

IS RESISTANCE TO FOREIGN LAW ROOTED IN RACISM?

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INTRODUCTION

Racism and oppression inhibit society and its actors and institutions from understanding the intricacies of ethnicity and race. This inhibition makes it more difficult for society to find solutions and remedy oppression. This Essay examines racism in the specific context of “transjudicial communications.” Anne-Marie Slaughter coined this term to describe the practice of courts in one country citing to the opinions and decisions of courts in foreign countries.¹ In the United States, domestic issues of race may shape how legal actors and institutions understand and utilize transjudicial communications. In numerous instances, lawmakers and judges have expressed resistance to foreign law while debating aspects of racial inequality and racism in the United States.

More specifically, racism may fuel myopia on the Supreme Court of the United States by blocking Justices from access to useful foreign legal decisions. As a result, the Justices’ learning process regarding ethnicity and race is stifled. This is a troubling issue, particularly where the perspective lent by transjudicial communications could have been helpful in the Court’s recent discussions of the constitutionality of both race-conscious admissions in higher education and bans on race-conscious affirmative action programs. Specifically, a recent Brazilian Supreme Federal Court decision could have shed light on how the U.S. Supreme Court should view the relation between diversity and equality, how universities might address the U.S. Supreme Court’s concern over applications that allow for self-identification without third-party review, and whether to characterize affirmative action programs as benignly discriminatory, as opposed to manifestations of substantive equality.

The goal of this Essay is to situate transjudicial communications and the backlash against foreign legal citations into a conversation about race

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¹ Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 101 (1994) [<http://perma.cc/VKD3-MTMK>].

and racism. The goal is not to try to prove that opposition to foreign law is racist. That claim is better left for future research. Rather, at a minimum, the resistance to foreign and international law has correlations to racism and is grounded in a racial narrative.

In discussing racism and transjudicial communications, this Essay begins with a working definition of the contested conceptualization of globalization because transjudicial communications are a specific example of globalization. Second, I provide a brief overview of transjudicial communications in the United States and discuss how resistance to this process is linked to oppression and racism. Finally, I argue how racially-rooted resistance to foreign legal citation inhibits the possibilities for U.S. Supreme Court Justices to learn about race in the context of race-conscious university admissions. I use the example of the Supreme Federal Court of Brazil's landmark affirmative action decision issued in April 2012 as an example of a missed opportunity for the U.S. Supreme Court to learn about race and the crafting of appropriate race-conscious remedies.²

I. WHAT IS GLOBALIZATION?

The citation of foreign authorities on domestic constitutional matters is a particularized manifestation of the globalization of law. Therefore, it is helpful to have a working definition of the term “globalization” before proceeding. Talk of the globalization of law may make some think of a law with a worldwide reach that spreads throughout the world and leads to greater homogeneity. This, however, is not an entirely accurate representation of globalization.

Often overused to describe and explain almost every phenomenon, globalization—especially as used in popular discourse—is messy. “Globalization” is a term that can mean everything to everybody. For some people, it means the liberalization of policies.³ For others, it means universalization, and for others, it means westernization.⁴ The term appeared as early as the 1960s, and it “has been variously used in both popular and academic literature to describe a process, a condition, a system, a force, and an age.”⁵ Given all these meanings, the word can often be obscure and invite confusion. Although there are a number of different

² S.T.F., *Arguição de Descumprimento de Preceito Fundamental* [ADPF] No. 186/DF, Relator: Des. Ricardo Lewandowski, 26.04.2012 (Braz.) [hereinafter *ADPF 186*], available at <http://www.stf.jus.br/arquivo/cms/noticianticiastf/anexo/adpf186rl.pdf> [<http://perma.cc/PVR3-BYHN>].

³ JAN AART SCHOLTE, *GLOBALIZATION: A CRITICAL INTRODUCTION* 56 (2d ed. 2005) [<http://perma.cc/Q7UG-G4EZ>]; see also Alexander Heffner, *Turnaround—Lessons from the Third World*, USA TODAY (Mar. 24, 2013, 9:02 AM), <http://www.usatoday.com/story/money/business/2013/03/24/book-review-turnaround/1997893/> [<http://perma.cc/VEA7-LV3T>].

⁴ SCHOLTE, *supra* note 3, at 5759.

⁵ MANFRED B. STEGNER, *GLOBALIZATION: A VERY SHORT INTRODUCTION* 8 (2d ed. 2009).

scholarly definitions of globalization,⁶ there is some overlap and agreement regarding the essence of its meaning. For many scholars, globalization is a set of social processes that: (1) creates and multiplies existing social networks that overcome political, economic, cultural, and geographic boundaries, (2) expands and stretches social networks and interdependencies, (3) intensifies and accelerates social exchanges and activities, and (4) fosters in people a growing subjective awareness of deepening connections between the local and the distant and the global.⁷

Scholars have identified transjudicial communications as an example of globalization.⁸ This does not mean, however, that the use of transjudicial communications will lead to foreign law replacing U.S. law. Rather, transjudicial communications could serve to inform and educate judges in the U.S., helping them to approach cases, particularly ones involving ethnicity and race, with a perspective that remains rooted in U.S. law.

In discussing transjudicial communications, L'Heureux-Dubé argues that one of the major factors leading to change and transjudicial communications is advances in technology.⁹ But this explanation is only part of the story. Globalization is not simply limited to electronic technology. Globalization is a social process.¹⁰ One can imagine a world where everyone has Internet connectivity—but if some perceive the Internet as dangerous, or amoral, those individuals will not use the Internet.

The same is true with respect to transjudicial communications. The availability of foreign decisions on the Internet does not mean that U.S. Justices will use them. National, cultural, political, and social forces can cause these Justices to perceive foreign law as problematic, despite its possible benefits. The next Part explores the possibly racist and oppressive U.S. conservative understandings and rejections of foreign law and transjudicial communications.

II. TRANSJUDICIAL COMMUNICATION IN THE UNITED STATES

In the U.S. Supreme Court, foreign legal citation has been sporadic and, until 2002, relatively uncontroversial. For example, the Court cited

⁶ No definition of globalization is completely unambiguous. See SCHOLTE, *supra* note 3, at 52–54.

⁷ STEGNER, *supra* note 5, at 14–15.

⁸ See e.g., Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15 (1998) [<http://perma.cc/QPES-LEHR>]; Slaughter, *supra* note 1, at 103.

⁹ L'Heureux-Dubé, *supra* note 8, at 25.

¹⁰ L'Heureux-Dubé identifies some sociological factors, e.g., that judges are considering similar issues and have personal contact with one another. L'Heureux-Dubé, *supra* note 8, at 23, 26. But one may also consider a number of other cultural and sociological factors when trying to ascertain how a country's judiciary makes meaning of the Internet and the propriety of using transjudicial communications. While L'Heureux-Dubé identifies some of the sociological pull factors that encourage individuals and institutions to participate in globalization, this Essay focuses more on the factors (e.g., racism as a factor) that push against global social processes.

foreign legal authority (i.e., foreign statutes and practices) in the landmark decision of *Miranda v. Arizona*.¹¹ In the 1990s, without controversy, conservative Chief Justice William Rehnquist endorsed the citation of foreign law—specifically citing the decisions of foreign judges in two controversial landmark decisions: the reproductive rights case *Planned Parenthood v. Casey*,¹² and the assisted suicide decision *Washington v. Glucksberg*.¹³

The first glimpse of controversy over transjudicial communications took place in 2002, when the Court decided *Atkins v. Virginia*, ruling that the death penalty for mentally retarded offenders constitutes cruel and unusual punishment.¹⁴ Writing for the majority, Justice Stevens referenced a European Union amicus brief and described how the world community disapproved of the death penalty for the mentally retarded.¹⁵ In dissent, Justice Scalia sharply criticized the reference and even bestowed an award for the footnote: “[T]he Prize for Court’s Most Feeble Effort to fabricate ‘national consensus’ must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called ‘world community,’ and respondents to opinion polls.”¹⁶

In the next year, the kerfuffle over the use of foreign authority erupted beyond the Court in *Lawrence v. Texas*, when the court invalidated state criminal laws that prohibited same-sex sodomy.¹⁷ In this decision, Justice Kennedy cited a European Court on Human Rights opinion.¹⁸ The debate over the use of foreign law continued in the Court largely in the form of critiques lodged by Justice Scalia in dissent to the *Lawrence* majority.¹⁹ With foreign citations occurring in high-profile cases as early as the 1960s, the press nonetheless characterized the foreign citation in *Lawrence* as new. One journalist mistakenly wrote, “Never before had the Supreme Court’s majority cited a foreign legal precedent in such a big case.”²⁰

¹¹ 384 U.S. 436, 486–90 (1966) (referencing foreign sources of law from several countries, including England, Scotland, and India) [<http://perma.cc/B5B8-5US4>].

¹² *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C.J., concurring) [<http://perma.cc/3PTR-MAS6>].

¹³ *Washington v. Glucksberg*, 521 U.S. 702, 718 n.16 (1997) [<http://perma.cc/9GS6-8KMB>]. In *Glucksberg*, Chief Justice Rehnquist cited the courts of last resort in Canada and Colombia because these were countries “embroiled” in a similar debate on euthanasia. *Id.*

¹⁴ *Atkins v. Virginia*, 536 U.S. 304 (2002) [<http://perma.cc/RD4A-C8HF>].

¹⁵ *Id.* at 316 n.21.

¹⁶ *Id.* at 347 (Scalia, J., dissenting).

¹⁷ *Lawrence v. Texas*, 539 U.S. 558 (2003) [<http://perma.cc/9P22-4HMY>].

¹⁸ *Id.* at 573.

¹⁹ *See, e.g., id.* at 598 (Scalia, J., dissenting).

²⁰ Joan Biskupic, *Supreme Court Citing More Foreign Cases*, USA TODAY (July 7, 2003, 9:19 PM), http://www.usatoday.com/news/washington/2003-07-07-foreign-usat_x.htm [<http://perma.cc/UV8E-FSH3>]. As discussed previously, the Court cited foreign authority in other landmark cases including

In the ten years since *Lawrence*, there has been significant legislative resistance via the introduction of resolutions and bills to prohibit the citation of foreign law.²¹ Additionally, legislators have made their resistance public. For example, Florida Congresswoman Sandy Adams wrote in an op-ed:

The imposition of foreign precedent into our federal court system is a real threat to our Constitution and could fundamentally break down the very system put in place by our forefathers more than 200 years ago. Each case that cites foreign law is another opportunity to set precedent and for the Constitution to be challenged and overruled.²²

This resistance to foreign legal citation has roots in oppression, generally, and in race and ethnicity, specifically. One can observe these links to racism both tangentially and more directly. First, tangential and circumstantial correlations exist between resistance to foreign law and race. A close examination of *Atkins* and *Lawrence*, each of which provoked strong resistance to foreign law, reveals the racial issues that coincide with that resistance.

At the heart of *Atkins* is the death penalty, an issue that is steeped in race in the United States. A number of studies demonstrate the significant effect that race has on whether an individual will receive the death penalty.²³ For example, the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System noted that black defendants received the death penalty at a “significantly higher rate” than non-black defendants who were similarly situated.²⁴ Additionally, the Committee concluded that one-third of Philadelphia County’s black death row inmates would have received a sentence of life imprisonment had they not been

Miranda, *Casey*, and *Glucksberg*, see cases cited *supra* notes 11–13 and accompanying text.

²¹ On March 20, 2005, Senator John Cornyn introduced a Senate Resolution against the use of foreign legal decisions. S. Res. 92, 109th Cong. (2005) [<http://perma.cc/YT8H-FYQB>]. See also H.R. Res. 568, 108th Cong. (2004) [<http://perma.cc/K2VL-85PH>]. More recently, then-Representative Sandy Adams introduced a bill to bar the use of foreign legal authority at the federal level. H.R. 973, 112th Cong. (2011) [<http://perma.cc/U9U4-A6FW>].

²² Sandy Adams, Op-Ed., *Adams: Ban Foreign Law from Courts*, WASH. TIMES (Mar. 9, 2011), <http://www.washingtontimes.com/2011/mar/9/in-recent-years-supreme-court-justices-have-interj> [<http://perma.cc/PZ2T-URNL>].

²³ See, e.g., AM. BAR ASS’N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE PENNSYLVANIA DEATH PENALTY ASSESSMENT REPORT (2007), available at <http://www.americanbar.org/content/aba/migrated/assessmentproject/finalreport.authcheckdam.pdf> [<http://perma.cc/PF08-PJVS>]; JOHN J. DONOHUE III, CAPITAL PUNISHMENT IN CONNECTICUT, 1973–2007: A COMPREHENSIVE EVALUATION FROM 4686 MURDERS TO ONE EXECUTION (2013), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1095&context=john_donohue [<http://perma.cc/T36A-SZTS>].

²⁴ See PA. SUPREME COURT COMM. ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM, FINAL REPORT 201 (2003), available at http://www.pa-interbranchcommission.com/_pdfs/FinalReport.pdf [<http://perma.cc/G3SG-XXYN>].

black.²⁵

The resistance to foreign law in *Lawrence* is situated next to opposition to same-sex rights. There may be links between the resistance to foreign law and the resistance to recognizing the rights and liberties of individuals with same-sex desire. A racial correlation exists as well. Most people are unaware that there were two petitioners in *Lawrence*: the named petitioner, John Geddes Lawrence, and his black partner, Tyron Garner.²⁶ Garner's jealous boyfriend, Robert Eubanks—who was known to refer to Garner as a “nigger”—called the Harris County Sheriff's Office to report “a black male going crazy with a gun” in Lawrence's apartment,²⁷ thereby giving the police probable cause to enter. While most consider *Lawrence* a same-sex rights decision, the actual case has unique, often ignored racial factors and origins, which arguably led to the sodomy charge.

These features of *Atkins* and *Lawrence* do not definitively prove that the racial inequality present in the background of these decisions is directly responsible for resistance to foreign law. Instead, I propose that the resistance to foreign law may be a common response to cases arising from racist origins and is linked to controversies that are bound up with and grounded in racial understandings.

Second, there are more direct connections between race and ethnicity and the resistance to foreign law. For example, a number of states have legislated (or are considering) bans on the use of foreign and international law in their respective state courts.²⁸ Anti-Islamic and anti-Arab sentiment following the events of September 11, 2001 may be partially responsible for these actions. Many of the state anti-foreign law initiatives explicitly reference and ban the use of sharia law.

The confirmation hearings for Supreme Court nominees have provided another instance to observe a direct connection between race and resistance to foreign law. During the Congressional hearings questioning then-nominee Sonia Sotomayor, disadvantaged minority identities—in the areas of race, ethnicity, and gender—were social attributes folded into questions framing foreign law as a dangerous stranger worthy of resistance. In the sole case of Justice Sotomayor,²⁹ conservatives established a connection

²⁵ *Id.*

²⁶ *Lawrence v. Texas*, 539 U.S. 558 (2003).

²⁷ DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 61–74 (2012). See Chapter 5 for a detailed account of the arrest of Tyron Garner and John Lawrence.

²⁸ See, e.g., MARTHA F. DAVIS & JOHANNA KALB, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, OKLAHOMA STATE QUESTION 755 AND AN ANALYSIS OF ANTI-INTERNATIONAL LAW INITIATIVES (2011) [<http://perma.cc/N4UG-68TX>]; Donna Leinwand, *More States Enter Debate on Sharia Law*, USA TODAY (Dec. 9, 2010), http://www.usatoday.com/news/nation/2010-12-09-shariaban09_ST_N.htm [<http://perma.cc/QMK2-S49X>].

²⁹ The ethnic backgrounds of Supreme Court nominees arose during the confirmation hearings of Justice Alito and Justice Kagan. During Justice Alito's hearing, questions that focused on his Italian identity attempted to highlight his compassion and make him a more sympathetic candidate. See

between the social identity of the nominee and her advocacy for the citation of foreign law. Specifically, there were attempts to link the subjectivity of her diverse ethnic and gender background to a bias in the use of foreign law. It was not uncommon for the Senators to discuss Justice Sotomayor's race and gender in the same breath as foreign law. For example, Senator Kyl said in his opening statement:

Many of Judge Sotomayor's public statements suggest that she may, indeed, allow, and even embrace, decision-making based on her biases and prejudices.

The "wise Latina woman" quote,³⁰ which I referred to earlier, suggests that Judge Sotomayor endorses the view that a judge should allow her gender-, ethnic-, and experience-based biases to guide her when rendering judicial opinions. This is in stark contrast to Judge Paez's view that these factors should be "set aside."

In the same lecture, Judge Sotomayor posits that "there is no objective stance but only a series of perspectives—no neutrality, no escape from choice in judging" and claims that "[t]he aspiration to impartiality is just that—it's an aspiration because it denies the fact that we are by our experiences making different choices than others." No neutrality, no impartiality in judging? Yet isn't that what the judicial oath explicitly requires?

....

Judge Sotomayor clearly rejected the notion that judges should strive for an impartial brand of justice. She has already "accepted" that her gender and Latina heritage will affect the outcome of her cases.

Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 333 (2006) [<http://perma.cc/78XR-YKKG>]. Kagan deliberately used her Jewish identity to bring levity to the hearings. When asked by Senator Graham about her whereabouts on Christmas Day 2009—the day when Umar Farouk Abdulmutallab attempted to set off a plastic explosive in his underwear on board Northwest Airlines Flight 253—Justice Kagan said, "You know, like all Jews, I was probably at a Chinese restaurant." See *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 144 (2010) [<http://perma.cc/LGR7-PPBF>]. Yet only during Justice Sotomayor's confirmation hearings did Republicans use social identity (i.e., Latina identity) negatively, and in conjunction with discussions of foreign law and bias in judicial interpretation. See Sheldon Bernard Lyke, *Making Strange Laws*, 35 U. PA. J. INT'L L. 675 (2014) (arguing that Supreme Court confirmation hearings reveal a socially constructed process where foreign law is transformed into a dangerous stranger).

³⁰ In 2001, while delivering the Judge Mario G. Olmos Memorial Lecture at the University of California, Berkeley School of Law, Justice Sotomayor stated, "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life." Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002) [<http://perma.cc/BV8R-DWNX>]. The "wise Latina" comment—which was a staple of speeches she delivered as early as 1994—drew heavy criticism from some Republicans during Justice Sotomayor's confirmation hearing in 2009. See *Sotomayor's 'Wise Latina' Comment a Staple of Her Speeches*, (June 8, 2009, 1:39 PM), <http://www.cnn.com/2009/POLITICS/06/05/sotomayor.speeches/> [<http://perma.cc/P8D4-3Q32>].

This is a serious issue, and it's not the only indication that Judge Sotomayor has an expansive view of what a judge may appropriately consider. In a speech to the Puerto Rican ACLU, Judge Sotomayor endorsed the idea that American judges should use "good ideas" found in foreign law so that America does not lose "influence in the world."

... [T]he laws and practices of foreign nations are simply irrelevant to interpreting the will of the American people as expressed through our Constitution.

Additionally, the vast expanse of foreign judicial opinions and practices from which one might draw simply gives activist judges cover for promoting their personal preferences instead of the law.³¹

Senator Kyl specifically categorized Justice Sotomayor's gendered and ethnic background as a source of bias. He linked his perception of an ethnic-racial bias to her endorsement of using foreign judicial opinions.

In summary, the goal of this part of the Essay is not to definitively prove that opposition to foreign law is a manifestation of racism. My claim is more modest and instead argues that the resistance to foreign law, at a minimum, may correlate to sentiments and structures of racial inequality.

III. FOREIGN LEGAL CITATION AND RACE-CONSCIOUS AFFIRMATIVE ACTION

The racialized resistance to foreign law has implications for understandings of race in the context of U.S. Supreme Court cases on race-conscious affirmative action programs. Citation to foreign and international law in such cases occurred only when Justice Ginsburg cited the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women in her concurring opinion in *Grutter v. Bollinger*³² and her dissent in *Gratz v. Bollinger*.³³ Foreign courts, however, have used U.S. Supreme Court decisions in race-conscious university admissions cases.³⁴ Most notable is the Brazilian Supreme Federal Court's recent decision in ADPF 186.³⁵ The unanimous decision endorsed race-

³¹ *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 1006 (2009) (statement of Sen. John Kyl) [<http://perma.cc/4XUX-PP4B>].

³² 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) [<http://perma.cc/H8T2-SGEJ>].

³³ 539 U.S. 244, 302 (2003) (Ginsburg, J., dissenting) [<http://perma.cc/G68K-UW47>].

³⁴ *See, e.g.*, *Ashoka Kumar Thakur v. Union of India*, (2007) 4 S.C.R. 493 (India) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)) [<http://perma.cc/RJ6Y-YZYX>]; *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)) [<http://perma.cc/P98V-JW58>].

³⁵ *ADPF 186*, *supra* note 2. An ADPF is a Claim of Breach of Fundamental Precept, which is an action brought to protect the guidelines and principles of the Brazilian Constitution and to prevent and

conscious admissions policies. The ruling declared that the Federal University of Brasilia's affirmative action quota program was a constitutional means to (1) create a diverse academic environment, (2) combat a history of racial discrimination, and (3) promote de facto racial equality in education.³⁶

The ADPF 186 decision cited extensively to *Bakke*, *Grutter*, and *Gratz* and dedicated an entire section of the opinion to "Affirmative Action in the United States of America."³⁷ The Court in *Grutter* held that race could be used to meet the compelling government interest in achieving educational diversity.³⁸ The *Grutter* decision, however, reaffirms the *Bakke* decision, which abandoned the use of racial and ethnic quotas in university admissions.³⁹ For the *Grutter* Court, race is an acceptable means for enriching the educational process, but following the race-blind strict scrutiny approach, the Court ultimately sees race-conscious admissions as an obstruction to equality, as opposed to a means towards it.⁴⁰

The Federal Supreme Court decision provides a great illustration of the globalization or stretching of law that does not merely lead to homogeneity. The Brazilian court citation to the United States was an exercise in comparative legal decision-making, and did not result in mere mimicry. Despite reviewing these U.S. cases, the ADPF 186 ruling distinguished itself from the U.S. Supreme Court and its refusal to validate quotas.⁴¹ The Brazilian court noted that structural differences exist between the two countries' constitutions that allow Brazil to offer a more liberal remedy.⁴²

Additionally, while the ADPF 186 decision mentioned *Grutter* and diversity, it did not discuss diversity in a manner wholly consistent with *Grutter*. For example, the Brazilian court touched on a rationale articulated in *Grutter* that diversity is important because it brings value to and enriches the educational experience. The ADPF 186 opinion stated: "It is true to say, moreover, the great beneficiary of affirmative action policies is not the one

repair any violations to these fundamental precepts by the public power. *Legal Glossary*, SUPREMO TRIBUNAL FEDERAL, http://www2.stf.jus.br/portalStfInternacional/cms/verGlossario.php?sigla=portalStfGlossario_en_us&indice=C&verbete=174624 (last visited July 29, 2014) [<http://perma.cc/HQ6M-H35A>]. For information regarding the Court, see *About the Court*, SUPREMO TRIBUNAL FEDERAL, http://www2.stf.jus.br/cms/verConteudo.php?sigla=portalStfSobreCorte_en_us (last visited July 29, 2014) [<http://perma.cc/SW6Q-JW36>].

³⁶ ADPF 186, *supra* note 2.

³⁷ See *id.* at 33–44 (section entitled "AS AÇÕES AFIRMATIVAS NOS ESTADOS UNIDOS DA AMÉRICA").

³⁸ *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

³⁹ *Id.* at 334 (stating that it is unconstitutional to establish quotas for racial and ethnic groups).

⁴⁰ *Id.* at 333.

⁴¹ ADPF 186, *supra* note 2, at 41.

⁴² *Id.* ("The Brazilian Constitution—it is important to note—allows an approach to affirmative action policies that is more comprehensive than that made by the Supreme Court of the United States.") (author's translation).

student who entered the university through policies to reserve places, but the entire academy who will have the opportunity to mingle with the other.”⁴³

The Brazilian court, however, moved beyond a mere diversity rationale and linked this discussion of the value of diversity as a means to achieve equality:

It is therefore necessary to build a public space open to the inclusion of the other, the social outsider. An area covering otherness. And the University is the ideal space for the demystification of social prejudices with respect to each other and therefore for the construction of a plural and culturally heterogeneous collective consciousness that is consistent with the globalized world in which we live.

It was exactly the perception that diversity is a component essence of university education that guided the decisions of the Supreme Court of the United States of America where they examined the constitutionality of affirmative action policies, for example, *Bakke v. Regents of the University of California* (1978), *Gratz v. Bollinger* (2003), and *Grutter v. Bollinger* (2003).⁴⁴

Thus, although overlap exists between the Brazilian and U.S. Supreme Court decisions, specifically with respect to the value of diversity in education and the demystification of social prejudices, several significant differences emerge. For example, the Court in *Grutter* did not imagine the role of the university as a racial integrator,⁴⁵ nor did its earlier decision in *Bakke* support the view that a compelling use of race (or a goal of diversity) was the inclusion of social outsiders.⁴⁶ These arguments veer away from U.S. judicial conceptualizations of diversity. The Brazilian court, however, appears to hold that the use of racial quotas promotes diversity while also promoting equality.⁴⁷

Even though U.S. precedent informed the ADPF 186 ruling, this landmark Brazilian case did not have a similar effect on the Supreme Court’s latest considerations of race-conscious admissions policies in *Fisher v. University of Texas at Austin*,⁴⁸ and anti-affirmative action ballot initiatives in *Schuette v. Coalition to Defend Affirmative Action*.⁴⁹ There was

⁴³ *Id.* at 31 (author’s translation).

⁴⁴ *Id.* at 32 (author’s translation).

⁴⁵ Compare *id.* at 30–33 (arguing in a section entitled “O PAPEL INTEGRADOR DA UNIVERSIDADE,” or the “Role of the University as Integrator,” that universities are ideal sites for racial inclusion) with *Grutter v. Bollinger*, 539 U.S. 306, 328–33 (2003) (discussing the positive effects of racial diversity on the quality of education and “diffusion of knowledge and opportunity”).

⁴⁶ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978) (rejecting the argument that general societal discrimination was a compelling government interest, and thereby denying states the right to use racial classifications) [<http://perma.cc/M3AU-ZHF2>].

⁴⁷ *ADPF 186*, *supra* note 2, at 32.

⁴⁸ 133 S. Ct. 2411 (2013) [<http://perma.cc/XT3P-YGMW>].

⁴⁹ *Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for*

no mention of the Brazilian decision in oral arguments,⁵⁰ and none of the Justices referred to the case in their written opinions. Given the resistance to foreign law—and the racial correlations to this opposition—it is not surprising that the majority, concurring, and dissenting opinions in *Fisher* and *Schuetz* were devoid of discussion of foreign and international law.

Relying on the Brazilian court's assessment that the constitution of Brazil might be less constrained than that of the U.S.,⁵¹ some might argue that there is no reason for the U.S. Supreme Court to pay attention to the ADPF 186. If the U.S. Constitution is more constrained, then there is no need to reference ADPF 186. First, the constitutional differences between the two countries might not be severe enough to bar the remedy granted in the ADPF 186 decision.⁵² Secondly, comparative and international law would not be in existence if courts only referenced constitutional systems that were largely, or mostly, identical to their own. Lastly, engaging in comparative analysis creates robust opinions. Judges citing foreign law in a comparative area not only engage a variety of different perspectives, but these perspectives belong to their peers who are facing similar issues and deciding issues of equality and fairness. Such considerations increase the chances that a particular judge will have the opportunity to write a more thorough decision.

The ADPF 186 decision could have served as a useful source of information for the *Fisher* Court, however. First, as mentioned above, the Brazilian case provides an alternate example of the ways in which the use of race to achieve diversity is not necessarily antithetical to achieving equality. Though the decision discusses diversity, it prominently grounds its reasoning in promoting equality by ending racism and social exclusion.⁵³

Equal. by Any Means Necessary (BAMN), 134 S. Ct. 1623 (2014) [<http://perma.cc/97H3-VCYM>].

⁵⁰ Transcript of Oral Argument, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) [<http://perma.cc/5JKD-QVRH>]; Transcript of Oral Argument, *Schuetz v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. by Any Means Necessary* (BAMN), 134 S. Ct. 1623 (2014) (No. 12-682) [<http://perma.cc/BBT6-FGJY>].

⁵¹ See *supra* note 42 and accompanying text.

⁵² While the Brazilian court notes differences between the Brazilian and American constitutions, the court does not characterize or identify the specific structural differences that permit Brazil to adopt a more comprehensive approach to affirmative action. Therefore, while I acknowledge that there are constitutional differences, I am cautious to overemphasize the Brazilian court's structural claims explanation. There is nothing evident from the actual structure of the United States Constitution that would preclude the Court from adopting the same approach to affirmative action that Brazil adopted. One could argue easily, however, that the Brazilian approach to affirmative action is less a product of constitutional structure, and more a result of judicial interpretation. As a result, the Court would be less likely to approve Brazil's comprehensive affirmative action policies, because of U.S. equal protection doctrine jurisprudence.

⁵³ See, e.g., *ADPF 186*, *supra* note 2, at 4–6 (discussing formal versus material equality and that it is the duty of the government to provide material equality, not simply proclaim the principle of equality in formal terms); Tanya K. Hernandez, *The View of Affirmative Action from the Other Side of the Americas*, HUFFINGTON POST (Oct. 9, 2012, 1:42 PM), http://www.huffingtonpost.com/tanya-k-hernandez/fischer-v-texas_b_1951278.html [<http://perma.cc/ST6-5ZMN>].

Diversity and the provision of de facto racial equality can be framed as mutually constitutive. This is not a novel idea. Rather, it somewhat reflects the original aim and interpretation of Justice Powell's opinion in *Bakke*.⁵⁴

Second, the Brazilian comparison can inform an issue that arose during oral argument in *Fisher* on the problem of racial identification. During oral argument, Chief Justice Roberts questioned Gregory Garre, attorney for The University of Texas, about the racial identification of student applicants:

CHIEF JUSTICE ROBERTS: Counsel, before—I need to figure out exactly what these numbers mean. Should someone who is one-quarter Hispanic check the Hispanic box or some different box?

MR. GARRE: Your Honor, there is a multiracial box. Students check boxes based on their own determination. Now, this is true under the Common Application—

CHIEF JUSTICE ROBERTS: Well, I suppose a person who is one-quarter percent Hispanic, his own determination, would be, I'm one-quarter percent Hispanic.

MR. GARRE: Then they would check that box, Your Honor, as is true of any—

CHIEF JUSTICE ROBERTS: They would check that box. What about one-eighth?

MR. GARRE: Your Honor, that was—they—they would make that self-determination, Your Honor. If—if anyone, in any part of the application, violated some honor code then that could come out—

CHIEF JUSTICE ROBERTS: Would it violate the honor code for someone who is one-eighth Hispanic and says, I identify as Hispanic, to check the Hispanic box?

MR. GARRE: I don't think—I don't think it would, Your Honor. I don't think that that issue would be any different than the plan upheld in *Grutter* or the Harvard plan or in *Bakke*—

CHIEF JUSTICE ROBERTS: You don't check, in any way, the racial identification?

⁵⁴ Brief for Respondents Kimberly James, et al. at 17, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (describing the link between equality and diversity: “To most Americans, uniting the nation on the basis of Justice Powell’s conception of diversity merged easily with the aspirations inspired by *Brown* to unite the nation on the basis of integration.”) [<http://perma.cc/7VBG-YYCF>]. There are both conservative and progressive critiques to this approach. A conservative view, which more closely mirrors the Court’s view, believes that the use of race in admissions is contrary to de jure equality as opposed to supporting de facto equality. A progressive critique of this approach argues that *Bakke* is a conservative compromise that takes the emphasis away from equality towards diversity and value. This critique believes that “Justice Powell’s decision is an inadequate one, a decision that helped slow down progress towards ‘genuine equality,’ even helped set it back to a certain extent, but did not halt it.” *Id.*

MR. GARRE: We do not, Your Honor, and no college in America, the Ivy Leagues, the Little Ivy Leagues, that I'm aware of.

CHIEF JUSTICE ROBERTS: So how do you know you have 15 percent African American—Hispanic or 15 percent minority?⁵⁵

At the heart of Chief Justice Roberts's questioning is a focus on how the government can identify an applicant's race for the purpose of administering a race-conscious admissions program. Attorney Garre's main answer to the Chief Justice's inquiry was that applicants have the opportunity to self-identify their ethnic and racial group(s) during the admissions process. This was a question of immense importance in the Brazil case because of an interest to facilitate the redistribution and avoid instances of individuals attempting to fraudulently gain benefits.⁵⁶ The Brazilian court identified two different methods of racial identification: self-identification (autoidentificação) and identification by others (heteroidentificação).⁵⁷ The decision ruled that it was constitutional for a university to administer the two methods or a combination of both selection systems, provided that they never cease to respect the personal dignity of the candidates and that they comply with certain criteria.⁵⁸ Some of these criteria included that (a) classification by the racial identification committee must be made after the candidate's self-identification as black or brown (to curb the dominance of a third-party classification) and (b) classification should be conducted by phenotype and not by descent.⁵⁹ The Brazilian approach may help shed light on the methods that the United States wants to adopt or avoid.

Finally, if the *Schuette* ruling engaged a comparative analysis of the ADPF 186 decision, then perhaps the Court could have analyzed affirmative action bans using a framework focused on formal/substantive equality, instead of one centered on benign-invidious discrimination. The benign-invidious distinction was pervasive in *Schuette*,⁶⁰ and flows from the

⁵⁵ Transcript of Oral Argument at 32–33, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345).

⁵⁶ The Brazil court quotes Daniela Ikawa in saying that the use of hetero-identification or, identification by others, can be used because of a desire “to suppress possible fraud identification as it refers to obtaining benefits, and to delineate the right to redistribution as closely as possible.” *ADPF 186*, *supra* note 2, at 38 (quoting DANIELA IKAWA, *AÇÕES AFIRMATIVAS EM UNIVERSIDADES* 129–30 (Lúmen Júris 2008)).

⁵⁷ See *ADPF 186*, *supra* note 2, at 38.

⁵⁸ *Id.* at 39.

⁵⁹ *Id.* at 38–39.

⁶⁰ Justice Kennedy's plurality opinion described that “What is at stake here is not whether injury will be inflicted but whether government can be instructed not to follow a course that entails . . . the grant of favored status to persons in some racial categories and not others.” *Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1638 (2014). In his concurrence, Justice Scalia discussed “the notion of ‘benign’ racial discrimination.” *Id.* at 1639 (Scalia, J. concurring). In dissent, Justice Sotomayor stated

belief that only invidious discrimination should be suspect and that when racial discrimination benefits racial minorities, it should not be subject to heightened scrutiny. The Court has ruled, however, that regardless of the benign-invidious distinction, racially discriminatory government classifications will be held to the same standard of heightened scrutiny under the Equal Protection Clause.⁶¹

If one believes that affirmative action is a tool for achieving equality, then characterizing affirmative action policies as discriminatory is deeply problematic. The Brazilian court dealt with the issue of characterizing affirmative action in a slightly different way. The court did not describe affirmative action as a policy that punishes the white majority, yet is excused because it provides benign results for racial minorities. Instead, the Brazilian court discussed affirmative action as a manifestation of equality. The court drew on the difference between formal equality—where the law is facially neutral—and material (or substantive) equality—where individuals actually experience similar treatment; the court stated that is the duty of the government to provide material equality.⁶²

In his *Schuetz* concurrence, Justice Scalia highlights the problem when a court takes a narrow view of material equality. Under the Court's current equal protection jurisprudence, when there is a facially neutral state action questioned for denying equal protection on racial grounds, the Court will ask whether the action reflects a racially discriminatory purpose.⁶³ Therefore, as long as a state action offers formal equality and has no racial motivation, the state action will stand even if it treats racial minorities substantively different. In *Schuetz*, a comparative analysis of the ADPF 186 decision on the question of equal protection could offer an alternative framework to the benign-invidious frame overly discussed in the court's jurisprudence. The Brazilian decision could encourage engaging the question of whether the Equal Protection Clause should facilitate substantive equality and protect minorities that experience disparate impact

that, following the mandate of the Equal Protection Clause, strict scrutiny should not be applied "to actions designed to benefit rather than burden the minority." *Id.* at 1672 (Sotomayor, J., dissenting).

⁶¹ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) [<http://perma.cc/6BHH-CJ46>]. R. Richard Banks argued that the benign-invidious framework had continuing importance for the Court's affirmative action decisions from *Bakke* through the Michigan cases in *Gratz* and *Grutter*. R. Richard Banks, *The Benign-Invidious Asymmetry in Equal Protection Analysis*, 31 HASTINGS CONST. L.Q. 573, 574 (2003) [<http://perma.cc/E8XP-4E2P>].

⁶² See ADPF 186, *supra* note 2, at 4–6. The Brazilian court's approach is not novel. A number of scholars have discussed the distinction between formal and material (or substantive) equality. See, e.g., Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1, 87–88 (2005) [<http://perma.cc/9P8Z-XEU6>]; Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CAL. L. REV. 735, 750–52 (2002) [<http://perma.cc/K8TA-ZPJV>].

⁶³ *Schuetz*, 134 S. Ct. at 1648 (Scalia, J., concurring). Scalia's comment is in accord with the rule announced in *Washington v. Davis*, 426 U.S. 229 (1976) [<http://perma.cc/VGR5-R9P3>], where the Court held that a law is not unconstitutional based solely on its racially disproportionate impact.

from facially neutral laws.

IV. CONCLUSION

This Essay suggests that the backlash to transjudicial communications may have roots in race and racism. Future research should explore these suggestions in order to discover whether a causal connection exists between racism and the resistance to foreign law.

Additionally, this Essay examines transjudicial communications that speak substantively on racial issues—specifically race-conscious affirmative action. Unsurprisingly, while non-U.S. countries cite *Bakke*, *Gratz*, and *Grutter*, the Supreme Court of the United States is hesitant to cite foreign and international law in its cases. It appears that the U.S. judiciary cannot enter cosmopolitan discussions on race with its international counterparts. These transjudicial communications could nuance the Court's own conversations on race in the United States, without posing a threat to the laws of the United States. The Brazil example offers great insight into the affirmative action problem in the United States. The Court would do well to view the decision to come up to speed on questions of equality and racial identification, even if it does not ultimately mimic the exact solutions accepted in the Federal Supreme Court's ADPF 186 decision.