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IV. The Propriety of Independently Referencing International Law

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IV. THE PROPRIETY OF INDEPENDENTLY REFERENCING INTERNATIONAL LAW

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A. Introduction

Historically, international law[1] was an accepted part of American jurisprudence.[2] Early Supreme Court cases decreed that it

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1. As used in this paper, "international law" refers to public and private international law and the laws of foreign countries. For a discussion of the specific sources of international law and the ways domestic courts use them, see *infra* Part C.

was germane to the domestic legal system.[3] The Declaration of Independence also identified that "a decent respect [should be paid] to the opinions of mankind."[4] Yet, in spite of this early acceptance of international law, there has been an uproar over recent Supreme Court references to international law in cases such as *Lawrence v. Texas*[5] and *Roper v. Simmons*.[6]

If the early American legal system approved of international law, how did referencing it become so unthinkable?[7] One possible explanation is that the current nationalist attitude reflects the United States' evolution in the global community. Early attitudes towards international law may have reflected a new nation's desire to be a part of the global community.[8] Acknowledging the importance of international law likely aided its acceptance into that community. Conversely, current attitudes may reflect a developed nation's position as a global leader who creates the benchmark for protecting many rights.[9]

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2. *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, 755 (2005) (stating that the Court's citation to foreign law is not a new practice); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 44 (2004) ("[M]any of [Justice] Marshall's early opinions expressly promoted the implicit or explicit internalization of international law into U.S. domestic law . . . .").

3. *See infra* Part C.1.

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

5. 539 U.S. 558, 573 (2003).

6. 543 U.S. 551, 575–76 (2005); *see infra* Part D.1.

7. *See* H.R. Res. 97, 109th Cong. (2005); *see also* Thomas P. Kilgannon, *Does the Constitution Matter?*, GOPUSA, Mar. 10, 2005, http://*www.gopusa.com*/commentary/guest/2005/tpk_0310p.shtml (stating that Congress should consider impeaching judges who rely on international law to interpret the Constitution).

8. *See, e.g.*, Rex D. Glensy, *Which Countries Count?* Lawrence v. Texas *and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357, 365 (2005) ("[C]ompliance with the law of nations was an expression of governmental legitimacy to the rest of [the] world."); Koh, *supra* note 2, at 44 (indicating the "legitimacy of a fledgling nation" depended on being compatible with international law).

9. *See* Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 67–68 (2004) (stating that other countries have severe restrictions on reproductive rights and hate speech); *see also* J. Ruth Bader Ginsburg, Lecture, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1, 1 (2003) [hereinafter Ginsburg, Lecture] (stating that the United States was one of the first nations to develop the concept of judicial review); 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, 1320 (2004) (stating that the United States is the leader in protecting abortion rights and freedom of speech).

The current uproar may also reflect the controversial nature of the issues implicated by the recent cases in which the Supreme Court used international law. These issues include the death penalty and sexual privacy rights, which have generally divided conservatives and liberals.[10] The early cases that used international law to resolve relatively non-controversial issues, such as admiralty, did not generate the same criticism.[11] Additionally, the conflict may illustrate some scholars' view that the Court's recent use of international law is distinguishable from its early use because the early Court never applied international law in purely domestic cases.[12]

Amidst the clamor surrounding the Supreme Court's references to international law, two camps have emerged: Nationalists and Transnationalists.[13] Both sides agree that referencing international law is appropriate when domestic law directs its application.[14] For example, when an international treaty is adopted into U.S. legislation, U.S. law directs domestic courts to apply the treaty when a case implicates it. Under those circumstances, both sides agree that

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10. *See* Osmar J. Benvenuto, *Reevaluating the Debate Surrounding the Supreme Court's Use of Foreign Precedent*, 74 FORDHAM L. REV. 2695, 2708 (2006) (stating that recent cases "presented the perennially problematic and contentious issues of homosexual sodomy and the death penalty"); J. Harvie Wilkinson, *The Use of International Law in Judicial Decisions*, 27 HARV. J.L. & PUB. POL'Y 423, 425 (2004) ("Where courts go too far . . . is where they rely upon international . . . precedents when resolving important and contentious social issues."); *see also Roper*, 543 U.S. at 559 (involving the juvenile death penalty); *Lawrence*, 539 U.S. at 562 (addressing an individual's right to sexual privacy); Atkins v. Virginia, 536 U.S. 304, 310 (2002) (evaluating the death penalty for the mentally disabled).

11. *See* The Paquete Habana, 175 U.S. 677 (1900) (resolving whether the United States could condemn fishing vessels); Murray v. Schooner Charming Betsy, 6 U.S. (2 CRANCH) 64, 64–65 (1804) (deciding whether a shipping vessel was wrongfully captured under a congressional act prohibiting commerce between the United States and France).

12. *See* Wilkinson, *supra* note 10, at 423 ("[T]he nature of the reliance [on international law] is changing. The Court has recently turned to foreign courts to support key positions in major rulings on wholly domestic social issues."). *But see* Koh, *supra* note 2, at 44 ("The original design and early practice of our courts envisioned that they would not merely accept, but would actively pursue, an understanding and incorporation of international law standards out of a decent respect for the opinions of mankind.").

13. *See infra* Part D.

14. *See* Benvenuto, *supra* note 10, at 2701–02; J. Antonin Scalia, *Keynote Address at the Ninety-Eighth Annual Meeting of the American Society of International Law: Foreign Legal Authority in the Federal Courts*, 98 AM. SOC'Y INT'L L. PROC. 305, 305 (2004); *see also* J. Antonin Scalia & J. Stephen Breyer, *A Conversation Between U.S. Supreme Court Justices: The Relevance of Foreign Legal Materials in U.S. Constitutional Cases*, 3 INT'L J. CONST. L. 519, 521 (2005) [hereinafter Scalia-Breyer Debate] (Justice Scalia stating that using foreign law is appropriate "in the interpretation of a treaty").

a domestic court may also refer to international courts' interpretations of the treaty in reaching its decision.[15] The major disagreement between the two camps occurs when no domestic law points to international law, but a domestic court still discusses it in resolving a case.[16] For example, in *Roper*, the Court discussed an international treaty even though the United States was not a signatory and no domestic law pointed to its use.[17] Transnationalists argued that discussing the treaty was appropriate, because the Court indicated that the treaty was not binding on its decision.[18] Nationalists argued that it was inappropriate to mention the treaty, because the case did not implicate international law.[19]

This Article discusses the Nationalist and Transnationalist views toward domestic courts' references to international law, and it compares these recent references to the Supreme Court's early use of international law. Part B of the Article further defines the current debate by highlighting the differences between cases in which both sides agree that the application of international law is appropriate, versus cases in which the two sides diverge. Part C compares the circumstances surrounding the Supreme Court's recent references to international law to the circumstances surrounding its early international law references in order to identify any similarities or differences between the two. Part D summarizes the arguments of Nationalists and Transnationalists. Finally, Part E concludes that it is uncertain whether the Supreme Court will continue to reference international law, particularly since two new Justices have joined the Court.

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15. Scalia, *supra* note 14, at 305.

16. See *infra* Part D.

17. *Roper v. Simmons*, 543 U.S. 551, 576 (2005).

18. J. Ruth Bader Ginsburg, *An Open Discussion*, 36 CONN. L. REV. 1033, 1042 (2004) [hereinafter Ginsburg, *Discussion*] (stating that international law "doesn't bind us"); Scalia-Breyer Debate, *supra* note 14, at 522–23.

19. *See* Benvenuto, *supra* note 10, at 2701–02, 2720; Glensy, *supra* note 8, at 380–81 (noting that Justice Scalia stated that American law does not have to conform to international law and there is "no common reference" between international and domestic law); Ernesto J. Sanchez, *A Case Against Judicial Internationalism*, 38 CONN. L. REV. 185, 188–89 (2005) ("Foreign materials . . . as well as international conventions can indeed assist judges in interpreting the Constitution as it applies to matters involving such conventions, international law in general, or some sort of foreign interest.").

B. Prescribed vs. Independent International Law References

There are several instances in which both Nationalists and Transnationalists agree that it is proper for domestic courts to use international law to resolve a case: when the case implicates an international treaty or convention to which the United States is a signatory; when the case implicates customary international law; and when the case implicates international law under the forum's choice of law method.[20] Moreover, both camps agree that it is appropriate for courts to use foreign case jurisprudence and legislative enactments as persuasive authority to interpret implicated international law.[21] However, the crux of the disagreement between Nationalists and Transnationalists is whether a domestic court should use international law, even as persuasive authority, when none of these established uses of international law apply.[22]

International treaties and conventions[23] to which the United States is a signatory are binding international law.[24] If a treaty is

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20. *See* Scalia, *supra* note 14, at 305.

21. *See id.* Federal Rule of Civil Procedure ("FRCP") section 44.1 is the procedural mechanism by which parties may plead international law, in the "agreed upon" categories of international law. F. R. CIV. P. 44.1. Case law indicates that it is most often applicable in the choice of law category. *See generally* Swiss Credit Bank v. Balink, 614 F.2d 1269, 1271–72 (10th Cir. 1980) (determining that Swiss law applied based on the parties' stipulation that it governed their relationship and, under FRCP 44.1, it was adequately pleaded); Siegelman v. Cunard White Star Ltd., 221 F.2d 189, 192–93 (2d Cir. 1955) (resolving whether English law governed the case since the ticket purchased by plaintiffs stated English law would govern the contract). Once a party gives notice of its intent to plead international law, FRCP 44.1 allows a court to investigate the content of international law using any relevant material, regardless of its admissibility in court. *See generally*, *Swiss*, 614 F.2d at 1272 (holding that FRCP 44.1 "gives the court wide latitude in determining foreign law, and it can consider any relevant material."); Ramirez v. Autobuses Blancos Flecha Roja, 486 F.2d 493, 497 n.11 (5th Cir. 1973) ("[FRCP 44.1] clearly and properly permits the District Court to 'consider any relevant material or sources' 'in determining foreign law.'").

22. Benvenuto, *supra* note 10, at 2757 (stating that Nationalists argue international law should play "no substantive role" in Constitutional interpretation and Transnationalists argue that the United States can learn from international law); Sanchez, *supra* note 19, at 188 ("[T]he decisions that have generated most of the debate concerning the proper role of foreign and international law in American jurisprudence have primarily involved purely domestic matters that mandate no reference to anything other than American law."); Scalia, *supra* note 14, at 307–08 ("It is my view that modern foreign legal materials can *never* be relevant to an interpretation of—to the *meaning* of—the U.S. Constitution.").

23. The remainder of this Article uses "treaties" to refer to both treaties and conventions. Treaties and conventions are international agreements between two or more nations. *See* BLACK'S LAW DICTIONARY 355 (8th ed. 2004).

24. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 111, cmts. b, c , h, 321 (1987); *see also* U.S. CONST. art. VI (stating that "treaties made . . . under the authority of the United States," are, like the Constitution itself and the laws of the United States, the "supreme law of the

self-executing or if Congress has implemented legislation to give it effect, courts must apply the treaty's rules unless the United States opted out of the rule before executing the treaty or the rule is contrary to the Constitution.[25] Thus, an international treaty to which the United States is a signatory essentially becomes U.S. law.[26]

Further, most scholars agree that it is appropriate for domestic courts to reference other signatory countries' interpretations of a treaty as persuasive authority, at least when no domestic law interprets it.[27] A treaty constitutes a standard, binding law that all signatory countries have agreed to follow.[28] The United States, as a signatory to the treaty, agrees to observe the same law.[29] Thus, it is appropriate to reference international and foreign courts' interpretations of the treaty as "persuasive evidence of what the law is."[30]

Another binding source of international law is customary international law.[31] Customary international law is international

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land" under Article VI of the Constitution, and "judges . . . shall be bound" by them). International conventions to which the United States is a signatory are also considered binding law for U.S. courts because they have the same authority as treaties to which the United States is a signatory. *See* Chateau des Charmes Wines Ltd. v. Sabate USA Inc., 328 F.3d 528, 530 (9th Cir. 2003) ("Because the President submitted the Convention to the Senate, which ratified it, there is no doubt that the Convention is valid and binding federal law." (citation omitted)).

25. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 111(2)–(4), cmts. (a)–(c), (h).

26. DAVID J. BEDERMAN WITH CHRISTOPHER J. BORGEN & DAVID A. MARTIN, INTERNATIONAL LAW: HANDBOOK FOR JUDGES 5 (American Society of International Law & Foundation Press 2003); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 111(1), cmt. b.

27. *See* Sanchez, *supra* note 19, at 192, 194 (stating that, if the United States is a signatory to a treaty, it is appropriate for U.S. courts to contemplate a foreign court's interpretation of that treaty if there are no American sources that offer guidance); Scalia, *supra* note 14, at 305 (stating that, in the interpretation of a treaty to which the United States is a signatory, it is appropriate to reference international courts' interpretations of that treaty, at least as persuasive authority); Tim Wu, *Foreign Exchange Should the Supreme Court Care What Other Countries Think?*, SLATE, Apr. 9, 2004, http://www.slate.com/toolbar.aspx?action=print&id=2098559 ("The use of foreign law to help ascertain a treaty's meaning is uncontroversial.").

28. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, §§ 111, cmts. c, h, 321.

29. *Id.* §§ 111, cmts. c, h, 321, cmt. b.

30. *Id.* §§ 103 cmt. b, 111, cmts. c, h, 321; *see also* Zicherman v. Korean Airlines Co., 516 U.S. 217, 221–23 (1996) (referencing other nations' interpretations of the Warsaw Convention, and stating that "[m]any signatory nations, including Czechoslovakia, Denmark, [and] Germany . . . did not . . . recognize a cause of action for nonpecuniary harm resulting from wrongful death").

31. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 102(1)(a), (c); *see also* Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L. L. 115, 122 (2005) ("Some of the norms that have emerged among states are known as legal rules—rules of customary law.").

common law that has developed "from [the] general and consistent practice" of the countries that choose to abide by it.[32] These countries "follow [it] from a sense of legal obligation."[33] There is no precise test to determine when a practice has become sufficiently general and consistent to constitute customary international law, "but [the practice in question] should reflect wide acceptance among [countries] particularly involved in the relevant activity."[34] "[A] practice that is generally followed but which [countries] feel legally free to disregard" is not customary international law.[35]

Because of the uncertainty in determining when a country's common practices have developed into customary international law, it is difficult to determine when a common practice is binding on a country.[36] However, if a common U.S. practice has developed into customary international law, it essentially becomes part of domestic law, and, if implicated, U.S. courts are bound to apply it.[37] Since the United States has agreed to adhere to law that binds other nations in similar circumstances, it is appropriate for domestic courts to reference other courts' interpretations of that law as persuasive authority.[38]

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32. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 102, cmt. b–d; *see also* United States v. Yousef, 327 F.3d 56, 91 n.24 (2d Cir. 2003) ("Customary international law is comprised of those practices and customs that States view as obligatory and that are engaged in or otherwise acceded to by a preponderance of States in a uniform and consistent fashion."); A. Mark Weisburd, *American Judges and International Law*, 36 VAND. J. TRANSNAT'L L. 1475, 1478 (2003) ("[I]n the CIL system, there is no sovereign with authority to control independent states. . . .").

33. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 102, cmts. b–d; *see also Yousef*, 327 F.3d at 91 n.24; Weisburd, *supra* note 32, at 1478.

34. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 102 cmt. b; *see also Yousef*, 327 F.3d at 93 (citing United States v. Smith, 18 U.S. (5 WHEAT.) 153, 160–61 (1820)) ("[A] court should identify the norms of customary international law by looking to 'the general usage and practice of nations [,] or by [looking to] judicial decisions recognizing and enforcing that law . . .[, or by] consulting the works of jurists writing professedly on public law.'"); Weisburd, *supra* note 32, at 1480 (stating that what counts as a state practice is not defined).

35. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 102 cmt. c.

36. Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 816 (1990); *see also* Kathleen M. Kedian, *Customary International Law and International Human Rights Litigation in United States Courts: Revitalizing the Legacy of the Paquete Habana*, 40 WM. & MARY L. REV. 1395, 1396–97 (1999) ("Determining the scope of customary international law is often difficult."); Larsen, *supra* note 9, at 1305–07 (recognizing the difficulty of trying to determine what is customary international law).

37. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 102(1)(a),(c), cmt. j.

38. *Id.* §§ 102 cmt. j, 103 cmt. b; *see also* Sanchez, *supra* note 19, at 188 (stating that foreign materials can assist judges if a case raises some international interest).

U.S. courts are also bound to apply international law to resolve domestic disputes when the forum's choice of law rules point to international law.[39] For example, assume there is a contract dispute between two parties, each of whom resides in a different country. The court that hears the case will have to determine which jurisdiction's laws to apply. If the court determines that a foreign country's law should apply, then it is bound to apply that country's law to the dispute. The court will also have to interpret the foreign country's law. In those circumstances, it is appropriate for the court to look to the foreign country's case law and legislation, as persuasive authority, to determine how to correctly apply the law.

Nationalists and Transnationalists agree that, in the situations described above, it is appropriate for domestic courts to apply international law and to reference other countries' interpretations of that law.[40] However, the recent debate over the Supreme Court's use of international law centers on the Court's application of international law in cases that do not fall into any of the prescribed uses discussed above.[41] For example, the Court in *Atkins v. Virginia*[42] had to decide whether it was unconstitutional to execute the mentally disabled.[43] Although no treaty, customary law, or foreign country's law applied, the Court referenced international law in its decision, surveying other countries' laws to see how many of them imposed the death penalty for the mentally disabled.[44]

The debate between the Nationalists and Transnationalists focuses on the propriety of cases, like *Atkins*, in which domestic

39. James P. George, *False Conflicts and Faulty Analyses: Judicial Misuse of Governmental Interests in the Second Restatement of Conflict of Laws*, 23 REV. LITIG. 489, 495–97, 501, 511, 519 (2004) (stating that there are essentially three main choice of law methodologies that currently exist in the United States, with variations in each state, including the vested-rights doctrine (adopted by states such as Connecticut), the most significant relationship test (adopted by states such as New York), and the governmental interest analysis (adopted by states such as California)).

40. *See* Benvenuto, *supra* note 10, at 2701–02; Scalia, *supra* note 14, at 305; *see also* Scalia-Breyer Debate, *supra* note 14, at 521 (Justice Scalia stating that using foreign law to interpret a treaty is appropriate); *supra* Part B.

41. Benvenuto, *supra* note 10, at 2757; Sanchez, *supra* note 19, at 188.

42. 536 U.S. 304 (2002).

43. *Id.* at 310.

44. *Id.* at 316 n.21; *see also* Lawrence v. Texas, 539 U.S. 558, 572–73 (2003) (surveying other nations' laws such as the British Parliament's "1957 repeal of laws punishing homosexual conduct"); Trop v. Dulles, 356 U.S. 86, 103 (1958) (concluding that denationalization for desertion was cruel and unusual punishment).

courts "reference" international law "independently"—meaning that they use international law as persuasive authority in instances other than those falling in the aforementioned categories.[45] The debate has particularly focused on cases in which the Court does this while interpreting the Constitution.[46] Transnationalists argue that independently referencing international law is appropriate because courts are only using the international law for informational purposes—that is, as persuasive authority—not as binding law.[47] Nationalists, however, argue against independently referencing international law, even when only as persuasive authority.[48]

C. Examples of Domestic Courts' References to International Law

Nationalists and Transnationalists disagree on whether precedent supports the Court's recent independent references to international law.[49] Nationalists argue that the Supreme Court's early references to international law all occurred in certain, limited circumstances, none of which were implicated in any of the recent cases in which the Court referenced international law.[50] Conversely, Transnationalists argue that the Court's recent references are authorized by the early cases.[51]

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45. Sanchez, *supra* note 19, at 188–89.

46. *Id.* at 200–01.

47. *See, e.g.*, Benvenuto, *supra* note 10, at 2697 (arguing "use of foreign precedent is largely inconsequential" and "used rhetorically, not substantially"); Glensy, *supra* note 8, at 366–67 (stating that "comparative analysis" is using law in "an advisory role"); Sanchez, *supra* note 19, at 185 (discussing recent use of foreign authority as persuasive and instructive in cases such as *Lawrence*, *Atkins*, and *Roper*); *see also infra* Part D.2.

48. Sanchez, *supra* note 19, at 201 ("Th[e] apparent deference to foreign legal authorities or inapplicable treaties in the wake of making decisions that do not require their use constitutes the crux of many observers' concerns . . . ."); *see also* H.R. Res. 97, 109th Cong. (2005) (resolving that courts should not base judgments on international law and opinion).

49. Sanchez, *supra* note 19, at 196–97.

50. *See* Calabresi & Zimdahl, *supra* note 2, at 894–95 ("We are inclined to believe that it is legitimate in a few contexts for the Court to look to foreign law, but that does not mean that the Court ought to cite foreign law in substantive due process cases."); Sanchez, supra note 19, at 200 (arguing that the early Court never referenced international law on its own; the circumstances in the early cases implicated international law).

51. Stephen Arvin, Roper v. Simmons *and International Law*, 83 DENV. U. L. REV. 209, 218 (2005) ("In fortifying *Roper v. Simmons*' evolving standards of decency analysis with the principles of the international community, the majority was following a long established tradition of Supreme Court jurisprudence."); Koh, *supra* note 2, at 44.

1. Early Supreme Court Citations to International Law

Transnationalists observe that the Supreme Court's history has been rife with international law references.[52] These early references, they argue, indicate the importance of international law in U.S. jurisprudence.[53]

Many Transnationalists identify *The Paquete Habana*[54] as the "seminal case" on the status of international law in the American legal system.[55] In *Paquete*, Spanish owners of two shipping vessels filed wrongful condemnation claims after an American ship captured their vessels.[56] No domestic law dictated whether the United States could capture and condemn foreign fishing vessels as prizes of war.[57] To determine whether the United States could do so, the Court reviewed the practices of other nations such as France and England.[58] Those countries historically disfavored the practice of capturing fishing vessels that were merely engaging in their livelihood.[59] The court adopted the international custom, stating, "[i]nternational law is part of our law," and where there is no domestic law relevant to resolving a particular claim, "resort must be had to the customs and

52. *See* Calabresi & Zimdahl, *supra* note 2, at 755 (concluding that it is incorrect to say the Court has never cited to international law).

53. *E.g.*, Andrew R. Dennington, *We Are the World? Justifying the U.S. Supreme Court's Use of Contemporary Foreign Legal Practice in* Atkins, Lawrence, *and* Roper, 29 B.C. INT'L & COMP. L. REV. 269, 272–75 (2006) ("While conservative critics of the Court's recent use of contemporary foreign legal materials in domestic constitutional interpretation describe this as an 'alarming new trend,' this is, in fact, not a novel phenomenon."); Glensy, *supra* note 8, at 359 ("[C]omparative analysis is hardly a 'new' phenomenon"). *See generally* Hilton v. Guyot, 159 U.S. 113, 163–66 (1895) (looking at laws in effect in Holland, Germany, Russia, Switzerland in holding that the judgment previously obtained in France was not entitled to full faith and credit in the United States); Dred Scott v. Sandford, 60 U.S. (19 HOWARD) 393, 477–80, 485–86, 496 (1857) (referencing English, French and Roman slavery laws); Holmes v. Jennison, 39 U.S.)(14 PET.) 540, 540–45 (1840) (analogizing the case's circumstances, where Canada requested extradition of its citizen, who was a suspected murderer, to English cases but acknowledged that the outcome will ultimately be determined by reviewing the Constitution); Chisholm v. Georgia, 2 U.S. (12 DALL.) 419, 437–45 (1793) (reviewing English cases to conclude that an action for assumpsit cannot be legally maintained against a state).

54. 175 U.S. 677, 700 (1900).

55. Sanchez, *supra* note 19, at 196 (stating that *Paquete* is the seminal case summarizing the early Court's approach to international law); *see also* Ginsburg *Discussion*, *supra* note 18, at 1040 ("The great Chief Justice John Marshall affirmed that international law is part of the law of the United States.").

56. *Paquete*, 175 U.S. at 678–79, 686.

57. *Id.* at 686, 700.

58. *Id.* at 686–700.

59. *Id.*

usages of [c]ivilized nations."[60] Accordingly, the Court concluded that the American ship wrongfully captured the Spanish vessels.[61] Thus, the Court indicated that international law is relevant in resolving a dispute, at least where there is no domestic law on the issue.[62]

Similar to *Paquete*, *Thirty Hogsheads of Sugar v. Boyle*[63] is another early case that, Transnationalists argue, endorses independent references to international law, at least in the absence of domestic law.[64] In *Thirty Hogsheads*, an "American privateer" captured and condemned a British ship as "enemy property" during war with England.[65] A Danish subject sought to recover sugar, which he believed to be his, that was on board the ship.[66] He claimed that it was wrongfully condemned, because it was Danish property, not British property.[67] Because no domestic rule dictated the ownership of the property, Justice Marshall referenced a British rule, which said that produce is owned by the country that owns the soil that yielded the produce.[68] Justice Marshall acknowledged that the British rule was not binding on U.S. decisions, but stated that "[t]he law of nations is the great source from which we derive those rules . . . which are . . . common to every country," and "[t]he decisions of the Courts of every country . . . will be considered in adopting [a] rule."[69] Thus, the Court held that the ship and its cargo belonged to Britain and were rightfully condemned as enemy property.[70] By using British law to resolve this case, Justice Marshall indicated that, at least in some circumstances, it is appropriate for the

60. *Id.* at 700, 708. *But cf.* Sanchez, *supra* note 19, at 196–97 (stating that *Paquete* does not stand for the proposition that the Court has always approved of using international law because of the qualifying language that international law can only be applied in the absence of domestic legislation).

61. *Paquete*, 175 U.S. at 714.

62. *Id.* at 700.

63. 13 U.S. (9 CRANCH) 191 (1815).

64. *See* Glensy, *supra* note 8, at 365.

65. Thirty Hogshead, 13 U.S. (9 CRANCH) at 195.

66. *Id.*

67. *Id.* at 195–96.

68. *Id.* at 196–97.

69. *Id.* at 198.

70. *Id.* at 199.

Court to use international law to resolve a case if domestic law does not resolve it.[71]

In addition to arguing that early cases endorse the use of international law when domestic law does not apply, Transnationalists argue that, under *Murray v. Schooner Charming Betsy*,[72] domestic courts should interpret domestic law consistently with international law whenever possible.[73] *Schooner* involved the capture and condemnation of a former American vessel—the Charming Betsy—under an act that authorized the capture of American ships engaging in commercial dealings with France or any of its territories.[74] The Charming Betsy was owned by a former U.S. citizen and was captured while it was transporting goods to a French territory.[75] The Court had to determine whether the Charming Betsy and its owner fell within the intent of the act under which the Charming Betsy was captured.[76] In interpreting Congress' intent, the Court stated that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[77] Consequently, the Court held that Congress did not intend to include former citizens engaged in purely commercial dealings within the act; otherwise, the act would be punishing commerce abroad more than is allowed by the "law of nations."[78] By interpreting a federal statute in light of international law, the Court indicated that U.S. courts should look to international law to ensure

71. *But see* Sanchez, *supra* note 19, at 199 (arguing international issues were applicable to this claim so it was appropriate for the Court to reference international law but the Court has never endorsed referencing international law when it was not applicable and especially when it was not consistent with American law).

72. 6 U.S. (2 CRANCH) 64 (1804).

73. *See, e.g.*, Calabresi & Zimdahl, *supra* note 2, at 765 (arguing *Schooner* "constitutes a clear acceptance by the Marshall court of the background importance of foreign sources of law."); Glensy, *supra* note 8, at 365 (stating that, based on *Schooner* and other cases, it was "apparent that sources of law whose genesis was foreign to the United States could, and did, impact federal statutory construction.").

74. *Schooner*, 6 U.S. (2 CRANCH) at 64–66 (1804).

75. *Id.* at 64, 66.

76. *Id.* at 118.

77. *Id.* at 118–20.

78. *Id.* at 118.

some level of harmony between U.S. law and the laws of other countries.[79]

2. The Supreme Court's More Recent References to International Law

The Supreme Court has independently referenced international law in several recent cases involving human rights and civil liberties.[80] In most of these cases, the Court has referenced international law in interpreting the Eighth Amendment to protect individuals from cruel and unusual state action. The Court has also referenced international law in Fourteenth Amendment cases to protect liberty rights, although it has referenced international law in these cases less frequently than it has in Eighth Amendment cases.

a. The Eighth Amendment

The Court has referenced international law in Eighth Amendment cases to determine whether a punishment is cruel and unusual. In *Trop v. Dulles*,[81] the Court used international law to develop a community standard for determining whether a particular form of punishment violates the Eighth Amendment's prohibition against cruel and unusual punishment.[82] The Court held that the constitutionality of state action must be measured against "the evolving standards of decency that mark the progress of a maturing society."[83] The petitioner in *Trop* was a U.S. citizen who lost his citizenship under the National Act of 1840 when he was convicted of

79. *Id.* at 118–20; *see also* Glensy, *supra* note 8, at 365 ("[I]f two interpretations of an act of Congress were plausible, that interpretation which complied with the law of nations would be preferred over that which did not.").

80. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 573 (2003); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002); Trop v. Dulles, 356 U.S. 86, 103 (1958); *see also* Calabresi & Zimdahl, *supra* note 2, at 885, 891, 903–05; Mark Wendell DeLaquil, *Foreign Law and Opinion in State Courts*, 69 ALB. L. REV. 697, 701–02 (2006) (stating that international law is most often addressed in the context of the Eighth Amendment); *Glensy*, *supra* note 8, at 367 (contending the Supreme Court usually references international law when fundamental human rights, usually involving the Eighth Amendment's prohibition against cruel and unusual punishment or Due Process rights, are at stake).

81. 356 U.S. 86 (1958).

82. *Id.* at 100–03.

83. *Id.* at 100–01; *see also* Roper v. Simmons, 543 U.S. 551, 561 (2005); *Atkins*, 536 U.S. at 311–12; Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) (resolving that, since the plurality in *Trop* emphasized international law, it is "not irrelevant here that out of 60 major nations . . . only 3 retained the death penalty for rape").

wartime desertion.[84] He argued that stripping him of his citizenship constituted cruel and unusual punishment.[85] The Court looked at the English Declaration of Rights and the Magna Carta, which formed the basis of the Eighth Amendment, to determine the policy underlying the Eighth Amendment.[86] It determined that the amendment limited the government to "civilized standards" in the types of punishment it could levy against individuals.[87] It further stated that "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime."[88] As a result, it held that denationalization constituted cruel and unusual punishment.[89] By referencing international standards in determining whether denationalization was cruel and unusual, the *Trop* Court indicated that international law is a component of the Eighth Amendment community standard.

The Court reaffirmed its willingness to reference international law within the Eighth Amendment context with its decision in the 2002 case, *Atkins*. The Court in *Atkins* had to resolve whether the death penalty violated the Eighth Amendment as applied to mentally disabled persons.[90] The Court first applied the *Trop* standard, looking at the national attitude toward mentally disabled offenders to determine whether the death penalty for mentally disabled persons was unconstitutional.[91] It then looked at other countries' practices to get a "broader social and professional consensus" and found that most countries had rejected this type of state action.[92] Although the Court acknowledged that international law was not dispositive, it referenced it to "lend[] further support to [the] conclusion that there [wa]s a consensus" against this type of state action.[93] Thus, by using

84. *Trop*, 356 U.S. at 87–88.

85. *Id.* at 88.

86. *Id.* at 99–100.

87. *Id.* at 100 ("Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.").

88. *Id.* at 102.

89. *Id.* at 103.

90. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

91. *Id.* at 310–12, 315–16.

92. *Id.* at 311–12, 316 n.21.

93. *Id.* at 316 n.21.

international views to support its conclusion, the *Atkins* court upheld *Trop's* international community standard.[94]

Roper, decided in 2005, is the Supreme Court's most recent Eighth Amendment death penalty case, and is at the center of the recent controversy over the use of international law.[95] In *Roper*, the Court had to determine whether the juvenile death penalty fell outside the standards of decency of civilized nations.[96] The defendant in *Roper* was convicted of murder when he was seventeen years old and sentenced to the death penalty.[97] After the *Atkins* court overturned the death penalty for the mentally disabled, he filed a new appeal arguing that the *Atkins* Court's reasoning also applied to the juvenile death penalty.[98] In determining whether the juvenile death penalty was cruel and unusual punishment, the Court followed an approach that was similar to its analysis in *Atkins*.[99] First, it surveyed state legislation to determine the national view on the subject and concluded that there was a national consensus against the juvenile death penalty.[100] It then referenced international law in the same way it did in *Atkins*, acknowledging that it was not binding, but using it to "find[] confirmation" for its conclusion that the juvenile death penalty fell outside society's standards of decency.[101] It surveyed other nations' views on the juvenile death penalty, and noted that the United States was one of the few countries that had not ratified Article 37 of the United Nations Convention on the Rights of the Child.[102] This supported its prior conclusion that the Eighth Amendment prohibited the juvenile death penalty.[103] In *Roper*, the Court again showed that it may reference international law in the

94. *Trop*, 356 U.S. at 103.

95. Roper v. Simmons, 543 U.S. 551, 555 (2005); *see infra* Part D.

96. *Roper*, 543 U.S. at 559, 561.

97. *Id.* at 557–58.

98. *Id.* at 559.

99. *See supra* text accompanying notes 90–94.

100. *Roper*, 543 U.S. at 564–65, 567.

101. *Id.* at 575, 578. Disagreeing with the majority that a "genuine national consensus" existed, Justice O'Connor supported using international law to determine Eighth Amendment violations because the Court has consistently referred to international law in Eighth Amendment issues. *See id.* at 604–05 (O'Connor, J., dissenting).

102. *Id.* at 576 ("Article 37 of the United Nations Convention on the Rights of the Child . . . contains an express prohibition on capital punishment for crimes committed by juveniles under 18.").

103. *Id.* at 568, 575.

interpretation of the Eighth Amendment with respect to human rights issues. However, it never addressed what it would do if international law conflicted with domestic law.

b. The Fourteenth Amendment

There are fewer independent references to international law in Fourteenth Amendment cases. One case in which the Court used international law to interpret the Fourteenth Amendment is *Lawrence v. Texas*.[104] *Lawrence* sparked an intense controversy surrounding the propriety of independently referencing international law, particularly in the context of sexual privacy rights.[105] In *Lawrence*, the petitioners, who were convicted under a Texas statute making it a crime for same-sex persons to engage in sexual conduct, claimed the statute violated the Fourteenth Amendment.[106] A prior case, *Bowers v. Hardwick*,[107] had held that there was no right to engage in certain homosexual conduct.[108] However, the Court in *Lawrence* reversed *Bowers*, holding that there was no long-standing national history prohibiting homosexual conduct as the *Bowers* Court claimed.[109] After finding domestic support for the recognition of a right to sexual privacy, the Court reviewed international history and found a right to sexual privacy in the "history of Western civilization and . . . Judeo-Christian moral and ethical standards[.]"[110] It also cited *Dudgeon v. United Kingdom*,[111] a European Court of Human Rights case that held that laws proscribing same-sex intimate conduct violated the

104. 539 U.S. 558 (2003).

105. *Id.* at 572–73; *see also* David Fontana, *The Next Generation of Transnational/Domestic Constitutional Law Scholarship: A Reply to Professor Tushnet*, 38 LOY. L.A. L. REV. 445, 451 (2004) ("Lawrence involved constitutional questions surrounding a politically controversial issue, homosexuality, so it was sure to again attention . . . ."); Wu, *supra* note 27 ("House Republicans reacted angrily to last spring's *Lawrence v. Texas*. . . .").

106. *Lawrence*, 539 U.S. at 562–63.

107. 478 U.S. 186 (1986).

108. *Id.* at 190–91.

109. *Lawrence*, 539 U.S. at 568, 578. The Court's re-interpretation of international consensus, however, has fueled one of the most controversial arguments against independently referencing international law, namely that judges are able to search through various international laws to find those that comport with their personal preferences to support their decisions. *E.g.*, *id.* at 598 (Scalia, J., dissenting) (stating that the majority haphazardly applied international law because it failed to look at all of the relevant international law); *see also infra* Part D.

110. *Id.* at 572.

111. 45 Eur. Ct. H.R. at 52 (1981).

European Convention,[112] and it used that case as support for its decision that the Fourteenth Amendment affords similar protection for those rights in the United States.[113] Although the Court has not independently referenced international law in Due Process cases as often as it has in Eighth Amendment cases, the *Lawrence* Court does extend the international analysis in its Eighth Amendment cases to the privacy rights realm. *Lawrence* indicates the Court's willingness to reference international law to protect Due Process rights.

Justice Ginsburg referenced international law in a similar way in her concurrence in *Grutter v. Bollinger*.[114] In that case, the Court considered whether the use of race as a factor in admissions policies violated the Equal Protection Clause.[115] The Court held that such a policy could survive strict scrutiny if the admissions policy were narrowly tailored to meet the compelling government interest of diversity.[116] One way the policy could do so was to be "limited in time."[117] In her concurrence, Justice Ginsburg cited international affirmative action programs to support the majority's conclusion that "race conscious programs" should be limited in time.[118] She also referenced the International Convention on the Elimination of All Forms of Racial Discrimination, which stated that affirmative action programs should only remain in place until their objectives have been met.[119] Justice Ginsburg's use of international law to support the majority's conclusion is consistent with the *Lawrence* Court's use of international law to support its recognition of a right to sexual privacy.

3. Comparing Early and Recent International Law References

Nationalists argue that the circumstances surrounding the Supreme Court's early references are distinguishable from its recent references, and thus, do not provide precedent for these recent cases.[120] Transnationalists, however, argue that the Court's recent

112. *Lawrence*, 539 U.S. at 573.
113. *Id.* at 576–78.
114. 539 U.S. 306 (2003).
115. *Id.* at 311, 316–17.
116. *Id.* at 326, 328.
117. *Id.* at 342.
118. *Id.* at 344 (Ginsburg, J., concurring).
119. *Id.*
120. *See* Sanchez, *supra* note 19, at 192; *see also* Benvenuto, *supra* note 10, at 2701–04.

references are consistent with the role international law played in those early cases.[121]

The early cases discussed above, although still good law, can be distinguished from the Court's recent references. In each of the early cases, the controversy involved at least one foreign party and occurred outside of national borders.[122] The early Court never applied international law to resolve a purely domestic issue involving only domestic parties. The Court's recent cases, however, have involved only domestic parties.[123] Additionally, each of the recent cases questioned the constitutionality of U.S. government action within the United States.[124] Thus, it could be argued that there were some international implications in each of these early cases, leading the Court to reference international law. Those international implications are absent in the Court's recent references.[125]

Another distinction between the early and recent cases is that the recent cases raised constitutional questions.[126] The early Court never referenced international law to interpret the Constitution; it referenced international law to resolve admiralty questions and issues surrounding appropriate war-time actions.[127] It could be argued that these early cases supported referencing international law only when cases raised global issues, or issues that were common to all countries.[128] The early cases may have also implicated customary international law, because they raised these common issues. If so,

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121. Arvin, *supra* note 51, at 218 (stating that the majority's reference to international law in *Roper* "follow[ed] a long established tradition of Supreme Court jurisprudence."); Koh, *supra* note 2, at 44.

122. Sanchez, *supra* note 19, at 192 (stating that recent cases only involved American statutes, American parties, and events occurring within the United States).

123. *See supra* Part C.2.

124. *See id.*

125. *E.g.*, Benvenuto, *supra* note 10, at 2701–04 (stating that there are only a few examples where the court used foreign precedent for a non-international purpose in early cases).

126. *See supra* Parts C.2; *see also* Sanchez, *supra* note 19, at 211 ("*Roper* carried no implications beyond United States borders except in the realm of public opinion. It was a case concerning the murder of an American national . . . on American soil which was investigated by American authorities.").

127. *See supra* Part C.1.

128. Calabresi & Zimdahl, *supra* note 2, at 764. ("Neither admiralty law nor the law of nations [is a traditional] area of constitutional law . . . such as Eighth Amendment and substantive due process cases. A big difference is that in both admiralty and law of nations cases it could be argued that the Constitution invites the Court to . . . consider[] foreign law."); Sanchez, *supra* note 19, at 194 (stating that "international law is relevant [to such issues] as maritime law").

the Court could reference international law to interpret the customary international law.[129] However, the U.S. Constitution is not common to all nations; it is particular to the United States. The Constitution does not implicate customary international law.[130] Thus, the Court's early international law references may not authorize its more recent references in the Eighth and Fourteenth Amendment cases discussed above.[131]

Additionally, the role of domestic law in the early cases is distinguishable from its role in recent cases. Before the Court in *Paquete* referenced international law, it stated that no domestic law resolved the case.[132] Similarly, in *Thirty Hogshead*, the Court looked at the British rule only after it determined that no domestic rule resolved the case.[133] Even in *Schooner*, which implicated a domestic statute, the Court only looked to international law after it concluded that the congressional intent behind the implicated act was unclear.[134] Thus, the early Court only endorsed referencing international law in the absence of clear domestic law.[135] However, in *Roper* and *Atkins*, the Court identified a national consensus against the death penalty, but it still referenced international law in its decisions.[136]

Yet, the early cases could arguably authorize the Court's recent references, because although the circumstances surrounding the cases are different, the Court is using international law in the same way. The early cases implicated issues that many nations have in common; these issues may be analogous to those raised in the Court's recent cases. For example, the *Paquete* Court quoted Justice Strong, who said that the law of the sea "'is of universal obligation [and] . . . rests

129. *See* The Paquete Habana, 175 U.S. 677, 687–700 (1900) (reviewing other countries' customs to determine whether fishing vessels could be rightfully captured); Thirty Hogshead of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815) (stating that rules concerning "neutral rights which are recognized by all civilized" nations should be respected); *see also supra* Part B.1.

130. *See supra* Part B.1.

131. *E.g.*, Calabresi & Zimdahl, *supra* note 2, at 907 ("Historical evidence largely supports Justice Scalia's claim that foreign sources of law generally are not and should not be relevant to the interpretation of the U.S. Constitution.").

132. *Paquete*, 175 U.S. at 686, 700.

133. *Thirty Hogshead*, 13 U.S. (9 Cranch) at 197–98.

134. Murray v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

135. Sanchez, *supra* note 19, at 197 (stating that courts should only reference international law "to the extent that United States law did not provide adequate guidance towards resolving the question at hand").

136. Roper v. Simmons, 543 U.S. 551, 574, 578 (2005); Lawrence v. Texas, 539 U.S. 558, 576–77 (2003).

upon the common consent of civilized communities.'"[137] In *Thirty Hogshead*, the Court emphasized that there are certain laws that are common to every country and, in those cases, it is appropriate to consider other countries' laws.[138] It could be argued that the Eighth Amendment primarily concerns human rights, which is a universal issue.[139] For example, the issue in *Roper*—protecting children from harmful state action—is a social concern that is not distinct to the United States or its Constitution.[140] Likewise, protecting citizens from excessive government intrusion, as the Court did in *Lawrence*, is a concern for all countries.[141] Thus, the Court is consistently applying international law to resolve issues common to all countries.

Early references may also authorize the Court's recent references, because the early Court never limited its international references to non-domestic cases.[142] In fact, in *Schooner*, the early Court indicated that domestic courts should try to remain consistent with international law whenever possible, not just in cases that implicate international law.[143] The *Lawrence* Court's use of international law is consistent with *Schooner*. After it recognized a right to sexual privacy, the Court reviewed international law to confirm its conclusion.[144] Similarly, in *Roper*, the Court looked at international law to confirm domestic disapproval of the juvenile death penalty.[145] Thus, the recent Court, consistent with *Schooner*, has merely ensured consistency with international law.

Additionally, throughout both the early cases and the recent cases, the Court has only used international law as persuasive authority.[146] In *Thirty Hogshead*, for example, the Court noted that it was not bound to apply the English rule, but could use it to inform its

137. The Paquete Habana, 175 U.S. (14 Wall.) 677, 711 (1900) (quoting The Scotia, 81 U.S. 170, 187–88 (1871)).

138. Thirty Hogshead of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815).

139. *See* Calabresi & Zimdahl, *supra* note 2, at 891–92 (stating that the nature of the Eighth Amendment implies a community standard).

140. *Roper*, 543 U.S. at 576.

141. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

142. *See supra* Part C.1.

143. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (determining Congress' intent behind an act, the Court stated that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

144. *Lawrence*, 539 U.S. at 576–77.

145. *Roper*, 543 U.S. at 575.

146. *See supra* Part C.

ultimate decisions.[147] Analogously, in *Roper*, the Court stated that international law was not binding,[148] as it also did in *Atkins*.[149] Therefore, international law is playing the same role in recent cases as it did in early cases.

4. Lower Courts' Use of International Law

Lower federal courts and state courts have generally been reluctant to follow the Supreme Court's lead in referencing international law to protect individual rights.[150] State courts have been more willing to look to international law in common law areas such as tort law.[151]

A few cases illustrate lower courts' general unwillingness to follow the Supreme Court's lead in using international law to interpret constitutional rights.[152] In *People v. Brown*,[153] the California Supreme Court was charged with resolving whether sentencing the defendant to the death penalty constituted cruel and unusual punishment, an issue that was similar to the issue the Supreme Court faced in *Roper*.[154] The defendant in *Brown* argued that the death penalty was unconstitutional because it violated "international norms of humanity and decency."[155] The California Supreme Court rejected the defendant's references to the International Covenant on Civil and

147. Thirty Hogshead of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815).

148. *Roper*, 543 U.S. 551, 578 (2005).

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

150. DeLaquil, *supra* note 80, at 698, 701; *see also* David S. Clark, *The Use of Comparative Law by American Courts*, 42 AM. J. COMP. L. SUPP. 23, 23 (1994) (stating that United States courts rarely cite to foreign law); Alain A. Levasseur & Madeline Herbert, *The Use of Comparative Law by Courts*, 42 AM. J. COMP. L. SUPP. 41, 42 (1994) (discussing the fact that most courts do not consider foreign law relevant).

151. DeLaquil, *supra* note 80, at 699.

152. *See, e.g.*, Allen v. Ornoski, 435 F.3d 946, 952 n.8 (9th Cir. 2006) (holding that a national consensus must exist before determining what constitutes cruel and unusual punishment). Generally, state courts have not followed the Supreme Court's lead in referencing international law in protecting liberty rights. There are a few instances where lower courts have mentioned international law in similar areas. *See* Bockting v. Bayer, 399 F.3d 1010 (9th Cir. 2005). In *Bockting*, the Ninth Circuit, in holding that a defendant's right to cross-examine the witnesses against him was essential, referenced a Supreme Court case in which Justice Scalia applied international law in recognizing the right to confront such witnesses. *Id.* at 1017 n.1. However, the *Bockting* court actually referred to the Supreme Court case in which Justice Scalia applied international law and not directly to the international law, which is inconsistent with how the Supreme Court has recently referenced international law.

153. 93 P.3d 244 (Cal. 2004).

154. *Id.* at 248, 258–59; *see supra* Part C.2.

155. *Brown*, 93 P.3d at 248, 258–59.

Political Rights ("ICCPR") because the United States, though a signatory to the treaty, "reserve[d] the right . . . to impose capital punishment."[156] The California court held that, because the United States was not a signatory to that part of the treaty, it was irrelevant in determining whether the death penalty was unconstitutional.[157] This is contrary to the decision in *Roper*, where the Court based its decision, in part, on the fact that many other countries were signatories to Article 37 of the Convention on the Rights of the Child, even though the United States was not.[158]

The Mississippi Supreme Court similarly considered whether the death penalty constituted cruel and unusual punishment in *Jordan v. Mississippi*.[159] There, the defendant filed a petition for post-conviction relief after he was convicted of two counts of capital murder and sentenced to death.[160] He alleged, among other things, that the death penalty is cruel and unusual punishment, in part because international treaties disfavored it.[161] The court acknowledged that the U.S. Constitution and U.S. Supreme Court cases were relevant in determining cruel and unusual punishment; however, the court declined to apply *Roper*, because the defendant was over 18 at the time he committed the crime.[162] The court also declined to apply international law at all in resolving the death penalty's constitutionality.[163]

Brown and *Jordan* are generally indicative of how most lower courts have responded to the Supreme Court's recent references to international law.[164] Despite lower courts' general reluctance to use

156. *Id.*

157. *Id.* at 258–59.

158. Roper v. Simmons, 543 U.S. 551, 576 (2005).

159. 918 So. 2d 636, 661 (Miss. 2005).

160. *Id.* at 643–44.

161. *Id.* at 656 (citing "the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the American Convention on Human Rights, [and] the International Covenant on Economic, Social and Cultural Rights").

162. *Id.*

163. *Id.*

164. Delaquil, *supra* note 80, at 701–02 ("In general, regardless of the type of foreign or international authority cited, state courts give these arguments a chilly reception."). *See generally* People v. Hillhouse, 40 P.3d 754, 782 (Cal. 2002) (rejecting defendant's argument that his death sentence violated customary international law because the defendant failed to establish that the death penalty violated state or federal law); Williamson v. State, 175 S.W.3d 522, 524–25 (Tex.

international law in resolving constitutional rights issues, they have looked to international law to resolve common law questions such as tort law.[165] For example, in *Li v. Yellow Cab*,[166] the California court had to resolve whether contributory negligence was still applicable or whether it should adopt a comparative negligence system.[167] The court reviewed French law in ultimately resolving to adopt the comparative negligence system.[168] Similarly, in *Capitol Records Inc., v. Naxos of America, Inc.*,[169] the New York court reviewed the international interpretation of the term publication to determine whether New York common law provided copyright protection.[170]

D. The Debate over Reliance on International Law

The response to the Court's independent references to international law has been fervent. The field has split into two sides—the Nationalists and the Transnationalists—who disagree on the propriety of referencing international law to resolve U.S. constitutional issues.[171] Nationalists believe courts should not independently use international law to interpret the Constitution because its meaning was fixed at the time it was drafted.[172] Transnationalists, on the other hand, believe the Constitution is an evolving document and that international law is relevant in

App. 2005) (finding that there is no international consensus about consecutive life sentences after the defendant cited *Roper*'s references to international law to support his argument that the imposition of three consecutive life sentences constituted cruel and unusual punishment).

165. Delaquil, *supra* note 80, at 699; *see, e.g.*, Kaatz v. State, 540 P.2d 1037, 1047, 1049 (Alaska 1975) (referencing, in deciding to adopt a comparative negligence rule, "other nations of the civilized Western world" that had adopted that rule); Holytz v. City of Milwaukee, 115 N.W.2d 618, 622–23 (Wis. 1962) (reviewing the immunity rule for public officials in personal injury cases, and referencing world opinion on the rule).

166. 532 P.2d 1226 (Cal. 1975).

167. *Id.* at 1236.

168. *Id.*

169. 830 N.E.2d 250 (N.Y. 2005).

170. *Id.* at 252, 264 n.9.

171. Benvenuto, *supra* note 10, at 2698, 2720, 2723.

172. Roper v. Simmons, 543 U.S. 551, 624, 627 (2005) (Scalia, J., dissenting); Benvenuto, *supra* note 10, at 2731 ("[F]oreign precedent is immaterial because it is silent on what the Constitution meant when it was adopted."); Saby Ghoshray, *To Understand Foreign Court Citation: Dissecting Originalism, Dynamicism, Romanticism, and Consequentialism*, 69 ALB. L. REV. 709, 711 (2006) (stating that Justice Scalia believes in the literal meaning of the Constitution's text, thus, he believes in the "immutability of the Constitution").

interpreting it.[173] The Supreme Court Justices' opinions surrounding this issue are just as spirited as scholars' opinions.

1. The Nationalist Backlash to the Supreme Court's Use of International Law

The backlash from the Supreme Court's recent international law references has been swift and vocal.[174] In 2004, Representative Tom Feeney resubmitted a non-binding resolution to the House of Representatives, which stated that "judicial determinations regarding the meaning of the laws of the United States should not be based on judgments, laws, or pronouncements of foreign institutions."[175] Representative Feeney expressed the concerns of many others who believe that the Court's independent references to international law threaten the independence and sovereignty of the United States.[176]

Various scholars have also reacted strongly to the Court's actions. One of the biggest problems for Nationalists is that the Court has not developed a methodology for determining the appropriate sources of international law to use when resolving domestic disputes.[177] With no methodology, a domestic court (including the Supreme Court) may not inquire into all applicable material before resolving a dispute and, as a result, may base its decisions on incomplete or partisan information.[178] For example, in

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173. *See, e.g.*, *Roper*, 543 U.S. at 587 (Stevens, J., concurring) ("If the meaning of [the Eighth Amendment] had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today."); Ghoshray, *supra* note 172, at 712–13 (stating that Justice Kennedy believes "present day Americans have a better understanding of the meaning of the Constitution than the Framers themselves did" and Justice Ginsburg believes the Constitution is "living [and] dynamic"); Ginsburg Lecture, *supra* note 9, at 5 (noting that taking pride in the U.S. constitutional system does not mean the United States should be complacent with current laws and the United States should look to international law to learn from it); Koh, *supra* note 2, at 53–54 (reasoning that "foreign constitutional precedents aid[] U.S. constitutional interpretation"); Scalia, *supra* note 14, at 308 (stating that under the "'living Constitution paradigm,'" the Court looks at current constitutional standards).

174. *See generally* Dennington, *supra* note 53, at 270–71 ("Judicial conservatives . . . correctly point out that the Court has yet to clearly explain when and why contemporary foreign legal materials are relevant to interpreting the U.S. Constitution."); Sanchez, *supra* note 19, at 187 (identifying "vehement criticisms of the Court" in response to its recent international law references).

175. H.R. Res. 97, 109th Cong. (2005).

176. Press Release, United States Cong. House of Rep., Feeney/Goodlatte Resolution Addresses Supreme Court Importation of International Law (July 19, 2005), http://www.house.gov/list/press/fl24_feeney/IntLawRes.shtml.

177. Glensy, *supra* note 8, at 359–60.

178. *See* Alford, *supra* note 9, at 64–65.

Lawrence, "it was the mere fact that other nations . . . had accepted the right the petitioners sought that the Court deemed important," but the Court did not look at the reasoning behind international law to understand why the world community did or did not support sexual privacy rights.[179] Consequently, a party may exert considerable influence over a court's decision by selectively referencing only the international law that is most favorable to that party's position.[180]

Moreover, without a methodology for sifting through the available sources, a domestic court is unlikely to have the tools necessary to evaluate whether a particular international law reference is appropriate. Therefore, the court may be relying on inappropriate or irrelevant information.[181] Not only could this lead to erroneous conclusions, it could create inconsistencies between decisions.[182] If there is no defined method of identifying the pertinent law from the appropriate source(s), then each court may develop its own methods based on its own historical approach, which would in turn cause varied results.[183] These varied results could encourage forum shopping as claimants realize that they could receive different results on the same claim in different courts.[184]

Another problem that stems from not having an established methodology is that judges gain too much discretion.[185] Without

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179. *See* Larsen, *supra* note 9, at 1297; *see also* Roper v. Simmons, 543 U.S. 551, 623 (2005) (Scalia, J., dissenting) (arguing that the majority accepted at face value that every foreign country had prohibited the death penalty but looked no further to see whether some of these nations had a mandatory death penalty for some crimes, a policy that is contrary to U.S. democratic ideals); Wilkinson, *supra* note 10, at 426 (stating that when judges rely on international law in their decisions "they move the bases for judicial decision-making even farther from . . . popular acceptance").

180. Alford, *supra* note 9, at 64–65 (arguing that the amicus briefs the Court relied on in *Lawrence* did not mention that homosexual rights are still not recognized in many countries); *see also* Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (stating that the majority "ignor[ed] . . . the many countries that ha[d] retained criminal prohibitions on sodomy").

181. Alford, *supra* note 9, at 64–65 (stating that the *Lawrence* Court expressly relied on an amicus brief that stated that most nations had abolished sodomy laws, but failed to recognize other reports not cited in the amicus brief that indicated that there was very little protection for gay and lesbian rights worldwide).

182. *See* Sanchez, *supra* note 19, at 225.

183. *Id.*

184. *See* ALLAN IDES & CHRISTOPHER N. MAY, CIVIL PROCEDURE CASES AND PROBLEMS 436 (2003).

185. *See* Donald J. Kochan, *Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Judicial Invocations of Foreign and International Law*, 29 FORDHAM INT'L L.J. 507, 509–10 (2006); *see also* Sanchez, *supra* note 19, at 190 (stating that because international law is "so vast and diverse," a judge can find law to support

appropriate constraints, judges are essentially able to "cherry-pick"[186] laws that comport with their personal beliefs and incorporate these personal preferences into their decisions.[187] Thus, judges are essentially able to create the "content to the domestic Constitution" according to their own beliefs.[188] For example, the Court in *Roe v. Wade*[189] chose not to reference international law to resolve reproductive rights, but the Court chose to reference international law to recognize a right to sexual privacy.[190] Selective, unprincipled use of international law will impact the Court's legitimacy.[191]

When judges selectively pick issues based on their personal beliefs that certain rights are more worthy of protection than others, judges cross into law-making and violate the separation of powers doctrine.[192] When a court resolves a dispute, its resolution and the reasoning behind it become precedent for future courts.[193] Therefore, when a court uses international law to resolve a dispute, it is creating

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any belief); Wilkinson, *supra* note 10, at 428 (stating that because of the "number and type of countries to consider," judges may not be able to identify appropriate sources of international law).

186. Kochan, *supra* note 185, at 509.

187. *Id.* at 509–10 (referencing Chief Justice Roberts' statement that a court can find anything it is looking for by searching all countries); *see also* Larsen, *supra* note 9, at 1295–97 (stating that the majority of the Court is merely looking to adopt particular beliefs when it references international law, and is just searching through international law in support of these particular beliefs); Sanchez, *supra* note 19, at 225 ("[B]ecause of the lack of neutral legal guidance . . . how else may judges refer to foreign legal sources but on the basis of some . . . subjective whim . . . ?").

188. Larsen, *supra* note 9, at 1296.

189. 410 U.S. 113 (1973).

190. Alford, *supra* note 9, at 67 (noting that "international sources are proposed for comparison only if they are viewed as rights enhancing" and are ignored when they reduce civil liberties).

191. Sanchez, *supra* note 19, at 216 (stating that making unprincipled decisions will weaken the Court's legitimacy); *see also* Alford, *supra* note 9, at 69 (stating that "[s]elective utilization of international sources" will be unpersuasive to the public); Kochan, *supra* note 185, at 509 (arguing that by allowing judges "to cherry-pick from laws around the world to define and interpret their laws at home, activism is emboldened and the rule of law is diminished."); Wilkinson, *supra* note 10, at 426 (stating that judges' reliance on international law affect their legitimacy).

192. Kochan, *supra* note 185, at 538–39 (stating that referencing foreign law "deviates from the traditional role of . . . the judicia[ry] in the U.S. system."); *see also* U.S. CONST. art. I, § 1 (vesting the legislative powers in Congress); U.S. CONST. art. II, § 1 (vesting the executive power in the President of the United States of America); U.S. CONST. art. III, § 1 (stating that the judiciary is a branch of limited jurisdiction); Larsen, *supra* note 9, at 1316–19 ("Foreign policy decisions have always been understood to be the domain of the political branches . . . .").

193. BLACK'S LAW DICTIONARY 700 (8th ed. 2004).

law that future courts are bound to follow.[194] However, "the United States is a country of limited, defined, and enumerated powers with elected branches that create laws and a judiciary that is limited to interpreting [those laws]."[195] By using international law, the Court and other domestic courts are circumventing the legislative branch, the branch designated by the Constitution to make law;[196] they are essentially deciding what the law should be and not what the law is.[197]

By using international law to circumvent the democratic process, a court will also diminish the sovereign power of the United States.[198] As a sovereign, a nation creates and enforces its own laws.[199] However, "'[t]o the extent that a state is subject to law made elsewhere, it has lost its sovereignty.'"[200] When a court uses international law to resolve domestic disputes, it is allowing another nation to affect U.S. law, thereby undermining U.S. sovereign power.[201] As a result, U.S. citizens who vote to implement particular laws or who elect persons to create those laws will lose some of their voice in the democratic process, thus undermining the notion of democratic governance.[202]

Laws made in other countries reflect those countries' historical foundations, legal systems, and local environments.[203] They are not

194. *Id.*

195. Kochan, *supra* note 185, at 513, 539–40 (stating that it is the "duty of the judiciary to decide what the law is, not what it should be"); *see also* Roper v. Simmons, 543 U.S. 551, 622–23 (2005) (Scalia, J., dissenting) (stating that the majority overstepped its constitutional (branch) power when it referenced the fact that the United States is one of the few nations that has not ratified Article 37 because the legislative and executive branch, who have the power to ratify treaties, have chosen not to ratify Article 37).

196. Benvenuto, *supra* note 10, at 2733 ("In a democracy, it is problematic for unelected judges to invalidate laws which are enacted by the people's democratically elected representatives."); *see also* U.S. CONST. art. VI, § 1.

197. Kochan, *supra* note 185, at 513.

198. *Id.* at 511–12.

199. *Id.* at 511–12, 540.

200. *Id.* at 541 (citing T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989, 1992–93 (2004)).

201. *Id.* at 512, 541.

202. *Id.* at 547–48; *see also* Alford, *supra* note 9, at 59 ("[W]hen a legislative or executive act is declared unconstitutional, it thwarts the will of the people and undermines the values of the prevailing majority.").

203. *See* Dennington, *supra* note 53, at 281 (implying that contemporary foreign legal materials may not be appropriate as interpretive aides because they reflect foreign legal cultures that may differ significantly from the U.S. legal culture); Sanchez, *supra* note 19, at 190 ("Foreign laws . . . stem from . . . different circumstances, philosophies, traditions, and

necessarily founded on the same policies as U.S. laws.[204] For example, constitutional measures such as bicameralism and presentment control the enactment of a U.S. law, but another country's laws are not necessarily subject to the same constitutional limitations.[205] Thus, a judge who references international law may reference a law that does not have the same institutional protections as a U.S. law. Additionally, a law reflects a society's characteristics, and a judge who references international law on a purely domestic issue is essentially applying irrelevant law to resolve a U.S. claim.[206] For example, what if the European prohibition on the juvenile death penalty were born from a more negative history than that of the United States, such as a previous excessive use of the death penalty?[207] Under these circumstances, the European death penalty system may no longer be viewed as more advanced.[208] That may have affected the Court's analysis in *Roper*.[209]

2. The Transnationalist Response

Although there has been significant backlash in response to the Supreme Court's citations to international law, Transnationalists embrace it. They argue that independently referencing international law is not a "new phenomenon" for the Court;[210] therefore, arguments that current international law references are inconsistent with the American legal principles are unfounded.[211] Since the Court has

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ideas . . . ."); *see also* Scalia-Breyer Debate, *supra* note 14, at 521, 526 (stating that using foreign law to determine the content of the Constitution is not appropriate because, Justice Scalia argues, the United States does not have the "same moral and legal framework as the rest of the world").

204. *E.g.*, Alford, *supra* note 9, at 64 (stating that international sources should be one of the last sources of information in comparative analysis because they do not reflect "our own national experience").

205. Kochan, *supra* note 185, at 542.

206. Sanchez, *supra* note 19, at 216; *see also* Alford, *supra* note 9, at 63–64 ("At most . . . international sources offer delocalized, independent moral and political arguments that . . . deserve a status at the bottom of the hierarchy of the interpretative canon[] below domestic value judgments . . . .").

207. Sanchez, *supra* note 19, at 227–28.

208. *Id.*

209. *Id.* at 226–28.

210. *See* Glensy, *supra* note 8, at 359; *see also* Calabresi & Zimdahl, *supra* note 2, at 755 (stating that it is wrong to say the Court has never relied on international law); *supra* Part C.1.

211. Glensy, *supra* note 8, at 361–62 (arguing that it is inaccurate to say that international law citations are far from the mainstream); *see also* Arvin, *supra* note 51, at 218 (acknowledging that the majority in *Roper* was being consistent with the Court's history of referencing international law in such cases as *Schooner* and *Paquete*); Calabresi & Zimdahl, *supra* note 2, at 755 ("[T]hose

always looked to international law, it is inaccurate to say that the Court is trying to expand its power by referencing international law.[212] Early precedent sets the foundation for the belief that the Founders intended domestic courts to be able to reference international law.[213] Additionally, any increased frequency of references to international law can be explained by the fact that communication between legal systems is much easier now.[214] Therefore, any relative lack of earlier references to international law, other than references to English common law—the system from which the U.S. system evolved—is not indicative of the fact that the Framers denounced such references.[215]

In fact, early case law indicated that U.S. decisions should be consistent with international law whenever possible.[216] Thus, early Supreme Court decisions looked favorably upon the use of international law as persuasive authority to ensure consistency with international law, even in cases without any international law implications.[217] It would be inconsistent with precedent if the Court did not reference international law.[218] In fact, it would be out of

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political and journalistic commentators who say that the Court has never before cited or relied upon foreign law are clearly and demonstrably wrong.").

212. *See* Glensy, *supra* note 8, at 361–62; Koh, *supra* note 2, at 44 ("[T]he early Supreme Court saw the judicial branch as a central channel for making international law part of U.S. law."); Darlene S. Wood, *In Defense of Transjudicialism*, 44 DUQ. L. REV. 93, 115 (2005) ("[R]eliance on foreign law is not new, and if past performance is the strongest indicator of future conduct, we have nothing to fear from this or any future court.").

213. Glensy, *supra* note 8, at 364.

214. *Id.* (stating that "practical communications difficulties" explain why the Court did not apply international law early on); *see also* Ginsburg, Lecture, *supra* note 9, at 3 ("Today, tools are readily at hand to pursue international and comparative law inquiries.").

215. *See* Glensy, *supra* note 8, at 364 ("Other than English common law . . . there simply was not much foreign law available to the judges of those early years from which to derive comparative reasoning.").

216. *See* Murray v. Schooner, 6 U.S. (2 Cranch) 64, 118 (1804).

217. Glensy, *supra* note 8, at 365; Sanchez, *supra* note 19, at 195–96. *See generally* The Paquete Habana, 175 U.S. 677, 700 (1900) (holding that "[i]nternational law is part of our law"); Rose v. Himely, 8 U.S. (4 Cranch) 241, 270–271 (1808) (looking at English court decisions in determining whether U.S. courts should examine foreign courts' jurisdiction over claims); *Schooner*, 6 U.S. (2 Cranch) at 118.

218. *See* Koh, *supra* note 2, at 45 (stating that "[f]rom the beginning . . . American courts regularly took judicial notice of both international law and foreign law . . . when construing American law."); *see also* Calabresi & Zimdahl, *supra* note 2, at 755; Glensy, *supra* note 8, at 366 ("Within fifty years of the founding of the nation, the U.S. Supreme Court had embarked on an interpretative enterprise that allowed for the use of comparative law derived from foreign sources.").

character for the Court not to do so.[219] Moreover, the Court's non-binding international law references are no different from the references to other non-binding materials it uses for fact-gathering and informational purposes, such as amicus briefs and other domestic courts' decisions.[220]

Early cases also define the Court's appropriate role as the head of the judicial branch. The Court has always played a role in the making of laws and in shaping their interpretation and meaning.[221] Proponents point to *Marbury v. Madison*[222] in which Justice Marshall illuminated the scope of the judiciary's power. In *Marbury*, Justice Marshall held that it is the enumerated duty of the judiciary "to say what the law is."[223] The judiciary does create law, because it must interpret a rule before applying it, and that interpretation essentially creates the law's contents.[224] Similarly, if two laws conflict, it is a court's duty to determine which of the laws to give effect in light of the Constitution.[225] The exercise of this duty also constitutes law-making.[226]

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219. *See* Koh, *supra* note 2, at 45 (stating that to "ignore international law . . . would constitute a stunning reversal of history"); *see also* Calabresi & Zimdahl, *supra* note 2, at 755; Glensy, *supra* note 8, at 366.

220. Shirley S. Abrahamson & Michael J. Fischer, *All the World's a Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273, 287 (1997) ("[F]oreign opinions could function like superstar amicus briefs, offering otherwise unavailable viewpoints, delivered from unique perspectives, by some of the world's leading legal minds."). *See generally* Roper v. Simmons, 543 U.S. 551, 578 (2003) (stating that the "opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."); Larsen, *supra* note 9, at 1299–1300 (stating that it is appropriate to look to international law to see how a rule will work; to gather information necessary to decide a particular question, as court did in *Glucksburg*, as it seems no different than looking to a law of another state to gather evidence); Scalia-Breyer Debate, *supra* note 14, at 523 (Justice Breyer stating, "If I have a difficult case and a human being called a judge, though of a different country, has had to consider a similar problem, why should I not read what that judge has said? It will not bind me, but I may learn something.").

221. *See* Scalia-Breyer Debate, *supra* note 14, at 522 (Justice Breyer acknowledging that, even though the courts play a limited role in the democratic process, they still participate in it); Koh, *supra* note 2, at 44 ("[T]he judicial branch [was seen] as a central channel for making international law part of U.S. law.").

222. 5 U.S. (1 Cranch) 137 (1803).

223. *Id.* at 177.

224. *Id.* at 177–78.

225. *Id.*

226. *Id.*

The Court in *Hilton v. Guyot*[227] also outlined the court's functions in determining the meaning of laws.[228] In addition to identifying international law as part of American law, the *Hilton* Court identified the duty of the judiciary to "ascertain[] and declar[e] what the law is . . . in order to determine the rights of [the] parties to suits regularly before them."[229] The Court held that, even absent any domestic law on an issue, a court must still determine the parties' rights and can look to international law to try to resolve that claim.[230] Therefore, proponents argue, the Court is not overstepping its power in its recent cases and is acting consistently with its judicial role.[231] Additionally, they note that legislatures always retain power to pass laws overriding a court's decisions, thereby maintaining their legislative function.[232]

Independently referencing international law is also appropriate because it is consistent with the judiciary's power to reference other jurisdictions as non-binding authority.[233] Domestic courts routinely reference other jurisdictions' laws independently without violating any legal foundations.[234] For example, in *Balmer v. Elan Corp.*,[235]

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227. 159 U.S. 113 (1895).

228. *Id.* at 123.

229. *Id.* at 163.

230. *Id.* at 162 (holding that international law "must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination").

231. *See* Koh, *supra* note 2, at 44–45; Scalia-Breyer Debate, *supra* note 14, at 522.

232. *See* Fontana, *supra* note 105, at 475.

233. *See* Glensy, *supra* note 8, at 366–67; *see also* Benvenuto, *supra* note 10, at 2697 ("[T]he Supreme Court's use of foreign precedent is largely inconsequential to its decisions."); Ginsburg, *Discussion*, *supra* note 18, at 1042 (stating that international law "doesn't bind us any more than a decision of, say, the New Jersey Supreme Court would bind the Connecticut Supreme Court . . . . But we have something to learn from the quality of the reasoning in an opinion on a question similar to a question that confronts us."); Sanchez, *supra* note 19, at 185 (stating that the Court has recently invoked international law as persuasive authority).

234. *See* Abrahamson & Fischer, *supra* note 220, at 276; *see also* Rebecca Leflar, *A Comparison of Comparison: Use of Foreign Case Law as Persuasive Authority by the United States Supreme Court, The Supreme Court of Canada and The High Court of Australia*, 11 S. CAL. INTERDISC. L.J. 165, 168 (2001) (stating that "American jurists are generally experienced comparativists" because they engage in comparisons of different states' laws). *See generally* Guam v. Ojeda, 758 F.2d 403, 406 (9th Cir. 1985) (holding that "where Guam law is unclear," California cases are persuasive authority); Kresha v. Kresha, 344 N.W.2d 906, 910 (Neb. 1984) (holding that, absent statutory law, it is appropriate to look at other states' court decisions as persuasive authority in resolving cases before the Nebraska courts); Oneida County Fair Bd. v. Smylie, 386 P.2d 374, 391 (Idaho 1963) (holding that "[i]n cases of first impression . . . we recognize that the decisions from sister states are not controlling [but this court may consider them] as an aid in arriving at its decision"); Nat'l Indem. Co. v. Spring Branch State Bank, 348

former Elan employees sued their employer for wrongful termination after their employer told them that cooperating with an FDA investigation would not adversely affect them.[236] The Georgia court, in deciding whether oral promises modifying at-will employment were enforceable, looked to other states for resolution, because there was no Georgia precedent on point.[237] The court acknowledged that it was not obligated to look at foreign authority and that it was not bound by other jurisdictions' decisions.[238]

One of the reasons a court may look to another state's case decisions or laws is to see the practical effects of implementing a particular kind of statute. Proponents argue that international law presents the same opportunity for domestic courts to gather practical evidence.[239] U.S. courts can look at international law to see how particular rules may work in particular systems or social environments, the types of problems associated with particular rules, and possible solutions to legal issues not previously discovered.[240] "[O]ther countries . . . may have obtained a better insight into constitutional problems . . . ."[241] Referencing international law may thus present U.S. courts with a range of possible solutions and "the practical effects of the[se] solutions."[242]

Understanding another country's laws may also help increase the United States' understanding of that country generally, which in turn may help to improve the relationship between the two

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S.W.2d 528, 531 (Tex. 1961) (acknowledging that Supreme Court of Colorado decisions were not binding on it, but using them as persuasive authority in ultimately following the minority rule).

235. 599 S.E.2d 158 (Ga. 2004).

236. *Id.* at 160.

237. *Id.* at 161.

238. *Id.*

239. *See* Benvenuto, *supra* note 10, at 2726; Larsen, *supra* note 9, at 1300.

240. Benvenuto, *supra* note 10, at 2726; Leflar, *supra* note 234, at 168–69 (stating that American courts should engage in international comparativism because they can learn from other countries, as they do when they look at other states' laws); Scalia-Breyer Debate (Justice Breyer), *supra* note 14, at 523 (arguing that foreign cases involve judges working through similar legal problems, and applying texts similar to the U.S. Constitution).

241. *See* Glensy, *supra* note 8, at 387; *see also* United States v. Then, 56 F.3d 464, 468–69 (2d Cir. 1995) (Calabresi, J., concurring) (arguing that U.S. courts should look at international law to learn from it because the United States is no longer the only country engaging in "constitutional judicial review").

242. *See* Benvenuto, *supra* note 10, at 2726–28; *see also* Fontana, *supra* note 105, at 483 ("As we learn more about how other countries handle situations, it will expand the range of possibilities we consider in our law.").

countries.[243] The United States must pay respect to other democratic nations who have cited to its Supreme Court opinions or it risks being isolated from the international community.[244] Scholars argue, for example, that other countries may view the United States as hypocritical if it holds itself out as a human rights protector but offers less protection for those rights domestically.[245] This will affect the United States' legitimacy in the eyes of the international community.[246]

Many commentators also presume that U.S. law is superior to foreign law, but some scholars question whether that presumption is always valid.[247] For example, in *Roper*, the United States was one of the few nations that had not ratified the treaty prohibiting the death penalty for children.[248] This might indicate that the United States is

243. Fontana, *supra* note 105, at 483 ("As we learn more about how other countries handle situations . . . [i]t will increase our understanding of these countries and hence improve our relationships with them."); *see also* Wu, *supra* note 27 (stating that referencing international law is a "useful courtesy").

244. *See* Jeffrey Toobin, *How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, THE NEW YORKER, Sept. 12, 2005, at 42, 42; *see also* Benvenuto, *supra* note 10, at 2728 (referencing scholars' views that failing to engage in international dialogue isolates the United States); Levasseur & Herbert, *supra* note 8, at 41 ("'Today there is no excuse not to learn from others. It would be arrogant . . . to hold out U.S. law as a model for legal reform . . . and to refuse to recognize that other legal systems have much to offer the United States.'" (quoting James R. Maxeiner, *1992: High Time for American Lawyers to Learn from Europe or Roscoe Pound's 1906 Address Revisited*, 15 FORDHAM INT'L L.J. 1, 5 (1991))).

245. *See* Larsen, *supra* note 9, at 1316–17 (stating that Transnationalists see "the risk of perceived hypocrisy, as the United States acts on the one hand as an outspoken champion of human rights . . . while on the other hand refusing to employ the full measure of international human rights law at home. The consequence . . . is that the United States will lose its moral authority in the field of human rights and thus its ability to foster human rights abroad"); Strossen, *supra* note 36, at 826–27 ("U.S. government officials profess outrage when international human rights norms are violated, and on occasion manifest this outrage in concrete terms [and] [t]o deny international human rights norms . . . could seem hypocritical . . . .").

246. Larsen, *supra* note 9, at 1316–17 ("To deny international human rights norms . . . could seem hypocritical in view of the U.S. insistence that other nations directly adopt and enforce such norms." (citing Strossen, *supra* note 36, at 825–27)); Randall Murphy, *The Framers' Evolutionary Perception of Rights: Using International Human Rights Norms as Source for Discovery of Ninth Amendment Rights*, 21 STETSON L. REV. 423, 462–63 (2005) ("If the courts chose not to embrace international human rights norms as a source of guidance concerning fundamental human rights . . . the United States would lose the high moral ground when citing human rights violations by other nations.").

247. H.R. Res. 97, 109th Cong. (2005); *see also* Arvin, *supra* note 51, at 209 ("A global movement has emerged that rejects capital punishment [but] the United States has not embraced this movement as fully . . . ."). *But see* Roper v. Simmons, 543 U.S. 551, 625–26 (2005) (Scalia, J., dissenting) (stating that the United States is "one of only six countries that allow abortion" until viability, providing more protection than most of the international community).

248. *Roper*, 543 U.S. at 576; Arvin, *supra* note 51, at 209.

no longer the most progressive nation when it comes to protecting human rights.[249]

3. The Split of Opinion on the Supreme Court

Many Supreme Court justices have identified themselves with one side or the other in the debate over independent use of international law. On the present Court, Justices Scalia and Thomas have disfavored international law references. On the other side, Justices Stevens, Kennedy, Ginsburg and Breyer have all favored referencing international law to some degree. Additionally, former Justice O'Connor was vocal in her support of international law references. Yet, it remains to be seen how the new Court, with Chief Justice Roberts and Justice Alito, will address international law references as persuasive authority.

The most vocal Nationalist on the Court has been Justice Scalia, who has been joined in many of his dissenting opinions by Justice Thomas and former Chief Justice Rehnquist.[250] In the Eighth Amendment cases, Justice Scalia has condemned the majority's international law citations, arguing that the Court has overstepped its constitutional role by referencing international law.[251] He argues that legislatures, and not courts, should be arbiters of the moral values of society, because only legislatures have the power—given to them by the Constitution—to answer to the people's will.[252] Courts should only interpret statutes passed by the legislature.[253] Therefore, the Court overstepped its power by circumventing the national consensus that supported the juvenile death penalty when it referenced

249. Arvin, *supra* note 51, at 213 ("[T]he international community has consistently outpaced the United States in abolishing death penalty practices, and [has resulted in] the consequential alienation of the United States . . . .").

250. *See* Benvenuto, *supra* note 10, at 2720–21; *see also Roper*, 543 U.S. at 607 (Scalia, J., dissenting); Atkins v. Virginia, 536 U.S. 304, 321, 322, 324 (2002) (Rehnquist, C.J., dissenting) ("The Court's suggestion that [foreign laws] are relevant to the constitutional question finds little support in our precedents . . . ." "[L]egislat[ion] . . . ought to be the sole indicator[] by which courts ascertain the contemporary American concept[s] of decency for purposes of the Eighth Amendment."); Sanchez, *supra* note 19, at 186 ("Justices Antonin Scalia and Clarence Thomas have generally decried this practice [of referencing international law] as inappropriate under most circumstances.").

251. Scalia, *supra* note 14, at 307–08, 310.

252. Roper v. Simmons, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting).

253. *See* Scalia, *supra* note 14, at 310; Lawrence v. Texas, 539 U.S. 558, 603–04 (2003) (Scalia, J., dissenting).

international law to overturn the juvenile death penalty.[254] Justice Scalia contended that the majority, in holding that the juvenile death penalty was unconstitutional, imposed its own personal beliefs.[255]

In the liberty rights cases, Justice Scalia has rejected the majority's premise that American law should be consistent with the laws of the rest of the world because the Court's previous decisions have been inconsistent with this premise.[256] For example, the Court's interpretation of the Establishment Clause does not reflect international views.[257] Because the Court has not developed a principled approach for referencing international law, Justice Scalia argues that allowing judges to reference international law will allow them to subjectively pick the situations in which they will apply international law.[258] This unprincipled approach will create a slippery slope, allowing courts, at their will, to increase or decrease individual rights protections.[259]

Justice Scalia does believe that there are some instances where referencing international law is appropriate. For example, he has no problem applying international law when a treaty is in place or when a federal statute points to international law.[260] In this circumstance, he believes it is appropriate to reference another court's interpretation of that treaty.[261] Moreover, he argues that is appropriate for courts to reference old English cases and opinions, because the Framers referenced these cases and opinions in drafting the Constitution; thus, these early cases are relevant in interpreting the Constitution.[262] However, Scalia believes that "modern foreign

254. *Roper*, 543 U.S. at 608–09, 622 (Scalia, J., dissenting).

255. *Id.* at 629.

256. *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting); *see also* Ghoshray, *supra* note 172, at 712 (noting that Justice Scalia rejects the notion of trying to gain international approval of U.S. law).

257. *Roper*, 543 U.S. at 625 (Scalia, J., dissenting).

258. Scalia, *supra* note 14, at 309; *see also* Ghoshray, *supra* note 172, at 722–23 (acknowledging that "Justice Scalia's distaste for judicial activism" has impacted his opinion of recent international law references).

259. Dennington, *supra* note 53, at 271 ("[B]ecause the Court fails to tell us when foreign law is relevant and when it is not, there is no limiting principle that would prevent a future Court from one day citing contemporary foreign legal practices to restrict, rather than expand, domestic civil rights and civil liberties . . . .").

260. *See* Scalia, *supra* note 14, at 305; *supra* Part B.

261. Scalia, *supra* note 14, at 305.

262. *Id.* at 306.

legal materials can never be relevant to an interpretation of . . . the U.S. Constitution."[263]

Many of the justices that support independent references to international law, those grouped into the Transnationalist camp, believe it is appropriately applied only in certain instances.[264] They proffer that independent international law is appropriately applied only when it is not dispositive in any case involving purely domestic issues. These Justices essentially believe that independent international law should be used only for informational purposes, as a yardstick against which court decisions based on national law should be measured to confirm those decisions' adequacy. For example, Justice Breyer recognizes that international law, absent a treaty, convention, or statute, is not binding on American courts, but may raise similar issues and concerns from which the United States can learn from.[265] Additionally, Justice O'Connor in her *Roper* dissent stated that it was appropriate to reference international law in Eighth Amendment cases; however, because there was no national consensus, the majority should not have held that the juvenile death penalty violated the Eighth Amendment, regardless of the international consensus.[266] The notion that independent references to international law are appropriately used as persuasive authority is also reflected in many recent majority opinions, which have acknowledged that international law references are "not controlling [over] the outcome" of any domestic case.[267]

Acknowledging that international law is not binding authority in purely domestic cases, Transnationalist justices believe that there still is value in surveying international law. Specifically, they cite the Transnationalist argument that international law can be a valuable educational tool for domestic courts.[268] Justice Breyer

263. *Id.* at 307.

264. Benvenuto, *supra* note 10, at 2723–25.

265. Scalia-Breyer Debate, *supra* note 14, at 522–23.

266. Roper v. Simmons, 543 U.S. 551, 604–05 (2005) (O'Connor, J., dissenting).

267. *Id.* at 578; *see also* Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (contending international law only confirms a decision already made based on U.S. law); Stanford v. Kentucky, 492 U.S. 361, 379–80 (1989) (stating that only American standards of decency are dispositive).

268. Scalia-Breyer Debate, *supra* note 14, at 522–23; *see also* Glensy, *supra* note 8, at 387 (stating that the U.S. can benefit from "reverse feedback" because other countries may have better solutions to constitutional problems); Larsen, *supra* note 9, at 1289–90 (stating that the

believes that there are "common legal problems" countries face and that the United States can learn from international courts when faced with these issues.[269] Justice Breyer, writing separately for the dissent in *Printz v. United States*,[270] looked to Germany and Switzerland, who had similar federal systems to the United States, to see how they have tried to resolve particular federalism concerns.[271] Justice Breyer acknowledged that "there may be relevant political and structural differences between [other countries'] systems and our own," but he also acknowledged that "their experience may . . . cast an empirical light on the consequences of different solutions to a common legal problem."[272] Justice Kennedy similarly argues that with the availability of "global sources of [international] information," although international law is not binding on American courts, it does not mean that domestic courts can ignore it.[273] Justice Ginsburg supports Justice Kennedy's statement, acknowledging that the United States should have an insular perspective, but should look to international law to learn from other countries.[274] She thinks it is important for the United States to learn from other nations just as they have learned from U.S. decisions.[275] The Framers learned from foreign countries when they created the U.S. Constitution, and the United States should continue learning from the international community.[276] Additionally, she argues, the United States can look to international law to see if America's stance on an issue is

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Glucksburg Court's review of a Dutch rule to see the effects of legalizing physician-assisted suicide was appropriate); *supra* notes 235–239.

269. Ghoshray, *supra* note 172, at 712, 737–38; *see also* Scalia-Breyer Debate, *supra* note 14, at 523; Stephen Breyer, Assoc. Justice U.S. Supreme Court, The Supreme Court and the New International Law (April 4, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html.

270. 521 U.S. 898 (1997).

271. *Id.* at 976.

272. *Id.* at 977.

273. *See* Toobin, *supra* note 244.

274. Ghoshray, *supra* note 172, at 713; *see also* Ginsburg, *Discussion*, *supra* note 18, at 1041 ("A wise parent knows she can learn from her children . . . ."); Ginsburg, Lecture, *supra* note 9, at 5 (stating that it is okay to take pride in the U.S. constitutional system, but that does not mean the United States should not look at international law).

275. *See* Ghoshray, *supra* note 172, at 713, 725–28; Ginsburg, *Discussion*, *supra* note 18, at 1041.

276. *See id.*

reasonable in the world; if there is a right recognized by the world, then it would just strengthen American belief in that right.[277]

Justices who support international law references also find support from former Justice O'Connor.[278] Justice O'Connor believes that globalization and a world economy are an impetus for the United States to develop a more global legal system.[279] She argues that because nations are interconnected economically, it would help economic and diplomatic relations if U.S. courts were to reference international law in the same way international courts reference U.S. Supreme Court decisions.[280] Justice O'Connor ultimately posits that while international law is "rarely binding upon our decisions, conclusions reached by other countries and by the international community should . . . constitute persuasive background in American courts."[281] Justice O'Connor argues that the appropriateness of using international law as persuasive authority is a firmly established principle in the U.S. legal system, stemming from such early cases as *Schooner*.[282]

Justices' opinions on referencing international law coincide with their opinions on constitutional interpretation.[283] For example, Justice Scalia identifies himself as an originalist who believes the meaning of the Constitution should be determined from the original text and case law and text in existence at the time the Constitution was drafted.[284] Therefore, he believes it is only appropriate to reference early English common law cases, because they were in existence at the time the Constitution was drafted and they influenced the Framers of the Constitution; however, current international law should have no influence in the Constitution's interpretation.[285] Other justices, like Justice Ginsburg, reject the idea

277. Ginsburg, Lecture, *supra* note 9, at 9–10.

278. *See* Roper v. Simmons, 543 U.S. 551, 604–05 (2005) (O'Connor, J., dissenting).

279. Sandra Day O'Connor, *Foreword* to DAVID J. BEDERMAN WITH CHRISTOPHER J. BORGEN & DAVID A. MARTIN, INTERNATIONAL LAW: HANDBOOK FOR JUDGES, at xix, xx (Foundation Press 2003) [hereinafter O'Connor, *Foreword*].

280. *Id.*

281. *Id.* at xx.

282. *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); O'Connor, *Foreword*, *supra* note 279, at xx, xxi.

283. *See* Benvenuto, *supra* note 10, at 2732; Ghoshray, *supra* note 172, at 711–16.

284. Roper v. Simmons, 543 U.S. 551, 626 (2005) (Scalia, J., dissenting).

285. *Id.* at 626, 630 (contending it is appropriate to interpret the meaning of Constitution by referencing 18th century "English law and legal thought" because that was the framework at the

that the Constitution should be determined by looking to the original meaning only; she thinks the Constitution is "living [and] dynamic."[286] Therefore, she believes the Constitution should be read to reflect current understandings, not just understandings that existed at the time of the Framers.[287] Like Justice Ginsburg, Justice Breyer believes that the Constitution should not be interpreted by referencing its original text alone.[288] Additionally, Justice Kennedy believes that "present day Americans have a better understanding of the meaning of the Constitution than the Framers themselves did."[289] His interpretation is "not bottled in the settled traditions and literal interpretations" of the Constitution.[290] These justices believe it is appropriate to reference international law as persuasive authority in interpreting the Constitution.

4. The Third Option: Is Some Use of International Law Appropriate?

Some commentators have advocated a middle ground, suggesting that it is appropriate to independently reference international law in some, but not all, circumstances. For example, Benvenuto, adopting Judge Posner's argument, states that international law references are appropriate for informational purposes but not as a basis for a court's decisions.[291] Benvenuto distinguishes informational use from persuasive authority, defining informational use as referencing international law for valuable facts or knowledge "rather than as support for the court's decision or rationales."[292] Benvenuto acknowledges that it is a fine line between using international law as an informational source and using it as

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time Constitution was drafted, but if the meaning of the Constitution is determined by current standards and opinions, the reasoning behind decisions would become unreliable and would create instability); Scalia, *supra* note 14, at 306 (using English cases from 1791 to interpret the Constitution is appropriate because it reflects the Framers' intent at the time the Constitution was drafted).

286. Ghoshray, *supra* note 172, at 713; *see also Roper*, 543 U.S. at 587 (Stevens, J., concurring) ("[O]ur understanding of the Constitution does change from time to time[, a notion that] has been [long] settled . . . .").

287. Ghoshray, *supra* note 172, at 713.

288. *Id.* at 712.

289. *Id.* at 712–13.

290. *Id.* at 731.

291. Benvenuto, *supra* note 10, at 2697, 2741, 2754–59.

292. *Id.* at 2741, 2755.

persuasive authority.[293] Using international law as a "point of contrast" or to show the results of a particular type of rule would be an informational use, while using international law as additional support or confirmation of a court's decisions would be a persuasive use.[294] He argues that using international law as a source of argument or for "helpful or interesting facts," rather than as support for the Court's decisions or rationales, would strike a compromise between Nationalists and Transnationalists.[295] Nationalists may favor informational use, because courts would not use international law to invalidate domestic laws.[296] Thus, the use of international law would not overcome the democratic will of the people.[297] Transnationalists might also be in favor of informational references, because domestic courts would still have the chance to learn from international law.[298]

Benvenuto's view that "informational" use would be appropriate is similar to Larsen's view of appropriate uses of international law.[299] One appropriate use of international law is what she terms "expository" uses, in which the Court "uses [a] foreign law rule to contrast and thereby explain a domestic constitutional rule."[300] Another appropriate use is "empirical" use, in which the Court looks to international law or opinion to see a proposed rule's effect but arrives at its decision from domestic sources only.[301] Larsen identifies the Court's international law reference in *Washington v. Glucksberg*[302] as an appropriate reference.[303] The *Glucksburg* Court looked at a Dutch rule allowing physician-assisted suicide to determine what the consequences might be if the same rule existed in

293. Benvenuto, *supra* note 10, at 2757.

294. *Id.* at 2757–58.

295. *Id.* at 2754–55, 2757; *see also* Fontana, *supra* note 105, at 448 (stating that referencing international law does not need to be an "all or nothing" approach, and it is not inappropriate to reference international law as an educational tool).

296. Benvenuto, *supra* note 10, at 2757.

297. *Id.*

298. *Id.*

299. *Id.* at 2741.

300. Larsen, *supra* note 9, at 1288.

301. *Id.* at 1289; *see also* Scalia-Breyer Debate, *supra* note 14, at 526 ("Of course, you can cite foreign law to show . . . that if the Court adopts this particular view of the Constitution, the sky will not fall.").

302. 521 U.S. 702, 785 (1997) (Souter, J., concurring).

303. Larsen, *supra* note 9, at 1289–90.

the United States.[304] However, Larsen says that it is not appropriate to reference international law in what she terms substantive or "moral fact-finding" cases, where the Court looks to international law to determine "the substantive content of the constitutional rule."[305] The problem with the "moral fact-finding" approach, Larsen explains, is that the Court only looks to the results of international cases, not to the reasoning behind these cases.[306] By looking only to the end result and not the reasoning behind the result, judges are merely referencing international law to support their personal opinions.[307]

Alford, unlike Benvenuto and Larsen, argues that the way the Court has applied international law in some of its recent Eighth Amendment cases is appropriate.[308] Alford argues that the Court's international law reference in *Atkins* illustrates how international law is appropriately used, because the Court's ruling was based on a national consensus, and international law just happened to be consistent with the national consensus.[309] American standards of decency should be dispositive in determining whether the Eighth Amendment has been violated, and international law is only relevant to clarify whether "a prohibition is implicit in ordered liberty and not simply an 'accidental' national consensus."[310] The *Atkins* Court appropriately used international law, using a national consensus as the basis for overturning the death penalty and only using international standards "as an *additional* check on the Eighth Amendment."[311] Alford argues international law should never be "binding and operative" over the Court's final decision.[312]

E. Conclusion

There is no clear answer in the debate over whether domestic courts should independently reference international law.

304. *Id.*
305. *Id.* at 1283, 1291, 1293.
306. *Id.* at 1295–96.
307. *Id.*
308. Alford, *supra* note 9, at 59–60.
309. *Id.* at 60.
310. *Id.*
311. *Id.*
312. *Id.* at 60, 64.

Transnationalists believe domestic courts should continue to reference international law, because the world is shifting from a narrow, national view to an international perspective. Nationalists, on the other hand, argue that regardless of the changing global environment, the Constitution should remain constant to ensure reliability and stability in the U.S. legal system.[313] Yet, it remains to be seen whether the Supreme Court will continue to independently reference international law to resolve constitutional questions. The change in the face of the Court could signal a new era in the debate over international law's place in U.S. jurisprudence.

313. Roper v. Simmons, 543 U.S. 551, 630 (2005) (Scalia, J., dissenting).