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## Brown Abroad: An Empirical Analysis of Foreign Judicial Citation and the Metaphor of Cosmopolitan Conversation

Sheldon B. Lyke

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# **Brown Abroad: An Empirical Analysis of Foreign Judicial Citation and the Metaphor of Cosmopolitan Conversation**

*Sheldon Bernard Lyke\**

## **ABSTRACT**

*This Article generates a data set (twelve courts and thirty-two decisions) of foreign judicial citations to the landmark U.S. Supreme Court decision in Brown v. Board of Education. The purpose of this Article is to learn what happens when a case is deterritorialized and reconstituted in a different national scenario, and to conceptualize how courts around the world use foreign authority. My analysis reveals that few foreign courts used Brown in decisions involving education or race and ethnicity. Foreign courts used the case as a form of factual evidence, as a guide in understanding the proper role of a court with respect to decision making, and as a source of substantive law in discussions on equal protection. Although central to comparative law, the legal transplant metaphor does not adequately explain the transnational use of Brown. By incorporating sociological theories of diffusion and innovation, I*

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*attempt to reconcile some of the flaws of the transplant metaphor and argue that conceptualizing judiciaries' use of foreign law as a cosmopolitan conversation is more appropriate. Cosmopolitan conversation has led to forms of legal learning and innovation when courts have cited, interpreted, and infused their own meaning into the Brown decision.*

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## I. INTRODUCTION

Foreign laws have significant influences on the development and interpretation of domestic laws. As global cultural flows have increased, it has become difficult to find purely territorialized law devoid of foreign national influences. It is not surprising to see the Americanization of Japanese laws,<sup>1</sup> international law influencing the

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1. See generally R. Daniel Keleman & Eric C. Sibbitt, *The Americanization of Japanese Law*, 23 U. PA. J. INT'L ECON. L. 269 (2002) (examining the convergence of Japanese and American legal styles in the contexts of securities and products liability).

female genital cutting policies of many African nations,<sup>2</sup> or the Supreme Court of the United States referring to world opinion and the practices of foreign nations in criminal cases.<sup>3</sup> Laws have become deterritorialized.<sup>4</sup>

The diffusion-based legal transplant theory is often used as a framework in attempts to understand how laws exert influence beyond their borders.<sup>5</sup> The theory states that the law of one nation has the ability to spread to and influence the legal system of another country or countries. In a comparative law context, legal transplants are successful when the transplanted laws have the same effect in the recipient country as in the country of origin, thereby leading to convergence.

The legal transplant metaphor is prominent in understandings of the Americanization of legal systems around the world. A wealth of commentaries discuss the strong, worldwide influence of American laws.<sup>6</sup> For example, Anthony Lester argues that we can see the

2. Elizabeth Heger Boyle & Sharon E. Preves, *National Politics as International Process: The Case of Anti-Female-Genital-Cutting Laws*, 34 LAW & SOC'Y REV. 703, 704 (2000).

3. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 554 (2005) ("The overwhelming weight of international opinion against the juvenile death penalty is not controlling here, but provides respected and significant confirmation for the Court's determination that the penalty is disproportionate punishment for offenders under 18."); *Lawrence v. Texas*, 539 U.S. 558, 560 (2003) (stating that many other nations had already adopted policies that protected the private rights of homosexual citizens); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (noting that the world community does not support the use of the death penalty for the mentally retarded); *Miranda v. Arizona*, 384 U.S. 436, 486-91 (1966) (discussing the use of anti-interrogation safeguards in other countries to suggest that such policies could be workable in the United States).

4. In an attempt to add clarity to the fuzzy concept of globalization, Scholte defines globalization as deterritorialization. He notes that deterritorialization consists of "trans-border exchanges without distance." JAN AART SCHOLTE, *GLOBALIZATION: A CRITICAL INTRODUCTION* 49 (2000). In short, deterritorialization refers to either the removal of objects from a particular geographic place, or the declining significance of the tie between culture and a specific geography.

5. See generally ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993) (giving an overview of legal transplant theory); Daniel Berkowitz et al., *Economic Development, Legality, and the Transplant Effect*, 47 EUR. ECON. REV. 165 (2003) (discussing the effects of legal transplanting on economic development); Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839 (2003) (laying out four types of legal transplants and discussing their implications using Argentinian law as an example).

6. See, e.g., Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19, 68-72 (David M. Trubek & Alvaro Santos eds., 2006) (discussing the historical context behind the spread of American legal theory after World War II and its ongoing effects); Wolfgang Wiegand, *Americanization of Law: Reception or Convergence?*, in *LEGAL CULTURE AND THE LEGAL PROFESSION* 137 (Lawrence M.

strength of American law with respect to transjudicial communication, and that the U.S. Supreme Court is in a one-way “overseas trade” with the courts of other nations.<sup>7</sup> For Lester, this means that many national courts consider the rulings of the United States with respect to issues on liberty, but that the U.S. Supreme Court does not refer to the judgments of the courts that refer to it. Lester writes:

Currently, there is a vigorous overseas trade in the [United States] Bill of Rights, in international and constitutional litigation involving norms derived from American constitutional law. When life or liberty is at stake, the landmark judgments of the Supreme Court of the United States, giving fresh meaning to the principles of the Bill of Rights, are studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C., or the State of Washington, or Springfield, Illinois.<sup>8</sup>

Some scholars argue that this strong influence is resulting in an Americanization of foreign legal systems at the national and international levels, where these systems emulate and mimic U.S. law and legal practices.<sup>9</sup> This understanding sees the transplant circulation of law as a process that inevitably leads to homogenization.

Other scholars caution against the Americanization thesis. They note that while the American legal system has a strong influence, we are not witnessing the recreation of U.S. legal practice in foreign jurisdictions, but actually the creation of more heterogeneous systems.<sup>10</sup> These scholars argue that legal transplant circulation does not necessarily lead to the replication of the laws of the source country.<sup>11</sup> They suggest that the metaphor of the unchanging legal transplant is problematic because it assumes that law serves the

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Friedman & Harry N. Scheiber eds., 1996) (arguing that there has been reception of American law in Europe and outlining different aspects of this process).

7. See Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 537–42 (1988).

8. *Id.* at 541.

9. See, e.g., Keleman & Sibbitt, *supra* note 1 (discussing the Americanization of Japanese law); Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229 (1991) (discussing the Americanization of European law).

10. See, e.g., Kennedy, *supra* note 6, at 69 (suggesting that the dominance of Americanization is exaggerated, and that there is still a “process of selection, in which legal elites around the world choose to be dominated in one way rather than another”); Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT’L L.J. 1 (2004) (arguing that the introduction of American plea bargaining into four different civil law countries is not likely to cause an overall Americanization of criminal procedure in those countries); Stephen Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 LAW & POL’Y INT’L BUS. 391 (1993) (arguing that Mexican laws, despite Americanization, do not merely replicate those in the United States).

11. See, e.g., Langer, *supra* note 10, at 3; Zamora, *supra* note 10, at 456–59.

same function when removed from one legal body and inserted into another.<sup>12</sup> While the legal transplant concept helps explain how development can occur in the country where law is received, it does not acknowledge the change that can occur to the legal idea as it is transferred from the country of origin. David Westbrook discusses this notion of legal heterogeneity, stating:

Locality still matters . . . . Indeed, culture still matters. More interestingly still, while we observe homogenization these days we also observe the emergence of new and important differences among people, and the emergence of such differences runs counter to anxieties, now clichéd, about homogenization.<sup>13</sup>

Westbrook highlights a classic question of whether globalization is a process that leads to greater homogeneity or one that brings about greater difference and hybridity. But perhaps this is the wrong question to ask, and the disparate results that we see in observations of globalization may reveal the limitations in how legal scholars and social scientists presently conceptualize global practices. Westbrook correctly urges scholars to resolve the contradictions we observe in globalization by changing our way of thinking.<sup>14</sup>

In this Article, I caution against the thesis that the circulation of law always leads to homogenization. In fact, the movement of law across borders is likely to produce heterogeneity. To support this view, I examine foreign judiciaries' citation and use of the landmark U.S. Supreme Court case, *Brown v. Board of Education*.<sup>15</sup> Decided on May 17, 1954, *Brown* held that state and local laws promoting racial segregation in public schools were unconstitutional.<sup>16</sup> The *Brown* decision effectively ended the doctrine of "separate but equal" articulated in *Plessy v. Ferguson*.<sup>17</sup> While there is debate about whether *Brown* was an engine for social change in the United States,<sup>18</sup> the influence of *Brown* around the world is undeniable.

12. See, e.g., Pierre Legrand, *The Impossibility of 'Legal Transplants'*, 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997).

13. David A. Westbrook, Keynote Address at the Harvard International Law Review Symposium: Theorizing the Diffusion of Law (Mar. 4, 2006), in 47 HARV. INT'L L.J. 489, 492 (2006).

14. *Id.* at 505.

15. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

16. *Id.* at 493–96. For a general discussion of *Brown*, see WALDO E. MARTIN JR., *BROWN V. BOARD OF EDUCATION: A BRIEF HISTORY WITH DOCUMENTS* (1998) (giving background on the 1954 decision and its reception through excerpted primary sources).

17. *Plessy v. Ferguson*, 163 U.S. 537, 537–52 (1896).

18. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 342–44 (2004) (arguing that the case spurred desegregation by bringing the topic to the foreground and inciting reactions that demanded attention and reform); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2001) (recounting

Legal historian Mary Dudziak researched the landmark case's role in an international context and argues that *Brown* was a case intimately linked to the Cold War.<sup>19</sup> She states that *Brown* aided the U.S. image abroad, because its formal legal change was seen as a blow to Communism, as people around the world could see that the United States was fair and that democracy as a political system was just.<sup>20</sup> Dudziak's work focuses largely on the reception of *Brown* in the international press and to the more political branches of foreign government. She does not examine how judicial branches of foreign government received the decision.

Richard Goldstone and Brian Ray agree that *Brown* was a domestic case decided in an international context, but argue that the case also has a profound international influence.<sup>21</sup> After a limited search, they found seven foreign case law citations to *Brown*. Their analysis of these foreign citations revealed that there are three areas linked directly to the *Brown* legacy: (1) the elimination of racial segregation, (2) the importance of education in a democratic society, and (3) the development of innovative judicial enforcement powers.<sup>22</sup> Goldstone and Ray do not articulate a sampling method for selecting the cases that cited *Brown*. As a result, their sample is comprised almost entirely of cases from Canada and South Africa, and therefore is not representative of the vast majority of foreign court citations to *Brown*. In addition, Goldstone and Ray do not offer a systematic research method or logic describing how they analyzed the cases in order to discern *Brown's* effect.

The goal of this project is two-fold. First, I assess whether the legal transplant metaphor is accurate in explaining the circulation of law. I test this by examining the circulation of *Brown* amongst foreign courts. By using transjudicial communications as my unit of analysis, I can comment not only the circulation of law between foreign legal systems generally, but I can also provide empirical data that may offer insight and clarify questions in the normative debate on the appropriateness of the judicial citation to foreign authority.<sup>23</sup>

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the history and circumstances surrounding the case and suggesting that it led to both triumphs and disappointments); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 39–169 (2d ed. 2008) (discussing how both judicial and extra-judicial factors collectively led to civil rights reform).

19. See Mary L. Dudziak, *Brown as a Cold War Case*, 91 J. AM. HIST. 32 (2004).

20. *Id.* at 35–38.

21. Richard J. Goldstone & Brian Ray, *The International Legacy of Brown v. Board of Education*, 35 MCGEORGE L. REV. 105 (2004).

22. *Id.* at 113.

23. The term “transjudicial communications” was coined by Anne-Marie Slaughter to describe instances when a court decision references the opinion of another court or courts in a foreign country or countries. Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 101 (1994).

My second goal is to examine the international influence of *Brown* by using social science research methods to gather a representative sample of foreign citations to *Brown*, and then analyze those cases using systematic qualitative research. I seek to understand how *Brown* is used as a symbol and is interpreted and re-interpreted by foreign courts. Generally, I am interested in learning what happens to a case once it is deterritorialized and taken out of the context of the nation-state where it was originally decided. Specifically, I want to understand how foreign judiciaries consume *Brown* and make meaning of the decision.

Court cases are interesting things to use to study deterritorialization because, in a common law system of precedent, they are symbols designed for courts to apply to new factual contexts.<sup>24</sup> Court cases serve as precedent, and are expected to be used to interpret the law, and guide judgments in situations that while not exactly the same, are similar to the original case facts.<sup>25</sup> Therefore, case law as socially constructed was designed to be applied to new situations. Studying case law makes for a fascinating project on the construction of meaning and deterritorialization, as I track how a case is applied not only to new facts, but in entirely different legal systems with different histories, customs, and rules.

Despite its worldwide influence, the citation of *Brown* does not always mimic American courts' use of this landmark case. While a few foreign national courts reproduce an American court's reading of *Brown*, the vast majority interpret *Brown* differently. To them, the case stands for principles and remedies unacknowledged by American courts in previous considerations of the case. As a result of my findings, I argue that we should move beyond the legal transplant metaphor, and I propose an alternate heuristic device—cosmopolitan conversations—to assist in understanding the transnational exchange of legal ideas. Cosmopolitan conversations take place when foreign actors send, receive, or engage with legal ideas. In a judicial context, these conversations occur when judges read foreign opinions, write opinions that are read by foreign judges, make reference to foreign decisions, or engage a legal discourse in their rulings.<sup>26</sup>

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24. See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 2–10 (1949) (describing generally the process of legal reasoning); SALMOND ON JURISPRUDENCE 162–63 (Glanville Williams ed., 1957) (distinguishing the English legal system of precedent from Roman law and highlighting the “peculiarly powerful and authoritative position” of precedent).

25. See LEVI, *supra* note 24, at 2–4.

26. While I focus on their written decisions as my unit of analysis, judges are not the only actors that can be engaged in judicial cosmopolitan conversations. Other actors can include law clerks, and the lawyers that argue before courts, including *amicus curiae*.



Transjudicial communications have a cosmopolitan nature because, at its core, cosmopolitanism is not an attempt to achieve either consensus, or homogenization, but to have the opportunity to learn from difference.<sup>27</sup> Legal innovation can result when cosmopolitan conversations lead to learning and the production of knowledge. There are two types of legal innovations: (1) the discovery of foreign laws and (2) the invention of new legal ideas and concepts.<sup>28</sup> Under this heuristic, *Brown* ceases being a transplanted organ with a specific function, and becomes a collection of symbols that judges and lawyers can exchange between courts. Social communications are subject to processes of interpretation where original meanings may be conveyed, misunderstood, taken out of context, or placed into new contexts. These interpretative processes can lead to the discoveries of previously created foreign laws, or the invention of new laws and concepts. Throughout this process, a judge can learn from a cosmopolitan conversation, which may lead to development and innovation in the receptive legal system.

In this Article, I show that *Brown's* influence on foreign judiciaries confirms the thesis that the deterritorialization of law can lead to greater heterogeneity. It also confirms that diffusion theories emphasizing the legal transplant as something that is simply to be mimicked or rejected are overly simplistic. I argue that while *Brown* was emulated in some scenarios, foreign judiciaries read and interpreted the case in ways that departed significantly from its U.S. context. In addition, foreign courts applied *Brown* in factual and legal scenarios that the case never addressed explicitly. The effect of these differences is to see foreign courts diverging from the *Brown* decision, as these institutions use the case to aid them in crafting legal innovations to solve the problems of their respective nations.

The structure of this Article is as follows. In Part II, I discuss the methods that I used in designing this research study of the *Brown* decision. I outline how I generated my sample, and discuss the qualitative methods I used to collect and analyze the data. In Part III, I present my results. This section discusses overall trends that I discovered in the data, and presents a typology of the various foreign court uses of *Brown*. In Part IV, I discuss my results. Finally, I conclude briefly and offer possibilities for future research.

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27. KWAME ANTHONY APPIAH, COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS 4 (2006).

28. In discussing legal innovation, I draw on a broader conceptualization of innovation. For a discussion of innovation, invention, and discovery, see JAMES BRIAN QUINN ET AL., INNOVATION EXPLOSION: USING INTELLECT AND SOFTWARE TO REVOLUTIONIZE GROWTH STRATEGIES (1998). Jon Witt states that innovation is comprised of discovery and invention. JON WITT, SOC 46 (Michael Ryan ed. 2009).

## II. METHODS

I conducted a content analysis study of foreign national high courts' use of *Brown*. As content analysis is the study of recorded human communications, it is well suited for studying transjudicial communications between courts. Analyzing court cases using content analysis is not a new endeavor. This study follows in the footsteps of David Zaring, who performed a qualitative content analysis that searched for mentions in court cases, read those mentions, analyzed the opinions that contained them, and coded the results.<sup>29</sup> Zaring referred to this process of qualitative content analysis as "citation analysis, with an analytical gloss."<sup>30</sup>

The methodology of this study merges the basic techniques of legal citation and doctrinal analysis familiar to legal scholars with the content analysis familiar to social scientists. This project is largely a qualitative content analysis interested in understanding how courts use foreign legal authority and the process by which a case is deterritorialized and reconstituted in a new national context.

### A. Sample Generation

My goal was to generate the universe of opinions issued by the highest national courts around the world that reference *Brown v. Board of Education*. One should note however, that *Brown* is a case that appeared before the Supreme Court of the United States in two separate instances. In 1954, the Court decided *Brown v. Board of Education*, and ruled that the doctrine of separate but equal was unconstitutional.<sup>31</sup> This case is often referred to as *Brown I*, and while it declared its position on the constitutionality of racial discrimination in public schools, it did not issue an order of relief for those parents and students suffering segregation.<sup>32</sup> The next year, in the case commonly referred to as *Brown II*, the Court decided that the appropriate remedy to ameliorate racial discrimination was for schools to desegregate "with all deliberate speed."<sup>33</sup> For the purposes

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29. David Zaring, *The Use of Foreign Decisions by Federal Courts: An Empirical Analysis*, 3 J. EMPIRICAL LEGAL STUD. 297, 303 (2006).

30. *Id.*

31. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) ("[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal [and deprive citizens] the equal protection of the laws guaranteed by the Fourteenth Amendment.").

32. See *id.* at 495 (restoring the case to the docket for reargument on the question of relief in order to "have the full assistance of the parties in formulating decrees").

33. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

of my search, I wanted to capture any mention of either *Brown I* or *II*. I culled decisions where a court secondarily cited *Brown* via one of its previous decisions,<sup>34</sup> or when it did not cite *Brown* in the actual text of the decision.<sup>35</sup>

In order to find citations to *Brown*, I relied on a number of searchable electronic databases of high court judicial opinions. These databases included popular resources like LexisNexis, but also the Internet search engines of a high court's website (i.e., the Supreme Court of Israel's website).<sup>36</sup>

Locating and searching the websites of foreign courts was a tedious endeavor. Some websites were challenging to locate. When found, a number of websites were difficult to navigate because they needed to be translated in order to learn whether their decisions were available electronically, and whether they provided the database search engines necessary to perform a *Brown* query. In total, I either visited the website or searched electronic databases that linked to 100 national high courts. Thirty-two courts had an online presence, but did not have searchable access to their decisions.<sup>37</sup> These courts either: (a) did not have a functioning Internet website,<sup>38</sup> (b) did not post their written decisions in an electronic format, or (c) did not provide an electronic search engine in order to perform key word searches of their written opinions. A key to this project was the ability to search the database of the actual text of a court's decisions for mentions of *Brown*. Due to the number of cases and the number of pages per case, a non-electronic, manual search for *Brown* amongst a few score of opinions would be extremely time consuming and next to impossible for achieving the goals of this project.

Once a court's database was identified, I searched for the following terms and citations: "Brown," "Brown v. Board of Education," "347 US 483," and "349 US 249." Of the remaining courts

34. I included cases however, when a court secondarily cited *Brown* through another foreign court's decision. For example, I included a Sri Lankan case that secondarily cited *Brown* via the Supreme Court of India. However, I excluded a Colombian case decided by the Constitutional Court of Colombia that secondarily cited *Brown*, by referencing one of the Colombia Court's previous decisions.

35. There were instances when *Brown* was mentioned in the case header, or in attorney arguments. These cases were excluded.

36. With the exception of Westlaw and LexisNexis, this study did not utilize online subscription databases in order to access a court's decisions. A number of premium subscription services exist for a variety of countries. For example, the private Lovdata Foundation offers a fee-based online subscription service which provides case law dating back to 1836 for the Supreme Court of Norway. See LOVDATA, <http://www.lovdata.no/info/lawdata.html> (last visited Dec. 26, 2011) (Nor.).

37. For a list of courts without a searchable electronic database, along with a description of each court's electronic deficiency with respect to this project, see *infra* Appendix, Table 5.

38. For example, the court may have had a web address, but a website that was either inoperable or under construction. See *infra* Appendix, Table 5.

with searchable electronic databases, forty-six made no citations to *Brown*.<sup>39</sup> A total of twelve national high courts issued at least one decision that cited *Brown*.<sup>40</sup>

I do not claim to have found all foreign opinions that cite *Brown*, but I believe I have located the vast majority. In addition to the limitations outlined, language created another, arguably small, barrier in conducting my research. While widely used by a number of courts, English—my native language—is not used by all courts. Fortunately, I have an intermediate reading proficiency in a number of Romance languages and am able to translate written Spanish, French, Italian, and Portuguese. There were a few instances, where, due to language barriers, I was unable to perform a thorough electronic search for a court's opinion. Of the 100 courts surveyed, ten provided a database of searchable opinions in a language that I could not easily interpret.<sup>41</sup> These countries were Armenia, Finland, Iceland, Norway, Romania, Russia, Rwanda, Sweden, Turkey, and the Ukraine. I do not think that my language limitations significantly affected my analysis. I entered my usual search terms and found no mention of *Brown*. Sometimes a court writing in a non-English language will include the original spelling of a cited US decision when it writes its opinion, even if the court's native language uses a non-Latin alphabet.<sup>42</sup> In addition, I believe that a more thorough search of these countries might not reveal a citation to *Brown*, because their legal systems are based in civil law,<sup>43</sup> while *Brown* is a common law decision.<sup>44</sup>

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39. Forty-six courts was a surprisingly large number of courts to make no reference to *Brown*. This number may not be entirely accurate however, because many of the databases for the national high courts that I searched were incomplete and only had decisions for limited, sometimes scattered, historical periods. For a list of countries with no citations to *Brown*, along with a description of the respective database's historical coverage, see *infra* Appendix, Table 4.

40. See *infra* Table 1.

41. See *infra* Appendix, Table 6.

42. I am careful not to exclude the possibility that I might not have captured whether these countries cited *Brown*. I understand that a thorough search for *Brown* would require me to translate my search terms into the language or, when applicable, the alphabet of the respective countries.

43. While Rwanda recently transitioned to a hybrid civil-common law system, it has spent the vast majority of its existence as civil law regime. Eunice Musiime, *Rwanda's Legal System and Legal Materials*, GLOBALEX, <http://www.nyulawglobal.org/globalex/rwanda.htm> (last visited Dec. 26, 2011).

44. My results show that the vast majority of decisions that cited *Brown* were common law courts. See *infra* Table 1.

### B. Data Collection and Analysis

My sampling procedure identified a total of thirty-two opinions that cited to either *Brown I* or *Brown II*. After identifying the cases, I went through the task of translating the five cases that were not written in English.<sup>45</sup> I then read each opinion in order to understand the case facts, issues, and result.

Next, I began coding the court decisions. Coding is the process of transforming the “raw” data—in this instance the citation to *Brown*—into a form that is standardized and able to be used in comparisons.<sup>46</sup> This occurs by developing themes and a conceptual schema from the data. For this project, coding was an interpretative act, as it was both qualitative and subjective. Due to my interest in understanding the process by which courts used *Brown*, I analyzed the citations for their latent content (i.e., underlying meaning), as opposed to their more surface, manifest content.<sup>47</sup>

My code categories were derived both inductively and deductively, and therefore involved both empirical observations and theoretical inquiry. This was a project where the data analysis sits between the grounded theory method and the extended case study approach.<sup>48</sup> In grounded theory, the researcher approaches data without any preconceived theories that may bias his judgment, and generates theories based on observed patterns and themes in what he observes.<sup>49</sup> Proponents of the extended case method argue that the best way to rebuild theory is “to lay out as coherently as possible what we expect to find in our site *before* entry.”<sup>50</sup> In extended case method, it is imperative to know the literature before you approach your data.

45. I should note that in the case of Brazil, due to the immense length of the case, I only translated the relevant sections of the case that pertained to *Brown*.

46. For a discussion of coding qualitative data, see CARL F. AUERBACH & LOUISE B. SILVERSTEIN, *QUALITATIVE DATA: AN INTRODUCTION TO CODING AND ANALYSIS* (2003).

47. For a discussion explaining the difference between manifest and latent content, see EARL BABBIE, *THE PRACTICE OF SOCIAL RESEARCH* 309–10 (9th ed. 2001).

48. Upon first glance, this project might not appear to be a likely candidate for the extended case method approach because it uses the entire universe of foreign cases (and for the sake of clarity I will now refer to them as decisions) in its analysis. I caution the reader not to confuse the term “case” in its use as a judicial decision with its use in the social sciences to refer to an intensive analysis of some individual unit or event. This project is an attempt to understand foreign citation practices and the legal transplant theory by looking at the individual event of foreign judiciaries’ use of *Brown*—and therefore makes a strong candidate for a case method analysis.

49. See BARNEY G. GLASER & ANSELM L. STRAUSS, *THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH* (1967) (outlining the process of conducting qualitative research using grounded theory).

50. MICHAEL BURAWOY ET AL., *ETHNOGRAPHY UNBOUND: POWER AND RESISTANCE IN THE MODERN METROPOLIS* 9 (1991).

This project lies between both approaches. I take the lessons of the extended case method to heart. The extended case method teaches a researcher to be reflexive and to be aware of the lens through which he makes sociological observations. I entered this project thinking about courts and foreign citations to test Alan Watson's legal transplant theory, and two additional conceptualizations of the use of foreign material advanced by Máximo Langer and Kwame Appiah. First, Langer's theory of legal translation argues that legal ideas are not merely transplanted unchanged, but are translated by the recipient country.<sup>51</sup> Although he does not write about the transmission of legal material, Appiah views the foreigner, or in this instance, the foreign citation—as source for a different perspective that a community may converse with and possibly learn from.<sup>52</sup> While performing my analysis, I looked for conflicts that the data may have with these three different theories in an attempt to improve theory and understanding. But I borrow from the grounded theory approach in that there may be some themes and categories that I notice that have no relevance to these theories, and which also do not contradict these thinkers. This combined grounded theory and extended case method approach allows me the reflexivity to be aware of my biases, reformulate existing theories of which I am aware, and keep my mind open to be guided in new directions by the data I observe.

### III. RESULTS

This Part is divided into two subparts. In the first subpart I describe characteristics of the data sample and highlight commonalities and possible relationships amongst the foreign courts that have cited *Brown*. I devote more time in my analysis and typology of the qualitative categories and themes I observed when I read the foreign courts' use of *Brown*.

#### A. Overall Trends<sup>53</sup>

Twelve courts cited *Brown* in thirty-two different opinions.<sup>54</sup> The Supreme Court of India and the Constitutional Court of South Africa

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51. Langer, *supra* note 10, at 5.

52. APPIAH, *supra* note 27, at 97.

53. For a tabular summary of the courts that cite *Brown*, along with categorizations of majority, concurring, dissenting, and special opinions, see *infra* Tables 1, 2a–d.

54. See *infra* Table 1.

cited *Brown* the most, with a total of six citations each. The United States' closest neighbor to make the list, Canada, had a total of five citations to *Brown*.<sup>55</sup> With seventeen citations, these three courts make up over half the citations to *Brown*. Seven of the twelve courts issued at least two opinions citing *Brown*. Four courts are located in the Americas (for a total of ten citations). One court is located on the African continent (for a total of six citations). Six of the courts are located in Asia (for a total of fourteen citations). *Brown* was cited by the majority in nine cases,<sup>56</sup> by a judge concurring with the main opinion on fourteen occasions,<sup>57</sup> and in the dissent in seven cases.<sup>58</sup>

The four courts with the most citations comprise twenty—the vast majority—of the *Brown* citations. These courts include the Supreme Court of India, the Constitutional Court of South Africa, the Supreme Court of Canada, and the Supreme Court of Israel. The citation to *Brown* is clearly a concentrated activity that occurs amongst a few courts. What do these countries have in common? The four countries are all common law democracies, with independent judiciaries, and large English speaking populations.<sup>59</sup>

The distribution of citation to *Brown* amongst the majority, concurring, and dissenting opinions is interesting. The most citations to *Brown* happen in concurrences, where the judge is voting with the result expressed by the majority, but feels the need to write an opinion highlighting some other aspect of the case. There are instances when the concurring opinion agrees with the result, yet disagrees with the majority's reasoning. Perhaps one could argue that if we look at the total concurring and dissenting citations, that *Brown* is mostly cited when judges want to highlight some issue, modify, or disagree with the majority opinion. Looking to foreign legal precedent may be an attempt for judges to signal outside approaches to the status quo.

55. One might expect Mexico to be on the list of courts citing *Brown* due to the country's close geographic proximity to the United States. A fundamental difference, however, between the U.S. and Mexican legal systems is that Mexico uses a civil law system. Additionally, Mexican case law is difficult to locate in an electronic, searchable format.

56. See *infra* Table 2a.

57. See *infra* Table 2b.

58. See *infra* Table 2c.

59. I obtained basic facts regarding foreign countries government structure, national legal systems, and demographic information about citizens by consulting *The World Factbook*. *The World Factbook*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook> (last visited Dec. 26, 2011).

**Table 1. Courts and the number of decisions that cite *Brown***

High Court/Nation	Number of Cases Citing <i>Brown</i>
Supreme Court of Justice of the Nation of Argentina	2
High Court of Australia	1
Federal Supreme Tribunal of Brazil	1
Supreme Court of Canada	5
Constitutional Court of the Republic of Colombia	2
British Privy Council	1
Supreme Court of India	6
Supreme Court of Israel	3
Supreme Court of Malaysia	1
Court of Appeal of New Zealand <sup>60</sup>	1
Constitutional Court of South Africa	6
Supreme Court of Sri Lanka	3
Total Number of Courts: 12	Total Number of Cases: 32

**Table 2a. Majority Opinions Citing *Brown***

1. Ross v. N.B. Sch. Dist. No. 15, [1996] 1 S.C.R. 825 (Can.).
2. R. v. Jones, [1986] 2 S.C.R. 284 (Can.).
3. Corte Constitucional [C.C.] [Constitutional Court], junio 24,

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60. This data sample includes *Quilter v Att'y Gen.* [1998] 1 NZLR 196, 523 (CA), which is a decision of the Court of Appeal of New Zealand. Prior to 2004, the court of last resort on some issues was the British Privy Council, and on other issues it was the Court of Appeal. After 2004, the Supreme Court of New Zealand replaced the Privy Council and is now the highest court in the country. See *History of the Supreme Court*, COURTS N.Z., <http://www.courtsofnz.govt.nz/about/supreme/history> (last visited Dec. 26, 2011).



- 1992, Sentencia T-429/92, Gaceta de la Corte Constitucional [G.C.C.] Colom.).
4. Corte Constitucional [C.C.] [Constitutional Court], octubre 30, 2003, Sentencia T-1030/03, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).
  5. CA 6698/95 Ka'adan v. Isr. Land Admin. 54(1) PD 258 [2000], [2000] IsrLR 51 (Isr.).
  6. *Lesbian & Gay Equal. Project v. Minister of Home Affairs* 2006 (1) SA 524 (CC) (S. Afr.).
  7. *Khosa v. Minister of Soc. Dev.* 2004 (6) BCLR 569 (CC) (S. Afr.).
  8. *Minister of Health v. Treatment Action Campaign* 2002 (10) BCLR 1075 (CC) (S. Afr.).
  9. *Seneviratne v. Univ. Grants Comm'n*, [1978–79–80] 1 Sri L.R. 182 (Sri Lanka).

#### Table 2b. Concurring Opinions Citing *Brown*

1. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 19/9/2000, "González de Delgado, Cristina c. Universidad Nacional de Córdoba," La Ley [L.L.] (2000-F-128) (Arg.).
2. S.T.J., HC 82.959-7, Relator: Min. Marco Aurélio, 23.2.2006, 200, REVISTA TRIMESTRAL DE JURISPRUDÊNCIA, 1.9.2006, 795 (Braz.).
3. *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 (Can.).
4. *R. v. Drybones*, [1970] S.C.R. 282 (Can.).
5. *Golaknath v. Punjab*, (1967) 2 S.C.R. 762 (Can.).
6. *Rajasthan v. Union of India*, (1978) 1 S.C.R. 1 (India).
7. *Unni Krishnan v. Andhra Pradesh*, (1993) 1 S.C.R. 594 (India).
8. *Ahmedabad St. Xavier's Coll. Soc'y v. Gujarat*, (1975) 1 S.C.R. 173, 255 (India).
9. HCJ 1067/08 Noar KeHalacha Ass'n. v. Ministry of Educ. [2009] IsrLR 84 (Isr.).
10. HCJ 4541/94 Miller v. Minister of Def. 49(4) PD 9 [1995], [1995–6] IsrLR 178. (Isr.).
11. *Quilter v Att'y Gen.* [1998] 1 NZLR 523 (CA) (N.Z.).
12. *In re Dispute Concerning the Constitutionality of Certain Provisions of the Sch. Educ. Bill of 1995* 1996 (3) SA 165 (S. Afr.).
13. *Premachandra v. Jayawickrema*, [1994] 2 Sri L.R. 90 (Sri Lanka).
14. *Ramupillai v. Festus Perea*, [1991] 1 Sri L.R. 11 (Sri Lanka).

**Table 2c. Dissenting Opinions Citing *Brown***

1. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 26/10/2004, "Bustos, Alberto Roque c. Estadio Nacional / amparo," *Jurisprudencia Argentina* [J.A.] (2005-III-189) (Arg.).
2. *Western Australia v Ward* (2002) 213 CLR 1 (Austl.).
3. *Egan v. Canada*, [1995] 2 S.C.R. 513 (Can.).
4. *Malaysian Bar v. Gov't of Malay*. [1987] 2 MLJ 165 (Malay.).
5. *Lewis v. Att'y Gen. of Jam.*, [2001] 2 A.C. 50 (P.C.) (appeal taken from Jam.) (U.K.).
6. *Daniels v. Campbell* 2004 (5) SA 331 (CC) (S. Afr.).
7. *S v. Jordan* 2002 (11) BCLR 1117 (CC) (S. Afr.).

**Table 2d. Special Orders Citing *Brown***

1. *Ashoka Kumar Thakur v. Union of India*, (2007) 4 S.C.R. 493 (India).
2. *Election Comm'n of India v. St. Mary's Sch.*, (2008) 2 S.C.C. 208 (India).

**B. Categorizing the Use of *Brown***

There are three major ways that foreign courts have used *Brown*. First, courts have used the decision as a source of factual evidence on issues ranging from stigma to the importance of education. Secondly, *Brown* seems to provide guidance to judges interested in learning about the proper role and functioning of the judiciary. Lastly, foreign courts have used *Brown* in their deliberations of substantive legal issues with respect to equal protection.

1. *Brown* as a Form of Factual Evidence

One of the unexpected ways in which courts used *Brown* was not as legal precedent, but as evidence to establish the existence of historical, political, psychological, and sociological facts. Courts use *Brown* to highlight a key feature of democracy, to discuss the perilous effects of "separate but equal" class distinctions, and as contextual background in the discussion of the development of the law.

## a. The Importance of Education

In *Election Commission of India v. St. Mary's School*, the Supreme Court of India refused to allow the national government to take teachers from the classroom to perform non-academic activities like census work or election duty at polling places.<sup>61</sup> The Court argued that the education of children superseded the state's need to conduct elections. The Court stated that, "Education is one of the most important functions of the State. The State has a basic responsibility in regard thereto."<sup>62</sup> The court then cited the following from *Brown*:

Today, education is perhaps the most important function of the State and local governments. . . . It is required in the performance of our most basic public responsibilities, even services in the armed forces. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.<sup>63</sup>

The court used this *Brown* quote on education to illustrate that the provision of education is a core function of government.

The Indian Supreme Court referenced this same *Brown* education quote in another decision when discussing the importance of education. In *Unni Krishnan v. Andhra Pradesh*, the Court ruled that the right to education could be treated as fundamental, even though it was not present in the fundamental rights section of the Constitution.<sup>64</sup> The Court held that "[t]he right to education which is implicit in the right to life and personal liberty guaranteed by Article 21 must be construed in the light of the directive principles in Part IV of the Constitution."<sup>65</sup> Both the majority opinion written by Justice Reddy and Justice Mohan's concurring opinion quoted the *Brown* decision's statement on the educational function of the state.<sup>66</sup>

The Supreme Court of Canada used the same *Brown* quotation on the importance of education in *Ross v. New Brunswick School District No. 15*.<sup>67</sup> In *Ross*, the court emphasized not only that the provision of education is a key function of government, but that the education of children is an important government interest. The court wrote, "While the importance of education of all ages is

61. See *Election Comm'n of India v. St. Mary's School*, (2008) 2 S.C.C. 208 (India).

62. *Id.* para. 25.

63. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

64. See *Unni Krishnan v. Andhra Pradesh*, (1993) 1 S.C.R. 594 (India).

65. *Id.* at 604.

66. See *id.* at 653-54, 696.

67. *Ross v. N.B. Sch. Dist. No. 15*, [1996] 1 S.C.R. 825 (Can.).

acknowledged, of principal importance is the education of the young. As stated in *Brown*, education awakens children to the values a society hopes to foster and to nurture."<sup>68</sup>

The *Ross* decision was not the first time the Canadian Supreme Court cited the *Brown* education quote in this context. Ten years prior to *Ross*, in *R. v. Jones*, the Canadian Court relied on *Brown* to show that the government's interest in educating the young is so compelling that the government can place reasonable limits on a parent's religious freedom.<sup>69</sup> In *Jones*, the Court ruled that a government school act, which prohibited Pastor Thomas Jones from educating his children in a state unapproved schooling program located in his church basement, did not violate his freedom of religion, nor did it deprive him of liberty.<sup>70</sup> The Court, balancing individual freedom against government interest wrote:

If the appellant has an interest in, and a religious conviction that he must himself provide for the education of his children, it should not be forgotten that the state, too, has an interest in the education of its citizens. Whether one views it from an economic, social, cultural or civic point of view, the education of the young is critically important in our society. From an early period, the provinces have responded to this interest by developing schemes for compulsory education. Education is today a matter of prime concern to government everywhere. Activities in this area account for a very significant part of every provincial budget. Indeed, in modern society, education has far-reaching implications beyond the province, not only at the national, but at the international level.<sup>71</sup>

Thus the *Jones* Court also found that the *Brown* decision had application in articulating the government's interest in education.

The Supreme Court of India performed a similar balancing of the rights of individuals versus government interests. In *Ahmedabad St. Xavier's College Society v. Gujarat*,<sup>72</sup> the Indian Court relied on the *Brown* education quote to show the importance of the state provision of education. Ahmedabad St. Xavier's College provided higher education for all students (regardless of social class or creed) in a minority religious (Christian) environment.<sup>73</sup> The Court found that the government's interest in the proper administration and provision of education did not trump the religious minority's "right to establish

68. See *id.* (citation omitted).

69. *R. v. Jones*, [1986] 2 S.C.R. 284 (Can.).

70. See *id.*

71. *Id.*

72. *Ahmedabad St. Xavier's Coll. Soc'y v. Gujarat*, (1975) 1 S.C.R. 173, 255 (India).

73. *Id.*

and administer its own educational institutions where it can impart secular education in a religious atmosphere.”<sup>74</sup>

For the decisions in this section, *Brown* is not necessarily cited for a particular legal principle. None of the cases refer to *Brown* for judicial rules of equality. Instead, these courts look at *Brown* as a factual statement on the vital role of education to the development of national citizenship, and the role of the nation-state in providing education.

#### b. Existence of Stigma

Foreign courts also use *Brown* as psychological and sociological evidence that stigma results from class distinctions. In addition to providing an existential understanding of stigma, *Brown* is also used as evidence of the negative effects of stigma.

The Constitutional Court of Colombia decided a case involving the provision of special education for children with special needs.<sup>75</sup> The Court was concerned that placing children in special institutions could “sometimes lead to isolation from their peers and possibly members of the same play group or joint activities, with all the psychological implications that may arise.”<sup>76</sup> In a discussion of stigma, the Colombian Court generally referenced the American experience of racial discrimination. Specifically, however, it cited *Brown*’s consideration of the Kansas district court’s finding that educational facilities based on the separation of persons constituted a source of inequality:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.<sup>77</sup>

The Colombian Court also argued that *Brown*:

[C]onstituted a valid statement about the concrete effects of the provision of segregated educational facilities. Indeed, as most interpreters have noted, the doctrine of the Supreme Court of the United States suggests a causal chain worthy to highlight. That is to say: segregation generates feelings of inferiority that are translated

74. *Id.*

75. Corte Constitucional [C.C.] [Constitutional Court], junio 24, 1992, Sentencia T-429/92, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

76. *Id.* (Author’s translation).

77. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (alterations in original).

into a low motivation to learn and then to low results, and little success in life.<sup>78</sup>

Before ruling that special educational facilities were constitutional, the Court clearly considered the evidence from *Brown* concerning the detrimental effects of creating separate educational facilities. The Court wrote that statements in *Brown*:

[M]ust be considered when educational programs are instituted that entail the injurious effects of the separation or isolation of the children of those whose own educational experiences are from the "normal" world. One cannot negate, that, at times, special education addresses the best intentions and resolutions to effectively help children to overcome their difficulties. But the separation or isolation can generate feelings of inferiority, with all of its negative consequences.<sup>79</sup>

In *Miller v. Minister of Defense*, the Supreme Court of Israel held that budgetary and planning considerations could not justify a policy which rejected all women from aviation training.<sup>80</sup> Justice Dorner cited *Brown* in a concurring opinion, writing, "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."<sup>81</sup> Justice Dorner thus used *Brown* to highlight and discuss the socio-psychological effects of discrimination. For him, the negative stigma and feelings associated with discrimination leads to the degradation of the victims.<sup>82</sup> Justice Dorner argued that Israeli law protects individuals from degradation and insults to dignity.<sup>83</sup> Dorner, like the Colombian Court in *Sentencia No.T-429/92*, does not rely on *Brown* necessarily for a legal principle, but more for the Court's statement about the psychological and social detriments of segregation.

### c. Context and History

Foreign courts have also referred to *Brown* as part of a background story. Again, in these situations, courts were not concerned with the legal analysis performed in *Brown*, as much as they highlighted the historical significance of the U.S. Supreme Court's action. For example, in *Western Australia v. Ward*, Justice McHugh referenced *Brown* while discussing the level of criticism and

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78. C.C. Sentencia T-429/92 (Author's translation).

79. *Id.*

80. HCJ 4541/94 *Miller v. Minister of Def.* 49(4) PD 9 [1995], [1995-6] IsrLR 178 (Isr.).

81. *Id.* at 45 (Dorner, J., concurring) (citing *Brown*, 347 U.S. at 494).

82. *Id.*

83. *Id.*

abuse leveled at the High Court of Australia after it issued a controversial decision.<sup>84</sup> He stated that the criticism leveled at the Australian Court was “mild compared to that directed to the U.S. Supreme Court after its two decisions in *Brown*.”<sup>85</sup> Justice McHugh did not quote any particular text from *Brown*, nor did he mention the legal analysis in *Brown*. McHugh merely discussed the case as an event of social and historical significance, while highlighting the reaction and resistance to the decision.

The *Brown* decision was used in a similar way by the Supreme Court of India. In *Ashoka Kumar Thakur v. Union of India*,<sup>86</sup> a two judge bench panel considering a case of caste-based affirmative action contrasted the equality provisions of the Indian Constitution to those of the U.S. and South African Constitutions. The two judge panel in *Ashoka* noted that slavery was legal at the founding of the United States, and the original U.S. Constitution made no mention of equality.<sup>87</sup> The Court narrated a story about the development of U.S. constitutional equality beginning with the abolishment of slavery through the Thirteenth Amendment and the establishment of the Equal Protection Clause of the Fourteenth Amendment.<sup>88</sup> In crafting this historical narrative, the Court references *Brown*, writing that “[t]he ‘separate but equal doctrine’ was sanctified by the decision of US Supreme Court in *Plessy v. Ferguson* (163 US 537). But the formal equality was established in the U.S. after the decision in *Brown v. Board of Education* (347 US 483).”<sup>89</sup> As in the Australian case, the Indian Court referenced *Brown* as part of a larger historical narrative used to compare and contrast the present Court’s actions.

In *Seneviratne v. University Grants Commission*, where the question was one of quotas, affirmative action and equality of opportunity in university admissions, the Sri Lankan Supreme Court discussed affirmative action and the U.S. Supreme Court’s *Regents of the University of California v. Bakke* decision in conjunction with *Brown*.<sup>90</sup> The Court wrote:

It is still too early to say in what direction the future decisions of the U.S. Supreme Court will tend, but I am sure that the *Bakke* case may slow down the process of the affirmative action programmes that came into being in consequence of the water-shed decision in *Brown v. Board*

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84. *Western Australia v Ward* (2002) 213 CLR 1 (Austl.) (McHugh, J., concurring).

85. *Id.*

86. *See generally* *Ashoka Kumar Thakur v. Union of India*, 2007 4 S.C.R. 493 (India).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Seneviratne v. Univ. Grants Comm’n*, [1978–80] 1 Sri L.R. 182 (Sri Lanka) (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

of Education in 1954. Brown's case declared that racial segregation was unlawful. Thereafter, all forms of racial discrimination came to be prohibited by law.<sup>91</sup>

According to the Sri Lankan Court, affirmative action programs were enacted to achieve true equality and to realize the theoretical equality articulated in a case like *Brown*.<sup>92</sup> The Court references *Brown* to help contextualize a broader comparative history of equality and affirmative action.

In *Quilter v Attorney General*,<sup>93</sup> three same-sex couples, claiming both sex and sexual orientation discrimination, challenged the New Zealand government's denial of marriage licenses. The New Zealand Court of Appeal held that New Zealand's Marriage Act of 1955 applied solely to marriage between a man and a woman, and that this application did not constitute a violation of the New Zealand Bill of Rights Act of 1990, or the Human Rights Act of 1993.<sup>94</sup>

In a concurring opinion, Justice Keith placed § 19 of the New Zealand Bill of Rights in a comparative foreign and international law context.<sup>95</sup> First, Keith noted that while § 19 has its origins in the equality provisions of both the International Covenant on Civil and Political Rights and the Canadian Charter, the section has a narrower scope.<sup>96</sup> He then contrasted § 19 with American jurisprudence, and argued that it did not offer

the similar guarantees in the 14th Amendment to the United States Constitution apparently had. United States jurisprudence, as already noted, grades the grounds of discrimination. Race is a "suspect" class and laws based on race are subject to the strictest scrutiny. That appears from the great decision of 1954 requiring the desegregation of public schools and the decision overturning laws prohibiting interracial marriage given over 20 years later.<sup>97</sup>

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91. *Id.* at 217.

92. The *Seneviratne* decision notes that in order to ensure true equality, one must distinguish between equality in fact and mere theoretical equality. The Court states that it is "necessary to give effect not only to the letter of the law, but also to its spirit." *Id.*

93. *Quilter v Att'y Gen.* [1998] 1 NZLR 523 (CA) (N.Z.).

94. *Id.*

95. *Id.* at 566. Section 19 of the New Zealand Bill of Rights states that every person has a right to be free from discrimination on the grounds articulated in the Human Rights Act of 1993. New Zealand Bill of Rights Act 1990, as substituted by section 145 of the Human Rights Act 1993 (N.Z.). The Human Rights Act of 1993 stipulates the prohibited grounds of discrimination—which includes sex and sexual orientation. See *Quilter* [1998] NZLR at 530.

96. *Quilter* [1998] 1 NZLR at 565–67.

97. *Id.* at 566 (citations omitted).



Justice Keith used *Brown* as a form of factual evidence.<sup>98</sup> Not only did Keith note the landmark status of *Brown*, but also presented *Brown*—along with American equal protection law generally, and Canadian and international law—as having a much broader reach than § 19. Keith used *Brown* as a contrast to highlight the distinctiveness of New Zealand law and to place the New Zealand Bill of Rights into context.

## 2. *Brown* as a Guide to Understanding the Role of the Judiciary

Many courts used *Brown* as a source to learn about the norms of judicial decision making, the appropriate role of the judiciary, and how courts should behave in relation to other branches of government. Courts looked to *Brown* to understand how to deal with and decide political questions, when to overturn previous decisions, and the appropriateness of judicial remedy.

### a. Stare Decisis

The doctrine of stare decisis is a central tenet in common law. When translated from Latin, it means “to stand by things decided.” Courts rely on stare decisis when the question presented to the court was previously brought before the court and decided. In this scenario, courts will usually follow the previous decision. However, there are exceptions to this general rule. When the Supreme Court of the United States decided *Brown*, it ruled that the state practice of maintaining “separate but equal” facilities was a constitutional violation.<sup>99</sup> The issue on the interpretation of the equal protection clause of the Fourteenth Amendment, however, had already been decided over sixty years before *Brown*, in the infamous *Plessy v. Ferguson* decision that acknowledged “separate but equal” as acceptable.<sup>100</sup> The *Brown* court broke with stare decisis and overturned *Plessy*. Foreign courts have referenced *Brown* when deciding whether to overturn previous decisions.

In *Daniels v. Campbell*, the Constitutional Court of South Africa found that the exclusion of spouses married under Muslim rites from inheritance claims was unconstitutional.<sup>101</sup> For purposes of inheritance, South African intestate laws only recognized spouses in a

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98. Justice Keith’s use of *Brown* falls into two thematic categories in this Article. In addition to using *Brown* as factual evidence, Keith also uses the decision substantively with respect to understanding equal protection doctrine. For a discussion of this category, and an overview of some of the cases that fit this theme, see *infra* Part III.B.3.

99. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

100. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

101. *Daniels v. Campbell* 2004 (5) SA 331 (CC) (S. Afr.).

marriage performed under South African law, and refused to recognize marriages joined solely under Muslim custom. The *Daniels* majority afforded a wider interpretation to the meaning of the word “spouse.”<sup>102</sup>

Justice Moseneke, dissenting, argued that by using a broad interpretation of “spouse,” the majority opinion went against precedent.<sup>103</sup> The dissent cited earlier opinions of the Constitutional Court that defined “spouse” more narrowly.<sup>104</sup> Justice Moseneke also discussed the doctrine of precedent and how it “imposes a general obligation on a court to follow legal rulings in previous judicial decisions.”<sup>105</sup> Moseneke observed that the precedent system of *stare decisis* is followed by other constitutional courts, including the United States in *Brown*.<sup>106</sup> He wrote:

The standard of the US Supreme Court for overriding its own previous judicial decisions is high. In *Brown v. Board of Education*, it was held that where the philosophy of the past does not reflect the development of the present, the Courts will be permitted to move away from its own decisions.<sup>107</sup>

Justice Moseneke believed that the *Brown* decision illustrated that before a previous decision can be overruled, a high standard must be met where the norms of the past are no longer relevant in contemporary society. Moseneke argued that the high standard of *stare decisis* had not been met, and therefore the definition of marriage should maintain its narrow definition as outlined in previous court decisions.<sup>108</sup>

The doctrine of *stare decisis* and *Brown* both arose in *Golaknath v. Punjab*, where the Supreme Court of India held that Parliament had no power to amend the Constitution so as to abridge or take away fundamental rights.<sup>109</sup> The *Golaknath* decision overruled the Court’s

102. See *id.* paras. 21–25 (noting that concerns about “constitutional values of equality, tolerance and respect” warrant a broader interpretation).

103. *Id.* paras. 68–76 (Moseneke, J., dissenting).

104. *Id.*

105. *Id.* para. 94.

106. *Id.* para. 96 n.64.

107. *Id.* (citations omitted). In the same footnote, Moseneke cited two other Rehnquist Court cases to highlight the importance of precedent: *Payne v. Tennessee*, 501 U.S. 808 (1991) and *Dickerson v. United States*, 530 U.S. 428 (2000). The U.S. Supreme Court was not Moseneke’s sole citation to foreign authority in support of *stare decisis*. He also cited to the Canadian Supreme Court.

108. *Daniels* 1994 (5) SA 331 (Moseneke, J., dissenting).

109. *Golaknath v. Punjab* (1967) 2 S.C.R. 762 (India). *Golaknath* concerned legislation passed in India that allowed for the redistribution of wealth from the landlord class. Some state courts ruled that this legislation violated fundamental rights to property protected by the Indian Constitution. The Indian Parliament then amended the Indian Constitution in order to allow them to abridge the fundamental rights and redistribute wealth. The *Golaknath* decision was later overruled by *Bharati*

previous decisions in *Shankari Prasad v. Union of India* and *Sajjan Singh v. Rajasthan*, where it ruled that Parliament had the power to limit or revoke fundamental rights provisions of the Constitution through the amendment process.<sup>110</sup> Justice Hidayatullah wrote in a concurring opinion that he would overrule precedents that allowed Parliament to abridge constitutional fundamental rights by amending the Constitution.<sup>111</sup> He wrote:

In a matter of the interpretation of the Constitution this Court must, look at the functioning of the Constitution as a whole. The rules of *res indicate [sic]*<sup>112</sup> and *stare decisis* are not, always appropriate in interpreting a Constitution . . . . The sanctity of a former judgment is for the matter then decided. In *Plessy v. Fergusson [sic]*, Harlan, J. alone, dissented against the separate but equal doctrine uttering the memorable words that there was no caste and that the Constitution of the United States was colour blind. This dissent made some Southern Senators to oppose his grandson (Mr. Justice John Marshall Harlan) in 1954. It took fifty-eight years for the words of Harlan, J.'s lone dissent (8 to 1) to become, the law of the united states at least in respect of segregation in the public schools . . . .<sup>113</sup>

In this passage, Hidayatullah analogized Parliament's amendments and the Indian Supreme Court's previous cases allowing for a taking and redistribution of landlords' property to a deprivation of rights imposed by U.S. state legislatures and the *Plessy* decision that permitted discrimination based on race. He cited to the *Brown* Court's overruling of the *Plessy* decision as a proper illustration of a situation when it is acceptable for a court to depart from the doctrine of *stare decisis*. Hidayatullah added that:

The history of freedom is not only how freedom is achieved but how it is preserved. I am of opinion that an attempt to abridge or take away Fundamental Rights by a constituted Parliament even through an amendment of the Constitution can be declared void. This Court has the power and jurisdiction to make the declaration. I dissent from the opposite view expressed in *Sajjan Singh's* case and I overrule that decision.<sup>114</sup>

A case before the British Privy Council provides an excellent example of how a judge on the Court used *Brown* as a way of

*v. Kerala*, A.I.R. 1973 S.C. 1461 (India). For an overview of the *Kesavananda* ruling, see David Gwynn Morgan, *The Indian "Essential Features" Case*, 30 INT'L & COMP. L.Q. 307 (1981).

110. See *Sajjan Singh v. Rajasthan*, (1965) 1 S.C.R. 933 (India); *Shankari Prasad v. Union of India*, A.I.R. 1951 S.C. 458 (India).

111. *Golaknath*, (1967) 2 S.C.R. at 855 (Hidayatullah, J., concurring) (citations omitted) (internal quotation marks omitted).

112. Given the context of the passage, I believe Justice Hidayatullah was referring to *res judicata*, which is a Latin term for "a matter already judged." BLACK'S LAW DICTIONARY (9th ed. 2009).

113. *Golaknath*, (1967) 2 S.C.R. at 897 (Hidayatullah, J., concurring) (citations omitted).

114. *Id.* at 898 (footnote omitted).

articulating and understanding the proper role of a common law appellate court. In *Lewis v. Attorney General of Jamaica*, the Privy Council set aside executions of men, partially on the grounds that a lengthy death row (the period between sentencing and execution) is a violation of an individual's right to be free from cruel and inhumane treatment.<sup>115</sup> Lord Hoffman, in dissent, argued that the Privy Council's decision was a departure from *stare decisis* and the Council's previous precedents.<sup>116</sup> He acknowledged that the Privy Council had the power to depart from earlier decisions, but stressed that there are principles that should guide these departures.<sup>117</sup> Lord Hoffman wrote:

Some assistance can be obtained from the practice of the Supreme Court of the United States. That court has never considered itself rigidly bound by precedent. In *Brown v. Board of Education of Topeka*, it famously overruled its previous decision that racial segregation was lawful. But in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court discussed the grounds upon which it would depart from precedent and why it would not overrule its equally controversial decision on abortion in *Roe v. Wade*.<sup>118</sup>

Lord Hoffman used *Brown* and *Casey* as polarized examples of when to depart and when to follow the doctrine of *stare decisis* in controversial constitutional decisions. He believed that the instant case of Neville Lewis should have been guided more by the *Casey* Court's willingness to modify—as opposed to overturn—the *Roe* decision. Lord Hoffman cited the *Brown* decision as an example of the ability of a common law judiciary to depart from the principle of *stare decisis*. Hoffman did not use *Brown* as a direct example of a case to follow, but more as an example of the power that courts can, but should not necessarily, use.

#### b. Political Questions

There are certain “political questions” that are thought to be outside the scope of judicial review, and therefore courts should refrain from deciding them. A court's avoidance of government questions that lie entirely within the discretion of the “political” branches of government (i.e., the Executive and Legislative Branches) is a principle of the political question doctrine.<sup>119</sup>

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115. *Lewis v. Att'y Gen. of Jam.*, [2001] 2 A.C. 50 (P.C.) (appeal taken from Jam.) (U.K.).

116. *Id.* at 88 (Lord Hoffman dissenting).

117. *Id.* at 89.

118. *Id.*

119. THE SUPREME COURT A TO Z 327 (Elder Witt ed., 2d ed. 1998).

In *Brown*, the Court dealt with an extremely heated political issue—government sponsored racial segregation—that was within the direct discretion of both the President and Congress. However, the *Brown* decision did not discuss whether evaluating government segregation was within the scope of judicial review, and therefore did not analyze whether the political question doctrine barred the court from deciding the case. There has been significant legal discussion on whether the issue of government-sponsored segregation was a political question, as evidenced by Alexander Bickel's defense of the Court's lack of discussion of the doctrine.<sup>120</sup>

Courts around the world also question their judicial scope, and whether the questions brought before them are of an entirely political nature. While the *Brown* decision does not analyze the political question doctrine, the cases in this discussion cite to *Brown* in their own discussions of proper judicial scope.<sup>121</sup>

In 1977, the Janata Party government took political action in India and dissolved a number of government assemblies.<sup>122</sup> In *Rajasthan v. Union of India*, the Supreme Court of India upheld the Janata Party's actions.<sup>123</sup> While there was no majority opinion, two justices cited *Brown* while considering whether the issue was a political question that went beyond the review of the Indian Supreme Court. In separate opinions, Justice Bhagwati argued that the political question doctrine prohibits judicial review of an issue that "is purely a political question not involving determination of any legal or constitutional right or obligation."<sup>124</sup> However Bhagwati distinguished issues that were purely political questions from issues that have a political complexion or color. Justice Bhagwati wrote, "[M]erely because a question has a political complexion that by itself is no ground for the Court to shrink from performing its duty under the Constitution, if it raises an issue for constitutional determination."<sup>125</sup>

Justice Bhagwati cited to *Brown*, and a number of other U.S. Supreme Court cases to support the broad proposition that "[i]t is necessary to assert in the clearest terms particularly in the context of

120. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 183–98 (1962). For a historical perspective on the political question doctrine, see Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441 (2004).

121. While analysis of the political question doctrine is absent in the *Brown* decision, it was a key issue deliberated in oral reargument. See Transcript of Oral Argument at 11, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No. 1), reprinted in 49A LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 556 (Philip B. Kurland & Gerhard Casper eds., 1975).

122. For a brief discussion of these events, see BRIJ KISHORE SHARMA, *INTRODUCTION TO THE CONSTITUTION OF INDIA* 325 (3d ed. 2005).

123. *Rajasthan v. Union of India*, (1978) 1 S.C.R. 1 (India).

124. *Id.* at 10 (Bhagwati & Gupta, JJ., concurring).

125. *Id.* at 11.

recent history that the Constitution is *suprema lex*, the paramount law of the land and there is no department or branch of Government above or beyond it.”<sup>126</sup>

In a separate opinion, Justice Bhagwati elaborated on the contrast between a question of pure politics and a question with a political complexion:

It was pointed out by Mr. Justice Brennan in the Opinion of the Court delivered by him in *Baker v. Carr*, an apoch [sic] making decision in American constitutional history, that “the mere fact that the suit seeks protection, of a political right does not mean that it presents a political question.” This was put in more emphatic terms in *Nixon v. Herndon* by saying that such an objection “is little more than a play upon words.” The, decision in *Baker v. Carr*, was indeed a striking advance in the field of constitutional law in the United States. Even before *Baker v. Carr*, the courts in the United States were dealing with a host of questions ‘political’ in ordinary comprehension. Even the desegregation decision of the Supreme Court in *Brown v. Board of Education* had a clearly political complexion.<sup>127</sup>

In this quote, Bhagwati used *Brown* as evidence of a case that did not evade review of the U.S. Supreme Court, despite its embodiment of an issue of considerable political importance. Bhagwati clearly classified *Brown* as a decision with a political complexion. For Bhagwati, while *Brown* decided a question of political importance, the case also touched on individual rights that required adjudication. For Bhagwati, having a political “complexion” was not enough for an issue to escape judicial review.

*Premachandra v. Jayawickrema* involved challenges to the appointments of chief ministers by two governors of two different Sri Lankan provinces.<sup>128</sup> The Supreme Court of Sri Lanka had to decide whether the appointment of an executive branch officer was a justiciable issue, or whether executive appointments were beyond the court’s review due to the political question doctrine. The Sri Lankan Court agreed with Justice Bhagwati’s opinion in the Indian Supreme Court case of *Rajasthan v. Union of India*.<sup>129</sup> The *Premachandra* Court quotes Bhagwati’s decision which quotes *Brown* and analyzes the political question doctrine.<sup>130</sup> The *Premachandra* Court agreed

126. *Id.*

127. *Id.* at 80.

128. *Premachandra v. Jayawickrema*, [1994] 2 Sri L.R. 90, 91 (Sri Lanka).

129. *See id.* at 109 (citing *Rajasthan*, (1978) 1 S.C.R. at 79–80). This case sample is unusual because the citation to *Brown* is a citation within a citation. While this is not an instance of a direct citation to *Brown*, I include the *Premachandra* decision in my sample because *Brown* is quoted indirectly, and the decision lists *Brown* as a “case referred to.”

130. *Id.* at 109–10.

with *Rajasthan* that a court should not decide a purely political question, and ultimately held:

The Governor's selection of a person for appointment as Chief Minister... may require the consideration of political factors; nevertheless it is not an act which is purely political in nature; it involves the determination of legal rights, flowing from constitutional provisions, concerning the allocation and exercise of powers (relating to the administration of the affairs of the Province) by the elected representatives of the people of the Province. The appointment of a Chief Minister is justiciable, and there is no self-imposed rule of judicial restraint which inhibits judicial review.<sup>131</sup>

The decision followed *Rajasthan* and *Brown* (indirectly) and ruled that the fact that an issue has a political complexion does not make it nonjusticiable.

Another case surrounding the political question doctrine took place in Canada, and involved issues of national security. In July 1983, the Canadian government began allowing the United States to perform cruise missile testing in Canada.<sup>132</sup> Opposed to the performance of these cruise missile tests, an activist organization called Operation Dismantle filed a § 7 Canadian Charter of Rights and Freedoms claim against the government.<sup>133</sup> Operation Dismantle believed that the Canadian policy of allowing the missile testing would increase the risk of nuclear altercation and increase the likelihood of an attack on Canada.<sup>134</sup>

In *Operation Dismantle v. The Queen*, the Supreme Court of Canada dismissed Operation Dismantle's § 7 Charter appeal.<sup>135</sup> One of the government's arguments was that Canadian policy allowing cruise missile testing could not be reviewed before a court because the question of whether it increases or decreases security is inherently nonjusticiable because it involves moral or political considerations not within the purview of the court.<sup>136</sup> While the majority opinion did not address the issue, Justice Wilson, in a concurring opinion, addressed the argument specifically. In order to understand judicial review of political considerations, she relied on the American law principle of

131. *Id.* at 116.

132. *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441. para. 42 (Can.) (Wilson, J., concurring).

133. *Id.* Section 7 of the Canadian Charter states that: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

134. *Operation Dismantle*, [1985] 1 S.C.R. 441 para. 42 (Wilson, J., concurring).

135. *Id.* para. 110 (majority opinion).

136. *Id.* para. 51 (Wilson, J., concurring) (disagreeing with the conclusion of two judges from the Federal Court of Appeal that the issues involved in the case were inherently nonjusticiable).

the political question doctrine.<sup>137</sup> In her review of the doctrine, Justice Wilson recounted former U.S. Supreme Court Justice William Brennan's rationale and reasoning for the doctrine, and notes that American courts are especially deferential to the Executive in the area of foreign affairs.<sup>138</sup>

However, Justice Wilson noted that while American law recognized the political question doctrine, there were a number of cases—including *Brown*—in American history where the U.S. Supreme Court made an exception to the political question doctrine:

In cases from *Marbury v. Madison*, to *United States v. Nixon*, the Court has not allowed the "respect due coordinate branches of government" to prevent it from rendering decisions highly embarrassing to those holding executive or legislative office. In *Baker v. Carr* itself, Frankfurter J., in dissent, expressed concern that the judiciary could not find manageable standards for the problems presented by the reapportionment of political districts. Indeed, some would say that the enforcement of the desegregation decision in *Brown v. Board of Education of Topeka*, gave rise to similar problems of judicial unmanageability. Yet American courts have ventured into these areas undeterred.<sup>139</sup>

Justice Wilson used *Brown* to put the American law principle of the political question doctrine into context. As she gave a detailed overview of the political question doctrine, she used *Brown* as a counterexample of an instance when a question of great political importance did not escape judicial review. Justice Wilson did not use *Brown* as an example of what factors need to be present in order to trigger the political question doctrine. Instead, after she described the doctrine, she argued that it has little grounding in Canadian law. She argued that § 1 of the Charter,<sup>140</sup> which she described as a "uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that come before it," rendered the political question doctrine unnecessary and permitted "the Court to deal with what might be termed 'prudential' considerations in a principled way without renouncing its constitutional and mandated responsibility for judicial review."<sup>141</sup>

137. *Id.* para. 55.

138. *Id.*

139. *Id.* (citations omitted).

140. Section 1 of the Canadian Charter of Rights and Freedoms "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.). Justice Wilson states that through its reference to a free and democratic society, that this section embodies "essential features of our constitution including the separation of powers, responsible government and the rule of law." *Operation Dismantle*, [1985] 1 S.C.R. 441 para. 104 (Wilson, J., concurring).

141. *Operation Dismantle*, [1985] 1 S.C.R. 441 para. 104 (Wilson, J., concurring).



The next case bridges the current conversation on political questions with the next section on remedies. In *Sentencia No. T-1030/03*, prisoners in the country of Colombia argued that the prison living conditions offered by the government violated their fundamental rights.<sup>142</sup> Some of the adverse treatments included mandatory head shavings and the lack of hot water.<sup>143</sup> The Constitutional Court of Colombia ruled that there are certain fundamental rights that the government cannot infringe, even when the individual is a prisoner.<sup>144</sup> The Court cited *Brown II* when it wrote:

In return, the guarantee of the objective dimension of fundamental rights is found in the “structural remedies whose history dates back to the famous jurisprudential case *Brown II*, concerning the structural situation of racial discrimination that was presented in U.S. public schools at the beginning of the sixties.”<sup>145</sup>

The Colombian Court noted that there is “a deep doctrinal and jurisprudential controversy” rooted in American history, “that arose from the late fifties in the United States between advocates of the ‘political question doctrine’ and those advocates of ‘structural remedies.’”<sup>146</sup> In this case, *Brown II* is used as an example of a structural remedy, and the Court chose to think about prisoner’s rights less as a political question, and more as an issue of violated rights in need of remedial action from the Court.

All of the foreign court cases citing to *Brown* in the context of the political question doctrine do so to help clarify an American legal principle. The *Rajasthan*, *Premachandra*, *Operation Dismantle*, and Colombian decisions use *Brown* as a counterexample to the political question doctrine, and as evidence of the U.S. Supreme Court reviewing an issue of great political importance. While the *Brown* decision does not perform an analysis of the political question doctrine, foreign justices use *Brown* in order to better understand the role of courts when deciding political questions.

### c. Remedy and Relief

A key role of a judiciary is to provide some form of relief for wronged individuals. A court provides a remedy as a means of enforcing a right, usually in civil litigation. Judicial remedy generally falls within two categories: legal remedy (monetary damages), and

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142. Corte Constitucional [C.C.] [Constitutional Court], octubre 30, 2003, *Sentencia T-1030/03*, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

143. *Id.*

144. *Id.*

145. *Id.* (citing *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955)) (Author’s translation).

146. *Id.* (Author’s translation).

equitable remedy (injunctive relief).<sup>147</sup> Some foreign courts have found *Brown* useful in understanding the judiciary's role in crafting remedy and providing relief.

In *Bustos*, four depositors sought an injunction against the National Central Bank after Argentina's federal government issued emergency rules between 2001 and 2002 instituting pesification (the compulsory conversion of U.S. dollar-denominated bank deposits into Argentine pesos at an official exchange rate).<sup>148</sup> The Supreme Court of Argentina validated these emergency rules on financial accounts and found the federal government's pesification policy to be constitutional.<sup>149</sup>

In a lone dissent, Minister Fayt wrote that the depositors' rights were clearly violated and that the emergency rules should be declared unconstitutional.<sup>150</sup> But after recognizing the constitutional violation, Fayt also took into account the grave crisis affecting the national economy.<sup>151</sup> He acknowledged that a remedy would have to both take note of the present crises and implement the judicial decision of unconstitutionality so as to not simultaneously (and paradoxically) restore and frustrate the rights that had been violated.<sup>152</sup> In his discussion of judicial remedy, Minister Fayt compared a number of foreign courts; some very different from Argentina (Spain, Italy, German, and Colombia) and one that was closer to Argentina's tradition (the United States).<sup>153</sup> Fayt's discussion of the United States centered entirely on the remedy formulated in *Brown II*. Quoting *Brown II*, he wrote:

[A]fter declaring that the racial discrimination in public education was unconstitutional, [the *Brown II* court] indicated that "full implementation of these constitutional principles may require solution of varied local school problems." "The courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling" and that "Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner." "The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school

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147. 1 WILLIAM BLACKSTONE, COMMENTARIES \*22-23.

148. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 26/10/2004, "Bustos, Alberto Roque c. Estadio Nacional / amparo," *Jurisprudencia Argentina* [J.A.] (2005-III-189) (Arg.) (Belluscio, Maqueda, Boggiano, Zaffaroni & de Holasco, JJ., concurring).

149. *Id.*

150. *Id.* para. 32 (Fayt, J., dissenting).

151. *Id.* para. 27.

152. *Id.*

153. *Id.* paras. 28-29.

plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system."<sup>154</sup>

Minister Fayt referred to *Brown II* in a comparative legal context (along with other foreign courts' practices) in order to learn more about the role of courts in mandating relief for individuals. He used *Brown II* to show that in order for a judicial remedy to avoid causing political or economic chaos, a court must take into account how a finding of unconstitutionality will affect a socially or economically sensitive situation.<sup>155</sup>

In South Africa, the Treatment Action Campaign (TAC) wanted the government to provide and allow for the distribution of Nevirapine—an anti-retroviral drug—to HIV-positive pregnant women in order to prevent female-to-fetus HIV transmission.<sup>156</sup> In *Minister of Health v. Treatment Action Campaign*, the TAC argued before the Constitutional Court of South Africa that the absence of these programs and provisions constituted a violation of the constitutional right to have access to adequate health care.<sup>157</sup> The Constitutional Court ordered that Nevirapine<sup>158</sup> be made available to pregnant HIV-positive women.<sup>159</sup> In asserting that its power went beyond offering mere declaratory relief,<sup>160</sup> the Court examined foreign case law. The Court began its survey of foreign law with *Brown*:

An examination of the jurisprudence of foreign jurisdictions on the question of remedies shows that courts in other countries also accept that it may be appropriate, depending on the circumstances of the particular case, to issue injunctive relief against the state. In the United States, for example, frequent use has been made of the structural injunction—a form of supervisory jurisdiction exercised by the courts over a government agency or institution. Most famously, the structural injunction was used in the case of *Brown v Board of Education* where the US Supreme Court held that lower courts would need to retain jurisdiction of *Brown* and similar cases. These lower courts would have the power to determine how much time was

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154. *Id.* para. 29 (Author's translation). I should note that Fayt translated the *Brown II* quotes into Spanish.

155. *Id.* para. 28.

156. *Minister of Health v. Treatment Action Campaign* 2002 (10) BCLR 1075 (CC) (S. Afr.).

157. *Id.* paras. 3–4.

158. The Constitutional Court describes Nevirapine as an antiretroviral drug used in the treatment of HIV/AIDS. The drug is effective in curbing the transmission of HIV between mother and child at birth. *See id.* para. 2 n.3, para. 12.

159. *Id.* para. 135.

160. *Id.* para. 106.

necessary for the school board to achieve full compliance with the Court's decision and would also be able to consider the adequacy of any plan proposed by the school boards "to effectuate a transition to a racially nondiscriminatory school system."<sup>161</sup>

After conducting its survey of foreign courts on the issue of injunctive relief,<sup>162</sup> the Constitutional Court noted that while the various courts adopted different methods on when to grant injunctive relief, all of the jurisdictions accepted that the separation of powers doctrine does not prohibit courts from making use of such remedies.<sup>163</sup>

### 3. *Brown* as a Source of Substantive Law: Equal Protection

Most who think about courts citing foreign authority are likely to think that a court is referencing a foreign court's position on some substantive or doctrinal legal issue. The *Brown* decision is largely known for its substantive ruling on equality and its stance against the doctrine of "separate but equal." The foreign case that most closely resembles the facts and ruling in *Brown* can be found in *Noar KeHalacha Association v. Ministry of Education*.<sup>164</sup> In *Noar KeHalacha*, a state licensed and subsidized girls' school created a new Hassidic track alongside a general track.<sup>165</sup> The tracks were completely separate; housed in separate wings, played in separate play grounds, and wore different uniforms.<sup>166</sup> An investigation found that 73 percent of the girls in the Hassidic track were of Ashkenazi origin, and 27 percent were of Oriental or Sephardic origin.<sup>167</sup> Twenty-three percent of the general track was comprised of students of Ashkenazi origin.<sup>168</sup>

The Supreme Court of Israel held that the separation and differentiation of the two tracks was discriminatory. In a concurring opinion, Justice Melcer noted the similarity between the instant case and *Brown*:

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161. *Id.* para. 107 (some citations omitted) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300–01 (1955)).

162. In addition to looking at the Supreme Court of the United States in *Brown*, 347 U.S. 483 (1954), and *Swann v. Charlotte-Mecklenburg*, 402 U.S. 1 (1971), the South African Constitutional Court also cited Indian, German, Canadian, and British case law on the question of injunctive relief. *Id.* paras. 107–11.

163. *Id.* para. 112.

164. HCJ 1067/08 *Noar KeHalacha Ass'n. v. Ministry of Educ.* [2009] IsrLR 84 (Isr.).

165. *Id.* at 89.

166. *Id.* at 88–90.

167. *Id.* at 90. Students of Ashkenazi origin were from families of Northern European origin, whereas students of Oriental or Sephardic origin were from families of Middle Eastern or North African ancestry.

168. *Id.*

[T]he famous judgment of the Supreme Court of the United States in *Brown v. Board of Education of Topeka*, which gave rise to questions that are to some extent similar to those that arise in our case. *Brown v. Board of Education of Topeka* rejected the doctrine that was previously accepted in American law with regard to “separate but equal” education.

....

The facts and the aforementioned American case (which was based on the right to equality that is enshrined in the Fourteenth Amendment of the United States Constitution, on the ground of inferiority and humiliation, which is more similar to the value of protecting dignity in Israel in the sense presented above) have as noted a certain similarity to the facts before us on the question of segregation, since in the reply to the petition it was also implied that it is supposedly possible to have equality despite the separation between the tracks, and that this does not constitute ethnic discrimination.<sup>169</sup>

Justice Melcer’s concurrence analogizes the facts of *Brown* to the instant case, and argues therefore that the *Brown* ruling should apply in *Noar KeHalacha*. His use of *Brown* is an example of classic diffusion because the facts of the two cases are so similar (both cases deal with ethnic or racial segregation in the classroom setting). Finding this commonality, Justice Melcer applied the same rationale found in *Brown* to the *Noar KeHalacha* concurrence.

In *Ka’adan v. Israel Land Administration*, a government-affiliated cooperative society denied an Arab couple’s request to live on land that was allocated for the exclusive establishment of a Jewish settlement.<sup>170</sup> The couple petitioned the Supreme Court of Israel, which ruled that the principle of equality applied to all actions of government authority, and that the cooperative society’s exclusion of non-Jews constituted unlawful discrimination on the basis of nationality.<sup>171</sup>

The government-affiliated cooperative defended its action by arguing that the establishment of an exclusive Jewish settlement was not discriminatory, because the Israel Land Administration was prepared to allocate land in order to establish an exclusive Arab settlement.<sup>172</sup> Referencing *Brown*, the Court responded:

Their contention, in its legal garb, is that treatment which is separate but equal amounts to equal treatment. It is well known that this argument was raised in the 1950’s in the United States, regarding the United States’ educational policy that provided separate education for white students and African-American students. Addressing that policy’s constitutionality, the United States Supreme Court held (in *Brown v.*

169. *Id.* at 121–22 (Melcer, J., concurring).

170. HCJ 6698/95 *Ka’adan v. Israel Land Admin.*, 54(1) PD 258 [2000], [2000] IsrLR 51 (Isr.).

171. *Id.* at 81.

172. *See id.* at 58–59 (“[R]espondents . . . do not contest the right of Israeli Arabs to live on state lands and enjoy full equality. Rather, they hold that there is no place for mixed communal settlements against the will of residents of the settlements.”).

*Board of Education of Topeka*) that a "separate but equal" policy is "inherently unequal." At the core of this approach is the notion that separation conveys an affront to a minority group that is excluded, sharpens the difference between it and others, and cements feelings of social inferiority.<sup>173</sup>

In a case before the Supreme Court of Canada, Joseph Drybones was convicted of violating § 94(b) of the Indian Act, which prohibited "Indians" from being intoxicated in any location outside of a reservation.<sup>174</sup> The law did not apply to non-native peoples.<sup>175</sup> In a divided judgment, the Canadian Supreme Court in *R. v. Drybones* rendered the Indian Act inoperative because it infringed the "equality before the law" clause of the Canadian Bill of Rights.<sup>176</sup> The Court concluded that the law punished Drybones differently from other Canadians based on his race.<sup>177</sup>

In a concurring opinion, Justice Hall used *Brown* to attack the argument that the Indian Act did not violate the Canadian Bill of Rights because the law treated all Indians equally.<sup>178</sup> Justice Hall analogized this argument to the "separate but equal" doctrine expressed in *Plessy*:

The social situations in *Brown v. Board of Education* and in the instant case are, of course, very different, but the basic philosophic concept is the same. The Canadian Bill of Rights is not fulfilled if it merely equates Indians with Indians in terms of equality before the law, but can have validity and meaning only when, subject to the single exception set out in s. 2, it is seen to repudiate discrimination in every law of Canada by reason of race, national origin, colour, religion or sex in respect of the human rights and fundamental freedoms set out in s. 1 in whatever way that discrimination may manifest itself, not only as between Indian and Indian, but as between all Canadians, whether Indian or non-Indian.<sup>179</sup>

*Brown* is used to discuss the principle of equality before the law, and Justice Hall's concurrence applies the *Brown* approach—as manifested in the United States—to racial and ethnic equality.

While the *Noar KeHalacha*, *Ka'adan*, and *Drybones* decisions interpreted *Brown* the same way an American court would interpret the decision, some foreign courts that cite *Brown* go beyond copying

173. *Id.* at 72 (citation omitted).

174. *R. v. Drybones*, [1970] S.C.R. 282, 282 (Can.).

175. *Id.* at 289–90.

176. *Id.* at 298.

177. *Id.*

178. *Id.* at 299 (Hall, J., concurring). Hall is specifically addressing an earlier, similar case, *R. v. Gonzales*, [1962] 32 D.L.R. (2d) 290 (Can.), that dealt with Indian drug possession outside of a reservation, which is outlawed by the Indian Act. The court in *Gonzales* argued that there was no violation of the Canadian Bill of Rights because all Indians were treated equally. *Id.*

179. *Drybones*, [1970] S.C.R. at 300 (Hall, J., concurring).

an American equal protection interpretation of the decision and infuse their own approach and meaning. An example of this is found in the following South African case.

The Constitutional Court of South Africa in *Khosa v. Minister of Social Development* ruled that the government could not limit access to social security support and benefits solely to national citizens.<sup>180</sup> In *Khosa*, permanent legal residents challenged legislation that limited entitlement to social grants for children of non-South African citizens and elderly non-citizens.

The Court held that the Constitution gave “everyone” the right to social security benefits—not only citizens, but also those residing in the country legally.<sup>181</sup> The majority opinion argued that permanent residents are “a vulnerable group in society . . . worthy of constitutional protection.”<sup>182</sup> The Court continued, holding that denying permanent residents access to social security is “sanctioned unequal treatment” that “has a strong stigmatising effect.”<sup>183</sup> To highlight this position, the *Khosa* Court relied on *Brown*:

To use the terminology from *Plessy v Ferguson* and *Brown v Board of Education*, the exclusion of foreigners from state welfare programmes not only operates to stamp them with a “badge of inferiority,” but marginalises them by sending a message of second-class status in the communities in which they reside.<sup>184</sup>

The *Khosa* decision may appear to be a classic case of *Brown*’s rule simply being applied to the instant facts. However, while *Khosa* used the rationale in *Brown*, the difference between *Khosa* and *Brown*, in a specific sense, is extreme.<sup>185</sup> The *Khosa* decision’s use of *Brown* is somewhat of a departure from the *Noar KeHalacha*, *Ka’adan* and *Drybones* decisions. The *Brown* decision analyzes disparate treatment in the area of government-provided education on the grounds of one’s ethnicity or race. The courts in *Noar KeHalacha* and *Drybones* both dealt with factual issues similar to those in *Brown*—specifically ethnicity in the scope of education and racially discriminatory criminal laws, respectively. However, the *Khosa* ruling’s analysis adjudicates disparate treatment in the area of government provided social welfare based on one’s national origin. Thus, the *Khosa* decision used *Brown*’s rationale in a distinctly non-American context and set of facts. In an American context, social welfare, except in

180. *Khosa v. Minister of Soc. Dev.* 2004 (6) BCLR 569 (CC) (S. Afr.).

181. *Id.* para. 47.

182. *Id.* para. 74.

183. *Id.*

184. *Id.* para. 74 n.83 (citations omitted).

185. One could (and the *Khosa* court does) argue that the facts are similar, from an abstract, more generalized perspective in that both cases have the government making classifications between two groups of people. *See id.*

limited situations, is not granted to legal permanent residents.<sup>186</sup> The current Supreme Court of the United States would not likely apply the *Brown* decision in a favorable manner to a challenge of the denial of welfare benefits to legal resident non-citizens.

The *Khosa* decision's use of *Brown* was similar to another South African Constitutional Court case, *Minister of Home Affairs v. Fourie*.<sup>187</sup> Both decisions used *Brown* in a substantive way for its doctrinal understanding of equal protection law and the inadequacies of "separate but equal" policies.

In *Fourie*, the Court decided that the state's lack of provision for same-sex marriages denied equal protection of the law and unfairly discriminated against individuals' sexual orientation.<sup>188</sup> As a result, the Court had to determine an appropriate remedy. Ultimately, the Court decided to leave the specific remedy to the Parliament, because it believed that the matter touched "deep public and private sensibilities," and that the Legislative Branch of government could find "the best ways of ensuring that same-sex couples" achieve equality.<sup>189</sup> While the Court refused to comment on the constitutionality of any particular legislative remedy, it did "point to certain guiding principles of special constitutional relevance" in order "to reduce the risk of endless adjudication ensuing on a matter which both evokes strong and divided opinions on the one hand, and calls for firm and clear resolution on the other."<sup>190</sup>

One of the Court's guiding principles was to avoid a "separate but equal" remedy that on its face provides equal protection, but in a manner that produces new forms of marginalization.<sup>191</sup> The Court was wary that "separate but equal" remedies may offer the same tangible rights and privileges, but may miss some intangibles.<sup>192</sup> The Court borrowed and highlighted the concept of tangibility from the following *Brown* quote:

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though that physical facilities and other "tangible" factors may be equal, deprive the children

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186. Before passage of welfare reform in 1996, legal permanent residents and documented immigrants were eligible for social welfare benefits on the same basis as citizens. See SHAWN FREMSTADT, CTR. ON BUDGET AND POLICY PRIORITIES, IMMIGRANTS AND WELFARE REAUTHORIZATION 1 (2002), available at <http://www.cbpp.org/files/1-22-02tanf4.pdf>.

187. *Minister of Home Affairs v. Fourie* 2006 (3) BCLR 355 (CC) (S. Afr.).

188. *Id.* para. 114.

189. *Id.* para. 138.

190. *Id.* para. 148.

191. An example of a "separate but equal" remedy with respect to marriage is for the state to offer an alternative institution that confers all the benefits, privileges, and protections afforded in marriage. Civil unions are an example of such an alternative.

192. *Fourie* 2006 (3) BCLR para. 153.



of the minority group of equal educational opportunities? We believe it does.<sup>193</sup>

In addition to referencing *Brown* as a landmark case, the Court compared the possible same-sex marriage alternatives to the separate but equal doctrine affirmed in *Plessy*. Whether they learned about the concept of intangibles, or used *Brown* to illustrate the dangers of avoiding intangibles is unclear, but either way the Court imported the same critical questioning used in *Brown*. The Court juxtaposed *Plessy*'s separate but equal doctrine against *Brown* to highlight the importance of being aware of remedies that do not account for intangible benefits and the possible marginalization that can result. The *Fourie* case is similar to *Khosa* because it applies the rationale of equality found in *Brown* to a set of facts (same-sex marriage) in a way that the current U.S. Supreme Court would not.

In *S v. Jordan*, the South African Constitutional Court decided the constitutionality of the 1957 Sexual Offences Act.<sup>194</sup> The Court ruled unanimously that the brothel provision of the act, which criminalized owning or managing a brothel, was unconstitutional.<sup>195</sup> In a minority opinion that concurred in the judgment with respect to the brothel, but dissented on the Act's criminalization of prostitution, Justices O'Regan and Sachs used *Brown* to explain the constitutionality of the brothel provision. The appellants (the brothel owner and brothel manager) argued that one of the unconstitutional purposes of the Sexual Offences Act was to enforce a particular moral position (i.e., that sex outside of marriage should be prohibited), and therefore the Act should be ruled unconstitutional.<sup>196</sup> The minority opinion acknowledged that the Act was originally enacted to impose a particular view of morality, and that for the state to impose these views would conflict with the Constitution.<sup>197</sup> However, in the interest of legal continuity the minority recognized the doctrine of shifting purpose,<sup>198</sup> holding that "[t]he mere fact that the original legislative purpose of a statute might have been incompatible with current constitutional standards, does not deprive it of the capacity to serve a legitimate governmental purpose today, unless its express language and intent is . . . manifestly inconsistent with constitutional values."<sup>199</sup> In support of the doctrine of shifting purpose, the Court referenced *Brown*:

193. *Id.* para. 153 n.154 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

194. *S v. Jordan* 2002 (11) BCLR 1117 (CC) (S. Afr.).

195. There was also a prostitution provision that criminalized the sexual intercourse for monetary reward. A divided court, in a vote of 6–5, ruled that the prostitution provision was also unconstitutional. *Id.* The minority opinion written by Justices O'Regan and Sachs is the focus of this section.

196. *Id.* para. 107 (O'Regan & Sachs, JJ., minority opinion).

197. *Id.* para. 113.

198. *Id.* paras. 109–10.

199. *Id.* para. 112 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

See too *Brown v Board of Education* where the Court stated: "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."<sup>200</sup>

The Court found that while the brothel provision in the Act was initially promulgated for an unconstitutional purpose, it continued to pursue a current legitimate constitutional purpose: the control of commercial sex.<sup>201</sup>

The doctrine of shifting purpose, while rejected by the Supreme Court of Canada, can be found articulated and manifested in Canadian law.<sup>202</sup> The South African Court seems to translate the holding in *Brown* and read the shifting purpose doctrine from the U.S. Supreme Court's landmark decision. The shifting purpose doctrine, at least as explicitly articulated and conceived in Canada (and in the *Jordan* decision) cannot be found explicitly named in *Brown* or in the jurisprudence of the United States.<sup>203</sup> It appears that the South African Court is taking *Brown* out of its original context, and into an entirely different conceptual framework.

In a concurring opinion on a habeas corpus case before the Supreme Federal Tribunal, Minister Gilmar Mendes<sup>204</sup> of the Brazilian Supreme Federal Court entered a lengthy discussion on the Brazilian legal system's concept of constitutional mutation, or *mutação constitucional*.<sup>205</sup> Constitutional mutation is an informal process of changing the constitution by attributing new meanings to content not previously emphasized in the letter of the constitution through either diverse forms and methods of interpretation, or through construction of the uses and customs of the constitution.<sup>206</sup>

200. *Id.* para. 112 n.71 (citations omitted) (quoting *Brown*, 347 U.S. at 492).

201. *Id.* para. 114.

202. For a discussion of the shifting purpose doctrine and its use in Canada, see Scott G. Requadt, *Worlds Apart or Words Apart: Re-Examining the Doctrine of Shifting Purpose in Statutory Interpretation*, 51 U. TORONTO FAC. L. REV. 331 (1993).

203. *Brown I* is not the only U.S. case that Justices O'Regan and Sachs translate as accepting the shifting purposes doctrine. The minority opinion also points out Chief Justice Warren's majority opinion on Sunday closing laws in *McGowan v. Maryland*, 366 U.S. 420 (1961). See *Jordan* 2002 (11) BCLR para. 110 (O'Regan & Sachs, JJ., minority opinion).

204. Judges on the Federal Supreme Court are called ministers. Their role is entirely judicial, however, and they serve no function in the Executive Branch of government.

205. S.T.J., HC 82.959-7, Relator: Min. Marco Aurélio, 23.2.2006, 200, REVISTA TRIMESTRAL DE JURISPRUDÊNCIA [R.T.J.], 1.9.2006, 795 (Braz.).

206. See PEDRO LENZA, DIREITO CONSTITUCIONAL ESQUEMATIZADO 90 (13th rev. ed. 2009).

Minister Mendes discussed the “phenomenon” of constitutional mutation as one asserting “that life situations are constitutive of the meaning of the rules of law, since it is only at the time of its application to occurring cases that the meaning and regulatory scope are revealed.”<sup>207</sup> Relying on constitutional legal scholars, he believed that the rule of law is not the basis, but is the product of the interpretative process.<sup>208</sup> Minister Mendes continued his discussion by citing *Brown*:

Perhaps the historically more relevant case of the call for constitutional mutation is expressed in the conception of racial equality in the United States. In 1896, in the *Plessy v. Ferguson* case, the American Supreme Court recognized that the separation in wagons of trains was legitimate. It was the consecration of the formula, “equal but separated.” This orientation came to be surpassed in the already classic *Brown*, in which it seated the incompatibility of this separation with the basic principles of equality.<sup>209</sup>

Minister Mendes believed that *Brown* is a good illustration of a foreign constitutional mutation—a concept that is not only absent in the *Brown* decision, but has no equivalent in American legal jurisprudence.

#### IV. DISCUSSION: FROM LEGAL TRANSPLANT TO COSMOPOLITAN INNOVATION

The data in this study illustrates how foreign courts have deterritorialized *Brown*, and then transmitted, used, or reinterpreted the decision. Foreign courts used *Brown* as a source for factual evidence, as a guide in understanding the role of a global judiciary, and as a model for employing equal protection law. I argue that these uses fall within Appiah’s framework of cosmopolitanism, where he highlights that cosmopolitan virtue lies in learning by observing and engaging the differences encountered in the world.<sup>210</sup>

This argument is a departure from the longstanding understandings of legal transplantation theory in the field of comparative law.<sup>211</sup> Watson coined the term legal transplant to describe the diffusion of law from a country of origin to a country of reception. In legal transplant theory, diffusion of law (or borrowing) is

207. S.T.J., 82.959-7, [S.T.F.J.], 576, 610 (Braz.) (Author’s translation).

208. *Id.*

209. *Id.* at 615 (Author’s translation).

210. APPIAH, *supra* note 27, at 4.

211. See generally H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD (4th ed. 2010); WATSON, *supra* note 5, at 1–9; Esin Örucü, *Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition*, 4.1 ELECTRONIC J. OF COMP. L. (1999); Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law II*, 29 AM. J. COMP. L. 343 (1991).

a source for receiving countries to legally develop and change. Twining characterizes the legal diffusion as having the following characteristics:

[A] bipolar relationship between two countries involving a direct one-way transfer of legal rules or institutions through the agency of governments involving formal enactment or adoption at a particular moment of time (a reception date) without major change. Although not explicitly stated in this example, it is commonly assumed that the standard case involves transfer from an advanced (parent) civil or common law system to a less developed one, in order to bring about technological change ("to modernize") by filling in gaps or replacing prior local law. There is also considerable vagueness about the criteria for "success" of a reception—one common assumption seems to be that if it has survived for a significant period "it works."<sup>212</sup>

Scholars have criticized the legal transplant theory, arguing that it lacks empirical grounding, ignores social science theories of diffusion, and that the metaphor of the transplant is problematic because transplanted laws (unlike biological transplants) often look different in their original and receiving environments.<sup>213</sup> My research on *Brown* adds further evidence to the critique that the transplant metaphor is inadequate, yet for a different reason.

Thinking about the globalization of law as a transplant has the effect of personifying law as an actor, and transforms the true agents of social change—lawyers interpreting case law—into passive participants. The data from this project illustrates that the *Brown* decision did not perform the same task, or provide the same consistent message across factual settings. This is because the *Brown* decision is not an active transplanted organ. Unlike a transplanted heart that pumps blood through a body, or a seed transplant that grows when it is placed into soil, the *Brown* decision, in and of itself, did not *do* anything. It has no agency.

212. William Twining, *Social Science and Diffusion of Law*, 32 J.L. & SOC'Y 203, 207 (2005) (emphasis omitted).

213. See Langer, *supra* note 10, at 29–35 (discussing the inadequacy of using the metaphor of transplant when discussing the movement of laws and ideas); Twining, *supra* note 212, at 203 (arguing that there is a gap between the social science literature on diffusion and the legal literature on reception and transplantation). Langer writes, "A kidney or an elm will look essentially alike in its original and receiving body or environment, but this frequently does not happen with legal institutions and ideas, which are imitated at certain conceptual levels but not at others." Langer, *supra* note 10, at 31. Langer is not entirely correct. The environment of a biological transplant, especially with respect to plants can have a profound effect on the appearance of a plant. I bring attention to the example of *Schefflera sp.*, which in its native Australian environment grows to the height of a tree, yet in lower temperature zones, like the United States, it is kept as a common houseplant, and known as an Umbrella Plant. T. Ombrello, *Umbrella Plant*, UCC BIOLOGY DEPT, [http://faculty.ucc.edu/biology-ombrello/POW/umbrella\\_plant.htm](http://faculty.ucc.edu/biology-ombrello/POW/umbrella_plant.htm) (last visited Dec. 26, 2011).

I argue that it is better to view the *Brown* decision as a cultural symbol. In the field of sociology, symbols exist at the heart of cultural systems and are things that people who share culture recognize as carrying a particular meaning.<sup>214</sup> Because the meaning of the symbol is deeply linked to a group's cultural use, it is understandable that the meaning of the same symbol can vary from culture to culture. Laws, legal concepts, and legal ideas are all examples of symbols. Their meaning is cultural and derives meaning from the actors in the group (i.e., judges, law clerks, and lawyers) who use them. No matter how much we personify law, we can transplant it, but the law itself will not do anything until people interpret it. Law is a passive symbol that society infuses with meaning.

As a consequence of the legal transplant metaphor's limitations, Máximo Langer proposed the expression "legal translation" to capture this phenomenon.<sup>215</sup> The legal translation metaphor avoids many of the problems associated with the transplant metaphor. Particularly, it allows one to account for the differences between the original and translated text, and highlights the changes that may occur to a law when it is transferred from the source to the target.<sup>216</sup> Langer describes three types of legal translations:

- (1) strict literalism, a "word-by-word matching" between the original and the translated texts; (2) "faithful but autonomous restatement," where the translator still tries to be faithful to the original but composes, at the same time, a text that is equally powerful in the target language; and (3) substantial recreation, variations, etc., where the idea of fidelity to the original is weakened or directly disappears, and the focus is to create a text that is powerful or appealing in the target language.<sup>217</sup>

The strength of Langer's work is that it treats law as a cultural object and highlights that individuals and groups in society negotiate the meaning of those objects.

Nevertheless, the legal translation metaphor presents important shortcomings. First, it assumes that the circulation of law results in a translation that is adopted in the recipient country. It does not distinguish between exposure to an idea, and adoption of an idea. While the translation theory allows for the eventual rejection of the translated law, this takes place after the law is translated and adopted.<sup>218</sup> The legal translation theory does not account merely for

214. ALLAN G. JOHNSON, *THE BLACKWELL DICTIONARY OF SOCIOLOGY* 321 (2000).

215. Langer, *supra* note 10, at 32–35.

216. *Id.* at 33.

217. *Id.*

218. Neither the legal transplant theory nor the legal translation metaphor capture this phenomenon, following its biological and medical metaphor, the legal transplant theory allows for the rejection of the transplant. Otto Kahn-Freund, *On Uses and Mis-Uses of Comparative Law*, 37 *MOD. L. REV.* 1, 6 (1974). Langer notes that

how the translation of the legal concept is part of the deliberative process, and how it shapes, informs, or possibly inspires the initial legal adoption. My work demonstrates that a number of courts were exposed to the *Brown* decision, and that it was part of their deliberative process, yet the *Brown* ruling was not necessarily adopted in every situation. For example, a number of courts cited *Brown* as a source of factual information in their deliberative process.<sup>219</sup> Yet the *Brown* ruling itself was not at issue for adoption.

Second, the legal translation theory does not capture attempts to engage a discursive legal community. In addition to the legal development of the recipient nation-state, a country may use foreign law in order to gain a better understanding of the parameters of the legal community that they are a part of, and also shape those parameters and change the legal discourse. This Article provides examples where courts used *Brown* in an attempt to better understand their discursive community, specifically with respect to understanding the role of the judiciary on issues ranging from when to use *stare decisis*, to what comprises an appropriate remedy for relief.<sup>220</sup>

Due to the limitations of both the transplant and translation metaphors, I draw on sociological understandings of the diffusion of ideas<sup>221</sup> in conjunction with Appiah in order to offer the heuristic of the cosmopolitan legal conversation. Social science diffusion theory has its origins in studies focusing on innovation.<sup>222</sup> Rogers states that “[d]iffusion is a special type of communication concerned with the spread of messages that are perceived as new ideas.”<sup>223</sup> He also defines innovation as “an idea, practice, or object perceived as new by an individual or other unit of adoption.”<sup>224</sup> Diffusion and innovation

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after the legal idea’s initial translation it may suffer neutralization, which he describes as disuse, desuetude, or being declared unconstitutional. Langer, *supra* note 10, at 34. As an example he points to a German rule translated and adopted from the Anglo-American adversarial system that was rarely applied because it did not “fit within the structure of German criminal procedure.” *Id.* at 34 n.162. From Langer’s writing and examples, it appears that in order for translation to take place, there must be an initial adoption of the law, and it does not appear that this metaphor makes room for the translated idea merely in the deliberative process.

219. See *supra* Part III.B.1.

220. See *supra* Part III.B.2.

221. See Twining, *supra* note 212, at 203.

222. See JAMES S. COLEMAN, ELIHU KATZ & HERBERT MENZEL, *MEDICAL INNOVATION: A DIFFUSION STUDY* (1966); T. HÄGERSTRAND, *INNOVATION OF DIFFUSION AS A SPATIAL PROCESS* (Univ. of Chi. Press, 1967) (1953); T. HÄGERSTRAND, *THE PROPAGATION OF INNOVATION WAVES* (1952); EVERETT M. ROGERS, *DIFFUSION OF INNOVATIONS* (5th ed. 2003); Bryce Ryan & Neal C. Gross, *The Diffusion of Hybrid Seed Corn in Two Iowa Communities*, 8 *RURAL SOC.* 15 (1943).

223. ROGERS, *supra* note 222, at 35.

224. *Id.* at 36.

can be seen as two concepts that are intrinsically, if not merely theoretically, connected.

Appiah argues that while we are citizens of the world, each of us is also a citizen of smaller, more local communities, such as nation-states or families.<sup>225</sup> Being separated by boundaries, in part, makes us different. With respect to this Article, I argue that the laws that come from these different communities and nation-states are the sources of perceived new ideas that Rogers discusses. They are potential sites of innovation.

Appiah provides Rogers's vehicle for diffusion by articulating the communication device of conversation. Appiah argues that we live a cosmopolitan existence when people separated by boundaries converse. For Appiah, what makes conversation across boundaries worthwhile is the opportunity for understanding people in other places and their interests, arguments, and errors.<sup>226</sup> These conversations and exchanges across boundaries produce change as individuals gradually acquire new perspectives on the things and events that they observe and experience.<sup>227</sup> The purpose of the conversation is not necessarily to achieve consensus, or to come to agreement on values. At the core of cosmopolitan exchange is the opportunity to learn.<sup>228</sup> Learning can provide the foundation that allows for recipients to innovate.<sup>229</sup>

There are two types of innovation: discovery and invention.<sup>230</sup> Discovery results when the existence of an aspect of reality is realized, and this knowledge is then shared with others.<sup>231</sup> Invention occurs when "existing cultural items are combined into a form that did not exist before."<sup>232</sup> Cosmopolitan conversation allows for the discovery of other legal systems and ideas that can be adopted, mimicked, or rejected. Innovation through cosmopolitan conversation can also take place through invention.

I propose thinking about the transmission of legal ideas as a form of cosmopolitan conversation that leads to legal innovation. It is important to note that cosmopolitan legal conversation is not the

225. APPIAH, *supra* note 27, at xviii.

226. *Id.* at 78.

227. *Id.* at 72.

228. *Id.* at xv.

229. Innovation is not the sole product resulting from cosmopolitan conversation. Another result of engaging in cosmopolitan conversations can be the attainment of an elite status or legitimacy. This second product enters some of the normative aspects of cosmopolitanism. While Appiah focuses on the cosmopolitan as learning from difference, another way of thinking about cosmopolitanism is that it is a form of worldly sophistication. Actors in legal systems may engage in certain cosmopolitan conversations in attempt to gain an elite status, or to seek legitimacy from well-respected source legal systems. *Id.* at xv.

230. WITT, *supra* note 28, at 46.

231. *Id.*

232. *Id.*

same as a conversation between two friends that takes place over a finite time, and where the interaction involves a call and response, or an immediate back and forth dialogue. These are conversations that take place amongst a number of actors. This Article has shown that a number of courts cited to the *Brown* decision. However, *Brown* was rarely the only foreign case cited. On a number of legal issues *Brown* was one of a number of foreign cases used to understand the discursive parameters of a legal concept. For example, this illustrates how courts use foreign law to enter into a discourse and engage a broader discursive legal community.

This concept highlights the fact that laws are cultural symbols that draw their meaning from the groups of individuals who use them. It allows for an understanding that these laws are exchanged as conversations between societies that seek to transmit and learn from difference. Legal innovation through cosmopolitan conversation also provides for discussing the various ways that receiving societies use exchanged laws. Cosmopolitan legal discovery can lead to a type of legal innovation where receptive societies remain fairly faithful to, or reject the original society's use of a law or legal decision. Cosmopolitan legal invention, however, is a type of innovation where the recipient legal system combines cultural symbols from the source legal system with its own in order to create novel legal reform. Overall, legal innovation as a result of cosmopolitan conversation stresses change by learning through cultural exchange. The data gathered in this study reveal instances of discovery through cosmopolitan conversation and the citation of *Brown*. For example, Justice Mercer's concurrence in the Israeli Supreme Court's decision of *Noar KeHalacha* is a classic case of discovery, where knowledge from a foreign source (the U.S. decision in *Brown*) is shared in Israel.<sup>233</sup> Justice Mercer adopts a position that mimics the equal protection approach found in *Brown*.<sup>234</sup> This is not surprising because both *Brown* and *Noar KeHalacha* deal with similar facts—the legality of ethnic and racial segregation in children's public education.<sup>235</sup> Justice Mercer does not engage in modifying *Brown*. Justice Mercer simply highlights and applies a rule discovered in *Brown* to the facts in *Noar KeHalacha*.

There are a number of cases where citations to *Brown* have led to legal invention. There are foreign court decisions that cite the *Brown* decision and combine it with other legal concepts or traditions

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233. See *supra* Part III.B.3 and text accompanying notes 159–204.

234. HCJ 1067/08 *Noar KeHalacha v. Ministry of Educ.* [2009] IsrLR (4) 84, 121–22 (Isr.) (Melcer, J., concurring).

235. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 487 (1954); *Noar KeHalacha* [2009] IsrLR 84.



in order to produce new legal rules that did not previously exist. For example, the Constitutional Court of Colombia, and Supreme Courts of India, Sri Lanka, and Canada, used *Brown* as they crafted rulings on the political question doctrine.<sup>236</sup> The *Brown* decision, however, offers no statement with respect to this legal issue. These courts could have cited U.S. cases that explicitly considered the political question doctrine, but instead used *Brown* to support a legal rule that *Brown* never analyzed. These courts read the *Brown* Court's willingness to decide a highly politicized issue as support for the proposition that there are some important political questions that should not evade judicial review.<sup>237</sup> Unlike the *Noar KeHalacha* citation, these courts never discovered a rule articulated in *Brown*. Instead, with knowledge of the political question doctrine, their own legal traditions, and the practice observed in *Brown*, these courts invented a legal rule that guided them in their process of judicial review.

Another example of a court reading a legal doctrine into *Brown* occurs in the South African case of *Jordan*, where the minority opinion cited *Brown* in support of the doctrine of shifting purpose.<sup>238</sup> Neither *Brown* nor American jurisprudence recognizes the doctrine of shifting purpose, yet the *Jordan* decision reads the doctrine of shifting responsibility into the decision, and in some ways forces *Brown* into conversation with a line of cases that are totally foreign to its inception. These examples of legal innovation show how courts reframe *Brown*, and use the case in conversation with different legal theories and decisions.

There are also examples where citation lead to activity located somewhere on a spectrum between discovery and invention. For example, in *Fourie*, the South African Constitutional Court guided the national legislature in crafting a remedy providing legal rights for same-sex couples seeking marriage.<sup>239</sup> Citing *Brown*, the *Fourie* Court warned the legislature not to pass a "separate but equal" remedy that offered the tangible rights of marriage, yet missed some intangibles.<sup>240</sup> In this example, the *Brown* ruling was not strictly replicated, yet was applied in a significantly different factual situation. When *Fourie* was decided, U.S. federal judges had never used *Brown* in an analysis to support the constitutionality of same-

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236. These courts cited to *Brown* in the following cases respectively: the Colombian cases, *Rajasthan* (India), *Premachandra* (Sri Lanka), and *Operation Dismantle* (Can.). See *supra* Part III.B.2.b.

237. See *supra* Part III.B.2.b.

238. See *supra* Part III.B.3.

239. See *supra* text accompanying notes 188–93.

240. A classic example would be to maintain marriage as a heterosexual union, but create civil unions for same-sex couples. While both institutions would have the same legal rights, some might argue that civil unions carry a badge of inferiority.

sex marriage.<sup>241</sup> Therefore, the *Fourie* application of *Brown* was a departure from U.S. practice. In a strict sense, the *Fourie* Court does not mimic *Brown*, or invent a new legal rule. Instead, *Fourie* takes the *Brown* decision out of its U.S. context and applies the core ruling to a different set of facts. This innovative use appears to be a blending of both discovery and invention.

Reconciling an emphasis on cultural symbols with the diffusion of innovation is an important step in developing a metaphor that accurately describes the transfer of law between societies. Appiah's theory of rooted cosmopolitanism serves as the perfect conduit of convergence. For Appiah, cosmopolitanism encourages shared humanity and learning from difference.<sup>242</sup> Appiah writes, "[T]here are some values that are, and should be, universal, just as there are lots of values that are, and must be, local. We can't hope to reach a final consensus on how to rank and order such values."<sup>243</sup> Distinctive in this view is that uniformity on all issues is not a requirement for a cosmopolitan existence. This view of cosmopolitanism draws on the philosophy of Diogenese, who is the first person credited to use the term cosmopolitan—meaning citizen of the world.<sup>244</sup>

The metaphor of the cosmopolitan legal conversation significantly improves upon the metaphors of the legal transplant and legal translation.<sup>245</sup> First, the conversation metaphor does the same work as the transplant and translation metaphors in that it allows for a comparison between both the original and receiving system.<sup>246</sup> Secondly, the conversation metaphor accounts for attempts to engage and understand one's discursive community. Next, the conversation metaphor is flexible enough to discuss the difference in power

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241. While he does not use *Brown* in the actual analysis of the case, Judge Vaughn Walker mentions *Brown* in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010). In a discussion of whether evidence exists to support California's refusal to recognize marriage between same-sex couples, Walker notes that many states, like California, restricted interracial marriage. Walker quotes historian George Chauncey's trial testimony on the history of antigay discrimination, where Chauncey noted that "Jerry Falwell criticized *Brown v Board of Education*, because school integration could 'lead to interracial marriage, which was then sort of the ultimate sign of black and white equality.'" *Id.* at 957.

242. APPIAH, *supra* note 27, at xv.

243. *Id.* at xxi.

244. When asked his place of origin, Diogenes answered, "I am a citizen of the world (*cosmopolites*)." 2 DIOGENES LAERTIUS: LIVES OF EMINENT PHILOSOPHERS 64–65 (R. D. Hicks trans., 1925).

245. The conversation metaphor assumes Langer's notion of translation, because, at a minimal level, conversations between foreign bodies require some form of translation. Translation however, is one of the first steps of the legal circulation process. See Langer, *supra* note 10, at 33.

246. Langer highlights that one of the strengths of the legal transplant metaphor is its comparative nature. *Id.* at 30.

relations between source and recipient. The transplant metaphor assumes that the donor is in a position of power, while the recipient somehow lacks power. The conversation metaphor notes that conversations can take place between donors and recipients of equal, or disparate standings, and that the recipient may sometimes be the more powerful party. Lastly, the conversation metaphor helps identify actors. Using this metaphor, the comparative legal scholar is forced to identify specifically who are the agents engaged in conversation.

For the purpose of this project, it is important to note briefly that the result—the actual ruling—is mostly an indicator that innovation is at work. Actual innovation occurs in the application of a decision to a set of facts. The innovation occurs in the thinking—how the judges make meaning and apply case law—not necessarily in the result (i.e., whether the result is liberal or conservative, or whether it is in agreement with the source country's use). This project is more analytical, and less focused on normative judgments of court decisions. By avoiding focusing on the results of the ruling, I avoid having to determine whether innovation requires a progressive or conservative ruling. Also, measuring innovation solely by the result may create the problem of the social science pitfall of selecting on the dependent variable.<sup>247</sup>

## V. CONCLUSION AND IMPLICATIONS FOR FUTURE RESEARCH

There are a number of directions for future research. First, I realize that there may be problems, from a methodological standpoint, with choosing *Brown* as a test case in order to understand how courts use constitutional transjudicial communications. The *Brown* decision is an enigma amongst case law, and may stand for general principles of justice. In a way, the case has been denationalized, due to its popularity, before a foreign court judge reads the actual text of the opinion. The *Brown* decision has an American context, but also a global context for justice.

Another problem with using *Brown* is that because it stands for such broad and universal concepts like equality, liberty, and freedom, it may be difficult to understand how courts are making meaning of the case as a symbol. Perhaps a more specific case with a more limited scope would be helpful to monitor, in a more specific fashion, how a foreign court deterritorializes and recontextualizes a decision. For example, it may be helpful to perform this study examining a

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247. GARY KING ET AL., DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH 128–49 (1994).

criminal procedure case like *Miranda v. Arizona*,<sup>248</sup> or a case specific to the role of the judiciary like *Marbury v. Madison*.<sup>249</sup>

This research project focused on the use of *Brown* at the national high court level. Theoretically, however, courts can participate in cosmopolitan legal referencing regardless of their national scale. A study analyzing lower courts' use of *Brown* might be fruitful to determine whether the scale of a court influences scope of use. Instead of doing an exhaustive search of *Brown* as performed in this study, it might be helpful to limit the scope to lower courts located in a couple of countries.

The *Brown* decision has played an important role in the education of foreign courts. The results from this project illustrate that foreign courts, by simply connecting to *Brown*, are not always plugging into the United States and feeding unfiltered. The exchange in ideas can lead to productivity. The courts surveyed in this Article have used *Brown* as part of a cosmopolitan learning process. But learning does not necessarily mean mimesis. Foreign courts have used *Brown* to learn about facts, the role of the judiciary, and substantive areas of law involving equal protection. They are learning information, but also placing it within their own domestic context. They are doing the work of decontextualizing *Brown* and recontextualizing it in their own local territories. These courts use *Brown* as a symbol where they infuse their own meaning. While some courts used *Brown* in a mimetic borrowing fashion akin to cosmopolitan discovery, many others fit the case within their established laws and practices to learn about and create new possibilities—conducting a form of cosmopolitan legal invention. Through these forms of cosmopolitan legal innovation, courts have access to a variety of ideas in their decision-making processes. In contrast to the popular phrase that something is “lost in translation,” as legal concepts and ideas are transferred transnationally, I argue that innovation can occur as a result of what is “found through conversation.”

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248. *Miranda v. Arizona*, 384 U.S. 436 (1966).

249. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

## APPENDIX

TABLE 3. List of Opinions with Citations to *Brown* by Country

1. **Argentina**
  - Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 26/10/2004, “Bustos, Alberto Roque c. Estadio Nacional / amparo,” *Jurisprudencia Argentina* [J.A.] (2005-III-189).
  - Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 19/9/2000, “González de Delgado, Cristina c. Universidad Nacional de Córdoba,” *La Ley* [L.L.] (2000-F-128).
2. **Australia**
  - *Western Australia v Ward* (2002) 213 CLR 1.
3. **Brazil**
  - S.T.J., HC 82.959-7, Relator: Min. Marco Aurélio, 23.2.2006, 200, *REVISTA TRIMESTRAL DE JURISPRUDÊNCIA*, 1.9.2006, 795.
4. **Canada**
  - *Ross v. N.B. Sch. Dist. No. 15*, [1996] 1 S.C.R. 825.
  - *Egan v. Canada*, [1995] 2 S.C.R. 513.
  - *R. v. Drybones*, [1970] S.C.R. 282.
  - *R. v. Jones*, [1986] 2 S.C.R. 284.
  - *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441.
5. **Colombia**
  - Corte Constitucional [C.C.] [Constitutional Court], junio 24, 1992, Sentencia T-429/92, *Gaceta de la Corte Constitucional* [G.C.C.].
  - Corte Constitucional [C.C.] [Constitutional Court], octubre 30, 2003, Sentencia T-1030/03, *Gaceta de la Corte Constitucional* [G.C.C.].
6. **India**
  - *Golaknath v. Punjab*, (1967) 2 S.C.R. 762.
  - *Rajasthan v. Union of India*, (1978) 1 S.C.R. 1.
  - *Unni Krishnan v. Andhra Pradesh*, (1993) 1 S.C.R. 594.
  - *Ahmedabad St. Xavier’s Coll. Soc’y v. Gujarat*, (1975) 1 S.C.R. 173, 255.
  - *Ashoka Kumar Thakur v. Union of India*, (2007) 4 S.C.R. 493.
  - *Election Comm’n of India v. St. Mary’s School*, (2008) 2 S.C.C. 208.

7. **Israel**
  - HCJ 4541/94 *Miller v. Minister of Def.* 49(4) PD 9 [1995], [1995–6] IsrLR 178.
  - CA 6698/95 *Ka'adan v. Isr. Land Admin.* 54(1) PD 258 [2000], [2000] IsrLR 51.
  - CJ 1067/08 *Noar KeHalacha Ass'n v. Ministry of Educ.* [2009] IsrLR 84.
8. **Malaysia**
  - *Malaysian Bar v. Gov't of Malay.* [1987] 2 M.L.J. 165.
9. **New Zealand**
  - *Quilter v Att'y Gen.* [1998] 1 NZLR 523 (CA).
10. **South Africa**
  - *Lesbian & Gay Equal. Project v. Minister of Home Affairs* 2006 (1) SA 524 (CC).
  - *Khosa v. Minister of Soc. Dev.* 2004 (6) BCLR 569 (CC).
  - *Daniels v. Campbell* 2004 (5) SA 331 (CC).
  - *Minister of Health v. Treatment Action Campaign* 2002 (10) BCLR 1075 (CC).
  - *S v. Jordan* 2002 (11) BCLR 1117 (CC).
  - *In re Dispute Concerning the Constitutionality of Certain Provisions of the Sch. Educ. Bill of 1995* 1996 (3) SA 165 (CC).
11. **Sri Lanka**
  - *Premachandra v. Jayawickrema*, [1994] 2 Sri L.R. 90.
  - *Ramupillai v. Festus Perea*, [1991] 1 Sri L.R. 11.
  - *Seneviratne v. Univ. Grants Comm'n*, [1978–79–80] 1 Sri L.R. 182.
12. **United Kingdom**
  - *Lewis v. Att'y Gen. of Jam.*, [2001] 2 A.C. 50 (P.C.) (appeal taken from Jam.).

**TABLE 4. List of Courts Without Citations to *Brown* (Total 46)**  
*(database name, website, and dates of case law coverage provided when available)*

1. **Albania (Constitutional Court)**
  - Cases from 1992 to present
  - <http://www.gjk.gov.al>

2. **Belgium** (*Cour de Cassation* and *Cour Constitutionnelle*)
  - Cases from 1990 to present
  - <http://jure.juridat.just.fgov.be/?lang=fr>
3. **Bolivia** (*Tribunal Constitucional Plurinacional*)
  - <http://www.tribunalconstitucional.gob.bo>
4. **Bosnia and Herzegovina** (Constitutional Court)
  - Cases from 1997
  - <http://www.ccbh.ba/eng/odluke>
5. **Botswana** (High Court)
  - Cases from 1999 to present
  - <http://www.saflii.org/bw/cases/BWHC>
6. **Costa Rica** (*Corte Suprema de Justicia*)
  - Selected cases from 1965 to present
  - <http://200.91.68.20/scij>
7. **Republic of Cyprus** (Supreme Court)
  - Cases from 1976 to 2003
  - <http://www.cylawreports.com/LRep.dll/MainPg>
8. **Czech Republic** (Constitutional Court)
  - Cases from 1992 to 2006
  - [http://angl.concourt.cz/angl\\_verze/cases.php](http://angl.concourt.cz/angl_verze/cases.php)
9. **Commonwealth of Dominica** (Eastern Caribbean Supreme Court)
  - Cases from 2004 through 2011
  - <http://eccourts.org/judgments.html>
10. **Ecuador** (*Corte Nacional de Justicia* and *Corte Constitucional*)<sup>250</sup>
  - *Corte Nacional de Justicia*  
<http://www.cortenacional.gob.ec/cn/index.php/cortenacionaldejusticia/bienvenidos>
  - *Corte Constitucional*  
<http://www.corteconstitucional.gob.ec>
11. **El Salvador** (*Corte Supreme de Justicia*)
  - <http://www.jurisprudencia.gob.sv/VisorMLX/Documento/BusquedaLibre.aspx>

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250. Following the 2008 adoption of a new constitution, the court of last resort in Ecuador is now the *Corte Nacional de Justicia*, replacing the *Corte Supreme de Justicia* and the country's constitutional court is the *Corte Constitucional*, replacing the *Tribunal Constitucional*.

12. **Fiji** (High Court)
  - Selected cases from 1876 to present
  - <http://www.pacii.org/fj/cases/FJSC>
13. **France** (*Cour de cassation*)
  - <http://www.conseil-constitutionnel.fr/recherche/index.html>
14. **Grenada** (Eastern Caribbean Supreme Court)
  - Cases from 2004 through 2011
  - <http://eccourts.org/judgments.html>
15. **Guam** (Supreme Court)
  - <http://www.guamsupremecourt.com/Opinions/supremeop.html>
16. **Guatemala** (*Corte de Constitucionalidad*)
  - <http://www.cc.gob.gt>
17. **Honduras** (*Corte Supreme de Justicia*)
  - [http://www.poderjudicial.gob.hn/juris/Jurisprudencia\\_Cedij.aspx](http://www.poderjudicial.gob.hn/juris/Jurisprudencia_Cedij.aspx)
18. **Italy** (*Corte Costituzionale*)
  - Cases from 1956 to present
  - <http://www.cortecostituzionale.it/ita/attivitacorte/pronunceemasime/pronunce/filtro.asp>
19. **Japan** (Supreme Court)
  - <http://www.courts.go.jp/english/judgments/index.html>
20. **Kiribati** (Court of Appeal)
  - Selected cases from 1979, from 1988 to 1990, and from 2000 to 2011
  - <http://www.pacii.org/KICA>
21. **Latvia** (Constitutional Court)
  - Selected cases from 1997 to 2007
  - <http://www.satv.tiesa.gov.lv/?lang=2&mid=19>
22. **Malta** (Constitutional Court)
  - Cases from 2001 to present and selected cases
  - <http://www2.justice.gov.mt/sentenzi/default.asp?lng=ENG>



23. **Marshall Islands** (Supreme Court)
  - Selected cases from 1982 and from 1984 to 2004
  - <http://www.paclii.org/databases.htm>
24. **Federated States of Micronesia** (Supreme Court)
  - Selected cases from 1981 to 1997 and 1999 to 2007
  - <http://www.paclii.org/fm/cases/FMSC>
25. **Namibia** (Supreme Court)
  - Selected cases from 1990 to 2007
  - <http://www.saflii.org/na/cases/NASC>
26. **Nauru** (Supreme Court)
  - Selected cases from 1969 to 1982, from 1984 to 1986, from 1988 to 1989, from 1998, from 2002 to 2004, and from 2006
  - <http://www.paclii.org/nr/cases/NRSC>
27. **New Zealand** (Court of Appeal)
  - Selected cases from 1999 to 2007
  - <http://www.nzlii.org/nz/cases/NZCA>
28. **Northern Ireland** (Court of Appeal)
  - Cases from 1998 to 2008
  - <http://www.bailii.org/nie/cases/NICA>
29. **Palau** (Supreme Court)
  - Selected cases from 1994 and from 2008 to 2011
  - <http://www.paclii.org/pw/cases/PWSC>
30. **Panama** (*Corte Suprema de Justicia*)
  - Cases from 1993 to 2006
  - <http://bd.organojudicial.gob.pa/registro.html>
31. **Papua New Guinea** (Supreme Court)
  - Cases from 1963 to 1965, 1967, 1969, 1971, and from 1973 to 2007
  - <http://www.paclii.org/pg/cases/PGSC>
32. **Paraguay** (*Corte Suprema de Justicia*)
  - Cases from 1995 to present
  - <http://www.csj.gov.py/jurisprudencia>

33. **Peru** (*Tribunal Constitucional and Corte Supreme de Justicia y la Republica*)
  - *Tribunal Constitucional*  
<http://www.tc.gob.pe/search/search.pl>
  - *Corte Supreme de Justicia y la Republica*  
<http://jurisprudencia.pj.gob.pe/jurisWeb/faces/faces/faces/faces/SearchParameters.jsp>
34. **Portugal** (*Supremo Tribunal de Justiça*)
  - Cases from 1996 to 2008
  - <http://www.stj.pt/?idm=32>
35. **Saint Kitts and Nevis** (Eastern Caribbean Supreme Court)
  - Cases from 2004 through 2011
  - <http://eccourts.org/judgments.html>
36. **Saint Lucia** (Eastern Caribbean Supreme Court)
  - Cases from 2004 through 2011
  - <http://eccourts.org/judgments.html>
37. **Saint Vincent and the Grenadines** (Eastern Caribbean Supreme Court)
  - Cases from 2004 through 2011
  - <http://eccourts.org/judgments.html>
38. **American Samoa** (High Court)
  - Selected cases from 1977, 1981, 1988, and 1989
  - <http://www.paclii.org/as/cases/ASHC>
39. **Scotland** (High Court of Justiciary)
  - Cases from 1997 to 2008
  - <http://www.bailii.org/scot/cases/ScotHC>
  - Also searchable in LexisNexis
40. **Slovenia** (Constitutional Court)
  - Cases translated into English since June 25, 1991
  - [http://www.us-rs.si/en/index.php?sv\\_path=3439,3440](http://www.us-rs.si/en/index.php?sv_path=3439,3440)
41. **Solomon Islands** (Court of Appeal)
  - Selected cases from 1983 to 1984, from 1986 to 1991, from 1993 to 2000, and from 2002 to 2007
  - <http://www.paclii.org/sb/cases/SBCA/>

42. **South Korea** (Constitutional Court)
  - <http://english.ccourt.go.kr>
43. **Spain** (*Tribunal Constitucional*)
  - Cases from 1980
  - [http://www.boe.es/g/es/bases\\_datos/tc.php](http://www.boe.es/g/es/bases_datos/tc.php)
44. **Switzerland** (Federal Supreme Court)
  - <http://www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm>
45. **Uganda** (Constitutional Court)
  - Cases from 1997 to present
  - <http://www.judicature.go.ug/appeal.php>
  - <http://www.ulii.org>
46. **Vanuatu** (Court of Appeal)
  - Cases from 1982 to present
  - <http://www.paclii.org/vu/cases/VUCA>

**TABLE 5. Courts with an Electronic Presence, but No Searchable Database (Total 32)**

*(website, dates and language of case law coverage provided when available )*

1. **Republic of Azerbaijan** (Constitutional Court)
  - Cases from 1998 to present
  - <http://www.constcourt.gov.az/index.php?j=6>
2. **Algeria** (Constitutional Council)
  - Case law available in French from 1989 to present
  - <http://www.conseil-constitutionnel.dz/indexAng.htm>
3. **Austria** (Constitutional Court)
  - Case law available in German
  - <http://www.vfgh.gv.at/cms/vfgh-site/english/index.html>
4. **Estonia** (Supreme Court)
  - <http://www.nc.ee/?id=82>
5. **Georgia** (Constitutional Court)
  - Website under construction
  - <http://www.constcourt.ge>

6. **Hungary** (Constitutional Court)
  - Case law available in Hungarian, with limited cases translated into English
  - <http://www.mkab.hu/index.php?id=decisions>
7. **Indonesia** (Constitutional Court)
  - Inoperable site
  - <http://www.mahkamahkonstitusi.go.id>
8. **Jamaica** (Supreme Court)
  - Case law available in English
  - <http://supremecourt.gov.jm/judgments>
9. **Lichtenstein** (State Court)
  - <http://www.stgh.li/englisch/default.as>
10. **Lithuania** (Constitutional Court)
  - Case law available in English from 1993 to present
  - [http://www.lrkt.lt/Documents1\\_e.html](http://www.lrkt.lt/Documents1_e.html)
11. **Mexico** (Supreme Court)
  - <http://www.sejn.gob.mx/PortalSCJN>
12. **Moldova** (Constitutional Court)
  - <http://www.constcourt.md>
13. **Mongolia** (Supreme Court)
  - <http://www.supremecourt.mn>
14. **Nepal** (Supreme Court)
  - <http://www.supremecourt.gov.np>
15. **The Netherlands** (Supreme Court)
  - <http://www.rechtspraak.nl/information+in+english>
16. **Nicaragua** (Supreme Court)
  - Inoperable website
  - <http://www.csj.gob.ni>
17. **Nigeria** (Court of Appeal)
  - <http://www.nigeria-law.org/LawReporting.htm>
18. **Pakistan** (Supreme Court)
  - <http://www.supremecourt.gov.pk/web>

19. **Poland** (Constitutional Tribunal)
  - <http://www.trybunal.gov.pl/eng/index.htm>
20. **Portugal** (*Tribunal Constitucional*)
  - <http://www.tribunalconstitucional.pt/tc/home.html>
21. **Russia** (Supreme Court)
  - <http://www.supcourt.ru/EN/supreme.htm>
22. **Senegal** (*La Cour de Cassation and Conseil Constitutionnel*)
  - *Conseil Constitutionnel*  
<http://www.gouv.sn/spip.php?article480>
  - *La Cour de Cassation*  
<http://www.gouv.sn/spip.php?article481>
23. **Serbia** (Constitutional Court)
  - <http://www.ustavni.sud.rs/page/view/en-GB/258-101207/case-law>
24. **Singapore** (Supreme Court)
  - <http://app.supremecourt.gov.sg/default.aspx?pgID=1>
  - <http://www.lawnet.com.sg/remweb/CommServlet.do?pTask=LawNet&com.crimsonlogic.cps.UI.personalize.isSelectedTab=false#LWB> (pay site)
25. **Slovakia** (Constitutional Court)
  - <http://www.concourt.sk/zbierka.do?rok=1993&lang=a&part>
26. **Sudan** (Supreme Court)
  - No case law available
  - There is also a Constitutional Court of Sudan as a result of a 1998 Constitutional Court Act, yet there is no electronic presence for this institution
  - <http://www.sudanjudiciary.org/judiciaryen/4.htm>
27. **Taiwan** (Constitutional Court) (*Judicial Yuan*)
  - <http://www.judicial.gov.tw/en>
28. **Thailand** (Constitutional Court)
  - <http://www.constitutionalcourt.or.th/english>
29. **Trinidad and Tobago** (Supreme Court)
  - <http://www.ttlawcourts.org>

30. **Uzbekistan** (Constitutional Court)
  - No case law available
  - [http://www.gov.uz/en/courts\\_and\\_prosecution/1295](http://www.gov.uz/en/courts_and_prosecution/1295)
31. **Vietnam** (Supreme People's Court)
  - <http://www.sotaythamphan.gov.vn/index.php?hidLang=en>
32. **Venezuela** (*Tribunal Supremo de Justicia*)
  - <http://www.tsj.gov.ve>

**TABLE 6. Courts with Searchable Databases and Case Law in Languages Other Than English, French, Italian, Portuguese, or Spanish (Total 10)**

*(language and website provided)*

1. **Armenia** (Constitutional Court)
  - Language: Armenian. Some case law summaries written in English and French
  - <http://www.concourt.am>
2. **Finland** (Supreme Court)
  - Language: Finnish and Swedish
  - <http://www.kko.fi/27080.htm>
  - <http://www.finlex.fi/> (decision database)
3. **Iceland** (Supreme Court)
  - Language: Icelandic
  - <http://haestirettur.is/control/index?pid=333>
4. **Norway** (Supreme Court)
  - Language: Norwegian
  - <http://www.domstol.no/en/Enkelt-domstol/-Norges-Hoyesterett>
5. **Romania** (Constitutional Court and High Court of Cassation and Justice)
  - Language: Romanian
  - <http://www.ccr.ro/default.aspx?lang=EN>
  - [http://www.scj.ro/cautare\\_decizii.asp](http://www.scj.ro/cautare_decizii.asp)
6. **Russia** (Constitutional Court)
  - Language: Russian
  - <http://www.ksrf.ru>

7. **Rwanda** (*Cour Suprême*)
  - Language: Kinyarwanda
  - <http://www.supremecourt.gov.rw/Jurisprudence.aspx>
  
8. **Sweden** (*Högsta domstolen*)
  - Language: Swedish
  - <http://www.hogstadamstolen.se>
  
9. **Turkey** (Constitutional Court)
  - Searchable database: Yes
  - Language: Turkish
  - <http://www.anayasa.gov.tr>
  
10. **Ukraine** (Constitutional Court)
  - Searchable database: Yes
  - Language: Ukrainian
  - <http://www.ccu.gov.ua/en/index>