The Dichotomy between Judicial Economy and Equality of Arms within International and Internationalized Criminal Trials: A Defense Perspective

Geert-Jan Alexander Knoops*
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Abstract

This Article considers the trend to effectuate judicial economy within international criminal trials juxtaposed with the principle of equality of arms from the standpoint of the defense. It focuses on this juxtaposition as exemplified in contemporary case law of the ICTY. In addressing this issue, the analysis in this Article will build on the assumption that the interrelationship between these two notions must be interpreted in light of two cardinal parameters: first, the protection of the interests of the defense, and second, the principle of independence and non-political use of the notion of judicial economy.
NOTE

REASON WITHOUT BORDERS: HOW TRANSNATIONAL VALUES CANNOT BE CONTAINED

Shane B. Kelbley*

And what is good, Phaedrus? And what is not good? Need we ask anyone to tell us these things?"'

INTRODUCTION

As the United States enters an age of increasingly globalized economies, governance, media, and trade, the U.S. Supreme Court finds itself at the forefront of a controversy implicating the globalization of U.S. constitutional jurisprudence.2 Proponents

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of constitutional globalism claim that U.S. courts considering difficult constitutional issues may benefit from the experiences of constitutional courts and democratic legislatures around the world.3 Opponents take the position that international sources4 are irrelevant and unconstitutional for U.S. courts to consider when interpreting the U.S. Constitution.5


4. For the purposes of this Note, the terms "international sources," "international materials," and "international law" will be used to describe the full range of non-U.S. legal materials, including, but not limited to: international treaties or agreements; non-U.S. constitutions, legislation, or case law; prevailing international opinion; and the writings of non-U.S. jurists or legal experts.

5. See Roper, 543 U.S. at 628 (Scalia, J., dissenting) (criticizing use of international law as unconstitutional); see also Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J. dissenting) (claiming that constitutional entitlements cannot be created by practices of other Nations); Atkins v. Virginia, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting) (arguing that it is unconstitutional to apply non-U.S. law to U.S. citizens); Thompson v.
Recent U.S. Supreme Court decisions reflect this tension, as Justices on both sides of the issue have expressed opinions on the propriety of international law citations. Most recently, the issue arose in *Roper v. Simmons*, a U.S. Supreme Court case that reversed earlier cases, and held the death penalty to be an unconstitutional punishment for juvenile offenders — those under the age of eighteen at the time of their crime. Though *Roper*’s holding is rooted in the established principles of the Court’s Eighth Amendment jurisprudence, legal scholars have criticized

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6. Compare *Roper*, 543 U.S. at 575 (stating that majority opinion holding execution of juveniles unconstitutional “finds confirmation” in fact that United States is only remaining Nation sanctioning such punishment), and *Lawrence*, 539 U.S. at 576-77 (citing with approval European Court of Human Rights case striking down laws forbidding consensual homosexual conduct), and *Atkins*, 536 U.S. at 316 n.21 (finding imposition of death penalty on mentally retarded offenders “overwhelmingly disapproved” of in world community), *with Roper*, 543 U.S. at 628 (Scalia, J., dissenting) (stating that acknowledgement of international laws or opinions is inappropriate in U.S. courts), and *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (characterizing majority opinion’s citation of non-U.S. opinions to be “meaningless” and “dangerous”), and *Atkins*, 536 U.S. at 322 (Rehnquist, C.J., dissenting) (claiming that majority opinion’s citation to non-U.S. law “finds little support in our precedents and... is antithetical to considerations of federalism”). See generally Waldmeir, *supra* note 2 (noting debate over citation of international law in recent U.S. Supreme Court cases).


8. See *Roper*, 543 U.S. at 578-79 (holding U.S. Constitution’s Eighth and Fourteenth Amendments to forbid imposing death penalty on offenders under age 18 at time of crime); see also Douglass W. Cassell, Jr., *Top Court Embraces a World View*, CHI. DAILY L. BULL., Mar. 4, 2005, at 5 (noting prominent role international opinion played in shaping *Roper* decision).

9. See *Roper*, 543 U.S. at 578-79 at 560-61 (stating that traditional formulation of whether a law violates Eighth Amendment’s prohibition on “cruel and unusual punishments” has been to “consult the evolving standards of decency that mark the progress of a maturing society,” as articulated in *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)); see also *Stanford*, 492 U.S. at 369 (stating that U.S. Supreme Court jurisprudence does not confine Eighth Amendment’s definition of “cruel and unusual punishments” to barbaric punishments generally outlawed in eighteenth century, instead has interpreted Amendment in “flexible and dynamic manner”) (quoting Gregg v. Georgia, 428 U.S. 153, 171 (1976)); *Weems v. United States*, 217 U.S. 349, 373 (1910) (stressing that precise definition of cruel and unusual punishment has never been explicitly defined, and that protections of Eighth Amendment may expand as public opinion evolves).
the decision's lengthy discussion of international law. This criticism quickly subsumed the initial debate over the constitutionality of executing minors. Public reaction in the United States remains deeply divided on the use of international law in U.S. courts. Indeed, the debate has existed since the founding of the United States (the "Founding"), and the outcome has the

10. See Opinion, Justices Out on a Limb, CLEV. PLAIN DEALER, Mar. 4, 2005, at B8 (praising abolition of juvenile death penalty, but lamenting Roper's reliance on international law as dangerously illogical); see also John Leo, Double-Standard Trouble, U.S. NEWS & WORLD REP., Mar. 28, 2005, at 67 (accusing U.S. Supreme Court of selectively invoking international standards when it suits their political preferences); George Neumayr, Constitution Killers, AM. SPECTATOR ONLINE, Mar. 3, 2005 (labeling Roper decision as "act of despotism that masquerades as jurisprudence," and claiming that U.S. Supreme Court is writing new U.S. Constitution, with non-U.S. citizens as co-authors), available at http://www.spectator.org/dsp_article.asp?artid=7841; Stuart Taylor, Jr., The Court, and Foreign Friends, as Constitutional Convention, NAT. J., Mar. 5, 2005 (criticizing Roper for reliance on international sources, and suggesting that this reliance may have developed as result of some U.S. Supreme Court Justices vacationing in Europe).

11. See Roper 543 U.S. at 622 (Scalia, J., dissenting) (claiming it is opinions of non-U.S. countries taking center stage in Roper majority decision, not opinions of U.S. Supreme Court); see also Cassell, supra note 8, at 5 (mentioning that Roper was not just about juvenile death penalty, but also about issue of international law's role in constitutional interpretation); Julia A. Youngs, Editorial, Public Policy Imposed By Court, SEATTLE POST-INTELLIGENCER, Mar. 9, 2005, at B6 (agreeing with U.S. Supreme Court's prohibition on juvenile death penalty, but criticizing Roper's reliance on international law).

12. See, e.g., S. Res. 92, 109th Cong. (2005) (expressing sense of U.S. Senate that U.S. courts should not decide constitutional cases based on non-U.S. cases, laws, or opinion, unless they "inform an understanding of the original meaning of the Constitution of the United States"); John R. Bolton, Is There Really "Law" in International Affairs?, 10 TRANSNAT'L L. & CONTEMP. PROBS. 1, 48 (2000) (denouncing international law as ineffective, trivial, and worthless); Peter Edelman, Time to Bench Judicial Activism, "WASH. POST, Feb. 25, 2004, at A25 (noting that Democrats and Republicans are both increasingly using unpopular court decisions in their political stump speeches as effective tool for motivating their political bases); Esther Kaplan, The Religious Right's Sense of Siege Is Fueling a Resurgence; Onward Christian Soldiers, NATION, July 5, 2004, at 33 (describing mobilization of Christian fundamentalists in reaction to Lawrence decision); Phyllis Schlafly, Supreme Court Justices Need to Focus on U.S. Constitution, COPLEY NEWS Svc., Nov. 2, 2004 (suggesting that U.S. Supreme Court Justices who reference non-U.S. laws should be impeached).

potential to shape future U.S. court decisions on a variety of important constitutional issues.\footnote{14}

Part I of this Note will review the influence of international law in early U.S. history as well as the current practice of the U.S. Supreme Court in citing international law, and will briefly explain how principles of international law are imported into U.S. courtrooms. Part II will examine competing legal theories on the proper role for international law in U.S. constitutional interpretation. Part III will argue that although it is proper for U.S. courts to reference international sources in their decisions, the U.S. Supreme Court’s current articulation of how courts should do so is deeply flawed. Part III will conclude by recommending a framework theory for how U.S. federal courts interpreting the U.S. Constitution might properly utilize international law.

I. INTERNATIONAL LAW IN NATIONAL COURTS

Using international law to interpret a national constitution naturally raises important issues of sovereignty, and in the case of the United States, invariably invites an analysis of historic practice.\footnote{15} Much about the way U.S. courts treat international law has changed since the United States was a newly formed Nation, devoid of a comprehensive judicial history.\footnote{16} In the early


years of the nineteenth century, when U.S. cultural, economic,
and military power was far from dominant, the U.S. Supreme
Court looked much more favorably upon international legal
sources than they do today.17 This Part will begin with an exami-
nation of how international law was perceived and utilized in
early U.S. history. This Part will then proceed to discuss the
basics of how international judge-made law is used in U.S.
courts, and will conclude by analyzing recent U.S. Supreme
Court cases citing international law.

A. U.S. Courts and International Law

The consultation of international sources in U.S. jurispru-
dence is not a new practice, nor is the criticism it engenders.18

17. See Ginsburg, supra note 3, at 330 (noting favorable pronouncements of early
U.S. Supreme Court Justices on merits of respecting international law); see also Stanley
N. Katz, A New American Dilemma?: U.S. Constitutionalism vs. International Human Rights,
tional theory of textualism, which hinges upon fidelity to original text, having devel-
oped from British system, which relied on unwritten constitutional tenets); Koh, Inter-
national Law as Our Law, supra note 2, at 44 (stating that there is much about U.S. Supreme Court's treatment of inter-
national law that has changed since 1789).

18. See, e.g., Chisholm v. Virginia, 2 U.S. (2 Dall.) 419, 466 (1793) (Wilson, J.)
(referencing "laws and practice of States and Kingdoms" in deciding whether a resident
of one state had standing to sue another state); Louis Henkin, International Law: Interna-
(stating that international law has been accepted as part of U.S. law since founding of
United States; therefore courts should continue to give effect to developments in inter-
national law); Jordan Paust, Customary International Law and Human Rights Treaties are
(1820) (Livingston, J., dissenting) (criticizing majority decision's reliance on non-U.S.
law in defining what constitutes piracy, and stating that U.S. Congress has duty "not to
refer the citizens of the United States for rules of conduct to the statutes or laws of any
foreign country"); Calabresi & Zimdahl, supra note 13, at 753-54 (cataloguing early U.S.
Supreme Court decisions referencing international law and noting early debates that
accompanied them).
International law is explicitly referenced in several important Founding documents: The Declaration of Independence aspires to give "decent respect to the opinions of mankind," and the U.S. Constitution explicitly invokes international law by delegating to Congress the power to define and punish offenses against the law of nations. In addition to these Founding documents, early U.S. courts referenced international law in a variety of situations.

1. Early U.S. Cases Citing International Law

Early U.S. history was marked by a series of naval conflicts. As a result, a number of early U.S. Supreme Court cases utilizing international law dealt with issues of maritime law and the law of war. In the cases described below, the Court looked to international sources in determining questions of statutory interpretation, federal jurisdiction, and constitutional interpretation.


20. See U.S. Const., art. I, § 8 (stating that "Congress shall have Power To . . . define and punish . . . Offences against the Law of Nations . . ."); id. art. III, § 2 (defining judicial power to exert to "all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . ."); see also Paust, supra note 18, at 301 (arguing that Founders clearly intended customary law of Nations to be supreme, binding law within United States).

21. See Curtis A. Bradley, The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law, 86 Geo. L.J. 479, 482 (1998) (explaining that U.S. courts have relied on international law in interpreting U.S. federal law since founding of the United States); see also Calabresi & Zimdahl, supra note 13, at 757 (noting that early U.S. Supreme Court decisions frequently referenced law of nations).


23. See Calabresi & Zimdahl, supra note 13, at 758, 768-83 (arguing that Founders intended international law to inform U.S. cases involving piracy and other heinous crimes; reviewing numerous early U.S. Supreme Court cases utilizing international law on subjects of piracy, prize, and law of war); see also Sarah H. Cleveland, Our International Constitution, 31 Yale J. Int’l L. 1, 19 (2006) (noting that international law has informed U.S. law of war jurisprudence since Founding).
a. The *Charming Betsy*: Statutory Interpretation

In 1804, fifteen years after the U.S. Constitution was ratified, the U.S. Supreme Court decided the case of *Murray v. Schooner Charming Betsy*. At the time, the United States was engaged in an undeclared war with France: the U.S. Congress had passed a law prohibiting trade with France, and U.S. President John Adams had ordered the U.S. Navy to capture vessels suspected of engaging in commerce with France or any of its colonies. The Danish-owned *Charming Betsy* was subsequently captured on suspicion of trading with the French, and brought to the United States. The owner of the *Charming Betsy* sued for the return of his boat, and the case reached the U.S. Supreme Court, which held that the taking was unjustified under U.S. law, since it involved a neutral Danish vessel. Importantly, Chief Justice John Marshall looked to international legal principles — which counseled against allowing the seizure of neutral vessels from non-combatant countries — in interpreting the statute at issue. Justice Marshall’s opinion articulated what has come to be known as the *Charming Betsy* canon of construction: that an act of Congress should never be construed to violate the law of nations if there is any other possible interpretation.

24. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (holding that U.S. law prohibiting trade with France was not violated by Dutch ship that traded with French colonies); see also Calabresi & Zimdahl, *supra* note 13, at 766 (characterizing *Charming Betsy* decision as “giving legal weight” to international sources of law).

25. See Federal Nonintercourse Act, ch. 10, § 1, 2 Stat. 7, 8 (1800) (expired 1801) (stating that any U.S. ships caught doing business with France would be “wholly forfeited,” and could subsequently be “seized and condemned” in any U.S. court); see also Bradley, *supra* note 21, at 485-87 (noting existence of undeclared war between United States and France, passage of Federal Nonintercourse Act, and U.S. President John Adams’ order to U.S. Navy to capture boats suspected of involvement with French).

26. See *Charming Betsy*, 6 U.S. (2 Cranch) at 116-17 (noting that U.S. Navy captured boat for suspected trade with French colony); see also Bradley, *supra* note 21, at 486 (explaining details surrounding capture of *Charming Betsy* by U.S. Navy).

27. See *Charming Betsy*, 6 U.S. (2 Cranch) at 120-21 (stating that *Charming Betsy* was not forfeitable, since it was Danish-owned); see also Bradley, *supra* note 21, at 486-87 (noting challenge to *Charming Betsy*’s seizure by original owner; explaining that U.S. Supreme Court held seizure unjustified).

28. See *Charming Betsy*, 6 U.S. (2 Cranch) at 118 (stating that acts of U.S. Congress should be interpreted so as not to conflict with law of nations); see also Calabresi & Zimdahl, *supra* note 13, at 766 (characterizing *Charming Betsy* decision as giving legal significance to international sources of law).

29. See *Charming Betsy*, 6 U.S. (2 Cranch) at 118 (holding that “an act of Congress ought never to be construed to violate the law of nations if any other possible construc-

Four years later, the Court was presented with another case involving a seized ship, and once again international law was invoked, this time to determine the scope of the Court's jurisdiction. A French ship had captured a trading vessel carrying a cargo of coffee owned by a U.S. citizen as it sailed from the French colony of Santo Domingo to the United States. A French tribunal in Santo Domingo condemned the captured vessel and sold it to another U.S. citizen, who transported the coffee to South Carolina, where the original U.S. owner subsequently brought suit to recover the cargo. The case reached the U.S. Supreme Court on the question of whether U.S. courts had jurisdiction to examine the findings of non-U.S. courts or tribunals — in this case, the French tribunal in Santo Domingo. The Supreme Court examined contemporaneous English cases addressing the ability of English courts to review the judgments of non-English tribunals. Each English case confirmed the Court's ultimate holding — that they did indeed
have jurisdiction to evaluate the validity of decisions made by non-U.S. tribunals.\textsuperscript{35}

c. Brown v. United States: Constitutional Interpretation

In addition to statutory interpretation and jurisdictional interpretation, early U.S. Supreme Court decisions also used international sources as an aid in constitutional interpretation.\textsuperscript{36} In Brown v. United States, the U.S. Government had seized a cargo of lumber that had been purchased by a U.S. citizen from a British seller just prior to the War of 1812.\textsuperscript{37} The U.S. purchaser sued, and the U.S. Supreme Court invalidated the seizure, interpreting the War Clause of the U.S. Constitution — which gives Congress the power to “make Rules concerning Captures on Land and Water”\textsuperscript{38} — by reference to the writings of a number of non-U.S. jurists.\textsuperscript{39} The Court found that the power to declare war required congressional authorization, which had been given, but that seizure of property within the United States required a separate congressional authorization — it was not implicit in a declaration of war.\textsuperscript{40} In other words, the Court looked to the writings of non-U.S. legal scholars and the law of nations to interpret the

\textsuperscript{35} See Rose, 8 U.S. (4 Cranch) at 270-72 (examining English cases in determining whether U.S. Supreme Court had power to review determinations of French tribunal regarding seizure of U.S. cargo ship; noting that English cases establish that English courts may examine jurisdictional competency of non-English tribunals); see also Calabresi & Zimdahl, \textit{supra} note 13, at 767 (concluding that Rose v. Himely was “clear example” of early U.S. Supreme Court giving legal weight to non-U.S. law).


\textsuperscript{37} See Brown, 12 U.S. (8 Cranch) at 121-22 (describing seizure of cargo purchased by U.S. citizen prior to War of 1812); see also Calabresi & Zimdahl, \textit{supra} note 13, at 771 (stating that Brown interpreted U.S. Constitution in way that “would accord with the law of nations”).

\textsuperscript{38} See Brown, 12 U.S. (8 Cranch) at 126 (utilizing law of nations to interpret War Clause); see also Calabresi & Zimdahl, \textit{supra} note 13, at 770 (noting that Brown held that declaration of war does not serve as permission for executive to confiscate property).

\textsuperscript{39} See Brown, 12 U.S. (8 Cranch) at 124-25 (citing writings of non-U.S. jurists such as Bynkershoek, Chitty, and Vattel, for proposition that seizure of property during wartime, even enemy property, is not directly related to declaration of war); see also Calabresi & Zimdahl, \textit{supra} note 13, at 770 (describing Brown’s reliance on non-U.S. jurists).

\textsuperscript{40} See Brown, 12 U.S. (8 Cranch) at 125-26 (stating that a declaration of war “has only the effect of placing the two nations in a state of hostility,” but does not automatically allow seizures of enemy property); see also Ingrid Brunk Wuerth, \textit{Authorizations for the Use of Force, International Law, and the Charming Betsy Canon}, 46 B.C. L. Rev. 293, 296
scope and power of the War Clause of the U.S. Constitution.41

2. How International Law Interacts With U.S. Courts

Over the years, what was once referred to as ‘the law of nations’ has become synonymous with the term ‘customary international law’ ("CIL"), a body of often unwritten law that must be interpreted and applied by U.S. courts.42 Today, the two major types of international law applied in U.S. courtrooms are CIL and international agreements.43 Both have historically influenced U.S. judicial decisions in cases dealing with subjects such as diplomatic immunity, the law of war, and piracy.44 For the purposes of this Note, only CIL, an entirely judicially-created form of federal law, will be analyzed.45 Because the creation of

n.10 (2005) (noting that Brown held that U.S. President could not confiscate private property without specific congressional authorization).

41. See Brown, 12 U.S. (8 Cranch) at 125-26 (warning that U.S. Constitution should not be interpreted as defining established rules of war different from those of other Nations); see also Calabresi & Zimdahl, supra note 13, at 771 (explaining that Brown construed War Clause so as not to conflict with international norms of warfare).

42. See Reestatement (Third), supra note 29, § 1 reporters’ note 5 (declaring CIL and treaties to be supreme over laws of U.S. states); see also Bradley & Goldsmith, supra note 16, at 819 (noting that modern CIL is directly descended from law of nations); Paust, supra note 18, at 301-05 (equating “Law of Nations” with CIL, and giving numerous examples of early applications of CIL in U.S. courts); see also Bradley & Goldsmith, supra note 16, at 817 & n.10 (listing CIL and international agreements as primary sources of international law utilized by U.S. courts).

43. See United States v. Belmont, 301 U.S. 324, 330-31 (1937) (recognizing power of executive agreements); see also Reestatement (Third), supra note 29, intro. (noting that most international law mentioned in Reestatement (Third) of the Foreign Relations Law of the United States ("Reestatement (Third)") comes from CIL and international agreements); Bradley & Goldsmith, supra note 16, at 817 & n.10 (listing CIL and international agreements as primary sources of international law utilized by U.S. courts).


45. See Sosa, 542 U.S. at 715 (noting that in early U.S. history, law of nations included “a body of judge-made law” which carried “an international savor”); see also
international agreements — such as executive agreements, trade agreements, or treaties — are created by (or with input from) the executive or legislative branches of the U.S. government, they are less helpful in illustrating the debate over the use of international sources in U.S. judicial decisions. Historically, international law norms were most often used to resolve disagreements between Nations, a kind of international *stare decisis* that U.S. courts distilled from the customs and usages of civilized Nations, international treaties, opinions of eminent statespersons, ordinances of non-U.S. States, text-writers of authority, and writings of distinguished jurists. The latter half of the twentieth century, however, has seen the birth of the "human rights era," which is marked by an expanding body of human rights cases referencing international law. As international law is increasingly used to regulate how Nations deal with their own citizens, a number of landmark U.S. cases involving constitutional issues relating to affirmative action, the death penalty, and sexual orientation have relied in part on international law. These cases

Kelly, *supra* note 42, at 527 (criticizing CIL as undemocratic because it is made by judges rather than legislatures). *But see* Henkin, *supra* note 18, at 1565 (describing process of discerning CIL as more akin to process of "finding" rather than "creating").

46. See U.S. CONST., art. II, § 2, cl. 2 (laying out treaty ratification process); *see also* Bradley & Goldsmith, *supra* note 16, at 817-18 (contrasting CIL and treaty power).

47. See *The Paquete Habana*, 175 U.S. 677, 700-01 (1900) (quoting WHEATON'S INTERNATIONAL LAW, (8th ed.) § 15) (listing sources to be consulted in deriving international law); *see also* Henkin, *supra* note 18, at 1561 (noting that federal courts derive precepts of international law from political actions of Nations of world, not from their own judgments or U.S. legal precedent).

48. See *Sosa v. Alvarez-Machain*, 542 U.S. 728-29 (2004) (Souter, J.) (stating that in future, courts may continue to recognize evolving norms of international law); *see also* Kadic v. Karadzic, 70 F.3d 292, 299 (2d Cir. 1995) (holding certain types of conduct violative of law of Nations, whether undertaken by government officials or as private citizens); Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980) (holding practice of torture by government officials to violate principles of CIL).

49. Because the scope of this Note does not encompass international agreements or treaties, the terms "international law" and CIL are used interchangeably throughout.

50. See Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d. Cir. 1980) (interpreting CIL as prohibitive of torture, also sufficient to establish subject matter jurisdiction in case awarding damages to family whose son was tortured and killed in Paraguay by Paraguayan military official); *see also* Bradley & Goldsmith, *supra* note 16, at 840-41 (asserting that content of CIL has changed, expanding since World War Two ("WWII") to provide redress to individuals in human rights cases).

51. See *Roper v. Simmons*, 543 U.S. 551, 575-78 (citing international sources to discern worldwide consensus against executing juvenile offenders); *see also* Lawrence v. Texas, 539 U.S. 558, 576-77 (2003) (noting worldwide trend against constitutionality of laws criminalizing consensual adult sexual relations); Grutter v. Bollinger, 539 U.S. 306,
have been criticized by commentators who point out that international legal norms have historically been invoked in cases concerning matters of foreign policy, rather than in cases dealing with individual human rights, and claim that modern U.S. courts have given international law too much power. Despite this criticism, however, a growing community of academics, judges, and litigators support the judicial practice of consulting international law, not only as consistent with the intent of the Framers of the U.S. Constitution, but also as a necessary component of a successful modern judicial system in an increasingly globalized world.

a. Judicially-Defined International Law

In the absence of an explicit constitutional provision, legislation, or treaty, a Nation may still be bound by CIL, a set of


52. See Lawrence, 539 U.S. at 598 (Scalia, J., dissenting) (describing majority opinion's discussion of non-U.S. opinions as "meaningless dicta," but also as "[d]angerous dicta . . . since this court . . . should not impose foreign moods, fads or fashions on Americans." (internal quotation marks omitted); see also Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring) (stating that U.S. treaties generally do not create privately enforceable rights in U.S. courts); Bradley & Goldsmith, supra note 16, at 817 (criticizing jurisprudential theories that consider CIL as powerful as federal law). See generally Ramsey, Part of Our Law, supra note 16, at 191-94 (providing overview of legal theories that seek to exclude international law from U.S. courts).

53. See Tel-Oren, 726 F.2d at 813-814 (Bork, J., concurring) (claiming that international law was historically only invoked in order to avoid conflicts with other Nations, such as in cases involving ambassadors or in piracy cases); see also Bradley & Goldsmith, supra note 16, at 873-76 (criticizing use of international law in human rights cases as without precedent).

54. See T. Alexander Aleinikoff, International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate, 98 Am. J. Int'1 L. 91, 93 (2004) (describing increasing power of CIL); see also Bradley & Goldsmith, supra note 16, at 821 (claiming that CIL now regulates many areas of law that were traditionally left to national governments to control).

55. See Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 163 (D.C. Cir., 2004) (stating that U.S. policy of denying enemy combatants their rights under Geneva Convention endangers U.S. citizens captured abroad by non-U.S. countries, who may be denied their rights as retaliation); see also Paust, supra note 18, at 335-36 (claiming that Framers, text, and structure of U.S. Constitution, along with overwhelming patterns of legal expectation since beginning of United States support current trend in judicial decision making utilizing CIL as law of United States); Peter J. Spiro, The New Sovereignists, FOREIGN AFF., Nov.-Dec. 2000, at 9 (arguing that forces of economic globalism will eventually force United States to accept international legal and human rights norms).
international rules,\(^5\) derived through the general and consistent practice of Nations, and conducted with a sense of legal obligation.\(^5\) As the cases discussed above show, international law was used by early U.S. courts as an interpretive aid for a variety of legal issues. Over the years, U.S. courts and legal scholars have concluded that CIL, as the modern equivalent of the law of nations, has the power of federal common law — judge-made federal rules — in U.S. courts.\(^5\)

i. Customary International Law ("CIL")

An early application of CIL — known at the time as the "law of nations" — in U.S. courts occurred in 1900, in *The Paquete Habana.*\(^5\) During the Spanish-American war, U.S. President William McKinley issued a Proclamation stating that enemy vessels could be seized as prizes of war according to the rules set forth in the law of nations.\(^6\) Pursuant to this Proclamation, a U.S. gunboat seized the *Paquete Habana*, a small fishing vessel, along the coast of Cuba.\(^6\) Over the objections of the owner and crew, the *Paquete Habana* was taken to Key West, Florida, where it was

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56. See Aleinikoff, *supra* note 54, at 93 & n.14 (discussing controversy over theory that United States might be bound by CIL norms it has not assented to); see also Kelly, *supra* note 42, at 451 (arguing that CIL should be abolished because it is undemocratic and difficult to apply). See generally Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 Va. J. Int’l L. 365, 369 (2002) (noting possibility, before Roper was decided, that if CIL has status of federal law, then state death penalty statutes might be preempted by federal law).

57. See Restatement (Third), *supra* note 29, § 109(2)-(3) (noting that term "opinio juris" is often used interchangeably with "a sense of legal obligation" when discussing CIL, and that international agreements or treaties can serve to create CIL when widely ratified); see also Bradley & Goldsmith, *supra* note 16, at 817-18 (providing overview of how CIL is created).

58. See Sosa v. Alvarez-Machain, 542 U.S. 692, 730-31 (2004) (discussing status of CIL as federal common law); see also Stephens, *supra* note 42, at 394-95 (stating that view of CIL as equivalent to federal common law has become widely accepted).


61. See *The Paquete Habana*, 175 U.S. at 678-79 (recounting details of seizure); see also Schneebaum, *supra* note 60, at 81 (noting seizure of Paquete Habana by U.S. vessel).
condemned and sold as a prize of war. The owners of the boat appealed to the U.S. Supreme Court, which was asked to decide if the law of nations had been violated. The Court engaged in a lengthy exploration of what would now be considered CIL, analyzing the customary treatment of coastal fishing vessels in times of war, and concluded that such vessels were exempt from capture as prizes of war. In its opinion, the Court issued the oft-cited declaration that "international law is part of our law." The Restatement (Third) of the Foreign Relations Law of the United States (the "Restatement (Third)") explains that a consistent practice among a majority of Nations eventually ripens into a principle of CIL, which, much like a multilateral treaty, creates obligations among States. Unlike treaties, however, CIL principles require no promulgation or ratification by the executive or legislative branches of the U.S. Government; instead, they are formed by the political actions of the Nations of the world. U.S. judges then determine and apply CIL, which has the force

62. See The Paquete Habana, 175 U.S. at 679 (noting that Paquete Habana was condemned in Key West and sold for US$490); see also Michael J. Glennon, Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?, 80 Nw. U. L. Rev. 321, 322 (1985) (noting that Paquete Habana was condemned and sold as prize of war despite its owners' legal objections).

63. See The Paquete Habana, 175 U.S. at 686 (characterizing issue to be decided as whether Cuban coastal fishing boats were subject to capture by U.S. vessels as prizes of war); see also Glennon, supra note 62, at 322 (noting that The Paquete Habana opinion involved lengthy analysis of international law).

64. See The Paquete Habana, 175 U.S. at 686 (stating that prohibition on seizure of coastal fishing vessels began as "an ancient usage among civilized nations" and had ripened into a rule of international law); see also Glennon, supra note 62, at 322 (explaining that The Paquete Habana has become leading case concerning incorporation of international norms into U.S. law).

65. See The Paquete Habana, 175 U.S. at 700 (holding that traditional prohibition against seizing coastal fishing vessels had ripened from principle of comity into settled principle of international law); see also Henkin, supra note 18, at 1555 (stating that when decided, holding of The Paquete Habana was uncontroversial, since it was "merely restating what had been established principle for the fathers of American jurisprudence and for their British legal ancestors").

66. See Restatement (Third), supra note 29, § 102 cmt. b (observing that failure of significant numbers of "important" States to adopt certain practice may prevent principle from becoming accepted part of CIL); see also Henkin, supra note 18, at 1561-62 (arguing that in some senses, federal judges "find" CIL rather than "create" it).

of federal common law — judge-made rules of decision — though whether it is fully equivalent to federal common law is debatable. 68 According to the Restatement (Third), the following human rights violations have “ripened” into CIL norms, and are prohibited: a consistent pattern of violating internationally recognized human rights, genocide, murder, prolonged arbitrary detention, slavery, systematic racial discrimination, and torture. 69

ii. Jus Cogens Norms

Among the most well-established tenets of CIL are jus cogens norms, also known as “peremptory norms” of international law. 70 These norms generally encompass types of human rights violations recognized as the most heinous crimes defined by CIL, such as genocide or slavery. 71 They are considered non-derogable duties — duties which cannot be violated — that can be modified only by subsequent jus cogens norms, and summarily void any international agreements or treaties that conflict with them. 72 According to jus cogens, certain CIL norms — codified or otherwise — can bind States if they have ripened into a wide-

68. See Michael J. Glennon, Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Constitutional?, 80 NW. U.L. REV. 321, 347 (1985) (noting that although U.S. courts have only recently equated CIL with federal common law, they have always considered law of nations to be U.S. law); Henkin, supra note 18 at 1561-63 (describing similarities, differences between federal common law and CIL); see also Paust, supra note 18, at 301 (stating that CIL has historically been construed as having power of federal common law).

69. See Restatement (Third), supra note 29, § 702 cmt a. (noting that list of CIL norms is not necessarily complete, and is open to creation of new human rights); see also Bradley & Goldsmith, supra note 16, at 834-38 (noting that Restatement (Third) attributes more power to CIL than previous Restatements).

70. See Restatement (Third), supra note 29, § 102 cmt. k (defining jus cogens norms as rules of international law permitting no derogation, and which “prevail over and invalidate international agreements and other rules of international law in conflict with them”); see also A. Mark Weisburd, American Judges and International Law, 36 VAND. J. TRANSNAT’L L. 1475, 1488 (2003) (noting that jus cogens norms are considered most powerful of CIL norms).

71. See Restatement (Third), supra note 29, § 702 cmt. n (including genocide and slavery among jus cogens norms); see also Weisburd, supra note 70, at 1488 (noting that jus cogens norms apply to most heinous types of human rights violations).

72. See Restatement (Third), supra note 29, § 702 cmt. n (defining jus cogens norms as non-derogable duties); see also Weisburd, supra note 70, at 1488-89 (concluding that jus cogens norms are accepted as class of rules of international law from which States are not permitted to derogate).
spread international consensus.\textsuperscript{73} For instance, until \textit{Roper} was decided, there was significant debate over whether the U.S. policy of executing juveniles violated \textit{jus cogens} norms, as the practice is condoned by only a handful of countries in the entire world.\textsuperscript{74} On the other hand, the acceptance of same-sex marriage as a fundamental right has likely not achieved the extremely demanding "widespread consensus" requirement necessary for classification as a \textit{jus cogens} norm.\textsuperscript{75} Like CIL norms, \textit{jus cogens} norms are treated like federal common law in U.S. courts.\textsuperscript{76}

Despite the \textit{Restatement (Third)} definition of CIL and \textit{jus cogens} norms, and the application of CIL in a number of human rights cases in the United States,\textsuperscript{77} the process by which these principles are discerned remains uncertain.\textsuperscript{78} Part of this uncertainty arises from the premise that a significant number of important States may prevent norms from forming, by refusing to

\textsuperscript{73} See \textit{Restatement (Third)}, supra note 29, \S 102 cmt. b (stating that rules of international law may be formed by widespread international consensus among Nations); see also id. \S 102 cmt. k (noting that \textit{jus cogens} norms, once formed, cannot be superceded by contrary international agreements); Paust, supra note 18, at 305 (asserting that U.S. courts are bound by developments of CIL).

\textsuperscript{74} See \textit{Roper} v. Simmons, 543 U.S. 551, 575-77 (noting almost unanimous prohibition on execution of juveniles in world community); see also Koh, \textit{International Law as Our Law}, supra note 2, at 52 (noting, before \textit{Roper} was decided, that U.S. Supreme Court might use international consensus against juvenile death penalty as one factor in deciding issue).

\textsuperscript{75} See \textit{Restatement (Third)}, supra note 29, \S 702 cmt n. (identifying genocide, murder, and slavery as \textit{jus cogens} norms, but notably leaving out gender discrimination, prolonged arbitrary detention, repeated patterns of gross human rights abuses, right to property, systematic racial or religious discrimination, and torture); see also id. \S 702 cmt. a (leaving open possibility that new rights may achieve status of CIL, and presumably \textit{jus cogens}, in future); see also Koh, \textit{International Law as Our Law}, supra note 2, at 52 (speculating that U.S. Supreme Court may, in future, rely on worldwide consensus against death penalty to strike down death penalty as unconstitutional).


\textsuperscript{77} See, e.g., Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995) (noting that some types of conduct violates law of Nations, regardless of whether undertaken by State officials or private citizens); \textit{Filartiga v. Pena-Irala}, 630 F.2d 876, 884 (2d Cir. 1980) (holding State-sanctioned torture a violation of CIL).

\textsuperscript{78} See Henkin, supra note 18, at 1566 (admitting that "[t]he process by which [CIL] is created is hardly certain"); see also Kelly, supra note 42, at 450 (noting lack of common understanding or agreement on formation process for CIL).
participate in a given practice.\textsuperscript{79} In addition to CIL's uncertain formation process, some commentators regard it as an elitist concept: Because "text-writers of authority" are consulted when a judge seeks to determine CIL, some critics argue that particularly influential law professors' theories on CIL are often used by U.S. courts in their determination of what the content of CIL actually is.\textsuperscript{80} These two persistent veins of criticism undergird the dominant objection: that because CIL principles may be heavily influenced by the actions of non-U.S. governments and legal scholars outside the United States, its application in U.S. courts is undemocratic.\textsuperscript{81}

b. Federal Common Law and CIL

To fully understand the use of these judicially-formed international law principles in U.S. courts, one must first understand the basic workings of federal common law. Federal common law may be defined as U.S. federal law created by a U.S. court (usually a federal court) when the substance of the rule is not clearly suggested by the text of federal or constitutional law.\textsuperscript{82} The modern concept of federal common law arose in the wake of the

\textsuperscript{79} Restatement (Third), supra note 29, § 102 cmt. d. (explaining that although States may be bound by CIL without their explicit consent, "a [S]tate that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures"); see also Curtis Bradley, The Juvenile Death Penalty and International Law, 52 Duke L.J. 485, 492 (2002) (claiming that United States has "opted out" of worldwide consensus against juvenile death penalty).

\textsuperscript{80} See Bradley & Goldsmith, supra note 16, at 836 (criticizing Restatement (Third), written in part by Professor Louis Henkin, as method of "bootstrapping," because it cites Henkin's own scholarly writings as part of a determination of what legal subjects had reached "consensus" in international community); see also Bolton, supra note 12, at 7 (deriding notion of international norms distilled from writings of academics).

\textsuperscript{81} See Weisburd, supra note 70, at 1479 (criticizing formula federal courts use to derive CIL because it "essentially converts law professors into philosopher kings" who then "impose their ideas of what the law should be under the guise of describing the law's content"); see also Bolton, supra note 12, at 7 (criticizing CIL as too reliant upon personal opinions of judges). But see Detlev F. Vagts, Hegemonic International Law, 95 Am. J. Int'l L. 843, 847 (2001) (claiming that as most powerful Nation in world, United States effectively can halt development of any new CIL norms by simply not participating in their development).

\textsuperscript{82} See Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99 Harv. L. Rev. 883, 890 (1986) (providing definition of federal common law); see also Hart & Wechsler's The Federal Courts and the Federal System 685 (5th ed. 2003) (reiterating Field's definition of federal common law as federal rules of decision that cannot be traced directly to federal statutes or constitutional commands) [hereinafter Hart & Wechsler].
well-known case, *Erie Railroad v. Tompkins*, which directed U.S. federal courts to apply state law to controversies which were not explicitly governed by federal statutes or Constitutional provisions. *Erie* put an end to the generalized common law that had up to that point been used by U.S. federal courts to overcome the laws of U.S. states under the regime of *Swift v. Tyson*.

What is less well-known, and what is more important for the purposes of this Note, is how *Erie*’s legal revolution affected the treatment of international law in U.S. courts. One year after *Erie* was decided, Philip C. Jessup recognized the importance of examining what effect its holding might have on international law. Jessup warned that if *Erie*’s prohibition on federal common law was interpreted broadly, it would mean U.S. state courts would be left to interpret issues of international law — an undesirable outcome, in his opinion.

Although *Erie* dispensed with the conception of a generalized federal common law, it left behind a body of federal, judge-made law, known as “specialized” federal common law. An ex-

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84. *See Erie*, 304 U.S. at 78 (holding that U.S. federal courts must apply state law principles to cases not involving federal statutes or the U.S. Constitution); see also *Field*, *supra* note 82, at 885 (noting that *Erie* held that federal courts must use state law where there is no federal or constitutional basis for decision).

85. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) (holding federal, not state interpretation of common law to be supreme); see also *Hart & Wechsler*, *supra* note 82, at 628 (explaining that under *Swift*, U.S. federal courts looked to general principles of federal law, rather than state law, in deciding numerous cases).

86. *Compare Stephens*, *supra* note 42, at 399 (stating that *Erie* decision played important role in defining CIL as federal common law), with Bradley & Goldsmith, *supra* note 16, at 817 (arguing that post-*Erie*, CIL should not be considered as federal common law).

87. *See Philip C. Jessup*, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 Am. J. Int’l L. 740, 741 (stating that *Erie* addressed only domestic law, not international law); see also Bradley & Goldsmith, *supra* note 16, at 827 (noting that modern conception of international law as specialized federal common law is founded upon Jessup’s argument).

88. *See Jessup*, *supra* note 87, at 742 (explaining why *Erie* decision should not be read as affecting interpretations of international law); see also Bradley & Goldsmith, *supra* note 16, at 827 (noting Jessup’s opposition to interpreting *Erie* as applying to international law).

89. *See Sosa*, 542 U.S. at 729-30 (noting that even after *Erie* decision, there exist “limited enclaves” of judge-created federal common law); see also *Hart & Wechsler*, *supra* note 82, at 685 (stating that “there is no longer serious dispute” that federal law
ample of "specialized" federal common law can be seen in *Clearfield Trust Co. v. United States*, which concerned a dispute over a forged check that had been drawn on the U.S. Treasury. Because there was no federal law on the subject, the U.S. District Court hearing the case assumed that under the *Erie* doctrine, state law would apply. On appeal, however, the Supreme Court held that *Erie* did not apply, and looked instead to judicially-created federal common law rules for deciding disputes involving U.S. commercial paper. The Court explained that because the case implicated serious federal concerns (the ability to issue U.S. Treasury checks) that originated from the text of the U.S. Constitution, it fell within the narrow category of cases that were still governed by specialized, judge-made federal common law.

*Clearfield Trust* has been followed by many cases in which federal courts have fashioned federal common law, though legal scholars still debate just when it is appropriate for a court to apply federal common law rather than state law. In *Textile Workers...* encompasses judge-made law); Henry J. Friendly, *In Praise of Erie — And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405 (1964) (explaining that *Erie* decision, which denied existence of generalized federal common law, led to development of "specialized" federal common law).

90. See *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943) (stating that *Erie* doctrine does not apply to cases involving vital U.S. interests, such as cases involving U.S. commercial paper); see also *Hart & Wechsler*, *supra* note 82, at 696 (explaining that *Clearfield* and numerous later cases have fashioned body of specialized federal common law).

91. See *Clearfield Trust*, 318 U.S. at 366 (recounting lower court's decision to apply Pennsylvania law, rather than federal common law, in determining dispute over forged check drawn on U.S. Treasury); see also *Field*, *supra* note 82, at 908-09 (noting that in *Clearfield*, U.S. Supreme Court applied a rule of federal common law rather than state law).

92. See *Clearfield Trust*, 318 U.S. at 366 (stating that *Erie* rule did not apply because case involved exercise of constitutional function); see also *Field*, *supra* note 82, at 908 (explaining that U.S. Supreme Court held state law inapplicable in *Clearfield* because uniform federal rule for business transactions was needed).

93. See *Clearfield Trust*, 318 U.S. at 367 (explaining that in absence of Congressional Act, federal courts must fashion rule governing commercial transactions with constitutional implications); see also Friendly, *supra* note 89, at 409 (identifying *Clearfield* as expressing theory of specialized federal common law).

v. Lincoln Mills, the U.S. Supreme Court clarified the procedure for determining federal common law.\footnote{Textile Workers v. Lincoln Mills, 353 U.S. 448, 449 (1957) (noting that case involved question of whether Labor Management Relations Act of 1947 ("Taft-Hartley Act") allowed federal courts to apply judge-made rules on enforceability of collective bargaining agreements, or whether they were required to apply state law; \textit{see also} Field, supra note 82, at 909-10 (noting that Lincoln Mills decision interpreted Taft-Hartley Act as allowing federal courts to fashion common law rules to enforce collective bargaining agreements).} Lincoln Mills involved the interpretation of the Labor Management Relations Act of 1947 ("Taft-Hartley Act"), a federal statute which allowed U.S. federal courts to hear labor disputes.\footnote{See Lincoln Mills, 353 U.S. at 449-50 (citing language of Taft-Hartley Act allowing labor disputes to be brought into federal courts); \textit{see also} Friendly, supra note 89, at 412 (noting that Congress gave federal judges power to fashion body of federal contract principles through passage of Taft-Hartley Act).} The dispute was between a union and its employer, who had entered into a collective bargaining agreement that specified arbitration as the final solution for grievances.\footnote{See Lincoln Mills, 353 U.S. at 449 (noting that case involved dispute between union and employer over enforcement of arbitration agreement); \textit{see also} Paul Lund, The Decline of Federal Common Law, 76 B.U. L. Rev. 895, 927-28 (1996) (explaining that Lincoln Mills arose from dispute between union and employer over enforcement of arbitration agreement).} When the union requested arbitration, the employer claimed that there was no federal or state remedy granting such relief, and a federal appellate court agreed.\footnote{See Lincoln Mills v. Textile Workers, 230 F.2d 81, 84 (5th Cir. 1956), \textit{rev'd}, 353 U.S. 448 (1957) (holding that although Taft-Hartley Act gave federal courts jurisdiction to hear labor disputes, in absence of express federal statute, agreements to arbitrate could not be specifically enforced); \textit{see also} Lincoln Mills, 353 U.S. at 449 (noting refusal of employer to submit to arbitration at request of union).} On appeal, the Supreme Court admitted that there was no explicit federal remedy addressing the enforceability of arbitration agreements, but declined to follow the command of \textit{Erie} that in the absence of a federal law, state law must be applied.\footnote{See Lincoln Mills, 353 U.S. at 449 (refusing to apply state common law rule against enforcement of arbitration contracts; applying federal common law rule instead); \textit{see also} Lund, supra note 97, at 928-29 (explaining that although state law would normally govern in case like Lincoln Mills, Supreme Court instead interpreted Taft-Hartley Act to authorize application of judicially-created federal common law rules).} Instead, the Court held that the Taft-Hartley Act implicitly authorized federal courts to apply federal common law to enforce col-
lective bargaining agreements.\textsuperscript{100} The proper rule, the Court stated, would be fashioned by federal courts, through an analysis of the objectives of the Taft-Hartley Act.\textsuperscript{101} Importantly, \textit{Lincoln Mills} explained that in formulating federal common law, federal courts would look to state law if it is "compatible with the purpose" of the federal objective, and that any state law applied would be "absorbed as federal law."\textsuperscript{102} Effectively, \textit{Lincoln Mills} articulated the principle that in determining the content of federal common law, federal courts have the power to choose among competing rules of decision, or to formulate their own rules, so long as the solution fits within the spirit of the overriding federal or constitutional objective.\textsuperscript{103}

Like federal common law, which is not derived from explicit congressional statutes, CIL is not derived from the explicit language of international treaties.\textsuperscript{104} Just as federal common law is determined by an examination of the underlying purpose of the federal interest at issue, CIL is found by looking to the practice of Nations in formulating international rules.\textsuperscript{105} Both federal

\textsuperscript{100} See \textit{Lincoln Mills}, 353 U.S. at 450-51 (stating that Taft-Hartley Act "authorizes federal courts to fashion a body of federal law" to enforce provisions of collective bargaining agreements); see also \textit{Field}, supra note 82, at 909-10 (explaining that Supreme Court interpreted federal legislation to allow for creation of federal common law rules enforcing arbitration agreements).

\textsuperscript{101} See \textit{Lincoln Mills}, 353 U.S. at 456-57 (stating that federal courts would create rule by looking to policy objectives of Taft-Hartley Act); see also \textit{Friendly}, supra note 89, at 412 (claiming that Congress mandated federal judges to fashion rules consistent with federal labor statutes rather than follow state labor statutes).

\textsuperscript{102} \textit{Lincoln Mills}, 353 U.S. at 457 (explaining that federal common law principles regarding labor disputes may be determined by looking to state law rules, but that such state laws will not be dispositive in formation of federal rules); see also Stephen L. Hayford, \textit{The Federal Arbitration Act: Key to Stabilizing and Strengthening the Law of Labor Arbitration}, 21 \textit{Berkeley J. Emp. \& Lab. L.} 521, 572-73 (2000) (noting that \textit{Lincoln Mills} directed U.S. federal courts to utilize "the range of judicial inventiveness" in determining federal common law rules).

\textsuperscript{103} See \textit{Lincoln Mills}, 353 U.S. at 456-57 (stating that federal common law will be fashioned by looking to purpose of federal government); see also Hayford, \textit{supra} note 102, at 572-73 (positing that \textit{Lincoln Mills} directed U.S. federal courts to fashion federal common law rules in labor disputes in accordance with national labor objectives).

\textsuperscript{104} See \textit{Field}, supra note 82, at 883 (explaining that U.S. federal common law principles are not found in explicit statutory or constitutional text); see also \textit{Restatement (Third)}, supra note 29, \S\ 102(2) (explaining that CIL is formed by "general and consistent practice of [S]tates followed by them from a sense of legal obligation").

\textsuperscript{105} See \textit{Lincoln Mills}, 353 U.S. at 456-57 (noting that federal courts formulating federal common law rules will be guided by federal policy objectives); see also \textit{Restatement (Third)}, supra note 29, \S\ 102(2) (stating that CIL is determined by looking to practice of Nations of the world).
common law and CIL are unique aspects of federal law; both are determined by judges, not legislatures, and both act to preempt contradictory state law.\footnote{106}{See Field, \textit{supra} note 82, at 883 (noting that federal common law is determined by U.S. judges and preempt state law); see also Paust, \textit{supra} note 18, at 305 (claiming that CIL, as determined by U.S. judges, is both federal law and supreme law of the land).}

\section*{B. Recent U.S. Cases Citing International Law}

Today, when the United States is one of the few remaining military superpowers and U.S. constitutional jurisprudence is among the most influential in the world,\footnote{107}{See Amy C. Harfeld, \textit{Oh Righteous Delinquent One: The United States' International Human Rights Double Standard — Explanation, Example, and Avenues for Change}, 4 N.Y. Crv. L. Rev. 59, 68-69 (2001) (noting that since fall of Soviet Union, United States has become primary world political and economic power); see also Vagts, \textit{supra} note 81, at 847 (criticizing U.S. pattern of abstention from CIL norms, claiming that as world's most powerful Nation, such norms can not develop without U.S. approval); Paul W. Kahn, \textit{Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order}, 1 CH. J. INT'L L. 1, 2 (2000) (claiming United States is sole superpower left in world); Charles Krauthammer, \textit{The Bush Doctrine; In American Foreign Policy, a New Motto: Don't Ask. Tell}, \textit{Time}, Mar. 5, 2001, at 42 (stating that United States is no longer "international citizen," and has become most dominant power in world "since Rome"). Cf. Bolton, \textit{supra} note 12, at 48 (describing hegemony of U.S. constitutional law); Choudhry, \textit{supra} note 2, at 821 (noting extensive influence U.S. Constitution has had upon writers of non-U.S. constitutions). But see L'Heureux-Dube, \textit{supra} note 2, at 29-40 (claiming that under Chief Justice William Rehnquist, U.S. Supreme Court jurisprudence has become less influential overseas, and noting that internationally, concept of "originalism" advocated by Justice Scalia is overwhelmingly disapproved of).}
it is unclear what role the laws and legal theories of other Nations should play in U.S. legal decisions.\footnote{108}{See generally \textit{Roper}, 543 U.S. at 577-79 (holding juvenile death penalty to be unconstitutional based in part on overwhelming worldwide consensus against it); Lawrence v. Texas, 539 U.S. 558, 576-77 (2003) (holding laws prohibiting consensual adult homosexual relations unconstitutional based in part on values of a "wider civilization"); Atkins v. Virginia, 536 U.S. 304, 316-17 n.20 (2002) (citing world community's over-}{\textit{Roper}} is the third in a series of recent Supreme Court decisions that highlight the debate over the proper scope and power attributed to international law in U.S. constitutional cases.\footnote{109}{See \textit{generally Roper}, 543 U.S. at 577-79 (holding juvenile death penalty to be unconstitutional based in part on overwhelming worldwide consensus against it); Lawrence v. Texas, 539 U.S. 558, 576-77 (2003) (holding laws prohibiting consensual adult homosexual relations unconstitutional based in part on values of a "wider civilization"); Atkins v. Virginia, 536 U.S. 304, 316-17 n.20 (2002) (citing world community's over-}

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ginia, a 2002 case prohibiting the execution of mentally retarded offenders, and Lawrence v. Texas, a 2003 decision holding the criminalization of homosexual sodomy unconstitutional. Like Roper, both of these decisions met with considerable criticism for their invocation of international law.

1. Atkins v. Virginia

In Atkins, the U.S. Supreme Court evaluated the constitutionality of executing mentally retarded offenders. In 1996, Daryl Renard Atkins and an accomplice kidnapped, robbed, and ultimately murdered a victim they had abducted from a local convenience store. Atkins was convicted of capital murder, and despite testimony by a forensic psychologist that he was mentally retarded, was sentenced to death in Virginia state

whelming disapproval of juvenile death penalty in opinion holding such punishment unconstitutional).

110. Compare Atkins, 536 U.S. at 316 n.20 (Stevens, J.) (stating that within world community, executions of mentally retarded offenders is overwhelmingly disapproved of), with id. at 347 (Scalia, J., dissenting), (criticizing majority opinion for referencing opinions of “so-called” world community, whose views and practices are “irrelevant,” and whose conceptions of justice “are (thankfully) not always those of our people”). See generally Linda Greenhouse, The Supreme Court: The Death Penalty; Citing ‘National Consen-


111. See Lawrence, 539 U.S. at 572-73 (citing advisory committee report to British Parliament and European Court of Human Rights decision in Dudgeon v. United King-

dom, 45 Eur. Ct. H.R. (ser. A) (1981)); see also id. at 598 (Scalia, J., dissenting) (referring to majority’s references to international law as “[d]angerous dicta”); Joan L. Larsen, Importing Constitutional Norms from a “Wider Civilization”: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation, 65 Ohio St. L.J. 1283, 1284 (2004) (noting that Lawrence may have sparked judicial trend towards citation of international opinions).


113. See Atkins v. Virginia, 536 U.S. 304, 307 (2002) (framing question to be decided as whether death penalty constituted cruel and unusual punishment for mentally retarded offenders); see also Ramsey, International Materials, supra note 15, at 81 (noting that Atkins involved question of whether execution of mentally handicapped defendant violated Eighth Amendment’s prohibition on cruel and unusual punishment).

114. See Atkins, 536 U.S. at 307 (recounting details of Atkins’s crime); see also Kristen F. Grunewald, Case Note, United States Supreme Court: Atkins v. Virginia, 122 S. Ct. 2242 (2002), 15 CAP. DEF. J. 117, 117 (2002) (explaining that Atkins and accomplices were convicted of kidnapping and killing victim).
On appeal to the U.S. Supreme Court, Atkins argued that the execution of mentally retarded offenders was cruel and unusual punishment prohibited by the Eighth Amendment of the U.S. Constitution. The majority opinion looked to the practices of other U.S. states and found that the execution of mentally retarded offenders had become extremely rare. On the basis of this analysis the Court ruled that a national consensus had developed against such executions, and held the practice to be unconstitutional as a violation of the Eighth Amendment’s prohibition on cruel and unusual punishment. In a footnote to the majority opinion, however, the Court also noted that executing mentally retarded offenders was widely disapproved of in the world community, citing a legal brief from the European Union on the issue. Although the Court went on to state that world opinion was not dispositive and served only to support their decision, the dissenting opinions were sharply critical of the majority’s invocation of non-U.S. sources.

115. See Atkins, 536 U.S. at 308-09 (stating that Atkins was convicted of capital murder and sentenced to death in Virginia state court; noting that defense introduced evidence that Atkins was mentally retarded during penalty phase); see also Grunewald, supra note 114, at 117 (recounting Atkins’s conviction and testimony of forensic psychologist, who declared him “mildly mentally retarded”).

116. See Atkins, 536 U.S. at 310 (noting Atkins’s contention that mentally challenged offenders cannot be executed under U.S. law); see also Grunewald, supra note 114, at 118 (explaining Atkins’s argument that death penalty was cruel and unusual punishment for mentally retarded offenders).

117. See Atkins, 536 U.S. at 311-12 (surveying previous U.S. Supreme Court jurisprudence on changing meaning of “cruel and unusual punishment”); see also Grunewald, supra note 114, at 118-20 (discussing Atkins’s examination of state practice in executing mentally retarded offenders).

118. See Atkins, 536 U.S. at 321 (finding consensus against imposition of death penalty for mentally retarded offenders); see also Grunewald, supra note 114, at 118-19 (noting U.S. Supreme Court’s holding that execution of mentally retarded offenders is unconstitutional, based on consensus of U.S. states against practice).


120. See Atkins, 536 U.S. at 316 n.21 (stating that although world opinion is not dispositive, its consistency with legislative record supports finding that U.S. consensus against executing mentally retarded offenders has developed). But see id. at 322-26 (Rehnquist, C.J., dissenting) (criticizing majority opinion for citing world opinion and claiming that Court had previously explicitly rejected reliance on non-U.S. sources); see
2. Lawrence v. Texas

In 2003, the U.S. Supreme Court decided Lawrence v. Texas, and struck down a Texas law that criminalized consensual homosexual sodomy.\(^{121}\) *Lawrence* explicitly overruled the Court’s decision seventeen years earlier in *Bowers v. Hardwick*, which upheld a state law on the same issue.\(^{122}\) The majority opinion in *Lawrence* included a substantial discussion of *Dudgeon v. United Kingdom*,\(^ {123}\) a European Court of Human Rights case that invalidated an Irish law similar to the Texas statute at issue in *Lawrence*. In addition, the Court considered the experience of British Parliament, which had received a report recommending that laws criminalizing consensual homosexual relations be repealed.\(^ {124}\)

Once again, the majority’s reference to international law prompted a strongly-worded dissent, which argued that an analysis of U.S. constitutional rights should not include references to the practices of non-U.S. Nations.\(^ {125}\) In addition to characterizing references to international law as “meaningless” and “dangerous,” the dissent stated that the Court should not impose “foreign moods, fads, or fashions on Americans.”\(^ {126}\) The dissent


\(^{122}\) See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding state statute criminalizing homosexual sodomy as constitutional), rev’d, 539 U.S. 558 (2003); see also Calabresi & Zimdahl, *supra* note 13, at 877 (noting that Justice Kennedy, who authored *Lawrence*, was overruling *Bowers*, which he had concurred in).

\(^{123}\) See *Lawrence*, 539 U.S. at 576 (noting that European Court of Human Rights “has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*”); see also Calabresi & Zimdahl, *supra* note 13, at 877 (recounting *Lawrence* decision’s discussion of *Dudgeon v. United Kingdom*).

\(^{124}\) See *Lawrence*, 539 U.S. at 572-73 (referencing a 1957 British Parliament committee report recommending abolition of laws prohibiting homosexual relations); see also Calabresi & Zimdahl, *supra* note 13, at 878 (noting that *Lawrence* decision discussed the experience of British Parliament).

\(^{125}\) See *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (arguing that constitutional rights “do not spring into existence” just because foreign countries decriminalize conduct); see also Calabresi & Zimdahl, *supra* note 13, at 878 (characterizing Justice Scalia’s dissent in *Lawrence* as “biting”; noting dissent’s criticism of majority opinion’s citation of non-U.S. law).

\(^{126}\) *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (objecting to majority opinion’s reference to non-U.S. laws and practices); see also Calabresi & Zimdahl, *supra* note...
thus implied that *Lawrence* relied on international law to a greater extent than the majority opinion made clear.\(^{127}\)

3. *Roper v. Simmons*

As the latest case to consider the role of international law in U.S. courts, *Roper* explicitly illustrates the differing philosophies of the U.S. Supreme Court Justices on the subject.\(^{128}\) *Roper’s* majority opinion squarely addressed the relevance of international sources in U.S. legal decisions, as did its dissenting opinions.\(^{129}\) Writing for the majority, Justice Kennedy divided his opinion into four parts: The first part discussed the facts of the case, the second surveyed the Court’s Eighth Amendment jurisprudence to date, and the third discussed the Court’s reasoning for holding the juvenile death penalty unconstitutional.\(^{130}\) The fourth — and most controversial — part of the majority’s opinion ex-

\(^{127}\) Lawrence, 539 U.S. at 598 (Scalia, J., dissenting) (arguing that international law citations should be considered “meaningless dicta”); see also Calabresi & Zimdahl, supra note 13, at 878 (stating that *Lawrence* decision referenced and relied on international law).


\(^{129}\) See *Roper*, 543 U.S. at 575-79 (referencing international laws as instructive in determining whether execution of juvenile offenders constitutes cruel and unusual punishment); see also Rosen, supra note 128 (criticizing *Roper*, claiming it to be symptomatic of international culture wars, with U.S. courts striking down traditional practices in name of international moral values); Young, supra note 56, at 365 (characterizing debate over international law in U.S. courts as “[o]ne of legal academia’s more heated spats in recent years”); Charles Lane, *The Court Is Open for Discussion; AU Students Get Rare Look At Justices’ Legal Sparring*, WASH. POST, Jan. 14, 2005, at A1 (describing public debate at American University School of Law between Justices Scalia, Breyer, on topic of international law in U.S. constitutional interpretation).

\(^{130}\) See *Roper* 543 U.S. at 556-60, 560-64, 564-75 & 575-79 (delineating four parts of Justice Kennedy’s opinion); see also Greenhouse, supra note 110 at A1 (noting controversy over international references in *Roper*).
amined the views of non-U.S. courts and of the international community on the juvenile death penalty.\(^{131}\) The Court noted that the United States was the only Nation in the world that continued to sanction the execution of minors for their crimes, and concluded that the overwhelming international condemnation of the practice confirmed the Court’s holding that the death penalty was disproportionate punishment for offenders under age eighteen.\(^{132}\)

Though dissenting, Justice Sandra Day O’Connor specifically affirmed the relevance of international sources.\(^{133}\) Both the majority opinion and one of the dissents thus endorsed the practice of consulting international sources in U.S. decisions, but only as confirmation of a conclusion already reached by the Court’s independent interpretation of the U.S. Constitution.\(^{134}\) Roper’s dissent, however, disputed the majority’s holding and rationale, and serves to illuminate the central controversy addressed by this Note.\(^{135}\) In particular, the dissent complained that the majority opinion was using international law as part of the reasoned basis for its opinion, rather than as confirmation of

\(^{131}\) See Roper 543 U.S. at 575 (finding international consensus against juvenile death penalty instructive in holding such punishment unconstitutional); see also Greenhouse, supra note 110 (noting that fourth part of Kennedy’s Roper opinion was most controversial).

\(^{132}\) See Roper, 543 U.S. at 575-76 (noting international consensus against juvenile death penalty); see also Joan Biskupic, Teen Killers Can’t Be Executed, USA TODAY, Mar. 2, 2005, at 1A (noting that until Roper was decided, United States stood virtually alone as only country to officially sanction death penalty for juvenile offenders).

\(^{133}\) See Roper, 543 U.S. at 604-05 (O’Connor, J., dissenting) (disagreeing with Justice Scalia’s assertion that international materials have no place in U.S. Supreme Court’s Eighth Amendment jurisprudence); see also Saletan, supra note 135 (noting disagreement between Justices Scalia and O’Connor on relevance of international sources).

\(^{134}\) See Roper, 543 U.S. at 575 (stating that “[o]ur determination that the death penalty is disproportionate punishment for offenders under 18 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.”) (emphasis added); see also id. at 605 (O’Connor, J., dissenting) (noting that “the existence of an international consensus . . . can serve to confirm the reasonableness of a consonant and genuine American consensus.”) (emphasis added); John O. McGinness, Foreign to Our Constitution, 100 Nw. U. L. Rev. 303, 306 & n.16 (2006) (noting that U.S. Supreme Court cited to international law as “confirmation” of its opinion that juvenile death penalty is unconstitutional in Roper).

\(^{135}\) See Roper, 543 U.S. at 622-27 (Scalia, J., dissenting) (stating that majority holding’s reliance on international law should be rejected, and that majority does not even subscribe to rationale announced in its own opinion); see also William Saletan, Rough Justice, SLATE, Mar. 2, 2005, http://www.slate.com/id/2114219/ (characterizing Justice Scalia’s dissent as derisive and accusatory).
a genuine consensus found within the United States.136

II. THEORIES ON INTERNATIONAL LAW IN U.S. COURTS

Some scholars and jurists view the influence of international law on U.S. jurisprudence as a comparative tool to be embraced; others view such an influence as an unsanctioned violation of constitutional authority.137 Support for each side can be found in the recent U.S. Supreme Court opinions discussed above,138 as the growing number of references to international law have prompted responses of approval, outrage, or interest from each of the nine Justices on the Court at the time Roper was decided.139 One group of Justices finds international law relevant in deciding controversial areas of constitutional adjudication, while the rest consider it irrelevant.140 This description, how-

136. See Roper, 543 U.S. at 622 (Scalia, J., dissenting) (stating that majority opinion gives too much power to opinions of non-U.S. countries); see also Calabresi & Zimdahl, supra note 13, at 865-66 (recounting Justice Scalia’s argument that majority opinion in Roper was relying on international law as actual basis for decision).

137. Compare Koh, International Law as Our Law, supra note 2, at 57-58 (arguing that U.S. Supreme Court has traditionally used international law in constitutional deliberations and should continue to do so), with Seth F. Kreimer, Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing, 1 U. PA. J. CONST. L. 640, 650 (1999) (arguing that use of international law to inform U.S. constitutional deliberations is incompatible with U.S. system of government).


139. See Roper, 543 U.S. at 578 (Kennedy, J.) (defending practice of looking to international sources when considering with close constitutional questions); see also Stephen Breyer, Keynote Address, 97 AM. J. INTR’L PROC. ANN. 265 (2003) (proclaiming international sources to be relevant to constitutional deliberation); Roger P. Alford, In Search of a Theory for Constitutional Comparativism, 52 UCLA L. REV. 639, 639 & n. 1 (2005) [hereinafter Alford, Comparativism] (listing instances in which U.S. Supreme Court Justices have referenced issue of international law’s influence).

140. See Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (Stevens, J., joined by O’Connor, Kennedy, Souter, Ginsburg & Breyer, JJ.) (stating that worldwide disapproval of executing juvenile offenders lends support to majority decision holding juvenile death penalty unconstitutional). But see id. at 322, 324-25 (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting) (characterizing majority opinion’s consultation of international materials as defective, unprecedented, irrelevant to decisional process). See generally David S. Law, Generic Constitutional Law, 89 MINN. L. REV. 652, 652-62 (2005) (highlighting disagreements over relevance of international sources in recent decisions on controversial issues which deal with unenumerated rights such as abortion, gay
ever, fails to capture the underlying argument justifying these philosophies; Yale Law School Dean Harold H. Koh has offered a more descriptive classification, identifying these competing theories as indicative of "nationalist" or "transnationalist" jurisprudence.  

A. Nationalist Jurisprudence

Nationalist jurisprudence is marked by an insistence upon the absolute supremacy of the U.S. Constitution's text and a rejection of international sources in considering U.S. constitutional questions. Of the three Roper Justices who adhere to the nationalist jurisprudence, Justices Scalia and Thomas have opposed any judicial references to international law in their interpretations of the U.S. Constitution. The late Chief Justice Rehnquist was often aligned with Justices Scalia and Thomas in criticizing the use of international law, however, some of his
opinions and writings indicate a more lenient viewpoint regarding the uses of international law.\textsuperscript{144} Although they exhibit differences, there are several propositions common to theories of nationalist jurisprudence.\textsuperscript{145}

I. American Exceptionalism

The term "American Exceptionalism" is said to have been popularized by Alexis de Tocqueville, and has historically been used to express the idea that the United States differs significantly from other Nations as a result of its unique origins, evolution, and distinctive political and religious organization.\textsuperscript{146} American Exceptionalism has many forms, but in the context of evaluating the relevance of international law to U.S. constitutional analysis, it has two distinct prongs: The first prong stresses that the United States is a unique political organization whose laws and Constitution are incompatible with those of other Nations.\textsuperscript{147} The second prong highlights potential problem areas


\textsuperscript{145} See Koh, \textit{International Law as Our Law}, \textit{supra} note 2, at 52-57 (outlining various theories of U.S. constitutional law's interaction with international law); \textit{see also} Kreimer, \textit{supra} note 137, at 642-44 (criticizing "constitutional borrowing" as incompatible with U.S. values and traditions).


\textsuperscript{147} See Thompson v. Oklahoma, 487 U.S. 815, 868-69 n.4 (Scalia, J., dissenting) (characterizing plurality opinion's consideration of international norms in constitutional interpretation as inappropriate because "the views of other nations, however enlightened the Justices of this Court may think them to be," cannot be forced on U.S. citizens through the U.S. Constitution); \textit{see also} Choudhry, \textit{supra} note 2, at 830 (describ-
where international legal principles might cut against accepted notions of core U.S. constitutional rights.148

a. The Unique Position of the United States

Insistence that U.S. constitutional values and issues are unique and different from constitutional issues considered abroad is perhaps the most defining tenet of nationalist jurisprudence.149 Under this theory, the content of non-U.S. laws and decisions of non-U.S. courts are irrelevant.150 Because the United States is a unique Nation, the argument goes, non-U.S. legal opinions or laws are unhelpful in deciding U.S. constitutional issues.151 Nationalist jurisprudence argues that these irrelevant international sources cannot be used when considering U.S. constitutional issues, because analysis must rest upon the
decisions of U.S. courts and legislators.152

A clear example of the American Exceptionalism paradigm is found in Printz v. United States.153 At issue in Printz was federal legislation requiring state and local law enforcement officials to assist the federal government in performing background checks on handgun purchasers.154 The majority opinion held that the legislation violated principles of federalism and was therefore unconstitutional.155 The dissent, however, suggested that federalism concerns did not require the Court to strike down the legislation at issue, and cited the success of the centralized authority system utilized by the European Union ("EU") to control national governments within Europe as an example.156

The majority opinion responded by stating that consideration of the benefits of the EU system, or of any non-U.S. system, is irrelevant, since they are not the same as the U.S. system.157

The recently overruled Stanford case — which upheld the consti-

152. See, e.g., Roper v. Simmons, 543 U.S. 551, 626-27 & n.9 (2005) (Scalia, J., dissenting) (stating that international sources are irrelevant in interpreting unique tenets of American Jurisprudence); see also Vicki C. Jackson, Constitutional Comparisons: Convergence, Resistance, Engagement, 119 Harv. L. Rev. 109, 114 (2005) (stating that Justice Scalia's opinions sometimes evince "a kind of willful indifference to foreign law in constitutional interpretation"); Harding, supra note 149, at 421 (claiming that nationalist jurisprudence evinces isolationist tendencies).


154. See Printz, 521 U.S. at 935 (Scalia, J.) (holding legislation requiring State officials to assist federal government in performing background checks on handgun purchasers to be unconstitutional); see also Harding, supra note 149, at 439-40 (noting Justice Scalia's position in Printz on irrelevance of any non-U.S. laws for U.S. constitutional interpretation).

155. See Printz, 521 U.S. at 935 (holding Brady Act unconstitutional); see also Vicki C. Jackson, Federalism and the Uses and Limits of Law: Printz and Principle?, 111 Harv. L. Rev. 2180, 2183 (1998) (noting Supreme Court's ruling in Printz held Brady Act to be unconstitutional violation of principles of federalism).

156. See Printz, 521 U.S. at 976-77 (Breyer, J., dissenting) (stating that experiences of non-U.S. federal systems demonstrate that alternative forms of dual sovereignty are workable); see also Tushnet, supra note 150, at 326 (summarizing Justice Breyer's dissent).

157. See Printz, 521 U.S. at 921 n.11 (Scalia, J.) (stating that comparative constitutional analysis is inappropriate when interpreting U.S. Constitution); see also Scalia & Breyer, supra note 15, at 521 (repeating Justice Scalia's statement that Russia employs a rule similar to U.S. Miranda requirement, but does not employ corresponding U.S. the-
tutionality of the juvenile death penalty — employed similar language.\textsuperscript{158} The overwhelming number of countries that prohibited the juvenile death penalty, which the dissent had considered as a factor in its deliberative process, was considered irrelevant by the majority.\textsuperscript{159}

b. U.S. Law as Rights Enhancing

Another persistent criticism of the use of international law in U.S. constitutional interpretation concerns areas in which U.S. jurisprudence is considered to be far more “rights enhancing” than the prevailing attitudes of the world.\textsuperscript{160} Proponents of American Exceptionalism argue that although there are certain issues — such as the juvenile death penalty — where the United States takes the minority position by denying a globally-accepted right, there are other constitutional issues — such as abortion, criminal procedure rights, free speech, or separation of church and State — where the United States is in the minority as one of the most rights-protective Nations in the world.\textsuperscript{161}

\begin{footnotes}
\item[158] See Stanford v. Kentucky, 492 U.S. 361, 369 n.2 (1989) (emphasizing that U.S. notions of decency are dispositive in Eighth Amendment cases, making practices of other countries irrelevant), \textit{rev'd}, 543 U.S. 551 (2005). \textit{But see} Scalia & Breyer, \textit{supra} note 15, at 554 (stating opinion of Justice Scalia that reading non-U.S. judicial opinions is constitutionally permissible, but to use their legal reasoning in deciding U.S. cases is not).

\item[159] \textit{Compare} Stanford, 492 U.S. at 369 n.1 (emphasizing that “it is American conceptions of decency that are dispositive,” and rejecting contention that sentencing practices of other Nations are relevant), \textit{with id.} at 389-90, (Brennan, J., dissenting) (stating that non-U.S. legislation is an objective indicator “of contemporary standards of decency,” and is therefore relevant to Eighth Amendment analysis of what constitutes cruel and unusual punishment); \textit{see also} Koh, \textit{American Exceptionalism}, \textit{supra} note 146, at 1482 (classifying Stanford as example of American Exceptionalism paradigm); Harding, \textit{supra} note 149 at 420 (noting Justice Scalia’s rejection of international sources in Stanford).

\item[160] See Ramsey, \textit{International Materials}, \textit{supra} note 15, at 69-70 (stating that for constitutional theory incorporating international sources, there must be neutral theory of relevance); \textit{see also} Larsen, \textit{supra} note 111, at 1319-21 (noting that United States is far more protective of free speech rights than rest of world).

\item[161] See Ramsey, \textit{International Materials}, \textit{supra} note 15, at 81 (commenting that rigorous comparison of international sources with U.S. conceptions of rights is likely to find United States more protective of greater number of rights than other Nations); \textit{see also} Roper v. Simmons, 543 U.S. 551, 625 (2005) (Scalia, J., dissenting) (stating that if U.S. Supreme Court were to consider international sources when considering establishment clause cases, they would find United States almost alone in its rigid separation between church and State); Larsen, \textit{supra} note 111, at 1288-89 (noting that internation-
risprudence argues that if international sources are to play a part in U.S. court decisions, they must play a consistent role; otherwise they are simply being used as a guise for the personal opinions of the judges who invoke them.\textsuperscript{162} Professor Michael D. Ramsey has termed this problem "taking the bitter with the sweet," and implies that a rigorous use of international sources may not be palatable to proponents of transnational jurisprudence, since it would require U.S. practice to fall in line with the more rights-restrictive international practices.\textsuperscript{163}

2. Democratic Concerns With the Use of International Law

The preceding arguments focus upon the exceptional nature of the U.S. system, arguing that the consultation of international law is ineffective and irrelevant for U.S. courts interpreting the U.S. Constitution. This Section focuses on another vein of criticism, which seeks to show why consulting international law is undemocratic and unconstitutional. This criticism is expressed both by political elites and by many average U.S. citizens.

a. Political Criticism

Critics in the academic world and in the U.S. judiciary have expressed concern that the consultation of international law endangers the theory of representative democracy in the United States by corrupting the nature of the judicial process.\textsuperscript{164} The argument against such consultation is similar to a traditional crit-

\begin{itemize}
\item \textsuperscript{162} See Ramsey, \textit{International Materials}, supra note 15, at 76-77 (stating that rigorous system of use for international sources requires that they not be used to create selective outcomes); \textit{see also} Law, supra note 140 passim (attempting to define "neutral" constitutional theory which would incorporate international law and yield non-selective decisions).
\item \textsuperscript{163} See Ramsey, \textit{International Materials}, supra note 15, at 76-77 (claiming that any theory incorporating international materials must, to be fair, consult international norms that are more rights-restrictive than U.S. laws, in addition to those that are more rights-expanding). \textit{Cf.} \textit{Roper}, 543 U.S. at 624-27 (Scalia, J., dissenting) (noting that Supreme Court's interpretation of laws pertaining to abortion, exclusion of evidence, and separation of church and State are each out of line with international practice).
\item \textsuperscript{164} See Thompson v. Okla., 487 U.S. 815, 869 (1988) (Scalia, J., dissenting) (stating that U.S. Constitution forbids allowing views of other Nations to be imposed upon U.S. citizens, and that fact that majority of Nations prohibits juvenile death penalty is not relevant to deliberations of U.S. Supreme Court); \textit{see also} Bradley & Goldsmith, supra note 16 at 873 (asserting that practice of federal courts interpreting and applying international law is in tension with basic U.S. constitutional principles).
\end{itemize}
icism of "judicial activism": it accords policy making power to the opinions and practices of unelected, unaccountable sources — in this case, the governments, judiciaries, and opinions of other Nations.\textsuperscript{165} Accusations of judicial activism often stem from the fact that U.S. federal judges enjoy lifetime tenure, and are appointed, rather than democratically elected.\textsuperscript{166} This raises concerns that federal judges are unaccountable, and thus likely to rely on their own opinions, rather than the relevant law.\textsuperscript{167} Nationalist jurisprudence, however, has redirected criticism aimed at the personal opinions of unaccountable, unelected judges to the opinions of unaccountable non-U.S. Nations.\textsuperscript{168} Under this paradigm, judicial consultation of international sources is an unsanctioned delegation of authority, and should be prohibited as unconstitutional.\textsuperscript{169}

The distrust of international sources extends far beyond academia and the judiciary; in the U.S. House of Representatives, several members of Congress have introduced a "Reaffirmation of American Independence Resolution."\textsuperscript{170}

\begin{footnotesize}
\begin{enumerate}
\item See U.S. CONST. art. III, § 1 (stating that federal judges are appointed to serve "during good behavior"); see also Robert L. Brown, From Earl Warren to Wendell Griffen: A Study of Judicial Intimidation and Judicial Self-Restraint, 28 U. ARK. LITTLE ROCK L. REV. 1, 7 (2005) (noting that U.S. federal judges are appointed for life and are not subject to reelection or other democratic concerns).
\item See THE FEDERALIST No. 78, at 434 (A. Hamilton) (Clinton Rossiter ed., 1961) (positing that lifetime appointments for federal judges would increase their independences and impartiality); see also Christopher L. Eisengruber, CONSTITUTIONAL SELF-GOVERNMENT 3-4 (2001) (arguing against conception of federal judges as unaccountable and undemocratic).
\item See, e.g., Robert H. Bork, Whose Constitution is it Anyway?, NAT'L REV., Dec. 8, 2003, at 37 (claiming that U.S. Supreme Court, in consulting international sources, is remaking U.S. Constitution to be more like constitutions of Africa, Europe, and Asia); see also Roger P. Alford, Misusing International Sources to Interpret the Constitution, 97 AM. J. INT'L L. 57, 58-61 (2004) (worrying that allowing international sources to influence U.S. constitutional interpretation will give rise to "international countermajoritarian difficulty," allowing U.S. Supreme Court to thwart will of majority of U.S. citizens).
\item See Bahdi, supra note 2, at 593 (noting that judges are aware that many in academic and legal fields consider consultation of international sources to be unqualified judicial activism); see also Glennon, supra note 68, at 351 (observing that citations to anything other than U.S. legal authorities often incurs charges of judicial activism).
\item See H.R. Res. 568, 108th Cong. (2004) (House Resolution expressing idea that U.S. courts should not refer to non-U.S. laws in deciding U.S. cases); see also Calabresi &
\end{enumerate}
\end{footnotesize}
tion expresses disapproval of the judicial consultation of non-U.S. law in deciding U.S. cases — explicitly mentioning Lawrence as an example — and argues that decisions invoking international laws threaten the sovereignty of the United States.\footnote{171} On the website of U.S. Representative Tom Feeney (R-Fla.), the bill’s co-sponsor, the headline introducing the legislation poses the question “Should Americans Be Governed By the Laws of Jamaica, India, Zimbabwe, or the European Union?”\footnote{172} Representative Feeney and other members of Congress are not alone in their disapproval.\footnote{173} This distrust of international law is shared by many across the country, who label judges consulting international sources “judicial activists.”\footnote{174}

\footnote{171} See H.R. Res. 568, 108th Cong. (2004) (criticizing U.S. Supreme Court for relying on judgments, laws, or pronouncements of non-U.S. institutions in Lawrence); see also Henkin, The Ghost of Senator Bricker, supra note 13, at 346 (recounting failed efforts in mid 1950s by Senator Bricker (R-Ohio) to amend U.S. Constitution to include provision prohibiting any international treaties from binding United States unless supporting legislation were enacted); Bradley, supra note 79, at 523 (noting one reason Bricker Amendment failed was because Eisenhower administration promised U.S. Senators it would not seek ratification of any major human rights treaties, including International Covenant on Civil and Political Rights (“ICCPR”)); James L. Taulbee, A Call to Arms Declined: The United States and the International Criminal Court, 14 EMORY INT’L L. REV. 105, 113-14 (2000) (characterizing Bricker Amendment as evincing U.S. attitude towards human rights, resisting examination or criticism from non-U.S. actors).

\footnote{172} Official Website of Congressman Tom Feeney, at http://www.house.gov/feeney/reaffirmation.htm (last visited Nov. 20, 2005) (utilizing language similar to Justice Clarence Thomas’ concurrence in Knight v. Florida, 528 U.S. 990, 990 (1999)); see also Knight, 528 U.S. at 990 (Thomas, J., concurring in denial of certiorari) (stating that “I am unaware of any support in the American constitutional tradition or in this Court’s precedent for . . . proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council [of Jamaica]”).


\footnote{174} See Phyllis Schlafly, Global Benchmarks, WASH. TIMES, Nov. 13, 2004, at A13 (lamenting, from perspective of prominent conservative commentator, U.S. Supreme Court’s “effort to import international law into the United States,” and implying that judges consulting international laws should be impeached); see also Romney, Bush Con-
Much evidence exists to suggest that the concept of unelected "activist judges" imposing their preference for non-U.S. law in U.S. courts is a widely held concern in the United States, as illustrated by the outcome of the November 2004 U.S. presidential elections.\(^\text{175}\) Beginning after Lawrence, and escalating after Goodridge v. Department of Public Health,\(^\text{176}\) the controversial case legalizing same-sex marriage in Massachusetts, conservative political groups were vocally critical of what many labeled "activist judges," guilty of imposing their personal beliefs on the U.S. population.\(^\text{177}\) A year after Goodridge was decided, eleven states passed amendments to their constitutions, effectively barring same-sex couples from marrying.\(^\text{178}\) These amendments are

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\(^\text{175}\) See Carolyn Lochhead, Gay Marriage: Did Issue Help Re-Elect Bush?, S.F. CHRON., Nov 4, 2004, at A1 (noting that issue galvanized millions of U.S. voters opposed to same-sex marriage); see also Joan Vennochi, Was Gay Marriage Kerry’s Undoing?, BOST. GLOBE, Nov. 4, 2004, at A15 (noting that Republican strategists viewed same-sex marriage as wedge issue during presidential election of 2004; quoting President George W. Bush as saying that Goodridge court "overreached its bounds as a court" by extending marriage rights to same-sex couples); Elizabeth Mehren, Bush Baffles Massachusetts Liberals, L.A. TIMES, Oct. 17, 2004 at A17 (theorizing that President Bush’s repeated references to Senator John Kerry as “Massachusetts Liberal” was veiled attempt to associate Kerry with Goodridge decision legalizing same-sex marriage).

\(^\text{176}\) See Goodridge, 440 Mass. 309 (2003) (holding Massachusetts state Constitution to preclude limiting marriages to be between men and women); see also Excerpts From the Massachusetts Ruling, N.Y. TIMES, Nov. 19, 2003, at 24 (excerpting passages from Goodridge case, noting that case held prohibition on same-sex marriages to be unconstitutional).

\(^\text{177}\) See Goodridge v. Dep’t of Public Health, 440 Mass. 309, 346-47 (2003) (holding Massachusetts Constitution permitted same-sex marriage); see also Vennochi, supra note 175, at A15 (describing backlash to Goodridge decision). Although Goodridge did not rely upon international sources, it is often understood as a logical outgrowth of Lawrence, as it echoes many substantive due process rights articulated in Lawrence, was decided very soon after Lawrence, and was seized upon by many opponents of Lawrence as extension of "judicial activism." See Scott Dodson, Commentary, Reconsider an Old Taboo: Judicial Activism, N.J. L. J., Nov. 8, 2004 (noting use of Goodridge as exemplar of "judicial activism," and arguing this premise); see also Kevin Martin, Op-Ed, Disorder in the Democracy, BOST. HERALD, Feb. 6, 2004, at 25 (stating that decision in Goodridge cast national spotlight on issue of judicial activism).

\(^\text{178}\) See Sarah Kershaw, Constitutional Bans on Same-Sex Marriage Gain Widespread Support in 10 States, N.Y. TIMES, Nov. 3, 2004, at P9 (noting passage of State amendments banning gay-marriage in Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, and Utah, and impending passage of similar amend-
believed to have been motivated in part by a public backlash to the Goodridge ruling, as well as to San Francisco Mayor Gavin Newsom’s decision to grant marriage licenses to same-sex couples early in 2003.\footnote{179}

\section*{B. Transnationalist Jurisprudence}

In contrast with nationalist jurisprudence, transnationalist jurisprudence considers international sources to have an intrinsic value when deciding certain types of U.S. constitutional issues, and is demonstrated in recent pronouncements by a number of U.S. Supreme Court Justices.\footnote{180} Transnational jurisprudence encompasses a wide spectrum of viewpoints, making a unified theory difficult to assemble; though there are some unifying themes, they tend to diverge along lines of weak and strong transnationalism.\footnote{181} Weak transnationalist jurisprudence is exemplified by the opinions of the late Chief Justice Rehnquist

\begin{footnotesize}
\footnote{179. See Fred Bayles & Andrea Stone, Gay-marriage Foes Try to Stop ‘Activist Courts,’ USA TODAY, Feb. 25, 2004, at 6A (noting anger directed at courts over Lawrence and Goodridge decisions); see also David von Drehle, Take the Issues to the People, Not to the Courts, WASH. POST, Nov. 14, 2004, at B4 (describing specter of “judicial activism” as powerful galvanizing political issue); Dean E. Murphy, Democrats Blame Some of Their Own, N.Y. TIMES, Nov. 5, 2004, at A1 (analyzing political backlash against gay marriage, and highlighting criticism of San Francisco Mayor Gavin Newsom’s decision to allow gay marriages by Sen. Diane Feinstein (D-CA) and Rep. Barney Frank (D-MA) as motivating Republicans to vote).

\footnote{180. See Printz v. United States, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) (stating that experiences of other Nations may be helpful in solving U.S. issues of common legal nature); see also Stephen Breyer, Keynote Address, 97 Am. Soc. INT’L L. & Proc. 265, 267 (2003) (stating that lines between comparative law and international law have become blurred as constitutional courts of different countries render decisions on increasingly similar issues); Transcript of Oral Argument at 24, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516) (noting Justice Ginsburg’s question during oral arguments on whether Supreme Court should decline to consider rationales employed by Canada, European Union, or South Africa in upholding affirmative action); Grutter v. Bollinger, 539 U.S. 342, 344 (2003) (Ginsburg, J., concurring) (citing international conceptions of affirmative action); Ginsburg, supra note 3, at 329-30 (stating that comparative analysis of opinions and practices of other Nations is nothing new in U.S. constitutional interpretation).

\footnote{181. See Larsen, supra note 111, at 1287-97 (setting out examples of different ways in which Rehnquist Court has utilized international sources in constitutional decisionmaking); see also Koh, American Exceptionalism, supra note 146, at 52 (contrasting theory of transnationalist jurisprudence with theory of nationalist jurisprudence).}
\end{footnotesize}
that have occasionally discussed the legal practices of other Nations, and by Justice Kennedy's "confirmatory" use of international sources in *Roper*.\(^{182}\) Strong transnationalist jurisprudence is exemplified in the extrajudicial writings of Justices Breyer, Ginsburg, and O'Connor.\(^{183}\)

1. Weak Transnationalism: Expository and Empirical Value

Weak transnationalism views international law as an instructive tool for determining the proper scope of U.S. constitutional law.\(^{184}\) Professor Joan Larsen describes these uses of international sources as "expository" and "empirical" uses of comparative constitutional materials.\(^{185}\) Although both methods look to the experiences of other Nations, neither uses international law as the reasoned legal basis for a constitutional decision.\(^{186}\)

a. Expository Value

The U.S. Supreme Court decision in *Raines v. Byrd* illustrates the "expository" use of international material, citing vari-


\(^{183}\) See, e.g., Scalia & Breyer, supra note 15, at 527-28 (recounting opinion of Justice Breyer that international law may be consulted in defining what constitutes "cruel and unusual punishment" under U.S. Constitution); see also Ginsburg, supra note 3, at 336-37 (stating that U.S. Supreme Court should continue to allow international law to inform U.S. constitutional analysis); Sandra Day O'Connor, *Keynote Address: Dedication of Eric E. Hotung International Law Center Building at Georgetown University* (Oct. 27, 2004), 36 Geo. J. Int'l L. 651, 651-53 (2005) (explaining that international law is increasingly used in U.S. courts).

\(^{184}\) See Larsen, *supra* note 111, at 1288-89 (suggesting that use of international sources to contrast and thereby explain U.S. constitutional rules is "expository" use of international sources); see, e.g., *Raines*, 521 U.S. at 828 (1997) (Rehnquist, C.J.) (contrasting European laws regarding legislative standing to sue with U.S. constitutional limitations on same issue); *Printz*, 521 U.S. at 977 (Breyer, J., dissenting) (stating that European Union's experiences with alternative models of federalism might inform U.S. practice).

\(^{185}\) See Larsen, *supra* note 111, at 1288-89 (cataloguing examples of "expository" and "empirical" uses of comparative constitutional law); see also Bodansky, *supra* note 14, at 425 (noting that foreign sources may prove instructive in determining how prospective legal rules operate in practice).

\(^{186}\) See Larsen, *supra* note 111, at 1286-87 (stating that expository and empirical uses of international law are not as problematic as theories which rely on international law to supply meaning to U.S. Constitution); see also Bodansky, *supra* note 14, at 423 (explaining that international law has not explicitly influenced recent U.S. Supreme Court decisions, but has indirectly been referenced).
ous methods for determining legislative standing used by a number of European constitutional courts.\textsuperscript{187} The opinion cited the legislative standing requirements as a contrast to the U.S. system, but declined to use them as support for the ultimate holding, stating that the U.S Constitution set out a different system.\textsuperscript{188} An expository use of international sources thus does not reach the issue of the influence of international sources, since they are only consulted to define the contours of the comparative U.S. constitutional practice.\textsuperscript{189} A weak transnationalist theory considers non-U.S. laws as comparative tools, useful foils for explaining or contrasting current U.S. practices.\textsuperscript{190}

b. Empirical Value

Another use for international sources is to demonstrate the usefulness of a particular constitutional interpretation.\textsuperscript{191} Empirical use evaluates the outcome of a non-U.S. constitutional interpretation to gauge the practical effect it might have if applied in the United States.\textsuperscript{192} Thus, the U.S. Supreme Court’s decision in\textit{Washington v. Glucksberg}, which considered the constitutionality of the State of Washington’s ban on physician-assisted suicide,

\textsuperscript{187} See Raines, 521 U.S. at 828 (arguing that there is nothing irrational about various European systems for granting legislative standing to sue); see also Larsen, supra note 111, at 1288-89 (stating that\textit{Raines} exemplifies “expository” use of comparative constitutional materials).

\textsuperscript{188} See Raines, 521 U.S. at 828 (noting methods for determining legislative standing in European Constitutional Courts, but declining to adopt them because they do not comport with system set out by U.S. Constitution); see also Larsen, supra note 111, at 1288-89 (reviewing use of international materials in\textit{Raines}).

\textsuperscript{189} See Larsen, supra note 111, at 1288-89 (noting that expository use of comparative materials is only to contrast and thereby explain U.S. law); see also Jackson, supra note 153, at 605-11 (noting Canadian Supreme Court decisions that might prove useful to U.S. Supreme Court for purposes of contrasting contents of U.S. law).

\textsuperscript{190} See Larsen, supra note 111, at 1288-89 (describing expository use of comparative materials as useful for illuminating differences between legal systems); see also Jackson, supra note 153, at 605-11 (using expository model of transnationalist jurisprudence to analyze Canadian Supreme Court decisions).

\textsuperscript{191} See Larsen, supra note 111, at 1289-91 (classifying this use of international sources as “empirical”); see also Washington v. Glucksberg, 521 U.S. 702, 734 (1997) (noting disturbingly large number of physician assisted suicides that lacked explicit consent of deceased in Netherlands, which was only country to legalize procedure).

\textsuperscript{192} See Larsen, supra note 111, at 1299 (contending that empirical use of international sources is justified when U.S. Supreme Court seeks to discern impact certain constitutional interpretations might have); see also Jackson, supra note 153, at 610-11 (suggesting that constitutional comparativism might assist U.S. Supreme Court in ascertaining probable outcomes of their decisions).
exemplifies the empirical use of international sources. Although the majority opinion began by stating that its analysis would begin with an examination of U.S. history, legal traditions, and practice, it went on to extensively consider the laws of the Netherlands. Because the Netherlands was the only country in the world at the time that had legalized assisted suicide, the Court gave special weight to studies that detailed the myriad problems and potential for abuse brought on by the legalization of assisted suicide.

2. Strong Transnationalism

Strong transnationalism utilizes both the expository and empirical benefits of comparative constitutional study, but goes further, considering international law as a possible basis for decisions in U.S. constitutional decision-making. Strong transnationalist jurisprudence considers non-U.S. sources as beneficial for contemplating U.S. constitutional questions. The benefits include a salutary effect on U.S. foreign relations, the continuing influence of U.S. Supreme Court jurisprudence around the world, and comity in non-U.S. courts for U.S. judicial deci-
Many arguments advocating for the consideration of international sources also cite the U.S. Declaration of Independence, which delineates the United States as a Nation that, from its inception, has given a “decent respect to the opinions of mankind.”

Justice Breyer has clearly articulated the “reason-borrowing” rationale for consultation of international materials. An analogous process is that in which consensus is determined on close constitutional issues by the U.S. Supreme Court; U.S. state court decisions and legislation are weighed by the Court to determine what the majority viewpoint is and for persuasive value. Roper provides an excellent example: Justice Kennedy adopted the reasoning of the state court below because he found it to be a convincing argument. The question that proponents of strong transnational theory offer is: if the U.S. Supreme Court listens to the rationale of a U.S. state court that goes against established U.S. Supreme Court precedent, why would it choose to

198. See Scalia & Breyer, supra note 15, at 523 (stating Justice Breyer’s opinion that one reason U.S. Supreme Court might cite to decisions of nascent foreign constitutional courts would be to imbue them with air of authority); see also Ginsburg, supra note 3, at 335 (explaining that citations to international sources reflects common respect for individual rights of all people). But see Jackson, supra note 153, at 601 (noting that U.S. Supreme Court decisions routinely fail to cite to Canadian Supreme Court cases dealing with similar issues). See generally Law, supra note 140 passim (attempting to identify neutral theory of constitutional jurisprudence that is easily transportable between national systems of justice).

199. See Knight v. Florida, 528 U.S. 990, 997 (Breyer, J., dissenting from denial of certiorari) (quoting Declaration of Independence as supportive of transnational theory of jurisprudence); see also Law, supra note 140, at 657 & n.18 (noting Justice Breyer’s invocation of Declaration of Independence as indicia of fundamental concern for views of all mankind).

200. See Scalia & Breyer, supra note 15 (stating Justice Breyer’s opinion that rationally reasoned opinions of foreign courts facing similar constitutional problems can be helpful in deciding U.S. constitutional issues). But see Larsen, supra note 111, at 1291 (noting that despite popularity of “reason-borrowing” rationale, no U.S. Supreme Court opinion has fully relied upon reasoning of non-U.S. courts).


202. See Roper 543 U.S. at 559-60 (Kennedy, J.) (agreeing with Missouri Supreme Court opinion’s rationale in finding constitutional prohibition against juvenile death penalty); see also Thompson v. Oklahoma, 487 U.S. 815, 829 & n.30 (Stevens, J.) (1988) (reviewing trend in state laws prohibiting execution of juvenile offenders under age 16, and finding it helpful in process of determining such punishment unconstitutional).
ignore international sources for similar opinions.\textsuperscript{203} The reason-borrowing approach, simply stated, claims that if a line of reasoning is persuasive or compelling as a theory, no matter where it originated, it would be irrational not to adopt it if it is within the bounds of the U.S. Constitution.\textsuperscript{204}

III. \textit{REASON WITHOUT BORDERS}

Part I of this Note reviewed the historical use of international law in U.S. Courts, explained how judge-made international law enters U.S. courtrooms, and examined the language of recent U.S. Supreme Court cases referencing international law.\textsuperscript{205} Part II reviewed two differing theories on the use of international law in U.S. courts — nationalist and transnationalist jurisprudence.\textsuperscript{206} This Part begins with a critique of nationalist jurisprudence, and continues with an analysis of the U.S. Supreme Court’s current use of international law in constitutional interpretation. This Part concludes with a recommendation for how U.S. courts might cite international law in future constitutional cases.

A. \textit{Problems With Nationalist Jurisprudence}

The nationalist jurisprudence model cites structural differences between the U.S. legal system and those of different Na-

\textsuperscript{203} See Scalia \& Breyer, supra note 15, at 529, 537 (noting Justice Breyer’s opinion that country of origin is irrelevant in evaluating cogency of argument); see also H. Patrick Glenn, \textit{Persuasive Authority}, 32 McGill L.J. 261, 266-68 (1987) (describing historical European view of Roman law as type of “universal learning” that defied national boundaries).

\textsuperscript{204} See, e.g., Hurtado v. California, 110 U.S. 516, 531 (1884) (noting that there are many successful non-U.S. judicial systems with similar versions of justice, and stating that there is nothing “which ought to exclude the best ideas of all systems and of every age” from consideration by U.S. courts); see also Jackson, supra note 153, at 601 (asserting that formulating answers to constitutional questions implicitly involves comparison of foreign materials); Scalia \& Breyer, supra note 15, at 537 (repeating Justice Breyer’s view that good ideas are good ideas, regardless of country of origin). See generally Law, supra note 140, at 735 (arguing that although use of foreign legal materials raises legitimate concerns, they are not any more dangerous than other types of materials used to decide constitutional issues).

\textsuperscript{205} See supra notes 15-136 and accompanying text (reviewing early U.S. Supreme Court cases citing international law; explaining how U.S. judges formulate CIL and \textit{jus cogens} norms; reviewing recent U.S. Supreme Court cases referencing international law).

\textsuperscript{206} See supra notes 137-204 and accompanying text (explaining theories of nationalist and transnationalist jurisprudence).
tions as a reason for the irrelevance of international law, but ignores the important and frequent convergence of identical legal reasoning on paramount legal matters common to all human beings. At the core of many of the criticisms proponents of nationalist jurisprudence have leveled at international law is that the U.S. Constitution, as the supreme law of the land, should not have its power usurped by the influence of non-U.S. Nations. In this they are correct, but only in cases where there is a conflict between a clear and unambiguous constitutional precedent and an internationally agreed upon concept.

The rationale behind nationalist jurisprudence theory breaks down when examining issues upon which the Constitution provides minimal guidance or is completely silent. For instance, although it is unclear if the constitutionality of laws regulating consensual sexual conduct or a woman’s right to have an abortion were issues contemplated by the Framers of the U.S. Constitution, the text is silent as to their intent. In such cases, because the concerns of nationalist jurisprudence are not clearly implicated, the debate may shift from a discussion of whether consultation of how other Nations address these issues is constitutionally prohibited, to whether such consultation is really beneficial in reaching a decision.

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207. See supra notes 149-59 and accompanying text (noting criticism that use of international law is irrelevant in U.S. Constitutional interpretation because U.S. system is unique and different from other Nations’ systems).

208. See supra notes 196-200, 203-04 and accompanying text (arguing that international legal principles might be of use in difficult U.S. constitutional decisions).

209. See supra note 164-69, 173 and accompanying text (detailing criticism that use of international law in U.S. courts is undemocratic; examining pending legislation seeking to restrict use of international law in U.S. judicial opinions).

210. See supra notes 185-93 and accompanying text (discussing models of expository and empirical transnational jurisprudence).

211. See supra notes 156, 180 and accompanying text (recounting arguments that comparative constitutional analysis may help to inform U.S. courts considering difficult or undefined constitutional issues).

212. E.g., supra notes 191-95 and accompanying text (explaining U.S. Supreme Court’s empirical use of international law in cases where there is no U.S. precedent).

213. See supra notes 196-200, 203-04 and accompanying text (listing benefits of comparative constitutional analysis). But see supra notes 160-63 and accompanying text (arguing that taking account of international norms is wrong because most Nations endorse more rights-restrictive constitutional theories than United States).
B. The Weakness of Roper's Articulation: From Confirmation to Instruction

The assertions by some commentators that *Roper* represents a clear victory for proponents of transnationalist jurisprudence are, at best, premature.214 Although the voices of nationalist jurisprudence are increasingly relegated to the text of dissenting opinions, their persistent criticism continues to temper the tone of the majority when referencing international sources.215 Indeed, from some perspectives, *Roper*'s articulation of the importance of international sources represents a step back from previous formulations of the Court's transnational jurisprudence.216

It is easy to see why the bifurcated decisional process Justice Kennedy invokes in *Roper* is undesirable.217 The process involves a legal decision based on U.S. law, followed by a “confirmatory” glance at international sources for approval.218 Without a system that permits consideration of international law, U.S. judges may seek to hide the international source of their reasoning, and instead attempt to inject the international values they agree with into their decisions through reinterpretation of U.S. constitutional provisions.219 This transparency problem is vividly illustrated in *Roper*'s articulation of the power of international sources.220 The majority opinion’s statement that international law is used only as “confirmation” of the Court's decision is immediately belied by the subsequent text of the opinion, which characterizes international sources as “instructive” in formulat-

214. See supra note 151 (describing increase in academic resistance to usage of international legal principles in U.S. constitutional adjudication).

215. See supra notes 128-36, 150 and accompanying text (examining language of U.S. Supreme Court's *Roper* opinion, which purportedly relied on international law as “confirmation” of an already-reached conclusion; stating opinion that those U.S. Supreme Court Justices who decry international law as irrelevant are increasingly heard in dissents rather than majority opinions).

216. See supra notes 131-34 and accompanying text (examining defensive language employed by *Roper*'s majority opinion to justify use of international sources).

217. See supra note 14 (discussing Professor Peter J. Spiro's theory that forces of globalization will increasingly influence U.S. policy).

218. See supra notes 132-34 and accompanying text (positing that international law may be used by U.S. courts deciding close constitutional cases for “confirmatory” value).

219. See supra note 164-69 and accompanying text (arguing that U.S. judges consulting international law in U.S. cases are subjected to criticism as “judicial activists”).

220. See supra note 128-34 and accompanying text (reviewing content of *Roper*'s majority opinion; highlighting defensive language used to justify use of international law in finding death penalty for mentally retarded offenders unconstitutional).
ing an opinion on the constitutionality of the juvenile death penalty.\textsuperscript{221} In addition, the U.S. Supreme Court cases cited by \textit{Roper} each seem to indicate that international sources may be consulted for more than mere confirmation, but less than controlling precedent.\textsuperscript{222} The true role of international sources in \textit{Roper} seems to occupy a position somewhere on the continuum of influence between confirmatory and controlling power.\textsuperscript{223}

Thus, the U.S. Supreme Court's articulation of the "confirmatory" value of international law illustrates the problem with a "weak transnationalist" theory of international legal influence.\textsuperscript{224} It is an ill-reasoned theory constructed to escape the inevitable accusations of "judicial activism," and calculated to defend against the criticism of international-law opponents.\textsuperscript{225} This "confirmatory" position gives inadequate force and effect to international sources, particularly where the Constitution is silent and international laws or opinions command a unanimous or nearly unanimous world position.\textsuperscript{226}

A confirmatory power for international law is unworkable because it necessarily implicates a post-analysis consultation, suggesting that international sources have no direct influence on a U.S. court's actual deliberative process.\textsuperscript{227} None of the recent Supreme Court opinions citing international law attempt to ex-

\textsuperscript{221} See \textit{supra} notes 128-36 and accompanying text (analyzing \textit{Roper}'s majority opinion and discussing criticism in \textit{Roper}'s dissent).

\textsuperscript{222} See \textit{supra} notes 118-20, 125-27 and accompanying text (relating U.S. Supreme Court's citation of international law in \textit{Atkins} and \textit{Lawrence}, noting that in each case, international law was not used as specific basis for holding).

\textsuperscript{223} See \textit{supra} notes 128, 136 and accompanying text (discussing continuum of deference afforded to international sources by various U.S. courts; criticizing \textit{Lawrence} and \textit{Roper} for substantively relying on international law to reach U.S. constitutional decision).

\textsuperscript{224} See \textit{supra} notes 132-34, 184-95 and accompanying text (arguing that holding in \textit{Roper} was based solely on examination of U.S. law, and that international sources were consulted only as "confirmation" of that decision; laying out basic theories of weak transnationalist jurisprudence).

\textsuperscript{225} See \textit{supra} notes 5, 6, 18, 112, 120, 125-26, 135-36 and accompanying text (noting variety of criticism attending modern U.S. Supreme Court opinions mentioning international sources; describing relation between criticism of consulting international sources and traditional accusations of judicial activism).

\textsuperscript{226} See \textit{supra} notes 15-17, 196-204 and accompanying text (explaining that early U.S. Supreme Court relied more heavily on international law than current Court; analyzing "strong transnationalist" theory of jurisprudence, which considers international law to be helpful in deciding complex constitutional cases).

\textsuperscript{227} See \textit{supra} notes 128-36 and accompanying text (reviewing language used in \textit{Roper} to articulate proper influence of international sources; noting that \textit{Roper}'s major-
plain just how such a bifurcated decisional process might operate.\textsuperscript{228} Indeed, it may be that by definition, a "post-analysis," or "confirmatory" consultation of international laws and norms is simply impossible to achieve, since it implicates an attempt to impose an artificial barrier between the twin judicial processes of deliberation and decision that is both unworkable and undesirable.\textsuperscript{229}

A confirmatory use of international law in U.S. constitutional interpretation reduces legal ideas into two types, "international" and "national," then attempts to restrict judges to only "national" laws in considering how to decide a case.\textsuperscript{230} This approach is unlikely to work, as judges are likely to endorse an efficient, logical rule that fits within the framework of the U.S. Constitution, regardless of the country of its origin.\textsuperscript{231} Because this artificial compartmentalization is likely to fail, a "confirmatory" power for international law is undesirable and may be a powerfully dangerous incentive for judges to be less transparent in sharing their reasons for deciding a case.\textsuperscript{232}

C. A Framework for U.S. Courts Citing International Law

The U.S. Supreme Court has referred extensively to international sources in recent cases involving contentious constitutional issues.\textsuperscript{233} Although the language of these decisions seeks to downplay their reliance on international sources, critics have

\begin{itemize}
  \item \textsuperscript{228} See supra notes 107-36 and accompanying text (surveying recent U.S. Supreme Court cases invoking international law; noting exact power of international law in U.S. Constitutional interpretation is not clearly defined, and is hotly debated).
  \item \textsuperscript{229} See supra notes 131-34, 182, 184-95 (recounting Roper's explanation of "confirmatory" power of international sources; relating this use of international law to "weak transnationalist" theory of jurisprudence).
  \item \textsuperscript{230} See supra notes 131-34 and accompanying text (noting language in \textit{Roper} emphasizing that international sources were used as confirmatory tools, rather than as basis for decision, in coming to decision on constitutional issue).
  \item \textsuperscript{231} See supra notes 196-204 and accompanying text (discussing "strong transnationalism" theory of jurisprudence, advocating use of international legal norms when trying to decide complex U.S. Constitutional questions).
  \item \textsuperscript{232} See supra notes 162-63, 204 and accompanying text (criticizing use of international law in U.S. constitutional analysis; pointing out that judges may use international sources to justify imposing their personal beliefs on U.S. citizens).
  \item \textsuperscript{233} See supra notes 107-36 and accompanying text (recounting facts and opinions in \textit{Atkins}, \textit{Lawrence}, and \textit{Roper}; noting that each case cited to international legal sources).
\end{itemize}
rightly pointed out that in each case, international sources were in fact used as part of the Court's reasoned basis for coming to a decision. This Note suggests that decisions like *Roper* should not seek to hide their reliance on international law, but should instead develop a transparent framework for doing so.

The outline of this framework might be found in the way that federal common law works. Like principles of international law, federal common law is not created by the executive or legislatures, and is susceptible to similar criticism of being undemocratic. Federal common law is recognized as useful for applying consistent national rules in important areas of federal concern, and international law might be used in a similar fashion. In areas of constitutional interpretation where the law is silent — such as unenumerated due process rights, or the interpretation of terms like "cruel and unusual punishment" — a U.S. court might adopt a system for looking to international law like that enunciated in *Lincoln Mills*. A U.S. court might survey the laws and practices of the world for rules that comport with the underlying purpose of the U.S. Constitution, and adopt the them as rules of U.S. Constitutional interpretation.

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234. *See supra* notes 120, 125-27, 135-36 and accompanying text (listing objections raised by dissents in *Atkins*, *Lawrence*, and *Roper*, to use of international sources; noting assertion that *Roper* majority opinion used international law as reasoned basis for opinion).

235. *See supra* notes 6-10 and accompanying text (discussing growing academic debate over propriety of U.S. courts using international sources; providing numerous sources attempting to identify cohesive theory integrating international law into U.S. jurisprudence).

236. *See supra* notes 82-106 and accompanying text (providing definition and overview of federal common law; comparing federal common law principles and CIL principles).

237. *See supra* notes 104-06 and accompanying text (listing similarities between methods for defining CIL and federal common law; explaining criticism that both are undemocratic).

238. *See supra* notes 101-03 and accompanying text (examining U.S. Supreme Court decision in *Lincoln Mills*; noting one rationale behind concept of federal common law is value of unitary national rules).

239. *See supra* notes 101-03, 200-04 and accompanying text (describing *Lincoln Mills* decision's method for determining rules of federal common law by surveying practices of U.S. states and choosing rules which best suit federal objectives; laying out theory of "strong transnationalist" jurisprudence that finds international sources helpful in deciding close constitutional questions).

240. *See supra* notes 101-03, 204 and accompanying text (providing analogous process through which U.S. courts discern federal common laws by analyzing practices of U.S. states).
CONCLUSION

Because a “confirmatory” role for international law in U.S. court decisions is descriptively inaccurate and normatively empty of content, the search for a cohesive constitutional theory for comparative constitutional analysis continues.\textsuperscript{241} This Note has argued that the separation of the deliberative process from the examination of international sources as confirmation is an artificial and unhelpful distinction. Likewise, ignoring the growing voice of constitutional courts around the world is not only unmanageable, it is intellectually dishonest. The idea that U.S. judges can or should ignore well-reasoned arguments for efficient solutions to common constitutional issues simply because they are “foreign” is a fiction that only serves to mask their actual deliberative process, a prospect which is both undemocratic and impermissibly vague.

\textsuperscript{241} See \textit{supra} notes 2, 13, 70 (listing scholarly articles attempting to identify cohesive constitutional theories for incorporating international sources into U.S. constitutional deliberations).