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## The Limits of Global Judicial Dialogue

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## THE LIMITS OF GLOBAL JUDICIAL DIALOGUE

David S. Law\* & Wen-Chen Chang\*\*

*Abstract:* The notion that “global judicial dialogue” is contributing to the globalization of constitutional law has attracted considerable attention. Various scholars have characterized the citation of foreign law by constitutional courts as a form of “dialogue” that both reflects and fosters the emergence of a common global enterprise of constitutional adjudication. It has also been claimed that increasing direct interaction between judges, face-to-face or otherwise, fuels the growth of a global constitutional jurisprudence.

This Article challenges these claims on empirical grounds and offers an alternative account of the actual reasons for which constitutional courts engage in comparative analysis. First, it is both conceptually and factually inaccurate to characterize the manner in which constitutional courts cite and analyze foreign jurisprudence as a form of “dialogue.” As a conceptual matter, constitutional courts do not cite one another for the purpose of communicating with another, while as an empirical matter, there is little evidence to suggest that one-sided citation of a handful of highly prestigious courts has given way to genuine two-way dialogue. Second, judicial interaction is neither a necessary nor a sufficient cause of constitutional globalization. Rather, the effect of such interaction on the extent to which

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\*\* Associate Professor, National Taiwan University College of Law. © 2011, David S. Law & Wen-Chen Chang. Earlier versions of this Article were presented at the Symposium on Global Law and Its Exceptions: Globalization, Legal Transplants, Local Reception, and Resistance, held at the University of Washington School of Law in Seattle; a faculty colloquium at Seton Hall University School of Law; the U.S.–Asia Law Institute at New York University School of Law; the 2011 Annual Meeting of the Law and Society Association in San Francisco; the 2011 Annual Meeting of the American Political Science Association in Seattle; the 2011 East Asian Law and Society Conference held at Yonsei University in Seoul; and the 2011 Junior/Senior Faculty Workshop on Judges and Judging at American University. The research underlying this Article was funded by a Fulbright research grant, National Taiwan University’s Top University Project, and Taiwan’s National Science Council. We wish to thank David Bosco, Yi-Ling Cheng, Jerry Cohen, Wei-Chien Feng, David Fontana, Jau-Yuan Hwang, Vicki Jackson, Jonathan Kang, Mark Levin, Nigel Li, Ben Liebman, Carol Lin, Chao-Chun Lin, Dennis Tang, Frank Upham, Kathryn Watts, Ya-Wen Yang, Jiunn-Rong Yeh, and David Zaring for their generous help and intellectual contributions; Shao-Man Lee, Chien-Chih Lin, and Raquel Frisardi for their dedicated and conscientious research assistance; Joel Ngugi and Sylvia Kang’ara for organizing the University of Washington symposium and inviting us to participate; the faculty at Seton Hall for their insightful comments; and, not least of all, the twelve current and former Justices and nine law clerks of the Constitutional Court of the Republic of China (Taiwan) who agreed to be interviewed for this Article. Confidentiality requires that their names be withheld from print, but this Article would not have been possible without their candor, generosity, insight, and kind hospitality. Under no circumstances should the views expressed herein be imputed to the Fulbright Foundation, the U.S. Department of State, the Ministry of Foreign Affairs of the Republic of China (Taiwan), or any of the colleagues, law clerks, or justices who were kind enough to share their ideas, insights, and experiences with us.

judges engage in comparativism is dwarfed by institutional and structural variables that lie largely beyond judicial control.

The relative unimportance of judicial interaction is illustrated by a comparative case study of the Constitutional Court of the Republic of China (Taiwan), which is akin to a natural experiment in the capacity of a constitutional court to make use of foreign law even when it is largely deprived of contact with other courts. Taiwan's precarious diplomatic situation effectively precludes the members of its Constitutional Court from participating in international judicial gatherings or visits to foreign courts. Nevertheless, the Taiwanese Constitutional Court nearly always engages in extensive comparative constitutional analysis, either expressly or implicitly, when rendering its decisions. To explain how and why the Court makes use of foreign law notwithstanding its isolation, this Article combines quantitative analysis of citations to foreign law in the Court's published opinions with in-depth interviews of numerous current and former members of the Court and their clerks.

Comparison of the Taiwanese Constitutional Court and U.S. Supreme Court demonstrates that "global judicial dialogue" plays a much smaller role in shaping a court's utilization of foreign law than institutional factors such as (a) the rules and practices governing the composition and staffing of the court and (b) the extent to which the structure of legal education and the legal profession incentivizes judges and academics to possess expertise in foreign law. Notwithstanding the fact that American justices enjoy unsurpassed opportunities to interact with judges from other countries, comparative analysis plays a less frequent role in their own constitutional jurisprudence than in that of their foreign counterparts. Openness on the part of individual justices to foreign law ultimately cannot compensate for the fact that the hiring and instructional practices of American law schools neither demand nor reward the possession of foreign legal expertise.

This Article also documents the fact that judicial opinions are a highly misleading source of data about judicial usage of foreign law. Interviews with members of the Taiwanese Constitutional Court and their clerks reveal the existence of a large gap between the frequency with which the court cites foreign law in its opinions and the extent to which it actually considers foreign law. Analysis of judicial opinions alone may lead scholars to conclude mistakenly that a court rarely engages in comparative analysis when, in fact, such analysis is highly routine.

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INTRODUCTION: MUCH ADO ABOUT NOTHING?	

No aspect of the globalization of constitutional law has thus far attracted more attention or controversy than the use of foreign and international legal materials by constitutional courts.<sup>1</sup> Although judicial citation of foreign law is hardly a new phenomenon, there is a widespread sense that constitutional courts are turning more frequently to foreign jurisprudence for guidance and inspiration.<sup>2</sup> Moreover, the manner in which courts and judges interact with one another has changed in ways that are said to have systemic implications for the global evolution of constitutional law. Prominent scholars and jurists now speak in glowing terms of the emergence of a “global” or “international” or “transnational judicial dialogue”<sup>3</sup> that unites judges

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1. For descriptions of the debate itself, see, for example, Roger P. Alford, *Four Mistakes in the Debate on “Outsourcing Authority,”* 69 ALB. L. REV. 653, 656–64 (2006); David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 699–701 (2005); and Adam Liptak, *U.S. Court, a Longtime Beacon, Is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 18, 2008, at A1. For examples of scholarly criticism of the judicial use of foreign law in constitutional cases, see ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 22–25 (2003); JEREMY A. RABKIN, *LAW WITHOUT NATIONS?: WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES* 22–23 (2005); Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT’L L. 57, 61–69 (2004); Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFF., July–Aug. 2004, at 40–42; and Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT’L L. 69, 72–80 (2004).

2. See, e.g., Liptak, *supra* note 1, at A1; Antonin Scalia, *Outsourcing American Law: Foreign Law in Constitutional Interpretation* 5 (Am. Enter. Inst., Working Paper No. 152, 2009), available at <http://www.aei.org/docLib/20090820-Chapter2.pdf> (lamenting that the citation of foreign law in constitutional cases appears to be the “wave of the future”). *But see* David Zaring, *The Use of Foreign Decisions by Federal Courts: An Empirical Analysis*, 3 J. EMPIRICAL LEGAL STUD. 297, 299 (2006) (suggesting that “the Supreme Court uses less foreign law now than it has at any other time in its history”).

3. See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 65–103 (2004); Claire L’Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 40 (1998); Michael Kirby, *Transnational Judicial Dialogue, Internationalisation of Law, and Australian Judges*, 9 MELB. J. INT’L L. 171, 173–81 (2008); Basil Markesinis & Jorg Fedtke, *The Judge as Comparatist*, 80 TUL. L. REV. 11, 15–17 (2005); Melissa Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 492 (2005); Katharine G. Young, *The World,*

around the world in a “common global judicial enterprise.”<sup>4</sup> It is said that, by engaging in “open” and “self-conscious” debate with courts in other countries over common questions of both substance and methodology, constitutional courts not only “improve the quality of their particular national decisions,” but also “contribute to a nascent global jurisprudence,” most notably in the area of human rights.<sup>5</sup>

Several varieties of global judicial dialogue are said to exist. One variety, which has already been mentioned, is comparative analysis of the type found in judicial decisions. Although judicial citation of foreign law is hardly a new phenomenon,<sup>6</sup> it is increasingly suggested that the manner in which constitutional courts analyze the work of their counterparts in other countries is characterized by such a degree of mutual engagement and substantive debate that it amounts to an ongoing conversation conducted through the medium of judicial opinions.<sup>7</sup> A second variety of global judicial dialogue is dialogue in a literal sense, in the form of “direct interactions”<sup>8</sup> and networking among judges. This type of dialogue has been fostered by technological advances, such as the internet, that have lowered the barriers to international communication, and by the deliberate efforts of academic institutions, intergovernmental and international organizations, and constitutional courts themselves to generate proliferating opportunities for face-to-face

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*Through the Judge's Eye*, 28 AUSTL. Y.B. INT'L L. 27, 31 (2009); see also Ronald J. Krotoszynski, Jr., “I'd Like to Teach the World to Sing (In Perfect Harmony)”: *International Judicial Dialogue and the Muses—Reflections on the Perils and the Promise of International Judicial Dialogue*, 104 MICH. L. REV. 1321, 1323 n.6, 1329 (2006) (reviewing various terms that scholars have used to refer to the same phenomenon, and noting that “advocates” of “international judicial dialogue” “far outnumber its critics”); Gerald Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 87 (2004) (identifying institutional reasons for the Supreme Court to engage in “normative dialogue” with constitutional courts and human rights tribunals).

4. SLAUGHTER, *supra* note 3, at 99.

5. *Id.* at 70.

6. See, e.g., DAVID B. GOLDMAN, GLOBALISATION AND THE WESTERN LEGAL TRADITION: RECURRING PATTERNS OF LAW AND AUTHORITY 125 (2007) (noting that the use of Continental law by English judges and practitioners “increased markedly” from the fourteenth through sixteenth centuries). Even the U.S. Supreme Court, which has acquired a reputation for not citing foreign law, see Liptak, *supra* note 1, at A1; L'Heureux-Dubé, *supra* note 3, at 37–38, has a long history of citing foreign law that dates back to its creation. See Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 756–92 (2005) (cataloguing the Court's relatively frequent invocation of the “law of nations” and Roman law from the nation's founding through 1840).

7. See sources cited *supra* note 3.

8. SLAUGHTER, *supra* note 3, at 70; see also, e.g., VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 100 (2010) (pointing to the existence of “a body of judicial ‘networks’” comprised of “constitutional court judges who communicate with each other and meet at conferences and fora around the world”).

interaction, in the form of conferences, visits, and the like.<sup>9</sup>

It is not the goal of this Article to contribute to the normative debate over whether global judicial dialogue is cause for celebration or consternation. Nor is it our purpose to evaluate the normative arguments in favor of an interpretive posture of “engagement”<sup>10</sup> or a “dialogical” approach to comparative analysis.<sup>11</sup> This Article aims, instead, to explain as an empirical matter why the concept of “global judicial dialogue” neither describes the actual practice of comparative analysis by judges nor explains the emergence of a global constitutional jurisprudence. We also demonstrate that the frequency with which a court cites foreign law in its opinions is an extremely unreliable measure of the extent to which the court actually makes use of foreign law. Scholars who wish to understand or measure a particular court’s usage of foreign law must therefore be prepared to supplement quantitative research methods, such as statistical analysis of citations to foreign law, with qualitative approaches that are capable of probing more deeply, such as interviews with court personnel.

Part II of this Article argues that the notion of “dialogue” is, both conceptually and empirically, an inapt metaphor for the comparative analysis performed by constitutional courts. Part III takes advantage of a natural experiment in judicial isolation to show that judge-to-judge dialogue and “judicial networks,” as eye-catching as they may be, have limited impact on constitutional adjudication and do little to explain the frequency or sophistication with which constitutional judges resort to foreign law. The natural experiment that we evaluate goes by the name of Taiwan—a democratic country with an active constitutional court that is nevertheless systematically deprived of opportunities to interact directly with other courts for a combination of historical and political

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9. SLAUGHTER, *supra* note 3, at 99; *see, e.g.*, Kirby, *supra* note 3, at 179 (describing various venues for transnational judicial dialogue, and observing that the process of “bring[ing] national judges of many countries together to discuss issues in common . . . has now been under way for decades”). A third variety of judicial dialogue, which is closely identified with the traditional concept of judicial comity but is not at issue in this Article, consists of the dialogue in which courts engage when overlapping jurisdiction forces them to address potential conflict over the resolution of specific cases. *See* SLAUGHTER, *supra* note 3, at 65; Waters, *supra* note 3, at 180–81.

10. JACKSON, *supra* note 8, at 72; *see id.* at 98 (arguing that “[t]he force of [the idea of independent judging], together with increases in institutional networks of judges and increased communications among courts, promotes, in various ways, a willingness to consider and refer to foreign and international legal materials . . . in a spirit of engagement”).

11. *See* Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 *IND. L.J.* 819, 833–41, 885–92 (1999) (contrasting and evaluating “genealogical,” “universalist,” and “dialogical” modes of comparative constitutional interpretation, and concluding that the “dialogical” mode best meets the demands of “scope” and “legitimacy,” if not also “constitutional culture”).

reasons. Our case study of Taiwan combines quantitative and qualitative empirical research methods, in the form of statistical analysis of the Taiwanese Constitutional Court's decisions and numerous off-the-record interviews with members of the Court and their law clerks. Although the Court rarely cites foreign law, foreign legal research forms a routine and indispensable part of its deliberations. Taiwan's experience strongly suggests that judicial interaction and networking play a much smaller role in shaping a court's utilization of foreign law than institutional factors such as the rules and practices governing the composition and staffing of the court and the extent to which the structure of legal education and the legal profession incentivizes judges and academics to possess expertise in foreign law. Comparison of the Taiwanese Constitutional Court with the U.S. Supreme Court, which rarely looks to foreign law for inspiration notwithstanding its extensive participation in various forms of global judicial dialogue, only reinforces this conclusion. This comparison is performed in Part IV. The Article concludes by highlighting the role that American legal education must play if the global influence of American constitutionalism is to be revived, or if American courts are to engage in comparativism of their own.

#### I. COMPARATIVE ANALYSIS: DIALOGUE OR MONOLOGUE?

Advocates of the global judicial dialogue thesis argue that the manner in which courts today engage in comparative analysis can be characterized as a form of dialogue. An oft-cited account is that of former Canadian Supreme Court Justice Claire L'Heureux-Dubé, who suggests that current patterns of jurisprudential influence are qualitatively different from those of the past.<sup>12</sup> Whereas courts previously influenced one another through a process of "reception," in which colonial powers and global hegemony engaged in "one-way transmission" of constitutional jurisprudence that courts in weaker countries would simply receive and imitate, constitutional courts now engage in an "active and ongoing dialogue"<sup>13</sup> wherein they evaluate the work of other courts in open-minded yet critical fashion and, in so doing, contribute to an ongoing conversation on matters of substance.<sup>14</sup> This

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12. L'Heureux-Dubé, *supra* note 3, at 21.

13. SLAUGHTER, *supra* note 3, at 66 (referring to a female "Canadian constitutional court justice").

14. L'Heureux-Dubé, *supra* note 3, at 21 (noting that "it was appropriate, until recently, to speak of the interaction among judges in different places as a process where some courts impacted others," and arguing that, by contrast, judges are now "mutually reading and discussing each others' jurisprudence" to "a greater and greater extent") (emphasis in original); *see, e.g.*, SLAUGHTER, *supra*

move from a paradigm of “reception” to one of “dialogue” is attributed to processes of globalization that have lowered the barriers to global interaction and thereby enabled constitutional courts to look to a broader range of jurisdictions with greater ease and sophistication.<sup>15</sup>

The use of dialogue as a metaphor for the comparative analysis found in constitutional decisions is problematic on multiple levels. A threshold problem is that of whether comparative analysis can be characterized as “dialogue” as a purely conceptual or definitional matter. “Dialogue” is defined by the *Oxford English Dictionary* in the following ways: (1) “A conversation carried on between two or more persons; a colloquy, talk together”; (2) “Verbal interchange of thought between two or more persons, conversation”; and (3) “discussion or diplomatic contact between the representatives of two nations, groups, or the like,” or, more generally, “valuable or constructive discussion or communication.”<sup>16</sup>

None of these definitions fits the practice of comparative analysis by constitutional courts terribly well. Two speakers addressing different audiences cannot be described as engaged in a dialogue with each other, even if they happen to conduct their conversations within earshot of each other. Nor can it be said that a dialogue exists between the two speakers if they eavesdrop upon each other, or even if each speaker happens to discuss the content of what is heard with his or her own audience. So, too, with constitutional courts. The act of judicial review may involve a substantial amount of dialogue,<sup>17</sup> but it is not dialogue with constitutional courts in other countries. The decisions that a court renders are necessarily targeted first and foremost at the domestic audiences who will be legally bound by them.<sup>18</sup> As a practical matter, the reactions of courts in other countries are at most a secondary consideration for a court grappling with a grave and controversial question of constitutional law, assuming that they are a consideration at all.<sup>19</sup> Indeed, constitutional judges who choose to write with foreign

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note 3, at 66, 70; Waters, *supra* note 3, at 492–93.

15. L’Heureux-Dubé, *supra* note 3, at 16–23.

16. THE OXFORD ENGLISH DICTIONARY (2d ed. 1989 & online version Nov. 2010).

17. See, e.g., Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 757 (2001) (discussing mechanisms for encouraging “inter-institutional dialogue” between constitutional courts and legislatures).

18. Exceptions to the practical requirement that domestic courts address their opinions to those who will be bound by them are noteworthy precisely because they are exceptional. See Young, *supra* note 3, at 28–29 & n.8 (suggesting that former Australian High Court Justice Kirby’s “outlier interpretations” were written less for other Australian justices or even future generations of Australians, than for a global audience).

19. See, e.g., Interview with Justice G, Current or Former Justice, Constitutional Court of the Republic of China, in Taipei, Taiwan, Dec. 27, 2010 (explaining that, when deciding constitutional cases, the members of Taiwan’s Constitutional Court “think primarily of the [decision’s] impact on



audiences in mind do so at their own peril, as Justice Breyer discovered firsthand when he dared to cite a decision by the Supreme Court of Zimbabwe, partly in the hope of offering succor to the beleaguered judge who had authored the opinion.<sup>20</sup>

The outpouring of outrage and ridicule elicited by this passing citation<sup>21</sup>—which ultimately led Justice Breyer himself to disavow the citation as ill-advised<sup>22</sup>—highlights another reason why dialogue is not an apt metaphor for what constitutional courts are actually doing when they engage in comparative analysis. As an initial matter, it is not difficult to see why the notion of dialogue might be an especially appealing metaphor for elite lawyers and judges steeped in the tenets of political liberalism<sup>23</sup> and the Legal Process school.<sup>24</sup> In the face of the

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society, how people will feel, what this will do to them, and what this will do to the development of the country. We will also think of how this makes us look internationally. A more distant consideration, but we do think about it.”).

20. *Knight v. Florida*, 528 U.S. 990, 996 (1999) (Breyer, J., dissenting from denial of certiorari) (citing, *inter alia*, Catholic Comm’n for Justice & Peace in *Zimb. v. Attorney-Gen.*, 1993 (1) *Zimb. L. Rep.* 242(S), 252, 282). In a debate with Justice Scalia held in 2005, Justice Breyer alluded to both his motives for referring to the decision in question and his subsequent misgivings about doing so:

Look, let me be a little bit more frank, that in some of these countries there are institutions, courts that are trying to make their way in societies that didn’t used to be democratic, and they are trying to protect human rights, they are trying to protect democracy. They’re having a document called a constitution, and they want to be independent judges. And for years people all over the world have cited the Supreme Court, why don’t we cite them occasionally? They will then go to some of their legislators and others and say, “See, the Supreme Court of the United States cites us.” That might give them a leg up, even if we just say it’s an interesting example. So, you see, it shows we read their opinions. That’s important . . . .

. . . .

. . . I think I may have made what I call a tactical error in citing a case from Zimbabwe—not the human rights capital of the world. (Laughter.) But it was at an earlier time—Judge [Gubbay of Zimbabwe] was a very good judge.

Justice Stephen Breyer & Justice Antonin Scalia, *A Conversation on the Relevance of Foreign Law for American Constitutional Adjudication*, Washington College of Law, American University, Washington, D.C., Jan. 13, 2005, <http://www.wcl.american.edu/seclc/founders/2005/050113.cfm>. Both the author of the decision cited by Justice Breyer—Chief Justice Gubbay of the Supreme Court of Zimbabwe—and the Zimbabwean judiciary more generally “had been under direct attack, including physical threats,” by the Mugabe government, and Chief Justice Gubbay was in fact subsequently forced to resign. SLAUGHTER, *supra* note 3, at 99; see Int’l Comm’n of Jurists, *Zimbabwe-Attacks on Justice* 417–21 (11th ed. 2002), <http://www.icj.org/dwn/database/Zimbabwe-AttacksonJustice2002.pdf>.

21. See, e.g., BORK, *supra* note 1, at 23 (calling Justice Breyer’s use of case law from Zimbabwe “risible”); Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 89 (2005) (deeming it not only “a juridical error,” but also “imprudent[.]” to “ask[] the American people . . . to accept that decisions by the Supreme Court of Zimbabwe, one of the world’s most disordered nations, should influence decisions by our Supreme Court”).

22. See *supra* note 20.

23. See Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT’L L.J. 1, 14–16 (1995) (noting the emphasis that procedurally oriented liberal democracies place upon the role of rational discourse in ensuring both liberty and peaceful coexistence).

deep diversity and intractable divisions that characterize political life at both the national and global levels, nothing would seem to hold greater hope for the peaceful, welfare-enhancing resolution of conflict in a manner that respects human dignity and equality than dialogue. No harm, and only good, can come of simply talking to one another: is it not self-evidently so? The metaphor of dialogue is further attractive because it both implies and promises that all participants are both entitled and empowered to speak.<sup>25</sup> If comparative constitutional analysis is a form of dialogue on a global scale, then nothing ought to prevent the courts of Switzerland and Swaziland from participating in that dialogue on equal terms. Dialogue is supposed to be inclusive, and it is supposed to involve mutual engagement. Therein lies much of its appeal.

And therein lies the problem as well. It is doubtful that the requirements of genuine dialogue can be reconciled with the politics of constitutional adjudication. In order for courts from more influential or powerful countries to treat courts in other countries with the respect and recognition due to fellow interlocutors in a true dialogue, they must both acknowledge and engage reciprocally with their interlocutors. Even if domestic stakeholders can accept a measure of foreign law usage, however, the type of foreign law usage that they are prepared to stomach is unlikely to be a citation practice that (1) respects all countries and courts as equals, and (2) is intended to allay foreign sensibilities or nurture a “common global judicial enterprise.”<sup>26</sup> The fact that constitutional courts are compelled as a practical, if not also normative, matter, to satisfy the expectations and demands of domestic audiences frustrates the development of a transparent and egalitarian global judicial discourse.

The use of the metaphor of dialogue to describe judicial comparativism is not only contrary to ordinary definition and political logic, but also lacking in empirical support. The handful of high-profile cases that tend to be recycled as evidence of dialogue do not appear to be

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24. See William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, at li, xciv, cxiii–cxxxvi (1994) (noting the Legal Process school’s emphasis upon deliberative procedures as a vehicle for reaching rational policy decisions in the face of “dispersed power and diverse views about substantive views,” and discussing the profound impact of this school of thought upon three generations of lawyers and legal scholars).

25. See JACKSON, *supra* note 8, at 71 (observing that the notion of dialogue implies “reciprocal intellectual give and take,” and suggesting that “engagement” is a more apt metaphor than “dialogue” because courts “may engage the work of other courts . . . without any necessary expectation of response”).

26. SLAUGHTER, *supra* note 3, at 99.

representative of overall practice.<sup>27</sup> Consider the two courts that have been repeatedly identified as the most active and influential participants in global judicial dialogue of the comparative-analysis variety—namely, the Supreme Court of Canada and the South African Constitutional Court.<sup>28</sup> It is reasonable to think that the most important participants in a so-called dialogue would refer to one another's decisions. Indeed, two of the four cases that Justice L'Heureux-Dubé cites as evidence of the shift from "one-way transmission" to "dialogue" implicate both of these courts.<sup>29</sup> Yet the exchange of ideas between these two courts is so lopsided that it is more accurately described as a monologue than a dialogue. As Justice L'Heureux-Dubé herself acknowledges, although the Canadian Supreme Court "is willing to look elsewhere, and does so frequently, it is cited by courts like those in Zimbabwe, South Africa, and Israel far more often than it refers to their cases."<sup>30</sup> This is, if anything, an understatement. In fact, the South African Constitutional Court cites decisions of the Canadian Supreme Court almost *three hundred times more often* than vice versa. Between 1995 and 2009, the justices of the South African Constitutional Court cited Canadian Supreme Court decisions on a collective total of 850 occasions.<sup>31</sup> By

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27. The standard examples include a trio of cases involving the death penalty: the South African Constitutional Court's decision in *State v. Makwanyane*, 1995 (2) SA 391 (CC); the Canadian Supreme Court's decision in *United States v. Burns*, [2001] 1 S.C.R. 283 (Can.); and the U.S. Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). See, e.g., JACKSON, *supra* note 8, at 56–57 (discussing *Burns*); *id.* at 78–79 (discussing *Makwanyane*); SLAUGHTER, *supra* note 3, at 80, 284 n.68 (discussing *Makwanyane*); Kirby, *supra* note 3, at 178 n.28, 186 n.81 (citing *Makwanyane* and *Atkins*); Waters, *supra* note 3, at 507 n.100, 557 n.315, 514–15 (discussing *Makwanyane*); *id.* at 521–23 (discussing *Burns*).

28. See, e.g., SLAUGHTER, *supra* note 3, at 74 (singling out the South African Constitutional Court and the "Canadian Constitutional Court" [sic] as "highly influential, apparently more so than the U.S. Supreme Court and other older and more established constitutional courts"); Heinz Klug, *Model and Anti-Model: The United States Constitution and the "Rise of World Constitutionalism,"* 2000 WISC. L. REV. 597, 607 (noting that the "highest courts of constitutional review in Canada, India, South Africa, [and] Zimbabwe . . . all engage in extensive discussion of comparative constitutional jurisprudence"); Markesinis & Fedtke, *supra* note 3, at 45 (using the Supreme Court of Canada and Constitutional Court of South Africa to define the category of courts that make open and "wide-ranging use of foreign law"); Waters, *supra* note 3, at 558 n.316 (identifying the Canadian Supreme Court as "one of the most influential domestic courts worldwide on human rights issues"); Liptak, *supra* note 1, at A1 ("Many legal scholars single[] out the Canadian Supreme Court and the Constitutional Court of South Africa as increasingly influential.").

29. See L'Heureux-Dubé, *supra* note 3, at 21–22 (citing *Makwanyane*, 1995 (2) SA 391 (CC) (S. Afr.), and *Hugo v. South Africa* (President) 1997 (4) SA 1 (CC)). The other two examples are a Namibian case, *Mwellie v. Ministry of Works* [1995] 4 L.R.C. 184 (Namib.), and a case from New Zealand, *Police v. Smith & Herewini* [1994] 2 NZLR 306 (CA).

30. L'Heureux-Dubé, *supra* note 3, at 27.

31. See Christa Rautenbach, Presentation at the VIIIth World Congress of the International Association of Constitutional Law: Use of Foreign Precedents by South African Constitutional Judges: Making Sense of Statistics (Dec. 8, 2010).

comparison, over the same period of time the members of the Supreme Court of Canada cited decisions of their South African counterpart only three times.<sup>32</sup> It is possible, of course, that the Canadian Supreme Court looks habitually to the South African Constitutional Court for guidance and inspiration and merely declines to cite foreign sources explicitly.<sup>33</sup> But nothing in Justice L'Heureux-Dubé's firsthand account of her own court suggests that this might be the case.<sup>34</sup> On the contrary, one of her former colleagues, Justice Michel Bastarache, reports that "attribution is systematic and considered mandatory" whenever the Canadian Supreme Court draws upon foreign jurisprudence.<sup>35</sup>

The fact that the conversation between these two standard-bearers of

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32. A search of the CANSCC-CS database on Westlaw conducted on February 4, 2011, for any appearance of the words "South Africa" between 1995 and 2009 yields a total of fifteen results; of these, only three involve actual citations to a decision of the South African Constitutional Court. *See* Marcovitz v. Bruker, [2007] 3 S.C.R. 607; R. v. Hall, [2002] 3 S.C.R. 309; United States v. Burns, [2001] 1 S.C.R. 283; *see also* Bijon Roy, *An Empirical Survey of Foreign Jurisprudence and International Instruments in Charter Litigation*, 62 U. TORONTO FAC. L. REV. 99, 125 (2004) (reporting that, from 1998 through 2003, the constitutional decisions of the Canadian Supreme Court referred to South African jurisprudence on just three occasions).

33. As many scholars have noted—and as we document in this Article, *see infra* Parts III.F–III.G—courts frequently engage in comparative analysis without acknowledging explicitly that they have done so. *See, e.g.*, Markesinis & Fedtke, *supra* note 3, at 28–29 (noting that, although French judicial opinions are prevented for stylistic and historical reasons from citing foreign law or academic authorities, the *avocats genereaux* who advise the Cour de Cassation "are nowadays expected to consult foreign law when preparing their recommendations") (emphasis in original); Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 511 (2000) (distinguishing between "explicit" and "non-explicit" references to foreign law); Edward McWhinney, *Judicial Review in a Federal and Plural Society: The Supreme Court of Canada*, in *COMPARATIVE JUDICIAL SYSTEMS: CHALLENGING FRONTIERS IN CONCEPTUAL AND EMPIRICAL ANALYSIS* 63, 69–70 (John R. Schmidhauser ed., 1987) (describing American-trained Canadian Supreme Court Justice Ivan Rand's deliberate failure to acknowledge the American origins of certain approaches that he adopted, in light of resistance from his colleagues to the use of American law); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 118 (1994) ("Considerable anecdotal evidence, gleaned from confidential interviews with law clerks of foreign courts and from careful reading between the lines, demonstrates that courts draw on the opinions of foreign courts without attribution.").

34. *See* L'Heureux-Dubé, *supra* note 3, at 27.

35. Michel Bastarache, *How Internationalization of the Law Has Materialized in Canada*, 59 U. NEW BRUNSWICK L.J. 190, 200 (2009); *see also id.* at 196, 204 (stating that "the influence of judicial borrowing in Canada is overstated by some," and concluding that "internationalization has had a minimal impact on our Court to date"). Speaking on condition of anonymity, a former Canadian Supreme Court clerk confirmed that, in his own experience, foreign jurisprudence would be cited if it had been considered. *See* E-mail From Anonymous Former Law Clerk, Supreme Court of Can., to David S. Law (Sept. 16, 2011, 17:50 CDT) (on file with authors). *But see* Lorraine E. Weinrib, *Constitutional Conceptions and Constitutional Comparativism*, in *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* 3, 25 (Vicki C. Jackson & Mark Tushnet eds., 2002) (stating that Canadian justices frequently considered foreign law in the years immediately following the 1982 adoption of the Canadian Charter of Rights and Freedoms but "often did not note their sources").

constitutional comparativism amounts to a monologue raises a troubling question for those who liken such comparativism to “dialogue.” If the “highly influential” South African Constitutional Court<sup>36</sup> maintains such a lopsided and disappointing balance of intellectual trade with a court that is renowned for its role in promoting global judicial dialogue, what hope do less influential or well-known courts have of being participants in a genuine “dialogue,” instead of engaging merely in “reception”? Moreover, it is not only courts from countries that are known for human rights abuses or otherwise lack international credibility, such as Zimbabwe, that risk exclusion from this so-called dialogue. Rather, reputable courts from vibrant democracies, such as South Africa and Taiwan, are also effectively excluded.<sup>37</sup>

Those who see the emergence of a “global judicial dialogue” are correct to observe that many constitutional courts pay careful attention to the decisions of their counterparts in other countries. That does not mean, however, that these courts can accurately be described as participants in a global judicial dialogue. Even if the intellectual traffic in ideas is growing, it continues to be largely one-way. The concept of dialogue implies open communication among interlocutors committed to listening as well as to speaking, and it holds out the promise of mutual learning and understanding. That is precisely why it is so appealing. But political realities, normative considerations, and enduring differences in prestige and credibility among courts all distort and restrict the flow of ideas to the point that the characteristics of genuine dialogue are lacking. When courts do analyze foreign jurisprudence, it often occurs surreptitiously, in the form of opinions that refrain from citing foreign law explicitly,<sup>38</sup> or in ways that marginalize all but a small handful of elite courts.<sup>39</sup> At least for now, efforts to characterize judicial comparativism as a form of dialogue are better understood as the expression of a hope for the future than as a descriptively accurate assessment of actual practice.

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36. SLAUGHTER, *supra* note 3, at 74.

37. *See infra* notes 60–62 and accompanying text (describing the failure of other courts to cite the work of the Taiwanese Constitutional Court, even when it happens to be directly relevant).

38. *See supra* note 33 (citing various examples of courts that routinely consider foreign law without also citing it).

39. *See supra* notes 20–22 and accompanying text (describing the hostile and at times incredulous reaction to Justice Breyer’s citation of precedent from Zimbabwe); *infra* notes 62–63 and accompanying text (describing the extent to which other constitutional courts, even in the same region, have ignored the jurisprudence of the Taiwanese Constitutional Court).

## II. THE LIMITED IMPACT OF JUDGE-TO-JUDGE DIALOGUE

### A. *Behind Closed Doors: The Mystery Surrounding Judge-to-Judge Dialogue*

Unlike the citation behavior of constitutional courts, judge-to-judge dialogue—or “J2J,” in the words of one justice<sup>40</sup>—is dialogue in the literal and truest sense of the word. Actual interaction between judges, especially of the face-to-face variety that receives such emphasis in the literature, feels at once both glamorous and vaguely conspiratorial. Existing accounts of this species of judicial dialogue, cobbled together from snippets and reports of closed meetings in Bangalore,<sup>41</sup> Johannesburg,<sup>42</sup> and New Haven<sup>43</sup> tantalize the reader with glimpses of something elusive and, for that very reason, seemingly important. They conjure up an image of judges trotting the globe to chart the course of constitutional law behind closed doors before returning home to impose this master scheme on their unwitting compatriots, with no one the wiser except the judges themselves and perhaps a handful of privileged legal academics located predominantly at elite law schools in the northeastern United States that have the prestige and financial wherewithal to dispatch their faculty to wherever these judicial gatherings may occur or, better yet, to host such gatherings themselves.<sup>44</sup> The resultant sense, perhaps, is that of being privy to the inner life of opaque “judicial networks” that engage in de facto global governance, or the exercise of power without authority, as part of a “new world order.”<sup>45</sup>

The opposite and more skeptical view would be that the entire notion of J2J dialogue boils down to the unexceptional and inconsequential claim that judges enjoy a growing range of opportunities to socialize over cocktails and have also learned to e-mail one another. On this view, one might be forgiven for thinking that “the “global community of courts”<sup>46</sup> constituted by transnational judicial dialogue is a toothless

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40. Interview with Justice J, Current or Former Justice, Constitutional Court of the Republic of China, in Taipei, Taiwan (Dec. 30, 2010).

41. Kirby, *supra* note 3, at 179.

42. SLAUGHTER, *supra* note 3, at 66.

43. See, e.g., JACKSON, *supra* note 8, at 102, 341 n.199; SLAUGHTER, *supra* note 3, at 98; Kirby, *supra* note 3, at 180; Waters, *supra* note 3, at 496.

44. See, e.g., SLAUGHTER, *supra* note 3, at 98 (citing conferences held at NYU Law School and Yale Law School); Kirby, *supra* note 3, at 179 (discussing, inter alia, the Bangalore conference); McCrudden, *supra* note 33, at 511; Waters, *supra* note 3, at 495–96.

45. E.g., BORK, *supra* note 1, at 15–17, 137–38; RABKIN, *supra* note 1, at 41; SLAUGHTER, *supra* note 3, at 261–71.

46. Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L. J. 191, 192 (2003)

development that bears more resemblance to “a literary salon writ large”<sup>47</sup> than an innovation in global governance capable of generating “an increasingly global constitutional jurisprudence.”<sup>48</sup>

The empirical claims that are more typically made about the practical impact of J2J interaction are somewhat vague. A common theme, however, is that dialogue of the J2J variety encourages judges to engage in comparative analysis.<sup>49</sup> Anne-Marie Slaughter, an early and prominent champion of global judicial dialogue, identifies a number of cognitive and social effects that “all these visits and exchanges and seminars” have on judges.<sup>50</sup> These opportunities for interaction “educate” and “cross-fertilize,” “broaden the perspectives of the participating judges,” “socialize” them as “participants in a common global judicial enterprise,”<sup>51</sup> and ultimately foster “an increasingly global constitutional jurisprudence” across a broad range of human rights issues.<sup>52</sup> Melissa Waters is more circumspect but ultimately makes similar claims: “‘Face-to-face’ contact among the world’s judges is increasingly frequent,” “has undoubtedly been a major factor in certain U.S. Supreme Court Justices’ increased interest” in other forms of dialogue such as comparative analysis, and “has undoubtedly played a significant role in creating an environment” in which these other forms of “dialogue can flourish.”<sup>53</sup>

The evidentiary support for these claims is anecdotal at best. There is little reason to doubt that J2J dialogue does occur and has even increased in frequency. But it is reasonable to wonder whether inclusion in the latest judicial gathering at Yale Law School has any tangible effect on the development of a nation’s constitutional jurisprudence.<sup>54</sup> Does J2J dialogue affect the way in which judges decide actual cases, and if so,

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(describing a “community of courts” constituted by the “self-awareness” of judges who are “coming together in all sorts of ways,” “from seminars to training sessions and judicial organizations”).

47. Law, *supra* note 1, at 702.

48. SLAUGHTER, *supra* note 3, at 66.

49. See, e.g., *id.* at 66, 99; Jeffrey Goldsworthy, *Australia: Devotion to Legalism*, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 106, 135 (Jeffrey Goldsworthy ed., 2006) (deeming “a marked increase in citations of foreign judgments” by Australian courts since 1980 “a consequence of ‘globalisation,’” along with “easier access to foreign materials through the internet, and increased interaction among judges at international conferences”); Kirby, *supra* note 3, at 173–80 (linking “the advent of the internet,” “enhanced international travel,” and the proliferation of international judicial groups and gatherings to the increased use of international human rights law by national judges); Waters, *supra* note 3, at 495–96.

50. SLAUGHTER, *supra* note 3, at 99.

51. *Id.*

52. *Id.* at 66.

53. Waters, *supra* note 3, at 495–96.

54. See sources cited *supra* note 43; *infra* text accompanying note 117.

how? What are the content and consequences of this dialogue? To what extent is it substantive, and to what extent is it social or personal in nature? To the extent that it is substantive, does it furnish judges with knowledge that they would not otherwise possess or acquire? Whatever its content, does direct interaction between judges pique their curiosity about foreign law, or encourage them to cite other courts more often, as some scholars have suggested? And even assuming that dialogue of this kind does in fact increase judicial interest in foreign law, what is its importance relative to domestic institutional variables, such as the prevalence of foreign legal training or the availability of support personnel who have received such training?

These questions are difficult to answer empirically for a number of reasons. A methodological challenge is that such questions concern, for the most part, the content of private communication between government officials and the impact of such communication on decision-making that also occurs behind closed doors. The only publicly available record of this behavior, for the most part, consists of the opinions that judges produce, which are painstakingly edited for public consumption and are neither designed nor intended to reveal the psychological or interpersonal dynamics behind their production. Quantitative analysis of these opinions cannot necessarily capture the frequency with which courts use foreign law, much less the reasons for which it is used. It is common practice for certain courts to consider foreign law without explicitly citing it in their opinions.<sup>55</sup> Thus, perhaps the only way to investigate the content and consequences of transnational J2J dialogue is to interview actual judges about their own experiences. Constitutional court justices do not ordinarily volunteer, however, to talk candidly and in detail about the content of their private discussions with foreign judges, the nature and extent of their participation in the world's judicial networks, and the reasons and motivations underlying their own usage of foreign law.

Another methodological challenge is the need for cross-country comparison and identification of a suitable case study. In order to isolate the impact of J2J dialogue on judicial behavior, it would help greatly to compare the behavior of a constitutional court that engages in a considerable amount of J2J dialogue with that of a court that engages in very little. The literature is replete with examples of constitutional courts

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55. See *supra* note 33 and accompanying text (discussing the frequency with which courts and judges decline to acknowledge foreign sources); *infra* note 63 (describing the reluctance of the South Korean Constitutional Court, Japanese Supreme Court, and Taiwanese Constitutional Court to explicitly cite foreign law, even when it has been taken into consideration).



that participate in this dialogue.<sup>56</sup> But where might one find a court that does not? Ideally, one would study a constitutional court that is generally comparable in most respects to courts that do participate in transnational J2J dialogue—in other words, a court that belongs to a bona fide constitutional democracy and enjoys the freedom to embrace or reject techniques such as comparative analysis—yet has also for some reason been excluded from this dialogue. If globalization has indeed lowered the barriers to global interaction and thus rendered J2J dialogue increasingly ubiquitous, however, then such an isolated court ought not to exist.

Enter Taiwan.

### B. *A Natural Experiment in Dialogue Deprivation*

Although the two countries may be oceans apart, the country that still formally styles itself the Republic of China shares a number of key historical and political characteristics with South Africa, the darling of constitutional comparativists. Both are recent democratic success stories. Like South Africa, Taiwan endured years of both internal and external legitimacy crises, only to rapidly establish itself over the last two decades as one of the most vibrant and robust constitutional democracies in its region of the world.<sup>57</sup> And like South Africa, Taiwan possesses an independent and active constitutional court with an outstanding intellectual pedigree, a large policy footprint, and a penchant for comparative analysis.<sup>58</sup>

But it is there, unfortunately, that the similarities end. Unlike post-apartheid South Africa, Taiwan remains diplomatically and politically isolated from the rest of the world, to an extent that even comparative constitutional scholars may not necessarily grasp. As a result, unlike the South African Constitutional Court, the Constitutional Court of the Republic of China (hereinafter the “Taiwanese Constitutional Court,” or “TCC”) faces severe constraints upon its ability to participate in the “judicial networks”<sup>59</sup> and opportunities for judge-to-judge interaction that are so often emphasized in the literature on global judicial dialogue. And whereas the South African Constitutional Court is widely viewed as

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56. See *supra* notes 2–3.

57. See *infra* Part II.C.

58. See TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 144–51 (2003) (describing the TCC’s role in dismantling the remnants of authoritarianism and reshaping the law in various areas along democratic lines); *infra* text accompanying notes 97–102 (discussing the educational background of the court’s members); *infra* Part III.G (discussing the court’s heavy usage of foreign law).

59. SLAUGHTER, *supra* note 3, at 65–103.

“highly” or even “disproportionately influential,”<sup>60</sup> few scholars would dream of saying the same about the TCC—assuming, indeed, that they have ever given the TCC any thought at all.<sup>61</sup> Over the course of numerous interviews with twelve current and former members of the TCC, not a single one believed that any of the TCC’s decisions had ever been cited by any other constitutional court. Neither the U.S. Supreme Court nor the Canadian Supreme Court has ever cited the TCC.<sup>62</sup> Nor, indeed, have the TCC’s closest neighbors, the Supreme Court of Japan and the Constitutional Court of South Korea, ever done so.<sup>63</sup> Yet

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60. *Id.* at 74.

61. For a prominent and important exception, see GINSBURG, cited above in note 58, at 106–57. For a discussion of just how widely ignored the TCC’s jurisprudence happens to be, see text accompanying notes 108–69 below.

62. A search of all U.S. Supreme Court and Canadian Supreme Court decisions available on Westlaw for the terms “Interpretation No” and “Taiwan” uncovered not a single case in which either court cited a TCC decision. The closest that either court came to doing so was in *National City Bank of New York v. Republic of China*, 348 U.S. 356 (1955), which concerned the ability of the R.O.C. government to bring suit in federal court. In that case, the U.S. Supreme Court cited two early decisions of Taiwan’s Judicial Yuan in 1929 and 1930, at which time Taiwan was still under Japanese rule and the Constitutional Court did not yet exist. *See id.* at 363 n.8, 364 n.10.

63. Judgments of the Supreme Court of Japan and the Korean Constitutional Court can be searched at the official English websites of the two courts. *See Judgments of the Supreme Court*, SUPREME CT. OF JAPAN, <http://www.courts.go.jp/english/judgments/index.html> (last visited Aug. 31, 2011); CONST. CT. OF KOREA, <http://english.court.go.kr> (last visited Aug. 31, 2011). The lack of citations by these two courts can be explained by the fact that, like Taiwan’s Constitutional Court, both the Japanese Supreme Court and the Korean Constitutional Court tend not to cite foreign law explicitly, even if they have investigated it in the course of reaching their decisions. *See* Akiko Ejima, *Enigmatic Attitude of the Supreme Court of Japan towards Foreign Precedents: Refusal at the Front Door and Admission at the Back Door*, 16 MEIJI L.J. 19, 21, 28–34 (2009) (reporting no direct citation of foreign cases in the majority opinions between January 1, 1990, and July 31, 2008, and only seven cases in which dissenting opinions directly cited foreign cases and four cases whose concurring opinions referred to foreign cases).

Empirical studies of foreign law usage by South Korea’s Constitutional Court are lacking, but the Court’s extensive use of foreign law is evident from its case law as well as from interviews conducted with two former law clerks or “constitutional research officers.” One interviewee, who had two years of experience as a “constitutional research officer,” indicated that it is standard practice for that court’s researchers to investigate all relevant foreign law in every case and to report their findings to the justices; another with over a decade of experience estimated that research on foreign law occurs at least sixty percent of the time. *See* Interview with Former Constitutional Research Officer, Constitutional Court of Korea, in Seattle, Wash. (Feb. 25, 2011). Indeed, the Constitutional Court of Korea is currently in the midst of creating a research institute that will be staffed by full-time researchers who speak English, German, Japanese, or Spanish. *See* E-mail from Chulwoo Lee, Professor of Law, Yonsei University Graduate School of Law, to David S. Law (Feb. 25, 2011, 20:13 PST) (on file with authors); The Constitutional Court Research Institute—Professor/Researcher Recruitment Announcement (Feb. 25, 2011) (on file with the authors) (identifying four “zones of language” from which researchers will be hired). The Korean Constitutional Court has cited Taiwanese law in three recent cases, but in none of these cases did it refer to the jurisprudence of Taiwan’s Constitutional Court. *See* Constitutional Court [Const. Ct.], 97Hun-Ka12, Aug. 31, 2000 (2000 DKCC, 52, 60) (S. Kor.), *English translation available at* [http://www.court.go.kr/home/att\\_file/library/decision\\_2000.pdf](http://www.court.go.kr/home/att_file/library/decision_2000.pdf) (referring to Taiwan along with

notwithstanding its marginalization, the extent to which the TCC engages in comparative analysis is second to none—far more so, indeed, than a court such as the U.S. Supreme Court that enjoys virtually unlimited opportunities for judicial interaction.

To gather data on the TCC's participation in J2J dialogue and usage of foreign law, we conducted confidential, face-to-face interviews with twelve current and former members of the Court and nine current law clerks.<sup>64</sup> We also analyzed all of the TCC's constitutional decisions—including majority, concurring, and dissenting opinions—for either explicit or implicit references to foreign law.<sup>65</sup> In order to provide the necessary factual context for our findings, however, we must first delve into the history of Taiwan and the organization of the TCC. Part III.C summarizes Taiwan's political history and relationship with China, while Part III.D offers a brief overview of the history, structure, and jurisdiction of the TCC.

### C. *Taiwan: The Most Marginalized Democracy in the World*

Taiwan, an island nation of twenty-three million people, is perhaps the most isolated democracy in the world today.<sup>66</sup> Indeed, it is besieged.

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other Asian countries such as Indonesia and Thailand as examples of nationality systems that remain keyed to the father's lineage); Constitutional Court [Const. Ct.], 2002Hun-Ka14, June 26, 2003, (2003 DKCC, 45, 67) (S. Kor.), *English translation available at* [http://www.ccourt.go.kr/home/att\\_file/library/decision\\_2003.pdf](http://www.ccourt.go.kr/home/att_file/library/decision_2003.pdf) (noting that the domestic statute being challenged referenced a similar law in Taiwan); Constitutional Court [Const. Ct.], 2002Hun-Ka1, Aug. 26, 2004, (2004 DKCC, 11, 43) (S. Kor.), *English translation available at* [http://www.ccourt.go.kr/home/att\\_file/library/decision\\_2002.pdf](http://www.ccourt.go.kr/home/att_file/library/decision_2002.pdf) (featuring a dissenting opinion that cited Taiwan, along with Germany, Denmark, France, Austria, Italy, Spain, and Brazil, as examples of countries that allow conscientious objectors to serve alternative, non-combat forms of mandatory military service). Indeed, in the last of these cases, the Korean Constitutional Court failed to acknowledge a Taiwanese decision that was highly relevant to the law being discussed. In response to the majority's conclusion that conscientious objectors were not constitutionally entitled to serve an alternative form of mandatory military service, the dissenting opinion made a point of noting that Taiwan makes alternative forms of military service available to military objectors. The majority opinion failed to note, however, that five years earlier, the Taiwanese Constitutional Court upheld an earlier version of Taiwan's mandatory military service law that made no such allowance for conscientious objectors. *See* J.Y. Interpretation No. 490, 12 SHIZI 20 (Const. Ct. Oct. 1, 1999) (Taiwan).

64. The interviews were conducted by Professor Law, on some occasions in conjunction with Professor Chang and once with the participation of Professor Carol Lin of National Chiao Tung University, in a combination of Mandarin and English depending upon the preferences of the interviewee. Some justices were interviewed more than once. Professor Chang herself served as a law clerk to former Chief Justice Weng Yueh-Sheng of the TCC but is not counted among the interviewees.

65. The quantitative data collection and analysis were performed by Professor Chang in conjunction with Professor Jiunn-Rong Yeh. *See infra* note 170.

66. As of March 2011, the R.O.C. has official diplomatic ties with only twenty-three nations. *See Diplomatic Allies*, MINISTRY OF FOREIGN AFF. REPUBLIC OF CHINA (TAIWAN),

Despite the fact that it has never actually governed or controlled the island for even a single day, the People's Republic of China ("P.R.C." or simply "China") views the fully democratic, functionally independent Republic of China ("R.O.C.," now widely known as "Taiwan") as a renegade province and claims sovereignty over the island.<sup>67</sup> The perplexing state of today's relationship between China and Taiwan is a direct result of the even more perplexing relationship between the two entities during the late nineteenth to mid-twentieth centuries.<sup>68</sup>

In 1895, Taiwan and a number of smaller, adjacent islands were ceded by the Qing Dynasty to Japan as part of the price for losing the Sino-Japanese War.<sup>69</sup> Upon Japan's surrender to the Allies at the end of World War II in 1945, the Nationalist (Kuomintang or "KMT") government of the Republic of China, which had succeeded the Qing Dynasty, took control of the islands and declared them a province of the R.O.C.<sup>70</sup> Four years later, however, the KMT government lost the civil war to the Chinese Communist Party on the mainland and retreated to Taiwan.<sup>71</sup> The Communists established the P.R.C. in 1949 and claimed it was the only legitimate government of China, while the KMT government in Taiwan made the same competing claim.<sup>72</sup> In the ensuing decades of intense diplomatic rivalry, the P.R.C. dealt Taiwan a massive blow in 1971 when the United Nations General Assembly passed a resolution expelling "the representatives of Chiang Kai-Shek" from the seats that the R.O.C. was deemed to have unlawfully occupied at the

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<http://www.mofa.gov.tw/webapp/ct.asp?xItem=32618&CtNode=1865&mp=6> (last visited Aug. 3, 2011). For recent contributions to the debate over the R.O.C.'s status as a state from the perspective of international law, see, for example, JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 198–221 (2007); Lung-chu Chen, *Taiwan's Current International Legal Status*, 32 *NEW ENG. L. REV.* 675, 677–80 (1998); Frank Chiang, *State, Sovereignty and Taiwan*, 23 *FORDHAM INT'L L.J.* 959, 982–86 (2000); and Brad R. Roth, *The Entity That Dare Not Speak Its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order*, 4 *E. ASIA L. REV.* 91, 110–14 (2009).

67. See KENNETH LIEBERTHAL, *GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM* 328–31 (2d ed. 2004); Robert A. Madsen, *The Struggle for Sovereignty Between China and Taiwan*, in *PROBLEMATIC SOVEREIGNTY: CONTESTED RULES AND POLITICAL POSSIBILITIES* 141, 158–59 (Stephen D. Krasner ed., 2001).

68. See generally TAIWAN: A NEW HISTORY (Murray A. Rubinstein ed., expanded ed., 2007); SIMON LONG, *TAIWAN: CHINA'S LAST FRONTIER* (1991).

69. The cession was pursuant to the TREATY OF PEACE BETWEEN CHINA AND JAPAN, May 8, 1895, 181 C.T.S. 217. See Chiang, *supra* note 66, at 995.

70. See Madsen, *supra* note 67, at 147–48.

71. See LIEBERTHAL, *supra* note 67, at 52–53; Madsen, *supra* note 67, at 148.

72. For further analysis of the competing claims made by both the P.R.C. and R.O.C., see Jonathan I. Charney & J.R.V. Prescott, *Resolving Cross-Strait Relations Between China and Taiwan*, 94 *AM. J. INT'L L.* 453, 458–73 (2000), and Chiang, cited above in note 66, at 998–99, 1003–04.

United Nations,<sup>73</sup> which included a permanent seat on the Security Council. Another blow came in 1979, when the United States withdrew its formal recognition of the R.O.C. and established formal diplomatic ties with China in its place,<sup>74</sup> although the United States remains responsible by statute for Taiwan's defense.<sup>75</sup> Since that time, the P.R.C. has leveraged its massive and escalating economic and political clout to quash the R.O.C.'s dwindling diplomatic ties with other states<sup>76</sup> and prevent it from participating in international treaty regimes or organizations, especially (but not limited to) those related in any way to the United Nations.<sup>77</sup> At present, the R.O.C. is able only on rare

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73. G.A. Res. 2758, 26 U.N. GAOR, Supp. 29, at 2, U.N. Doc. A/8429 (1971); see Madsen, *supra* note 67, at 156 (describing the R.O.C.'s attempt to "salvage a bit of pride" by walking out of the General Assembly before it could be expelled). Chiang Kai-Shek was at that time President of the R.O.C. For further background, see generally HARVEY J. FELDMAN, *TAIWAN AND THE UNITED NATIONS: CONFLICT BETWEEN DOMESTIC POLICIES AND INTERNATIONAL OBJECTIVES* 15 (1995).

74. For further elaboration, see, for example, JOHN H. HOLDRIDGE, *CROSSING THE DIVIDE: AN INSIDER'S ACCOUNT OF NORMALIZATION OF U.S.-CHINA RELATIONS* 179-85 (1997).

75. Congress responded in 1979 to the Carter Administration's termination of diplomatic ties with Taiwan by enacting the Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 14, (codified at 22 U.S.C. §§ 3301-16 (1979)), and making the act effective retroactively to January 1 of that year. See CONG. REC. H1668-70 (daily ed. Mar. 16, 1979). The goal of the Act was to preserve stability in the region and maintain growing trade relations with Taiwan without offending the P.R.C. government. The Act refers to the R.O.C. government and its successors on this island as "the governing authorities on Taiwan" rather than the "Republic of China," but also provides that references in U.S. law to foreign countries, nations, states, or governments will be deemed to include Taiwan. 22 U.S.C. § 3303. With respect to Taiwan's military security, the Act obligates the United States "to provide Taiwan with arms of a defensive character" and "to maintain the capacity of the United States to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system, of the people on Taiwan." *Id.* § 3301.

76. See Foreign Policy Report, 7th Congress of the Legislative Yuan, 1st Session (Mar. 5, 2008), in 26 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 205, 214 (2008) (reporting that China is pursuing all possible strategies to take away Taiwan's remaining diplomatic allies and cut off Taiwanese participation in the international arena).

77. At present, Taiwan cannot join treaties, conventions, organizations, or even economic cooperation organizations, such as the World Bank, that happen to be affiliated in any way with the United Nations. Thus, for example, Taiwan's ongoing efforts to ratify the International Covenant on Civil and Political Rights (ICCPR)—which include unilateral legislative incorporation of the covenant into domestic law—have, at best, been ignored by the U.N. Secretary-General and, at worst, explicitly rebuffed. In 2007, Taiwan signed and ratified the Convention on the Elimination of Discrimination Against Women (CEDAW) and issued the first state report two years later. In 2009, the legislature ratified the ICCPR and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and also enacted an Implementation Act that incorporated the rights found in the two covenants into domestic law. However, Taiwan's efforts to formally ratify the ICCPR, IESCR, and CEDAW were all rebuffed by the U.N. Secretary-General on the basis of the 1971 General Assembly resolution that expelled Taiwan. See Wen-Chen Chang, *An Isolated Nation with Global-Minded Citizens: Bottom-up Transnational Constitutionalism in Taiwan*, 4 NTU L. REV. 203, 210, 226 (2009).

Some of the myriad and often petty ways in which the P.R.C. and its proxies have hounded Taiwanese judges and professors at international events and venues are documented below. See *infra* Part III.E (describing, inter alia, the P.R.C.-instigated expulsion of Taiwan's national

occasions to participate in international activities or organizations, and even then only in a limited capacity as a wholly economic entity<sup>78</sup> or under the strategically ambiguous pseudonym of “Chinese Taipei,” which the P.R.C. has sometimes deemed acceptable in the context of cultural events such as athletic competitions and beauty pageants.<sup>79</sup>

This oppressive and growing isolation has not prevented Taiwan, however, from making extremely robust economic and political progress since the 1980s. Political liberalization and democratization have occurred hand-in-hand with double-digit economic growth.<sup>80</sup> The organization of Taiwan’s first opposition party, the Democratic Progressive Party (DPP) was tolerated in 1986, and martial law was formally lifted in 1987.<sup>81</sup> As a consequence of both Taiwan’s unique history and the KMT regime’s need for formal institutions that would legitimize its continuing rule, the majority of the R.O.C.’s nominally elected legislators had occupied their seats continuously since 1948 on the basis that the areas they represented were under Communist control and could no longer hold elections.<sup>82</sup> In 1990, however, the Constitutional Court rendered a sweeping decision ordering these superannuated incumbents to leave office and mandating new elections.<sup>83</sup> The R.O.C. Constitution has since been revised seven times, and in 2000, Taiwan’s first democratic transfer of government power took place when the DPP candidate won the presidency.<sup>84</sup> In 2008, the second peaceful transfer of government power occurred as the KMT fought its way back to control of both the executive and legislative

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association of constitutional law scholars from the International Association of Constitutional Law, a private scholarly organization).

78. For example, Taiwan joined the World Trade Organization (WTO) as a separate customs territory rather than as a country and has been able to join certain fishery conventions as a separate fishing entity. *See, e.g.*, Roth, *supra* note 66, at 114.

79. *See* Catherine Kai-Ping Lin, Nationalism in International Politics: The Republic of China’s Sports Foreign Policy-Making and Diplomacy from 1972 to 1981, at 234–62 (Feb. 28, 2008) (unpublished Ph.D. dissertation, Georgetown University) (on file with the author) (offering a detailed historical account of how Taiwan has been forced to participate in athletic competitions under the name of “Chinese Taipei”); *Chinese Taipei*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Chinese\\_Taipei](http://en.wikipedia.org/wiki/Chinese_Taipei) (last updated July 30, 2011) (discussing Taiwan’s use of the “Chinese Taipei” pseudonym in athletic competitions and beauty pageants).

80. *See* HUNG-MAO TIEN, THE GREAT TRANSITION: POLITICAL AND SOCIAL CHANGE IN THE REPUBLIC OF CHINA 17–18 (1989).

81. *See* GINSBURG, *supra* note 58, at 118.

82. *See id.* at 129.

83. J.Y. Interpretation No. 261, 4 SHIZI 110 (Const. Ct. June 21, 1990) (Taiwan).

84. *See* Jiunn-Rong Yeh, *Presidential Politics and Judicial Facilitation of Political Dialogue between Political Actors in New Asian Democracies: Comparing the South Korean and Taiwanese Experiences*, 8 INT’L J. CONST. L. 911, 911–12 (2010).

branches.<sup>85</sup> Democracy in Taiwan is now characterized by, *inter alia*, fiercely contested elections at both the local and national levels, and an abundance of independent media outlets that habitually attack the government with a degree of dogged partisanship that even American observers might find startling.<sup>86</sup>

#### D. *The History and Structure of Taiwan's Constitutional Court*

Established in 1948, the Constitutional Court of the Republic of China, formerly known as the Council of Grand Justices, is now one of the oldest constitutional courts in Asia.<sup>87</sup> In the European or Kelsenian mold,<sup>88</sup> the TCC is a specialized court with jurisdiction over constitutional questions raised by individual petitions or referred by the lower courts, jurisdictional conflicts between government agencies, and serious political matters such as presidential impeachment and dissolution of unconstitutional political parties.<sup>89</sup> Apart from its

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85. *Id.*

86. Yeh, *supra* note 84, at 911–12; *see also* Chang Wen-Chen, Ling Lei te Hsien Kai Kung Cheng: Po Chien Tai Wan te Fa Chih Yu Cheng Chih Hsin Jen [Alternative Agenda in Constitutional Reengineering: Ensuring the Rule of Law and Political Trust in Taiwan], in HSIEN HSING MIN CHU TE HSIEN CHENG KAI TSAO [CONSTITUTIONAL REENGINEERING IN NEW DEMOCRACIES: TAIWAN AND THE WORLD] 307, 307–09 (Yeh Jiunn-Rong & Chang Wen-Chen eds., 2008).

87. Under the 1958 Act Regarding the Council of Grand Justices, the Court was known as the Council of Grand Justices and was later rechristened the Constitutional Court by the 1993 Constitutional Interpretation Procedure Act. *See* Wen-Chen Chang, *The Role of Judicial Review in Consolidating Democracy: The Case of Taiwan*, 2 ASIA L. REV., Dec. 2005, at 73, 74 n.1, 76–78 (explaining the name change). The TCC was established in accordance with the Republic of China Constitution, which was promulgated and became effective in Nanjing, China in 1947. Upon the defeat of the Nationalist (Kuomintang) government by the Communists in the Chinese civil war, the government, including the TCC, relocated to Taiwan in 1949. *See* GINSBURG, *supra* note 58, at 107, 111; TA FA KUAN SHI XIAN SHI LIAO [HISTORY OF THE JUDICIAL YUAN INTERPRETATIONS] 55–56 (Secretariat Judicial Yuan ed., 1998). For a brief introduction to the Court and the content of the Constitutional Interpretation Procedure Act, *see* *Constitutional Interpretation Procedure Act*, JUSTICES OF THE CONST. CT., JUD. YUAN, [http://www.judicial.gov.tw/constitutionalcourt/en/p07\\_2.asp?lawno=73](http://www.judicial.gov.tw/constitutionalcourt/en/p07_2.asp?lawno=73) (last visited Oct. 14, 2011).

88. The goal of the drafters of the R.O.C. Constitution was apparently to create a court of general jurisdiction more akin to the U.S. Supreme Court that would have final authority over all cases, not simply constitutional questions. Due in large part to a drafting error consisting of the last-minute resequencing of relevant provisions of the constitution, however, the TCC found itself limited to abstract constitutional review and a handful of specialty jurisdictions enumerated in the constitution. *See* Wen-Chen Chang, *Transition to Democracy, Constitutionalism and Judicial Activism: Taiwan in Comparative Constitutional Perspective* 138–45 (2001) (unpublished J.S.D. dissertation, Yale Law School). Since then, it has ruled that it may hear constitutional questions referred by the lower courts, thus conferring upon itself a form of concrete review power. *See* J.Y. Interpretation No. 590, 18 SHIZI 90 (Const. Ct. Feb. 25, 2005); J.Y. Interpretation No. 572, 17 SHIZI 113 (Const. Ct. Feb. 6, 2004); J.Y. Interpretation No. 371, 7 SHIZI 26 (Const. Ct. Jan. 20, 1995).

89. Unlike other constitutional courts that can grant relief to litigants, Taiwan's Constitutional Court only rules on the constitutionality of laws and regulations in response to petitions for

jurisdiction over constitutional questions and various political matters, the Constitutional Court is also responsible for issuing uniform interpretations of statutes and regulations in situations where the regular and administrative courts arrive at conflicting interpretations.<sup>90</sup> This jurisdiction over uniform interpretations now constitutes only two percent of the Court's caseload, down from approximately twenty percent in the 1960s and 1970s and fifty percent in the 1950s.<sup>91</sup>

The Constitutional Court is composed of fifteen justices who are appointed by the President upon confirmation by the Legislative Yuan for a nonrenewable term of eight years, with the exception of the two justices who serve concurrently as president and vice president of the Judicial Yuan and are not guaranteed a full eight years in office.<sup>92</sup> By statute, the Court is to be composed of a mixture of legal scholars, career judges, legislators, and persons with a combination of scholarly and political experience. The Organic Act of the Judicial Yuan sets forth five categories of people who are eligible for appointment, and no single category is supposed to comprise more than one-third of the Court.<sup>93</sup> In

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constitutional interpretations. If a law or regulation is found unconstitutional by the TCC, the litigant who successfully challenged the law must then seek a retrial or special trial in a regular court in order to obtain the benefit of the TCC's ruling. *See Petition for Interpretation*, JUSTICES OF THE CONST. CT., JUD. YUAN, [http://www.judicial.gov.tw/constitutionalcourt/en/p02\\_01\\_01.asp](http://www.judicial.gov.tw/constitutionalcourt/en/p02_01_01.asp) (last visited Aug. 6, 2011) (explaining the procedures and rules governing petitions for constitutional interpretations); *Procedure for Interpretation*, JUSTICES OF THE CONST. CT., JUD. YUAN, [http://www.judicial.gov.tw/constitutionalcourt/en/p02\\_01\\_02.asp](http://www.judicial.gov.tw/constitutionalcourt/en/p02_01_02.asp) (last visited Aug. 6, 2011) (explaining the Court's procedures for constitutional interpretations).

90. Ssu Fa Yuan Ta Fa Kuan Shen Li An Chien Fa [Constitutional Interpretation Procedure Act], art. 7, 37 ZHONGHUA MINGUO XIANXING FAGUI HUIBIAN 25773, 25774 (2004) (Taiwan).

91. *See* Chang, *supra* note 87, at 77 tbl.1.

92. *See* MINGUO XIANFA amend. 5 (2000) (Taiwan). Prior to 2003, justices were appointed for a term of nine years with the possibility of reappointment. Under the system that was in place from 1948 to 2003, there were six distinct cohorts of justices, each of which is known as a "term" of the Court: the first "term" was from 1948 to 1958, the second from 1958 to 1967, the third from 1967 to 1976, the fourth from 1976 to 1985, the fifth from 1985 to 1994, and the sixth from 1994 to 2003. *See* Chang, *supra* note 88, at 203. The longest serving justice was Justice Weng Yueh-Sheng, who joined the Court in July 1972 and left in September 2007. *See Former Justices*, JUSTICES OF THE CONST. CT., JUD. YUAN, [http://www.judicial.gov.tw/constitutionalcourt/en/p01\\_04.asp](http://www.judicial.gov.tw/constitutionalcourt/en/p01_04.asp) (last visited Sept. 16, 2011). Constitutional amendments adopted in 2000 introduced non-renewable eight-year terms for the justices and also staggered their membership, with the result that it is no longer possible to speak of a specific "term" of the Court that is defined by a fixed cohort of justices. *See* MINGUO XIANFA, *supra*, amend. 5.

93. In order to be eligible for appointment to the Constitutional Court, a candidate must: (1) have served as a justice of the Supreme Court for more than ten years with a distinguished record; (2) have served as a member of the Legislative Yuan for more than nine years with distinguished contributions; (3) have been a professor of a major field of law at a university for more than ten years and have authored publications in a specialized field; (4) have served on the International Court of Justice, or have published authoritative works in the fields of public or comparative law; or (5) be a person highly reputed in the field of legal research and have political experience. In addition, the number of justices appointed under any one of the above categories is not to exceed



practice, however, flexible interpretation of the categories has meant that the vast majority of those appointed have been either career judges with prior experience on the Supreme Court or Supreme Administrative Court, or law professors.<sup>94</sup> Nine out of the current fifteen justices are legal scholars; of the remainder, five are career judges, and only one is a former private attorney.<sup>95</sup> Very rarely are private attorneys appointed to the Court.<sup>96</sup>

Thanks in part to the heavy representation of former academics, the justices collectively possess impressive educational credentials and considerable expertise in foreign law. In Taiwan, a doctorate in the form of either a Ph.D. or J.S.D. is effectively a prerequisite to becoming a law professor, and universities tend to value foreign legal training in particular.<sup>97</sup> The nine law professors currently on the Court are typical in this regard: eight hold doctorates in law from Germany, while the last holds a doctorate from the United States.<sup>98</sup> In addition to these nine

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one-third of the total number of justices. See Ssu Fa Yuan Tsu Chih Fa [Organic Act of the Judicial Yuan], art. 4, para.1, 37 ZHONGHUA MINGUO XIANXING FAGUI HUIBIAN 25399, 25400 (1957) (Taiwan), *English translation available at* [http://www.judicial.gov.tw/constitutionalcourt/en/p07\\_2.asp?lawno=73](http://www.judicial.gov.tw/constitutionalcourt/en/p07_2.asp?lawno=73). The former scholars on the Court are in practice appointed under the third, fourth, and fifth categories, whereas the career judges are appointed mostly under the first and fifth categories. In recent years, no justices have been appointed under the second category (namely, legislator with more than ten years' experience). Because Taiwan is no longer recognized as a state by the United Nations, *see supra* note 73 and accompanying text, no one from Taiwan can be appointed to the International Court of Justice, and it has thus become impossible for anyone to be appointed to the Court under the first clause of category four.

94. See Chang, *supra* note 87, at 75.

95. The current President of the Judicial Yuan and Chief Justice of the Constitutional Court was a private attorney for about forty years prior to joining the Court. See *Hau-Min Rai*, JUSTICES OF THE CONST. CT., JUD. YUAN, [http://www.judicial.gov.tw/constitutionalcourt/en/p01\\_03\\_01.asp?curno=24](http://www.judicial.gov.tw/constitutionalcourt/en/p01_03_01.asp?curno=24) (last visited Oct. 14, 2011).

96. See Chang, *supra* note 88, at 209–10.

97. For example, at National Taiwan University College of Law, the top law school in Taiwan, there are at present forty full-time law professors, including associate and assistant professors. Among them, seventeen hold doctorates from Germany, eleven from the United States, seven from Japan, three from England, and one from France. Only one was educated entirely in Taiwan. See *Full Time Professors*, NTU COLLEGE OF LAW, [http://www.law.ntu.edu.tw/english/full\\_time\\_professors.html](http://www.law.ntu.edu.tw/english/full_time_professors.html) (last visited Aug. 6, 2011). The dominance of foreign-trained faculty is typical of other law schools in Taiwan as well and reflects a combination of historical context and academic politics. See *infra* notes 239–246 and accompanying text (discussing the patchwork of foreign influences that make up Taiwanese law and the consequent habitual use of foreign law by Taiwanese scholars and judges).

98. Brief biographies of the current justices are available at the Constitutional Court's English-language website. See *Justices*, JUSTICES OF THE CONST. CT., JUD. YUAN, [http://www.judicial.gov.tw/constitutionalcourt/en/p01\\_03.asp](http://www.judicial.gov.tw/constitutionalcourt/en/p01_03.asp) (last visited July 20, 2011). The predominance of justices from scholarly backgrounds is a fairly recent phenomenon. Prior to the 1980s, legal scholars typically constituted from one-third to less than one-half of the Court. See

former professors, two of the other current members of the TCC hold foreign LL.M.s, one from Japan, the other from the United States.<sup>99</sup> Thus, over two-thirds of the current justices have been formally trained overseas in foreign law. Only one of the fifteen justices holds neither an LL.M. nor a Ph.D.<sup>100</sup>

The TCC's law clerks—one for each justice—also bring a combination of advanced legal training and exposure to foreign law to their work. An LL.M., either foreign or domestic, is a de facto requirement to be hired as a clerk.<sup>101</sup> There is no fixed term of service for the clerks, who tend to serve for longer than just one year and are often concurrently enrolled in domestic Ph.D. programs or preparing to apply for Ph.D. programs overseas.<sup>102</sup> As a result of both their length of service and their advanced training, Taiwan's law clerks tend to have more experience and to know more about foreign law than their American counterparts. Law clerk hiring turns heavily on word-of-mouth and personal recommendations: many are recommended by the outgoing clerk or inherited from the previous justice, while justices who are former academics often hire either their own former students or those recommended by their former law school colleagues.<sup>103</sup>

As of this writing, the TCC has rendered a total of nearly seven hundred constitutional interpretations over the course of its existence.<sup>104</sup> The bulk of these decisions postdate the democratization and constitutional reforms of the late 1980s.<sup>105</sup> The Court currently issues

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Chang, *supra* note 88, at 75; *Former Justices*, JUSTICES OF THE CONST. CT., JUD. YUAN, [http://www.judicial.gov.tw/constitutionalcourt/en/p01\\_04.asp](http://www.judicial.gov.tw/constitutionalcourt/en/p01_04.asp) (last visited July 20, 2011) (listing all former justices).

99. See *Pi-Hu Hsu*, JUSTICES OF THE CONST. CT., JUD. YUAN, [http://www.judicial.gov.tw/constitutionalcourt/en/p01\\_03\\_01.asp?curno=34](http://www.judicial.gov.tw/constitutionalcourt/en/p01_03_01.asp?curno=34) (last visited July 19, 2011) (listing an LL.M. from Columbia Law School); *Hau-Min Rai*, *supra* note 95 (listing an LL.M. from the University of Tokyo).

100. See *Chi-Ming Chih*, JUSTICES OF THE CONST. CT., JUD. YUAN, [http://www.judicial.gov.tw/constitutionalcourt/en/p01\\_03\\_01.asp?curno=88](http://www.judicial.gov.tw/constitutionalcourt/en/p01_03_01.asp?curno=88) (last visited Sept. 20, 2011).

101. See Interview with Clerk 1, Law Clerk to a Justice of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Nov. 17, 2010).

102. See *id.* (noting that the justice for whom she works has had a total of four clerks in seven years).

103. For example, upon her graduation from the graduate program of National Taiwan University College of Law, Professor Chang was hired as a law clerk to former Chief Justice Yueh-Sheng Weng, who was a professor at National Taiwan University College of Law and continued to serve as an adjunct professor there.

104. As of September 20, 2011, it had rendered 689 interpretations. See *Interpretations*, JUSTICES OF THE CONST. CT., JUD. YUAN, <http://www.judicial.gov.tw/constitutionalcourt/en/p03.asp> (last visited Sept. 20, 2011).

105. The TCC rendered 79 constitutional interpretations in its first term (1948–1958), 43 in its

about twenty to thirty constitutional interpretations per year, of which roughly one-quarter to one-third result in a finding of unconstitutionality.<sup>106</sup> The TCC has been praised by many for facilitating Taiwan's relatively smooth and rapid transition to democracy, and for proving itself a strong guardian of individual rights and freedoms.<sup>107</sup>

*E. The Growing Isolation of Taiwan's Judges*

China's efforts to isolate Taiwan—both literally and figuratively a small island of democracy—are not merely disheartening, but also stunningly comprehensive. The dwindling handful of countries with which Taiwan still enjoys diplomatic relations<sup>108</sup> are the few remaining places in the world where the Justices of the Constitutional Court can expect a red-carpet welcome. South Africa under apartheid was one such country; visiting members of the TCC attended a party in their honor with members of the South African Constitutional Court and were even treated to a tour of the country.<sup>109</sup> Today, the members of the TCC can still look forward to a warm welcome if they visit Panama or Burkina Faso. But such hospitality is disappearing in tandem with Taiwan's diplomatic relations.

Membership in international organizations also poses challenges for the TCC and its justices. Last year, for example, the Association of Asian Constitutional Court Judges established a new organization, the Association of Asian Constitutional Courts.<sup>110</sup> Much of the impetus for the formation of this organization came reportedly from members of the South Korean Constitutional Court, one of whom contacted a member of the TCC.<sup>111</sup> The TCC did not receive an actual invitation to join the new

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second term (1958–1967), 24 in its third term (1967–1976), 53 in its fourth term (1976–1985), 167 in its fifth term (1985–1994), and 200 in its sixth term (1994–2003). The cohort of justices appointed in 2003 has thus far rendered an additional 119 interpretations. *See* Chang, *supra* note 87, at 77 tbl.1.

106. *See* Chang, *supra* note 87, at 85 tbl.5.

107. *See* GINSBURG, *supra* note 58, at 144–57; Chang, *supra* note 87, at 83–85.

108. *See supra* note 66.

109. *See* Interview with Justice D, Current or Former Justice, Constitutional Court of the Republic of China, in Taipei, Taiwan (Nov. 26, 2010); Interview with Justice E, Current or Former Justice, Constitutional Court of the Republic of China, in Taipei, Taiwan (Dec. 3, 2010).

110. *See Rule of Law Programme Asia*, KONRAD-ADENAUER-STIFTUNG, <http://www.kas.de/rspa/en/events/41710/> (last visited Aug. 7, 2011) (noting the adoption of the “Jakarta Declaration” establishing the Association of Asian Constitutional Courts).

111. A subsequent interview with a member of the Korean Constitutional Court confirmed the prominent role of that court in organizing the Association of Asian Constitutional Courts. *See* Interview with Current or Former Justice, Constitutional Court of Korea, in Seoul, Korea (July 6, 2011).

association, however, but was merely invited to apply for membership. Ultimately, after some internal discussion, the TCC decided not to apply, partly for fear of the potential “embarrassment” that might result if China were subsequently asked to participate.<sup>112</sup> A number of justices expressed concern that if the TCC were to join first under its proper name, the “Constitutional Court of the Republic of China,” and then China were to join subsequently, China might insist that the TCC be forced to participate under a different name or ejected from the organization entirely, a possibility that they wished to avoid.<sup>113</sup>

Participation by individual justices in international associations and conferences is no less problematic. As one justice glumly remarked, China’s unrelenting exertion of pressure on other countries makes it “hard for us to attend conferences.”<sup>114</sup> In many cases, they are simply not invited. The website for the latest World Congress of Constitutional Justice, for example, proudly boasts the participation of no fewer than eighty-eight constitutional courts and ten regional court associations.<sup>115</sup> Yet not only was no one from the TCC invited, but the justices who relayed this fact to us reported that they had not even heard of the event until we asked them about it.<sup>116</sup> One of the justices deemed Taiwan’s exclusion unsurprising in light of the fact that the conference was hosted by the Federal Supreme Court of Brazil and sponsored by the Venice Commission of the Council of Europe, neither of which is keen to complicate relations with China. Even if there are no political barriers to Taiwanese participation in a particular gathering of judges, however, a small country such as Taiwan is easily overlooked or ignored by the

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112. See Interview with Justice A, Current or Former Justice, Constitutional Court of the Republic of China, in Taipei, Taiwan (Dec. 18, 2010); Interview with Justice I, Current or Former Justice, Constitutional Court of the Republic of China, in Taipei, Taiwan (Dec. 27, 2010); Interview with Justice I, Current or Former Justice, Constitutional Court of the Republic of China, in Taipei, Taiwan (Dec. 18, 2010); Interview with Judicial Administrator in Taipei, Taiwan (Nov. 25, 2010). The justices were also aware that Japan had already decided not to join, although its reasons for declining were not known.

113. See, e.g., Interview with Justice A, *supra* note 112; Interview with Justice I, *supra* note 112. Ultimately, neither Taiwan nor China joined the association. See The Statute of the Association of Asian Constitutional Courts and Equivalent Institutions, available at [http://www.venice.coe.int/AACCEI/AACCEI\\_Statute.pdf](http://www.venice.coe.int/AACCEI/AACCEI_Statute.pdf) (last visited Sept. 6, 2011).

114. Interview with Justice B, Current or Former Justice of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Nov. 19, 2010).

115. See *List of Participants*, 2ND CONG. WORLD CONF. ON CONST. JUST. (last updated Jan. 30, 2011), [http://www.venice.coe.int/WCCJ/Rio/WCCJ\\_List\\_of\\_Participants.pdf](http://www.venice.coe.int/WCCJ/Rio/WCCJ_List_of_Participants.pdf) (listing the representatives of the eighty-eight constitutional courts and ten regional court associations that participated in the January 2011 meeting).

116. See E-mail from Justice A, Current or Former Justice, Constitutional Court of the Republic of China, to David S. Law (Feb. 27, 2011, 08:29 CST); E-mail from Justice H, Current or Former Justice, Constitutional Court of the Republic of China, to David S. Law (Mar. 1, 2011, 03:14 CST).

organizers of such events.<sup>117</sup>

In other cases, the justices may literally be turned away at the border. In 1983, for example, a number of judges from Taiwan—including at least one member of the Constitutional Court—arrived in Egypt to attend a meeting of the International Association of Judges. The group was not allowed to clear immigration and was forced to turn back.<sup>118</sup> Another justice met a similar fate when she attempted to attend the 2004 biannual meeting of the International Association of Women Judges held in Uganda. All of the Taiwanese judges were denied entry visas, reportedly because China had offered to fund construction of a new building for the Ugandan judiciary and had made clear its desire that the Taiwanese delegation be barred from attending.<sup>119</sup>

Indeed, China hounds Taiwan so thoroughly and relentlessly that it even interferes with the ability of law professors to participate in a private capacity in international academic meetings and organizations that are not sponsored by or affiliated with any government. One justice related the story of how an international conference organized by Pitman Potter, a distinguished scholar of Chinese law at the University of British Columbia, fell victim to a Chinese boycott just two days before it was scheduled to begin. Potter had invited scholars from both China and Taiwan to Canada, but the Chinese government would not allow its own scholars to attend an “international” conference if scholars from Taiwan would also be present.<sup>120</sup> The fact that the justices call upon local scholars for foreign legal expertise<sup>121</sup> and are frequently former academics themselves<sup>122</sup> means that such efforts to isolate Taiwanese law professors reinforce the isolation of the TCC as well.

Even more striking was the expulsion of Taiwan’s national

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117. A case in point is Yale Law School’s oft-noted global constitutionalism seminar, now in its sixteenth year, which brings together constitutional judges from around the world on an invitation-only basis for closed-door discussions. *See* sources cited *supra* note 43. On only one occasion—in 1997—has a member of the TCC participated, and our interviewees knew of only one other justice who had ever been invited.

118. Interview with Justice E, *supra* note 109.

119. Interview with Justice I, *supra* note 112.

120. Interview with Justice B, *supra* note 114; *see also* E-mail from Pitman Potter, Hong Kong Bank Chair in Asian Research and Professor of Law, Univ. of B.C., to David S. Law (Apr. 27, 2011, 09:49 PST) (on file with authors). Chinese authorities indicated that holding the conference in Canada would impermissibly “internationalize” the issue of cross-strait relations, and that Chinese scholars would be permitted to attend such a conference only if it were to be held in China or Taiwan. *Id.*; *see also* Pitman B. Potter, *Preface to LAW AND ECONOMIC DEVELOPMENT IN CHINA MAINLAND AND TAIWAN*, at iii, vi (Pitman B. Potter ed., 2006) (alluding to this incident).

121. *See infra* text accompanying note 208 (discussing the TCC’s practice of convening informational sessions with academics).

122. *See supra* notes 93–99 and accompanying text.

association of constitutional law professors from the International Association of Constitutional Law (IACL) in 1999.<sup>123</sup> Yueh-Sheng Weng, a longtime member of the National Taiwan University law faculty and at that time Chief Justice of the TCC, had been tapped to serve on the executive committee of the IACL in advance of the organization's fifth congress in Rotterdam. Unable to attend the meeting at which he was to be formally elected, Weng designated Tzong-Li Hsu, a colleague at National Taiwan University who would later be appointed to the TCC himself, to travel to Rotterdam and attend the meeting in Weng's place.<sup>124</sup> At the meeting, however, China's representative on the executive committee objected angrily to Weng's selection on the ground that Taiwan was not a country and that Taiwan's so-called national association of constitutional scholars was therefore ineligible to belong to the IACL.<sup>125</sup> Hsu countered that the IACL was a private scholarly association, not the United Nations, and that Taiwan deserved to be included in an organization dedicated to the study of constitutionalism, given its own status as a constitutional democracy.<sup>126</sup> The Chinese position prevailed, however, and not only was Weng denied a seat on the executive committee, but Taiwan's national association was expelled from the organization, with the result that all scholars from Taiwan lost their membership in the IACL.<sup>127</sup> Subsequent changes in leadership at the IACL enabled a handful to apply successfully for membership on an individual basis,<sup>128</sup> but most no longer belong to the organization,<sup>129</sup> and Chinese harassment of the few Taiwanese scholars who do remain

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123. For a description of the International Association of Constitutional Law, see INT'L ASS'N CONST. L., <http://www.iacl-aicd.org> (last visited Mar. 15, 2011).

124. Interview with Justice A, Current or Former Justice, Constitutional Court of the Republic of China, in Taipei, Taiwan (Nov. 12, 2010); Interview with Justice C, Current or Former Justice, Constitutional Court of the Republic of China, in Taipei, Taiwan (Nov. 26, 2010).

125. Interview with Justice A, *supra* note 124; Interview with Justice C, *supra* note 124.

126. Interview with Justice A, *supra* note 124; Interview with Justice C, *supra* note 124.

127. Interview with Justice A, *supra* note 124; Interview with Justice C, Current or Former Justice, Constitutional Court of the Republic of China, in Taipei, Taiwan (Mar. 4, 2011); Interview with Dennis T.C. Tang, Dir. and Distinguished Research Professor, Institutum Iurisprudentiae, in Taipei, Taiwan (Mar. 4, 2011); Interview with Jiunn-Rong Yeh, Distinguished Professor, National Taiwan University College of Law, in Taipei, Taiwan (Mar. 6, 2011). If Taiwan were to be considered part of China—as the Chinese scholars argued to the executive committee—then Taiwanese scholars could, in theory, seek continued membership in the IACL via the Chinese national association. To the best of our knowledge, however, no one from Taiwan has ever attempted to join the Chinese association.

128. Professor Chang joined the IACL as an individual member in 2005.

129. One prominent scholar reports that his application for individual membership, filed shortly after the expulsion of the Taiwanese national association, was never even acknowledged by the IACL.

continues in other forms.<sup>130</sup>

One might think that China is especially anxious to prevent Taiwanese judges (and academics) from attending “international” gatherings because such attendance implies that Taiwan is a “nation.” But the obstacles that China has erected to J2J interaction involving Taiwanese judges are by no means limited to international meetings. Efforts by the members of the TCC to visit constitutional courts in other countries have also been frustrated by Chinese interference. The justices ordinarily receive a travel budget that enables them to visit courts in other countries for research purposes; the choice of destination is left to them, and in a typical year, a group of three or four justices will make use of the summer recess to visit a constitutional court that they find of particular interest or relevance to their work.<sup>131</sup> Some countries, such as Australia,<sup>132</sup> Hungary,<sup>133</sup> and South Korea,<sup>134</sup> were identified as relatively hospitable and trouble-free destinations, at least for a lucky few justices. It has also been “no problem” for the justices to visit Germany, although one justice warned that revelation of this fact might elicit “protests” from China.<sup>135</sup>

In other countries, however, the welcome mat is nowhere to be found. A former Chief Justice of the TCC told of many such stories. On one occasion, for example, he had been invited to Argentina in his capacity as President of the Judicial Yuan, only to be denied a visa.<sup>136</sup> On another

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130. At the 1999 meeting, Chinese professors shadowed and eavesdropped upon gatherings of Taiwanese professors. Most recently, at the IACL congress held in Mexico City in December 2010, Jiunn-Rong Yeh of National Taiwan University was selected as a last-minute substitute to appear on a panel concerning the universality or particularity of constitutional principles. Neither the topic of the panel nor Yeh’s relatively abstract and jurisprudential presentation, witnessed by both authors of this Article, touched in any discernible way upon any question relating to either Taiwanese statehood or Taiwan’s relationship with China. During the question period, the chair of the session noted that there were still many in the audience waiting to pose questions during the little time remaining before recognizing Jihong Mo, a law professor at the government-run Chinese Academy of Social Sciences and member of the IACL executive committee. See *Brief Introduction of Mo Jihong*, VIIITH WORLD CONG. INT’L ASS’N CONST. L., [http://www.enelsyn.gr/en/CV/Mo\\_Jihong.htm](http://www.enelsyn.gr/en/CV/Mo_Jihong.htm) (last visited Mar. 3, 2011). Mo proceeded to filibuster for most of the remaining time with an irrelevant, incoherent, and rambling question that boiled down to a contention that Professor Yeh lacked standing to address questions of constitutional law because Taiwan is not a country.

131. Interview with Justice B, *supra* note 114; Interview with Clerk 2, Law Clerk to a Justice of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Nov. 17, 2010).

132. Interview with Justice I, *supra* note 112; Interview with Judicial Administrator, *supra* note 112.

133. Interview with Justice B, *supra* note 114.

134. Interview with Clerk 2, *supra* note 131 (describing an official reception held at the South Korean Constitutional Court for visitors from the TCC).

135. Interview with Justice C, *supra* note 124.

136. See *id.*

occasion, when he sought to visit Brazil, he was issued a visa but instructed not to visit the capital of Brasilia because the Chinese prime minister would be there at the same time.<sup>137</sup> In some cases, unwilling hosts have resorted to face-saving avoidance techniques. For example, although judicial visits to France do occur, such visits pose “some difficulties,”<sup>138</sup> and it appears that the French have on occasion found “diplomatic” ways of thwarting them<sup>139</sup>: the justices might be told that a visit to the Conseil Constitutionnel would require approval by the Ministry of Foreign Affairs<sup>140</sup> or that the officials needed to authorize passage through France happen to be on vacation.<sup>141</sup>

Similar episodes occurred in nearby Italy and Spain when a group of justices attempted in 2006 to visit the Italian and Spanish Constitutional Courts. Taiwan’s Ministry of Foreign Affairs was told that a visit to the Italian Constitutional Court (ICC) could not be arranged because the entire court would be on vacation. After various efforts were made through unofficial channels to prod the ICC, the Taiwanese justices finally received word from an Italian academic that a visit to the ICC would in fact be possible, and that the Italian justices might even meet them. Ultimately, however, they did not meet any of their Italian counterparts but instead received a tour of the building and met with the ICC’s general secretary who, although “very friendly,” was unable to answer all of their questions.<sup>142</sup> By contrast, the trip to the Spanish Constitutional Court promised greater success, at least initially. Word had been relayed through a Spanish law professor that the justices themselves would receive the visitors at the court itself.<sup>143</sup> Upon their actual arrival at the court, however, the Taiwanese justices were told that the Spanish justices were too busy to meet them, and they were left instead in the care of a retired chief justice.<sup>144</sup> Yet even this meeting might not have been possible had it not been for the academic contacts that one of the Taiwanese justices possessed at a university in Madrid.<sup>145</sup>

Nor are countries with close historical or political ties to Taiwan

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137. *See id.*

138. Interview with Justice L, Current or Former Justice, Constitutional Court of the Republic of China, in Taipei, Taiwan (Jan. 18, 2011).

139. Interview with Spouse of Justice L, in Taipei, Taiwan (Jan. 18, 2011).

140. *See* Interview with Judicial Administrator, *supra* note 112.

141. *See* Interview with Justice C, *supra* note 124.

142. Interview with Justice H, Current or Former Justice, Constitutional Court of the Republic of China, in Taipei, Taiwan (Jan. 10, 2011). According to another justice, the TCC delegation also met a retired justice. *See* Interview with Justice G, *supra* note 19.

143. Interview with Justice A, *supra* note 124.

144. *See id.*; Interview with Justice H, *supra* note 142.

145. *See* Interview with Justice H, *supra* note 142.



necessarily more receptive to Taiwanese visitors. Notwithstanding its primary responsibility for shaping Taiwan's current legal system over five decades of colonial rule, Japan now keeps Taiwanese judges at a wary distance. Japanese judges and officials were described as "generally unwilling to meet" with Taiwanese visiting judges and more concerned with the state of their relations with China than with their former colony.<sup>146</sup> The fact that some Taiwanese judges have obtained advanced degrees in Japan and thus know some Japanese judges personally, particularly those on the Japanese administrative courts, means that judge-to-judge contact remains possible at least on an unofficial, individual basis.<sup>147</sup> On the whole, however, visitors from the TCC are "not as welcome there" as in other countries.<sup>148</sup> TCC justices who wished to visit the Japanese Supreme Court were reportedly told that their Japanese counterparts could not greet them at the court itself, and a dinner meeting at a restaurant was arranged instead.<sup>149</sup> If visitors from the TCC are received at the Japanese Supreme Court at all, it is generally by administrative officials or, at best, retired justices.<sup>150</sup>

Members of the TCC have generally, but not always, enjoyed better luck when attempting to visit Taiwan's closest and most important ally, the United States. A number of justices reported that they found it unproblematic to visit the United States, and when they have traveled to the U.S. Supreme Court, they have been met with hospitality. One Taiwanese justice recalled how, on his first visit to the U.S. Supreme Court over the summer of 1998, he and his colleagues from Taiwan were informed that their American counterparts were on vacation and thus unable to greet them.<sup>151</sup> Instead, they were entertained at the Court by retired Chief Justice Burger, who served them afternoon tea, regaled them with stories about his grandfather's dealings with the Qing Dynasty, and even praised the European model of judicial review as superior to the American model.<sup>152</sup> Nevertheless, diplomatic obstacles can still interfere with judicial visits to the United States. On one occasion, while passing through the United States en route to Guatemala in his official capacity as head of the Judicial Yuan, Chief Justice Weng

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146. See Interview with Judicial Administrator, *supra* note 112.

147. See *id.*

148. *Id.*

149. See Interview with Clerk 5, Law Clerk to a Justice of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Nov. 22, 2010).

150. See Interview with Clerk 2, *supra* note 131; Interview with Clerk 8, Law Clerk to a Justice of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Nov. 26, 2010).

151. See Interview with Justice C, *supra* note 124.

152. See *id.*

was reportedly warned by Taiwan's Ministry of Foreign Affairs not to set foot in Washington, D.C., although New York was deemed acceptable.<sup>153</sup> On subsequent official visits to Honduras and Panama, however, Weng was once again allowed to stop en route in the nation's capital. Indeed, when he visited the Supreme Court en route to Panama, he was greeted by Justices O'Connor and Scalia and had his picture taken by the Court's official photographer with Chief Justice Roberts and Justice Kennedy.<sup>154</sup> For reasons that should by now be clear, Taiwan's justices do not take such courtesies for granted, and the photograph is on display in the Judicial Yuan.

As difficult as it can be for Taiwan's judges to attend international meetings or visit courts in other countries, playing the part of host can pose even greater challenges. Inviting justices from other countries to Taiwan is, in the words of one TCC justice, "very hard."<sup>155</sup> Notwithstanding Germany's willingness to accept Taiwanese justices as visitors, reciprocal visits on the part of the Germans have proved harder: the President of the German Bundesverfassungsgericht, for example, indicated with regret that it would be "difficult" for political reasons to accept the TCC's invitation,<sup>156</sup> and a number of justices reported that their success in inviting German constitutional jurists had been limited to retirees.<sup>157</sup> On this count, the members of the U.S. Supreme Court have proved braver: Justices O'Connor, Kennedy, and Scalia—who is no great fan of global judicial dialogue<sup>158</sup>—have all visited the TCC.<sup>159</sup> Even when dealing with the U.S. Supreme Court, however, the Taiwanese justices are wary of extending official invitations for fear that they are more likely to be rebuffed. For this reason, efforts to bring

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153. *See id.*

154. *See id.*

155. Interview with Justice B, *supra* note 114.

156. Interview with Clerk 3, Law Clerk to a Justice of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Nov. 22, 2010).

157. *See, e.g.*, Interview with Justice J, *supra* note 40; Interview with Judicial Administrator, *supra* note 112.

158. *See, e.g.*, *Thompson v. Oklahoma*, 487 U.S. 815, 859–60 (1988) (Scalia, J., dissenting) (protesting that "the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution").

159. Justice O'Connor and her husband visited the TCC on September 5, 1987, and Justice Kennedy visited the TCC on September 6, 1994. Professor Chang acted as Justice Scalia's translator during his visit to the TCC on September 19, 2002. Their visits are chronicled in Chinese on the TCC's website. *See Da Shi Ji Yao [Summary of Major Events]*, JUSTICES OF THE CONST. CT., JUD. YUAN, <http://www.judicial.gov.tw/constitutionalcourt/p08.asp> (last visited Sept. 20, 2011); *see also* Jimmy Chuang, *US Supreme Court Justice Scalia Gives Taipei Speech*, *TAIPEI TIMES*, Sept. 14, 2002, at 2, available at <http://www.taipetimes.com/News/taiwan/archives/2002/09/14/0000167980> (describing Justice Scalia's visit).

Justice Souter to Taipei were conducted via a professor at Harvard, although the invitation was ultimately declined.<sup>160</sup>

The TCC's ties to the outside world are bolstered to some extent by the fact that the former law professors on the court possess an international network of academic connections, which they frequently employ in addition to, or in lieu of, official efforts by the Ministry of Foreign Affairs to orchestrate visits abroad.<sup>161</sup> For example, when the Chief Justice needed to pass through Paris in order to reach Burkina Faso as part of a diplomatic delegation, the Ministry reported difficulty obtaining the necessary clearance, ostensibly because the trip was occurring close to Christmas and the relevant French officials were on vacation.<sup>162</sup> The Chief Justice ultimately solved the problem by contacting a French law professor he knew who, in turn, managed to set the bureaucracy in motion.<sup>163</sup>

These backdoor efforts are at best partially successful, however, as illustrated by the recent trips to Italy<sup>164</sup> and Spain.<sup>165</sup> In an effort to salvage the visit to the Italian Constitutional Court, one former law professor on the TCC wrote no fewer than thirty-eight letters and e-mails to professors in Italy and elsewhere, and to judges outside of Italy, in the hope that word of mouth might encourage the Italian justices to meet with the Taiwanese group, and it initially seemed that this correspondence campaign might bear fruit.<sup>166</sup> Similarly, it was a former professor on the TCC who initially secured the Spanish Constitutional Court's agreement to greet the Taiwanese justices by calling upon his academic contacts.<sup>167</sup> Yet the justices from Taiwan were ultimately unable to meet active members of either court.<sup>168</sup> The effectiveness of academic backchannels as a means of overcoming Taiwan's isolation is limited by China's constant, petty efforts to prevent Taiwanese

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160. See Interview with Justice B, *supra* note 114.

161. An example of a country where the TCC has enjoyed unofficial academic connections in addition to official contact is South Korea. Although the Korean Constitutional Court did not balk at hosting an official reception for visiting members of the TCC, a number of the former academics on the TCC also visit South Korea routinely in their capacity as professors under the auspices of the *Dong Ya Fa Xue Hui*, or East Asian Legal Studies Association, which has been in operation for over a decade. See Interview with Clerk 3, *supra* note 156.

162. See Interview with Justice C, *supra* note 124.

163. See *id.*

164. See *supra* text accompanying note 142.

165. See *supra* text accompanying notes 143–44.

166. See Interview with Justice H, *supra* note 142.

167. See Interview with Justice A, *supra* note 124.

168. See *id.*; Interview with Justice H, *supra* note 142; Interview with Judicial Administrator, *supra* note 112.

professors from participating in international events.<sup>169</sup>

*F. A Statistical Analysis of Foreign Law Citation by Taiwan's Constitutional Court*

The published opinions of the TCC give the superficial appearance of a court that makes relatively little use of foreign law. Actual citation of foreign law is rare, especially in majority opinions. Analysis of every constitutional interpretation rendered by the TCC from January 1949 to June 2008—a total of 644 interpretations in all<sup>170</sup>—reveals that in only four cases (0.62%) did the opinion of the court explicitly cite a foreign judicial decision,<sup>171</sup> and in only eight cases (1.4%) did the majority opinion explicitly cite a foreign constitution or statute.<sup>172</sup> Citations to foreign law were much more common, but still not routine, among the 554 concurring and dissenting opinions authored by individual justices: 74 of these separate opinions (13.4%) cited foreign precedent and another 121 (21.8%) cited foreign constitutions or statutes.

The foreign judicial decisions cited by the TCC originated mostly from Germany (206 citations distributed over 173 opinions), the United States (75 citations distributed over 65 opinions), Japan (40 citations distributed over 37 opinions), and the European Court of Justice and European Court of Human Rights (a total of 7 citations distributed over 6 opinions). Decisions from France, Austria, Turkey, Canada, Hungary, Italy, Switzerland, the Philippines, and South Korea were also cited from

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169. See *supra* note 130 and accompanying text (describing the travails associated with the participation of Taiwanese legal scholars in international academic organizations and gatherings when Chinese academics are also present).

170. The authors are particularly grateful to Professor Jiunn-Rong Yeh for his generous permission to use findings from the research that he conducted in conjunction with one of the authors in an earlier collaboration. See Wen-Chen Chang & Jiunn-Rong Yeh, *The Explicit and Implicit Use of Foreign Precedents by the Constitutional Court in Taiwan*, Presentation at the VIIIth World Congress of the International Association of Constitutional Law (Dec. 8, 2010). For further information about the collaborative, cross-national research effort of which this study of Taiwan formed a part, see *Cross-Judicial Fertilization—the Use of Foreign precedents by Constitutional Judges*, INT'L ASS'N OF CONST. L., [http://www.iacl-aicd.org/?page\\_id=54](http://www.iacl-aicd.org/?page_id=54) (last visited Sept. 19, 2011).

171. See J.Y. Interpretation No. 499, 13 SHIZI 1 (Const. Ct. Mar. 24, 2000); J.Y. Interpretation No. 392, 7 SHIZI 377 (Const. Ct. Dec. 22, 1995); J.Y. Interpretation No. 342, 6 SHIZI 124 (Const. Ct. Apr. 8, 1994); J.Y. Interpretation No. 165, 2 SHIZI 214 (Council Grand J. Sept. 12, 1980).

172. See J.Y. Interpretation No. 632, 20 SHIZI 321 (Const. Ct. Aug. 15, 2007); J.Y. Interpretation No. 617, 19 SHIZI 341 (Const. Ct. Oct. 26, 2006); J.Y. Interpretation No. 601, 18 SHIZI 335 (Const. Ct. July 22, 2005); J.Y. Interpretation No. 587, 17 SHIZI 826 (Const. Ct. Dec. 30, 2004); J.Y. Interpretation No. 582, 17 SHIZI 519 (Const. Ct. July 23, 2004); J.Y. Interpretation No. 419, 8 SHIZI 640 (Const. Ct. Dec. 31, 1996); J.Y. Interpretation No. 392, 7 SHIZI 377 (Const. Ct. Dec. 22, 1995); J.Y. Interpretation No. 371, 7 SHIZI 26 (Const. Ct. Jan. 20, 1995).

time to time.<sup>173</sup> References to foreign constitutions and laws also centered most heavily on Germany, the United States, and Japan, in that order.

The data reveal two strong predictors of whether a justice will cite foreign law and, if so, which country that justice will favor. First, a justice's prior professional background is strongly correlated with the frequency with which he or she cites foreign law: justices who were previously law professors cited foreign judicial decisions four times more often than did those who were appointed from the career judiciary. References to foreign statutes and constitutional texts, however, were much more equally distributed between former professors and career judges.<sup>174</sup> Second, there is a striking link between the educational backgrounds of the justices and the sources of foreign law that they prefer to cite. Eighty-seven percent of the citations to German constitutional jurisprudence and 60% of the citations to German constitutional or statutory provisions were the work of justices who had themselves obtained either master's or doctoral degrees in Germany. Similarly, justices with some form of American legal training were responsible for 61.7% of the citations to American judicial decisions.

#### *G. Behind the Scenes: The Court's Extensive Usage of Foreign Law*

Citation patterns are, however, a highly unreliable indicator of the extent to which judges actually consider foreign law.<sup>175</sup> No court better illustrates the perils of using foreign law citation to measure foreign law usage than the TCC. Various justices explained that, as a matter of "tradition,"<sup>176</sup> "convention,"<sup>177</sup> and "judicial style,"<sup>178</sup> opinions for the court are succinct and tend not to contain footnotes, which makes citation to foreign law difficult.<sup>179</sup> In part, this style of opinion-writing reflects a feeling shared by some academics and justices that "official"

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173. France and Austria were each cited a total of three times over the course of three different opinions. Turkey was cited a total of two times in a total of two opinions. Canada, Hungary, Italy, Switzerland, the Philippines, and South Korea were each cited once.

174. Most citations of foreign judicial precedent are the work of justices from scholarly backgrounds (325 citations) as opposed to career judges (84 citations). By contrast, references to foreign constitutional provisions and statutes are equally common among former scholars (259 citations) and career judges (249 citations).

175. *See supra* note 38.

176. Interview with Justice G, *supra* note 19.

177. Interview with Justice B, *supra* note 114.

178. Interview with Justice J, *supra* note 40.

179. Interview with Justice A, *supra* note 124; Interview with Justice B, *supra* note 114; Interview with Justice G, *supra* note 19; Interview with Clerk 2, *supra* note 131.

documents should not contain citations,<sup>180</sup> and that it is “harder to justify mentioning foreign law in opinions” when “we feel we are writing for the country.”<sup>181</sup> When exceptions to this unwritten rule against citation of foreign law are made, they are more likely to occur in those rare cases of unusual importance where oral argument is held.<sup>182</sup> By comparison, separate opinions are more likely to contain explicit references to foreign law because they are free to assume a “less rigid” form.<sup>183</sup> A distinction also exists between foreign and international law: treaties and other international legal instruments, such as the various United Nations covenants, are more likely to be cited than the domestic law of other countries.<sup>184</sup>

For these reasons, failure to *cite* foreign law does not denote failure to *consider* foreign law.<sup>185</sup> One justice offered by way of example a recent high-profile case concerning the detention of former president Chen Shui-Bian pending his trial on corruption charges. The TCC ultimately adopted a multi-part test drawn from German law that already resembled existing doctrine in Taiwan. Instead of acknowledging the test’s German provenance, however, the justices instead “digested” the German

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180. Interview with Justice B, *supra* note 114.

181. Interview with Justice G, *supra* note 19. We also asked several justices whether the reluctance to cite foreign law might be attributable in part to a separate opinion by Justice Herbert Ma in an important separation-of-powers case that had criticized the majority opinion’s citation of foreign law. Ma’s opinion argued, *inter alia*, that foreign law should only be cited in footnotes, if at all, and only for the purpose of providing additional examples in support of a proposition already established as a matter of domestic law. *See* J.Y. Interpretation 342, 6 SHIZI 124 (Const. Ct. Apr. 8, 1994), *English translation available at* [http://www.judicial.gov.tw/constitutionalcourt/en/p03\\_01.asp?expno=342](http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=342). The justices we interviewed rejected the notion that Justice Ma’s opinion had discouraged others from citing foreign law; one justice said, quite bluntly, that Justice Ma’s views on citation of foreign law had been “ignored.” Interview with Justice D, *supra* note 109; *see also* Interview with Justice J, *supra* note 40. Our empirical analysis of the TCC’s opinions from 1949 to 2008 shows, moreover, that citations to foreign law have actually become slightly more common since Justice Ma’s opinion appeared in 1994. As another justice observed, however, even if Justice Ma’s opinion itself did not lead to modification of the TCC’s citation practices, it did express a view held by some academics and justices. *See* Interview with Justice C, *supra* note 124.

182. Interview with Justice A, *supra* note 124. As of this writing, the TCC has held oral argument in only six cases, the most recent of which was decided in 2005: J.Y. Interpretation No. 603, 18 SHIZI 456 (Const. Ct. Sept. 28, 2005); J.Y. Interpretation No. 585, 17 SHIZI 723 (Const. Ct. Dec. 15, 2004); J.Y. Interpretation No. 445, 10 SHIZI 15 (Const. Ct. Jan. 23, 1998); J.Y. Interpretation No. 419, 8 SHIZI 640 (Const. Ct. Dec. 31, 1996); J.Y. Interpretation No. 392, 7 SHIZI 377 (Const. Ct. Dec. 22, 1995); J.Y. Interpretation No. 334, 6 SHIZI 17 (Const. Ct. Jan. 14, 1994).

183. Interview with Justice B, *supra* note 114.

184. Interview with Clerk 2, *supra* note 131.

185. The TCC is by no means the only constitutional court that makes a habit of considering, but not citing, foreign law. *See supra* note 63 (noting that the Japanese Supreme Court and Korean Constitutional Court tend not to cite foreign law in their opinions, even when it has actually been taken into account).

approach “into our own language.”<sup>186</sup> The TCC’s decisions are rife with examples of such adoption of foreign approaches without explicit citation or acknowledgment. Proportionality analysis,<sup>187</sup> the concepts of substantive and procedural due process,<sup>188</sup> the political question doctrine,<sup>189</sup> the distinction between content-based and content-neutral restrictions on expression,<sup>190</sup> and heightened scrutiny of suspect classifications in equality cases<sup>191</sup> are among the many recognizable but unlabeled foreign imports to be found in the TCC’s jurisprudence.

In fact, comparative constitutional analysis is virtually automatic practice for a majority of the justices, even if there is usually no telltale indication of the scope of their foreign legal research. Typical was the view expressed by one former academic on the Court that the justices “consult foreign constitutional materials” in “almost every case.”<sup>192</sup> Another justice—also a former academic—estimated that they consider foreign law “ninety-plus percent” of the time, and he further described the rare exceptions as cases in which foreign law will obviously not be

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186. Interview with Justice G, *supra* note 19.

187. The principle of proportionality first appeared in J.Y. Interpretation No. 471, 10 SHIZI 456 (Const. Ct. Dec. 18, 1998), *English translation available at* [http://www.judicial.gov.tw/constitutionalcourt/en/p03\\_01.asp?expno=471](http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=471), and was later fully elaborated in J.Y. Interpretation No. 476, 11 SHIZI 59 (Const. Ct. Jan. 29, 1999), *English translation available at* [http://www.judicial.gov.tw/constitutionalcourt/en/p03\\_01.asp?expno=476](http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=476). Since then, proportionality has become a standard feature of the Court’s constitutional jurisprudence as well as in other areas of law. *See* CHANG-FA LO, *THE LEGAL CULTURE AND SYSTEM OF TAIWAN* 61–62 (2006).

188. The concepts of substantive and procedural due process were first introduced in J.Y. Interpretation No. 384, 7 SHIZI 226 (Const. Ct. July 28, 1995), and have since appeared in many other interpretations. *See, e.g.*, J.Y. Interpretation No. 670, 24 SHIZI 1 (Const. Ct. Jan. 29, 2010); J.Y. Interpretation No. 664, 23 SHIZI 17 (Const. Ct. July 31, 2009); J.Y. Interpretation No. 636, 21 SHIZI 1 (Const. Ct. Feb. 1, 2008); J.Y. Interpretation No. 588, 18 SHIZI 1 (Const. Ct. Jan. 28, 2005); J.Y. Interpretation No. 567, 16 SHIZI 233 (Const. Ct. Oct. 24, 2003); J.Y. Interpretation No. 535, 14 SHIZI 357 (Const. Ct. Dec. 14, 2001); J.Y. Interpretation No. 471, 10 SHIZI 456 (Const. Ct. Dec. 18, 1998); Interpretation No. 392, 7 SHIZI 377 (Const. Ct. Dec. 22, 1995).

189. *See* J.Y. Interpretation No. 328, 5 SHIZI 481 (Const. Ct. Nov. 26, 1993), *English translation available at* [http://www.judicial.gov.tw/constitutionalcourt/en/p03\\_01.asp?expno=328](http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=328).

190. *See* J.Y. Interpretation No. 678, 25 SHIZI 26 (Const. Ct. July 2, 2010) (regarding access to media); J.Y. Interpretation No. 623, 20 SHIZI 1 (Const. Ct. Jan. 26, 2007) (regarding obscene speech); J.Y. Interpretation No. 617, 19 SHIZI 341 (Const. Ct. Oct. 26, 2006); J.Y. Interpretation No. 577, 17 SHIZI 319 (Const. Ct. May 7, 2004) (regarding commercial speech); Interpretation No. 509, 13 SHIZI 298 (Const. Ct. July 7, 2000) (regarding defamatory speech); J.Y. Interpretation No. 445, 10 SHIZI 15 (Const. Ct. Jan. 23, 1998); J.Y. Interpretation No. 414, 8 SHIZI 578 (Const. Ct. Nov. 8, 1996); J.Y. Interpretation No. 407, 8 SHIZI 369 (Const. Ct. July 5, 1996).

191. *See, e.g.*, J.Y. Interpretation No. 666, 23 SHIZI 200 (Const. Ct. Nov. 6, 2009), *English translation available at* [http://www.judicial.gov.tw/constitutionalcourt/en/p03\\_01.asp?expno=666](http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=666) (indicating that the principle of equality requires a “substantive nexus” between the “legislative purpose” and any distinctions drawn in the law).

192. Interview with Justice A, *supra* note 124.

relevant or useful, such as a separation-of-powers case involving the Examination Yuan, one of the five branches of a convoluted governmental structure that is wholly unique to the R.O.C. Constitution.<sup>193</sup>

Even justices who use foreign law infrequently by the standards of the TCC still use it frequently in absolute terms. The most conservative estimate of foreign law usage was given by a law clerk who indicated that the justice for whom he works, a career judge, partakes of foreign law in one or two out of every six cases. Most, but not all, of the justices and clerks opined that those appointed from the career judiciary tend to be more “skeptical” of the value and relevance of foreign law.<sup>194</sup> The justices who were not themselves former academics tended to be more circumspect about the extent to which they consult foreign law, saying only that “it depends on the case,”<sup>195</sup> or that they engage in comparative research “only if we think there is relevant foreign law to guide us.”<sup>196</sup> All agreed, however, that consulting foreign constitutional materials was simply not controversial, and that there is no meaningful connection between a justice’s political ideology and his or her willingness to consider foreign law. As one clerk observed: “Conservatives use foreign law too. They all use it.”<sup>197</sup>

The law clerks described an even greater degree of exposure to foreign law than the justices. When hired, they are often told that their “primary responsibility” will be “comparative legal research.”<sup>198</sup> It is up to each justice how to select his or her sole law clerk. However, an LL.M. is a de facto hiring requirement, and many of the clerks receive part or all of their graduate-level legal training overseas.<sup>199</sup> In addition, some justices seek to hire clerks with strength in a particular language, typically either English or German, that will be helpful for research purposes.<sup>200</sup> Approximately 90% of the petitions received by the TCC

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193. Interview with Justice B, *supra* note 114.

194. Compare Interview with Justice C, *supra* note 124, and Interview with Clerk 6, Law Clerk to a Justice of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Nov. 25, 2010), and Interview with Clerk 8, *supra* note 150 (indicating that career judges are less inclined to use foreign law), with Interview with Justice B, *supra* note 114, and Interview with Clerk 3, *supra* note 156 (arguing that career judges are no less inclined to use foreign law).

195. Interview with Justice G, *supra* note 19.

196. Interview with Justice I, *supra* note 112.

197. Interview with Clerk 5, *supra* note 149.

198. Interview with Clerk 1, *supra* note 101; Interview with Clerk 2, *supra* note 131.

199. Interview with Clerk 1, *supra* note 101.

200. Of the justices who make a point of hiring clerks with particular linguistic aptitudes, some justices seek out clerks who can compensate for their own weakness in a particular language, see Interview with Justice J, *supra* note 40, while other justices prefer clerks who share the same linguistic strengths as they do, in order to help them research the law of countries that they already



are dismissed without a ruling on the merits and thus do not call for the clerks to perform foreign legal research.<sup>201</sup> With respect to the 10% that the Court decides to hear, however, comparative legal research is “the most basic thing” that the clerks do and is required “probably 100% of the time.”<sup>202</sup> The clerks also reported that analysis of the TCC’s own precedent typically comprises only a “very small portion” of the reports that they prepare for the justices on each case; the “vast majority” of the typical report is foreign legal research.<sup>203</sup> Foreign constitutional law is taken so seriously, in fact, that the Taiwanese judiciary itself publishes and sells hardbound Chinese translations of the case law of those constitutional courts that are considered most influential in Taiwan—namely, the U.S. Supreme Court, the German Bundesverfassungsgericht and, most recently, the European Court of Human Rights, but no longer the Japanese Supreme Court.<sup>204</sup> These translations are available to the general public and find their way into library collections throughout Taiwan including those of the justices themselves.

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tend to consult most frequently, *see* Interview with Clerk 9, Law Clerk to a Justice of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Dec. 27, 2010).

201. *See* Interview with Clerk 4, Law Clerk to a Justice of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Nov. 22, 2010).

202. Interview with Clerk 3, *supra* note 156.

203. Interview with Clerk 1, *supra* note 101; Interview with Clerk 2, *supra* note 131.

204. *See* Interview with Justice J, *supra* note 40; Interview with Clerk 2, *supra* note 131; Interview with Clerk 4, *supra* note 201. The Judicial Yuan’s recent discontinuation of the translation of Japanese Supreme Court decisions was attributed to a combination of a “lack of resources,” Interview with Justice B, *supra* note 114, and the fact that the influence of the Japanese Supreme Court on Taiwanese constitutional law is “obviously declining, severely.” Interview with Clerk 2, *supra* note 131. This decline was attributed, in turn, to a variety of mutually reinforcing factors. One is the growing willingness and greater ability on the part of the justices to “cut out the middleman” and look directly to U.S. and German law, from which Japanese constitutional jurisprudence borrows heavily. Interview with Justice B, *supra* note 114; *accord* Interview with Clerk 2, *supra* note 131. Another is the fact that few of the current justices or clerks have Japanese legal training, which both reflects and accelerates the decline of Japanese influence. Third, and most interestingly, is a growing sense that the Japanese Supreme Court is simply too conservative and too willing to uphold government action for its decisions to be of continuing interest or use to the TCC. On the increasingly rare occasions that a justice attempts to argue in favor of the (invariably conservative) Japanese approach, other justices will now object that Japan is “not really an open, free country,” that there is consequently “no need to look at what they’re saying.” Interview with Clerk 5, *supra* note 149, and that Taiwan ought to look to “more advanced or progressive countries.” Interview with Clerk 6, *supra* note 194; *accord* Interview with Clerk 4, *supra* note 201; Interview with Clerk 8, *supra* note 150. Yet another cause, related to the immediately preceding one, is that Japanese legal scholarship has become a substitute for Japanese case law because, as compared to the case law, the scholarship is more “solid,” “fully developed,” and “critical” and thus of greater use to the TCC. Interview with Clerk 4, *supra* note 201.

*H. How the Justices Do—and Do Not—Learn About Foreign Law*

Not surprisingly, the result of this routine and extensive investigation into foreign law is a constitutional court that is highly knowledgeable of how courts elsewhere have approached similar issues, even though its opinions tend not to reveal the scope of its knowledge. If the TCC fails to cite or adopt another court's approach to a particular question, it does so out of choice, not out of ignorance. "If it's been covered elsewhere," assured one clerk, "they have considered it. They might not follow [the foreign approach], but they'll consider it."<sup>205</sup> One justice explained the situation bluntly: "We are already fully knowledgeable about foreign law. The problem is translating this knowledge into our social and political context."<sup>206</sup>

But how exactly do the justices and their clerks acquire their extensive knowledge of foreign law? It turns out that, for the most part, they do so in very old-fashioned ways: they study it in school, they conduct research, and they talk to their colleagues. Much of this research concerns legal systems to which the justices and clerks have already been exposed as graduate students: eleven of the fifteen justices hold either an LL.M. or Ph.D. in law from another country.<sup>207</sup> Another important resource for the clerks when performing comparative research is the assistance of their fellow clerks. Rather than working in isolation for their respective justices, the clerks share offices with, and rely heavily upon, one another, thanks in part to the fact that they complement each other with different language skills and foreign legal expertise. Finally, if the justices feel that they need more information on a particular topic, they will convene an unofficial *shuo ming hui*, or information-gathering session, to which they will invite academics to discuss the topic and explain relevant foreign jurisprudence.<sup>208</sup> These sessions occasionally include scholars from overseas; German public law specialists, in particular, are invited to the Court an average of once or twice per year.<sup>209</sup>

What has transformed the way in which Taiwanese justices and clerks learn about foreign law is not an expansion of opportunities to interact with judges in other countries, but rather the increasing availability and utility of electronic research tools. Their research on foreign law is now

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205. Interview with Clerk 2, *supra* note 131.

206. Interview with Justice F, Current or Former Justice, Constitutional Court of the Republic of China, in Taipei, Taiwan (Dec. 27, 2010).

207. *See supra* notes 98–99 and accompanying text.

208. Interview with Justice B, *supra* note 114.

209. Interview with Judicial Administrator, *supra* note 112.

conducted “mostly” on the internet, but also through the online research services Westlaw and Beck Online, a German equivalent.<sup>210</sup> There are occasions, however, when the Internet alone is not enough, and the TCC’s inability to obtain information through formal channels can complicate its efforts to obtain needed information. The story behind one high-profile decision illustrates the Court’s ability to overcome such challenges without the help of J2J dialogue, albeit in a highly roundabout fashion.

In *Interpretation No. 499*, the TCC struck down as unconstitutional a constitutional amendment by which Taiwan’s National Assembly had sought to extend its own term of office.<sup>211</sup> Given the sensitivity and importance of the case, the justices were keen to learn all they could about cases in which other constitutional courts had declared constitutional amendments unconstitutional, and the resulting decision was one of the rare ones in which the TCC actually cited foreign law explicitly.<sup>212</sup> The justice assigned to write the opinion had read in a German law journal that the Italian Constitutional Court had previously rendered such a decision, and so he set about to obtain a copy of the Italian decision in Chinese for the Court’s use.<sup>213</sup> Italy’s lack of diplomatic ties with Taiwan ruled out direct contact with the Italian government, and a request to Taiwan’s Ministry of Foreign Affairs for help proved fruitless.<sup>214</sup> Among the few states that do recognize Taiwan, however, is the Vatican. The justice thus contacted a diplomat he knew personally at the Holy See’s embassy in Taiwan, who promptly obtained a copy of the decision, but in Italian. Translation of the opinion into Chinese then proceeded on two fronts. The justice visited the nearest Catholic church and recruited the help of its priest, who had just arrived from Italy and did not speak Chinese, and together, the priest and the justice prepared a translation. Meanwhile, one of the Court’s clerks made contact over the internet with a law professor from Florence, who partnered with the clerk to create a translation of their own.<sup>215</sup>

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210. Interview with Clerk 4, *supra* note 201; Interview with Clerk 5, *supra* note 149. Although the Court’s librarians do not help with substantive foreign legal research, they will acquire books upon request. See Interview with Clerk 2, *supra* note 131.

211. J.Y. Interpretation No. 499, 13 SHIZI 1 (Const. Ct. Mar. 24, 2000), *English translation available at* [http://www.judicial.gov.tw/constitutionalcourt/en/p03\\_01.asp?expno=499](http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=499).

212. See *id.* (citing, among others, Corte Cost., 29 dicembre 1988, n. 1146, Giur. it. 1988, I, 5565 (It.)).

213. Interview with Justice D, Current or Former Justice, Constitutional Court of the Republic of China, in Taipei, Taiwan (Mar. 3, 2011).

214. The Ministry of Foreign Affairs reportedly responded that Italy lacks a constitutional court. Interview with Justice D, *supra* note 109.

215. *Id.* The two unofficial translations turned out to be the same in all material respects.

Just as important and interesting as the ways in which the justices learn about foreign law, however, are the way ways in which they do *not* learn about foreign law. Notwithstanding their tremendous knowledge of foreign law, there are two mechanisms in particular upon which they do not rely. One way in which they do not learn about foreign law is via the submissions of litigants. A large proportion of petitioners to the TCC are pro se, and of those who do have lawyers, the briefs that they file may contain references to foreign law but are generally of “poor” quality because, with only “one or two exceptions,” law firms in Taiwan have no real experience with constitutional litigation.<sup>216</sup> Nor does the Court receive amicus briefs.<sup>217</sup> Oral argument, meanwhile, takes place only in unusually important, “extreme cases.”<sup>218</sup>

Another potential avenue for learning about foreign law that appears to make little practical difference to Taiwan’s Constitutional Court is J2J dialogue, especially of the face-to-face variety. The justices largely rejected the suggestion that their isolation and lack of opportunities for personal interaction with judges elsewhere has either diminished their interest in foreign law or impaired their ability to learn adequately about it. Tangible evidence that face-to-face interaction (or a lack thereof) has in any way influenced the TCC’s use of foreign law is especially elusive. One of the twelve justices interviewed did argue that face-to-face interaction with foreign judges is “totally different” from ordinary legal research: this justice argued that such interaction is both more focused on “reality” (meaning candid) and more “to the point” (meaning efficient) than what is publicly available, but no examples were forthcoming.<sup>219</sup> Another justice initially opined that “we can always get

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216. Interview with Clerk 1, *supra* note 101 (indicating that some briefs from the law firm of Lee and Li are “much better”); *accord* Interview with Justice B, *supra* note 114 (identifying Lee and Li as one of the few law firms that handles constitutional cases on a pro bono basis); Interview with Nigel Li, Chief Exec. Officer, Lee & Li, Attorneys-at-Law, in Taipei, Taiwan (Nov. 24, 2010) (estimating that his firm handles perhaps ten to twelve cases per year that culminate in an actual petition to the TCC, and that there are “maybe five or six lawyers” in Taiwan “who do this kind of work regularly”); Interview with Wei-Chien Feng, Attorney, in Taipei, Taiwan (Nov. 24, 2010) (concurring in Nigel Li’s assessment of the size of the constitutional bar in Taiwan); Interview with Clerk 2, *supra* note 131.

217. Interview with Justice B, *supra* note 114. Although the justices are apparently willing in principle to consider amicus briefs, the Court’s formal procedures do not contemplate that parties will file them; nor are there any organizations that attempt to do so. *See* Constitutional Adjudication Procedure Act, art. 13 (1993), *available at* [http://www.judicial.gov.tw/constitutionalcourt/en/p07\\_2.asp?lawno=73](http://www.judicial.gov.tw/constitutionalcourt/en/p07_2.asp?lawno=73).

218. *Id.*

219. Interview with Justice J, *supra* note 40. A different justice did offer a modest example of a piece of information, concerning the motives behind South Africa’s abolition of the death penalty, that he did not feel he could have learned via more conventional means. This particular tidbit, which the justice found both interesting and surprising, was a South African judge’s observation that one

things in person that can't be put in writing" but nevertheless concluded that he could only speculate as to whether face-to-face dialogue was in fact useful: in his view, it was "hard to say whether foreign justices are in fact more open [or] forthcoming in person than in writing. But maybe we are missing out if we don't talk to them."<sup>220</sup> Still another justice offered weakly that exchanges with foreign judges "maybe stimulate mutual interest."<sup>221</sup>

For the most part, however, the justices were openly skeptical that J2J dialogue could bolster either their (already extensive) interest in comparative analysis or their (already extensive) knowledge of foreign law. Indeed, even the justice who expressed a fear of "missing out" observed that contact with foreign academics was probably an adequate substitute for contact with foreign judges: he himself "had no questions that could be answered only by judges, not by professors," and the fact that so many constitutional judges are themselves former academics, as in Germany or Taiwan, makes foreign judges and foreign academics somewhat fungible sources of information about foreign law.<sup>222</sup> There are no doubt cases in which more extensive J2J dialogue would simplify the TCC's efforts to obtain needed information; the travails involved in obtaining a Chinese translation of a prominent Italian decision, described above, offer a vivid (if not necessarily representative) example.<sup>223</sup> It appears, however, that the improvisation and ingenuity of the Court have proven sufficient to the challenge.

Much of the justices' skepticism about the value of J2J dialogue arises from their own experience with such dialogue. Most of the justices described their encounters with foreign judges as too brief to permit any meaningful substantive discussion of constitutional law, even on those occasions when written questions and answers were circulated in advance so as to facilitate deeper discussion. These encounters were typically described as involving "maybe one hour or so for oral discussion,"<sup>224</sup> or what one justice colorfully dubbed "just a light dip in the water," with little opportunity for actual learning.<sup>225</sup> Others

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reason for the apartheid regime's suspension of the death penalty was its fear that the Africa National Congress might eventually engage in retaliatory executions of white political prisoners if it took control. This justice also expressed the view that it would be easier to obtain relevant information on international human rights conventions through the Ministry of Foreign Affairs if Taiwan enjoyed regular diplomatic relations. Interview with Justice E, *supra* note 109.

220. Interview with Justice G, *supra* note 19.

221. Interview with Justice F, *supra* note 206.

222. Interview with Justice G, *supra* note 19.

223. *See supra* text accompanying notes 211–15.

224. Interview with Justice G, *supra* note 19; *see also* Interview with Justice F, *supra* note 206.

225. Interview with Justice E, *supra* note 109.

suggested that J2J dialogue of the formal variety involves little or no substance at all. Asked to describe the content of his own meetings with members of the U.S. Supreme Court, a former justice described the discussions as “formal,” “polite,” and concerned with such “ordinary topics” as their plans for life after retirement.<sup>226</sup> Another longtime member of the Court was much more blunt. “Formal interaction really doesn’t matter,” he explained. “It’s really just social. Small talk. Doing real comparative law research is from the books. It is absolutely not substantive discussion. In fact, there is not even time.”<sup>227</sup> The value of interaction with American judges, in particular, is sharply limited by American ignorance of foreign law: “U.S. justices,” he lamented, “barely can tell Taiwan from Thailand.”<sup>228</sup>

Thus, on the rare occasions that the justices do engage in substantive J2J dialogue, it is not of the glamorous variety that occurs behind closed doors at international gatherings or prestigious law schools. Nor, for the most part, does it even occur face-to-face. One longtime member of the TCC observed that there were only two countries where visits would entail meaningful substantive discussion—namely, Germany and Austria.<sup>229</sup> Instead, when Taiwan’s justices do engage in J2J dialogue, it typically takes the mundane form of e-mail communication with foreign judges to whom the justices already have personal or professional ties stemming from their own education abroad or past experience as academics.<sup>230</sup> In practice, this means simply that some of the German-trained justices e-mail questions directly to members of the German Bundesverfassungsgericht. Various justices described the existence of “generally strong personal connections” to the German court that enable them to e-mail their German counterparts and ask, in connection with specific cases, “from your perspective, what should we consider or look at, what do you think?”<sup>231</sup>

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226. Interview with Justice C, *supra* note 124.

227. Interview with Justice D, *supra* note 109.

228. *Id.*

229. *See id.*

230. *See, e.g.*, Interview with Justice B, *supra* note 114; Interview with Justice H, *supra* note 142.

231. Interview with Justice C, *supra* note 124. One German-trained justice recalled, for example, writing over ten e-mails to various members of the German court specializing in both public law and criminal law in connection with a case involving the right to an interpreter in child custody proceedings. *See* Interview with Justice H, *supra* note 142 (discussing J.Y. Interpretation 590, 18 SHIZI 90 (Const. Ct. Feb. 25, 2005), which involved the right to petition the TCC for a constitutional interpretation in the course of a child custody hearing during which the trial court had ruled immediately on a constitutional challenge to a statute instead of referring the constitutional question to the TCC).

### III. THE CAUSES OF COMPARATIVISM: WHY THE U.S. SUPREME COURT AND TAIWANESE CONSTITUTIONAL COURT APPROACH FOREIGN LAW SO DIFFERENTLY

Comparison of the Taiwanese Constitutional Court and U.S. Supreme Court sheds considerable light upon the question of what role, if any, J2J dialogue plays in determining the extent to which a constitutional court will make use of foreign law. On the one hand, if J2J dialogue on human rights issues were necessary for courts to make use of foreign law, then a marginalized, isolated court, such as the TCC, ought to make little or no use of foreign law. On the other hand, if J2J dialogue does indeed whet the judicial appetite for comparative analysis, then the U.S. Supreme Court, whose members are inundated with opportunities to network with foreign judges, ought to be a ferocious consumer of foreign law. Indeed, if scholarly depictions of the forms and avenues of J2J dialogue are accurate, nowhere are the opportunities for J2J interaction richer than at a handful of elite law schools located a short train ride from the U.S. Supreme Court.<sup>232</sup>

Yet precisely the opposite is true. The U.S. Supreme Court has, in fact, been singled out for criticism for its failure to participate in global judicial dialogue.<sup>233</sup> Even though its references to foreign law in a handful of relatively recent high-profile constitutional cases have attracted enormous attention,<sup>234</sup> the use of foreign law remains anything but routine, and it is open to dispute whether the Court is in fact making more frequent use of foreign law than it has done in the past.<sup>235</sup> By

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232. See, e.g., SLAUGHTER, *supra* note 3, at 66–67; Waters, *supra* note 3, at 492.

233. See, e.g., MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 145–46 (1991) (“Except for Justice Story, who died in 1845, no American Supreme Court justice has shown as much interest in the law of other nations as many foreign judges now do in ours.”); L’Heureux-Dubé, *supra* note 3, at 15, 37–38 (observing that “American judgments almost never consider the reasoning of other courts,” and arguing that “the failure of the United States Supreme Court to take part in the international dialogue among the courts of the world, particularly on human rights issues, is contributing to a growing isolation and diminished influence”).

234. See, e.g., *Graham v. Florida*, 560 U.S. \_\_\_, 130 S. Ct. 2011, 2033–34 (2010) (citing a “global consensus” against the practice of sentencing juveniles to life imprisonment without possibility of parole, and noting that the United Nations Convention on the Rights of the Child specifically prohibits the practice); Law, *supra* note 1, at 653–59 (describing the controversy over earlier references by the Court to foreign law).

235. Compare, e.g., Calabresi & Zimdahl, *supra* note 6, at 838–39 (concluding that, since 1940, “the Supreme Court has greatly accelerated the number of references it has made to foreign law in constitutional cases,” “especially in the area of criminal law, and in progressively more controversial and groundbreaking cases”), and Krotoszynski, *supra* note 3, at 1323–24 (arguing that “[t]he Supreme Court has made a conscious turn toward international judicial dialogue” in recent years), with Zaring, *supra* note 2, at 299, 331 (indicating that “the Supreme Court uses less foreign law now than it has at any other time in its history,” and finding “little evidence” that the use of

contrast, it is difficult to imagine how any court could engage more often in comparative analysis than the Taiwanese Constitutional Court. Comparison of the two courts thus only reinforces the conclusion that direct interaction between judges has relatively little impact on the degree to which constitutional courts engage in comparative analysis.

More likely explanations for the TCC's extensive use of foreign law involve much deeper causes. From a functional perspective, it is unclear whether Taiwan possesses the resources to rely exclusively upon domestic constitutional law. Unlike the United States, Taiwan does not possess the corpus of constitutional jurisprudence that comes with over two centuries of experience with judicial review; indeed, it emerged from authoritarian rule less than three decades ago.<sup>236</sup> The relative brevity of Taiwan's experience with democracy means that the TCC has less homegrown material to draw upon and thus faces a practical need to look elsewhere for inspiration.<sup>237</sup> Another relevant factor in Taiwan's case may be that of sheer size—or lack thereof. One justice went so far as to suggest that Taiwan lacks the human capital to construct its own jurisprudence from scratch, especially when compared to such behemoths as Japan and the United States, each of which boasts a vastly larger population, a correspondingly larger number of law faculties and legal experts, and economies of scale that can support research infrastructure along the lines of Westlaw and Lexis.<sup>238</sup>

Other explanations for the comparative leanings of the TCC are historical and political in nature. There is simply no debate in Taiwan over whether it is appropriate to be guided by foreign examples in constitutional cases because Taiwan's entire legal history has been one of imposition and imitation. The fact that Taiwan was a Japanese colony for half a century, and that Japan itself imported vast swaths of German law, remains one of the biggest factors shaping the Constitutional Court's patterns of foreign law usage.<sup>239</sup> Consulting foreign law is an

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foreign law as an interpretive aid by the federal courts "is growing or at all vibrant").

236. See *supra* note 81 and accompanying text (describing the TCC's role in the democratization of Taiwan).

237. See Interview with Clerk 3, *supra* note 156 (identifying a lack of domestic case law as one of the major factors that will lead the TCC to resort to foreign legal research in a particular case); cf. Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 *LAW & SOC. INQUIRY* 763, 790 (2002) (arguing that, because "legislatures in new democracies are typically underdeveloped and unable to carry out what might otherwise be their natural function of norm replacement," "courts in democratic transitions" may end up "play[ing] a special role of looking abroad to transform their constitutional orders").

238. See Interview with Justice B, *supra* note 114.

239. Cf. Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law*, 2009 *BYU L. REV.* 1813, 1831–42, 1849 (finding as an empirical matter that those who author corporate law statutes and treatises in countries that were once colonies are



“unthinking habit” inherited from that era, if not earlier.<sup>240</sup> Indeed, a number of justices lamented that the construction of a genuinely domestic constitutional jurisprudence remains a work-in-progress, tentatively cobbled together from a variety of German, American, and other parts that have yet to be digested into something uniquely Taiwanese.<sup>241</sup> At the same time, Taiwan’s diplomatic isolation creates a political incentive for the TCC to borrow from other countries. The justices are aware that Taiwan can generate badly needed support and acceptance among the international community by following in the footsteps of powerful and prestigious countries.<sup>242</sup> Although such considerations are not foremost in the minds of the justices,<sup>243</sup> the fact that they are present at all suggests that the TCC’s use of foreign jurisprudence from such countries might be considered a form of judicial diplomacy.

This confluence of historical and geopolitical circumstances has created a domestic political environment in which judicial usage of foreign law is not only uncontroversial, but potentially even advantageous for the TCC. In especially controversial or politically sensitive cases, observed one justice, the ability to say “this is how it’s done elsewhere” and “we used a foreign mainstream standard” can provide a “kind of safe harbor” from criticism that the Court is simply

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disproportionately likely to have studied law in the former colonizing power or another “core country of the same legal family”).

240. See Interview with Judicial Administrator, *supra* note 112.

241. See Interview with Justice B, *supra* note 114 (arguing that the reception of foreign law in Taiwan has yet to undergo the equivalent of “Japanization,” wherein one takes the foreign and makes it one’s own). Not coincidentally, the mixture of foreign components found in Taiwan’s constitutional jurisprudence mirrors the mixture of educational backgrounds found among Taiwan’s legal scholars, the vast majority of whom are trained in Germany, the United States, Japan, and England. See *supra* note 98.

242. See David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163, 1178, 1181–82 (2011) (arguing that “constitutional conformity” is an “attractive” strategy for “marginal states” “that struggle to obtain, maintain, or consolidate the recognition and approval of world society,” and that Taiwan in particular has responded to its diplomatic isolation “by adopting political and constitutional reforms that it knew would win the approval of a clique of powerful nations”); Interview with Justice G, *supra* note 19 (observing that “we cite foreign cases” in part because “we are aware that what we do represents the country and affects how we look”); Interview with Justice J, *supra* note 40 (explaining that Taiwan hopes that democratization, respect for human rights, and being on the “frontline of the Freedom House rankings” will enable it to become “less isolated”).

243. See Interview with Justice G, *supra* note 19 (noting that “how this makes us look internationally” is “a more distant consideration” for the justices when they decide cases); Interview with Justice J, *supra* note 40 (indicating that considerations of “global relations” and international “legitimacy” are neither the “biggest” nor “most proximate” cause behind the TCC’s use of foreign law).

making up answers out of whole cloth to suit its own naked desires.<sup>244</sup> In other words, the practice of looking consistently to the same handful of prestigious and influential countries for guidance may be perceived not as a form of illicit judicial activism, but rather as a constraint upon judicial discretion and thus a source of legitimacy for the TCC.

Perhaps the most proximate cause of foreign law usage by the TCC, however, is the educational and professional background of the justices. As previously noted, there is a strong correlation between where the justices happen to be educated and which countries they look to for guidance.<sup>245</sup> In-depth questioning of the justices only confirmed the importance of the relationship between judicial background and foreign law usage. Nothing commanded stronger agreement among the justices and clerks than the proposition that the justices' predilection for foreign law is shaped by their background. As one justice bluntly put it, "only one thing makes a difference when it comes to use of foreign law: the judge's background."<sup>246</sup>

Background, emphasized another justice, encompasses a variety of elements, "including not only foreign education but personal upbringing, family background, personal experience, who you normally come into contact with."<sup>247</sup> But the two most important elements are where the justices were educated, and what they did professionally prior to joining the TCC.<sup>248</sup> First, it is clear, both from the justices' own accounts and from empirical analysis of their opinions, that the justices tend to reach for the body of foreign law that they know best on account of their own training. As a result, German-trained justices and American-trained justices may often find that they bring very different perspectives to the same constitutional question.<sup>249</sup> Not surprisingly, foreign training is also said to influence the clerks in the same manner.<sup>250</sup> Second, although it may be true that career judges are "equally open-minded" to arguments

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244. Interview with Justice J, *supra* note 40.

245. *See supra* Part III.F.

246. Interview with Justice D, *supra* note 109.

247. Interview with Justice C, *supra* note 124.

248. *See, e.g.*, Interview with Justice A, *supra* note 124; Interview with Justice B, *supra* note 114; Interview with Justice C, *supra* note 124; Interview with Justice D, *supra* note 109; Interview with Justice G, *supra* note 19.

249. Constitutional law scholars in Taiwan exhibit similar biases in favor of the countries where they were trained. *See* Yeh Jiunn-Rong, *Fa Lu Hsueh Men Cheng Chiu Ping Ku Yu Chan Wang [Prospects and Evaluation of Development in Legal Academia]*, 27 KO HSUEH FA CHAN YUE KAN [SCI. EDUC. MONTHLY] 607, 607-08 (1999) (Taiwan).

250. *See* Interview with Clerk 1, *supra* note 101 (noting, for example, that while American-trained clerks find the concept of a "public forum" in the context of freedom of expression to be "totally basic," German-trained clerks "don't even think in terms of that concept").

based on foreign law—particularly when those arguments happen to suit their own purposes<sup>251</sup>—the weight of both the qualitative and quantitative evidence suggests that former academics make more extensive and systematic use of foreign law.<sup>252</sup> Thus, the fact that the composition of the TCC is tilted sharply in favor of foreign-trained academics is a recipe for extensive foreign law usage, and the fact that most of them received their graduate legal training in Germany is, in turn, an effective guarantee of German influence over Taiwanese constitutional law.

There are at least two reasons why the U.S. Supreme Court, by comparison, lags substantially in its use of foreign law, notwithstanding its location at both the figurative and literal epicenter of J2J dialogue. One explanation, which has received extensive scholarly attention, would be that the Court feels at least somewhat chastened by the intense criticism (and even direct threats<sup>253</sup>) that its recent forays into foreign constitutional law have aroused. But another, no less important explanation would be that the U.S. Supreme Court, unlike the Taiwanese Constitutional Court, simply lacks the necessary institutional capacity to learn about foreign law in anything approaching a routine and systematic manner. There is no expectation or requirement, formal or informal, that the Justices have prior experience with foreign law, and they typically have no foreign legal training. The majority are not academics, much less academics with graduate training in foreign law.<sup>254</sup>

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251. Interview with Justice A, *supra* note 124; Interview with Clerk 3, *supra* note 156; *see also supra* notes 194–96 and accompanying text (contrasting the foreign law usage of justices who were career judges with that of justices from academic backgrounds).

252. *See, e.g.*, Interview with Justice A, *supra* note 124 (“[C]areer judges are just conservative: they assume the law is constitutional and tend to seek evidence, including foreign law, that upholds the law.”); Interview with Clerk 1, *supra* note 101 (observing that former academics are “more systematic” in their use of foreign law and “more interested in the whole theory and doctrine” when deciding what theory to adopt); Interview with Clerk 2, *supra* note 131 (observing that career judges will consider foreign law but are ultimately “less interested in importing the theoretical underpinnings of the doctrine, the whole system,” and “more interested in finding something that supports the result” and thus are content to “maybe just borrow a couple of arguments from the case”).

253. Law, *supra* note 1, at 656–57 (describing the impeachment threats and even death threats made against certain Justices for referring to foreign law).

254. All three of the former academics on the Court as of this writing studied abroad over the course of their formal educations, but none focused on law during their time abroad. Justices Breyer and Kagan both hold degrees from Oxford, but not in law. *See Stephen G. Breyer*, FINDLAW, [http://supreme.lp.findlaw.com/supreme\\_court/justices/breyer.html](http://supreme.lp.findlaw.com/supreme_court/justices/breyer.html) (last visited Sept. 21, 2011) (indicating that Justice Breyer studied economics at Magdalen College, Oxford); *Elena Kagan*, THE OYEZ PROJECT AT IIT CHICAGO-KENT COLLEGE OF LAW, [http://www.oyez.org/justices/elena\\_kagan](http://www.oyez.org/justices/elena_kagan) (last visited Sept. 21, 2011) (indicating that Justice Kagan’s field of study at Worcester College, Oxford, was philosophy). Justice Scalia spent his junior year as an undergraduate at the University of Fribourg but focused on history, economics, and literature. *See* JOAN BISKUPIC, AMERICAN

Nor, unlike many other prominent constitutional courts, does the U.S. Supreme Court even attempt to compensate for these deficiencies by hiring clerks or researchers with the kind of training, experience, or even language abilities, that might help fill the resulting knowledge gaps.<sup>255</sup> As Vicki Jackson observes, there are a number of ways in which the Court might acquire the capacity to learn about foreign law in a fair, transparent, and accurate manner.<sup>256</sup> For example, it could introduce new briefing procedures that guarantee adequate and balanced participation by a combination of court-appointed experts and knowledgeable amici curiae.<sup>257</sup> It might also hire foreign lawyers as clerks,<sup>258</sup> or it could seek more generally to ensure that it “has within its institutional apparatus personnel with sufficient education and expertise to assist in research on issues of foreign or international law.”<sup>259</sup> Instead, however, the Court makes do with the help of a combination of court and library personnel and an obscure arm of the Library of Congress called the Directorate of

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ORIGINAL: THE LIFE AND CONSTITUTION OF JUSTICE ANTONIN SCALIA 25 (2009).

255. 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, 244 (2009) (noting that justices of the South African Constitutional Court “have the benefit of up to five clerks selected from applicants around the world” in addition to two South African law clerks); Alexander Somek, *The Deadweight of Formulae: What Might Have Been the Second Germanization of American Equal Protection Review*, 1 U. PA. J. CONST. L. 284, 284 n.1 (1998) (describing the Israeli Supreme Court as “the most important comparative constitutional law institute of the world,” and attributing its prowess at comparative constitutional analysis in part to its “practice of employing clerks from all over the world, who do the research work on their country of origin”); *supra* note 63 (discussing the practices of the “constitutional research officers” and foreign law specialists employed by the South Korean Constitutional Court). Moreover, a court need not employ clerks or justices who are literally foreign in order to enjoy an institutional capacity for learning about foreign law. Although the Canadian Supreme Court does not make a point of hiring clerks from other countries, it enjoys both an innate knowledge of, and capacity for learning about, foreign law that the U.S. Supreme Court lacks. The unwritten rules governing the allocation of seats on the Canadian court on the basis of geography guarantee that a sizeable portion of the justices are native francophones with a civil law background. See F.L. Morton, *Judicial Appointments in Post-Charter Canada: A System in Transition*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 56, 70 (Kate Malleson & Peter H. Russell eds., 2006). So, too, are a sizeable fraction of the court's clerks. The infrastructure for this legal and linguistic diversification is both intellectual and historical: Canada's law schools provide a combination of common law and civil law training in a combination of English and French. See Aline Grenon & Louis Perret, *Globalization and Canadian Legal Education*, 43 S. TEX. L. REV. 543, 549–52 (2002) (describing how certain Canadian law schools ensure “direct access to Canada's legal and linguistic duality” by offering both civil law and common law instruction, in both official languages).

256. See JACKSON, *supra* note 8, at 190–91.

257. *Id.*

258. *Id.* at 189.

259. *Id.* The Korean Constitutional Court is pursuing such a strategy to a dramatic extent by establishing its own research institute to be staffed by scholars who are fluent in foreign languages. See *supra* note 63.

Legal Research.<sup>260</sup>

Above all, there are structural limits upon what the U.S. Supreme Court can do to improve its own capacity for comparative analysis. Institutional factors well beyond the Court's control mean that there is no meaningful pool of talent from which either potential clerks or judicial candidates with substantial foreign legal expertise can be recruited. The first such factor is the composition of the Court itself. Unlike in Taiwan, there is no quota of seats on the Court that are reserved for law professors with foreign legal training who are inherently likely to make enthusiastic use of foreign law.

The second factor, which contributes to the first and defies easy reform, is the structure of legal education in the United States. Whereas basic legal training in Taiwan occurs at the undergraduate level, the fact that law is exclusively a graduate subject in the United States makes it less feasible for American lawyers to obtain formal training in foreign law in addition to their obligatory training in domestic law. It is less realistic to ask someone who already holds both undergraduate and law degrees to obtain an additional degree in foreign law as a condition of obtaining a clerkship than to ask someone who merely holds an undergraduate degree in law. Nor is foreign legal training made more attractive by the prospect of an academic job, as in Taiwan. Although law school hiring of teaching candidates who hold both a J.D. and a Ph.D. is accelerating, would-be law professors who obtained their law degrees in the United States do not go overseas for their Ph.D.s, and recent hiring trends offer little evidence that teaching candidates are rewarded by the job market for having foreign legal training.<sup>261</sup> The dearth of such training on the part of the nation's law professors, meanwhile, tends to ensure that little knowledge of foreign law will be imparted to the next generation of law clerks and judicial candidates. Thus, to the extent that the U.S. Supreme Court appears parochial in its choice of persuasive authorities, that parochialism can be traced back to the manner in which American law schools hire today's legal scholars and train tomorrow's law clerks and judges.

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260. See *id.* at 189–91; Michael Ravnitzky, *The Directorate of Legal Research at the Library of Congress: A Treasure Hidden Under a Bushel Basket*, LLRX.COM (Nov. 22, 2006), <http://www.llrx.com/features/lclegalresearch.htm> (describing the Directorate of Legal Research as a “research department contained within the Library of Congress” that “receives scant mention even among the legal research community”).

261. See *Entry Level Hiring Survey 2010*, LEGAL THEORY BLOG (Apr. 12, 2010), <http://solum.typepad.com/legaltheory/2010/04/entry-level-hiring-survey-2010.html> (listing the educational credentials of those hired into tenure-track teaching positions at American law schools in 2010); *2009 Entry Level Hiring Report*, LEGAL THEORY BLOG (Apr. 26, 2009), [http://solum.typepad.com/legaltheory/entry\\_level\\_hiring\\_report](http://solum.typepad.com/legaltheory/entry_level_hiring_report) (doing the same for 2009).

CONCLUSION: THE CONSEQUENCES OF ACADEMIC  
PAROCHIALISM AND THE COST OF CONSTITUTIONAL  
INFLUENCE

We do not dispute that globalization has had a profound impact on the capacity of judges to interact across national borders and, indeed, upon the development of constitutional law more generally. Nor do we question the value of comparative analysis for constitutional courts around the world that increasingly find themselves faced with similar questions and equipped with similar analytical tools.<sup>262</sup> It is both conceptually inaccurate and empirically unwarranted, however, to characterize the way in which constitutional courts currently use foreign law as a form of “dialogue.” And it is also doubtful whether actual dialogue of the literal, judge-to-judge variety has much impact on either the frequency or sophistication with which constitutional courts actually consider foreign law. As comparison of the Taiwanese Constitutional Court and U.S. Supreme Court demonstrates, participation in global J2J dialogue is neither a necessary nor sufficient condition for meaningful judicial usage of foreign law and cannot compensate for an array of vastly more important institutional variables, such as the structure of legal education and the qualifications for judicial office.

The manner in which constitutional comparativism has developed in Taiwan holds distinct lessons for those who wish to see the U.S. Supreme Court make greater and more sophisticated use of foreign law, on the one hand, and those who fear the decline of American soft power and wish to see the global influence of American constitutionalism restored to its former glory, on the other.<sup>263</sup> For those who might wish to see the U.S. Supreme Court exhibit greater cosmopolitanism in its use of persuasive authorities, jawboning its members or inviting them to additional conferences and gatherings is likely to have little impact. The supposed parochialism of the U.S. Supreme Court should not be understood entirely, or even primarily, as a function of close-mindedness or stubbornness on the part of the Justices. At this point in time, the

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262. See Law, *supra* note 1, at 697–700 (characterizing balancing and means-end analysis as inescapable and ubiquitous forms of “generic constitutional analysis”); see also ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* 32–33 (2004) (identifying the “reason-giving” requirement as a ubiquitous part of constitutional adjudication).

263. See David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 97 *NYU L. REV.* (forthcoming June 2012), available at <http://ssrn.com/abstract=1923556> (documenting the declining popularity of the United States Constitution as a model for constitution-makers elsewhere); Liptak, *supra* note 1, at A1 (citing evidence that American constitutional jurisprudence has become less influential in other countries, and that the Supreme Court’s own aversion to considering foreign law may be partly to blame).

greatest obstacle to a routine and sophisticated practice of judicial comparativism in the United States is not the unwillingness of individual judges to consider foreign legal materials. Within the last decade, no fewer than six different Justices publicly voiced their support for comparative constitutional analysis.<sup>264</sup> As promising as such an attitudinal shift might seem, however, there is a world of difference between expressing support for comparative analysis in principle and having the wherewithal to actually perform such analysis on more than a sporadic, ad hoc basis.

It is, instead, the political economy of American legal training that poses the greater obstacle to the emergence of robust judicial comparativism. The fact that American judges and law clerks examine foreign law far less frequently or thoroughly than their Taiwanese counterparts is hardly surprising given how few of them possess foreign legal training. To ensure an adequate supply of outstanding judges and clerks with such training would, however, require a sea change in American legal education. As long as American law school faculties neither place a premium upon hiring legal scholars with comparative training nor train their own students in foreign law, today's law clerks and tomorrow's judges and law professors will neither seek nor possess such training. American judges are not to be blamed if their own vision ends at water's edge. They are simply products of the system that created them. The day that American law students prize a degree in comparative law as a stepping stone to a Supreme Court clerkship or a teaching position in an American law school will be the day that judicial comparativism has become truly institutionalized.

For those concerned about the loss of American constitutional influence overseas, the case of Taiwan suggests even greater reason for despondency. Perhaps no country in the world is more dependent on the United States for its security than this small, diplomatically isolated island under constant threat from the world's most populous country and (for now) second-largest economy. There may be no country that values its ties with the United States more highly. Yet Germany has far greater influence over Taiwanese constitutional jurisprudence at this point than does the United States. That influence reflects not simply the historical origins of the Taiwanese legal system, but also Germany's extensive and

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264. Indeed, at least as of 2005, those Justices who had publicly announced or demonstrated their support for the use of foreign and international legal materials as persuasive authority constituted a solid majority of the Court. *See* Law, *supra* note 1, at 653–55 (citing the public pronouncements of then-Chief Justice Rehnquist and Justices Stevens, O'Connor, Kennedy, Ginsburg, and Breyer on the use of foreign law).

far-sighted investment in the education of foreign lawyers who will be tomorrow's foreign leaders.<sup>265</sup>

One could, of course, take a benign view of such developments. Constitutional democracy with a German twist is still constitutional democracy. Its spread serves only to advance democracy and the rule of law and poses no discernible threat to American interests. If loss of American constitutional influence in countries that are otherwise within America's sphere of influence is indeed cause for concern, however, an easy and obvious solution suggests itself. Financial support for American legal training of foreign academics and judges—not least of all those in Taiwan who find themselves on the frontline of democracy and constitutionalism in Asia—is both morally and strategically sound. It is no coincidence that the one current member of the TCC with American legal training is a former Fulbright scholar<sup>266</sup>—or, for that matter, that the other eight former academics on the Court received equivalent scholarships from Germany.<sup>267</sup> A relatively small investment in the noble cause of bolstering democratic institutions, and in a country that happens to be a close American ally in an increasingly treacherous region of the world, is likely to yield dividends and can do only good.

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265. See Yeh, *supra* note 249, at 608 (noting the popularity of the German government-sponsored DAAD scholarship among Taiwan's subsequent law professors and justices).

266. See Tzu-Yi Lin, JUSTICES OF THE CONST. CT., JUD. YUAN, [http://www.judicial.gov.tw/constitutionalcourt/en/p01\\_03\\_01.asp?curno=31](http://www.judicial.gov.tw/constitutionalcourt/en/p01_03_01.asp?curno=31) (last visited Sept. 21, 2011).

267. In the flush of its postwar economic success, Germany launched a generous academic scholarship for which Taiwanese law students were eligible—namely, the Deutscher Akademischer Austausch Dienst, or DAAD—at roughly the same time as the United States began to scale back its economic and military aid to Taiwan. Most, if not all, of the German-trained law professors in Taiwan have at some point received a DAAD scholarship. This German influence has, in turn, been passed down from one generation to the next. One of the most important of these German-trained justices, Weng Yueh-Sheng, who was appointed to the Constitutional Court in 1972 and served until his retirement in 2007, obtained a Ph.D. from Heidelberg University with the support of a DAAD scholarship and shaped an entire generation of legal academics through his part-time teaching at National Taiwan University. See Yeh, *supra* note 249, at 607–08 (discussing the impact of the German DAAD scholarship on legal education in Taiwan).