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SYMPOSIUM

International Law and Rehnquist-Era Reversals

DIANE MARIE AMANN*

In its waning Terms, the Rehnquist Court held, in *Lawrence v. Texas*, that due process bars criminal prosecution of same-sex intimacy and, in *Atkins v. Virginia* and *Roper v. Simmons*, that it is cruel and unusual to execute mentally retarded persons or juveniles.[1] Each judgment overruled a precedent set earlier in the tenure of this Court's eponymous member.[2] These reversals shared another trait as well, for in each case Justices consulted international law as an aid to construing the U.S. Constitution. This Article analyzes that phenomenon. It first sets forth three Rehnquist-era precedents that granted states leeway to prosecute in these areas. Then turning to the reversals of those precedents, the Article traces the role that international law played in *Atkins*, *Lawrence*, and *Simmons*. It next examines the backlash these consultations spawned—not just academic criticism, but also congressional calls to impeach judges who look to international law. Critics tended to pretermit that in looking to external norms the Court was following a jurisprudential tradition. After marking that tradition, this Article gives the interpretive practice qualified approval. It is time for Justices both to articulate when it is appropriate to look to external sources and to set forth a framework for consultation. At a minimum, foreign jurisprudence ought to shed the light of experience on issues like those posed in the cases before the Court; it must arise out of a legal culture that shares with the United States a commitment to fundamental rights; and the way in which the jurisprudence influenced the Court must be set forth in a reasoned explanation. Whether a majority of the Court will pursue such a path remains uncertain, however, as the Rehnquist era ends and that of the new Chief Justice, John G. Roberts, Jr., begins.

I. REHNQUIST-ERA PRECEDENTS

The Rehnquist Court made its debut on the first Monday of October 1986, days after the swearing-in of William Hubbs Rehnquist as Chief Justice of the United States and of Antonin Scalia to replace him as an Associate Justice of the

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1. Roper v. Simmons, 543 U.S. 551 (2005); Lawrence v. Texas, 539 U.S. 558 (2003); Atkins v. Virginia, 536 U.S. 304 (2002).

2. *See Simmons*, 543 U.S. at 574–75 (overruling the holding in *Stanford v. Kentucky*, 492 U.S. 361 (1989)); *Lawrence*, 539 U.S. at 578 (explicitly overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)); *Atkins*, 536 U.S. at 319–21 (ruling contrary to the holding in *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

Originally Published in Georgetown Law Journal
Vol. 94, pp 1319-1346, 2006

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U.S. Supreme Court.[3] Rehnquist, who had endured a summer-long campaign against his elevation, was confirmed despite a record thirty-three Senate "no" votes.[4] President Ronald Reagan hailed the transition as furthering "'the principle of judicial restraint'" and "'government by the people.'"[5] Observers across the political spectrum predicted that Rehnquist would help to move the Court to the right, toward a position of resistance to pleas either for recognition of constitutional rights or for expansion of the scope of rights already recognized. These predictions held in large part true for many of the nineteen Terms that ensued before Rehnquist succumbed to thyroid cancer on September 3, 2005.[6]

By 1986 the position of resistance already had won Court favor in the area of criminal justice; indeed, a bellwether had been sounded three months before Rehnquist took over as Chief. In *Bowers v. Hardwick*,[7] Justices were asked to turn back a bid for a declaratory judgment against a Georgia statute that made the act of sodomy a crime punishable by up to twenty years in prison.[8] Five members, among them then-Associate Justice Rehnquist, acceded, in a judgment that focused on the substantive component of the Due Process Clause.[9] "The issue presented," Justice Byron R. White's opinion for the Court reasoned, "is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that

3. *See* Stuart Taylor Jr., *Justices to Open 1986 Term Today Facing Key Issues*, N.Y. TIMES, Oct. 6, 1986, at A1; Stuart Taylor Jr., *Rehnquist and Scalia Take Their Places on Court*, N.Y. TIMES, Sept. 27, 1986, § 1, at 8 [hereinafter Taylor, *Places*].

4. Linda Greenhouse, *Senate, 65 to 33, Votes to Confirm Rehnquist as 16th Chief Justice*, N.Y. TIMES, Sept. 18, 1986, at A1 (writing that "Rehnquist received more negative votes than any other Justice who has been confirmed to the High Court," while "the debate . . . on Judge Scalia consumed barely five minutes" before his unanimous confirmation). The record was broken five years later, when Senators confirmed Clarence Thomas by a 52–48 margin. Ross K. Baker, *The Sitting Justices: How They Fared When Facing the Senate*, USA TODAY, Aug. 29, 2005, at 13A.

5. Taylor, *Places*, *supra* note 3 (quoting Reagan).

6. For a retrospective highlighting the Court's shift, see David G. Savage, *Chief Justice, 80, Led Court on a Conservative Path*, L.A. TIMES, Sept. 4, 2005, at A1. For commentaries that tempered discussion of this rightward movement by mentioning recent reversals, among them those examined in this Article, see Cliff Sloan, *A Limited Legacy*, WASH. POST, Sept. 5, 2005, at A31, and John Yoo, *A Revolution That Had Run its Course*, L.A. TIMES, Sept. 5, 2005, at B15.

7. 478 U.S. 186 (1986).

8. *Id.* at 188 n.1 (quoting GA. CODE ANN. § 16-6-2 (1984)). As written, the statute pertained even to heterosexual activity; the majority maintained, however, that only application of the statute to homosexual acts was at issue. *Id.* at 188 nn.1, 2. *But see id.* at 200–03 (Blackmun, J., dissenting) (stressing dual applicability of the statute); *id.* at 214–20 (Stevens, J., dissenting) (analyzing the statute in light of its prohibition on "all sodomy" and arguing that petitioner's suit ought to have survived a motion to dismiss).

9. *Id.* at 187–96 (majority opinion). *Bowers* involved the application of the Due Process Clause of the Fourteenth Amendment to the Constitution, which provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. IV; *see also* U.S. CONST. amend. V (containing a similar clause limiting actions of the federal government); *cf. Bowers*, 478 U.S. at 197 (Powell, J., concurring) (indicating that although due process did not protect against prosecution, had respondent been convicted, "a prison sentence for such conduct—certainly a sentence of long duration—would create a serious Eighth Amendment issue.").

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still make such conduct illegal and have done so for a very long time."[10] The majority answered its question in the negative.[11] A brief concurrence by Chief Justice Warren E. Burger underscored this conclusion. He found support for the majority's contention that "proscriptions against sodomy have very 'ancient roots'" in sources other than the domestic laws to which the majority pointed; in particular, he pointed to "Judeao-Christian moral and ethical standards," the Code of Justinian, and Blackstone's *Commentaries*.[12] The Constitution did not forbid Georgia to make same-sex intimacy a crime, Burger wrote, for the reason that "[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization."[13]

Rehnquist Court rulings respecting criminal justice likewise sustained states' requests for resistance to claims of rights. Rules designed to exclude tainted testimonial or physical evidence were relaxed, and proof of deliberate governmental action was entrenched as a prerequisite to constitutional remedy.[14] Of particular note for present purposes are two decisions issued on the same day in 1989, each of which examined the degree to which the Eighth Amendment's ban on cruel and unusual punishments[15] circumscribed governmental authority

10. *Bowers*, 478 U.S. at 190. This framing of the question drew considerable criticism from dissenters in *Bowers* and thereafter. *See id.* at 199 (Blackmun, J., dissenting) (asserting that "this case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'") (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)); Lawrence v. Texas, 539 U.S. 558, 567 (2003) (Kennedy, J.) (writing that the articulation of the issue in *Bowers* "discloses the Court's own failure to appreciate the extent of the liberty at stake"); Frank N. Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16, 29 (1988) (criticizing *Bowers* as a "classic example" of "instances where the majority and minority of the Court see the issue quite differently and, accordingly, march off in opposite directions without acknowledging the other position"); Richard Delgado & Jean Stefancic, *Scorn*, 35 WM. & MARY L. REV. 1061, 1080–81 (1994) (critiquing the framing of the issue in *Bowers*); Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. "Process,"* 74 N.Y.U. L. REV. 313, 341 n.143 (1999) (citing *Bowers* as "[a]mong constitutional scholars, the best known example" of the "art" of framing).

11. *Bowers*, 478 U.S. at 193–196.

12. *Id.* at 196 (Burger, C.J., concurring) (quoting the majority opinion at 192) (spelling as in original).

13. *Id.*

14. Many of these opinions were written by Chief Justice Rehnquist. *See, e.g.*, Ohio v. Robinette, 519 U.S. 33, 39–40 (1996) (permitting prosecution based on evidence seized after an officer, during an objectively justified traffic stop, asked to search a car without mentioning the right not to consent to search); Duckworth v. Eagan, 492 U.S. 195, 197, 203–04 (1989) (declining to suppress a statement secured after police advised an interrogee, in deviation from the exact form of the warnings established by *Miranda v. Arizona*, 384 U.S. 436, 479 (1966), "that a lawyer would be appointed 'if and when you go to court'"); Colorado v. Connelly, 479 U.S. 157, 165–67 (1986) (establishing coercive police activity as an essential predicate to judging a confession involuntary); *accord* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 194–99 & n.5 (1989) (reaffirming that "[t]o make out an Eighth Amendment claim based on the failure to provide adequate medical care, a prisoner must show that the state defendants exhibited 'deliberate indifference' to his 'serious' medical needs" and rejecting the claim that because of "'special relationship'" based on an extension of protective services, the state had a constitutional duty to protect a child from a beating at the hands of the father) (quoting Estelle v. Gamble, 429 U.S. 97, 105–06 (1976)).

15. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

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to impose the death penalty. One of these, *Stanford v. Kentucky*,[16] concerned the execution of persons who were sixteen or seventeen years old at the time they committed murder; the other, *Penry v. Lynaugh*,[17] concerned the execution of mentally retarded persons.

The Term before these cases were decided, the Court had held in *Thompson v. Oklahoma*[18] that the Constitution prohibits the execution of fifteen-year-old murderers.[19] Justice John Paul Stevens's analysis for a plurality began as had many twentieth-century judgments respecting the clause at issue:

> The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges who have been guided by the "evolving standards of decency that mark the progress of a maturing society." In performing that task the Court has reviewed the work product of state legislatures and sentencing juries, and has carefully considered the reasons why a civilized society may accept or reject the death penalty in certain types of cases.[20]

The plurality identified a domestic legislative consensus among the states "that have expressly established a minimum age in their death-penalty statutes" against executing fifteen year olds, then turned to another source that the Court previously had deemed relevant; that is, "the views of the international community."[21] Citing data in an amicus brief and in a Library of Congress report that the Court appeared to have commissioned, the plurality demonstrated that the juvenile death sentence was outlawed in many democracies and in the Soviet Union.[22] Moreover, this penalty was prohibited in a number of human rights treaties that the United States had signed and, in one case, ratified.[23] "The

16. 492 U.S. 361 (1989).

17. 492 U.S. 302 (1989).

18. 487 U.S. 815 (1988).

19. *Id.* at 838 (plurality opinion); *see also id.* at 848–59 (O'Connor, J., concurring). Justice Anthony M. Kennedy, who joined the Court months after oral argument in *Thompson*, did not participate in the decision. *Id.* at 838 (plurality opinion); *see also* Stuart Taylor Jr., *Kennedy Sworn As 104th Justice On High Court*, N.Y. TIMES, Feb. 19, 1988, at A10.

20. *Thompson*, 487 U.S. at 821–22 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)) (footnotes and other citations in quoted text omitted).

21. *Id.* at 829, 830 n.31 (citing *Trop*, 356 U.S. at 102 & n.35; Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977); Enmund v. Florida, 458 U.S. 782, 796–97 n.22 (1982)).

22. *Id.* at 830–31 & n.34 (stating that "[a]ll information regarding foreign death penalty laws is drawn from App. to Brief for Amnesty International as *Amicus Curiae* A-1–A-9, and from Death Penalty in Various Countries, prepared by members of the staff of the Law Library of the Library of Congress, January 22, 1988 (available in Clerk of Court's case file)," and specifically citing laws of the United Kingdom and New Zealand).

23. *Id.* at 831 n.34 (citing the International Covenant on Civil and Political Rights art. 6(5), Dec. 16, 1999, 999 U.N.T.S. 171 [hereinafter ICCPR], and the Organization of American States, American Convention on Human Rights art. 4(5), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention], both of which the United States had signed but not ratified, and the Geneva Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War, art. 68,

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conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense," the plurality wrote, "is consistent with the views that have been expressed by . . . other nations that share our Anglo-American heritage, and by the leading members of the Western European community."[24]

Use of foreign and international law to help determine contemporary standards of decency drew immediate rebuke. Such usage "is totally inappropriate as a means of establishing the fundamental beliefs of this Nation," Scalia declared in a dissent joined by Rehnquist and White.[25] "The practices of other nations, particularly other democracies, can be relevant," he conceded, "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."[26] But he argued that converse evidence—evidence of uniform global opposition—ought not render a U.S. practice unconstitutional.[27] Evoking a touchstone of judicial review, Scalia wrote, "We must never forget that it is a Constitution for the United States of America that we are expounding."[28]

A year later, in *Stanford*, Scalia prevailed. Joined in full by his erstwhile fellow dissenters and Justice Anthony M. Kennedy, and in part by Justice Sandra Day O'Connor, Scalia wrote that the Constitution permits execution of offenders as young as sixteen.[29] Members of the Court who had composed the plurality in *Thompson* restated their view that "the choices of governments elsewhere in the world also merit our attention as indicators whether a punishment is acceptable in a civilized society," and then cited evidence of widespread opposition to the juvenile death penalty in "the world community."[30] This did nothing to dissuade the majority. As Scalia put it: "[I]t is *American* conceptions

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Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention], to which the United States was already a full state party); *cf. id.* at 851–52 (O'Connor, J., concurring) (finding in the U.S. ratification of the Fourth Geneva Convention evidence that Congress did not intend by separate legislation to authorize a federal death penalty for fifteen year olds).

24. *Thompson*, 487 U.S. at 830.

25. *Id.* at 868 n.4 (Scalia, J., dissenting).

26. *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

27. *Id.* ("That 40% of our States do not rule out capital punishment for 15-year-old felons is determinative of the question before us here, even if that position contradicts the uniform view of the rest of the world."); *see also id.* ("But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.").

28. *Id.*; *cf.* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (Marshall, C.J.) (writing that "we must never forget that it is a *constitution* we are expounding") (emphasis in original).

29. *See* Stanford v. Kentucky, 492 U.S. 361, 380 (1989); *id.* at 380–82 (O'Connor, J., concurring in part and concurring in the judgment) (joining all of Scalia's opinion save that which maintains the Court has no duty to apply a proportionality analysis to the sentence imposed).

30. *Id.* at 384, 390 (Brennan, J., dissenting). These members referred to many countries' abandonment of capital punishment for minors and to the rarity with which such punishment was inflicted even in countries that had not abolished it formally. *See id.* at 389–90.

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of decency that are dispositive . . . ."[31] Given that the Court in *Penry* rejected a challenge to the execution of mentally retarded persons without so much as a nod at global opinion, this italicized retort in *Stanford* signaled the Rehnquist Court's retreat from consultation of international sources.[32]

II. REHNQUIST-ERA REVERSALS

That is where matters stood for thirteen years, until a 2002 challenge to capital punishment reopened the door to consultation. In contrast with *Penry*, the petitioner in *Atkins v. Virginia* persuaded five Justices that the Eighth Amendment categorically prohibits execution of mentally retarded offenders.[33] Stevens's opinion for the Court focused on domestic indicia of standards of decency—specifically, on a state legislative trend against the practice,[34] on the paucity of actual executions,[35] and on an "independent" judgment that such executions do not "measurably advance the deterrent or the retributive purpose of the death penalty."[36] After finding a national consensus based on internal factors, the Court added in a footnote: "Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."[37]

Though terse, this observation provoked objections laced with rhetorical spice. Rehnquist insisted that the decision in *Stanford* had laid to rest the practice of consulting other countries' sentencing practices, and rightfully so: "[I]f it is evidence of a *national* consensus for which we are looking," he wrote, "then the viewpoints of other countries simply are not relevant."[38] In his view, statutes and jury verdicts "ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of

31. *Id.* at 369 n.1 (majority opinion) (emphasis in original).

32. *See* Penry v. Lynaugh, 492 U.S. 302, 330–35 (1989) (following analysis of wholly domestic factors, finding "insufficient evidence of a national consensus against executing mentally retarded persons"). Even dissenters in *Penry* steered clear of foreign sources. *See id.* at 341–49 (Brennan, J., joined by Marshall, J., dissenting); *id.* at 349–50 (Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part). Confirmation of that retreat came in a case unrelated to criminal justice. *See* Printz v. United States, 521 U.S. 898, 921 n.11 (1997) (turning aside Justice Breyer's argument in dissent that experience of federal governments outside the United States might shed light on shared problems).

33. Atkins v. Virginia, 536 U.S. 304, 313–21 (2002) (overruling Penry v. Lynaugh, 492 U.S. 302 (1989)). The Court had agreed to revisit the issue in another case but dismissed the writ of certiorari after the state enacted a law forbidding execution of mentally retarded persons. McCarver v. North Carolina, 533 U.S. 975 (2001) (mem.); *see* Gina Holland, *Court Reviews Executing Mentally Ill*, AP ONLINE, Sept. 25, 2001.

34. *Atkins*, 536 U.S. at 314–16.

35. *Id.* at 316.

36. *Id.* at 322.

37. *Id.* at 316 n.21 (citing Brief for Amicus Curiae The European Union in Support of the Petitioner at 4, McCarver v. North Carolina, 532 U.S. 941 (2001) (No. 00-8727)).

38. *Id.* at 325 (Rehnquist, C.J., dissenting) (emphasis in original); *accord* Antonin Scalia, *Commentary*, 40 ST. LOUIS U. L.J. 1119, 1121 (1996) (stating that *Stanford* "retired" consultation of external norms).

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the Eighth Amendment."[39] Scalia professed to award "the Prize for the Court's Most Feeble Effort to fabricate 'national consensus' . . . to its appeal (deservedly relegated to a footnote) to," among others, "members of the so-called 'world community,' . . . whose notions of justice are (thankfully) not always those of our people."[40]

In spite of this assault, a majority of the Court discussed external sources in the text of a reversal issued the very next Term. Writing for five members of the Court in *Lawrence v. Texas*, Kennedy expressly overruled *Bowers* to hold that due process forbids a state from prosecuting criminally the commission of same-sex sodomy.[41] He refuted a key premise in *Bowers*, that proscriptions against sodomy enjoyed "ancient roots."[42] By the time *Bowers* was decided, Britain already had repealed criminal statutes respecting homosexual conduct, and the European Court of Human Rights already had held that such statutes violated the region's human rights convention; an accurate assessment of the foreign legal landscape thus would have precluded the apprehension of "Western civilization" that underlay the result in *Bowers*.[43] Scalia, joined once again by Rehnquist and also by Justice Clarence Thomas, dissented. "The *Bowers* majority opinion *never* relied on values we share with a wider civilization," he maintained, "but rather rejected the claimed right to sodomy on the ground that such a right was not deeply rooted in *this Nation's* history and tradition."[44] He dubbed the Court's discussion of external sources as dictum that was "meaningless" yet "[d]angerous," on the ground that it invited judicial imposition of "'foreign moods, fads, or fashions on Americans.'"[45]

The Court in *Atkins* had taken pains to note that after *Stanford*, in contrast with the post-*Penry* trend respecting mentally retarded offenders, very few states raised the minimum age for capital punishment.[46] Nonetheless, just three years after deciding *Atkins*, a five-member majority departed from *Stanford* and

39. *Atkins*, 536 U.S. at 324 (Rehnquist, C.J., dissenting).

40. *Id.* at 347 (Scalia, J., dissenting).

41. Lawrence v. Texas, 539 U.S. 558, 578 (2003). O'Connor agreed with the result but based her reasoning on equal protection principles. *See id.* at 579–86 (O'Connor, J., concurring).

42. *Id.* at 567–73 (criticizing reference to such roots in *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986)) (internal quotations omitted).

43. *Compare id.* at 572–73 (discussing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 149 & para. 52 (1981); Sexual Offences Act, 1967, c. 60, § 1(1) (Eng. & Wales)), *with Bowers*, 478 U.S. at 196 (Burger, C.J., concurring). *See also Lawrence*, 539 U.S. at 576–77 (noting that in intervening years the European human rights court has adhered to its decision in *Dudgeon* and that "[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct") (citing Brief Amici Curiae of Mary Robinson et al. in Support of Petitioners at 11–12, *Lawrence*, 539 U.S. 558 (No. 02-102)).

44. *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (internal quotation marks and citations omitted) (emphases in original).

45. *Id.* (quoting Foster v. Florida, 537 U.S. 990 (2002) (Thomas, J., concurring in denial of certiorari)).

46. Atkins v. Virginia, 536 U.S. 304, 315 n.18 (2002) ("Although we decided *Stanford* on the same day as *Penry*, apparently only two state legislatures have raised the threshold age for imposition of the death penalty.").

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held in *Roper v. Simmons* that the Eighth Amendment prohibits execution of persons who were under eighteen at the time of their offense.[47] Again, "objective indicia" of "national consensus" and the Court's "independent judgment on the proportionality of the death penalty" took center stage.[48] Again, too, the majority looked beyond U.S. borders for support; indeed, it detailed a long tradition of "referr[ing] to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"[49] Kennedy's opinion for the Court discussed external sources—including human rights instruments such as the U.N. Convention on the Rights of the Child and the International Covenant on Civil and Political Rights, as well as British law—that forbid execution of minors.[50] "Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty," Kennedy wrote, and added, "This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility."[51]

Attributing the result in *Simmons* to "the subjective views of five Members of this Court and like-minded foreigners," Scalia dissented in an opinion joined by Rehnquist and Thomas.[52] Scalia asserted once again that the Court ought not to have taken anything other than legislative enactments and jury verdicts into account: "In other words, all the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends."[53] In the dissenters' view, the role that external sources played in *Simmons* was not

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47. Roper v. Simmons, 543 U.S. 551, 574, 578 (2005).

48. *See id.* at 564–74.

49. *Id.* at 574–75 (quoting Trop v. Dulles, 356 U.S. 86, 102–03 (1958); citing *Atkins*, 536 U.S. at 317 n.21; Thompson v. Oklahoma, 487 U.S. 815, 830–31 & n.31 (1988); Enmund v. Florida, 458 U.S. 782, 796–97 n.22 (1982); and Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977)). Phrasing in the text echoes the title of one Justice's defense of the consultation of foreign law. *See* Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329 (2004) [hereinafter Ginsburg, *Borders*].

50. *Simmons*, 543 U.S. at 576–78 (citing U.N. Convention the Rights of the Child art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter Children's Convention]; ICCPR, *supra* note 23, art. 6(5); American Convention, *supra* note 23, art. 4(5); African Charter on the Rights and Welfare of the Child art. 5(3), OAU Doc. CAB/LEG/24.9/49 (1990); Criminal Justice Act, 1948, 11 & 12 Geo. 6, ch. 58 (U.K.); and practices in other countries).

51. *Id.* at 575. Kennedy repeated this position at the end of his opinion in *Simmons*:

> The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions. . . .
>
> It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

Id. at 578.

52. *Id.* at 608 (Scalia, J., dissenting).

53. *Id.* at 617 (citing Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) (observing in a critique of the majority's method of interpreting the statute at issue that

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"confirmatory," as O'Connor had put it,[54] but rather, to coin an antonym, "conformatory": Scalia contended that "the basic premise of the Court's argument" is "that American law should conform to the laws of the rest of the world," and he urged that this "be rejected out of hand."[55] He further cautioned that serious consideration of external sources would call into question a host of U.S. practices, some widely held to be more protective of individual rights than their counterparts abroad.[56] Yet he hastened to argue that the Court's use of such sources was not, in fact, serious. "What these foreign sources 'affirm,'" Scalia wrote, "is the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America."[57]

III. BACKLASH

Scalia's complaints pointed to a broader uneasiness respecting the Court's increased willingness to consult international norms and foreign jurisprudence. On his reelection campaign trail, President George W. Bush had said he was "deeply concerned" that matters like gay rights were being decided by judges "and not the citizenry of the United States."[58] He endorsed a controversial statute that withdraws from judges the power to interpret the word "marriage," and pledged that his judicial appointees would be "strict constructionists."[59] The latter term often is used to refer to those who profess to interpret the Constitution by looking at little more than what words meant at the time they were adopted—and surely not those who look to contemporary external norms as an interpretive source. As Bush spoke, pending in Congress was a resolution that would proclaim "the sense of the House of Representatives that judicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless" the latter "are incorporated into the legislative history of laws passed by the elected legislative branches of the United States or otherwise inform an understanding of the original meaning of the laws of the United

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"Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends")).

54. *See id.* at 604–05 (O'Connor, J., dissenting) (stating that external sources may play a "*confirmatory* role," but only after establishment of a "genuine *national* consensus," and, in her view, the latter did not exist with respect to the juvenile death penalty) (emphases in original).

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

56. *Id.* at 623–627 (referring specifically to the exclusionary rule, separation of church and state, abortion jurisprudence, double jeopardy, and the right to trial by jury).

57. *Id.* at 628.

58. *Transcript of Debate Between Bush and Kerry, With Domestic Policy the Topic*, N.Y. TIMES, Oct. 14, 2004, at A22.

59. *Id.* (voicing support for Defense of Marriage Act of 1996 § 3(a), 1 U.S.C. § 7 (2000) (defining "marriage" to mean "only a legal union between one man and one woman as husband and wife," and "spouse" to mean "a person of the opposite sex who is a husband or wife"); *see also The Presidential Debate; Excerpts from Debate; Bush, Kerry Meet in Town Hall*, L.A. TIMES, Oct. 9, 2004, at A21 (calling for judges who "interpret" rather than "make" law).

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States."[60] The preamble to this proposal, like versions that preceded and succeeded it, made clear that the Court's references to foreign and international norms in *Atkins* and *Lawrence* had spurred these members to act.[61] Cosponsors said that consultation posed a threat to U.S. sovereignty;[62] one went so far as to suggest that if such a resolution were to pass, judicial disregard of its admonition would invite impeachment.[63]

Justices pushed back. In what would prove to be his last annual report, Rehnquist, whom Reagan had elevated in pursuit of "judicial restraint,"[64] expressed dismay at "the recently mounting criticism of judges for engaging in what is often referred to as 'judicial activism.'"[65] Interbranch criticism generally is "healthy in maintaining a balance of power in our government," Rehnquist allowed.[66] But he warned that "Congress's authority to impeach and remove judges should not extend to decisions from the bench" lest the independence that the Constitution guarantees federal judges be unduly threatened.[67] Stevens, meanwhile, told a gathering of judges and lawyers that he had "received a copy of a mass mailing suggesting that I should be impeached for joining Justice Kennedy's opinion" in *Simmons*.[68] After detailing how the letter "seriously distorts" that decision, Stevens said:

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60. H.R. Res. 568, 108th Cong. (2004).

61. *Id.* (citing *Lawrence*); *see also* H.R. Res. 97, 109th Cong. (2005) (allowing for use of foreign law if consistent with the "original meaning of the Constitution of the United States," and mentioning *Lawrence* as catalyst for the proposal); H.R. Res. 446, 108th Cong. (2003) (after citing both *Atkins* and *Lawrence*, omitting an originalist exception in resolving that "the Supreme Court should base its decisions on the Constitution and the Laws of the United States, and not on the law of any foreign country or any international law or agreement not made under the authority of the United States"); *cf.* Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER, Sept. 12, 2005, at 42 (reporting that one congressional critic conducted an investigation of Justices' overseas travel in the five years before *Lawrence* was decided).

62. Rep. F. James Sensenbrenner, Jr. (R-WI), Zale Lecture in Public Policy, Stanford University 6 (May 9, 2005), http://judiciary.house.gov/media/pdfs/stanfordjudgesspeechpressversion505.pdf (declaring that the bill "safeguards the sovereignty for which America's Founding generation and those who have followed have fought and died" and promising that "Congress will continue to monitor judicial operations just as the Judiciary will continue to evaluate our legislative work").

63. *See* Tom Curry, *A Flap Over Foreign Matter at the Supreme Court*, MSNBC, Mar. 11, 2004, http://msnbc.msn.com/id/4506232 (quoting Rep. Tom Feeney (R-FL) as stating that judges who deliberately ignored Congress deserved the "ultimate remedy, which would be impeachment"); *cf. Transcript: Day Three of the Roberts Confirmation Hearings (Morning Session: Sens. Brownback and Coburn)*, WASHINGTONPOST.COM, Sept. 14, 2005, *available at* 2005 WLNR 14639466 (remarks of Sen. Tom Coburn (R-OK)) [hereinafter Roberts-Coburn Transcript] (indicating his own position, in confirmation hearings for Rehnquist's successor, that consulting foreign sources was not "good behavior" within the meaning of Article III, thereby implicitly characterizing consultation as an impeachable offense).

64. *See supra* text accompanying note 5.

65. WILLIAM H. REHNQUIST, 2004 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1 (2005), http://www.supremecourtus.gov/publicinfo/year-end/2004year-endreport.pdf.

66. *Id.* at 4.

67. *Id.* at 5; *see* Linda Greenhouse, *Rehnquist Resumes His Call for Judicial Independence*, N.Y. TIMES, Jan. 1, 2005, at A10.

68. John Paul Stevens, "Justice Stevens' Remarks," Seventh Circuit Judicial Conference Dinner, at 2 (May 23, 2005) (on file with author) [hereinafter Stevens Remarks].

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> It does seem to me, however, that there is a vast difference between, on the one hand, considering the thoughtful views of other scholars and judges – whether they be Americans or foreigners and whether they be state judges, federal judges or judges sitting in other countries – before making up our own minds, and, on the other hand, treating international opinion as controlling our interpretation of our own law. We should not be impeached for the former; we are not guilty of the latter.[69]

Like Stevens, many of the Justices who looked to external norms in *Atkins* or the other two Rehnquist-era reversals under review have since made public comments in defense of this interpretive practice.[70]

Revived use of external norms also sparked debate in academic journals. Commentators tended to agree on the need for theory and methodology for consultation regardless of their opinion about the propriety of consultation.[71] On that antecedent question, some favored the Court's show of interest in global matters, especially in times of rapid globalization.[72] "Justices who declare the

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69. *Id.* at 3, 8. *See generally* Diane Marie Amann, *John Paul Stevens, Human Rights Judge*, 74 FORDHAM L. REV. 1569 (2006) (detailing Stevens's role in the reversals discussed in this Article and positing reasons for Stevens's selective receptivity to foreign context).

70. *See, e.g.*, Stephen Breyer, *Keynote Address*, 97 AM. SOC'Y INT'L L. PROC. 265, 265 (2003); Ginsburg, *Borders*, *supra* note 49; *An Open Discussion with Justice Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033, 1040–42 (2004); *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 522–24 (2005) [hereinafter Scalia-Breyer Conversation]; Ruth Bader Ginsburg, "A Decent Respect to the Opinions of [Human]kind:" The Value of a Comparative Perspective in Constitutional Adjudication (Apr. 1, 2005), http://www.asil.org/events/AM05/ginsburg050401.html; Sandra Day O'Connor, Remarks to Southern Center for International Studies 2 (Oct. 28, 2003), http://www.southerncenter.org/OConnor_transcript.pdf; *see also* Toobin, *supra* note 61 (reporting Justice Kennedy's defense of consultation).

71. *See, e.g.*, T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989, 2004–10 (2004) (positing an American popular sovereignty account that eases legitimacy objections to the use of external norms); Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 703–12 (2005) (having shown the unsuitability of theories such as originalism, offering his own theory for consultation); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on* Atkins *and* Lawrence, 98 AM. J. INT'L L. 69, 72–82 (2004) (setting forth guidelines for a "rigorous project" of consultation); Patricia M. Wald, *The Use of International Law in the American Adjudicative Process*, 27 HARV. J.L. & PUB. POL'Y 431, 439–40 (2004) [hereinafter Wald, *Use*] (finding, in a presentation by a former federal appellate judge, "some truth" in the concern of a onetime colleague that consultation may not always take into adequate account the differences in legal systems and cultures) (quoting ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 137 (2003)); Mary Ann Glendon, *Judicial Tourism*, WALL ST. J., Sept. 16, 2005, at A14 ("The problem is not reference to foreign law: It is how foreign law is used by judges who usurp powers reserved under the Constitution to the people and their elected representatives, and whose desire to 'learn' is limited to finding arguments in support of conclusions that have little constitutional warrant.").

72. *E.g.*, Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT'L & COMP. L. 421, 421 (2004) (stressing "the myriad ways" the United States is "connected to other countries" in the course of approving consultation practice); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 56 (2004) (finding in "transnationalist jurisprudence" a suggestion that "the United States expresses its national sovereignty not by blocking out all foreign influence but by vigorous 'participation in the various regimes that regulate and order the international

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world irrelevant to our Constitution make our Constitution appear irrelevant to the world," Professor Gerald L. Neuman wrote.[73] "Such isolation," he added, "would impair the promotion of U.S. constitutional values for U.S. citizens."[74] But others worried that consultation of foreign norms strayed from American constitutional tradition, or warned that consultation could undermine the legitimacy and accountability of the Court.[75] Quoting Professor Charles Fried, Professor Roger P. Alford posited that the "'canon of authoritative materials from which constitutional common law reasoning might go forward'" is composed of "text, structure, history, and national experience," and then argued that the addition of international sources to this canon "fundamentally destabilizes the equilibrium of constitutional decisionmaking."[76]

IV. BACKSTORY

But international sources long have belonged to the interpretive canon. Professor Steven G. Calabresi and Stephanie Dotson Zimdahl, among others, have written that "those . . . who say that the Court has never before cited or relied upon foreign law are clearly and demonstrably wrong."[77] As early as 1804, Chief Justice John Marshall established the *Charming Betsy* principle, which counsels courts not to adopt a construction that would violate international law unless there is no alternative construction.[78] Early citations to the "law of nations"—the "decisions of the Courts of every country, so far as they are founded upon a law common to every country"—often occurred in cases

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system'" (quoting ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 27 (1995)); Peter E. Quint, *International Human Rights: The Convergence of Comparative and International Law*, 36 TEX. INT'L L.J. 605, 610 (2001) (hoping to "welcome" the "impact of comparative and international law on our human rights jurisprudence"); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 219 (2003) (seeing cross-border dialogue among judges as a key component "to build a world under law").

73. Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 87 (2004).

74. *Id.*

75. *E.g.*, Eugene Kontorovich, *Disrespecting the "Opinions of Mankind,"* 8 GREEN BAG 2D 261, 265 (2005) (criticizing "internationalists'" frequent quotation of the Declaration of Independence, arguing that "the Declaration was written to *shape* the opinions of mankind; it did not contemplate being influenced *by* them"); Harvie Wilkinson III, *The Use of International Law in Judicial Decisions*, 27 HARV. J.L. & PUB. POL'Y 423, 429 (2004) (stating, as a federal appellate judge, that "use of interuational law to resolve social issues of domestic import runs counter to the democratic accountability and federal structure envisioned by our Constitution").

76. Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 57–58 (2004) (quoting Charles Fried, *Scholars and Judges, Reason and Power*, 23 HARV. J.L. & PUB. POL'Y 807, 819 (2000)).

77. Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 755 (2005); *see also* Diane Marie Amann, *"Raise the Flag and Let It Talk": On the Use of External Norms in Constitutional Decision Making*, 2 INT'L J. CONST. L. 597, 601–02 (2004) [hereinafter Amann, *Norms*] (citing instances of consultation).

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

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that raised no constitutional issue.[79] But there were exceptions; in an 1832 judgment, Marshall discussed what today would be called international law in the course of situating Native American tribes within the constitutional structure.[80]

In such instances, the Court embraced an understanding of the United States as a member of a larger community, one from which it had drawn many of its citizens and many of its values. It was a "national character" in keeping with the one advanced scant years before in *Federalist* No. 63, written to justify establishment of a Senate as an august institution whose members would be chosen in state legislatures rather than in direct elections and who would be older and hold office longer than others in Congress.[81] This body's remove from frequent elections, it was argued, would help the new country to win "respect and confidence" in the world.[82] The essay argued that "attention to the judgment of other nations is important to every government," both to demonstrate the wisdom of American decisions and to aid decision in close matters: "[I]n 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."[83] The Court's references to the law of nations in early decisions may be seen as efforts by another governmental body, even more removed from the political fray, to enhance the fledgling nation's status in the global arena. The references suggest that there may be an originalist justification for some consultation—a justification that no doubt would come as a surprise to those members of Congress who oppose consultation but would allow it when consistent with the Constitution's "original meaning."[84]

Although the Court made fewer overt references to external sources as its own corpus of jurisprudence grew, it never ceased entirely to look abroad in the course of construing the U.S. Constitution. Awareness of connections to a larger world was evident, for example, during the half-century long, piecemeal process known as "selective incorporation," by which the Court determined that nearly all the guarantees enumerated in the Bill of Rights are so fundamental that they

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79. Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815) (controversy arising out of a wartime capture of a vessel).

80. *See* Worcester v. Georgia, 31 U.S. 515, 560–61 (1832); *see also* Rex D. Glensy, *Which Countries Count?:* Lawrence v. Texas *and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357, 364–66 (2005) (providing an extended account of early uses of international law); Wald, *Use*, *supra* note 71, at 441 (noting the frequency with which Marshall looked to foreign sources).

81. THE FEDERALIST No. 63, at 407–08 (Alexander Hamilton or James Madison) (1st Modern Library ed., 1941).

82. *Id.* at 407.

83. *Id.* at 407–08; *see also* Wald, *Use*, *supra* note 71, at 441 (quoting a passage in THE FEDERALIST No. 63, *supra* note 81, at 408, that "asked of the embryonic United States, '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 which they would probably appear to the unbiased part of mankind?'").

84. *See* H.R. Res. 97, 109th Cong. (2005), *quoted supra* note 61; H.R. Res. 568, 108th Cong. (2004), *quoted supra* text accompanying note 60.

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apply not only to the federal government, but also, by dint of the Due Process Clause of the Fourteenth Amendment, to the governments of the Union's sundry states.[85] The Court articulated various tests for whether a guarantee thus implicated "fundamental fairness."[86] A few expressly called for examination of non-U.S. sources: Justices asked in some instances if the guarantee was "enshrined in the history and the basic constitutional documents of English-speaking peoples,"[87] and in others if it was "part of the Anglo-American legal heritage."[88] Furthermore, judgments setting forth tests that seemed domestic in dimension nevertheless discussed foreign practice in determining whether the test had been satisfied. In one case the Court drew negative lessons from the old Englisb Star Chamber and its corollaries in Spain and France as it decided that a state's criminal procedure denied rights "basic in our system of jurisprudence";[89] concurring, Justice Wiley Rutledge likened the state's process to fascist regimes in mid-century Europe.[90] And Justice Benjamin Cardozo gave effect to what has become a leading formula for incorporation—whether a guarantee is "implicit in the concept of ordered liberty"—by looking not only to U.S. sources but also to a treatise by British scholar Jeremy Bentham and to studies of Roman and French law that illuminated "the established procedure in the law of Continental Europe."[91] It is on account of this tradition that even the Rehnquist Court's most mordant critic of consultation conceded that examination of foreign practice bears relevance to fundamental fairuess inquiries.[92]

Consultation also bas been a component of evaluation of whether a governmental practice violated an enumerated right. Interpretation of tbe Fourth Amend-

85. *See, e.g.*, Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253 (1982) (offering a detailed survey and retrospective critique of process); *see also* Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809, 812–14 (2000) [hereinafter Amann, *Convergence?*] (describing process and citing principal precedents).

86. For examples of the many uses of this term, see Duncan v. Louisiana, 391 U.S. 145, 148–50 (1968) and Irvine v. California, 347 U.S. 128, 148 (1954).

87. Ingraham v. Wright, 430 U.S. 651, 673 n.42 (1977) (quoting Wolf v. Colorado, 338 U.S. 25, 27–28 (1949)) (internal quotations omitted).

88. Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337, 343 (1969) (Harlan, J., concurring) (internal quotations omitted).

89. *In re* Oliver, 333 U.S. 257, 269–71, 273 (1948).

90. *Id.* at 281 (Rutledge, J., concurring); *see* Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263, 345–47 (2004) [hereinafter Amann, *Guantánamo*] (discussing Rutledge's concurrence); *see also* Amann, *Norms*, *supra* note 77, at 601 & nn.20–21 (citing other opinions demonstrating the influence of an "abhorrence of ancient inquisitional abuse and contemporary totalitarian repression" on the determination of which rights are fundamental in the United States).

91. Palko v. Connecticut, 302 U.S. 319, 325 & n.3 (1937) (holding after review of such sources that the incorporation test had not been satisfied in a challenge to the state's appeal of petitioner's criminal trial).

92. Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting). The account of Scalia's position advanced in reply to this Article suffers for failure even to mention Scalia's own concession that in the context of the Eighth Amendment and other fundamental fairness doctrines, consultation is relevant to determine not only original meaning, but also evolving standards. *See* Kenneth Starr, *Pragmatism Rules: A Response to Professors Chemerinsky and Amann*, 94 GEO. L.J. 1565, 1583–85 (2006) (treating Scalia's position as limited to original meaning).

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ment guarantee that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,"[93] has prompted judicial consideration of external laws or practices.[94] The same has been true with regard to the Eighth Amendment's requirement that "cruel and unusual punishments" shall not be "inflicted."[95] Frequently cited as the basis for consultation in such cases is *Trop v. Dulles*,[96] a 1958 case involving a native-born American stripped of his nationality after he was convicted of deserting the Army during World War II.[97] Endeavoring to ascribe meaning to "cruel and unusual punishments," Chief Justice Earl Warren traced the clause to the Magna Carta of 1215.[98] "The basic concept," he continued, "is nothing less than the dignity of man," such that the state must exercise its "power to punish . . . within the limits of civilized standards."[99] Asserting that the terms "are not precise, and that their scope is not static," he wrote that the clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[100] That "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime" contributed to the conclusion that denationalization of petitioner violated the Constitution.[101] Though the opinion failed to persuade a majority in *Trop*, consultation of external norms consequently won acceptance as a part of Justices' evolving standards inquiry.[102]

The attack on consultation launched in *Thompson* and secured in *Stanford*

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93. U.S. CONST. amend. IV.

94. *See, e.g.*, Johnson v. United States, 333 U.S. 10, 17 (1948) (Jackson, J.) (writing, in a decision issued not long after Jackson's service as Chief U.S. Prosecutor at the Nuremberg trial of Nazi war criminals, that to allow the state to enter a home without justification "would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law"); *see* Boyd v. United States, 116 U.S. 616, 624–29 (1886) (giving broad protection in part on account of a determination that the Framers drafted the Fourth Amendment as a safeguard against general warrants like those used by England's Star Chamber); United States v. Peterson, 812 F.2d 486, 490 (9th Cir. 1987) (stating, in an opinion by then-Judge Kennedy, that foreign law may be relevant to determine whether to suppress evidence obtained in the course of a warrantless search abroad).

95. U.S. CONST. amend. VIII, *quoted in full supra* note 15.

96. 356 U.S. 86 (1958).

97. *Id.* at 87–88.

98. *Id.* at 100 (plurality opinion).

99. *Id.*

100. *Id.* at 100–01.

101. *Id.* at 102–03 (citing study hy United Nations on the issue). Justice William J. Brennan concurred on different grounds. *See id.* at 105–14.

102. *See, e.g.*, Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982) (noting the status of the felony murder doctrine in India, England, Canada, and continental Europe); Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) (plurality opinion) (deeming it "not irrelevant" to a determination of the constitutionality of capital punishment for rape "that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue") (citing U.N. DEP'T OF ECON. & SOC. AFF., CAPITAL PUNISHMENT 40, 86 (1968)). *But see* Atkins v. Virginia, 536 U.S. 304, 325 (2002) (Rehnquist, C.J., dissenting) (writing that "the *Trop* plurality—representing the view of only a minority of the Court—offered no explanation for its own citation, and there is no reason to resurrect this view given our sound rejection of the argument in *Stanford*").

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appears in this light an aberration. *Atkins*, *Lawrence*, and *Simmons*, though they reversed results in early Rehnquist-era cases, are revealed as renewals of a tradition of looking at foreign and international law as aids to constitutional interpretation. It is a tradition that found in foreign sources evidence that confirmed the Court's understanding of contemporary American standards, and not, contrary to Scalia's allegation, a command to conform to an external norm.[103] It is a tradition in which all who sat on the High Court at the time of Rehnquist's death had, at times, taken part. Breyer and Ginsburg showed especial interest in consultation.[104] O'Connor did too, though her deployment of foreign law often was measured.[105] Stevens and Kennedy were the authors of the judgments under review; Justice Souter cast tacit votes in favor.[106] The ardor with which Rehnquist, Scalia, and Thomas inveighed against consultation obscured the fact that they too had cited foreign practice, when sources consulted opposed a claim of constitutional right.[107] Notwithstanding those methodological lapses, for more than a dozen years the critique forged by these three Justices staved off consultation and garnered significant political support. For the first time in memory, judicial use of external norms is a chronic source of controversy.[108] Something else is at play.

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103. *See supra* text accompanying note 55. Dissenters proffered no evidence of any conformatory imperative. A case unrelated to these reversals presented the possibility of a requirement to conform, for petitioner contended that because the United States had submitted to the compulsory jurisdiction of the International Court of Justice with respect to a consular relations treaty, the U.S. Supreme Court was bound to enforce the World Court's order for review of death sentences imposed against defendants whose rights under that treaty police had violated. Brief for Petitioner at 19, Medellín v. Dretke, 125 S. Ct. 2088 (2005) (No. 04-5928). Justices declined to reach the merits, thus leaving the question of obligation to enforce undecided. *See Medellín*, 125 S. Ct. at 2092.

104. *See* Amann, *Norms*, *supra* note 77, at 602 & n.28 (describing these Justices' approach toward international developments).

105. *See id.* at 602–03 & nn.25–27 & 29 (discussing O'Connor's approach toward international developments).

106. *Id.* at 602–03 & n.28 (outlining views of these Justices).

107. *See id.* at 603–04 (noting references to foreign developments in *Washington v. Glucksberg*, 521 U.S. 702, 718 n.16 (1997) (discussing laws in Australia, Britain, Canada, Colombia, and New Zealand in holding that there is no U.S. constitutional right to assisted suicide), and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C.J., joined by White, Scalia, and Thomas, JJ., concurring in part and dissenting in part) (mentioning rulings in Canada and Germany and arguing that the U.S. Constitution allows some limits on abortion)). It is to be noted that these three dissented from reversals under review in part by reference to other countries' norms or practices. *See* Roper v. Simmons, 543 U.S. 551, 624–27 (2005) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (detailing differences between U.S. and foreign rights jurisprudence); Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (faulting the Court for "ignoring, of course, the many countries that have retained criminal prohibitions on sodomy").

108. *See* Bodansky, *supra* note 72, at 426 ("In contrast to today, I am not aware that when the Court, in these earlier cases, paid a decent respect to the opinions of mankind, this was criticized as illegitimate or otherwise un-American.").

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V. ACTIVISM AND INTERACTION

Debate respecting consultation of foreign and international practice entangles two separate yet not unrelated questions: first, whether it is appropriate for judges to ascertain the meaning of constitutional provisions by reference to sources other than plain text and framers' intent; and second, whether and to what extent the U.S. justice system should become a site for negotiation of transnational tensions. The former question—that of activism—embodies the enduring dispute respecting the proper role of unelected judges in a democracy. The latter question—that of interaction—captures concerns respecting the place of the United States in the global arena. Both questions have a long provenance, yet both seemed especially pressing in the Rehnquist era.

As each reversal brought with it added complaints, it appeared ever clearer that use of foreign law was not all that bothered critics. The crux of the problem was the persistence of living-Constitution doctrines. One such doctrine finds in the Due Process Clause substantive as well as procedural protection. Another finds in the Cruel and Unusual Punishments Clause a duty to adapt to "evolving standards of decency," phrasing that was first articulated in 1958 yet derives from a Court judgment issued nearly a half-century before that date. In *Trop*, Chief Justice Earl Warren made express reference to *Weems v. United States*.[109] There, a court in the Philippines, a U.S. territory, had applied old Spanish law to sentence a U.S. civil servant convicted of falsifying an official document to a minimum of "confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council," after which he would have to endure "a perpetual limitation of his liberty" by means of surveillance and civil disqualifications.[110] The Court first deemed the Cruel and Unusual Punishments Clause that the United States had imposed on the Philippines identical in meaning to that in the U.S. Constitution.[111] Its consequent prescription for interpreting the clause amounted to a paean to the living Constitution:

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had therefore taken. Time works changes, brings into existence new conditions and purposes. Theretofore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of

109. Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion) (discussing Weems v. United States, 217 U.S. 349 (1910)).

110. *Weems*, 217 U.S. at 366.

111. *Id.* at 367–68.

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> Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it."[112]

Out of this precedent emerged Warren's statement that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[113]

Living-Constitution doctrines require the Court to render a decision faithful both to constitutional history and to contemporary circumstance. Seldom will the words of a provision—particularly of an open-textured term like "due process," "cruel and unusual," or, for that matter, "unreasonable"[114]—prove the final authority. The doctrines thus invite judges to consult additional sources. Some of those sources would not be admitted into the Fried-Alford "'canon of authoritative materials,'" for one expects that Fried and Alford would ascribe to "national experience" a narrow meaning.[115] So too the opponents to consultation on the Court: Rehnquist, joined by Scalia and Thomas, defined "national consensus" regarding the death penalty as nothing more than "the work product of state legislatures and sentencing jury determinations."[116] Other sources are to be held inappropriate whether they are domestic or foreign. Accordingly, criticism of citations to foreign law has stood not alone, but rather alongside criticism of briefs by domestic groups, among them American psychologists and American Catholic bishops.[117]

The cliché critique of dynamic-construction doctrines is that they upset the balance of power embedded in the Constitution—that they transform an unelected judiciary into a legislature whose so-called "activist" decisions may subvert majority will and thus undercut popular sovereignty.[118] But that critique ignores another bedrock principle of the United States's constitutional compact. No less officers of the national government than are legislators or the President, federal judges have the duty, as James Madison put it, to "consider themselves in a peculiar manner the guardians of those rights" in the Constitution and "an

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112. *Id.* at 373 (quoting, without citation, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 387 (1821)).

113. *Trop*, 356 U.S. at 101 (plurality opinion); *accord* Thompson v. Oklahoma, 487 U.S. 815, 821 n.4 (1988) (plurality opinion) (Stevens, J.) (tracing the evolutive approach forwarded in *Trop* to *Weems*).

114. *See* Amann, *Guantánamo*, *supra* note 90, at 301 & n.165 (discussing the particular usefulness of consultation of external sources in construing the Constitution's open-textured clauses).

115. *See supra* note 76 and accompanying text.

116. *See* Atkins v. Virginia, 536 U.S. 304, 324 (2002) (Rehnquist, C.J., dissenting), *discussed supra* text accompanying note 39.

117. *E.g.*, *id.* at 347 & n.6 (Scalia, J., dissenting) (deeming irrelevant not only world opinion, but also "the views of professional and religious organizations," including the U.S. Catholic Conference and the American Psychological Association).

118. *See supra* text accompanying notes 56–62 (quoting examples of this critique); *see also Relating to the Use of Foreign Materials in Interpreting U.S. Law: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 106 n.27 (2004) (statement of Michael D. Ramsey, Professor of Law, University of San Diego Law School), *available at* http://judiciary.house.gov/media/pdfs/ramsey032504.pdf; *cf.* Starr, *supra* note 92, at 1580 (placing controversy respecting use of foreign law materials "[a]t the center of the 'who decides' debate").

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impenetrable bulwark against every assumption of power in the Legislative or Executive . . . ."[119] To promote this function, the Constitution safeguards judges' independence,[120] and the Court has developed doctrines of construction that make it possible for a judge to refuse to sustain a state practice that, though an expression of the will of the majority, trounces the rights of disfavored individuals.

Each of the judgments under review provoked dissenters' dismay not just because it cited foreign law, but also, crucially, because it reinforced a doctrine of dynamic interpretation. Stevens recognized as much when he wrote in *Simmons*, "Perhaps even more important than our specific holding today is our reaffirmation of the basic principle that informs the Court's interpretation of the Eighth Amendment"; that is, of the "evolving standards" doctrine.[121]

That said, consultation of external norms is a particularly prickly aspect of the "activism" critique. Stated fears of interference, erosion of a domestic legal culture considered exceptional, and encroachments on sovereignty are hallmarks of some Americans' mistrust of influence from abroad. They are manifest in the U.S. government's ambivalent behavior toward international agreements and its active opposition to the International Criminal Court.[122] With respect to judicial interpretation of the U.S. Constitution, these concerns are embodied in the seemingly self-evident propositions that foreign sources are aliens and that sovereignty yields when those sources control. In fact, however, neither proposition obtains.

In none of the judgments under review did the Court seek in external norms the rule that would govern its decision. Rather, norms were consulted as persuasive authority—as sources that might enrich understanding of contemporary values or provide lessons learned from others' experiences with similar problems. The Court thus explained in *Atkins* that although factors such as world opinion "are by no means dispositive," the fact of "their consistency with the legislative evidence lends further support to our conclusion that there is a

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119. 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1834).

120. *See id.* (describing guardians of rights as "independent tribunals of justice"); THE FEDERALIST No. 78, at 508 (Alexander Hamilton) (1st Modern Library ed., 1941) (calling the independent federal judiciary "the bulwark[] of a limited Constitution"). Dean Kenneth Starr has characterized the concern for vulnerable persons animating decision in *Atkins* and *Simmons* as little more than a byproduct of judicial pragmatism. *See* Starr, *supra* note 92, at 1566–68. One expects he would say much the same about the concern for vulnerable persons in *Lawrence*. The perspective profoundly discounts the judge's duty to guard the rights of just such persons—a duty expressed not only in the Framers' comments quoted here, but more recently by, among others, Justice Felix Frankfurter. *See* Wolf v. Colorado, 338 U.S. 25, 27 (1949) (stating that the Due Process Clause operates to protect "the lowliest and most outcast").

121. Roper v. Simmons, 543 U.S. 551, 587 (2005) (Stevens, J., concurring).

122. *See, e.g.*, Diane Marie Amann & M.N.S. Sellers, *The United States and the International Criminal Court*, 50 AM. J. COMP. L. 381, 381–91 (Supp. 2002) (detailing the nature and manifestations of ICC opposition); Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193, 1197 (2005) (discussing U.S. opposition to a "dazzlingly broad" range of international ventures, among them the ICC, the Kyoto Protocol on Global Warming, agencies of the United Nations, the Convention on the Law of the Sea, and the Comprehensive Test Ban Treaty).

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consensus among those who have addressed the issue."[123] In *Lawrence*, the Court discussed European jurisprudence and other countries' laws in the course of enunciating its view of the values—as *Lawrence*, borrowing from *Bowers*, put it, the "civilization"—on which the Constitution is founded.[124] The Court took pains in *Simmons* to explain that global views confirmed but did not control its own conclusion that capital punishment of juvenile offenders is forbidden by the Constitution of the United States.[125]

In each case, moreover, the Court limited its citations to authorities arising out of legal systems or cultures that shared with the United States a commitment to fundamental rights. A common point of reference was Britain, wellspring of the "Anglo-American legal heritage" long recognized as an authoritative source for interpretation of the U.S. Constitution.[126] Another was France, which shares with the United States the Enlightenment tradition and a codification of rights dating to the eighteenth century.[127] Also discussed were multilateral treaties. The United States is a state party to some of these; for instance, the International Covenant on Civil and Political Rights, as well as the Geneva Conventions on the laws of war.[128] All the treaties cited are products of the post-World War II period during which concepts that matured in the United States—fundamental fairness and equal protection, among others—spread across the globe and were incorporated into national and international instruments.[129] Patently, the authorities cited were not the wholly alien influences that terms like "foreign" or "external" might imply.[130]

VI. CABINING CONSULTATION

Consultation of foreign sources may aid an American judge in the exercise of her constitutional duty to protect individual rights; most notably for present purposes, the rights of a person caught within the net of the American criminal justice system. But consultation cannot play this role well unless it occurs within a predictable and consistent interpretive framework. Unfortunately, no such framework has yet emerged. It is not yet clear when Justices will look to external sources or for what reasons. Often, the catalyst for consultation appears

123. Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2005).

124. *See* Lawrence v. Texas, 539 U.S. 558, 572–73 (2003).

125. *See Simmons*, 543 U.S. at 574–75 (majority opinion).

126. *See* Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337, 342–43 (1969) (Harlan, J., concurring); *see also supra* text accompanying notes 82–84.

127. *See* Amann, *Guantánamo*, *supra* note 90, at 301–03 & n.174.

128. *See supra* notes 23, 50 and accompanying text (describing sources cited by Justices). The United States has signed but not ratified other treaties that Justices have cited. *See, e.g.*, American Convention, *supra* note 23.

129. *See* Amann, *Guantánamo*, *supra* note 90, at 303 & n.174.

130. *See* Amann, *Norms*, *supra* note 77, at 606 (explaining that "calling a cited norm 'external,' though a convenient rhetorical feint, is a misnomer").

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to have been an amicus brief rather than a less litigant-driven factor.[131] In at least one case, undue reliance on that source may have focused some Justices' attention on international law to such a degree that they wrongly conferred on a petitioner less protection against state action than other Justices would have accorded him under a purely domestic constitutional analysis.[132] Furthermore, the seeming absence of criteria or methodology has permitted critics to try to dismiss consultation as just another way that so-called activist judges make policy rather than interpret the law. Justice Breyer recognized as much when, in a public debate with Justice Scalia, he said, "The criticism is you'll look over the party, the cocktail party . . . to identify your friends."[133] Breyer insisted that he considered foreign precedents with which he disagreed as well as those with which he agreed.[134] Such assurances ought not to stand alone, however; articulation of a transparent framework that constrains judicial consultation would do far more to sap the choosing-friends criticism of its force.

This Article does not pretend to posit a comprehensive framework. But it does point to a path along which that framework may be developed. Especially useful is a 1999 formulation by Breyer, who advocated looking at external practice to resolve "roughly comparable questions under roughly comparable

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131. *See* Roper v. Simmons, 543 U.S. 551, 576–78 (2005) (citing with respect to international law not only respondent's brief, but also amicus briefs from the European Union, former President Jimmy Carter, former U.S. diplomats, and the Human Rights Committee of the Bar of England and Wales); Amann, *Norms*, *supra* note 77, at 604 n.36 (listing amicus briefs mentioned by Justices in the course of discussing external norms in, inter alia, *Lawrence* and *Atkins*).

132. *See* Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085, 2126–30 (2005) (arguing that the controlling plurality opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), misconstrued international law and in so doing denied petitioner, an American citizen, rights that two dissenters argued were due to him under the Constitution); *cf. Simmons*, 543 U.S. at 622 (Scalia, J., dissenting), *discussed supra* note 56 and accompanying text; Amann, *Norms*, *supra* note 77, at 609 (making the same point with particular reference to the use of the law of nations in the service of slavery).

133. Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer, American University Washington College of Law, Jan. 13, 2005, http:// domino.american.edu/AU/media/mediarel.nsf/0/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument (last visited Mar. 27, 2006) [hereinafter Scalia-Breyer Transcript]. The statement appears in slightly different form in the edited version. Scalia-Breyer Conversation, *supra* note 70, at 53. The metaphor is one that the late Judge Harold Leventhal, U.S. Court of Appeals for the D.C. Circuit, is said to have put forward as a critique of using legislative history to interpret statutes. *Id.*; *see supra* note 53 and accompanying text (quoting Scalia's usage in *Simmons* and attribution to Leventhal); Wald, *Use*, *supra* note 71, at 440–41 (advising "caution and restraint in the use of foreign decisions, but not an absolute bar," and remarking, "I don't think that using foreign decisions should be, as my former colleague Harold Leventhal said about legislative history, 'looking over a crowd and picking out your friends'" (citing Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court*, 68 IOWA L. REV. 195, 214 (1983) (quoting her own conversation with Leventhal))).

134. Specifically, Breyer said:

> I would refer to the cases against me that I come across as mucb as for me. And the fact that somebody's come out the other way in a foreign court doesn't make it any the less interesting. Maybe it's more interesting. But this is not a major thing. It's not some kind of determinative thing in dozens of cases of constitutional law; it's simply from time to time relevant. And if it becomes more than that, I don't know how it's going to work.

Scalia-Breyer Transcript, *supra* note 133; *see also* Scalia-Breyer Conversation, *supra* note 70, at 53.

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legal standards."[135] From this phrase may be derived two minimum requirements: first, foreign jurisprudence ought to shed the light of experience on questions like those presented in the case before the Court, and, second, it must arise out of a legal culture that shares with the United States a commitment to fundamental rights. Likewise essential is a third requirement, that in each case the Court explain its reasons for looking to foreign sources and the way in which those sources influenced its interpretation of the U.S. Constitution.

The "comparable questions" criterion imposes a baseline requirement that a case have some cross-border component. Such components are present frequently in today's interdependent world. This is beyond dispute among practitioners though it appears still contestable in the academe.[136] As one example, a litigant might hail from a country or culture outside the United States—this often will be the case in a state like California, where more than a quarter of the population is foreign-born.[137] Some of the conduct in dispute might take place abroad; for instance, money laundering or drug trafficking is unlikely to merit the time of federal prosecutors unless some portion of the transaction occurred outside U.S. territory. A case might have no obvious overseas link and yet entail facts such as those that a foreign tribunal has resolved. A case also might take on an international aspect if it raises an issue, such as the death penalty, that is of considerable international interest.[138] In such instances, U.S. courts might benefit from knowledge of others' experience. Suggestion that the United States has nothing to learn now that it has an indigenous jurisprudence thus astounds.[139] By the very act of looking to others' experience, moreover, U.S.

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135. Knight v. Florida, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting from denial of cert.); *see* Breyer, *supra* note 70, at 265–66 (setting forth similar factors as a demonstration "of the need and usefulness of international and foreign law"). Dean Starr has assigned much of the responsibility for Rehnquist-era reversals to Justice Breyer, whose ascendance to the Court in 1994 is said to have coincided with a resurgence of pragmatism. *See* Starr, *supra* note 92, at 1567. The assertion disregards the role that consultation played in the reversals under review in this Article. A number of Justices embraced consultation in *Thompson*, decided years before Breyer's arrival, and they retained their willingness to look to external sources throughout the *Stanford*-inspired hiatus that soon ensued. *See supra* text accompanying notes 19–49.

136. At least it is contested by Dean Starr. *See* Starr, *supra* note 92, at 1580–88. My own understanding of transnational issues emerged while practicing federal criminal law in Pacific Rim jurisdictions in the early 1990s; it has been reinforced by greater general awareness of such matters in recent years.

137. *See* U.S. CENSUS BUREAU, THE FOREIGN BORN POPULATION: 2000, at 3 (Dec. 2003), *available at* http://www.census.gov/prod/2003pubs/c2kbr-34.pdf (reporting that 26.2 percent of California residents in 2000 were born outside United States).

138. *See* Amann, *Norms*, *supra* note 77, at 605–06 (citing examples of these types of cases).

139. *See* Starr, *supra* note 92, at 1582 (deflecting evidence of the Framers' receptivity to external jurisprudence on the ground that "[a]fter all, in 1787 there was relatively little American law for American jurists to apply"); *but see* Amann, *Norms*, *supra* note 77, at 601 ("Consideration of external norms ebbed as internal jurisprudence grew, yet it did not disappear entirely."). The passage cited by Dean Starr as evidence of the limited relevance of judicial practice at the founding of the Republic does not support his premise. *See* Starr, *supra* note 92 at 1582–83 (quoting Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815)). In *Boyle*, Chief Justice Marshall spoke of more than "looking back to our common roots," as Starr contends. *Id.* Rather, Marshall declined either to accept

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courts would manifest an understanding of the United States as both a leader and a partner in a global effort to instill liberal democratic values.

The "comparable legal standards" criterion assures the existence of such shared values. Proper consultation thus requires judges to inquire into the nature of the legal system or culture out of which a norm or practice arises. The foreign system in question should be founded on rights like those enumerated in the U.S. Constitution and the jurisprudence interpreting that document. If this is the case, consideration of the work of that system may be seen as consistent with an understanding of America as a nation that draws strength from contributions that may come from outside yet fortify internal values. The foreign system also must endeavor in practice to enforce the rights that it espouses. For no matter how well reasoned, a judgment arising out of a repressive regime rarely would merit citation as persuasive authority by a U.S. court. Particularly for those skeptical of consultation, reference to such a judgment fuels the fear that foreign influence might diminish American respect for individual rights.[140] But even precedents derived from other fundamental rights jurisdictions may counsel against a right that is nonetheless appropriate to the American tradition. Consulting judges are free—indeed, are duty-bound—to reject international precedents that fail to confirm the values underlying the national constitutional culture.[141]

The third criterion, that of a reasoned explanation, will help to ensure that neither of the first two criteria is determined cavalierly. Though perhaps discussed more often in relation to administrative agency decisions,[142] "reasoned explanation" also refers to judicial decision-making. Professor Vikram David Amar explained the rationale as follows:

> [C]ourts can never completely insulate themselves from accusations of politicization. But courts' best defense here is to engage in a full and fair discussion of the competing arguments and provide a clearly stated explanation of the reasons behind their judgments. Well-reasoned explanations, in the form of

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"any obvious misconstruction of public law made by the British courts" or to privilege those courts' rules over "the recent rules of other countries." *Boyle*, 13 U.S. (9 Cranch) at 198. The passage does not bar consideration of such recent rules in order to identify the Constitution's contemporary meaning. Marshall's readiness to reject inapt foreign law, moreover, is fully in keeping with a tenet of consultation. *See infra* text accompanying note 141 (explaining judges' duty not to follow jurisprudence contrary to American legal values).

140. *See* Amann, *Norms*, *supra* note 77 at 606 n.45 (referring to a speech in which Breyer acknowledged this concern by admitting that his reference in *Knight*, 528 U.S. at 996 (dissenting from denial of cert.), to an opinion of Zimbabwe's highest court might have been ill-advised).

141. *See id.* at 608 & nn.53–54 (citing instances in which non-U.S. courts considered, and then rejected, holdings enunciated by the U.S. Supreme Court). A number of Justices have stressed this. *See, e.g.*, Breyer, *supra* note 70, at 266 ("[C]omparative use of foreign constitutional decisions will not lead us blindly to follow the foreign court."); Stevens Remarks, *supra* note 68, at 8; *cf.* Roper v. Simmons, 543 U.S. 551, 575 (2005) (Kennedy, J.), *quoted supra* text accompanying note 51.

142. *See* Craig N. Oren, *Be Careful What You Wish For: Amending the Administrative Procedure Act*, 56 ADMIN. L. REV. 1141, 1143 (2004) (tracing the evolution of the reasoned explanation requirement in administrative law).

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> judicial opinions, are a key institutional feature that distinguishes the exercise of judicial power from other kinds of government power, and one that will reduce, though not entirely eliminate, suspicions among the polity. In short, judges have a duty to explain to the parties and the world not only what decisions they reach, but also why those decisions have been reached.[143]

Pursuant to this requirement, Justices who have looked to foreign or international norms ought to explicate why they chose to do so, what they learned from the consultation, and how this learning affected their reasoning in the case at bar. They would do well to explain both why they embraced certain foreign precedents and why they rejected others. Committing such thought processes to paper would enable not only parties, but also other Justices, other courts, other lawyers, and the public at large to comprehend what mattered in the making of a decision. Professor Pierre Legrand properly has stressed that explication would pay to those who established a foreign norm or precedent the respect that is their due.[144] Conversely, explication would pay respect to concerns of undue foreign influence, for it would demonstrate that in a particular instance consultation was, as its proponents contend that it is, confirmatory and not conformatory.[145] Explication presumes that the Court will train on foreign citations the same gimlet eye that it casts on domestic citations; a litigant's description of a judicial holding or a state practice ought to be double-checked no less if the court or state is foreign than if it is domestic. This is, of course, hard work. One need only look to the exhaustive nature of comparative analyses by international tribunals—indeed, of the Court's own analyses of the historical roots of enumerated rights or of legal practice among the fifty-one jurisdictions in the United

143. Vikram David Amar, *Adventures in Direct Democracy: The Top Ten Constitutional Lessons from the California Recall Experience*, 92 CAL. L. REV. 927, 940 (2004); *see also id.* at 940 n.62 ("'A requirement that judges give reasons for their decisions—grounds of decision that can be debated, attacked, and defended—serves a vital function in constraining the judiciary's exercise of power.'") (quoting David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987)); Diane Marie Amann, *International Decisions:* Prosecutor v. Kupreškic, 96 AM. J. INT'L L. 439, 444 (2002) (discussing appellate reversal of an international criminal tribunal conviction on the ground that the trial judges failed to meet a reasoned explanation standard); Patricia M. Wald, *Reflections on Judging: At Home and Abroad*, 7 U. PA. J. CONST. L. 219, 241 (2004) (contrasting civil law judicial practices with the common law system, the latter characterized in part by "the fully reasoned explanation of decisions that we are accustomed to").

144. Pierre Legrand, Professor of Law at the Université de Paris 1 (Panthéon-Sorbonne) and Visiting Professor of Law at the University of San Diego, Remarks at UCLA Law Faculty Workshop (Sept. 23, 2005) (emphasizing this point in his presentation of *Comparative Legal Studies and the Matter of Authenticity*, 1 J. COMP. L. (forthcoming 2006)). In response to questions, Legrand added that in his view, U.S. courts had a duty to analyze foreign sources more rigorously than they might domestic sources, for the simple reason that the former are "foreign."

145. *See supra* text accompanying notes 54–55 (discussing the terms "confirmatory" and "conformatory"). It is precisely because of these concerns about the legitimacy of consultation that the Justices ought not simply consider "the thoughtful views of . . . judges sitting in other countries," Stevens Remarks, *supra* note 68, at 8, but also to explain what rendered these judges' pronouncements thoughtful enough to merit consideration.

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States—to grasp the challenge of robust reasoning.[146] It is thus not surprising that even Justices supportive of consultation at times have expressed doubts about the Court's capacity to consult. Justice Souter once posed the question of "whether an independent front-line investigation into the facts of a foreign country's legal administration can be soundly undertaken through American courtroom litigation."[147] Breyer maintained that "[n]either I nor my law clerks can easily find relevant comparative material on our own," so that "lawyers must do the basic work: finding, analyzing, and referring us to that material."[148] But upon choosing to consult, a court ought to assume a responsibility to educate itself and its staff on the intricacies of international and comparative law. Creative means ought to be considered: It is worth recalling that in *Thompson*, the case with which this account of consultation began, Justices relied on a Library of Congress study of the juvenile death penalty, conducted after oral argument, rather than base their reasoning solely on a human rights group's amicus brief.[149] Without full exploitation of the resources at its command, the Court will remain prone to legal oddities, such as its decision in *Simmons* to place greater emphasis on a multilateral convention that the United States has not ratified than it did on the International Covenant on Civil and Political Rights, a treaty regarded as part of an international bill of rights and to which the United States is a state party.[150]

The criteria of comparable question, comparable law, and reasoned explanation, in short, represent an outline for a framework that could do much to secure for consultation of external norms a place in the American canon of constitutional interpretation.

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146. *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 824 & nn.17–22, 826–27 & nn.24–26, 839–48 (1988) (plurality opinion) (detailing in text, footnotes, and six appendices states' laws respecting juvenile execution and other treatment of minors); Powell v. Alabama, 287 U.S. 55, 60–66 (1932) (recounting treatment of the right to counsel in old England, the American colonies, and states of the Union); Prosecutor v. Erdemovic, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 32–89 (Oct. 7, 1997) (engaging in an extended comparison of countries' treatment of the duress defense). The risk that consultation may be misused is obvious, as both this Article and Starr, *supra* note 92, at 1585–86, recognize. But the risk does not compel a categorical ban on looking to foreign law, any more than a similar risk requires a categorical ban on looking to legislative history. The risk does, however, underscore the need for consultation to follow a rigorous and transparent methodology.

147. Washington v. Glucksberg, 521 U.S. 702, 787 (1997) (Souter, J., concurring).

148. Breyer, *supra* note 70, at 267.

149. *See Thompson*, 487 U.S. at 815 (1988) (indicating that the case was argued in November 1987); *supra* note 22 and accompanying text (discussing the use of a January 1988 Library of Congress report in *Thompson*).

150. Roper v. Simmons, 543 U.S. 551, 576–77 (2005) (discussing at length the Children's Convention, *supra* note 50, yet only including reference to ICCPR, *supra* note 23, in a string cite); *see also id.* at 622 (Scalia, J., dissenting) (chiding the Court for discussing a treaty "which every country in the world has ratified *save for the United States* and Somalia") (emphasis in original); *cf.* Amann, *Convergence?*, *supra* note 85, at 825–27 (discussing the status of ICCPR as a foundational international human rights instrument). Notwithstanding a pertinent U.S. reservation to the ICCPR, this prioritization likely struck many international lawyers as odd.

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CONCLUSION

It is commonplace to name a decade after a societal trend—the Seventies as the "Me Decade," for instance—even though the trend developed before or lasted after those years. The same may be said of the practice of naming a Court after its Chief Justice or a political movement after its most prominent purveyor. To speak as this Article does of the "Rehnquist Court" is to profess to synthesize diverse juridical developments that occurred in fits and starts over nearly a score of years. The task is impossible, and the phrasing cannot be taken literally. No one person can be responsible for the evolution in that period of an institution led by a shifting complement of nine individuals. Seeds of a doctrine that wins support in the time of one Chief likely were sown in the time of his predecessor and may not bear fruit until the time of his successor. Surely this was true of the "Rehnquist Court." The elevation of its namesake served an already strong preference among conservatives for what they termed "judicial restraint"—that is, for a judge to refrain as a matter of course from interference with the actions of the executive or enactments of the legislature. The concept tends to be associated with a movement known as the "Reagan Revolution," even though criticism of the Warren Court's expansive rights jurisprudence was prevalent during the checkered tenure of a prior President, Richard M. Nixon, and even though the full effects of the movement were unclear even a decade and a half after Reagan left office.

As early as 1970 Chief Justice Burger had written to fellow Nixon appointee Harry A. Blackmun of his plan to move the Court "'away from the attitude that everything unwise or wicked is unconstitutional and that if we but search, we will find some long hidden meaning in Due Process or Equal Protection or whatnot.'"[151] The steadfast steward of that plan proved not to be Burger but rather the third Nixon appointee to the office of Associate Justice, William H. Rehnquist. His solo opinions earned him the nickname "Lone Ranger"; even as Chief, Rehnquist often found himself dissenting in service of a conservative agenda.[152] On some matters a majority came around to his view, a fact due in part to Rehnquist's influence, but also to changes in tbe Court's composition and in the legal and political landscape that surrounded the Court.

This is the case with respect to Justices' use of foreign and international sources in constitutional decisionmaking. In 1989, the still-new Chief declared to a multinational gathering of jurists that "it is time that the United States

151. LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 52 (2005) (quoting Chief Justice Burger).

152. *See* Bernard Schwartz, *Term Limits, Commerce, and the Rehnquist Court*, 31 TULSA L.J. 521, 529 (1996) (stating that as Associate Justice, Rehnquist "dissented alone fifty-four times—a Court record" for which his law clerks gave him a Lone Ranger doll, and that as Chief he could forge a "fragile" majority only if both Justices O'Connor and Kennedy, "'swing' Justices," joined him and the more predictable Justices Scalia and Thomas); Saundra Saperstein & George Lardner Jr., *Rehnquist: Nixon's Long Shot for a 'Law and Order' Court; On the Bench, a Confirmed Lone Ranger*, WASH. POST, July 7, 1986, at A1; *see also supra* text accompanying note 25 (discussing opposition to the use of international law).

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courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process."[153] Yet the same year, in *Stanford*, he joined an opinion that treated reference to world opinion as un-American.[154] The *Stanford* rebuff held sway for more than a decade. It won adherents in the political branches and the academy. But support within the Court dwindled, and so Rehnquist found himself in the minority in *Atkins*, *Lawrence*, and *Simmons*, three decisions that reversed criminal justice precedents set during his tenure.[155] In each reversal the majority, despite still-heated objection from Rehnquist, looked to external sources that militated in favor of recognizing or expanding the scope of constitutional rights. A majority of other Justices thus displayed increased willingness to take into account foreign and international norms and practice. This judicial response left much to be desired as the October 2004 Term came to end; the need to flesh out the theoretical bases for and the methodology of consultation was evident.

One could not predict whether that need would be fulfilled. Long-term prospects for the practice itself were in doubt in the wake of Rehnquist's passing and the retirement of O'Connor. The latter often was receptive to consultation; in stark contrast, her successor, Samuel A. Alito, Jr., proclaimed, "I don't think that foreign law is helpful in interpreting the Constitution."[156] Rehnquist, meanwhile, was replaced by one of his former law clerks, John G. Roberts, Jr.[157] Like Rehnquist, after his clerkship Roberts labored in the Executive Branch; moreover, written works indicated that Roberts shared much of the "judicial restraint" philosophy of his initial employers, Rehnquist and Reagan.[158] Roberts's writings further evinced a resistance to domestic application of foreign and international law similar to that of those two mentors. In a 1984 memorandum, Roberts characterized as "not unfounded" concerns expressed by opponents to U.S. ratification of the U.N. treaty against genocide—concerns similar to those raised today by opponents of the International Criminal Court—

153. William Rehnquist, *Constitutional Courts—Comparative Remarks* (1989), *reprinted in* 14 GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

154. *See supra* note 38–39 and accompanying text.

155. *See supra* text accompanying notes 33–57 (discussing these judgments).

156. *U.S. Senator Arlen Specter (R-Pa) Holds a Hearing on the Nomination of Judge Samuel Alito to the Supreme Court, Part Two*, Jan. 10, 2006, FDCH CAPITAL TRANSCRIPTS, 2006 WLNR 52434; *see also* Jo Becker & Amy Goldstein, *'86 Alito Memo Argues Against Foreigners' Rights*, WASH. POST, Nov. 29, 2005, at A4 (reporting on a memorandum in which Alito, then a Justice Department lawyer, "argued that immigrants who enter the United States illegally and foreigners living outside their countries are not entitled to the constitutional rights afforded to Americans").

157. *See* Maura Reynolds, *Roberts Is Sworn In as Chief Justice*, L.A. TIMES, Sept. 30, 2005, at A1.

158. On Roberts's background, see Charles Lane, *Roberts Was Influenced by Critics of the Warren Court; Like Rehnquist, the Nominee Is a Skeptic on Judicial Intervention*, WASH. POST, Sept. 6, 2005, at A1, and R. Jeffrey Smith, Amy Goldstein & Jo Becker, *A Charter Member of Reagan Vanguard*, WASH. POST, Aug. 1, 2005, at A1. On Rehnquist's service as law clerk to U.S. Supreme Court Justice Robert H. Jackson and, later, in the U.S. Department of Justice, see Savage, *supra* note 6.

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but recommended joinder for geopolitical reasons.[159] In a decision rendered just days before Bush tapped him for the High Court, Roberts joined colleagues on the U.S. Court of Appeals for the District of Columbia Circuit in approving the use of special military commissions to try persons whom the President designates enemy combatants.[160] And he provided the decisive vote in that case for the holding that the Third Geneva Convention, even if it were justiciable in U.S. courts, does not apply to anyone who takes up arms on behalf of a nonstate entity like al Qaeda.[161] Most tellingly, in his confirmation hearings, Roberts spoke of consultation in words virtually identical to Scalia's dissent in *Simmons*: "As somebody said in another context, looking at foreign law for support is like looking out over a crowd and picking out your friends."[162] Roberts then positioned himself closer to Scalia than to Breyer, the other Justice who had brought this metaphor into the consultation debate. Roberts deflected a suggestion that consultation constituted an impeachable offense; nonetheless, voicing a now-standard critique, Roberts judged consultation "a misuse of precedent" on the ground that it accords courts too much interpretive discretion.[163] It thus seems clear that on issues like consultation of foreign sources, the last chapters of the Rehnquist Court narrative, no less than those of the Reagan Revolution, have not yet been written.

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159. *See* Amy Argetsinger & Jo Becker, *Roberts Set Out Doubts on Genocide Treaty*, WASH. POST, Sept. 3, 2005, at A3 (quoting Roberts as advising ratification of the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, reasoning that although "'objections are not unfounded, . . . a consensus has evolved that they are outweighed by the propaganda windfall our failure to ratify the convention has already afforded our international opponents'"); *cf.* Harold Hongju Koh, et. al., *The Treaty Power*, 43 U. MIAMI L. REV. 101, 110 n.47 (1988) (remarks of Professor Koh) (stating that the United States became a state party to the treaty after "the Reagan administration offered the Genocide Convention for advice and consent with more conditions than had been offered by any prior Administration").

160. Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005) (rejecting a challenge brought by a Guantánamo detainee alleged to have been Osama bin Laden's personal driver), *cert. granted*, 126 S. Ct. 622 (Nov. 7, 2005) (No. 05-184). For discussion of special commissions, see Amann, *Guantánamo*, *supra* note 90, at 268–70, 329–35.

161. One member of the panel disagreed with the view, set forth in *Hamdan*, 415 F.3d at 40–42, that Common Article 3 of the Geneva Convention (No. III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, does not apply. *Hamdan*, 415 F.3d at 44 (Williams, J., concurring) (arguing that Common Article 3 fills a gap in order to assure "some minimal protection" for nonstate actors).

162. *Transcript: Day Two of the Roberts Confirmation Hearings; (Part III: Sens. Kyl and Kohl)*, WASHINGTONPOST.COM, Sept. 13, 2005, *available at* 2005 WLNR 14576513 [hereinafter Roberts-Kyl Transcript] (responding to a question from Senator Jon Kyl (R-AZ)); *see also supra* note 53 and accompanying text.

163. Roberts-Kyl Transcript, *supra* note 162 (elaborating further on how consultation "expands the discretion of the judge"); *see* Roberts-Coburn Transcript, *supra* note 63 (responding to a query that implicitly linked consultation with impeachment by stating that although in Roberts's view consultation is not "a good approach," Roberts planned "to sit down and argue" with his colleagues and "wouldn't accuse judges or justices who disagree . . . of violating their oath"); *see also supra* text accompanying note 133 (discussing Breyer's use of metaphor).

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