Fordham International Law Journal

Volume 28, *Issue* 6 2004 *Article* 2

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

Geert-Jan Alexander Knoops*

*

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

Geert-Jan Alexander Knoops

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?[1]

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

---

* J.D. Candidate, 2006, Fordham University School of Law; Editor-in-Chief, Vol. XXIX, *Fordham International Law Journal*; B.A., Boston University, 2001. The author would like to thank Professors Liz Cooper and Martin Flaherty for their invaluable comments. Special thanks are also due to Rosa Morales and Benita Hussain, without whom none of this would have been possible, and to my father, Professor Charles Kelbley, for reading all my drafts and for being my finest teacher, in law and in life.

1. ROBERT PIRSIG, ZEN AND THE ART OF MOTORCYCLE MAINTENANCE: AN INQUIRY INTO VALUES, epigraph (1974) (paraphrasing Plato's Phaedrus).

2. *See* David Shaw, *Matters of Taste: What's Behind the Buzz*, L.A. TIMES, Mar. 16, 2005, at F1 (noting increased globalization in wine industry); *see also* Editorial, *The Future of Irish Film*, IRISH TIMES, July 1, 2003, at 15 (describing increasing globalization of media industry); Henry Kaufman, *Why There Can Be No Alternative to the US dollar*, FIN. TIMES (London), Dec. 9, 2004, at 19 (analyzing general effects of increasing economic globalization); Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1404 (2006) (book review) (discussing growing reach of international law in increasingly globalized world); Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570, 2572 (2004) (book review) (characterizing constitutional law as last frontier for globalism). A growing body of scholarship has begun to address the issue of international law's influence in the United States. *See* Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 191 (2003) [hereinafter Slaughter, *Global Community*] (describing rise in transnational litigation, which encompasses cases between States, between individuals and States, and between individuals across borders, blurring traditional conception of international disputes as only existing between States); *see also* Anne-Marie Slaughter, Breard*: Court to Court*, 92 AM. J. INT'L L. 708, 708-10 (1998) [hereinafter Slaughter, *Court to Court*] (explaining concepts of judicial comity and transjudicial relations); Reem Bahdi, *Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts*, 34 GEO. WASH. INT'L L. REV. 555, 557-58 (2002) (describing process by which judges from different countries have begun communicating and learning from one another); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 53 (2004) [hereinafter Koh, *International Law as Our Law*]

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 sources[4] are irrelevant and unconstitutional for U.S. courts to consider when interpreting the U.S. Constitution.[5]

(describing form of "transnationalist jurisprudence" that recognizes emergence of transnational law as result of increasingly globalized world); Claire L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 29-40 (1998) (noting increasing dialogue between international courts). Although many non-U.S. constitutional courts routinely consult international sources in deciding constitutional issues, the practice is controversial in U.S. courts. *See* ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 15-25 (2003) (characterizing trend towards interpreting U.S. Constitution with reference to international sources as "insidious"); *see also* Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 819 (1999) (noting dearth of comparative constitutional analysis in U.S. case law as compared to other Nations); Sarah H. Cleveland, *Is There Room for the World in Our Courts?*, WASH. POST, Mar. 20, 2005, at B5 (suggesting that ongoing disagreement over influence of international law reflects U.S. Supreme Court Justices' widely divergent opinions on U.S. place in increasingly globalized world); Scott Malcomson, *Lawfare*, N.Y. TIMES, Dec. 12, 2004, § 6 (magazine), at 80 (highlighting U.S. politicians' criticism of increasing globalization of U.S. Supreme Court decisions); Patti Waldmeir, *Top Court Abolishes US Death Penalty For Juveniles*, FIN. TIMES (London), May 2, 2005, at 10 (noting controversy over increased references to international sources in recent U.S. Supreme Court decisions).

3. *See* Roper v. Simmons, 543 U.S. 551, 575-76 (2005) (holding laws of other countries instructive for purposes of interpreting Eighth Amendment); *see also* Printz v. United States, 521 U.S. 898, 977 (1997) (Breyer, J., joined by Stevens, J., dissenting) (stating that experiences of non-U.S. systems may assist in evaluating merits of proposed solutions to common legal problems); Cleveland, *supra* note 2 (arguing that drafters of U.S. Constitution expected some aspects of constitutional interpretation to be informed by international norms); Ruth Bader Ginsburg, *Looking Beyond our Borders: The Value of Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329, 330-32 (2004) (stating that authors of Declaration of Independence and U.S. Constitution created documents reflecting their concern for world opinion); Harold Hongju H. Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1087-90 (2002) [hereinafter Koh, *World Opinion*] (asserting that Framers of U.S. Constitution ("Framers") intended term "Law of Nations" to be enforceable as U.S. law).

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.[6] Most recently, the issue arose in *Roper v. Simmons*, a U.S. Supreme Court case that reversed earlier cases,[7] 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.[8] Though *Roper*'s holding is rooted in the established principles of the Court's Eighth Amendment jurisprudence,[9] legal scholars have criticized

---

Okla., 487 U.S. 815, 869 n.4 (1988) (Scalia, J. dissenting) (stating that because there is no discernable U.S. consensus against executing offenders under age of 16, fact that majority of Nations prohibits such punishment is irrelevant).

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).

7. *Compare Roper*, 543 U.S. at 578-79 (holding juvenile death penalty unconstitutional under Eighth Amendment prohibition on cruel and unusual punishment), *with* Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (upholding juvenile death penalty as constitutional). *See also* Charles Lane, *Kennedy Reversal Swings Court Against Juvenile Death Penalty*, WASH. POST, Mar. 7, 2005, at A17 (noting Justice Kennedy's change of mind on constitutionality of juvenile death penalty).

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.[10] This criticism quickly subsumed the initial debate over the constitutionality of executing minors.[11] Public reaction in the United States remains deeply divided on the use of international law in U.S. courts.[12] Indeed, the debate has existed since the founding of the United States (the "Founding"),[13] 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?art_id=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).

13. *Compare* Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 426 (1857) (Taney, J.) (claiming that views of Europeans on abhorrent nature of slavery are irrelevant to considerations of whether practice is constitutional), *with id.* at 556-57 (McLean, J., dissenting) (arguing that international laws regarding slavery should control, and that such laws would classify Dred Scott as free man, not slave). *See* Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 754 (2005) (stating that debate over citation of non-U.S. law in U.S. court opinions is "not at all new"); *see also* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 348-49 (1995) [hereinafter Henkin, *The Ghost of Senator Bricker*] (describing U.S. Congress's hostility to international law in 1950's).

potential to shape future U.S. court decisions on a variety of important constitutional issues.[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.[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.[16] In the early

14. *See* Daniel Bodansky, *Debate: The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT'L & COMP. L. 421, 428 (2004) (noting utility of international law in deciding close constitutional cases); *see also* Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999, 2026-28 (2003) (explaining controversy over U.S. courts' application of international norms in constitutional issues, suggesting that in short run, such norms may serve to inform constitutional interpretation, and contemplating future in which U.S. Constitution is subordinate to international norms).

15. *See* Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on* Atkins *and* Lawrence, 98 AM. J. INT'L L. 69, 70 (2004) [hereinafter Ramsey, *International Materials*] (stating that references to international sources in U.S. constitutional interpretation is not new, nor is criticism that attends such references); *see also* Slaughter, *Global Community*, *supra* note 2, at 195 n.11 (noting that Framers borrowed heavily from judicial principles of English common law, as well as political theories of Age of Enlightenment). *See generally* Antonin Scalia & Stephen Breyer, Assoc. Justices, U.S. Supreme Court, Discussion at the American University Washington College of Law: Debate on the Relevance of Foreign Law for American Constitutional Adjudication (Jan. 13, 2005), *reprinted in The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519 [hereinafter Scalia & Breyer] (debating history and relevance of international law in U.S. judicial decisions).

16. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 822-26 (1997)

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 examination 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. jurisprudence is not a new practice, nor is the criticism it engenders.[18]

(noting that conceptions of how international law interacts with U.S. law has changed significantly over time); *see also* Michael D. Ramsey, *International Law as Part of Our Law: A Constitutional Perspective*, 29 PEPP. L. REV. 187, 196 (2001) [hereinafter Ramsey, *Part of Our Law*] (asserting that there is much about U.S. Supreme Court's treatment of international law that has changed since 1789).

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*, 58 U. MIAMI L. REV. 323, 324-26 (2003) (noting irony in development of U.S. constitutional theory of textualism, which hinges upon fidelity to original text, having developed from British system, which relied on unwritten constitutional tenets); Koh, *International Law as Our Law*, *supra* note 2, at 44 (stating that Framers of U.S. Constitution, as well as early Justices of U.S. Supreme Court, recognized that ensuring compatibility of U.S. law with rules of international law was essential to stability of their newly formed Nation); Ramsey, *Part of Our Law*, *supra* note 16, at 196 (noting Framers' concern that Articles of Confederation lacked power to prevent individual States from violating international law); Slaughter, *Global Community*, *supra* note 2, at 197 (noting that courts in fledgling States or newly decolonized countries, such as post-Revolution United States, have historically borrowed from laws of other countries to fill gaps or build legal foundations).

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: International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1559-60, 1569 (1984) (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 international law); Jordan Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 MICH. J. INT'L L. 301, 301-05 (1999) (listing early U.S. cases invoking law of nations). *But see* United States v. Smith, 18 U.S. (5 Wheat.) 153, 182 (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,"[19] 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.[20] In addition to these Founding documents, early U.S. courts referenced international law in a variety of situations.[21]

1. Early U.S. Cases Citing International Law

Early U.S. history was marked by a series of naval conflicts.[22] 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.[23] In the cases described below, the Court looked to international sources in determining questions of statutory interpretation, federal jurisdiction, and constitutional interpretation.

---

19. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776); *see also* Harry A. Blackmun, Assoc. Justice, U.S. Supreme Court, Address Before the Annual Dinner of the American Society of International Law, *in* AM. SOC. INT'L L. NEWSL., Mar. 1994 (suggesting that language of U.S. Declaration of Independence indicates that drafters of U.S. Constitution intended law of nations to be binding on United States).

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 exent 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).

22. *E.g.*, G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 AM. J. INT'L L. 727, 727 (1989) (explaining that early U.S. naval conflicts resulted in proliferation of early piracy cases); *see also* C. Kevin Marshall, Note, *Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars*, 64 U. CHI. L. REV. 953, 974-75 (1997) (noting that privateers captured boats without much governmental oversight throughout early U.S. history; stating that U.S. courts were often only meaningful check on privateers' actions).

23. *See* Calabresi & Zimdahl, *supra* note 13, at 758, 763-83 (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*.[24] 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.[25] The Danish-owned *Charming Betsy* was subsequently captured on suspicion of trading with the French, and brought to the United States.[26] 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.[27] Importantly, Chief Justice John Marshall looked to international legal principles — which counseled against allowing the seizure of neutral vessels from noncombatant countries — in interpreting the statute at issue.[28] 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.[29]

---

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-

b. *Rose v. Himely*: Jurisdictional Interpretation

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.[30] 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.[31] 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.[32] 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.[33] The Supreme Court examined contemporaneous English cases addressing the ability of English courts to review the judgments of non-English tribunals.[34] Each English case confirmed the Court's ultimate holding — that they did indeed

---

tion remains"); *see also* Bradley, *supra* note 21, at 485-86 (noting that *Charming Betsy* canon had been articulated three years earlier in *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801)). *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987) [hereinafter RESTATEMENT (THIRD)] (adopting *Charming Betsy* canon of construction).

30. *See* Rose v. Himely, 8 U.S. (4 Cranch) 241, 268, 270-71 (1808) (examining contemporaneous British cases to determine whether there was jurisdiction for U.S. courts to examine judgments of non-U.S. tribunals); *see also* Calabresi & Zimdahl, *supra* note 13, at 769 (stating that *Rose v. Himely* clearly relied upon contemporaneous British case law in deciding question of jurisdiction).

31. *See Rose*, 8 U.S. (4 Cranch) at 268 (recounting capture of U.S. cargo by French authorities and subsequent resale to U.S. defendant); *see also* G. Edward White, *Recovering the World of the Marshall Court*, 33 J. MARSHALL L. REV. 781, 788 n.21 (noting that *Rose* was one of many complicated jurisdictional cases decided when there were many ships from belligerent and neutral countries sailing through ocean near United States).

32. *See Rose*, 8 U.S. (4 Cranch) at 268 (explaining that French tribunal in Santo Domingo condemned ship and resold its cargo); *see also* Calabresi & Zimdahl, *supra* note 13, at 766 (noting that case involved seizure of U.S.-owned cargo by French authorities).

33. *See Rose*, 8 U.S. (4 Cranch) at 268 (noting that "the great question to be decided . . . is . . . . [c]an this court examine the jurisdiction of a foreign tribunal?"); *see also* Calabresi & Zimdahl, *supra* note 13, at 766 (explaining that *Rose* involved "a question of jurisdiction and a seized vessel").

34. *See Rose*, 8 U.S. (4 Cranch) at 270-72 (citing English court cases such as *The Flad Oyen*, *The Christopher*, *The Kierlighett*, *The Henrick and Maria*, and *The Comet*, each of which reviewed decisions of non-English tribunals); *see also* Calabresi & Zimdahl, *supra* note 13, at 767 (noting that *Rose* discussed several contemporary English cases in coming to a decision).

have jurisdiction to evaluate the validity of decisions made by non-U.S. tribunals.[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.[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.[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"[38] — by reference to the writings of a number of non-U.S. jurists.[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.[40] In other words, the Court looked to the writings of non-U.S. legal scholars and the law of nations to interpret the

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, *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).

36. *See, e.g.*, Brown v. United States, 12 U.S. (8 Cranch) 110, 123-27 (1814) (interpreting Article I, section 8, clause 11, of U.S. Constitution ("War Clause") with reference to international law); *see also* Calabresi & Zimdahl, *supra* note 13, at 770-71 (using *Brown* as example of early U.S court using international law to interpret U.S. Constitution).

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, *supra* note 13, at 771 (stating that *Brown* interpreted U.S. Constitution in way that "would accord with the law of nations").

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

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, *supra* note 13, at 770 (describing *Brown*'s reliance on non-U.S. jurists).

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, *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* RESTATEMENT (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); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After* Erie, 66 FORDHAM L. REV. 393, 393-96 (1997) (noting that traditionally, CIL has been considered similar in status to non-general common law after *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938): legally binding federal law developed by federal courts in absence of statutory guidance). *But see* Bradley & Goldsmith, *supra* note 16, at 857 (questioning validity of previous scholarship on CIL and claiming that CIL is no longer valid after *Erie* decision); Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 452 (2000) (arguing for abolition of CIL). *Contra* Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39, 40 (1994) (stating that, despite debate on some issues of international law's power, it is clear that "[c]ustomary international law informs the construction of domestic law," and is controlling in absence of superseding law to contrary); Stephens, *supra*, at 396-98 (rebutting criticism of CIL as misleading and incorrect).

43. *See* United States v. Belmont, 301 U.S. 324, 330-31 (1937) (recognizing power of executive agreements); *see also* RESTATEMENT (THIRD), *supra* note 29, intro. (noting that most international law mentioned in *Restatement (Third) of the Foreign Relations Law of the United States* ("*Restatement (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).

44. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 720 (2004) (noting that early U.S. Congress provided remedies for violations of at least three aspects of law of nations: offenses against ambassadors, piracy, and violation of safe conduct); *see also* White, *supra* note 22, at 734-35.

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.[46] 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.[47] 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.[48] As international law[49] is increasingly used to regulate how Nations deal with their own citizens,[50] 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.[51] 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 232, 239 (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[52] 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,[53] and claim that modern U.S. courts have given international law too much power.[54] 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.[55]

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

---

344 (2003) (Ginsburg, J., concurring) (examining worldwide consensus in favor of affirmative action); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (considering worldwide consensus against punishing mentally retarded offenders with death penalty).

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'L 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 Sovereigntists*, 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,[56] derived through the general and consistent practice of Nations, and conducted with a sense of legal obligation.[57] 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.[58]

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.*[59] 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.[60] Pursuant to this Proclamation, a U.S. gunboat seized the *Paquete Habana,* a small fishing vessel, along the coast of Cuba.[61] Over the objections of the owner and crew, the *Paquete Habana* was taken to Key West, Florida, where it was

---

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, § 102(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).

59. *See* The Paquete Habana, 175 U.S. 677, 709 (1900) (holding law of nations to forbid seizure of coastal fishing vessels as prizes of war); *see also* Harold Hongju Koh, *Is International Law Really State Law?,* 111 HARV. L. REV. 1824, 1842 (1998) (citing *The Paquete Habana* as example of early U.S. courts using CIL)

60. *See* Presidential Proclamation, 30 Stat. 1769 (Apr. 22, 1898) (authorizing blockade of Cuba in pursuance of U.S. law and law of nations); *see also* Steven M. Schneebaum, The Paquete Habana *Sails On: International Law in U.S. Courts After* Sosa, 19 EMORY INT'L L. REV. 81, 81 (2005) (noting that Presidential Proclamation ordering U.S. ships to seize Spanish ships violating blockade of Cuba was made days before outbreak of Spanish-American War).

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.[62] 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.[63] 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.[64] In its opinion, the Court issued the often-cited declaration that "[i]nternational law is part of our law."[65]

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.[66] 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.[67] 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).

67. *See* Henkin, *supra* note 18, at 1562 (claiming that courts determine CIL norms by looking to political actions of State governments); *see also* Donald J. Kochan, *The Political Economy of the Production of Customary International Law: The Role of Non-governmental Organizations in U.S. Courts*, 22 Berkeley J. Int'l L. 240, 260-63 (2004) (noting growing role of non-governmental organizations in creation of new CIL norms).

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.[73] For instance, until *Roper* was decided, there was significant debate over whether the U.S. policy of executing juveniles violated *jus cogens* norms, as the practice is condoned by only a handful of countries in the entire world.[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 *jus cogens* norm.[75] Like CIL norms, *jus cogens* norms are treated like federal common law in U.S. courts.[76]

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

---

73. *See* RESTATEMENT (THIRD), *supra* note 29, § 102 cmt. b (stating that rules of international law may be formed by widespread international consensus among Nations); *see also id.* § 102 cmt. k (noting that *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).

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

75. *See* RESTATEMENT (THIRD), *supra* note 29, § 702 cmt n. (identifying genocide, murder, and slavery as *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.* § 702 cmt. a (leaving open possibility that new rights may achieve status of CIL, and presumably *jus cogens*, in future); *see also* Koh, *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).

76. *See* Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 512 (1997) (explaining that *jus cogens* norms are incorporated into federal common law); *see also* Joel R. Paul, *The Bush Doctrine: Making or Breaking Customary International Law?*, 27 HASTINGS INT'L & COMP. L. REV. 469 n.25 (noting *jus cogens* and CIL as equivalent to U.S. federal common law).

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); Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980) (holding State-sanctioned torture a violation of CIL).

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.[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.[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.[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.[82] The modern concept of federal common law arose in the wake of the

---

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).

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).

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).

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*,[83] which directed U.S. federal courts to apply state law to controversies which were not explicitly governed by federal statutes or Constitutional provisions.[84] *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*.[85]

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.[86] One year after *Erie* was decided, Philip C. Jessup recognized the importance of examining what effect its holding might have on international law.[87] 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.[88]

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.[89] An ex-

83. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (declaring that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the [s]tate"); *see also* Bradley & Goldsmith, *supra* note 16, at 827 (noting that *Erie* ended federal court creation of general common law).

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.[90] 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.[91] 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.[92] 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.[93]

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.[94] 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).

94. *Compare* Field, *supra* note 82, at 883 (stating that federal common law can be used by U.S. courts whenever they interpret a federal law or Constitutional provision to authorize it), *and* Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 805 (1989) (interpreting federal common law broadly, as appropriate whenever Constitution authorizes federal legislative or executive action), *with* Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1025-26

v. Lincoln Mills, the U.S. Supreme Court clarified the procedure for determining federal common law.[95] *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.[96] 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.[97] 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.[98] 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 *Erie* that in the absence of a federal law, state law must be applied.[99] Instead, the Court held that the Taft-Hartley Act implicitly authorized federal courts to apply federal common law to enforce col-

---

(1967) (arguing that U.S. Constitution authorizes federal common lawmaking in only four areas: admirality, international relations, interstate controversies, and proprietary U.S. transactions), *and* Thomas Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 330-31 (1992) (defining federal common lawmaking power narrowly; claiming that U.S. courts can use federal common law only when explicitly authorized by Congress).

95. *See* 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); *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).

96. *See Lincoln Mills*, 353 U.S. at 449-50 (citing language of Taft-Hartley Act allowing labor disputes to be brought into federal courts); *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).

97. *See Lincoln Mills*, 353 U.S. at 449 (noting that case involved dispute between union and employer over arbitration agreement); *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).

98. *See* Lincoln Mills v. Textile Workers, 230 F.2d 81, 84 (5th Cir. 1956), *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); *see also Lincoln Mills*, 353 U.S. at 449 (noting refusal of employer to submit to arbitration at request of union).

99. *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); *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).

lective bargaining agreements.[100] The proper rule, the Court stated, would be fashioned by federal courts, through an analysis of the objectives of the Taft-Hartley Act.[101] Importantly, *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."[102] Effectively, *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.[103]

Like federal common law, which is not derived from explicit congressional statutes, CIL is not derived from the explicit language of international treaties.[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.[105] Both federal

---

100. *See 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* 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).

101. *See 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* 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).

102. *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, *The Federal Arbitration Act: Key to Stabilizing and Strengthening the Law of Labor Arbitration*, 21 BERKELEY J. EMP. & LAB. L. 521, 572-73 (2000) (noting that *Lincoln Mills* directed U.S. federal courts to utilize "the range of judicial inventiveness" in determining federal common law rules).

103. *See 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, *supra* note 102, at 572-73 (positing that *Lincoln Mills* directed U.S. federal courts to fashion federal common law rules in labor disputes in accordance with national labor objectives).

104. *See* 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* RESTATEMENT (THIRD), *supra* note 29, § 102(2) (explaining that CIL is formed by "general and consistent practice of [S]tates followed by them from a sense of legal obligation").

105. *See 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* RESTATEMENT (THIRD), *supra* note 29, § 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.[106]

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,[107] it is unclear what role the laws and legal theories of other Nations should play in U.S. legal decisions.[108] *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.[109] *Roper*'s predecessors include *Atkins v. Vir-*

---

106. *See* Field, *supra* note 82, at 883 (noting that federal common law is determined by U.S. judges and preempts state law); *see also* Paust, *supra* note 18, at 305 (claiming that CIL, as determined by U.S. judges, is both federal law and supreme law of the land).

107. *See* Amy C. Harfeld, *Oh Righteous Delinquent One: The United States' International Human Rights Double Standard — Explanation, Example, and Avenues for Change*, 4 N.Y. CITY 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, *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, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT'L L. 1, 2 (2000) (claiming United States is sole superpower left in world); Charles Krauthammer, *The Bush Doctrine; In American Foreign Policy, a New Motto: Don't Ask. Tell*, 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, *supra* note 12, at 48 (describing hegemony of U.S. constitutional law); Choudhry, *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, *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).

108. *See* Slaughter, *Global Community*, *supra* note 2, at 196 (noting that since 1945, many non-U.S. courts, especially those formed by United States or upon U.S. model, borrow heavily from U.S. Supreme Court jurisprudence). *Compare* United States v. Then, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) (claiming that United States no longer has monopoly on constitutional review and stating that U.S. courts should be willing to look to their "constitutional offspring" to see how they have dealt with analogous problems), *with* Bolton, *supra* note 12, at 48 (stating that influence of international law should be avoided at all costs in U.S. court decisions).

109. *See generally Roper*, 543 U.S. at 577-79 (holding juvenile death penalty to be unconstitutional based in part on overwhelming worldwide consensus againt 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-

ginia, a 2002 case prohibiting the execution of mentally retarded offenders,[110] and *Lawrence v. Texas*, a 2003 decision holding the criminalization of homosexual sodomy unconstitutional.[111] Like *Roper*, both of these decisions met with considerable criticism for their invocation of international law.[112]

1. *Atkins v. Virginia*

In *Atkins*, the U.S. Supreme Court evaluated the constitutionality of executing mentally retarded offenders.[113] In 1996, Daryl Renard Atkins and an accomplice kidnapped, robbed, and ultimately murdered a victim they had abducted from a local convenience store.[114] 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 dissaproval 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 Consensus,' Justices Bar Death Penalty for Retarded Defendants*, N.Y. TIMES, June 20, 2002, at A1 (providing brief overview of U.S. Supreme Court's recent death penalty jurisprudence).

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 Kingdom*, 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).

112. *See, e.g.*, John Cornyn, *Domestic, Not Foreign*, NAT. REV. ONLINE, Mar. 28, 2005 (criticizing *Lawrence* for relying on European court decisions). *But see* Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 89 (2004) (arguing that *Lawrence* referred to international law only to rebut historical inaccuracies that *Bowers v. Hardwick*, 478 U.S. 186 (1986) relied upon to uphold laws criminalizing homosexual relations).

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 Eight 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).

court.[115]

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.[116] 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.[117] 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 Eight Amendment's prohibition on cruel and unusual punishment.[118] 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.[119] 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.[120]

---

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).

119. *See* Atkins, 536 U.S. at 316 n.21 (citing Brief for European Union as Amicus Curiae Supporting Petitioner, *McCarver v. North Carolina*, 533 U.S. 975 (2001) (No. 00-8727), 2001 WL 648609 (resubmitted in *Atkins*)); *see also id.* at 347-48 (Scalia, J., dissenting) (criticizing majority opinion for imposing views of other Nations on U.S. citizens); Ramsey, *International Materials*, *supra* note 15, at 70 (observing that *Atkins* decision discussed views of "world community" on execution of mentally retarded criminals).

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

---

also id. at 347-48 (Scalia, J., dissenting) (characterizing world opinion as "irrelevant" to interpretation of what constitutes cruel and unusual punishment).

121. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (overruling *Bowers* and holding that Due Process clause of U.S. Constitution confers a right to privacy in consensual intercourse between consenting adults); *see also* Ramsey, *International Materials*, *supra* note 15, at 70 (explaining holding of *Lawrence* overruled *Bowers* and struck down Texas statute criminalizing consensual homosexual sodomy).

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-

---

13, at 878 (recounting Justice Scalia's objections to citation of international law in *Lawrence*).

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).

128. *See* Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675, *passim* (2003) [hereinafter Alford, *Federal Courts*] (laying out seven separate models for evaluating influence of international sources in federal court decisions); *see also* Jeffrey Rosen, *Juvenile Logic*, NEW REP., Mar. 21, 2005, at 11 (criticizing Justice Kennedy's opinion in *Roper*, and highlighting hostility social conservatives evince towards uses of international law in judicial opinions); Ed Feulner, *Courting Trouble*, WASH. TIMES, Mar. 16, 2005, at A18 (criticizing Justice Kennedy's *Roper* opinion, and praising Justice Scalia's dissent); Editorial, *Other Nations' Laws*, WASH. TIMES, Mar. 13, 2005, at B2 (suggesting that one way to end consultation of international law in U.S. Supreme Court decisions would be to amend U.S. Constitution, allowing Congress to directly overrule Court decisions); Tony Mauro, *A Lost Chance to Be the Chief*, LEGAL TIMES, Mar. 7, 2005, at 1 (noting harsh criticism aimed at Justice Kennedy by prominent Republican academics, politicians, and judicial officials as result of *Roper* opinion).

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).

138. *See* United States v. Then, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) (noting benefits of looking to international sources when considering solutions to common constitutional problems). *Compare* Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (Scalia, J., joined by Rehnquist, C.J., and White, J., dissenting) (arguing that views of other Nations are irrelevant for purposes of U.S. constitutional interpretation), *with* Ginsburg, *supra* note 3, at 330 (stating that views of non-U.S. Nations are relevant for purposes of U.S. constitutional interpretation).

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. INT' 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.[141]

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.[142] Of the three *Roper* Justices who adhere to the nationalistic jurisprudence, Justices Scalia and Thomas have opposed any judicial references to international law in their interpretations of the U.S. Constitution.[143] The late Chief Justice Rehnquist was often aligned with Justices Scalia and Thomas in criticizing the use of international law, however, some of his

---

rights, death penalty); Alford, *Comparativism*, *supra* note 139, at 640 (noting that U.S. Supreme Court is bitterly divided over citing to international law).

141. *See* Koh, *International Law as Our Law*, *supra* note 2, at 52-53 (setting out tenets of "nationalist" and "transnationalist" jurisprudence); *see also* John Dugard, *The Implications for the Legal Profession of Conflicts Between International Law and National Law*, 46 S. TEX. L. REV. 579, 590 (2005) (noting with approval Professor Koh's distinction of two main types of global jurisprudence).

142. *See* Alford, *Comparativism*, *supra* note 139, at 655 (noting that Justice Scalia, as proponent of originalist theory of constitutional interpretation, has consistently opposed references to contemporary international sources as irrelevant); *see also* Scalia & Breyer, *supra* note 15, at 526 (quoting Justice Scalia as saying that non-U.S. standards of decency are irrelevant because non-U.S. countries do not share U.S. background, culture, or moral values); *see generally* Koh, *International Law as Our Law*, *supra* note 2, at 52 (marking general contours of nationalist jurisprudence theory).

143. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (opposing consultation of international sources in determining constitutionality of laws regulating consensual adult sexual relations); Atkins v. Virginia, 536 U.S. 304, 340-41, 347-48 (2002) (Scalia, J., dissenting) (objecting to majority opinion's reference to international sources); Foster v. Florida, 537 U.S. 990, 990 (2002) (mem.) (Thomas, J., concurring in denial of certiorari) (stating that U.S. Supreme Court should not consult fads or opinions of other Nations); Knight v. Florida, 528 U.S. 990, 990 n.1 (1999) (Thomas, J., concurring in denial of certiorari) (claiming that if petitioners' request for rehearing had any merit, it would not require resort to opinions of other Nations, and would instead rely on U.S. court decisions); Printz v. United States, 521 U.S. 898, 921 n.11 (1997) (Scalia, J., plurality opinion) (holding comparative constitutional analysis irrelevant in deciding constitutional questions). *See generally* Alford, *Comparativism*, *supra* note 139, at 640 & n.1 (discussing opinions of Justices Scalia and Thomas critical of consultation of international sources); Ramsey, *International Materials*, *supra* note 15, at 69 (noting Justice Scalia's distaste for use of international materials in expanding scope of U.S. constitutional rights).

opinions and writings indicate a more lenient viewpoint regarding the uses of international law.[144] Although they exhibit differences, there are several propositions common to theories of nationalist jurisprudence.[145]

1. 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.[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.[147] The second prong highlights potential problem areas

144. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 710, 718 n.16 (1997) (Rehnquist, C.J.) (noting worldwide condemnation of euthanasia as criminal act); Raines v. Byrd, 521 U.S. 811, 828 (1997) (Rehnquist, C.J.) (noting favorably European laws regarding legislative standing, but declining to apply such law because it is not provided for in U.S. Constitution); Planned Parenthood v. Casey, 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (citing to abortion cases from Supreme Court of Canada and West German Constitutional Court); William H. Rehnquist, *Constitutional Courts — Comparative Remarks, reprinted in* GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE — A GERMAN-AMERICAN SYMPOSIUM 411-12 (Paul Kirchoff & Donald P. Kommers eds., 1993) (stating that because constitutional law is now solidly grounded in so many countries, it is time for U.S. courts to begin looking to their decisions for aid in deciding U.S. cases). *But see* Atkins v. Virginia, 536 U.S. 304, 347-48 (2002) (Rehnquist, C.J., dissenting) (criticizing majority's reliance on international laws); *see also* Larsen, *supra* note 111, at 1288-89 (claiming that Chief Justice Rehnquist's discussion of European law in *Raines v. Byrd* was only intended to show by contrast what U.S. law did not stand for).

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

146. *See* 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 36-37 (Phillips Bradley ed., Henry Reeve trans., A.A. Knopf 1948) (1835); *see also* Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1481 n.4 (2003) [hereinafter Koh, *American Exceptionalism*] (noting history of term "American Exceptionalism").

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); *see also* Choudhry, 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

---

ing "legal particularism" theory, which finds international sources irrelevant for U.S. constitutional interpretation); Scalia & Breyer, *supra* note 15, at 521 (stating opinion of Justice Scalia that international law should not be consulted when interpreting U.S. Constitution because United States has unique moral and legal framework).

148. *See* Roper v. Simmons, 543 U.S. 551, 625 (2005) (Scalia, J., dissenting) (stating that if U.S. Supreme Court were to survey international laws on abortion, they would find few Nations permitting practice); *see also* Ramsey, *International Materials*, *supra* note 15, at 81 (noting that in many areas, U.S. law is more rights-protective than international norms).

149. *See* Scalia & Breyer, *supra* note 15, at 521 (stating opinion of Justice Scalia that United States has always had unique moral, legal framework that is significantly different from rest of world); *see also* Koh, *American Exceptionalism*, *supra* note 146, at 1483 (describing U.S. insistence on using different labels to describe internationally recognized concepts of rights); Spiro, *supra* note 55, at 12 (explaining that "linchpin" of anti-international law arguments is reliance on ability of United States to opt out of international law); Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 421 (2003) (stating that U.S. insistence on referencing "civil" or "constitutional" rights instead of "human" rights necessarily implicates opinion that U.S. experience is different from rest of world).

150. *See* Koh, *American Exceptionalism*, *supra* note 146, at 1482 (discussing various typologies of American Exceptionalism); *see also* Ginsburg, *supra* note 3, at 331 (linking critics of international law with "originalist" constitutional theorists, and remarking that although "partisans of that view sometimes carry the day," U.S. Supreme Court's trend is toward more inclusive view of international law); Law, *supra* note 140, at 729 (noting opponents of international consultation often promote originalist theory of constitutional interpretation); Mark Tushnet, *Returning With Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 325, 334 (1998) (noting similarities between "strong organicist" position in use of constitutional borrowing with nationalist jurisprudence theory).

151. *See* Scalia & Breyer, *supra* note 15 (stating Justice Scalia's view that laws of other countries are irrelevant for purposes of deciding constitutional issues); *see also* Spiro, *supra* note 55, (noting recent academic support for position against relevance of international law).

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, Resitance, 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 jurisprudince evinces isolationist tendencies).

153. *See* Printz v. U.S., 521 U.S. 898, 921 n.11 (1997) (criticizing Justice Breyer's dissent for considering benefits of non-U.S. systems of federalism and labeling "comparative analysis" inappropriate for interpreting U.S. Constitution); *see also* Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 593 (1999) (claiming that Justice Scalia's opinion in *Printz* was influenced by American Exceptionalism paradigm).

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.[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.[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.[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.[161] Nationalist ju-

---

ory of evidentiary exclusion, as illustration of dangers of comparative constitutional analysis).

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), *rev'd*, 543 U.S. 551 (2005). *But see* Scalia & Breyer, *supra* note 15, at 534 (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).

159. *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), *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); *see also* Koh, *American Exceptionalism*, *supra* note 146, at 1482 (classifying *Stanford* as example of American Exceptionalism paradigm); Harding, *supra* note 149 at 420 (noting Justice Scalia's rejection of international sources in *Stanford*).

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

161. *See* Ramsey, *International Materials*, *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); *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, *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.[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.[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.[164] The argument against such consultation is similar to a traditional crit-

---

ally, United States is among most protective of abortion rights, and pointing out that most other Nations allow far more restrictions on free speech).

162. *See* Ramsey, *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); *see also* Law, *supra* note 140 *passim* (attempting to define "neutral" constitutional theory which would incorporate international law and yield non-selective decisions).

163. *See* Ramsey, *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). *Cf. 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).

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); *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).

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.[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.[166] This raises concerns that federal judges are unaccountable, and thus likely to rely on their own opinions, rather than the relevant law.[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.[168] Under this paradigm, judicial consultation of international sources is an unsanctioned delegation of authority, and should be prohibited as unconstitutional.[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."[170] The Resolu-

165. *See* Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 CALIF. L. REV. 1441 *passim* (2004) (summarizing history and current meaning of term "judicial activism"); *see also* Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1401 (2002) (describing term "judicial activism" as empty of meaning).

166. *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).

167. *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).

168. *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).

169. *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).

170. *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 &

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.[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?"[172] Representative Feeney and other members of Congress are not alone in their disapproval.[173] This distrust of international law is shared by many across the country, who label judges consulting international sources "judicial activists."[174]

Zimdahl, *supra* note 13, at 752-53 (noting recent introduction of Reaffirmation of American Independence Resolution).

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).

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]").

173. *See, e.g.*, H.R. Res. 468, 108th Cong. (2003) (singling out Justices Stevens, Kennedy, Ginsburg, and Breyer by name for criticism over their repeated uses of international sources); *see also* Constitution Restoration Act of 2004, S. 2323, 108th Cong. § 201 (2004) (attempting to prohibit federal courts from considering international or non-U.S. law — except for English law — in interpreting or applying U.S. Constitution); Constitutional Preservation Resolution, H.R. Res. 446, 108th Cong. (2003) (expressing sense of the U.S. House of Representatives "that the Supreme Court should base its decisions on the Constitution and the Laws of the United States, and not on the law of any foreign country or any international law or agreement not made under the authority of the United States").

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-*

b. Popular Disapproval

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.[175] Beginning after *Lawrence*, and escalating after *Goodridge v. Department of Public Health*,[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.[177] A year after *Goodridge* was decided, eleven states passed amendments to their constitutions, effectively barring same-sex couples from marrying.[178] These amendments are

---

tend Some Judges Go Too Far, BOSTON GLOBE, Oct. 20, 2004, at B6 (listing quotes from Massachusetts Governor Mitt Romney and U.S. President George W. Bush accusing judges in *Goodridge v. Dep't of Public Health*, 440 Mass. 309 (2003) of judicial activism for legalizing same-sex marriages in Massachusetts).

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).

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).

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).

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.[179]

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.[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.[181] Weak transnationalist jurisprudence is exemplified by the opinions of the late Chief Justice Rehnquist

---

ment in Oregon); *see also* Brad Knickerbocker, *Political battles over gay marriage still spreading*, CHRISTIAN SCIENCE MONITOR, Nov. 29, 2004, at 1 (noting that gay marriage continues to be considered hot-button issue even after 11 state amendments passed in November 2004).

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).

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).

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 decision-making); *see also* Koh, *American Exceptionalism*, *supra* note 146, at 52 (contrasting theory of transnationalist jurisprudence with theory of nationalist jurisprudence).

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-

182. *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 828 (1997) (Rehnquist, C.J.) (discussing European laws regarding legislative standing); Washington v. Glucksberg, 521 U.S. 702, 734 (1997) (Rehnquist, C.J.) (noting Dutch experience with legalization of assisted suicide).

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.[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.[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.[189] A weak transnationalist theory considers non-U.S. laws as comparative tools, useful foils for explaining or contrasting current U.S. practices.[190]

b. Empirical Value

Another use for international sources is to demonstrate the usefulness of a particular constitutional interpretation.[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.[192] Thus, the U.S. Supreme Court's decision in *Washington v. Glucksberg*, which considered the constitutionality of the State of Washington's ban on physician-assisted suicide,

---

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 *Raines* exemplifies "expository" use of comparative constitutional materials).

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 *Raines*).

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).

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).

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).

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.[193] 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.[194] 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.[195]

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.[196] Strong transnationalist jurisprudence considers non-U.S. sources as beneficial for contemplating U.S. constitutional questions.[197] 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-

---

193. *See Glucksberg*, 521 U.S. at 735 (holding Washington State ban on physician-assisted suicide constitutional); *see also id.* at 785 (Breyer, J., concurring) (giving special weight to Dutch experience with physician-assisted suicide, as Netherlands was only country with experience that "has yielded empirical evidence about how such regulations might affect actual practice"); Calabresi & Zimdahl, *supra* note 13, at 873 (stating that *Glucksberg* majority and concurring opinions "are inundated" with references to laws and practices of non-U.S. States).

194. *See Glucksberg*, 521 U.S. at 734 (surveying the experience of the Netherlands and concluding that legalized euthanasia did not reduce problems associated with assisted suicide); Calabresi & Zimdahl, *supra* note 13, at 873 (noting *Glucksberg*'s discussion of Dutch experience with legalized euthanasia).

195. *See Glucksberg*, 521 U.S. at 734 (surveying the experience of the Netherlands and concluding that legalized euthanasia did not reduce problems associated with assisted suicide); Calabresi & Zimdahl, *supra* note 13, at 873 (noting *Glucksberg*'s discussion of Dutch experience with legalized euthanasia).

196. *See* Law, *supra* note 140, at 662 (observing that many Nations face conflicts between unelected judiciary and democratically elected governments); *see also* L'Heureux-Dube, *supra* note 2, at 37-40 (noting that U.S. Supreme Court's failure to participate in "international dialogue" has eroded their influence in non-U.S. courts).

197. *See* Koh, *International Law as Our Law*, *supra* note 2, at 52-53 (noting that proponents of transnationalist jurisprudence look favorably on the influence of non-U.S. and international law); *see also see also* Larsen, *supra* note 111, at 1297 (criticizing recent U.S. Supreme Court decisions for considering international law in their constitutional analysis).

sions.[198] 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."[199]

Justice Breyer has clearly articulated the "reason-borrowing" rationale for consultation of international materials.[200] 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.[201] *Roper* provides an excellent example: Justice Kennedy adopted the reasoning of the state court below because he found it to be a convincing argument.[202] 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).

201. *See* Roper v. Simmons, 543 U.S. 551, 564-67 (2005) (Kennedy, J.) (examining practices of U.S. states to determine national consensus against juvenile death penalty); *see also* Ford v. Wainwright, 477 U.S. 399, 408 (1986) (looking to unanimous prohibition among U.S. states against executing insane offenders in declaring practice to be unconstitutional).

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?[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.[204]

III. *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.[205] Part II reviewed two differing theories on the use of international law in U.S. courts — nationalist and transnationalist jurisprudence.[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. *Problems With Nationalist Jurisprudence*

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

---

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, *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).

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).

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 *jus cogens* norms; reviewing recent U.S. Supreme Court cases referencing international law).

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,[207] but ignores the important and frequent convergence of identical legal reasoning on paramount legal matters common to all human beings.[208] 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.[209] 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.[210]

The rationale behind nationalist jurisprudence theory breaks down when examining issues upon which the Constitution provides minimal guidance or is completely silent.[211] 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.[212] 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.[213]

---

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 globalism 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.[221] In addition, the U.S. Supreme Court cases cited by *Roper* each seem to indicate that international sources may be consulted for more than mere confirmation, but less than controlling precedent.[222] The true role of international sources in *Roper* seems to occupy a position somewhere on the continuum of influence between confirmatory and controlling power.[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.[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.[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.[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.[227] None of the recent Supreme Court opinions citing international law attempt to ex-

---

221. *See supra* notes 128-36 and accompanying text (analyzing *Roper*'s majority opinion and discussing criticism in *Roper*'s dissent).

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

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

224. *See supra* notes 132-34, 184-95 and accompanying text (arguing that holding in *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).

225. *See 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).

226. *See 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).

227. *See supra* notes 128-36 and accompanying text (reviewing language used in *Roper* to articulate proper influence of international sources; noting that Roper's major-

plain just how such a bifurcated decisional process might operate.[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.[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.[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.[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.[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.[233] Although the language of these decisions seeks to downplay their reliance on international sources, critics have

---

ity opinion held execution of mentally retarded offenders unconstitutional before discussing international law supporting decision).

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).

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).

230. *See supra* notes 131-34 and accompanying text (noting language in *Roper* emphasizing that international sources were used as confirmatory tools, rather than as basis for decision, in coming to decision on consitutional issue)

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).

232. *See supra* notes 162-63, 204 and accompanying text (criticizing use of international law in U.S. constitutional analyis; pointing out that judges may use international sources to justify imposing their personal beliefs on U.S. citizens).

233. *See supra* notes 107-36 and accompanying text (recounting facts and opinions in *Atkins*, *Lawrence*, and *Roper*, noting that each case cited to international legal sources).

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.[234] 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.[235]

The outline of this framework might be found in the way that federal common law works.[236] 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.[237] 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.[238] 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*.[239] 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.[240]

---

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.[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.

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