We Are the World: The U.S. Supreme Court's Use of Foreign Sources of Law – Online Supplement

Descriptive Information

In the manuscript, we provide the following table to show readers what kinds of foreign sources of law the Court cited positively. Here, we reproduce the table and provide some examples of opinions that used the various categories of foreign law.

Category	**Frequency**	**Percent**
Court decisions	97	19.6
Court procedures/practices	93	18.9
Law enforcement procedures/practices	15	3.0
Constitutional provisions	17	3.4
Laws, statutes, regulations, codes, etc.	101	20.4
Informal governmental acts	37	7.5
Cultural, economic, political, or historical practices	38	7.7
International treaties	1	0.2
Common law	96	19.4
Total	495	

Foreign court decisions. Citations to foreign court decisions are largely self-explanatory, but a good example comes in *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 273 (1989), where the Court stated: "So, for example, when the House of Lords placed certain limits on the types of cases in which exemplary damages could be awarded, Lord Devlin's extensive discussion mentioned neither Magna Carta or the Excessive Fines Clause of the 1689 Bill of Rights, nor did it suggest that English constitutional or common law placed any restrictions on the award of exemplary damages other than those discussed above. Rookes v. Barnard, [1964] A. C. 1129, 1221-1231. In fact, Lord Devlin recognized that his suggested alterations were a departure from the traditional common-law view. Id., at 1226. We find it significant that other countries that share an English common-law heritage have not followed the decision in Rookes, and continue to allow punitive or exemplary damages to be awarded without substantial interference. See, e. g., Uren v. John Fairfax & Sons, [1967] A. L. R. 25, 27 (Australia) (declining to follow Rookes); Bahner v. Marwest Hotel Co., 6 D. L. R. 3d 322, 329 (1969) (Canada) (same); Fogg v. McKnight, [1968] N. Z. L. R. 330, 333 (New Zealand) (same)."

Foreign court procedures/practices. A good example of the Court referencing foreign court procedures comes in *United States v. Wade*, 388 U.S. 218, 238 (1967), where the Court states: "Many other nations surround the lineup with safeguards against prejudice to the suspect. In England the suspect must be allowed the presence of his solicitor or a friend; Germany requires the presence of retained counsel; France forbids the confrontation of the suspect in the absence of his counsel; Spain, Mexico, and Italy provide detailed procedures prescribing the conditions under which confrontation must occur under the supervision of a judicial officer who sees to it that the proceedings are officially recorded to assure adequate scrutiny at trial."

Foreign law enforcement procedures/practices. For foreign law enforcement practices, we look to *Miranda v. Arizona*, 384 U.S. 436, 488-489 (1966) where the Court stated: " Scottish judicial decisions bar use in evidence of most confessions obtained through police interrogation. In India, confessions made to police not in the presence of a magistrate have been excluded by rule of evidence since 1872, at a time when it operated under British law."

Foreign constitutional provisions. One example of the Court referencing a foreign constitution came in *Coy v. Iowa*, 487 U.S. 1012, 1016-1017 (1988) where the Court stated: "We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact. For example, in *Kirby v. United States*, 174 U.S. 47, 55 (1899), which concerned the admissibility of prior convictions of codefendants to prove an element of the offense of receiving stolen Government property, we described the operation of the Clause as follows: '[A] fact which can be primarily established only by witnesses cannot be proved against an accused. . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases.' Similarly, in *Dowdell v. United States*, 221 U.S. 325, 330 (1911), we described a provision of the Philippine Bill of Rights as substantially the same as the Sixth Amendment, and proceeded to interpret it as intended "to secure the accused the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of

cross-examination."

Foreign laws, statutes, regulations, codes, etc. In *Washington v. Glucksberg*, 521 U.S. 702, 718 (1997), Chief Justice Rehnquist's majority opinion stated: "Other countries are embroiled in similar debates: The Supreme Court of Canada recently rejected a claim that the Canadian Charter of Rights and Freedoms establishes a fundamental right to assisted suicide, Rodriguez v. British Columbia (Attorney General), 107 D. L. R. (4th) 342 (1993); the British House of Lords Select Committee on Medical Ethics refused to recommend any change in Great Britain's assisted-suicide prohibition, House of Lords, Session 1993-94 Report of the Select Committee on Medical Ethics, 12 Issues in Law & Med. 193, 202 (1996) ("We identify no circumstances in which assisted suicide should be permitted"); New Zealand's Parliament rejected a proposed "Death With Dignity Bill" that would have legalized physician-assisted suicide in August 1995, Graeme, MPs Throw out Euthanasia Bill, The Dominion (Wellington), Aug. 17, 1995, p. 1; and the Northern Territory of Australia legalized assisted suicide and voluntary euthanasia in 1995. See Shenon, Australian Doctors Get Right to Assist Suicide, N.Y. Times, July 28, 1995, p. A8. As of February 1997, three persons had ended their lives with physician assistance in the Northern Territory. Mydans, Assisted Suicide: Australia Faces a Grim Reality, N. Y. Times, Febr. 2, 1997, p. A3. On March 24, 1997, however, the Australian Senate voted to overturn the Northern Territory's law. Thornhill, Australia Repeals Euthanasia Law, Washington Post, March 25, 1997, p. A14; see Euthanasia Laws Act 1997, No. 17, 1997 (Austl.). On the other hand, on May 20, 1997, Colombia's Constitutional Court legalized voluntary euthanasia for terminally ill people. Sentencia No. C-239/97 (Corte Constitucional, Mayo 20, 1997); see Colombia's Top Court Legalizes Euthanasia, Orlando Sentinel, May 22, 1997, p. A18."

Foreign informal governmental acts. In *Quinn v. United States*, 349 U.S. 155, 167 (1955), the Court addressed how Congress could deal with recalcitrant witnesses. The Court stated: "While of course not binding on Congress or its committees, the practice in the States and other English-speaking jurisdictions is at least worthy of note. . . Recalcitrant witnesses before investigating committees of the British House of Commons have traditionally been apprised of the disposition of their objections and given subsequent opportunity to respond before being

subjected to the contempt power of the legislature. . . For Canadian practice, see the case of W. T. R. Preston before the Committee on Public Accounts, the Committee on Agriculture and Colonization, and the House of Commons. 41 Journals of the House of Commons, Canada, 298, 316, 323; 41 id., Appendix No. 2, 324-327; 41 id., Appendix No. 3, 250-251; 76 Debates, House of Commons, Canada, Session 1906, Vol. III, 4451-4535."

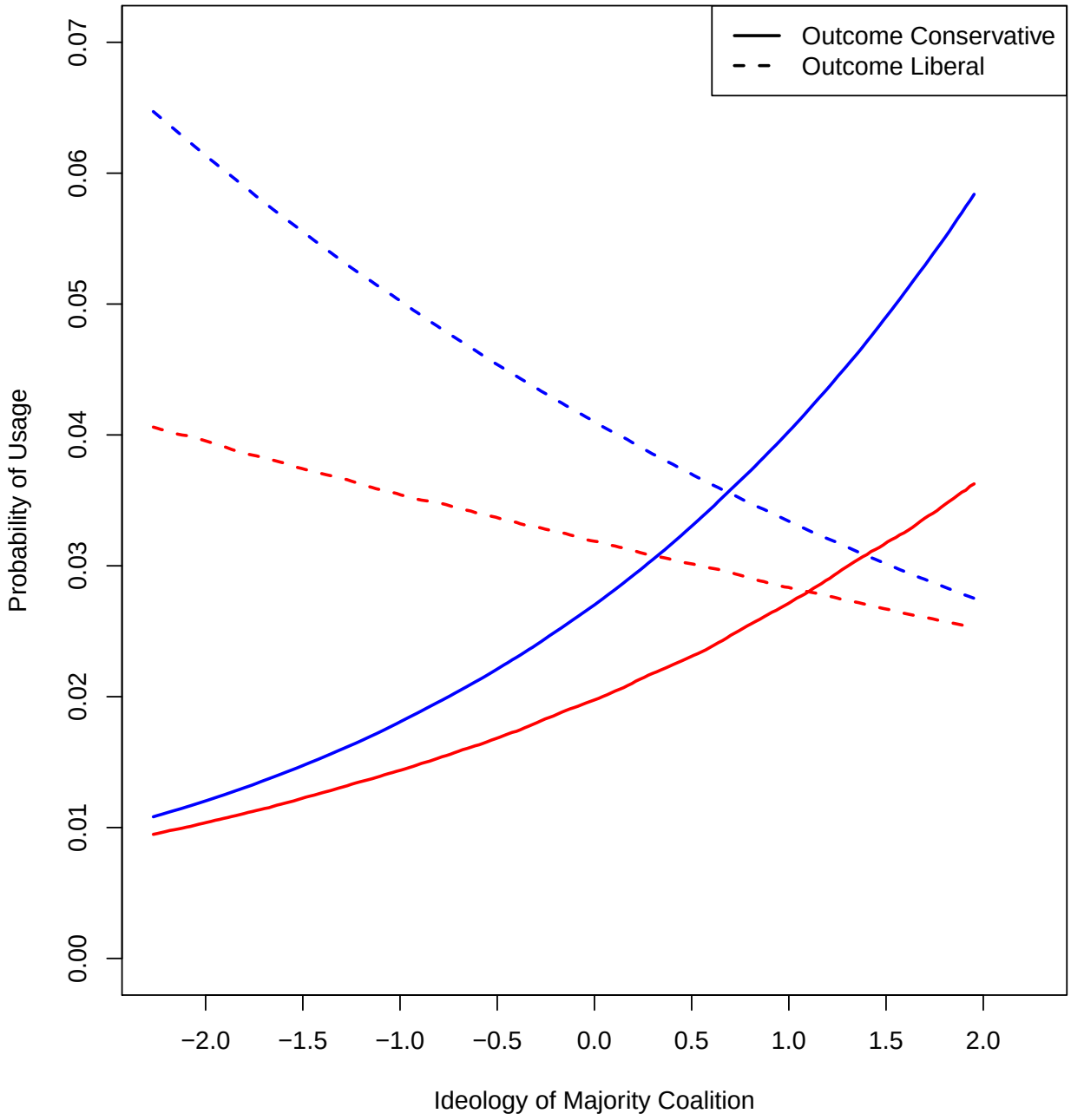
Foreign cultural, economic, political, or historical practices. In *Walz v. Tax Commissioner of New York*, 3997 U.S. 664, 675 (1970), the Court stated: " Governmental support of religion is common in many countries. See e. g., R. Murray, A Brief History of the Church of Sweden 75 (1961); G. Codding, The Federal Government of Switzerland 53-54 (1961); M. Scehic, Zbirka Propisa o Doprinosima i Porezima Gradjana 357 (Yugoslavia) (1968)." Similarly, as we stated in the manuscript, the Court in *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) held: "The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community."

International treaties. The Court expressly dealt with a treaty in *Reid v. Covert*, 354 U.S. 1, 16-17 (1957) when it declared: "There is nothing in [the supremacy clause] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. These debates as well as the history that surrounds the adoption of the treaty provision in Article VI make it clear that the reason treaties were not limited to those made in "pursuance" of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important peace treaties which concluded the Revolutionary War, would remain in effect. It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights – let alone alien to our entire constitutional history and tradition – to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions."

Common law. In *Deck v. Missouri*, 544 U.S. 622, 626-627 (2005)(cites omitted) the Court stated: "American courts have traditionally followed Blackstone's'ancient' English rule, while making clear that in extreme and exceptional cases, where the safe custody of the prisoner and the peace of the tribunal imperatively demand, the manacles may be retained." Likewise, in *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986), the Court stated: "Georgia had no criminal sodomy statute until 1816, but sodomy was a crime at common law, and the General Assembly adopted the common law of England as the law of Georgia in 1784."

Common Law References

To ensure that our results were not being driven by common law references alone (which presumably might have a different purpose), we re-estimated our models excluding all references to common law from our dependent variables. In Model 1 (whether the Court cites foreign law—Table 1 in the manuscript), we observe but a single change between the two models. This change has to do with the interaction between the direction of the Courts decision and the ideology of the majority coalition, which we display in the figure below. This figure is an expanded version of Figure 1 in the manuscript. The key modification is that we now show two sets of results: those that include common law (blue lines) and those that exclude common law references (red lines). The solid lines continue to indicate a conservative outcome and the dashed lines denote a liberal outcome. As the figure shows, the directionality of the interactive effect remains the same for models both with and without common law references, although the exclusion of common law references has an attenuating effect on the slope of the lines. In terms of the implications for statistically significant differences between the conservative and liberal lines, we find that the range for which a difference exists changes between the two sets of results, but the percent of observations in our data for which a significant difference exists remains unchanged at around 40%.



Opinion Author Effects

In the manuscript, we argue that controlling for the identity of the majority opinion author appears to explain very little additional variation in the likelihood the Court cites foreign materials. Support for that claim comes from a series of analyses we present in the table below. The leftmost column shows a random effects model where the panel consists of each of the 31 unique opinion authors we observe in our data. Each justice appears an average of approximately

185 times, with a minimum of 7 (Robert H. Jackson) and a maximum of 472 (Byron White) appearances. The middle column shows estimates for a fixed effects model. The rightmost column—which does not specifically control for who wrote the majority opinion—corresponds to the estimates we report in the manuscript. The number of observations changes across the models because the random and fixed effects models exclude per curiam opinions. The difference between the fixed and random effects comes from the fact that several justices never cite foreign materials and therefore are dropped from the model (see below for additional discussion).

	Effect Type		
	Random	Fixed	Pooled
Exercise of Judicial Review	0.475*	0.472*	0.503*
	(0.199)	(0.200)	(0.197)
Case Alters Precedent	1.085*	1.100*	1.152*
	(0.260)	(0.260)	(0.262)
Number of Amicus Briefs	0.034*	0.035*	0.035*
	(0.009)	(0.009)	(0.010)
Court Term	-0.002	-0.010	0.003
	(0.005)	(0.010)	(0.005)
Case Involved Treaty Interpretation	2.734*	2.730*	2.551*
	(0.517)	(0.526)	(0.502)
Case Involved Foreign Litigant	1.050*	0.984*	1.130*
	(0.378)	(0.381)	(0.399)
Liberal Case Outcome	0.362	0.381*	0.430*
	(0.188)	(0.189)	(0.187)
Majority Coalition Ideology	0.383*	0.399*	0.411*
	(0.165)	(0.169)	(0.168)
Liberal Outcome x Majority Ideology	-0.593*	-0.625*	-0.621*
	(0.196)	(0.198)	(0.201)
Constrained Court	0.070	0.067	0.073
	(0.136)	(0.138)	(0.140)
Legislative Liberalism	0.737	0.671	0.584
	(0.702)	(0.770)	(0.679)
Constant	0.695		-9.286
	(10.490)		(9.429)
Log Likelihood	-1111.436	-1036.399	-1133.816
Observations	5730	5669	6212

In terms of the random effects model, the maximum likelihood estimate of ρ, the proportion of the variance in our dependent variable attributable to the panel level component (i.e., the identity of the justice writing the opinion), was 0.01 with a 95% confidence interval of [0.002,

0.08]. A likelihood ratio test of whether ρ is actually equal to zero has a chi-square statistic of 1.90, which, with one degree of freedom, has an associated p-value of 0.08. Thus, under the most common 0.05 threshold, we would fail to reject the null hypothesis that a justice's identity contributes no additional explanatory power to the decision to cite foreign materials.

Parameter estimates for the fixed effects model appear in the middle column. As we mention above, the number of observations is smaller for the fixed effects model than it is for the random effects model because three justices in our data never cited foreign materials when writing majority opinions. They are (number of majority opinions in parentheses): Samuel A. Alito (18), Robert H. Jackson (7), and Harold H. Burton (36). Dummies for these justices, therefore, perfectly predict their failure to cite foreign materials (i.e., a dependent variable value of 0) and both the variables and the corresponding observations are automatically dropped when we estimate the fixed effects model. An alternative to this approach is to estimate a penalized-likelihood model, which can provide parameter estimates even in the presence of separation problems such as those we encounter above.[1] We used the "firthlogit" package in Stata to estimate this model. A table of parameter estimates appears after the next paragraph.

Importantly, in comparing these three sets of parameter estimates with those in our manuscript, we note that *our results are robust to multiple alternative specifications that control for the identity of the opinion author.* Coefficient sizes stay about the same and, with one exception, so does the statistical significance of the variables. The lone exception to this is the Liberal Case Outcome variable, which has a p-value of 0.054 in the random effects model, which is why it lacks an asterisk. Following the advice of others,[2] we do not read much into this difference.

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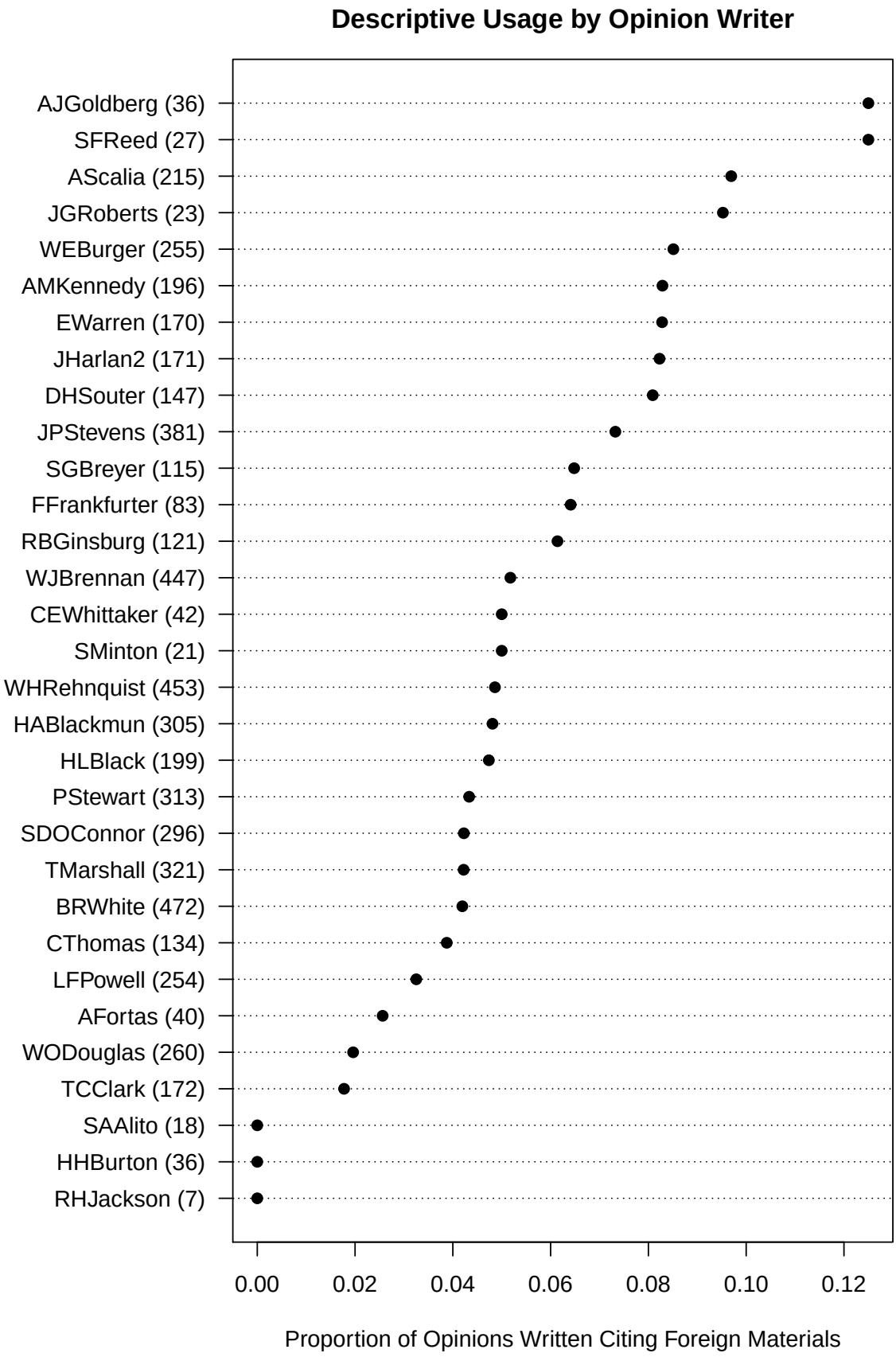
[1]See Zorn, Christopher. 2005. "A Solution to Separation in Binary Response Models." *Political Analysis* 13: 157-170.

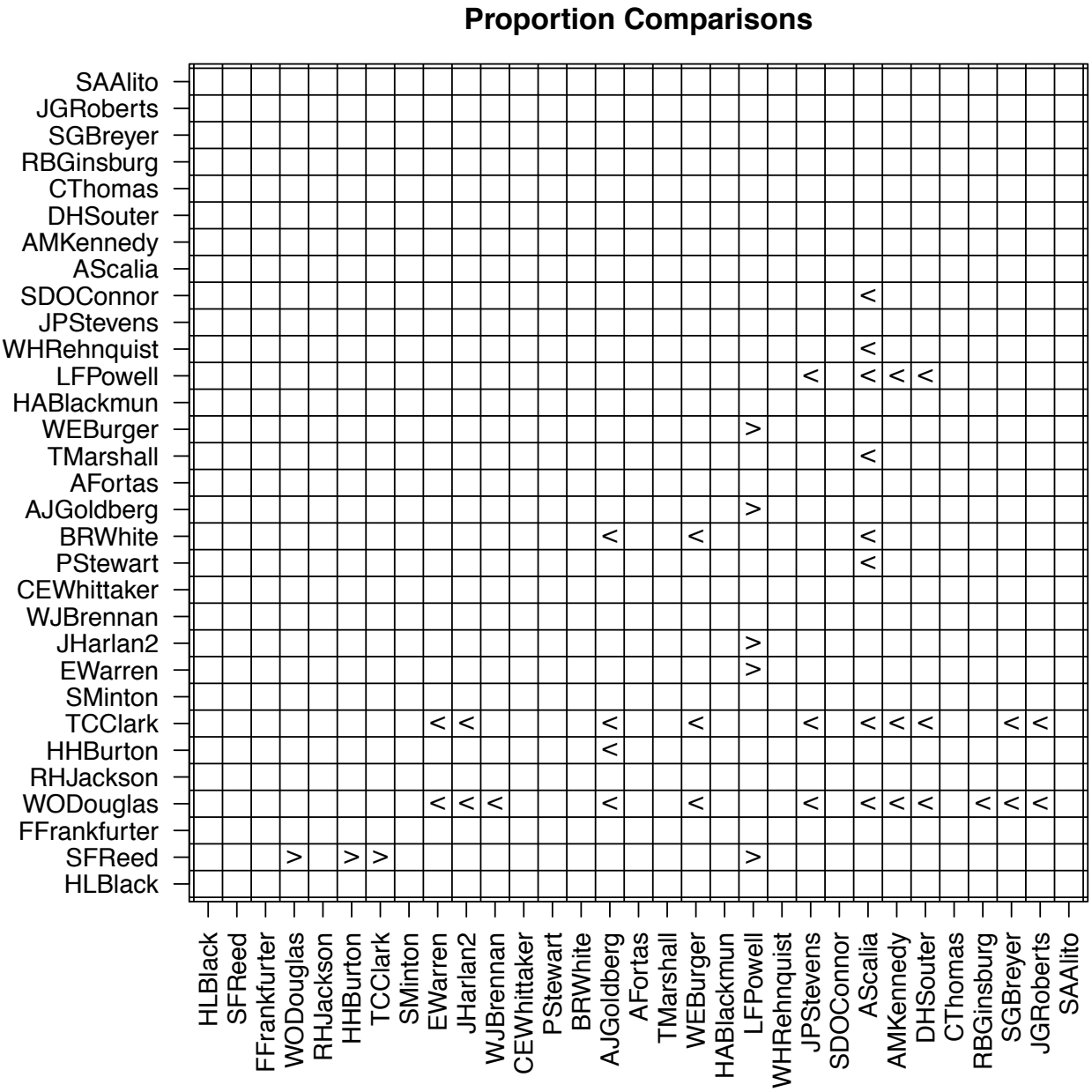
[2]See, e.g., Gelman, Andrew and Hal Stern. 2006. "The Difference Between 'Significant' and 'Not Significant' is Not Itself Statistically Significant." *American Statistician* 60: 328-331.

	Coefficient	S.E.
Exercise of Judicial Review	0.479*	0.198
Case Alters Precedent	1.113*	0.257
Number of Amicus Briefs	0.035*	0.009
Court Term	-0.010*	0.004
Case Involved Treaty Interpretation	2.725*	0.515
Case Involved Foreign Litigant	1.015*	0.373
Liberal Case Outcome	0.373*	0.188
Majority Coalition Ideology	0.390*	0.168
Liberal Outcome x Majority Ideology	-0.615*	0.198
Constrained Court	0.069	0.137
Legislative Liberalism	0.676	0.753
Author Dummies (Alito is Omitted Baseline)		
HLBlack	0.300	1.481
SFReed	1.434	1.554
FFrankfurter	0.696	1.507
WODouglas	-0.521	1.506
RHJackson	0.473	2.060
HHBurton	-0.917	2.028
TCClark	-0.491	1.540
SMinton	0.800	1.675
EWarren	0.838	1.471
JHarlan2	0.999	1.468
WJBrennan	0.502	1.455
CEWhittaker	0.719	1.582
PStewart	0.386	1.465
BRWhite	0.404	1.455
AJGoldberg	1.074	1.550
AFortas	0.258	1.669
TMarshall	0.466	1.464
WEBurger	1.127	1.454
HABlackmun	0.525	1.462
LFPowell	0.174	1.477
WHRehnquist	0.432	1.451
JPStevens	0.915	1.450
SDOConnor	0.273	1.465
AScalia	1.160	1.455
AMKennedy	0.963	1.459
DHSouter	1.086	1.469
CThomas	0.352	1.502
RBGinsburg	0.848	1.487
SGBreyer	0.907	1.489
JGRoberts	0.527	1.663
Constant	15.557	8.891
Observations	5730	
Log Likelihood	-1042.247	

Next, we present descriptive data on foreign material usage by each of the 31 majority opinion authors in our data. The first figure presents the proportion of opinions in which an author positively cited foreign materials. The number of opinions written by an author appear in parentheses next to each justice's name. Justice Goldberg, for example, wrote 36 majority opinions in our data and positively cited foreign materials in 12% of them. He was followed by Justice Reed, who wrote 27 opinions in our data and positively cited foreign law in 12% of them. As we stated earlier, Justices Alito, Burton, and Jackson did not cite foreign law in their opinions.


Descriptive Usage by Opinion Writer
AJGoldberg (36)
SFReed (27)
AScalia (215)
JGRoberts (23)
WEBurger (255)
AMKennedy (196)
EWarren (170)
JHarlan2 (171)
DHSouter (147)
JPStevens (381)
SGBreyer (115)
FFrankfurter (83)
RBGinsburg (121)
WJBrennan (447)
CEWhittaker (42)
SMinton (21)
WHRehnquist (453)
HABlackmun (305)
HLBlack (199)
PStewart (313)
SDOConnor (296)
TMarshall (321)
BRWhite (472)
CThomas (134)
LFPowell (254)
AFortas (40)
WODouglas (260)
TCClark (172)
SAAlito (18)
HHBurton (36)
RHJackson (7)
0.00
0.02
0.04
0.06
0.08
0.10
0.12
Proportion of Opinions Written Citing Foreign Materials

The second figure shows whether significant differences exist between any two individual justices in terms of citing foreign law. We generated the figure by performing a two-sample difference in proportion test. If a significant difference exists ($p < 0.05$, two-tailed test), then the cell entry for that justice dyad will have either a "<" or ">" in it. A "<" denotes that the justice whose name appears in the *column* has a higher rate of usage than the justice whose name appears in the *row*. For example, Chief Justice Warren used foreign law at a significantly higher rate than Justice Clark. A ">" means the opposite. For example, Justice Reed was significantly more likely to use foreign materials than Justice Douglas. Overall, 42 of the 465 unique pairings (i.e., about 9%) are significantly different.



Issue Area Controls

We next address the issues the Court decided. If some issue areas are more likely than others to cite foreign law (or are more likely to see the Court alter precedent or exercise judicial review), then our main results of interest could potentially be spuriously driven by a case's issue area. To investigate this possibility we refit our case-level model with fixed effects for issue area (using the Supreme Court Database's "issueArea" variable). We omitted one interstate relations

case from this auxiliary analysis as it was the only case in that issue area. All of our results are substantively unchanged. The Court is still significantly more likely to cite foreign law when it exercises judicial review or alters its own precedent. We also continue to observe the same interactive effect portrayed in Figure 1 of the manuscript. Thus, we have no evidence that our results of interest are sensitive to the inclusion of issue area controls.

At the same time, however, we have mixed evidence about whether their inclusion helps improve our model's fit. On the one hand, when we compare the Bayesian Information Criterion (BIC) values for the two models, we find "very strong" evidence[3] to prefer the model without issue-area controls over the model that includes them. On the other hand, about 25% of the unique pairwise comparisons exhibit a statistically significant difference. The figure below presents the probability estimates for each of the 11 issue areas in our data (recall that we dropped the single interstate relations case from our analysis).

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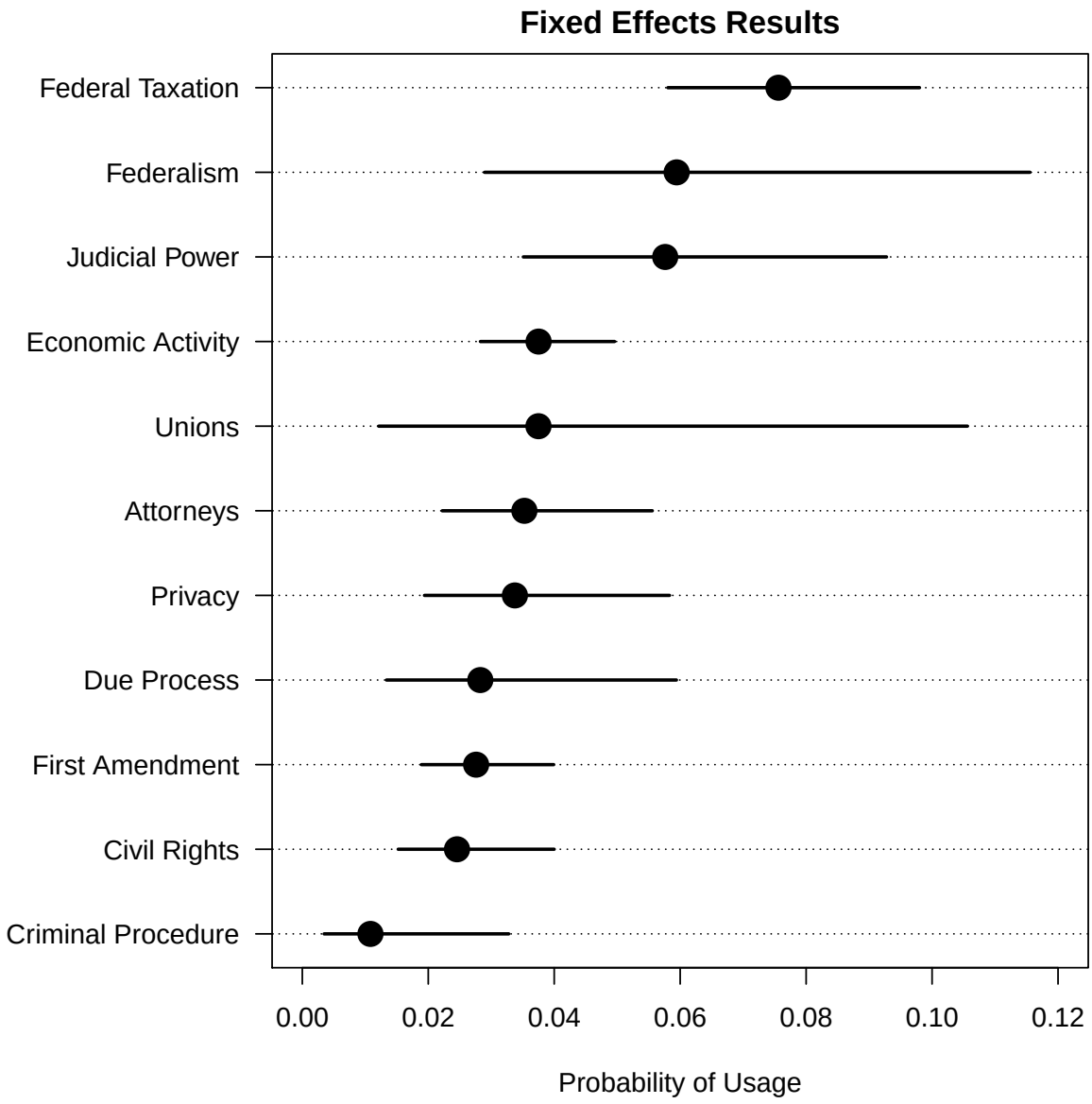
[3]Long, J. Scott and Freese, Jeremy. 2006. *Regression Models for Categorical Dependent Variables Using Stata.* College Station, TX: Stata Press.



There are 55 unique pairwise combinations among these 11 issue areas (i.e., 11 choose 2). The 14 differences that are statistically significant ($p < 0.05$, two-tailed test) are: Criminal Procedure > Civil Rights, Criminal Procedure > Economic Activity, Criminal Procedure > Federal Taxation, Criminal Procedure > Federalism, Criminal Procedure > First Amendment, Criminal Procedure > Judicial Power, Criminal Procedure > Unions, Due Process > Civil Rights, Due Process > Judicial Power, Due Process > Unions, Economic Activity > Unions, Privacy > Civil Rights, Privacy > Judicial Power, Privacy > Unions.