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CHAPTER THREE

Foreign Law in Domestic Courts

Different Uses, Different Implications

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One can be forgiven for wondering if the debate about references to foreign law in U.S. court opinions is much ado about nothing.[1] In none of the cases that sparked the debate—*Atkins v. Virginia*,[2] *Lawrence v. Texas*,[3] and *Roper v. Simmons*[4]—did the U.S. Supreme Court treat foreign law as binding law that could override U.S. law. Nor, as two recent articles empirically demonstrate, is the use of foreign law by U.S. courts anything new.[5] For courts in other countries, the use of foreign law is "decidedly commonplace."[6] Yet "[t]here is little evidence to suggest parallel mobilization in opposition to foreign citations by courts abroad"[7]—which suggests that the controversy in the United States indeed might be disproportionate to the problems posed by comparativism in judicial decision making. As Noga Morag-Levine states, "Supreme Court opinions are replete with references to extra-legal sources such as philosophical treatises and social science research. Why single out foreign case law as deserving of special condemnation?"[8] After a careful analysis of the debate, Mark Tushnet concludes that what really is motivating critics of foreign law in U.S. courts is concern about the appropriate scope of judicial power, not foreign law per se.[9]

Nevertheless, the question of foreign law in domestic courts is an important one. Skeptics correctly warn that the use of foreign law—at least in the context of constitutional interpretation—raises serious issues of constitutional theory[10] and comparative methodology.[11] Those more sympathetic to

the use of foreign law not only disagree with skeptics' arguments that there is no "constitutional license" to use foreign law,[12] but also claim that a greater willingness of domestic courts to use foreign law can improve the quality of constitutional decision making. The focus of existing research and commentary on both sides of this debate is on the constitutional issues associated with references to foreign law in U.S. court opinions and, more generally, on the important normative concerns about whether and how domestic courts should use foreign law.

This work, however, focuses little attention on the actual consequences of domestic court references to foreign law and therefore eventually relies on untested empirical assumptions about what those consequences might be.[13] Nonconsequentialist reasons to favor or disfavor foreign law in domestic courts exist, of course. Yet a well-informed, normative dialogue must be attentive to consequences, at least if it is to extend beyond the narrow confines of more formal variants of constitutional theory. The use of foreign law in domestic courts also raises interesting questions of positive theory—particularly about the relationship between different uses of foreign law and the cross-border migration of legal norms that so far are unexplored. For these reasons, this chapter proposes a social science approach that focuses on the empirical implications of foreign law in domestic courts.

Unfortunately, the existing literature does not provide the conceptual foundations for exploring these implications. Scholars generally appreciate that domestic courts can use foreign law in different ways and that these differences are analytically significant, but the result has been an overabundance of typologies of different uses and a lack of conceptual clarity. Therefore, in the main part of this chapter, I will attempt to take a small conceptual step forward by consolidating into a single, manageable typology the many different uses of foreign law in domestic courts that already have been identified by scholars. No single typology can be useful for all purposes, and ultimately an empirical project motivated by a particular theory calls for concepts that are motivated by the same theory. Thus the goal is modest: to provide a language for a preliminary exploration of the empirical implications of different uses of foreign law that may be useful to a wide range of scholars. Next, I will build on the typology by considering the consequences of different uses of foreign law in domestic courts and the role of domestic courts as agents in processes of norm internalization and transnational policy diffusion. In particular, I will use the typology to examine the claim made by some critics that foreign law references in U.S. court opinions lead to the internalization of non-U.S. norms into U.S. society by changing domestic law or policy. Finally, I will suggest several avenues for future research on foreign law in domestic courts and domestic courts as institutional pathways for norm internalization. The central message is simple: Different uses of foreign law have different implications for the cross-border migration of legal norms, and both normative theory and positive theory should take these differences into account.[14]

DIFFERENT USES OF FOREIGN LAW IN DOMESTIC COURTS

"Stable concepts and a shared understanding of categories are routinely viewed as a foundation of any research community."[15] If this view is correct, then the emerging community of scholars studying foreign law references in U.S. court opinions is being built on somewhat shaky foundations; the scholarly conversation about how domestic courts use foreign law suffers from a cacophony of categories. Richard Posner distinguishes informational and precedential citations to foreign law.[16] Anne-Marie Slaughter distinguishes between using foreign law as coercive authority and using it as persuasive authority.[17] Vicki Jackson takes Slaughter's category of persuasive authority and breaks it into more than a dozen specific ways that domestic courts have used foreign law.[18] Kenneth Anderson distinguishes the use of foreign law to help interpret the U.S. Constitution from other uses of foreign law.[19] Still others—including David Fontana and Kim Scheppele—distinguish between using foreign law in a positive way, as an example of what a domestic court should do, and in a negative way, as an example of what a domestic court should not do.[20] Fontana also distinguishes "genealogical comparativism" from "ahistorical comparativism," as well as three other ways domestic courts may use foreign law: in *dicta*, to create a principle of law, and to prove a constitutional fact.[21]

For Sujit Choudhry, foreign law can be used in one of three modes—universalist, genealogical, and dialogical[22]—whereas Mark Tushnet identifies functionalism, expressivism, and bricolage as three ways of using foreign law in constitutional interpretation.[23] Harold Koh refers to three situations in which the U.S. Supreme Court has referred to foreign law: when a U.S. law parallels the law of another country; to learn about the possible consequences of a particular solution to a common legal problem; and when a U.S. constitutional concept refers to a community standard such as "cruel and unusual," "due process," or "unreasonable."[24] Kai Schadbach, using a more traditional comparative law perspective, emphasizes the use of foreign law for enhancing knowledge and understanding and as a source of ideas and solutions.[25] More empirically oriented scholars have categorized uses of foreign law more exhaustively. David Zaring identifies five uses: to interpret domestic law, interpret foreign law, interpret treaties, interpret customary international law, and help coordinate litigation.[26] Steven Calabresi and Stephanie Zimdahl discern five "thematic categories" of foreign law use: use in "reasonableness" determinations; interpretation of ambiguous phrases; evidence in criminal law cases; logical reinforcement for judicial opinions; and illustrations of possible consequences of a legal decision.[27]

Social science methodologist John Gerring emphasizes that "[c]oncept formation concerns the most basic question of research: What are we talking about?"[28] Legal scholars generally have a shared understanding of what is meant by "foreign law."[29] They appreciate that domestic courts can use

foreign law in different ways, thus avoiding the pitfall of lumping together all uses of foreign law.[30] However, as demonstrated by the foregoing tour of typologies, scholars are classifying these different uses very differently, resulting in a proliferation of categories that blurs the fundamental "what are we talking about" question. The lack of agreement about how to categorize the different ways that domestic courts use foreign law risks hindering productive scholarly dialogue and retarding theoretical progress.

With these concerns in mind, I propose a five-part conceptual typology of the different ways that domestic courts can use foreign law: as (1) binding law, (2) a nonbinding norm, (3) an interpretive aid, (4) a basis for functional comparison, and (5) factual information.[31] The immediate consequence inevitably is to add to the already long list of typologies. However, the typology proposed here seeks to consolidate existing categories, and to the extent it succeeds in doing so, the result is integration rather than further proliferation. More fundamentally, the typology attempts to strike an appropriate balance between capturing analytically relevant differences, on one hand, and avoiding digression into an unmanageable and conceptually useless list on the other.

First, courts can use foreign law as binding law to help answer the question, "What must we decide?" This use occurs when a domestic court makes a legal decision by applying foreign law to a given set of facts based on an implicit or explicit claim that the foreign law is a binding legal rule in the domestic forum. Such a claim in turn depends on the application of a "rule of recognition," to use H. L. A. Hart's terminology, that specifies "some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a [legal] rule."[32] The underlying logic can be called a "logic of necessity:" the court uses a particular legal rule because the rule of recognition demands it.[33]

Most legal scholars understand that in none of the cases that have led to the current controversy has a court used foreign law as binding law. However, this type of use is more than a theoretical possibility. In many cases, U.S. state and federal courts dealing with transnational litigation apply foreign law as the binding law in the case after engaging in choice-of-law analysis.[34] Similarly, U.S. courts frequently recognize and enforce the judgments of foreign courts.[35] An example is *Silverman v. Rosewood Hotels & Resorts*, in which the plaintiff filed a suit in a U.S. district court against the company that managed a Mexican hotel, claiming that she was injured while staying there.[36] The plaintiff argued that New York law should apply to the case, and the defendant argued that Mexican law should apply. In its choice-of-law analysis, the court considered a number of factors, including the general principle that the law of the place of the injury should govern. It then concluded that Mexican law applied and used that law to determine the amount of damages owed to the plaintiff.

Second, judges can use foreign law as a nonbinding norm—as a source of answers to the question, "What should we decide?" This use occurs when a domestic court refers to foreign law to make or support a normative argument but does not treat it as binding law. Whereas the use of foreign law as binding law relies on the claim that the foreign law is, according to the rule of recognition, binding law in the domestic forum, the use of foreign law as a nonbinding norm relies on an argument—again, either implicit or explicit—that the foreign law has some normative force. Such a claim may, for example, be rooted in the intrinsic normative value of the foreign law's content, such as its rationality or resonance within a particular set of moral values or on the law's provenance.[37] The underlying logic is a logic of appropriateness:[38] foreign law is used as a norm to suggest which decision is appropriate, not which one is legally necessary.[39]

Use of foreign law as a nonbinding norm includes a number of uses described by other scholars, all of which involve references to foreign law to make or reinforce a normative argument: use as evidence of reasonableness,[40] community standards,[41] or natural[42] or universal law;[43] use of foreign law in an expressive,[44] aversive, aspirational,[45] or genealogical mode;[46] and more generally, use as what Calabresi and Zimdahl call "logical reinforcement."[47] However, use as a nonbinding norm is not intended to include all uses of foreign law that are covered by Slaughter's concept of "persuasive authority."[48] Foreign law may be persuasive because of its normative force, in which case it is used as a nonbinding norm; because it is deemed relevant to the interpretation of a legal text, in which case it is used as an interpretive aid; or because it provides information about the consequences of a particular legal decision, in which case the foreign law is being used for functional comparison.[49]

An example of foreign law being used as a nonbinding norm is the U.S. Supreme Court's 2005 decision in *Roper v. Simmons*. In that case, the Court referred to foreign law to provide normative support for the legal analysis of the Eighth Amendment that led it to conclude that the death penalty is cruel and unusual punishment when applied to minors: "Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty." The Court continued: "[O]nly seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[50]

Third, judges can use foreign law as an interpretive aid—as a tool for answering the question, "What does it mean?" This use occurs when a domestic court refers to foreign law to make or support an argument about the meaning of a legal text. There is a reliance on the claim that there is some relationship—whether textual, procedural, or historical—between the text being interpreted and the foreign law that makes the foreign law appropriate

as an interpretive aid. For some purposes, it may prove analytically helpful to divide this use into three subcategories: use of foreign law to interpret (1) domestic law, (2) foreign law, or (3) international law.[51]

An example of foreign law being used as an aid in interpreting domestic law is *Crawford v. Washington*, which the Supreme Court decided in 2004. The Court extensively discussed English common law to establish the historical context in which the Sixth Amendment was adopted in order to establish the meaning of the confrontation clause originally intended by the drafters of the U.S. Bill of Rights.[52] An example of the use of foreign law as an aid in interpreting foreign law is *Torah Soft v. Drosnin*, in which a U.S. district court, after applying choice-of-law analysis, used the Israeli Commercial Torts Law as binding law in the case and then consulted Israeli case law to help interpret it.[53] Finally, an example of using foreign law as an aid in interpreting international law is *Air France v. Saks*, in which the U.S. Supreme Court faced the task of interpreting the word "accident" in the Warsaw Convention.[54] As an interpretive aid, the Court examined a decision of a French court that had interpreted the same provision of the Warsaw Convention. The U.S. Supreme Court noted that, "[i]n determining precisely what causes can be considered accidents, we 'find the opinions of our sister signatories to be entitled to considerable weight.' "[55]

Fourth, foreign law can be used as a basis for functional comparison—as evidence to help answer the question, "What are the likely consequences of our decision?"[56] This use occurs when a domestic court refers to foreign law and the apparent consequences of that law to make inferences about the consequences of a possible decision.[57] This usage relies on the implicit assumption or explicit claim that the foreign experience is sufficiently comparable to the domestic experience to make the domestic court's analysis of likely consequences more accurate or reliable than it would be without considering foreign legal experience.[58] Unlike the use of foreign law as a nonbinding norm, which follows a logic of appropriateness, the use of foreign law for functional comparison follows a logic of consequences.[59] The focus is not on the foreign law's intrinsic normative value, but rather on its effects and what can be inferred from them about the likely effects of the domestic court's decision.

An example of the use of foreign law as a basis for functional comparison is the U.S. Supreme Court's landmark decision in *Miranda v. State of Arizona*.[60] The Court looked to the experience of other countries to bolster its claim that to require what have come to be known as Miranda warnings would not have a substantial detrimental effect on law enforcement. The Court first noted that the law of England, Scotland, and India requires equally or more comprehensive warnings to be given to an accused. It then explained: "There appears to have been no marked detrimental effect on criminal law enforcement in these jurisdictions as a result of these rules. Conditions of law enforcement in our country are sufficiently similar to permit reference to this experience as assurance that lawlessness will not result from warning an individual of his rights or allowing him to exercise them."[61]

Finally, domestic courts can use foreign law as factual information to answer factual questions. Not at issue is the foreign law's domestic legal or normative force, its bearing on the interpretation of a legal text, or its consequences. Rather, foreign law is used as a fact necessary for the application of a domestic legal principle[62] or for a domestic court to understand foreign legal proceedings according to what might be called a "logic of information." For example, a defendant's prior conviction in a foreign country may be a relevant fact in determining whether criminal prosecution in the United States is barred by the constitutional prohibition of double jeopardy;[63] in choice-of-law analysis, foreign law may be relevant in determining the extent of a foreign government's interest in having its law apply to transnational litigation filed in a domestic court. The adequacy of a foreign court as an alternative to the domestic court is a standard element of *forum non conveniens* analysis, and facts about the status of foreign legal proceedings are essential for judicial efforts to coordinate transnational litigation.

These five categories—use as binding law, as a nonbinding norm, as an interpretive aid, for functional comparison, and as factual information—inevitably occupy a somewhat uncomfortable middle ground between the inductivism and proliferation of categories beyond which this chapter attempts to move and the precisely tailored and theoretically motivated approach to concept formation and typologies that ultimately will be necessary for the most rigorous analytical work.[64] It is clear that no typology can work for all purposes. Nevertheless, this typology encompasses most of the uses of foreign law that other scholars have deemed important, organizes them analytically, and does so in a manageable way, using only a small number of categories. It is offered as a common language for scholars interested in exploring the implications of foreign law in domestic courts and as a starting point for further conceptual refinement.[65]

DIFFERENT USES, DIFFERENT IMPLICATIONS: DOMESTIC COURTS AS AGENTS OF NORM INTERNALIZATION

Do references to foreign law in domestic court opinions cause changes in domestic law or policy? This is one of the great concerns of critics of foreign law citations.[66] For example, Justice Scalia, citing Justice Thomas, argued in his dissent in *Lawrence* that the Court's references to foreign law in that case were "dangerous" because "this Court . . . should not impose foreign moods, fads, or fashions on Americans."[67] Yet there is no simple answer to this question,

Table 3.1. Different Uses of Foreign Law by Domestic Courts

Type of Use	*Associated Question*	*Associated Logic*	*Underlying Claim*
Binding Law	What must we decide?	Logic of Necessity	The foreign law is applicable binding law in the case.
Nonbinding Norm	What should we decide?	Logic of Appropriateness	The foreign law has normative force.
Interpretive Aid	What does it mean?	Logic of Interpretation	There is a textual or historical relationship between the foreign law and the text being interpreted.
Functional Comparison	What are the consequences?	Logic of Consequences	The foreign legal experience is comparable to domestic experience.
Factual Information	What are the relevant facts?	Logic of Information	The foreign law is a fact that is relevant to the legal analysis.

because different uses of foreign law imply different degrees and different kinds of cross-border norm migration.

It is worth emphasizing what is at stake here. The criticism rests on an empirical assumption, namely that the use of foreign law in domestic courts results in norm internalization. Whether this assumption is sound raises a formidable counterfactual question: But for the use of foreign law, how would the Court's decision, or the consequences of the Court's decision, be different, if at all? Little progress can be made toward answering this question here. My goal is more modest: to explore the intuition that emerges from the categorization of different uses of foreign law and how these differences have implications for norm internalization.

The use of foreign law as binding law involves direct but usually very limited degrees of norm internalization. It is direct because it involves the application of foreign law as the basis for an authoritative decision by a domestic court. However, it generally indicates a very limited degree of internalization. When a domestic court enforces a foreign judgment, it typically binds only the parties to the litigation giving rise to that judgment. Likewise, when choice-of-law analysis leads a domestic court to apply foreign law as binding law, it ordinarily applies only to the specific parties and facts of the case. In neither case is foreign law incorporated into generally applicable domestic law or used to change domestic policy.[68] Rather, internalization is limited to the specific case at hand.

Somewhat counterintuitively, then, the use of foreign law as a nonbinding norm or for functional comparison may in practice result in a higher degree of internalization than its use as binding law. In contrast to one-shot applications of foreign law to specific litigants, use as a nonbinding norm or for functional comparison may be associated with significant changes in domestic policy, even if it is not the primary basis for the Court's decision. In *Roper*, for example, the U.S. Supreme Court did not base its decision primarily on its use of foreign law as a nonbinding norm, but the decision changed U.S. policy regarding the punishment of criminal offenders. In *Miranda*, the Court did not base its decision primarily on its use of foreign law for functional comparison, but that decision resulted in important changes in criminal procedure. As already noted, to estimate how much different uses of foreign law affect judicial decision making would involve very difficult counterfactual reasoning. However, the foregoing analysis suggests that the distinction between the use of foreign law as binding law, on one hand, and as a nonbinding norm or for functional comparison, on the other, is a distinction with a theoretical and practical difference.

Moreover, internalization is likely to be qualitatively different depending on whether foreign law is used as a nonbinding norm or for functional comparison. In the first instance, to the extent that a norm is internalized, it is because of its normative salience according to a logic of appropriateness—

normative values associated with societal ends are being introduced domestically. In the case of functional comparison, internalization occurs instead because of a norm's functionality—because it is an effective means to a given end—according to a logic of expected consequences. In that case, solutions are being introduced domestically. In the *Roper* case, foreign law was used as a nonbinding norm to support the Court's conclusion that applying the death penalty to minors was unconstitutional. To the extent that there was internalization, it was internalization of a norm about appropriate forms of punishment. In *Miranda*, on the other hand, foreign law was used for functional comparison. Although the Court's decision obviously had normative content, to the extent that this particular functional use of foreign law resulted in internalization, it was internalization of a method for pursuing a societal goal—in this case, a solution to the problem of protecting suspects' constitutional privilege against self-incrimination without impeding law enforcement. Of course, different normative values may have different consequences, and different solutions are likely to have different normative implications—the line between ends and means rarely is obvious. Nevertheless, these different uses of foreign law imply different modes of internalization with qualitatively different impacts on domestic law and policy.

The use of foreign law as factual information generally should not lead directly to norm internalization, although it may do so indirectly; for example, as part of a choice-of-law analysis. The use of foreign law as an interpretive aid, however, may lead to incidental norm internalization. Take, for example, a domestic court that is applying a provision of its own country's constitution, using it as the binding law in the case, and assume that there is a range of interpretations considered *ex ante* by the sitting judge to be reasonable. If the use of foreign law as an interpretive aid moves the judge in favor of a particular interpretation or even merely narrows the scope of interpretations under consideration, then there has been internalization at the margins, with the possible result—again, difficult to estimate because of the challenges of counterfactual reasoning and causal inference—that the domestic court's decision is closer to that of another country than it would have been without the interpretive use of foreign law.

Given the plausibility of these relationships, international relations and comparative politics scholars should pay close attention to the role of domestic courts in transnational processes of norm internalization and policy diffusion. Leading approaches to norm internalization and policy diffusion focus on interactions between unitary states, treating them either as rational actors who incorporate norms in response to altered payoffs or new information[69] or as agents who internalize norms through processes of socialization.[70] For example, in the work of Beth Simmons and Zachary Elkins on the diffusion of liberal economic policies, the unit of analysis is the state, and the key

explanatory variables generally relate to the choices of other states and various qualities associated with those other states. Promising as these approaches may be, they tend to neglect domestic political variables that may determine the conditions under which norms or policies are likely to spread from one country to another. For this reason, state-centric versions of diffusion and norm internalization theory have been criticized for failing to explain the actual causal links between external rules and domestic policy choices[71] and for being vague: "[F]ew [studies] focus on the diffusion mechanism, or how it might vary cross-nationally. Large-N studies of global norm diffusion offer little additional insight, as they are quantitative and correlational in design. Missing is the detailed process tracing and case research needed to explore actual diffusion mechanisms."[72] Systematic study of the role of domestic courts as institutional pathways for the cross-border migration of norms would be one way to respond constructively to these criticisms.

Other approaches drop the unitary state actor assumption and look at how domestic actors and political structures provide pathways whereby external norms can be internalized—yet the role of domestic courts remains neglected. Andrew Cortell and James Davis emphasize two characteristics of domestic political structure that can increase the likelihood of norm internalization: decentralized decision-making authority based on separation of powers, with the reasoning that separation of powers provides more independent institutional pathways for norm internalization, and incorporation of international norms into domestic law.[73] The authors do not explore the role of domestic courts in their theory, but it would seem that domestic courts could play a central role in Cortell and Davis's causal story. To the extent that courts enjoy judicial independence, they offer a distinct institutional pathway for introducing external norms into domestic society and incorporating them into domestic law.[74] Thus international relations and comparative politics scholars could improve their understanding of cross-border norm migration by exploring the role of domestic courts in transnational processes of norm internalization and policy diffusion.

For their part, scholars specifically interested in the consequences of foreign law in domestic courts could benefit from exploring political science theories of diffusion and norm internalization.[75] For example, Cortell and Davis emphasize the domestic salience or legitimacy of a norm: In general, the greater a norm's domestic salience, the greater its impact is likely to be on domestic policy.[76] They suggest that an international norm is likely to have more domestic salience when there is a "cultural match"—that is, when it resonates "with domestic norms, widely held domestic understandings, beliefs, and obligations."[77] This reasoning would seem equally plausible when applied to foreign law and has several interesting implications. The higher the domestic salience of a foreign law, the greater its domestic impact is likely to be if used

by a domestic court. References to foreign law that do not enjoy domestic salience are less likely to have significant domestic normative consequences. In this way, even if a domestic court uses foreign law with the intention of changing domestic norms, the normative fabric of domestic society places a check on the court's ability to do so: If the norms it attempts to import by using foreign law do not resonate domestically, they are less likely to have domestic impact than if they do resonate with existing domestic norms.[78] As suggested by a long tradition of comparative law scholarship, it is far from obvious that formal introduction of external norms necessarily results in domestic normative change.[79]

Because different uses of foreign law in domestic courts are associated with different degrees and qualities of norm internalization and because norm internalization depends on domestic salience, across-the-board critiques of foreign law references based on concerns about judicial imposition of "foreign fads and fashions" miss the mark. The foregoing analysis suggests that if these concerns are valid, they probably are most justified in certain cases in which courts use foreign law as a nonbinding norm and less so under other circumstances. The analysis also suggests that even when domestic courts use foreign law with the goal of internalizing a foreign norm, such efforts are likely to have limited domestic consequences unless the foreign law has sufficient legitimacy under existing domestic norms. Ultimately, assessing the consequences of foreign law in domestic courts depends on addressing the formidable challenges of causal inference posed by the following counterfactual question: But for a court's use of foreign law, how would its decision, or the consequences of its decision, be different, if at all? Notwithstanding these challenges, the validity of untested assumptions about the consequences of foreign law references in domestic court opinions should not be taken for granted. Instead, they should be subjected to careful scrutiny.

CONCLUSION

The foregoing discussion of the different consequences of different uses of foreign law is not intended to be more than exploratory. Although motivated by empirical concerns, the analysis has been primarily conceptual. This is a necessary first step, given the absence of conceptual foundations in the existing literature, but the results are at best suggestive. An important line of further research is to more exhaustively examine the implications of different uses of foreign law and move beyond conceptual work to theory building and hypothesis testing.

In addition, this chapter surely raises more questions than it answers about the role of domestic courts as agents in processes of norm internalization and policy diffusion. For example, what determines whether and how

domestic courts use foreign law? This implies a second avenue of further research: Under what conditions are domestic courts likely to use foreign law in different ways?[80] Several hypotheses from the work of Beth Simmons and Zachary Elkins on diffusion might be adapted to address this question. For example, a domestic court may be more likely to use (1) foreign law that has been widely used by other states; (2) the foreign law of states that are economic competitors; or (3) that have the best economic performance. A domestic court also may be more likely to use foreign law of states from which the domestic court has the most extensive opportunities to obtain information about the consequences of the foreign law or that have a cultural affinity with the domestic court's state.[81] Recent work by Lee Epstein and Jack Knight illustrates another way of answering this question that pays closer attention to the judicial micro-foundations of diffusion. According to them, whether or not actors involved in the design of constitutions use foreign constitutional models depends on their strategic choices, which in turn reflect their "relative influence, preferences, and beliefs."[82] Although their empirical analysis does not extend to judicial decision making, they argue that their theory does—when courts decide whether or not to use foreign law, they are making decisions about the "design [of] institutions to govern their societies," and these decisions are a product of judges' strategic considerations given their preferences and the preferences of other political actors.[83] Epstein and Knight's approach, perhaps combined with a typology of different uses of foreign law, such as the one proposed in this chapter, might help lead scholars toward a theory of cross-border norm migration that provides a rigorous account of the judicial pathway that is missing from state-centric theories of diffusion and even theories of norm internalization that emphasize domestic political structures.

Moreover, although the debate about foreign law in domestic courts prompted this chapter, limiting the analysis to foreign law is—at least from the perspective of positive theory—somewhat arbitrary. My typology of different uses of foreign law may also be analytically helpful for understanding the role of international law in domestic courts, and to the extent it is, it may for some purposes be more productive to use a single concept of nondomestic, external, or "outside" law rather than separate concepts of foreign law and international law. Thus, although the foreign law/international law distinction clearly has important implications for legal theory, the distinction may be less important for, and perhaps even an impediment to, positive theories of norm internalization. Different ways of using "outside" law may do a better job of explaining different empirical consequences than whether that law is foreign or international. This reasoning suggests a broader research agenda that would bring legal scholars and political scientists interested in comparative legal analysis together with those interested in international legal analysis in domestic courts.[84] The central

premise, however, would remain the same: Different uses of "outside" law have different implications for processes of cross-border norm migration and for our understanding of the role of domestic courts in these processes.

NOTES

1. For concise overviews of the debate—in which recent references to foreign law in prominent U.S. Supreme Court decisions have been strongly criticized by some judges, legal scholars, and politicians, and defended by others—see Sujit Choudhry, "Migration as a New Metaphor in Comparative Constitutional Law," in *The Migration of Constitutional Ideas*, ed. Sujit Choudhry (Cambridge: Cambridge University Press, 2006), 1–13, and David S. Law, "Generic Constitutional Law," *Minnesota Law Review* 89 (2005): 653–657.

2. 536 U.S. 304 (2002) (holding that the death penalty applied to the mentally retarded is unconstitutional).

3. 539 U.S. 558 (2003) (holding that a Texas statute criminalizing same-sex sodomy is unconstitutional).

4. 543 U.S. 551 (2005) (holding that the death penalty applied to juvenile offenders is unconstitutional).

5. Steven G. Calabresi and Stephanie Dotson Zimdahl, "The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision," *William and Mary Law Review* 47 (2005): 743–910, and David Zaring, "The Use of Foreign Decisions by Federal Courts: An Empirical Analysis," *Journal of Empirical Legal Studies* 3 (2006): 297–331. But see Ken I. Kersch, "The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law," *Washington University Global Studies Law Review* 4 (2005): 346 (arguing that "the current transnational trend amongst judges and scholars is not . . . business as usual in the American courts").

6. Melissa A. Waters, "Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law," *Georgetown Law Journal* 93 (2005): 491.

7. Noga Morag-Levine, "Judges, Legislators, and Europe's Law: Common-Law Constitutionalism and Foreign Precedents," *Maryland Law Review* 65 (2006): 102.

8. Ibid. Similarly, Vicki Jackson notes that the nonbinding use of foreign law "shares characteristics of other forms of persuasive authority used in Supreme Court decisions" such as state and lower court opinions, law review articles, and literature. Vicki Jackson, "Yes Please, I'd Love to Talk with You," *Legal Affairs* (July/August 2004), online at http://www.legalaffairs.org/issues/July-August-2004/feature_jackson_julaug04.msp. In his empirical study, Zaring found thirty-three federal court citations to Bruce Springsteen, twenty-seven to Bob Dylan, and ten to John Updike. Zaring, 327.

9. Mark Tushnet, "Transnational/Domestic Constitutional Law," *Loyola of Los Angeles Law Review* 37 (2003): 248. See also Choudhry, 6.

10. Roger P. Alford, "In Search of a Theory for Constitutional Comparativism," *UCLA Law Review* 52 (2005): 639–714.

11. Michael D. Ramsey, "International Materials and Domestic Rights: Reflections on Atkins and Lawrence," *American Journal of International Law* 98 (2004): 69–82.

12. Mark Tushnet, "The Possibilities of Comparative Constitutional Law," *Yale Law Journal* 108 (1999): 1225–1308.

13. For a recent collection of essays that begins to explore the implications of judicial comparativism for the migration of constitutional ideas, see Sujit Choudhry, ed., *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2007).

14. To be clear, I do not in any way intend to minimize the importance of the normative concerns raised by foreign law in domestic courts. Rather, I wish to highlight the need to assess the empirical assumptions on which these concerns rest.

15. David Collier and James E. Mahon Jr., "Conceptual 'Stretching' Revisited: Adapting Categories in Comparative Analysis," *American Political Science Review* 87 (1993): 845.

16. Richard Posner, "No Thanks, We Already Have Our Own Laws," *Legal Affairs* (online at July/August 2004), http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp.

17. Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004), 69. See also Laurence R. Helfer and Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication," *Yale Law Journal* 107 (1997): 320–321.

18. Vicki Jackson, "Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality," *Loyola of Los Angeles Law Review* 37 (2003): 282–287.

19. Kenneth Anderson, "Foreign Law and the U.S. Constitution: The Supreme Court's Global Aspirations," *Policy Review*, no. 131 (June–July 2005), online at http://www.hoover.org/publications/policyreview/2932196.html.

20. See David Fontana, "Refined Comparativism in Constitutional Law," *UCLA Law Review* 49 (1999): 551 (distinguishing "positive" and "negative comparativism") and Kim Lane Scheppele, "Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models," *International Journal of Constitutional Law* 1 (2003): 299–301 (distinguishing "aspirational" and "aversive constitutionalism").

21. Fontana, 550–551.

22. Sujit Choudhry, "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation," *Indiana Law Journal* 74 (1999): 825.

23. Tushnet, "Possibilities," 1228.

24. Harold Hongju Koh, "International Law as Part of Our Law," *American Journal of International Law* 98 (2004): 45–46.

25. Kai Schadbach, "The Benefits of Comparative Law: A Continental European View," *Boston University International Law Journal* 16 (1998): 331–422.

26. Zaring, 306–307. He adds a sixth category to capture "passing references" to foreign law.

27. Calabresi and Zimdahl, 884.

28. John Gerring, *Social Science Methodology: A Criterial Framework* (Cambridge: Cambridge University Press, 2001), 35.

29. Nevertheless, Frederic Kirgis, an honorary editor of the *American Journal of International Law*, noted that some commentators were confusing foreign law with international law and thus deemed it appropriate to publish a brief explanation. Frederic L. Kirgis, "Is Foreign Law International Law?" *ASIL Insights* (October 31, 2005), online at http://www.asil.org/insights/2005/10/insights051031.html. For the purposes of this chapter, foreign law means the law of a country other than the country of the court using it, including constitutions, legislation, regulations, case law, judgments, and proceedings.

30. This is a pitfall because domestic courts use foreign law in different ways, and as this chapter seeks to demonstrate, these differences are important in both theory and practice.

31. This typology represents only one dimension along which uses of foreign law may vary. In addition, there may be interesting variations in which courts use foreign law, which foreign law is used, and whether foreign law is being used to support or oppose the domestic status quo. I thank Mark Axelrod for pointing out these possibilities.

32. H. L. A. Hart, *The Concept of Law*, 2d ed. (Oxford: Oxford University Press, 1994), 94–95. A rule of recognition is what Hart calls a "secondary" rule—a "rule about rules"—that identifies valid "primary" legal rules by reference to specific texts or by their characteristics, such as "the fact of their having been enacted by a specific body, or their long customary practice, or their relation to judicial decisions." Ibid.

33. This definition is similar to Helfer and Slaughter's term "coercive authority," which is associated with "an argument of authority." Helfer and Slaughter, 320–321. Using this chapter's definition of binding law, the relevant "argument of authority" would be that the rule of recognition requires (or bars) application of a particular legal rule.

34. See George A. Bermann, *Transnational Litigation* (St. Paul: West, 2003), chap. 7, and Gary B. Born and Peter B. Rutledge, *International Civil Litigation in United States Courts*, 4th ed. (New York: Aspen Publishers, 2007), chap. 8.

35. See Bermann, chap. 10, and Born and Rutledge, chap. 12.

36. 2004 U.S. Dist. LEXIS 16110 (2004).

37. See Anne-Marie Slaughter, "A Typology of Transjudicial Communication," *University of Richmond Law Review* 29 (1994): 124 (domestic courts are unlikely to use foreign law as persuasive authority unless "they are persuaded or if they conclude that either the content of the idea and/or its source will enable them better to persuade their own audience").

38. March and Olsen explain the logic of appropriateness as follows: "actions are seen as rule-based. . . . Action involves evoking an identity or role and matching the obligations of that identity or role to a specific situation. The pursuit of purpose is associated with identities more than with interests, and with the selection of rules more than with individual rational expectations." James G. March and Johan P. Olsen, "The Institutional Dynamics of International Political Orders," *International Organization* 52 (1998): 951. Use as binding law according to what I have called a logic of necessity can be understood as a special case of the logic of appropriateness, one based on the rule of recognition.

39. By way of example, a court might use foreign law in this manner in order to choose among multiple legally permissible decisions or, in the words of Sujit Choudhry, to help "decid[e] hard cases where the positive legal materials run out." Choudhry, 4.

40. Calabresi and Zimdahl, 884.

41. Koh, 45–46.

42. Alford, 659–673.

43. Choudhry, 825.

44. Tushnet, 1228.

45. Fontana, 551; Scheppele, 299–301.

46. Choudhry, 825; Fontana, 550.

47. Calabresi and Zimdahl, 884.

48. Slaughter, *New World Order*, 75–78.

49. These last two uses are described below.

50. 543 U.S. 551, at 575–578. It is interesting to note that a genealogical claim underlies one element of the court's use of foreign law as a nonbinding norm: "[T]he United Kingdom abolished the juvenile death penalty. . . . The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins. . . ." 543 U.S. 551, at 577.

51. See Zaring, 306.

52. 541 U.S. 36 (2004).

53. 224 F. Supp. 2d 704 (2002).

54. 470 U.S. 392 (1985).

55. Ibid., at 403–404.

56. Functionalism is a venerable methodology in comparative legal studies. For a classic statement of functionalism, see Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, 3d ed. (Oxford: Oxford University Press, 1998), and for recent overviews of functionalism, see Michele Graziadei, "The Functionalist Heritage," in *Comparative Legal Studies: Traditions and Transitions*, ed. Pierre Legrand and Roderick Munday (Cambridge: Cambridge University Press, 2003), 100–130, and Ralf Michaels, "The Functional Method of Comparative Law," in *Oxford Handbook of Comparative Law*, ed. Mathias Reimann and Reinhard Zimmermann (Oxford: Oxford University Press, 2006): 339–382.

57. This use is what Tushnet calls "functionalism"; what Koh, drawing on Justice Breyer's work, calls "empirical light"; and what Calabresi and Zimdahl call "empirical consequences." Tushnet, *Possibilities*, 1238–1269; Koh, *International Law*, 45–46; Calabresi and Zimdahl, 884. As with the use of foreign law as a nonbinding norm, foreign law can be used either aspirationally or aversively in the functional mode.

58. This is an exercise in causal inference; and causal inference requires data. When attempting to infer the likely consequences of a particular legal decision, the relevant data would include other instances in which similar legal decisions were made, in other places or in other times. If there is no similar earlier decision that has been made domestically, it may be necessary to look to foreign legal experience for relevant data. Even if there have been similar domestic decisions, it may be useful to look to foreign legal experience as well, because increasing the number of cases in one's analysis can increase the confidence one can reasonably have in the resulting causal inference. The challenges of making sound causal inferences—especially using cross-national data—are, of course, formidable. Yet there is an enormous literature in both comparative politics and comparative law (literatures that so far have evolved separately) aimed at addressing these challenges. See Ran Hirschl, "The Question of Case Selection in Comparative Constitutional Law," *American Journal of Comparative Law* 53 (2005) and Christopher A. Whytock, "Taking Causality Seriously in Comparative Constitutional Law: Insights from Comparative Politics and Comparative Political Economy," *Loyola of Los Angeles Law Review* 41 (2008): 629 (reviewing these literatures with an emphasis on qualitative and quantitative approaches, respectively). An important issue, and one I hope to pursue in future work, is the extent to which judges, either directly or through expert social science testimony, are equipped to make these types

of causal inferences. My intuition is that causal inferences are unavoidable in judicial decision making and that more attention should be devoted to figuring out how to make these inferences as sound as possible given the limitations of judicial capacity.

59. According to March and Olsen, "Those who see actions as driven by expectations of consequences imagine that human actors choose among alternatives by evaluating their likely consequences for personal or collective objectives." March and Olsen, 949. The logic of appropriateness and the logic of consequences approximately correspond to the two elements of ends–means analysis in constitutional interpretation: The ends are determined by the former logic, and the means by the latter.

60. 384 U.S. 436 (1966).

61. 384 U.S. 436, at 487–490 [footnotes omitted].

62. This includes using foreign law as "datum" and the preliminary and incidental application of foreign law in resolving questions of private international law, including choice-of-law rules. Hans W. Baade, "The Operation of Foreign Public Law," *Texas International Law Journal* 30 (1995): 448 and 458.

63. Ibid., 450.

64. See Gerring, chap. 3, and Colin Elman, "Explanatory Typologies in Qualitative Studies of International Politics," *International Organization* 59 (2005): 293–326.

65. This typology might also be useful as a categorical variable—either one to be explained or one that might help to explain varying consequences of using foreign law in domestic courts. It also may be useful for refining normative and legal theories of comparativism, because different uses of foreign law have different normative and legal implications.

66. And, with respect to international norms, it is one of the great hopes of some international legal scholars. See, for example, Koh, "Transnational Legal Process," *Nebraska Law Review* 75 (1996): 181.

67. 539 U.S. 558, 598 (Scalia, joined by Rehnquist and Thomas, dissenting) (quoting from Justice Thomas's concurring opinion in *Foster v. Florida*, 537 U.S. 990 (2002) (Thomas, J., concurring in denial of certiorari).

68. However, in deciding such cases, domestic courts send signals to transnational actors about how they might decide similar foreign judgment and choice-of-law issues under similar circumstances in the future. Christopher A. Whytock, "Transnational Law, Domestic Courts, and Global Governance" (March 15, 2007), online at http://ssrn.com/abstract=976274. Moreover, such decisions may contribute to the shaping of domestic common law principles relating to the recognition and enforcement of foreign judgments or to choice of law.

69. See, for example, Beth A. Simmons and Zachary Elkins, "The Globalization of Liberalization: Policy Diffusion in the International Political Economy," *American Political Science Review* 98 (2004): 171–189.

70. See, for example, Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999).

71. Andrew P. Cortell and James W. Davis Jr., "How Do International Institutions Matter? The Domestic Impact of International Rules and Norms," *International Studies Quarterly* 40 (1996): 451.

72. Jeffrey T. Checkel, "International Norms and Domestic Politics: Bridging the Rationalist-Contructivist Divide," *European Journal of International Relations* 3 (1997): 476.

73. Cortell and Davis, 471.

74. A focus on courts as important domestic structures in Cortell and Davis's account would be consistent with Harold Koh's transnational legal process theory, which argues that courts play an important role in the process of incorporating international law into domestic law. Koh, *Transnational Legal Process*, 204.

75. Similarly, William Twining argues that diffusion theory might provide important insights for comparative legal scholars interested in the transnational spread of laws and legal institutions. William Twining, "Diffusion of Law: A Global Perspective," *Journal of Legal Pluralism* 49 (2004): 1–45, and William Twining, "Social Science and Diffusion of Law," *Journal of Law and Society* 32 (2005): 203–240.

76. Cortell and Davis, 456–457; Andrew P. Cortell and James W. Davis Jr., "Understanding the Domestic Impact of International Norms: A Research Agenda," *International Studies Review* 2 (2000): 65–90.

77. Cortell and Davis, "Domestic Impact," 73.

78. In fact, this would further imply that domestic courts, concerned about maintaining their legitimacy, would be disinclined to use foreign law in the first place if they did not expect it to have domestic resonance. On the other hand, it is likely that the legal imprimatur of a domestic court on a foreign legal principle could itself increase its domestic salience, at least in rule-of-law societies.

79. Mark Tushnet refers to this as the "organicist" critique of legal transplants and attributes it to Montesquieu and Hegel. Mark Tushnet, "Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law," *University of Pennsylvania Journal of Constitutional Law* 1 (1998): 333. The basic logic is that only legal institutions that emerge organically within a society will be accepted by that society.

80. Although this chapter focuses on U.S. courts, this research question implies eventual comparative study: The factors that influence judicial decision making may vary cross-nationally.

81. Simmons and Elkins, 172–176. These are the hypotheses applied by Simmons and Elkins to the diffusion of liberal economic policies based on the logics of altered payoffs and new information. Their empirical findings support the hypotheses about economic competitors and cultural peers (for which common religion is used as a proxy).

82. Lee Epstein and Jack Knight, "Constitutional Borrowing and Nonborrowing," *International Journal of Constitutional Law* 1 (2003): 209–210.

83. Ibid., 197.

84. According to this perspective, domestic courts play a role not only in norm internalization, as discussed in this chapter, but also in the interpretation and shaping of international law—thus domestic courts play a role in both "second image reversed" (Peter Gourevitch's term) accounts of world politics that I have emphasized here and "second image" (Kenneth Waltz's term) accounts, which I have discussed elsewhere. See Christopher A. Whytock, "Foreign Law, Domestic Courts, and World Politics" (paper presented at the annual conference of the International Studies Association, San Diego, Calif., March 22–25, 2006).