

A CASE AGAINST JUDICIAL INTERNATIONALISM

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Abstract

The United States Supreme Court has increasingly referred to specific foreign legal authorities and practices, as well as international conventions, in decisions involving purely domestic concerns. While the Court, to date, has only given such materials persuasive, and not binding, effect in such instances, a number of legislators and commentators in both the media and the legal academy have expressed concern over foreign and international law's increasing role in constitutional jurisprudence.

This article critiques what it defines as the Court's increasing internationalism – the use of foreign law and international conventions as persuasive authority in cases with little or no implications beyond U.S. borders. It suggests that the Court should both refuse to expand and reconsider this approach to constitutional adjudication. The article first examines the history of the Court's use of foreign and international law in illustrating how this so-called “cosmopolitan approach” to decisionmaking constitutes a relatively recent phenomenon. After exploring the current state of the debate over the degree to which the Court should incorporate non-U.S. legal perspectives into its interpretations of the Constitution, the article suggests some negative consequences that might result from the Court's basing conclusions of law on anything but American authorities and practices when evaluating domestic constitutional issues.

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In addition, I thank Professors Roger Alford and Michael Ramsey of the Pepperdine University Law School and the University of San Diego Law School respectively for their extraordinarily helpful comments and suggestions. Finally, I extend my gratitude to Professor Frank Goodman of the University of Pennsylvania Law School, who initially encouraged me to pursue this endeavor.

The views expressed in this article are solely my own and do not necessarily reflect those of Hughes Hubbard & Reed LLP or any of its clients or other members of its staff.

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INTRODUCTION

To what extent are foreign laws, court decisions, international conventions, and even social and cultural traditions or practices relevant to determining the protections and guarantees of the United States Constitution? Over the past three years, the United States Supreme Court has invoked such resources as persuasive authority in a number of highly publicized cases that involve purely domestic concerns. The Court has taken what this article will call a more internationalist approach to constitutional interpretation in the cases of *Atkins v. Virginia*, which declared unconstitutional the imposition of the death penalty on the mentally retarded,¹ and *Grutter v. Bollinger*, which upheld the use of race-based affirmative action measures in university admissions.² More prominently, the Court invalidated all laws criminalizing sexual relationships between individuals of the same gender in *Lawrence v. Texas*.³ Finally, in this term's *Roper v. Simmons*, the Court referred to foreign authorities as "instructive" in striking down all U.S. death penalty law provisions allowing the execution of juveniles.⁴

Consequently, in view of their votes on these decisions or remarks to various organizations, Justices John Paul Stevens, Sandra Day O'Connor, Anthony Kennedy, David Souter, Ruth Bader Ginsburg, and Stephen Breyer have explicitly expressed an interest in further utilizing foreign legal sources and international conventions in future cases.⁵ In contrast, Justices Antonin Scalia and Clarence Thomas have generally decried

¹ *Atkins v. Virginia*, 536 U.S. 304 (2002).

² *Grutter v. Bollinger*, 539 U.S. 306 (2003).

³ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴ *Roper v. Simmons*, No. 03-633, 2005 U.S.LEXIS 2200 at *44 (Mar. 1, 2005)(print citation currently unavailable).

⁵ See, e.g., Sandra Day O'Connor, Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law (March 16, 2002), in 96 AM. SOC'Y INT'L L. PROC. 348 (2002); Hope Yen, *O'Connor Extols Role of International Law in Post-Sept. 11 World*, ASSOCIATED PRESS, Oct.

this practice as inappropriate under most circumstances.⁶ Chief Justice Rehnquist's overall record in terms of votes and speeches also demonstrates skepticism about this trend, though perhaps not to the same degree.⁷ Yet perhaps because these judicial decisions and statements by justices signal what international law professors Lori Damrosch and Bernard Oxman have called "a long-term trend toward a more cosmopolitan jurisprudence,"⁸ some Supreme Court litigants have begun to adamantly advocate a greater role for foreign legal perspectives in regard to their own disputes.⁹

27, 2004, at Washington Dateline; Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999) (arguing the relevance of international law to constitutional interpretation concerning affirmative action); Justice Ruth Bader Ginsburg, Remarks for the American Constitution Society (August 2, 2003)(available at http://www.humanrightsfirst.org/us_law/inthecourts/Ginsburg_transcript_080203.pdf); Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1 (2003); Stephen Breyer, The Supreme Court and the New International Law, Remarks Before The Ninety-Seventh Annual Meeting of the American Society of International Law 97th Annual Meeting, Apr. 4, 2003, in 97 AM. SOC'Y INT'L L. PROC. 265 (2003); Stephen Breyer, Remarks to the Paris Bar Association (November 11, 2004)(video available at <http://www.c-span.org/videoarchives.asp?CatCodePairs=Series,AC&ArchiveDays=100>); Stephen Breyer, Constitutional Relevance of Foreign Court Decisions, Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer – American University Washington College of Law (Jan. 13, 2005)(available at <http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument>).

⁶ See Ann Gearan, *Foreign Rulings Not Relevant To High Court, Scalia, Says*, WASHINGTON POST, Apr. 3, 2004, at A07; Antonin Scalia, Constitutional Relevance of Foreign Court Decisions, Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer – American University Washington College of Law (Jan. 13, 2005)(available at <http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument>); Foster v. Florida, 537 U.S. 990 (2002)(Thomas, J., concurring in denial of certiorari)("This Court...should not impose foreign moods, fads, or fashions on Americans").

⁷ For example, Chief Justice Rehnquist dissented in *Atkins*, *Grutter*, *Lawrence*, and *Roper*. But in writing for the majority in *Washington v. Glucksberg*, which upheld Washington state's ban on assisted suicide, he noted that the Supreme Court of Canada had reached a similar decision and that Australia, Britain, and New Zealand outlawed the practice. *Washington v. Glucksberg*, 521 U.S. 702, 718 (1997). Similarly, Rehnquist once called for the greater use of foreign legal sources for reference purposes in a 1989 speech. William H. Rehnquist, *Constitutional Courts – Comparative Remarks* (1989), reprinted in *GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE – A GERMAN-AMERICAN SYMPOSIUM* 411, 412 (Paul Kirchhof & Donald P. Kommers eds. 1993).

⁸ Lori Damrosch & Bernard Oxman, *Agora: The United States Constitution And International Law – Editor's Introduction*, 98 AM. J. INT'L. LAW 42 (2004).

⁹ For example, the cases of "enemy combatants" detained at the U.S. naval base at Guantánamo Bay, Cuba, witnessed numerous *amicus* briefs, some on behalf of foreign government officials, urging the Court to consider the detentions' international law implications. See, e.g., Brief of Amici Curiae 175 Members of Both Houses of the Parliament of the United Kingdom of Great Britain and Northern Ireland, *Rasul v. Bush*, 124 S. Ct. 2686 (2004)(No. 03-334, 03-343), available at

In some instances, the Court has apparently paid attention. In *Roper*, the Court acknowledged other countries and international conventions that had banned the execution of juvenile murderers after having received a significant number of *amicus* briefs from foreign legal and human rights organizations, past Nobel Peace Prize recipients, and former U.S. diplomats centering on one general theme – that executing such persons violated the Eighth Amendment to the U.S. Constitution by contradicting prevailing norms of international law, as most countries’ abolition of the practice evidenced.¹⁰ Less notably, in an action last term concerning whether a federal district court compel the release of evidentiary materials for use in hearings before the European Commission, the Court allowed the Commission’s attorneys to participate in oral arguments in the *amicus* capacity in which they had filed briefs.¹¹ This development constituted the first time the Court had ever allowed a foreign government to avail itself of this already rare privilege.

While legal scholars have both praised and criticized this direction the Court has taken,¹² in addition to vehement criticisms of the Court in both print and electronic media,¹³ perhaps a recent action by the Bush Administration best indicates that the

http://www.humanrightsfirst.org/us_law/inthecourts/gitmo_briefs/Parliament_United_Kingdom_Northern_Ireland.pdf.

¹⁰ See Brief of Amici Curiae The Human Rights Committee of the Bar of England and Wales et al., *Roper v. Simmons*, No. 03-633 (U.S. Supreme Court argued Oct. 13, 2004), available at <http://www.abanet.org/crimjust/juvjus/simmons/engwales.pdf>; Brief of Amici Curiae President James Earl Carter, Jr., *Roper*, available at <http://www.abanet.org/crimjust/ juvjus/simmons/nobel.pdf>; Brief of Amici Curiae Former U.S. Diplomats, *Roper*, available at <http://www.abanet.org/crimjust/juvjus/simmons/diplomats.pdf>.

¹¹ Oral Argument Transcript at 16-25, *Intel Corp. V. Adv. Micro Devices, Inc.*, 124 S. Ct. 2466 (2004)(No. 02-572). Citation according to the *United States Reports* for 2004 is not available yet.

¹² See, e.g., Lori Damrosch et al., *Agora: The United States Constitution And International Law*, 98 AM. J. INT’L. LAW 42 (2004).

¹³ In fact, much of these criticisms have taken very aggressive or sarcastic tones. See, e.g., MARK R. LEVIN, *MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA* 18-22 (Regnery Publishing, Inc. 2005)(criticizes the views of Justices Stevens, O’Connor, Kennedy, and Ginsburg on utilizing non-U.S. legal sources as expressed in prior opinions and speeches). See also Townhall.com Editors, *U.S. Constitution: Made In Jamaica?* (Mar. 18, 2005), available at <http://www.townhall.com/columnists/Guest>

Court's use of foreign law or international conventions in decisionmaking merits attention beyond the legal academy and specialized areas of the press. At the end of this term, in *Medellin v. Dretke*, the Court will rule on the enforceability of a United Nations International Court of Justice (I.C.J.) order that the U.S. review the death sentences of 51 Mexican nationals convicted of murder. The I.C.J. found that the U.S. had denied these individuals the right to seek aid from their country's diplomatic representatives as guaranteed by the Optional Protocol of the 1969 Vienna Convention on Consular Relations, which the U.S. had ratified. The Protocol requires signatories to let the I.C.J. make the final decision as to when one country illegally denies a foreign national the right to seek consulate assistance when taken into custody. And on March 10, 2005, the State Department announced that the U.S. had withdrawn from the Protocol, apparently reflecting a concern among White House policymakers that international law was beginning to exert an unwelcome level of influence over domestic affairs.¹⁴

Given all this issue's heightened prominence, the judiciary as a whole may well benefit from a definition by the Supreme Court of when and when not to refer to non-U.S. law and international conventions in the processes of constitutional interpretation and decisionmaking. This article suggests just such a framework.

Foreign materials, which this article defines as a country's specific laws or court decisions, as well as international conventions and treaties, can indeed assist judges in interpreting the Constitution as it applies to matters involving such conventions, international law, or some sort of foreign interest. But the decisions that have generated

Columns/printEditors20050318.shtml; Edwin Fuelner, *Courting Trouble* (Mar. 9, 2005), available at <http://www.townhall.com/columnists/edwinfuelner/printef20050309.shtml>.

¹⁴ Adam Liptak, *U.S. Says It Has Withdrawn From World Judicial Body*, N.Y. TIMES, Mar. 10, 2005, at A16. This decision is also significant because the U.S. itself invoked the Protocol on such occasions as a 1979 action against Iran in the I.C.J. for the seizure of 52 American hostages.

most of the debate concerning the proper role of foreign and international law in American jurisprudence have primarily involved purely domestic matters that mandate no reference to anything other than American law. These rulings have entailed using the existence or absence of laws concerning a specific issue in selected countries as secondary support for upholding or invalidating the same sort of law here in the U.S. And while none of these decisions has so far bound any segment of American case law to a non-American law, the shortcomings of utilizing foreign authority in this manner become more palpable if one hypothesizes that *a specific guarantee or privilege should or should not exist in U.S. law specifically because the same guarantee or privilege does or does not exist in a foreign country*. This more aggressively internationalist approach is precisely what many of the *amicus* briefs in such cases as *Roper* advocated.

This article not only critiques this method of constitutional interpretation, but seeks to do so by transcending such traditional labels as left or right, Republican or Democrat, and originalist or pragmatic. The Court's references to foreign law in the past few terms' decisions have indeed favored outcomes that are indeed "liberal" from a perspective of contemporary American social policy.¹⁵ Furthermore, in considering this issue within the context of legal theory, an adherent to the originalist school of thought would probably not approve of referring to foreign law in order to decide a domestic constitutional issue.¹⁶

¹⁵ The contemporary use of the term "liberal" in the United States varies with the use of the term elsewhere in the world. In Europe, for example, liberalism generally refers to a respect for individual liberties and a belief in a democratically accountable government, which should act to alleviate social ills without extensive intervention in society or the economy. But in the United States, the definition of the term has evolved to include a belief in an active government role in combating actual or perceived social injustices. Views that typify such liberalism today, then, include support for abortion and homosexual rights and opposition to the death penalty.

¹⁶ The leading academic theories of constitutional law include originalism and pragmatism. Originalism basically holds that judges should construe the Constitution's meaning on a given issue in a manner that is

Nevertheless, people who consider themselves politically liberal or who would rather judges not take on originalist approach to interpreting the Constitution should in fact be wary of courts' use of non-U.S. legal principles or international agreements to decide purely domestic disputes, in contrast to any enthusiasm they might initially feel for any such developments. Neither the Constitution, legislatures, or the Court have ever established a rule or framework governing the application of such authorities on a domestic basis in any circumstances other than those the Constitution already specifies. Even decisions that political conservatives or originalist legal theorists might criticize, such as the Warren Court's rulings concerning criminal procedure and the right to privacy, still used the Constitution's text as a fundamental basis for their analyses, even though their actual conclusions may have given the pertinent constitutional provisions a debatable meaning.

Foreign laws, however, do not stem from the same philosophical base, but from different circumstances, philosophies, traditions, and ideas. A foreign law does not reflect an American constitutional principle or tradition, but merely represents the needs and characteristics of a different society and culture, even though some of these traits may outwardly resemble American ones. In that way, foreign laws' relevance to the circumstances surrounding an American legal issue with no external implications

consistent with the original understanding of those who drafted and ratified the document. Decisions, then, are made based on facts as they occurred when the document was enacted, and not according to adjustments for time or context.

In recent years, constitutional scholars have come up with a number of approaches that all reject the Constitution's original meaning as a means of guiding judicial decisionmaking to some extent. Perhaps the term "legal pragmatism" best encompasses this approach, which primarily concerns itself with a decision's factual consequences. Legal pragmatism consequently encourages the use of a more diverse set of data in interpreting the Constitution and views law as a guideline to be determined according to the specific context at hand. For an extensive description and comparison of originalism and pragmatism, with a focus on how each would apply to the use of foreign law in judicial decisionmaking, see Roger Alford, *In Search Of A Theory Of Constitutional Comparativism*, 52 U.C.L.A. LAW REV. 1 (2005).

whatsoever remains quite questionable. And the range of these laws, and the social, cultural, and legal concepts they represent, is simply so vast and diverse, that a judge could probably find some foreign law supporting any outcome when considering a specific issue. To date, Justice Breyer has offered what appears to be the most detailed framework for an internationalist approach to judicial decisionmaking – reference to “standards roughly comparable to our own constitutional standards in roughly comparable circumstances.”¹⁷ It is this absence of any more specific guideline for a judge determine how to apply non-American legal principles to purely domestic issues, given each national legal system’s own unique characteristics and idiosyncrasies, in a manner entirely consistent with the Constitution and the ideas it reflects, that remains problematic.

Part I of this article, then, explores how the U.S. Supreme Court has utilized foreign law and international conventions throughout its history. The purpose of this overview is to show how the Court’s use of non-American legal authorities and international conventions not applying to the U.S. in purely domestic constitutional disputes primarily remains a phenomenon of roughly the past half-century. And even in cases concerning agreements the U.S. has ratified, the Court has hesitated to give these sources binding effect. Consequently, this part of the article seeks to rebut an argument that the internationalist approach’s proponents frequently offer – that the bulk of the Court’s case law sanctions this judicial decisionmaking method.

Part II explores the current state of the debate over foreign and international law’s role in American jurisprudence. Specifically, this section identifies the concerns of many

¹⁷ *Knight v. Florida*, 528 U.S. 990, 997 (1999)(Breyer, J., concurring in denial of certiorari).

American policymakers in the wake of *Lawrence* and *Roper* and these decisions' call for greater engagement of foreign legal authority in judicial decisionmaking.

Finally, part III presents a case against referring to non-American legal perspectives, whether they consist of actual laws, court decisions, provisions of international treaties the U.S. has not ratified, or even cultural practices or mores, as either advisory or binding authority in cases with purely domestic implications. The framework that should guide the Court's references, and those of the judiciary as a whole, to non-American legal authorities or international conventions, then, is simple – courts should never use such sources to any degree in instances where the specific disputes they consider, whether in the facts they involve or the laws they concern, do not actually necessitate such a reference under the Constitution.

I) THE SUPREME COURT'S USE OF NON-AMERICAN LEGAL MATERIALS

The Supreme Court has referred to foreign sources of law and international conventions in three specific types of cases. The first involves disputes over the meaning of treaties that the United States has ratified, where the Court has considered foreign court decisions interpreting the same treaty provisions a case it faces involves. The Court has also heard cases that do not involve a specific treaty, but that nonetheless involve some sort of foreign interest. Some federal appellate court decisions regarding these same situations have also gained prominence in recent years, with the issues they raise having the potential to reach the Court. All of these latter disputes have primarily included questions concerning American statutory implementations of international law, matters that indirectly implicate international law issues on account of how one of the

parties to the litigation comes from a foreign country or how the law at issue exerts some sort of effect on commerce with foreign states or another country's domestic practices.

More importantly, the Court has only considered non-U.S. legal perspectives to be advisory, and not binding, authorities. Perhaps Chief Justice John Marshall best outlined this method of decisionmaking in the 1815 case of *Thirty Hogsheads of Sugar v. Boyle*: “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.”¹⁸

But the Court has increasingly referred to non-U.S. law and inapplicable international conventions as persuasive authority in cases raising no implications beyond concrete domestic matters. The laws at issue in these cases have all been American statutes of some sort. The parties have all been resident in the United States. The facts of these cases have not involved any event that occurred outside of American borders. Consequently, these rulings are themselves unprecedented.

A) Interpreting Treaties

Article VI of the Constitution requires courts to decide disputes concerning obligations under a ratified treaty according to that treaty's pertinent provisions.¹⁹ And just as the Supreme Court often considers American legislation with an ambiguous meaning, it sometimes considers sections of treaties under the same circumstance. So if a court in another country that is a party to the treaty has examined the same part of the treaty the Court must interpret, and if the Court can find no guidance from any American

¹⁸ *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. 191, 198 (1815)(affirming a lower court's decision to condemn the claimant's sugar as enemy property because the United States had captured the sugar while raiding a British vessel that had docked on an island, which was British territory, where the claimant had a plantation).

¹⁹ U.S. CONST. art. VI (“[A]ll treaties made....under the authority of the United States shall be the supreme law of the land.”).

legal source, the foreign court's view of the treaty may at least provide a very useful perspective on what the provision in question means. To this effect, the Court has stated that in interpreting a treaty, it is not only appropriate to refer to the records of its drafting or negotiations, but also to grant "considerable weight" to the interpretations of "sister signatories."²⁰

Medellin, if decided in the petitioner's favor, and in spite of policymakers' apparent fear of how such a development might damage American sovereignty, would arguably constitute such an instance, given how the case concerns a convention that the U.S. recognized at one time. In addition, that same principle has influenced the Court's case law concerning the 1929 Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air. In *El Al Airlines v. Tsui Yuan Tseng*, the Court precluded a passenger's tort action against an airline concerning an intrusive security search that resulted in psychosomatic injuries.²¹ The issue underlying the dispute entailed whether the search constituted an "accident" under the meaning of the treaty, given that airline personnel had mistakenly detained and searched the passenger as a suspected terrorist. In an 8-1 decision concluding that the treaty did not encompass the scenario at hand, the Court referred to decisions by the British House of Lords, the Supreme Court of British Columbia, the New Zealand Court of Appeal, and the Singapore Court of Appeal which addressed similar issues.²²

And in *Eastern Airlines v. Floyd*, the Court precluded recovery by a group of airline passengers who sued for mental distress stemming from their plane's narrow

²⁰ *Air France v. Saks*, 470 U.S. 392, 404 (1985).

²¹ *El Al Airlines v. Tsui Yuan Tseng*, 525 U.S. 155 (1999).

²² *Id.* at 176.

avoidance of a crash.²³ The Court conducted an extensive review of the Convention's history and terms, as well as one of French statutory and case law because "the Convention was drafted in French by continental jurists."²⁴ In the end, the only foreign case encompassing a similar fact situation that the Court found involved the Supreme Court of Israel, whose decision allowed recovery for mental distress related to aircraft problems. The U.S. Supreme Court, however, held that it was "not persuaded by that court's reasoning" because the Convention's legal history and terms indicated no support for lawsuits based on "psychic injuries."²⁵ This line of reasoning followed the lead set forth in *Air France* by looking to foreign legal sources for guidance in interpreting the Warsaw Convention. However, the Court eventually applied Marshall's approach in *Thirty Hogsheads* in not letting the contents of those sources preclude a supposedly proper resolution of the matter.

Another instance in which the Court may have to resort to foreign legal perspectives in the future concerns the Convention for the International Sale of Goods (C.I.S.G.), "an international form of the Uniform Commercial Code" consisting of 62 signatory nations that governs the sale of goods between parties in different states.²⁶ The rise in cross-border transactions over the past few years has increased the number of C.I.S.G. cases U.S. courts have faced, resulting in an unsuccessful motion for a writ of certiorari from the Seventh Circuit Court of Appeals requesting clarification of the term "considerable weight" as stated in *Air France*.²⁷ The decision the motion concerned

²³ *Eastern Airlines v. Floyd*, 499 U.S. 530 (1991).

²⁴ *Id.* at 536.

²⁵ *Id.* at 550-51.

²⁶ See Javier H. Rubinstein, *Global Litigation: International Law's New Importance in the U.S.*, NAT'L L.J., Sept. 15, 2003, at 16.

²⁷ *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385 (7th Cir. 2002), *cert. denied*, 124 S. Ct. 803 (2003).

involved the C.I.S.G., but did not cite any foreign court opinions itself.²⁸ Nevertheless, other U.S. courts have discussed foreign court decisions in interpreting the C.I.S.G.²⁹

Medellin and the cases concerning the Warsaw Convention and the C.I.S.G. have occurred in the context of treaties to which the United States has agreed. U.S. courts may, therefore, legitimately look to how foreign courts have interpreted these same treaties. And their willingness in some of these instances to use such rulings on a strictly advisory basis should certainly quell any fears that such references might dilute American sovereignty in the manner that *Lawrence* and *Roper* arguably illustrated.

B) Disputes Indirectly Concerning International Law Or External Interests

The Court has also utilized foreign sources in order to interpret questions of U.S. law, or supported the practice of doing so, in cases involving foreign interests or instances that raise questions of international law more indirectly. A foreign government or entity may have interests in a given dispute as a party to the resulting litigation. A dispute may also involve a subject area to which international law is relevant or an American statute that implements a provision of international law. Throughout the nineteenth century, cases where the Court referred to non-U.S. sources of law primarily involved these circumstances.

Yet in more recent years, the increased ease of trade and travel among nations has made such statutes that implement international law provisions as the 1976 Foreign Sovereign Immunities Act (F.S.I.A.) necessary. In addition, lower courts have displayed a renewed interest in older such statutes as the 1789 Alien Tort Claims Act (A.T.C.A.).

²⁸ *Id.*

²⁹ Rubinstein, *supra* note 26, *citing* Usinor Industeel v. Leeco Steel Prods., Inc., 209 F.Supp 2d 880, 886 (N.D. Ill. 2002); Medical Marketing Intern. Inc. v. Internazionale Medico Scientifica SRL, 1999 WL 311945, at *2 (E.D. La. 1999); St. Paul Guardian Ins. Co. v. Neuromed Medical Sys. & Support GmbH, 2002 WL 465312 (S.D.N.Y. 2002).

Cases arising under these two laws often implicate considerations of international law in some form, thereby possibly making non-U.S. legal materials or international conventions relevant. But consistent with its practice in the cases concerning actual treaties, the Court has not given binding or persuasive effect to such sources at U.S. authorities' general and overall expense.

The Court's 1816 decision in *Martin v. Hunter's Lessee* was one of the first instances where it recognized that foreign legal sources might bear relevance in areas that could possibly raise implications of international law. Citing such subjects as admiralty law and the law concerning jurisdiction over diplomats, Justice Joseph Story maintained that "the principles of the law and comity of nations often form[ed] an essential inquiry" in matters where foreign nations were "deeply interested."³⁰

Professor Vicki Jackson of the Georgetown University Law Center has documented how the Court looked to "understandings of the law and practice of other nations" in reaching "correct interpretations of the U.S. Constitution" and in "resolving particular controversies."³¹ Her study mentions how Chief Justice John Marshall considered general concepts of the law governing treaties in evaluating the status of Indian tribes under the Constitution³² and how Chief Justice Roger Taney considered the extradition practices of other countries in determining whether the Constitution precluded a fugitive's extradition to Canada.³³ In resolving particular admiralty disputes, the Court referred to "the usages and received obligations of the civilized world" to preclude the

³⁰ *Martin v. Hunter's Lessee*, 14 U.S. 304, 335 (1816).

³¹ *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing Before the Subcomm. On the Constitution of the House Comm. On the Judiciary*, 108th Congress 2-3 (2004)(statement of Professor Vicki Jackson, Georgetown University Law Center).

³² *Id.* at 3, citing *Worcester v. Georgia*, 31 US 515, 560-61 (1832).

³³ *Id.*, citing *Holmes v. Jennison*, 39 U.S. 540, 569-73 (1840).

seizure of a foreign vessel in a U.S. port.³⁴ More notably, Chief Justice Marshall articulated how “an act of Congress ought never to be construed to violate the law of nations if any other possible construction exists.”³⁵ In all of these instances, the Court emphasized the importance of acknowledging international law only to the extent it was consistent with the U.S. law governing the specific dispute.

By the end of the nineteenth century, the Court came to summarize this general framework in the seminal case of *The Paquete Habana*, which concerned two boats belonging to Spanish citizens that the United States seized as “prizes” in a naval blockade imposed during the Spanish-American War. In ruling that the seizures lacked probable cause and violated international law, the Court held:

International law is part of American law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.³⁶

This holding bears significance because proponents of the internationalist approach to constitutional interpretation often cite this statement in claiming that the Court has always unconditionally approved of referring to foreign law in decisionmaking concerning domestic issues.³⁷ Indeed, one critic of the internationalist approach, Center for Strategic and International Studies fellow Laurence E. Rothenberg, has gone so far as to call this

³⁴ *Id.*, citing *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 137-46 (1812).

³⁵ *Id.*, citing *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

³⁶ *The Paquete Habana*, 175 U.S. 677, 700 (1900), citing *Hilton v. Guyot*, 159 U.S. 113 (1895).

³⁷ See, e.g., Harold Koh, *Agora: The United States Constitution And International Law – International Law As Part Of Our Law*, 98 AM. J. INT’L. LAW 43, 44 (2004) (“Perhaps the Court was suggesting that, in an interdependent world, United States courts should not decide cases without paying ‘a decent respect to the opinions of mankind, in the memorable words of the Declaration of Independence.’”).

decision “an icon for international activists and internationalist scholars.”³⁸ Given the context in which the Court made the statement, however, the *Paquete Habana* decision really did not imply any such approval.

The Court’s qualification following the phrase “international law is part of our law” is most important – the Court held that international law applied in U.S. courts only “where there is no treaty and no controlling executive or legislative act or judicial decision.” Simply put, international law can, to borrow a contract law term, serve as an effective “gap filler” when a court cannot find a domestic rule to guide its deliberations. Unfortunately, as Mr. Rothenberg has noted, it is quite notable that “those citing *The Paquete Habana* generally end at [the first sentence] and go on to assert far-ranging claims for application of international law in U.S. courts.”³⁹

More significantly, the Court’s decision in the case upon which this much quoted holding was based, *Hilton v. Guyot*, also held that courts should only refer to non-U.S. legal materials in adjudicating disputes with specific international law implications and only do so to the extent that U.S. law did not provide adequate guidance towards resolving the question at hand.⁴⁰ The Court stated:

International law, in its widest and most comprehensive sense -- including not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private

³⁸ Laurence E. Rothenberg, *International Law, U.S. Sovereignty, and the Death Penalty*, 35 GEO. J. INT’L L. 547 (2004).

³⁹ *Id.*, citing Brief of Amicus Curiae International Law Expert in Support of Petitioners, at 4, Rasul. See also *supra* note 32 (Koh begins his article as follows: “What did the United States Supreme Court mean when it famously said, ‘International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination?’”).

⁴⁰ *Hilton*, 159 U.S. at 113. This case concerned the extent to which the United States should recognize foreign court decisions and involved defendants – American citizens - in a French contract case. The French courts had ruled against them, leading the French plaintiffs to file an action to collect damages in the United States. But the U.S. Supreme Court found that comity was reciprocal. Because France did not recognize final judgments of the United States, and would try such judgments anew, French judgments should be given the same treatment.

international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation -- is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination. *The most certain guide, no doubt, for the decision of such questions is a treaty or a statute of this country.*⁴¹

The Court defined the preservation of American sovereignty as a paramount goal when confronted with the dilemma of making a decision without adequate domestic legal guidance. In general, then, the Court viewed non-U.S. law *as a supplement to, and not as a potential replacement of*, American laws and legal traditions. The Court continued:

But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations.⁴²

The Court went on to clarify that the decision to apply foreign or international law lay at its own discretion. Basic principles of sovereignty meant that even when confronted with a case explicitly encompassing international interests or questions of foreign law, the Court could refuse to set aside American law, especially if American law provided a satisfactory framework for resolving the issue at hand.

So the Court may have accepted the concept of considering whether to apply foreign law within American borders because of the need, in order to sustain positive foreign relations, to acknowledge the specific state's own legitimacy as a nation. The Court held:

Comity is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.⁴³

⁴¹ *Id.* at 163.

⁴² *Id.*

⁴³ *Id.* at 163-64.

But at the same time, the Court prioritized between American law and foreign law in favor of the former. The Court noted:

Comity is, and ever must be, uncertain; that it must necessarily depend on a variety of circumstances which cannot be reduced to any certain rule; that no nation will suffer the laws of another to interfere with her own to the injury of her citizens; that whether they do or not must depend on the condition of the country in which the foreign law is sought to be enforced, the particular nature of her legislation, her policy, and the character of her institutions; that in the conflict of laws it must often be a matter of doubt which should prevail; and that, whenever a doubt does exist, the court, which decides, will prefer the laws of its own country to that of the stranger."⁴⁴

Both *Hilton* and *The Paquete Habana*, then, articulated Marshall's conception from the *Thirty Hogsheads* case of the use of non-American legal sources in further detail – such materials could provide useful perspectives in some cases, especially in matters concerning such international law or relations issues as comity. But foreign law never merited definitive weight at U.S. law's expense.⁴⁵

The Court continued this same approach as the body of statutory law implementing provisions of international law, such as the F.S.I.A. increased. The F.S.I.A. entitled foreign states to immunity from the jurisdiction of courts in the United States, subject to certain enumerated exceptions.⁴⁶ In a decision concerning one such exception, which provided that a foreign state was not immune from suit in any case where the action stemmed from a commercial activity directly affecting the United States, the Court referred to an Italian court case solely for assistance in defining what

⁴⁴ *Id.* at 164-65.

⁴⁵ This article will assume that *The Paquete Habana* remains valid law. However, it is worth noting that some scholars have questioned this very validity in the wake of the Court's later conclusion that federal courts have no authority to create "general common law." See *supra* note 37 n.83, citing *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938); Curtis A. Bradley & Jack L. Goldsmith, *Customary, International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT'L. L. 513, 519. Mr. Rothenberg has also noted the work of scholars opposing this conclusion. *Supra* note 37 n. 83, citing Harold Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

⁴⁶ Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A § 1604 (2003).

constituted cross-border “commercial activity.”⁴⁷ In an earlier dispute concerning a tort action by the owner of a Liberian oil tanker against Argentina for having bombed the ship in international waters, despite its non-combatant status during the Falklands War, the Court referred to treaties governing what and where nations could recover under similar circumstances in concluding that U.S. courts had no subject matter jurisdiction over the dispute.⁴⁸

American courts, in another instance that may yet receive Supreme Court attention, have also referred to foreign legal perspectives in cases concerning the A.T.C.A., which gives American courts “original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States.”⁴⁹ In a 1980 ruling that drew criticism from some originalist or conservative legal scholars,⁵⁰ the Court of Appeals for the Second Circuit upheld an award of damages to a group of Paraguayan plaintiffs residing in the U.S. for the torture and murder in Paraguay of a relative by a Paraguayan police official.⁵¹ The court referred to numerous international conventions in concluding that the “law of nations” prohibited official torture, thereby further justifying the suit under the Act.⁵²

But for the most part, following the U.S. Supreme Court’s *Eastern Airlines* lead, courts have not hesitated to use their discretion to refer to foreign legal sources and

⁴⁷ Republic of Argentina v. Weltover, 504 U.S. 607, 614-615 (1992).

⁴⁸ Argentine Republic v. Amerada Hess Shipping Corp., 488 US 428, 442-43 (1989).

⁴⁹ Alien Tort Claims Act of 1789, 28 U.S.C.A. § 1350 (2003).

⁵⁰ See, e.g., ROBERT BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 25 (AEI Press 2003), citing JEREMY RABKIN, WHY SOVEREIGNTY MATTERS (AEI Press 1998) (“The court, as Professor Jeremy Rabkin put it, ‘cheered on by a host of international law scholars, insisted...that ‘customary international law’ has greatly expanded and now incorporates an international law of human rights.’...These suits do not really seek recompense; rather, they aspire to make a propaganda point appear more compelling by the decision of a U.S. court.”).

⁵¹ Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

⁵² *Id.* at 884.

disregard them if they feel doing so is necessary. In *Ullonoa Flores v. Southern Peru Copper Corp.*, the Second Circuit held that treaties and non-binding declarations of the United Nations General Assembly were not adequate evidence of customary international law in an unsuccessful suit by Peruvian plaintiffs for deaths supposedly resulting from the defendant company's pollution.⁵³ Specifically, the court held that "because United Nations General Assembly documents are at best merely advisory, they do not, on their own and without proof of uniform state practice, evidence an intent by member states to be legally bound by their principles, and thus cannot give rise to rules of customary international law for purposes of the Alien Tort Claims Act."⁵⁴

International law issues, then, became pertinent in these cases through the nature of the facts involved. The courts did not raise these questions or consult foreign legal materials on their own. Yet these cases presented an overall picture of courts that remained willing to disregard foreign legal perspectives if they felt that those perspectives would not lead to an analysis or result consistent with American legal traditions. This more restrained approach to using foreign legal materials sharply contrasts with the approach evident in a series of Supreme Court decisions, primarily during the last fifty years or so, which have primarily involved purely domestic social issues.

C) The Supreme Court's Internationalist Decisions

Roper and *Lawrence* have exemplified the decisions this accelerating internationalist trend encompasses. The general method by which the Court has applied foreign legal authorities or international conventions in this regard is rather consistent.

⁵³ *Ullonoa Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003).

⁵⁴ *Id.* at 167.

The facts and issues of a given case generally pertain to a question of what the Constitution means in some respect. The case involves no foreign interests or issues of non-U.S. law or international law directly or indirectly. And yet the Court still refers to some foreign court decision or law or international convention the U.S. has not ratified as a reason to adopt one constitutional interpretation over another. Normally, the non-U.S. legal source is cited in some claim about a consensus within the “world community” or “community of nations” in favor of viewing a specific issue in a given context. Such a perspective, then, supposedly outlines why a particular approach to the facts and issues underlying the case is correct.

The greater significance of this line of reasoning involves the message the Court implies. In these decisions, the Court usually gives no reason for why a particular source pertains to the issue at hand, beyond articulating foreign and international law’s general relevance. It simply lists the source and the principle it outlines in articulating its reasoning in favor of the ultimate decision. The Court, therefore, seems to believe the following – that because this foreign law or these specific countries take a given approach to an issue, the United States should take the same approach to the same matter. In other words, the Court gives foreign legal perspectives far more persuasive weight than it does in its lines of decisions that more directly involve international law or foreign interests. This apparent deference to foreign legal authorities or inapplicable treaties in the wake of making decisions that do not require their use constitutes the crux of the concern many observers have expressed about *Roper*, *Lawrence*, and similar cases, especially given how these disputes often involve bitterly debated constitutional issues. Consequently,

several questions about how this practice will ultimately affect the Constitution's status as the ultimate arbiter of every American legal dispute remain.

Foreign law played a role in Supreme Court decisions not relating to external interests far before *Roper* and *Lawrence* were decided. Professor Gerald Neuman of Columbia Law School recently described how "foreign law played a well-known role in the debates over the relationship between the Bill of Rights and the Fourteenth Amendment."⁵⁵ In fact, Professor Neuman highlighted a series of cases not pertaining to foreign interests where the Court seemed to acknowledge how foreign law could provide useful, but not binding, perspectives for use in American constitutional interpretation. In the 1884 decision of *Hurtado v. California*, for example, the Court held:

While we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown...There is nothing in the *Magna Carta*, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted.⁵⁶

But the approach the Court applied in *Lawrence*, *Roper*, and the other "internationalist" decisions of the late twentieth and early twenty-first centuries began to take place more frequently in cases during the tenure of Chief Justice Earl Warren concerning the Eighth Amendment's prohibition on "cruel and unusual" punishment.

In the 1958 decision of *Trop v. Dulles*, the Court held that the Eighth Amendment did not permit the government to rescind a person's citizenship as punishment for a

⁵⁵ Gerald Neuman, *Agora: The United States Constitution And International Law – The Uses of International Law*, 98 AM. J. INT'L. LAW 82, 83 (2004), citing *Palko v. Connecticut*, 302 U.S. 319, 325-26 & n.3 (1937)(analogously referring to "continental Europe[s]" sanction of compulsory self-incrimination in affirming a death sentence because a state statute allowing a new trial in a criminal case did not violate the Fourteenth Amendment's prohibition on double jeopardy, so long as the new trial was meant to ensure a hearing free of legal error), *overruled by* *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

⁵⁶ *Id.*, quoting *Hurtado v. California*, 110 U.S. 516, 531 (1884)(upholding a murder prosecution commencing by information and not indictment as consistent with minimum due process).

crime.⁵⁷ The majority opinion by Chief Justice Warren specifically referred to how “the international community of democracy” had rejected denationalization as a form of punishment for crimes. It extensively cited foreign laws concerning the issue as an additional policy reason for interpreting the Eighth Amendment to preclude the punishment in question. Warren wrote:

The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. It is true that several countries prescribe expatriation in the event that their nationals engage in conduct in derogation of native allegiance. Even statutes of this sort are generally applicable primarily to naturalized citizens. But use of denationalization as punishment for crime is an entirely different matter. The United Nations' survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion. In this country the Eighth Amendment forbids this to be done.⁵⁸

Perhaps one could say that this case belongs in the category of disputes explicitly concerning foreign interests. After all, many of those cases also involved the treatment of foreign-born individuals. But the underlying issue – the Eighth Amendment’s prohibition on “cruel and unusual” punishment – was wholly domestically oriented. The decision, then, began a more definite Supreme Court trend towards using foreign laws as persuasive authority in resolving constitutional disputes with purely domestic implications.

This practice was not confined to majority opinions. In *Schneider v. Rusk*, which invalidated a law allowing the State Department to revoke the citizenship of naturalized citizens who had resided in a foreign country for a certain amount of time, the Court held that the same law unconstitutionally assumed that naturalized citizens as a class were less reliable and bore less allegiance to the U.S. than did the native born, thereby violating

⁵⁷ *Trop v. Dulles*, 356 U.S. 86 (1958).

⁵⁸ *Id.* at 102-03.

due process under the Fifth Amendment.⁵⁹ But a dissent by Justice Tom Clark appeared to imply that since a significant number of foreign countries had similar laws in place, perhaps having one in the United States would also have been reasonable. Justice Clark noted:

Nor is the United States alone in making residence abroad cause for expatriation. Although the number of years of foreign residence varies from 2 to 10 years, 29 countries, including the United Kingdom and 7 Commonwealth countries, expatriate naturalized citizens residing abroad. Only four -- Czechoslovakia, Poland, Afghanistan, and Yugoslavia -- apply expatriation to both native-born and naturalized citizens. Even the United Nations sanctions different treatment for naturalized and native-born citizens; Article 7 of the United Nations Convention on the Reduction of Statelessness provides that naturalized citizens who reside abroad for seven years may be expatriated unless they declare their intent to retain citizenship.⁶⁰

Trop and *Schneider*, therefore, illustrate an interest on a number of justices' parts, in majority opinions and in dissents, towards looking to foreign legal perspectives in evaluating questions about domestic criminal punishment. And the opinions and dissents in these respective cases seemed to encourage references to foreign laws when those same laws facilitated the result certain judges appeared to want.

In a later case, the Court went even further in its use of foreign sources. The Court faced the question, to which a majority answered in the affirmative, of whether the Eighth Amendment's prohibition on "cruel and unusual" punishment applied to capital punishment in the United States in the 1972 case of *Furman v. Georgia*.⁶¹ A concurring opinion by Justice William O. Douglas actually used a reference to the term "cruel and unusual" in a non-American legal document, the 1689 English Bill of Rights, to conclude the following:

The words "cruel and unusual" certainly include penalties that are barbaric. But the words, at least when read in light of the English proscription against selective and irregular use of penalties, suggest that it is "cruel and unusual" to apply the death penalty

⁵⁹ *Schneider v. Rusk*, 377 U.S. 163 (1964).

⁶⁰ *Id.* at 174 (Clark, J., dissenting).

⁶¹ *Furman v. Georgia*, 408 U.S. 238 (1972).

- or any other penalty - selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.⁶²

Justice Douglas's use of the 1689 English Bill of Rights to justify his conclusion that American courts imposed the death penalty arbitrarily on the basis of race bears significance. Simply put, he used a foreign document of over 350 years of age, albeit one to which American constitutional documents were closely related, not just to determine the Framers' intended meaning for the phrase, but to go beyond such an analysis in developing a meaning for the phrase that accounted for the circumstances they probably did not view in the same light.⁶³ And while Douglas's analysis of capital punishment did not prevail in the end on account of the Court's decision to reinstate the death penalty four years later,⁶⁴ it continued a barely noticeable trend on Supreme Court justices' parts of giving very persuasive effect to laws that technically did not apply to the United States.

The 1977 decision of *Coker v. Georgia*, which invalidated the imposition of capital punishment for rape, followed the example the Court set in *Trop* and explicitly discussed the importance of how other nations had followed a similar path. One footnote stated:

In *Trop v. Dulles* (citation omitted), the plurality took pains to note the climate of international opinion concerning the acceptability of a particular punishment. It is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.⁶⁵

⁶² *Id.* at 244-45 (Douglas, J., concurring).

⁶³ Given the greater use of capital punishment and the prevalence of slavery in the U.S. at the time the Bill of Rights was enacted, it is difficult to substantiate a claim that a majority of the Framers adhered to a view of racial justice as understood in a twentieth or twenty-first century context.

⁶⁴ *Gregg v. Georgia*, 428 U.S. 153 (1976)(Court held that states has successfully satisfied the reservations about capital punishment expressed in *Furman* with updated laws to this effect).

⁶⁵ *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977).

The Court did the same in *Enmund v. Florida*, where it forbade the imposition of the death penalty for vicarious felony murder.⁶⁶ In a footnote similar to the one in *Coker* referring to foreign perspectives on the death penalty, the Court held:

[The] climate of international opinion concerning the acceptability of a particular punishment" is an additional consideration which is "not irrelevant." It is thus worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.⁶⁷

In turn, Justice John Paul Stevens cited both *Enmund* and *Coker* in the 1988 decision of *Thompson v. Oklahoma*, where the Court held that the Eighth Amendment precluded the execution of individuals under the age of fifteen. Specifically, his majority opinion held: "We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual."⁶⁸ He continued to list a number of nations, primarily in Western Europe, that had abolished the death penalty for most, if not all crimes.⁶⁹

The bulk of the Court's decisions and dissents utilizing foreign legal principles in this manner during the 1980's and 1990's generally involved capital punishment. In fact, most of these references consisted of documenting how countries in the European Union had abolished the death penalty in order to show why the United States should at least restrict its use. Justice William Brennan made one such reference in his dissent in *Stanford v. Kentucky*, where the Court allowed the imposition of the death penalty on defendants over the age of sixteen.⁷⁰ More recently, however, the Court acknowledged the view that the "world community" condemned the execution of the mentally retarded

⁶⁶ *Enmund v. Florida*, 458 U.S. 782 (1982).

⁶⁷ *Id.* at 796 n.22.

⁶⁸ *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988)(Stevens, J., concurring).

⁶⁹ *Id.* n.34.

⁷⁰ *Stanford v. Kentucky*, 492 U.S. 361, 390 (1989)(Brennan, J., dissenting)., *overruled by Roper*, 2005 U.S.LEXIS 2200 at *1.

by citing to only one *amicus* brief filed by European Union representatives. That decision, *Atkins v. Virginia*, prohibited states from executing individuals who were mentally disabled in some way when they committed their crimes.⁷¹

In the 1990's, the Court began to refer to foreign laws in a much wider array of cases. It also began to cite international conventions, including some the U.S. had not ratified. Some of these references specifically occurred in individual concurring opinions. In *Printz v. United States*, Justice Stephen Breyer outlined his view that foreign concepts of federalism “may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem.”⁷² And in his concurrence in *Nixon v. Shrink Missouri Government PAC*, which upheld state campaign finance limitations under the First Amendment, Breyer cited decisions by the Supreme Court of Canada and the European Court of Human Rights (E.C.H.R.) in comparing American courts’ approach to the issue with “that of other constitutional courts facing similar complex constitutional problems.”⁷³

In voting against their more internationalist colleagues, more “conservative” justices apparently registered their general displeasure with these developments. Nonetheless, even these justices cited foreign practices in support of their views, albeit in exceptional instances, and not with the same degrees of attempted persuasiveness.⁷⁴

In any event, a central reason why observers probably noticed this internationalism on the Court’s part later rather than sooner probably had to do with the

⁷¹ *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

⁷² *Printz v. United States*, 521 U.S. 897, 977 (1997)(federal gun control laws could not require state officials to enforce federal policies)(Breyer, J., dissenting).

⁷³ *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 403 (2000)(Breyer, J., concurring).

⁷⁴ *See supra* note 7; *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 381 (1995)(Scalia, J., dissenting)(citing practices of Australia, Canada, and England in dissenting from a decision striking down a state law requiring the publishers of political campaign pamphlets to identify themselves).

fact that two of the latest decisions to this effect involved highly publicized cases on two “hot button” issues - affirmative action and homosexual rights. In their concurrence in *Grutter v. Bollinger*, which upheld the narrowly tailored use of race as a factor in university admissions decisions, which universities successfully claimed was crucial to furthering a compelling interest in obtaining racial diversity’s educational benefits, Justices Breyer and Ginsburg cited the provisions of the 1965 International (United Nations) Convention on the Elimination of All Forms of Racial Discrimination in further supporting the Court’s decision. They noted how the Convention endorsed “special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.” More significantly, the concurrence also referred to the 1979 United Nations (U.N.) Convention on the Elimination of All Forms of Discrimination Against Women, which the United States had in fact not ratified, as well.⁷⁵

Finally, the Court made one of its two most famous references to foreign legal sources to date in *Lawrence*. That reference consisted of an earlier decision by the E.C.H.R. holding that sodomy laws were unnecessary to the protection of public health or morals and Britain’s statutory legalization of homosexual activity. Again, the discussion of the E.C.H.R. decision and British law was not crucial to the Court’s decision, which focused on the validity of sodomy laws under the U.S. Constitution.⁷⁶ But in utilizing

⁷⁵ *Grutter*, 539 U.S. at 342 (Ginsburg, J., concurring).

⁷⁶ The reasoning in *Lawrence* consisted of three primary prongs – 1) because *stare decisis* was flexible, there was no individual or societal reliance on *Bowers v. Hardwick*, the Court’s seminal 1986 precedent that had upheld the criminalization of homosexual sodomy, that counseled against overruling it in the wake of compelling reasons to do so; 2) *Bowers* demeaned the lives of homosexual persons as consenting adults; and 3) a compelling state interest did not trump the right of privacy in this case. The reference to foreign law comprised a part of the first and second prongs in terms of providing evidence that the statute in

such a source anyway, the Court appeared to acknowledge the usefulness of such materials as persuasive authority. Notably, Justice Kennedy wrote: “The sweeping references by Chief Justice [Warren] Burger [in *Bowers v. Hardwick*]⁷⁷ to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction.” Justice Kennedy then cited Britain’s 1967 legalization of homosexuality and the E.C.H.R. decision.⁷⁸ In doing so, he seemed to criticize *Bowers* for having upheld bans on homosexual sodomy simply to follow certain cultural norms, even though those norms were, in his view, inaccurate. But after finding sources of foreign law that he felt were more appropriate, without explaining why from a constitutional standpoint, Kennedy followed the same lead.

Those who became skeptical of the *Lawrence* decision in this respect probably found little solace in subsequent statements by some justices, which assumed a perspective to the effect of the United States needing to, in a sense, “learn” from other countries. In one speech, Justice Ginsburg stated: “We are the losers if we do not both share our experience with, and learn from others.”⁷⁹ In referring to the *Lawrence* decision, she publicly argued that the United States’s “island or lone ranger mentality [was] beginning to change.”⁸⁰ Justice O’Connor presented a similar view when she stated that “there is much to learn from...distinguished jurists [in the rest of the world]

question was outmoded in the context of social norms and demeaned the lives of homosexual persons given how other nations had legalized the practice. See *Lawrence*, 539 U.S. at 577-78.

⁷⁷ *Bowers v. Hardwick*, 478 U.S. 186 (1986)(criminalization of sodomy upheld because the Fourteenth Amendment’s Due Process Clause did not create a fundamental right for homosexual persons to engage in consensual sodomy, even in the privacy of their own homes), *overruled by Lawrence*, 539 U.S. at 578.

⁷⁸ *Lawrence*, 539 U.S. at 573, *citing* *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. 52 (1981); Sexual Offences Act, 1967, § 1.

⁷⁹ Justice Ruth Bader Ginsburg, Remarks for the American Constitution Society (August 2, 2003).

⁸⁰ *Id.*

who have given thought to the same difficult issues that we face here.”⁸¹ And in spite of his dissent in *Lawrence*, perhaps even Chief Justice Rehnquist might be, or at least may have been at one time, receptive to this same trend. He once claimed: “But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.”⁸²

The saying that one should watch what one does and not what one says may add a useful perspective here. The justices’ statements are seemingly innocuous. But when one examines the wording of *Lawrence*, and that of such similar decisions as *Trop* or *Atkins*, one implication becomes apparent. In referring to foreign laws and court decisions when the issues surrounding a case do not involve any sort of external implication, the Court seems to view the sources it selects as persuasive. *Lawrence* and these other “internationalist” cases were not instances where the Court needed to look to foreign law because American law pertaining to the subject at hand was unavailable or because the cases somehow involved non-American interests. Instead, the Court seemed to imply that the perspectives of countries that approached a given issue from the same point of view it sought to apply should be given persuasive effect. In essence, the Court used foreign direction to influence a domestic result. And while not using foreign sources probably would not have changed the outcome in any of these cases, the Court

⁸¹ *Id.*, quoting Sandra Day O’Connor, Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law (March 16, 2002), in 96 AM. SOC’Y INT’L L. PROC. 348, 350 (2002).

⁸² *Id.*, quoting William H. Rehnquist, Constitutional Courts – Comparative Remarks (1989), reprinted in GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE – A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchof & Donald P. Kommers eds. 1993).

set a precedent for more extensive use of such materials in the future, as *Roper* evidenced.

III) The Post – *Lawrence* Debate and *Roper*

Roper constitutes the first “internationalist” decision to have occurred in the context of a clear debate in the legal academy and the media on this decisionmaking approach’s appropriateness under the Constitution. Certainly, the reference to foreign court decisions and statutes in *Lawrence* exemplifies a documented tendency on some foreign courts’ parts to justify their decisions with references to other countries’ laws, a trend that Robert Bork has called “the international homogenization of constitutional law.”⁸³ Nonetheless, *Lawrence* galvanized members of Congress and other observers who felt that non-U.S. legal perspectives had no place in the process of constitutional interpretation beyond the role the Constitution explicitly prescribed.

A number of editorials to this effect soon appeared in the media.⁸⁴ And, during the summer following *Lawrence*, critics of the decision in the House of Representatives offered a resolution expressing similar concerns. The proposed Feeney-Goodblatte Resolution, or House Resolution 568, declared:

It is the sense of the House of Representatives that judicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws or pronouncements are incorporated into the legislative history of laws passed by the elected legislative branches of the United States or otherwise inform an understanding of the original meaning of the laws of the United States.⁸⁵

⁸³ See ROBERT BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 24 (2003)(citing decisions by the supreme courts of Canada and Israel); J. Harvie Wilkinson III, *The Use of International Law in Judicial Decisions*, 27 HARV. J.L. & PUB. POL’Y 423, 427, citing S. AFR. CONST. § 39(1)(“When interpreting the [South African] Bill of Rights, a court, tribunal, or forum....(b) must consider international law; and (c) may consider foreign law.”).

⁸⁴ See, e.g., Phyllis Schlafly, *International Law Should Not Trump The Constitution*, Human Events Online, Nov. 4, 2004, at <http://www.humaneventsonline.com/article.php?id=5665> (last visited Jan. 1, 2005); Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFFAIRS, July-Aug. 2004, at http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.html.

⁸⁵ Feeney-Goodblatte Resolution, H.R. 568, 108th Cong. (2004).

Congressman Steve Chabot (R-Ohio), chairman of the Judiciary Committee's Subcommittee on the Constitution, later stated that this resolution was necessary because of "an alarming new trend" of "judges reaching beyond even their own imaginations to the decisions of foreign institutions to justify their decisions."⁸⁶ In fact, Chabot even quoted the news commentator Stuart Taylor's sarcastic observation on Justice Ginsburg's reference to the 1979 U.N. Convention on the Elimination of All Forms of Discrimination Against Women in her *Grutter* concurrence: "If an international agreement that the United States has refused to ratify can be invoked as a guide to the meaning of the 136-year-old Fourteenth Amendment, what will be next? Constitutional interpretation based on the sayings of Chairman Mao? Or Barbara Streisand?"⁸⁷

Of the Court's members, only Justices Scalia and Thomas have explicitly stated their opposition to the Court's internationalist approach to decisionmaking.⁸⁸ Other prominent legal scholars such as Judge Richard Posner have joined Scalia in expressing comparable skepticism.⁸⁹ In contrast, whether by voting or making speeches, Justices Stevens, O'Connor, Kennedy, Souter, Ginsburg, and Breyer have each called for greater engagement of non-U.S. legal sources at some point. And a number of well-known international law experts have joined these three justices. For example, Dean Harold Koh of the Yale Law School⁹⁰ and Professors Jackson⁹¹ and Neuman⁹² have praised the

⁸⁶ *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing Before the Subcomm. On the Constitution of the House Comm. On the Judiciary*, 108th Congress 1 (2004)(statement of Rep. Chabot, Member, House Comm. on the Judiciary).

⁸⁷ *Id.* at 3.

⁸⁸ *See supra* notes 6-7.

⁸⁹ Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFFAIRS, July-Aug. 2004, at http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.html.

⁹⁰ *See Koh, Agora: The United States Constitution And International Law*, 98 AM. J. INT'L. LAW at 43 (January 2004).

Court's acknowledgement of foreign legal points of view on homosexuality, affirmative action, and the death penalty in *Lawrence*, *Grutter*, and *Atkins* respectively.

Consequently, over the course of this and the last term, the Court has witnessed a noticeable increase in the number of advocates explicitly calling for viewing foreign laws and international conventions as binding authority in specific disputes.⁹³ And it is the Court's acknowledgement of these arguments in *Roper* that have brought this issue its current prominence beyond legal academic circles.

Roper, which was argued this past October, concerned a Missouri death row inmate who was 17 at the time of his arrest for murder. After a nine year appeal process, the Missouri Supreme Court directly and unilaterally contradicted the *Stanford* decision, which, again, had sanctioned the executions of persons between the ages of 16 and 18, by striking down the state's law allowing the death penalty for such individuals as a violation of the Eighth Amendment.⁹⁴

Unlike *Medellin*, which involved a treaty the U.S. had ratified, or the Guantánamo Bay prisoners' cases, which involved the rights of foreign nationals held under wartime

⁹¹ See *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing Before the Subcomm. On the Constitution of the House Comm. On the Judiciary*, 108th Congress (2004)(statement of Professor Vicki Jackson, Georgetown University Law School).

⁹² See Gerald L. Neuman, *Agora: The United States Constitution And International Law – The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L. LAW 82 (January 2004).

⁹³ For, example, the cases of *Rasul v. Bush* and *Al-Odah v. United States*, which concerned the question of whether United States courts could exercise jurisdiction over challenges to the legality of detaining foreign nationals, captured during the 2001-02 hostilities in Afghanistan, at the Guantánamo Bay U.S. Naval Base in Cuba, attracted such interest. See, e.g., Brief of Amici Curiae 175 Members of Both Houses of the Parliament at 16-19, *Rasul*; Brief of Amici Curiae Commonwealth Lawyers Association, at 2, *Rasul*, available at http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/83/amicuscuriae_%20commonwealth_lawyers_association.pdf (noting how the writ of *habeas corpus* originated in England and how the Court had previously referred to these origins and “the harmony between the relevant laws of the two jurisdictions.”); Brief of Amici Curiae International Commission of Jurists et. al., at 7, *Rasul*, available at http://www.ccr-ny.org/v2/rasul_v_bush/legal/petitioners/International%20Commission%20of%20Jurists%20Brief.pdf; Brief of Amici Curiae Human Rights Institute of the International Bar Association, at 8-10, *Rasul*, available at http://www.ccr-ny.org/v2/rasul_v_bush/legal/petitioners/International%20Bar%20Association%20Brief.pdf.

⁹⁴ *Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003).

conditions, *Roper* carried no implications beyond U.S. borders except in the realm of public opinion. It was a case concerning the murder of an American national by another American national on American soil which was investigated by American authorities. The law under which the original defendant was convicted and sentenced to death concerned no treaty with a foreign country or international convention, nor any other facet of U.S. foreign relations. Until this year, no foreign party had demonstrated any kind of interest in the case. *Roper* was, in sum, a basic death penalty appeal that probably caught the Court's attention simply because a state supreme court chose to disregard federal constitutional law and conclude that the sentence violated the Eighth Amendment.

And yet, the case attracted the interest of European Union representatives⁹⁵ and Nobel Peace Prize laureates⁹⁶ among others, who each presented a very ambitious case in favor of why foreign law and international conventions should at least influence this purely domestic capital punishment matter. The *amicus* briefs supporting this perspective, which also included submissions from former U.S. diplomats⁹⁷ and human rights organizations,⁹⁸ cited how the execution of persons under the age of 18 violated customary international law mainly because virtually every country in the world had abolished the practice. In their view, the prohibition had obtained the status of *jus cogens*, a peremptory norm of international law that no nation could violate according to the 1969 Vienna Convention on the Law of Treaties, which defined procedures by which

⁹⁵ Brief of Amici Curiae The European Union, *Roper*.

⁹⁶ Brief of Amici Curiae President James Earl Carter, Jr., *Roper*.

⁹⁷ Brief of Amici Curiae Former U.S. Diplomats, *Roper*.

⁹⁸ Brief of Amici Curiae Human Rights Committee of the Bar of England and Wales, *Roper*.

nations could adopt, interpret, or invalidate treaties. There existed, however, one basic problem with this conclusion – the United States had not ratified this agreement.⁹⁹

Nevertheless, the briefs’ general line of reasoning in favor of banning juvenile executions on *jus cogens* grounds can be summarized as follows. The Convention states that nations must abide by *jus cogens* norms. Prohibiting the execution of juveniles constitutes such a norm because numerous treaties, declarations, and international conventions make the concept prevalent in the annals of international law. Consistent with this guideline, the vast majority of nations have abolished capital punishment for juveniles. Each of these pertinent treaties and pronouncements and the like remain non-derogable and no contrary norm appears to have emerged. Finally, the U.S. Supreme Court has considered the views of the world community to be relevant to Eighth Amendment issues, an additional reason to take this opportunity to abolish a practice that the vast majority of nations have rejected.¹⁰⁰

Setting the issue of ratification aside, this argument still remains malleable on the first and last grounds. In the first case, the treaties and conventions the briefs cite either contain no language explicitly requiring the United States to abolish the death penalty for juveniles in the context *Roper* presented or have no binding effect on the United States at all.¹⁰¹ And the final prong of the briefs’ case primarily involves citations to the more

⁹⁹ In sum, the Convention outlined the “international law” governing treaties. The Convention primarily codified already existing and binding customary law on treaties, and so aside from some necessary gap-filling and clarification, it did not really change existing international law. This means that unlike most treaties, the Vienna Convention could *arguably* bind non-parties.

¹⁰⁰ *Supra* note 105.

¹⁰¹ The *amicus* brief submitted by the Human Rights Committee of the Bar of England and Wales and other human rights organizations offers what is probably the most extensive description, among all the *amicus* briefs against the imposition of capital punishment on juveniles, of arguably applicable international conventions. The brief refers to treaties, United Nations resolutions, and rulings by the Inter-American Commission of Human Rights. Brief of Amici Curiae Human Rights Committee, at 13-17, *Roper*.

internationalist line of Supreme Court cases referring to non-U.S. legal principles discussed previously. Again, these cases refer to these sources solely in an advisory context – the need for a particular law can be exemplified by the existence or absence of a similar law in another country. The legal premise from which these decisions stem are strengthened by these references, but by no means dependent on them. To refer to foreign legal authorities on a persuasive level is, consequently, purely optional.

The Court’s eventual decision followed the lead established in *Lawrence* – it did not give any non-U.S. law or international convention binding effect. Yet the majority

The treaties cited include the 1966 International Convention on Civil and Public Rights (I.C.C.P.R.), which was intended to more specifically apply the seminal 1948 Universal Declaration of Human Rights, the 1989 U.N. Convention on the Rights of the Child, the 1949 Geneva Convention Related to the Protection of Civilians in Times of War, and the 1969 American Convention on Human Rights. Of these conventions, the I.C.C.P.R., which explicitly prohibits juvenile executions, also contains a reservation to U.S. ratification concerning the same issue, which other signatories have, of course, criticized, but which nevertheless makes the provision’s applicability questionable. U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, Reservation I(2), 138 Cong. Rec. S4781-01 (Apr. 2, 1992), available at http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm. The U.S. has not ratified the U.N. Convention on the Rights of the Child. Convention on the Rights of the Child, opened for signature Nov. 20, 1989, art. 37, 1577 U.N.T.S. 43, 28 I.L.M. 1448; see also U.N.I.C.E.F., *Convention on the Rights of the Child - Introduction*, available at <http://www.unicef.org/crc/crc.htm> (describes ratification status). In contrast, the United States has ratified the Geneva Convention, which precludes the execution of “those who...find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals” and who are under eighteen years of age. Yet this convention, specifically intended for times of war, does not encompass the situation of a basic murder at peacetime *Roper* concerns. Geneva Convention Related to the Protection of Civilians in Times of War, adopted Aug. 12, 1949, art. 5, 68, U.N.T.S. No. 973, vol. 75. Finally, the American Convention, which also prohibits juvenile executions, has also not been ratified by the United States. American Convention on Human Rights, Nov. 22, 1969, art. 4, 1144 U.N.T.S. 123.

The brief also cites several United Nations resolutions opposing the practice of executing juveniles, mainly consisting of resolutions from the United Nations Commission on Human Rights. However, United Nations resolutions are not legally binding upon the United States, or any member nation for that matter, in and of themselves. See, e.g., U.N. CHARTER, art. 10.

Finally, the brief notes how the Inter-American Commission on Human Rights (I.A.H.C.R.), a body of the Organization of American States, found that a *jus cogens* norm precludes juvenile executions in a number of rulings. See, e.g., *Michael Domingues v. United States*, Inter-Am. C.H.R., 62/02, Merits Case 12.285 (2002). Again, however, I.A.C.H.R. findings are not binding upon member states. Organization of American States, *Inter-American Commission on Human Rights*, available at <http://www.cidh.oas.org>.

For a detailed analysis of how international law applies to the U.S. death penalty in general, see Laurence E. Rothenberg, *International Law, U.S. Sovereignty, and the Death Penalty*, 35 GEO. J. INT’L L. 547 (2004). This article argues that international law in general does not prohibit the imposition of the death penalty and refers to most of the conventions and treaties cited previously by documenting how they do not bind the United States.

opinion's language certainly legitimized the idea of letting such resources exercise an unprecedented level of influence over the decisionmaking process.

The need to abolish the death penalty for juvenile murderers, Justice Kennedy noted, found "confirmation in the stark reality that the United States [was] the only country in the world that continue[d] to give official sanction" to such punishment.¹⁰² Those opposing such comparative perspectives on the death penalty, or similarly controversial domestic social issues, could have found a small degree of comfort in his admission that "this reality [was not] controlling, for the task of interpreting the Eighth Amendment remain[ed] [the Court's] responsibility."¹⁰³ Yet the opinion certainly left open the possibility for more such "non-binding" influences.

Despite the fact that the United States had not ratified the U.N. Convention on the Rights of the Child prohibiting capital punishment for juveniles, Justice Kennedy referred to this treaty as if it constituted international law binding upon the United States given how every country in the world except Somalia had recognized it. And in so doing, he acknowledged the arguments to that effect the *amicus* briefs from the European Union and others presented.¹⁰⁴

In terms of referring to specific foreign practices, however, the Court limited itself to discussing the history of capital punishment for juveniles and its abolition in Great Britain, the country with which the United States perhaps bore the greatest number of similarities "in light of the historic ties between" the two nations.¹⁰⁵ Justice Kennedy concluded by stating: "It does not lessen our fidelity to the Constitution or our pride in its

¹⁰² Roper, 2005 U.S. LEXIS 2200 at *43.

¹⁰³ *Id.* at *44.

¹⁰⁴ *Id.* at *45-46.

¹⁰⁵ *Id.* at *47.

origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”¹⁰⁶

Perhaps *Roper*, then, was meant to signal a subtle change in the internationalist approach. Instead of looking to see how foreign courts and the like examined a given issue at a dispute’s outset, simply checking the extent to which other countries had reached the same conclusion *after* reaching a decision would constitute a more viable course of action. But this change certainly did not take place in practice. The Court still cited to conventions the United States had not approved and gave non-U.S. legal principles more than a passing reference.

The Court’s failure to actually bind the United States to any non-domestic law certainly did not calm the internationalist trend’s congressional critics, who still seemed to fear that the Court could eventually follow such a course. Shortly after the decision, Senator John Cornyn (R-TX) introduced a measure similar to the Feeney-Goodblatte Resolution in the Senate. In cautious support of Cornyn, Senator Lindsey Graham (R-S.C.) stated: “I don’t believe it’s the role of the court to determine how the United States fits into the world.”¹⁰⁷ The debate over the Court’s approach, then, certainly promises to cause more debate beyond the legal academy and the judiciary in Congress and the media.

For one who supports the outcomes of such cases as *Lawrence* and *Roper*, American courts’ use of foreign law and international conventions in evaluating domestic constitutional disputes may indeed constitute a welcome development. Yet the very idea

¹⁰⁶ *Id.* at *49.

¹⁰⁷ Jess Bravin, *Congress May Fight Court On Global Front*, WALL ST. J., Mar. 21, 2005, at A4.

that an American court may refer to a foreign practice in justifying any approach to a domestic legal issue actually merits a great deal of concern on the part of all sides of the legal and political spectrum.

III) THE CONSEQUENCES OF JUDICIAL INTERNATIONALISM

The basic problem underlying the internationalist approach the Court followed in *Lawrence* and *Roper* is simply that no set of “neutral, generally accepted legal principles”¹⁰⁸ exists to guide the use of foreign legal authorities in anything other than the two instances the first two lines of cases previously discussed respectively reflect. The Court’s internationalist decisions simply refer to some foreign law or non-binding international convention that agrees with a specific ruling, without clarifying why the specific references used merit definitive weight. Why, for example, does one brief from the European Union demonstrate a growing international consensus against the execution of the mentally retarded as *Lawrence* claimed? It is possible that the Court may have set a precedent for judges in need of support for debatable rulings to simply pick whatever non-U.S. authority suits their preferences, thereby adding a new level of subjectivity to judicial decisionmaking.

Specifically, there are five reasons why the use of non-U.S. legal authorities in constitutional interpretation remains unwise. First, the Framers never intended for courts to have the power to refer to non-U.S. legal materials as binding or influential authority when sufficient guidance concerning a pertinent issue existed in American law. Second, the lack of any constitutional framework to support an internationalist approach threatens to make the use of non-American legal authorities inconsistent and arbitrary. Third, on a

¹⁰⁸ See *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing Before the Subcomm. On the Constitution of the House Comm. On the Judiciary*, 108th Congress 8 (2004)(statement of Professor Michael Ramsey, University of San Diego Law School).

more philosophical or theoretical level, because all nations indeed differ from each other in the social and cultural contexts that result in laws' development, a foreign state's practice concerning an issue can never really be relevant or be "transferred" to the United States. This is especially the case if the authority charged with applying developments to the U.S. is an unelected judge whose true area of expertise is U.S. law and who lacks access to adequate resources for research on foreign law and culture.

The fourth reason against an internationalist approach to judicial decisionmaking involves the danger of becoming too concerned with international public opinion on specific American practices. Simply put, if the arguments the *Roper amicus* diplomats' briefs advanced – that American courts should consider how foreign laws would approach a domestic issue for the sake of international approval – becomes enshrined in law in one instance, it is possible that future judges will have license to do the same in other circumstances and in a manner that may more clearly conflict with established, and otherwise more definitely constitutional, American legal practice. In terms of the fifth and final argument against judicial internationalism, the fact that unelected judges will be the ones doing so can only weaken the judiciary's legitimacy in the eyes of the American population, since that very legitimacy depends on "making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."¹⁰⁹

A) Reference To Non-U.S. Legal Authorities Violates The Framers' Original Intent

Why is the Framers' intent on a given constitutional issue, if they expressed any, important? That is, why should a judge apply the Constitution according to the principles intended by those who prepared the document? Space constraints obviously preclude an

¹⁰⁹ *Planned Parenthood v. Casey*, 505 U.S. 833, 866 (1992).

extensive defense of the originalist theory of constitutional interpretation here. Yet the concept of originalism merits some explanation because the idea that the courts should not use foreign laws and international conventions as persuasive or binding authorities in anything but cases involving foreign interests or international law is fundamentally originalist in nature.

When testifying in favor of the Feeney-Goodblatte Resolution, Professor John McGinnis of the Northwestern University Law School discussed how the judiciary's "institutional competence" depended on adherence to the Constitution's original meaning. He claimed:

[The argument for originalism] parallels the argument for democracy itself. Originalism is the worst system of interpretation except for all the others. While sometimes it is difficult to discern the original meaning of the constitution because of the passage of time, at least the inquiry into historical meaning requires judges to engage in disciplined search for objective evidence and to consider the purposes of others rather than their own. As such, originalism constitutes a break on judicial willfulness and subjectivity – tendencies that deprive the judiciary of the comparative advantage they hold over other political actors in constitutional interpretation and therefore undermine the justification for the judiciary's power to invalidate statutes through judicial review...[I]f we abandon this common default rule of interpretation, there are scores of current interpretative theories from which to choose and many others that surely will be advanced by scholars yet unborn...If our Constitution is a common bond, we need a common way of understanding it and that common understanding can only be provided by the default rule of interpretation that we generally apply to historical documents.¹¹⁰

What the Constitution and writings by the Founding Fathers have to say about using foreign law in constitutional interpretation is, therefore, crucial to guiding courts towards utilizing that law appropriately, if they can even utilize it legitimately at all.

The Declaration of Independence first set forth the Framers' intent with regard to how American policymakers and judges should allow foreign legal perspectives to influence the development of American law. The Declaration's first paragraph argued that when a region chooses to declare independence from a controlling authority, "a

¹¹⁰ *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing Before the Subcomm. On the Constitution of the House Comm. On the Judiciary, 108th Congress 3-4 (2004)*(statement of Professor John McGinnis, Northwestern University Law School).

decent respect to the opinions of mankind requires that they should declare the causes which impel them to separation.”¹¹¹ The Founding Fathers wanted other nations to view the region encompassing Britain’s thirteen original North American colonies as an independent state that no longer had to answer to the dictates of King George III of England. In other words, they wanted other states to view what would become the United States of America as an equal in the community of nations that was “not subject to the control of influence of another” and that enjoyed the “freedom to manage all of its affairs, whether external or internal, without control by other countries.”¹¹² And to come closer to attaining this objective, they at least had to set forth the reasons that drove their declaration of independence from England.

Respecting foreign opinion, then, did not necessarily mean deferring to that opinion. The “respect” to which the Declaration referred meant explaining the reasons for declaring independence from England in the hope that others would understand the American cause’s rightfulness. After all, the leaders of any land seeking independence from a colonizer would probably want other nations to accept its legitimacy as an independent state, at least as a way of pressuring the colonizers to grant their wishes for self-determination. But in the end, the fact that this attempt to engage world opinion was a document that helped continue a revolution signified that American sovereignty, and the idea that Americans would have the ultimate say on the laws that would govern them, came first. Foreign support for domestic actions in American interests, then, would not be dispositive.

¹¹¹ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

¹¹² BLACK’S LAW DICTIONARY 774 (7th ed. 1999)(defining “independence”).

The Federalist Papers later reflected this same perspective. In Federalist Number 63, Alexander Hamilton or James Madison stated:

An attention to the judgment of other nations is important to every government for two reasons: the one is, that, independently of the merits of any particular plan or measure, it is desirable, on various accounts, that it should appear to other nations as the offspring of a wise and honorable policy; the second is, that in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed. What has not America lost by her want of character with foreign nations; and how many errors and follies would she not have avoided, if the justice and propriety of her measures had, in every instance, been previously tried by the light in which they would probably appear to the unbiased part of mankind?¹¹³

In a very basic word, this statement, along with the first paragraph of the Declaration of Independence, highlighted the importance of keeping an open mind. Sometimes, foreign perspectives could teach America how to frame its laws in a way that more effectively attained the goals its founding principles outlined, as the fact that the U.S. Bill of Rights derived a number of its provisions from the English Bill of Rights of 1689 demonstrated.

Yet only America could decide upon the course of action that lay in its best interests after evaluating all possible perspectives. Consequently, in Federalist Number 14, Madison claimed:

Is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience? To this manly spirit, posterity will be indebted for the possession, and the world for the example, of the numerous innovations displayed on the American theatre, in favor of private rights and public happiness.¹¹⁴

Examining foreign perspectives for enlightenment, without compromising American principles of law, then, became a staple of American jurisprudence involving international law. The earliest lawmakers acknowledged the need to abide by international law, with the Constitution granting Congress the power “to define and

¹¹³ THE FEDERALIST NO. 63 (Alexander Hamilton or James Madison)(which of these two authored the article remains the subject of debate among historians.).

¹¹⁴ THE FEDERALIST NO. 14 (James Madison).

punish...offences against the Law of Nations.”¹¹⁵ But the same Constitution did not allow unlimited authority to set American legal principles aside. Article VI stated:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.¹¹⁶

The Supremacy Clause of the Constitution made the Framers’ intent with regard to using foreign law to support constitutional interpretation of issues with solely domestic implications clear – the Constitution of the United States and the principles it enshrined in American law were to serve as the ultimate guide for courts in the decisions they made. In the bulk of the Court’s decisions before *Trop* that referred to foreign or international law, then, references to non-U.S. legal authorities took place only to the extent that they were consistent with a tenet of American law in some way or where the issues a case presented mandated a reference to them.

B) Reference To Non-U.S. Legal Authorities Can Never Be Consistent

Originalism, however, is certainly not the only theory of constitutional interpretation to which judges adhere. Although he is one of the most prominent, if not the single most prominent, originalist legal scholars today, Robert Bork proposed seven reasons why originalism might make one uncomfortable:

- Original understanding is unknowable
- The belief that the Constitution must change as society changes
- The claim that “there is no real reason the living should be governed by the dead”

¹¹⁵ U.S. CONST. art. I.

¹¹⁶ U.S. CONST. art. VI.

- The view that there is no basis for continuing loyalty to the Constitution as law
- The idea that constitutional interpretation is by nature a subjective process that makes the Constitution essentially into what judges say it is
- The belief that originalism’s claim to political neutrality is a “pretense since the choice of that philosophy is itself a political decision”
- What Bork calls “the impossibility of clause-bound interpretivism,” or the claim that the “law of the Constitution commands judges to find rights that are not specified in the Constitution.”¹¹⁷

In the spirit of these criticisms, and especially in the spirit of the second one, perhaps Chief Justice Warren’s conception of the Eighth Amendment as expressed in *Trop* best highlights a more pragmatic perspective antithetical to originalism: the Constitution must “draw its meaning from the evolving standards...that mark the progress of a maturing society.”¹¹⁸ Can foreign laws concerning a particular issue, then, effectively measure such progress?

Using foreign or international law in constitutional interpretation affecting purely domestic issues should even concern someone who advocates this more flexible approach to adjudication. There exists no framework for what sorts of foreign sources or what country’s perspectives a court should consider when it wishes to utilize such tools in evaluating such matters. If courts are to adopt the practice of referring to foreign legal principles and treaties in interpreting the Constitution and resolving disputes in all types of domestic cases, then, the general absence of any sort of guideline as to how to implement such an approach, in statutory or case law, allows judges to mold their own personal views into law.

¹¹⁷ See ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 161-185 (The Free Press 1990).

¹¹⁸ *Trop*, 356 U.S. at 101.

The implications of this situation are simple, as two hypothetical scenarios will illustrate. Because an exhaustive reference to what every country's laws have to say on a subject is probably impractical, the temptation for a judge to use foreign materials selectively in order to support a specific outcome will be too great. One should note that as flexible or pragmatic or as liberal as one may view the non-originalist approach *Trop* exemplified, the decision still referred to the Eighth Amendment as a sort of philosophical base. Its meaning may have evolved, but the basic textual guidelines were still applicable. In contrast, there exists no such "base" principle from which to determine what foreign laws to use in constitutional interpretation. The Court's internationalist decisions illustrate no distinct method by which to utilize such sources. This lack of guidance simply allows too much of an opportunity for the judge who wishes to pick and choose precedents according to the particular outcome he desires, instead of applying the "neutral, generally accepted set of legal principles" that the Court has itself acknowledged is crucial to its legitimacy. A case's results will consequently not depend on such principles, but on a judge's own personal preferences as to policy and the like. And any result will likely be possible because of foreign legal literature's vastness – a simple situation of basically finding the right sources so that the message that a judge wants to send is sent.

**i) The Internationalist Approach Could Have Caused A Different Result In
*Lawrence***

If the Court indeed assumed a purely outcome-determinative approach in its internationalist decisions, one should have great cause for concern for this very reason. Consider how in *Lawrence*, then, the Court only referred to two European sources to

support its contention that an emerging world consensus in favor of homosexual rights justified its decision.

But why only refer to Europe? The United States might share common cultural traits with Europe and, in England's instance, a common legal system. Yet does not the growing number of Americans who trace their ancestry to non-European nations make the experience of such nations relevant as well?¹¹⁹ Perhaps the fact that the British colonial legacy in countries of the Caribbean, Africa, and Asia led to the development of similar common law judicial systems could ameliorate any concerns that one might have about referring to laws from such states with cultural traditions that differ extensively from American ones. Why not examine what those countries' laws have to say about homosexual sodomy?¹²⁰

In fact, as Professor Roger Alford of the Pepperdine University School of Law has noted, had the Court engaged in a more inclusive overview of global perspectives on this issue, it may well not have been able to refer to the emergence of a definitive global consensus in favor of homosexuals' rights to privacy at all.¹²¹ Simply put, 84 out of the 195 sovereign states in the world still have enforceable laws barring sexual intercourse between two consenting adults of the same gender.¹²²

¹¹⁹ For example, one estimate places the share of "nonwhites" as a percentage of the U.S. population at 22.9%. This figure includes individuals of African and Asian descent, as well as members of other ethnic groups as well. See Central Intelligence Agency, *CIA World Factbook – United States*, available at <http://www.cia.gov/cia/publications/factbook/geos/us.html#People>.

¹²⁰ See J. Harvie Wilkinson III, *The Use of International Law in Judicial Decisions*, 27 HARV. J.L. & PUB. POL'Y 423, 428 (limiting references to European sources constitutes a form of "Eurocentrism" when American citizens come from "all corners of the globe.").

¹²¹ Roger P. Alford, *Agora: The United States Constitution And International Law – Misusing International Sources To Interpret The Constitution*, 98 AM. J. INT'L. LAW 57, 66 (2004).

¹²² *Id.*; see also International Gay and Lesbian Human Rights Commission, *Where Having Sex is a Crime: Criminalization and Decriminalization of Homosexual Acts* (2003), available at <http://www.iglhrc.org/site/iglhrc/content.php?type=1&id=77>.

What the Court implied in *Lawrence*, therefore, was that the European Union was somehow the best model for the United States in examining foreign perspectives on homosexual conduct. Yet the Court really did not say why. And even if it had set forth such a reason, the possibility for debate still would have existed in that the Court would have opened the door to a string of cases concerning the criteria by which to select foreign legal sources. If the Court, then, was trying to legitimize the idea that because other countries had legalized homosexual activity, the United States should do so as well, its selectivity in selecting states to serve as a model certainly remains obvious given the true state of the ability to legally engage in homosexual activity throughout the world. Had the Court referred to other countries and not the European Union, or even performed an exhaustive study of all 195 countries in the world, it most definitely could not have claimed that the United States should follow the lead of the “rest of the world” in promoting homosexual rights because the “rest of the world” really did not promote such rights or had not developed a consensus on the issue.

Criticizing the Court’s apparent “Eurocentrism”¹²³ has absolutely nothing to do with whether one agrees that the Constitution bans states from forbidding homosexual conduct or not. In fact, in a more roundabout or theoretical sense, the Court may have made overturning *Lawrence* easier for its successors. The Court referred to how *Bowers* wrongly concluded that bans on homosexuality were consistent with the norms of Western civilization by citing the E.C.H.R. decision and Britain’s legalization of homosexuality. What if the Court’s makeup should change in the next few years to include a majority of justices who personally find homosexuality to be morally abhorrent? Just as the Court selectively referred to states that had legalized

¹²³See *supra* 120.

homosexuality, a future Court could redo the analysis, adjust its criteria, and come to the opposite conclusion. This scenario may not be likely in the near future. But because the Court has offered no guidelines as to how to use foreign law in cases not involving international law or external interests, it remains a possibility. At least, the Court would be able to go back on its claims of a definitive world consensus in favor of legalizing homosexual activity, for its analysis would depend upon what the Court viewed as proof of any such consensus.

The reference to foreign law in *Lawrence*, *Roper*, and their internationalist predecessors may not have provided crucial support to the basic legal analyses that brought about their respective outcomes. But because the Court has established the idea that the United States should approach a legal issue in a certain way because other states have done so in precedent, there consequently exists the prospect that this line of reasoning could definitively affect a future case's outcome when two equally convincing domestic legal perspectives exist. The issue of abortion rights may exemplify such an instance.

ii) The Internationalist Approach Could Have Reversed *Roe v. Wade*

Assume entirely for the sake of argument that the Court once again faces the same issue it faced in the seminal case of *Roe v. Wade* – whether the scope of the concept of personal liberty guaranteed by the Fourteenth Amendment's Due Process Clause guarantees a woman's right to abort a pregnancy in the first trimester of pregnancy. The Court could have faced this same matter again given how Norma McCorvey, the original "Jane Roe" who has become a prominent pro-life activist, filed a Rule 60 motion¹²⁴ to

¹²⁴ Federal Rule of Civil Procedure 60 allows the original litigants in a court case to petition the court to change its ruling if relevant new evidence becomes available. *See* FED. R. CIV. P. 60.

overturn the initial ruling about two years ago.¹²⁵ A Houston federal district court dismissed the motion last year and held that *Roe* “was certainly final in this litigation” and that it was “simply too late now, thirty years after the fact, for McCorvey to revisit that judgment.”¹²⁶ The Fifth Circuit Court of Appeals refused to hear oral arguments in the case on February 23, 2004 and considered the appeal based on McCorvey’s brief alone, a document that included more than 1,000 pages of affidavits by women who claimed that their abortions had emotionally harmed them in a manner that the original ruling did not consider possible.¹²⁷ On September 14, 2004, the court dismissed the appeal – because the statutes declared unconstitutional in *Roe* had been repealed, McCorvey’s motion was moot. The Supreme Court subsequently denied certiorari.¹²⁸

But how could the Court have reviewed this decision had it chosen to disregard the Fifth Circuit’s conclusion on the mootness issue? Setting aside the issue of whether McCorvey filed her motion in a “reasonable time,” the case stemmed from two very convincing, yet diametrically opposite, perspectives. On one end, in addition to repeating the original legal reasoning underlying *Roe*, the Court could have simply defended the decision on *stare decisis* grounds¹²⁹ since so much of its reproductive rights jurisprudence over the past thirty-two years has simply stemmed from the assumption that the Constitution protects first trimester abortion rights.¹³⁰

¹²⁵ McCorvey v. Hill, Civil Action No. 3:03-CV-1340-N, 2003 U.S. Dist. LEXIS 12986, at *1 (N.D. Tex. June 19, 2003).

¹²⁶ *Id.* at *13.

¹²⁷ Allan Turner, *30 Years Later, ‘Jane Roe’ Takes Her Case Back To Court*, HOUSTON CHRON., February 20, 2004, at 1.

¹²⁸ McCorvey v. Hill, 385 F.3d 846 (5th Cir. 2004), *cert. denied*, 73 U.S.L.W. 3495 (U.S. Feb. 22, 2005)(No. 04-967).

¹²⁹ BLACK’S LAW DICTIONARY 1414 (7th ed. 1999).

¹³⁰ *See, e.g.*, Planned Parenthood, 505 U.S. at 833 (the husband notification provision of the Pennsylvania Abortion Control Act placed an undue burden on a woman’s right to have an abortion in a large fraction of cases and was unconstitutional); Webster v. Reproductive Health Services, 492 U.S. 490 (1989)(upholding

But the Court might also have followed the same line of reasoning it applied in *Lawrence* to outline the case for overturning *Roe*. In the *Lawrence* opinion, the Court held that *stare decisis* did not constitute an “inexorable command,” but a “principle of policy” that did not mandate the use of a “mechanical formula of adherence to the latest decision.”¹³¹ So the discovery of compelling reasons to overrule a precedent certainly justified doing so, namely in the form of concluding that “world opinion” helped show how bans on sodomy “demean[ed]” the lives of homosexual persons. Perhaps thirty-two years of new evidence, then, could have highlighted how abortion emotionally harmed women.

How could the Court have used foreign legal perspectives to choose either side of the question of whether it should overrule *Roe*? In *Lawrence*, the Court cited the E.C.H.R. opinion to show that a growing international consensus against bans on homosexual sodomy had developed and that this overwhelming world opinion on the subject helped demonstrate that such laws demeaned the lives of homosexual persons, thereby providing a compelling interest to overturn *Bowers*. Likewise, the Court could have referred to how the fact that 141 out of the world’s 195 independent countries still outlaw abortion on demand strengthens the contention that abortion harms women. After all, 141 countries out of 195 certainly would have illustrated a broad international consensus in favor of outlawing abortion.¹³² In contrast, the Court could have simply referred to how most countries in Western Europe have legalized abortion in order to claim that the evidence McCorvey presented was not convincing enough on account of

Roe v. Wade, but otherwise allowing states to prohibit the use of public funds and facilities to provide abortions).

¹³¹ *Lawrence*, 539 U.S. at 577.

¹³² Center for Reproductive Rights, *The World’s Abortion Laws (September 2003)*, available at http://www.crlp.org/pub_fac_abortion_laws.html.

how “developed” countries, or countries with whom the U.S. shares a common cultural heritage, have come to favor abortion rights.¹³³

Each of the results pertaining to the *Roe* scenario is completely opposed to the other. And yet, had the Court reviewed the case, either one will be possible given the subjective nature of the reasoning the Court could pursue in deciding that foreign legal sources bear relevance to the issue at hand.

The Court has no rule or writing by the Founding Fathers to document what sources to utilize and how extensively to utilize them. This lack of guidance, deliberate or not, basically gives the Court license to assume whatever perspective it pleases without saying why. And the fact that two completely different outcomes could have result, thereby blatantly sidelining an opposite side that nevertheless stemmed from a strong constitutional perspective, should make both sides of the abortion controversy wonder whether foreign legal sources should even be used at all, given how reconsidering *Roe* at all would only concern abortions in the United States.

The use of foreign legal sources in cases with no foreign implications can, therefore, never be consistent. And because of the lack of neutral legal guidance on this issue, how else may judges refer to foreign legal sources but on the basis of some principle that satisfied a subjective whim of whatever political or legal philosophy they prefer? *Lawrence*, *Roper*, and the rest of the internationalist decisions, then, carved new and unprecedented ground in creating a Pandora’s box of confusing questions. A court can use foreign legal sources to aid in the process of constitutional interpretation, but a rhyme or reason to the sources it does use need not exist. This situation simply allows too much of an opportunity for all judges, Republican or Democrat, conservative or

¹³³ *Id.*

liberal, and originalist or pragmatic, to abuse their discretion under a very nebulous guideline that allows the use of foreign legal sources without further specifications.

C) Non-U.S. Legal Authorities Can Never Be Truly Relevant To Purely Domestic Issues

In reality, the likelihood that an American judge will refer to the laws of developing countries in Asia or Africa as an appropriate model for a decision probably remains slim. What has likely driven the Eurocentrism evident in most and internationalist decisions is the fundamental truth that the United States has historically shared more in common culturally with the nations of western Europe than with any other region of the world. Even today, as the rate of non-European descendants as a share of the American population decreases, the vast majority of natural-born Americans can still trace their ancestry to the nations of Europe. With that ancestry comes such shared cultural traits as the relation of the English language to Europe's many Anglo-Saxon languages or adherence to the Christian faith. If American courts restrict their non-U.S. legal references to laws and court decisions from these countries, where they may have arisen from similar cultural contexts, then, is judicial internationalism really a trend to fear?

In fact, a nation's laws stem from its own unique social, historical, and political background. Consequently, no foreign law can ever be completely "transferable" to another country, even if the same country's courts refer to that law as persuasive rather than binding authority. To hold that a law's presence or absence in a peer nation is a relevant, if not central, reason why a state should or should not enact a similar law simply ignores the contextual milieu of each country's social, cultural, and historical background.

Judge Posner has articulated this same perspective and has suggested that the very subtlety of the factors from which laws often result place such an understanding beyond most American jurists' competence. He has claimed:

The...problem with citing foreign decisions in U.S. courts is that they emerge from a complex socio-historico-politico-institutional background of which our judges, I respectfully suggest, are almost entirely ignorant. (Do any of the Supreme Court justices know any foreign languages well enough to read a judicial decision that is not written in English? And are translations of foreign decisions into English reliable?)...To cite foreign law as authority is to flirt with the discredited (I thought) idea of a universal natural law; or to suppose fantastically that the world's judges constitute a single, elite community of wisdom and conscience.¹³⁴

Judge Posner's argument applies to any kind of reference to non-American law in considering purely domestic issues, from the aggressive approach some of the *Roper amicus* briefs advocated to the more innocuous approach evidenced in *Lawrence* and *Roper* itself.

The concept that a state and its laws, and the particular society or culture they encompass, are unique and non-transferable is not a new one. In *The Republic*, where he defined the notion of a "state," Plato himself argued that societies were invariably formed for a particular purpose and that individuals gathered into communities for the mutual attainment of common aims, facilitated by laws and governments.¹³⁵ So what one might call the English experience or the German experience on a particular issue can never be entirely relevant to the American experience on the same issue because each might stem from different factors with which an American judge, well-versed only in American law, may well not be familiar simply because she has grown up in a different country and culture.

¹³⁴ *Supra* note 89.

¹³⁵ PLATO, *THE REPUBLIC* 53 (Barnes & Noble 2004) ("A State...arises...out of the needs of mankind; no one is self-sufficing, but all of us have many wants...Then, as we have many wants, and many persons are needed to supply them, one takes a helper for one purpose and another for another; and when these partners and helpers are gathered together in one habitation the body of inhabitants is termed a State.").

Judge Posner's example of the death penalty may best exemplify this situation. It is fair to say that pressuring the United States to abolish capital punishment has become a favored cause in European legal and diplomatic circles, if the European Union's filing of numerous *amicus* briefs in Supreme Court death penalty cases is any guide. An American judge, then, may indeed feel that the imposition of capital punishment is unbecoming a western democracy and that the United States is unique in its stubborn retention of the ultimate sentence.

But could this uniqueness, in fact, not really stem from more negative factors on Europe's part? The death penalty may indeed be harsh. And it is true that there is probably no greater travesty of justice than to execute a person who has committed no crime against another or against society. So when one examines capital punishment's history in both Europe and the United States, is it fair to say that their histories in regard to this issue are interchangeable? Judge Posner states:

It seems highly likely that the European rejection of the death penalty, which advocates of abolition in the United States cite as evidence for an emerging international consensus that ought to influence our Supreme Court, is related to two things: the past overuse of the penalty by European nations (think only of the executions for petty larceny in 18th-century England, the Reign of Terror in France, and the rampant employment of the death penalty by Nazi Germany and the Soviet Union); and the less democratic cast of European politics, which makes elite opinion more likely to override public opinion there than in the United States. For example, public opinion in the United Kingdom supports the death penalty as strongly as public opinion in the United States does, yet Parliament repealed the death penalty...in 1965 and has since steadily refused to reconsider.¹³⁶

The death penalty's retention by 38 U.S. states and the federal government, then, is not something of which one should be as ashamed from the perspective of the history of human rights in the States. One may certainly oppose the death penalty on moral grounds. But the history of its imposition in the United States is not marred by the sorts of horrific episodes Judge Posner cites. Americans should feel ashamed of such events as

¹³⁶ *Supra* note 137.

the Salem Witchcraft Trials or the cases of Sacco and Vanzetti and the Scottsboro Boys. But when this record is compared with that of western Europe, no matter how respectful of democracy and human rights its governments may be today, there is probably no credible comparison possible. It may be simplistic, then, to say that Europeans are more skeptical of the death penalty because of their history and their experiences with it, but it appears to be true to a degree. The average German can probably relate to the danger of the state executing an innocent person far better than the average American can because the latter, if one might generalize, is more familiar with the death penalty as a punishment for common murderers, individuals who arguably merit the punishment, that is imposed with such guarantees as due process and rights to appeal in place.

Hence, if a person claims that there is an international consensus against the death penalty, as evidenced by its absence in European legal systems, one must be careful to understand why such a “consensus” exists and why the same “consensus” may not be relevant to the United States at all. The circumstances under which the United States has imposed capital punishment for the most part have differed significantly from those throughout European history. The United States was founded upon such ideals as religious tolerance, which was not evident in Spain during the Inquisition, and the view that an accused criminal is considered innocent until proven guilty, which was completely absent in France’s Dreyfus affair and the persecution of political dissidents and non-preferred ethnic groups in Nazi Germany. To say that the United States should abolish the death penalty in order to join the ranks of western democracies, then, may make sense if one opposes capital punishment in principle. But if European practices form a central part of an abolitionist case – that Europe’s practice in and of itself is a

good reason to abolish the death penalty or the main reason to do so – then that same case will rest upon grounds that are not really applicable to the United States.

But what about Great Britain? As Justice Kennedy implied in *Roper*, Great Britain is probably the foreign country with which the United States shares the most in common. The United States, for example, shares a common language with Great Britain and a history in which Christianity has played a major role. And most importantly, from a legal perspective, the United States legal system stems from Great Britain's. Both countries adhere to common law principles and maintain such traditions as trial by jury and *habeas corpus*. And the 1791 Bill of Rights is partially modeled on the British Bill of Rights of 1689. If courts cannot utilize an internationalist legal perspective because of cultural differences, could they not make an exception for Great Britain?

In fact, even Great Britain has its own historical idiosyncrasies that might make its legal authorities more irrelevant to the United States than an internationalist jurist might wish to admit. As Judge Posner noted in the earlier quote, perhaps Parliament's 1965 abolition of the death penalty in spite of popular opinion might stem from Great Britain's monarchical past and once rigid class system. After all, the very concept of a hereditary monarchy rests upon such principles as divine right and the idea that some individuals, through no real doing of their own, are more fit to govern and hold certain positions. Perhaps some Britons still unconsciously held this view, thereby making Parliament's actions more tolerable for them. In contrast, the United States has no such political tradition or social more, a fact that is perhaps reflected in both the Republican and Democratic parties' official support of capital punishment and many governors'

reluctance to halt executions, a remarkable consistency with American public opinion on the subject.

Referring to British law in some contexts may even disregard perspectives American case law mandates. For example, a much debated provision of the U.S. No Child Left Behind Act, which enacts a number of education system reforms,¹³⁷ sanctions government aid to faith-based educational initiatives.¹³⁸ Does this facet of the Act not violate the Constitution's Establishment Clause?¹³⁹ And does such a provision appropriately concern individuals who fear that government may be sending a tacit message of approval in favor of the particular religious faith to which the initiative's organization might belong?

American judicial precedent holds that government may not advance any religion.¹⁴⁰ But if one were to take the position that the Establishment Clause only precluded the establishment of a state church and not government support of social programs with secular aims that religious organizations happen to run,¹⁴¹ this type of initiative would likely be constitutionally defensible if it could be proven that it would

¹³⁷ No Child Left Behind Act of 2001, 20 U.S.C.A. § 7231 *et. seq.* (2004)(among other regulations, requiring states to implement achievement standards in reading and mathematics and voucher programs, while allowing states greater flexibility in the use of federal education funds and increasing federal funding for elementary school reading instruction initiatives).

¹³⁸ *Id.*

¹³⁹ See *Rosenberger v. Rectors and Visitors of Univ. Of Va.*, 515 U.S. 819, 842 (1995)(citations omitted)("We have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions.").

¹⁴⁰ According to the Supreme Court's decision in *Lemon v. Kurtzman*, in order to determine whether a government measure has the effect of "establishing" religion, a court must consider whether the measure has a religious purpose, advances or inhibits religion, and excessively entangles the government in religious affairs. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

¹⁴¹ Adherents to the "originalist" school of thought often adhere to this view. See, e.g. *Elk Grove Unified School District v. Newdow*, 124 S. Ct 2301, 2330 (2004)(Thomas, J., dissenting)("The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." As a textual matter, this Clause probably prohibits Congress from establishing a national religion (citation omitted). Perhaps more importantly, the Clause made clear that Congress could not interfere with state establishments, notwithstanding any argument that could be made based on Congress' power under the Necessary and Proper Clause (citation omitted). Nothing in the text of the Clause suggests that it reaches any further.").

not convey a message of sanctioning a particular religious view to an impressionable minor.

Here, however, is where reference to British authorities, with which American law admittedly does have a lot in common, might become problematic. To prove that students would not somehow feel indoctrinated, an advocate of a faith-based educational initiative could prove, by performing a statistical study or the like, that exposure to the program would not somehow increase the level of religious observance or the level of adherence to the initiative's specific faith among the targeted student group. In this case, one could analogize the situation to that of the British educational system and the laws to which it answers. The British Education Reform Act of 1988 requires state schools to offer a daily act of collective worship "of a broadly Christian character," given the existence of a state church adhering to the Anglican faith tradition.¹⁴² In addition, religious education must follow a Christian orientation.¹⁴³ This is a far more aggressive advancement of a religious idea than anything the No Child Left Behind Act explicitly sanctions.

And yet in showing that the American law would not advance religion by analogy to the British experience, one could cite the generally low rates of attendance at Church of England services in Great Britain, especially among younger people, when compared against British population figures as a whole.¹⁴⁴ In other words, those who fear that

¹⁴² Education Reform Act 1988, § 6-7.

¹⁴³ *Id.*, § 8.

¹⁴⁴ The Central Intelligence Agency has estimated Great Britain's population to be 60,270,708. Of that figure, approximately 41,560,000 belong to a Christian denomination by baptism, with the Anglican and Roman Catholic faiths encompassing all but 1,560,000 of these individuals. Central Intelligence Agency, *C.I.A. World Factbook – United Kingdom*, available at <http://www.cia.gov/cia/publications/factbook/geos/uk.html>. And yet, the rate of religious observance among this Christian population remains quite low. As the state church in England, the Church of England by far holds the largest baptized membership of all Christian denominations in the United Kingdom. But the decline in attendance of Church of England

exposure to an educational initiative with a secular aim, which is run by a religious organization, need not fear that students will resultingly prefer the faith to which the same organization adheres, since more aggressive attempts to advance religion have been tried in Great Britain, a country that adheres to similar concepts of religious tolerance, to absolutely no avail.

But would the British experience automatically recreate itself in the States? Might British statistics on church attendance not instead reflect a deep-seated popular cynicism towards organized religion in general that the well-documented excesses of many European church denominations as late as the middle, and even late, twentieth century may have molded? The history of organized religion in Europe is fraught with such instances as prelates sanctioning the rule of dictators or other state practices that could easily be considered immoral.¹⁴⁵ A Briton might resent what he views as his country's history of unwarranted discrimination against Roman Catholics, as evidenced

worship services, and services in other denominations, has been noted by the media for quite some time. *See, e.g., UK Is "Losing" Its Religion*, BBC NEWS, NOV. 28, 2000, available at <http://news.bbc.co.uk/1/hi/uk/1043986.stm>. In fact, as of 2002, the last year for which figures are available, the Church of England registered a membership of only 1,166,000 on its parishes' electoral rolls, with an average weekly attendance of 937,000 adults and 228,000 children. Church of England, *Church Statistics 2002*, at 14, 15, available at <http://www.cofe.anglican.org/info/statistics/churchstatistics2002>.

¹⁴⁵ Among the most obvious and famous such episodes are the Spanish Inquisition and the persecution of Roman Catholics (e.g. seizure of churches and cathedrals) that followed the split, at the direction of King Henry VIII, of the British Catholic Church from the Roman Catholic Church, thereby creating the modern Church of England, in 1534. And Martin Luther, the founder of the Lutheran faith encompassing much of the German population and the majorities of the populations of the Scandinavian countries, called for the destruction of Jewish homes and synagogues in Germany, an episode which many believe gave the denomination a legacy of tolerating anti-Semitism that lasted until the Nazi era. More recently, the Roman Catholic Church has been accused of not having done enough, through its vast influence in axis Italy to prevent the Holocaust. For a particularly controversial explanation of this accusation, *see* John Cornwell, *HITLER'S POPE: THE SECRET HISTORY OF PIUS XII* (Penguin-Putnam 1999). Regardless of whether these latter accusations are true (and they remain the subject of much debate and research supporting both sides of the charges), much of the Spanish Catholic hierarchy openly supported the rule of General Francisco Franco, a Fascist and known Nazi sympathizer who ruled Spain from 1939 to 1975, until the advent of the Second Vatican Council of 1962-65. *See, e.g.,* Paul Preston, *FRANCO* 213-14, 717-20 (Fontana Press 1993).

by the existence of a state church adhering to the Anglican faith¹⁴⁶ and such resulting laws as the prohibition on an heir or heiress to the throne marrying a Roman Catholic.¹⁴⁷ More recently, the once bloody conflict in Northern Ireland, where sides divided themselves along Catholic and Protestant lines, may have led people to wonder whether strong religious allegiances might fuel unhealthy emotions towards those of other faiths (to say the least).

The point here is that history often shapes popular attitudes at a specific moment in time. And Great Britain, with its longer history, has had an opportunity to witness far more of state-sanctioned organized religion's negative aspects than has the United States. So while a British student faces Christian education with what she learns in British or European history classes, the average American student does not have to confront or come to terms with as many such connotations in American history. The United States, for example, does have a legacy of anti-Semitism in many respects. But the U.S. also served as a refuge for Eastern European Jews fleeing much bloodier pogroms in the nineteenth century. With these examples and comparisons in mind, a secular initiative run by a religious organization that the American student appreciates, uninhibited by legacies of vehement religious prejudice on his country's part, may well encourage his curiosity to explore the same organization's ideas and objectives. That same initiative, which would likely not "advance religion" in Great Britain, then, might conceivably "advance religion" in the United States!

¹⁴⁶ In practice, the effects of a state church remain minimal, but they certainly might offend someone who hold, or at least sympathizes with, the view that the state should treat all faiths as equal. The monarch must be a member of the Church of England, 26 bishops of the Church of England sit in the House of Lords, which has the authority to approve or delay government policies, and state ceremonies follow Anglican rubrics. The prime minister also advises the monarch on the appointment of senior church officials. But unlike the situation in Lutheran Norway, for example, the Church of England receives no state funds.

¹⁴⁷ ACT OF SETTLEMENT (U.K. 1701).

This, of course, is a completely hypothetical scenario. But it reflects the problems of referring to British culture and British history as a means of supporting the need for a particular law in the United States. Great Britain may be a country that is outwardly similar to the U.S. It is, however, different in enough respects that its laws stem from different factors and idiosyncrasies, which in turn preclude those same laws from being easily “transferred” to the United States, especially given the consequences of E.U. integration for British law.¹⁴⁸ As a result, when considering whether to uphold or invalidate a particular law or practice, an American judge, whose expertise lies solely in the field of American law, should probably only refer to American legal authorities, which, in turn, result from applicable cultural factors.

The Court’s reference to foreign legal sources in *Lawrence* and *Roper* and other such cases may not have been legally incorrect, then, because they did not bind American law in any way. But they certainly were unwise in how they referred to perspectives stemming from different social and cultural aspects, however minor they may have been.

D) The Internationalist Approach Threatens Basic Constitutional Rights

The contention *Roper* implied by acknowledging the retired diplomats’ *amicus* briefs – that American courts should pay attention to foreign opinion on purely domestic American legal issues for healthy foreign relations’ sake¹⁴⁹ - creates a “slippery slope” for American jurisprudence. If the United States is to worry about how other countries

¹⁴⁸ See *Roper*, 2005 U.S. LEXIS 2200 at *132 (Scalia, J., dissenting)(“It is beyond comprehension why we should look...to a country that has developed...with...the...recent submission to the jurisprudence of European courts dominated by continental jurists a legal, political, and social culture quite different from our own.”).

¹⁴⁹ Brief of Amici Curiae Former U.S. Diplomats, at 20, *Roper* (“By continuing to embrace the globally condemned practice of executing juvenile offenders, a few individual states [in the U.S.] risk undermining critical foreign policy interests...allowing Missouri to execute Christopher Simmons will diplomatically isolate the United States and hinder its foreign policy goals by alienating countries that have been American allies of long standing.”).

would address its own constitutional issues, why not reevaluate other provisions of American law to see if other countries recognize them or not? The likelihood that a future Supreme Court may take this kind of approach is likely quite slim, thereby making this question merit only minimal study. But the question is a logical result of what occurred in *Lawrence* and *Roper*.

The fact that foreign opinion and laws stem from different cultural contexts, as previously discussed, would certainly make few Americans want the courts to embark upon such a trend. Many foreign legal systems in other democracies, for example, do not recognize rights that Americans take for granted. One could argue that the United States allows more freedom of speech than France or Germany given those two countries' prohibitions on "hate" or racist speech or similar activities.¹⁵⁰ While most Americans would probably (and hopefully) find the ideas underlying such speech or activities abhorrent, the right to say whatever one wants without bringing about physical harm to innocent parties and to believe in whatever ideology one wishes constitutes a central tenet of the American legal psyche.¹⁵¹

Speech regulations are not the only area where the U.S. differs from several foreign states. The First Amendment prohibits the establishment of any religion. But England has established the Anglican church as the official state church, which receives

¹⁵⁰ The French National Assembly recently passed a law banning anyone from "provoking hatred" towards another person, through speech or other means, on the basis of gender or sexual orientation. See *France: Sexist And Anti-Gay Hate Speech Banned*, N.Y. TIMES, Dec. 23, 2004, at 11. In addition, a German court has sanctioned the confiscation of designer sweaters bearing S.S. -like logos. *Germany To Ban Nazi Symbols*, OTTAWA CITIZEN, Nov. 13, 2004, at A14. This action represents the latest development in a concerted government campaign to "stamp out" neo-Nazi political parties. See, e.g., John Hooper, *German Court Rejects Attempt To Ban Neo-Nazi Party*, THE GUARDIAN, Mar. 19, 2003, at 15.

¹⁵¹ Compare, for example, these French and German examples with the U.S. Supreme Court's 1977 stay of an Illinois Supreme Court injunction precluding members of the American National Socialist Party from holding a demonstration in Skokie, IL. *National Socialist Party of America v. Village of Skokie*, 432 U.S.43 (1977)(per curiam).

government preferences that other denominations cannot obtain. The concept that one is innocent until proven guilty is a fundamental tenet of the American criminal justice system, leading to an elaborate array of protection for criminal suspects such as preclusions on unreasonable searches and seizures and the privilege against self-incrimination. Yet in most other countries, especially those adhering to a civil law system, a more inquisitorial philosophy pervades criminal justice systems.¹⁵² And in spite of the jury system's "deep roots" in Great Britain, criminal trial by jury is nowhere near as common there as it is here.¹⁵³ The right to criminal or civil trial by jury is nowhere near as common in the civil law states of the European Continent as it is in common law ones. And again, these differences only involve nations that otherwise qualify as democracies that bear a degree of cultural similarity to the U.S.

If courts are to assume that U.S. law should have a certain approach to an issue because other states have the same approach, would the next step not consist of reevaluating some of the rights and guarantees of the U.S. Constitution to make them consistent with the laws of other nations? Again, the chance that a future Supreme Court will undertake such an extensive review of American law is not great. But claiming or implying that a foreign law should guide the American approach to a given constitutional issue to even a small extent, when American law is nonetheless available or when a case raises no non-U.S. law implications, certainly appears to pose this danger.

E) The Internationalist Approach Threatens the Judiciary's Popular Legitimacy

Criticisms against the far-reaching decisions of unelected judges are nothing new to the American legal scene. But it is, in a sense, fair to say that the American

¹⁵² See Roper, 2005 U.S. LEXIS 2200 at *127-28 (identifying how the exclusionary rule has been "universally rejected" by other countries).

¹⁵³ *Id.* at *133, *citing* CRIMINAL PROCEDURE: A WORLDWIDE STUDY, 91, 114-15 (C. Bradley ed. 1999).

government's elaborate system of checks and balances gives the people an indirect say over how judges interpret the law, albeit a very small one.

Consider the U.S. Supreme Court, for example. The president of the United States, who the people elect through the popular vote and Electoral College, appoints the Court's members. The U.S. Senate, which is also popularly elected, confirms the president's selections. In theory, at least, who the president appoints and whether the Senate consents to the appointment will reflect the people's preferences as to the sorts of judges they want on the Court and the legal philosophies to which they wish these jurists to adhere.

At the same time, it is important to remember that American voters only have a direct say in the actions of their own elected officials and not those of other countries. American voters, for example, have no say in electing the prime minister of Great Britain, who in turn recommends the appointment of individuals to the House of Lords, the highest avenue for appeals in England. Supposedly, these individuals share the political and legal philosophies that the British people supported in voting his party's candidates into a parliamentary majority. So if the U.S. Supreme Court were to utilize British, or for that matter, any other country's legislation or court decisions in making a constitutional interpretation, it would be referring to a source in whose development no American citizen had any kind of say at any time.

Proponents of the internationalist approach to constitutional interpretation that such cases as *Lawrence* and *Roper* illustrated would do well to consider whether this prospect is truly consistent with the concept of a sovereign nation. Judges who choose to use their power to pick and choose foreign legal principles to impose on the American

people may face a well-deserved backlash from at least some segments of the general population.

These sorts of crises are not unprecedented. One recent news article in a well-known legal publication has commented on how many congressmen and senators feel that recent Supreme Court decisions have constituted unconstitutional and unwarranted usurpations of power that only legislators may rightfully exercise.¹⁵⁴ And what members of a certain generation of attorneys can forget the popular movement, which some congressmen and senators supported, to impeach Earl Warren and William O. Douglas, who were supposedly guilty of the crime of excessive judicial activism? Yet to ask Americans to put up with court decisions because foreigners happen to approve of them would risk a far greater backlash. As Professor Jeremy Rabkin of Cornell University has stated, “we implicitly appeal to our citizens to put up with court rulings they find objectionable in the interest of maintaining a common constitutional framework.” Accordingly, “it is a big leap beyond this understanding to ask Americans to put up with a ruling because it is what foreigners happen to approve.”¹⁵⁵

It is easy to dismiss such concerns about this internationalist approach as bitter complaints regarding the results of decisions with which one does not agree. But to refer to legal sources other than the Constitution in interpreting law simply threatens to make the judiciary into less of an institution of judges and more of a group of policymakers. The simple fact remains that effective research can probably find some foreign legal

¹⁵⁴ Marcia Coyle, *Rift Grows Between Congress And The Courts*, NATIONAL LAW JOURNAL, Oct. 18, 2004, at 1.

¹⁵⁵ *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing Before the Subcomm. On the Constitution of the House Comm. On the Judiciary*, 108th Congress 2 (2004)(statement of Professor Jeremy Rabkin, Cornell University).

source to support any possible conclusion, in the absence of any neutral, guiding principle. Legislatures, then, remain the proper forum to examine whether the United States should emulate other countries' practices concerning a specific issue. The differences in the contexts in which laws are adopted are so important, and the comparative, overall level of expertise on foreign law in the United States so questionable, that considering the applicability of a foreign law merits the debate and openness inherent in legislative sessions, and not the confidentiality of judicial deliberations.

And there certainly may be practices of which Americans should feel ashamed given their uniqueness among western democracies and, in spite of the implications for the American system of government, whose abolition by the judiciary could conceivably be welcomed so far as results are concerned. But, to paraphrase the well-known expression, the ends do not justify the means. Perhaps the imposition of the death penalty on juveniles, then, can be likened to another country's experience with a local practice that received similar condemnations worldwide.

In the years following World War II, as its neighbors abolished the death penalty, France steadfastly retained capital punishment for murder and its infamous method of execution – beheading by guillotine. By the mid-1970's, France was the last western European country to actively impose capital punishment, with its last execution taking place in 1977, in spite of widespread criticism by neighboring countries' governments and human rights organizations. One of the first acts of the Socialist government of

President Francois Mitterrand was to enact a law, with the National Assembly's approval, abolishing the death penalty for all crimes four years later.¹⁵⁶

Why is this episode relevant? The French experience with the death penalty quite frankly exemplifies the best model by which a country should decide as to whether to bow to international pressure or norms. As if it were deciding to ratify a treaty, France abolished the death penalty at the conclusion of a democratic, legislative process. It may be ironic, given this article's arguments, that looking to a foreign country can demonstrate an optimal way to incorporate a foreign perspective into domestic law. But the means by which France, and other countries such as Canada and Great Britain for that matter, abolished capital punishment is the sort of process that is consistent with the Framers' intent underlying the laws of the United States – that legislatures, and not judges, should enact policy changes. Just as treaties do not become law until Congress ratifies them, so too should international perspectives not be applied to purely domestic issues until the popular will on the subject has been fully heard. In contrast, the imposition of such rules by unelected judges, who must constantly interpret laws in ways with which a majority of the population might disagree, surely would exacerbate the popular tensions this comparatively unaccountable branch of government faces and undermine the respect for its power upon which the rule of law's stability depends.

CONCLUSION

To what extent, then, should American courts look to foreign sources of law and international conventions in determining the protections and guarantees of the United

¹⁵⁶ See Thomas Sancton, *A Matter of Life or Death: The McVeigh Case Shows How Differently Europe and America View Capital Punishment*, TIME, May 21, 2001, at 28; *The Guillotine Falls*, TIME, Sept. 28, 1981, at 43; Amnesty International, *The Death Penalty: List of Abolitionist and Retentionist Countries (1 January 2002)*, available at <http://web.amnesty.org/library/index/ENGA500022002>.

States Constitution? With the exception of cases that raise questions of international law because they involve treaty obligations or facts that otherwise implicate international law issues or non-American interests in some form, the answer to that question should quite simply be that courts should make no such references.

This article has sought to demonstrate why such an approach violates basic constitutional tenets and the consequences that might ensue if courts continue to follow this direction. And while the greatest supporters on the Supreme Court of this trend primarily appear to be justices of a more “liberal” philosophical persuasion, those who adhere to that or any other such ideology should be equally concerned with the Court’s increasing internationalism.

The increased reliance on non-U.S. legal sources, without any form of conceptual guidance or framework to which judges might refer, threatens to reduce the process of constitutional interpretation to a series of outcome-determinative tests. There simply appears to have been no other guide to the Court’s use of foreign legal materials in the internationalist line of decisions than whether the given source consulted supported the specific result the Court wanted to reach. Taken to an extreme, such a trend could result in judges facing a legal issue, considering the result they think is fair, and then finding a foreign legal source to support such a conclusion. The casualty of any such approach would be the constitutionally oriented, even-handed, and dispassionate analyses that form the hallmarks of how judges are expected to evaluate any given dispute.

A judge’s unnecessary reliance on the law of any foreign country or inapplicable international convention to any degree in interpreting American law is quite simply a grave error that seriously endangers the concept of the United States as an independent

nation with the Constitution as its highest legal authority. That Constitution begins: “We the People of the United States...establish the Constitution of the United States.” It is our constitution and it is distinct from the bodies of law to which other nations adhere. Consequently, as Professor McGinnis stated in congressional testimony concerning this issue, referring to foreign law in determining what the Constitution means will only enable Americans to “lose identity with the document” whose “emphatically American nature...has been a source of affection and pride that have contributed to [America’s] social stability.”¹⁵⁷ This article, therefore, respectfully suggests that the Supreme Court should immediately reconsider the use of non-U.S. legal materials as persuasive authority in cases with solely domestic implications.

¹⁵⁷ *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing Before the Subcomm. On the Constitution of the House Comm. On the Judiciary, 108th Congress 8 (2004)*(statement of Professor John McGinnis, Northwestern University Law School).