ARTICLES

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Internationalizing Legal Briefs: A Survey of Supreme Court Jurisprudence

> The decisions of the Courts of every country, so far as they are founded upon a law common to every country will be received, not as authority, but with respect.[1]
>
> —Chief Justice John Marshall

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1 Thirty Hogsheads of Sugar v. Boyle, 13 U.S. 191, 198 (1815).

INTRODUCTION

Briefs should always contain citations to international law. Many practitioners fail to appreciate the effect of international law on U.S. jurisprudence, and the potency of well-drafted citations. If citations to international law are not included in a brief, the Supreme Court of the United States (the Court) may not consider international law in its reasoning. When briefs do provide international legal citations, the Court often cites to international law. Now, more than ever, citing to international law is vital in providing a diversity of support to a legal issue.

This Article proposes a new way to approach citations to international law by using the "Brandeis International Brief," a template for drafting effective citations. By providing a practical six-step guide that highlights the use of citation from international and commonwealth legal traditions, and the power of favorable amicus briefs, practitioners can increase their chances of success that the Court will consider international issues raised in a brief. This template benefits from the analysis of numerous factors that affect why and how the Court treats international law. This Article first surveys twelve cases decided by the modern Court and focuses primarily on Fourth and Eighth Amendment jurisprudence. The second part of the Article provides additional insight by uncovering the most effective and most frequently cited international legal authorities. The thirteen Justices who cited to international law in their opinions are then analyzed based on their personal and professional backgrounds. Lastly, this Article recommends the practitioner internationalize his briefs by using a Brandeis International Brief template. By applying the foreign support and social science data of the Brandeis Brief from *Muller v. Oregon*, the practitioner can take advantage of the trends identified in this Article.

Of the cases surveyed, seventy-five percent cited to international law in a dissent, while sixty-six percent cited to international law in a majority opinion. All the cases that cited to international law in briefs had the topic discussed by the Court. Ninety-one percent of cases that cited to international law reference former or current commonwealth nations or the United Nations (U.N.). Justices who had attorneys for parents always cited favorably to international law, as did those appointed by Democratic Presidents. Eighty percent of Justices who studied outside the United States drafted citations favorable to international law. These trends highlight the importance of international law on U.S. jurisprudence.

This Article expands upon these survey results by first explaining why international law is cited before determining which citations are the most effective, exploring the Justices who cite to international law, and concluding with a template outline for a Brandeis International Brief to aid practitioners.

I
WHY INTERNATIONAL LAW IS CITED

Practitioners who use the Brandeis International Brief for citation to international law first need to understand why and how the Court cites to international law. Citations containing comparative and persuasive authority are often brought to the attention of the Court, based on history and current world trends. These perspectives influence the Court's decisions in modern times,[2] and are often present when the Court has a particularly challenging task. Through the cases surveyed, the Court often cites to common law precedent and historical legal underpinnings from commonwealth law as persuasive authority, and modern legal traditions as comparative authority.[3] The majority of the twelve cases surveyed in this Article include either the Fourth or Eighth Amendments, due to the Court's frequency in applying international law in domestic criminal law cases.[4] Of these cases, six of them concern capital punishment.[5]

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2 For the purposes of this Article, the term "modern times" means after 1966, based on the decision of the earliest case analyzed, *Miranda v. Arizona*, 384 U.S. 436 (1966).

3 *See infra* Section I–B.

4 *See infra* notes 12–17.

5 *See infra* notes 6–11.

A. Cases That Yield International Legal Citation

Coker v. Georgia begins the line of capital punishment cases surveyed in 1977. In that case the Court held that capital punishment for the rape of an adult was grossly disproportionate and excessive per the Eighth Amendment.[6] *Coker* set the stage for further Eighth Amendment jurisprudence in *Thompson v. Oklahoma*, which held that capital punishment of minors convicted of murder was cruel and unusual punishment.[7] *Thompson* continued a string of cases concerning capital punishment, including *Stanford v. Kentucky*, which held the imposition of capital punishment on an individual for a crime committed at age sixteen or seventeen did not violate evolving standards of decency and thus did not constitute cruel and unusual punishment under the Eighth Amendment.[8] *Stanford* was later overturned by *Roper v. Simmons*, making plain that the execution of individuals under the age of eighteen at the time their capital crime was committed is prohibited by the Eighth and Fourteenth Amendments.[9] Additional cases considered in this Article includes those of cruel and unusual punishments outside of age factors that contain citations to international law. *Atkins v. Virginia* held the executions of mentally retarded criminals to be cruel and unusual punishment prohibited by the Eighth Amendment.[10] In comparison, the Court in *Knight v. Florida* refused to hear a case premised on twenty years on death row being cruel and unusual punishment.[11]

Cases that cite to international law outside the area of capital punishment jurisprudence include *Miranda v. Arizona*, which requires that law enforcement provide warnings or risk statements to arrestees or risk having statements be inadmissible as having been obtained in violation of the Fifth Amendment.[12] *New York v. Quarles* created an exception to these Miranda warnings to protect public safety.[13] Outside of criminal procedure cases, *Lawrence v. Texas* allowed intimate sexual conduct while in the privacy of the home.[14] *Grutter v. Bollinger* required that efforts to gain diversity in law school admissions

6 Coker v. Georgia, 433 U.S. 584 (1977).
7 Thompson v. Oklahoma, 487 U.S. 815 (1988).
8 Stanford v. Kentucky, 492 U.S. 361 (1989).
9 Roper v. Simmons, 543 U.S. 551 (2005).
10 Atkins v. Virginia, 536 U.S. 304 (2002).
11 Knight v. Florida, 528 U.S. 944 (1999).
12 Miranda v. Arizona, 384 U.S. 436 (1966).
13 New York v. Quarles, 467 U.S. 649 (1984).
14 Lawrence v. Texas, 539 U.S. 558 (2003).

programs be narrowly tailored so as to not violate the Equal Protection Clause.[15]

The final two cases surveyed concern how the United States treats international regulations and judicial holdings. *Olympic Airways v. Husain* required the Court to consider a term in the Warsaw Convention.[16] However, in *Medellin v. Texas* the Court decided that certain International Court of Justice (ICJ) decisions are not directly enforceable federal law.[17]

Despite the different legal issues addressed, all of these cases cite to international law or an international legal body.[18] The changes from case to case are mainly the location of the citation in the opinions and whether or not the citation was favorable toward international law.

B. Why Persuasive and Comparative International Citations in Court Opinions Are Effective

Justices often cite to international law if it is raised in a brief.[19] These citations are usually persuasive if referencing previous Court jurisprudence or U.N. resolutions and treatises, and often comparative when contrasting U.S. law to the laws of other nations, or a national or international consensus.[20] As Figure 1 illustrates, citations to international law can be found in majority opinions, concurrences, and dissents. Although many citations occur in the text of different types of opinions, they are also found in footnotes.

In *Coker v. Georgia*, the international citation is a footnote in the majority opinion authored by Justice White.[21] The citation references *Trop v. Dulles*,[22] and a paper by the U.N.'s Department of Economic and Social Affairs, noting that international opinion was relevant as many developed nations had abolished the death penalty for rape.[23] After *Coker*, the remaining cases cite to international law in the body of the opinion. In the majority opinion in *Thompson v. Oklahoma*,

15 Grutter v. Bollinger, 539 U.S. 306 (2003).

16 Olympic Airways v. Husain, 540 U.S. 644 (2004).

17 Medellin v. Texas, 552 U.S. 491 (2008).

18 *See infra* Section I–B.

19 *See* David J. Seipp, *Our Law, Their Law, History, and the Citation of Foreign Law*, 86 B.U. L. Rev. 1417, 1440 (2006).

20 *Id.*

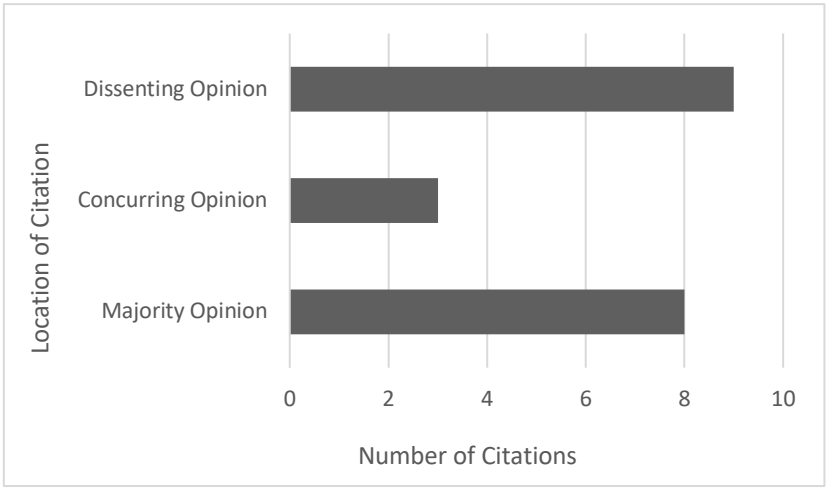
21 Coker v. Georgia, 443 U.S. 584, 596 n.10 (1977).

22 Trop v. Dulles, 356 U.S. 86, 102 (1958).

23 *Coker*, 443 U.S. 584 (1977).

Justice Stevens compared U.S. legal traditions to nations where the death penalty has been abolished.[24] These nations include Scandinavian nations, the former Soviet Union, and other European nations.[25] In *Atkins v. Virginia*, Justice Stevens briefly addressed international law by mentioning a national consensus.[26] Justice Kennedy's majority opinion in *Roper v. Simmons* referenced both U.N. conventions on the rights of children, and the legal traditions of current and former commonwealth countries.[27]

Figure 1. International Citation in Case Opinions



Outside of capital punishment jurisprudence the citations to international law become less robust and more infrequent. Justice Warren's majority opinion in *Miranda v. Arizona* briefly touched on the laws of commonwealth countries,[28] while cursory citations are also found in *New York v. Quarles*,[29] and in Justice Kennedy's majority opinion in *Lawrence v. Texas*.[30] *Medellin v. Texas* is an exception and has numerous international citations because it directly dealt with whether decisions of international courts are binding on U.S. law.[31]

24 Thompson v. Oklahoma, 487 U.S. 815, 830–31 (1988).
25 *Id.*
26 Atkins v. Virginia, 536 U.S. 394, 321 (2002).
27 Roper v. Simmons, 543 U.S. 551, 577–78 (2005).
28 Miranda v. Arizona, 384 U.S. 436, 486–89 (1966).
29 New York v. Quarles, 467 U.S. 649, 672–74 (1984).
30 Lawrence v. Texas, 539 U.S. 558, 572–74 (2003).
31 *See* Medellin v. Texas, 552 U.S. 491 (2008).

Chief Justice Robert's majority opinion held that decisions from the ICJ were not directly enforceable as domestic law in state court, as there was no self-executing statute in place to result in ratification.[32]

Citations to international law in concurring opinions are also commonplace. In *Thompson v. Oklahoma*, Justice O'Connor's concurrence made note of the United States' decision to execute a fifteen-year-old as a contravention of the Geneva Convention.[33] In *Grutter v. Bollinger*, Justice Ginsburg's concurrence discussed international standards to end discrimination based on race or gender, applying ratified international conventions to inform her rationale.[34] In *Knight v. Florida*, Justice Thomas's concurring opinion refused to rely on international law because of a lack of backing in American jurisprudence despite a dissent arguing otherwise.[35]

The dissenting opinions often echo Justice Thomas's concurrence in *Knight*. Justice Scalia's dissent in *Thompson v. Oklahoma* relies on history through international citations to bolster his argument, noting that at the time of U.S. independence, the common laws of England allowed for capital punishment of minors.[36] Justice Scalia also dissented in *Lawrence v. Texas* where he rejected foreign views on sodomy,[37] and in *Olympic Airways v. Husain* where his dissent considers the interpretations of the Warsaw Convention by the United States and its treaty partners.[38]

Justice Scalia's voice is frequently heard in dissenting opinions, and in *Atkins v. Virginia* it was bolstered by Chief Justice Rehnquist.[39] Though the majority by Justice Stevens only briefly mentioned a national consensus against capital punishment for the mentally handicapped as developed from religious and international opinions,[40] the dissent discussed that other countries' abolition of the death penalty for such persons had no bearing on the interpretation of the United States Constitution.[41]

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32 *Id.* at 503–32.

33 Thompson v. Oklahoma, 487 U.S. 815, 851–52 (1988).

34 *Grutter*, 539 U.S. 306, 344 (2003).

35 Knight v. Florida, 528 U.S. 990 (1999).

36 *Thompson*, 487 U.S. at 864.

37 Lawrence v. Texas, 539 U.S. 558, 598 (2003).

38 Olympic Airways v. Husain, 540 U.S. 644, 658 (2004).

39 Atkins v. Virginia, 536 U.S. 304, 321 (2002).

40 *Id.* at 316.

41 *Id.* at 324–35.

In *Roper v. Simmons*, Justice O'Connor's dissent recognized a world-wide trend toward abolishing capital punishment.[42] However, she noted this did not sway her opinion of the operation of the Eighth Amendment because a national consensus against the juvenile death penalty had not yet developed.[43] Justice Scalia's dissent, on the other hand, suggested that American law should not conform to international law because the laws of many other countries differ in substantial ways.[44] This sentiment was echoed in the second Justice Harlan's (Justice Harlan) dissent in *Miranda v. Arizona*, where he admitted to the relevancy of commonwealth law, but found it unpersuasive due to his perception of the Court taking liberties with constitutional history and precedent.[45]

Many dissents are critical of the Court's use of international law, though some view it favorably. In *Knight v. Florida*, the dissent was in favor of the rationale adopted by the courts of commonwealth countries.[46] In *Stanford v. Kentucky*, Justice Brennan cites to *Thompson* for its figures on capital punishment. Justice Brennan goes further by discussing the executions of juveniles and a general world consensus against capital punishment for minors.[47] Justice Breyer's dissent in *Medellin v. Texas* stated that the ICJ's decision bound the United States because of the ratification of treaties agreeing to comply with the ICJ's adjudicatory authority in several circumstances.[48] *Medellin* emphasized the importance of international jurisprudence in the American legal tradition, as reflected in the frequency of its citations to international law.[49]

In addition to *Medellin*, seven other cases surveyed raised an international legal issue in a majority opinion.[50] Nine of the twelve cases, or seventy-five percent, raised an international legal issue in the

42 Roper v. Simmons, 543 U.S. at 551, 604 (2005).

43 *Id.*

44 *Id.* at 622–28.

45 Miranda v. Arizona, 384 U.S. 436, 521–23 (1966).

46 Knight v. Florida, 528 U.S. 990, 993–98 (1999).

47 Stanford v. Kentucky, 492 U.S. 361, 389–90 (1989).

48 Medellin v. Texas, 552 U.S. 491, 538 (2008).

49 *See generally id.*

50 Coker v. Georgia, 433 U.S. 584 (1977); *Thompson*, 487 U.S. 815 (1988); Atkins v. Virginia, 536 U.S. 304 (2002); Roper v. Simmons, 543 U.S. 551 (2005); *Miranda*, 384 U.S. 436 (1966); New York v. Quarles, 467 U.S. 649 (1984); Lawrence v. Texas, 539 U.S. 558 (2003).

dissent.[51] Across all of the opinions, more citations in majority opinions were favorable toward international law than unfavorable.

The effectiveness of a citation to international law is determined based on three criteria. The first criterion is where the citation appears in the opinion. Citations provided in the majority opinion of a decision are the most effective as secondary authority, while citations that appear in concurrences or dissents are less effective because they do not become a part of binding law. The second criterion analyzes the most effective cases from the first criteria (those with international cites in the majority opinion) by determining how much weight the Court gives the international legal citation.[52] The third criterion narrows the remaining cases by weighing references to specific bodies of international law more heavily than references to general geographic or world views.

The first criterion highlights the effectiveness of citations in majority opinions, whereas references in concurrences, dissents, and footnotes are considered ineffective.[53] Thus, the citations from the concurrences in *Thompson*, *Grutter*, and *Knight* are not effective. Similarly, the citations in the dissents of *Knight*, *Lawrence*, *Husain*, *Atkins*, *Roper*, *Miranda*, and *Medellin* are ineffective.[54]

Citations to international law are more effective if they are in majority opinions, such as in *Thompson*, *Atkins*, *Roper*, *Miranda*, *Quarles*, and *Medellin*. Although the footnote reference in *Coker* is in a majority opinion, it is ineffective because it does not provide an argument.[55]

The second criterion examines how much weight the Court puts on the international legal citation. The most weight given to international citations appears in two cases, *Thompson* and *Medellin*. *Thompson* relied heavily on international legal precedent that proved helpful in determining the outcome of the case.[56] In *Medellin*, the Court relied on its own precedent and how other nations consider international treaties,

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51 *See supra* notes 36–49.

52 *I.e.* whether the Court seems to rely on the rationale of those citations.

53 Unless they are the basis for a reversal of precedent.

54 However, Justice Brennan's dissenting opinion in *Stanford v. Kentucky* is effective because it set the stage for the majority opinion of *Roper v. Simmons*, reversing *Stanford* (*Roper*, 543 U.S. at 555).

55 *Coker*, 443 U.S. 584.

56 Thompson v. Oklahoma, 487 U.S. 815, 864 (1988).

noting that the ICJ did not bind U.S. courts with its opinions and that it could not enforce international treaties that were not binding.[57]

The remaining cases that feature a majority citation to international law or a dissent laying the groundwork for reversal vary in the weight given to the citation. In *Atkins*, a national consensus provided solid footing for an "evolving standard of decency" against the imposition of the death penalty against mentally retarded defendants.[58] The majority provided footnote references to the Anglo-American heritage of Western European countries, resulting in the Court providing some weight to geographic-centric legal traditions.[59] In *Stanford*, a dissent that cited to international legal tradition set the stage for a change of precedent in *Roper* over a decade later, resulting in the dissent having considerable weight.[60] Specifically, *Roper* found that *Stanford* did not control based in part on similar international resolutions and traditions of Western European nations found in *Stanford*'s dissent.[61]

The references to commonwealth law in both *Miranda* and *Quarles* provided a historical and international legal backdrop that informed the majority opinion.[62] The majority noted the persuasiveness of the commonwealth law highlighted in *Roper*,[63] although perhaps not giving the citation as much weight as the dissent desired.[64]

The third criterion continues to narrow the cases surveyed to those with the most effective citations based on how the Court cited to international law. The cases of *Thompson*, *Medellin*, *Atkins*, and *Stanford* feature international citation in the majority opinion that the Court relied upon to a meaningful degree. Only *Atkins* stands out as not having a specific international legal citation, as the majority opinion cites to a national consensus and the subsequent footnote briefly mentions the Western European community.[65] The remaining three cases all cite to specific bodies of international law in the majority opinion.

Though none of the international legal precedent cited in these cases was binding, it was likely helpful in deciding the outcome. The three

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57 Medellin v. Texas, 552 U.S. 491, 491–96 (2008).

58 Atkins v. Virginia, 536 U.S. 304, 321 (2002).

59 *Id.*

60 Stanford v. Kentucky, 492 U.S. 361, 389–90 (1989).

61 Roper v. Simmons, 543 U.S. 551, 575–79 (2005).

62 *See infra* note 91.

63 *Roper*, 543 U.S. at 575–79.

64 *Id.* at 622–28.

65 *Atkins*, 536 U.S. at 304.

cases that have the most effective citations per the three criteria, *Medellin*, *Thompson*, and *Stanford*, all feature the heavy use of international law as support for varying legal positions, favorable or unfavorable. These three cases and their respective filings should be used as a reference to the practitioner who is seeking an example of effective international law citation. Except for *Medellin*, the Court may not have addressed international legal issues were it not included in filings and briefs drafted by practitioners.

C. How Briefs Bring International Legal Issues to the Court's Attention

When a decision cites to international law in the majority opinion, such as in *Atkins*, *Roper*, *Lawrence*, *Thompson*, *Miranda*, and *Medellin*, eighty percent of the time the Court takes these citations into consideration as support for or against an argument. This is due to the briefs filed by the petitioner, the respondent, and third parties, though sometimes no international issues need to be raised in a brief for the Court to take notice.[66]

In nine of the twelve cases there are international citations in briefs for the petitioner, respondent, or in the form of an amici,[67] while *Knight*, *Miranda*, and *Quarles* have no filing information available. In *Coker*, the petitioner's brief provides comparative citation of a pro-international stance by highlighting an international shift towards abolition of the death penalty among civilized nations.[68] In *Thompson*, the brief for the petitioner and more than five amicus briefs filed by different U.S. and international groups cited to substantial international trends against the juvenile death penalty.[69] Theories supporting international law can also be found in *Stanford* via briefs for the petitioner, respondent, and amici.[70]

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66 *See generally* Martha F. Davis, *International Human Rights and United States Law: Predictions of a Courtwatcher*, 64 ALB. L. REV. 417 (2000); Gordon R. Jimilson, *Amicus Filings and International Law: Toward a Global View of the United States Constitution*, 55 Cath. U.L. Rev. 267, 284–85 (2005).

67 *See id.*

68 Br. for Petitioner, Coker v. Georgia, 443 U.S. 584 (1977), 1976 WL 181481, at *1, *49.

69 *See generally* Br. for Amicus Curiae Defense for Children International-USA, Thompson v. Oklahoma, 487 U.S. 815 (1988), 1987 WL 881446.

70 Br. for Petitioner, Stanford v. Kentucky, 492 U.S. 361 (1989), 1988 WL 1026341 at *20–21; Br. of the Office of the Capital Collateral Representative for the State of Florida, as Amicus Curiae in Support of Petitioner, Stanford v. Kentucky, 492 U.S. 361 (1989), 1988

Roper's filings, including the brief for the petitioner[71] and amicus briefs cite to persuasive international law in the form of previous U.S. Senate decisions and U.N. authority.[72] *Grutter* also provides support for international law in its amicus briefs, both persuasive in the form of citations to the U.N. and comparative when discussing foreign-born law students.[73] In *Lawrence*, both persuasive and comparative international legal citations are given in support of the petitioners through U.N. authority and various examples from the United Kingdom.[74] *Husain* necessarily references persuasive international law because of its interpretation of an international treaty with amici briefs affirming that the United States has international treaty obligations.[75] In *Atkins*, an unfavorable stance toward international law appears in the brief for the respondent through comparative citation[76]—though the international references in the petitioner's brief were favorably drafted, using comparative citation in its footnotes.[77]

Medellin provides the greatest variation among the briefs filed, with those for the petitioner favorable toward international law by using persuasive citation to the ICJ to demonstrate its authority. However, the majority of the remaining briefs, including those of the respondent and numerous amici, are unfavorable toward the authority of the ICJ, using similar persuasive international legal citations.[78] U.S. states filed many of these amici, as they would be bound to enforce domestic law created by international entities if *Medellin* had been decided differently.

WL 1026340 at *19–21; Br. for Respondent, Stanford v. Kentucky, 492 U.S. 361 (1989), 1988 WL 1026344 at *38–40.

71 Br. for Petitioner, Roper v. Simmons, 543 U.S. 551 (2005), 2004 WL 903158, at *1, *41.

72 *See generally* Br. of Amici Curiae President James Earl Carter, Jr., et al. in Support of Respondent, Roper v. Simmons, 543 U.S. 551 (2005), 2004 WL 1636446.

73 *See generally* Br. Amici Curiae of The National Coalition of Blacks for Reparations in America (N'Cobra) and The National Conference of Black Lawyers (NCBL) in Support of Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003), 2003 WL 400433, at *1, *3–4.

74 *See generally* Br. Amici Curiae of Mary Robinson et al., Lawrence v. Texas, 539 U.S. 558 (2003), WL 164151.

75 *See generally* Br. of the Air Transp. Ass'n of America, Inc. as Amicus Curiae in Support of Petitioner, Olympic Airways v. Husain, 540 U.S. 644 (2004), WL 21673767.

76 Br. of Respondent, Atkins v. Virginia, 534 U.S. 1122 (2002), WL 63826, at *43.

77 Br. for Petitioner, Atkins v. Virginia, 534 U.S. 1122 (2002), WL 1663817, at *43.

78 *See* Reply Br. for Petitioner, Medellin v. Texas, 552 U.S. 491 (2008), 2007 WL 2886606; Br. for Respondent, *Medellin*, 552 U.S. 491, 2007 WL 2428387; *see generally* Amicus Curiae Br. of Mountain States Legal Found. in Support of Respondent, *Medellin*, 552 U.S. 491, 2007 WL 2414906.

Of the nine cases with available filings, six had amicus briefs that cited to international law.[79] The remaining three had references to international law in either the briefs for the petitioner, respondent, or both.[80] One-hundred percent of the cases that raised international legal issues in briefs had them discussed in at least one opinion, and the Court cited to at least one amicus in seventy-seven percent of its opinions.[81] These amici are relevant because in *Roper*, *Thompson*, and *Medellin*, the number of briefs filed far outweighed those in the other cases analyzed by this Article, and in all three cases the Court found international legal citation to be relevant, influencing the holding.

II
BEST SOURCES FOR FAVORABLE INTERNATIONAL LEGAL CITATION

Practitioners using the Brandeis International Brief template need to know the bodies of international law most frequently referenced by the Court. Analyzing the best sources of international law requires an analysis of two criteria: (1) the frequency of certain types of international law citations in the Court's opinions; and (2) whether language was a factor in the Court's decision to applying international law. The analysis of these factors is designed to ensure the practitioner cites to only the most useful international law.

A. Citation to International Legal Authorities That Are the Most Frequent and Effective

When the Court cites to international law, it frequently provides a reference to a specific source or a geographic or worldwide consensus. The most frequent persuasive sources cited to are U.N. conventions.[82]

In *Coker*, the Court cited to the U.N.'s Department of Economic and Social Affairs in support of a trend rejecting capital punishment for rape.[83] *Thompson* continues the trend of citing to U.N. authority by

79 *Lawrence*, 539 U.S. 558; Grutter v. Bollinger, 539 U.S. 306 (2003); Roper v. Simmons, 543 U.S. 551 (2005); Thompson v. Oklahoma, 487 U.S. 815 (1988); Stanford v. Kentucky, 492 U.S. 361 (1989); and Olympic Airways v. Husain, 540 U.S. 644 (2004).

80 *Atkins*, 536 U.S. 304; Coker v. Georgia, 433 U.S. 584 (1977); Medellin v. Texas, 552 U.S. 491 (2008).

81 The *Coker* and *Husain* opinions did not contain citations to amici in the text or footnotes.

82 *See* cases cited *infra* notes 83–91.

83 *Coker*, 433 U.S. at 596 n. 10.

referencing the Geneva Convention[84] and the International Covenant on Civil Rights (ICCPR).[85] In *Stanford*, the Court's reliance on international death penalty opinions is reinforced, with citations to the ICCPR, the American Convention on Human Rights, the Geneva Convention and the U.N. Economic and Social Council.[86] *Roper* cites to the ICCPR,[87] the U.N. Convention on the Rights of the Child, and the American Convention on Human Rights.[88] *Grutter* generated citations to several U.N. general assembly resolutions, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Elimination of All Forms of Violence Against Women.[89] *Knight* cites not only to the U.N. Committee on Human Rights but also to the European Convention on Human Rights.[90]

Medellin continued this trend, featuring numerous references to the ICJ, the United Nations, its charter, and numerous of its provisions.[91] There are also significant references to restatements of conflicts of laws and foreign relations,[92] resulting in *Medellin* highlighting the scope of international law as it applies to U.S. jurisprudence. This scope was similarly considered in *Husain*, where the Court considered the Warsaw Convention and International Transportation rules and took note of English and Australian common law.[93]

Both current and former commonwealth countries are often cited when analyzing historical or comparative issues. In *Atkins* and *Knight* there is an emphasis on Western European legal traditions that reference the laws of several current or former commonwealth countries including Jamaica, India, Zimbabwe, and Canada.[94] *Miranda* and *Quarles* cite to the English criminal procedure tradition and also reference the legal traditions of India, Ceylon, and Scotland.[95] In *Lawrence v. Texas*, however, the references to international law are

84 *Thompson*, 487 U.S. at 851–52.

85 *Id.* at 831 n. 34.

86 Stanford v. Kentucky, 492 U.S. 361, 389–90 (1989).

87 Roper v. Simmons, 543 U.S. 551, 622 (2005).

88 *Id.* at 576.

89 Grutter v. Bollinger, 539 U.S. 306, 344 (2003).

90 Knight v. Florida, 528 U.S. 990, 993–98 (1999).

91 *See* Medellin v. Texas, 552 U.S. 491 (2008).

92 *Id.* at 558–59.

93 Olympic Airways v. Husain, 540 U.S. 644, 649–63 (2004).

94 Atkins v. Virginia, 536 U.S. 304, 316–25; *Knight*, 528 U.S. at 995–97.

95 *See infra* note 103.

minimal, with the general view of Western Civilization and the European Court of Human Rights receiving brief mention.[96] *Thompson* mentions Blackstone's Commentaries on the Laws of England regarding capital punishment, as it is widely accepted that the Eighth Amendment was adopted based on English common law.[97] *Roper* references the African Charter on the Rights and Welfare of the Child, as well as the death penalty traditions of Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of the Congo, and China.[98] Both *Roper*'s majority and dissent highlight the influence of English law on U.S. jurisprudence due to the latter's historical English underpinnings.[99]

There is a clear trend of the Court citing more often to U.N. authority and the laws of commonwealth countries, as illustrated in Figure 2. The Court often cites to the U.N. especially when discussing capital punishment. Eight of the twelve cases, or sixty-six percent, cite to U.N. treaties and resolutions, with the ICCPR being the most common citation, appearing at least three times, or twenty-five percent of the time.[100] Second to the ICCPR is the Geneva Convention with two references. Seven of the twelve cases, or fifty-eight percent, cite to the legal traditions of commonwealth countries. Minimal reference is given to geographical conventions including the European Convention on Human Rights, the African Charter on the Rights and Welfare of the Child, and the Warsaw Convention. Citations to specific nations, such as Yemen, Saudi Arabia, and Scandinavian and other Western European nations also receive minimal reference.[101] When the Court seeks a historical backdrop to frame its arguments, it often cites to English and commonwealth common law.

96 Lawrence v. Texas, 539 U.S. 558, 576–77 (2003).

97 Thompson v. Oklahoma, 487 U.S. 815, 864 (1988).

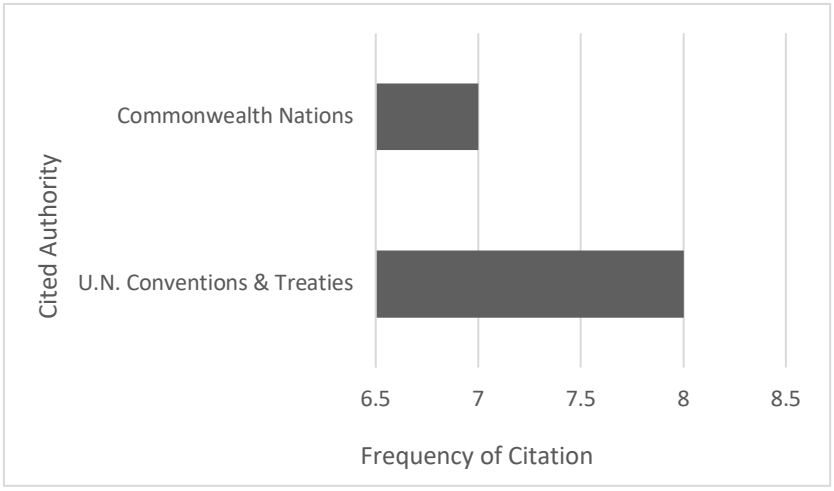
98 *See* Roper v. Simmons, 543 U.S. 551 (2005).

99 *Id.*

100 *See supra* notes 83–91.

101 *Lawrence*, 539 U.S. at 576–77; *Thompson*, 487 U.S. at 864; *see Roper*, 543 U.S. 551.

Figure 2. Most Cited and Effective International Legal Authorities



B. The Effectiveness of Language on International Legal Citations

The combination of reliance on the legal traditions of commonwealth countries and the provisions of the United Nations highlights the importance of language in international law citations. The language of the English courts and those of many current and former commonwealth countries is English.[102] One of the six official languages of the United Nations is English.[103] Due to the history of the English legal tradition, the accessibility of cases from commonwealth countries for English-speaking courts and U.N. conventions produced in English, the Court likely prefers citations to sources in English. This may be evidenced by the eleven of twelve, or ninety-one percent, of cases that reference international law from either English-speaking countries or the United Nations.

If the Court takes notice of international law, it frequently comes from these sources that are consistently available in English. It is the choice of the individual Justice, however, to include international legal citations in their discourse.

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102 *E.g.*, INDIA CONST. art. 348, § 1.

103 The other official languages are Arabic, Chinese, French, Russian, and Spanish. *Official Languages*, UNITED NATIONS, http://www.un.org/en/sections/about-un/official-languages/index.html (last visited Aug. 30, 2018).

III
DIRECTING INTERNATIONAL CITATIONS AT SPECIFIC JUSTICES CAN INCREASE THE ODDS OF DISCUSSION IN OPINIONS

The Brandeis International Brief requires that practitioners aim their international law citations at certain Justices to increase the possibility of successful discourse in opinions. The modern Court has both its champions and detractors of applying international law, based on their personal and professional experiences. In the twelve cases surveyed, thirteen Justices authored either a majority, concurrence, or dissent that included reference to international law. The Justices that are the subject of this survey are: John Paul Stevens;[104] William Rehnquist;[105] Antonin Scalia;[106] Anthony Kennedy;[107] Byron White;[108] Sandra Day O'Connor;[109] Clarence Thomas;[110] Stephen Breyer;[111] Earl Warren;[112] John Marshall Harlan;[113] William Brennan;[114] John Roberts;[115] and Ruth Bader Ginsburg.[116] The backgrounds analyzed include: (1) place of birth; (2) parents' education and economic status; (3) schools attended; (4) occupational background; and (5) the political party of the President that nominated them.

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104 Justice Stevens authored the majority in Atkins v. Virginia, 536 U.S. 304 (2002); *Thompson*, 487 U.S. 815.

105 Justice Rehnquist authored a dissent in *Atkins*, 536 U.S. at 321–28.

106 Justice Scalia authored dissents in *Lawrence*, 539 U.S. at 586–606; *Roper*, 543 U.S. at 607–30; *Thompson*, 487 U.S. at 859–78; and Olympic Airways v. Husain, 540 U.S. 644, 658–67 (2004).

107 Justice Kennedy authored the majority in *Lawrence*, 539 U.S. 558; and *Roper*, 543 U.S. 551.

108 Justice White authored the majority in Coker v. Georgia, 433 U.S. 584, 604–22; and a dissent in Miranda v. Arizona, 384 U.S. 436, 526–45 (1966).

109 Justice O'Connor authored concurrences in *Thompson*, 487 U.S. at 859–78; and New York v. Quarles, 467 U.S. 649, 674–90 (1984).

110 Justice Thomas authored a concurrence in Knight v. Florida, 528 U.S. 990 (1999).

111 Justice Breyer authored dissents in *Knight*, 528 U.S. 990; and *Medellin*, 552 U.S. at 538–67.

112 Justice Warren authored the majority in *Miranda*, 384 U.S. 436.

113 Justice Harlan authored a dissent in *Miranda*, 384 U.S. at 504–26.

114 Justice Brennan authored a dissent in Stanford v. Kentucky, 492 U.S. 361, 382–405 (1989).

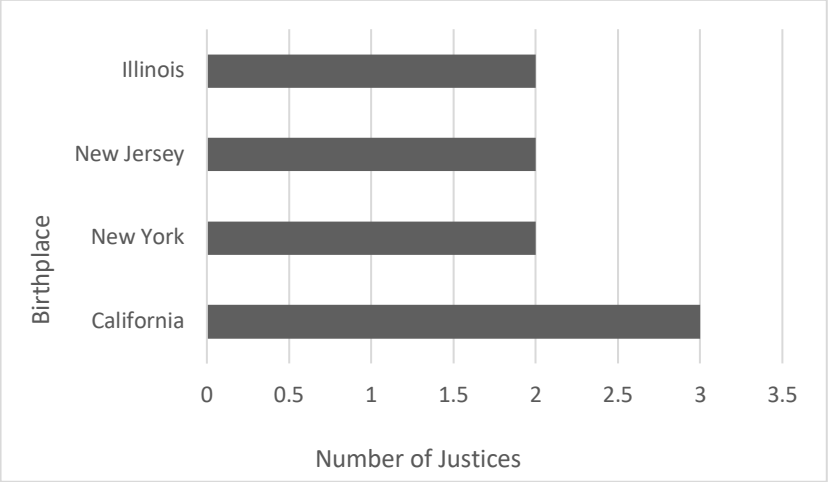
115 Justice Roberts authored the majority in *Medellin*, 552 U.S. 491.

116 Justice Ginsburg authored a concurrence in Grutter v. Bollinger, 539 U.S. 306, 344–47 (2003).

A. Place of Birth as a Factor

Each Justice's personal background may inform whether they cite to international law.[117] Each Justice is a product of their time, with war, economic conditions, and place of birth all serving as factors that can influence citation to international law. Figure 3 illustrates the most frequent birthplaces of the Justices citing to international law.

Figure 3. Place of Birth



The two Justices born before the turn of the century are Justice Warren (1891), followed by Justice Harlan (1899), in Los Angeles, California, and Chicago, Illinois, respectively.[118] Justice Brennan was born in Newark, New Jersey (1906),[119] Justice White in Fort Collins, Colorado (1917),[120] Justice Stevens in Chicago, Illinois (1920),[121] Justice Rehnquist in Milwaukee, Wisconsin (1924),[122] and Justice

117 *See supra* Section I–B.

118 *See* G. Edward White, *Earl Warren, a Public Life* 9 (1982); *John Marshall Harlan II, 1955–1971*, THE SUPREME COURT HISTORICAL SOCIETY, http://supremecourthistory.org/timeline_harlan_1955_1971.html (last visited Aug. 30, 2018).

119 *William Brennan*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/William-Joseph-Brennan-Jr. (last visited Aug. 30, 2018).

120 *Byron R. White*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/Byron-R-White (last visited Aug. 30, 2018).

121 *Current Members*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/biographies.aspx (last visited Aug. 30, 2018).

122 William Hubbs Rehnquist, LEGAL INFORMATION INST., https://www.law.cornell.edu/supct/Justices/rehnquist.bio.html (last visited Aug. 30, 2018).

O'Connor in El Paso, Texas (1930).[123] The remainder of the Justices were born after 1931, with Justice Ginsburg born in Brooklyn, New York (1933),[124] Justice Scalia born in Trenton, New Jersey (1936),[125] Justice Kennedy born in Sacramento, California (1936),[126] Justice Breyer born in San Francisco, California (1938),[127] Justice Thomas born in the Pinpoint community near Savanah, Georgia in 1948,[128] and Justice Roberts born in Buffalo, New York (1955).[129]

The year of birth may have an impact on why and how Justices cite to international law. The majority of these thirteen Justices were born after 1930, with six of thirteen, or forty-six percent born prior to 1929.[130] Conversely, only three, or twenty-three percent, were born before the outbreak of hostilities during the Great War.[131] The earlier the date of birth of the Justice, the more likely a positive citation to international law.[132] Every Justice born before 1920 favorably cited to international law. However, for Justices born from 1930 to 1955, only four, or fifty-seven percent cited favorably or neutrally to international law.[133] Only three Justices—Rehnquist, Kennedy and Roberts—provided only unfavorable citations to international law.[134]

California is home to the most Justices, with three, or twenty-three percent, of those analyzed. Three states are home to two Justices each: New York, New Jersey, and Illinois. The most popular place of birth is Chicago, Illinois, home to both Justices Stevens and Harlan.[135] The place of birth of a Justice may be relevant, and practitioners should analyze this factor because some states may develop Justices more disposed to international legal citation than others. All three Justices

123 *Current Members*, *supra* note 121.

124 *Id.*

125 Supreme Court of the United States, *Biography of Former Associate Justice Antonin Scalia*, https://www.supremecourt.gov/about/biographyScalia.aspx (last visited Aug. 30, 2018).

126 *Current Members*, *supra* note 121.

127 *Id.*

128 *Id.*

129 *Id.*

130 Justices Warren, Harlan II, Brennan, White, Stevens, and Rehnquist.

131 Justices Warren, Harlan II, and Brennan.

132 *See supra* Section I–B.

133 *Id.*

134 *Id.*

135 The places of birth and how each state votes in presidential elections are not considered by this survey.

from California cited favorably to international law, as did those from Illinois, whereas fifty percent of the Justices from New York and New Jersey cited favorably to international law.

B. Childhood and Economic Status as a Factor

Research into the Justices' childhood and economic status is important for the drafter of a Brandeis International Brief. Justice Warren's father and mother both emigrated to Los Angeles, California.[136] Justice Warren's father worked for long hours and low pay, raising his family in a row house across the street from the shipyards.[137] Justice Harlan grew up in opposite surroundings, the product of a wealthy family.[138] His father was an attorney and politician, and the young Justice attended private and boarding schools during his youth.[139]

Justice Brennan, the child of Irish immigrants, grew up middle class though he witnessed the economic hardships of those from his hometown.[140] Justice White grew up in similar middle class means, and his parents did not complete high school.[141] Justice Stevens was born into a wealthy family, but saw the family business crumble during the Great Depression.[142] Justice Rehnquist grew up in modest means to a conservative family and attended public schools,[143] his father was a paper salesman.[144] Justice O'Connor grew up in the middle class on her family's ranch in Arizona.[145]

Justice Ginsburg grew up in New York City, to a family of modest means. Her father worked as a furrier and her mother in a garment

136 G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 13–14 (1982).

137 *Id.*

138 *John M. Harlan II*, OYEZ, https://www.oyez.org/Justices/john_m_harlan2 (last visited Aug. 30, 2018).

139 *Id.*

140 Brennan Center for Justice, Celebrating Justice Brennan, https://www.brennancenter.org/celebrating-Justice-brennan (last visited Aug. 30, 2018).

141 *Byron R. White*, OYEZ, https://www.oyez.org/Justices/byron_r_white (last visited Aug. 30, 2018).

142 *John Paul Stevens*, OYEZ, https://www.oyez.org/Justices/john_paul_stevens (last visited Aug. 30, 2018).

143 *William H. Rehnquist*, OYEZ, https://www.oyez.org/Justices/william_h_rehnquist (last visited Aug. 30, 2018).

144 *William Rehnquist*, BIOGRAPHY, https://www.biography.com/people/william-rehnquist-9454479 (last visited Aug. 30, 2018).

145 *Sandra Day O'Connor*, OYEZ, https://www.oyez.org/Justices/sandra_day_oconnor (last visited Aug. 30, 2018).

factory.[146] Justice Scalia was born middle class to an Italian immigrant family. His mother was a primary school teacher and his father was a university professor.[147] Justice Kennedy was raised in the upper-middle class, with his father an attorney and lobbyist in Sacramento, California. His mother was a teacher.[148] Justice Breyer grew up in an upper-middle class family.[149] His father worked for the San Francisco Board of Education as legal counsel while his mother worked in public service.[150] Justice Thomas's father left his family when the Justice was young, leaving his mother struggling—a challenge enhanced by the family home burning down and subsequent homelessness.[151] Justice Roberts was born into the upper class in New York, with his father working as an executive for Bethlehem Steel, but the family later moved to Indiana.[152]

Several trends emerge upon examination of this factor. Three of the thirteen Justices, or twenty-three percent, were born of immigrants to the United States. Similarly, three of the thirteen Justices had parents who were attorneys. At least ten of the thirteen Justices, or seventy-six percent, grew up in the middle or upper class, and at least two of the thirteen Justices, or fifteen percent, grew up in families of poor economic means.[153] All three Justices with attorneys for parents cited favorably to international law. The children born to immigrants were not of a single mind when citing to international law, with two of the three citing favorably to international law. Fifty percent of the Justices who grew up in a poor economic situation cited favorably to international law. Despite the disparity in wealth and family

146 *Ruth Bader Ginsburg*, OYEZ, https://www.oyez.org/Justices/ruth_bader_ginsburg (last visited Aug. 30, 2018).

147 *Antonin Scalia*, OYEZ, https://www.oyez.org/Justices/antonin_scalia (last visited Aug. 30, 2018).

148 *Anthony M. Kennedy*, OYEZ, https://www.oyez.org/Justices/anthony_m_kennedy (last visited Aug. 30, 2018).

149 *Stephen G. Breyer*, OYEZ, https://www.oyez.org/Justices/stephen_g_breyer (last visited Aug. 30, 2018).

150 *Id.*

151 *Clarence Thomas*, OYEZ, https://www.oyez.org/Justices/clarence_thomas (last visited Aug. 30, 2018).

152 Todd S. Purdum, Jodi Wilgoren & Pam Belluck, *Court Nominee's Life Is Rooted in Faith and Respect for Law*, N.Y. TIMES (Jul. 21, 2005), https://www.nytimes.com/2005/07/21/politics/court-nominees-life-is-rooted-in-faith-and-respect-for-law.html.

153 This claim is based on the occupation and economic means of the parents. For example, Justices Warren and Thomas grew up in families of poor economic status, whereas Justices Harlan and Roberts were born into families with much greater economic means.

occupations, all of the Justices distinguished themselves and attended some of the best universities and law schools.

C. Education as a Factor

Justice Harlan attended Princeton University, the University of Oxford in the United Kingdom, and New York Law School.[154] Justice White attended the University of Colorado at Boulder on an athletic scholarship, then played professional football for the Pittsburgh Steelers.[155] After playing for a year he completed a Rhodes Scholarship at the University of Oxford and then attended Yale Law School after World War II.[156] Justice Stevens attended the University of Chicago and Northwestern University School of Law.[157] Justice Rehnquist attended Stanford for his bachelor's, master's, and laws degrees, and Harvard for an additional master's degree.[158] Justice O'Connor similarly attended Stanford for both her bachelor's and law degrees.[159] Justice Warren attended both U.C. Berkeley and the U.C. Berkeley School of Law.[160]

Justice Ginsburg attended Cornell University for her undergraduate degree and Harvard Law School, though she transferred in her final year to Columbia Law School in New York.[161] Justice Scalia is the only Justice on this list to have studied at Georgetown University, where he also studied at the University of Fribourg in Switzerland during his junior year, before attending Harvard Law School.[162] Justice Kennedy also studied abroad for a year, though at the London School of

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154 *John M. Harlan II*, OYEZ, https://www.oyez.org/Justices/john_m_harlan2 (last visited Aug. 30, 2018).

155 *Byron R. White*, OYEZ, https://www.oyez.org/Justices/byron_r_white (last visited Aug. 30, 2018).

156 *Id.*

157 *John Paul Stevens*, OYEZ, https://www.oyez.org/Justices/john_paul_stevens (last visited Aug. 30, 2018).

158 *William H. Rehnquist*, OYEZ, https://www.oyez.org/Justices/william_h_rehnquist (last visited Aug. 30, 2018).

159 *Sandra Day O'Connor*, OYEZ, https://www.oyez.org/Justices/sandra_day_oconnor (last visited Aug. 30, 2018).

160 *Earl Warren*, OYEZ, https://www.oyez.org/Justices/earl_warren (last visited Aug. 30, 2018).

161 *Ruth Bader Ginsburg*, OYEZ, https://www.oyez.org/Justices/ruth_bader_ginsburg (last visited Aug. 30, 2018).

162 *Antonin Scalia*, OYEZ, https://www.oyez.org/Justices/antonin_scalia (last visited Aug. 30, 2018).

Economics while studying at Stanford.[163] Justice Kennedy also studied at Harvard Law School.[164] Justice Thomas went to Yale Law School, though his previous degrees stand out from the rest, as he attended Conception Seminary and Holy Cross College.[165] Justice Breyer studied abroad at Magdalen College Oxford after graduating from Stanford University prior to attending Harvard Law School.[166] Justice Brennan also attended Harvard Law School after attending the University of Pennsylvania.[167] Justice Roberts continued this trend, attending Harvard for both his undergraduate degree and law degree.[168]

The most obvious trend amongst the Justices is the presence of Ivy League education in either undergraduate, graduate, or law school. Eleven of the thirteen Justices, or eighty-four percent, attended an Ivy League institution. Stanford was the next most common university, with four of thirteen, or thirty percent, attending to obtain a degree. Five of the thirteen Justices, or thirty-eight percent, studied abroad during their formal education. Unsurprisingly, four of the five Justices who studied abroad or obtained degrees from international institutions, or eighty percent, cited favorably to international law. Due to many of the Justices attending Ivy League universities, this factor does not weigh heavily for or against citation to international law. Figure 4 illustrates the frequency of the Justices' attendance at Ivy League universities.

163 *Anthony M. Kennedy*, OYEZ, https://www.oyez.org/Justices/anthony_m_kennedy (last visited Aug. 30, 2018).

164 *Id.*

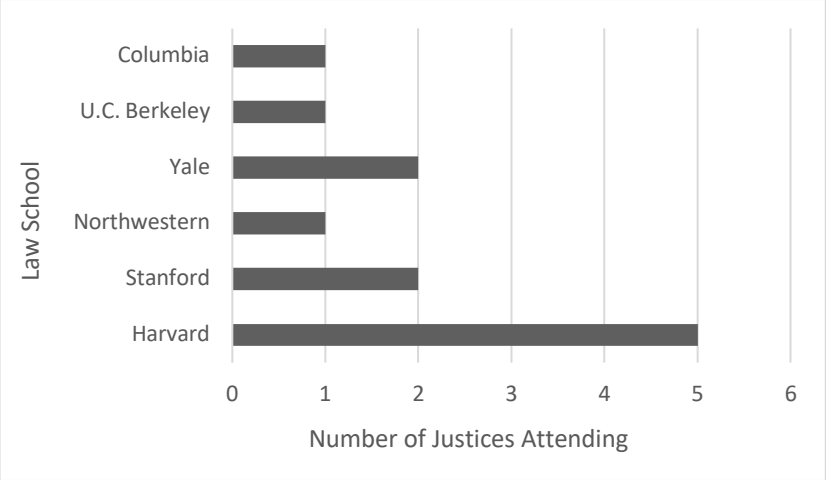
165 *Clarence Thomas*, OYEZ, https://www.oyez.org/Justices/clarence_thomas (last visited Aug. 30, 2018).

166 *Stephen G. Breyer*, OYEZ, https://www.oyez.org/Justices/stephen_g_breyer (last visited Aug. 30, 2018).

167 *William J. Brennan, Jr.*, OYEZ, https://www.oyez.org/Justices/william_j_brennan_jr (last visited Aug. 30, 2018).

168 *John G. Roberts, Jr.*, OYEZ, https://www.oyez.org/Justices/john_g_roberts_jr (last visited Aug. 30, 2018).

Figure 4. Law School Attendance



D. Occupational Experience As a Factor

The Justices undertook several categories of employment prior to being nominated to the bench: private practice, public service, academia, and serving as a government attorney.[169] However many of the Justices began their careers by clerking for a federal judge.

Justice White, a former NFL football player, clerked for Justice Vinson before joining a law firm in Denver, Colorado, after which he was appointed Assistant Attorney General and Justice of the Court.[170] Justice Stevens also clerked for Justice Rutledge.[171] After serving in legal positions in the U.S. House of Representatives, the Attorney General's Office and the American Bar Association, he was appointed to the Seventh Circuit before being nominated to the Court.[172] Like his peers, Justice Rehnquist clerked for a member of the Court, Justice

169 One trait common among many Justices is prior military service. Though it would be an interesting inquiry to determine if military service (particularly based on experience and exposure in World War II, the Korean War, and the Vietnam War) affected legal reasoning, this trend is beyond the scope of this Article. Furthermore, the last Justice who served in the military at the time of this writing was retired associate Justice John Paul Stevens. No current members of the Court served in an active military component.

170 *Byron R. White*, OYEZ, https://www.oyez.org/Justices/byron_r_white (last visited Aug. 30, 2018).

171 *Current Members*, *supra* note 121.

172 *Id.*

Jackson.[173] He then entered private practice before serving as Deputy Attorney General for the Department of Justice before being nominated to the Court.[174] Justice Ginsburg also clerked for a judge before she became a research associate and then the director of Columbia Law's project on international procedure.[175] After becoming a professor at Rutgers University School of Law and Columbia Law School, she later served on the ACLU's national board of directors and general counsel before her appointment to the U.S. Court of Appeals for the D.C. Circuit and subsequent nomination to the Court.[176]

Justice Breyer clerked for Justice Goldberg before becoming Special Assistant to the Assistant U.S. Attorney General for Antitrust.[177] He later served as an Assistant Special Prosecutor of the Watergate Special Prosecution Force, and special and chief counsel of the U.S. Judiciary Committee.[178] During these years he also was a law professor at Harvard Law School and the Kennedy School of Government, including as a visiting professor at the College of Law in Sydney, Australia, and at the University of Rome.[179] After appointment to the First Circuit Court of Appeals, he was nominated to the Court.[180] Justice Roberts clerked for both a Second Circuit judge and Chief Justice Rehnquist.[181] He later became a special assistant to the U.S. Attorney General before becoming associate counsel to President Reagan, White House Counsel's office, and Deputy Solicitor General. He later entered private practice before being appointed to the U.S. Court of Appeals for the D.C. Circuit and prior to his nomination to the Court.[182]

Several Justices entered political life in addition to the legal profession. After clerking for the Judiciary Committee of the California Assembly, Justice Warren became Deputy District Attorney, then

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173 *William H. Rehnquist*, OYEZ, https://www.oyez.org/Justices/william_h_rehnquist (last visited Aug. 30, 2018).

174 *Id.*

175 *Current Members*, *supra* note 121.

176 *Id.*

177 *Id.*

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.*

182 *Id.*

District Attorney for Alameda County, California.[183] He later became the Attorney General for California, and then Governor before being nominated to the Court.[184] After graduating from Stanford, Justice O'Connor served as the Deputy County Attorney for San Mateo County and a civilian attorney for Quartermaster Market Center in Frankfurt Germany.[185] She then entered private practice in Arizona before serving as Assistant Attorney General of Arizona and later as a member of the Arizona State Senate.[186] After serving her terms, she worked her way up the judicial ladder and became a Justice of the Arizona Court of Appeals before being nominated to the Court.[187]

Many of the Justices also served as law professors and engaged in private practice before being nominated to the Court. Justice Kennedy entered private practice before becoming a law professor at the McGeorge School of Law.[188] In addition to other positions in the judiciary, he was appointed to the Ninth Circuit Court of Appeals before being nominated to the Court. Justice Scalia first entered private practice and later served as a law professor at the University of Virginia, the University of Chicago, Georgetown, and Stanford.[189] He served as general counsel to the Office of Telecommunications Policy, and later as Chairman of the Administrative Conference of the United States before becoming the Assistant Attorney General for the office of legal counsel, all prior to his appointment to the U.S. Court of Appeals for the D.C. Circuit and later nomination to the Court.[190] Justice Brennan first entered private practice before becoming a superior, appellate and supreme court judge in New Jersey prior to being nominated to the Court.[191]

Amongst the Justices are those who were government employees at the federal and state levels. Justice Thomas first served as an Assistant Attorney General of Missouri before he began working with the

183 *Earl Warren*, OYEZ, https://www.oyez.org/Justices/earl_warren (last visited Aug. 30, 2018).

184 *Id.*

185 *Current Members*, *supra* note 121.

186 *Id.*

187 *Id.*

188 *Id.*

189 *Biography of Former Associate Justice Antonin Scalia*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/biographyScalia.aspx (last visited Aug. 30, 2018).

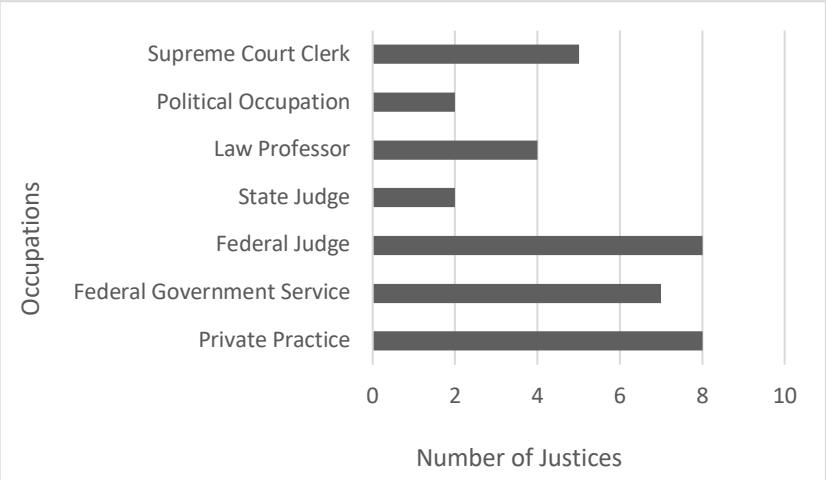
190 *Id.*

191 *William J. Brennan*, OYEZ, https://www.oyez.org/Justices/william_j_brennan_jr (last visited Aug. 30, 2018).

Monsanto Company. He later worked for Senator John Danforth, the Department of Education, and as chairman of the Equal Employment Opportunity Commission before being appointed to the U.S. Court of Appeals for the D.C. Circuit and being nominated to the Court.[192] Justice Harlan entered private practice before becoming an assistant U.S. Attorney and Special Assistant Attorney General in New York, and then returned to private practice. After serving in World War II, he became the chief counsel to the New York State Crime Commission, and later a Justice of the Second Circuit Court of Appeals before being nominated to the Court.[193]

There are several trends based on the legal profession of the Justices. As Figure 5 shows, five of the thirteen Justices, or thirty-eight percent, clerked for a Supreme Court Justice. Three of those five Justices who previously clerked cited favorably to international law. Four of the thirteen Justices were law professors and of those four, seventy-five percent cited favorably to international law. Four of the Justices, or thirty percent, were previously judges on the D.C. Circuit. Three of the thirteen Justices, or twenty-three percent, either worked internationally or in issues that concerned international law. Of those three Justices, sixty-six percent cited favorably to international law. Two of the thirteen, or fifteen percent, were elected officials.

Figure 5. Occupational Experiences



192 *Current Members*, *supra* note 121.

193 *John Marshall Harlan II*, OYEZ, https://www.oyez.org/Justices/john_m_harlan2 (last visited Aug. 30, 2018).

E. Presidential Appointment as a Factor

Justices Warren, Harlan, and Brennan were nominated by President Eisenhower, a registered Republican.[194] Justice White was nominated by President Kennedy, a registered Democrat.[195] Justice Rehnquist was nominated by President Nixon, a registered Republican.[196] Justice Stevens was nominated by President Ford, a registered Republican.[197] Justices Scalia, Kennedy, and O'Connor were nominated by President Reagan, a registered Republican.[198] Justice Thomas was nominated by President George H.W. Bush, a registered Republican.[199] Justices Breyer and Ginsburg were nominated by President Clinton, a registered Democrat.[200] Lastly, Justice Roberts was nominated by President George W. Bush, a registered Republican.[201]

Two Presidents—Eisenhower and Reagan—nominated three Justices each. President Clinton nominated two Justices during his terms as President. More interesting, however, is that ten out of thirteen Justices, or seventy-six percent, were nominated by Republican Presidents. Only three of thirteen, or twenty-four percent, were nominated by Democratic Presidents. All three Justices nominated by Democratic Presidents, or one hundred percent, cited favorably to

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194 *Justices 1789 to Present*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/members_text.aspx (last visited Aug. 30, 2018); *Dwight D. Eisenhower*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/presidents/dwight-d-eisenhower/ (last visited Aug. 30, 2018).

195 *Justices 1789 to Present*, *supra* note 194; *John F. Kennedy*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/presidents/john-f-kennedy/ (last visited Aug. 30, 2018).

196 *Justices 1789 to Present*, *supra* note 194; *Richard M. Nixon*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/presidents/richard-m-nixon/ (last visited Aug. 30, 2018).

197 *Justices 1789 to Present*, *supra* note 194; *Gerald R. Ford*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/presidents/gerald-r-ford/ (last visited Aug. 30, 2018).

198 *Justices 1789 to Present*, *supra* note 194; *Ronald Reagan*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/presidents/ronald-reagan/ (last visited Aug. 30, 2018).

199 *Justices 1789 to Present*, *supra* note 194; *George H. W. Bush*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/presidents/george-h-w-bush/ (last visited Aug. 30, 2018).

200 *Justices 1789 to Present*, *supra* note 194; *William J. Clinton*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/presidents/william-j-clinton/ (last visited Aug. 30, 2018).

201 *Justices 1789 to Present*, *supra* note 194; *George W. Bush*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/presidents/george-w-bush/ (last visited Aug. 30, 2018).

international law. Of the ten Justices nominated by Republican Presidents, eight, or eighty percent, cited favorably to international law. Of the twelve cases surveyed, eleven, or ninety-one percent, were decided when the bench had been nominated more by Republican Presidents than Democratic Presidents. Only in *Miranda* was the bench comprised of five Justices nominated by Democratic Presidents.[202]

The practitioner should consider the five criteria analyzed when determining where to direct international law citations in a Brandeis International Brief. Additionally, practitioners should also consider the past decisions of the Justices before they were nominated to the Court, as the rewards will likely be worth the effort.[203]

IV
THE BRANDEIS INTERNATIONAL BRIEF TEMPLATE AS A BEST PRACTICE FOR INTERNATIONAL LAW CITATION

The trends identified in this survey demonstrate that the Court is likely to cite to international law based on numerous criteria. The practitioner using the Brandeis International Brief must analyze the legal issues presented, historically beneficial citations to international law, and the backgrounds of the Justices themselves to improve their chances of having international citations considered as persuasive or comparative authority. Maximizing chances of success requires looking at the whole picture and providing the Court with a clear framework for its citation, one modeled after the Brandeis Brief.[204]

A. Reviving the Brandeis Brief

The Brandeis Brief is well known in U.S. jurisprudence for its submission of factual information to an appellate court through a legal brief.[205] The brief was filed by future Justice Louis D. Brandeis in his

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202 *See generally Miranda v. Arizona*, OYEZ, https://www.oyez.org/cases/1965/759 (last visited Jan. 20, 2019).

203 Because the survey considered mostly Justices that were either federal or state judges before being nominated to the bench, it may be a worthwhile inquiry to research the individual Justice's opinions before being nominated to the Court to determine if they cite to international law. The research required for the previous opinions and writings of thirteen Justices is outside the scope of this survey.

204 *See* Br. for the State of Oregon, Muller v. Oregon, 208 U.S. 412 (1908).

205 Ben K. Grunwald, *Suboptimal Social Science and Judicial Precedent*, 161 U. PA. L. REV. 1409, 1414 (2013).

representation of the state of Oregon in *Muller v. Oregon*,[206] a case that involved the constitutionality of working hours for female laundry workers. Brandeis' brief not only applied legal reasoning, but non-legal social science data from the United States and international sources.[207] This revolutionary brief broke the mold of then-traditional legal briefs and opened the door for non-legal information to be included in legal filings.

Brandeis' brief provided legislative facts supporting the proposition that a piece of legislation had a reasonable basis.[208] Instead of a court being asked to take notice of certain facts, or accepting them as authoritative, Brandeis provided them in his brief, supplying the necessary documentation to satisfy the existence of a law.[209] Within his brief Brandeis described social science data that supported his propositions,[210] and legal precedent from the laws of other states and countries.[211] Brandeis undoubtedly aided his cause by providing this information and facts and figures that the Court did not overlook, and ultimately won his case.[212]

The citation to international law found in the Brandeis Brief is one element that sets it apart from other briefs. Brandeis introduced the reader to foreign legislation up front in his brief, specifically mentioning the laws of Great Britain.[213] In the following paragraphs the legislative traditions of numerous European nations were discussed, before turning to U.S. legislative history.[214] By framing his argument with the legislation of foreign nations with lengthier histories than the United States, he provides not only historical perspective but furthers the notion that European law and legislation provides favorable citation for U.S. law. This argument is enhanced by the use of social science data from both European nations and U.S. state agencies, demonstrating the similarities between them.[215] By showing these commonalities, Brandeis couched his international legal citation in

206 Muller v. Oregon, 208 U.S. 412 (1908).

207 *See* Br. for the State of Oregon, *supra* note 204.

208 DAVID G. KNIBB, FEDERAL COURT OF APPEALS MANUAL § 28:20 (6th ed. 2018).

209 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 15:3(a) (2017).

210 *See* Grunwald, *supra* note 205.

211 *See* Rotunda & Nowak, *supra* note 209.

212 Muller v. Oregon, 208 U.S. 412, 423 (1908); Davis, *supra* note 66, at 424.

213 Br. for the State of Oregon at 11, Muller v. Oregon, 28 U.S. 324 (1908) (No. 107).

214 *Id.* at *11–16.

215 *Id.* at *18–57.

U.S. jurisprudence, demonstrating the worth of citations to sources outside of U.S. jurisprudence. As the trends identified in this survey show, citation to foreign law in the same way that Brandeis cited to foreign sources and social science can be effective at supporting a domestic legal issue.[216]

Providing the modern Court with a similarly easy solution is required, even though the Court may refuse to take judicial notice of foreign legal facts. By giving the Court what it needs legally, legislatively, and internationally, the practitioner can attempt to weigh the odds in his favor.[217] By using a "Brandeis International Brief," an enhanced version of the Brandeis Brief, a practitioner can structure his international law argument in a way that provides the Court with clear authority on which to base its opinions.

B. The Brandeis International Brief Outlined and Explained

Attorneys should internationalize their briefs based on the trends identified by this survey. Favorable citation to international law based on legal briefs is likely if practitioners do the following: (1) research persuasive and comparative international law that is not attempting to bind; (2) find sources for drafting amicus briefs that support international legal positions; (3) research the laws of current or former commonwealth countries as influencing the historical development of the Constitution; (4) obtain citations written in English, including those of the United Nations; and (5) check the backgrounds of the Justices in order to direct citations to specific members of the Court.

By combining research in these five areas, a practitioner can lay the groundwork for numerous productive citations to international law. Analyzing these criteria requires a framework for successful citations, an enhanced version of the Brandeis Brief known as the Brandeis International Brief. An example of a Brandeis International Brief that considers the different criteria detailed in the survey above can be found below. This example is only an outline that provides a starting point for international citations. However, in practice, the outline can be expanded upon based on the specific legal issue:

1. Introduce the legal issue in U.S. jurisprudence.

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216 Mary Ann Glendon, *Comparative Law in the Age of Globalization*, 52 DUQ. L. REV. 1, 13–14 (2014).

217 *See generally* Ellie Margolis, *Beyond Brandeis: Exploring Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. REV. 197 (1999).

2. Refer to similar cases in U.S. jurisprudence that apply international law.
3. Refer to the common law of commonwealth, English-speaking nations for comparative citations that inform the present legal issue, especially if it can be tied to the underpinnings of the Constitution or the development of an amendment.
4. Synonymize the legal issue to U.N. resolutions and protocols for persuasive citation to show that there is a global consensus or movement regarding the legal issue.
5. Explain how the impacts of foreign law affected the host-nation, and how the United States would benefit from the passing of a similar law, using U.S. social science data as support.
6. Incorporate references to favorable amici that rely on international law and obtain supportive filings from amicus briefs regarding the present issue.

The first point, introducing the legal issue in U.S. jurisprudence, serves to introduce the uninformed legal reader to the topics currently at issue. The practitioner should narrow the topics with state, federal, and international law in mind if arguing before the Court. Some topics are more conducive to an international analysis, such as Fourth and Eighth Amendment jurisprudence. If the practitioner reduces the available discourse to a narrow legal issue, he may miss an opportunity for effective citation.

The second point, referring to similar cases in U.S. jurisprudence that apply international law, informs the same reader that other nations and legal traditions have encountered the same problem. Introducing international legal law early prepares the reader for future citations. Similar to the Brandeis Brief, which featured international law at the beginning, the Brandeis International Brief does the same.

The third point, referring to the laws of commonwealth nations for comparative analysis, focuses on commonwealth, English-speaking nations that have encountered the same problem either in the present or past, and how those results bear on U.S. jurisprudence. This point is aimed towards textual interpreters of the Constitution and provides for citation to persuasive authority. Certain Justices appreciate the historical perspective, especially if the relevant commonwealth citations impacted the Constitution or provided justification for an amendment.

The fourth point, synonymizing the legal issue to U.N. resolutions and protocols for persuasive citation, builds on the previous three points, lending additional support from a global consensus regarding

the legal issue. This point provides the practitioner an option to cite to comparative international law, such as U.N. resolutions. These citations should be aimed at Justices with previous international experience who have historically appreciated a global or geographically aligned perspective.

The fifth point, explaining the impacts of a foreign law on the host-nation and analogizing it to the United States, provides the social science data support as found in the Brandeis Brief, showing the real-world effects of the legal issue from nations with similar legal traditions. This point should provide the opportunity for the Court to take judicial notice of relevant data. Although some Justices may disagree with this practice, it is hard to argue with hard facts that show the real-world implications of a judicial decision.

The sixth point, incorporating reference to favorable amici that rely on international law, is for convincing the Court to move in a certain direction by providing as many supportive amici as possible. This survey has shown that the more citations to international law from a variety of sources, the more likely the Court will address international issues. Using *Medellin*, *Thompson*, and *Roper* as guides for effective citation, third party drafters can craft briefs that bring international law to the Court's attention.

Legal briefs should be internationalized with this framework in mind. By taking advantage of available research, informed decisions can be made regarding how best to approach the Court with international citations to maximize their effectiveness. By realizing the positives of the English-speaking legal traditions of commonwealth nations and U.N. support, and the personal and professional backgrounds of each Justice, a practitioner can craft arguments using international law to their benefit. This benefit provides yet another support for a legal argument, and in addition to references to both state and federal law, can push the scales in favor of the practitioner who does the research.

CONCLUSION

In surveying twelve cases and thirteen Justices of the Court, the overarching trend is that the Court respects international law, while recognizing that it is not binding authority. Although the legal issues may change, certain truths remain the same: the Court likes to use international legal citations as support; prefers references to current or former commonwealth, English speaking nations, and the United

Nations. Justices appointed by Democrats invariably favor international law, as do the children of attorneys, and those born in California. These realizations, paired with the knowledge that a well-researched and written legal brief can win the day, are likely to aid a practitioner. International citations in a Brandeis International Brief that considers the criteria in this survey, and also caters to individual Justices, can increase the likelihood of success that the Court will rely on international authority and cite it in the ultimate opinion. The disposition of the Court will change, and though this Article represents a relatively small sample size of cases and Justices, it underscores the potential of the Brandeis International Brief as a future drafting tool. Such a drafting tool is essential for effectively incorporating the support of social factors and legislation across nations and legal traditions, and for influencing future U.S. jurisprudence.