

## American Citations and the McLachlin Court: An Empirical Study

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This article examines the use of American jurisprudence by the judges of the McLachlin Court, using an earlier study of such citations as a reference point. In addition to tracking overall use of American citations over time, it looks at these trends: which Canadian judges use American cases and for which types of cases; and which American cases, courts, and judges are being cited. Brief descriptions of the Supreme Court cases with the largest use of American citations precede a categorization of the results. The article confirms previous academic findings that the use of American citations have been modest, with a strictly contained impact, and thus casts doubt on the notion of a globalizing transnational judicial community.

Le présent article se penche sur l'usage que les juges de la Cour McLachlin font de la jurisprudence américaine, en ayant recours à une étude antérieure de pareilles citations comme point de référence. Outre le fait d'assurer le suivi de l'ensemble des citations américaines utilisées au fil du temps, il examine les tendances suivantes : quels sont les juges canadiens qui utilisent des cas américains et dans quels genres d'instances ; et quels sont les cas américains, les cours et les juges américains qui sont cités. De brèves descriptions des cas de la Cour suprême avec le plus grand nombre de citations américaines précèdent une catégorisation des résultats. L'article confirme les résultats académiques antérieurs à l'effet que l'utilisation de citations américaines a été modeste, avec une incidence strictement contenue et, par conséquent, ce qui jette le doute sur la notion d'une mondialisation de la collectivité judiciaire internationale.

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**WE ARE TOLD THIS IS AN AGE OF JUDICIAL GLOBALIZATION**, characterized by an international community of judges who are more aware of each other and more engaged in active communication and interaction than ever before. Anne-Marie Slaughter enthuses that “courts are talking to one another all over the world,”<sup>1</sup> Mark Tushnet talks of the “globalization of [domestic] constitutional law,”<sup>2</sup> and Lorraine Weinrib describes the “postwar paradigm” of law and constitutionalism that has effectively been adopted by nations around the world.<sup>3</sup> According to Lefler, “a growing legal dialogue [is] being created and developed by some of the world’s most brilliant legal minds.”<sup>4</sup> As an indication of how well-established the notion of judicial globalization has become, the Registrar of the Supreme Court of Canada (SCC) includes the “international judicial community” in its list of stakeholders, and describes the Supreme Court as being called upon to play an “active role” as a member of this community.<sup>5</sup>

This article picks up on Christopher McCrudden’s suggestion that one of the significant vectors for judicial globalization (or internationalization) has been “the increased citation by judges of ‘foreign’ legal materials, in particular judicial

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1. Anne-Marie Slaughter, “A Typology of Transjudicial Communication” (1994) 29 U. Rich. L. Rev. 99 at 99.
  2. Mark Tushnet, “The Inevitable Globalization of Constitutional Law” (Paper presented to the Hague Institute for the Internationalization of Law, October 2008), Harvard Public Law Working Paper No. 09-06, online: <<http://ssrn.com/abstract=1317766>>.
  3. Lorraine E. Weinrib, “The postwar paradigm and American exceptionalism” in Sujit Choudhry, ed., *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006) 84.
  4. Rebecca Lefler, “A Comparison of Comparison: Use of Foreign Case Law as Persuasive Authority by the United States Supreme Court, The Supreme Court of Canada and the High Court of Australia” (2001-2002) 11 S. Cal. Interdisciplinary L.J. 165 at 167.
  5. Office of the Registrar of the Supreme Court of Canada, *2006-2007 Estimates: A Report on Plans and Priorities* (Ottawa: Treasury Board Secretariat, 2006) at 9, online: <<http://www.tbs-sct.gc.ca/rpp/0607/sc-cs/sc-cs-eng.pdf>>.

opinions, from jurisdictions that have no legal authority in the ‘receiving’ jurisdiction.”<sup>6</sup> I will begin by identifying the extent of such “foreign” citation by the SCC. I do so, however, in order to focus on a particular subset of these citations: American judicial opinions.

There is some irony in this focus; although debates on the globalization of law have become routine in many countries, these issues have become very controversial in the United States itself. A number of recent US Supreme Court (US SC) decisions have been particularly relevant and have dealt with issues of interest beyond American borders, including the execution of mentally disabled persons,<sup>7</sup> affirmative action in university admissions,<sup>8</sup> the criminal prohibition of homosexual activity,<sup>9</sup> and the execution of juvenile offenders.<sup>10</sup> The practice of referring to foreign judgments has not only divided the Court—most notably with Justice Breyer supporting the practice and Justice Scalia opposing it<sup>11</sup>—but the controversy has also reverberated throughout the American academic literature.<sup>12</sup> This criticism of foreign citations is a curious commentary on the notion

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6. Christopher McCrudden, “Judicial Comparativism and Human Rights” in Esin Öricü & David Nelken, eds., *Comparative Law: A Handbook* (Portland: Hart Publishing, 2007) 371 at 371.
  7. *Atkins v. Virginia*, 536 U.S. 304 (2002).
  8. *Grutter v. Bollinger*, 539 U.S. 306 (2003).
  9. *Lawrence v. Texas*, 539 U.S. 558 (2003).
  10. *Roper v. Simmons*, 543 U.S. 551 (2005).
  11. For the “conversation” between Justice Scalia and Justice Breyer on the validity of using foreign law in US cases, see Norman Dorsen, “A conversation between U.S. Supreme Court justices – The relevance of foreign legal materials in U.S. constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer” (2005) 3 *Int’l J. Const. L.* 519.
  12. For perspectives opposed to using foreign materials in US cases, see Roger P. Alford, “In Search of a Theory for Constitutional Comparativism” (2005) 52 *UCLA L. Rev.* 639; Robert J. Delahunty & John Yoo, “Against Foreign Law” (2005) 29 *Harv. J.L. & Pub. Pol’y* 291; John O. McGinnis, “Foreign to Our Constitution” (2006) 100 *Nw. U.L. Rev.* 303; Ernesto J. Sanchez, “A Case Against Judicial Internationalism” (2005) 38 *Conn. L. Rev.* 185; and Richard A. Posner, “Foreword: A Political Court” (2005) 119 *Harv. L. Rev.* 31. For perspectives in favour of using foreign materials in US cases, see Melissa A. Waters, “Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law” (2005) 93 *Geo. L.J.* 487; Vicki C. Jackson, “Constitutional Comparison: Convergence, Resistance, Engagement” (2005) 119 *Harv. L. Rev.* 109; Mark Tushnet, “Transnational/Domestic Constitutional Law” (2003) 49 *Loy. L.A. L. Rev.* 109; and Mark Tushnet, “When is Knowing Less Better Than Knowing More?”

of an emerging globalization of law, especially because the United States has long prided itself on the exportability of its judicial practices and insights.<sup>13</sup> Be that as it may, the controversy has raised few Canadian echoes, to such an extent that Anne Warner La Forest has described the academic discussion about the impact of international legal norms and comparative law on judicial decisions in this country as “trite.”<sup>14</sup>

Even if American courts are reluctant to import judicial citations from other countries, it is still the case that other countries draw upon American jurisprudence. The focus of this paper will be to consider the extent of such citation by the current SCC—the McLachlin Court—as well as whether the use of American judicial pronouncements in Canadian decisions is increasing or decreasing over time. It will also examine which judges use American citations in which kinds of cases, and what these citations typically look like.

## I. THE THEORY OF STUDYING CITATIONS

Appeal courts do not produce outcomes alone, but also structured reasons, to explain and justify those outcomes by placing the legal issues of the immediate case into a broader framework. Ultimately, the power of a judicial decision lies in its capacity to persuade other actors that the outcome is legitimate and appropriate, and that the principles of law laid down can appropriately be applied in the immediate case and in similar cases. The preferred weapon in the explanatory arsenal of common law courts is the judicial precedent: justifying the immediate outcome by linking it to the reasoning in prior decisions of that court and other courts. This involves a double displacement: first, the immediate decision is not something new but simply makes explicit what was already immanent within the law; and second, the immediate decision is attributed not to the discretionary will of the current judge(s) but to a broader and historically grounded legal community. This double displacement is accomplished through the citation of authority and, until recently, almost exclusively judicial authority.

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Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law” (2005-2006) 90 Minn. L. Rev. 1275.

13. Louis Henkin & Albert J. Rosenthal, eds., *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (New York: Columbia University Press, 1990).

14. Anne Warner La Forest, “Domestic Application of International Law in *Charter* Cases: Are We There Yet?” (2004) 37 U.B.C. L. Rev. 157.

As noted by Merryman, “a citation means something to the person citing, and presumably he anticipates that it will have some meaning to a reader.”<sup>15</sup> The most common type of citation, and the easiest to explain, is the hierarchical citation—when the judge cites a prior decision of her own court (horizontal authority), or of a higher court to which the immediate decision could be appealed (vertical authority).<sup>16</sup> The reasons in judicial decisions deal with the interpretation of written documents, the application of legal rules and principles, the immediate implications of more general legal values and principles, or the interaction of different sets of rules and principles. These resolutions of specific issues are then followed, sometimes adjusted, or even reversed, in subsequent judicial decisions. Citation serves the purpose of locating the immediate decision and reasoning within the context of these earlier decisions. For almost all contested issues, there is a set of judicial decisions that one expects to see: if it is a question of reasonable limits under the *Charter*, we would be surprised not to see *Oakes*;<sup>17</sup> if we are talking about standards of review, we would look for *Canadian Union of Public Employees v. New Brunswick*<sup>18</sup> and *Dunsmuir*;<sup>19</sup> if the case is about *Charter* equality rights, we expect *Andrews*,<sup>20</sup> *Law*,<sup>21</sup> and *Kapp*;<sup>22</sup> and so on. Considerable information can be gleaned from watching these standard patterns, as some cases are added to the normally expected set, some cases are dropped, and others continue to be cited.<sup>23</sup>

If the largest set of citations by the modern SCC is to its own prior decisions, then the second largest is to the decisions of provincial and federal courts of appeal, and the third is to Canadian trial courts. Although we often tend to fo-

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15. John Henry Merryman, “The Authority of Authority: What the California Supreme Court Cited in 1950” (1954) 6 *Stan. L. Rev.* 613 at 613.

16. For the SCC, there has not been a higher court since the ending of appeals to the Judicial Committee of the Privy Council after 1949.

17. *R. v. Oakes*, [1986] 1 S.C.R. 103.

18. *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.

19. *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

20. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

21. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

22. *R. v. Kapp*, [2008] 2 S.C.R. 483.

23. See Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981) at 13; Martin Shapiro, “Towards a Theory of *Stare Decisis*” (1972) 1 *J. Legal Stud.* 125 at 127.

cus on the hierarchical aspects of the court system (lower courts being bound by higher courts; higher courts directing lower courts), this is paradoxically juxtaposed to the horizontal collegiality of the common law, in which all judges are equally engaged in the process of finding and explaining the law. Sometimes when the SCC cites lower court decisions, it is to criticize their doctrinal position, or to line up the decisions of lower courts when they have divided by “picking a winner” or establishing their own alternative view. But much of the time, references to lower court decisions are polite, even deferential; the reasons of “our learned colleague” on a lower court are taken as a solid, even decisive, part of the discussion.

In general, citations to the decisions of Canadian courts are drawn from an established universe of domestic legal discourse where each citation is a content-filled placeholder for specific aspects of the contemporary meaning of the law. Judicial decisions are part of an evolving conversation about the law, one in which all judges take part. Domestic citation takes place within an established context and a settled frame of conventions and understandings.

What about citations of the judicial decisions of other countries? The common law has always found some place for the decisions of judges in other common law countries. Though the hierarchical dimension is completely absent—no court in another common law country is today a “higher court” to the SCC—the informative and persuasive dimension remains.

The status of English courts in this process is unique, as English common law is what Canada formally adopted. Not only was that law already embodied to some extent in prior judicial decisions, but the subsequent decisions of more recent English courts can also be instructive in helping us to understand precisely what we adopted. The decisions of the House of Lords—the highest court in England—carry a special weight even if no Canadian decision can ever be appealed to it, although this is arguably a diminishing factor in our law. Ian Bushnell has referred to this as “the equation” whose effect was to make “the House of Lords the ultimate Court,” a consideration that did not begin to fade until the 1960s.<sup>24</sup> Additionally, Canada’s historic origins as a British colony made the decisions of some English courts or quasi-courts, such as the Judicial Committee of the Privy Council, authoritative within a system of binding precedent. Even

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24. Ian Bushnell, “The Use of American Cases” (1986) 35 U.N.B.L.J. 157 at 164-65. The “equation” Bushnell refers to is: “THE LAW OF CANADA = THE LAW OF ENGLAND” (capitals in original).

today, these account for one in every six of the English citations.<sup>25</sup> Finally, the reputation and quality of the judges on many English courts made them an attractive reference for emerging legal issues or challenges common to the two countries. Given these three considerations, it is not surprising that English citations have always made up the largest part of the Supreme Court's non-Canadian citations, and continue to do so today.<sup>26</sup> Further afield, there has long been a more limited practice of citation of other common law precedent, including American, Australian, and New Zealand cases. More recently, the notion of the "globalization of law" involves a readiness to refer to a wider set of judicial doctrines, including those from countries outside the common law world.

## II. THE DATABASE

The analysis that follows is drawn from a database consisting of all judicial citations made by the justices of the Supreme Court in their published reasons since 1 January 2000—a period that coincides with the Chief Justiceship of Madam Justice Beverley McLachlin. They include citations from minority reasons (both dissents and separate concurrences), in addition to citations drawn from majority reasons. The inclusion of minority opinions reflects their status as part of the Supreme Court's institutional product, and my conviction that these represent a meaningful contribution to an evolving discourse about the law.<sup>27</sup> The decisions were accessed on the Supreme Court decision website maintained by LEXUM.<sup>28</sup>

The period under consideration is a somewhat awkward eight-and-a-half years. My discussion will be in terms of calendar years, primarily because this is the way that the Supreme Court itself now organizes its own material. It should be noted that the McLachlin Court is already approaching the length of its predecessor, the Lamer Court—eight-and-a-half years compared to nine-and-a-half years—and already has presided longer than the six years of the preceding

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25. Peter McCormick, "Foreign Citations and the McLachlin Court" (Paper presented to the Midwest Political Science Association Annual Meeting, Chicago, Illinois, 3 April 2009).

26. *Ibid.*

27. It is worth noting that the Supreme Court frequently cites minority reasons from its own prior cases. See Peter McCormick, "Second Thoughts: Supreme Court Citation of Dissents & Separate Concurrences, 1949-1999" (2002) 81 Can. Bar Rev. 369.

28. See "Judgments of the Supreme Court of Canada," online: <<http://scc.lexum.umontreal.ca>>.

Dickson Court. The time period is therefore a reasonable one that makes comparison appropriate. Finally, the most direct comparison will be to my own earlier article that looked at the Supreme Court's American citations in and before 1994.<sup>29</sup>

### III. THE SUPREME COURT AND JUDICIAL CITATIONS

Between 1 January 2000 and 30 June 2008, the Supreme Court handed down 632 decisions, which used a total of 13,602 citations to judicial authority. The average decision included just under twenty-two judicial citations. However, this is slightly misleading given that eighty-two decisions were oral and therefore handed down on the same day that the oral argument was heard. These decisions are typically very brief (rarely more than a single paragraph, and sometimes no more than a single formulaic sentence), and typically include no citations to authority. It is therefore more useful to focus on those cases that were reserved for judgment after oral argument; there have been 550 such decisions, using an average of twenty-five judicial citations.

These judicial citations were drawn from a wide variety of sources—from trial courts and appeal courts to the decisions of boards and tribunals—and from a dozen different countries besides Canada. The breakdown of citations is shown in Table 1.

The most striking observation is that the Supreme Court cites its own prior decisions more than all of the other sources of judicial authority combined. Second is the overwhelming predominance of domestic citations, with almost nine in every ten references to judicial authority referring to Canadian courts and tribunals. The table shows a relentless attrition: decisions of Canadian appeal courts are cited about one-third as often as Supreme Court decisions; Canadian trial decisions half as often as Canadian appeal court decisions; English cases half as often as Canadian trial courts; American decisions half as often as English; and the decisions of other countries and supranational tribunals half as often as American cases.

Table 1 shows the figures for a single time period—the McLachlin Court in the early twenty-first century. The obvious question is how this compares with earlier periods, and what the long-term trends look like; this is taken up in

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29. Peter McCormick, "The Supreme Court of Canada and American Citations 1945-1994: A Statistical Overview" (1997) 8 *Sup. Ct. L. Rev.* 527 [McCormick, "American Citations"].

**TABLE 1: SOURCES OF JUDICIAL AUTHORITY  
SCC, 2000-2008**

Source of Citations	Number	Percentage
SCC	7,989	58.7%
Canadian Appeal Courts	2,452	18.0%
Canadian Trial Courts	1,479	10.9%
England	824	6.1%
United States	476	3.5%
Other Countries & Supranational	220	1.6%
Canadian Boards & Tribunals	162	1.2%
Total	13,602	

Table 2, below.<sup>30</sup> Supreme Court citations only became the largest single category in the 1960s, and have exceeded all other citations combined since the 1990s. Citations to other Canadian courts rose for some time after 1949, but now seem to have stabilized at or near 30%. English citations (including those of the Judicial Committee of the Privy Council)—once an absolute majority of all citations to judicial authority—have been declining steadily to the point where they now provide less than one in every sixteen citations. “Other” citations have oscillated between 1% and 2% of all citations over the whole period, trending slightly upward. The most relentless growth is that of “all Canadian” citations, which have increased by about 8% for each Chief Justiceship, mostly at the expense of English citations.

It is notable that the Court’s use of American citations does not indicate a distinct trend, as does the use of other citations. For most of our history such citations were infrequent, comparably unusual to the “other” citations that have never surpassed 2% of the total. What is distinctive is the sharp jump in American citations under Chief Justice Dickson and, to a slightly lesser extent, Chief Justice Lamer. However, this trend was not sustained, and their use has now fallen to pre-Laskin levels. It would seem that the jump in American citations under the

30. Peter McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada* (Toronto: James Lorimer, 2000) [McCormick, *Supreme at Last*].

**TABLE 2: SOURCES OF JUDICIAL AUTHORITY, BY CHIEF JUSTICESHIP  
SCC, 1949-2008**

Chief Justice	SCC	Other Cdn	English <sup>31</sup>	US	Other
Rinfret <sup>32</sup>	21.7%	16.7%	59.8%	0.8%	1.0%
Kerwin	28.7%	21.4%	46.9%	1.5%	1.5%
T/C/F <sup>33</sup>	38.8%	24.3%	32.8%	3.1%	1.1%
Laskin	38.4%	29.4%	27.0%	3.3%	1.9%
Dickson	38.9%	35.3%	16.6%	7.2%	2.0%
Lamer	55.8%	27.5%	9.4%	5.6%	1.8%
McLachlin	58.7%	30.1%	6.1%	3.5%	1.6%

**TABLE 3: CITATIONS TO AMERICAN JUDICIAL AUTHORITY  
SCC, 2000-2008**

Source of Citations	Number	Median Date	Percentage
US Supreme Court	220	1973	46.2%
US Federal Courts	110	1989	23.1%
US State Courts	140	1984	29.4%
US Board & Tribunal	6	1990	1.3%
Total	476	1981	

Dickson Court and the early Lamer Court was not the beginning of a new trend, but, rather, a temporary departure. La Forest's reference to "our modern and expanding reliance on foreign materials," and his expectation that "the use of American, international, and foreign materials will continue to grow" in retrospect now appear to be time-bound comments uniquely appropriate to the early 1990s.<sup>34</sup>

31. This category includes citations to decisions of the Judicial Committee of the Privy Council.

32. Only decisions under Chief Justice Rinfret's Court after 1949 are included, as this was the end of appeals to the Judicial Committee of the Privy Council.

33. This category includes the courts of Chief Justices Taschereau, Cartwright, and Fauteux.

34. *Gérald V. La Forest*, "The Use of American Precedents in Canadian Courts" (1994) 46 *Me. L. Rev.* 211 at 212, 217.

More apposite is Smithey's notion that the use of higher foreign citations initially caused by major constitutional novelty will subsequently decline as constitutional routinization sets in.<sup>35</sup>

My simple category of "American citations" provides only a blunt measure because the citations are drawn from different American courts, as shown in Table 3. The largest single source is the US SC, but this accounts for just under half of all American citations, with state court citations slightly outnumbering federal court citations (30% compared to 23%). These ratios are roughly similar to those identified in the 1997 paper.<sup>36</sup> References to the decisions of boards or tribunals are extremely unusual, accounting for only 1.3% of all American citations.

It is striking that the citation of American cases does not focus on more recent cases, but rather on well-established (not to say somewhat dated) ones, as shown in Table 3. The median citation to the US SC is to a case decided thirty years earlier, citations to state courts involve decisions that are twenty years old, and US federal court citations are from cases decided fifteen years earlier. This comparative sequencing is interesting in itself, but even more curiously, this means that the typical American citation is slightly less current under the McLachlin Court than it was for either the Dickson Court or the Lamer Court;<sup>37</sup> for both, the median age was about twenty years, a number which has now increased to almost twenty-five under the McLachlin Court. I will return to this tendency, and discuss its implications, below.

Alternatively, we can count the cases in which American citations are used, rather than the number of American citations themselves. These results are shown in Table 4. One in every five reserved decisions uses American citations, and two-thirds of these (or one in seven) involve the use of one or more citations to the US SC. The use of federal court citations is somewhat more focused, occurring in only fifty-one cases (or one in eleven), and state court citations are found in only thirty-three cases (or one in seventeen). "One case in five" is a solid increase over the "one case in ten" identified by Bushnell for the pre-*Charter* period,<sup>38</sup>

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35. Shannon Ishiyama Smithey, "A Tool, Not a Master: The Use of Foreign Case Law in Canada and South Africa" (2001) 34 *Comp. Pol. Stud.* 1188 at 1192-99.

36. McCormick, *Supreme at Last*, *supra* note 30.

37. *Ibid.* at 117, 139.

38. Bushnell, *supra* note 24 at 160. MacIntyre's reference to finding American citations in "about four cases a year" cannot be taken as accurate. See J.M. MacIntyre, "The Use of American Cases in Canadian Courts" (1964-1966) 2 *U.B.C. L. Rev.* 478 at 489.

**TABLE 4: NUMBER OF DECISIONS CITING AMERICAN AUTHORITY BY YEAR  
SCC DECISIONS, 2000-2008**

Year	All reserved decisions	Cases citing US cases	Cases citing US SC cases	Cases citing federal courts	Cases citing state courts
2000	55	16	15	9	7
2001	76	17	9	8	2
2002	73	23	15	9	6
2003	60	10	9	1	3
2004	70	15	11	8	2
2005	72	6	5	1	0
2006	53	13	9	5	2
2007	53	17	11	6	8
2008	38	7	4	4	3
Total	550	124	88	51	33

and it contrasts dramatically with the US SC's citation of foreign authority in about one case in every two hundred.<sup>39</sup>

In general, American authority is not a major feature of the case law of the McLachlin Court, and is somewhat less prominent than was the case for the two preceding Chief Justiceships. In this, the Canadian experience differs from that of other comparable countries; for example, the frequency of American citations by the High Court of Australia has been rising steadily since the 1970s, and has been averaging well over three hundred citations per year in this century—about six times the current Canadian figure.<sup>40</sup>

#### IV. WHO CITES AMERICAN CASES?

Not all judges use American citations to the same extent. Table 5 breaks down the American citations among the fourteen judges who served on the Court

39. See David Zaring, "The Use of Foreign Decisions by Federal Courts: An Empirical Analysis" (2006) 3 J. Empirical Legal Stud. 297.

40. Paul von Nessen, "Is There Anything to Fear in Transnational Development of Law? The Australian Experience" (2006) 33 Pepp. L. Rev. 883 at 918-19.

during the first eight-and-a-half years of the twenty-first century (and therefore excludes the citations included in the anonymous “By the Court” decisions, in jointly-authored judgments or minority reasons). Because judges have served for varying periods of time, the total American citations for each judge are presented on a “per year” basis, and the ordering is driven by the descending order of the final column, American citations per year. One of the questions is whether the numbers are affected by the extent to which the judges vary in terms of their opportunities to write. Hence, the “reasons (judgments)” column, within which the numbers should be read in “zoom-in” fashion: x (y) means x sets of reasons, of which (y) were judgments of the Court.

The most obvious conclusion to be drawn from the numbers is the uniqueness of Justice Binnie, who alone accounts for more than one-third of all American citations with an annual rate that is almost five times that of the average of all other judges. Second to Justice Binnie is Justice Iacobucci, who served for just over half of the period studied. Together Justices Binnie and Iacobucci account for approximately half of all American citations. What is striking about the data in Table 5 is the separation between Justices Binnie and Iacobucci and the rest of the Court. Without them, the use of American citations would be at the level it was in the 1950s. In the early 1990s, Justice La Forest led the Court in the use of American citations with an average of twenty-five per year; at that time, Justice Binnie’s numbers would have placed him third on the list, and Justice Iacobucci’s would have ranked seventh.<sup>41</sup> What the figures from the 1990s suggest, and those from the new decade do not, is a frequency of citation implying a steady conversation about American judicial ideas. This conversation was joined on a regular basis by most of the members of the Court; there were half-a-dozen members of that Court who cited American decisions more than a dozen times every year. The figures in Table 5 point to quite a different trend, which seems more pronounced after the departure of Justice Iacobucci in 2004.

The turnover in Supreme Court membership between 1994 and 2000-2008 is so substantial that Chief Justice McLachlin is one of the few names to appear on both lists. In the 1990s, she was among the most frequent users of American cases, averaging more than seventeen citations per year.<sup>42</sup> Now, she is near the

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41. McCormick, “American Citations,” *supra* note 29.

42. *Ibid.* at 536.

bottom of the table; from 2000-2008, she has barely cited as many American cases as she averaged per year in her first six years on the Court. Conversely, Justice Iacobucci was well down the list for the early 1990s, at about seven citations per year; under Chief Justice McLachlin, he stepped this up by more than half.<sup>43</sup>

Moving beyond specific individuals, the fourteen judges who have served on the Supreme Court in the twenty-first century can be divided into three groups. There are the four “constants” who served the entire eight-and-a-half years (Chief Justice McLachlin and Justices Binnie, Bastarache,<sup>44</sup> and LeBel). Between them, they account for thirty-four judge-years of service and 248 American citations, for an average of 7.3 per judge per year. The second group are the five “leavers” who left the Court some time after 1 January 2000, including Justices L’Heureux-Dubé (2002), Gonthier (2003), Arbour and Iacobucci (2004), and Major (2005). Together, they account for 21.2 judge-years of service and 102 American citations, for an average of 4.8 per judge per year. The third group consists of the five “joiners” who have been appointed to the Court since 1 January 2000, and these include Justices Deschamps (2002), Fish (2003), Abella and Charron (2004), and Rothstein (2006). As a group, they account for 20.7 judge-years of service and a mere 57 American citations, for an average of 2.8 per judge per year. The reasonable implication of these numbers is that American citations will continue to decline as an element of the judicial authority acknowledged by the SCC, with a large drop when Justices Binnie and LeBel—both in the top third of the table—leave the Court, more or less together, in 2014.<sup>45</sup>

Twenty years ago, Ian Bushnell suggested that there was a correlation between those judges who had received legal training in the United States and those judges who were the most likely to cite American authorities;<sup>46</sup> Gérard La Forest corroborated this tendency a decade later.<sup>47</sup> My own earlier study found some

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43. However, more than half of Justice Iacobucci’s American citations are packed into a single set of reasons. See his separate concurrence in *Non-Marine Underwriters, Lloyd’s of London v. Scalera*, [2000] 1 S.C.R. 551 [*Non-Marine Underwriters*]. This case is discussed below.

44. My logic is slightly compromised by the fact that Justice Bastarache served the whole period, but left the Court on precisely the last day under consideration; switching him from the “constants” to the “leavers,” however, does not undermine the point that I am making.

45. This assumes that both Justices Binnie and LeBel will serve until mandatory retirement.

46. Bushnell, *supra* note 24 at 169.

47. La Forest, *supra* note 34 at 213

**TABLE 5: CITATIONS OF AMERICAN AUTHORITY, BY JUSTICE  
SCC DECISIONS, 2000-2008**

Judge	US Cites	Years	Reasons (Judgments)	Cites/Year
Binnie	164	8.5	94 (61)	19.29
Iacobucci	60	4.5	42 (36)	13.33
Bastarache	42	8.5	90 (47)	4.94
L'Heureux-Dubé	12	2.5	21 (4)	4.80
LeBel	40	8.5	98 (53)	4.71
Deschamps	23	5.9	47 (22)	3.90
Major	23	6.0	49 (43)	3.83
Charron	13	3.8	35 (27)	3.42
Arbour	14	4.5	51 (30)	3.11
Gonthier	11	3.6	27 (19)	3.06
Rothstein	7	2.3	13 (10)	3.04
McLachlin	18	8.5	74 (63)	2.12
Abella	7	3.8	34 (16)	1.84
Fish	7	4.9	42 (24)	1.43
All Judges <sup>48</sup>	441	75.8	717 (455)	5.82

basis for thinking that, although the judicial conversation on American authority may have been started by justices with some US legal training (especially Chief Justice Laskin and Justice La Forest), the practice had spread to colleagues without such training by the early 1990s; only one of the six most frequent users of American citation on the Lamer Court attended an American law school.<sup>49</sup> Today, for almost the first time since the Second World War, there is not a single judge on the SCC with a law degree from an American university.<sup>50</sup>

48. The data in this table omits US citations in “By the Court” decisions, as well as in joint opinions and minority reasons.

49. McCormick, “American Citations,” *supra* note 29 at 537.

50. I use the term “almost” in reference to the four year gap between the departure of Rand in 1959 and the appointment of Spence in 1963.

**TABLE 6: CITATIONS TO THE US SC, BY CHIEF JUSTICESHIP  
SCC DECISIONS, 2000-2008**

US SC Chief Justice	Citations	Percentage
Marshall [1801 – 1835]	5	2.3%
Taney [1836 – 1864]	1	0.5%
Chase [1864 – 1873]	0	0%
Waite [1874 – 1888]	3	1.4%
Fuller [1888 – 1910]	16	7.3%
White [1910 – 1921]	4	1.8%
Taft [1921 – 1930]	5	2.3%
Hughes [1930 – 1941]	7	3.2%
Stone [1941 – 1946]	6	2.7%
Vinson [1946 – 1953]	8	3.6%
Warren [1953 – 1969]	30	13.6%
Burger [1969 – 1986]	74	33.6%
Rehnquist [1986 – 2005]	55	25.0%
Roberts [2005 – 2008]	6	2.7%
Total	220	

However, Bushnell's parallel observation that "[j]udges with exposure to a legal education in England are correspondingly relatively low on a list of users of American law"<sup>51</sup> has weathered much less well; Justices Binnie and Iacobucci, the two members of the current Court most likely to use American citations, both received law degrees from Cambridge.

## V. WHAT SORTS OF US SC CASES GET CITED?

Since the largest block of American citations are drawn from the US SC, I will consider this set of citations more closely. I have already suggested above that

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51. Bushnell, *supra* note 24 at 169.

the median age of these citations is somewhat high (around thirty years). Table 6 follows up on this suggestion, allocating the US SC citations to the various Chief Justiceships.<sup>52</sup>

Given the fact that the Roberts Court dates back only to 2005, there are very few citations from it.<sup>53</sup> The bulk of citations to the US SC (more than two-thirds) comes from the three previous Chief Justiceships, with the Burger Court (1969 to 1986) providing the single largest block, followed at some distance by the Rehnquist Court, and, finally, the Warren Court. This leaves a very large tail of citations dating all the way back to the beginning of the nineteenth century, including a curious bulge for the Fuller Court at the end of that century that will be examined more closely below.

On their own, and without any point of comparison, the numbers in Table 6 are, at best, mildly interesting. Table 7 examines the use by the SCC of its own prior decisions, organized by SCC Chief Justiceship (and combining the first seven Chief Justiceships into a single row). I suggest that Table 7 represents the normal time distribution for judicial citations by the modern SCC. Elsewhere,<sup>54</sup> I have suggested that there is a strong tendency for the modern Supreme Court to cite recent decisions. This tendency declines steadily over time—so much so that one can generate a “decay curve” linking the age of a set of cases to the frequency with which they are cited. Posner refers to this as the “depreciation of precedent.”<sup>55</sup> The practical effect of this is that citations to recent decisions crowd out references to earlier cases; hence the Dickson Court precedents have been progressively vanishing behind citations to the decisions of the Lamer Court, and they in turn are beginning to yield to the decisions of the McLachlin Court itself.<sup>56</sup>

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52. Absent from this data are citations from the period prior to the Chief Justiceship of John Marshall. There are no citations to any such decisions by the Supreme Court in the time period under consideration.

53. Only nineteen of the citations (4.2% of the total) are to US SC decisions that were handed down since 1 January 2000.

54. Peter McCormick, “The Supreme Court Cites the Supreme Court: Follow-Up Citation on the Supreme Court of Canada, 1989-1993” (1995) 33 *Osgoode Hall L.J.* 453.

55. Richard A. Posner, “An Economic Analysis of the Use of Citations in Law” (2000) 2 *Am. L. & Econ. Rev.* 381 at 401. See also William M. Landes & Richard A. Posner, “Legal Precedent: A Theoretical and Empirical Analysis” (1976) 19 *J.L. & Econ.* 249.

56. For the first six months of the 2008 calendar year, there were 183 citations of Lamer Court decisions and 157 citations of McLachlin Court decisions.

**TABLE 7: SCC SELF-CITATIONS, BY CHIEF JUSTICESHIP  
SCC DECISIONS, 2000-2008**

SCC Chief Justice	Citations	Percentage
pre-Duff [ up to 1933 ]	116	1.5%
Duff [1933 – 1944]	69	0.9%
Rinfret [1944 – 1955]	95	1.2%
Kerwin [1954 – 1963]	128	1.6%
T/C/F <sup>57</sup> [1963 – 1973]	137	1.7%
Laskin [1973 – 1984]	737	9.2%
Dickson [1984 – 1990]	1,296	16.2%
Lamer [1990 – 2000]	3,660	45.8%
McLachlin [2000 – 2008]	1,747	21.9%
Total	7,989	

Since the Chief Justiceships of the American and Canadian courts do not match particularly well, the numbers cannot simply be juxtaposed. The point, however, can be made by two comparisons. The Chief Justiceships of Rehnquist and Roberts reach back just over two decades, beginning in 1986; just over one-quarter (27.7%) of all SCC citations to US SC decisions in this century have been drawn from this period. The Chief Justiceships of Dickson, Lamer, and McLachlin are roughly comparable, beginning in 1984, and five-sixths of the SCC's self-citations have been drawn from this period, which is more than triple the American proportion. Conversely, the Chief Justiceship of Earl Warren marked an important watershed for the US SC, with just over one-quarter (25.1%) of all SCC citations of US SC decisions pre-dating this critical transition. The Canadian counterpart to the Warren Court (beginning in 1954) is the Kerwin Court (beginning in 1955), with only 3.6% of the SCC's self-citations dating from before this period.<sup>58</sup>

57. This category combines the Chief Justiceships of Taschereau, Cartwright, and Fauteux.

58. It might be suggested that the comparison is unbalanced because, compared with the SCC, the history of the US SC goes back almost an additional century. However, this does not

It is reasonable to see Table 7 as showing a particular approach to the role of the Supreme Court, balancing continuity and predictability with a willingness to explore legal issues and ideas in the context of changing circumstances. The median date of a set of cited cases is a rough measure of this. When the median date of a SCC self-citation in this century is 1993 (in other words, the median age of a cited case is just over fifteen years), this is a strong indication of how rapidly new decisions—new *law*—are replacing old(er) decisions and law. In this context, a comparison of the McLachlin Court with the citation patterns of the Lamer Court is useful.

During the 1990s, the median date for a SCC self-citation was 1989, indicating a median age of about six years—considerably lower than that for the current Court—and the median date for an American citation was 1974, indicating a median citation age of about twenty years.<sup>59</sup> This trend is reflected in the data within Table 6, where the median date for a cited case is 1973, and the potentially critical clustering of cited cases matches up with the dates for the Laskin Court. It therefore takes longer for American cases to register in the SCC’s jurisprudence, and it takes longer for them to fade and to be replaced by more recent decisions and reasons. Thus, American citations do not follow the same trend as Supreme Court self-citations; they are not centered to the same extent on judicial deliberations about recent experiences or developments.

Perhaps the logic behind citing US SC cases is different. It could be that the novelty of the decision is less important, and instead, a greater emphasis is placed on the reputation of the specific judges cited than is the case for SCC self-citations. Perhaps we should be thinking in terms of the specific US SC judges whose decisions for the Court, or much more rarely, minority reasons,<sup>60</sup> have been cited by the McLachlin Court. In this century, the SCC has made reference to the decisions of forty-six different US SC judges out of the 110

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significantly compromise my point because only six citations to the US SC pre-date the 1875 establishment of the SCC.

59. The median date and age is more useful than the average, because we are looking at a range of numbers that is bounded on one side (the age of a citation cannot be less than zero; the date of the cited case cannot be later than the date of the citing case), but not on the other.
60. Smithey, *supra* note 35 at 1209. The author states: “[r]ather than merely following foreign majority opinions, judges in Canada and South Africa have often found the logic of foreign dissenting opinions to be more persuasive.” However, in this century, only thirteen of the 220 citations to US SC decisions have referenced dissenting opinions; six of these citations were in *Charter* cases.

who have served on that Court. Nineteen US SC justices were cited only once each, while the thirteen most frequently cited are listed in Table 8. The number in brackets indicates how often that citation was accompanied by an explicit naming of the justice in question.<sup>61</sup> If it is indeed the reputation or the prestige of a particular judge that is being referenced, then a specific reference to the name of the judge may well be part of the analysis.

To put it mildly, these numbers are very much on the modest side. There have been more than two hundred citations to US SC decisions, yet Justices Kennedy and Black, each with only six citations in total, both make the list. Additionally, the five-way tie for first place involves barely double this number, or less than twice per year.<sup>62</sup> Not only are the numbers modest, but also the names themselves are a curious collection. The numbers are not heavily skewed toward the current members; only five of the top thirteen (and only two of the top six) have served on the US SC in this new century, a number balanced by the five whose service ended before the 1990s began. Parallel lists for the SCC for the post-war Chief Justiceships typically include only the current members of the Court and the previous Chief Justice or two.<sup>63</sup>

If the novelty of American decisions is not a strong determining factor of whether Canadian Supreme Court justices will refer to it, neither is quality. Americans are constantly ranking and rating their judges. One of the most prominent of these exercises was the questionnaire distributed by Mersky and Blaustein in 1970, with a revised and updated version in 1993; the numbers in the third column of Table 7 are drawn from this 1993 survey.<sup>64</sup> The rankings of the top thirteen show just how curious the SCC's citation practices would appear to an American scholar. Only three judges from the US top twenty (Brennan, Warren, and Black) make the list at all, mostly in the bottom half; indeed, only

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61. Given that this is a subset of the larger number, these numbers should not be summed, but should rather be read (*e.g.*, for Rehnquist or White) as "fourteen citations, of which three involved direct naming."

62. I cannot resist pointing out that White leads the list, Black fills the bottom place, and Gray is also on the list—that is to say, three of the US SC justices whose last names are colours are among the top "baker's dozen" for the SCC's citations; only Brown (1891-1906) fails to make the list, although, as it happens, he was also cited (once).

63. See McCormick, *Supreme at Last*, *supra* note 30. Lists similar to Table 8 are provided for each Chief Justiceship since the end of appeals to the Judicial Committee of the Privy Council.

64. *Infra* note 65.

**TABLE 8: SCC CITATIONS TO US SC, BY US SC JUSTICE  
SCC DECISIONS, 2000-2008**

US SC Justice	Citations (Named)	Ranking <sup>65</sup>
Rehnquist [1972 – 2005]	14 (3)	48th
White [1962 – 1993]	14 (3)	41st
Brennan [1956 – 1990]	14 (2)	7th
Stewart [1958 – 1981]	14 (2)	28th
Stevens [1958 – 2008]	14 (1)	33rd
Burger [1969 – 1986]	13 (6)	91st
Blackmun [1970 – 1994]	12 (2)	24th
O'Connor [1981 – 2006]	11 (5)	34th
Scalia [1986 – 2008]	9 (4)	42nd
Gray [1882 – 1902]	8 (2)	45th
Warren [1953 – 1969]	8 (1)	5th
Kennedy [1988 – 2008]	6 (2)	46th
Black [1937 – 1971]	6 (1)	6th

six of the top forty judges appear at all, balanced by the five who rank between 40th and 50th. The US SC justice who is specifically named the most often by the SCC (Burger)—something that might reasonably be taken as an indicator of special relevance or importance—is ranked 91st by American lawyers and academics.

Particularly striking is the presence of Justice Horace Gray, who makes the SCC top dozen, despite the fact that his service barely reached into the twentieth

65. Rankings are based on the 1993 Mersky & Blaustein survey, as reported by William G. Ross, “The Ratings Game: Factors that Influence Judicial Reputation” (1996) 79 Marq. L. Rev. 401 at 445-52. For the original Mersky & Blaustein survey, see Albert P. Blaustein & Roy M. Mersky, “Rating Supreme Court Justices” (1972) 58 A.B.A. J. 183. The survey used the responses of sixty-five law school deans to rank US SC justices in five categories from “great” down to “failure.” This was updated by the 1993 survey referenced in this article. The justices were ranked from the best (CJ John Marshall) through to the worst (James C. McReynolds).

century. Gray's service was not insignificant; when Currie<sup>66</sup> and Easterbrook<sup>67</sup> had their tongue-in-cheek argument about who had been the most insignificant justice ever to serve on the US SC,<sup>68</sup> Gray did not even receive passing mention. But his ranking—a modest 45th—does not suggest any major contribution to judicial doctrine that might be expected to reach through the ages. He is noted in American literature as the legal historian among the justices,<sup>69</sup> his decisions light on abstract principle and heavy on American historical detail.<sup>70</sup> He was the first US SC justice to hire law clerks.<sup>71</sup> He is generally mentioned only for a couple of decisions that were part of a general tendency of the Fuller Court to support national power over the states; one of this pair is among his citations by the SCC, but it is not used in this context.<sup>72</sup> Yet he received eight citations for four different cases, by five different SCC judges<sup>73</sup> in six different SCC decisions<sup>74</sup>

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66. David P. Currie, "The Most Insignificant Justice: A Preliminary Enquiry" (1983) 50 U. Chicago L. Rev. 466.
67. Frank H. Easterbrook, "The Most Insignificant Justice: Further Evidence" (1983) 50 U. Chicago L. Rev. 481.
68. See John G. Roberts, Jr., Address (Delivered to the Seventh Annual Barbara K. Olson Memorial Lecture delivered at the Federalist Society, Washington, 16 November 2007), online: <[http://fora.tv/2007/11/16/Supreme\\_Court\\_Justice\\_John\\_G\\_Roberts#chapter\\_01](http://fora.tv/2007/11/16/Supreme_Court_Justice_John_G_Roberts#chapter_01)>.
69. See Robert M. Spector, "Legal Historian on the United States Supreme Court: Justice Horace Gray, Jr., and the Historical Method" (1968) 12 Am. J. Legal Hist. 181.
70. "His opinions were steeped in legal history and they lacked any appeal to public policy." "Oyez: Horace Gray, U.S. Supreme Court Justice" *Oyez: U.S. Supreme Court Media* (30 August 2008), online: <[http://www.oyez.org/justices/horace\\_gray](http://www.oyez.org/justices/horace_gray)>.
71. Todd C. Peppers, "Birth of an Institution: Horace Gray and the Lost Law Clerks" (2007) 32 J. Sup. Ct. Hist. 229.
72. Even more ironic is the fact that one of his cited decisions, *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), is used in the American literature to demonstrate the openness of early American courts to the experiences and practices of other countries in constitutional decisions. See Ryan C. Black & Lee Epstein, "(Re-)Setting the Scholarly Agenda on Transjudicial Communication," Book Review of *Coercing Virtue: The Worldwide Rules of Judges* by Robert H. Bork, and *A New World Order* by Anne-Marie Slaughter, (2007) 32 Law & Soc. Inquiry 791 at 794.
73. The judges are Chief Justice McLachlin, Justice L'Heureux-Dubé, Justice Deschamps, Justice LeBel (twice), and Justice Binnie (three times).
74. *Beals v. Saldanha*, [2003] 3 S.C.R. 416; *Spar Aerospace v. American Mobile*, [2002] 4 S.C.R. 205; *R. v. Starr*, [2000] 2 S.C.R. 144; *Pro Swing Inc. v. Elta Golf*, [2006] 2 S.C.R. 612; *Mitchell v. MNR*, [2001] 1 S.C.R. 911 [*Mitchell*]; and *Holt Cargo Systems v. ABC Containerline*, [2001] 3 S.C.R. 907.

in five different terms. He is tied with Chief Justice Earl Warren for citation frequency, and mentioned by name more often.

Both the modest overall numbers and the skewing of citation frequencies away from the more recent Chief Justiceships suggest a careful distancing of Canadian law from American precedents. There is no indication from its citation practices that the SCC is closely engaged with the most recent controversies and debates of its American counterparts. Likewise, if we can indeed think of the divisions within the recent US SC as reflecting the “culture wars” that have loomed so large in recent American politics, there is nothing in the citation patterns to suggest that the SCC is tracking this development, let alone attaching itself to either side. Rather, citations to the US SC reflect a more occasional and opportunistic behaviour, “treat[ing] American law as a grab bag of handy one-liners to be quoted without reference to context.”<sup>75</sup> More neutrally and more generally, Richards speaks of “problems of methodological indeterminacy” in the citation of foreign authority, and of the possibility of “selection bias” of various types.<sup>76</sup>

Nor does the diffusion of citations fit particularly well with the overtones of the “emerging judicial community” literature.<sup>77</sup> It may be that the judges of various national high courts are getting to know each other better as they interact at conferences and in personal meetings, and it may be that modern information technology makes the most recent decisions of most national high courts far more immediately accessible than ever before. However, this does not result in today’s Canadian judges citing current American judges particularly often.

## VI. WHICH AMERICAN CASES ARE CITED?

Zeroing in on the individual cases that are being cited may give a better idea of how the citations are being used. There are only seven US SC decisions that have been cited as often as three times, and none that have been cited more than

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75. Robert Harvie & Hamar Foster, “Different Drummers, Different Drums: The Supreme Court of Canada, American Jurisprudence and the Continuing Revision of Criminal Law Under the Charter” (1992) 24 *Ottawa L. Rev.* 39 at 112 (stating, in 1992, that Canadian judges are becoming “less inclined” to treat American law this way).

76. Sidney W. Richards, “Survey article: the legitimacy of Supreme Courts in the context of globalisation” (2008) 4 *Utrecht L. Rev.* 104 at 124-25.

77. See *e.g.* Slaughter, *supra* note 1.

**TABLE 9: US SC DECISIONS MOST FREQUENTLY CITED BY SCC  
SCC DECISIONS, 2000-2008**

Case	Times Cited	Justice	Subject
<i>Terry v. Ohio</i> <sup>78</sup>	4	Warren	Search and seizure
<i>Illinois v. Caballes</i> <sup>79</sup>	4	Ginsburg	Search and seizure
<i>Hilton v. Guyot</i> <sup>80</sup>	4	Gray	Weight given to foreign judgments
<i>Daubert v. Merrell Dow</i> <sup>81</sup>	3	Blackmun	Expert evidence
<i>Diamond v. Chakrabarty</i> <sup>82</sup>	3	Burger	Patenting of human-made micro-organism
<i>Rock v. Arkansas</i> <sup>83</sup>	3	Blackmun	Hypnotically refreshed memory
<i>United States v. Place</i> <sup>84</sup>	3	O'Connor	Search and seizure

four. These cases are highlighted in Table 9. There were also sixteen decisions, by thirteen different justices, that were cited twice.

Only a single judge (Blackmun) placed as many as two cases on the “three times or more” list. Only one of the cases is a recent one—indeed, only two cases postdate the beginning of the Lamer Court in 1990—and the oldest of the set (by Gray, discussed above) is from the nineteenth century. The “cited twice” list is similarly spread, with only three cases from this century and two from the 1990s. The subject matter of the seven in Table 9 is focused on criminal cases and especially on issues surrounding obtaining and using evidence, including search and seizure, the use of expert testimony, and hypnotism.

Citations of federal courts, other than the US SC, are similarly diverse. Cases have been cited from all but one of the thirteen federal circuit courts of appeal; the missing one is the Sixth Circuit (which includes Kentucky, Michigan, Ohio, and Tennessee). The only circuits to have made it into double digits

78. 392 U.S. 1 (1968).

79. 543 U.S. 405 (2005).

80. 159 U.S. 113 (1895).

81. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) [*Daubert*].

82. 447 U.S. 303 (1980).

83. 483 U.S. 44 (1987).

84. 462 U.S. 696 (1983).

are the Second Circuit (Connecticut, New York, and Vermont) and the Ninth Circuit (California plus eight other far western states). The Ninth Circuit is the largest (with twenty-eight judges) and also has the dubious reputation of being the most frequently reversed by the US SC;<sup>85</sup> but, since it accounted for only a dozen SCC citations, it would be unreasonable to make too much of this. Only a single federal circuit court case<sup>86</sup> (dealing with evidence issues) has been cited more than once. There were also citations of twenty-three federal district (trial) court decisions.

Canadian Supreme Court citations of US state courts are similarly scattered among forty-one states and the District of Columbia.<sup>87</sup> Only three states made it into double figures: New York (twenty-one), California (eleven), and New Jersey (eleven). This is consistent with the findings from the author's earlier study of American citations in the 1990s;<sup>88</sup> even the percentage of the total state court citations enjoyed by front-running New York and second-place California are unchanged, although New Jersey has emerged from a four-way tie for third by doubling its share of state court citations since 1993. It is not particularly surprising that these three states should lead the list; they are, after all, large states with well established judiciaries presiding over highly urban territories. California tends to lead the list in most American studies of state court citation rates,<sup>89</sup> although New York and New Jersey are usually further down this list than one might expect. Indeed, a recent study of the overall quality of state courts ranks California second with New York at the bottom of, and New Jersey outside of, the top ten.<sup>90</sup> Only three state court decisions have been cited by the SCC as often as twice; one on family law and two dealing with insurance law.

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85. Richard A. Posner, "Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality" (2000) 29 J. Legal Stud. 711; Keen Scott, "Supreme Court Reversals of the Ninth Circuit" (2006) 48 *Ariz. L. Rev.* 341.

86. *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923).

87. The nine states not cited are Idaho, Kentucky, Montana, Nebraska, Nevada, North Dakota, Oklahoma, South Dakota, and Virginia.

88. McCormick, "American Citations," *supra* note 29.

89. See *e.g.* Jake Dear & Edward W. Jessen, "'Followed' Rates and Leading State Cases, 1940-2005" (2007) 41 *U.C. Davis L. Rev.* 683.

90. Stephen J. Choi, Mitu Gulati & Eric A. Posner, "Which States Have the Best (and Worst) High Courts?" (1 May 2008) [unpublished, archived at University of Chicago], online: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1130358](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1130358)>.

## VII. WHERE ARE AMERICAN CITATIONS USED?

The SCC handles an extremely diverse range of cases in many different areas of law, and it is hardly to be expected that all will draw equally on American experience and doctrine. Table 10 allocates American citations among four different types of cases: *Charter* law, criminal law, public law, and private law.<sup>91</sup> In overall citations, public law and private law cases cite to US judicial authority most frequently, and criminal law less often.

The use of American citations by the Supreme Court is slightly skewed toward private cases, and strongly skewed away from public law cases. Given the strong similarities in the basic economic systems of the two countries, as well as their common grounding in English common law, it is not surprising that private law would be expected to lead. There are some areas of law—such as insurance law and intellectual property—in which there is considerable congruency between the two countries, as will be reflected in a list of cases to follow. However, the overall effect of this is very modest, and private law rises only modestly above the overall figure of 3.5%. It is worth pointing out that American citations are not significantly more common for *Charter* cases. In some reasons—such as those of *La Forest*<sup>92</sup> and *Smithey*<sup>93</sup>—the novelty of the *Charter* within the Canadian constitutional framework created the impetus toward the use of American citations. Either way, the comparatively low figure for American public law citations, reflecting the tendency among Supreme Court justices to refer to it less often, is the main conclusion to be drawn from Table 10.

Table 11 focuses more specifically on the thirteen Supreme Court cases that use ten or more such American citations. This collection shows considerable variety, with cases from seven different calendar years. There are two *Charter* cases (*Advance Cutting* and *Kang-Brown*), three non-*Charter* criminal cases (*Burke*, *Smith*, and *Trochym*), two public law cases (*Mitchell* and *ATCO*), and six private law cases. These include four insurance cases (*Family Insurance*, *Non-Marine Underwriters*, *Somersall*, and *Whiten*), one dealing with intellectual

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91. The four categories are not quite of a type, because all *Charter* cases are also something else (that is to say, one of the other three) in addition to raising the *Charter* issue. But the *Charter* looms sufficiently larger in contemporary Canadian law and politics to justify breaking these cases out as a separate category.

92. *La Forest*, *supra* note 34 at 213.

93. *Smithey*, *supra* note 35 at 1192.

**TABLE 10: FREQUENCY OF CITATIONS TO AMERICAN AUTHORITY BY TYPE OF LAW SCC DECISIONS, 2000-2008**

Type of Case	All Cites	US SC	Federal Courts	State Courts	Other	Total US
Private	3,489	40	45	81	0	166 (4.8%)
<i>Charter</i>	3,495	101	23	9	0	133 (3.8%)
Criminal	2,710	32	24	40	0	96 (3.5%)
Public	3,908	47	18	10	6	81 (2.1%)
Total	13,602	220	110	140	6	476 (3.5%)

property issues (*Veuve Clicquot*), and one with compensation for damages (*Canadian Forest*). Only three of them are unanimous decisions, with a single judge writing for the full panel; since three reserved decisions in every five in the total caseload are unanimous, this is a lower incidence than one might have expected. To this extent, Table 11 supports Smithey's hypothesis that the frequency of foreign citations should be higher in cases involving disagreement within the panel.<sup>94</sup> Two cases drew separate concurrences, four drew dissents, and four saw both separate concurrences and dissents. Six different judges wrote the majority decisions, while eight different judges wrote the fifteen sets of minority reasons. In total, given that these groupings overlap, there were reasons written by ten different members of the Court. This diversity implies that there is no real center of gravity to the citation practices, and no area of law—except, perhaps, insurance law—where American citations are frequent and routine enough to suggest some degree of ongoing influence.

At the same time, it is surprising that certain sets of cases did not draw upon American case law. Freedom of religion, for example, was addressed in one of the early, important *Charter* cases, namely *Big M Drug Mart* in 1985.<sup>95</sup> However, like many of the Dickson Court's early *Charter* decisions, this case boldly sketched a general approach to this right, while leaving the details to be specified by later decisions. "Later" proved to be a long time, with the specific constitutional meaning of freedom of religion not being addressed in a rigor-

94. *Ibid.* at 1202.

95. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 [*Big M Drug Mart*].

**TABLE 11: SCC DECISIONS CITING THE LARGEST NUMBER OF AMERICAN CASES  
SCC DECISIONS, 2000-2008**

Case	US SC	Federal	State	Other	Total
<i>Non-Marine Underwriters</i> <sup>96</sup>	0	4	26	0	30
<i>R. v. Trochym</i> <sup>97</sup>	5	1	11	0	17
<i>R. v. Smith</i> <sup>98</sup>	3	6	6	0	15
<i>Canadian Forest Products</i> <sup>99</sup>	9	4	2	0	15
<i>R. v. Burke</i> <sup>100</sup>	0	1	14	0	15
<i>R. v. Kang-Brown</i> <sup>101</sup>	8	1	4	0	13
<i>Mitchell v. M.N.R.</i> <sup>102</sup>	9	2	0	0	11
<i>ATCO v. Alberta</i> <sup>103</sup>	3	1	2	5	11
<i>Somersall v. Friedman</i> <sup>104</sup>	0	3	8	0	11
<i>Whiten</i> <sup>105</sup>	7	0	4	0	11
<i>Advance Cutting</i> <sup>106</sup>	0	0	10	0	10
<i>Family Insurance</i> <sup>107</sup>	0	0	10	0	10
<i>Veuve Clicquot</i> <sup>108</sup>	1	2	7	0	10

96. *Non-Marine Underwriters*, *supra* note 43.

97. [2007] 1 S.C.R. 239 [*Trochym*].

98. [2004] 1 S.C.R. 385 [*Smith*].

99. *British Columbia v. Canadian Forest Products Ltd.*, [2004] 2 S.C.R. 74 [*Canadian Forest Products*].

100. [2002] 2 S.C.R. 857 [*Burke*].

101. [2008] 1 S.C.R. 456 [*Kang-Brown*].

102. *Mitchell*, *supra* note 74.

103. *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utility Board)*, [2006] 1 S.C.R. 140 [*ATCO*].

104. [2002] 3 S.C.R. 109 [*Somersall*].

105. *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 [*Whiten*].

106. *R. v. Advance Cutting and Coring Ltd.*, [2001] 3 S.C.R. 209 [*Advance Cutting*].

107. *Family Insurance Corp. v. Lombard Canada Ltd.*, [2002] 2 S.C.R. 695 [*Family Insurance*].

108. *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée*, [2006] 1 S.C.R. 824 [*Veuve Clicquot*].

ous and thorough way until the decisions of the McLachlin Court in *Amselem*<sup>109</sup> in 2004 and *Multani*<sup>110</sup> in 2006.<sup>111</sup> Freedom of religion is a significant issue in American constitutional law, and one that remains controversial and dynamic to this day. A landmark test was established in *Lemon* in 1971,<sup>112</sup> only to be dramatically replaced by a 5-4 court with a new doctrine in *Oregon* in 1990.<sup>113</sup> This new doctrine proved controversial, with some members of the US SC continuing to argue against it.<sup>114</sup> Unlike *Big M Drug Mart*, however, which surveyed the American cases up until that date before finding that their focus on “establishment” renders them “not particularly helpful,”<sup>115</sup> more recent Canadian cases mention American experience only in the most casual way. Justice Iacobucci’s majority reasons in *Amselem*, for example, refer approvingly to the earlier case overturned by *Oregon*, without mentioning that it was, in fact, overturned;<sup>116</sup> only Justice Binnie’s short dissent notices *Oregon* and, even then, it is mentioned only casually. In *Multani*, on the other hand, neither the majority reasons nor the two sets of minority reasons cite American cases. The point is not that the SCC should necessarily follow the lead of American courts, but rather, that cases such as *Multani* do not mention US cases at all, even when the central issue is precisely the same.

As another example, part of the legacy of the Rehnquist Court in the United States has been the creation of a “new judicial federalism” that has effectively reversed a decades-long trend of centralization, by reaffirming the rights and jurisdiction of state governments in the face of congressional initiatives. The

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109. *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 [*Amselem*].

110. *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 [*Multani*].

111. There were also two further cases—*Trinity Western* and *St.-Jérôme-Lafontaine*—where the dissenters did, while the majority did not, think that freedom of religion rights were engaged, but the dissents did not cite American authorities either. *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 [*Trinity Western*]; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650 [*St-Jérôme-Lafontaine*].

112. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) [*Lemon*].

113. *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) [*Oregon*].

114. See e.g. Justice Souter’s concurring comments in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

115. *Big M Drug Mart*, *supra* note 95 at para. 105.

116. *Amselem*, *supra* note 109 at para. 189.

first such attempt, *National League of Cities*,<sup>117</sup> was overruled by *Garcia*,<sup>118</sup> leading some commentators to assume that the federalism revolution was over. However, later cases focusing on state powers, such as *Lopez*,<sup>119</sup> *Printz*,<sup>120</sup> and *Seminole Tribe of Florida*, have proved more durable.<sup>121</sup> The US SC's reinvigoration—one could say “re-invention”—of American federalism and state powers is sufficiently pronounced, enduring, and significant enough that Baier entitled the American chapter of his comparative survey of federalism and the courts “The US Supreme Court: Revived Federalism.”<sup>122</sup>

The SCC continues to deal with a steady stream of federalism cases, mostly involving the federal/provincial division of legislative authority. The McLachlin Court has already heard and decided twenty of these cases in this century, and this rate of two and a half per year is well below that of the Dickson and Lamer Courts. Some of these break little new ground—many people will be surprised to discover that the Supreme Court is still dealing with the question of coloured margarine<sup>123</sup> more than half a century after the *Margarine Reference*<sup>124</sup>—but others are more substantial. Perhaps the most significant, if not certainly the most widely debated case, has been *Canadian Western Bank*.<sup>125</sup> However, one searches in vain for any consideration of American case law within these cases; none of the recent US authorities on federalism have been referred to, even in passing, in the Supreme Court's jurisprudence.<sup>126</sup> For instance, *La-*

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117. *National League of Cities v. Usery*, 426 U.S. 833 (1976).

118. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

119. *United States v. Lopez*, 514 U.S. 549 (1995) [Lopez]. *Lopez* has been described as “the first decision since the New Deal to find an entire piece of commerce clause legislation unconstitutional.” See Gerald Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia and Canada* (Vancouver: University of British Columbia Press, 2006) at 76.

120. *Printz v. United States*, 521 U.S. 898 (1997) [Printz]. *Printz* articulated a state freedom from federal pre-emption.

121. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). This case declared a strong doctrine of state immunity. *Alden v. Maine*, 527 U.S. 706 (1999) is perhaps a better known case that extends this principle.

122. Baier, *supra* note 119 at 63.

123. *UL Canada v. Quebec (Attorney General)*, [2005] 1 S.C.R. 143.

124. *Reference re: Dairy Industry Act (Canada) S. 5(a)*, [1949] S.C.R. 1.

125. *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3.

126. There has been a single reference to *Printz*, but not in the context of any federalism issue;

*farge*<sup>127</sup> focused specifically on the question of the place of intergovernmental immunity in contemporary Canadian federalism; however, it also proceeded without drawing on American doctrine or the American academic literature, even though this is one of the “hot” topics in the United States. Again, the point is not that the American courts have found the “right” answer or that Canadian courts should simply follow. Rather, the American experience represents the considered deliberation<sup>128</sup> of experienced judges in a comparable jurisdiction confronting comparable problems and issues.

### VIII. WHAT DOES THE CITATION OF AMERICAN LAW LOOK LIKE?

Statistics can only take one so far. The ultimate question arising from the data surveyed above is what these citations look like in practice, how they affect the flow and feel of judicial reasons, and whether they are a central part of an argument or simply a casual appendage to it. This section discusses the cases in Table 11 and provides insight into the use and impact of American citations in twenty-first century Supreme Court judgments.

There is another reason for giving particular attention to these cases. One of the problems associated with foreign citation is the risk of using a citation or taking a quotation out of context, either deliberately or inadvertently. A threshold problem in comparative law is ensuring that legal concepts are placed in an appropriate legal context.<sup>129</sup> This context can be provided by including adequate consideration of the cluster of cases that both flesh out and contain the message from a single case. Only multiple citations provide this opportunity; solo cites cannot convey context without extensive textual expansion, which is almost always lacking.

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rather, it is cited with respect to the Second Amendment to the Constitution of the United States in a criminal case involving guns. The case is *R. v. Clayton*, [2007] 2 S.C.R. 725.

127. *British Columbia (Attorney General) v. LaFarge Canada Inc.*, [2007] 2 S.C.R. 86.

128. Given that federalism issues continue to be divisive within the US SC, one can see both sides of a live argument rather than a gradual and consensual expansion of an established doctrine. See e.g. *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002) (noting Judge Breyer’s grim assertion that “[t]oday’s decision reaffirms the need for continued dissent” at 788).

129. Cheryl Saunders, “The Use and Misuse of Comparative Constitutional Law” (2006) 13 *Ind. J. Global Legal Stud.* 37 at 67.

## IX. THE TOP THIRTEEN CONSIDERED

*Non-Marine Underwriters, Lloyd's of London v. Scalera*<sup>130</sup>

*Non-Marine Underwriters* is slightly unusual, as it appears that Justice Iacobucci assumed the responsibility to write the reasons for the Court. His are the more extensive reasons, and are also more complete in that they alone include a description of the facts and the lower court proceedings. In comparison, Chief Justice McLachlin begins with an acknowledgement of the reasons of Justice Iacobucci by stating, "I have read the reasons of Iacobucci J. and agree with the results that he reaches and with much of the reasoning,"<sup>131</sup> and then jumps straight to the analysis. "Much" denies "all," and since three colleagues on the seven-judge bench signed on with Justice McLachlin, hers became the majority opinion.<sup>132</sup> Both positions agree that there is a tort of sexual battery, and also that the tort does not trigger liability under standard homeowner's insurance. However, they disagree on the question of how the tort of sexual battery relates to the onus of proof regarding consent.

American citations are found almost entirely (twenty-nine of the thirty citations) in Justice Iacobucci's reasons: that is to say, in the reasons that did not attract majority support. His reasons also take a very specific form, of which there are three noteworthy examples. First, in leading up to paragraph 78, Justice Iacobucci discusses and quotes from Supreme Court decisions, especially an earlier decision by Chief Justice McLachlin. He concludes his argument by stating that "[t]his conclusion is consistent with the majority of American courts,"<sup>133</sup> and then proceeds to make reference to six American citations to support this claim. Later, Justice Iacobucci again expands on an earlier Supreme Court decision (also, as it happens, by Chief Justice McLachlin), and concludes that "th[e] issue is somewhat new to Canadian law, [but] it has been extensively canvassed in the United States,"<sup>134</sup> again making reference to six American citations in support. Finally, after a close and extended discussion of a prior Supreme Court decision

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130. *Non-Marine Underwriters, supra* note 43.

131. *Ibid.* at para. 1.

132. For a discussion of the "swing" judgment phenomenon, see Peter McCormick, "Was it Something I Said?: Losing the Majority on the Supreme Court of Canada, 1984-2007" (Paper presented to the Midwest Political Science Association Annual Meeting, April 2008) [unpublished].

133. *Non-Marine Underwriters, supra* note 43 at para. 78.

134. *Ibid.* at para. 87.

(this time by Justice Cory), he states: “[i]n the considerable jurisprudence on the point, most U.S. courts have reached the same conclusion,”<sup>135</sup> giving a list of ten American citations and winding up by quoting from one of them.<sup>136</sup> Here, a string of citations is all that is provided; there is no focused discussion of the individual cases. Interestingly, the references to British and New Zealand cases, although fewer in number, involve more specific elaboration.

*R. v. Trochym*<sup>137</sup>

*Trochym* dealt with the acceptability of testimony based on hypnotically refreshed memory. The seventeen American citations are almost evenly divided between the majority reasons and the dissent. Both the lower courts and the majority and minority opinions accept that the relevant guideline case is *R. v. Clark*.<sup>138</sup> However, there are three interesting things about this case and Justice Deschamps’ treatment of it for the majority. The first is that this case is not a Supreme Court decision, or even a decision of a provincial court of appeal, but rather, is a trial court decision from the Alberta Court of Queen’s Bench that has been followed by other courts in different provinces. The second is that the test in this specific trial court decision is explicitly identified as being drawn from a pair of American state court decisions.<sup>139</sup> Finally, those decisions focus on the significance of an American academic expert<sup>140</sup> who later became very critical of the practice of hypnotically refreshed memory. This being the case, Justice Deschamps draws on the “novel science” guidelines from *J. L.-J.*,<sup>141</sup> a prior Supreme Court decision, which in turn drew heavily on a US Supreme Court case, *Daubert*,<sup>142</sup> to mandate a strong presumption against the admission of post-hypnosis testimony.<sup>143</sup>

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135. *Ibid.* at para. 121.

136. To reinforce my point, an extended quote from one of the earlier SCC cases ends with similar language: “The same view generally prevails in the United States.” *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801 at para. 19.

137. *Trochym*, *supra* note 97.

138. (1984), 32 Alta. L.R. (2d) 1637.

139. *State v. Hurd*, 414 A. 2d. 291 (N.J. Sup. Ct. 1980); *People v. McDowell*, 427 2d N.Y.S. 2d. 181 (N.Y. Sup. Ct. 1980).

140. “The *Clark* guidelines are drawn from Dr. Orne’s testimony in *Hurd*...” *Trochym*, *supra* note 97 at para. 30.

141. *R. v. J. L.-J.*, [2000] 2 S.C.R. 600.

142. *Daubert*, *supra* note 81.

143. *Trochym*, *supra* note 97 at para. 61.

In his dissent, Justice Bastarache uses American citations to disagree with this presumption that US practice has swung so sharply against post-hypnotic testimony, to question the application of the *J. L.-J.* guidelines to something that does not, in his opinion, involve “novel science,” and to defend the *voir dire* procedure as sufficient protection against possible misuse of such evidence. Justice Charron effectively splits the difference between them, agreeing that there were aspects of this particular testimony that necessitate reversing the trial court decision, but disagrees with the strong presumption against post-hypnotic testimony.

The American citations are clearly central to two of the three sets of reasons in this case—Justice Deschamps and Justice Bastarache both identify American decisions that are important to the use of the type of evidence that was at issue in this case (*Hurd* and *Daubert*). The two disagree about the implications of these decisions for current Canadian law and practice, and draw on a mix of more recent American and Canadian cases to support their respective positions.<sup>144</sup>

*R. v. Smith*<sup>145</sup>

*Smith* considered what happens to a criminal appeal when the appellant dies before the appeal court decides, or, in this case, even hears, the appeal.<sup>146</sup> Writing for a unanimous seven-judge panel, Justice Binnie uses string citations totaling fifteen American decisions—which are curiously introduced as “a review of the jurisprudence of other common law jurisdictions,”<sup>147</sup> despite the fact that only American cases are mentioned in the four paragraphs—to set out the three alternative ways in which such a question can be resolved. Although US decisions are used to frame the options that are available, they are not canvassed again to direct the outcome, which is drawn from the specific wording of the *Criminal Code* and from Canadian case law.

*British Columbia v. Canadian Forest Products Ltd.*<sup>148</sup>

*Canadian Forest Products* involved a 1992 fire in the Stone Creek area of British Columbia that damaged 1,500 hectares of forest on Crown land, for

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144. Not to oversimplify, the case also involves the issue of “similar fact” evidence, as well as specific aspects of the evidence in the immediate case. See *ibid.*

145. *Smith*, *supra* note 98.

146. The court of appeal retains the jurisdiction to proceed with the appeal, but has the discretion to decide not to entertain the appeal as it did in the immediate case.

147. *Smith*, *supra* note 98 at para. 14.

148. *Canadian Forest Products*, *supra* note 99.

which CanFor was (on joint submission) fully responsible. The provincial government claimed damages to cover the cost of firefighting and reclamation, lost stumpage revenue from trees that would have been harvested under normal circumstances, and loss of trees that had been set aside for various environmental purposes. The trial judge granted only the first of these three, and the Supreme Court reached the same conclusion. At first glance, this would seem to create problems from the standpoint of categorization; it is unclear whether this case is best considered within the realm of public law or private law. Given that the province claimed damages in its role as landowner of a tract of forest, acting on the same narrow commercial basis as any other private landowner, the Supreme Court emphasized that this case fell into the latter category.

Writing the judgment for six members of a full panel, Justice Binnie cites eleven US cases in four paragraphs<sup>149</sup> to demonstrate that a number of federal and state courts have found not only a common law basis for governments to represent a *parens patriae* jurisdiction on behalf of the collective interests of the public, but also a “public trust” responsibility that makes public title more extensive than private title. Having raised the possibility that this might apply in a Canadian context, he puts it aside by concluding that “this is not a proper appeal for the Court to embark on a consideration of these difficult issues;”<sup>150</sup> although there was no legal barrier to the Crown pursuing such claims, they had not, in fact, been advanced in the pleadings of the immediate case. On the narrower ground that was actually argued, with the Crown claiming the rights of any property owner, the Court found that the province’s claim could not be sustained. Justice Binnie does not say in so many words that a “public interest” claim would have succeeded, but the hint is broad. This is especially so, as Justice LeBel, writing in dissent with two colleagues, rejects the suggestion that the Crown’s ability to sue in the public interest should be ignored or limited in the immediate case.

*R. v. Burke*<sup>151</sup>

In *Burke*, the foreman of the jury in a trial for attempted murder indicated a finding of “guilty” that was misheard by the judge as “not guilty” and the mistake was not brought to the judge’s attention until the jury had dispersed.

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149. *Ibid.* at paras. 77-80.

150. *Ibid.* at para. 82.

151. *Burke, supra* note 100.

The question was whether the judge erred in calling the jurors back the following day and correcting the recorded verdict. On a nine-judge panel, three signed Justice L'Heureux-Dubé's reasons dismissing the appeal, and three signed Justice Major's reasons allowing the appeal and directing a new trial. Justice Arbour's partial concurrence made Justice Major's reasons the judgment of the Court. All but one of the American citations appear in Justice Major's reasons, packed into a single string citation supporting this sentence: "[a]lthough American case law diverges widely on this issue, several courts have held that in certain situations verdicts can be revisited after the trial judge tells the jury that it is discharged."<sup>152</sup> This follows a similar string of Commonwealth citations,<sup>153</sup> both sets of which are used to demonstrate that a "wealth of authority" supports the need for a "more refined and flexible analysis"<sup>154</sup> than that laid down in the most relevant Canadian case.

*R. v. Kang-Brown*<sup>155</sup>

The issue in *Kang-Brown* was the use of a sniffer dog in a bus station, whose positive indication of the presence of drugs led to a physical search that resulted in charges for possession and trafficking in drugs. Justice LeBel wrote the judgment of the Court, but only for a four-judge plurality on a full nine-judge panel. Justice Binnie and Chief Justice McLachlin concurred in part; Justice Deschamps and Justice Bastarache wrote dissents.<sup>156</sup> Most of the American citations are found in Justice Binnie's concurrence (six) and Justice Deschamps' dissent (five), while Justice LeBel and Justice Bastarache each cite only one

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152. *Ibid.* at para. 51.

153. Justice Major refers to them under the general heading "The law in the United Kingdom," but, in fact, one of the listed cases is from an Australian court and a second is from New Zealand. See *R. v. Cefia* (1979), 21 S.A.S.R. 171 (S.C.); *R. v. Loumoli*, [1995] 2 N.Z.L.R. 656 (C.A.), respectively.

154. *Burke*, *supra* note 100 at para. 51.

155. *Kang-Brown*, *supra* note 101.

156. *Ibid.* Like *Non-Marine Underwriters*, this is a swing judgment. Justice LeBel's opening acknowledgment—"I have had the opportunity of reading the reasons of Justice Binnie" (at para. 1)—implicitly concedes that Justice Binnie had been assigned the writing of the judgment at the post-hearing conference, but Justice LeBel's much shorter reasons are identified in the Supreme Court Reports as the reasons for judgment. Indeed, it is striking that all three of the minority reasons are longer and more complete (including both a summary of the facts and a description of the actions of the lower courts) than Justice LeBel's.

American case. There is little overlap in the cases cited; the thirteen references are to twelve different cases.

Both Justice Deschamps and Justice Binnie cite American decisions primarily focused on the question of what constitutes “reasonable suspicion” or “probable cause” for the purpose of justifying a search. As they each reach different conclusions it is perhaps not surprising that they cite different cases. Justice LeBel’s single American citation indicates doubts about the reliability of sniffer dogs, while Justice Bastarache uses his lone citation to point out that, for the US SC, a “sniff” does not constitute a search. The companion case of *R. v. A.M.*,<sup>157</sup> which involved a sniffer dog search in a school, raised the same issues and drew more media attention. It was decided the same day, by the same panel, and with the same breakdown on opinions and votes. Here, however, only Justice Binnie made use of American citations, while Justice Deschamps did not.

*Mitchell v. Minister of National Revenue*<sup>158</sup>

*Mitchell* dealt with the case of an Akwesasne Mohawk who brought goods across the Canada-US border. Mitchell’s claim was that he had an Aboriginal right to the free movement of goods across the border for the purpose of trade. His claim was successful at both the trial and appeal levels, but was ultimately dismissed at the Supreme Court. Chief Justice McLachlin, writing for five of the seven justices on the panel, found that the Aboriginal right to trade had not been established on the record, and, therefore, duty was owed on the goods. Justice Binnie (with Justice Major) wrote a separate concurrence, using American citations to demonstrate that even if US doctrines of state sovereignty and First Nations self-government apply—without claiming that they do or suggesting that they should—Chief Justice McLachlin’s conclusion is still the correct one. Justice Binnie does not present himself as being in significant disagreement, but, rather, as presenting “additional considerations” that reinforced the result.

*ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*<sup>159</sup>

ATCO, a privately-owned public utility in Alberta that delivers natural gas, had received approval for the sale of buildings and land in Calgary. At issue was how the resulting monies should be distributed. ATCO argued that the money should go to the company and shareholders, while the City of Calgary argued

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157. [2008] 1 S.C.R. 569.

158. *Mitchell*, *supra* note 74.

159. *ATCO*, *supra* note 103.

that a portion of the amount by which the proceeds of the sale exceeded the original cost should be distributed to Calgary ratepayers. The Alberta Energy and Utilities Board agreed with the city; the Alberta Court of Appeal agreed with ATCO. In a sharply divided four-three decision, the Supreme Court upheld the Court of Appeal decision. Indeed, it went even further, saying that the Court of Appeal had erred in not describing in more sweeping terms the limits on the Board's jurisdiction.

Justice Binnie dissented at length, and all but two of the American citations are found in his minority reasons. He essentially disagrees with his colleagues, and with the Alberta Court of Appeal, that the case is primarily about property, arguing instead that the real question is the power of public boards in regulated industries. It is worth noting that Justice Binnie's citations also include five decisions of American regulatory boards, something that is not part of the normal citation repertoire. However, there is another important issue that arises in this case. The modern style of Canadian citation, a style which Goutal has previously identified as American in origin and which contrasts with a chattier story-telling English style,<sup>160</sup> typically consists of a flat statement of a legal rule or principle, followed by a string of case citations—in Goutal's colourful phrase, a “telegram-style statement” followed by “an avalanche of cases.”<sup>161</sup> Alternatively, the statement of law will be followed by the citation of a single case. It is more unusual for a cited decision to be opened up to reveal something of its details, either by direct quotation and/or reasonably extended discussion; the ratio for all citations, including American citations, is roughly 50% string, 25% solo, and 25% extended.<sup>162</sup> Justice Bastarache's majority decision here includes thirty-nine judicial citations, twenty-nine of which are included in string citations and seven of which appear as solo illustrations of a statement of law. By contrast, Justice Binnie's minority reasons include twenty-eight citations, of which twenty-three—including all nine of the American citations—are exposed to the closer consideration of discussion and quotation.

*Somersall v. Friedman*<sup>163</sup>

The case involved car insurance and the relevant issue was subrogation;

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160. Jean Louis Goutal, “Characteristics of Judicial Style in France, Britain and the U.S.A.” (1976) 24 Am. J. Comp. L. 43.

161. *Ibid.* at 53.

162. Comment based on research in progress; data on file with the author.

163. *Somersall*, *supra* note 104.

specifically, the question was whether the insurance company was bound by a limiting agreement that had been entered into by the insured party without informing the company. Justice Iacobucci's majority opinion is based on prior decisions by the Ontario Court of Appeal and on a consideration of the wording of the specific policies; however, he adds that he is "bolstered in [his] approach"<sup>164</sup> by the longer history of interpretation of the relevant phrase in the United States, and lists seven American cases in two string-cites to support this statement. Justice Binnie's dissent flows from the fact that he does not agree with the applicability of the American cases.

*Whiten v. Pilot Insurance Co.*<sup>165</sup>

*Whiten* involved the general issue of punitive damages assessed in civil trials, in this case against an insurer who pursued a strongly confrontational policy with respect to a fire insurance claim and contested the claim in bad faith at trial. Justice Binnie wrote for the majority, while Justice LeBel wrote a solo dissent. All but one of the American citations are in the majority opinion,<sup>166</sup> which introduces the general subject of punitive damages and then suggests that it is "convenient" to note how other common law jurisdictions have addressed the problem of disproportionate awards of punitive damages. This review of foreign cases takes up about one-quarter of Justice Binnie's reasons. He looks at England (five cases), Australia (four cases), New Zealand (thirteen cases), Ireland (two cases), and the United States (ten cases). He concludes the survey by noting: "I draw the following assistance from the experience in other common law jurisdictions which I believe is consistent with Canadian practice and precedent,"<sup>167</sup> and proceeds to list ten "general principles" before turning to the specific issues raised by the appeal.

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164. *Ibid.* at para. 34.

165. *Whiten*, *supra* note 105.

166. *Ibid.* at para. 153. Intriguingly, Justice LeBel's lone citation is to the famous (or perhaps infamous) case of *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928), perennially used in American tort law courses to demonstrate that the intuitively fair outcome is not necessarily the legally indicated one. Justice LeBel's use of the case is sufficiently general so as not to raise the aspect of the case that drew this critical attention. For a further discussion of this provocative case, see William H. Manz, "Palsgraf: Cardozo's Urban Legend?" (2003) 107 Dick. L. Rev. 104.

167. *Whiten*, *ibid.* at para. 66.

*R. v. Advance Cutting and Coring Ltd.*<sup>168</sup>

*Advance Cutting* is one of the two *Charter* cases on the list.<sup>169</sup> The provincial statute subject to the *Charter* challenge required construction workers to have competency certificates issued by specifically designated unions. This was challenged as violating the “freedom *not* to associate,” which was allegedly part of the *Charter* right to freedom of association. Justice Bastarache, writing with three colleagues in dissent, agreed there was such a right that was violated in the immediate case. The five other judges wrote three different sets of reasons to reach the opposite outcome: one (Justice L’Heureux-Dubé) denied a right not to associate, another (Justice Iacobucci) found that the right to be free from compelled association was violated, but in such a way as to constitute a reasonable limit, and a third (Justice LeBel) concluded that there was such a right, but that it was not triggered in the immediate case.

Although Justice L’Heureux-Dubé was the second-most frequent citer of American decisions in the early 1990s, and Justice Iacobucci the second-most frequent from 2000-2008, neither made any reference to American jurisprudence in this case. Moreover, Justice Bastarache also made no references to American cases in the dissent. All ten such references are found in Justice LeBel’s plurality judgment for the Court, in a thousand word section entitled “American Jurisprudence” that shows how the “freedom not to associate” has been dealt with by the US SC as a First Amendment issue. But he concludes by noting: “[t]his Court has already chosen to diverge from the American approach to the right not to associate.”<sup>170</sup>

*Family Insurance Corp. v. Lombard Canada Ltd.*<sup>171</sup>

*Family Insurance* is one of the three unanimous decisions on this list, with Justice Bastarache writing for a seven-judge panel. The case involved overlapping insurance policies—that is to say, a claim for loss that could be brought

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168. *Advance Cutting*, *supra* note 106.

169. This is not, of course, to deny that the case has significant implications for federalism as well. This case is just the most recent skirmish in the Ontario/Quebec border wars over construction companies, with each province seeking to limit the extent to which companies from the other side of the border can compete for contracts—in the immediate case, by requiring that construction workers must be members of particular (provincial) trade unions. There is no hint of this aspect of the situation in the decision.

170. *Advance Cutting*, *supra* note 106 at para. 248.

171. *Family Insurance*, *supra* note 107.

under either a residential/homeowners policy or a commercial general liability policy, with each insurance company wanting the other to carry the major cost under the “excess insurance” clause. The middle-third of the brief reasons explains the dominant, but criticized, approach in the US—the “Minnesota approach”<sup>172</sup>—which is centered on the notion of “closeness to risk.” This section cites two American decisions and strings seven others together. Justice Bastarache concludes that the Minnesota approach “does not accord with the principle of equitable contribution”<sup>173</sup> and goes on to note that “Canadian courts have adopted a different approach,”<sup>174</sup> which he then follows. Once again, the purpose of the citations is to indicate a general tendency in the American jurisprudence, but here it is for the purposes of setting it aside rather than following it.

*Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée.*<sup>175</sup>

Also a unanimous decision, *Veuve Clicquot* deals with the question of intellectual property and, specifically, whether the use of the word “Cliquot” by a string of women’s dress shops infringes the trademark of a brand of champagne. Ultimately, the Supreme Court ruled that it does not, because there is no likelihood of confusion between the brands in their respective markets. Justice Binnie summarizes the US law in four paragraphs, with one direct quote and two string citations, but concludes that “[t]hese references to U.S. cases are made for the purpose of illustration” because “[o]ur Act is differently worded.”<sup>176</sup> The use of American citations here is directly parallel to that in *Advance Cutting*.

## X. SUMMARY

These short descriptions need to be assimilated to some functional categorization, and a number have been suggested in the literature. Bushnell developed his own five-fold classification (used/same/qualified/special/differ).<sup>177</sup> Harvie and Foster subsequently suggested four categories (inconsequential, rejection, support, and marginal). Sitaramen has come up with a ten-item continuum, from least to

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172. *Ibid.* at para. 21-23.

173. *Ibid.* at para. 27.

174. *Ibid.* at para. 30.

175. *Veuve Clicquot*, *supra* note 108.

176. *Ibid.* at para. 67.

177. Bushnell, *supra* note 24 at 162.

most problematic,<sup>178</sup> although this is too finely tuned to American issues to be easily adaptable to Canadian conditions.

I shall instead work within the categorization that was suggested by McCrudden, who distinguished between judges “merely mentioning” foreign citations, judges “actually following” them, and judges “distinguishing” the reasoning in foreign cases.<sup>179</sup> Roy has subsequently unfolded the “merely mentioned” category to distinguish between “survey” usage, where judges simply canvass a range of positions supported by citation, and “supporting” usage,<sup>180</sup> which is what Calabresi and Zimbahl have referred to as “logical reinforcement.”<sup>181</sup> This is largely parallel to the standard categories that the Supreme Court itself uses for the list of judicial authorities provided within the text of Supreme Court decisions. Using these terms in relation to foreign authority must be understood as suggestive rather than literal, because no foreign authority can constitute an “authority to be followed” in the same way as a domestic authority within the judicial hierarchy. Since there is never the same expectation of citation for any foreign authority, the action of “distinguishing” has different overtones as well. I would modify Roy’s highly useful categorization by simply restoring the negative category from Harvie and Foster; keeping the parallel with the SCC’s own descriptive practices, I will call this “not approved.”<sup>182</sup> The thirteen American authority-using cases nicely illustrate all of these categories.

*Whiten* exemplifies a *survey*, in which Justice Binnie undertakes a multinational review of case law (the United States being only one of five countries

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178. Ganesh Sitaraman, “The Use and Abuse of Foreign Law in Constitutional Interpretation” (2009) Harv. J.L. & Pub. Pol’y [forthcoming], online: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1282177#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1282177#)>.

179. Christopher McCrudden, “A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights” (2000) 20 Oxford J. Legal Stud. 499 at 512.

180. Bijon Roy, “An Empirical Survey of Foreign Jurisprudence and International Instruments in Charter Litigation” (2004) 62 U.T. Fac. L. Rev. 99 at 120.

181. Steven G. Calabresi & Stephanie Dotson Zimdahl, “The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision” (2005) 47 Wm. & Mary L. Rev. 743 at 899. As summarized by Sitaramen: “[t]he Court’s decisions themselves rely upon domestic sources, but the Court uses foreign sources to show that its interpretation is not unreasonable or peculiar.” *Supra* note 178 at 14.

182. The more dramatic “overruled” seems to be reserved for the Court’s own prior decisions. See e.g. *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, [2007] 2 S.C.R. 391.

considered) to generate a set of general principles, on which foundation the immediate case can be resolved. *Smith* similarly uses a range of American cases to set out the alternative positions, but then uses domestic sources to direct the choice. Two cases—*Non-Marine Underwriters* and *Burke*—demonstrate *support* usage; after a decision and a rationale have been reached using Canadian cases, it is then demonstrated that the American authorities support a similar conclusion. The majority use of American cases in *Somersall* is similar, although it differs in that it was contested by the minority on precisely this point. Two other cases—*Kang-Brown* and *Trochym*—demonstrate *follow*; American precedents are accepted without much cavil as strongly influential and even conclusive. In *Kang-Brown*, American cases strongly guide the discussion of the “probable cause/reasonable suspicion” aspect of reasonable/unreasonable search and seizure. In *Trochym*, they provide the background to the rules regarding “novel science” evidence in general and hypnotically-enhanced testimony in particular; this description is not undermined by the fact that majority and minority opinions disagree on exactly where these American cases take us.

Three cases discuss a set of American citations only to set them aside. Two of these cases<sup>183</sup>—*Advance Cutting* and *Veuve Clicquot*—provide a compact summary of American law only to conclude that our legal or constitutional circumstances are so different as to make them irrelevant; these are clearly examples of *distinguishing*. A third (*Family Insurance*) provides a similar analysis of American law, which it rejects as inapplicable, and as fundamentally mistaken and unsatisfactory. In this instance, US precedent is *disapproved*.

Three sets of reasons—*Canadian Forest*, *ATCO*, and *Mitchell*—all by Justice Binnie, use American cases to put together a strong and coherent position. But in none of the three does this position drive the outcome of the case or constitute precedent. In *ATCO*, this is because he is writing a dissent; in *Canadian Forest*, it is because he is using the argument to chide the provincial Crown for not having developed a stronger and more imaginative argument; and in *Mitchell*, it is used to explore an “even if” scenario. The label that seems to cover these examples is *obiter*—comments not strictly a necessary part of the logical trail leading to the conclusion in the immediate case, but which can nonetheless be of interest in terms of a broader strategy or a longer time frame.

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183. See also Justice Binnie’s minority reasons in *Somersall*, *supra* note 104.

## XI. CONCLUSION

In the 1980s, there was some concern that the well-established American Bill of Rights jurisprudence would overwhelm the SCC's interpretation of the *Charter*. The relative absence of relevant Canadian case law, contrasted with the many decades of thorough judicial and academic analysis in the United States, would be irresistible.<sup>184</sup> These worries ultimately proved unfounded. As Roy has demonstrated, the citation of American cases is used to frame decisions or to reinforce conclusions based on domestic sources and authorities<sup>185</sup> in a "supportive," rather than an "authoritative" role.<sup>186</sup> In sum, "external sources are very rarely, if ever, dispositive of *Charter* issues."<sup>187</sup>

More generally, the worry was that once Canadian courts overcame their historic reluctance to use American citations<sup>188</sup> and their traditional suspicion of American authority,<sup>189</sup> they would be profoundly influenced by the enormous depth and sophistication of American jurisprudence in general. For example, La Forest thought that once the Court had yielded to the undeniable reasons for drawing on American experience for the *Charter*, the increased familiarity with American sources and experts would ripple into other types of law.<sup>190</sup> For a time, the patterns of citation seemed to bear out these concerns—1977 was the first year in which SCC citations of American cases topped fifty;<sup>191</sup> in 1985, the first year, they topped one hundred; and in 1990 the numbers exceeded two hundred. Any straight-line extrapolation from these tendencies would yield quite sensational consequences very quickly. In reality, however, there was a sharp drop-off in subsequent years that conclusively refutes the implicit "slippery

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184. Bushnell, *supra* note 24 at 157-58.

185. Roy, *supra* note 180 at 138-39.

186. *Ibid.* at 120.

187. *Ibid.* at 104.

188. Bushnell, *supra* note 24 at 161. Bushnell notes that the use of cases from the United States was very rare, due to the structure of legal education during the period between the 1940s and 1960s.

189. Robert Harvie & Hamar Foster, "Ties That Bind? The Supreme Court of Canada, American Jurisprudence, and the Revision of Canadian Criminal Law Under the Charter" (1990) 28 Osgoode Hall L.J. 729 at 735.

190. La Forest, *supra* note 34 at 216.

191. McCormick, "American Citations," *supra* note 29 at 534.

slope” argument. By 1995, American citations were back down below one hundred per year, and for several years in this new century they have fallen below fifty. Smithey’s “response to constitutional newness” model<sup>192</sup> may explain the 1990 surge, and La Forest’s “spreading awareness”<sup>193</sup> argument may explain why *Charter* cases were one part of a wider phenomenon. However, the combined outcome has not been a steady growth in American citations, but rather, normalization at a considerably more modest level.

What we are left with, it would seem, is a new stable equilibrium that includes a modest level of American citations and an even more constrained reference to other foreign judicial authority. Leave out the “constitutional novelty spike” for the initial impact of *Charter* issues, and we seem to have about fifty American citations and twenty other foreign citations per year, together making up less than one-twentieth of all references to judicial authority. Is this a lot, or a little? Smithey is surely right to observe that “[w]e should expect citation of foreign precedent to be relatively rare under normal circumstances,”<sup>194</sup> and, moreover, that lawyers and judges are not only “not legally obligated” to cite foreign authority, but “are not usually equipped to do so.”<sup>195</sup> Similarly, Saunders points out the considerable “threshold problem” in fully understanding the context and the evolution of foreign law, absent which there is a danger of “unjustifiable selectivity,” which is equally problematic whether it is done “deliberately or by inadvertence.”<sup>196</sup>

Most of the “foreign” citations are American,<sup>197</sup> and their impact is constrained by certain factors. First, the number of SCC cases in which the number of American citations is high enough to suggest that we are reaching some critical mass, or some theoretical tipping point, is very small. This impression is enhanced by the fact that many of these references are “string citations”—citations in the form of a flat list of half a dozen or more cases, rather than a more focused intellectual examination. Moreover, the string citation is often

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192. Smithey, *supra* note 35.

193. La Forest, *supra* note 34.

194. Smithey, *supra* note 35 at 1192.

195. *Ibid.* at 1191.

196. Saunders, *supra* note 129 at 67.

197. The English citations would have to be systematically disaggregated into binding highest court decisions, foundational common law decisions, and more contemporary decisions before one could run direct comparisons.

used not to follow or adopt the American ideas, but rather to set them aside as not relevant or as unconvincing in some respect.

Second, the number of SCC judges who make anything more than passing references to American cases has become very small—arguably, it is now usually Justice Binnie and, occasionally, Justice Deschamps. In the early 1990s, there was some suggestion of a cluster of judges—at times, most of those serving on the Court—who used American cases with some frequency. This is no longer the case. Since Justice La Forest's departure in 1997, there are no judges on the SCC who can bring the background knowledge that comes from a period of graduate study in the United States.

Third, the cases, courts, and judges who are cited are widely scattered with no identifiable clustering of the sort that we might expect if the SCC were channeling the ideas of some identifiable sub-set of American judges (*i.e.*, judges on the US SC or elsewhere, the current judges or some earlier set, or majority opinions or minority reasons). This suggests that we are seeing less of a sustained intellectual exploration of American ideas than an occasional selective raid. This impression is sustained by a closer look at the casual use that is made of cases that are an important part of the US canon. When the Supreme Court expanded on the meaning of freedom of religion under the *Charter*, it made only passing reference to the extensive American case law that might conceivably have provided at least a distinguishable background to uniquely Canadian conclusions.

Fourth, American citations by our current Canadian judges do not draw on the cases decided and explained by current American judges. If there is a global community fed by modern communication technology and new levels of interaction, then we would expect to find the members of the community showing a greater awareness of each other—that is to say, of the specific individuals who are their contemporaries on other national high courts, who face similar modern problems emerging from modern social contexts. When the SCC cites itself, the emphasis on its own most recent decisions is striking. But when we look at SCC citations of American cases, no emphasis is placed on the recency of the case or the members of the immediate court. When Horace Gray makes the top ten on the most-cited justice list for a cluster of cases from the late nineteenth century, this trend suggests something other than the product of a conversation within the contemporary global judicial community.

From the citation practices of the modern SCC, it would seem that the talk of a “global community of judges” is somewhat overblown. At least from the

Canadian perspective, we need not worry that “globalization will result in a kind of colonial domination in which indigenous approaches are displaced by external ones, most often from the United States or Western Europe.”<sup>198</sup> Nor is there any support for suggestions of a strong trend toward increasing frequency of such citations; the “*Charter* spike” aside, citations of American and other foreign judicial authority are not significantly higher now than they were fifty years ago. If there are universalist tendencies buried in some of the “global community” rhetoric,<sup>199</sup> Canadian judges are not responding to them. As Roy concludes, “the Court seems acutely conscious of the dangers of adopting foreign jurisprudence, and appears wary of giving the impression that it is overly willing to entertain such arguments as authoritative.”<sup>200</sup> The real story of the evolution of Canadian jurisprudence is its steadily increasing focus on domestic judicial authority, especially that of the Supreme Court itself, and not on foreign sources.

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198. Smithey, *supra* note 35 at 1208.

199. See *e.g.* David M. Beatty, *The Ultimate Rule of Law* (New York: Oxford University Press, 2004); T.R.S. Allen, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001). For a critique of these universalist assumptions, see Jeffrey Goldsworthy, “Homogenizing Constitutions” (2003) 23 *Oxford J. Legal Stud.* 483.

200. Roy, *supra* note 180 at 132.