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Looking Beyond the Boundaries: Incorporating International Norms into the Supreme Court's Constitutional Jurisprudence

Josh Hsu

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During the 2004 Presidential Election, Democratic-nominee John Kerry criticized President Bush for not engaging in an international dialogue for the Iraqi War and the War on Terrorism. The rationale behind this criticism was two-fold. First, involving other nations in the discussion would show that we respected their ideas and that we were willing to listen to their thoughts on how to best address the two global conflicts. Second, showing this respect to other nations would be beneficial toward obtaining their cooperation in resolving the Iraqi conflict and international terrorism.

The push for an international dialogue was a serious campaign issue as it divided our nation into two factions—one argued that international diplomacy was the most effective means of solving the War with Iraq and the War on Terrorism, and the other claimed that such a dialogue was an unnecessary hurdle toward achieving the most important objective of all—the safety of the American people. There were those who straddled the line on this issue, but it would be an understatement to say that the issue was not polarizing.

This debate, which involved the executive branch, has a parallel in the judicial branch. There, however, the issue is whether the Supreme Court should involve itself in an international dialogue when resolving its own cases. This dispute has risen to the forefront lately, along with the push for more international diplomacy on the executive front. Whether this is a result of globalization or a mere coincidence, one cannot deny that an international presence has lodged itself as an integral part of our political discourse. While the recent presidential election provided airtime to the executive’s prerogative to engage in an international dialogue, this Article seeks to take a more expansive look at a similar issue from the perspective of the Judiciary, where the factions that have formed are just as divided.
Aside from a few cases involving the death penalty,\(^5\) the Supreme Court's use of international legal norms in its constitutional jurisprudence has been relatively sparse. Before the 2001 Supreme Court Term, the last time the Court referenced international authority was in *Thompson v. Oklahoma*,\(^6\) a 1988 juvenile death penalty case. Just a year later, the Court appeared to have laid this practice to rest as it explicitly rejected the use of international authority in *Stanford v. Kentucky*,\(^7\) another juvenile death penalty case.\(^8\) Thus, it came as quite a surprise for court-watchers when the Court decided to revive this practice in *Atkins v. Virginia*,\(^9\) a decision that was issued at the conclusion of the 2001 Term, in which Justice Stevens noted the international community's opposition to executing criminals with mental retardation.\(^10\) While some pundits argued that the use of international norms in *Atkins* did not signal a more widespread trend of citing foreign law,\(^11\) others felt that *Atkins* placed more emphasis on international authority than previous death penalty cases.\(^12\)

Both sides of the issue, however, were forced to recognize the possibility of an increased role for international authority in the Supreme Court's jurisprudence\(^13\) when Justice Kennedy penned *Lawrence v. Texas*\(^14\) the following Term. In *Lawrence*, Justice Kennedy relied on a case from the European Court of Human Rights as persuasive authority in his interpretation of the Due Process Clause's right to privacy.\(^15\) This extension of international authority to a case wholly unrelated to the death penalty hinted at the potential for the application of foreign sources to a whole new area of law.\(^16\)

And finally, in May of 2005, the Supreme Court decided *Roper v. Simmons*,\(^17\) where it held that the death penalty was unconstitutional when applied to juveniles who were under the age of eighteen at the time they committed their capital crime.\(^18\) *Roper*, which picked up where *Atkins* left off, asserted in a separate section the

\(^5\) *See* *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (1988) (holding that executing a juvenile under the age of sixteen would offend civilized standards of decency, which is "consistent with the views [of]... other nations that share our Anglo-American heritage, and by leading members of the Western European community"); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (noting that "‘the climate of international opinion concerning acceptability of a particular punishment’ is an additional consideration which is ‘not irrelevant’" (quoting *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977))).

\(^6\) *Id.* at 815 (1988).

\(^7\) *Id.* at 361 (1989).

\(^8\) *Id.* at 369 n.1 ("We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici*... that the sentencing practices of other countries are relevant.").


\(^10\) *Id.* at 316 n.21.

\(^11\) *See*, *e.g.*, Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 248 n.131 (2003) (stating that the citation to international opinion in *Atkins* was relegated to a mere footnote and that many of the justices were unwilling to permit jurisprudence from foreign nations to affect U.S. laws).


\(^13\) *See*, *e.g.*, Charles Lane, *Thinking Outside the U.S.*, WASH. POST, Aug. 4, 2003, at A13.


\(^15\) *Id.* at 573.

\(^16\) *See infra* Part I.

\(^17\) 543 U.S. 551 (2005).

\(^18\) *Id.* at 572.
views of other nations in assessing the constitutionality of the death penalty as applied to juveniles. Importantly, Justice Kennedy's decision to devote a separate section of the opinion to those views perhaps eradicated any doubts that Atkins and Lawrence were isolated instances of referencing international sources of authority.

Although these three decisions alone do not signify that the Court has incorporated the use of international norms into its adjudicative process, this Article argues here that there are significant benefits to such a practice. In spite of intense criticism accusing the Court of abusing its power and exceeding its authority, it is this Article's contention that in referencing international authority the Court is taking a logical step in the face of globalization. The use of international norms can provide the Court with, among other things, a different perspective, unique insight, and legitimacy in the eyes of the world community. These benefits may all result from a simple act of reciprocity whereby the preeminent court in the American judiciary demonstrates its willingness to participate in an international dialogue about the law.

As of the writing of this Article, the majority of the Justices sitting on the U.S. Supreme Court appear to be open to the possibility of using international norms in the Court's adjudicative process. Based on past opinions, as well as on articles written about the Justices' public engagements, Justices Stevens, Souter, Breyer, Ginsburg, and Kennedy all seem to favor this practice, while only Justices Scalia and Thomas openly oppose it. At a recent event honoring Justice O'Connor, she expressed views characteristic of the majority in espousing this trend: "I suspect that over time we will rely increasingly, or take notice at least increasingly, on international and foreign courts in examining domestic issues." And, that doing so "may not only enrich our own country's decisions," but may also "create that all important good impression."
Even though a majority of the Justices seem to support the use of international norms as persuasive authority, numerous critics have voiced their opposition to this practice. There are those like Justice Scalia and Judge Bork who argue that the Court's adoption of international authority violates principles of separation of powers because the unelected, activist judiciary has imposed the laws and norms of other nations onto our citizenry—in spite of the fact that those norms have not been enacted through the democratic process. This practice has also been attacked from the standpoint that the use of international norms raises federalism concerns because these norms are being used by the Supreme Court to invalidate state laws that have been passed democratically via state legislatures. Thus, the argument goes, when the Court relies on foreign authority, it is allowing a non-relevant source of law to serve as the outcome-determinative factor in assessing the constitutionality of that state law. This seems to strike at the very heart of the federalism doctrine, which prohibits the federal government from arbitrarily infringing on a state's generalized police powers. Lastly, the practice of using international norms is also subject to criticism in its very application by the Supreme Court. The most common critique is that the Court does not have any checks to confine its use of foreign authority. It could very well decide to apply international norms as binding authority or arbitrarily select a foreign norm to support the outcome of its case. Because international norms are not systematically organized, in terms of precedential value or persuasiveness, this practice is vulnerable to large-scale abuse.

The majority of the criticisms fall into one of the three areas described above: separation of powers, federalism, and arbitrary application of international legal norms. This Article seeks to explore and refute these concerns, using Atkins, Lawrence, and Roper as a contextual basis.

To summarize briefly, the Article will be organized as follows: Part I will provide some additional background on Atkins, Lawrence, and Roper and will also assess their historical significance. Part II will present more fully the three foundational arguments and will rebut them accordingly. Finally, Part III will

28. The changes that will occur with the new Roberts Court may be narrowing this majority rapidly. First, Chief Justice Roberts expressed concern over the use of international norms in the Court's decisions during his confirmation hearings. See James G. Lakely, Roberts Criticizes Foreign Law Used as Precedent, WASH. TIMES, Sept. 14, 2005, at A11. Second, Justice O'Connor's retirement was conditioned upon the confirmation of her successor. Justice O'Connor was an ardent proponent of citing international norms, and it is possible that newly appointed Justice Alito will not be as amenable as Justice O'Connor was to that practice.

29. See ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 16 (2003) (maintaining that those who cannot achieve their political goals through the legislative process turn to the courts and push for the adoption of international norms); see also Lawrence, 539 U.S. at 598 (Scalia, J., dissenting) (arguing that the Court should not "impose foreign moods, fads, or fashions on Americans" (quoting Foster, 537 U.S. at 990 n. (Thomas, J., concurring in denial of certiorari))).

30. See, e.g., Atkins, 536 U.S. at 322 (Rehnquist, C.J., dissenting) (arguing that the Court's decision to place weight on foreign laws "is antithetical to considerations of federalism").

31. Id.

32. See id.


34. See id.
expound on the true benefits of taking part in this international dialogue by delving into the arguments about the additional perspective provided by international authority, as well as its potential to ensure the Court of its international legitimacy.

I. ATKINS, ROPER, AND LAWRENCE: THE PIONEERS

Atkins v. Virginia,\textsuperscript{35} Lawrence v. Texas,\textsuperscript{36} and Roper v. Simmons\textsuperscript{37} are the most recent Supreme Court decisions in which the Justices used international norms as a source of authority in support of their holdings.\textsuperscript{38} The importance of Atkins lies primarily in its restoration of citing foreign norms after Stanford v. Kentucky\textsuperscript{39} explicitly rejected this practice in 1989.\textsuperscript{40} Justice Scalia, who authored Stanford and upheld the constitutionality of the death penalty as applied to juveniles,\textsuperscript{41} asserted in a footnote that the sentencing practices of other countries were not relevant in deciding the constitutionality of the death penalty in this country.\textsuperscript{42} Thirteen years later\textsuperscript{43} in Atkins, the Court was again forced to confront the constitutionality of the death penalty, but this time, as applied to criminals with mental retardation convicted of a capital crime.\textsuperscript{44} Justice Stevens, writing for the majority,\textsuperscript{45} held that it was unconstitutional to apply the death penalty to criminals with mental retardation.\textsuperscript{46} In his opinion, Justice Stevens inserted a footnote citing to an amicus brief by the European Union, which stated that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”\textsuperscript{47} Perhaps foreseeing the potential controversy in using such a source, Justice Stevens asserted that the international norm was “by no means dispositive”\textsuperscript{48} and based his central holding on a national consensus

\textsuperscript{35} 536 U.S. 304 (2002).
\textsuperscript{36} 539 U.S. 558 (2003).
\textsuperscript{37} 543 U.S. 551 (2005).
\textsuperscript{38} Without viewing the three cases successively, the title to this Part is somewhat misleading because Atkins, Lawrence, and Roper are hardly pioneers, being that they were far from the first Supreme Court cases to cite international norms. See generally 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 (2005), available at http://ssrn.com/abstract=700176 (providing an expansive overview of the Supreme Court’s citation to foreign sources of law from the inception of the Court). Rather, the three cases are “pioneers” in the sense that they are groundbreaking due to their revival and expansion of the Court’s use of international authority in its constitutional jurisprudence.
\textsuperscript{39} 492 U.S. 361 (1989).
\textsuperscript{40} Id. at 380.
\textsuperscript{41} Id.
\textsuperscript{42} Id. at 369 n.1.
\textsuperscript{44} See Atkins v. Virginia, 536 U.S. 304, 306 (2002).
\textsuperscript{45} It should be noted that Justice Stevens also authored Thompson v. Oklahoma, 487 U.S. 815 (1988), a juvenile death penalty case prior to Stanford that cited international authority. See id. at 830–31.
\textsuperscript{46} Atkins, 536 U.S. at 321.
\textsuperscript{47} Id. at 316 n.21.
\textsuperscript{48} Id.
consisting of "the American public, legislators, scholars, and judges." Although he relegated his citation of the international authority to a footnote, it should not be confused with a lack of significance. A quick peek into the Court’s past opinions illustrates that Justices tend to bury some of the most critical information in footnotes. The point to take away from Atkins, however, is that Justice Stevens reinstated the consideration of international authority into the Supreme Court’s Eighth Amendment jurisprudence. In the face of the Court’s express disapproval of this practice in Stanford, Justice Stevens’ defiance in Atkins was indeed a significant occurrence.

Two years after Atkins, the Court continued its practice of referencing foreign sources of law in the death penalty context in Roper v. Simmons. In Roper, the Court held that executing juveniles who were under eighteen years of age at the time of their capital crime violated the Eighth and Fourteenth Amendments. Notably, Roper devoted an entire section of the opinion (section IV) to the views of other nations on the subject. The Court prefaced the section with the following words:

Our 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. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court’s decision in Trop, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of “cruel and unusual punishments.”

Thus, while Atkins reasserted the views of other nations in the Court’s Eighth Amendment jurisprudence, Roper entrenched that role for future generations. The approach of Atkins, as compared to Roper, is also noteworthy. Whereas Atkins contained the reference to international views in a footnote, Roper contained numerous references to various international sources in its own section in the opinion, perhaps indicative of its future role in the Court’s constitutional jurisprudence.

Moreover, while Roper can more logically be seen as an extension of Atkins because both involved the death penalty, it should not be forgotten that Roper came after both Atkins and Lawrence. This may be most transparent in the Court’s seemingly preemptive defense of its assertion of international views. The Court, perhaps sensing the mounting criticism of its use of international sources in Atkins and Lawrence, defended its use of foreign sources in Roper. The Court stated:

49. Id. at 307.
52. Id. at 1200.
53. Id. at 1198–1200.
54. Id. at 1198.
The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our conclusions....Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.55

Some might construe the language in Roper as the Court being defensive because it realizes it should not partake in such a practice. But, it might also be seen as a sign that the Court is willing to maintain and defend its use of such a practice, in spite of the mounting public criticism.

If Atkins and Roper were critical in reviving the Court’s use of international norms in the context of the death penalty, then Lawrence may possess even more historical significance for expanding the application of foreign authority into areas of the law where the Court had never before ventured. In Lawrence, the issue was whether a Texas statute, criminalizing sexual conduct between two consenting same-sex adults, was a violation of the Due Process Clause of the Fourteenth Amendment.56 There, the Court overruled Bowers v. Hardwick,57 where a similar statute from the state of Georgia was upheld in the face of a constitutional challenge.58 Justice Kennedy cited to a case from the European Court of Human Rights (ECHR) as persuasive authority in striking down the Texas law prohibiting homosexual sodomy.59 The ECHR case Kennedy cited was Dudgeon v. United Kingdom,60 which involved a challenge to a Northern Ireland law that prohibited the practice of consensual homosexual conduct.61 The European Court struck down the Northern Ireland law and held that it was invalid under the European Convention on Human Rights.62 The importance of this citation to international authority in Lawrence relates to its application and the extension of that application to a different area of law.

Justice Kennedy’s decision to cite the ECHR case opened the door for the Court to apply international authority to a much broader range of cases, namely those involving the right to privacy. In the past, the Court primarily sought and interjected international authority only in the death penalty context.63 Lawrence changed this by referencing a foreign authority for a case involving privacy. This was a significant leap because the right to privacy has a reach that is both farther and wider than situations involving the death penalty. For example, the right to privacy incorporates “personal decisions relating to marriage, procreation, contraception,
family relationships, child rearing, and education. Thus, in terms of the Lawrence decision, its legacy resides not merely in the area of gay rights, but also includes its promotion of the use of international norms to influence other issues that touch upon the everyday lives of individuals. By incorporating the case from the ECHR, Lawrence paved the way for the Court to reference international sources of law in future due process cases. It may have started a trend that the Court will expand upon.

In summary, Atkins, Roper, and Lawrence offer significant hope for those who advocate the use of international norms in the Supreme Court’s constitutional jurisprudence. Atkins revived the practice after Stanford, Roper sustained it, and Lawrence provided the prospect that the Court will extend the use of international authority into other areas of the law, such as the right to privacy. Thus, if the Court expands the role of international authority further in the next few years as Justice O’Connor predicted, then historians will likely look back on the era of Atkins, Roper, and Lawrence as a turning point in the Court’s decision-making process.

While Atkins, Roper, and Lawrence may have set out increased expectations for the use of international norms, there are concerns that fundamental democratic principles are being sacrificed in the process. These concerns have been grouped into three categories, otherwise known as the foundational arguments. The next Part will discuss what critics consider to be the most pressing issues involving the use of international norms.

II. REINING IN ATKINS, ROPER, AND LAWRENCE: THE CRITICS AND THE THREE FOUNDATIONAL ARGUMENTS

The Court’s newfound attention to international sources of law in areas beyond the traditional capital punishment arena has no shortage of critics who would like to clamp down on this application before it becomes custom. The reluctance to embrace the use of foreign authority in purely domestic cases is based on a fear that such a practice violates three of this nation’s most cherished foundational principles: separation of powers, federalism, and fairness of application. This Part discusses the various arguments that critics have posed with respect to the three principles, provides a response to each of them, and ultimately demonstrates the concerns to be credible, but overstated.

A. Separation of Powers: Accusations of Judicial Activism

Perhaps no other doctrine epitomizes our democracy as well as that of separation of powers. In The Federalist No. 47, James Madison pronounced:

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.... In order to form correct ideas on this important subject, it will be proper to investigate the

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64. Lawrence, 539 U.S. at 574.
65. See Rankin, supra note 24.
66. See Bork, supra note 29; Hargan, supra note 33; see also Mary Ann Glendon, Judicial Tourism, WALL. ST. J., Sept. 16, 2005, at A14.
sense in which the preservation of liberty requires, that the three great
departments of power should be separate and distinct.\textsuperscript{67}

The application of international norms by the Supreme Court has triggered forceful
denunciations by critics who claim that the judiciary is infringing on this sacred
doctrine.\textsuperscript{68} The argument is that the Court’s use of international authority usurps
legislative powers by taking a norm that has not been passed upon through the
democratic process and then forcing it upon our people.\textsuperscript{69} In his article, \textit{The Sovereignty Implications of Two Recent Supreme Court Decisions}, Eric Hargan argued that this is exactly what occurs in \textit{Atkins} and \textit{Lawrence}.\textsuperscript{70} Hargan criticized the Supreme Court for applying international norms as if it were domestic law when American voters had not passed upon these norms.\textsuperscript{71} In other words, he accused the Supreme Court of assuming the role of the legislature by taking an international norm and making it the law of our land.\textsuperscript{72}

At the heart of his criticism is the fundamental notion that legislation cannot be
promulgated unless it is generated through the traditional democratic machinery.\textsuperscript{73} This process, which requires both bicameralism (passage by both Houses of Congress) and presentment (signed by the President), is expressly laid out in Article I, Section 7 of the U.S. Constitution\textsuperscript{74} and has been described as a “finely wrought” procedure designed by the Framers.\textsuperscript{75} Our domestic laws have been subject to both bicameralism and presentment, while international laws (with the exception of treaties and executive agreements) arise through a much different process and are not the products of the “finely wrought” procedure that our Framers had in mind.\textsuperscript{76} Because “international law is not grounded upon as secure a positive law foundation as is domestic law,”\textsuperscript{77} when the judiciary applies international norms, “they are not following the lead of the elected branches, but are striking out on their own.”\textsuperscript{78} This is threatening because the people are essentially being denied their voice in the
democratic process.

Every individual who has stepped foot in an elementary school classroom has
been inundated with the refrain that “the legislative branch makes laws, the
executive branch enforces laws, and the judicial branch interprets laws.” Here,

\textsuperscript{67.} \textit{The Federalist} No. 47 (James Madison) (emphasis added).
\textsuperscript{68.} See Hargan, \textit{supra} note 33.
\textsuperscript{69.} Id.
\textsuperscript{70.} Id.
\textsuperscript{71.} See id.
\textsuperscript{72.} Id.
\textsuperscript{73.} Id.
\textsuperscript{74.} Id.
\textsuperscript{75.} The relevant portion reads:
Every Bill which shall have passed the House of Representatives and the Senate, shall, before
it become a Law, be presented to the President of the United States; If he approve he shall sign
it, but if not he shall return it, with his Objections to that House in which it shall have
originated, who shall enter the Objections at large on their Journal, and proceed to reconsider
it.
\textit{U.S. Const.} art. I, § 7, cl. 2.
\textsuperscript{76.} \textit{Id.}
\textsuperscript{77.} Id.
\textsuperscript{78.} Id.
when the judicial branch uses an international norm as an authority in its opinion, critics accuse the courts of usurping the lawmaking powers of the legislative branch. More precisely, the international norm becomes law without ever having been secured through the political process.

The first defect with this assertion is the underlying assumption that when the Court uses international norms to assist in the interpretation of the Constitution, it is essentially adopting a foreign law. In Atkins, Roper, and Lawrence, the international norms were used not as a dispositive factor but rather as additional support only after domestic authority had been used. In Atkins, the purpose of referencing the European Union’s amicus brief was not to say that the European Union dictates whether or not it is constitutional to apply the death penalty to an individual with mental retardation, but rather to support the notion that in the world community, application of the death penalty to such individuals is considered “cruel and unusual.” One might argue whether it is necessary to mention the views of the European Union, but it is not accurate to characterize such a move as “legislating.” Similarly, in Roper, the cataloguing of foreign sources on the subject was to “provide respected and significant confirmation for [the Court’s] conclusions,” not, as some might imply, to make the law based on international norms. As was the case in Atkins, the reference to international sources did not come about until after the Court carefully assessed the views of the state legislatures.

Likewise, in Lawrence, Justice Kennedy’s citation of the ECHR case was not an attempt to assert that the law, as shaped by that court, dictates our decisions. His decision to reference the case was merely to note that in other parts of the world, the right to privacy extends to homosexuals as well as heterosexuals. Hence, in those cases, the Court did not make an end-run around the democratic lawmaking process by adopting an international norm as if it were the law but, rather, simply looked to the norm as another source of guidance while primarily relying on domestic authority for the foundation of its opinion.

On a more basic level, and contrary to the allegations of judicial activism, the Supreme Court’s use of international norms is rightly within the Court’s authority as the interpreter of the law. In other words, constitutional interpretation is not a legislative function in the first instance. It has been established since Marbury v. Madison that it is plainly within the ambit of the judiciary to declare the meaning of the law. As Dean Harold Hongju Koh noted:

79. See Lawrence v. Texas, 539 U.S. 558, 564–72 (2003) (discussing a line of Supreme Court cases upholding the right to privacy); Atkins v. Virginia, 536 U.S. 304, 312 (2002) (stating that the most reliable objective factor in its analysis was the legislation enacted by state legislatures (citing Penry v. Lynaugh, 492 U.S. 302, 331 (1989)). In Roper, Justice Kennedy recognized that consensus among the U.S. state legislatures was the starting, and most important, point for Eighth Amendment analysis. Roper v. Simmons, 543 U.S. 551, 564 (2005) ("The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. This data gives us essential instruction.").
80. Atkins, 536 U.S. at 316 n.21.
81. Roper, 543 U.S. at 578.
82. See id. at 560–67.
83. Lawrence, 539 U.S. at 573.
84. See, e.g., Jane Lampman, Bringing the Case Against Judges, CHRISTIAN SCI. MONITOR, Apr. 13, 2005, at 15.
85. 5 U.S. (1 Cranch) 137 (1803).
The Supreme Court clearly saw the judicial branch as the central channel for making international law part of U.S. law. For when "there is no written law upon the subject," Justice Gray directed, "the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them." That language strongly recalls cadences in Marbury v. Madison's command that "[i]t is emphatically the province and duty of the judicial department to say what the law is," a directive that nowhere limited the judiciary's law-declaring function to cases involving domestic law.86

Dean Koh's argument thus ties the Court's right to recognize international norms to its most fundamental power, that is, to declare what the law is. It should be clear then that the Court can reference international norms when the Court deems it necessary to interpret the law.

There is a sense that Marbury and the doctrine of judicial review can be used as a catch-all to rationalize every interpretive method that the Supreme Court employs. For example, let us assume that the Court decided to use (suspending disbelief for a second) fortunes from fortune cookies to assist in the interpretation of the Constitution. It seems as if the Court could simply defend this absurd practice by claiming that it is within its power to declare what the law is, and if using the fortunes from fortune cookies is a useful aid, it should be a permissible practice. The problem with the judicial activism argument is that it is more of an attack on judicial review than it is on the practice of using international norms.

The Court has always exercised broad discretion in its interpretation of the Constitution.87 Where the text of the Constitution is vague, we defer to the Court's expertise on the subject matter. Simply because the Court has wide discretion to interpret the Constitution does not mean that the Court will necessarily abuse that power. As Professor Cass Sunstein observed, "If the words of the Constitution do not resolve hard constitutional cases, it seems undeniable that people who interpret the document have to look to something other than those words in order to do their jobs."88 In doing so, wrote Professor Levinson, "[o]ne might well say that a clearly expressed 'local norm' ought to trump an international norm, but if we view the relevant constitutional text as quite indeterminate, then why should judges not look to other courts to see how they confronted similar issues?"89 The assertion that we should limit the Court's ability to look outside our country's borders is to doubt the Court's judgment on how it should go about declaring what the law is. We should be wary of making such an assertion absent evidence that the Court is exhibiting clear disregard for the Constitution.

87. See, e.g., Marbury, 5 U.S. (1 Cranch) at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").
88. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 94 (1993). But cf. Cass R. Sunstein, in Symposium, supra note 20, at 43, 45 (arguing that Lawrence should have struck down the Texas sodomy statute on narrower grounds, avoiding the use of both emerging social values and judgments of other nations).
89. Levinson, in Symposium, supra note 20, at 37, 39.
It is true that the Court often appears to have too much power with its ability to render an act of Congress or a state law invalid.\textsuperscript{90} This, however, is one of the consequences of the doctrine of separation of powers, which allows for a system of checks and balances. As Justice Scalia wrote in his dissent in \textit{Morrison v. Olson},\textsuperscript{91} A system of separate and coordinate powers necessarily involves an acceptance of exclusive power that can theoretically be abused. As we reiterate this very day, "[i]t is a truism that constitutional protections have costs." While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty.\textsuperscript{92} Although Justice Scalia was writing about the need for a strong executive branch in \textit{Morrison}, the same might be said for a strong judiciary. It is the strength of each branch that keeps the other branches in check.

In summation, the criticism that the use of international norms violates the separation of powers doctrine has not been substantiated with any empirical evidence. In \textit{Atkins, Roper,} and \textit{Lawrence,} the reliance on international authority only came about after Justices Stevens and Kennedy supported their holdings with domestic authority.\textsuperscript{93} Furthermore, the use of international norms in helping interpret the Constitution is within the power of the Court to declare the meaning of the law, and if those norms provide some additional insight on a vague subject, then allowing them to be used as persuasive authority would not contravene any separation of powers principles. Separation of powers is a sacred doctrine, one which lies at the core of this nation's governmental system. Any charges that it is being violated will always be of great concern. Here, however, the apprehension that the Court's practice of looking abroad will result in a seizure of legislative lawmaking powers is largely overstated.

\textbf{B. Federalism: Infringing on State Police Power?}

The federal system under which our nation operates is a unique governmental system. Rather than have an all-encompassing federal government, we have a country of fifty subunits, each with the power to pass its own laws. To quote recently retired Justice O'Connor, federalism "assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society."\textsuperscript{94} Thus, the purpose behind allowing each state government to pass its own laws is to insure that each state may accommodate and meet the specific needs of its constituents.\textsuperscript{95} To expect the federal government to address the particularized needs of each state

\textsuperscript{90} See, e.g., Erwin Chemerinsky, \textit{Understanding the Rehnquist Court: An Admiring Reply to Professor Merrill}, 47 ST. LOUIS U. L.J. 659, 663 (2003) (describing the Rehnquist Court as having two phases, with the subsequent one showing little deference to the elected branches of government). \textit{But see} Michael J. Gerhardt, \textit{The Limited Path Dependency of Precedent}, 7 U. PA. J. CONST. L. 903, 987–88 (2005) (stating that the Supreme Court has overturned federal and state laws very infrequently throughout its history).

\textsuperscript{91} 487 U.S. 654 (1988).

\textsuperscript{92} \textit{Id.} at 710–11 (Scalia, J., dissenting) (quoting Coy v. Iowa, 487 U.S. 1012, 1020 (1988)) (citation omitted).

\textsuperscript{93} \textit{See supra} note 79.


\textsuperscript{95} \textit{See also} New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (discussing individual states passing laws and serving as a laboratory to try social and economic experiments).
would be too arduous a task for even the most efficient federal government because it has the enormous responsibility of overseeing the welfare of the entire nation. Therefore, federalism, which asks that state and local governments take on the details, is a system that provides a lot of responsibility to our communities. The introduction of international norms in the federalism context causes problems precisely because international norms are not attuned to local needs. This leads to a potential conflict with a state’s police powers.

The proper starting point for any federalism discussion must be the Tenth Amendment of the Constitution, which states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Thus, states are generally recognized as having the authority to regulate the everyday affairs of their constituents, such as safety and local law enforcement. As the Court stated in United States v. Morrison, “the principle that ‘the Constitution created a Federal Government of limited powers,’ while reserving a generalized police power to the States is deeply ingrained in our constitutional history.” Those who condemn the Supreme Court’s practice of using foreign authority assert that, in cases like Atkins, Roper, and Lawrence, state legislatures have already passed laws pursuant to their generalized police power. Hence, the argument continues, the Court is violating fundamental principles of federalism by utilizing international norms not passed upon by the state legislatures to strike down those statutes.

The Court, critics argue, has no right to impose an international norm upon the people when the governing authority clearly belongs to the states. For states’ rights supporters, the use of foreign norms is especially galling because of the absolute disconnect between general international norms and specific local interests. Judge Bork proclaimed that it is “liberalism’s tendency to search for the universal and to denigrate the particular.” More simply, representatives of state legislatures were arguably voted upon to represent their own constituents, and, thus, the laws they passed should govern—not some generalized international norm or the result of a foreign case.

There is, however, a crucial distinction that must be made regarding the cases in which the Supreme Court has recognized international norms. It is undisputably true that states can regulate law enforcement stemming from their generalized police powers. This, however, does not grant them the right to pass laws that conflict with the fundamental rights of the people as guaranteed by the Constitution. In
Atkins, for example, the Court sought to determine whether sentencing an individual with mental retardation to death was a violation of the "cruel and unusual punishment" clause of the Eighth Amendment.\textsuperscript{107} The Court drew upon international authority not as a substitute for the local law, but to assist in the determination of whether the local law itself was constitutional.\textsuperscript{108} To say that the Court substituted international opinion for local law is to overstate the value that the Court has placed on the foreign authority. Though it is difficult to discern just how much weight the Court assigned to each of their authorities, it is safe to assert that international authority was not the sole and primary basis for the Court's holdings in Atkins, Roper, and Lawrence. As mentioned before, those cases used domestic sources as primary authority.\textsuperscript{109} As a result, the federalism argument collapses if (1) the local or state norm is constitutionally impermissible on domestic grounds, and (2) the international norm is a consideration but not a primary basis for overruling the local norm.

Even if one recognizes that the Supreme Court has a right to use international norms in its jurisprudence, there is still a sense of dissatisfaction for those who have concerns with the Court using foreign sources of law. Much of this discontent derives from the realization that if the Court can use international norms at its discretion, then there appears to be no boundaries to circumscribe the Court's power to use them arbitrarily and to strike down domestic laws at its whim. The next Part discusses this remaining, underlying fear of those who criticize the practice of citing to foreign norms.

C. Fairness of Application

1. Mistrust of the Court

Of the three branches, the judiciary was always thought to be the least threatening to the ideals of democracy. The familiar passage by Alexander Hamilton in \textit{The Federalist No. 78} stated:

> Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.... [T]he judiciary...has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment.\textsuperscript{110}

\textsuperscript{108} See \textit{id.} at 311--12.
\textsuperscript{109} See \textit{supra} notes 79--83 and accompanying text.
\textsuperscript{110} JOHN HART ELY, DEMOCRACY AND DISTRUST 45 (1980) (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).
These days, the mere "judgment" that Hamilton speaks of performs a critical role in the way this nation functions. Many believe today not that the Court is weak, but rather that it has too much power and often reaches beyond what the Constitution would permit when deciding its cases. It has become no less than a national pastime to accuse the Court of being activist, and its decision to increase the use of international norms has only served to intensify those accusations. Aside from separation of powers and federalism concerns, the most common critique relates to the fairness of application, or the application of foreign authority in a consistent fashion. It has been argued that if the Court is to reference or rely on foreign authorities, then it should do so in a consistent and logical manner that is in harmony with the principles of stare decisis. The underlying fear is that the use of international norms is not a structured discipline, and, thus, the Court has too much power and discretion to arbitrarily select a foreign authority to support its holding. Critics such as Hargan argue that the Court "has made no effort to delineate 'good' and 'bad' foreign authorities, to differentiate among the various sources it considers binding," and has never explained why certain authorities such as the European Union or the ECHR are ultimately used rather than an authority from China or a Chinese court of law.

To begin with, the Supreme Court does not have to differentiate between international authorities that are binding rather than persuasive. I do not propose, nor do I believe the Court would propose, a practice of citing international norms as binding authority. On the other hand, the Court's choice of international authorities in crafting a particular decision should be explained and defended. After all, there should be some rational basis for the cases and norms that it cites. In Atkins, for example, the majority opinion cites an amicus brief from the European Union, stating that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." Hargan is troubled by this selection because he believes that the European Union is no more representative of the "world community" than the United States. Thus, he argues, the European Union should not be used "as a

111. See id.
112. See, e.g., Symposium, supra note 20, at 25.
113. See, e.g., BORK, supra note 29, at 15–25; see also Donald Lambro, DeLay Slams Court Activism as "Autocracy", WASH. TIMES, Aug. 15, 2005, at A4 (discussing U.S. Representative Tom DeLay's argument that there has been a movement of judicial activism by the courts, including the Supreme Court).
114. See, e.g., Lawrence v. Texas, 539 U.S. 558, 598 (Scalia, J., dissenting) (arguing that while the majority cited foreign law, it ignored "the many countries that have retained criminal prohibitions on sodomy").
116. For example, U.S. Representative Tom Feeney asked, "[H]ow is a judge, if [comparative analysis] is an appropriate process, to discern which of the countries is appropriate to cite and which of the countries is not?" Id. at 359 (quoting Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H.R. Res. 568 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 108th Cong., 2d Sess. 77 (2004)).
117. Hargan, supra note 33.
118. Accord Davis, supra note 23 (arguing that courts should not cite international norms as controlling authority but that it may sometimes be appropriate).
120. Hargan, supra note 33.
proxy for the world community, without [the Court] ever explaining how the EU obtained that authority.\textsuperscript{121}

In one respect, Hargan is correct when he claims that the United States is as much a representative of the "world community" as the European Union. Nevertheless, this point has little relevance since the Justices in Atkins were already considering the consensus of the state legislatures to be the "clearest and most reliable objective evidence of contemporary values."\textsuperscript{122} That the foreign authority was consistent with the consensus of the state legislatures provided only additional support for Justice Stevens' majority opinion, which, consequently, resulted in a stronger, more forceful opinion.\textsuperscript{123} In other words, the Court was not considering either the consensus within the United States or the consensus outside of the United States. Rather, it was considering the international consensus in addition to the consensus within the United States. It is absolutely critical to acknowledge that, in deciding this case, the Court placed primary weight on domestic authority.

Second, the Court did not proffer the EU brief as a proxy for the opinion of the world community. Justice Stevens writes that "within the world community" executing criminals with mental retardation is disapproved.\textsuperscript{124} More to the point, the Court chose the European Union to represent one opinion from the world community (albeit an important one), not the opinion of the entire world community. This is a crucial distinction because it demonstrates that Justice Stevens cites to the European Union not to deceive the audience into thinking that the world is unanimous on this issue, but because an important segment of the world community is opposed to the practice of executing individuals with mental retardation. Of course, Justice Stevens could have forged a consensus that involved a larger segment of the world community, but this still does not negate the fact that the European Union is a logical international authority to reference, given that it consists of a group of democratic European countries,\textsuperscript{125} some of which provided the foundational principles for our own democracy. The parallel experiences resulting from a shared democratic governing structure make the European Union a more rational international norm to reference than other countries that may not share the same form or principles of governance. States often look to other states because those other states share similar constructs of government.\textsuperscript{126} The Supreme Court is merely doing the same on a larger scale. The idea is that other nations, such as those in the European Union, face similar issues because of the way their countries are governed. Thus, it is beneficial to see how those other countries deal with familiar problems in a comparable contextual setting.\textsuperscript{127}

\begin{enumerate}
\item Id.
\item Atkins, 536 U.S. at 312.
\item Id. at 316 n.21. However, one may debate the merits of whether the state legislatures had really reached a consensus on prohibiting the use of the death penalty against the individuals with mental retardation. \textit{See id.} at 341–48 (Scalia, J., dissenting).
\item Id. at 316 n.21 (majority opinion) (emphasis added).
\item See infra note 139 and accompanying text.
\item In \textit{Roper}, while Justice Kennedy does not cite to the European Union, he does cite to those countries that have ratified Article 37 of the U.N. Convention on the Rights of the Child. \textit{Roper v. Simmons}, 543 U.S. 551,
In Atkins, the use of international norms could be explained by the Court’s search for a consensus both inside and outside the country. In Lawrence, however, Justice Kennedy supplied his own explanation for his use of the ECHR case. In the first instance, the case was referenced because of its similarities to Bowers v. Hardwick and Lawrence on its facts. Like Bowers and Lawrence, the ECHR case was about a man who was prohibited by his jurisdiction from engaging in homosexual conduct. Moreover, Justice Kennedy provided another reason for citing the ECHR case when he stated that the ECHR is “authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now).” The use of a case from a court that covers multiple jurisdictions was logical for a controversial case like Lawrence, particularly because the Supreme Court exercises jurisdiction over a union of states, which, in many instances, operate as if they were independent nations. Thus, a case from the ECHR provides greater persuasive value precisely because a large number of countries follow its decisions.

It is true, however, that the Court has not yet developed a structure for determining whether certain international norms are more persuasive than others. Should a case from the ECHR be more persuasive than a similar case from a court in an Asian, African, or South American country? There is certainly an arbitrary quality to the selection of international authorities, but I would argue that much of this has to do with the fact that the practice of referencing international norms is still in its nascent stages. Though the Court has long cited international norms, it has not done so prevalently. In addition, there is no constraint on dissenting Justices who might wish to reference conflicting international norms for the purpose of open debate. Thus, if there is a case from an Asian, African, or South American country that addresses the same issue, there is no reason that it could not be used to counter the ECHR.

Moreover, the argument against the practice of drawing upon international authority because of the arbitrariness of application is overstated since the authorities themselves are not binding. When Justices look abroad, they are not looking for an international norm or case that provides a definitive answer that they can follow. Rather, the purpose of their search is to observe how other nations resolve similar issues under similar circumstances. For example, in his dissent in Printz v. United States, Justice Breyer offered vital insight as to why the Court has looked to international norms: “Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and

576 (2005). Although not all countries within this group have similar governing structures, it nevertheless involves entities that have entered a common international pact.

130. See id.
131. Id.
132. See supra note 95.
133. See supra note 5 (describing use of international norms in death penalty cases).
134. See Davis, supra note 23, at 419 (“The same readiness to look beyond one’s own shores has not marked the decisions of the court on which I serve.”) (quoting Ruth Bader Ginsburg & Deborah Jones Merritt, Affirmative Action: An International Human Rights Dialogue, 21 CARDOZO L. REV. 253, 282 (1999))).
structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem.\footnote{136}

Therefore, when the Court cites to an international norm, it is looking for insight, not a panacea. Accordingly, it should matter little whether the international authority comes from the Privy Council of Jamaica, the Supreme Court of India, the Supreme Court of Zimbabwe, the Supreme Court of Canada,\footnote{137} or the ECHR.\footnote{138} As long as the authority is relegated to its role as a helpful guide and not as the sole, binding authority, the use of international norms is no different than when Justices cite to other outside sources. Professor Sanford Levinson argues:

After all, state courts within the United States often look to other state courts—not because a California court believes itself obligated to follow New York law but rather because a properly humble judge finds it useful to see what colleagues elsewhere have done. Similarly, no one suggests that the views of the European courts should be controlling, only that they provide potential insight. We might take a leaf here from the emphasis in The Federalist on “experience” as a guide, and from James Madison’s own emphasis in his writings on comparative government. Publius would undoubtedly have found it unbearably parochial to be told that we in the United States can learn nothing from the experience of other countries. So should we.\footnote{139}

Professor Levinson’s comparison highlights precisely why the fairness of application argument is overstated. First, the Supreme Court’s practice of looking beyond this nation’s boundaries is not unlike a state court looking to another state’s jurisprudence for guidance. It is nothing more than an attempt to look at what others in similar situations have done. Thus, California may look to New York rather than Ohio, not because New York’s authority is more representative of California’s views, but because Ohio may not have confronted the issue or, similarly, may not have heard a case with a factual basis that parallels the case under review in California. The same logic applies here. Justice Kennedy’s decision to choose a case from the ECHR rather than a case from another country’s court can certainly be attributed to other countries not having confronted the issue as squarely or as recently as the ECHR.

In addition, the Court’s practice of looking abroad is more indicative of a humble approach to adjudicating its cases than that of a Court that will stop at nothing to justify its conclusions.\footnote{140} That the Court is willing to seek outside perspectives to

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\footnote{136} ld. at 977 (Breyer, J., dissenting) (citation omitted).
\footnote{137} See Bork, supra note 29, at 23 (arguing against Justice Breyer’s dissent in the denial of certiorari to Knight v. Florida, 528 U.S. 990 (1999)); see also Knight, 528 U.S. at 995–96 (Breyer, J., dissenting) (citing to cases from the Privy Council of Jamaica, the Supreme Court of India, the Supreme Court of Canada, and the Supreme Court of Zimbabwe).
\footnote{138} See Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 403 (2000) (Breyer, J., concurring) (citing cases from the Supreme Court of Canada and the ECHR to argue that “other constitutional courts facing similarly complex constitutional problems” have taken a comparable approach in upholding campaign finance laws against a First Amendment challenge).
\footnote{139} Levinson, in Symposium, supra note 20, at 37, 39.
\footnote{140} Of course the converse is not necessarily true. A court that does not cite international or foreign sources may not believe that the foreign sources shed light on the case. The point here is that looking to international
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improve its decision making process is an expression of tolerance. Professor Levinson’s position is that “[n]o one... should believe that... jurisdictional limitations would still the often bitter debates about constitutional interpretation.”

In his view, the “Constitution is full of what Robert Jackson termed ‘majestic generalities,’ and it is quixotic to expect a consensus on their meaning.” Thus, he argues that the best method of guarding against judicial activism is to allow them to have a “greater diversity of judicial perspectives.”

In short, the arbitrariness of application is not a grave concern when one takes into account that the international norm is not being relied on as the sole binding authority but, rather, as one instrument of persuasive value. The next section briefly discusses the most appropriate instances in which to reference foreign norms. Certain types of cases benefit more than others from the use of international norms, and, as a starting point, the Court should look to increase their use of foreign authority in these areas of the law.

2. When International Norms Should Be Applied

The question of when international authority should be sought out is also a possible subject of criticism. One can argue that the Court should at least be consistent as to when international norms will apply in the adjudication of its cases. For example, why were international norms cited for Atkins and Lawrence but not in any of the seventy-plus cases in their respective terms? I propose that the Court look to international authority when the relevant constitutional language is vague and undetermined. Justice Blackmun was a staunch proponent of this practice, suggesting that “[i]nternational law can and should inform the interpretation of various clauses of the Constitution, notably the Due Process Clause and the Eighth Amendment prohibition against cruel and unusual punishments.” That statement, made in 1994, seems prophetic, especially in light of the Lawrence decision. International norms had already been a mainstay in the Eighth Amendment context, but its application in the Due Process context was a novel development at the time of the Lawrence decision.

It is in the constitutionally vague areas that international authority has the potential for the most benefit. Part of the reason is that the interpretation of constitutionally vague clauses often requires finding a consensus. The benefit of having a consensus that includes the standards and norms of other nations is more compelling than a mere consensus amongst the states. Justice Blackmun argued that it is not simply a good idea for the Court to look abroad; rather, he indicates that the Court is obligated to look abroad when interpreting certain clauses, such as the

sources of law is not result-oriented. Rather, it is an attempt to look to any source that may be of assistance and recognizing that source.

141. Levinson, in Symposium, supra note 20, at 37, 39.
142. Id.
143. Id.
144. For an example of a framework used in deciding which international norms should be applied, see generally Glensy, supra note 115, at 401-40.
146. See supra notes 5–8 and accompanying text.
"cruel and unusual punishment" clause of the Eighth Amendment.\textsuperscript{147} Justice Blackmun said:

Refusing to consider international practice in construing the Eighth Amendment is convenient for a Court that wishes to avoid conflict between the death penalty and the Constitution. But it is not consistent with this Court's established construction of the Eighth Amendment. If the substance of the Eighth Amendment is to turn on the "evolving standards of decency" of the civilized world, there can be no justification for limiting judicial inquiry to the opinions of the United States.\textsuperscript{148}

Although there have been criticisms launched at using a consensus approach to interpret the Constitution,\textsuperscript{149} it is the settled method of adjudication for certain areas of law, such as application of the Eighth Amendment.\textsuperscript{150} Consequently, insofar as consensus is required, the use of international norms is an ideal fit because a consensus that consists of both this country and other members of the world community is more persuasive than a consensus that only consists of the states. This is not to say that the consensus of the international community should trump a consensus within this country if there is ever a conflict. There is little question that a consensus formed from the states is more significant.\textsuperscript{151} However, the international community is also an important voice that should be considered as a factor when there is no clear consensus from within this country. It is at ambiguous times when looking to international norms can be of great benefit.

Because of the Supreme Court's influence over this nation's constituents, it is natural to be skeptical of the Court's interpretive tools. Like other methods of interpretation,\textsuperscript{152} the practice of using international norms is subject to unfairness or arbitrariness of application. This criticism, however, is exaggerated because of the reasons outlined above. Contrary to the critics' assumption that the Court would be limitless in its power to apply international legal norms,\textsuperscript{153} there are forces that constrain the Court from arbitrarily choosing any foreign authority to support its propositions. The practice of looking abroad to see how others have resolved similar issues is cabined by both factual and contextual restrictions and may not even apply unless the Constitution is sufficiently vague on the subject.\textsuperscript{154} Therefore, the fear of arbitrary application is largely overstated because the value of insight that an international norm can provide will reach only as far as the parallels that can be

\textsuperscript{147} See Blackmun, supra note 145, at 48.
\textsuperscript{148} Id.
\textsuperscript{149} See, e.g., ELY, supra note 110, at 63–69.
\textsuperscript{150} See, e.g., Roper v. Simmons, 543 U.S. 551, 560–64 (2005) (describing Eighth Amendment analysis and using the consensus approach based on the "evolving standards of decency").
\textsuperscript{151} "The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question.... We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles." Id. at 1192 (emphasis added).
\textsuperscript{152} See ELY, supra note 110 (describing and critiquing various methods of interpretation).
\textsuperscript{153} See BORK, supra note 29, at 22–24 (alleging an abuse of power in the Supreme Court's citing to foreign sources).
\textsuperscript{154} For example, Lawrence was cabined by the facts of its case—the criminality of homosexual sodomy—and the case cited from the ECHR specifically dealt with similar facts. See supra notes 56–62 and accompanying text.
drawn from the norm. Ultimately, the Court would not choose to cite arbitrary international norms because it would be undercutting the very reason for using that authority in the first place.

III. BEYOND THE FUNCTIONAL: OTHER PURPOSES FOR USING INTERNATIONAL NORMS

The principal rationale tendered for incorporating international norms into our constitutional jurisprudence is that it provides insight into how others have resolved common legal problems.\(^\text{155}\) A good argument can be made, however, that the risks of this practice, in terms of the possibility that it may violate principles of separation of powers, federalism, and fairness of application, render it a perilous undertaking.\(^\text{156}\) Do the positive factors of looking beyond our shores really outweigh the negative factors? Are there additional reasons for using international law, besides the fact that it may sometimes be “helpful”? The reality that this practice provides potential insight might be enough to justify its application by the Court, but it may not be satisfying to those critics who see the negative factors as a collective ax chipping away at the underpinnings of the Constitution. This Part seeks to expound on additional arguments that support the Court’s use of international norms in its adjudicative process.

One argument that has been proffered to support the practice of incorporating international law is that it strengthens the legitimacy of the U.S. Supreme Court.\(^\text{157}\) The Court has traditionally been looked upon by other nations as a leading legal institution, and, thus, its jurisprudence has performed an instrumental role in the governance of other nations.\(^\text{158}\) For example, the Indian Constitution of 1850 was written in language that reflects the U.S. Supreme Court’s interpretation of the Constitution.\(^\text{159}\) Moreover, the Supreme Court of Canada has frequently looked to the jurisprudence of its U.S. counterpart when interpreting its own Charter of Rights and Freedoms (Canada’s version of the Bill of Rights).\(^\text{160}\)

In the past few years, however, the Rehnquist Court was criticized by the judiciaries of other nations for isolating itself from foreign legal authorities.\(^\text{161}\) Justice Claire L’Heureux-Dubé of the Supreme Court of Canada commented on the

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156. See supra Part II.
157. See Davis, supra note 23, at 421 (arguing that as a result of globalization, the legitimacy of U.S. courts depends on their willingness to incorporate international legal norms).
159. See id. at 18.
160. Id. at 19.
161. See id. at 37–40; see also BORK, supra note 29, at 24–25. In particular, Justice L’Heureux-Dubé stated: In my opinion, the failure of the United States Supreme Court to take part in the international dialogue among the courts of the world, particularly on human rights issues, is contributing to a growing isolation and diminished influence. The U.S. Supreme Court has failed to look with any regularity outside the borders of the United States for sources of inspiration. In my view this tendency to look inward may well make the judgments of U.S. courts increasingly less relevant internationally.

L’Heureux-Dubé, supra note 158, at 37.
declining influence of the Rehnquist Court internationally\textsuperscript{162} and stated that the Court has chosen not to participate in this international "dialogue."\textsuperscript{163} When the Justices of the Supreme Court traveled abroad in 2000 to an American Bar Association conference in London, they were criticized for not taking heed of foreign authorities.\textsuperscript{164} Judge Bork wrote of a prominent London barrister who accused the U.S. Supreme Court of "turning its back on the Continent" and denounced the United States as being "quite certain it has nothing much to learn from us."\textsuperscript{165}

In response to these criticisms, professor Martha Davis argued that the Court must pay more attention to international norms as a way to maintain its status as a leading legal institution and to ensure that its legitimacy is not undermined.\textsuperscript{166} Davis asserted that "[g]lobalization has now so pervaded our national culture and identities that a court that consistently ignores international precedents and experiences when considering human rights issues, even if merely for their persuasive or moral weight, risks irrelevancy."\textsuperscript{167} The legitimacy argument reflects Justice O'Connor's sentiment that the Court should increase its reliance on international norms to "create that all important good impression."\textsuperscript{168}

This line of reasoning is nonetheless subject to the criticisms that the Court should only be concerned with its proper role within the United States. Critics suggest, for example, that making a good impression internationally should not be an objective on the Court's checklist because it compromises the Court's primary duty of loyalty to the constituents of this nation.\textsuperscript{169} To appease the international judiciaries by taking part in this international dialogue would be nothing more than self-aggrandizement, a self-serving quest for respect.

These criticisms, however, fail to account for the "melting pot" that makes up our nation. According to the U.S. Census Bureau, almost half of all Americans will consist of minorities by the year 2050.\textsuperscript{170} Furthermore, as of 1999, nearly ten percent of the U.S. population was foreign-born.\textsuperscript{171} The ties that American constituents have with other nations and cultures provide a strong endorsement for a constitutional jurisprudence that is in step with international norms. Looking to authorities from abroad is not just placating the desires of foreign judiciaries, it is also reaffirming to our own constituents that the Supreme Court does not adjudicate cases in a vacuum.

To be clear, Justice L'Heureux-Dubé is not advocating that the U.S. Supreme Court "change its constitutional interpretations to accord with decisions anywhere

\textsuperscript{162} L'Heureux-Dubé, supra note 158, at 27.
\textsuperscript{163} Id. at 37.
\textsuperscript{164} See Bork, supra note 29, at 24.
\textsuperscript{165} Id. These criticisms, however, have not been as prevalent as they have previously been, perhaps because of the Court's recent citations to international sources.
\textsuperscript{166} Davis, supra note 23, at 421.
\textsuperscript{167} Id.
\textsuperscript{168} Rankin, supra note 24.
\textsuperscript{169} See Hargan, supra note 33.
\textsuperscript{170} Davis, supra note 23, at 425.
\textsuperscript{171} Id.
else in the world.”\textsuperscript{172} Nor should it abandon “the doctrines and approaches particular to American constitutional law.”\textsuperscript{173} But, she believes that “considering and comparing judgments from various jurisdictions makes for stronger, more considered decisions, even if the result is the same” and that “[f]oreign comparison broadens the perspectives for decision-making.”\textsuperscript{174} In other words, the Court’s opinions will be less prone to attacks on its legitimacy because it will have looked at the problem from multiple perspectives.

By taking into account foreign norms, the Court maintains some semblance of credibility in the face of increasing globalization. At the very least, this practice will convey a different perspective and, at most, may very well provide luminous insight.

The Court should also extend its treatment of international norms into its constitutional jurisprudence out of a “decent respect for the opinions of mankind.”\textsuperscript{175} This argument, which is essentially a subset of the legitimacy argument, has been promoted by Justice Blackmun,\textsuperscript{176} Professor Louis Henkin,\textsuperscript{177} and Dean Koh.\textsuperscript{178} As a fledgling nation, the United States felt an obligation to look outside its borders because the colonies wanted to be viewed as more than just property by their peers.\textsuperscript{179} Because the United States did not have a legal system of its own at the time, “the Framers necessarily looked to the Law of Nations, which had a concrete and well-understood meaning in the courts of the American colonies.”\textsuperscript{180} In effect, the independent colonies needed to establish their collective credibility as an independent sovereign by gaining the respect of other nations. Because obeying the law of nations was a direct route to obtaining that credibility, “the law of nations became part of the common law of the United States.”\textsuperscript{181} The United States should not disregard international authority now that it no longer needs to establish its credibility as an independent nation. Such disloyalty to international authority chips away at the integrity of our judicial system. Although the independent judiciary should maintain its distance from foreign and political affairs, a U.S. Supreme Court that lacks legitimacy in the eyes of other nations necessarily undercuts the legitimacy of the other branches of government.

These arguments, which are not functional in nature, provide additional reasons for the Court to incorporate international norms into its jurisprudence. Although the legitimacy argument can be criticized as being political in nature, it is vital that the Supreme Court, which is seen as the enduring symbol of American justice, not be seen as parochial. This is a nation that has often been portrayed as the paragon of democracy and the leader in human rights reform. However, this enduring vision that other nations equate with America may slowly deteriorate as others see the

\textsuperscript{172} L’Heureux-Dubé, \textit{supra} note 158, at 38–39.
\textsuperscript{173} Id. at 39.
\textsuperscript{174} Id.
\textsuperscript{175} Blackmun, \textit{supra} note 145, at 45.
\textsuperscript{176} Id.
\textsuperscript{178} Koh, \textit{supra} note 86, at 1087.
\textsuperscript{179} See id.
\textsuperscript{180} Id. at 1087–88.
\textsuperscript{181} Id. at 1088.
United States fall behind on certain human rights’ issues. Dean Koh of Yale Law School stated that “[h]uman rights progress is not the same in every part of the world at the same time.... In the U.S., we’re ahead on some issues, but behind on others, such as the death penalty, gay rights and immigrants’ rights.”

By looking at international sources and using them when appropriate, the Supreme Court signals a willingness to remain a leader on all issues and thus preserves its image as the preeminent advocate for human rights.

IV. CONCLUSION

Whether or not the new Roberts Court will actually increase the role of international norms in its constitutional jurisprudence, the Supreme Court has enunciated, even in early cases such as The Paquete Habana, that “international law is part of our law.” Accordingly, the Justices of the Court can and should look beyond the boundaries of this nation when adjudicating its cases. In fact, the Court’s recent opinions in Atkins v. Virginia, Lawrence v. Texas, and Roper v. Simmons indicate that this Court is prepared to thrust international authority into a larger spotlight, although holdovers, such as Justice Scalia and Justice Thomas, seek to prevent this practice from becoming custom. Even without a consensus, it appears that the U.S. Supreme Court is ready to increase its part in this international dialogue and to carve a new niche for international norms into its constitutional jurisprudence.

182. Lane, supra note 13.

183. Whether or not it is the role of the Court to maintain an image as an advocate for human rights is beyond the scope of this Article. One might argue that the Court should have a much more limited role. However, in citing to foreign sources and considering these sources when necessary, the Court will nevertheless retain such an image. What is more, so long as the Court considers international sources when relevant, it will be free to disregard these sources in certain instances without losing this image because the Court will likely have cited to foreign sources in enough cases to maintain such an image.

184. 175 U.S. 677 (1900).

185. Id. at 700.


188. 543 U.S. 551 (2005).

189. Roper provides especially strong support for the proposition that the Court is willing to expand on the usage of foreign sources, given that the Roper opinion included a separate section on these foreign sources. See supra notes 51–55 and accompanying text.

190. The changes in the Court’s composition may obviously play a role in this trend. Justice O’Connor may have been one of the stronger proponents of citing foreign sources, and her replacement may slow or even reverse this trend. See supra note 28.