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out of the egg.”<sup>98</sup> Like it or not, both foreign and international law are already part of our law. In time, I expect, those who continue to deny that reality will be remembered like those who “assumed the attitude once ascribed . . . to the British: when told how things are done in another country they simply say ‘How funny.’”<sup>99</sup>

## MISUSING INTERNATIONAL SOURCES TO INTERPRET THE CONSTITUTION

By Roger P. Alford\*

In the keynote address to the 2003 annual meeting of the American Society of International Law, Justice Stephen Breyer declared that “comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights.”<sup>1</sup> Justice Breyer concluded that nothing could be “more exciting for an academic, practitioner, or judge than the global legal enterprise that is now upon us.”<sup>2</sup> In a room filled with international lawyers and academics, he received a home court standing ovation.

I would hazard that the wider legal academy would not have received Justice Breyer’s speech with nearly the same enthusiasm, just as it will not warmly embrace the “remarkable” and “quite extraordinary”<sup>3</sup> appeal to international sources<sup>4</sup> that is evident in recent Supreme Court decisions.<sup>5</sup> For if we accept Justice Breyer’s incipient constitutional comparativism, conceding that judges everywhere face the “same kinds of problems . . . armed with the same kinds of legal instruments,”<sup>6</sup> then we accept a potential “change [to] the course of American law”<sup>7</sup> through expansion of the traditional “canon of authoritative materials from which constitutional common law reasoning might go forward.”<sup>8</sup> That canon has traditionally been viewed as encompassing text, structure, history, and national experience.<sup>9</sup> Including a new source

<sup>98</sup> Breyer, *supra* note 33, at 267.

<sup>99</sup> James Michael, *Homosexuals and Privacy*, 138 NEW L.J. 831, 831 (1988).

\* Associate Professor of Law, Pepperdine University School of Law. Earlier versions of these comments were presented at the 2002 annual conference of the American Society of International Law, Section on International Law in Domestic Courts, Fordham University Law School; and the 2003 International Law Society–West symposium at Loyola of Los Angeles Law School. I gratefully acknowledge the comments of the participants at those conferences, as well as the research assistance of David Dae Hoon Kim, Georgetown University Law Center.

<sup>1</sup> Stephen Breyer, Keynote Address, 97 ASIL PROC. 265, 265 (2003) (quoting Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, Fifty-first Cardozo Memorial Lecture (Feb. 11, 1999), in 21 CARDOZO L. REV. 253, 282 (1999)).

<sup>2</sup> *Id.* at 268.

<sup>3</sup> Peter Rubin, *American Constitution Society Supreme Court Roundup* (July 1, 2003), at <<http://www.acslaw.org/pdf/SCOTUStans.pdf>> (describing references to European Court of Human Rights in Supreme Court’s *Lawrence* decision as “remarkable” and “quite extraordinary”); see also *Inferior Imports*, INVESTOR’S BUS. DAILY, July 10, 2003, at A15 (discussing “disturbing” approach in *Lawrence* of using foreign courts to interpret Constitution); Tony Mauro, *Supreme Court Opening up to World Opinion*, LEGAL TIMES, July 7, 2003, at 1, 8 (this year was “breakthrough term” in which “the ostrich’s head came out of the sand”). For a particularly sharp critique, see ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 15–25, 135–39 (2003) (discussing “insidious appeal of internationalism” in constitutional interpretation).

<sup>4</sup> I use the term “international sources” in order to include the full panoply of transnational comparative materials that may be borrowed in the interpretive process, including international and foreign laws and practices.

<sup>5</sup> For a discussion of these cases, see text at notes 21–24, 40–41, 58–61 *infra*.

<sup>6</sup> Stephen Breyer, *Réflexions relatives au principe de fraternité*, Address to the 30th Congress of the Association of French-Speaking Constitutional Courts (June 20, 2003), at <[http://www.supremecourtus.gov/publicinfo/speeches/sp\\_06-20-03.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_06-20-03.html)> (“En un mot on trouve partout des juges faisant face aux mêmes espèces de problèmes et armés des mêmes espèces d’instruments juridiques.”).

<sup>7</sup> Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 203 (2003) (discussing potential change resulting from cross-fertilization).

<sup>8</sup> Charles Fried, *Scholars and Judges, Reason and Power*, 23 HARV. J.L. & PUB. POL’Y 807, 819 (2000) (discussing Justice Breyer’s proposal to use comparative materials in *Printz v. United States*, 521 U.S. 898 (1997)).

<sup>9</sup> See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 3–119 (1982); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 75 (2000).

fundamentally destabilizes the equilibrium of constitutional decision making. Using international law as an interpretive aid also ignores the Supremacy Clause, which renders all of our laws subject to, and not source material for, our Constitution.

But even assuming that using international sources to interpret the Constitution were appropriate, I am doubtful that it would be advisable. It would be inadvisable because it assumes that such a project could be (and would be) done in a rigorously empirical, rather than a haphazard, manner, and doubly inadvisable because, in a country that is one of the world's foremost guarantors of civil liberties, a robust use of international sources could have the unintended consequence of undermining rather than promoting numerous constitutional guarantees.

Of course, this essay does not suggest that international sources should never be used as persuasive authority in certain types of constitutional analysis.<sup>10</sup> Rather, the purpose of this essay is to outline a few of the potential misuses that may occur if international and foreign materials are referenced in interpretation of the Constitution.<sup>11</sup>

### I. COUNTERMAJORITARIAN USE OF INTERNATIONAL SOURCES

The first misuse of international sources—particularly evident in death penalty litigation—occurs when the “global opinions of humankind” are ascribed constitutional value to thwart the domestic opinions of Americans.<sup>12</sup> To the extent that value judgments are a source of constitutional understandings of community standards, in the hierarchical ranking of relative values domestic majoritarian judgments should hold sway over international majoritarian values.<sup>13</sup> Using global opinions as a means of constitutional interpretation dramatically undermines sovereignty by utilizing the one vehicle—constitutional supremacy—that can trump the democratic will reflected in state and federal legislative and executive pronouncements.

Treaty norms embodied in canonical human rights instruments are a reflection of an international majoritarian perspective on what is required of a good and just society. Internalization of these norms through treaty adherence and legislative enactments furthers that

<sup>10</sup> For example, Congress recently extended the copyright term to match the European Union's copyright term. The Court described this as a “rational exercise of the legislative authority conferred by the Copyright Clause.” *Eldred v. Ashcroft*, 537 U.S. 186, 188, 205–08 (2003). Other appropriate examples include the Court's occasional recourse to “historical matrix comparativism” to understand the context of our Constitution's text, structure, and history, *see note 46 infra*, and the use of such sources to interpret constitutional provisions that textually anticipate recourse to international law. *See generally* Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AJIL 82, 82–83 (2004); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AJIL 69, 71 n.14 (2004); T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AJIL 91, 98 (2004).

<sup>11</sup> Although I am described by Harold Koh as a “nationalist academic,” apparently because I have reservations about the use of international sources to interpret the Constitution, *see* Harold Hongju Koh, *International Law as Part of Our Law*, 98 AJIL 43, 55 (2004), I am quite sympathetic when federal courts use international law in some contexts. *See generally* Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675 (2003). As that article suggests, to say that international law and practice has had, and should have, a limited role in constitutional interpretation is not to say that we should blindly stick our head in the sand and reject or ignore the broader reality of “international norm internalization” that is occurring within the judicial, legislative, and executive branches.

<sup>12</sup> Harold Hongju Koh, *Paying “Decent Respect” to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1129 (2002) (“The evidence strongly suggests that we do not currently pay decent respect to the opinions of humankind in our administration of the death penalty. *For that reason*, the death penalty should, in time, be declared in violation of the Eighth Amendment.”) (emphasis added). This section builds on a brief discussion of the same topic in a previous writing. *See* Alford, *supra* note 11, at 772–91.

<sup>13</sup> The debate over whether community standards should have any relevance to constitutional interpretation is well-known. But even assuming that critics are correct that “living constitutionalism”—the notion that the Constitution “means from age to age whatever the society (or perhaps the Court) thinks it ought to mean”—is a “conventional fallacy,” Antonin Scalia, *God's Justice and Ours*, FIRST THINGS, May 2002, at 17, 17, the Court undoubtedly has embraced this “fallacy,” albeit fettered with certain constraints. Therefore, I do not enter the longstanding discussion over the question of the propriety of using community standards and contemporary norms in constitutional interpretation. I only seek to elaborate on the unsettled question of the logical limits that constrain the Court and that it should impose in resorting to such community standards.

majoritarian objective, and it does so consistently with domestic sovereignty concerns. But occasionally, as with capital punishment, the international majoritarian impulse is not consistent with the domestic majoritarian impulse. The values inherent in national sovereignty and the objectives reflected in international and foreign sources clash. If international majoritarian values cannot find expression through the political branches, advocates resort to the courts. But in the courts, overcoming sovereign values reflected in legislative enactments can be achieved only through constitutional supremacy. Hence the strategy to utilize international law to interpret the Constitution. If what is good and just cannot be achieved by democratic governance, then it shall be foisted upon the governed through constitutional interpretation.

Such an approach must squarely address what I call the “international countermajoritarian difficulty.” This difficulty shares many of the burdens of the traditional countermajoritarian difficulty,<sup>14</sup> which reflects concerns that when a legislative or executive act is declared unconstitutional, it thwarts the will of the people and undermines the values of the prevailing majority. Constitutional review serves as a countermajoritarian check on the legislature and the executive.<sup>15</sup> This extends to the international context as a check on the making of treaties. The treaty-making power is not unlimited and does not “extend so far as to authorize what the Constitution forbids.”<sup>16</sup> But the international countermajoritarian difficulty also suffers a burden unique to the international context: to the extent that constitutional guarantees *are* responsive to democratic popular will, those guarantees are not to be interpreted to give expression to international majoritarian values to protect the individual from democratic governance.

The difficulty for international majoritarians is that, while certain constitutional provisions have been interpreted to embrace community standards, those standards have been interpreted consistently with—not counter to—majoritarian values reflected in our national experience. The international countermajoritarian difficulty would suggest that international norms cannot be internalized within our Constitution unless such norms are first internalized by our people as our community standards. That is, international standards cannot serve as community standards unless they reflect our own national experience. To conclude otherwise would grant countermajoritarian international norms constitutional relevance as a community standard.

As suggested above, the international countermajoritarian difficulty is readily apparent in death penalty litigation.<sup>17</sup> Although the Supreme Court is frequently criticized for thwarting the popular will by protecting minority rights against majoritarian values, Eighth Amendment jurisprudence is unusual for lacking a traditional countermajoritarian difficulty. The Supreme Court has adopted a majoritarian paradigm that it describes as the “national consensus.”<sup>18</sup> If the national consensus is that a certain punishment is cruel and unusual, then this

<sup>14</sup> On the countermajoritarian difficulty, see, for example, Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 335 (1998).

<sup>15</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 17–21 (1962).

<sup>16</sup> *De Geofroy v. Riggs*, 133 U.S. 258, 267 (1890).

<sup>17</sup> Although not discussed here, it is also implicit in substantive due process jurisprudence. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (fundamental due process rights must be deeply rooted in this nation’s history and tradition and “implicit in the concept of ordered liberty”); see also *Reno v. Flores*, 507 U.S. 292, 303 (1993) (interest must be so rooted in the traditions and conscience of our people as to be ranked as fundamental); *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (fundamental liberty interest must be an interest traditionally protected by our society); Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on Lawrence v. Texas*, 44 VA. J. INT’L L. (forthcoming 2004) (“[S]imilar to the Eighth Amendment, reference to global standards under the conception of ordered liberty provides an additional check on substantive due process, to be utilized if it has also been established that a right is part of our own history and tradition.”).

<sup>18</sup> *Atkins v. Virginia*, 536 U.S. 304, 312–16 (2002); *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989); *Enmund v. Florida*, 458 U.S. 782, 794–96 (1982); *Coker v. Georgia*, 433 U.S. 584, 593–97 (1977); *Developments in the Law—The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 HARV. L. REV. 2049, 2068 (2001).

American conception of decency will be dispositive. The legitimating function of this national consensus in defining what is cruel and unusual serves as a checking function on international majoritarian norms. Thus, the absence of a national consensus validates a punishment as neither cruel nor unusual, rendering constitutionally legitimate what international opinion would declare illegitimate.

Such an approach is evident in *Stanford v. Kentucky*, where the Court held that in determining evolving standards of decency, “we have looked to . . . those of modern American society as a whole.”<sup>19</sup> It emphasized that it is

*American* conceptions of decency that are dispositive . . . . While the practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so implicit in the concept of ordered liberty that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well, they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.<sup>20</sup>

The recent case of *Atkins v. Virginia*<sup>21</sup> confirms this international countermajoritarian difficulty. Advocates in *Atkins* argued that executing the mentally retarded is abhorrent to international standards of decency that establish a growing international consensus against the practice. This international consensus, they contended, is relevant to the constitutional inquiry.<sup>22</sup> The Supreme Court did not disagree, but neither did it depart from the majoritarian paradigm outlined in *Stanford*. In the factual obverse of *Stanford*, the Court in *Atkins* found a national consensus and then concluded that this consensus was consistent with a much broader consensus among others who have considered the matter.<sup>23</sup> *Atkins* thus reaffirms the international countermajoritarian difficulty: the global consensus does not provide content to the national consensus<sup>24</sup> and the global consensus is of no relevance in the absence of a national consensus. To the extent that international sources are relevant, they are used to confirm that a prohibition is implicit in ordered liberty and not simply an “accidental” national consensus. Such confirmation inures to the benefit of death penalty proponents, with the global consensus used as an *additional* check on the Eighth Amendment.

In the death penalty context, the Court does not attach importance to international sources in undertaking a constitutional analysis because in adopting a majoritarian paradigm, whether a punishment is unusual or cruel should depend on a national consensus that gives expression to the sovereign will of the American people. Sovereign expressions of decency give voice to the constitutional standard, and while nonbinding treaty norms may echo those expressions, they are not part of the chorus. Constitutional law cannot, as the Court has put it, rest upon uncertain foundations such as majoritarian values expressed in nonbinding opinions.<sup>25</sup> To justify a permanent prohibition under the Eighth Amendment, one must look to the operative acts that the people have approved—laws and the application thereof.<sup>26</sup> In short, the

<sup>19</sup> *Stanford*, 492 U.S. at 369 n.1.

<sup>20</sup> *Id.* (internal citations and quotations omitted).

<sup>21</sup> 536 U.S. 304 (2002).

<sup>22</sup> Brief for Petitioner at 43 n.46, *Atkins* (No. 00-8452), available in 2001 WL 1663817; Amicus Brief of the European Union, amicus curiae, at 4–18, *McCarver v. North Carolina*, 533 U.S. 975 (2001) (No. 00-8727), available in 2001 WL 648609 (resubmitted in *Atkins*); Brief of Diplomats Morton Abramowitz et al., amici curiae, at 7–8, *McCarver* (No. 00-8727), available in 2001 WL 648609 (resubmitted in *Atkins*).

<sup>23</sup> *Atkins*, 536 U.S. at 316 & n.21.

<sup>24</sup> Of course, a binding treaty addressing the death penalty could assist in determining a federal consensus. See *Thompson v. Knight*, 487 U.S. 815, 851–52 (1988) (O'Connor, J., concurring). But there are currently no binding international laws reflecting a federal consensus on the death penalty, other than the consensus to use treaty reservations to disarm those laws of relevance. See, e.g., U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 CONG. REC. 8068 (1992).

<sup>25</sup> *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989).

<sup>26</sup> *Id.*; see also *id.* at 382 (O'Connor, J., concurring).

international countermajoritarian difficulty severely limits the degree of respect that can be shown to the global opinions of humanity when doing so shows disrespect to our own national experience.<sup>27</sup>

Constitutional decision making is not a scatter diagram in which all data points, domestic and global, are used to plot a constitutional line of best fit.<sup>28</sup> Reliance on global standards of decency undermines the sovereign limitations inherent in federalist restraints, limitations born out of respect for the reserved powers of the states to assess which punishments are appropriate for which crimes.<sup>29</sup> To the extent that international majoritarians argue that global standards are relevant notwithstanding their inconsistency with American standards, this view reflects far less respect for federalism concerns than required by the Court.<sup>30</sup>

## II. ELEVATED USE OF INTERNATIONAL SOURCES

The second misuse of international sources occurs when treaties are elevated to a status they do not enjoy under our federal system. The entire edifice of constitutional law rests on the foundation that the acts of the political branches are subject to and limited by the Constitution. Proposing that international law be part of the canon of constitutional material improperly empowers the political branches to create source materials—treaties and executive agreements—that serve as interpretive inputs to the process of constitutional decision making.

Let us posit for a moment the proposition that a federal statute should be used to interpret the Constitution. For example, should the Equal Protection Clause be read in light of the Americans with Disabilities Act?<sup>31</sup> The problems inherent in such an approach should be

<sup>27</sup> See John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143, 146–58 (1986) (reviewing historical practice of capital punishment in the United States); James H. Wyman, *Vengeance Is Whose? The Death Penalty and Cultural Relativism in International Law*, 6 J. TRANSNAT'L L. & POL'Y 543, 553 (1997) (discussing support for death penalty).

<sup>28</sup> Cf. Harold Hongju Koh, *Paying Decent Respect to International Tribunal Rulings*, 96 ASIL PROC. 45, 53 (2002) (“cruel and unusual” should be measured by evolving standards that take into account not just the practice of Texas but also the practice of Kyrgyzstan).

<sup>29</sup> *Gregg v. Georgia*, 428 U.S. 153, 176 (1976) (“The deference we owe to the decisions of the state legislatures under our federal system is enhanced where the specification of punishments is concerned, for these are peculiarly questions of legislative policy.”) (internal citations and quotations omitted).

<sup>30</sup> Koh rejects my notion of an international countermajoritarian difficulty on two bases. First, he contends that my argument “assumes that the job of judges construing the Constitution is to give expression to majoritarian impulses, when their long-settled role . . . has been to apply enduring principles of law to evolving circumstance without regard to the will of shifting democratic majorities.” Koh, *supra* note 11, at 55. This argument, which sounds surprisingly similar to Justice Scalia’s concerns about a living Constitution, see, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System*, in ANTONIN SCALIA, A MATTER OF INTERPRETATION 45 (1997), fundamentally undercuts his central thesis. If judges should construe the Constitution on the basis of “enduring principles of law” without regard to shifting democratic majority whim, then would this not also condemn reliance on international majoritarian values? If reference to majoritarian values is never appropriate in constitutional adjudication, then on what basis should developing international norms ever be relevant to understanding constitutional principles such as evolving standards of decency or due process of law? As discussed above, note 13 *supra*, I do not assume the relevance of majoritarian values for all constitutional provisions. I simply recognize the Court’s application of them in certain contexts—which happen to be those contexts where reference to international sources may be of the greatest potential utility—and accept the limitations that a domestic majoritarian paradigm imposes.

Second, Koh argues that transnational legal process is not necessarily antidemocratic because it encompasses the dialogic process by which academics, nongovernmental organizations, judges, executive officials, Congress, and foreign governments interact to make, interpret, internalize, and enforce rules of transnational law. Koh, *supra* note 11, at 45. I fully agree that transnational legal process is not necessarily antidemocratic. But if international majoritarians wish to avoid charges that they are being antidemocratic, they should seek abolition of the death penalty through the direct approach of shaping the opinions of the public and the political branches. If such attempts fail, they do so as an appropriate reflection of the primacy of democratic sovereignty over international majoritarian values. But they need not fail and one should not assume they will fail. The evolution of the national consensus with respect to executing the mentally retarded is evidence of its potential for success. A similar evolution could occur regarding the juvenile death penalty. But it is facile to suggest that someone who counsels channeling the discussion of international values away from the constitutional forum and into other fora bears any resemblance to the parochial nationalist Koh describes who scratches his head in benighted puzzlement at how strangely things are done in other countries. *Id.* at 57.

<sup>31</sup> 42 U.S.C. §12101 (2000).

apparent. The Supremacy Clause defines the hierarchy of federal laws and delineates the relationship between statutes and the U.S. Constitution. Federal statutes are subject to constitutional guarantees and are not interpretive source material to be used in defining those guarantees.<sup>32</sup>

If so, it should be equally clear that international treaties are on no surer footing than federal statutes.<sup>33</sup> Assuming the United States were to ratify, say, the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities,<sup>34</sup> which is based in large part on the Americans with Disabilities Act,<sup>35</sup> no doubt some advocates would contend that the Equal Protection Clause should be read in light of that and similar disability treaties. As a result, a constitutional provision would be read in light of a treaty whose provisions were inspired by and are subject to override by a federal statute. It would be completely anomalous to say that the Court should use a treaty to interpret the Constitution when such an agreement can be overridden, or for that matter implemented, by a statute that the Court would not use to interpret that instrument.<sup>36</sup> But advocates contend just that in suggesting treaties and executive agreements as an interpretive source for the Constitution.

Using international acts of the political branches—international treaties and executive agreements—to interpret the Constitution has the potential to elevate impermissibly their constitutionally circumscribed authority. As the Court put it in *City of Boerne*, our political branches do “not enforce a constitutional right by changing what the right is.”<sup>37</sup> If Congress or the executive has the power, in whole or in part, to “interpret the Constitution” and enact laws that “define its own powers by altering [a constitutional provision’s] meaning, no longer would the Constitution be superior, paramount law, unchangeable by ordinary means.”<sup>38</sup> It follows that if Congress cannot define the contours of a constitutional guarantee by statutory enactment, neither can it do so directly through the treaty-making power, or indirectly through judicial interpretation of that guarantee in light of treaties entered into pursuant to that power.<sup>39</sup>

Given this backdrop, Justice Ruth Bader Ginsburg’s concurring opinion in *Grutter v. Bollinger* is perplexing. Justice Ginsburg, joined by Justice Breyer, noted that

[t]he Court’s observation that race-conscious programs must have a logical end point accords with the international understanding of the office of affirmative action. The International Convention on the Elimination of All Forms of Racial Discrimination . . . endorses

<sup>32</sup> There are, of course, instances in which statutes are coextensive with or embody constitutional restraints, such that precedents from one context may be applied in another. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 286–87 (1978) (Powell, J.); *Reina v. United States*, 364 U.S. 507, 514 (1960); *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 413 n.7 (1984).

<sup>33</sup> *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“[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.”).

<sup>34</sup> Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, OAS Doc. AG/RES, 1608 (XXIX–0199) (June 7, 1999), available at <<http://www.oas.org/juridico/english/ga-res99/eres1608.htm>>.

<sup>35</sup> Rodrigo Jiménez, *The Americans with Disabilities Act and Its Impact on International and Latin American Law*, 52 ALA. L. REV. 419, 420 (2000); see also Theresia Degener, *International Disability Law—A New Legal Subject on the Rise: The Interregional Experts’ Meeting in Hong Kong, December 13–17, 1999*, 18 BERKELEY J. INT’L L. 180, 184 (2000).

<sup>36</sup> Cf. *Reid v. Covert*, 354 U.S. 1, 18 (1957) (“It would be completely anomalous to say that the Court should use a treaty to interpret the Constitution when such an agreement can be overridden by a statute that must conform to that instrument.”).

<sup>37</sup> *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

<sup>38</sup> *Id.* at 528–29 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

<sup>39</sup> To take the *City of Boerne* example, if the Religious Freedom Restoration Act is an impermissible attempt by Congress to define a constitutional guarantee, a treaty that achieved the same result would likewise be impermissible. See Curtis A. Bradley, Breard, *Our Dualist Conception, and the Internationalist Conception*, 51 STAN. L. REV. 529, 555 (1999). But see Gerald L. Neuman, *Global Dimensions of RFRA*, 14 CONST. COMMENT. 33, 42–46, 53 (1997); Gerald L. Neuman, *The Nationalization of Civil Liberties, Revisited*, 99 COLUM. L. REV. 1630, 1645 & n.101 (1999). An indirect approach of interpreting the guarantee in light of a non-self-executing treaty poses a lesser variation of that same threat.



special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.<sup>40</sup>

But it is far from clear what relevance that treaty has to the constitutional analysis if one takes seriously the Supremacy Clause and the Senate's treaty ratification confirming that supremacy.<sup>41</sup> This hierarchy mandates that the treaty be subject to constitutional constraints and not serve as an interpretive source of those constraints.

This misuse is also evident when it is argued, as Justice Harry Blackmun has, that the Court has relied on international law in other contexts and that "[u]nder the principles set forth in *The Paquete Habana*, interpretation of the Eighth Amendment, no less than interpretations of treaties and statutes, should be informed by a decent respect for the global opinions of mankind."<sup>42</sup> Of course international law is part of our law.<sup>43</sup> But it is not our protean law. The status of international law remains subconstitutional, and cannot be changed to ignore the hierarchy that renders all of our laws subject to constitutional constraints. The Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty. "Exercis[ing] power under an international agreement without observing constitutional prohibitions" would, in effect, permit the executive and the Senate to amend the Constitution "in a manner not sanctioned by Article V."<sup>44</sup> Likewise, attempts to construe the Constitution in light of Executive and Senate action embodied in contemporary treaties grant the political branches a role not envisioned by the framers under the Supremacy Clause.

I do not mean to overdraw the point. It is certainly arguable that international laws themselves are not being elevated to an improper status within the federalist hierarchy but, rather, that it is the value judgments underlying those laws that are of constitutional import. Just as other materials in the domestic context reflect certain fundamental values that may be relevant to the constitutional analysis, so, too, are certain values reflected on the international and foreign plane. To be sure, traditional sources of constitutional authority are value infused, such that appeals to normative arguments are useful to understand text, framers' intent, judicial precedent, or constitutional theory.<sup>45</sup> But the values reflected in contemporary international laws are independent of those other interpretive categories. One does not analyze contemporary human rights treaties or the current practice of nations to understand our Constitution's text, structure, or history.<sup>46</sup> At most under this approach, then, international sources offer delocalized, independent moral and political arguments that serve as an index

<sup>40</sup> *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (Ginsburg, J., concurring) (internal citations and quotations omitted).

<sup>41</sup> A proviso to the ratification stipulates that "[n]othing in this Convention requires or authorizes legislation, or other action, . . . prohibited by the Constitution of the United States as interpreted by the United States." U.S. Reservations, Understandings and Declarations, International Convention on the Elimination of All Forms of Racial Discrimination, 140 CONG. REC. 14,326 (1994).

<sup>42</sup> Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 48 (1994); see also Koh, *supra* note 12, at 1103.

<sup>43</sup> Under *The Paquete Habana*, reference to and reliance upon international law are appropriate and frequently occur when rights depending upon it are duly presented for their determination. *The Paquete Habana*, 175 U.S. 677, 700 (1900); see generally Alford, *supra* note 11, at 746–59. While there are subjects of constitutional law that likely anticipate recourse to international law for resolution, see citations at note 10 *supra*, the aspirational individual rights provisions of the Constitution are not among them.

<sup>44</sup> *Reid v. Covert*, 354 U.S. 1, 16 (1957); see also *Boos v. Barry*, 485 U.S. 312, 324 (1988) ("[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." (quoting *Reid v. Covert*, 354 U.S. 1, 16 (1957))).

<sup>45</sup> Richard H. Fallon Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1262–63 (1987).

<sup>46</sup> However, the Court has on various occasions engaged in what one may call "historical matrix comparativism," referencing historical international and foreign materials to understand the context of our Constitution's text and structure. See, e.g., *Loving v. United States*, 517 U.S. 748, 759–66 (1996); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988); *Culombe v. Connecticut*, 367 U.S. 568, 583–84 (1961); *Boyd v. United States*, 116 U.S. 616, 624–25 (1886); *Kilbourn v. Thompson*, 103 U.S. 168, 183–89 (1881); see also David Fontana, *Refined Comparativism in International Law*, 49 UCLA L. REV. 539, 550–51 (2001) (discussing "genealogical comparativism").

of the correctness of competing claims about essentially contestable concepts embodied in aspirational provisions of the Constitution.<sup>47</sup> With such “value comparativism” the interpretive materials are not used in the constitutional analysis as international *law* binding and operative in the United States, but simply as yet another comparative reference point, reflecting a “formal expression of society’s agreement on basic principles.”<sup>48</sup> But if international sources simply aid constitutional value arguments, they deserve a status at the bottom of the hierarchy of the interpretive canon,<sup>49</sup> below domestic value judgments reflecting our own national experience,<sup>50</sup> and on a par with other independent sources of normative value judgments, legal and perhaps even extralegal.<sup>51</sup> In short, if international sources are “not irrelevant”<sup>52</sup> to the constitutional inquiry, they are emphatically less relevant than other hermeneutical tools.

### III. HAPHAZARD USE OF INTERNATIONAL SOURCES

The third misuse of international sources occurs when the Court references them haphazardly, relying on only those materials that are readily at its fingertips. In the international legal arena, where the Court has little or no expertise, the Court is unduly susceptible to selective and incomplete presentations of the true state of international and foreign affairs. If the suggestion is that international sources may “cast an empirical light on the consequences of different solutions to a common legal problem,”<sup>53</sup> it is incumbent upon the Court to engage in empirical rather than haphazard comparativism. It is far from evident that this is what the Court is doing.

Rather than recognize the illegitimacy of haphazard comparativism, the tendency is to ignore or justify it. One noted scholar, Mark Tushnet, has co-opted a clever term—“bricolage”—to describe and justify the haphazard grasping at comparative materials. For Tushnet, interpretive bricolage is essentially a random, playful, and perhaps even unconscious process of reaching into a grab bag and using the first thing that happens to fit the constitutional problem at hand.<sup>54</sup> Unlike the engineer, who rationally sorts through competing materials to assemble a constitutionally coherent design, the interpretive “bricoleur” co-opts and transforms existing legal material to address a constitutional problem.<sup>55</sup> But, of course, for a Supreme Court justice uninitiated in the details of international and comparative law, the tools that will be “at hand” will be the ones made available to him or her by international legal experts.<sup>56</sup>

<sup>47</sup> Fallon, *supra* note 45, at 1263. Illustrative of this index are references to “English-speaking peoples” in order to understand the concept of “implicit in ordered liberty.” See *Ingraham v. Wright*, 430 U.S. 651, 673 n.42 (1977); *Foster v. California*, 394 U.S. 440, 449–50 (1969) (Black, J., dissenting); *Rochin v. California*, 342 U.S. 165, 169 (1952); *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949); see also *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989); *Alford*, *supra* note 17. Such “value comparativism” appears to resemble Gerald Neuman’s argument concerning the “suprapositive” use of international law. Neuman, *supra* note 10, at 84, 87–88.

<sup>48</sup> Sandra Day O’Connor, Keynote Address, 96 ASIL PROC. 348, 351 (2002).

<sup>49</sup> Fallon, *supra* note 45, at 1194, 1244–46, 1264–65 (value arguments below arguments based on text, founders’ intent, theory, and judicial precedent).

<sup>50</sup> See *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (the “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures”); *Washington v. Glucksberg*, 521 U.S. 702, 711 (1997) (“the primary and most reliable indication of a national consensus is the pattern of enacted [state] laws”); see also text *supra* at notes 12–27.

<sup>51</sup> See, e.g., *Lawrence v. Texas*, 123 S.Ct. 2472, 2480–83 (2003) (citing Richard Posner, Charles Fried, the American Law Institute, the British Parliament, and the European Court of Human Rights as critical of or inconsistent with *Bowers*); *Atkins*, 536 U.S. at 316 n.21 (giving weight to the opinions of the American Psychological Association, religious communities, polling data, and the global community to determine “broader consensus”). For a useful discussion as to whether legal sources should have greater weight in value comparativism than extralegal sources, compare Neuman, *supra* note 10, at 88, with Ramsey, *supra* note 10, at 74–75.

<sup>52</sup> *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982).

<sup>53</sup> *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

<sup>54</sup> Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1237–38, 1285–1306 (1999).

<sup>55</sup> *Id.* at 1285–87, 1301.

<sup>56</sup> Justice Breyer has openly admitted that neither he nor his clerks can easily find relevant comparative material and that he must rely on international legal experts to find, analyze, and refer the Court to the relevant material. Breyer, *supra* note 1, at 267–68.

Thus, expert advocates will by design include in the international grab bag of the judicial bricoleur only those international objects that promote a particular result. Under this theory, it is not that the Court is results oriented or utilitarian; it is that the Court fundamentally lacks the institutional capacity to engage in proper comparativism and unduly relies on advocacy at its peril.<sup>57</sup>

The recent decision in *Lawrence v. Texas* is illustrative.<sup>58</sup> The Supreme Court argued, in overruling *Bowers v. Hardwick*, that even prior to *Bowers* there was an “emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>59</sup> The Court in particular criticized *Bowers*’s sweeping references to the history of Western civilization for failing to take account of “other authorities” that point in the opposite direction, specifically the landmark decision of the European Court of Human Rights in *Dudgeon v. United Kingdom*, which disapproved legislation in Britain outlawing sodomy.<sup>60</sup> *Dudgeon*, the Court reasoned, is “[a]uthoritative in all countries that are members of the Council of Europe” and is “at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.”<sup>61</sup>

A bricolage analysis would suggest that the Court identified an “emerging awareness” and used what was at hand to support that proposition. An amicus brief filed by human rights organizations in *Lawrence* was readily available and highlighted those instances in which sodomy laws had been outlawed, most notably in the *Dudgeon* case.<sup>62</sup> The brief, which the Court expressly relied upon,<sup>63</sup> argued that the “United States is not the world’s only civilized society” and that it “would be folly to ignore foreign practice and precedent at a time when courts across the world are increasingly caught up in a process of cross-fertilization among legal systems.”<sup>64</sup> The clear image the Court was to draw from the brief was that the United States was out of step with the rest of the civilized world in maintaining sodomy laws and otherwise discriminating against gays and lesbians.<sup>65</sup>

But what may have been lost on the Court is that these same human rights organizations paint a very different picture in their human rights reports of the moral and legal opprobrium that continues to attach to homosexual conduct throughout the world. In its 2002 *World Report*, Human Rights Watch states that “[i]n virtually every country in the world people suffered from *de jure* and *de facto* discrimination based on their actual or perceived sexual orientation.”<sup>66</sup> Amnesty International reports that “[i]ndividuals in all continents and cultures are at risk” of discrimination based on sexual orientation and “many governments at the U.N. have vigorously contested any attempts to address the human rights of lesbian, gay, bisexual and

<sup>57</sup> Cf. Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952, 957 (2003) (advising hesitancy in constitutional interpretation given limited knowledge bases of Supreme Court justices).

<sup>58</sup> *Lawrence v. Texas*, 123 S.Ct. 2472 (2003). *Lawrence* is by no means the only example. See, e.g., *Muller v. Oregon*, 208 U.S. 412, 419 & n.1 (1908); Fontana, *supra* note 46, at 585.

<sup>59</sup> *Lawrence*, 123 S.Ct. at 2480. For *Bowers v. Hardwick*, see 478 U.S. 186 (1986).

<sup>60</sup> *Lawrence*, 123 S.Ct. at 2481.

<sup>61</sup> *Id.*

<sup>62</sup> Brief of Mary Robinson et al., amici curiae, *Lawrence*, 123 S.Ct. 2472 (2003) (No. 02-102), available in 2003 WL 164151 [hereinafter Brief].

<sup>63</sup> *Lawrence*, 123 S.Ct. at 2483.

<sup>64</sup> Brief, *supra* note 62, at \*29–30.

<sup>65</sup> *Id.* at \*9 (“This Court’s understanding of facts should be informed by the parallel understandings of peer nations. These precedents demonstrate that the *Bowers* Court misperceived key facts about same-sex sexual conduct.”); at \*18 (“[I]nternational and foreign law recognize sodomy laws as impermissible discrimination based on sexual orientation, which violates fundamental global principles of equal treatment.”); at \*21 (“Reflecting an emerging global movement, international treaty bodies and foreign court decisions have correctly viewed same-sex sodomy laws as impermissible discrimination.”); at \*23 (“These rulings regarding sodomy laws stand atop a much larger global human rights trend calling for equal treatment of persons without regard to sexual orientation.”).

<sup>66</sup> HUMAN RIGHTS WATCH, *Lesbian, Gay, Bisexual, and Transgender Rights*, in WORLD REPORT 2002 (2002), available at <<http://www.hrw.org/wr2k2/lgbt.html>>.

transgender people.<sup>67</sup> One definitive source not cited in any amicus brief paints a bleak picture, indicating that there is “hardly any support for gay and lesbian rights” among the population in 144 countries, that the treatment of homosexuals is far worse in the former British colonies than elsewhere, that a majority in only eleven countries favors equal rights for homosexuals, that only six countries legally protect gays and lesbians against discrimination, and that 74 of the 172 countries surveyed outlaw homosexuality.<sup>68</sup> In short, while the Court is no doubt correct that *Bowers* has been rejected elsewhere in the world, these and similar reports also make clear that the reasoning and holding in *Bowers* has *not* been rejected in much of the civilized world.<sup>69</sup>

Haphazard use of comparative material is of substantive as well as procedural import. Had the Court appreciated just how contested this issue is at home and abroad, it is at least plausible that it would have taken the more restrained approach of all nine Justices in *Glucksberg* and entrusted the matter to the democratic laboratory.<sup>70</sup>

The great risk of bricolage, as has been suggested, is posed by the experts who selectively place the objects in the bricoleur’s grab bag.<sup>71</sup> Interpretive bricolage predicts that the Court will haphazardly use international sources that are at hand, (perhaps unwittingly) eschewing a systematic, empirical approach that comprehensively examines all “relevant” international sources. As illustrated by *Lawrence*, the Court used only those international and foreign tools that were within its ready grasp. In a subject area where the Supreme Court is woefully lacking in basic knowledge,<sup>72</sup> the sources at its ready reference were materials that international legal experts selectively chose to make available to it.<sup>73</sup>

<sup>67</sup> Amnesty International Press Release, U.N. Commission on Human Rights: Universality Under Threat over Sexual Orientation Resolution (Apr. 22, 2003), at <<http://web.amnesty.org/library/eng-347/index>>.

<sup>68</sup> Rob Tielman & Hans Hammelburg, *World Survey on the Social and Legal Position of Gays and Lesbians, in THE THIRD PINK BOOK: A GLOBAL VIEW OF LESBIAN AND GAY LIBERATION AND OPPRESSION* 250–51 (1993); see also International Gay and Lesbian Human Rights Commission, *Sodomy Fact Sheet: A Global Overview*, at <<http://www.iglhrc.org/files/iglhrc/reports/sodomy.pdf>> (visited June 26, 2003) (identifying over 80 countries that currently have enforceable sodomy laws).

<sup>69</sup> Unless, of course, one is willing to contend that over 74 countries in five continents are uncivilized. Even leading academics who strongly oppose sodomy laws have warned against undue reliance on the “peculiarly European interpretation of human rights standards” reflected in *Dudgeon*. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 384 n.496 (1997). Noting that there were “74 countries around the world [that] still criminalized homosexual conduct between consenting adults,” Professors Helfer and Slaughter argue that if one were to “rely unthinkingly on European precedents concerning homosexuality,” one could “well be accused of imposing a specialized view of human rights throughout the planet.” *Id.* Indeed, Justice Scalia’s dissent in *Lawrence* makes just such an accusation. He challenges the notion of an emerging awareness as “factually false,” accusing the majority of “ignoring . . . the many countries that have retained criminal prohibitions on sodomy.” *Lawrence*, 123 S.Ct. at 2495 (Scalia, J., dissenting).

<sup>70</sup> *Washington v. Glucksberg*, 521 U.S. 702, 718–19 & n.16 (Rehnquist, C.J., joined by O’Connor, Scalia, Kennedy, Thomas, J.J.); *id.* at 737 (O’Connor, J., joined by Ginsburg, Breyer, J.J.); *id.* at 764, 775–87 (Souter, J., concurring); see also RICHARD H. FALLON, *IMPLEMENTING THE CONSTITUTION* 68 (2001) (“For the concurring Justices as much as for the majority [in *Glucksberg*], it mattered enormously that public debate about matters of death and dying was currently under way.”). More likely, the Court recognized the checkered treatment of homosexuals at home and abroad but was attempting—as in *Roe* and *Brown*—to lead the nation (and perhaps the world) in a particular direction, calling upon “the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.” *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 867 (1992).

<sup>71</sup> A possible antidote to such selective advocacy is judicial education about international and foreign law, O’Connor, *supra* note 48, at 352, and effective advocacy from all perspectives. Breyer, *supra* note 1, at 267 (discussing “chicken and egg problem” of comparative advocacy). Even then, however, independent comparative analysis is remarkably difficult. *Glucksberg*, 521 U.S. at 787 (Souter, J., concurring) (questioning whether independent investigation of foreign country’s legal administration can be undertaken by American litigation). Having worked for an international tribunal that comprehensively analyzed inheritance laws in numerous languages in dozens of countries in order to resolve Holocaust claims against Swiss banks, I can personally attest to the difficulties associated with a truly systematic comparative analysis. See Roger P. Alford, *The Claims Resolution Tribunal and Holocaust Claims Against Swiss Banks*, 20 *BERKELEY J. INT’L L.* 250, 269–70 (2002).

<sup>72</sup> O’Connor, *supra* note 48, at 351 (“The fact is that international and foreign law are being raised in our courts more often and in more areas than our courts have the knowledge and experience to deal with. There is a great need for expanded knowledge in the field, and the need is now.”).

<sup>73</sup> Of the more than thirty briefs filed in *Lawrence*, only one amicus brief addressed *Dudgeon* and only three briefs addressed international law, all on the side of petitioners. Brief, *supra* note 62; Brief of American Bar Association

In short, the Court has long been criticized for engaging in “history lite,”<sup>74</sup> haphazardly drawing on the wisdom of the past. It now risks embracing “comparativism lite,” haphazardly drawing on the wisdom of the present.

#### IV. SELECTIVE USE OF INTERNATIONAL SOURCES

A final misuse occurs when international and foreign materials are used selectively. In a country that “considers itself the world’s foremost protector of civil liberties,”<sup>75</sup> what is perhaps most surprising about the enthusiasm for comparativism is the assumption that it will enhance rather than diminish basic human rights in this country. This assumption is either blind to our visionary leadership,<sup>76</sup> deaf to the discord in the international instruments,<sup>77</sup> or selectively mute in giving voice to only certain topics for comparison.

A variety of constitutional liberties are ripe for comparison—property rights, establishment of religion, abortion, procedural due process, free speech—but query whether these subjects are on the agenda for comparative analysis. One may surmise that they are not, and the reason may well be that selective comparativism promotes the goal, to quote Justice Oliver Wendell Holmes, of having the Constitution become “the partisan of a particular set of ethical . . . opinions, which by no means are held *semper ubique et ab omnibus*.”<sup>78</sup> Put simply, international sources are proposed for comparison only if they are viewed as rights enhancing.<sup>79</sup> To the extent that a comparative analysis supports government interests in lessening civil liberties—or at least certain civil liberties—international sources will likely be ignored.

Although by no means the best example, one obvious instance in which comparative analysis could alter substantive due process jurisprudence in this country relates to abortion.<sup>80</sup> Since abortion was constitutionally guaranteed by *Roe v. Wade* in 1973, the Convention on the Elimination of All Forms of Discrimination Against Women has been ratified by over 170 states without any provision for reproductive rights,<sup>81</sup> and many countries have reaffirmed severe government restrictions on such rights, with only a minority of countries permitting abortion on demand.<sup>82</sup> As Mary Ann Glendon has put it:

as amicus curiae, *Lawrence* (No. 02-102), available in 2003 WL 164108; Amicus Curiae Brief of Human Rights Campaign et al., *Lawrence* (No. 02-102), available in 2003 WL 152347.

<sup>74</sup> See, e.g., Martin Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

<sup>75</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 285 (1990) (Brennan, J., dissenting).

<sup>76</sup> Drew Days, American Constitution Society Supreme Court Roundup (July 1, 2003), at <<http://www.acslaw.org/pdf/SCOTUStrns.pdf>> (describing the Supreme Court as no longer the world leader in protecting civil liberties).

<sup>77</sup> See Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, 14 CARDOZO L. REV. 533, 542–45 (1993) (discussing defects of human rights instruments).

<sup>78</sup> *Otis v. Parker*, 187 U.S. 606, 609 (1903).

<sup>79</sup> For example, although Justice Breyer denies that comparativism tries “to move the law in a particular substantive direction,” he defends its use in order to learn what “others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups.” Breyer, *supra* note 1, at 265; cf. *Lawrence*, 123 S.Ct. at 2483 (no showing that government interest in limiting rights accepted elsewhere is more legitimate here).

<sup>80</sup> For a detailed comparison of abortion laws, see VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 1–143, 173–80 (1999).

<sup>81</sup> The Department of State has described the Convention as “abortion neutral” and the Senate Committee on Foreign Relations has expressed the understanding that “nothing in this Convention shall be construed to reflect or create any right to abortion and in no case should abortion be promoted as a method of family planning.” S. REP. NO. 103–38, at 52 (1994); Anne F. Bayefsky, *CEDAW: Threat to, or Enhancement of, Human Rights?* 94 ASIL PROC. 197, 202 (2000); Nora O’Connell & Ritu Sharma, *Treaty for the Rights of Women Deserves Full U.S. Support*, HUM. RTS., Winter 2003, at 22.

<sup>82</sup> Population and Human Rights: Proceedings of the Expert Group Meeting on Population and Human Rights, Geneva, 3–6 April 1989, UN ESCOR, at 45–46, UN Doc. ST/ESA/SER.R/107 (1990) (only 18 of 82 countries surveyed permit abortion on request); Jill M. Bracken, *Respecting Human Rights in Population Policies: An International Customary Right to Reproductive Choice*, 6 IND. INT’L & COMP. L. REV. 197, 225–26 (1995); Sarah A. Rumage, *Resisting the West: The Clinton Administration’s Promotion of Abortion at the 1994 Cairo Conference and the Strength of the Islamic Response*, 27 CAL. W. INT’L L.J. 1, 77 (1996) (noting that almost every Latin American country has a right-to-life charter; Ireland and Germany have similar constitutional provisions; and other states, including Muslim states, have strong legal and cultural prohibitions).

From the comparative point of view abortion policy in the United States appears singular, not only because it requires no protection of unborn life at any stage in pregnancy, in contrast to all the other countries with which we customarily compare ourselves, but also because our abortion policy was not worked out in the give-and-take of the legislative process. . . . Nowhere have the courts gone so far as has the United States Supreme Court in precluding further statutory developments.<sup>83</sup>

Paraphrasing *Lawrence*, one could argue that “to the extent [*Roe*] relied on values we share with a wider civilization, it should be noted that the reasoning and holding in [*Roe*] has been rejected elsewhere.”<sup>84</sup> But the Court has not viewed<sup>85</sup> and likely will not view international sources as “emphatically relevant”<sup>86</sup> in determining the scope of reproductive freedoms in this country.

Other examples of the selective use of international sources abound. The Second Amendment, it is argued, should be curtailed because we stand alone in the modern world in the extent that we grant the right to bear arms.<sup>87</sup> But few would suggest that free speech rights should be curtailed because the United States is “alone among the major common-law jurisdictions in its complete tolerance of [hate] speech.”<sup>88</sup> The United States grants less protection against regulatory takings under the Fifth Amendment than property owners enjoy under NAFTA,<sup>89</sup> but we do not hear advocates contending that we should therefore place a lesser value on government interests in protecting the environment. Nor are there demands to erode the First Amendment prohibition against the establishment of religion by taking into consideration “[i]nternational law and many [foreign] laws that regard the material and moral cooperation of church and state as conducive, and sometimes essential, to the achievement of religious liberty.”<sup>90</sup> The American approach to personal jurisdiction is at odds with international law and practice,<sup>91</sup> but human rights advocates do not suggest that we should accordingly modify procedural due process jurisprudence to curtail “tag” or “doing business” jurisdiction over foreign defendants in human rights litigation.<sup>92</sup> Nor would these advocates deem it emphatically relevant in interpreting the Define and Punish Clause that we stand virtually alone in the world in creating a civil cause of action for human rights violations under the Alien Tort Claims Act.<sup>93</sup>

<sup>83</sup> MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 24–25 (1987); see also *id.* at 145–54 (detailed appendix of laws of various countries); Lynn D. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists*, 62 ALB. L. REV. 853, 868 (1999).

<sup>84</sup> *Lawrence*, 123 S.Ct. at 2483.

<sup>85</sup> MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 167–68 (1991) (noting that Court’s attention was invited to foreign decisions in *Webster*, and that as in *Bowers*, Court could have benefited from reflection on foreign decisions); see also *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C.J., concurring in part, dissenting in part).

<sup>86</sup> Breyer, *supra* note 1, at 265 (quoting Ginsburg & Merritt, *supra* note 1, at 282).

<sup>87</sup> Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 456 & n.202 (1999).

<sup>88</sup> Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2347–48 (1989).

<sup>89</sup> See Vicki Been & Joel Beauvais, *The Global Fifth Amendment? NAFTA’s Investment Protection and the Misguided Quest for an International “Regulatory Takings” Doctrine*, 78 N.Y.U. L. REV. 30, 59–87 (2003) (discussing the more expansive compensation protections of the North American Free Trade Agreement as compared to the Fifth Amendment); John D. Echeverria, *The Real Contract on America*, ENVTL. F., July–Aug. 2003, at 28, 35, available at <<http://www.law.georgetown.edu/gelpl/papers/realcontract.pdf>>; see also Alford, *supra* note 11, at 786–88.

<sup>90</sup> John Witte Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 440 (1996).

<sup>91</sup> Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgment Convention be Stalled?* 52 DEPAUL L. REV. 319, 328–31, 338–45 (2002); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §421 cmt. e (1987) (“tag” jurisdiction unacceptable under international law).

<sup>92</sup> Silberman, *supra* note 91, at 323–24, 345; see also Beth van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT’L L.J. 141 (2001); cf. Andrew L. Strauss, *Where America Ends and the International Order Begins: Interpreting the Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments*, 61 ALB. L. REV. 1237 (1998).

<sup>93</sup> See Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L. 1, 17–34 (2002); Beth Stephens, *Federalism and Foreign Affairs: Congress’ Power to “Define and Punish . . . Offenses Against the Law of Nations,”* 42 WM. & MARY L. REV. 447, 483–525 (2000).

Selective utilization of international sources is perhaps expected of advocates. But if the Supreme Court takes liberties with the comparative material in order to promote only certain liberties, few will find its approach persuasive. If international and foreign sources are arrows in the quiver of constitutional interpretation, those arrows should pierce our constitutional jurisprudence to produce results that we celebrate and that we abhor. Put simply, if we are all comparativists now, the results will by no means herald a capacious enhancement of civil liberties in this country.<sup>94</sup> Such a prospect should give one pause before embarking on the project of using international sources to interpret the Constitution.

## INTERNATIONAL MATERIALS AND DOMESTIC RIGHTS: REFLECTIONS ON *ATKINS* AND *LAWRENCE*

By Michael D. Ramsey \*

In two recent cases—*Atkins v. Virginia* and *Lawrence v. Texas*—amicus briefs urged the U.S. Supreme Court to use international materials to expand the scope of domestic constitutional rights.<sup>1</sup> In a footnote in *Atkins* and three paragraphs in *Lawrence*, the Court may have signaled a willingness to listen.<sup>2</sup> Some applaud the beginning of a positive trend. Others—notably Justice Antonin Scalia in dissent in the two cases—condemn the entire project as illegitimate.<sup>3</sup>

Rather than seeking an immediate answer to the question whether international materials should be determinative of domestic rights, this essay makes an indirect approach by asking: if we are to undertake a serious project of using international materials in this way, what would that project look like? Identifying the nature of the project may suggest whether it is the sort of thing we want to undertake, and what the scope of its impact is likely to be.

The most trenchant critique of this use of international materials is that it serves as mere cover for the expansion of selected rights favored by domestic advocacy groups, for reasons having nothing to do with anything international. This suggestion of opportunistic advocacy can be resisted only by developing a rigorous discipline for the use of international materials. After a brief review of recent developments, this essay suggests four guidelines for developing such a principled approach. First, there must be a neutral theory as to *which* international

<sup>94</sup> See, e.g., *Dred Scott v. Sandford*, 60 U.S. 393, 410 (1856) (although “the general words” in the Declaration of Independence appear to “embrace the whole human family . . . the men who framed this declaration . . . knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery”); *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893) (due process claim denied; international law justifies exclusion of aliens or admission on such conditions as the sovereign may see fit to prescribe); *Wolf v. Colorado*, 338 U.S. 25, 29 (1949) (questioning *Weeks v. United States* exclusionary rule given that “most of the English-speaking world does not treat this remedy as an essential ingredient of the right”).

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<sup>1</sup> Brief of the European Union, amicus curiae, *McCarver v. North Carolina*, 533 U.S. 975 (2001) (No. 00-8727), available in 2001 WL 648609 (resubmitted in *Atkins*) [hereinafter EU Brief]; Brief of Diplomats Morton Abramowitz et al., amici curiae, *McCarver* (No. 00-8727), available in 2001 WL 648607 (resubmitted in *Atkins*) [hereinafter Abramowitz Brief]; Brief of Mary Robinson et al., amici curiae, *Lawrence*, 123 S.Ct. 2472 (2003) (No. 02-102), available in 2003 WL 164151 [hereinafter Robinson Brief]; see also Brief of the American Bar Association as amicus curiae at 24 n.15, *Lawrence* (No. 02-102), available in 2003 WL 164108 (referring to international materials in a footnote).

<sup>2</sup> *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *Lawrence v. Texas*, 123 S.Ct. 2472, 2483 (2003).

<sup>3</sup> *Lawrence*, 123 S.Ct. at 2494–95 (Scalia, J., dissenting); *Atkins*, 536 U.S. at 347–48 (Scalia, J., dissenting); see also *id.* at 324–25 (Rehnquist, C.J., dissenting) (“I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court’s ultimate determination.”); *Foster v. Florida*, 537 U.S. 990, 990 n.\* (2002) (Thomas, J., concurring) (“[T]his Court . . . should not impose foreign moods, fads, or fashions on Americans.”).