Pragmatism*, 72 MD. L. REV. 85, 107-23 (2012). Courts tend to cite *Roe v. Wade*, 410 U.S. 113 (1973), for an expansive understanding of women’s right to reproductive choice, without noting (or perhaps being aware of) the Court’s subsequent case law and the decisions of lower courts allowing for significant exceptions to that right. Rebouché, *supra*.

problematic decisional outcomes. Foster cites as an example the April 2009 decision by Acting National Director of Public Prosecutions, Mokededi Mpshe, to drop criminal charges against Jacob Zuma, which he justified in international terms.¹⁵⁸ This decision cleared the way for Zuma, the African National Congress President, to become the President of South Africa. Mr. Mpshe relied on cases from English courts in holding that political interference required the prosecution to drop the charges, but as Foster explains it, the cited cases were both “distinguishable on the facts and inconsistent with South African precedent.”¹⁵⁹

This example of abuse demonstrates how the practice of comparative citation may, somewhat easily, be used to mask, rather than expose, politically motivated outcomes, but notably, this was not a court decision. Nor, in the extensive literature on foreign citation, are there many noted flagrant misrepresentations of foreign or international law by courts, although the Bangladeshi decision in *Anti-Corruption Commission* may come close.¹⁶⁰ This perhaps makes sense. Most of the time, constrained courts need not make the effort of justifying their decisionmaking in terms of international and comparative law because their sources of authority come more directly from their alignment with the elected branches.

Again, the problem in these cases is not really one of counter-majoritarianism or domestic displacement.¹⁶¹ Nor, for the most part, is it unique to the use of comparative citation (with the exception of the challenges presented by comparative analysis). Rather, as I have suggested,¹⁶² these cases—and the challenges they present—require the possibly uncomfortable acknowledgement that courts are political institutions that may be less than transparent, or even disingenuous, in their decisionmaking.¹⁶³ Moreover, they demonstrate that courts, like all institutions, have limitations that may shape their decisionmaking in unfortunate ways. Nonetheless, to the extent that international convergence on a norm actually increases the likelihood of its “accuracy,”¹⁶⁴ the practice of foreign citation may have an overall positive

158. Foster, *supra* note 3, at 80.

159. *Id.* at 80, 115-18.

160. The Court did not misrepresent the holdings of these foreign cases, but it did fail to note that both countries have long since repudiated them. See *Anti-Corruption Commission*, 37 CLC (AD).

161. In fact, the critique of these courts might be quite the opposite. Because of their reliance on popular support, these courts may be overly accountable to domestic opinion and may be less likely to issue counter-majoritarian decisions.

162. See *supra* Section II.D.

163. Theunis Roux makes the point that legal academics are uncomfortable, particularly in the South African context, acknowledging that extraneous political factors exert any kind of influence at all on the way judges make their decisions. Theunis Roux, *Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court*, in *DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES* 66, 67 (Siri Gloppen et al. eds., 2004).

164. See Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 141 (2006); Jeremy Waldron, *Foreign Law and the Modern Jus Gentium*, 119 HARV. L. REV. 129, 143-46 (2005). These kinds of “epistemic claims assume that guidance to answers on open questions relevant to constitutional judgment can be found in the accumulation of third party decision-making (like that of juries or scientific communities) by multiple national legal systems.” JACKSON, *supra* note 82, at 47.

impact on the development of a functional indigenous legal culture and may lead to “correct” results more of the time.

C. *Beyond Transition: Comparative Citation Continued*

Without undermining the fundamental premise of this project, which is that context matters, the strategic account of foreign citation in transitional regimes may have something to contribute to the debate over the use of the practice in more established democracies. As Eyal Benvenisti has noted, even in these countries, domestic institutional weaknesses and international pressures may undermine the ability of the elected branches to be responsive to domestic demands.¹⁶⁵ In response, courts may rely on comparative citation as a way of mediating international and national conflicts, in a way that both builds the autonomy and representative capacity of domestic institutions and protects the spaces for potential democratic deliberations.

I referred earlier to the Supreme Court of India’s environmental jurisprudence of the 1990s as an example of diagonal accountability through comparative citation.¹⁶⁶ India was no longer a new democracy at this point; nonetheless, it faced some of the same institutional challenges that characterize nations in transition. Beginning in the late 1970s, following the end of the “Emergency” and the collapse of the Congress Party, the Court arose as one of the few remaining national institutions.¹⁶⁷ Emboldened by the weakness of the elected branches and cognizant of the atrocities committed during the Emergency, the Supreme Court of India set about to bring national constitutional standards in line with international norms, relying heavily on both foreign and international law to frame and legitimate its decisionmaking.¹⁶⁸ Although the Court’s citation to foreign and international law has declined since its early years,¹⁶⁹ perhaps reflecting the strength and stability of its own domestic jurisprudence, it still regularly looks abroad when deciding path-breaking new cases in areas of second generation rights.

The Court emerged from the post-Emergency period as the most popular and arguably most responsive branch of domestic government.¹⁷⁰ It had also

165. See Benvenisti, *supra* note 37, at 273. Eyal Benvenisti explains the increasing prevalence of foreign citation practice as a judicial “reaction to the delegation of governmental authority to formal or informal international institutions and to the mounting economic pressures on governments and courts to conform to global standards.” *Id.* Through cooperation, in the form of reference and citation, he suggests that judges and Justices from different national courts are resisting actions taken by the legislative branches in response to global pressures. My thesis is less concerned with the existence of a “dialogue,” or cooperation, between judicial actors—the evidence of which is limited. See Tom Ginsburg, *National Courts, Domestic Democracy, and the Evolution of International Law: A Reply to Eyal Benvenisti and George Downs*, 20 EUR. J. INT’L L. 1021, 1023-25 (2009); Law & Chang, *supra* note 5, at 528-32.

166. See *supra* note 130 and accompanying text.

167. Smith, *supra* note 2, at 251-52.

168. *Id.* at 252-53.

169. See *id.* at 240-41.

170. It is not an exaggeration to say that the degree of respect and public confidence enjoyed by the Supreme Court is not matched by many other institutions in the country. “The judiciary in India has become the last refuge for the people and the future of the country will depend upon the fulfillment of

become part of the judicial dialogue on important rights issues.¹⁷¹ The Court has capitalized on its strength and popularity to position itself as an engine of diagonal accountability in the nation. It has drawn on international standards in decisions policing the actions of the other branches.¹⁷² Moreover, it has, in some instances, set itself up as a check on the coercive international pressures of globalization, protecting the space for a robust domestic discussion on second-order rights that run counter to international economic pressures.¹⁷³

David Landau has written extensively on the activism of the Colombian Constitutional Court under somewhat similar institutional conditions.¹⁷⁴ Like India, Colombia also has a lengthy history as a democracy,¹⁷⁵ but it was not until 1991 that the country adopted a written constitution in response to the widespread perception of governmental failure among the population. Because of institutional weaknesses in the other branches,¹⁷⁶ the Constitutional Court

the high expectations reposed by the people in it." President Kocheil Raman Narayanan, Speech on the Occasion of the Golden Jubilee Celebrations in the Supreme Court of India (Jan. 28, 2000), available at <http://www.india-seminar.com/2000/487/487%20narayanan.htm>.

171. See generally Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003) (including the Supreme Court of India among the active participants in the global judicial dialogue on rights). The Court's death penalty jurisprudence has been cited by both the U.S. Supreme Court and the Constitutional Court of South Africa. See, e.g., *Knight v. Florida*, 528 U.S. 990, 996-97 (1999) (Breyer, J., dissenting) ("The Supreme Court of India has held that an appellate court, which itself has authority to sentence, must take account of delay when deciding whether to impose a death penalty. . . . A condemned prisoner may ask whether it is 'just and fair' to permit execution in instances of '[p]rolonged delay.'" (citing *Sher Singh v. State of Punjab*, A.I.R. 1983 S.C. 465, 470-71 (India)); *State v. Makwanyane* 1995 (3) SA 391 (CC), ¶ 79 (S. Afr.) ("To complete the picture, it should be mentioned that long delays in carrying out the death sentence in particular cases have apparently been held in India to be unjust and unfair to the prisoner, and in such circumstances the death sentence is liable to be set aside." (citing *Triveniben v. State of Gujarat* (1989) 1 S.C.C. 678 (India); *Daya Singh Lahoria v. Union of India & Ors.*, (1991) 2 S.C.R. 462 (India)); *Prakash Mani Sharma and Others on Behalf of Forum for Protection of Public Interest (Pro Public) v. Prime Minister and Office of Council of Minister and Others*, Writ Petition No. 0065-w0-149 of 2065 BS (2008) (Nepal)); see also Ruth Bader Ginsburg, *Affirmative Action as an International Human Rights Dialogue: Considered Opinion*, BROOKINGS REV., Winter 2000, at 2, 3 (discussing the Supreme Court of India's affirmative action jurisprudence).

172. As Smith explains, the Court has issued decisions requiring the creation of a governmental "watch dog" body to investigate allegations of public wrongdoing, increasing transparency in the electoral system, and defining a broader right of information access—and in so doing, has regularly referenced international principles and international law. Smith, *supra* note 2, at 258-59 (citing *Vineet Narayan v. Union of India*, A.I.R. 1998 S.C. 889 (India); *Peoples Union for Civil Liberties v. Union of India*, A.I.R. 1997 S.C. 568 (India); and *Civil Writ Petition #7257* (1999) (Delhi H.C.)).

173. See Lauren Birchfield & Jessica Corsi, *The Right to Life Is the Right to Food: People's Union for Civil Liberties v. Union of India & Others*, 17 HUM. RTS. BRIEF 15, 15 (2010) ("In a notable refusal to accept the negative effects of globalization upon access to basic nutrition for its poorest populations . . . the Supreme Court of India has established itself as a champion of food security and committed itself to the realization of the right to food in India."). The Court has recently expanded the ability of the domestic judiciary to review broad "public policy" challenges to foreign arbitral awards. Dharmendra Rautray, *India's Supreme Court Places New Hurdles on Enforcement of Foreign Awards: Venture Global and the Cases Leading up to It*, 64 DISP. RESOL. J. 80, 81 (2009). This trend is not uniform, however. See Upendra Baxi, *Access to Justice in a Globalised Economy: Some Reflections*, in GOLDEN JUBILEE VOLUME 27, 28 (India Law Inst. ed., 2007) (discussing decisions of the Court that made Indian law more open to free market globalization).

174. Landau, *supra* note 29, at 321 ("[T]he Colombian Constitutional Court has viewed these political conditions as a license to become perhaps the most activist court in the world.").

175. See DAVID BUSHNELL, *THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF* 201-48 (1993).

176. Landau, *supra* note 29, at 322.

has taken a leadership role in many significant issues of domestic policy. Its continued responsiveness to the pressing challenges facing Colombia's citizenry has made it a popular institution domestically,¹⁷⁷ and its creative and thoughtful efforts to interpret the Constitution's guarantees within the context of international and foreign law have earned it an international reputation for creative rights-enhancing jurisprudence.¹⁷⁸ Like the Supreme Court of India, the Colombian Constitutional Court has been able to leverage its domestic and international status to protect itself from unfriendly political elites¹⁷⁹ and to create space for domestic policymaking to occur in the face of international pressures. For example, during the mortgage crisis of the late 1990s, the Court stepped into the void created by the president's preoccupation with "international calls for fiscal austerity" and legislature's dysfunction to help craft a housing policy that, while flawed, "was very popular and . . . kept most homeowners in their homes."¹⁸⁰ Notably, the executive branch ultimately drafted the legislation—but the Court's efforts helped to create the space for a response by the legislative branch in the face of international pressures.

Even democratic institutions in the United States are not entirely immune to the harmonization demands of globalization. For example, the United States is increasingly out of sync with the international community in its commitment to the continued exercise of the death penalty.¹⁸¹ This damages the nation's

177. *Id.* at 322 (noting the Court's institutional popularity); *see also id.* at 374 ("[D]ecisions like the mortgage interest case suggest that the Court is doing a better job than either of the other branches in responding to a popular outcry. Unlike in the United States . . . in Colombia, the Court itself appears to best reflect popular visions of constitutional transformation.").

178. The Court has issued landmark decisions on a variety of issues, including abortion, euthanasia, and healthcare, that have established it as an international leader on issues of human rights. For example, in 2006 the Court struck down a law banning all abortions as unconstitutional, relying on international and foreign law to shape the domestic constitutional protections. In a lengthy discussion, the Court described the trajectory towards international recognition of the full equality of women and then discussed the relationship between reproductive rights and the realization of these goals. The Court referred both to the international human rights treaties to which the nation is a party, including the Convention on the Elimination of All Forms of Discrimination Against Women, the ICCPR, and the Convention on the Rights of the Child, but also to the decisions from the constitutional courts of the United States, Germany, and Spain. For translated excerpts from the decisions, see *Excerpts of the Constitutional Court's Ruling That Liberalized Abortion in Colombia*, WOMEN'S LINK WORLDWIDE (2007), http://www.womenslinkworldwide.org/pdf_pubs/pub_c3552006.pdf.

179. Landau, *supra* note 29, at 374.

180. *Id.* at 320; *see also* Cesar Rodriguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 TEX. L. REV. 1669, 1690 (2011) (discussing the Court's activism in the 1990s and a 1999 decision in which the Court replaced the national system of housing finance with one that it had largely created itself).

181. "Beginning in the late 1980s, supranational and national tribunals began to consider the legality of various aspects of the death penalty, taking as their starting point the prohibition on cruel or inhuman punishment (a prohibition commonly found in both domestic and international legal sources)." Melissa A. Waters, *Judicial Dialogue in Roper: Signaling the Court's Emergence as a Transnational Legal Actor?*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT 523, 524 (David L. Sloss et al. eds., 2011) (citing Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 507-16 (2005)). By the time the twentieth century came to a close, "the United States stood entirely alone as the only Western industrialized nation still to retain the death penalty." Mark Warren, *Death, Dissent and Diplomacy: The U.S. Death Penalty as an Obstacle to Foreign Relations*, 13 WM. & MARY BILL RTS. J. 309, 313 (2004).

international image,¹⁸² and its ability to cooperate on a host of issues, including perhaps most significantly, counterterrorism and national security.¹⁸³

Yet changing the law of the death penalty domestically to reconcile its conflict with our foreign relations is complicated. Our federalist structure bifurcates these responsibilities, placing the exercise of the death penalty primarily with the states, while control over international relations lies with the federal government.¹⁸⁴ The deep commitment of a few states' citizenry to the practice of the death penalty means that opposing it carries a significant political cost, even with respect to practices opposed by the vast majority of the U.S. population, like the juvenile death penalty. By the time the Supreme Court reversed its sixteen-year-old opinion in *Stanford v. Kentucky* and barred the execution of persons whose crimes were committed prior to their eighteenth birthday, they were "abolish[ing] a practice that had pretty much died out on its own."¹⁸⁵ Only two states, Virginia and Texas, continued to execute juvenile offenders on a regular basis, and they "accounted for over 75 percent of all

182. As a former United States Ambassador to France put it:

[N]o single issue evoked as much passion and as much protest as executions in the United States. Repeated protests in front of the embassy in Paris, protests at our consulates and, just recently, a petition signed by 500,000 French men and women delivered to our embassy in Paris were part of a constant refrain.

Felix G. Rohaytn, *America's Deadly Image*, WASH. POST, Feb. 20, 2001, at A23. The extent of the international approbation, brought on by the United States' practice of capital punishment, changed the ambassador's personal position. He explained his support for a moratorium by reasoning that "[s]ome 300 million of our closest allies think capital punishment is cruel and unusual and it might be worthwhile to give it some further thought." *Id.* In 2001, a group of former U.S. diplomats filed an amicus brief opposing the execution of the mentally retarded, arguing that continuing the practice would "strain diplomatic relations with close American allies, provide diplomatic ammunition to countries with demonstrably worse human rights records, increase U.S. diplomatic isolation, and impair other United States foreign policy interests." Brief for Morton Abramowitz et al. as Amici Curiae Supporting Petitioner at 7-9, *McCarver v. North Carolina*, 532 U.S. 941 (2001) (No. 00-8727). In 2001, as a result of its continued execution of juvenile offenders, the United States lost its seat on the U.N. Commission on Human Rights.

183. The Austrian government delayed signing a new extradition treaty with the United States due to concerns that the death penalty might be imposed in those cases, despite treaty law and assurances to the contrary. *See* Warren, *supra* note 181, at 326 (citing Press Release, Austrian Press and Information Service, Extradition Treaty Between Austria and the United States (Jan. 8, 1998) (on file with author)). The European Union did likewise. *See id.* at 335 (citing Agreement on Extradition Between the United States of America and the European Union art. 13, U.S.-E.U., June 25, 2003, 43 I.L.M. 749). Negotiations with the Australian government over placing sky marshals on flights between the countries stalled when the U.S. government refused to promise that no Australians arrested onboard one of these flights would face the death penalty for any offense. *Id.* at 326 (citing *One Point Holds Up Sky Patrol*, AUSTL. ASSOC. PRESS, Feb. 1, 2004, http://www.news.com.au/common/story_page/0,4057,8561647%255E2,00.html). The execution of a Mexican citizen denied his consular rights prompted President Vicente Fox to cancel a state visit with President George W. Bush. *See id.* at 327 (citing Press Release, Office of the President of Mexico, President Fox Cancels Proposed Texas Tour in Repudiation of the Execution of Javier Suarez Medina (Aug. 14, 2002) (on file with author), available at <http://fox.presidencia.gob.mx/en/search/?contenido=3504&pagina=1&palabras=Francisco+Javier+Mayorga>).

184. Perhaps nowhere has this conflict been more apparent than in the litigation surrounding the United States' failure to meet its obligations under the Vienna Convention on Consular Relations. Most recently, the State of Texas executed Humberto Leal, a Mexican citizen whose Vienna Convention rights were violated, over the objection of Obama Administration and despite the pleas of top military leaders and State Department officials. *See* Ed Pilkington, *US Politicians and Lawyers Protest Against Death Penalty for Mexican Man*, GUARDIAN (London), Jun. 7, 2011, <http://www.guardian.co.uk/world/2011/jun/07/us-texas-humberto-leal-execution>.

185. Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 52 (2007) (discussing *Stanford v. Kentucky*, 492 U.S. 361 (1989)).

juvenile offender executions in the modern death penalty era.”¹⁸⁶ By contrast, nationally, “over two-thirds of those asked opposed the juvenile death penalty.”¹⁸⁷ The continued use of the juvenile death penalty lacked national majoritarian support, and came at a high cost for the United States internationally.

The strategic use of foreign and international law in the Supreme Court’s death penalty jurisprudence may be helping to mediate this conflict between international norms and domestic preferences. By carving out specifically problematic applications of capital punishment as unconstitutional while leaving the practice largely intact, the Supreme Court brings the United States into compliance with international law norms in ways that would be politically challenging for the elected branches, and that would likely be stymied, in any event, by the federalist division of labor. Furthermore, by eliminating some of these more extreme practices from U.S. law, the Court removes some of the barriers to increased U.S. participation in other international legal regimes.¹⁸⁸ Finally, by acknowledging foreign and international law and practice in its death penalty jurisprudence, the Court may actually be softening the conflict between the domestic practice and the international norm in ways that protect a space for the practice to continue. The Court’s references to international and comparative law signal to external observers that their concerns are not going entirely ignored, even if the political branches are not (or cannot) be responsive. In this way, the Court’s incremental chipping away at the practice can be seen as buying time for domestic deliberations around the use of the death penalty to continue to occur.

The juvenile death penalty example is somewhat anomalous. On relatively few issues is the United States so far outside the international mainstream on an issue that ignites such widespread popular condemnation. I raise it therefore only to demonstrate that even in an economically powerful and well-established democracy, courts may be the institution best positioned to respond to the powerful legal harmonization pressures of globalization—and that they may do so in ways that further undermine the applicability of the antidemocratic critique of foreign citation.

VI. CONCLUSION

Establishing the rule of law is a crucial step towards solidifying democratic governance, yet it is also one of the most challenging. The existence

186. *Id.* at 52-53 (citing Victor L. Streib, *Executing Juvenile Offenders: The Ultimate Denial of Juvenile Justice*, 14 STAN. L. & POL’Y REV. 121, 125-26 (2003)).

187. *Id.* A Gallup poll showed sixty-nine percent of those asked were against the death penalty for juvenile offenders. *Id.* (citing *Death Penalty*, GALLUP NEWS SERV., Aug. 31, 2007 (on file with the Duke Law Journal)).

188. For example, the preservation of the juvenile death penalty was a primary reason why the United States has declined to ratify the Convention on the Rights of the Child, the human rights treaty with the widest support internationally. See Lainie Rutkow & Joshua T. Lozman, *Suffer the Children?: A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 177 (2006).

of independent courts poses a real threat to the regime in power, and thus judges who defy the state are often sanctioned. Nonetheless, even in new and hybrid democracies where institutional protections are weak, judges exhibit unexpectedly independent behavior. This Article posits a theory for why judges in newly or weakly democratic regimes engage in independent decisionmaking and identifies comparative citation as a tool that allows them to do so effectively. It thus builds upon and contributes to the growing literature that identifies judges as agents of their own institutional development.

This Article also problematizes the “antidemocratic” critique of foreign citation practice in both new and established democratic systems. When domestic political failures converge with international pressures, comparative citation can be a powerful tool for court-led diagonal accountability. To be clear, I do not mean to suggest that it is only under these conditions that comparative citation is appropriate. Numerous other authors have articulated the educational and aspirational¹⁸⁹ benefits of the foreign citation practice. Rather, my focus here has been on contextualizing the “antidemocratic” critique to demonstrate how fully it is premised on an idealized view of the way democracy works—a vision that is never uniformly realized, even in the most established democratic nations.

Like the international and foreign norms themselves, the antidemocratic critique travels and its message is powerful. In January 2011, a Ugandan court ordered a tabloid magazine to pay damages after it published a front-page article including the photos and addresses of gay and lesbian Ugandans under the banner “Hang Them.” Citing foreign law, the court found that the tabloid’s conduct violated the subjects’ rights to dignity and privacy.¹⁹⁰ Later that same year, former Ethics and Integrity State Minister James Nsaba Buturo, wrote an op-ed column accusing Ugandans of “self-hatred.” He attacked the adoption of foreign and international human right norms in language that (while far more pointed) resonates with the U.S. debate. He concluded his op-ed by suggesting that

Our maturity as a nation will be assessed by the extent to which we are staunchly

189. See, e.g., Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 114 (2002) (critiquing the U.S. Supreme Court for “fail[ing] to make use of an important source of inspiration, one that enriches legal thinking, makes law more creative, and strengthens the democratic ties and foundations of different legal systems”); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 118 (2005) (“Looking to foreign law may . . . enhance judicial decisionmaking by expanding opportunities for ethical engagement with the views of those having equivalent responsibility and aspiring to similar impartiality.”); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1309 (1999) (“We can learn from comparative constitutional experience . . . just in the way we learn from anything else. Thinking about that experience can be part of the ordinary liberal education of thoughtful lawyers.”).

190. Anthony Wesaka, *Court Orders Tabloid To Pay Shs4.5m over Gays Story*, DAILY MONITOR, Jan. 5, 2011, <http://www.monitor.co.ug/News/National/-/688334/1083838/-/cjdcliz/-/index.html>. The *Rolling Stone* tabloid magazine had published a front-page article that included the photos and whereabouts of gay and lesbian Ugandans under a banner urging “Hang Them.” Jeffrey Gettleman, *Ugandan Who Spoke Up for Gays Is Beaten to Death*, N.Y. TIMES, Jan. 27, 2011, <http://www.nytimes.com/2011/01/28/world/africa/28uganda.html>. A few months later, gay rights advocate David Kato was beaten death with a hammer in his own neighborhood. *Id.*

patriotic and how much we truly shun practices and values that undermine our integrity, development, unity and our nation's stability When our maturity is not found wanting, at that point, other nations will respect us. Some of them may even stop seeing our God-blessed nation as a dumping ground for their practices and values which they are touting to be "human rights" but in reality are a threat to our nation's viability and integrity.¹⁹¹

The charge that courts' foreign citation is undermining national sovereignty or identity is powerful, particularly in post-colonial societies. It may be used as a way to delegitimize and retaliate against courts that attempt to limit state power.¹⁹² Given the important work that comparative citation can do to promote democratic transition and consolidation, endorsing a narrative that undermines it deprives courts of an important tool.

Viewed more broadly, this Article suggests the value of evaluating comparative law through an institutional lens. We cannot accurately assess the validity of judicial action without understanding what it is a court is trying to do and why. This requires a closer and deeper look at the judiciary's characteristics and its relationship with other domestic institutions. Moreover, as this analysis has made plain, this kind of contextual view may not only undermine the international applicability of American constitutional law truisms, it may shed important light on their domestic application.

191. Nsaba Buturo, *I Find It Disturbing that We, Ugandans, Hate Ourselves*, DAILY MONITOR, Aug. 31, 2011, <http://www.monitor.co.ug/OpEd/Commentary/-/689364/1227976/-/12s0twyz/-/index.html>.

192. The judiciary in Singapore was also an "enthusiastic" participant in the global judicial dialogue until, in a rather sudden reversal, it adopted an explicit "hands-off" policy to citing foreign constitutional decisions. Arun Thiruvengadam attributes the change not to any reason articulated in a court decision, but rather to a speech made by Singapore's Law Minister criticizing the use of foreign precedents in a decision limiting the government's authority to detain citizens. Arun Thiruvengadam, *The Use of Foreign Law in Constitutional Cases in India and Singapore: Empirical Trends and Theoretical Concerns* 13 (2010) (unpublished manuscript) (on file with author). Law Minister S. Jayakumar argued:

[I]f we allow foreign case law and precedents to allow our courts to be involved in an interventionist role, then we will have an untenable position . . . because our law on national security matters will be governed by cases decided abroad, in countries where conditions are totally different from ours . . . if Singapore courts are allowed, because of all these foreign precedents to review the discretion of the Executive on security matters . . . then Singapore judges will in effect become responsible for and answerable to decisions affecting national security of Singapore . . . Our courts . . . should not therefore be involved in the exercise of these powers of detention.

Shortly after this speech, the judge who wrote the decision retired and was succeeded by a jurist who rejected the use of foreign authority and who, perhaps not coincidentally, adopted a judicial philosophy of extreme deference to the view of the elected branches in determining constitutional meaning. *Id.* at 16.