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

Cindy G. Buys\*

## I. INTRODUCTION

In the last few years, the U.S. Supreme Court has issued several high-profile opinions that refer to international and foreign law,<sup>1</sup> igniting a heated debate among the justices, legal scholars, politicians,<sup>2</sup> and commentators regarding the proper use of international and foreign law in Supreme Court jurisprudence. Justice Scalia, usually joined by Justice Thomas and Chief Justice Rehnquist, has led the fight against the use of foreign and, to a lesser extent, international law as a basis for constitutional decision-making. Justices Breyer, Ginsberg, Kennedy, O'Connor, Souter, Stevens, and White have asserted that international and foreign law have relevance to their work and that it is not inappropriate to refer to such sources in their decision-making.<sup>3</sup>

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

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

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

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

Objections to the use of international law in U.S. Supreme Court jurisprudence are somewhat surprising in light of the fact that international law has always been part of U.S. law. International law is expressly mentioned in the U.S. Constitution in more than one place.<sup>4</sup> International law acts to define the United States as a sovereign nation-state, with all the powers associated with that status, and imposes responsibilities upon the use of those powers. U.S. constitutional concepts of individual rights together with international human rights law share common natural law foundations and the development of each has greatly influenced the development of the other.

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

Despite a fairly large amount of commentary on this issue in recent times, the positions of the parties on both sides of this debate and the basis for those positions have not been fully explicated. In addition, this debate has been confused by the conflation of international law and foreign law sources and by a lack of careful distinction between various sources of international law.<sup>5</sup> Furthermore, critics, including most

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*Alito's Nomination to the Supreme Court*, WASH POST, Jan. 10, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/10/AR2006011000781.html> (last visited Oct. 4, 2006).

4. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 10 (“The Congress shall have the Power To . . . define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of nations); U.S. CONST. art. II, § 2, cl. 2 (The President “shall have the Power . . . to make Treaties”); U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority”); U.S. CONST. art. VI, § 1, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”).

5. For example, several newspapers recently ran an Associated Press article under a title which suggested the Attorney General was critical of international law, when in fact the article

prominently Justice Scalia, have rightly chastised the Supreme Court for its selective use of foreign and international law without articulating clearer standards regarding the circumstances under which it is appropriate to do so.

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

The article then briefly introduces the arguments on both sides of the debate and seeks to clear away some of the confusion as to what international and foreign law is being used and how each type is being used by the current Supreme Court. The article then examines the influence of international and foreign law on the U.S. Constitution, both at its inception and throughout its history. This examination demonstrates that the use of international law by the U.S. Supreme Court to inform its understanding of individual rights protected by the U.S. Constitution is well grounded in historical practice and the political theories, namely sovereignty and natural law, upon which the Constitution is based. These political theories recognize the responsibility of states to protect human rights.

Through this examination, this article demonstrates that, not only is it entirely appropriate for the U.S. Supreme Court to take into account international law when interpreting the Constitution, the Court often has an obligation to do so. In fact, failing to take international law into account would be contrary to the Framers' intentions, violate the social compact upon which the nation is formed, and could undermine the Supreme Court's legitimacy. The article acknowledges and responds to

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discussed Attorney General Gonzales's concerns with respect to the use of *foreign* law, not *international* law. Compare Mark Sherman, *U.S. Attorney General: Justices Are Wrong to Cite International Law*, THE LEGAL INTELLIGENCER, Oct. 19, 2005, at 4, available at <http://www.law.com/jsp/article.jsp?id=1129626313552> with Attorney General Alberto R. Gonzales, Prepared Remarks at George Mason University (Oct. 18, 2005) (transcript available at <http://releases.usnewswire.com/printing.asp?id=55230>). As is discussed below, foreign law and international law are two very different sources of law. In fact, Attorney General Gonzales himself drew clear distinctions between the use of international and foreign law in his recent remarks at the University of Chicago Law School. See Attorney General Alberto R. Gonzales, Prepared Remarks at the University of Chicago Law School (Nov. 9, 2005) (transcript available at [http://www.usdoj.gov/ag/speeches/2005/ag\\_speech\\_0511091.html](http://www.usdoj.gov/ag/speeches/2005/ag_speech_0511091.html)).

critics of the use of foreign and international law and demonstrates why foreign law has a weaker historical and theoretical basis in our democratic system and should therefore be approached with much greater caution. This article also suggests reasons why the Supreme Court should continue to take international law into account in the future. Finally, this article proposes some guidelines for when and how international and foreign law should or should not be used in U.S. Constitutional interpretation in the future.

## II. CLARIFYING THE ISSUE

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

International law is commonly thought to be derived from international treaties or conventions, customary international law, general principles of law, and the works of jurists and scholars.<sup>6</sup>

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

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6. See Statute of the International Court of Justice, I.C.J. art. 38(1) [hereinafter ICJ].

7. See U.S. CONST. art. VI, § 2; *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). A recent unobjectionable example of the use of international treaty law by a Supreme Court justice occurred in *Grutter v. Bollinger*, 539 U.S. 306 (2003), where the Supreme Court upheld the University of Michigan Law School's admission policies regarding the promotion of diversity. Justice Ginsberg wrote a concurring opinion in which she observed that the Court's holding "accords with the international understanding of the office of affirmative action." *Grutter*, 539 U.S. at 344. In support of this statement, Justice Ginsberg cited two multilateral treaties aimed at eliminating discrimination: 1) The International Convention on the Elimination of All Forms of Racial Discrimination, Annex A, G.A. Res. 2106, 20 U.N. GAOR Res. Supp. (No.14) 47, U.N. Doc. A/6014, Art. 2(2) (1965), which was ratified by the United States in 1994 (see State Dept., *Treaties in Force* 422-423 (June 1996)), and 2) the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Annex, G.A. Res. 34/180, 34 U.N. GAOR Res. Supp. (No. 46) 194, U.N. Doc. A/34/46 (1979) (the United States signed CEDAW in 1980, but the Senate has not yet given its advice and consent to ratification of the treaty). Justice Ginsberg thus used international treaty law that is part of the supreme law of the United States as further justification for the holding of the case, as well as an international treaty which the United States has signed, but not yet ratified.

8. U.S. CONST. art. II, § 2, cl.2.

ratified, and other types of executive international agreements.<sup>9</sup>

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

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.<sup>11</sup>

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

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

10. ICJ, *supra* note 7, at art. 38(1)(b).

11. *The Paquete Habana*, 175 U.S. 677, 700 (1900). In fact, the concept of incorporating the law of nations into domestic law predated the U.S. Constitution. *See, e.g.*, *Respublica v. de Longchamps*, 1 U.S. (1 Dall.) 111 (1784). “The Framers understood the ‘law of nations’ (which then was almost entirely customary practice, as opposed to treaties) to be part of the ‘law’ of the United States. President Washington claimed authority to execute the law of nations by executive order, e.g. by declaring neutrality in the 1793 war between France and Great Britain. He also issued regulations defining specific offenses against the law of nations which provided the governing law until Congress passed applicable legislation.” PHILLIP R. TRIMBLE, *INTERNATIONAL LAW: UNITED STATES FOREIGN RELATIONS LAW* 183 (Foundation Press 2002). *See also* Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 824-28 (1989). The Executive Branch continues to participate in the development of customary international law today by issuing executive orders claiming jurisdiction over fisheries, the continental shelf, air space and the Exclusive Economic Zone. *See* TRIMBLE, *supra* note 12, at 183; *see also infra* Part V.

12. “[G]eneral principles of law” is another source of international law listed in the Statute of the International Court of Justice. ICJ, *supra* note 7, at art. 38(1)(c). It refers to legal principles that are so fundamental, they will be found in virtually every national legal system. MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 56 (Aspen 4th ed. 2003).

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

that rule becomes part of U.S. law.<sup>14</sup>

The second category of law at issue in this debate is foreign law, largely consisting of foreign statutes or codes and decisions by the national courts of foreign countries. As a general rule, foreign law, unlike international law, is not binding on the United States, unless there is such a consensus among the legal systems of the world that a particular rule has gained the status of a general principle of law, in which case the rule may have a status akin to that of customary international law.<sup>15</sup>

The question remains, however, what does it mean to say that the United States is bound by a treaty provision or a rule of customary international law? The federal courts have created some rules with respect to the relationship between federal statutes and treaties, such as the *Charming Betsy* Rule<sup>16</sup> and the Last-in-Time Rule.<sup>17</sup> But these rules do not address whether federal courts are required to interpret the U.S. Constitution in a manner that is consistent with an international law rule. In the event it is not possible to reconcile the two, does international law ever trump the U.S. Constitution? Even if international law does not supersede the Constitution, is there an obligation to interpret the

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were bound to receive the law of nations, in its modern state of purity and refinement.”).

14. Despite this history and case law, some scholars have argued in recent years that customary international law is not part of the supreme law of the land such that it preempts state law. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997). This position has been soundly refuted by other scholars, such as Philip Jessup, Louis Henkin, Gerald Neuman, and Harold H. Koh who have used history, prior case law, and structural arguments based on federalism and separation of powers principles to demonstrate that customary international law is part of the binding law of the United States. See, e.g., Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT’L L. 740 (1939); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 876 (1987); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 666-67, n.221 (1998); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) [hereinafter Koh, *International Law*]. Jessup’s argument was accepted by the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425-28 (1964), and subsequent cases. See Koh, *International Law*, *supra* note 15, at 1834-38 and accompanying footnotes.

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

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

17. “By the Constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.” *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

Constitution in a manner consistent with international law principles similar to the *Charming Betsy* doctrine for statutes? If yes, when? The following sections examine these questions and suggest some answers.

### III. WHY AND HOW ARE INTERNATIONAL AND FOREIGN LAW CURRENTLY USED BY THE U.S. SUPREME COURT?

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

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

Justice Scalia has expressed far stronger opposition to the use of foreign legal materials, which he defines as statutes and judicial opinions, than he has to international law. Despite his "anti-foreign law" position, he certainly does not reject the use of all international and foreign law.<sup>18</sup> However, Justice Scalia has been one of the most vocal and colorful critics of the Supreme Court's references to international and foreign law in recent cases, writing several dissenting opinions in which Chief Justice Rehnquist and Justice Thomas have joined. Because he has spoken publicly on the topic on more than one occasion, Justice Scalia's remarks are used herein to illustrate the positions of those who generally oppose the use of foreign and international law by the U.S. Supreme Court.<sup>19</sup> Where appropriate, additional criticisms made by other judges and scholars are included to more fully address all the arguments that have been raised in opposition to the use of international and foreign law in constitutional jurisprudence.

Justice Scalia believes international and foreign law may be relevant in some cases. He agrees that treaties ratified by the U.S. are part of the supreme law of the land and he will use international law in the

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

19. *Id.*; see also Justices Antonin Scalia and Stephen Breyer, Transcript of Discussion at the American University College of Law (January 13, 2005), at 5, <http://domino.american.edu/AU/media/mediaref.nsf/1D265343BDC2189785256B810071F2> [hereinafter AU Transcript].



interpretation of a treaty.<sup>20</sup> In addition, Justice Scalia has stated that, “[f]oreign constructions [of international treaties] are evidence of the original shared understanding of the contracting parties” and are therefore appropriately taken into account.<sup>21</sup> Justice Scalia also believes that it is appropriate for the Court to consult foreign or international law when directed by a federal statute to do so, such as the Foreign Sovereign Immunities Act.<sup>22</sup> Finally, Justice Scalia has stated that:

[F]oreign statutory and judicial law can be consulted in assessing the argument that a particular construction of an ambiguous provision in a federal statute would be disastrous. If foreign courts have long been applying precisely the rule argued against, and disaster has *not* ensued, unless there is some countervailing factor at work the argument can safely be rejected.<sup>23</sup>

On the other hand, Justice Scalia has strenuously objected to the use of foreign law for two primary reasons. First, Justice Scalia does not believe foreign legal materials should be allowed to influence the determination of the substantive meaning of the words of the Constitution itself.<sup>24</sup> Justice Scalia suggests that foreign law should not be authoritative because we as a nation do not “want to be governed by the views of foreigners.”<sup>25</sup> Second, Justice Scalia has criticized the Court for its selective use of foreign law without clearly articulated standards as to when foreign law should be consulted.<sup>26</sup>

In addition to these two primary objections, Justice Scalia also is critical of the Court’s use of foreign law when it has not made a sufficient inquiry into whether the foreign legal system is sufficiently similar to that of the United States such that fair comparisons can be made.<sup>27</sup> If the justices use foreign law, they have to select which rules to follow among competing rules and there are no criteria to follow in deciding which foreign law to use.<sup>28</sup>

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20. AU Transcript, *supra* note 20, at 5.

21. *Olympic Airways v. Husain*, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting).

22. Scalia Keynote Address, *supra* note 19, at 306. Although Justice Scalia would limit any claims based on the law of nations to the law of nations as understood in the 18<sup>th</sup> century. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 748-51 (Scalia, J., concurring in part and concurring in judgment).

23. Scalia Keynote Address, *supra* note 19, at 306.

24. *Id.* at 307. Justice Scalia only discusses foreign legal materials here and not international legal materials. For a fuller explanation of Justice Scalia’s approach to constitutional interpretation and his objections to the use of foreign and international law in that endeavor, *see infra* Part V.

25. AU Transcript, *supra* note 20, at 5.

26. *Roper v. Simmons*, 543 U.S. 551, 622-28 (Scalia, J., dissenting).

27. *Id.* at 624 (Scalia, J., dissenting).

28. AU Transcript, *supra* note 20, at 5. Like Justice Scalia, Seventh Circuit Judge Richard

*B. Why Some Justices Are Willing to Use International or Foreign Law*

Justice Breyer has been one of the most outspoken justices in favor of using foreign and international law. He has pointed out that foreign judges and U.S. Supreme Court justices are both human beings facing similar problems.<sup>29</sup> In addition, many foreign societies are becoming more democratic. Foreign judges interpret documents that protect basic human rights, similar to the U.S. Constitution's Bill of Rights.<sup>30</sup> For these reasons, U.S. Supreme Court justices can learn from the experience of foreign judges who have faced similar issues.<sup>31</sup> Justices who favor consideration of international and foreign legal sources do not suggest, however, that the U.S. Supreme Court is in any way bound by the interpretations of these foreign judges; only that we may learn from them.<sup>32</sup> Thus, this group of justices appears to advocate the use of foreign materials primarily for comparative purposes.

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Posner also is concerned about the use of foreign and international law. Judge Posner cites four problems with using foreign and international law: (1) there are too many sources, making research difficult; (2) foreign judges come from different "socio-historico-politico-institutional backgrounds" making accurate and fair comparisons difficult; (3) foreign judges have no democratic legitimacy in the U.S.; and (4) judges use foreign and international law to justify their own personal preferences. See Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFF., July-Aug. 2004, at 40, available at [http://www.legalaffairs.org/issues/July-August-2004/feature\\_posner\\_julaug04.html](http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.html). All of these concerns are addressed in *infra* Part V.

29. AU Transcript, *supra* note 20, at 5.

30. See AU Transcript, *supra* note 20, at 6–7. In her recent keynote address to the American Society of International Law, Justice Ginsberg noted, "an evolving appreciation that U.S. judges are not alone in the endeavor to interpret fundamental human rights norms and apply them to concrete cases" and opined that "[t]he U.S. judicial system will be the poorer, I believe, if we do not share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own." Ruth Bader Ginsberg, "A Decent Respect to the Opinions of [Human]kind": *The Value of a Comparative Perspective in Constitutional Adjudication*, 99 AM. SOC'Y INT'L L. PROC. 351, 351 (2005).

31. AU Transcript, *supra* note 20, at 7. Several of the Supreme Court justices have expressed agreement with this view. See Ruth Bader Ginsberg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1 (2003); Justice Sandra Day O'Connor, Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 16, 2002), in 96 AM. SOC'Y INT'L L. PROC. 348, 350 (2002). Even Chief Justice Rehnquist has expressed the view that "it's time the U.S. courts began looking to the decisions of other constitutional courts to aid in their own deliberative process." William H. Rehnquist, *Foreward* to *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* viii (Vicki C. Jackson & Mark Tushnet, eds., Praeger Publishers 2002).

32. AU Transcript, *supra* note 20, at 6.

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

Given these different attitudes toward the use of international and foreign law in U.S. constitutional jurisprudence, it is appropriate to examine how these sources actually are being used by the current Supreme Court. As mentioned at the outset of this article, there have been a number of cases in the past few years in which the Supreme Court has referred to international or foreign law sources in its opinions.<sup>33</sup>

In *Atkins v. Virginia*, the Supreme Court struck down a Virginia law permitting the execution of mentally retarded persons.<sup>34</sup> The Court held that imposing capital punishment on mentally retarded persons constitutes cruel and unusual punishment within the meaning of the Eighth Amendment because such persons have “disabilities in areas of reasoning, judgment, and control of their impulses” and, therefore, “do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.”<sup>35</sup> In assessing the constitutionality of capital punishment for mentally retarded persons, the Court stated that it must be determined whether the punishment is excessive based on currently prevailing moral standards.<sup>36</sup> The Court further held that the best evidence of those standards is state legislation and found that the trend is toward prohibiting capital punishment for mentally retarded persons.<sup>37</sup> The Court then noted that this trend “reflects a much broader social and professional consensus,”<sup>38</sup> citing several *amicus* briefs. Of relevance here, one of the *amicus* briefs cited by the Court was the Brief for the European Union filed as *Amicus Curiae* in another case, *McCarver v. North Carolina*, O.T.2001, No. 00-8727, which established that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”<sup>39</sup>

Justice Scalia wrote a scathing dissent in *Atkins* ridiculing the majority’s attempt to find a consensus where less than a majority of

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33. See cases cited *supra* note 1.

34. *Atkins v. Virginia*, 536 U.S. 304 (2002).

35. *Id.* at 306. The court also held that these disabilities can jeopardize the fairness of the proceedings against such persons. *Id.*

36. *Id.* at 311. The Court’s current Eighth Amendment jurisprudence is based on its holding in *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958), wherein the Court held that, “[t]he Amendment must draw its meaning from evolving standards of decency that mark the progress of a maturing society.”

37. *Atkins*, 536 U.S. at 311–16.

38. *Id.* at 316 n.21.

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

states had enacted legislation outlawing capital punishment for mentally retarded criminals.<sup>40</sup> He directed his harshest criticism, however, at the majority's reference to the views of the "world community," stating:

But the Prize for the Court's Most Feeble Effort to fabricate "national consensus" must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called "world community," and respondents to opinion polls . . . Equally irrelevant are the practices of the "world community," whose notions of justice are (thankfully) not always those of our people.<sup>41</sup>

A second recent case which illustrates this debate regarding currently prevailing moral standards is *Lawrence v. Texas*,<sup>42</sup> where the Court found unconstitutional a Texas statute that made it a crime for two persons of the same sex to engage in certain intimate sexual conduct because the statute violates the Due Process Clause of the Fourteenth Amendment.<sup>43</sup> Justice Kennedy, writing for the majority, used international law to refute earlier claims by Chief Justice Burger in *Bowers v. Hardwick*<sup>44</sup> that "[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo [sic]-Christian moral and ethical standards."<sup>45</sup> Justice Kennedy pointed out that Chief Justice Burger's "sweeping references . . . to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction."<sup>46</sup> Specifically, Justice Kennedy cited European practices in this regard, including case law of the European Court of Human Rights, in which the European Court held that laws similar to the Texas statute were invalid under the European Convention on Human Rights and Fundamental Freedoms.<sup>47</sup>

Again, Justice Scalia dissented, this time joined by Chief Justice

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

41. *Id.* at 347-48.

42. *Lawrence v. Texas*, 539 U.S. 558 (2003).

43. *Id.* at 578.

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

45. *Lawrence*, 539 U.S. at 571 (citing *Bowers*, 478 U.S. at 196).

46. *Lawrence*, 539 U.S. at 572.

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

Rehnquist and Justice Thomas.<sup>48</sup> And once again, Justice Scalia took issue with the majority's reliance on the "views of a wider civilization."<sup>49</sup> Justice Scalia argued that Chief Justice Burger's statements in *Bowers* were mere dicta and were not the basis for the court's decision.<sup>50</sup> Therefore, there was no need for the majority in *Lawrence* to refute them by way of reference to other nations' views on the issue.<sup>51</sup>

The most recent case involving foreign law is *Roper v. Simmons*.<sup>52</sup> In *Roper*, the Supreme Court was called on to reconsider whether the Eighth Amendment's prohibition on "cruel and unusual punishments" forbids the execution of a juvenile offender who was older than fifteen but younger than eighteen when he committed a capital crime.<sup>53</sup> Just fifteen years previously, in *Stanford v. Kentucky*,<sup>54</sup> a divided Supreme Court upheld the ability of states to impose capital punishment on persons between the ages of fifteen and eighteen. At that time, the Court determined that no national consensus existed sufficient to label such punishment cruel and unusual.<sup>55</sup> In *Roper*, the Supreme Court held that enough states have now abolished the death penalty for juvenile offenders to warrant a finding of a national consensus against the execution of juvenile offenders.<sup>56</sup> As a result, a 5-4 majority of the *Roper* court held that *Stanford* is no longer controlling.

Writing for the majority in *Roper*, Justice Kennedy stated that the decision "finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."<sup>57</sup> The opinion further states that while "this reality does not become controlling," the Court "has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition on 'cruel and unusual punishment'" for almost fifty years.<sup>58</sup> The opinion then cites several international treaties that ban the juvenile death penalty, including the U.N. Convention on the Rights of the Child, the International Covenant on Civil and Political Rights (ICCPR), the American Covenant on Human Rights, and the African Charter on the

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

49. *Id.* at 598.

50. *Id.*

51. *Id.*

52. 543 U.S. 551 (2005).

53. *Id.* at 555.

54. 492 U.S. 361 (1989).

55. *Id.* at 362.

56. *Roper*, 543 U.S. at 567-68.

57. *Id.* at 575.

58. *Id.*

Rights and Welfare of the Child. Of seven other countries that have executed juveniles since the *Stanford* decision, the opinion states that all of them have since abolished or disavowed the practice.<sup>59</sup> As a result, the Court concluded, “it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.”<sup>60</sup>

The Court placed special emphasis on the fact that the United Kingdom has long since abolished the juvenile death penalty. The Court indicated that the United Kingdom’s experience has particular relevance in light of the historic ties between our countries and in light of the Eighth Amendment’s own origins (it is modeled on a parallel provision in the English Declaration of Rights of 1689).<sup>61</sup> Finally, the Court concluded that while the overwhelming opinion of the world community against the juvenile death penalty is not controlling, it does provide “respected and significant confirmation” for the Court’s conclusions.<sup>62</sup>

Justice O’Connor wrote a dissenting opinion in which she discussed the appropriate use of foreign and international law. She stated that because she believes there is lack of national consensus against the juvenile death penalty, she cannot assign a “confirmatory” role to the international consensus described by the Court.<sup>63</sup> However, she stated that reference to foreign and international law is relevant to the Court’s assessment of evolving standards of decency because of the special character of the Eighth Amendment, which draws its meaning directly from the maturing values of a civilized society.<sup>64</sup> In this case, however, the existence of a global consensus cannot alter the fact that domestic consensus is lacking.

Justice Scalia also wrote a dissenting opinion, in which Justice Thomas and Chief Justice Rehnquist joined, once again attacking the use of foreign and international law by the majority.<sup>65</sup> Justice Scalia accused the majority of treating the views of U.S. citizens as “essentially irrelevant” while “the views of other countries and the so-called international community take center stage.”<sup>66</sup> He pointed out that the President and the Senate, the political bodies charged with making and ratifying treaties, have specifically declined to join the Convention on the Rights of the Child (CRC)<sup>67</sup> and have entered a reservation to the ICCPR

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59. *Id.* at 576.

60. *Id.* at 577.

61. *Id.*

62. *Id.* at 578.

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

64. *Id.* at 604–05.

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

66. *Id.* at 622.

67. *Id.* at 622–23. The U.S. signed the CRC in 1995, but it has not yet been presented to the

preserving the right to execute juveniles.<sup>68</sup> According to Justice Scalia, these facts suggest that our country has not reached a national consensus against the juvenile death penalty.<sup>69</sup> He also chastised the majority for not inquiring more deeply into whether foreign legal systems are sufficiently similar to that of the United States such that fair comparisons can be made. Most fundamentally, however, Justice Scalia rejected outright the idea that American law should conform to the laws of the rest of the world.<sup>70</sup> In fact, he pointed out that when the practices of foreign nations do not conform to the views of the majority of the Court, those foreign practices are rejected, citing examples such as the Court's establishment clause and abortion jurisprudence.<sup>71</sup>

While the *Roper* opinion was pending, Justice Scalia had an opportunity to elaborate publicly on his view of the relationship between the Court's jurisprudence and foreign and international law.<sup>72</sup> Although clearly not Justice Scalia's preferred approach, he recognized that in some areas of constitutional jurisprudence, beginning with the Eighth Amendment's prohibition on cruel and unusual punishment, the Supreme Court has adopted the notion that the Constitution is not static.<sup>73</sup> Rather, the meaning of the constitution "changes from era to era to comport with . . . 'the evolving standards of decency that mark the progress of a maturing society.'"<sup>74</sup> Justice Scalia does not believe this approach is correct because it allows judges to decide what is best based on their own personal viewpoints.<sup>75</sup> However, if one accepts the notion that it is appropriate to look to evolving standards of decency, Justice Scalia argues that one should only look to the standards of decency in American society, not the standards of decency in foreign countries because foreign countries do not share our background, culture, and moral views.<sup>76</sup>

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Senate for its advice and consent. United Nations Convention of the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, available at <http://www.ohchr.org/english/countries/ratification/11.htm> (last visited October 8, 2006).

68. It is important to note that the United States joined the ICCPR in 1992, closer in time to the *Stanford* decision and at a time when the present national consensus did not yet exist. See S. REP. NO. 102-23 (1992), as reprinted in 31 I.L.M. 645, 659 (1992).

69. *Roper v. Simmons*, 543 U.S. 551, 622 (2005) (Scalia, J., dissenting).

70. *Id.* at 624.

71. *Id.* at 625–26.

72. See AU Transcript, *supra* note 20.

73. AU Transcript, *supra* note 20, at 8.

74. AU Transcript, *supra* note 20, at 8 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

75. AU Transcript, *supra* note 20, at 9. Judge Robert H. Bork has raised a similar concern in his book, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* (American Enterprise Institute Press 2003).

76. AU Transcript, *supra* note 20, at 9. Justice Scalia suggests that the opinion of a "wise Zimbabwe judge or a wise member of the House of Lords law committee" have little to do with what Americans believe. *Id.* at 11. While there are clearly reasons to be more cautious about the use of

Justice Scalia would find American standards of decency in state legislation because such legislation is democratically adopted by the American people.<sup>77</sup>

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

#### IV. INFLUENCE OF INTERNATIONAL AND FOREIGN LAW ON THE U.S. CONSTITUTION

From before the founding of the United States of America, international law, previously referred to as the law of nations,<sup>78</sup> exercised a heavy influence on the development of the U.S. Constitution and the Supreme Court’s constitutional jurisprudence. Likewise, the Framers of the Constitution were familiar with international and foreign law and often drew on that knowledge in deciding how to form a new nation.

Two areas of international law were particularly relevant to the creation and development of the United States as a constitutional government and its protection of individual rights. First, the international law concept of sovereignty helped the fledgling United States to gain international recognition and imposed obligations on the federal government vis-à-vis other nations, as well as towards its own subjects. As explained below, the concept of sovereignty has continued to evolve, which in turn has implications for a state such as the United States claiming to be sovereign. Second, the evolution of the meaning of

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foreign law in constitutional decision-making (*see* discussion *infra* Part V), Justice Scalia’s statement demonstrates an underlying assumption that Americans are somehow fundamentally different from persons in other countries, such that foreign laws and judicial decisions can never be relevant to Americans. This view is one of the underlying assumptions that separates Justice Scalia from other justices, like Justice Breyer, who views the world as full of human beings with common problems and struggles who can learn from one another’s experiences. AU Transcript, *supra* note 20, at 10–11.

77. AU Transcript, *supra* note 20, at 17. Responses to Justice Scalia’s concerns regarding judges’ basing their decisions on personal preferences and a lack of democratic legitimacy are addressed *infra* Part V of this article.

78. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 260–61 (1823).



sovereignty paralleled the development of international human rights law. International human rights law was greatly influenced by individual rights jurisprudence that had developed under the U.S. Constitution. Both sovereignty and international human rights law have their roots in natural law concepts and the evolution of each has impacted the development of the other. Concepts of natural law, sovereignty and, later, human rights, all influenced the framing of the Constitution and its interpretation over the past two centuries. Accordingly, it is appropriate to take these sources into account both to understand the original goals and purposes of the Constitution and to understand how the Constitution should be interpreted and applied today.<sup>79</sup> Thus, this next section will focus on the development of these two aspects of international law, their impact on U.S. constitutional law, and their relevance to this current constitutional debate.

#### A. *Natural Law Foundations of International Law*

Both the international law of sovereignty and international human rights law developed from concepts of natural law.<sup>80</sup> Natural law, in turn, is sometimes said to be synonymous with, and sometimes derived from, divine law.<sup>81</sup> Both divine law and natural law are considered “higher law” that is universally applicable and superior to positive law created by governments.<sup>82</sup> One of the primary differences between the two is that divine law is said to come from God, whereas some theorists suggest that natural law is a product of “right reason.”<sup>83</sup> The next section elaborates on how natural law theories laid the foundation for the international law of sovereignty and international human rights law.

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

80. See Jay, *supra* note 12, at 821–22. “The ‘law of nations’ and ‘the law of nature’ were closely allied concepts for [Chief Justice] Marshall and his contemporaries.” G. Edward White, *The United States Constitution in its Third Century: Foreign Affairs: History: The Marshall Court and International Law: The Piracy Cases*, 83 AM. J. INT’L L. 727, 728 (1989).

81. See Jay, *supra* note 12, at 822–23. Some scholars have suggested that the existence of divine law is evidenced by the universality of certain religious beliefs. For example, all the major religions of the world adopt a version of what the Christians call the “Golden Rule,” *i.e.*, “do unto others as you would have them do unto you.” PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* 5 (University of Pennsylvania Press 2d ed. 2003).

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

83. See *id.* at 49; MAURICE CRANSTON, *WHAT ARE HUMAN RIGHTS?* 10–11 (Taplinger Pub. Co. 1973).

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*B. International Law of Sovereignty*

The concept of sovereign states grew out of natural law concepts of equality of persons,<sup>84</sup> but transformed the equality of persons into an equality of states. Over time, the concept of sovereignty has changed and grown to have a number of different meanings and aspects.<sup>85</sup> This evolution, in turn, affects what it means for a state like the United States that claims to be sovereign. Thus, the next section examines the evolving concept of sovereignty in an effort to understand how the concept of sovereignty affected the founding of the United States and the drafting of its new constitution and how its continuing evolution over the last two centuries has impacted the United States.

*1. Evolving definition of sovereignty*

Traditional definitions of sovereignty often emphasized the powers or rights of the sovereign, and not its responsibilities. The French philosopher, Jean Bodin is often credited with first stating the theory of sovereignty in his 1576 *Les Six Livres de la République*.<sup>86</sup> Bodin asserted that sovereignty is defined as power absolute and perpetual, “supreme,” and “subject to no law.”<sup>87</sup> Only a state possessed the power to decide how it would treat its people within its own borders and those under its control elsewhere.<sup>88</sup> Thomas Hobbes concurred in *The Leviathan*.<sup>89</sup>

While Bodin argued that the sovereign was not subject to positive

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84. JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* 309 (Cambridge University Press 1960). Equality of persons is said to be part of divine law, as it is a basic tenet of many major faiths, including Judaism, Buddhism, Christianity, and Islam. LAUREN, *supra* note 82, at 6–8, 11.

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

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

87. JEAN BODIN, *ON SOVEREIGNTY: FOUR CHAPTERS FROM THE SIX BOOKS OF THE COMMONWEALTH* 1, 11 (Julian H. Franklin, ed. and trans., Cambridge Univ. Press 1992) (1576).

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

89. THOMAS HOBBS, *THE LEVIATHAN* 120–128 (Penguin Books 1985) (1651).

law because the sovereign creates the positive laws, the sovereign was still bound by the laws of nature.<sup>90</sup> Likewise, St. Thomas Aquinas and his followers believed that the Pope could be disciplined if he violated divine or natural law.<sup>91</sup> Hugo Grotius also attempted to reconcile the concept of an independent and all-powerful sovereign with the concept of natural law, to which the sovereign was still subject.<sup>92</sup> He theorized that the original sovereignty of the people was transferred to a sovereign government, which had the function and duty to protect the people in exchange.<sup>93</sup> This theme was carried forward in John Locke's *SECOND TREATISE OF GOVERNMENT*, in which he emphasizes the social contract between the people and the sovereign government.<sup>94</sup> These concepts of sovereignty formed the basis of the modern nation-state, with Locke's social contract theory having special relevance for the United States.

Many of the founding fathers were heavily influenced by the theories of John Locke. In his *SECOND TREATISE ON GOVERNMENT*, Locke asserted that everyone is born into a state of nature in which everyone is equal and is perfectly free to do as they choose within the bounds of the laws of nature.<sup>95</sup> Life in this state of nature is uncertain and constantly exposed to invasion by others.<sup>96</sup> Men act as judges in their own cases and have a tendency to be partial to their own cases and those of their friends.<sup>97</sup> As a result, individuals choose to give up some of their freedom to form a political society or civil government, the purpose of which is to remedy the inconveniences of the state of nature and protect the lives, liberties, and property of the persons in the society.<sup>98</sup> In this political society, every man obligates himself to every other man to submit to the determination of the majority and to be bound by it.<sup>99</sup> Locke calls this state of affairs a social compact.<sup>100</sup>

The American Revolution took Locke's theories and put them into practice. The idea of popular sovereignty became the basis of political

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90. Simonovic, *supra* note 87, at 383; *see also* RABKIN, *supra* note 86, at 55. To the contrary, Hobbes' sovereign was not subject to any law, including natural law. HINSLEY, *supra* note 87, at 142–43. Hobbes' ideas ultimately were rejected in favor of those of John Locke. HINSLEY, *supra* note 87, at 146–49.

91. HINSLEY, *supra* note 87, at 95.

92. *Id.* at 139.

93. *See id.*

94. LOCKE, *supra* note 85.

95. *Id.* at 309.

96. *Id.* at 395.

97. *Id.* at 316.

98. *Id.* at 316, 367, 395.

99. *Id.* at 376.

100. *Id.*

legitimacy for the new Republic.<sup>101</sup> Several of the founding documents contain the word sovereignty, including the Declaration and Resolves of the First Continental Congress, the Declaration of Independence and the Articles of Confederation.<sup>102</sup> The people of the thirteen colonies consented to the exercise of power over them by a federal government in exchange for the protection of that government.<sup>103</sup> Thus, partly as a result of Locke's ideas and certain political movements such as the American and French Revolutions, the concept of sovereignty changed from an emphasis on the sovereignty of the state to an emphasis on the sovereignty of the people.

## 2. *Modern concepts of sovereignty*

The meaning of sovereignty has not remained static since the founding of the nation. More recent political pronouncements and scholarly treatments of the subject of sovereignty have rightly given greater emphasis to the idea that sovereignty has both internal and external aspects.<sup>104</sup> In 2000, the government of Canada spearheaded the formation of the International Commission on Intervention and State Sovereignty (ICISS). The ICISS concluded that, "sovereignty implies a dual responsibility: externally—to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state."<sup>105</sup> This theme has been echoed by United Nations Secretary General Kofi Annan<sup>106</sup> and the U.N. High-Level Panel on Threats, Challenges and Change. In its recent report, the U.N. High-Level Panel stated:

In signing the Charter of the United Nations, States not only benefit

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101. See W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 867 (1990).

102. See Declaration and Resolves of the First Continental Congress (Oct. 14, 1774), reprinted in THE AMERICAN REPUBLIC 154–155 (Bruce Frohnen ed, Liberty Fund 2002) [hereinafter Declaration and Resolves]; THE DECLARATION OF INDEPENDENCE (U.S. 1776) reprinted in THE AMERICAN REPUBLIC 189 (Bruce Frohnen ed, Liberty Fund 2002) [hereinafter DECLARATION OF INDEPENDENCE]. See also RABKIN, *supra* note 86, at 45 (In fact, "[i]n the text of *The Federalist Papers*, . . . the terms 'sovereign' or 'sovereignty' appear more often than 'freedom' . . . 'republic' . . . or 'morals.'").

103. See Reisman, *supra* note 102, at 867.

104. Simonovic, *supra* note 87, at 384. See also Ronald A. Brand, *External Sovereignty and International Law*, 18 FORDHAM INT'L L.J. 1685, 1689 (1995).

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

106. Press Release, Kofi Annan, Secretary-General, Secretary-General Addresses International Peace Academy Seminar on 'The Responsibility to Protect,' U.N. Doc. SG/SM/8125 (Feb. 15, 2002), available at <http://www.un.org/News/Press/docs/2002/sgsm8125.doc.htm>.

from the privileges of sovereignty but also accept its responsibilities. Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community.<sup>107</sup>

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

*a. External aspects of sovereignty.* The external component of sovereignty relates to the international law of sovereignty, which defines the criteria for statehood recognition as an equal member of the international community and regulates how nations are to behave toward one another.<sup>108</sup> Emphasizing the international law aspects of sovereignty, the International Court of Justice has defined sovereignty as: “the whole body of rights and attributes which a state possesses in its territory, to the exclusion of all other states, and also in its relations with other states.”<sup>109</sup> Thus, under international law, the concept of sovereignty bestows an equality of states and independence of action.<sup>110</sup> It is reflected in international law in a variety of ways, such as in the United Nations Charter.<sup>111</sup> Thus, the concept of sovereignty derives from international law and sovereign states must take international law into account when exercising their sovereign powers.<sup>112</sup>

These external or international aspects of sovereignty were crucial to the formation of the new United States of America.<sup>113</sup> They guaranteed

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107. High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 21, U.N. Doc. A/59/565 (Dec. 2, 2004).

108. Stephen Krasner refers to “the practices associated with mutual recognition” of states as “international legal sovereignty.” KRASNER, *supra* note 89, at 3.

109. *Corfu Channel Case*, 1949 I.C.J. 4, 43 (Apr. 9) (Individual Opinion by Judge Alvarez), available at [http://www.icj-cij.org/icjwww/icas/icc/icc\\_ijudgment/iCC\\_ijudgment\\_19490409\\_alvarez\\_translation.pdf](http://www.icj-cij.org/icjwww/icas/icc/icc_ijudgment/iCC_ijudgment_19490409_alvarez_translation.pdf) idecisions/isummaries/Iccsummary490409.htm.

110. Simonovic, *supra* note 87, at 384. Brierly states that natural rights of states generally include the rights of self-preservation, independence, equality, respect, and intercourse. J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 49 (Sir Humphrey Waldock ed, Oxford University Press, 6th ed. 1963).

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

112. See Natsu Taylor Saito, *Returning to First Principles: International Human Rights as U.S. Constitutionalism*, 1 FIU L. REV. 45, 50 (2006).

113. Harold Hongju Koh, *The United States Constitution and International Law: International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 44 (2004) [hereinafter Koh, *Constitution and International Law*] (“The framers and early Justices understood that the global legitimacy of a fledgling nation crucially depended upon the compatibility of its domestic law with the rules of the international system within which it sought acceptance.”(footnote omitted)).

her independence and equality among the community of states.<sup>114</sup> They ensured her ability to enter into contracts, i.e., treaties and other international agreements, with other states and to enforce those contractual obligations.<sup>115</sup>

While international law is still concerned with the protection of these aspects of sovereignty, it now recognizes that sovereignty ultimately rests in the people. It is the object of modern international law to protect those people, not the authority wielding power.<sup>116</sup> As a result, under international law today, sovereignty can be violated by an outside force or by an internal force that acts contrary to the wishes of the people.<sup>117</sup> Thus, the concept of sovereignty today places more emphasis on its internal aspects.

*b. Internal aspects of sovereignty.* This internal component of sovereignty requires that the sovereign state abide by its social contract with the people. In the United States, this social contract is embodied by the U.S. Constitution. Pursuant to this social contract, the people gave up certain freedoms and submitted themselves to the authority of the federal government, in exchange for certain protections from the government. Since pre-revolutionary times, it has been accepted that the primary purpose of the government is to act for the good of the people.<sup>118</sup> Thus, the government has the right to make and enforce certain laws for the public welfare, but also has the duty to protect the people within its territory.

### 3. Influence of sovereignty theory on the United States

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

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

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114. Jay, *supra* note 12, at 839–40. See also RABKIN, *supra* note 86, at 93–94, 112–13.

115. Jay, *supra* note 12, at 828; Saito, *supra* note 113, at 51.

116. Reisman, *supra* note 102, at 872.

117. See *id.*

118. Edwin S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 392 (1928) (Locke insisted that the public good be the object of legislation and of government action in general). See also MARY BALDWIN, *THE NEW ENGLAND CLERGY AND THE AMERICAN REVOLUTION* 22–23 (Duke University Press 1928).

1. That they are entitled to life, liberty, and property, & they have never ceded to any *sovereign* power whatever, a right to dispose of either without their consent.
2. That our ancestors, who first settled these colonies were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects within the realm of England.<sup>119</sup>

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

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

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. *That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.*<sup>120</sup>

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

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>121</sup>

Thus, the constitutional government of the United States is founded upon natural law theories of equality of persons and states, social

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119. Declaration and Resolves, *supra* note 103 (emphasis added).

120. DECLARATION OF INDEPENDENCE, *supra* note 103 (emphasis added). Many religious leaders were chosen to assist in the work of making the new Constitution and many of their resolutions and instructions stressed natural law doctrines. BALDWIN, *supra* note 119, at 135–36, 144.

121. U.S. CONST. pmb.

contract theory, and the idea that the primary purpose of the government is the protection and betterment of the people, all of which are part of the modern concept of sovereignty.

In recognition of this history, sovereignty has been used by the Supreme Court as a source of federal power, rights, and duties. For example, in the *Chinese Exclusion Cases*, the Supreme Court found that sovereignty implied an authority to deal with matters relating to immigration, even though the power to regulate immigration was not expressly given to the federal government in the Constitution.<sup>122</sup> Likewise, there is no express constitutional grant of legislative power to Congress to make laws with respect to maritime matters, yet the federal courts have inferred such a grant in part by virtue of the “ancient jurisdiction” inherent in admiralty of sovereign states<sup>123</sup> and the grant of judicial power in Article III § 2 to federal courts to hear cases of admiralty and maritime jurisdiction.<sup>124</sup> There also is no general foreign affairs power in the Constitution, but in *Curtiss-Wright*, Justice Sutherland stated that the foreign affairs power of the federal government came not from the states when they signed and ratified the U.S. Constitution, but from international law concepts of sovereignty.<sup>125</sup> Thus, the Supreme Court has subscribed to these sovereignty theories and used them to justify action by the federal government. In so doing, the Court must also accept the duties that come with being a sovereign state—the most important of which is to conduct the government for the benefit of the people.

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122. See *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (“The power of exclusion of foreigners being an incident of sovereignty . . .”); *Ekiu v. United States*, 142 U.S. 651, 658 (1892) (“It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and under such conditions as it may see fit to prescribe.”). See also LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 18–26 (Foundation Press, 1972) [hereinafter HENKIN, *FOREIGN AFFAIRS*].

123. *De Lovio v. Boit*, 2 Gall. 398 (C.C.D. Mass. 1815); *The Lottawanna*, 88 U.S. 558, 572 (1874); see also FRANK L. MARAIST & THOMAS C. GALLIGAN, *ADMIRALTY IN A NUTSHELL* 5 (Thomson West 2005).

124. See *S. Pac. Co. v. Jensen*, 244 U.S. 205 (1917); *Chelentis v. Luckenbach Steamship Co.*, 247 U.S. 372 (1918); *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354 (1959).

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



*C. The Evolution of Individual Rights in the U.S. into International  
Human Rights*

Natural law theories exercised a heavy influence on the Founding Fathers not only with respect to ideas of sovereignty and social compacts, but also with respect to ideas of individual rights.<sup>126</sup> The next section reviews the influence of natural law on the individual rights in the U.S. Constitution and the corresponding influence of those rights on modern-day conceptions of international human rights.

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

Most scholars agree that the Framers of the Constitution and Bill of Rights were committed to the idea of natural rights in the context of social contract political theory.<sup>127</sup> In particular, the reasoning of John Locke and the example of the English Bill of Rights had a great influence on the U.S. Bill of Rights.<sup>128</sup>

In pre-revolutionary America, religious and political leaders (who were often one and the same) affirmed that positive laws must be in accord with divine law and natural law.<sup>129</sup> For example, in 1717, John

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

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

128. LOUIS HENKIN, *THE AGE OF RIGHTS*, 1, 6 (Columbia University Press 1990) [hereinafter HENKIN, *AGE OF RIGHTS*]; CRANSTON, *supra* note 84, at 1; Corwin, *supra* note 119, at 383 ("The conveyance of natural law ideas into American constitutional theory was the work preeminently—though by no means exclusively—of John Locke's *Second Treatise on Civil Government*.").

129. ANTIEAU, *supra* note 83, at 12. In fact, many clergy of this period saw natural law and

Wise, a distinguished Massachusetts clergyman, preached that it is because “God does not permit it, that rulers cannot invade the rights and liberties of the people.”<sup>130</sup> In 1744, Reverend Elisha Williams observed that arbitrary governments are not really governments, but tyrants, and are absolutely against the laws of God and nature.<sup>131</sup> Richard Bland, a cousin of Thomas Jefferson from Virginia, wrote in 1766 that government is only lawful as long as “it will conduce to [men’s] happiness, which they have a natural right to promote.”<sup>132</sup> According to all these men, when government violates higher law, the government is not worthy of respect.<sup>133</sup> Governments were obliged to obey God’s law and to serve God’s people.<sup>134</sup>

Several of the Founding Fathers were ardent adherents of natural rights theory. They included James Wilson, James Madison,<sup>135</sup> and John Adams.<sup>136</sup> Likewise, Thomas Paine and Thomas Jefferson believed that there were natural rights which could not be restrained or repealed by human laws.<sup>137</sup>

The 1774 Declaration and Resolves of the First Continental Congress included natural law concepts regarding entitlement to life, liberty, and property.<sup>138</sup> The Declaration was followed by the 1776 Virginia Bill of Rights, which foreshadowed the Declaration of Independence, and asserted several natural rights, including the right of equality, the right to enjoy life and liberty with the means of acquiring and possessing property, the right to pursue and obtain happiness and safety, the right to alter or abolish a government that does not act for the public good, the right to suffrage, the right of due process, the right not to be punished in any cruel or unusual manner, the right to freedom of the press, and the right of freedom of religion.<sup>139</sup> Other states’ bills of rights also contained

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divine law as synonymous. BALDWIN, *supra* note 119, at 14–15, 22.

130. ANTIEAU, *supra* note 83, at 12.

131. *See id.*

132. *Id.* at 135. According to Mary Baldwin, “the social compact theory seems to have been accepted without question by the ministers of both the seventeenth and eighteenth centuries.” BALDWIN, *supra* note 119, at 25.

133. ANTIEAU, *supra* note 83, at 12. *See also* BALDWIN, *supra* note 119, at 19.

134. BALDWIN, *supra* note 119, at 16, 23.

135. THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 12–25, 36–37 (Randy E. Barnett ed, George Mason University Press 1989).

136. Corwin, *supra* note 119, at 401 (citing 3 Adams, *Life and Works* 374 (C.F. Adams, ed. 1850) (John Adams recorded in his diary that he “was strenuous for retaining and insisting on [the law of nature].”). *See also* JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 197–98 (Carolina Academic Press 2d ed. 2003).

137. EDGAR BODENHEIMER, *JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW* 52 (Harvard University Press 1974) [hereinafter BODENHEIMER, *JURISPRUDENCE*].

138. Declaration and Resolves, *supra* note 103.

139. VA. CONST. Bill of Rights, June 12, 1776, *reprinted in* THE AMERICAN REPUBLIC 57–

similar natural rights guarantees.

The Declaration of Independence followed shortly thereafter and was heavily influenced by Locke's natural law theories as well.<sup>140</sup> The Declaration suggests a right of self-determination based on natural law<sup>141</sup> and lists several inalienable rights, including equality of man, and the right to life, liberty, and the pursuit of happiness.<sup>142</sup>

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

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

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

That the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution.<sup>143</sup>

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

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

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158 (Bruce Frohnen ed. 2002).

140. BRIERLY, *supra* note 111, at 50.

141. "When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation." DECLARATION OF INDEPENDENCE, *supra* note 103.

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

143. James Madison, Speech Introducing Proposed Constitutional Amendments (June 8, 1789), *reprinted in* THE AMERICAN REPUBLIC 338 (Bruce Frohnen ed. 2002).

such powers, or as inserted merely for greater caution.<sup>144</sup>

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

The first government of United States also demonstrated its commitment to natural rights in connection with an incident that occurred during the French war with Great Britain in 1793. Three months after the declaration of war by France in February 1793, President George Washington issued a proclamation of neutrality on the part of the United States. Several difficult questions arose as to the United States' rights and duties as a neutral country. Accordingly, Secretary of State Thomas Jefferson, at President George Washington's request, wrote to the U.S. Supreme Court to solicit the justices' advice regarding the international law of neutrality.<sup>145</sup> In his letter, Jefferson asked the Supreme Court's opinion as to both international law and the law of nature:

The war which has taken place among the powers of Europe produces frequent transactions within our ports and limits, on which questions arise of considerable difficulty, and of greater importance to the peace of the United States. These questions depend for their solution on the construction of our treaties, *on the laws of nature and nations*, and on the law of the land, and are often presented under circumstances which do not give a cognizance of them to the tribunals of the country.<sup>146</sup>

The Supreme Court declined to provide the requested guidance for jurisprudential reasons.<sup>147</sup> However, the correspondence is relevant in demonstrating the importance of natural law and international law to the early republic.

As at least one scholar has suggested, "the modern debate is not over whether it was a central end of the Constitution to secure natural rights, but the relationship of such natural rights to the law of the Constitution."<sup>148</sup> This relationship is the subject of some of the following sections of this article.

While the Constitution is the United States' supreme positive law

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144. *Id.* at 339 (emphasis added).

145. Letter from Thomas Jefferson to the U.S. Supreme Court (July 1793), *reprinted in* CALVIN MASSEY, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* 70 (Aspen Publishers 2005) (emphasis added).

146. *Id.*

147. *See id.*

148. McAfee, *supra* note 128, at 271.

that protects individual rights, its references to broadly worded rights, such as due process, and unenumerated rights require further explication.<sup>149</sup> It makes some sense to use natural law theories regarding social compacts between the people and the government and the idea of inherent individual rights<sup>150</sup> to perform this task given the influence of natural law on the Constitution's drafting.<sup>151</sup> However, the problem with natural law was and is, of course, that it is so hard to ascertain exactly what the "rules" of natural law are. As Professor Ely points out, natural law has historically been invoked to "support of all manner of causes in this country—some worthy, others nefarious."<sup>152</sup> Thus, while natural law may continue to inform our constitutional understandings, it has fallen out of favor as a method of creating rules for decision. This next section outlines the Supreme Court's struggle to define the scope of both expressly enumerated rights and unenumerated rights through its history. As discussed below, international human rights principles can be used as the successor to natural law theory and provide more concrete rules of decision that can better inform our constitutional jurisprudence.<sup>153</sup>

## 2. *Unenumerated rights under the U.S. Constitution*

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

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

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149. HENKIN, *AGE OF RIGHTS*, *supra* note 129, at 84.

150. *Id.* at 84–85.

151. See ANTIEAU, *supra* note 83, at 12, 107, 109, 131, 135.

152. ELY, *supra* note 128, at 50.

153. See Ruti Teitel, *Human Rights Genealogy*, 66 *FORDHAM L. REV.* 301, 308 (1997) (“[P]ostwar international human rights are commonly represented as an instance of natural law norms made positive.”).

James Wilson, an early justice of the Supreme Court, believed strongly in the existence of natural law.<sup>154</sup> “[I]n his view human law was grounded on the consent of those whose obedience the law required. He thus linked the doctrine of natural law with the theory of popular sovereignty.”<sup>155</sup> Like Locke, Wilson believed that the state was founded on the compact of its members, who united for the common benefit. According to Wilson, each man had a natural right to his property, his character, his liberty, and his safety.<sup>156</sup> At least one scholar has described James Wilson’s philosophy as “the most consistent expression of classical American philosophy of law and government” and has stated that it was shared by most of the fathers of the Constitution.<sup>157</sup>

Supreme Court Justice Joseph Story also was a firm believer in the existence of natural law.<sup>158</sup> In deciding *United States v. La Jeune Eugenie*, Justice Story took the position that a strong international trend against the slave trade, evidenced by numerous international declarations as well as by some municipal statutes directed against its legality, might justify judicial recognition of a rule of international law condemning such trade even though the institution of slavery had not been outlawed as unjust by some of the leading nations of the world.<sup>159</sup>

In *Chisholm v. Georgia*,<sup>160</sup> a case involving the question of whether an action in assumpsit may lie against a state, several of the justices referred to natural law principles in their respective opinions. Similarly, in *Calder v. Bull*,<sup>161</sup> a case involving the probate of a will, Justice Chase based his opinion on social compact theory and argued that any act of a legislature that is contrary to the principles of the social compact cannot be considered a rightful exercise of legislative authority.<sup>162</sup> Finally, in *Citizens’ Savings and Loan Association v. Topeka*,<sup>163</sup> the Supreme Court stated:

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154. BODENHEIMER, JURISPRUDENCE, *supra* note 138, at 51 (citing THE WORKS OF JAMES WILSON I 49 (James DeWitt Andrews ed., Callaghan & Co., 1896)).

155. BODENHEIMER, JURISPRUDENCE, *supra* note 138, at 51 (footnote omitted).

156. *Id.*

157. *Id.* at 52.

158. Joseph Story, *Essay on Natural Law*, reprinted in 34 OR. L. REV. 88 (1955).

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

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

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

162. Justice Iredell disputed this idea, arguing that the courts do not have the power to declare a law void as violative of natural justice. *Id.* at 399 For further discussion of the Supreme Court’s use of natural law theory, see Alford, *supra* note 127, at 659–68.

163. 87 U.S. 655 (1874).

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[T]here are . . . rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. . . . There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.<sup>164</sup>

Using these cases and others, some scholars have demonstrated that natural law philosophy exercised a fairly significant influence on the Supreme Court's interpretation of the Bill of Rights, and especially the due process clause, during the Court's early history.<sup>165</sup>

*b. The role of the Ninth Amendment.* The influence of the idea of natural rights on the U.S. Constitution is particularly evident in the language of the Ninth Amendment which states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."<sup>166</sup> This language recognizes that the people possessed rights that existed prior to the U.S. Constitution; they were not created by the Constitution.<sup>167</sup> The partial listing in the Constitution of some of those antecedent rights should not be read in such a way as to undermine the existence or scope of any other non-enumerated rights that were "retained by the people."<sup>168</sup>

For example, in the case of *Griswold v. Connecticut*<sup>169</sup> involving the right of access to contraceptives, Justice Douglas cited the Ninth Amendment in support of his opinion and stated that the Court was "deal[ing] with a right of privacy older than the Bill of Rights,"<sup>170</sup> leaving no doubt as to his belief in preexisting unenumerated constitutional rights (although he attempted to tie those unenumerated rights to enumerated rights through "penumbras" and "emanations"). Likewise, in his concurring opinion, Justice Goldberg stated his view

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164. *Id.* at 663.

165. BODENHEIMER, JURISPRUDENCE, *supra* note 138, at 50 (citing J.A.C. Grant, *The Natural Law Background of Due Process*, 31 COLUM. L. REV. 56 (1931)); Lowell J. Howe, *The Meaning of Due Process of Law: Prior to the Adopting of the Fourteenth Amendment*, 18 CAL. L. REV. 583, 588-89 (1930).

166. U.S. CONST. amend. IX.

167. HENKIN, THE AGE OF RIGHTS, *supra* note 129, at 86, reprinted in BARNETT, *supra* note 116, at 107.

168. HENKIN, THE AGE OF RIGHTS, *supra* note 129, at 86-87 (quoting U.S. CONST. amend. IX).

169. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

170. *Id.* at 486.

that, “the language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.”<sup>171</sup>

Some scholars have disputed the idea that U.S. citizens have any rights that may be protected by the government apart from those expressly enumerated in the Constitution.<sup>172</sup> The fear seems to be that once we admit that unenumerated rights exist, judges will be free to exercise unlimited discretion in identifying and enforcing such rights.<sup>173</sup> To address this concern, only the democratically elected and more politically accountable Congress should be the arbiter of such rights. Thus, if Congress has not recognized the right, it does not exist as an enforceable right.<sup>174</sup>

In contrast, denying the existence and protection of preexisting unenumerated rights is contrary to the language of the documents on which this country was founded. For example, the Declaration of Independence refers to “inalienable rights,” which means that these rights are “incapable of being alienated, surrendered or transferred.”<sup>175</sup> Thus, it is not possible for the people to give any of their inalienable rights to the government. The Ninth Amendment assumes the existence of certain unnamed rights. If Congress has to enumerate the right before it may be protected by any branch of government, these words have no meaning.<sup>176</sup> And if the judiciary, as a part of the government, cannot

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

172. Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 8 (1980), reprinted in BARNETT, *supra* note 116, at 191-92.

173. For example, Raoul Berger suggests that if we adopt Justice Goldberg’s view of the Ninth Amendment in *Griswold v. Connecticut*, we “would transform the ninth amendment into a bottomless well in which judiciary can dip for the formation of undreamed of ‘rights’ in their limitless discretion.” Berger, *supra* note 173, at 192. See also, BORK, *supra* note 76 at 8-9.

174. If, as Professor Tom McAfee admits, the people are superior to the Constitution, then the rights of the people are also superior to the Constitution and remain with the people regardless of their expression in the Constitution. See McAfee, *supra* note 128, at 275. See also HENKIN, *THE AGE OF RIGHTS*, *supra* note 129, at 86 (“Individual rights, then, are natural, inherent. They cannot be taken away, or even suspended. They are not a gift from society, or from any government . . . they are freedoms and entitlements of all men, everywhere, antecedent and superior to government. They do not derive from any constitution; they antecede all constitutions.”).

175. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 607 (1985). While the Supreme Court generally does not rely on the Declaration of Independence as a legally enforceable document standing alone, the Declaration may certainly be used to inform our understanding of what the Framers thought they were doing during the process of creating a new government.

176. Professor Tom McAfee attempts to reconcile the idea of “inalienable rights” with the need for written law protecting those rights. McAfee, *supra* note 128, at 276-80. Despite the fact



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protect those unenumerated rights, then those rights either have little, if any, substance, or essentially have been alienated contrary to the intention of the Framers.<sup>177</sup>

International human rights law can help to address the concern of some scholars who believe that allowing the recognition and protection of unenumerated rights opens a Pandora's Box of limitless judicial discretion. If judges take into consideration the existence and scope of a right under international human rights law in the context of deciding whether such a right exists in our own constitutional jurisprudence, such reference can help to shape and limit judges' abilities to create new rights or expand existing rights. For example, if a U.S. federal judge is deciding a case involving an asserted right of privacy with respect to family and home, that judge may look to international law as reflected in the ICCPR,<sup>178</sup> and the scope of those rights as they have been defined by judges in other countries also parties to the treaty. On the other hand, if no such right is expressly mentioned in the U.S. Constitution, and no such right can be found in other domestic or international human rights laws, a federal judge would be hard-pressed to justify the recognition or expansion of such a right.

But even assuming, *arguendo*, that the only rights that are part of the Constitution and that may be protected by the government are the ones expressly mentioned in the Constitution, international law could and should be used to help define the contours of those rights that are expressly mentioned. In this way, international law would still have a role in constitutional interpretation as to the meaning of ambiguous terms such as due process, cruel and unusual punishment, and habeas corpus. Such usage of international human rights law is consistent with the Framers' use of natural law concepts of individual rights to draft the Constitution and their intention that the Constitution continue to be interpreted consistently with the United States' international obligations.

*c. Substantive due process.* Perhaps because of the uncertainty of natural law and the debate regarding the appropriate role and meaning of the Ninth Amendment, the U.S. Supreme Court has more recently

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that such rights are "inalienable," he suggests that such rights may "be granted away in law by the people's design or neglect." *Id.* at 280. Not only is this suggestion inconsistent with the ordinary meaning of the words used, it also is inconsistent with the Ninth Amendment's command that the unenumerated rights shall not be denied or disparaged. Simeon C.R. McIntosh, *On Reading the Ninth Amendment: A Reply to Raoul Berger*, 28 HOW. L.J. 913, 915 (1985), reprinted in BARNETT, *supra* note 116, at 219, 225.

177. McIntosh, *supra* note 177, at 219, 224. Some scholars may be confusing the existence of such rights with the methods chosen to protect them. See, e.g., Berger, *supra* note 173, at 191. (stating that he believes it was left for the states to protect those rights).

178. International Covenant on Civil and Political Rights art. 17, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

grounded unenumerated “fundamental rights” in the concept of substantive due process under the Fifth and Fourteenth Amendments.<sup>179</sup>

The Court has held that while “[t]he Constitution does not explicitly mention any right of privacy . . . one aspect of the ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment is ‘a right of personal privacy, or a guarantee of certain areas or zones of privacy.’”<sup>180</sup> And while the Court has never defined the outer limits of the right of privacy, its decisions have extended that right to include a variety of personal decisions a person may make without unjustified governmental interference such as the right of parents to make decisions about child-rearing and education,<sup>181</sup> and the right of couples to make decisions about procreation,<sup>182</sup> contraception,<sup>183</sup> abortion,<sup>184</sup> and marriage.<sup>185</sup> In *Meyer*, the Court defined liberty broadly to

denote[] not merely freedom from bodily restraint but also the right of an individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>186</sup>

Accordingly, on numerous occasions, the Court has been willing to find rights to be protected by the Constitution that are not expressly mentioned therein. It has long assumed the role of guarantor of these natural or unenumerated rights by way of its power to review the acts of the other branches of government and determine whether those acts are consistent with higher law principles, whether those rights are grounded in natural law, the Ninth Amendment or the Fifth and Fourteenth

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

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

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

182. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541-42 (1942).

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

184. *Roe*, 410 U.S. at 113 (1973).

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

186. *Meyer*, 262 U.S. at 399.

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Amendments to the Constitution.<sup>187</sup>

One reason the Court has been willing to protect unenumerated rights in more recent years may be the influence of the growing body of international human rights law that recognizes certain universal, fundamental rights that belong to all persons, regardless of their specific expression in the positive domestic law of a state. As discussed in more detail below many of these rights are expressed in treaties to which the United States is a party, such as the Convention on the Prevention and Punishment of Genocide,<sup>188</sup> the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>189</sup> and the ICCPR. They are thus part of the supreme law of the land that is to be interpreted and applied by the Court.

#### *D. The Emergence of International Human Rights Law*

American notions of individual rights both contributed to the development of international human rights law and, more recently, have been influenced by that growing body of international law in turn.<sup>190</sup> Accordingly, this section briefly traces the development of international human rights law and its influence on U.S. constitutional jurisprudence of individual rights.

##### *1. Evolution from natural law to international human rights law*

Like the international law of sovereignty, the international human rights law is founded on natural law. However, exactly the opposite of early sovereignty theories, early theories of divine and natural law focused on universal responsibilities of man rather than rights.<sup>191</sup> Several historical events, including the decline of feudalism, the expansion of commerce, and an emerging middle class, contributed to a growing interest in the concept of rights.<sup>192</sup> In 1791, Thomas Paine produced *THE RIGHTS OF MAN*, which introduced the specific expression “human

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187. Hamilton and Jefferson shared the view that it was the function of the courts to defend human rights against intrusions by the legislature. BODENHEIMER, *JURISPRUDENCE*, *supra* note 138, at 52.

188. Convention on the Prevention and Punishment of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277.

189. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85.

190. For an interesting discussion of international influence on the early American civil liberties movement, see John Fabian Witt, *Crystal Eastman and the Internationalist Beginnings of American Civil Liberties*, 54 *DUKE L.J.* 705 (2004).

191. LAUREN, *supra* note 82, at 13.

192. *Id.*

rights.”<sup>193</sup>

Both religious beliefs and moral and political philosophy contributed to the development of international human rights.<sup>194</sup> One author states it thus: “Human rights is a twentieth-century name for what has been traditionally known as natural rights or, in a more exhilarating phrase, the rights of man.”<sup>195</sup> Human rights law is rooted in natural law.<sup>196</sup> Some scholars have suggested that the very idea of human rights is “ineliminably religious.”<sup>197</sup> Other scholars have suggested that it is just this connection to “higher law” or natural law that has caused some scholars and judges to be apprehensive when approaching human rights claims.<sup>198</sup>

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

While the idea of human rights has existed for several centuries, modern international human rights law only really developed in a concrete form following World War II.<sup>199</sup> It found expression in the United Nations Charter,<sup>200</sup> the 1948 Universal Declaration of Human Rights,<sup>201</sup> and subsequent treaties. The U.N. Charter and the Universal Declaration gave voice to many of the rights contained in the U.S. Bill of Rights on an international level.<sup>202</sup>

The United States was a leader in the development of international

193. THOMAS PAINE, *THE RIGHTS OF MAN* 18 (New York: Heritage Press, 1961 ed.). See also PAUST, *supra* note 137, at 201.

194. LAUREN, *supra* note 82, at 10-13.

195. CRANSTON, *supra* note 84, at 1.

196. HENKIN, *THE AGE OF RIGHTS*, *supra* note 128, at 1. Although Henkin suggests that “the contemporary version does not ground or justify itself in natural law.” *Id.* at 2. See also CRANSTON, *supra* note 84, at 7; Robert J. Araujo, *The Catholic Neo-Scholastic Contribution to Human Rights: The Natural Law Foundation*, 1 AVE MARIA L. REV. 159, 163 (2003) (“[I]nternational law has a strong foundation in the natural law tradition that is very much at the core of international human rights law.”).

197. Michael Perry, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* 11–41 (Oxford University Press 1998).

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

199. HENKIN, *THE AGE OF RIGHTS*, *supra* note 129, at 16.

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

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

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

human rights. It hosted the conference at which the United Nations Charter was drafted.<sup>203</sup> It was one of the five victor countries that conducted the Nuremberg trials—the first time individuals were held accountable for war crimes before an international criminal tribunal. The United States participated in drafting the Universal Declaration of Human Rights, as well as the more detailed International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.<sup>204</sup> While the United States has sometimes been reluctant to ratify certain international human rights treaties, such as the recent Statute for the International Criminal Court (ICC), it has remained deeply involved in the development of international human rights norms, including the drafting of the ICC Charter.

*3. The U.S. Supreme Court has consistently used foreign and international law throughout its history*

While it is clear that the United States government has been an active participant in developing the rules of international human rights law, the question remains: What impact has that international activity had on courts and the development of the law in the United States? As Mr. Dorsen, Founder and President of the U.S. Association of Constitutional Law, stated in his introductory remarks at the recent Scalia-Breyer Discussion regarding the Supreme Court's use of international and foreign law, "[I]t is important to recognize that since the early 19<sup>th</sup> century, Supreme Court cases have relied, without much fuss or fanfare, on certain foreign materials."<sup>205</sup> Several scholars have documented the Supreme Court's use of foreign and international legal materials throughout its history.<sup>206</sup> Accordingly, I do not propose to review that

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203. JOHN P. HUMPHREY, HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE 12-13 (Transnational Publishers 1984).

204. In fact, First Lady Eleanor Roosevelt chaired the first Commission on Human Rights which adopted the U.N. Declaration of Human Rights. *See id.* at 4-5.

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

206. PAUST, *supra* note 137, at 208-24 (documenting Supreme Court references to natural rights and human rights in particular); Koh, *Constitution and International Law*, *supra* note 114, at 45-48; Vicki Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 110 (2005). *See also* Jon M. Van Dyke, *The Role of Customary International Law in Federal and State Court Litigation*, 26 UNIV. HAW. L. REV. 362-64 (2004); White, *supra* note 81, at 727; Rex Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357, 361-87 (2005).

entire history here. However, one particularly interesting recent study demonstrated that twenty-five percent of the early Supreme Court's docket consisted of cases involving foreign and international issues and concluded that the early Supreme Court was in the day-to-day business of foreign affairs.<sup>207</sup>

Dean of Yale Law School, Harold Hongju Koh, suggests that, historically, the Supreme Court "has regularly looked to foreign and international precedents as an aid to constitutional interpretation in at least three situations," which he calls, "parallel rules," "empirical light," and "community standard."<sup>208</sup> First, the Court has noted when legal rules in the United States "parallel those of other nations, particularly those with similar legal and social traditions."<sup>209</sup> Second, "empirical light" refers to the fact that the Court "has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances."<sup>210</sup> Third, the Court has considered international and foreign legal sources when a U.S constitutional concept such as "cruel and unusual" or "due process" by its own terms implicitly refers to a community standard.<sup>211</sup> Thus, there is ample evidence that the Supreme Court has frequently referred to foreign and international sources throughout its history and has used these sources to assist in interpreting federal statutes, treaties, and the U.S. Constitution.

#### 4. *Implications for the future*

The changes in the understanding of the meaning of sovereignty and the development of international human rights law described above have far-reaching implications for nation-states such as the United States. As Professor Reisman has stated, "[b]y shifting the fulcrum of the system from the protection of sovereigns to the protection of the people, [international human rights law] works qualitative changes in virtually every component."<sup>212</sup> This new concept of sovereignty even affects the relationship between national and international law. Because international law acts to create and define a sovereign state and its duty

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

208. Koh, *Constitution and International Law*, *supra* note 114, at 45.

209. *Id.*

210. *Id.* at 47 (quoting Justice Breyer's dissent in *Knight v. Florida*, 528 U.S. 990, 997 (1999)).

211. Koh, *Constitution and International Law*, *supra* note 114, at 46.

212. Reisman, *supra* note 102, at 872.

to protect its people, the actions of any particular state carried out in fulfillment of that duty must be measured by both international and national law standards. It has long been established that national law may not be invoked to justify violations of international law.<sup>213</sup> If the international law concept of sovereignty is used to assert federal power, as has been done by the Supreme Court in the cases cited above, then it also should be used to inform the meaning of limits on sovereignty suggested by international human rights norms.<sup>214</sup> As Professor Ronald Brand has stated, “If the role of the sovereign is to provide security, and strengthening the international rule of law results in increased security, then the role of the sovereign must be to strengthen the international rule of law.”<sup>215</sup> This mandate applies to all branches of government—the legislative, executive, and judiciary. Thus, U.S. courts, as one branch of the federal government, share in the sovereign duty to protect and are therefore derelict in their duties if they do not judge the lawfulness of government action by both national and international law standards, including international human rights law.

#### V. OBJECTIONS TO THE USE OF FOREIGN AND INTERNATIONAL LAW

Despite this frequent use of foreign and international law by the Supreme Court, Justice Scalia remains unconvinced of the merits of looking to foreign law in particular. He has two responses to the argument that the Framers of the U.S. Constitution were influenced by foreign law. First, he argues that the Framers “didn’t have a whole lot of respect for many of the rules in European countries.”<sup>216</sup> However, he does admit that the Framers “used a lot of foreign law,” which is evidenced by discussions of the Swiss and German systems in the Federalist Papers.<sup>217</sup> He further states that while foreign law may be

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213. *See id.* at 874. *See also* Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, Hein’s No. KAV 2424.

214. *See* Christenson, *supra* note 128, at 29–30.

215. Brand, *supra* note 105, at 1696-97.

216. AU Transcript, *supra* note 20, at 5.

217. *Id.* at 8. *See also* Printz v. United States, 521 U.S. 898, 921, n.11 (1997). *See also* the statement in Federalist Paper No. 63 which has been attributed to either Alexander Hamilton or James Madison, in which the author gives two reasons why the U.S. should pay attention to other nations: “An attention to the judgment of other nations is important to every Government for two reasons: The one is, that, independently of the merits of any particular plan or measure, it is desirable, on various accounts, that it should appear to other nations as the offspring of a wise and honorable policy; The second is, that in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed. What has not America lost with her want of character with foreign nations? And how many errors and follies would she not have avoided, if the justice and propriety of her measures had, in every instance, been previously tried by the light in

useful in devising a constitution, it is not useful in interpreting one.<sup>218</sup> Justice Scalia argues that when interpreting the U.S. Constitution, the appropriate judicial task is to understand what it meant when it was adopted and that the meaning of the Constitution does not change over time.<sup>219</sup>

To perform the task of determining the Constitution's original meaning, Justice Scalia admits that one must look to foreign sources to determine what the constitution meant when it was drafted; however, he would limit that inquiry to "Old English law."<sup>220</sup> Although the Federalist Papers are full of references to foreign law and the law of nations,<sup>221</sup> Justice Scalia only allows for reliance on "Old English law" because many constitutional phrases, such as due process, are taken from "Old English law."<sup>222</sup> However, English law was not formed in isolation any more than American law has been. It was influenced by Roman law, other European law and the law of nations.<sup>223</sup> Moreover, many of the Framers were aware of and influenced by the French Revolution and the Declaration of the Rights of Man.<sup>224</sup> Thus, even under an originalist theory of interpretation, in order to fully understand what the Framers had in mind, it is likely that we need to look beyond just "Old English law" to other foreign systems to understand what these words meant when the Constitution was drafted.<sup>225</sup>

Justice Scalia ascribes to a textualist theory of interpretation, which he has described as follows: "A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to

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which they would probably appear to the unbiased part of mankind?" THE FEDERALIST NO. 63.

218. AU Transcript, *supra* note 20, at 8. See also *Printz*, 521 U.S. at 921, n.11 ("We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.").

219. AU Transcript, *supra* note 20, at 8.

220. In *Atkins*, Justice Scalia cited to Blackstone's Commentaries on the Laws of England in making his case that the execution of mildly retarded persons would not have been considered cruel and unusual punishment in 1791. *Atkins v. Virginia*, 536 U.S. 304, 340 (Scalia, J., dissenting). See also *Roper v. Simmons*, 543 U.S. 551, 626 ("It is of course true that we share a common history with the United Kingdom, and that we often consult English sources when asked to discern the meaning of a constitutional text written against the backdrop of 18<sup>th</sup> century English law and legal thought.").

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

222. AU Transcript, *supra* note 20, at 8. Interestingly, Justice Scalia would look to English law to determine the meaning of sovereignty as it was understood at the time the constitution was drafted. *Id.* at 25.

223. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 53 (Wayne Morrison ed., Cavendish 2001) (1765-69) (stating that the law of nations has been "adopted in [its] full extent by the common law and is held to be a part of the law of the land.").

224. See Alford, *supra* note 127, at 656-58.

225. See *id.* at 645-54.



contain all this fairly means.”<sup>226</sup> In order to determine what constitutes a “reasonable” interpretation, it is likely that an interpreter will consider common methods of interpretation such as the ordinary meaning of a word, the intent of the Framers, and the context in which the words are used, among other possible sources of information. Because the Framers of the Constitution were influenced by natural law and the law of nations, using this method of interpretation opens the door to consider such sources in determining what interpretation is reasonable.

In any event, a static originalist theory of the Constitution is a bankrupt method of interpretation for those who were not included in the early Constitutional experiment. As Professor Louis Henkin rightly points out, the social compact made at the time of the founding of our nation was made by only a small portion of the inhabitants of the United States.<sup>227</sup> Only property owners were allowed to vote. Poor men, slaves, and women were excluded. Therefore, the original social compact lacks a certain amount of legitimacy for these groups. While the Framers of the Constitution laid a very worthwhile foundation, why should today’s citizens be bound by the values of a minority group that lived over 200 years ago? As Henkin has argued, “[t]he Constitution as social compact requires a contemporary compact by the people today.”<sup>228</sup> The continuing legitimacy of the Constitution may depend on whether it accurately expresses the will and values of the people today.

Using international human rights law to inform the meaning of the Constitution today may actually increase that constitutional legitimacy because the United States has been a leader in helping to create that law and, thus, that law is more likely to reflect our contemporary values. International human rights law is inclusive of all the groups mentioned above who were excluded from the original social compact. Today, there are numerous international treaties specifically designed to guard against racial discrimination<sup>229</sup> and to protect the rights of women.<sup>230</sup>

Justice Scalia also is concerned that using foreign law is dangerous because U.S. judges will not be familiar with the surrounding jurisprudence such that they are likely to misunderstand the foreign rules.<sup>231</sup> While this might be a danger, it would seem that the answer is

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226. ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 23 (Amy Gutmann ed., Princeton University Press 1997).

227. HENKIN, *THE AGE OF RIGHTS*, *supra* note 129, at 91.

228. *Id.* at 103.

229. *See, e.g.*, Convention on the Elimination of All Forms of Racial Discrimination, 4660 U.N.T.S. 195, 5 I.L.M. 352 (1966).

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

231. AU Transcript, *supra* note 20, at 11. *See also* Posner, *supra* note 29, at 41–42.

not to discard the use of foreign law, but to be better educated about it. It is really the job of the attorneys in any given case to educate the court about any applicable law and that includes any relevant or useful foreign or international law.<sup>232</sup>

Furthermore, Justice Scalia's objection to references to international law in recent cases such as *Atkins* and *Lawrence* is inconsistent with his acceptance of the supremacy of U.S. treaty law. The United States is a party to the ICCPR, which makes the ICCPR part of the supreme law of the land.<sup>233</sup> In joining the ICCPR, the United States undertook an obligation to take any steps necessary to ensure to all individuals within its territory and subject to its jurisdiction the rights set forth in the ICCPR.<sup>234</sup> Article 7 of the ICCPR states that "[n]o one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment."<sup>235</sup> Prior to the *Atkins* decision, the Human Rights Committee, a body created by the ICCPR to monitor compliance with the Convention,<sup>236</sup> expressed regret that the United States did not protect mentally retarded persons from the death penalty.<sup>237</sup> While the United States has made a reservation to the ICCPR with respect to the imposition of the death penalty, there is some doubt regarding whether its reservation is valid as a matter of treaty law.<sup>238</sup> But even if the reservation is valid as a legal matter, the widespread acceptance among the nations of the world of the treaty's ban on the death penalty is certainly evidence of evolving standards of decency and should inform our view of acceptable treatment of mentally retarded persons.

In addition, the European Union's *amicus* brief establishing overwhelming disapproval for the imposition of the death penalty for

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232. Justice Breyer has invited law professors and lawyers to do exactly that. Justice Stephen Breyer, Keynote Address at the Meeting of the American Society of International Law: The Supreme Court and the New International Law (April 4, 2003), in 97 AM. SOC'Y. INT'L PROC. 265 (2003) [hereinafter Breyer].

233. U.S. CONST. art. VI. When the U.S. Senate gave its advice and consent to the ICCPR, it did so subject to a number of reservations, understandings, and declarations. Of relevance here, the Senate's advice and consent was subject to the declaration that Articles 1 through 27 of the ICCPR are not self-executing. See S. EXEC. DOC. NO. 95-2 (1992), 31 I.L.M. 648.

234. ICCPR, *supra* note 179, at art. 7.

235. *Id.*

236. *Id.* at art. 28.

237. Report of the Human Rights Committee, ¶ 281, delivered to the General Assembly, U.N. Doc. 1/50/40 (Oct. 3, 1995).

238. See, e.g., General Comment adopted by the Human Rights Committee, under International Covenant on Civil and Political Rights art 40, para. 4, Mar. 23, 1976, 999 U.N.T.S. 171, U.N. Doc. CCPR/C/21/Rev. 1/Add.6 (11 Nov. 1994). William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT'L L. 277 (1995). The United States Supreme Court has never addressed the issue of the reservation's validity. The point is now largely moot in light of the Supreme Court's decisions in *Atkins* and *Roper*.

crimes committed by mentally retarded offenders provides evidence of custom and general principles of law. Because international law is part of our law,<sup>239</sup> the Supreme Court had a duty to examine the practices of the world community to determine whether those practices may establish an international rule that is binding on the United States.<sup>240</sup>

In his recent confirmation hearings, Chief Justice Roberts expressed concern about the use of foreign law, suggesting that it does not limit judicial discretion because “you can find anything you want . . . . As somebody said in a different context, looking at foreign law for support is like looking out over a crowd and picking out your friends.”<sup>241</sup> While Justice Roberts has expressed a valid concern about the use of foreign law generally, where there is virtually unanimous consensus among the rest of the world condemning an action like the imposition of the death penalty on juveniles or the mentally retarded, his point is not as well taken.

As in *Atkins*, the majority’s reference to international law in *Lawrence* was entirely appropriate. First, references in *Lawrence* to non-U.S. sources were made to rebut claims made by other justices in similar cases in order to establish equal treatment of the issue. The majority in *Lawrence* used foreign and international law to rebut Chief Justice Burger’s claims regarding the historical condemnation of homosexual practices in Judeo-Christian moral and ethical standards in *Bowers v. Hardwick*.<sup>242</sup> Thus, the majority was not doing anything that the Court had not done before.

Second, such references were appropriate because the United States is bound by international treaty obligations to respect the right of privacy in one’s home and to provide for equal protection of the law. In these regards, Article 17 of the ICCPR provides that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation,” and that “[e]veryone has the right to the protection of the law against such interference or attacks.”<sup>243</sup> Article 26 of the ICCPR further provides that “[a]ll persons are equal before the law and are entitled without discrimination to the equal protection of the law.”<sup>244</sup> Even Justice Scalia should be willing to admit that ratified treaty

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239. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

240. In a recent speech to the American Society of International Law, Justice Breyer suggested that many of the justices on the Supreme Court would be receptive to such a task, but require assistance from the lawyers who brief the Court. Breyer, *supra* note 233.

241. *Roberts*, *supra* note 4.

242. *Bowers v. Hardwick*, 478 U.S. 186, 196–97 (1986) (Burger, C.J., concurring).

243. ICCPR, *supra* note 179, at art 17.

244. *Id.* at art 26.

obligations ought to inform our understanding of comparable rights protected by the Constitution.

A misperception may exist that because the U.S. Senate declared articles 1-27 of the ICCPR to be non-self-executing, the entire treaty is not enforceable by U.S. courts and therefore should not be used by U.S. courts in their decision-making. While the self-executing treaty doctrine does prevent litigants from bringing a claim based on the non-self-executing portions of a treaty, the self-executing treaty doctrine does not bar courts from taking into account the United States' treaty obligations altogether.<sup>245</sup> When the President of the United States signs a treaty and two-thirds of the Senators give their consent to that treaty, the United States has expressed its political will that the United States is in agreement with the treaty's statements regarding international rights and duties. A ratified treaty creates binding international legal obligations for the United States even if portions of it are not directly enforceable in U.S. courts. The treaty becomes part of the Supreme Law of the Land under the Supremacy Clause and will trump inconsistent state laws. U.S. courts have recognized that even when a treaty contemplates further action by the other branches of government, "the judicial branch should certainly attempt to reflect in its decision making the spirit as well as the letter of an international agreement to which the United States is a party."<sup>246</sup>

The federal courts have long stated that they will not assume that Congress intends to violate the United States' international obligations.<sup>247</sup> Accordingly, where there are competing interpretations of a federal statute and a treaty to which the U.S. is a party, the courts will adopt the interpretation that attempts to reconcile the two.<sup>248</sup> U.S. courts should likewise use the language of a treaty to which the United States is a party to inform the understanding of individual rights under the Constitution and choose an interpretation that reconciles the two whenever possible. Doing so will assist the United States in avoiding violations of its international obligations.<sup>249</sup> It is also consistent with the

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245. PAUST, *supra* note 137, at 78-79, 361-62; Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 532 (1991). See also Francisco Forrest Martin, *The Constitution and Human Rights: The International Legal Constructionist Approach to Ensuring the Protection of Human Rights*, 1 FIU L. REV. 71, 80-85 (2006) (criticizing the non-self-executing treaty doctrine).

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

247. *Murray v. Schooner Charming Besty*, 6 U.S. 64 (1804).

248. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

249. Professor John Quigley argues that during the nineteenth century, U.S. courts were more likely to apply treaty-based rights, but that practice has changed in the twentieth century to the detriment of the United States' international obligations. John Quigley, *Toward More Effective*

democratic will as expressed by the legislative and executive branches when they ratified the treaty.

Additionally, the United States is bound by any relevant customary international law separate and apart from its treaty obligations.<sup>250</sup> Despite this long-established principle, some scholars and judges are uncomfortable with the application of customary international law, perhaps because customary international rules are not written “positive” laws, or because they can be vague and rest on diffuse sources that are hard to find.<sup>251</sup> Treaties often contain very vague and broadly worded obligations as well, yet they are still considering binding “law.” Furthermore, while it is laudable that the law be known and available to any interested person, difficulty in finding the law cannot be determinative of its character as law. And while it is true that customary international law often cannot be found in one place like a treaty, the rules of customary international law are often written down in diplomatic correspondence, executive orders, and similar documents. In fact, the U.S. government has often made public statements officially accepting the binding nature of certain rules of customary international law that have been codified in treaties which the United States has not ratified, such as the Vienna Convention on the Law of Treaties<sup>252</sup> and the U.N. Convention on the Law of the Sea.<sup>253</sup> Some judges and scholars also have expressed concern about the political foundations of customary international law, believing that is not well grounded because it is not

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*Judicial Implementation of Treaty-Based Rights*, 29 *FORDHAM INT’L L.J.* 552, 581 (2006).

250. *Beharry v. Reno*, 183 F. Supp. 2d 584, 597–99 (E.D.N.Y. 2002). Customary international law is commonly defined as “general practice [of states] accepted as law.” *See, e.g.*, ICJ, *supra* note 7, at art. 38(1)(b). *See also supra* notes 12 & 14.

251. TRIMBLE, *supra* note 12, at 187.

252. *See, e.g.*, ROVINE, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 1973, 307, 482–83 (1974). *See also* Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 *VA. J. INT’L L.* 281, 299–302 (1988); Robert Dalton, *The Vienna Convention on the Law of Treaties: Consequences for the United States in The Vienna Convention on the Law of Treaties: The Consequences of Participation and Nonparticipation*, 78 *AM. SOC’Y INT’L L. PROC.* 270, 277–79 (1984); *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* §§ 312, 325 (1987); *Chubb & Son v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000) (“The United States recognizes the Vienna Convention as a codification of customary international law.”).

253. *See, e.g.*, *Amerada Hess Shipping v. Argentine Republic*, 830 F.2d 421, 424 (1987), *rev’d on other grounds*, 488 U.S. 428 (1989) (“Argentina is a signatory to the Law of the Sea Convention and the United States has endorsed the relevant sections of it.”); *Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part XI of the Law of the Sea Convention: Hearings before the Senate Environment and Public Works Comm.*, 103d Cong. 39 (2004) (testimony of John F. Turner, Assistant Secretary of State, Oceans and International Environmental and Scientific Affairs) (“At home, President Reagan’s 1983 Oceans Policy Statement directed the United States to abide by the non-deep sea bed provisions of the Convention. Abroad, the United States has worked both diplomatically and operationally to promote the Convention as reflective of customary international law.”).

expressly made the law of the land in the Constitution and is not approved by the Senate or Congress more generally.<sup>254</sup> While it is true that the Supremacy Clause of the Constitution only mentions treaties and not customary international law, the Constitution does take into account customary international law in at least one other place, *i.e.*, its reference to offenses against the laws of nations in Article I.<sup>255</sup> Furthermore, the Executive Branch, which is charged with taking a primary role in foreign affairs, is daily involved in the creation of the rules of customary international law through its practices and pronouncements. Thus, it is perfectly appropriate for U.S. courts to continue to ascertain and apply customary international law just as they have for more than two centuries.

A similar objection that has been raised with respect to the use of foreign legal materials is that foreign legal materials have no democratic provenance or connection to the U.S. legal system and thus lack democratic accountability.<sup>256</sup> Justice Breyer responds to this concern by stating that the court relies on many extrinsic sources in constitutional interpretation which lack a democratic base, including the work of legal scholars.<sup>257</sup> Thus, using foreign or international materials is no worse. More importantly, however, he points out that transnational law is created by the interaction of many constituencies, such as the interested public, affected groups, specialists, legislatures, and others.<sup>258</sup> “That is the democratic process in action.”<sup>259</sup> Persons and groups in the United States participate in this process, particularly through involvement in nongovernmental organizations.<sup>260</sup> The United States, as the most powerful state in the international system, has a predominant role in creating the rules of international law, whether by negotiating and drafting treaties or by its conduct leading to the creation of customary international law. Thus, with respect to international law, the United States’ legislative and executive branches both have a role in creating the rules and can be held accountable for their actions in this regard.

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254. TRIMBLE, *supra* note 12, at 187.

255. U.S. CONST. art. I, § 8, cl. 10.

256. Posner, *supra* note 29, at 42; J. Harvie Wilkinson III, *The Use of International Law in Judicial Decisions*, 27 HARV. J.L. & PUB. POL’Y 423, 425–26 (2004); Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT’L L. 675, 785–86 (2003).

257. AU Transcript, *supra* note 20, at 26.

258. Breyer, *supra* note 233.

259. *Id.*

260. See Koh, *Constitution and International Law*, *supra* note 114, at 55–57 (listing the involvement in the “transnational legal process” of “litigants, activists, publicists, and academic commentators” as well as nongovernmental organizations); see also Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT’L L. 348 (2006).

Thus, concerns that anti-democratic processes may influence U.S. judges rings much truer with respect to *foreign* legal materials than with respect to *international* materials, because the democratically elected bodies and other groups in the United States participate in the formation of international legal rules. Furthermore, the United States can further alleviate anti-democratic concerns by being a full and vigorous participant in developing transnational law in the future.<sup>261</sup>

The United States may even influence foreign legal materials to the extent that foreign legislatures and judges take into account what other countries are doing when fashioning their own rules. Because the United States is the most powerful country in the world in the present time and because historically, it has a long history of democratic governance and protection of individual rights, it is likely that the United States is one of the countries whose practices will be considered.<sup>262</sup>

As a general proposition, however, international law does have more legitimacy in the U.S. legal system than foreign law because the U.S. has a greater role in shaping international law than foreign law.<sup>263</sup> As a result, there are different considerations at work with respect to the use of foreign law in constitutional interpretation. In the *Knight v. Florida* death penalty case, Justice Breyer wrote a dissenting opinion in which he suggested some standards for the use of foreign law.<sup>264</sup> He suggests the use of foreign law is appropriate in two situations. First, it is appropriate when there exists a roughly comparable question and there is a transnational or global aspect to the case, there are shared standards, or world opinion is implicated. Second, the use of foreign law is appropriate when roughly comparable legal standards exist, *i.e.*, when the external or foreign norms resonate internally. Justice Breyer suggests that this last situation is most likely to occur with respect to Europe and its former colonies because of our shared human rights heritage.<sup>265</sup>

These suggestions are worthy of further exploration to determine whether “roughly comparable questions” or “roughly comparable legal standards” can be identified with some confidence. However, use of foreign law should be approached with particular caution. A specific

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261. *See id.* at 56-57.

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

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

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

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

nation's laws reflect that nation's history, culture, and legal system.<sup>266</sup> Thus, any one nation's legal rules are likely to be of limited value to another nation with a different history, culture and legal system. However, if a worldwide survey is conducted and many or most nations in the world have adopted a particular legal rule, that rule will reflect a consensus derived from many different cultures and legal systems and will likely be more useful and persuasive.

Finally, persons on both sides of the debate agree that part of what is driving this debate regarding the use of international and foreign law is a concern that such law will be used by judges in an unprincipled manner to support the judges' personal viewpoints.<sup>267</sup> Justice Breyer responds to this concern by arguing that a good way to counter the possibility of judges imposing their own moral values is for judges to look outside themselves and see how society is dealing with the issue – including looking to foreign societies and international law.<sup>268</sup> Moreover, it may be argued that international law is a more effective interpretive tool than many other external sources a judge may use because rules of international law are “a product of years of distillation of principles formed through international consensus,” that are evidenced by state practice and agreements that articulate the relevant principles.<sup>269</sup> As a result, reliance on a rule of international law may actually reduce an individual judge's subjectivity when interpreting constitutional provisions.<sup>270</sup>

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

#### VI. WHY SHOULD THE SUPREME COURT CONTINUE TO USE INTERNATIONAL AND FOREIGN LAW?

Thus far, this article has established the political and historical bases for the incorporation of international law and to a lesser extent, foreign law, principles into U.S. constitutional jurisprudence and has described

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266. See James Allan & Grant Huscroft, *Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts*, 43 SAN DIEGO L. REV. 1, 14-27 (2006) (contrasting U.S. rights-based constitutionalism with those of other common law jurisdictions).

267. AU Transcript, *supra* note 20, at 9.

268. AU Transcript, *supra* note 20, at 10.

269. See Tamara Hughlett, *International Law: The Use of International Law as a Guide to Interpretation of the United States Constitution*, 45 OKLA. L. REV. 169, 182 (1992). Similarly, Professor Vicki Jackson has suggested that “[l]ooking to foreign law may also enhance judicial decision making by expanding opportunities for ethical engagement with the views of those having equivalent responsibility and aspiring to similar impartiality.” Jackson, *supra* note 207, at 118.

270. See Hughlett, *supra* note 270, at 182.



both the historical and recent use of international and foreign law by the U.S. Supreme Court. It also has responded to the concerns of critics. This section provides some reasons why the Supreme Court should continue to use international and foreign law in the future.

The most important reason supporting the Supreme Court's continued use of international law is that the Constitution requires it. As noted above, the Constitution makes treaties part of the supreme law of the land on par with federal statutes.<sup>271</sup> When the political branches have come together and agreed to sign and ratify a treaty, the Supreme Court should give deference to the judgment of the other branches as to the rules of international law expressed in that treaty and should assist the United States in complying with its treaty obligations by adopting an interpretation that is consistent with those treaty obligations whenever possible.<sup>272</sup>

Even when the Constitution does not expressly incorporate international law, federal statutes, such as in the Foreign Sovereign Immunities Act<sup>273</sup> or the Alien Tort Statute, may do so.<sup>274</sup> It also seems fairly uncontroversial that when the U.S. Supreme Court is interpreting a treaty, it should take into account the practice of states who are also parties to the treaty and decisions of their courts interpreting the treaty because such evidence would be relevant and useful evidence of the meaning of the treaty.<sup>275</sup> Thus, the Supreme Court should continue to use international and foreign legal sources when it is required to do so by the Constitution or by statute.

Likewise, the U.S. Supreme Court must continue to ascertain and apply customary international law principles when called for by the Constitution or by federal statute. For example, the Court may need to consider customary international law pursuant to the Constitution's grant of authority to Congress to define and punish offenses against the law of nations,<sup>276</sup> as it did in *United States v. Smith*.<sup>277</sup>

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

272. Of course, if the other branches of government entered into a treaty that denied a constitutionally protected right such as a right to a jury trial as was the case in *Reid v. Covert*, 354 U.S. 1 (1957), the Court would be bound to ignore the inconsistent treaty obligation.

273. 28 U.S.C. § 1602 (2000).

274. See 28 U.S.C. § 1350 (2005). Other examples of incorporation of the law of nations or international law into U.S. statutes may be found in the Torture Victim Protection Act of 1991, 28 U.S.C.A. § 1350 (West 2006); *Internee of Belligerent Nation*, 18 U.S.C.A. § 756; *Interned Belligerent Nationals*, 18 U.S.C.A. § 3058 (West 2006); *Departure of Vessel Forbidden in Aid of Neutrality*, 18 U.S.C.A. § 967 (West 2006); *Destruction or Misuse of Vessel by Person in Charge*, 18 U.S.C.A. § 2274 (West 2006); *Compelling Foreign Vessels to Depart*, 22 U.S.C.A. § 462 (West 2006); *Condemnation of Piratical Vessels*, 33 U.S.C.A. § 384 (West 2006); *Seizure and Condemnation of Vessels Fitted Out for Piracy*, 33 U.S.C.A. § 385 (West 2006).

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

276. U.S. CONST. art. I, sec. 8.

The recent case of *Sosa v. Alvarez-Machain* provides a timely example of a statutory requirement to consider customary international law. In *Sosa*, the Supreme Court was required by the Alien Tort Statute to determine whether particular conduct constituted a tort under the law of nations.<sup>278</sup> The Supreme Court affirmed that it was required to ascertain and apply a modern-day understanding of international torts, at least where the norm of international character is accepted by the civilized world and defined with specificity.<sup>279</sup>

Use of international treaty law and the customary international law of human rights to inform U.S. constitutional rights jurisprudence also can be justified under and reconciled with many classic theories of constitutional interpretation.<sup>280</sup> From an originalist perspective, such usage is appropriate because the Founding Fathers were heavily influenced by foreign and international law and incorporated some of these sources and ideas into the Constitution (although a “hard” originalist might only allow for international law as it existed at the time of the writing of the Constitution).<sup>281</sup> A natural law proponent should be open to using international human rights law to inform U.S. individual rights jurisprudence because of the shared natural law foundations and the mutual influence of U.S. law and international law on one another. From a structural majoritarianism perspective, it may be argued that appropriate use of foreign and international law where it has been created and approved by the political branches of the federal government demonstrates proper deference to those branches. On the other hand, an interpretive majoritarianism view might use present-day concepts of sovereignty and international human rights to facilitate our understanding of the meaning of a “living” constitution that changes over time in response to societal changes. Finally, a pragmatic approach might encourage examination of foreign legal experiences to better understand the consequences of different legal solutions for common legal problems.<sup>282</sup>

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277. 18 U.S. 153 (1820).

278. See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

279. *Id.* at 724-25.

280. See Alford, *supra* note 127, at 644 (Professor Alford discusses four types of classic constitutional theories – originalism, natural law, majoritarianism (both structural and interpretive), and pragmatism). See also MICHAEL J. GERHARDT ET AL., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES §§ 1.101–1.104 (LexisNexis 2d ed. 2000) (providing an historical overview of constitutional theories).

281. SUNSTEIN, *supra* note 80, at 173. (Professor Sunstein distinguishes between “hard” originalism, which makes a historical inquiry to discover specific answers to specific questions and “soft” originalism, which makes the historical inquiry to discover constraining but flexible standards.).

282. An example of this approach may be found in Justice Breyer’s dissenting opinion in

Moreover, using international and foreign law will assist the U.S. government in carrying out its duty to protect the people. Modern conceptions of sovereignty require that the sovereign state take seriously its responsibility to protect its citizens.<sup>283</sup> Because “[h]uman rights are *rights*” and not aspirations, the government has an obligation to protect such rights.<sup>284</sup> While many international human rights are said to be universal and do not differ substantively in different national legal systems, they depend on national governments for their protection.<sup>285</sup> If the state is not providing a level of protection for human rights that has been widely adopted elsewhere in the world, perhaps it is time for the state to reexamine why this is the case. Such an examination does not necessarily require a change in the law, as there may be important and justifiable reasons that a state has chosen a particular legal rule, (such as competing human rights values), but at least requiring that examination could force a state to confront its laws and practices and have to justify them to its own polity and to the world.<sup>286</sup>

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

In sum, the U.S. Supreme Court should continue to consider international and foreign legal materials in its work because it is sometimes required to do so by the constitution or by federal statute, because it increases the legitimacy of the court’s jurisprudence, and because it is good foreign relations policy.

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Printz v. United States, 521 U.S. 898, 977 (1997).

283. As Thomas Jefferson stated, governments are instituted “to secure these rights.” HENKIN, *THE AGE OF RIGHTS*, *supra* note 129, at 87.

284. *Id.* at 3.

285. *Id.* at 2, 17.

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

VII. HOW SHOULD INTERNATIONAL LAW BE USED BY THE SUPREME COURT IN THE FUTURE?

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

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

Justice Scalia has complained, however, that there is a lack of international consensus on many legal rules and that the U.S. Supreme Court lacks criteria to assist in deciding when and which of these foreign rules to use. This criticism is a potentially troubling one, but no more so than Justice Scalia's concerns with respect to the use of any external source in constitutional interpretation. As both Justices Scalia and Breyer point out, using international or foreign law is similar to using any other external source, such as legislative history, in interpreting a vague or ambiguous constitutional term or phrase.<sup>287</sup> The court has been able to successfully use legislative history when it has found such history to be persuasive or useful. In this regard, Justice Breyer argues that the Supreme Court cites many sources in its jurisprudence and that the main guideline for using these external sources is their usefulness.<sup>288</sup> Likewise, it does not seem like an insurmountable hurdle for the justices to devise some loose guidelines for the use of international and foreign law in their jurisprudence.<sup>289</sup> Set forth below are a few suggestions in this regard.

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287. AU Transcript, *supra* note 20, at 7, 13.

288. AU Transcript, *supra* note 20, at 6.

289. In fact, the Honorable Patricia Wald, formerly the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, has stated that American judges "are used to making judgment calls on the caliber of the courts and even sometimes of the individual judge authors whose decisions they decide to cite or rely upon." Patricia M. Wald, *The Use of International Law in the American Adjudicative Process*, 27 HARV. J.L. & PUB. POL'Y 431, 440 (2004). They also "are in the

*A. International and Foreign Law as an Interpretive Aid*

First, international and foreign law may be used as an interpretive aid when the language of the Constitution standing alone does not answer a question. Where the text of the Constitution is perfectly clear (e.g., the necessary age of thirty-five to become President of the United States),<sup>290</sup> there usually is no need to consider extrinsic sources. However, in many cases already discussed herein, the text is not perfectly clear on its face. Phrases like liberty, due process, and cruel and unusual punishment all invite interpretation and explanation. In such cases, it has been common for the Supreme Court to look to external sources to aid in its interpretation of these vague or ambiguous phrases. International law, particularly international human rights norms, may be treated as an external source to be used in interpretation of vague or ambiguous terms.<sup>291</sup> As demonstrated above, it is particularly appropriate to turn to international human rights law as an interpretive tool given the common historical and theoretical foundations of U.S. individual rights and international human rights law.

Legal positivists might object to the use of international law in this way because they would limit themselves to “formal sources of law, [e.g.,] those formalized precepts and mandates which have been promulgated or issued by a legislature, a constitutional convention, a court, or an administrative agency.”<sup>292</sup> Although treaties fit the definition of positive law, many other sources of international law may not. The problem with limiting legal decision-makers exclusively to such formal sources of law is that those sources do not answer every question.<sup>293</sup> Positive laws always contain ambiguities and gaps. In such cases, what means are available to legal decision-makers to resolve these questions? Legal positivists have struggled to answer this question.<sup>294</sup> Using international human rights law to inform U.S. Constitutional jurisprudence can help to solve this dilemma.<sup>295</sup>

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habit of making judicious selection of the precedents in the context of the court and the judges that write them. And I would trust them to do so in the case of foreign court judgments as well.” *Id.*

290. U.S. CONST. art. II.

291. See Christenson, *supra* note 128, at 4-6, 16, 20.

292. BODENHEIMER, JURISPRUDENCE, *supra* note 138, at 346.

293. See *id.* at 347.

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

295. One scholar has argued that at least some U.S. courts have been willing to use provisions of the U.N. Charter to “find” the U.S. Constitution, *i.e.*, to redefine the due process and equal protection clauses to reflect antiracial discrimination norms found in the U.N. Charter. Lockwood, *supra* note 203, at 902.

This is not a new idea. The U.S. Supreme Court has sanctioned the notion that judges may look beyond strictly positive sources of law in a number of cases.<sup>296</sup> And as Justice Cardozo pointed out many years ago, many gaps in U.S. common law have been filled by borrowing from Roman law or other legal systems.<sup>297</sup>

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

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

This approach would satisfy the objection that application of foreign or international law would lead to the adoption of practices of a country with a poor human rights record. However, it still does not answer the more difficult questions involving competing human rights, such as those of a mother and the potential life represented by a fetus in abortion jurisprudence.

Of course, it also is settled law that “treaties are subject to the constitutional limitations that apply to all exercises of federal power, principally, the prohibitions of the Bill of Rights.”<sup>298</sup> The Treaty Power does not extend “so far as to authorize what the Constitution forbids.”<sup>299</sup> Taking this proposition together with the Ninth Amendment’s admonishment that the people retain rights in addition to those enumerated in the Constitution, we see that international law can add to the list of individual rights retained by the people and can be used to

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296. *See, e.g., Int’l Serv. v. Associated Press*, 248 U.S. 215 (1918) (resulting in significant innovation in the law of unfair competition).

297. BODENHEIMER, *JURISPRUDENCE*, *supra* note 138, at 353 (citing BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 123 (New Haven 1921)).

298. HENKIN, *FOREIGN AFFAIRS*, *supra* note 123, at 137, 254.

299. *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *The Cherokee Tobacco*, 78 U.S. 616 (1871); *Asakura v. Seattle*, 265 U.S. 332, 341 (1924); *Reid v. Covert*, 354 U.S. 1, 16 (1957); *Boos v. Barry*, 485 U.S. 312, 324 (1988).

interpret or give meaning to rights that are enumerated in the Constitution, but cannot take away rights enumerated in the Constitution.

*C. International and Foreign Law as an Educational Tool*

Several of the Supreme Court justices and scholars have pointed out ways in which international and foreign law can be a useful educational tool. First, surveying international and foreign legal sources can show developing trends in the law. Second, it can suggest new ways of approaching common problems.<sup>300</sup> Third, it can stimulate thinking about different solutions. Fourth, a non-U.S. legal source may suggest a persuasive line of logic. Thus, international and foreign legal sources can be of tremendous educational value, regardless of whether such sources are formally relied upon or cited as any kind of authority for the court's opinion.

## VIII. CONCLUSION

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

The implications for the United States are that while international law does not trump the Constitution, the U.S. Supreme Court should consider international law rules in constitutional interpretation whenever the political branches of government have adopted international agreements or participated in the creation of customary international law rules that express the United States' position on human rights. It also should use international law as an interpretive tool to inform its

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

understanding of vague or ambiguous constitutional provisions. Under the dictates of sovereignty theory, the Court would never be forced to adopt a foreign practice that is less protective of the people because that would be contrary to the entire purpose for which the government was created. Rather, the Supreme Court should continue to use foreign and international law to expand our conception of human rights consistently with the Constitution and should use international law as an interpretive and educational tool in appropriate circumstances as outlined above.