

Burying Our Constitution in the Sand?: Evaluating the Ostrich Response to the Use of International and Foreign Law in U.S. Constitutional Interpretation¹

I. Introduction

In the last few years, the U.S. Supreme Court has issued several high-profile opinions that refer to international and foreign law,² igniting a heated debate among the justices, legal scholars, politicians,³ and commentators regarding the proper use of international and foreign law in Supreme Court jurisprudence. Justice Scalia, usually joined by Justice Thomas and Chief Justice Rehnquist, has led the fight against the use of foreign and, to a lesser extent, international law as a basis for constitutional decision-making. Justices Breyer, Ginsberg, Kennedy, O'Connor, Souter, Stevens, and White, have asserted that international and foreign law has relevance to their work and that is not inappropriate to refer to such sources in their decision-making.⁴

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² See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005), (holding that executions of juveniles below the age of 18 constitutes cruel and unusual punishment prohibited by the Eighth Amendment); *Lawrence v. Texas*, 539 U.S. 558 (2003), (striking down a Texas statute that makes it a crime for two persons of the same sex to engage in certain intimate sexual conduct); *Grutter v. Bollinger*, 539 U.S. 306 (2003), (upholding the constitutionality of the University of Michigan Law School's admissions policies with respect to diversity); and *Atkins v. Virginia*, 536 U.S. 304 (2002), (holding that executions of mentally retarded criminals constitute cruel and unusual punishment prohibited by the Eighth Amendment).

³ Certain politicians who advocate against the use of such sources have introduced resolutions and legislation that would limit the ability of federal courts to use international or foreign law in their decisions. See, e.g., H.R. 446, 108th Cong. § 1 (2003); Constitution Restoration Act of 2005, H.R. 1070, 109th Cong. § 1 (2005); H.R. Res. 97, 109th Cong. (2005).

⁴ Chief Justice Roberts' views on the issue are still largely unknown. However, during his confirmation hearings before the Senate, Chief Justice Roberts did express concern "about the use of foreign law as precedent." *Confirmation of John Roberts to be Chief Justice of the Supreme Court: Hearings before the Senate Judiciary Comm.*, (Sept. 13, 2005), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301210.html>. Similarly, new Supreme Court Justice Samuel Alito stated during his confirmation hearings: "I don't think that foreign law is helpful in interpreting the Constitution," although he allowed that using foreign law is legitimate in other situations, such as when interpreting treaties or when called for by private contracts. *U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court* (Jan. 10, 2006), available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/10/AR2006011000781.html>.

The debate regarding the use of foreign and international law is really a sub-set of the debate about the proper method of interpreting the U.S. Constitution. One goal of this article is to demonstrate that there are legitimate reasons to use these sources in constitutional interpretation in appropriate cases. In fact, use of international law sources can be reconciled with many classic theories of constitutional interpretation. A second goal is to clarify distinctions between these sources and to demonstrate how and why each may be used most appropriately by the Court.

Objections to the use of international law in U.S. Supreme Court jurisprudence are somewhat surprising in light of the fact that international law has always been part of U.S. law. International law is expressly mentioned in the U.S. Constitution in more than one place. International law acts to define the United States as a sovereign nation-state, with all the powers associated with that status, and imposes responsibilities upon the use of those powers. U.S. constitutional concepts of individual rights and international human rights law share common natural law foundations and the development of each has greatly influenced the development of the other.

Both international and foreign law exercised a heavy influence on the framers of the U.S. Constitution. In addition, the U.S. Supreme Court has referred to international and foreign sources in many cases throughout its history. In light of this history, it would be surprising if the U.S. Supreme Court did not look to international law for guidance. However, there remains much disagreement as to the use of international and foreign law in U.S. constitutional jurisprudence, particularly with respect to defining the scope of various individual rights.

Despite a fairly high degree of commentary on this issue in recent times, the positions of the parties on both sides of this debate have not been fully explicated. Therefore, the bases for their respective positions are somewhat unclear. In addition, this debate has been confused by the conflation of international law and foreign law sources and a lack of careful distinction between various sources of international law.⁵ Furthermore, critics, including most prominently Justice Scalia, have rightly chastised the Supreme Court for its selective use of foreign and international law without articulating clearer standards regarding the circumstances under which it is appropriate to do so.

Accordingly, this article seeks to analyze why, when, and how international and foreign law is and should be used by the U.S. Supreme Court in its decision-making. The article begins by distinguishing the two very different sources of law at issue in this debate – international law and foreign law. As the article demonstrates, the use of international law is clearly required by the U.S. Constitution in some cases, whereas the use of foreign law has a weaker constitutional basis. There are also different sources of international law, treaty law and customary international law, which are not always as clearly distinguished as they should be in the context of this debate.

The article summarizes the arguments on both sides of the debate and seeks to clear away some of the confusion as to what international and foreign law is being used

⁵ For example, several newspapers recently ran an Associated Press article under a title which suggested the Attorney General was critical of international law, when in fact the article discussed Attorney General Gonzales's concerns with respect to the use of *foreign* law, not *international* law. Compare Mark Sherman, *U.S. Attorney General: Judges Citing International Law Wrong, Unworkable*, The Legal Intelligencer, Oct. 20, 2005, at 4, available at <http://www.law.com/jsp/article.jsp?id=1129626313552> and Prepared Remarks of Attorney General Alberto R. Gonzales at George Mason University, Oct. 18, 2005, available at <http://releases.usnewswire.com/printing.asp?id=55230>. As is discussed below, foreign law and international law are two very different sources of law. In fact, Attorney General Gonzales himself drew clear distinctions between the use of international and foreign law in his recent remarks at the University of Chicago Law School. See Prepared Remarks of Attorney General Alberto R. Gonzales at the University of Chicago Law School, Nov. 9, 2005, available at http://www.usdoj.gov/ag/speeches/2005/ag_speech_0511091.html.

and how each is being used by the current Supreme Court. The article then examines the influence of international and foreign law on the U.S. Constitution, both at its inception and throughout its history. This examination demonstrates that the use of international law by the U.S. Supreme Court in the area of individual rights is well grounded in history and political theory concepts of sovereignty and natural law, which recognize a responsibility of states to protect human rights.

Through this examination, the article demonstrates that, not only is it entirely appropriate for the U.S. Supreme Court to take into account international law when interpreting the Constitution in many cases, the Court often has an obligation to do so. In fact, failing to take international law into account would be contrary to the framers' intentions, violate the social compact upon which the nation is formed, and could undermine the Supreme Court's legitimacy. The article also suggests reasons why the Supreme Court should take international law into account in the future. The article demonstrates why foreign law has a weaker historical and theoretical basis in our democratic system and should therefore be approached with much greater caution. Finally, the article proposes some guidelines for when and how international and foreign law should or should not be used in U.S. Constitutional interpretation in the future.

II. Clarifying the Issue

Before delving into the arguments of the various parties, it is first necessary to clarify exactly what the debate is all about. There are two very different types of law at issue in this debate: international law and foreign law. These two very different types of law are sometimes conflated by commentators, which has served to confuse the debate on this subject.

First, there is international law, which is commonly thought to be derived from international treaties or conventions, customary international law, general principles of law, and the works of jurists and scholars.⁶

With respect to conventional international law, the Supremacy Clause of the U.S. Constitution makes treaties part of the supreme law of the land on par with federal statutes.⁷ In the United States, treaties are made by the President, subject to the advice and consent of two-thirds of the Senate.⁸ U.S. law recognizes a variety of different types of international agreements that create binding international obligations for the United States, including self-executing and non-self-executing treaties, treaties that have been signed by the President, but not yet ratified, and other types of Executive international agreements.⁹

⁶ Statute of the International Court of Justice (“ICJ”) art. 38(1).

⁷ U.S. Const. art. VI, § 2; *Whitney v. Robinson*, 124 U.S. 190, 194 (1888). A recent unobjectionable example of the use of international treaty law by a Supreme Court justice occurred in *Grutter v. Bollinger*, 539 U.S. 306 (2003), where the Supreme Court upheld the University of Michigan Law School’s admission policies regarding the promotion of diversity. Justice Ginsburg wrote a concurring opinion in which she observed that the Court’s holding “accords with the international understanding of the office of affirmative action.” *Id.* at 344. In support of this statement, Justice Ginsburg cited two multilateral treaties aimed at eliminating discrimination, the International Convention on the Elimination of All Forms of Racial Discrimination, Annex A to G.A. Res. 2106, 20 U.N. GAOR Res. Supp. (No.14) 47, U.N. Doc. A/6014, Art. 2(2) (1965), which was ratified by the United States in 1994, (*see* State Dept., *Treaties in Force* 422-423 (June 1996)), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Annex to G.A. Res. 34/180, 34 U.N. GAOR Res. Supp. (No. 46) 194, U.N. Doc. A/34/46 (1979) (the United States signed CEDAW in 1980, but the Senate has not yet given its advice and consent to ratification of the treaty). Justice Ginsburg thus used international treaty law that is part of the supreme law of the United States as further justification for the holding of the case, as well as an international treaty which the United States has signed, but not yet ratified.

⁸ U.S. Const., art. II, § 2, cl.2.

⁹ Over time, it has come to be accepted practice that the President may enter into international agreements which are given the same legal status as treaties, even though they are not subject to the advice and consent of the Senate. *See, e.g., U.S. v. Belmont*, 301 U.S. 324 (1937).

Customary international law, defined as general state practice accepted as law,¹⁰ also is binding law in the United States. As Justice Gray of the U.S. Supreme Court famously stated more than a century ago:

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. 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.¹¹

Thus, the Supreme Court has a duty to ascertain whether a particular state practice has risen to the status of a customary international law rule or a general principle of law that is binding on the United States.¹² If so, that rule becomes part of U.S. law.¹³

¹⁰ Statute of the ICJ art. 38(1)(b).

¹¹ *The Paquete Habana*, 175 U.S. 677 (1900). In fact, the concept of incorporating the law of nations into domestic law predated the U.S. Constitution. *See, e.g.,* *Respublica v. de Longchamps*, 1 U.S. (1 Dall.) 111, 1 L.Ed. 59 (1784). “The Framers understood the law of nations (which was then almost entirely customary practice, as opposed to treaties) to be part of the “law” of the United States. President Washington claimed authority to execute the law of nations by executive order, *e.g.*, by declaring neutrality in the 1793 war between France and Great Britain. He also issued regulations defining specific offenses against the law of nations which provided the governing law until Congress passed applicable legislation.” PHILLIP R. TRIMBLE, *INTERNATIONAL LAW: UNITED STATES FOREIGN RELATIONS LAW* 183 (Foundation Press 2002) [hereafter *U.S. FOREIGN RELATIONS LAW*]. *See also* Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 *VAND. L. REV.* 819, 824-28 (1989). The Executive branch continues to participate in the development of customary international law today by issuing executive orders claiming jurisdiction over fisheries, the continental shelf, air space and the Exclusive Economic Zone. *See* TRIMBLE, *FOREIGN RELATIONS LAW* at 183; *see also* part III(D)(3) *infra*.

¹² *See* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729, 124 S.Ct. 2764, 2755 (2004) (“For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.”). *See also* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (“It is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances.”); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 5 L.Ed. 57 (1820) (“The common law, too, recognises [sic] and punishes piracy as an offense, not against its municipal code, but as an offense against the law of nations, (which is part of the common law,)”); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (“[T]he Court is bound by the law of nations which is part of the law of the land.”); *Ware v. Hylton*, 3 Dall. 199, 281, 1 L.Ed. 568 (1796) (“When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.”).

The second category of law at issue in this debate is foreign law, largely consisting of foreign statutes or codes and decisions by the national courts of foreign countries. As a general rule, foreign law, unlike international law, is not binding on the United States, unless there is such a consensus among the legal systems of the world that particular rule has gained the status of a general principle of law, in which case the rule may have a status akin to that of customary international law.¹⁴

The question remains, however, what does it mean to say that the United States is bound by a treaty provision or a rule of customary international law? The federal courts have created some rules with respect to the relationship between federal statutes and treaties, such as the Charming Betsy rule¹⁵ and the last-in-time rule.¹⁶ But these rules do

¹³ Despite this history and case law, some scholars have argued in recent years that customary international law is not part of the supreme law of the land such that it preempts state law. *See, e.g.*, 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). This position has been soundly refuted by other scholars, such as Philip Jessup, Louis Henkin, and Harold H. Koh who have used history, prior case law, and structural arguments based on federalism and separation of powers principles to demonstrate that customary international law is part of the binding law of the United States. *See, e.g.*, Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740 (1939); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 876 (1987); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 666 and n. 221 (1998); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998). Jessup's argument was accepted by the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425-428 (1964) and subsequent cases. *See* Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. at 1834-1838 and accompanying footnotes.

¹⁴ *See* *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d cir. 1980) (The court noted a survey that showed that torture had been banned in more than 55 national constitutions, thus supporting a determination that torture is prohibited by customary international law.)

¹⁵ In *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), the Supreme Court held that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction" exists.

¹⁶ "By the Constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date with control the other, provided always the stipulation of the treaty on the subject is self-executing." Whitney, *supra* note ____, at 194.

not address whether federal courts are required to interpret the *U.S. Constitution* in a manner that is consistent with an international law rule. In the event it is not possible to reconcile the two, does international law *ever* trump the U.S. Constitution? Even if international law does not supersede the Constitution, is there an obligation to interpret the Constitution in a manner consistent with international law principles similar to the *Charming Betsy* doctrine for statutes? If yes, when? The following sections examine these questions and suggest some answers.

III. Why and How Are International and Foreign Law Currently Used by the U.S. Supreme Court?

The justices on the current U.S. Supreme Court largely fall into two camps with respect to whether and how the court should use international or foreign law in its jurisprudence. A minority of the justices, usually led by Justice Scalia, has been outspoken against the use of foreign and, to a lesser extent, international law as a basis for constitutional interpretation. The majority, on the other hand, finds international and foreign law to be instructive and seems increasingly willing to refer to such sources in decision-making.

A. Justice Scalia's "Anti-Foreign Law" Position

Justice Scalia has expressed far stronger opposition to the use of foreign legal materials, which he defines as statutes and judicial opinions, than he has to international law. Despite his "anti-foreign law" position, he certainly does not reject the use of all international and foreign law.¹⁷ However, Justice Scalia has been one of the most vocal and colorful critics of the Supreme Court's references to international and foreign law in

¹⁷ Justice Antonin Scalia, Foreign Legal Authority in the Federal Courts, Keynote Address to the American Society of International Law (April 2, 2004), *in* 98 AM. SOC'Y INT'L L. PROC. 305 (2004) [hereinafter Scalia Keynote Address].

recent cases, writing several dissenting opinions in which Chief Justice Rehnquist and Justice Thomas have joined. Because he has spoken publicly on the topic on more than one occasion, I have chosen to use Justice Scalia's position to illustrate the positions of those who generally oppose the use of foreign and international law by the U.S. Supreme Court. Where appropriate, I also have added criticisms made by other judges and scholars to more fully address all the arguments that have been raised.

As indicated above, Justice Scalia believes international and foreign law may be relevant in some cases. He certainly agrees that treaties ratified by the U.S. are part of the supreme law of the land and he will use international law in the interpretation of a treaty.¹⁸ In addition, Justice Scalia has stated that: "Foreign constructions [of international treaties] are evidence of the original shared understanding of the contracting parties" and are therefore appropriately taken into account.¹⁹ Justice Scalia also believes that it is appropriate for the Court to consult foreign or international law when directed by a federal statute to do so, such as the Foreign Sovereign Immunities Act.²⁰ Finally, Justice Scalia has stated that:

foreign statutory and judicial law can be consulted in assessing the argument that a particular construction of an ambiguous provision in a federal statute would be disastrous. If foreign courts have long been applying precisely the rule argued against, and disaster has not

¹⁸ Transcript of Discussion between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer at the American University College of Law (January 13, 2005) at 5 [hereinafter AU Transcript], *available at* <http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F2>.

¹⁹ *Olympic Airways v. Husain*, 540 U.S. 644, 660, 124 S.Ct. 1221, 1232 (2004) (Scalia, J., dissenting).

²⁰ Scalia Keynote Address, at 305. Although Justice Scalia would limit any claims based on the law of nations to the law of nations as understood in the 18th century. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 748-751, 124 S.Ct. 2739, 2775-76, 159 L.Ed.2d 718 (2004) (Scalia, J., concurring in part and concurring in judgment).

ensued, unless there is some countervailing factor at work the argument can safely be rejected.²¹

On the other hand, Justice Scalia has strenuously objected to the use of foreign law for two primary reasons. First, Justice Scalia does not believe foreign legal materials should be allowed to influence the determination of the substantive meaning of the words of the Constitution itself.²² Justice Scalia suggests that foreign law should not be authoritative because we as a nation do not “want to be governed by the views of foreigners.”²³ Second, Justice Scalia has criticized the Court for its selective use of foreign law without clearly articulated standards as to when foreign law will be consulted.²⁴

In addition to these two primary objections, Justice Scalia also is critical of the Court’s use of foreign law when it has not made a sufficient inquiry into whether the foreign legal system is sufficiently similar to that of the United States such that a fair comparisons can be made.²⁵ If the justices use foreign law, they have to select which rules to follow among competing rules and there are no criteria to follow in deciding which foreign law to use.²⁶

²¹ Scalia Keynote Address, at 306.

²² Scalia Keynote Address, at 307. Justice Scalia only discusses foreign legal materials here and not international legal materials.

²³ AU Transcript, at 5.

²⁴ Roper, 543 U.S. at 622-628 (Part III) (Scalia, J., dissenting).

²⁵ Roper, 543 U.S. at 624.

²⁶ AU Transcript, at 5. Like Justice Scalia, Seventh Circuit Judge Richard Posner also is concerned about the use of foreign and international law. Judge Posner cites four problems with using foreign and international law: (1) there are too many sources, making research difficult; (2) foreign judges come from different “socio-historico-politico-institutional backgrounds” making accurate and fair comparisons difficult; (3) foreign judges have no democratic legitimacy in the U.S.; and (4) judges use foreign and international law to justify their own personal preferences. *See also* Richard Posner, *No Thanks, We*

B. Why some justices are willing to use international or foreign law

Justice Breyer has been one of the most outspoken justices in favor of using foreign and international law. He has pointed out that foreign judges and U.S. Supreme Court justices are both human beings facing similar problems.²⁷ In addition, many foreign societies are becoming more democratic. Foreign judges are interpreting documents that protect basic human rights, as does the U.S. Constitution's Bill of Rights.²⁸ For these reasons, U.S. Supreme Court justices can learn from the experience of foreign judges who have faced similar issues.²⁹ Justices who favor consideration of international and foreign legal sources do not suggest, however, that the U.S. Supreme Court is in any way bound by the interpretations of these foreign judges; only that we may learn from them.³⁰ Thus, this group of justices appears to be advocating for the use of foreign materials primarily for comparative educational purposes.

Already Have Our Own Laws, LEGAL AFFAIRS, July-Aug. 2004, at 40, available at http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.html. All of these concerns are addressed in Part V below.

²⁷ AU Transcript, at 5.

²⁸ AU Transcript, at 6-7. In her recent keynote address to the American Society of International Law, Justice Ginsberg noted: "an evolving appreciation that U.S. judges are not alone in the endeavor to interpret fundamental human rights norms and apply them to concrete cases" and opined that "[t]he U.S. judicial system will be the poorer, I believe, if we do not share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own." Ruth Bader Ginsberg, "A Decent Respect to the Opinions of [Human]kind": *The Value of a Comparative Perspective in Constitutional Adjudication* (April 1, 2005), available at <http://www.asil.org/events/AM05/ginsburg050401.html>.

²⁹ AU Transcript, at 7. Several of the Supreme Court justices have expressed agreement with this view. See Ruth Bader Ginsberg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1 (2003); Sandra Day O'Connor, Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 16, 2002), in 96 AM. SOC'Y INT'L L. PROC. 348, 350 (2002). Even Chief Justice Rehnquist has expressed the view that "it's time for the U.S. courts began looking to the decisions of other constitutional courts to aid in their own deliberative process." William H. Rehnquist, *Forward to DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* viii (V. Jackson and M. Tushnet, ed., 2002).

³⁰ AU Transcript, at 6.

C. **Recent Examples of Cases in Which International and Foreign Law Has Been Used by the U.S. Supreme Court**

Given these different attitudes towards the use of international and foreign law in U.S. constitutional jurisprudence, it is appropriate to examine how these sources actually are being used by the current Supreme Court. As mentioned at the outset of this article, there have been a number of cases in the past few years in which the Supreme Court has referred to international or foreign law sources in its opinions.³¹ This section will briefly review some of the most relevant aspects of this recent jurisprudence.

In *Atkins v. Virginia*, the Supreme Court struck down a Virginia law permitting the execution of mentally retarded persons.³² The Court held that imposing capital punishment on mentally retarded persons constitutes cruel and unusual punishment within the meaning of the Eighth Amendment because such persons have “disabilities in areas of reasoning, judgment and control of their impulses” and, therefore, “do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.”³³ In assessing the constitutionality of capital punishment for mentally retarded persons, the Court stated that it must be determined whether the punishment is excessive based on currently prevailing moral standards.³⁴ The Court further held that the best evidence of those standards is state legislation and found that the consistent trend is

³¹ See cases cited in note 1.

³² *Atkins*, 536 U.S. 304.

³³ *Atkins*, 536 U.S. at 306. The court also held that these disabilities can jeopardize the fairness of the proceedings against such persons. *Id.*

³⁴ *Id.* at 311. The Court’s current Eighth Amendment jurisprudence is based on its holding in *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958), wherein the Court held that: “The Amendment must draw its meaning from evolving standards of decency that mark the progress of maturing society.”

toward prohibiting capital punishment for mentally retarded persons.³⁵ The Court then noted that this trend “reflects a much broader social and professional consensus,” citing several *amicus* briefs. Of relevance here, one of the *amicus* briefs cited by the Court was the Brief for the European Union filed as *Amicus Curiae* in another case, *McCarver v. North Carolina*, O.T.2001, No. 00-8727, which established that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”³⁶

Justice Scalia wrote a scathing dissent in *Atkins* ridiculing the majority’s attempt to find a consensus where less than a majority of states had enacted legislation outlawing capital punishment for mentally retarded criminals.³⁷ He directed his harshest criticism, however, at the majority’s reference to the views of the “world community,” stating:

But the Prize for the Court’s Most Feeble Effort to fabricate “national consensus” must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called “world community,” and respondents to opinion polls . . . Equally irrelevant are the practices of the world community, whose notions of justice are (thankfully) not always those of our people.³⁸

A second recent case which illustrates this debate regarding currently prevailing moral standards is *Lawrence v. Texas*, where the Court found unconstitutional a Texas statute that makes it a crime for two persons of the same sex to engage in certain intimate

³⁵ *Id.* at 311-316.

³⁶ *Id.* at 316, n. 21. The Court also referred to an earlier case in which it had considered the views of “other nations that share our Anglo-American heritage, and by the leading members of the Western European community.” *See Id.*

³⁷ *Id.* at 337 (Scalia, J., dissenting).

³⁸ *Id.* at 347-48.

sexual conduct because the statute violates the Due Process Clause of the Fourteenth Amendment.³⁹ Justice Kennedy, writing for the majority, used international law to refute earlier claims by Chief Justice Burger in *Bowers v. Hardwick*⁴⁰ that: “Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.”⁴¹ Justice Kennedy pointed out that Chief Justice Burger’s “sweeping references . . . 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.”⁴² Specifically, Justice Kennedy cited European practices in this regard, including case law of the European Court of Human Rights, in which the European Court held that laws similar to the Texas statute were invalid under the European Convention on Human Rights and Fundamental Freedoms.⁴³

Once again, Justice Scalia dissented, this time joined by Chief Justice Rehnquist and Justice Thomas.⁴⁴ And once again, Justice Scalia took issue with the majority’s reliance on the “views of a wider civilization.”⁴⁵ Justice Scalia argued that Chief Justice

³⁹ Lawrence, 539 U.S. at 578.

⁴⁰ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, CJ., concurring).

⁴¹ Lawrence, 539 U.S. at 571, *citing* *Bowers*, 478 U.S. at 196.

⁴² Lawrence, 539 U.S. at 572.

⁴³ *Id.* at 573. Forty-five European nations currently ascribe to the European Convention for the Protection of Human Rights and Fundamental Freedoms. In addition, the Court cited an *amicus* brief filed by Mary Robinson, former United Nations High Commissioner for Human Rights, which established that other nations have also taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. *Id.* at 576.

⁴⁴ *Id.* at 586 (Scalia, J., dissenting).

⁴⁵ *Id.* at 598.

Burger's statements in *Bowers* were mere dicta and were not the basis for the court's decision.⁴⁶ Therefore, there was no need for the majority in *Lawrence* to refute them by way of reference to other nations' views on the issue.⁴⁷

The most recent case involving this issue is *Roper v. Simmons*.⁴⁸ In *Roper*, the Supreme Court was called on to reconsider whether the Eighth Amendment's prohibition on "cruel and unusual punishments" forbids the execution of a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime. Just 15 years previously, in *Stanford v. Kentucky*,⁴⁹ a divided Supreme Court upheld the ability of states to impose capital punishment on persons between the ages of 15 and 18. At that time, the Court determined that no national consensus existed sufficient to label such punishment cruel and unusual.⁵⁰ In *Roper*, the Supreme Court held that enough states have now abolished the death penalty for juvenile offenders to warrant a finding of a national consensus against the execution of juvenile offenders. As a result, a 5-4 majority of the *Roper* court held that *Stanford* is no longer controlling.

Writing for the majority in *Roper*, Justice Kennedy stated that the decision "finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."⁵¹ The opinion further states that while "this reality is not controlling," the Court "has referred to the

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Roper*, 543 U.S. 551.

⁴⁹ *Stanford*, 492 U.S. 361.

⁵⁰ *Id.* at 362.

⁵¹ *Roper*, 543 U.S. at 573.

laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition on ‘cruel and unusual punishment’” for almost 50 years.⁵² The opinion then cites several international treaties that ban the juvenile death penalty, including the U.N. Convention on the Rights of the Child, the International Covenant on Civil and Political Rights (ICCPR), the American Covenant on Human Rights, and the African Charter on the Rights and Welfare of the Child. Of seven other countries that have executed juveniles since the *Stanford* decision, the opinion states that all of them have since abolished or disavowed the practice. As a result, the Court concluded, “it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.”⁵³

The Court placed special emphasis on the fact that the United Kingdom has long since abolished the juvenile death penalty. The Court indicated that the United Kingdom’s experience has particular relevance in light of the historic ties between our countries and in light of the Eighth Amendment’s own origins (it is modeled on a parallel provision in the English Declaration of Rights of 1689).⁵⁴ Finally, the Court concluded that while the overwhelming opinion of the world community against the juvenile death penalty is not controlling, it does provide “respected and significant confirmation” for the Court’s conclusions.⁵⁵

Justice O’Conner wrote a dissenting opinion in which she discussed the appropriate use of foreign and international law. She stated that because she believes

⁵² *Id.* at 575.

⁵³ *Id.* at 577.

⁵⁴ *Id.*

⁵⁵ *Id.* at 578.

there is lack of national consensus against the juvenile death penalty, she cannot assign a “confirmatory role to the international consensus described by the Court.”⁵⁶ However, she stated that reference to foreign and international law is relevant to the Court’s assessment of evolving standards of decency because of the special character of the Eighth Amendment, which draws its meaning directly from the maturing values of a civilized society. In this case, however, the existence of a global consensus cannot alter the fact that domestic consensus is lacking.

Justice Scalia also wrote a dissenting opinion, in which Justice Thomas and Chief Justice Rehnquist joined, once again attacking the use of foreign and international law by the majority.⁵⁷ Justice Scalia accused the majority of treating the views of U.S. citizens as “essentially irrelevant” while “the views of other countries and the so-called international community take center stage.”⁵⁸ He pointed out that the President and the Senate, the political bodies charged with making and ratifying treaties, have specifically declined to join the Convention on the Rights of the Child (CRC)⁵⁹ and have entered a reservation to the ICCPR preserving the right to execute juveniles.⁶⁰ According to Justice Scalia, these facts suggest that our country has not reached a national consensus against

⁵⁶ *Id.* at 604 (O’Connor, J., dissenting).

⁵⁷ *Id.* at 607, (Scalia, J., dissenting).

⁵⁸ *Id.* at 622.

⁵⁹ *Id.* at 622-23. The U.S. signed the CRC in 1995, but it has not yet been presented to the Senate for its advice and consent. Office of the United Nations High Commissioner for Human Rights, Convention of the Rights of the Child, available at <http://www.ohchr.org/english/countries/ratification/11.htm> (last visited Feb. 20, 2006).

⁶⁰ It is important to note that the United States joined the ICCPR in 1992, closer in time to *Stanford* and at a time when the present national consensus did not yet exist. See United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, S. Rep. No. 102-23 (1992), reprinted in 31 I.L.M. 645, 659 (1992)

the juvenile death penalty. He also chastised the majority for not inquiring more deeply into whether foreign legal systems are sufficiently similar to that of the United States such that fair comparisons can be made. Most fundamentally, however, Justice Scalia rejected outright the idea that American law should conform to the laws of the rest of the world. In fact, he pointed out that when the practices of foreign nations do not conform to the views of the majority of the Court, those foreign practices are rejected, citing examples such as the Court's establishment clause and abortion jurisprudence.⁶¹

While the *Roper* opinion was pending, Justice Scalia had an opportunity to elaborate publicly on his view of the relationship between the Court's jurisprudence and foreign and international law. Although clearly not Justice Scalia's preferred approach, he recognized that in some areas of constitutional jurisprudence, beginning with the Eighth Amendment's prohibition on cruel and unusual punishment, the Supreme Court has adopted the notion that the Constitution is not static.⁶² Rather, the meaning of the constitution "changes from era to era to comport with . . . the evolving standards of decency that mark the progress of a maturing society."⁶³ Justice Scalia does not believe this approach is correct because it allows judges to decide what is best based on their own personal viewpoints.⁶⁴ However, if one accepts the notion that it is appropriate to look to evolving standards of decency, Justice Scalia argues that one should only look to the standards of decency in American society, not the standards of decency in foreign

⁶¹ *Roper*, 543 U.S. at 625.

⁶² AU Transcript, at 8.

⁶³ AU Transcript, at 8, *quoting* *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

⁶⁴ AU Transcript, at 9. Judge Robert H. Bork has raised a similar concern in his book, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* (American Enterprise Institute Press 2003).

countries because foreign countries do not share our background, culture and moral views.⁶⁵ Justice Scalia would find American standards of decency in state legislation because such legislation is democratically adopted by the American people.⁶⁶

As will be shown below, attempts to completely “wall off” the U.S. Constitution from international and foreign law: (1) are contrary to the development of international law as incorporated into U.S. law, including the concepts of sovereignty and international human rights; (2) are not consistent with the Framers’ understanding of the relationship between individual rights, international law, and the Constitution; (3) are not supported by the history of the Supreme Court’s jurisprudence; and (4) are not good policy. The majority position of the Supreme Court better reflects this history and understanding and should continue to be developed through the Court’s jurisprudence.

IV. Influence of International and Foreign Law on the U.S. Constitution

From before the founding of the United States of America, international law, previously referred to as the law of nations, exercised a heavy influence on the development of the U.S. Constitution and the Supreme Court’s constitutional jurisprudence. Likewise, the Framers of the Constitution were familiar with international and foreign law and often drew on that knowledge in deciding how to form a new nation.

⁶⁵ AU Transcript, at 9. Justice Scalia suggests that the opinion of a “wise Zimbabwe judge or a wise member of the House of Lords law committee” have little to do with what Americans believe. *Id.* at 11. While there are clearly reasons to be more cautious about the use of foreign law in constitutional decision-making (see discussion below), Justice Scalia’s statement demonstrates an underlying assumption that Americans are somehow fundamentally different from persons in other countries, such that foreign laws and judicial decisions can never be relevant to Americans. This view is one of the underlying assumptions that separates Justice Scalia from other justices, like Justice Breyer, who views the world as full of human beings with common problems and struggles who can learn from one another’s experiences. *Id.* at 10-11.

⁶⁶ AU Transcript, at 17. Responses to Justice Scalia’s concerns regarding judges’ basing their decisions on personal preferences and a lack of democratic legitimacy are addressed *infra* in Part V of this article.

Two areas of international law are particularly relevant to the creation and development of the United States as a constitutional government and its protection of individual rights. First, the international law concept of sovereignty helped the fledgling United States to gain international recognition and imposed obligations on the federal government vis-à-vis other nations, as well as towards its own subjects. As explained below, the concept of sovereignty has continued to evolve, which in turn has implications for a state such as the United States claiming to be sovereign. Second, the evolution of the meaning of sovereignty paralleled the development of international human rights law. International human rights law was greatly influenced by individual rights jurisprudence that had developed under the U.S. Constitution. Both sovereignty and international human rights law have their roots in natural law concepts and the evolution of each has impacted the development of the other. Concepts of natural law, sovereignty and, later, human rights, all influenced the framing of the Constitution and its interpretation over the past two centuries. Accordingly, it is appropriate to take these sources into account both to understand the original goals and purposes of the Constitution and to understand how the Constitution should be interpreted and applied today.⁶⁷ Thus, this next section will focus on the development of these two aspects of international law, their impact on U.S. constitutional law, and their relevance for this current constitutional debate.

⁶⁷ Professor Cass Sunstein might label this reasoning a form of “soft originalism,” which he defines as making a historical inquiry “not to obtain specific answers to specific questions, but instead to get a more general sense of goals and purposes.” CASS SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 173 (Oxford University Press 1996).

A. Natural Law Foundations of International Law

Both the international law of sovereignty and international human rights law developed from concepts of natural law.⁶⁸ Natural law, in turn, is sometimes said to be synonymous with and sometimes said to be derived from divine law.⁶⁹ Both divine law and natural law are considered “higher law” that is universally applicable and superior to positive law created by governments.⁷⁰ One of the primary differences between the two is that divine law is said to come from God, whereas some theorists suggested that natural law is a product of “right reason.”⁷¹ The next section elaborates on how natural law theories laid the foundation for the international law of sovereignty and international human rights law.

B. International Law of Sovereignty

The concept of sovereign states grew out of natural law concepts of equality of persons,⁷² but transformed the equality of persons into an equality of states. Over time,

⁶⁸ Jay, *supra* note __, at 821-22. “The ‘law of nations’ and ‘the law of nature’ were closely allied concepts for [Chief Justice] Marshall and his contemporaries.” G. Edward White, *The United States Constitution in its Third Century: Foreign Affairs: History: The Marshall Court and International Law: The Piracy Cases*, 83 A.J.I.L. 727, 728 (1989).

⁶⁹ Jay, *supra* note __ at 822-23. Some scholars have suggested that the existence of divine law is evidenced by the universality of certain religious beliefs. For example, all the major religions of the world adopt a version of what the Christians call the “Golden Rule,” *i.e.*, “do unto others as you would have them do unto you.” PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN 5* (University of Pennsylvania Press 2d ed. 2003).

⁷⁰ CHESTER J. ANTIEAU, *THE HIGHER LAWS: ORIGINS OF MODERN CONSTITUTIONAL LAW* v. (William S. Hein & Co. 1994). Antieau provides examples of the universality of divine and natural law from Ancient Greek, Roman and Chinese philosophers, as well as from Christianity, Judaism, and Islam. *Id.* at 2, 6, 20-21, 28.

⁷¹ ANTIEAU, *supra* note __, at 49; MAURICE WILLIAM CRANSTON, *WHAT ARE HUMAN RIGHTS?* 10-11 (Taplinger Pub. Co. 1973).

⁷² JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* 309 (Cambridge University Press 1960). Equality of persons is said to be part of divine law, as it is a basic tenet of many major faiths, including Judaism, Buddhism, Christianity, and Islam. LAUREN, *supra* note __ at 6-8, 11.

the concept of sovereignty has changed and grown to have a number of different meanings and aspects.⁷³ This evolution, in turn, affects what it means for a state like the United States that claims to be sovereign. Thus, this next section examines the evolving concept of sovereignty in an effort to understand how the concept of sovereignty affected the founding of the United States and the drafting of the new constitution and how its continuing evolution over the last two centuries has impacted the United States.

1. Evolving definition of sovereignty

The French philosopher, Jean Bodin is often credited with first stating the theory of sovereignty in his 1576 *Six Livres de la republic*.⁷⁴ Bodin asserted that sovereignty is defined as power absolute and perpetual, “supreme,” and “subject to no law.”⁷⁵ Only a state possessed the power to decide how it would treat its people within its own borders and those under its control elsewhere.⁷⁶ Thomas Hobbes concurred in *The Leviathan*.⁷⁷ Thus, traditional definitions of sovereignty often emphasized the powers or rights of the sovereign, and not its responsibilities.

⁷³ For a description of the historical roots of the concept of sovereignty, see JEREMY A. RABKIN, *LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATE?* 47-62 (Princeton University Press 2005).

⁷⁴ See F. H. HINSLEY, *SOVEREIGNTY* 71 (Cambridge University Press 2d ed. 1986); Ivan Simonovic, *State Sovereignty and Globalization: Are Some States More Equal?*, 28 GA. J. INT’L & COMP. L. 381, 382 (2000).

⁷⁵ JEAN BODIN, *LES SIX LIVRES DE LA REPUBLIC* 1:179-228; 295-310 (Fayard 1986) (1576).

⁷⁶ *Id.* Stephen Krasner refers to a state’s ability to exclude external actors from a given territory as Westphalian sovereignty and a state’s ability to exercise effective control within its borders as domestic sovereignty. STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 3-4 (Princeton University Press 1999).

⁷⁷ THOMAS HOBBS, *THE LEVIATHAN* 120-128 (Penguin Books 1985) (1651).

While Bodin argued that the sovereign was not subject to positive law because the sovereign creates the positive laws, the sovereign is still bound by the laws of nature.⁷⁸ Likewise, St. Thomas Aquinas and his followers believed that the Pope could be disciplined if he violated divine or natural law.⁷⁹ Hugo Grotius also attempted to reconcile the concept of an independent and all powerful sovereign with the concept of natural law, to which the sovereign was still subject.⁸⁰ He theorized that the original sovereignty of the people was transferred to a sovereign government, which had the function and duty to protect the people in exchange.⁸¹ This theme was carried forward in John Locke's *SECOND TREATISE OF GOVERNMENT*, in which he emphasizes the social contract between the people and the sovereign government. These concepts of sovereignty formed the basis of the modern nation-state, with Locke's social contract theory having special relevance for the United States.

Many of the founding fathers were heavily influenced by the theories of John Locke. In his *SECOND TREATISE ON GOVERNMENT*, Locke asserted that everyone is born into a state of nature in which everyone is equal and is perfectly free to do as they choose within the bounds of the laws of nature.⁸² Life in this state of nature is uncertain and constantly exposed to invasion by others.⁸³ Men act as judges in their own cases and

⁷⁸ Simonovic, *supra* note __, at 383; *see also* RABKIN, *supra* note __, at 55. To the contrary, Hobbes's sovereign was not subject to any law, including natural law. HINSLEY, *supra* note __, at 142-143. Hobbes' ideas ultimately were rejected in favor of those of John Locke. *Id.* at 146-149.

⁷⁹ HINSLEY, *supra* note __, at 95.

⁸⁰ HINSLEY, *supra* note __, at 139.

⁸¹ *See Id.*

⁸² LOCKE, *supra* note __, at 309.

⁸³ *Id.* at 395.

have a tendency to be partial to their own cases and those of their friends.⁸⁴ As a result, individuals will choose to give up some of their freedom to form a political society or civil government, the purpose of which is to remedy the inconveniences of the state of nature and protect the lives, liberties, and property of the persons in the society.⁸⁵ In this political society, every man obligates himself to every other man to submit to the determination of the majority and to be bound by it.⁸⁶ Locke calls this state of affairs a social compact.⁸⁷

The American Revolution took Locke's theories and put them into practice. The idea of popular sovereignty became the basis of political legitimacy. Several of the founding documents contain the word sovereignty, including the Declaration and Resolves of the First Continental Congress, the Declaration of Independence and the Articles of Confederation.⁸⁸ The people of the thirteen colonies consented to the exercise of power over them by a federal government in exchange for the protection of that government.⁸⁹ Thus, partly as a result of Locke's ideas and certain political movements such as the American and French Revolutions, the Westphalian concept of sovereignty

⁸⁴ *Id.* at 316.

⁸⁵ *Id.* at 316, 367, 395.

⁸⁶ *Id.* at 376.

⁸⁷ *Id.*

⁸⁸ See Declaration and Resolves of the First Continental Congress (Oct. 14, 1774), reprinted in THE AMERICAN REPUBLIC 154-155 (ed. B. Frohnen 2002); Declaration of Independence (July 4, 1776) reprinted in reprinted in THE AMERICAN REPUBLIC 189 (ed. B. Frohnen 2002). See also RABKIN, *supra* note __, at 45 (In fact, "[i]n the text of The Federalist Papers, . . . the terms 'sovereign' and 'sovereignty' appear more often than 'freedom' . . . 'republic' . . . or 'morals.'").

⁸⁹ See W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 A.J.I.L. 866, 867 (1990).

changed from an emphasis on the sovereignty of the state to an emphasis on the sovereignty of the people.

2. Modern Concepts of Sovereignty

The meaning of sovereignty has not remained static since that time. More recent political pronouncements and scholarly treatments of the subject of sovereignty have rightly given greater emphasis to the duality of the concept of sovereignty and the idea that it has both internal and external aspects.⁹⁰ In 2000, the government of Canada spearheaded the formation of the International Commission on Intervention and State Sovereignty (ICISS), which concluded that: “[S]overeignty implies a dual responsibility: externally – to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state.”⁹¹ This theme has been echoed by United Nations Secretary General Kofi Annan⁹² and the U.N. High-Level Panel on Threats, Challenges and Change. In its recent report, the U.N. High-Level Panel stated: “In signing the Charter of the United Nations, States not only benefit from the privileges of sovereignty but also accept its responsibilities. Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community.”⁹³ Thus,

⁹⁰ Simonovic, *supra* note ___, at 384. See also Ronald A. Brand, *External Sovereignty and International Law*, 18 FORDHAM INT’L L. J. 1685, 1689 (1995).

⁹¹ Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* 8 (International Development Research Centre 2001).

⁹² Kofi Annan, Secretary-General, Secretary-General Addresses International Peace Academy Seminar on ‘The Responsibility to Protect,’ U.N. Doc. SG/SM/8125 (Feb. 15, 2002).

⁹³ Report of the High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 29, U.N. Doc. A/59/565 (Dec. 2, 2004).

sovereignty has an external component which concerns relations with other states and an internal component which concerns relations between the government and the governed.

a. External Aspects of Sovereignty

The external component of sovereignty relates to the international law of sovereignty, which defines the criteria for statehood and recognition as an equal member of the international community and regulates how nations are to behave toward one another.⁹⁴ Emphasizing the international law aspects of sovereignty, the International Court of Justice has defined sovereignty as: “The whole body of rights and attributes which a state possesses in its territory, to the exclusion of all other states, and also in its relations with other states.”⁹⁵ Thus, under international law, the concept of sovereignty bestows an equality of states and independence of action.⁹⁶ It is reflected in international law in a variety of ways, such as in the United Nations Charter.⁹⁷ Thus, the concept of sovereignty derives from and is part of international law and sovereign states must take international law into account when exercising their sovereign powers.

These external or international aspects of sovereignty were crucial to the formation of the new United States of America.⁹⁸ They guaranteed her independence

⁹⁴ Stephen Krasner refers to “the practices of mutual recognition” of states as “international legal sovereignty.” KRASNER, *supra* note __, at 3.

⁹⁵ Corfu Channel Case (ICJ 1949), available at <http://www.lawschool.cornell.edu/library/cijwww/icjwww/idecisions/isummaries/lccsummary490409.htm>.

⁹⁶ Simonovic, *supra* note __, at 384. Brierly states that natural rights of states generally include the rights of self-preservation, independence, equality, respect, and intercourse. J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PIECE* 49 (Oxford University Press, 1963).

⁹⁷ U.N. CHARTER, art. 2(1). (“The Organization is based on the principle of the sovereign equality of all its Members.”).

⁹⁸ Harold Hongju Koh, *The United States Constitution and International Law: International Law as Part of Our Law*, 98 A.J.I.L. 43, 44 (2004). (“The framers and early Justices understood that the global legitimacy

and equality among the community of states.⁹⁹ They ensured her ability to enter into contracts, i.e., treaties and other international agreements, with other states and to enforce those contractual obligations.¹⁰⁰

While international law is still concerned with the protection of these aspects of sovereignty, it now recognizes that sovereignty ultimately rests in the people. It is the object of modern international law to protect those people, not the authority wielding power.¹⁰¹ As a result, under international law today, sovereignty can be violated by an outside force or by an internal force that acts contrary to the wishes of the people.¹⁰² Thus, the concept of sovereignty today places more emphasis on its internal aspects.

b. Internal Aspects of Sovereignty

This internal component of sovereignty requires that the sovereign state abide by its social contract with the people. In the United States, this social contract is embodied by the U.S. Constitution. Pursuant to this social contract, the people gave up certain freedoms and submitted themselves to the authority of the federal government, in exchange for certain protections from the government. Since pre-revolutionary times, it has been accepted that the primary purpose of the government is the good of the

of a fledgling nation crucially depended upon the compatibility of its domestic law with the rules of the international system within which it sought acceptance.”).

⁹⁹ Jay, *supra* note ___, at 839-40. *See also* RABKIN, *supra* note ___, at 93-94, 112-113.

¹⁰⁰ Jay, *supra* note ___, at 828.

¹⁰¹ Reisman, *supra* note ___, at 872.

¹⁰² *See Id.*

people.¹⁰³ Thus, the government has the right to make and enforce certain laws for the public welfare, but also has the duty to protect the people within its territory.

3. Influence of sovereignty theory on the United States

The founders of the United States clearly believed in both the external and internal components of sovereignty theory and their natural law underpinnings. The Declaration and Resolves of the First Continental Congress provided:

That the inhabitants of the English Colonies in North America, *by the immutable laws of nature*, the principles of the English constitution, and the several charters or compacts, have the following Rights:

Resolved, N.C.D.

1. That they are entitled to life, liberty, and property, & they have never ceded to any *sovereign* power whatever, a right to dispose of either without their consent.
2. That our ancestors, who first settled these colonies were at the time of their emigration from the mother country, entitled to all the rights, liberties and immunities of free and natural-born subjects within the realm of England.¹⁰⁴

This theme of consent to be governed by way of a social contract based on natural law principles was carried forward in the Declaration of Independence:

When in the Course of human events, it becomes necessary for one people to dissolve the political bonds which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which *the Laws of Nature and of Nature's God* entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel the separation.

¹⁰³ Edwin S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, __ (1928) (Locke insisted that the public good be the object of legislation and of government action in general.). See also MARY BALDWIN, *THE NEW ENGLAND CLERGY AND THE AMERICAN REVOLUTION* 22-23 (Duke University Press 1928).

¹⁰⁴ Declaration and Resolves of the First Continental Congress (Oct. 14, 1774), reprinted in *THE AMERICAN REPUBLIC* 154-155 (ed. B. Frohnen 2002) (emphasis added).

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. *That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed*¹⁰⁵

Finally, the preamble to the U.S. Constitution itself makes it clear that the “People” are coming together to form a compact for the purpose of creating a better life for themselves:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.¹⁰⁶

Thus, the constitutional government of the United States is founded upon natural law theories of equality of persons and states, social contract theory, and the idea that the primary purpose of the government is the protection and betterment of the people, all of which are part of the modern concept of sovereignty.

In recognition of this history, sovereignty has been used by the Supreme Court as a source of federal power, rights and duties. For example, in the Chinese Exclusion Case, the Supreme Court found that sovereignty implied an authority to deal with matters relating to immigration, even though the power to regulate immigration was not expressly

¹⁰⁵ Declaration of Independence (July 4, 1776) reprinted in reprinted in THE AMERICAN REPUBLIC 189 (ed. B. Frohnen 2002) (emphasis added). Many religious leaders were chosen to assist in the work of making the new Constitution and many of their resolutions and instructions stressed natural law doctrines. BALDWIN, *supra* note ____, at 13-136, 144.

¹⁰⁶ U.S. CONST., preamble.

given to the federal government in the Constitution.¹⁰⁷ Likewise, there is no express constitutional grant of legislative power to Congress to make laws with respect to maritime matters, yet the federal courts have implied such a grant in part by virtue of the “ancient jurisdiction” inherent in admiralty of sovereign states¹⁰⁸ and the grant of judicial power in Article III § 2 to federal courts to hear cases of admiralty and maritime jurisdiction.¹⁰⁹ There also is no general foreign affairs power in the Constitution, but in *Curtiss-Wright*, Justice Sutherland stated that the foreign affairs power of the federal government came not from the states when they signed and ratified the U.S. Constitution, but from international law concepts of sovereignty.¹¹⁰ Thus, the Supreme Court has ascribed to these sovereignty theories and used them to justify action by the federal government. In so doing, the Court must also accept the duties that come with being a sovereign state –the primary duty of which is to conduct the government for the benefit of the people.

¹⁰⁷ See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (“The power of exclusion of foreigners being an incident of sovereignty”); *Ekiu v. United States*, 142 U.S. 651 (1892) (“It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and under such conditions as it may see fit to prescribe.”). See also LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 18-26 (Oxford University Press, 1972). [hereinafter HENKIN, *FOREIGN AFFAIRS*]

¹⁰⁸ *Delovio v. Boit*, 2 Gall. 398, 7 F.Cas. 418 (C.C.D. Mass. 1815); *The Lottawanna*, 88 U.S. 558, 572 (1874); see also FRANK MARAIST & THOMAS GALLIGAN, *ADMIRALTY IN A NUTSHELL* 5 (2005).

¹⁰⁹ *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *Chelentis v. Luckenbach Steamship Co.*, 245 U.S. 655 (1917); *Romero v. International Terminal Operating Co.*, 359 U.S.962 (1959).

¹¹⁰ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

C. Individual Rights in the US

Natural law theories exercised a heavy influence on the founding fathers not only with respect to ideas of sovereignty and social compacts, but also with respect to ideas of individual rights.¹¹¹

1. Natural law underpinnings of individual rights in the U.S. Constitution

Most scholars agree that the framers of the Constitution and Bill of Rights were committed to the idea of natural rights in the context of social contract political theory.¹¹² In particular, the reasoning of John Locke and the example of the English Bill of Rights had a great influence on the U.S. Bill of Rights.¹¹³ Several of the founding fathers were ardent adherents to natural rights theory, including James Wilson, James Madison,¹¹⁴ and

¹¹¹ While natural law theory was largely overtaken by positivist legal theory over the next century and a half, it has never been completely abandoned by the Supreme Court with respect to individual rights theory. It also regained credence in international law theory around the time of World War II in response to the actions of many totalitarian governments, which were largely authorized by positive law but which were clearly contrary to a broader understanding of human rights. See Alfred Von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571 (1937). See also, Roger Alford, *In Search of a Theory for Constitutional Comparativism*, 52 U.C.L.A. L. REV. 639, 663-64 (2005).

¹¹² Thomas B. McAfee, *The Bill of Rights, Social Contract Theory, and the Rights "Retained" by the People*, 16 SO. IL. L.J. 267, 271 (1992) ("The ratification debates over the Constitution are filled with the rhetoric of natural and inalienable rights, and both sides in the debate stood as pretenders to the guardian of such rights."). See also Andrzej Rapaczynski, *The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation*, 64 CHI-KENT L. REV. 177, 179 (1988) ("It seems indubitable that the founding fathers believed in some form of 'natural law' and in some basic, unchanging standards of morality and political justice."); Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3, 7 (1983). But see John Hart Ely, *The Ninth Amendment in DEMOCRACY AND DISTRUST* 39, 50 (Harvard University Press 1980) (Ely argues that although the Constitution was "informed by natural law, this theme was far from universally accepted and probably was not even the majority view among those 'framers' we would be likely to think of first." However, Ely acknowledges the importance of natural law, stating that while natural law is too vague to create rules, it would be "folly . . . to ignore it as a source of constitutional values.").

¹¹³ HENKIN, *THE AGE OF RIGHTS*, 1, 6 (Columbia University Press 1990); CRANSTON, *supra* note __, at 1; Edward S. Corwin, *The 'Higher Law' Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928) ("The conveyance of natural law ideas into American constitutional theory was the work preeminently – though by no means exclusively – of *John Locke's Second Treatise on Civil Government*.").

¹¹⁴ RANDY E. BARNETT, *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* 12-25, 36-37 (George Mason University Press 1989).

John Adams.¹¹⁵ Likewise, Thomas Paine and Thomas Jefferson believed that there were natural rights which could not be restrained or repealed by human laws.¹¹⁶

In pre-revolutionary America, religious and political leaders (who were often one and the same) affirmed that positive laws must be in accord with divine law and natural law.¹¹⁷ For example, in 1717, John Wise, a distinguished Massachusetts clergyman, preached that it is because “God does not permit it, that rulers cannot invade the rights and liberties of the people.”¹¹⁸ In 1744, Reverend Elisha Williams observed that arbitrary governments are not really governments, but tyrants, and are absolutely against the laws of God and nature.¹¹⁹ Richard Bland, a cousin of Thomas Jefferson from Virginia, wrote in 1766 that government is only lawful as long as “it will conduce to [men’s] happiness, which they have a natural right to promote.”¹²⁰ According to all these men, when government violates higher law, the government may be disrespected.¹²¹ Governments were obliged to obey God’s law and to serve God’s people.¹²²

¹¹⁵ Corwin, *supra* note __, at __ citing 2 Adams, *Life and Works* 374 (C.F. Adams, ed. 1850) (John Adams recorded in his diary that he ‘was strenuous for retaining and insisting on [the law of nature].’).

¹¹⁶ BODENHEIMER, *JURISPRUDENCE – THE PHILOSOPHY AND METHOD OF THE LAW*, (Harvard University Press 1974) [hereinafter BODENHEIMER, *JURISPRUDENCE*].

¹¹⁷ ANTIEAU, *supra* note __, at 12. In fact, many clergy of this period saw natural law and divine law as synonymous. BALDWIN, *supra* note __, at 14-15, 22.

¹¹⁸ ANTIEAU, *supra* note __, at 12.

¹¹⁹ *See Id.*

¹²⁰ ANTIEAU, *supra* note __, at 135. According to Mary Baldwin, “the social compact theory seems to have been accepted without question by the ministers of both the seventeenth and eighteenth centuries.” BALDWIN, *supra* note __, at 25.

¹²¹ ANTIEAU, *supra* note __, at 12. *See also* BALDWIN, *supra* note __, at 19.

¹²² BALDWIN, *supra* note __, at 16, 23.

As quoted above, the 1774 Declaration and Resolves of the First Continental Congress included natural law concepts regarding entitlement to life, liberty and property.¹²³ This was followed by the 1776 Virginia Bill of Rights, which foreshadowed the Declaration of Independence, and asserted several natural rights, including the right of equality, the right to enjoy life and liberty with the means of acquiring and possessing property, the right to pursue and obtain happiness and safety, the right to alter or abolish a government that does not act for the public good, the right to suffrage, the right of due process, the right not to be punished in any cruel or unusual manner, the right to freedom of the press, and the right of freedom of religion.¹²⁴ Other states' bills of rights also contained similar natural rights guarantees.

The Declaration of Independence followed shortly thereafter and was heavily influenced by Locke's natural law theories as well.¹²⁵ It suggests a right of self determination based on natural law¹²⁶ and then lists several inalienable rights, including equality of man, and the right to life, liberty and the pursuit of happiness.¹²⁷

¹²³ Declaration and Resolves of the First Continental Congress (Oct. 14, 1774), reprinted in *THE AMERICAN REPUBLIC* 154-155 (ed. B. Frohnen 2002), *supra* note ___.

¹²⁴ Virginia Bill of Rights, June 12, 1776, reprinted in *THE AMERICAN REPUBLIC: PRIMARY SOURCES* (B. Frohnen, ed. 2002).

¹²⁵ Brierly, *supra* note __, at 50.

¹²⁶ "When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation." The Declaration of Independence, July 4, 1776, reprinted in *THE AMERICAN REPUBLIC: PRIMARY SOURCES* (B. Frohnen, ed. 2002).

¹²⁷ "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." *Id.* Of course, the Declaration's reference to all men was meant literally to include only men and not women, but was not to be read literally to include all men. The legal recognition of the fact that all *persons* shared these natural rights came later with the adoption of the Thirteenth, Fourteenth, Fifteenth and Nineteenth Amendments.

In proposing the Bill of Rights to the Constitution, James Madison suggested certain amendments that he believed should properly be recommended by the Congress to the States, including the following:

First. That there be prefixed to the Constitution a declaration, that all power is originally vested in, and consequently derived from, the people.

That Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.

That the people have an indubitable, unalienable, and indefeasible right to reform or change their government, whenever it be found adverse or inadequate to the purposes of the institution.¹²⁸

In addition to these expressly enumerated rights, Madison's proposed amendments also included references to unenumerated rights retained by the people:

The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of *other rights retained by the people*, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.¹²⁹

This language came to be the present-day Ninth Amendment to the U.S. Constitution.

The first government of United States also demonstrated its commitment to natural rights in connection with an incident that occurred during the French war with Great Britain in 1793. Three months after the declaration of war by France in February

¹²⁸ James, Madison, Speech Introducing Proposed Constitutional Amendments (June 8, 1789), *reprinted in THE AMERICAN REPUBLIC: PRIMARY SOURCES* at 338.

¹²⁹ *Id.* at 339 (emphasis added).

1793, President George Washington issued a proclamation of neutrality on the part of the United States. Several difficult questions arose as to the United States' rights and duties as a neutral country. Accordingly, Secretary of State Thomas Jefferson, at President George Washington's request, wrote to the U.S. Supreme Court to solicit the justices' advice regarding the international law of neutrality. In this letter, Jefferson asks the Supreme Court's opinion as to both international law and the law of nature:

The war which has taken place among the powers of Europe produces frequent transactions within our ports and limits, on which questions arise of considerable difficulty, and of greater importance to the peace of the United States. These questions depend for their solution on the construction of our treaties, *on the laws of nature and nations*, and on the law of the land, and are often presented under circumstances which do not give a cognizance of them to the tribunals of the country.¹³⁰

The Supreme Court declined to provide the requested guidance for jurisprudential reasons. However, the correspondence is relevant in demonstrating the importance of natural law and international law to the early republic. As at least one scholar has suggested, "the modern debate is not over whether it was a central end of the Constitution to secure natural rights, but the relationship of such natural rights to the law of the Constitution."¹³¹ This relationship is the subject of some of the following sections of this article.

This section has established that the drafting of the U.S. Constitution was strongly influenced by concepts of both divine law and natural law.¹³² The Constitution is the

¹³⁰ Letter from Thomas Jefferson to the U.S. Supreme Court (July 1793), *reprinted in* CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 74 (Aspen Publishers 2001) (emphasis added).

¹³¹ McAfee, *supra* note __ at 271.

¹³² ANTIEAU, *supra* note __ , at 12, 107, 109, 131, 135.

supreme positive law that protects individual rights.¹³³ It was drafted to carry out the promises and aspirations set forth in the Declaration of Independence, which, as demonstrated above, relied heavily on natural law theories of a social compact between the people and the government and the idea of inherent individual rights.¹³⁴

The problem with natural law was and is, of course, that it is so hard to ascertain exactly what the “rules” of natural law are. As Professor Ely points out, natural law has historically been invoked to “support all manner of causes in this country – some worthy, others nefarious.”¹³⁵ Thus, while natural law may inform our constitutional understandings, it has fallen out of favor as a method of creating rules for decision. As discussed below, I suggest here that international human rights principles are the successor to natural law theory and provide more concrete rules of decision that can better inform our constitutional jurisprudence.

2. Unenumerated Rights under the U.S. Constitution

Although the U.S. Supreme Court has struggled over the years to locate the source and define the scope of rights not expressly mentioned in the Constitution, it has frequently declared that such rights exist and has taken on the role of guarantor of such rights. In finding and defining the existence and scope of such rights, some justices have relied on natural law concepts, others on the Ninth Amendment and others on the due process clauses of the 5th and 14th Amendment, or some combination thereof.

¹³³ HENKIN, *THE AGE OF RIGHTS*, *supra* note __, at 84.

¹³⁴ *Id.* at 84-85.

¹³⁵ ELY, *The Ninth Amendment*, *supra* note __, 50.

a. The influence of natural law theories on the U.S. Supreme Court as the basis of unenumerated rights

While not overwhelming in number, there have been several justices in the history of the U.S. Supreme Court who have demonstrated their awareness of the role of natural law in the framing of the Constitution and the corresponding appropriateness of using such theories in constitutional interpretation. What follows is a brief survey of some of the more important opinions in this regard.

James Wilson, an early justice of the Supreme Court, believed strongly in the existence of natural law.¹³⁶ “[I]n his view human law was grounded on the consent of those whose obedience the law required. He thus linked the doctrine of natural law with the theory of popular sovereignty.”¹³⁷ Like Locke, Wilson believed that the state was founded on the compact of its members, who united together for the common benefit. According to Wilson, each man had a natural right to his property, his character, his liberty and his safety.¹³⁸ At least one scholar has described James Wilson’s philosophy as “the most consistent expression of classical American philosophy of law and government” and has stated that it was shared by most of the fathers of the Constitution.¹³⁹

Supreme Court Justice Joseph Story also was a firm believer in the existence of natural law.¹⁴⁰ In deciding *The Schooner La Jeune Eugenie*, Justice Story took the

¹³⁶ BODENHEIMER, JURISPRUDENCE, *supra* note __, at 51, citing JAMES WILSON, WORKS, I, 49 (J.D. Andrews, ed., Chicago, 1896).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ BODENHEIMER, JURISPRUDENCE, *supra* note __, at 52.

¹⁴⁰ Joseph Story, *Essay on Natural Law*, reprinted in 34 Ore. L. Rev. 88 (1955).

position that a strong international trend against the slave trade, evidenced by numerous international declarations as well as by some municipal statutes directed against its legality, might justify judicial recognition of a rule of international law condemning such trade even though the institution of slavery had not been outlawed as unjust by some of the leading nations of the world.¹⁴¹

In *Chisholm v. Georgia*,¹⁴² a case involving the question of whether an action in assumpsit may lie against a state, several of the justices referred to natural law principles in their respective opinions. Similarly, in *Calder v. Bull*,¹⁴³ a case involving the probate of a will, Justice Chase based his opinion on social compact theory and argued that any act of a legislature that is contrary to the principles of the social compact cannot be considered a rightful exercise of legislative authority.¹⁴⁴

b. The Role of the Ninth Amendment

The influence of the idea of natural rights on the U.S. Constitution is particularly evident in the language of the Ninth Amendment which states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹⁴⁵ This language recognizes that the people possessed rights that existed

¹⁴¹ *United States v. The Schooner La Jeune Eugenie*, 26 F. Cas. 832, 847 (C.C.D. Mass. 1822) (No. 15,511).

¹⁴² *Chisholm v. Georgia*, 2 U.S. 419 (2 Dall. 419) (1793).

¹⁴³ *Calder v. Bull*, 3 U.S. 386 (1798).

¹⁴⁴ Justice Iredell disputed this idea, arguing that the courts do not have the power to declare a law void as violative of natural justice. *Id.* at ___. For further discussion of the Supreme Court’s use of natural law theory, see Alford, *In Search of a Theory for Constitutional Comparativism*, *supra* note ___, at 659-68.

¹⁴⁵ U.S. CONST., amend. IX.

prior to the U.S. Constitution; they were not created by the Constitution.¹⁴⁶ The partial listing in the Constitution of some of those antecedent rights should not be read in such a way as to undermine the existence or scope of any other non-enumerated rights that were “retained by the people.”¹⁴⁷

In the contraceptive case of *Griswold v. Connecticut*,¹⁴⁸ for example, Justice Douglas cited the Ninth Amendment in support of his opinion and stated that the court was “deal[ing] with a right of privacy older than the Bill of Rights,”¹⁴⁹ leaving no doubt as to his belief in preexisting unenumerated constitutional rights (although he attempted to tie those unenumerated rights to enumerated rights through “penumbras” and “emanations”). Likewise, in his concurring opinion, Justice Goldberg stated his view that, “the language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.”¹⁵⁰

Some scholars have disputed the idea that U.S. citizens have any rights that may be protected by the government apart from those expressly enumerated in the

¹⁴⁶ HENKIN, THE AGE OF RIGHTS, *supra* note __ , at 86. See also Bennett B. Patterson, THE FORGOTTEN NINTH AMENDMENT __ (1955), excerpted in BARNETT, *supra* note __ , at 107.

¹⁴⁷ HENKIN, THE AGE OF RIGHTS, *supra* note __ , at 86-87.

¹⁴⁸ *Griswold v. State of Connecticut*, 381 U.S. 479 (1965).

¹⁴⁹ *Id.* at 486.

¹⁵⁰ *Id.* at 488 (Goldberg, J., concurring). See also *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833, 848 (1992) (“Neither the Bill of Rights nor the specific practices of the States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. U.S. Const. Amend. 9.”)

Constitution.¹⁵¹ The fear seems to be that once we admit that unenumerated rights exist, judges will be free to exercise unlimited discretion in identifying and enforcing such rights.¹⁵² To address this concern, it is argued that only the democratically elected and more politically accountable Congress should be the arbiter of such rights. If Congress has not recognized the right, it does not exist as an enforceable right.¹⁵³

But denying the existence and protection of preexisting unenumerated rights is contrary to the language of the documents on which this country was founded. For example, the Declaration of Independence refers to “inalienable rights,” which means that these rights are “incapable of being alienated, surrendered or transferred.”¹⁵⁴ Thus, it is not possible for the people to give any of their inalienable rights to the government. The Ninth Amendment assumes the existence of certain unnamed rights. If Congress has to enumerate the right before it may be protected by any branch of government, these

¹⁵¹ Raoul Berger, *The Ninth Amendment*, 66 Cornell L. Rev. 1, ___ (1980), excerpted in BARNETT, *supra* note __, at 191, 192.

¹⁵² For example, Raoul Berger suggests that if we adopt Justice Goldberg’s view of the ninth amendment in *Griswold v. Connecticut*, we “would transform the ninth amendment into a bottomless well in which judiciary can dip for the formation of undreamed of rights in their limitless discretion.” Raoul Berger, *The Ninth Amendment*, 66 Cornell L. Rev. 1, 2 (1980), excerpted in BARNETT, *supra* note __, at 192. *See also*, BORK, *COERCING VIRTUE*, *supra* note __ at 8-9.

¹⁵³ If, as Professor Tom McAfee admits, the people are superior to the Constitution, then the rights of the people are also superior to the Constitution and remain with the people regardless of their expression in the Constitution. *See* McAfee, *supra* note __, at 275. *See also* HENKIN, *THE AGE OF RIGHTS*, *supra* note __, at 86 (“Individual rights, then, are natural, inherent. They cannot be taken away, or even suspended. They are not a gift from society, or from any government. . . they are freedoms and entitlements of all men, everywhere, antecedent and superior to government. They do not derive from any constitution; they antecede all constitutions.”)

¹⁵⁴ Webster’s Ninth New Collegiate Dictionary 607 (1990). While the Supreme Court generally does not rely on the Declaration of Independence as a legally enforceable document standing alone, the Declaration may certainly be used to inform our understanding of what the Framers thought they were doing during the process of creating a new government.

words have no meaning.¹⁵⁵ And if the judiciary, as a part of the government, cannot protect those unenumerated rights, then those rights either have little, if any, substance, or essentially have been alienated contrary to the intention of the framers.¹⁵⁶

International human rights law can help to address the concerns of some scholars that allowing the recognition and protection of unenumerated rights opens a Pandora's Box of limitless judicial discretion. If judges take into consideration the existence and scope of a right under international human rights law in the context of deciding whether such a right exists in our own constitutional jurisprudence, such reference can help to shape and limit judges' abilities to create new rights or expand existing rights. If no such right is expressly mentioned in the U.S. Constitution, and no such right can be found in international human rights law, a federal judge would be hard-pressed to justify the recognition of such a right.

But even assuming, *arguendo*, that the only rights that are part of the Constitution and that may be protected by the government are the ones expressly mentioned in the Constitution, international law could and should be used to help define the contours of those rights that are expressly mentioned. In this way, international law would still have a role in constitutional interpretation as to the meaning of ambiguous terms such as due process, cruel and unusual punishment, and habeas corpus.

¹⁵⁵ Professor Tom McAfee attempts to reconcile the idea of "inalienable rights" with the need for written law protecting those rights. McAfee, *supra* note __, at 276-280. Despite the fact that such rights are "inalienable," he suggests that such rights may "be granted away in law by the people's design or neglect." *Id.* at 280. Not only is this suggestion inconsistent with the ordinary meaning of the words used, it also is inconsistent with the Ninth Amendment's command that the unenumerated rights shall not be denied or disparaged. Simeon C.R. McIntosh, *On Reading the Ninth Amendment: A Reply to Raoul Berger*, 28 *How. L.J.* 913, 915 (1985), excerpted in BARNETT, *supra* note __, at 219, 225.

¹⁵⁶ McIntosh, *supra* note __, at 919, excerpted in BARNETT, *supra* note __, at 219, 224. Some scholars may be confusing the existence of such rights with the methods chosen to protect them. *See e.g.*, Raoul Berger, *The Ninth Amendment*, 66 *Cornell L. Rev.* 1, 8 (1980) (who believes it was left for the states to protect those rights), excerpted in BARNETT, *supra* note __, at 191.

c. Substantive Due Process

Perhaps because of this debate regarding the appropriate role and meaning of the Ninth Amendment, the U.S. Supreme Court has more recently grounded unenumerated “fundamental rights” in the concept of substantive due process under the Fifth and Fourteenth Amendments.¹⁵⁷

Some scholars have demonstrated that natural law philosophy heavily influenced the Supreme Court’s interpretation of the Bill of Rights, and especially the due process clause, during the Court’s early history.¹⁵⁸ For example, in *Savings and Loan Assoc. v. Topeka*,¹⁵⁹ the Supreme Court stated:

There are . . . rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty, the property of its citizens subject at all times to the absolute power, is after all but a despotism . . . There are limitations on such power which grow out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.¹⁶⁰

Similarly, the Court has repeatedly held that while “[t]he Constitution does not explicitly mention any right of privacy . . . one aspect of the ‘liberty’ protected by the

¹⁵⁷ In *Meachum v. Fano*, 427 U.S. 215, 230 (1976), Justice Stevens wrote: “I had thought it self-evident that all men were endowed by the Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process clause protects. . . .” *Id.* at 230 (Stevens, J., dissenting).

¹⁵⁸ BODENHEIMER, *JURISPRUDENCE*, *supra* note __, at 50, citing J.A.C. Grant, *The Natural Law Background of Due Process*, 31 Colum. L. Rev. 56 (1931); Lowell J. Howe, *The Meaning of Due Process of Law: Prior to the Adopting of the Fourteenth Amendment*, 18 Cal. L. Rev. 583, 588-89 (1930).

¹⁵⁹ *Loan Association v. Topeka*, 87 U.S. 655, 1874 WL 17323, (1874).

¹⁶⁰ *Id.* at * 6.

Due Process Clause of the Fourteenth Amendment is ‘a right of personal privacy, or a guarantee of certain areas or zones of privacy.’”¹⁶¹ And while the Court has never defined the outer limits of the right of privacy, its decisions have extended that right to include a variety of personal decisions a person may make without unjustified governmental interference, such as the right of parents to make decisions about child-rearing and education,¹⁶² the right of couples to make decisions about procreation,¹⁶³ contraception,¹⁶⁴ abortion,¹⁶⁵ and marriage.¹⁶⁶ In *Meyer*, the Court defined liberty broadly to “denote[] not merely freedom from bodily restraint but also the right of an individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”¹⁶⁷

Accordingly, on numerous occasions, the Court has been willing to find rights to be protected by the Constitution that are not expressly mentioned therein. One reason the

¹⁶¹ *Carey v. Population Serv. Int’l*, 431 U.S. 678, 684 (1977) (*citing* *Roe v. Wade*, 410 U.S. 113, 152 (1973)).

¹⁶² *See* *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). In *Prince*, the Supreme Court stated: “[T]he custody, care and nurture of the child resides first with the parents . . . and it is in recognition of this that [prior Supreme Court] decisions have respected the private realm of family life which the state cannot enter.” *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

¹⁶³ *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 525, 541-42 (1942).

¹⁶⁴ *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁶⁵ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁶⁶ *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

¹⁶⁷ *Meyer*, 262 U.S. at 399.

Court may have been willing to do so is the influence of the growing body of international human rights law that recognizes certain universal, fundamental rights that belong to all persons, regardless of their specific expression in the positive domestic law of a state.

The Supreme Court has thus assumed the role of guarantor of natural or unenumerated rights by way of its power to review the acts of the other branches of government and determine whether those acts are consistent with higher law principles, whether those rights are grounded in natural law, the Ninth Amendment or the Fifth and Fourteenth Amendments to the Constitution.¹⁶⁸

D. The Emergence of International Human Rights Law

American notions of individual rights both contributed to the development of international human rights law and, more recently, have been influenced by that growing body of international law in turn. Accordingly, this next section briefly traces the development of international human rights law and its influence on U.S. constitutional jurisprudence of individual rights.

1. Evolution from natural law to international human rights law

Like the international law of sovereignty, the international human rights law is founded on natural law. However, exactly the opposite of early sovereignty theories, early theories of divine and natural law focused on universal responsibilities of man rather than rights.¹⁶⁹ Several historical events, including the decline of feudalism, the

¹⁶⁸ Hamilton and Jefferson shared the view that it was the function of the courts to defend human rights against intrusions by the legislature. BODENHEIMER, JURISPRUDENCE *supra* note __ at 52, citing Hamilton in Federalist essay no. 78 and Jefferson's Letters to F. Hopkinson, March 13, 1789, and to J. Madison, March 15, 1789, in the Papers of Thomas Jefferson, ed. J.P. Boyd (Princeton, 1958), XIV, 650, 659.

¹⁶⁹ LAUREN, *supra* note __ at 13.

expansion of commerce, and an emerging middle class, contributed to a growing interest in the concept of rights.¹⁷⁰ In 1761, Thomas Paine produced *THE RIGHTS OF MAN* which introduced the specific expression “human rights.”¹⁷¹

Both religious beliefs and moral and political philosophy contributed to the development of international human rights.¹⁷² One author states it thus: “Human rights is a twentieth-century name for what has been traditionally known as natural rights or, in a more exhilarating phrase, the rights of man.”¹⁷³ Human rights law is rooted in natural law.¹⁷⁴ Some scholars have suggested that the very idea of human rights is “ineliminably religious.”¹⁷⁵ Other scholars have suggested that it is just this connection to “higher law” or natural law that has caused some scholars and judges to be apprehensive when approaching human rights claims.¹⁷⁶

2. U.S. participation in the development of international human rights

While the idea of human rights has been around for several centuries, modern international human rights law only really developed in a concrete form following World War II.¹⁷⁷ It found expression in the United Nations Charter,¹⁷⁸ the 1948 Universal

¹⁷⁰ *Id.*

¹⁷¹ THOMAS PAINE, *THE RIGHTS OF MAN* 18 (New York: Heritage Press, 1961 ed.).

¹⁷² LAUREN, *supra* note __ at 10-13.

¹⁷³ CRANSTON, *supra* note __, at 1.

¹⁷⁴ HENKIN, *THE AGE OF RIGHTS*, *supra* note __, at 1. (although Henkin suggests that “the contemporary version does not ground or justify itself in natural law”). *See also* CRANSTON, *supra* note __, at 7; Robert J. Araujo, *The Catholic Neo-Scholastic Contribution to Human Rights: The Natural Law Foundation*, 1 *AVA MARIA L. REV.* 159, 163 (2003) (“[I]nternational law has a strong foundation in the natural law tradition that is very much at the core of international human rights.”)

¹⁷⁵ Michael Perry, *THE IDEA OF HUMAN RIGHTS* 11-41 (Oxford University Press 1998).

¹⁷⁶ K. Lee Boyd, *Are Human Rights Political?*, 53 *RUTGERS L. REV.* 277, 285-86 (2001).

¹⁷⁷ HENKIN, *THE AGE OF RIGHTS*, *supra* note __, at 16.

Declaration of Human Rights,¹⁷⁹ and subsequent treaties. The U.N. Charter and the Universal Declaration gave voice to many of the rights contained in the U.S. Bill of Rights on an international level.¹⁸⁰

The United States was a leader in the development of international human rights. It hosted the conference at which the United Nations Charter was drafted. It was one of the five victor countries that conducted the Nuremberg trials - the first time individuals were held accountable for war crimes before an international criminal tribunal. The United States participated in drafting the Universal Declaration of Human Rights, as well as the more detailed International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. While the United States has sometimes been reluctant to ratify certain international human rights treaties, such as the recent Statute for the International Criminal Court (ICC), it has remained deeply involved in the development of international human rights norms, including the drafting of the ICC Charter.

3. The U.S. Supreme Court Has Consistently Used Foreign and International Law throughout Its History

While it is clear that the United States government has been an active participant in developing the rules of international human rights law, the question remains: what

¹⁷⁸ The preamble to the U.N. Charter states: “WE THE PEOPLES OF THE UNITED NATIONS DETERMINED . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . : U.N. Charter, preamble. The Charter also states that one of its “Purposes and Principles” is to promote and encourage “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” U.N. Charter, art. 1(3); *see also* U.N. Charter, art. 55-56.

¹⁷⁹ G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).

¹⁸⁰ Bert B. Lockwood, *The United Nations Charter and the United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 901, 915 (1984).

impact has that international activity had on courts and the development of the law in the United States? As American University Dean Claudio Grossman stated in his opening remarks in the recent Scalia-Beyer Discussion regarding the Supreme Court's use of international and foreign law: "It is important to recognize that since the early 19th century, Supreme Court cases have relied, without much fuss or fanfare, on certain foreign materials."¹⁸¹ Several scholars have documented the Supreme Court's use of foreign and international legal materials throughout its history.¹⁸² Accordingly, I do not propose to review that entire history here. However, one particularly interesting recent study demonstrated that 25% of the early Supreme Court's docket consisted of cases involving foreign and international issues and concluded that the early Supreme Court was in the day-to-day business of foreign affairs.¹⁸³

Dean of Yale Law School, Harold Hongju Koh, suggests that, historically, the Supreme Court "has regularly looked to foreign and international precedents as an aid to constitutional interpretation in at least three situations," which he calls, "parallel rules,"

¹⁸¹ Remarks of Claudio Grossman, Dean of the American University College of Law, Transcript of Discussion between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer, American University College of Law, January 13, 2005 at 4, *available at* <http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F2>. As examples, Dean Grossman pointed to an 1855 case in which the Court said that the English Magna Carta was relevant to the case and a 1960s case in which the court relied on the so-called English Judges' Rule. *See Id.*

¹⁸² Koh, *International Law as Part of Our Law*, *supra* note ___, at 45-48; Vicki Jackson, *Yes, Please, I'd Love to Talk With You*, LEGAL AFFAIRS, July-Aug. 2004, at 43, *available at* http://www.legalaffairs.org/issues/July-August-2004/feature_jackson_julaug04.html. *See also* Jon M. Van Dyke, *The Role of Customary International Law in Federal and State Court Litigation*, 26 UNIV. HAWAII L. REV. 362-64 (2004); G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 A.J.I.L. 727 (1989); Rex Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357, 361-87 (2005).

¹⁸³ Ariel N. Lavinbuk, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court's Docket*, 114Y ALE L. J. 855, 861, 874 (2005). Of course, not all of these cases involved individual or human rights issues, but certainly some of them did. *Id.*

“empirical light,” and “community standard.”¹⁸⁴ First, the Court has noted when legal rules in the United States “parallel those of other nations, particularly those with similar legal and social traditions.”¹⁸⁵ Second, “empirical light” refers to the fact that the Court “has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances.”¹⁸⁶ Third, the Court has considered international and foreign legal sources when a U.S constitutional concept such as “cruel and unusual” or “due process” by its own terms implicitly refers to a community standard.¹⁸⁷ Thus, there is ample evidence that the Supreme Court has frequently referred to foreign and international sources throughout its history and has used these sources to assist in interpreting federal statutes, treaties, and the U.S. Constitution.

4. Implications for the Future

The changes in the understanding of the meaning of sovereignty and the development of international human rights law described above have far-reaching implications for nation-states such as the United States. As Professor Reisman has stated: “By shifting the fulcrum of the system from the protection of sovereigns to the protection of the people, [international human rights law] works qualitative changes in virtually every component.”¹⁸⁸ This new concept of sovereignty even affects the relationship between national and international law. Because international law acts to create and

¹⁸⁴ Koh, *International Law as Part of Our Law*, *supra* note __, at 45.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 46, *quoting* Justice Breyer’s dissent in *Knight v. Florida*, 528 U.S. 990, 997 (1999).

¹⁸⁷ Koh, *supra* note __, at 46.

¹⁸⁸ Reisman, *supra* note __, at 872.

define a sovereign state and its duty to protect its people, the actions of any particular state carried out in fulfillment of that duty must be measured by both international and national law standards. It has long been established that national law may not be invoked to justify violations of international law.¹⁸⁹ If the international law concept of sovereignty is used to assert federal power, as has been done by the Supreme Court in the cases cited above, then it also should be used to inform the meaning of limits on sovereignty suggested by international human rights norms.¹⁹⁰ As Professor Ronald Brand has stated: “If the role of the sovereign is to provide security, and strengthening the international rule of law results in increased security, then the role of the sovereign must be to strengthen the international rule of law.”¹⁹¹ This mandate applies to all branches of government – the legislative, executive, and judiciary. Thus, U.S. courts, as one branch of the federal government, share in the sovereign duty to protect and are therefore derelict in their duties if they do not judge the lawfulness of government action by both national and international law standards, including international human rights law.

V. Objections to the Use of Foreign and International Law

Despite this frequent use of foreign and international law by the Supreme Court, Justice Scalia remains unconvinced of the merits of looking to foreign law in particular. He has two responses to the argument that the Framers of the U.S. Constitution were influenced by foreign law. First, he argues that the Framers “didn’t have a lot of respect

¹⁸⁹ See *Id.* at 874. See also Vienna Convention on the Law of Treaties, art. 27.

¹⁹⁰ See Christenson, *supra* note __, at 29-30.

¹⁹¹ Ronald A. Brand, *Essay: The Role of International Law in the Twenty First Century: External Sovereignty and International Law*, 18 *FORDHAM INT’L L. J.* 1685, 1696-97 (1995).

for many of the rules in European countries.”¹⁹² However, he does admit that the framers “used a lot of foreign law,” which is evidenced by discussions of the Swiss and German systems in the Federalist Papers.¹⁹³ He further states that while foreign law may be useful in devising a constitution, it is not useful in interpreting one.¹⁹⁴ Justice Scalia argues that when interpreting the U.S. Constitution, the appropriate judicial task is to understand what it meant when it was adopted and that the meaning of the Constitution does not change over time.¹⁹⁵

To perform the task of determining the Constitution’s original meaning, Justice Scalia admits that one must look to foreign sources to determine what the constitution meant when it was drafted; however, he would limit that inquiry to “Old English law.”¹⁹⁶ Although the Federalist Papers are full of references to foreign law and the law of

¹⁹² AU Transcript, at 5.

¹⁹³ AU Transcript, at 8. *See also* *Printz v. U.S.*, 521 U.S. 898, 921, n.11 (1997). *See also* the statement in Federalist Paper No. 63 which has been attributed to either Alexander Hamilton or James Madison, in which the author gives two reasons why the U.S. should pay attention to other nations: “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?” THE FEDERALIST NO. 63.

¹⁹⁴ AU Transcript, at 8. *See also* *Printz*, 521 U.S. at 921, n. 11 (“We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course relevant to the task of writing one.”).

¹⁹⁵ *Id.* at 8.

¹⁹⁶ In *Atkins*, Justice Scalia cited to Blackstone’s Commentaries on the Laws of England in making his case that the execution of mildly retarded persons would not have been considered cruel and unusual punishment in 1791. *Atkins*, 536 U.S. at 340 (Scalia, J., dissenting). *See also* *Roper*, 543 U.S. at 626 (“It is of course true that we share a common history with the United Kingdom, and that we often consult English sources when asked to discern the meaning of a constitutional text written against the backdrop of 18th century English law and legal thought.”).

nations,¹⁹⁷ Justice Scalia only allows for reliance on “Old English law” because many constitutional phrases, such as due process, are taken from “Old English law.”¹⁹⁸ However, English law was not formed in isolation any more than American law has been. It was influenced by Roman law, other European law and the law of nations.¹⁹⁹ Moreover, many of the Framers were aware of and influenced by the French Revolution and the Declaration of the Rights of Man.²⁰⁰ Thus, even under an originalist theory of interpretation, in order to fully understand what the Framers had in mind, it is likely that we need to look beyond just “Old English law” to other foreign systems to understand what these words meant when the Constitution was drafted.²⁰¹

Justice Scalia ascribes to a textualist theory of interpretation, which he has described as follows: “A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all this fairly means.”²⁰² In order to determine what constitutes a “reasonable” interpretation, it is likely that an interpreter will consider common methods of interpretation such as considering the ordinary meaning of a word, the intent of the framers, and the context in which the words are used, among other possible sources of information. Because the framers of the

¹⁹⁷ See, e.g., Jay John, THE FEDERALIST NO. 3, at 10. (“It is of high importance to the peace of America, that she observe the law of nations towards all these Powers.”)

¹⁹⁸ AU Transcript, at 8. Interestingly, Justice Scalia would look to English law to determine the meaning of sovereignty as it was understood at the time the constitution was drafted. *Id.* at 25.

¹⁹⁹ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 67 (Wayne Morrison, ed., Cavendish 2001) (1st ed. 1765-69) (The law of nations has been “adopted in [its] full extent by the common law and is held to be a part of the law of the land.”).

²⁰⁰ See Alford, *In Search of a Theory for Constitutional Comparativism*, *supra* note __, at 656-58.

²⁰¹ See Alford, *In Search of a Theory for Constitutional Comparativism*, *supra* note __, at 645-54.

²⁰² ANTONIN SCALIA, A MATTER OF INTERPRETATION 23 (Princeton University Press 1997).

Constitution were influenced by natural law and the law of nations, using this method of interpretation opens the door to consider such sources in determining what interpretation is reasonable.

In any event, a static originalist theory of the Constitution is a bankrupt method of interpretation for those who were not included in the early Constitutional experiment. As Professor Louis Henkin rightly points out, the social compact made at the time of the founding of our nation was made by only a small portion of the inhabitants of the United States.²⁰³ Only property owners were allowed to vote. Poor men, slaves, and women were excluded. Therefore, the original social compact lacks a certain amount of legitimacy for these groups. While the framers of the Constitution laid a very worthwhile foundation, why should today's citizens be bound by the values of a minority group that lived over 200 years ago? As Henkin has argued: "The Constitution as social compact requires a contemporary compact by the people today."²⁰⁴ The continuing legitimacy of the Constitution may depend on whether it accurately expresses the will and values of the people today.

Using international human rights law to inform the meaning of the Constitution today may actually increase that constitutional legitimacy because the United States has been a leader in helping to create that law and thus it reflects our more contemporary values. International human rights law is inclusive of all the groups mentioned above who were excluded from the original social compact. Today, there are numerous

²⁰³ HENKIN, *THE AGE OF RIGHTS*, *supra* note __ , at 91.

²⁰⁴ *Id.* at 103.

international treaties specifically designed to guard against racial discrimination²⁰⁵ and to protect the rights of women.²⁰⁶

Justice Scalia also is concerned that using foreign law is dangerous because U.S. judges will not be familiar with the surrounding jurisprudence such that they are likely to misunderstand the foreign rules.²⁰⁷ While this might be a danger, it would seem that the answer is not to discard the use of foreign law, but to be better educated about it. It is really the job of the attorneys in any given case to educate the court about any applicable law and that includes foreign and international law.²⁰⁸

Furthermore, Justice Scalia's objection to references to international law in recent cases such as *Atkins* and *Lawrence* is inconsistent with his acceptance of the supremacy of U.S. treaty law. The United States is a party to the ICCPR, which makes it part of the supreme law of the land.²⁰⁹ In joining the ICCPR, the United States undertook an obligation to take any steps necessary to ensure to all individuals within its territory and subject to its jurisdiction the rights set forth in the ICCPR.²¹⁰ Article 7 of the ICCPR states that "No one shall be subjected to torture or cruel, inhuman or degrading treatment

²⁰⁵ *E.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S., 5 I.L.M. 352 (1966).

²⁰⁶ *E.g.*, Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980).

²⁰⁷ AU Transcript, at 11. *See also* Posner, *supra* note __, at 41-42, available at http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.html.

²⁰⁸ Justice Breyer has invited law professors and lawyers to do exactly that. Stephen Breyer, Keynote Address, 97 A.S.I.L. PROC. 265 (2003).

²⁰⁹ U.S. CONST. art. VI, §.2. When the U.S. Senate gave its advice and consent to the ICCPR, it did so subject to a number of reservations, understandings, and declarations. Of relevance here, the Senate's advice and consent was subject to the declaration that Articles 1 through 27 of the ICCPR are not self-executing. *See* United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, S. Rep. No. 102-23 (1992), reprinted in 31 I.L.M. 645, 659 (1992).

²¹⁰ ICCPR, art. 2.

or punishment.”²¹¹ Prior to the *Atkins* decision, the Human Rights Committee, a body created by the ICCPR to monitor compliance with the Convention,²¹² expressed regret that the United States did not protect mentally retarded persons from the death penalty.²¹³ While the United States has made a reservation to the ICCPR with respect to the imposition of the death penalty, there is some doubt regarding whether its reservation is valid as a matter of treaty law.²¹⁴ But even if the reservation is valid as a legal matter, the widespread acceptance among the nations of the world of the treaty’s ban on the death penalty is certainly evidence of evolving standards of decency and should inform our view of acceptable treatment of mentally retarded persons.

In addition, the European Union’s *amicus* brief establishing overwhelming disapproval for the imposition of the death penalty for crimes committed by mentally retarded offenders provides evidence of custom and general principles of law in this area. Because international law is part of our law, the Supreme Court had a duty to examine the practices of the world community to determine whether those practices may establish an international rule that is binding on the United States.²¹⁵

²¹¹ ICCPR, art. 7.

²¹² ICCPR, art. 28.

²¹³ Report of the Human Rights Comm., U.N. Doc. No. 1/50/40 (3 Oct. 1995) para. 281.

²¹⁴ *See, e.g.*, General Comment adopted by the U.N. Human Rights Committee (HRC) under art. 40, para. 4 of the ICCPR (11 Nov. 1994). William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOKLYN J. INT’L L. 277 (1995). The United States Supreme Court has never addressed the issue of the reservation’s validity. The point is now largely moot in light of the Supreme Court’s decisions in *Atkins* and *Roper*.

²¹⁵ In a recent speech to the American Society of International Law, Justice Breyer suggested that many of the justices on the Supreme Court would be receptive to such a task, but require assistance from the lawyers who brief the Court. Justice Stephen Breyer, Address at the 97th Annual Meeting of the American Society of International Law (April 4, 2003).

In his recent confirmation hearings, Chief Justice Roberts expressed concern about the use of foreign law, suggesting that it does not limit judicial discretion because “you can find anything you want . . . As somebody said in a different context, looking at foreign law for support is like looking out over a crowd and picking out you’re your friends.”²¹⁶ While Justice Roberts has expressed a valid concern about the use of foreign law generally, where there is virtually unanimous consensus among the rest of the world condemning an action like the imposition of the death penalty on juveniles or the mentally retarded, his point is not as well taken.

As in *Atkins*, the majority’s reference to international law in *Lawrence* was entirely appropriate. First, references in *Lawrence* to non-U.S. sources were made to rebut claims made by other justices in similar cases in order to establish equal treatment of the issue. The majority in *Lawrence* used foreign and international law to rebut Chief Justice Burger’s claims regarding the historical condemnation of homosexual practices in Judeo-Christian moral and ethical standards in *Bowers v. Hardwick*.²¹⁷ Thus, the majority was not doing anything that had not been done before.

Second, such references were appropriate because the United States is bound by international treaty obligations to respect the right of privacy in one’s home and to provide for equal protection of the law. In these regards, Article 17 of the ICCPR provides that: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or

²¹⁶ *Confirmation of John Roberts to be Chief Justice of the Supreme Court: Hearings before the Senate Judiciary Comm.*, (Sept. 13, 2005), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301210.html>.

²¹⁷ *Bowers*, 478 U.S. at 196-97 (Burger, C.J., concurring).

reputation,” and that: “Everyone has the right to the protection of the law against such interference or attacks.”²¹⁸ Article 26 of the ICCPR further provides: “All persons are equal before the law and are entitled without discrimination to the equal protection of the law.”²¹⁹ Even Justice Scalia should be willing to admit that ratified treaty obligations ought to inform our understanding of these rights.

A misperception may exist that because the U.S. Senate declared articles 1-27 of the ICCPR to be non-self-executing, the entire treaty is not enforceable by U.S. courts and therefore should not be used by U.S. courts in their decision-making. While the self-executing treaty doctrine does prevent litigants from bringing a claim based on the non-self-executing portions of a treaty, the self-executing treaty doctrine does not bar courts from taking into account the United States’ treaty obligations altogether.²²⁰ When the President of the United States signs a treaty and two-thirds of the Senators give their consent to that treaty, the United States has expressed its political will that the United States is in agreement with the treaty’s statements regarding international rights and duties. A ratified treaty creates binding international legal obligations for the United States even if it is not directly enforceable in U.S. courts. The treaty becomes part of the Supreme Law of the Land under the Supremacy Clause and will trump inconsistent state laws. U.S. courts have recognized that even when a treaty contemplates further action by the other branches of government, “the judicial branch should certainly attempt to reflect

²¹⁸ ICCPR, art. 17.

²¹⁹ ICCPR, art 26.

²²⁰ JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 78-79, 361-62 (Carolina Academic Press 2d ed. 2003).

in its decisionmaking the spirit as well as the letter of an international agreement to which the United States is a party.”²²¹

The federal courts have long stated that they will not assume that Congress intends to violate the United States’ international obligations.²²² Accordingly, where there are competing interpretations of a federal statute and a treaty to which the U.S. is a party, the courts will adopt the interpretation that attempts to reconcile the two.²²³ U.S. courts likewise should use the language of a treaty to which the United States is a party to inform the understanding of individual rights under the Constitution and choose an interpretation that reconciles the two whenever possible. Doing so will assist the United States in avoiding violations of its international obligations. It is also consistent with the democratic will as expressed by the legislative and executive branches when they ratified the treaty.

The United States also is bound by any relevant customary international law separate and apart from its treaty obligations.²²⁴ Despite this long-established principle, some scholars and judges are uncomfortable with the application of customary international law, perhaps because customary international rules are not written “positive” laws, or because they can be vague and rest on diffuse sources that are hard to find.²²⁵ Treaties often contain very vague and broadly worded obligations as well, yet

²²¹ *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 296 (7th Cir. 1990), cert denied, 502 U.S. 941 (1991).

²²² *Charming Besty*, 6 U.S. (2 Cranch) at 118.

²²³ *Whitney*, 124 U.S. at 194.

²²⁴ Customary international law is commonly defined as “general practice accepted as law.” *See, e.g.*, Statute of the International Court of Justice, art. 38(1)(b), 59 Stat. 1031, T.S. No. 993 (1945).

²²⁵ TRIMBLE, U.S. FOREIGN RELATIONS LAW, at 187.

they are still considering binding “law.” Furthermore, while it is laudable that the law be known and available to any interested person, difficulty in finding the law cannot be determinative of its character as law. And while it is true that customary international law often cannot be found in one place like a treaty, the rules of customary international law are often written down in diplomatic correspondence, executive orders, and similar documents. In fact, the U.S. government has often made public statements officially accepting the binding nature of certain rules of customary international law that have been codified in treaties which the United States has not ratified, such as the Vienna Convention on the Law of Treaties²²⁶ and the U.N. Convention on the Law of the Sea.²²⁷

Some judges and scholars also have expressed concerns about the political foundations of customary international law believing that is not well grounded because it is not expressly made the law of the land in the Constitution and is not approved by the Senate or Congress.²²⁸ While it is true that the supremacy clause of the Constitution only mentions treaties and not customary international law, the Constitution does take into

²²⁶ See, e.g., Rovine, *Digest of United States Practice in International Law* 1973, at 307, 482-83 (1974). See also Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 299-302 and accompanying footnotes (1988); Robert Dalton, *The Vienna Convention on the Law of Treaties: Consequences for the United States in The Vienna Convention on the Law of Treaties: The Consequences of Participation and Nonparticipation*, 78 AM. SOC'Y INT'L L. PROC. 270, 277-279 (1984); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 312, 325 (1987); *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000) (“The United States recognizes the Vienna Convention as a codification of customary international law.”).

²²⁷ See e.g., *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 424 (1987), *reversed on other grounds*, 488 U.S. 428 (1989) (“Argentina is a signatory to the Law of the Sea Convention and the United States has endorsed the relevant sections of it.”); *Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part XI of the Law of the Sea Convention: Hearings before the Senate Environment and Public Works Comm.*, 103d Cong. 39 (2004) (testimony of John F. Turner, Assistant Secretary of State, Oceans and International Environmental and Scientific Affairs), available at <http://www.state.gov/g/oes/rls/rm/2004/30723.htm> (last visited Oct. 13, 2005) (“Abroad, the United States has worked both diplomatically and operationally to promote the Convention as reflective of customary international law”).

²²⁸ TRIMBLE, U.S. FOREIGN RELATIONS LAW, at 187.

account customary international law in at least one other place, *i.e.*, its reference to offenses against the laws of nations in Article I.²²⁹ Furthermore, the Executive Branch, which is charged with taking a primary role in foreign affairs, is daily involved in the creation of the rules of customary international law through its practices and pronouncements. Thus, it is perfectly appropriate for U.S. courts to continue to ascertain and apply customary international law just as they have done for more than two centuries.

A similar objection that has been raised with respect to the use of foreign legal materials is that foreign legal materials have no democratic provenance or connection to the U.S. legal system and thus lack democratic accountability.²³⁰ Justice Breyer responds to this concern by stating that the court relies on many extrinsic sources in constitutional interpretation which lack a democratic base, including the work of legal scholars.²³¹ Thus, using foreign or international materials is no worse. More importantly, however, he points out that transnational law is created by the interaction of many constituencies, such as the interested public, affected groups, specialists, legislatures, and others.²³² “That is the democratic process in action.”²³³ Persons and groups in the United States participate in this process.²³⁴ The United States, as the most powerful state in the international system, has a predominant role in creating the rules of international law,

²²⁹ U.S. Const. art. I, § 8, cl. 10.

²³⁰ Posner, *supra* note __, at 42, available at http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.html; J. Harvie Wilkinson III, *The Use of International Law in Judicial Decisions*, 27 HARV. J.L. & PUB. POL’Y 423,425-426 (2004).; Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT’L L. 675, 785-786 (2003).

²³¹ AU Transcript, at 26.

²³² Stephen Breyer, Keynote Address, 97 A.S.I.L. PROC. 265 (2003).

²³³ *Id.*

²³⁴ See Koh, *International Law as Part of Our Law*, *supra* note __ at 55-57.

whether by negotiating and drafting treaties or by its conduct leading to the creation of customary international law. Thus, with respect to international law, the United States' legislative and executive branches both have a role in creating the rules and can be held accountable for their actions in this regard.

Thus, concerns that anti-democratic processes may influence U.S. judges rings much truer with respect to *foreign* legal materials than with respect to *international* materials, because the democratically elected bodies and other groups in the United States participate in the formation of international legal rules. Furthermore, the United States can further alleviate any anti-democratic concerns by being a full and vigorous participant in developing transnational law in the future.²³⁵

The United States may even influence foreign legal materials to the extent that foreign legislatures and judges take into account what other countries are doing when fashioning their own rules. Because the United States is the most powerful country in the world in the present time and because historically, it has a long history of democratic governance and protection of individual rights, it is likely that the United States is one of the countries whose practices will be considered.²³⁶

As a general proposition, however, international law does have more legitimacy in the U.S. legal system than foreign law because the U.S. has a greater role in shaping international law than foreign law.²³⁷ As a result, there are different considerations at

²³⁵ See *Id.* at 56-57.

²³⁶ Some may take issue with the United States' current reputation as a leader in the area of individual rights in light of recent events arising from the detention of persons in connection with the fight against terrorism.

²³⁷ Justice Scalia's criticisms of the Supreme Court's use of foreign law therefore has more legitimacy than any criticism of the use of international law.

work with respect to the use of foreign law in constitutional interpretation. In the *Knight v. Florida* death penalty case, Justice Breyer wrote a dissenting opinion in which he suggested some standards for the use of foreign law.²³⁸ He suggests the use of foreign law is appropriate in two situations. First, it is appropriate when there exists a roughly comparable question and there is a transnational or global aspect to the case, there are shared standards, or world opinion is implicated. Second, the use of foreign law is appropriate when roughly comparable legal standards exist, *i.e.*, when the external or foreign norms resonate internally. Justice Breyer suggests that this last situation is most likely to occur with respect to Europe and its former colonies because of our shared human rights heritage.²³⁹

These suggestions are worthy of consideration. However, use of foreign law should be approached with particular caution. A specific nation's laws reflect that nation's history, culture, and legal system. Thus, any one nation's legal rules are likely to be of limited value to another nation with a different history, culture and legal system. However, if a worldwide survey is conducted and many or most nations of the world have adopted a particular legal rule, that rule will reflect a consensus derived from many different cultures and legal system and will likely be more useful and persuasive.

Finally, persons on both sides of the debate agree that part of what is driving this debate regarding the use of international and foreign law is a concern that such law will be used by judges in an unprincipled manner to support the judges' personal

²³⁸ *Knight v. Florida*, 528 U.S. 990, 997-98 (1999) (Breyer, J., dissenting).

²³⁹ Similarly, Professor Rex Glensey suggests the U.S. should only look to "genuine liberal democracies" that share our societal values. Rex D. Glensey, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357, 412 (2005).

viewpoints.²⁴⁰ Justice Breyer responds to this concern by arguing that a good way to counter the possibility of judges imposing their own moral values is for judges to look outside themselves and see how society is dealing with the issue – including looking to foreign societies and international law.²⁴¹ Moreover, it may be argued that international law is a more effective interpretive tool than many other external sources a judge may use because rules of international law are “a product of years of distillation of principles formed through international consensus,” that are evidenced by state practice and agreements that articulate the relevant principles.²⁴² As a result, reliance on a rule of international law may actually reduce an individual judge’s subjectivity when interpreting constitutional provisions.²⁴³

For all these reasons, it is incorrect to suggest that references to international and foreign law have *no* place in U.S. Constitutional interpretation.

VI. Why should the Supreme Court continue to use international and foreign law?

Thus far, this article has established the political and historical bases for the incorporation of international law and to a lesser extent, foreign law, principles into U.S. constitutional jurisprudence and has described both the historical and recent use of international and foreign law by the U.S. Supreme Court. It also has responded to the concerns of critics. This section provides some reasons why the Supreme Court should continue to use international and foreign law in the future.

²⁴⁰ AU Transcript, at 9.

²⁴¹ AU Transcript, at 10.

²⁴² See Tamara Hughlett, *International Law: The Use of International Law as a Guide to Interpretation of the United States Constitution*, 45 OKLA. L. REV. 169, 182 (1992).

²⁴³ See *Id.*

The most important reason supporting the Supreme Court's continued use of international law is that the Constitution requires it. As noted above, the Constitution makes treaties part of the supreme law of the land on par with federal statutes.²⁴⁴ When the political branches have come together and agreed to sign and ratify a treaty, the Supreme Court should give deference to the judgment of the other branches as to the rules of international law expressed in that treaty and should assist the United States in complying with its treaty obligations by adopting an interpretation that is consistent with those treaty obligations whenever possible.²⁴⁵

Even when the Constitution does not expressly incorporate international law, federal statutes may, such as in the Foreign Sovereign Immunities Act²⁴⁶ or the Alien Tort Statute.²⁴⁷ It also seems fairly uncontroversial that when the U.S. Supreme Court is interpreting a treaty, it should take into account the practice of states and prior judicial decisions interpreting the same treaty made by courts of other parties to the treaty because such evidence would be relevant and useful evidence of the meaning of the

²⁴⁴ U.S. Const. art. VI, § 2; *Whitney v. Robinson*, 124 U.S. 190 (1888).

²⁴⁵ Of course, if the other branches of government entered into a treaty that denied a constitutionally protected right such as a right to a jury trial as was the case in *Reid v. Covert*, the Court would be bound to ignore the inconsistent treaty obligation.

²⁴⁶ 28 U.S.C. § 1602.

²⁴⁷ See 28 U.S.C. § 1350 (2005). Other examples of incorporation of the law of nations or international law into U.S. statutes may be found in the Torture Victim Protection Act of 1991, PL 106 Stat. 73, 28 U.S.C.A. § 1350 Note; Internee of Belligerent Nation, 18 U.S.C.A. § 756; Interned belligerent nationals, 18 U.S.C.A. § 3058; Departure of vessel forbidden in aid of neutrality, 18 U.S.C.A. § 967; Destruction or misuse of vessel by person in charge, 18 U.S.C.A. § 2274; Compelling foreign vessels to depart, 22 U.S.C.A. § 462; Condemnation of piratical vessels, 33 U.S.C.A. § 384; Seizure and condemnation of vessels fitted out for piracy, 33 U.S.C.A. § 385.

treaty.²⁴⁸ Thus, the Supreme Court should continue to use international and foreign legal sources when it is required to do so by the Constitution or by statute.

Likewise, the U.S. Supreme Court must continue to ascertain and apply customary international law principles when called for by the Constitution or by federal statute. For example, the Court may need to consider customary international law pursuant to the Constitution's grant of authority to Congress to define and punish offenses against the law of nations,²⁴⁹ as it did in *United States v. Smith*.²⁵⁰

The recent case of *Sosa v. Alvarez-Machain* provides a timely example of a statutory requirement to consider customary international law. In *Sosa*, the Supreme Court was required by the Alien Tort Statute to determine whether particular conduct constituted a tort under the law of nations.²⁵¹ The Supreme Court affirmed that it was required to ascertain and apply a modern-day understanding of international torts, at least where the norm of international character is accepted by the civilized world and defined with specificity.²⁵²

Use of international treaty law and the customary international law of human rights to inform U.S. constitutional rights jurisprudence also can be justified under and reconciled with many classic theories of constitutional interpretation.²⁵³ From an

²⁴⁸ See, e.g., *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991).

²⁴⁹ U.S. CONST. art. I, sec. 8.

²⁵⁰ 18 U.S. (5 Wheat.) 153, 5 L.Ed. 57 (1820).

²⁵¹ See *Id.*

²⁵² *Sosa*, 542 U.S. at 724-25, 124 S.Ct. at 2761.

²⁵³ See Alford, *In Search of a Theory for Constitutional Comparativism*, *supra* note ___ at 644 (Professor Alford discusses four types of classic constitutional theories – originalism, natural law, majoritarianism (both structural and interpretive), and pragmatism). See also MICHAEL J. GERHARDT ET AL.,

originalist perspective, such usage is appropriate because the founding fathers were heavily influenced by foreign and international law and incorporated some of these sources and ideas into the Constitution (although a “hard” originalist might only allow for international law as it existed at the time of the writing of the Constitution).²⁵⁴ A natural law proponent should be open to using international human rights law to inform U.S. U.S. individual rights jurisprudence because of their shared natural law foundations and their mutual influence on the development of the other. From a structural majoritarianism perspective, it may be argued that appropriate use of foreign and international law where it has been created and approved by the political branches of the federal government demonstrates proper deference to those branches. On the other hand, an interpretive majoritarianism view might use present-day concepts of sovereignty and international human rights to facilitate our understanding of the meaning of a “living” constitution that changes over time in response to societal changes. Finally, a pragmatic approach might encourage examination of foreign legal experiences to better understand the consequences of different legal solutions for common legal problems.²⁵⁵

Moreover, using international and foreign law will assist the U.S. government in carrying out its duty to protect the people. Modern conceptions of sovereignty require that the sovereign state take seriously its responsibility to protect its citizens. This conception of sovereignty places a duty on states to ask if they are fulfilling this

CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES §§ 1.101–1.104 (LexisNexis 2d ed. 2000) (providing an historical overview of constitutional theories).

²⁵⁴ SUNSTEIN, *supra* note __, at 173. (Professor Sunstein distinguishes between “hard” originalism, which makes a historical inquiry to discover specific answers to specific questions and “soft” originalism, which makes the historical inquiry to discover constraining but flexible standards.).

²⁵⁵ An example of this approach may be found in Justice Breyer’s dissenting opinion in *Printz v. United States*, 521 U.S. 898, 977 (1997).

obligation.²⁵⁶ Because human rights are *rights*, and not aspirations, the government has an obligation to protect such rights.²⁵⁷ While many international human rights are said to be universal and do not differ substantively in different national legal systems, they depend on national governments for their protection.²⁵⁸ If the state is not providing a level of protection for human rights that has been widely adopted elsewhere in the world, perhaps it is time for the state to reexamine why this is the case. Such an examination does not necessarily require a change in the law, as there may be important and justifiable reasons that a state has chosen a particular legal rule, (such as competing human rights values), but at least requiring that examination could force a state to confront its laws and practices and have to justify them to its own polity and to the world.²⁵⁹

Finally, the U.S. Supreme Court should take international human rights norms into account because it is good foreign relations policy. Taking international human rights norms into account serves foreign relations purposes by allowing the United States to maintain a position of leadership in international affairs, earn a “good” reputation, encourage good human rights practices in other countries, promote conditions conducive to trade, and encourage peace and stability.²⁶⁰

In sum, the U.S. Supreme Court should continue to consider international and foreign legal materials in its work because it is sometimes required to do so by the

²⁵⁶ As Thomas Jefferson stated, governments are instituted “to secure these rights.” HENKIN, *THE AGE OF RIGHTS*, *supra* note ___, at 87.

²⁵⁷ HENKIN, *THE AGE OF RIGHTS*, *supra* note ___, at 3.

²⁵⁸ *Id.* at 2, 17.

²⁵⁹ On the other hand, if there is little agreement in international law regarding the prevailing human rights standards, international law would not be so helpful and U.S. justices would be freer to form their own conclusions about the parameters of a particular right based solely on our own constitutional history.

²⁶⁰ *See* HENKIN, *FOREIGN AFFAIRS* at 152.

constitution or by federal statute, because it increases the legitimacy of the court's jurisprudence, and because it is good foreign relations policy.

VII. How should international law be used by Supreme Court in the future?

At the outset of the article, I noted that one criticism of the Supreme Court's use of foreign and international law is that there is a lack of guidelines or standards as to when use of such sources is appropriate. I believe this criticism is valid. While some attempts have been made to offer such guidelines, they remain incomplete. Accordingly, in this final section, I will offer some additional ideas for guidelines or standards that may be useful in assessing the appropriateness of the use of foreign and international law sources by the Supreme Court in the future.

Before embarking on that endeavor, however, I wish to offer one caveat. Inherent in the U.S.'s tripartite system of government is a certain reliance on the wisdom and integrity of the judges who sit on the federal bench. They are appointed for life in part because we expect them to act as checks on the other branches of government without fear of retaliation. On a daily basis, they are asked to interpret ambiguous laws, whether they be domestic or international. This system allows the judges a certain level of discretion when deciding cases, regardless of whether international or foreign law is used by the judges is involved. Thus, no absolute or rigid guidelines for the use of international or foreign law are possible or even desirable.

Justice Scalia has complained, however, that there is a lack of international consensus on many legal rules and that the U.S. Supreme Court lack criteria to assist in deciding when and which of these foreign rules to use. This criticism is a potentially troubling, but no more so than Justice Scalia's concerns with respect to the use of any

external source in constitutional interpretation. As both Justices Scalia and Breyer point out, using international or foreign law is similar to using any other external source, such as legislative history, in interpreting a vague or ambiguous constitutional term or phrase.²⁶¹ The court has been able to successfully use legislative history when it has found such history to be persuasive or useful. In this regard, Justice Breyer argues that the Supreme Court cites many sources in its jurisprudence and that the main guideline for using these external sources is their usefulness.²⁶² Likewise, it does not seem like an insurmountable hurdle for the justices to devise some loose guidelines for the use of international and foreign law in their jurisprudence.²⁶³ Set forth below are a few suggestions in this regard.

A. International and Foreign Law as an Interpretive Aid

First, international and foreign law may be used as an interpretive aid when the language of the Constitution standing alone does not answer a question. Where the text of the Constitution is perfectly clear (e.g., the necessary age of 35 to become President of the United States), there usually is no need to consider extrinsic sources. However, in many cases already discussed herein, the text is not perfectly clear on its face. Phrases like liberty, due process, and cruel and unusual punishment all invite interpretation and explanation. In such cases, it has been common for the Supreme Court to look to external

²⁶¹ AU Transcript, at 7, 13.

²⁶² AU Transcript, at 6.

²⁶³ In fact, the Honorable Patricia Wald, formerly the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, has stated that American judges “are used to making judgment calls on the caliber of the courts and even sometimes of the individual judge authors whose decisions they decide to cite or rely upon.” Patricia M. Wald, *The Use of International Law in the American Adjudicative Process*, 27 HARV. J.L. & PUB. POL’Y 431, 440 (2004). They also “are in the habit of making judicious selection of the precedents in the context of the court and the judges that write them. And I would trust them to do so in the case of foreign court judgments as well.” *Id.*

sources to aid in its interpretation of these vague or ambiguous phrases. International law, particularly international human rights norms, may be treated as an external source to be used in interpretation of vague or ambiguous terms.²⁶⁴ As demonstrated above, it is particularly appropriate to turn to international human rights law as an interpretive tool given the common historical and theoretical foundations of U.S. individual rights and international human rights law.

Legal positivists might object to the use of international law in this way because they would limit themselves to “formal sources of law, [*e.g.*,] those formalized precepts and mandates which have been promulgated or issued by a legislature, a constitutional convention, a court, or an administrative agency.”²⁶⁵ Although treaties may fit the definition of positive law, many other sources of international law may not. The problem with limiting legal decision-makers exclusively to such formal sources of law is that those sources do not answer every question.²⁶⁶ Positive laws always contain ambiguities and gaps. In such cases, what means are available to legal decision-makers to resolve these questions? Legal positivists have struggled to answer this question.²⁶⁷ Using international human rights law to inform U.S. Constitutional jurisprudence can help to solve this dilemma.²⁶⁸

²⁶⁴ See Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3, 4-6, 16, 20 (1983).

²⁶⁵ BODENHEIMER, JURISPRUDENCE, *supra* note __, at 346.

²⁶⁶ See *Id.* at 347.

²⁶⁷ See Bodenheimer’s description of possible solutions proposed by John Austin and Hans Kelsen, neither of which appears to be satisfactory even to themselves. See *Id.* at 347-49.

²⁶⁸ One scholar has argued that at least some U.S courts have been willing to use provisions of the U.N. Charter to “find” the U.S. Constitution, *i.e.*, to redefine the due process and equal protection clauses to reflect antiracial discrimination norms found in the U.N. Charter. Lockwood, *supra* note __, at 902.

This is not a new idea. The U.S. Supreme Court has sanctioned the notion that judges may look beyond strictly positive sources of law in a number of cases.²⁶⁹ And as Justice Cardozo pointed out many years ago, many gaps in U.S. common law have been filled by borrowing from Roman law or other legal systems.²⁷⁰

B. The United States Constitution as a Floor for Human Rights

Another possibility would be to treat the relationship between foreign and international law similarly to the relationship between state constitutions and the federal constitution. In the U.S. federalist system, the U.S. Constitution provides a floor for the protection of individual rights below which states may not go. States may provide more protection for individual rights pursuant to their own laws and constitutions, but not less. Foreign and international law could be treated similarly in that the U.S. Supreme Court could refer to foreign and international law standards when they provide a higher level of protection than the U.S. Constitution, but would never be forced to adopt a foreign or international law standard that is less protective than that of the Constitution. In this way, the Supreme Court would be assisting the United States in fulfilling its sovereign duty to protect.

This approach would satisfy the objection that application of foreign or international law would lead to the adoption of practices of a country with a poor human rights record. However, it still does not answer the more difficult questions involving

²⁶⁹ *See, e.g.*, *International News Serv. v. Associated Press*, 248 U.S. 215 (1918) (resulting in significant innovation in the law of unfair competition).

²⁷⁰ BODENHEIMER, *JURISPRUDENCE*, *supra* note ___ at 353 (citing BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 123 (New Haven 1921)).

competing human rights, such as those of a mother and an unborn child in abortion jurisprudence.

Of course, it also is settled law that “treaties are subject to the constitutional limitations that apply to all exercises of federal power, principally, the prohibitions of the Bill of Rights.”²⁷¹ The Treaty Power does not extend “so far as to authorize what the Constitution forbids.”²⁷² Taking this proposition together with the Ninth Amendment’s admonishment that the people retain rights in addition to those enumerated in the Constitution, we see that international law can add to the list of individual rights retained by the people and can be used to interpret or give meaning to rights that are enumerated in the Constitution, but cannot take away rights enumerated in the Constitution.

C. International and Foreign Law as an Educational Tool

Several of the Supreme Court justices and scholars have pointed out ways in which international and foreign law can be a useful educational tool. First, surveying international and foreign legal sources can show developing trends in the law. Second, it can suggest new ways of approaching common problems.²⁷³ Third, it can stimulate thinking about different solutions. Fourth, a non-U.S. legal source may suggest a persuasive line of logic. Thus, international and foreign legal sources can be of

²⁷¹ HENKIN, FOREIGN AFFAIRS at 137, 254.

²⁷² *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *The Cherokee Tobacco*, 11 Wall. 616, 620-21 (US 1871); *Asakura v. Seattle*, 265 U.S. 332, 341 (1924); *Reid v. Covert*, 354 U.S. 1, 16 (1957); *Boos v. Barry*, 485 U.S. 312, 324 (1988).

²⁷³ For example, in *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377 (2000), Justice Souter compared the U.S. approach to campaign financing to those taken by “other Constitutional Courts facing similar complex problems” and cited to the European Court of Human Rights and the Canadian Constitutional Court. *Shrink*, 528 U.S. at 403. *See also* *United States v. Then*, 56 F.3d 464, 468-69 (1995) (Calabresi, C.J., concurring) (“In exercising restraint, American courts might nonetheless take note of what the Constitutional Courts of some cognate countries have done in like situations.”).

tremendous educational value, regardless of whether such sources are formally relied upon or cited as any kind of authority for the court's opinion.

VIII. Conclusion

Individual rights in the United States are interrelated with the developing system of international human rights. Both share a common ancestry deriving from natural law principles and political theories of sovereignty. Proper understandings of sovereignty recognize that sovereign states have both powers and responsibilities and that the primary responsibility of the government is the protection of the people who created that government and endowed it with its sovereignty in the first place. Thus, governments, including courts, have a duty to take international law, including international human rights, into account when interpreting national constitutions intended for the protection of the people.

The implications for the United States are that while international law does not trump the Constitution, the U.S. Supreme Court should consider international law rules in constitutional interpretation whenever the political branches of government have adopted international agreements or participated in the creation of customary international law rules that express the United States' position on human rights. It also should use international law as an interpretive tool to inform its understanding of vague or ambiguous constitutional provisions. Under the dictates of sovereignty theory, the Court would never be forced to adopt a foreign practice that is less protective of the people because that would be contrary to the entire purpose for which the government was created. Rather, the Supreme Court should continue to use foreign and international law

to expand our conception of human rights consistently with the Constitution and should use international law as an interpretive and educational tool in appropriate circumstances.